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Master of Laws Thesis 2018

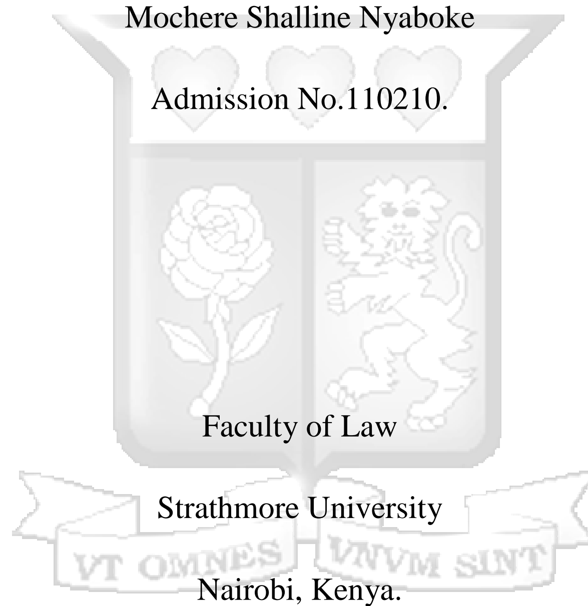
Money Laundering in the Banking Sector: A Critical Analysis of the Enforcement Procedures in Kenya.

Submitted in Partial Fulfillment of the Requirements of the Masters of Laws Degree in International Financial Law and Regulation, Strathmore University

By

Mochere Shalline Nyaboke

Admission No.110210.



Faculty of Law

Strathmore University

Nairobi, Kenya.

September, 2019.

Declaration

I **SHALLINE NYABOKE MOCHERE**, do hereby declare that this thesis is my authentic work and it has not been presented or submitted in part or in whole for the award of any degree, in any other university.

Signed …………………………………………………………

Shalline Nyaboke Mochere.

Admission No 110210.

Dated …………………………………………………………

Supervisors Declaration

This thesis has been submitted for examination with my approval as a supervisor at Strathmore University.

Signed …………………………………………………………

Dr. Antoinette Kankindi.

Senior Lecturer, Strathmore Law School.

Abstract

Financial crimes in the banking sector have caused the downfall of several banks in Kenya. The success rate of prosecutions and the ability of regulators, as well as law enforcement to curtail financial crime has been under challenge. This is true despite various enacted comprehensive legislation and institutions at their disposal, to curtail financial crimes. This study focuses on money laundering in the banking sector. The objectives of the study are to establish the causes of money laundering in the Kenyan banking sector; the challenges hindering effective enforcement of money laundering laws and regulations in the banking sector; on one hand, and the other to suggest possible measures that would help deter the crime. The study applied qualitative research methods and examination of relevant case laws. The study was able to identify the enforcement measures against money laundering in the banking sector to include a series of correlative measures composed of both preventive and law enforcement procedures. The preventive measures are carried out by the banking institutions to inhibit the infiltration of illicit money into the system. These include; carrying out customer due diligence, reporting any transactions that appear to be suspicious to the FRC and keeping financial transaction records. Law enforcement agents, on the other hand, step in to complement these preventive procedures by using measures such as financial sanctions, investigating predicate offences, confiscating assets acquired through illicit proceeds, and prosecuting banks found to be culpable. The study identified some of the problems facing the enforcement measures against money laundering to include: voluntary and involuntary violations of the AML legislation by banks, corruption, discretionary powers of the different enforcement agents, lack of resources that would help in the investigation and prosecution of the offence, presence of rogue banking officials in the banking sector and the multiplicity of agents in the enforcement process. The study analysed the different laws mandated to fight the offence in Kenya, such as the Proceeds of Crime and Anti-Money Laundering Act, the Anti-Corruption and Economics Crime Act, the Banking Act, and the Central Bank Act. From the examination of the law, the study established that some loopholes in the law that have caused enforcement to be at a minimal pace despite the efforts of the legislators in ensuring that the anti-money laundering laws are in tandem with the international best practices, such as the FATF Recommendations. The study concluded that, Kenya appears to have the proper mechanisms to combat and prevent money laundering, which if observed to would ensure prevention of the offence, nonetheless, the identified challenges bring about problems in the enforcement of the law and its measures. The

findings suggest what could be done to improve the enforcement procedures regarding money laundering. These include, banks refraining from superficial compliance of the law, the provision of adequate resources to the enforcement agents, use of alternative sanctions to complement the monetary fines, prosecution of banks found culpable and sealing of the various loopholes in the law that hinder the effective implementation of the law.

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Acronyms

AML	Anti-Money Laundering
ARA	Asset Recovery Agency
CBK	Central Bank of Kenya
CARF	Criminal Asset Recovery Fund
DPP	Director of Public Prosecution
EACC	Ethics and Anti-Corruption Commission
ESAAMLG	Eastern and South African Anti Money Laundering Group
FATF	Financial Action Task Force
FRC	Financial Reporting Center
FSRBs	Financial Action Task Force-Style Regional Bodies
KACC	Kenya Anti-Corruption Commission
KRA	Kenya Revenue Authority
KSHS	Kenya Shillings
LTD	Limited
MLRO	Money Laundering Reporting Officers
NYS	National Youth Service
ODPP	Office of The Director of Public Prosecution
STRs	Suspicious Transaction Reports
ACECA	The Anti-Corruption and Economic Crimes Act
BFIU	The Banking Fraud and Investigation Unit
POCAMLA	The Proceeds of Crime and Anti-Laundering Act
UK	The United Kingdom
USA	United States of America

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I would also like to thank my family and friends for all the continued love and support they have shown me during the course of my studies.

May God Almighty bless you all.

Dedication

I dedicate this thesis to my dear son, Nathaniel Priestley and my family. You have been my main source of motivation to study and work hard.

List of Case Law

Kenyan Case Laws

1. Family Bank Limited & 2 others v Director of Public Prosecutions and 2 others [2018] eKLR.
2. Manfred Walter Schmitt and another v Attorney General and 3 others [2014] eKLR.
3. Printwell Industries Limited v Barclays Bank of Kenya Limited [2013] eKLR.
4. Republic v Director of Public Prosecutions and another; Ex Parte Patrick Onyango Ogola [2016] eKLR.
5. Republic v Ethics and Anti-Corruption Commission Ex parte Sanjay Shah [2016] eKLR.
6. Republic v Heinz Andreas Schaller and Another [2016] eKLR
7. Thuita Mwangi and 2 others v The Ethics and Anti–Corruption Commission [2014] eKLR.

Foreign Case Law

1. *Ivanov v Northwest Gambling Board [2012*], The Supreme Court of Appeal of South Africa.
2. *Republic v Anwoir 1WLR 980 [2009*], England and Wales Court of Appeal, Criminal Division.
3. *Republic v NW and others EWCA Crim 2[2008*], England and Wales Court of Appeal, Criminal.
4. *R v Montila [2004] UKHL 50*, England and Wales Court of Appeal.
5. *Karak Brothers Company Ltd v Burden* (1972) All ER 1210, England and Wales Court of Appeal.

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Chapter One

1.0. Introduction

Elod defines money laundering as illicit money transfer which involves a series of transactions which aims to make illegally obtained money appear legal[1]. Banks are often being implicated in the offence when they facilitate such transactions. These transactions occur in the following manner; the illegally obtained money is placed into the banking institution by making a deposit into an account, the money is then layered through various transactions to hide the criminal source, and finally, the newly laundered money is channeled into the economy[2]. It is indicated by Tucker, that the entire process obscures the true origin of the funds, thus causing difficulties for enforcement agencies to prosecute the crime as it happens. This is also increasingly difficult in circumstances where the transactions do not raise the suspicion of being proceeds of crime, and appear to genuine when they are illicit[3].

Banks as financial institutions play a fundamental role in facilitating financial transactions, thus enabling the movement of funds in the economy. It is therefore a principal obligation for financial institutions to accept monetary deposits from its customers and enable cash transfers when requested. However, Muragura notes that in doing so they face a higher risk of possible misuse by criminals for money laundering purposes[4].

Additionally, banks have financial records which are highly resourceful in determining physical transactions and are often the only evidence of their occurrence. It is also notable that criminals will always try to find a way to obscure their source of illicit proceeds, through banks, to fund legal or illegal ventures[5].

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[1] Előd T, 'A Theory of "Crying wolf: The economics of money laundering enforcement,' IMF Working Paper 07/81, 2007, 7.

[2] Nagel P, and Wieman C, 'Money Laundering', 52, *American Criminal Law Review,* 1357,2015.

[3] Tucker R, 'When bankers look the other way: suspicious activity requires vigilance, not avoidance,' 14 *Business Law Today*, 5, 2005, 27.

[4] Gikonyo C, 'Banks in Kenya and anti-money laundering obligations: the conflicts of interests arising,' 2020,https://www.emerald.com.ezproxy.library.strathmore.edu/insight/search?q=Banks+in+Kenya+and+anti-money+laundering+obligations%3A+the+conflicts+of+interests+arising

[5] Plombeck T, 'Confidentiality and disclosure: The Money Laundering Control Act of 1986 and Banking Secrecy', 2, *The international Lawyer*,1,1988,69-988.

This was the case in 2001, where the Charterhouse Bank in Kenya received an international transfer of 30 million dollars from the United States (US) in the account of one of its customers. This caused suspicion amongst the banks' officials who immediately informed the Central Bank of Kenya (CBK) following the prudential regulations, which mandated them to report transfers of more than 500,000 US dollars. The report prompted the Banking Fraud Investigations Unit (BFIU) to apply to the court, for the account to be frozen, on the notion that the money was connected to criminal proceeds. Nonetheless, during the court proceedings. The recipients of the money argued efficaciously that the funds did not stem from illicit activities, but rather from a charitable organisation in the US, which had intended to make investments in a Kenya by way of charitable contributions, which was fallacious[6].

The Chatter House Bank scenario gives a clear picture of how banks can be used as conduits of illicit money transfers. In certain cases, banks are aware of this, and may also opt not to report such suspicious transactions intentionally, and even collaborate with money launderers and help to facilitate the crime.

This could be the reason why the available data globally submits that the Anti-Money Laundering (AML) regime has not had major effects in conquering the crime[7].This is regardless of the preventive and enforcement measures against the offence[8]. Angella finds that ultimately, financial crimes including money laundering, if not dealt with, ends up causing damage to banking institutions, by way of diverting resources to criminals, and eventually encouraging other forms financial crimes[9].

It has also been reported that Kenya's financial and economic sector loses around 40 billion annually due to unlawful financial transfers, part of the contributory factor being the lack of compliance to the preventive measures against illegal cash transfers by banks[10]. As a result, the government of Kenya has enacted several laws to help curb money laundering offences by banking

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[6]Peter W, ' Detecting and investigating money laundering in Kenya,'2006, https://issafrica.org/chapter-4-detecting-and-investigating-money-laundering-in-kenya , on 24 November 2018.
[7]Micheal L and Peter R, 'Money laundering,' 34 *Crime and Justice*, 1, 2006, 289-375.
[8]Micheal L and Peter R, 'Money laundering,' 34 *Crime and Justice*, 1, 2006, 289-375.
[9]Angella B and Willy M, 'Do economic crimes affect Kenya's economic growth? A cointegration approach,'4, *International Journal of Economics, Commerce and Management* ,11,2016.
[10]Barasa T, Illicit financial flows in Kenya: mapping of the literature and synthesis of the evidence, August 2018,http://www.pasgr.org/wp-content/uploads/2018/09/Kenya-Illicit-Financial-Flows-Report.pdf, on 8 May 2019.

institutions, but the execution of these laws has not been easy due to numerous challenges faced in their enforcement.

The first initiative was through the Proceeds of Crime and Anti-Laundering Act 2009 (POCAMLA)[11].The Act aligned Kenya to the international standards that combat money laundering and financial crimes. It addressed the concerns about money laundering and other related crimes and ushered in strong compliance standards for the Kenyan banking, and insurance sectors[12].This was followed by the Proceeds of Crime and Anti-Money Laundering Regulations[13] by the CBK, issued in 2013.These laws, however, were not an assurance that the war to counter money laundering would be easier, especially in the financial sector, in situations where banks would engage in deliberate violations of the law or even partner with criminals to assist in laundering illicit proceeds.

Additionally, the laws mandated institutional agents such as to curb the CBK, the Kenya Assets Recovery Agency(ARA),the Financial Reporting Center(FRC) and the Office of the Director of Public Prosecutions (ODPP)[14] to ensure they implement the enforcement measures which would complement preventive measures by banks. Nonetheless, the country since 2009 has been seen to remain vulnerable to money laundering offences, especially where banks aid such transactions.

The inadequacies posed by the POCAMLA 2009 such as the incapability of ARA to specially handle all asset recovered from the predicate offences relate to money laundering, and the FRC being limited to only collecting data concerning the offence[15], necessitated amendments to seal such regulatory gaps. The aim was to avoid any setbacks created by them, and avoid rogue financial institutions from abusing such loopholes. Furthermore, the loopholes in the law made the legislation weak, by causing difficulty in enforcement and giving rise to other economic vices like

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[11]Proceeds of Crime and Anti-Laundering Act (Act No 9 of 2009).

[12]Sharon C, 'A perspective on Kenya's Proceeds of Crime and Anti-Money Laundering (Amendment) Act' April 2017,http://www.africapractice.com/wp-content/uploads/2017/05/africapractice-A-perspective-on-Kenyas-Proceeds-of-Crime-and-Anti-Mon....pdf on 27 November 2018.

[13] Proceeds of Crime and Anti-Money Laundering Regulations, 2013.

[14]Barasa T, Illicit financial flows in Kenya: mapping of the literature and synthesis of the evidence, August 2018,http://www.pasgr.org/wp-content/uploads/2018/09/Kenya-Illicit-Financial-Flows-Report.pdf, on 8 May 2019.

[15] Sharon C, 'A perspective on Kenya's Proceeds of Crime and Anti-Money Laundering (Amendment) Act' April 2017,http://www.africapractice.com/wp-content/uploads/2017/05/africapractice-A-perspective-on-Kenyas-Proceeds-of-Crime-and-Anti-Mon....pdf on 2 October, 2020.

corruption[16]. In order to deal with the regulatory gaps, amendments were done to POCAMLA 2009 by way of the Proceeds of Crime and Money Laundering (Amendment) Act 2017.

The Amendment Act[17], laid out novel legal sanctions against financial crimes, and set out and improved the procedures related to, tracking, freezing, seizing, and confiscating criminal proceeds[18]. It also established the Assets Recovery Agency (ARA)[19]as the main agent to deal with all cases pertaining to the recovery of criminal proceeds and refurbished the powers and mandates of the Financial Reporting Center (FRC). This was done in line with the Financial Action Taskforce Recommendations (FATF), which outlines what needs to be done by countries implement to fight money laundering and terrorist financing[20].

Despite the milestones, enforcement of the law and the prescribed measures has still bedeviled the government. Many challenges continued to persist. According to Barasa, such challenges included: the susceptibility of Kenya's economic sector to a wide range of financiers with good, or corrupt intentions; lack of inter-agency teamwork between the regulators of the financial sector, financial institutions and the enforcement agents; other emerging loopholes in the existing laws governing the institutional agents in fighting money laundering, predicate offences and negligence by financial institutions [21].

These setbacks were verified by the fact that the CBK, in the year 2018, had to fine five banks for violating various provisions of the law regarding money laundering which included: failing to report large cash transactions; not carrying out satisfactory customer due diligence; failure to

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[16]A Perspective on Kenya's Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017 http://www.africapractice.com/snap-shots/a-perspective-on-kenyas-proceeds-of-crime-and-anti-money-laundering-amendment-act-2017/ on 24 November 2018.

[17]The Proceeds of Crime and Anti-Money Laundering Amendment Act, 2017.

[18]Barasa T, Illicit financial flows in Kenya: mapping of the literature and synthesis of the evidence, August 2018,http://www.pasgr.org/wp-content/uploads/2018/09/Kenya-Illicit-Financial-Flows-Report.pdf, on 8 May 2019.

[19]Section 53(1), Proceeds of Crime and Anti-Money Laundering Act (Act No 9 0f 2009).

[20] http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html on 5 October,2020.

[21]Barasa T, Illicit financial flows in Kenya: mapping of the literature and synthesis of the evidence,22,August 2018,http://www.pasgr.org/wp-content/uploads/2018/09/Kenya-Illicit-Financial-Flows-Report.pdf, on 8 May 2019.

produce records that would back up large transactions that they had done and gaps in the reporting of Suspicious Transactions (STRs), contrary to several provisions of the POCAMLA[22].

Additionally, Serah notes other challenges hindering effective enforcement include feeble internal controls in banks, conspiracy amid employees in banks and lack of segregation of duties of different regulatory and enforcement bodies, and sometimes political interference which creates circumstances that cause the inability to prosecute these financial crimes[23].

Notwithstanding the amendments and efforts by the CBK, the AML laws and regulations have not been able to accomplish much due to recurrent incidences of money laundering cases in the financial sector. For these reasons, I seek to critically analyse the enforcement procedures of money laundering in the Kenyan banking sector, and suggest possible solutions which can be applied by the enforcement agencies to help deter the crime.

1.2. Research Problem

The AML regime is aimed at preventing and enforcing certain measures directed at curbing money laundering. Preventive measures are mostly done by banks to shield them from the infiltration of criminal proceeds, and where they fail the law enforcement steps in to implement other enforcement measures such as the prosecution of the lawbreakers.

Many factors can cause the enforcement of the AML regime to be challenging, such as corruption, rogue employees in banking institutions and poor detection mechanisms in banks[24]. These factors consequently create difficulties for the law enforcers who fight the crime[25]. The situation is at times aggravated by the use of different agencies such as the EACC, ARA, the National Police, KRA and CBK which all have different motives, that may create a conflict of interest in the

[22]The CBK Press release https://www.centralbank.go.ke/uploads/press_releases/104465402_Press%20Release%20-%20Investigations%20of%20Banks%20Related%20to%20National%20Youth%20Service%20Transactions.pdf, on 28 January 2018.

[23]Serah A, 'Prosecuting bank fraud in Kenya: challenges faced by the banking sector," 14 *Journal of Finance and Management*, 1, 2015, 3.

[24]Reuter P and Truman E, 'Chasing dirty money: the fight against money laundering' *Washington DC Institute for International Economics*, 2004, 132–133.

[25]Reuter P and Truman E, 'Chasing dirty money: the fight against money laundering' *Washington DC Institute for International Economics*, 2004, 132–133.

enforcement procedures hence making the process complicated, and not produce the intended outcome.

The battle against money laundering in Kenya has also been weighed heavily by continual violations of the AML laws by banks either unintentionally or knowingly, such as contravening preventive measures such as reporting obligations in place or even facilitating the money laundering process. It has been observed that if the fight against money laundering is not effective, there is an increase in the crime, and the banks become more susceptible to other forms of financial crimes, ultimately weakening public trust on the banking industry[26].

This, therefore, calls for an analysis of the enforcement procedures of laws and regulations against money laundering offences banks in Kenya, and for this reasons this reason, the study will seek to critically analyse the enforcement procedures against it and suggest what may likely be done to improve them.

1.3. Research Hypotheses

H1: Anti-money laundering legislation does not deter banks in Kenya from engaging in unlawful financial activities.

H2: It is assumed that in instances where banks are likely to collaborate with money launderers, the enforcement of statutes against illicit financial activities becomes impossible on practical grounds.

1.4. Research Objectives

1.4.1. General objective

i. To examine the enforcement procedures in place against money laundering offences by banks in Kenya.

1.4.2. Other Objectives

ii. To critically examine the challenges faced within the confines of the enforcement procedures aimed to counter money laundering in the Kenyan banking sector.

[26] Idowu A, Obasan K, ‘Anti-Money laundering policy and its effects on bank performance in Nigeria,’5 *Business Intelligence Journal*, 2, 367, 2012.

iii. To critically evaluate the loopholes in the legal framework on the enforcement of the laws against money laundering in the Kenyan banking sector.

iv. To suggest possible solutions in countering money laundering in the Kenyan banking sector.

1.5. Research Questions

i. What are the measures established to facilitate the enforcement laws against money laundering the Kenyan banking sector?

ii. In what ways have the enforcement measures, impacted the enforcement of the crime a?

iii. What are the loopholes in the law concerning to the enforcement procedures against money laundering, that cause banks in Kenya to violate them?

iv. What are the possible solutions that will help in deterring money laundering offences by banks in Kenya?

1.6. Limitations of the Study

Money laundering is a global problem and affects other institutions apart from banks. However, this research will be limited to financial institutions specifically banks in Kenya. The reason being that Kenyan banks have been in the spotlight for the wrong reasons, such as deliberately violating AML preventive measures. Yet, enforcement against such violations has been minimal, evidenced by fewer convictions of banking officials and banking institutions suspected or found to be at fault.

For that reason, the study does not examine violations of other financial institutions such as mortgage companies, insurance companies, credit unions and brokerage firms. The study focuses on enforcement procedures against money laundering to shed a light on them and elicit the legal challenges and loopholes faced by the enforcement of the same.

There has been hardly any conviction of banks found to have committed money laundering offences, since the enactment of the law in Kenya. As a result, there is scant case law on the prosecution of banks in Kenya hence no jurisprudence has been established on enforcement of the offence by banks. Consequently, the cases examined comprise of judicial petitions, judicial

applications and judicial reviews, to show the attempts made to enforce the POCAMLA in Kenya, and the difficulties arising from the same.

The study did not delve into corporate governance deficiencies by banks but rather the implementation of laws and regulations. This is because corporate governance deals with the internal affairs of a company and its management, and may not necessarily be linked to the enforcement of AML measures.

1.7. Significance of the Study

Money laundering activities can cause devastating impacts on the economy of Kenya such as making it hard for a legitimate business to thrive or by destroying customer trust in banking institutions.

The study will analyse some of the reasons why banks facilitate or commit money laundering offences, and recommend strategies that can be employed by the law enforcers to ensure effective enforcement of the law. The findings will suggest what could be done to improve the enforcement procedures against money laundering by the law enforcement agents and ensure that they work efficiently to deter the crime, and to lessen instances where banks collaborate with money launderers.

The study can be of importance to the policymakers by assisting them in coming up with ways of sealing the regulatory loopholes in the legal framework that will help improve the enforcement procedures against the offence, especially in the use of the different agents in fighting the crime.

To the CBK in helping it to find ways of preventing institutional collaborations by banks and money launderers in facilitating the crime, and ensuring the proper implementation of preventive measures against the offence.

To fellow researchers, the challenges examined herein can provide further areas of research concerning the prevention and enforcement of the AML regime in Kenya.

1.8. Theoretical Framework

The theories that will be applied to analyse of the enforcement procedures against money laundering in the Kenyan banking sector, will be the sanction theory and the agency theory. The sanction theory will be used to reinforce the reasons behind the deterrence of crime, and why

obliging banking institutions to conform legislation against money laundering is important for financial stability and economic growth. The agency theory will be used to build a case on the agency problem created by the use of multiple agents to carry out the roles allocated to them by the legal statutes in enforcing AML laws.

1.8.1. John Austin's Sanction Theory

According to Austin, the law is made up of rules simply laid down for the guidance of intelligent beings backed up by sanctions[27]. He belonged to the positive school of thought that understood laws to be commands separate from morality[28]. According to him, these laws were therefore parameters to the subjects, by instituting compliance even in the absence of the lawmaker[29]. Where the subjects chose to disobey the law, sanctions were then executed upon them to ensure compliance. The fear of being punished was supposed to cause habitual compliance with the laws and regulations in place[30].

Similarly, banks as corporate institutions are supposed to adhere to the AML measures or face repercussions in the form of sanctions, which are financial. The government of Kenya has enacted laws against money laundering which govern the banking sector. These laws play the role of commands which are supposed to be obeyed by the banks and the enforcement agencies. It is therefore expected that corporations as legal persons obey them. Banks are reporting bodies under the legislation against Money laundering in Kenya[31]. They are therefore mandated to monitor all financial transactions carried out by them, report any suspicious activities to the FRC, and refrain from facilitating illicit transfers of money.

Failure to report these suspicious transactions, or facilitating illicit transactions amounts to a crime and warrants the use of sanctions established by the government to impose habitual compliance with the law. These penalties are enforced by the sovereign's agents which are the law

[27]Stumpff A, 'Law is the command of the sovereign: HLA. Hart reconsidered', 29 *Ratio Juris,*2016 https://ssrn.com/abstract=2476005 , on 23 April 2019.
[28] Stanford Encyclopedia of Philosophy, February *8, 2018, https://plato.stanford.edu/entries/austin-john* on 5 October,2020.
[29]Tapper C, 'Austin on sanctions,' 23 *Cambridge Law Journal,* 2, 1965, 277-283.
[30]Tapper C, 'Austin on sanctions,' 23 *Cambridge Law Journal,* 2, 1965, 277-283.
[31]The Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009), and the Prudential Guidelines 2013.

implementation agencies, and the CBK as the financial regulator of banking institutions, to deter these banks from engaging in repeated violations of the law.

This theory will be used to analyse the flaws in the enforcement procedures against money laundering. It will further be used to explain whether the use of sanctions provided by the statutes have been effective in preventing the recurring violation of these laws by banks. Furthermore, if they have had any impact in achieving behavioral change and deterrence in banks which engage in the crime. This regardless of how symbolic as they are[32].

It is also the belief that punitive financial sanctions act as a form of preventive measures to effectively deter banks from noncompliance with the law. This study seeks to examine if this has been the case especially in the banking sector where such financial penalties are used to curb the offence.

1.8.2. The Agency Theory

The agency theory was first proposed by Ross and Mitnick. Ross is responsible for the economic proposal of the theory, whereas Mitnick is known for proposing the institutional usage of the theory[33].In the legal sphere, common law has made use of the agency theory to illustrate legal implications of individuals or institutions acting as agents on behalf of their principals, and the shortcomings of such relationships[34].

The agency theory will be used the illustrate the legal consequences of using institutional agents in the implementation of enforcement of AML measures, and the consequences arising from the same. This will be done by conceptualizing the relationship among the agents under the agency theory.

The CBK and the FRC play the role of the principals and the law implementation institutions act as agents. They all have the main goal of preventing and deterring the offence of money laundering, but the agency problem can arise where the agents and principals pursue their own goals and fail

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[32]Tan V, 'The art of deterrence: Singapore's anti-money laundering regimes', 25 *Journal of Financial Crime*, 2, 2018, 467-498.

[33]https://www.researchgate.net/publication/228124397_Origin_of_the_Theory_of_Agency_An_Account_By_One_of_the_Theory's_Originators on 24 June 2020.

[34]Kim T, 'Beyond principal–agent theories: law and the judicial hierarchy,'105 *North western university Law review*, 2, 2011,538.

to act in harmony due to different interests they may opt to pursue. For instance, CBK may want to impose punishments against banks that contravene the laws but it is mainly interested in the continued existence of banks and aims to prevent systemic risks. Conversely, the law implementation agencies may be more interested in the criminal trials of the banks, which may threaten the financial soundness of banks, by damaging their reputation and causing systemic risk, consequently threatening their existence.

The CBK has a supervisory role over banks in Kenya, this includes providing with prudential regulations that guide banks in preventing the transfer of illicit money. It is aided by the FRC an intelligence center, that receives and collects information reported by banks about suspicious financial transactions, and then shares the information to the law execution agencies such the National Police Service, EACC, KRA and the ARA which assist in the implementation of the law through execution of different penalties.

The law has enabled each agency to carry out different functions relating to law enforcement, which at times creates a decentralised approach in the execution of their roles. This decentralisation may lead to multiplicity of roles, and different motivations in carrying out their mandates.

The agency theory will be used to show what hinders law enforcers to be efficient especially where coordination is dependent on a hierarchical chain that is decentralised. This is through the use of different agents, and the consequent effects on the enforcement measures in place.

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1.10. Research Methodology

This research applied qualitative and case law analysis methods to explore on money laundering offences by banks and enforcement procedures. Qualitative research was used to find out the reasons behind the challenges faced in the enforcement procedures and why banks commit money laundering offences.

Case law analysis was used to examine interpretations by the courts on the rules and the principles in cases where banks or its officials were accused of the offence, the penalties provided against banks that committed the offence, and the challenges courts face in the enforcement of the law against the crime. The secondary data such as reports, journal articles, statutes and books were used. Desktop research was utilized due to the ease of obtaining data online.

1.11. Chapter Breakdown

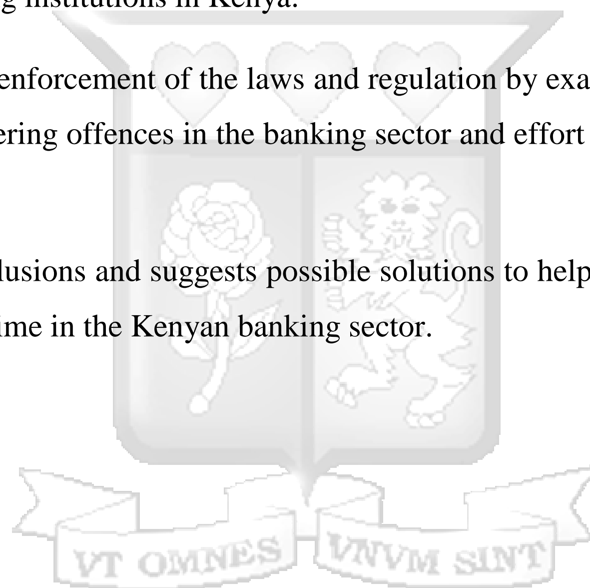
Chapter i introduces the background of the study, the research problem, research hypothesis, research objectives, the scope and limitations of the study, significance of the study and the theoretical frameworks.

Chapter ii focuses on relevant literature on the enforcement procedures against money laundering offences by banking institutions in Kenya.

Chapter iii reviews the legal and regulatory framework on enforcement of money laundering and how they apply to banking institutions in Kenya.

Chapter iv examines the enforcement of the laws and regulation by examining relevant case laws concerning money laundering offences in the banking sector and effort of banks to curb the same in Kenya.

Chapter v gives the conclusions and suggests possible solutions to help improve the enforcement procedures against the crime in the Kenyan banking sector.



Chapter Two

2.0 The Enforcement Procedures against Money Laundering and Challenges Faced by Banks, and the Law enforcement in Fighting the Crime

2.1. Introduction

The enforcement of AML regime is composed of a broad range of financial supervisory measures that include; preventive measures, related sanctions and other corrective actions that are used by the law enforcers in the banking sector[35]. The CBK is oversees the implementation of these measures as a supervisory body over banks in Kenya.

The preventive measures are composed of internal controls which are protective against the transmission of illicit funds through the banking system [36]. These include, performing customer due diligence[37], documenting monetary transactions[38] making reports on any monetary transaction that appears to be unusual[39]. These three measures present a present the aspect of enforcement procedures carried out by banks before other government actors come into play. They are all aimed at averting the infiltration of criminal money into the economy, and to discourage facilitation of the criminal transactions and to ensure banks adhere to these, sanctions are established by the law for deterrence.

Law enforcement agents come into come into play with additional enforcement mechanisms to complement the preventive measures. Such include inspecting books of accounts by the CBK and FRC, which also include, issuing warning letters and financial penalties for non-compliance. In addition, the ARA performs the role of tracking criminal property, criminal and civil forfeiture of realizable property, and obtaining orders to monitor the same, whereas the court enforces this by ensuring compliance of those orders, and by issuing restraint orders to suspects to prevent them from dealing with the realizable property. The DPP on the other hand receives cases to conduct

[35] Chasing dirty money,https://www.fatf-gafi.org/media/fatf/documents/reports/RBA-Effective-supervision-and-enforcement.pdf on 24 July 2020

[36] Chasing dirty money,https://www.fatf-gafi.org/media/fatf/documents/reports/RBA-Effective-supervision-and-enforcement.pdf on 24 July 2020.

[37]Section 45, Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).

[38]Section 46, Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).

[39]Section 44, Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).

criminal prosecution for the most serious AML breaches, after investigations have been conducted[40].These measures and procedures can either be conducted separately or complementary by the law enforcement agents[41].

These enforcement procedures are nonetheless faced with several challenges, which make the prosecution of the offence of money laundering by banks difficult. These challenges include; the presence of rogue officials in the banking sector, discretionary powers granted to different agents which may influence the investigation or prosecution of the offence, the use of multi-agency partnerships in the enforcement of the offence, corruption and technological advancements in the commission of the offence.

This chapter is going to discuss the enforcement measures under the AML regime in Kenya, and point out the challenges faced in the process of fighting the crime.

2.2 Preventive Measures by Banks and their Challenges

2.2.1. Customer Due Diligence and Record Keeping

Due diligence reports by banks can be termed as their critical analysis of data relating to potential customers intending to transact with the bank, or customers who already own accounts with the bank. Afande states that it is a process designed to gather sufficient data concerning customers or potential customers, and in due course create a database of their records and transactions. He goes on to say, such information may entail the nature of the business transactions they are involved in, the ultimate recipients of the funds, and the source of their funds[42]. The reasons for collecting such information among others are, to validate the customer's identity and to identify transactions which appear to be strange[43]. Where this is noted, banking officials will be required to make reports to the relevant authority.

Several problems could be encountered in this process such as the insufficiency of the information collected, which may be linked to inadequately trained personnel mandated to carry out this role.

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[40] The Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).

[41] https://www.fatf-gafi.org/media/fatf/documents/reports/RBA-Effective-supervision-and-enforcement.pdf on 24 July 2020.

[42]Afande O, 'Use of regulatory policies in the fight against money laundering in Kenya,'*5 Public Policy and Research,*3, 2015.

[43]Himaambo L, 'Role of banks as private police in the anti-money laundering crusade,' 9 *Bocconi Legal Papers*, 157, 2017.

Such information could then be inaccurate or incomplete, and could likely pose difficulties if relied on by law enforcers in the tracking of the source of illicit proceeds.

For instance, bank employees carrying out the due diligence reports may choose to ignore crucial information such as failing to ask for the identification documents, and verifying if they are credible. Satish claims that even with these preventive measures, banking officials who willfully decide to turn a blind eye in their duties while performing due diligence cause a hindrance in preventing the crime. He further adds that reasons behind this could be attributable to their own motivations, or their institutional interests. Such instances then allow money launderers to be able to collude with financial institutions that will help them facilitate their transfer of criminal proceeds[44]. Yeoh additionally argues that, where supervisory bodies in the financial sector fail to continually monitor banks, rules will be consistently disobeyed[45].

The above occurrences tend to suggest that when due diligence seems to fail, the preventive internal controls might be judged as weak and considered to be the major cause of the above incidences, but on the contrary, even with strong internal controls that have well-functioning preventive measures, some banks in Kenya still opt to facilitate the offence.

This then creates concerns on whether, the supervisory role of the CBK as empowered by its Act[46] to give guidelines that are supposed to help in creating a firm and effective financial system (In exercise of these powers, the CBK has made the Regulations on Money Laundering, which is the most deliberate attempt under Kenyan law to curb the offence at present) in ensuring the implementation of these measures, through formal warnings and administrative penalties implementation internal controls against money laundering indeed work?

This study will thus examine penalties outlined by the law, issued by the CBK and other law enforcement bodies in Kenya, and find out if they have played any significant role in reducing the offence being committed by banks.

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[44]Satish M, 'Recent anti- money laundering enforcement actions: lessons to be learned at others' expense', 7 *Journal of Investment Compliance*, 3, 2006.
[45]Yeoh P, 'Enhancing effectiveness of anti-money laundering laws through whistleblowing, '17 *Journal of Money Laundering Control*,3,2014, 327–342.
[46]The Central Bank of Kenya Act, Cap 491.

2.2.2 Reporting of Suspicious Transactions

Suspicious transactions are considered to be those that seem unusual according to Naheem. He adds that a myriad of factors can be observed to know whether a transaction is suspicious, and this range from strange behaviors of the customers, through patterns of their transactions via their accounts. He further notes that this places reporting institutions with a greater responsibility of ensuring they act swiftly, by making reports to the relevant agency whenever they sense that transactions appear to be wary[47].

The significance of suspicious reporting is to help law enforcers start a criminal investigations, which are important to facilitate implementation of the law[48]. Such investigations, assist them to build a case against unusual transactions. They help to ascertain whether such transactions appear to be fraudulent or aim to cover up a specific crime by persons making them. However, it is also the possible that banks may not be in a position to unearth wary financial schemes and make reports of the same. Contrariwise, in some instances they can also make numerous reports of the same but supervisory bodies fail to act upon them[49]. This may be due their credibility or the laxity of law enforcers.

For instance, Lowe refutes the reliability of STRs. He argues that information which may be obtained from them is not be strong because the intelligence collected, requires law enforcement agents to go back to previous banking records of the suspects, which only gives a snapshot of their former transactions, hence may not show any form of risk or suspicion[50]. Consequently, such information may not build a solid criminal case against the perpetrators, or even satisfy the standard of proof in a criminal prosecution. This is also the case where the reports filed are defensive. Eugene indicates that, such reports contain voluminous details of transactions, which can be insignificant, hence of no use to the law enforcers[51].

[47]Naheem M, 'Suspicious alerts in money laundering – the Crédit Agricole case', 24 *Journal of Financial Crime*, 4,2017,691-703.
[48] He Ping, 'The Suspicious transactions reporting system,' 8 *Journal of Money Laundering Control*,3, 2005, 252-259.
[49] He Ping, 'The Suspicious transactions reporting system,' 252-259.
[50]Lowe J, 'Anti-money laundering –the need for intelligence', 24 *Journal of Financial Crime*, 3,472-479,2017.
[51]Mniwasa E, 'The financial intelligence unit and money laundering control in Tanzania,'22 *Journal of Money Laundering Control*,3,2019, 543–562.

Additionally, Naheem affirms the difficulty of actually determining whether a transaction is suspicious or not. He points out that valid business transactions could also create false alarms in some circumstances, this is because the precise nature of each transaction cannot be verified all the time. He calls for the revision of the term, to broaden its meaning, to capture what might be termed as suspicious in the current society[52].

Moreover the law[53] criminalises the offence of tipping off. This offence occurs if the bank discloses any information relating to the STRs to their customers. Muragura indicates that, at times, the reporting requirements can involuntarily cause the suspected criminals to be aware of impending or continuing money laundering investigations[54]. This happens when the accounts are frozen to facilitate investigations. In such circumstances, the suspects can find other ways of hiding evidence that may link them to the offence.

Questions have also been raised on whether financial intelligence centers, such as the FRC, utilise the reports filed with them. A close look at the FRCs website[55] to date does not reveal the existence of yearly reports on the utilisation of STRs, and the number of cases directed to the ODPP for prosecution. Goodfellow posits that the absence of feedbacks from financial intelligence centers on the reports made, and actions that have been taken, counters the measures adopted to maintain high standards in compliance with the laws and regulation[56]. One is left to question whether such reports made by the banks in Kenya have been of any use in curbing the crime or if there is any need to make such reports at all. Furthermore, if reports are made to the FRC for analysis, and it takes too long before the matter is referred to the enforcement agencies, the delay creates a setback in the enforcement process.

It has also been argued by Kayuni that STRs alone are not adequate to prove the existence of money laundering. He states that law enforcers should come to terms with the reality that predicate

[52]Naheem M, 'Suspicious alerts in money laundering – the Crédit Agricole case', 691-703.
[53]The proceeds of crime and Anti-Money Laundering Act (Act No 9 of 2009).
[54]Muragura N, 'The jeopardy of the bank in enforcement of normative anti-money laundering and countering financing of terrorism regimes,' 18 *Journal of Money Laundering Control*,3,2015.
[55]http://www.frc.go.ke/ on 25 September 2019.
[56]Goodfellow B and Lokanan M, 'Anti-money laundering and moral intensity in suspicious activity reporting an application of Jones' issue contingent model,'21 *Journal of Money Laundering Control*, 4, 2018, 520-533.

offences can help in tracing the criminal proceeds[57]. Kenya acknowledges the existence of such offences as falling under the category of economic crimes.

This study will examine whether STRs have been used to bring any money laundering charges against banks or their officials. It will further seek to find instances where banks have failed to file such reports. It will also explore situations in which if they have been of any use in curbing illicit transactions by banks, and attempt to address the consequences of failure by the to file such reports. Moreover, it will seek address how predicate crimes have been used to fight the offence.

2.2.3. Financial Sanctions

Banks commit AML breaches voluntarily or non-voluntarily. According to Tan, banks engage in voluntary violation of AML preventive measures when they are aware that they will reap a greater financial benefit from those violations. On the other hand, it is non-voluntary when the banks fail to implement proper internal control measures hence falling to detect or report STRs[58]. Financial sanctions are supposed to act as form of deterrence to prevent the above situations from happening. The Kenyan AML regime has laid down hefty financial penalties for both individuals and corporate bodies who violate it. It is however not clear if they act as a form of deterrence or not, especially for banks which aim to make profitable business ventures, regardless of such penalties. The study aims to find out the effect of such sanctions on Kenyan banking institutions and their effect in the preventing the transmission of illicit proceeds through them.

2.3. Challenges Faced in the Enforcement Procedures against Money Laundering

2.3.1. Confiscation of Illicit Proceeds

Confiscation is legal term under the AML regime which implies to the process persons or institutions suspected to have engaged in money laundering are deprived of their ill-gotten gains[59]. The aim is to ensure that criminals do not benefit from illicit profits generated through crime[60].

[57]Kayuni S, 'Running to stand still: reflections on the cash gate scandal heist in Malawi,'19 *Journal of Money Laundering Control* 2,2016,169-188.
[58]Tan V, 'The art of deterrence: Singapore's anti-money laundering regimes,' 25 *Journal of Financial Crime* 2, 2018, 467-498.
[59]Johan B, 'Asset confiscation in Europe- past present and future challenges,'26 *Journal of Financial crime,* 2,2019,527.
[60] Johan B, 'Asset confiscation in Europe –past, present, and future challenges,'26 *Journal of Financial Crime*, 2,2019, 526-548

It entails a series of investigative processes which aim to establish the persons or institutions behind the crime, identifying the source of their illicit funds, assets that can be confiscated, and developing evidence to be used in criminal proceedings[61].Confiscation in Kenya is done through civil and criminal forfeiture of assets. Anusha and Aspalella state that, criminal forfeiture of illicit proceeds entails a criminal trial which is conducted in personam, and if the suspect is found guilty, they are convicted or fined. they further add that, civil forfeiture on the other hand is done after obtaining court orders amounts to seize the property suspected to been obtained through illicit proceeds, regardless of its owner's guilt or innocence[62].

Transparency international notes that, the Kenyan asset recovery regime is subject to civil judicial proceedings which are lengthy, and subject civil suits challenging the process[63]. Kabau adds, by stating that such civil suits constitute of constitutional petitions on violations of individuals rights caused by the enforcement measures against the offence money laundering[64]. This study intends to establish the impact of such challenges in the process of asset recovery via the POCAMLA and the implications of petitions filed to oppose the process.

2.3.2. Use of Predicate Offences

Predicate offences are those which bring about the offence of money laundering. The position in the USA is that such offences are thought crucial in tracing illicit proceeds[65]. In the UK, the position is the use of circumstantial evidence that gives rise to the irresistible inference that the property could only be derived from a criminal source[66]. These offences may be described by reference to all offences, or to a threshold linked either to a category of serious offences[67]. Both approaches present their unique challenges especially when it comes to the financial crimes perpetrated by banks, in relation to illicit proceeds. The study aims to investigate which challenges

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[61]Johan B, Asset confiscation in Europe- past present and future challenges,' 26 *Journal of Financial crime,* 2,2019,527.

[62] Anusha A and Aspalella A, 'Money laundering and civil forfeiture regime: Malaysian experience,' 19 *Journal of Money Laundering Control* 4, 2016, 337-345.

[63]Owino K, 'Asset recovery in Kenya: outstanding questions?'June,2008, https://tikenya.org/wp-content/uploads/2017/06/adili103.pdf on 1 October,2020.

[64] Kabau T, 'Constitutional dilemmas in the recovery of corruptly acquired assets in Kenya: strengthening judicial assault on corruption,'1 *Africa Journal of Comparative Constitutional Law*, 2016.

[65] Bell R, 'Abolishing the concept of predicate offence,'6 *Journal of Money laundering Control 2, 2002.*

[66]Murray K, 'In the shadow of the dark twin – proving criminality in money laundering cases

[67] International standards on combating money laundering and the financing of terrorism & proliferation, 2019.

are faced by adopting the UK approach in Kenya, and the prosecution of such offences by banks, more so if they have had an impact in curtailing money laundering.

2.3.3. Investigations

Investigations are conducted where a suspicious transaction has been relayed to the relevant authority. The aim is to track the source of the illicit proceeds and build a prosecution case. Some challenges however exist in the process. For instance, the DPPs annual report acknowledges that some of the reasons why economic crime cases in Kenya are found to be inadmissible in court is partly linked to outdated technology used in both investigation and prosecution. This also causes the loss of crucial evidence that may be used in court[68]. Such outdated techniques create limitations in building cases on money laundering because criminals use more advanced technology in committing the offence. Similarly, poor investigation techniques, lack of adequate resources and lack of qualified personnel, also lead to loss of important evidence.

Several scholars have also offered some convincing reasons why investigation techniques against money laundering seem not to be efficient. Stefan for example observes that investigations of illicit transactions has been presumably done by tracing the three stages in which criminal proceeds are laundered; these include placement, layering and integration. For that reason, she argues that the assumption is wrong, and investigators should not fixedly align themselves to that process. She is convinced that process is outdated because not all criminals will follow the order as it is especially in this modern age. She thus advocates for new initiatives in ensuring successful investigation[69].

It may be true that the three stages are outmoded, but they provide a step by step basis of tracking illicit money. Reasonably law enforcers should device ways of expounding the model. As Murray posits, verifying that the money is illegal is increasingly a difficult task which requires backdated approach by the investigators in tracing the source illicit of the funds. He adds that the technology

[68]Annual anti-corruption report by the director of public prosecutions in respect of prosecution of anti-corruption and economic crime related cases, pursuant to the provisions of section 37 of the Anti-Corruption And Economic Crimes Act (Act No 3 of 2003), January to December 2016, http://www.odpp.go.ke/wp-content/uploads/2017/06/FINAL-ODPP-ANTI-CORRUPTION-ANNUAL-REPORT-JANUARY-TO-DECEMBER-2016-8TH-MAY-2017.pdf on 26 July 2019.
[69]Stefan D, 'Toward a new model of money laundering: Is the "placement, layering, integration" model obsolete?'21 *Journal of Money Laundering Contro*l, 4, 494-497.

used by investigators should be very efficient carrying out investigations, because criminals generate breakdowns or substitute money to hide its original source[70].

The stages would therefore be important in assisting investigators to connect different crimes that led to the process of laundering illicit money. Lowe notes that failure only creeps if law enforcers entertain reactive probes, which consequently do not provide sufficient evidence that may sustain a money laundering case in court. He adds that this causes nothing much to be accomplished due to the possibility of generating errors in the process of gathering evidence, and hence failure building a solid case[71].

In some cases, qualified personnel who may not be familiar with modern trends of investigations, technology can pose continued difficulties for law enforcement agencies. This is true even if they have modern tools at their disposal[72]. The consequence of this is that it creates the need to hire experts, which would require additional expenses. For instance, Zolkalfill notes that investigation into money that has been laundered proceeds requires the examination of financial statements and records[73]. Therefore, financial experts such as independent auditors may be hired where the investigators are not versed in the knowledge of carrying out such financial investigation.

Bell agrees with the above argument and according to him, investigating illicit proceeds transactions will therefore require adequate resources. He adds that this is inevitable also due to the need of expert evidence during trials, which comes with the extra costs for their services[74]. Where the government does not ensure the agencies are well funded to support their work, investigation becomes problematic due to the high costs involved in conducting them.

Furthermore, the use of circumstantial evidence is mostly preferred in money laundering investigations. This position given by Bell who argues that prosecutions will usually be based on this type of evidence, especially if the transactions were so complex, hence it is problematic to connect the underlying offences to it[75]. Since circumstantial evidence depends on pieces of evidence linked together to demonstrate that the offence was committed, it may not be strong to secure a possible conviction as opposed to direct evidence.

On occasions where money laundering is considered to be a standalone offence, prosecutors may not require to prove that the criminal proceeds are of a particular criminal conduct[76]. This then

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[70]Murray K, 'In the shadow of the dark twin – proving criminality in money laundering cases', 19 *Journal of Money Laundering Control*, 4, 447-458, 2016.
[71]Lowe J, 'Anti-money laundering –the need for intelligence,' 24 *Journal of Financial Crime*, 3, 2017.
[72]Kayuni S, 'Running to stand still: reflections on the cash gate scandal heist in Malawi,'169-188.
[73]Zolkaflil S, 'Implementation evaluation: a future direction in money laundering investigation,'22 *Journal of money Laundering control,* 2, 2019, 318-326.
[74]Bell E, 'Proving the criminal origin of property in money laundering prosecutions,'4 *Journal of Money Laundering Control*,1,2000, 12-24.
[75]Bell E, 'Proving the criminal origin of property in money-laundering prosecutions,' 12-24.
[76]Murray K, 'Dismantling organised crime groups through enforcement of the POCA money laundering offences,' 13 *Journal of Money Laundering Control*, 1, 2010, 7-14.

questions if there is need to investigate the underlying offences that led to the crime. Murray posits that, a typical investigation into the source of illicit proceeds starts with financial records. This means that investigations begin after a specific offence initially occurred. It is therefore impossible to ignore predicates that led to the crime being committed in the first place[77].

The current study will thus examine the steps taken to investigate money that has be laundered as per the legal framework, and challenges faced in the process.

2.3.4. Prosecution

Prosecution under the AML regime ensures those found culpable are taken through the court process and convicted if found guilty for their offences. The process aims to prove the guilt of the persons or corporate institutions who are suspected of having committed the offence.

The process is nonetheless dependent on discretionary powers granted to the different law enforcement agents. These discretionary can be exercised by various officials while carrying out their roles. It allows them to make decisions based on their judgement but in line with legal provisions of the law[78]. Such officials in Kenya include the Attorney General, the DPP and judicial officers such as magistrates and judges, among others.

When they exercise these powers, they will respond to legal issues without external influence but will rely on the law[79]. Depending on how such powers are exercised, it results in different outcomes on the way cases will be determined, pursued for prosecution or even investigation. Additionally, in some situations external influence can also have an impact on these powers.

For instance, in Kenya prosecutorial discretion is linked to *nolle prosequi* powers, given by the law to DPP. This enables him to either discontinue or pursue the prosecution of any case referred to his office[80]. Where the DPP decides not to continue with any criminal case referred to him, he can decide to settle the matter out of court or enter into a plea bargain agreement. Consequently, the accused may only be required to pay a fine that will be agreed on, where the case does not proceed to conclusion. This can be the case for banks found to have facilitated the transfer of illicit proceeds.

On certain occasions, prosecutors may decide not pursue a criminal case against bank in the normal exercise of their discretion. External factors can nonetheless have an influence on this, such as possible reputational damage that can be incurred by a bank, which may cause it to lose business or goodwill. However, in Kenya, banking institutions are governed by the Banking Act[81]. Moreover, since they are also corporate bodies, they are as well governed by the Companies Act[82]

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[77]Murray K, 'Dismantling organised crime groups through enforcement of the POCA money laundering offences,'7-14.
[78] https://www.law.cornell.edu/wex/discretion on 20 September 2019.
[79] https://thelawdictionary.org/discretion/ on 20 September 2019.
[80]Section 82 and 87, Criminal Procedure Code, Cap 75, and Article 157 (6) (c) of the Constitution of Kenya (2010).
[81]The Banking Act, 2015.
[82]The Companies Act (Act No 17 of 2015)

which gives various provisions on the possible offences chargeable against corporate bodies, their directors, and other individuals working on their behalf. Therefore, if the DDP settles a case out of court, it does not mean that individuals who facilitated or committed the offence cannot be prosecuted. Accordingly, if banks as corporate bodies will not face criminal prosecution or conviction, individual bank officials can if found guilty of any money laundering offence they have committed. The POCAMLA also gives similar provisions.

In other jurisdictions like the USA, the concept of corporate criminality is acknowledged and, as a result banks can be convicted for criminal offences. And more so, Geslevieh, indicates that prosecutors in the USA, in most cases, have nonetheless refrained from this because of the banking institution dependency on leveraged income. He adds that they have to weigh the probability of causing collateral damage such as systemic risk versus the duty to ensure the enforcement of the law through prosecution[83].

He further explains that certain arrangements, such as out of court settlements can be made by prosecutors formally through applications to court where the banks and the officials are fined instead, and the case is resolved. He has consequently observed that if such arrangements are made, there may be no legal action taken against the banks, and there is the possibility of not prosecuting the banking officials involved in the offence[84].

As alluded to earlier, the DPP in Kenya through n*olle prosequi* powers can also exercise a similar discretion, by making an application to court either orally or in writing, that he has decided against not proceeding with an entire case or a part of it. In such occasions a plea arrangement can be entered into, and the matter can be settled out of court[85]. This may also apply to cases involving illicit transfer of money by banks.

Furthermore, where discretionary powers are exercised by judicial officers in courts, the judges can review either acts or omissions made by fellow law enforcement agents in implementation of the law. Dale and Jeane argue that, if any official or public agent fails to act by the statute, their actions and decisions can be challenged in court[86]. For that reason, if law enforcement agencies are implementing the POCAMLA provisions but do not adhere to other laws that validate any of the actions taken, courts may interfere by quashing the actions taken, even if done in good faith.

Where agents charged with the investigations exercise the same power, and choose to only pursue predicate offences, there is reduction in the number of actual money laundering cases brought to court. This is the observation made by Maylam who argues that in the United Kingdom (UK),

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[83]Geslevich N, 'Breaking bad: too-big-to-fail banks not guilty as not charged,' 91 *Washington Law Review* 1089, 2014.
[84]Geslevich N, 'Breaking bad: too-big-to-fail banks not guilty as not charged,' 2014.
[85]Section 82 and 87, Criminal Procedure Code and Article 157 (6) (c), Constitution of Kenya (2010).
[86]Jean M, and Dale, *Scottish administrative law essentials*, Edinburgh University Press, 2006. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/strathmore-ebooks/detail.action?docID=1665338 on 21 September 2019.

where the prosecutor chooses to prefer a predicate offence and not include money laundering, then the result is fewer prosecutions of the offence[87]. The situation is also similar if they prefer to pursue money laundering as a standalone offence, which means predicate offences may be ignored[88].

The study will explore the effects of discretionary used by different public officials including the DPP concerning the offences relating to money laundering. It will also attempt to highlight instances where it has been used for crimes other than of money laundering; and the impact of out of court settlements in fighting the crime in Kenya.

2.3.5 Access to Information

Access to information is a right provided by the constitution of Kenya[89]. Today, information on different aspects of the law is readily available on different platforms. Additionally, the government has ensured that AML laws are easily accessible on online platforms to the public[90]. The public also includes money launderers who are also very aware of these rules and will therefore be at a better position in manipulating schemes to by-pass them[91].

Accordingly, Tuner is in agreement with the above statement, and attributes it to the modernisation of the global society. Consequently the law enforcers have a hard task of dealing with lawbreakers who are versed and advanced in hiding their trails, therefore making the tracking of illicit moneys more difficult [92].

Likewise, access to information by law enforcement agents is vital. Any findings from the investigations should easily be obtained by each agent, who should make that information easily accessible to other agents involved, as Sharman and Chaikin indicate[93]. This can enhance the success of AML enforcement. Where such information is not easily accessible, the enforcement process becomes slow compared to the speed with which illicit proceeds are disguised to appear

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[87]Maylam S, 'Prosecution for money laundering in the UK,' 10 *Journal of Financial Crime*, 2, 2003.
[88]Bell E, 'Discretion and decision making in money laundering prosecutions,' 5 *Journal of Money Laundering Control* ,1, 2001, 42-50.
[89]Article 35, Constitution of Kenya (2010).
[90] Kenya Law http://kenyalaw.org/kl/, on 19 July 2019.
[91]Előd T, 'A Theory of "Crying wolf: the economics of money laundering enforcement,' IMF Working Paper 07/81, 2007,8,https://www.imf.org/en/Publications/WP/Issues/2016/12/31/A-Theory-of-Crying-Wolf-The-Economics-of-Money-Laundering-Enforcement-20623, on 19 July 2019.
[92]Turner E 'Money laundering prevention: deterring, detecting, and resolving financial fraud' *John Wiley and Sons*, 2011.
[93]Sharman J and Chaikin D, 'Corruption and anti- money- laundering systems: putting a luxury good to work,' 22 *An International Journal of Policy, Administration and Institution 1,2009,27-45.*

legitimate[94]. The study will therefore seek to examine whether the above situations have occurred in Kenya or not.

2.3.6. Advancements in Banking Technology

Technological advancements have made challenging for banking institutions to at times verify the customers they are dealing with in certain instances. This relatively attributed to financial innovations banking sector. Morris-Cotteril argues that innovations in the financial sector, such as the use of monetary instruments has allowed money launderers to change, transfer, or hide the money that they hold in bank accounts without being detected[95].

The same argument is advanced by Tuner who agrees that technological advancements have also transformed ways of laundering money, hence restraining and significantly reducing the likelihood of detection. In their view, internet banking has eliminated need of over the counter transactions, and, therefore, allowing transactions to occur at a fast pace before law enforcers discover them[96]. Merlonghi similarly adds that, the conversion of money into a digital form may not essentially need the use of a bank, but rather a telephone service provider. This then creates instances of anonymity and the consequent concealing of the identities of criminals involved[97].

In such situations due diligence analysis is undermined by the difficulty in identifying everyone involved in the transaction. Technology has therefore blurred the possibility of banks gathering truthful information about customers, thus creating prime avenues for untraceable financial transactions[98].

2.3.7. Rogue Officials in the Banking Sector

The fact that money laundering has become rampant in Kenya can also be partially attributed to rogue officials who may assist criminals in facilitating the offence. As Warutere points out, rogue banking officials have to infiltrated the market, by creating avenues for illicit transfer of proceeds

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[94]Sharman J and Chaikin D, 'Corruption and anti- money- laundering systems: putting a luxury good to work,' 22 *An International Journal of Policy, Administration and Institution 1,2009,27-45*
[95]Morris-Cotterill N, 'Money laundering,' *Foreign Policy*,124, 2001, 16-22.
[96]Turner E, Money laundering prevention: deterring, detecting, and resolving financial fraud, 2011.
[97]Merlonghi G, 'Fighting financial crime in the age of electronic money: opportunities and limitations,'13 *Journal of Money Laundering Control,* 3, 2010, 202-214.
[98]Konstadin P and Alexandra P, 'Prevention of money laundering: the problem of contemporary banking,'1 *International Journal of Economics and the Law,*1, 2011.

of crime. He alludes to classical corruption scandals in Kenya, where corrupt officials in the banking industry have aided in the laundering of illicit proceeds[99].

Nelsol also adds that, rogue officials include senior managing officials who by indulging in willful blindness, can encourage the crime. Alternatively, he further states, management may well chose to facade reports of internal controls against money laundering, to show compliance, whereas they are not[100]. A case in point was Dubai bank in Kenya which was ultimately liquidated due to non-compliance of various banking regulations, and the publication of fraudulent reports ,which hid various criminal activities carried out by senior management[101].

In the same vein, consequently Konstadin and Pusara posit that the above scenarios can bring about circumstances of institutional collaboration between banking officials and members of a criminal organisation; therefore building a firm ground where the crime thrives in of exchange of monetary compensation[102]. Margaret[103] affirms this by indicating that business corporations such as banks, can support illicit enterprises and be mutually supported by them. She gives various reasons attributable to these partnerships, such as greed and corruption. She however notes that sometimes legitimate businesses can opt to facilitate criminal transactions by their own will.

2.3.8. Multi-Agency Collaborations

Where different institutions partner to fight a crime, the approach can be termed as multi agency. The multi-agency approach is a similar method used in Kenya fight money laundering. Partnerships with the following government agencies ; the National Police Service, Directorate of Criminal Investigation, the DPP, ARA, KRA, FRC and CBK have been established to curb the crime[104].

Schneider and Hurt observe that this approach incorporates different agents who join efforts in combating a crime. They add that the different agents can emanate from criminal enforcement, regulatory institutions and administrative bodies. They further note that this technique has been

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[99] Peter W, ‘ Detecting and investigating money laundering in Kenya,’ 2006, https://issafrica.org/chapter-4-detecting-and-investigating-money-laundering-in-kenya , on 24 November 2018.
[100]Nelsol JS, ‘Disclosure- driven crimes,’ 52 *UC Davies Law Review*, 2019.
[101]Gathaiya R, ‘Analysis of issues affecting collapsed banks in Kenya from year 2015 to 2016 ‘, 7 *International Journal of Management and Business Studies*, 3, 2017.
[102]Konstadin P and Alexandra P, ‘Prevention of money laundering, the problem of contemporary banking,’ 2011.
[103]Margaret E, ‘The devil made me do it: business partners in crime,’ 14 *Journal of Financial Crime,* 1, 2007, 34–48
[104]http://www.eacc.go.ke/partnership/ on 15 July 2019.

perceived as ideal globally to fight organised crime such as money laundering, but it is also faced with a lot of shortcomings. These range from the legal provisions in the different statues giving the agents different mandates, the lack of resources, the safeguarded nature of findings after investigations, alleged views of corruption in the agencies and competition amongst them. All this may then cause the agencies to be disjunctive in the manner in which they are to carry out their duties[105].

The above study correlates with the findings of Turner, who also cites the challenge of communication overlaps where different agents are used in enforcement of law. They observe that the process of gathering adequate and reliable data is key in enforcement of the law. According to them, impediments are likely to be drawn in when information stems from different sources[106]. According to them ,this leads to the watering down of information, which may then not assist in the analytical process of investigating money[107].

The current study will seek to examine different laws that have mandated various government agents to fight the crime and try to address potential areas of conflict in Kenya.

2.3.9. Law Suits for Breach of Banker - Customer Relationships

The banker-customer relationship is contractual according to Hudson. For him, this therefore makes the relationship hence fiduciary. For that reason, bankers then have to comply with the execution of their customers' instructions such as making payments, and honoring cheques. Refusal to do so may lead to a legal action against the bank[108].

As earlier discussed banks are supposed to comply with reporting obligations, and where their transactions create any form of suspicion, be it legitimate or not, the accounts may be frozen after court order, in certain cases to facilitate investigations. Such instances have at times caused banks to be sued even if they did so in compliance with court orders. Furthermore, there are circumstances where customers have also filed constitutional petitions to review the validity of the warrants issued to investigate the accounts. This occurs especially when such actions taken by

[105]Schneider S and Hurst C, 'Obstacles to an integrated, joint forces approach to organized crime enforcement,' 31 *International Journal of Police Strategies and Management,*3, 2008.
[106]Turner E, *Money laundering prevention: deterring, detecting, and resolving financial fraud*, John Wiley and Sons, 2011,106.
[107]Turner E, Money laundering prevention: deterring, detecting, and resolving financial fraud, 106.
[108]Hudson A, The law of finance, *Sweet and Maxwell* 2ed, 2013,892.

banks, in obedience to the law cause any form of inconvenience to their customers, particularly where the investigations are not done expeditiously.

This study will therefore attempt to highlight challenges faced by the banks where banks in Kenya in a bid to comply with the law by making reports of suspicious transactions, and examine some instances where such reports are made in good faith have caused banks to be sued.

2.3.10. Corruption

Corruption can be described as a mechanism which favors or facilitates the commission of other criminal activities in any institution[109]. Muragura observes that money laundering and corruption are so intertwined, because corruption may give rise to the money laundering offence. He further argues that the reason could be that because most AML regimes were not specifically designed to curb corruption that is related to it[110]. However, AML regulations acknowledge the existence of predicate offences. Corruption has hence been presumed to be part of those offences in Kenya. It therefore falls under the category of offences that can be pursued under the AML regime

Aketch notes that corruption can be attributable institutional problems in any organization. This is regardless of it being a public or a private institution. He adds, Kenya has however been lenient in prosecuting corrupt officials or institutions[111]. As a result, the offence has been tolerated, and is widely practiced in the country. This includes some banks and their employees can also engage in corrupt conducts. This same observation made by Solaiman[112] who indicates that, if corrupt persons are treated like trivial offenders of the law, there is an implied notion of tolerance towards the offence by law enforcers to the general public, which ultimately breeds grounds for the commission of other crimes.

[109]Transparency International, https://www.transparency.org/what-is-corruption, on 10 September 2019.
[110]Muragura N, 'Uncoupling the relationship between corruption and money laundering crimes,'21 *Journal of Financial Crime*,1,2016, 74-89.
[111]Aketch M, 'Abuse of power and corruption in Kenya: will the new Constitution enhance government accountability,18 *Indiana Journal of Global Legal Studies*,'1, 2011. http://www.repository.law.indiana.edu/ijgls/vol18/iss1/15 on 19 September 2019.
[112]Solaiman M, 'Captured by evils" – combating black money, corruption and money laundering in Bangladesh the dog must bark to keep predators away', 21 *Journal of money Laundering Control*,3,2018,254-259.

Lukito points out that in certain instances, banks have been accused of failing to reveal money laundering offences if for example bribery has been used to facilitate an illicit transaction[113].

Zali and Maulidi further reaffirm that enforcement of AML laws becomes difficult if corrupt conspiracies exist between criminals and banking institutions. They state that this makes the detection of the crime almost impossible, because the accomplices can easily fabricate any evidence indicating their transactions. Therefore, threat of detection is reduced and criminals are shielded from the law enforcement agencies[114], regardless of banks implementing internal control measures to curtail illicit transactions.

2.4. Conclusion

From the examined literature, there is a clear indication that enforcement of AML regime has put various measures to curb the offence of money laundering. These range from the preventive measures conducted by banks, to the law enforcement mechanisms by the different law enforcement agents who facilitate the investigation or prosecution of the offence. It is also evident that for these measures to work banks should work together with the law enforcement agents to ensure criminals do not succeed in the transmission of illicit proceeds through them.

However, where there are deliberate violations of the preventive measures, coupled with other challenges in the enforcement process, there is difficulty in ensuring the effectiveness of the process. This therefore causes the enforcement practices to fail, even if there is commitment to enforce AML laws.

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[113]Lukito A 'Financial intelligent investigations in combating money laundering crime,'19 *Journal of Money Laundering* Control,1, 2016, 92-10.

[114]Zali M and Maulidi A, 'Fighting against money laundering,' 5 *BRICS Law Journal,* 3, 2018, 40-63.

Chapter Three: Review of the Laws and Regulation Governing Money Laundering in Kenya

3.0. Introduction

This section will analyse different laws that pertain to curbing the offence of money laundering and its predicate offences. These laws include the Constitution of Kenya (2010); the Proceeds of Crime and Anti-Money Laundering Act (No 9 of 2009); the Ethics and Anti-Corruption Commission Act (No 22 of 2011), (ACECA); the Anti-Corruption and Economic Crimes Act (No 3 of 2003); the Banking Act, 2015, the Central Bank of Kenya cap 491; some provisions from the Prudential Guidelines 2013 and the Proceeds of Crime and Anti-Money Laundering Regulations, 2013 and some provisions form the Financial Action Taskforce(FATF) 40+9 Recommendations. Particular attention will be given to sections aimed at enforcement money laundering, and their impact on banking institutions. Emphasis will be limited to the statutory bodies and agencies established to fight the crime. The FATF 40+ 9 recommendations were chosen as opposed to other conventions that fight money laundering due their relevance in shaping the POCAMLA.

3.1. The Constitution of Kenya 2010

The Constitution is the supreme law of Kenya and binds every individual and state organ, to act following its provisions[115]. It further prescribes certain national values and principles which should be adhered to in whatever acts that individuals or state organs decide to pursue under article 10.These principles include; good governance, integrity, transparency and accountability[116]. therefore, banks and law enforcement agents are required to observe these principles, as they prevent and enforce the rules and laws against money laundering.

3.2. The Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009)

The POCAMLA, was legislated to outlaw the offences involving money laundering ,and hence, to bring about ways of fighting the offence, such as identifying, tracing, freezing, and confiscating

[115] Article 2(1), The constitution of Kenya, 2010.
[116] Article 10(2), The constitution of Kenya, 2010.

criminal proceeds[117]. These methods are aimed at curtailing the different stages which money laundering takes place as described in the Prudential Guidelines under section 3[118].

The stages as per the guidelines include: placement of the initial proceeds resulting from an illegal activity in the financial institution; layering which hides the source of the money through complex transactions intended to mask the audit trail of investigators and create anonymity; and finally integration by making the laundered funds proceed back into the society making it appear to be a normal day to day business transaction. These convoluted processes then bring the offence of money laundering. Consequently, 'money laundering' can be defined as transactions aimed to hide the source or characteristics of the of the illicit proceeds[119]. These transactions can be done in Kenya or any other jurisdiction.

3.2.1. Money Laundering Sanctions

The Act has provisions for various sanctions corresponding to different offences of money laundering. The ultimate aim of the sanctions under the POCAMLA, are to deprive banks from any gains obtained by breaching its provisions. Some of the offences and corresponding penalties established by section 16 of the Act are:

Upon conviction a corporate institution is liable to a fine not exceeding twenty five million shillings, or the amount of the value of the property involved in the offence[120]. This is for committing money laundering by financial transmission or acquiring and using proceeds of crime[121]. Further Section 16(2) states: failure to report suspicious transactions; tipping off reports to be sent to the FRC; failure to monitor and report transactions whether suspicious or usual regularly; failure to establish the identities of customers, or maintaining customer records, warrants a fine not exceeding ten million shillings or the amount of the value of the property involved in the offence, whichever is the higher[122]. Additionally if an institution fails to report the conveyance of a financial instrument, they attract a financial penalty not exceeding ten per cent of the amount of that financial instruments[123].

[117]The Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).
[118]Section 3.1.3, Prudential Guidelines, 2013.
[119]Section 3, Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).
[120]Section 16(b), Proceeds of Crime and Anti- Money Laundering Act (Act No 9 of 2009).
[121]Section 4, Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).
[122]Section 16(2) (b), Proceeds of Crime and Anti- Money Laundering Act (Act No 9 of 2009).
[123]Section 16(3), Proceeds of Crime and Anti-Money Laundering Act (Act No 3 of 2009)

The punitive nature of these sanctions against banks, if executed aims at encouraging compliance. Yusuf and Ekundayo adds that, sanctions also encourage discipline and discourage possible repeated violations of the law[124]. Unfortunately, it has not been clear if hefty financial fines can inculcate such culture in banks. This is because they are corporate business entities, whose aim is to make profit from certain transactions. DiLorenzo argues that such fines will only cause a recidivist behavior for corporate institutions such as banks, for various offences they opt to violate[125]. This is done specifically in situations where criminal acts bear gains which outweigh the financial penalties.

3.2.2. The proceeds of Crime and Anti-Money Laundering Regulations

These regulations were issued by the Finance Minister, to expound on the AML obligations by reporting institutions including banks. Section 10 states that reporting institutions such as banks should employ or appoint a Money Laundering Reporting Officers (MLRO). The task of such officers would be to work in the management position of the institution, and other junior employees are required report and file STRs with them. The regulations only state that these officers are supposed to have the necessary competencies[126], but is silent on what such competency entails.

Kayuni argues that the clear presentation of qualifications for certain positions required by the law is very important, in ensuring the right candidates get the job[127]. This is important for proper the enforcement of the AML regime in banks. The absence of indicating such required qualifications for that position, may lead to the employment of individuals who are not aware of the weight of their duties. Consequently, internal preventive measures fail as result which can be partly connected this gap in the law. It does not properly guide banking institutions on the appropriate skills, qualifications and experience required for the position.

Section 10(4) recognises MLRO as the designated officials to file the STRs to the FRC, which should be done without delays. However, the regulation prescribes other additional duties[128] such as applying internal risk management procedures on suspicious transactions; training employees

[124]Yusuf I and Ekundayo D, 'Regulatory non-compliance and performance of deposit money banks in Nigeria,'26 *Journal of financial regulation and compliance*, 3, 2018.
[125]DiLorenzo V, Corporate wrongdoing: interactions of legal mandates and corporate culture review of banking and financial law, Research Paper No 17-0002.
[126]Section 10(2), Proceeds of Crime and Anti-Money Laundering Regulations, 2013.
[127]Kayuni S, 'Running to stand still: reflections on the cash gate scandal heist in Malawi,'169-188.
[128]Section 10(6)(a) to (e), Proceeds of Crime and Anti-Money Laundering regulations, 2013.

the requirements of the POCAMLA and working together the human resource department to ensure the screening of persons intended to hired as employees.

From the above duties, the role of an MLRO seems to be involving, and where banks assign then other roles besides those prescribed by the law, there is the possibility of them being overworked. The Financial Conduct Authority in the UK, has observed that if the senior management overburdens the MLRO with other tasks not related to ensuring the efficacy of internal control measures, such measures will not work efficiently[129]. This happens where they work in other departments within the bank, and hence cannot give keen attention to their work by performing those duties.

The screening of employees by the MLRO as provided by the regulation is aimed at preventing the infiltration of banking sector with rogue employees. However, the regulations do not go further to explain what that process may entail. It left to the discretion of the MLRO and the human resource department, which may not be effective. If the law laid down the required standards, it can prevent such instances from occurring. Kayuni argues that where the law is silent on such interpretations, the provision remains open to different perceptions of banks[130]. It may not be effective to prevent the financial sector from criminal infiltration.

Section 22 mandates banks to carry out special risk management processes if they transact with politically exposed persons[131]. In such cases, employees are required to obtain the approval of the senior officials if they establish that they are dealing with such clients. Consequently, they are mandated take extra care to identify the origin of their wealth. The question that can arise from this provision is what happens if the banks belongs to politicians or the politically exposed persons? There might be unreliable due diligence measures applied on such occasions.

[129]Financial conduct authority imposes penalties on Sonali bank (UK) limited and its former money laundering reporting officer for serious anti-money laundering systems failings https://www-lexisnexis-com.ezproxy.library.strathmore.edu/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T28990639588&format=GNBFULL&startDocNo=0&resultsUrlKey=0_T28990639590&backKey=20_T28990639591&csi=405534&docNo=7 on 19 September 2019.
[130]Kayuni S, 'Running to stand still: reflections on the cash gate scandal heist in Malawi,'169-188.
[131]22(1) Proceeds of Crime and Anti-Money Laundering Regulations,2013.

Daniela argues that it has be reported on certain occasions, business entities owned by politicians or politically exposed persons, could be the main conduits for concealing illicit proceeds of crime belonging to corrupt public officials[132].

3.3. Predicate Offences

Section 2 of the Anti -Corruption and Economic Crimes Act (Act No 3 of 2003) Act states that, corruption is an economic crime which entail fraud, bribery, and conspiracies to commit either offences[133]. These offences can form part of the principal offences that facilitate the laundering of money in the banking sector. This inference is drawn from section 2 of the POCAMLA which defines criminal proceeds as,

'properties or economic advantages derived or realized, directly or indirectly, as a result of or in connection with an offence (…) later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed.'[134] Therefore, corruption offences can bring about proceeds of crime.

Corruption can then involve both public organizations and private entities. Banks fall under the category of private entities. Under section 38, agents in the public or private sectors and similar institutions, can be held liable for corrupt conduct. These agents may be rogue banking officials or banks that are susceptible to the said wrongdoings. Additionally, the challenge posed by corrupt offences linked to money laundering is their late detection. This is attributed to the complexity of corrupt offences. Consequently, there is delay in detecting the crime in a well-timed manner allowing corrupt institutions to bypass the law[135].

3.4. The Banking Act, 2015

The Act gives various provisions on the conduct of the banking business in Kenya and some offences which banks may be prone to. It further gives detailed information on the CBK role as

[132] Daniele C, 'Politically exposed entities: how to tailor PEP requirements to PEP owned legal entities, 22 *Journal of Money Laundering Control*, 2, 2019,359-372.
[133]Section 47A, Anti -Corruption and Economic Crimes Act (Act No 3 of 2003).
[134]Section 2, Proceeds of Crime and Anti –Money Laundering Act (Act No 9 of 2009).
[135]Pavlovic, Z and Paunovic N, 'Corruption criminal offenses as predicate economic crimes to money laundering,' *Journal of Eastern-European Criminal Law*,2, 2019, 223-231.

the main supervisory body to banks. In Section 32(4) the CBK can assist other investigative agencies in matters related to suspected fraud or malfeasance by banking institutions. This can be done at the request of other law enforcement agencies or on its discretion. Such malfeasance on the part of supervised banks can be related to money laundering offences. Similarly the CBK, as coordinator of joint supervision, done by other regulatory bodies, can appoint any of them to conduct investigations on any offences committed by banks[136].

3.5. The Institutions mandated to Fight Money Laundering, their roles and Challenges Faced in the Different Enforcement methods used against Money Laundering

3.5.1 The Central Bank

The CBK is established under section 3 of the Central Bank Act. It is the main supervisory body to banks. Section 33F (1) of the Act indicates that the CBK is mandated to carry out regular inspections of banking records. This is to ensure banks comply with the law. Where such inspections are done, banks are supposed to avail all books and records of accounts. If after the inspection the CBK has reason to believe that the inspected bank is being operated in contrary to its requirements, it can give guidance on the conduct of business[137].

These records include customer records as mandated by the POCAMLA[138]. This CBK role a is similar to some of the tasks carried out by the FRC, where officers and employees of banking institutions are required to avail all the books, accounts and other documents that will provide information concerning their conduct of business[139].

Where the CBK finds that the bank is being conducted in a way that conflicts with its legal requirements, it can issue recommendations to remedy the situation, and improvement its management[140]. In connection with the prevention of illicit transactions, such recommendations or

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[136]Section 32 (4)(5) (a) and (b), Banking Act, 2015.
[137]Section 33 F, Central Bank Act, Cap 491.
[138]Section 46, Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).
[139]Section 33, Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).
[140]Section 43 (1), Central Bank Act, Cap 491.

guidance are issued through guidance notes[141]or guidelines[142]. They contain detailed requirements on various measures that banks are to implement.

3.5.2. The Financial Reporting Center (FRC)

Section 21 of the POCAMLA establishes the FRC. It is a corporate body. Consequently, it is tasked with the duties of receiving, analysing and interpreting financial reports relating to money transactions or transmissions[143]. These reports concern suspicious monetary transactions. Once the reports are received the center is mandated to evaluate the reports by carrying out investigations[144]. The investigations are done to establish if the suspicious transactions can be connected to money laundering. Afterwards, the evidence gathered is disseminated to law enforcement agencies for appropriate action[145]. Unfortunately, there is no documentation readily available on their website as of to date[146], informing the public about appropriate actions taken after reports are made. This has created the absence of a results-based feedback from the FRC

Section 38 of the POCAMLA indicates that the center can only go as far as obtaining monitoring orders to allow it to trace illicit proceeds, hence cannot confiscate them after it is done tracking. Consequently, it cannot implement some judicial remedies provided in the POCAMLA, when it finds banks in violation of it. Such remedies include preservation orders for the confiscation of the illicit proceeds.

The model adopted by the center in carrying out its function is administrative. For that reason, it has powers under section 24C to enforce administrative penalties. These include warnings, orders requiring compliance, cancellation or suspension of licenses and orders barring the offenders from employment temporarily or permanently[147]. But the law through the Proceeds of Crime and Anti Money Laundering Amendment Act, 2017, section 4, additionally gave it elaborate powers under section 24B of the POCAMLA, to execute financial penalties to both individuals and corporate bodies, when they do not act in accordance with any of its requirements set under the law. These

[141]The Central Bank of Kenya guidance note: conducting money laundering/ terrorism financing risk assessment, cbk,2018,https://Www.Centralbank.Go.Ke/Wp-Content/Uploads/2018/03/Guidance-Note-On-Ml_Tf-Risk-Assessment.Pdf on 25 August 2019.
[142]The Prudential Guidelines, 2013.
[143]Section 24(a)(i) and (ii) Proceeds of Crime and Anti- Money Laundering Act (Act No 9 of 2009).
[144]Section 24(c), Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).
[145]Section 24(b), Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).
[146]http://www.frc.go.ke/14-reporting.html, on 25 September 2019.
[147]Section 24C(1)(a)(b)(c) and (d), Proceeds of Crime and Anti -Money Laundering Act (Act No 9 of 2009).

amounts go up to the tune five million shillings for individuals, and twenty-five million shillings for corporate bodies such as banks.

In line with the Financial Action Task Force (FATF)[148], recommendation 35, these sanctions are meant to be dissuasive and proportionate. Morogo observes that the above financial sanctions, may be exaggerated, due to the high deterrent value. He further states that it may not be plausible for effective regulation, because in as much as banks ought to cooperate with the FRC, they will be effective only in creating fear and encouraging protective tick-box compliance by banks, to its requirements[149].

Consequently, banking institutions will then tend to employ self-protective compliance, where they excessively make reports, to paint the picture of actual compliance. Resultantly, the FRC only then gathers unreliable data which may not assist at all in investigations aimed at building cases that may be referred for prosecution.

POCAMLA does not also prescribe the limit for an investigative agency, after receiving STRs, to conduct and finalise the investigations and give feedback to the FRC. Similarly, it does not give the time limit for the DPP, having received the relevant evidence, to undertake the necessary measure. This may be the reason behind lengthy investigative periods, which may not be effective in enforcement of AML laws.

3.5.3. The Assets Recovery Agency

ARA is established under section 53(1) of the POCAMLA. It has the power to carry out criminal and civil confiscation of illicit proceeds[150] to deprive criminals of the benefits resulting from their criminal activities. The difference between civil and criminal forfeiture, in the recovery of illicit assets, is that criminal forfeiture enables the ARA to secure the confiscation of the recovered assets; initiate the prosecution of the suspect via criminal proceedings; and sustain a conviction depending on evidence.

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[148]International standards on combating money laundering and the financing of terrorism & proliferation, FATF, recommendations,2012,https://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf, on 20 August 2019.
[149]Morogo D, An appraisal of the institutional framework under the Kenya proceeds of crime and anti-money Laundering Act, unpublished LLM thesis, University of Western Cape, South Africa, 2017.
[150]Section 54(1), Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).

Civil forfeiture on the other hand does not require a conviction of the suspect, or the initiation of proceedings against them. Their absence does not affect confiscation orders issued by the court[151]. Civil confiscation orders only require proof that the property was either used, or was intended to be used in the facilitation of a crime[152]. Consequently, its proceedings are not conviction-based since the action is against the property. The aim is to recover assets obtained criminally in the absence of a criminal conviction or on occasions where the evidence is insufficient, and the suspected criminal is cannot be found or is dead[153].

The reasons why the law allows this, is to moderate the high standards of proof required in criminal law, where a case has to be proven beyond reasonable doubt. These are the same opinions of both Aurasu and Rahman, who add that this allows ease in confiscation of illicit proceeds[154]. The law in Kenya assumes this standard in section 56 of the POCAMLA, thereby allowing criminal confiscation orders to apply civil procedure rules in its proceedings.

The impediment that could occur in obtaining confiscation orders, is if civil forfeiture is used in circumstances, where criminal forfeiture could be appropriate. This is in a situation where suspects are known, but law enforcers do not pursue them. Such instances occur, and according to Stefan law enforcers become negligent, if the custody of illicit proceeds is done under civil forfeiture orders, to avoid investigation to determine true owners of the illicit money. She notes that in such circumstances, law enforces fail because where suspects are known, it is possible to institute criminal proceedings[155].

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Nevertheless, whichever mechanism is used, banks and other law enforcement agencies are mandated to cooperate with the ARA when it comes to the implementation of the confiscation orders[156]. Such cooperation will entail obedience to the orders made by freezing the suspects' accounts, to allow the seizure of moneys deposited therein. Jonah notes that, the main challenge is

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[151]Section 92(3), Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).
[152]Section 92 (1)(a) and (b), Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).
[153]Transparency International, 'Combating money laundering and recovering looted gains: raising the UK's game, May 2012, https://star.worldbank.org/corruptioncases/sites/corruptioncases/files/documents/arw/transparency_intl_uk_recovering_looted_gains_june_2009.pdf, on 4 August 2019.
[154]Aurasu A and Rahaman A, 'Forfeiture of criminal proceeds under anti-money laundering laws a comparative analysis between Malaysia and United Kingdom,'21 *Journal of money laundering control*,1, 2018.
[155]Stefan D, 'Choose your weapon is civil forfeiture really necessary, or is it an undesirable shortcut to real law enforcement?' 21 *Journal of Money Laundering Control*,3, 2018.
[156]Section 55, Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).

ensuring that the rights of individuals are respected in the process[157]. If the orders are obtained without substantial evidence, there are possibilities of them being challenged by individuals in court. This is through applications to have the orders quashed.

After the accounts are frozen, the ARA is then mandated to carry out their investigations within a reasonable time. If the time used in doing so is unreasonable, or prolonged without good reasons, then it breeds ground for numerous ligations against banks and the law enforcement agencies for breach of various rights under the Constitution[158]. This is acknowledged by the Office of the Director of Public Prosecution (ODPP) in its annual report for 2017 which states that if constitutional rights are breached in the process of implementing the law, suits are likely to be filed by the affected parties[159]. Ultimately this may cause investigations to drag, as law enforcers await the outcomes of the court decisions challenging their actions.

Additionally, the time frame provided for the implementation of civil forfeiture orders by the ARA lengthy. This may defeat the purpose of those orders. Section 92(5) specifies, that after the order is made, the Registrar of the High Court has to publish a notice of not more than thirty days. Section 92 (6) further indicates the order will not take effect before applications to vary or retract the orders, have been heard[160], or appeals under section 92(6) for the exclusion of interests have been concluded.

The other challenge resulting from this lengthy process, is the possibility of suspects being tipped off concerning the oncoming investigations being initiated, and may therefore find ways of escaping justice.

Furthermore, the United Nations Office on Drugs and Crime (UNODC) has observed that delays caused by the legal process of obtaining forfeiture orders in Kenya can drag down the process of

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[157]Johan B, 'Asset confiscation in Europe –past, present, and future challenges,'26 *Journal of Financial Crime*, 2,2019, 526-548.
[158]The Constitution of Kenya (2010).
[159]Annual Anti-Corruption report by the director of public prosecutions in respect of prosecution of anti-corruption and economic Crime related cases, pursuant to the provisions of section 37 of the Anti-Corruption and Economic Crimes Act (Act No 3 of 2003), January to December 2016, http://www.odpp.go.ke/wp-content/uploads/2017/06/FINAL-ODPP-ANTI-CORRUPTION-ANNUAL-REPORT-JANUARY-TO-DECEMBER-2016-8TH-MAY-2017.pdf ,on 26 July 2019.
[160]Section 89, Proceeds of Crime and Anti Money Laundering Act (Act No 9 of 2009).

recovering criminal proceeds, subsequently causing delay in the administration of justice. This is especially in situations where legal action ought to be taken immediately[161].

3.5.4. The Office of the Director of Public Prosecutions

The ODPP is established under article 157(1) of the Constitution. The core duty of this office is to charge and prosecute cases dispatched by investigative agencies[162]. Under article 157(4), the DPP has power to instruct other law enforcement agents, such as the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct. From this provision, it is evident that the police will be also be involved in investigations pertaining to money laundering offence.

Article 157(6) further allows the DPP to commence criminal court action against any person[163]; take up any criminal matter that was already instituted in court by any person with their permission[164]; or bring the proceedings to an halt at any stage before judgment is delivered[165]. These powers under article 157(9) can also be exercised by subsidiary officers, following his instructions. Under article 157(10) the DPP will not require the permission of any official or institution to begin any criminal proceedings. This article introduces the concept of prosecutorial discretion. Where the DPP exercises such discretion, out of court settlements can be entered into at, at any stage of the trial. The effect is that some case may be concluded without having to go through a criminal trial[166].

3.5.5. The Office of the Attorney General

The Attorney-General's office has the authority to also direct order investigations on money laundering. This authority is given to him by section 122 of the POCAMLA, if he suspects that any person has possession of information relating to offences of money laundering. This can be done before any civil or criminal proceedings are initiated. Similarly, discretionary powers to

[161]Country review report of Kenya by United Nations Office on Drugs and Crime, https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2015_09_28_Kenya_Final_Country_Report.pdf on 7 July 2019.
[162]http://www.odpp.go.ke/core-functions/ on 2 August 2019.
[163]Article 157(a), Constitution of Kenya, (2010).
[164]Article 157(b), Constitution of Kenya, (2010).
[165]Article 157(c), Constitution of Kenya, (2010).
[166]The prosecutor: a newsletter from the office of the director of public prosecution, http://www.odpp.go.ke/wp-content/uploads/2019/01/odpp-newsletter-issue-no.-001.pdf, on 2 August 2010.

either continue or discontinue with investigations are also given to the Attorney General in the ACECA. the act states:

'The Commission may, in consultation with the Minister and the Attorney General, tender an undertaking in a form prescribed by the Minister, not to institute or continue with investigations against any person suspected of an offence under this Act'.[167]

However, the Institute of Certified Public Accountants of Kenya (ICPAK) reports that the above provision may limit the investigative processes that can be initiated by other bodies[168]. Primarily, when it comes to the investigation of predicate offences related to money laundering.

The Attorney General can also allow out of court settlements. This is through his discretionary power, on occasions where accused persons either make full and truthful disclosure of their corruption or economic crimes. They may then be required to refund the property to the persons affected by their crimes, through the EACC[169].

These discretionary powers given to both the ODPP and the AG are subjective nature. There is therefore the possibility of biasness being involved in their application. Nonetheless, there are also cases where such power is correctly exercised, but it is still subjected to constitutional reviews and petitions, which cause delay in enforcement of cases.

Despite other agencies being involved in the enforcement of POCAMLA, the power to prosecute any of the offences rests with the ODPP. The examined statutes do not give any of the agencies the powers to prosecute.

3.5.6 The Ethics and Anti-Corruption Commission

The EACC Act under section 3, provides for it powers to the fight against economic crimes and corruption. Criminal proceeds can be derived from corrupt offences. Some of the corruption offences form part of predicate offences that bring about money laundering. Consequently, the

[167]Section 25A (1), Anti-Corruption and Economic Crimes Act (Act No 3 of 2003).
[168]The current challenges in enforcing the Anti -Corruption and Economic Crimes Act (ACECA), https://www.icpak.com/wp-content/uploads/2015/09/THE-Challenges-In-Enforcing-the-Anti-Corruption-and-Economic-Crimes-Act.pdf, on 31 July 2019.
[169] Section 25A (3), Anti -Corruption and Economic Crimes Act (Act No 3 of 2003).

Commission can commence the investigation of these offences and recommend to the DPP their prosecution. These offences are indicated in the ACECA.

The EACC has a similar role given to ARA under section 55 of the ACECA, which is the recovery of assets. They are therefore mandated to commence proceedings in court for the retrieval or protection of property that belongs to the public; freeze or confiscate proceeds of corruption, and like the FRC implement corrective measures[170]. The corrective measures are in the form of monetary fines, and out of court settlements.

In line with the above powers, the commission can obtain preservation orders aimed at preventing the transfer, or disposal of property suspected to be obtained through corrupt conduct. The orders can be in force for up to six months to facilitate investigation[171]. Noteworthy obstacles faced by the ARA, can also be faced by the EACC, where petitions may be filed to challenge the length of time by persons whose accounts are frozen, to facilitate investigation of predicate offences linked to money laundering.

The EACC is also required to partner with other state agencies, both local and international, in the prevention and investigation of corruption[172]. In implementing their roles, the ACECA, clearly lays down the various offences it can pursue.

In section 56B, the commission can enter into out of court settlements with accused persons before instituting any civil charges against them. The settlements are to be registered in court. This is a form of discretionary power that is granted to the EACC. The consequence of this provision is possible reduction of causes related to money laundering[173]

3.5.7. Cooperation Among the Institutional Agents and Enforcement Challenges

The examined legal frameworks, do not provide elaborate mechanisms dealing with multi-agency frameworks and cooperation. However, from different provisions in the statutes discussed above, such partnership can be entered into. This through formal agreements between the different agents.

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[170]Section 11(j), Ethics and Anti-Corruption Commission Act (Act No 22 of 2011).
[171]Section 56 Anti-Corruption and Economic Crimes Act (Act No 3 of 2003).
[172]Section 11(3), Ethics and Anti-Corruption Commission Act (Act No 22 of 2011).
[173] Section 56B, Anti -Corruption and Economic Crimes Act (Act No 3 of 2003).

The sole purpose is to assist each other in carrying out different roles in the enforcement of money laundering.

In the POCAMLA section31(3), indicates that FRC can create agreements with other state departments or agencies to conduct some of its roles. Similarly, the EACC can establish strategic partnerships that can assist it in exercising its functions[174].

The likely benefit derived from such agreements would be pooling of resources, among other things. It would also avoid the duplicating efforts in curtailing the crime. Nonetheless the setback facing this joint approach in Kenya, as discussed by Nyaga, is the lack of a clear-cut mechanism or differentiation of obligations in certain joint operations, leading to overlapping roles[175].

A report[176], on the multi-agency taskforce in fighting crimes in the country cites that the absence of legal or administrative framework on collaboration amongst agencies, may impede a solid involvement by the agencies in carrying out their roles.

In practical terms some of the roles do overlap. This resultantly constricts how they operate. For instance, the EACC and ARA can perform asset recovery after obtaining confiscation orders from the high court; and the FRC and CBK can carry out inspections on the financial records of banks, in connection with the fight against money laundering. These are potential areas of conflict amongst some officials. More so in circumstances where recognition ought to be given for the work done or the level of expertise needed.

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Inter-agency cooperation is also undermined in situations where there is also lack of transparency on gathered information. The second schedule of the POCAMLA indicates that cash declarations of persons transmitting monetary instruments of US $10,000, should be made, at the point of entry or exit[177]. When this is done, the information concerning the declaration is remitted to the FRC[178]. Under section 2, these authorized officers, may be the ARA director, police officers, compliance

[174]Section 11(c), Anticorruption and Economic Crimes Act (Act No 3 of 2003).
[175]Nyaga C,'Enhancing synergies: the multi-agency experience in fighting corruption in Kenya, https://www.unafei.or.jp/publications/pdf/RS_No104/No104_21_IP_Kenya.pdf, on 5 August 2019.
[176]Report of the task force on the review of the legal, policy and institutional framework for fighting corruption in Kenya,2015,https://www.statelaw.go.ke/wp-content/uploads/2016/08/Republic-of-Kenya-Report-of-the-Task-Force-on-the-Review-of-the-Legal-Policy-and-Institutional-Framework-for-Fighting-Corruption-in-Kenya-2015.pdf, on 5 August 2019.
[177]Section 12 (1), Proceeds of Crime and Anti Money Laundering Act (Act No 9 of 2009).
[178]Section 12 (2), Proceeds of Crime and Anti Money Laundering Act (Act No 9 of 2009).

officers in banking institutions, or any other persons given the authority to do so under the Act[179]. If an appropriation is made by any of them, a receipt is issued accordingly to the person as proof of the confiscation[180]. However, upon confiscation, disclosure and surrender of the said amount is communicated the director of the ARA [181] and not the FRC.

Gikonyo argues where disclosure of the information of any confiscation is made to the ARA, and not to the FRC, in the long run will defeat its main role which is to receive and analyse all reports of[182]. Consequently, though such cooperation is provided for in the statute, it may not exist in actual practice under certain occasions.

3.6. International bodies, and Mechanisms Adopted by Kenya to Fight Money Laundering

3.6.1. United Nations Office on Drugs and Crime (UNODOC)

UNODOC is an international body under the United Nation (UN) mandated to fight illicit trafficking of drugs, terrorism, corruption and the prevention of crime[183]. In partnership with other UN bodies it has created model laws to assist its member countries, including Kenya, in setting up legislation. These legislations are founded under the FATF Recommendations[184].

These recommendations are of importance to financial institutions, as they lay down the preventive measures to be adopted to curb the infiltration of illicit proceeds in them. They also prescribe additional law enforcement measures to be adopted by the member countries.

3.6.2 The Financial Action Task Force (FATF) 40+ 9 Recommendations

The FATF is a global body that regulates illicit financial behavior. It is mandated to issue guidance in the form of recommendations to its member countries, which are expected to implement the

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[179]Section 2, Proceeds of Crime and Anti Money Laundering Act (Act No 9 of 2009).
[180]Section 12 (5)(a), Proceeds of Crime and Anti Money Laundering Act (Act No 9 of 2009).
[181]Section 12 (6), Proceeds of Crime and Anti Money Laundering Act (Act No 9 of 2009).
[182]Gikonyo C, 'Detection mechanisms under Kenya's anti-money laundering regime: omissions and loopholes,'21 *Journal of Money Laundering Control*,1, 2018.
[183]UNODC on money-laundering and countering the financing of terrorism https://www.unodc.org/unodc/en/money-laundering/index.html, on 4 October, 2020
[184]UNODC on money-laundering and countering the financing of terrorism https://www.unodc.org/unodc/en/money-laundering/index.html, on 4 October, 2020

same[185]. This is done by encouraging the countries to adopt legislative measures which are aimed at deterring the offence such establishing financial investigation units; and cooperate fully in international law enforcement efforts to combat money laundering[186]. Most of its recommendations are reflected in the POCAMLA. Additionally, the 9 recommendations touch on terrorist financing hence providing some broad procedures on how to fight terrorism that has been financed by illicit proceeds[187].

The FATF has established eight regional bodies known as the FATF-style regional bodies (FSRBs) to help in the promotion of its mandate. Among them is the Eastern and South African Anti Money Laundering Group (ESAAMLG) of which Kenya is a member. It plays a crucial role in the dissemination of FATF recommendations on combating money laundering and financing of terrorism[188], and takes the necessary steps to prevent the transmission of illicit proceed among its member countries[189]. The FRC in Kenya is mandated to ensure this done through mutual agreements of reciprocity, with the member foreign financial intelligence units[190]. Unfortunately, criminal and terrorist organisations create multi-layered, international schemes to evade surveillance. Although Kenya has made efforts with its legislation in compliance with the recommendations, much work still needs to be done to prevent money laundering in the banking sector.

3.7. Conclusion

The legal frameworks that have been presented here provide ways of fighting money laundering. However as noted there are loopholes in the legal provision such as delays in obtaining court

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[185]What are the FATF's 40+9 Recommendations and Standards' https://www.sygna.io/blog/what-are-the-fatfs-409-recommendations-and-standards/ on 24 September, 2020.
[186] International standards on combating money laundering and the financing of terrorism & proliferation https://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf
[187] https://www.unodc.org/unodc/en/money-laundering/Instruments-Standards.html?ref=menuside, on 2 October,2020.
[188] International standards on combating money laundering and the financing of terrorism & proliferation, on 24 September, 2020. https://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf on 24 September, 2020
[189] International standards on combating money laundering and the financing of terrorism & proliferation, on 24 September, 2020. https://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf on 24 September, 2020
[190]Section 24 (l), The Proceeds of Crime and Anti Money Laundering Act, (Act No 9 of 2009).

orders, the lack of trust among enforcement agents and the duplicity in some legal provisions on enforcement, tend to make the enforcement process difficult.

It appears that these deficiencies could be the reasons why banks may choose to engage in deliberate violations of the law, by making use of both the legal and regulatory deficiencies. This therefore makes it easier for the gritty money launderers to find ways and means to bypass the system, and ultimately causing the enforcement measures to be ineffective.

Chapter Four: The Enforcement of Money Laundering Laws by the Kenyan Courts

4.0. Introduction

This chapter presents the enforcement of the AML regime in Kenya through case law. The selected cases are not exhaustive, but they are meant to demonstrate the attempts made by the Kenyan law enforcement agents in investigating, prosecuting and confiscating criminal proceeds. Additionally, they demonstrate the difficulties faced in the processes of doing so, in the banking sector.

4.1. Republic v Director of Public Prosecutions and another; Ex Parte Patrick Onyango Ogola [2016] eKLR

This case sought to clarify whether money laundering charges could be considered as a standalone offence. The applicants wanted the high court to issue orders of prohibition against the DPP to prevent him from instituting charges against them, for laundering money stolen from the National Youth Service (NYS). This was until initial charges for theft, against them had been heard and determined. The applicants believed that money laundering charges would only be brought against them if the theft charges had been proved indubitably.

The Judge stated that the prosecution of money laundering did not require the proof of a previous criminal offence. The basis of his decision was borrowed from established precedents in the UK. In decisions made in the cases of Republic v Anwoir[191], and Republic v NW and others[192]. In both cases, the Judges held that prosecutors did not need to prove an earlier conviction of predicate offences, in order to bring money laundering charges against suspects. Consequently, he held that money laundering was a standalone offence and circumstantial evidence is admissible in proving it. The possible outcome of the statement made by the Judge could have the effect of undermining the use of predicate offences linked to the offences of money laundering.

'… *I so hold, that the prosecution need not prove, prior to any charges of money laundering, that there has existed a conviction or an affirmation of a predicate offence. The prosecution need not consequently show a determination by a court of law that there was theft or forgery or fraud that*

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[191] 1 WLR 980[2009].

[192] EWCA Crim 2[2008].

led to the acquisition of the proceeds or property the subject of the money laundering proceedings…. '[193]

A close reading of the POCAMLA under section 2 states that;

"*proceeds of crime means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence…*'

It can therefore be argued that the offence of money laundering is linked closely to the commission of a scheduled offence. It is argued by the World Bank, in a report on combating money laundering[194], financial crimes often require the specification of a class of offences that lead to money laundering. Consequently, where a prosecutor tables evidence that only shows that a transaction appeared unlawful or suspects appeared not to any lawful income, it may not be sufficient.

This is because the offence takes place in different phases, which are all aimed to cover up a specific crime. Indicating the predicate offences that led to it can help during detection and investigation. It creates an important link to establish how money laundering occurred in the first place.

In money laundering cases, the Prosecution must also prove beyond a reasonable doubt that the property alleged to have been laundered is, or represents property obtained as a result of, or in connection with, criminal conduct[195].

Additionally, in the UK, Murray asserts that, prosecutors have also had difficulties in obtaining convictions for money laundering offences, especially where it is not connected to an earlier predicate offence. He adds that, where the prosecutor just relies on the existence of some criminal activities, without specifying the crime, could relegate the use of predicate offences in bringing charges against suspects who may have committed the money laundering offences[196]. Kenya is also not immune to such problems. This might as well occur in future cases due to the custom of

[193]Republic v Director of Public Prosecutions and another; Ex Parte Patrick Onyango Ogola [2016] eKLR, para 150.
[194] Combating Money Laundering and the Financing of Terrorism, http://documents1.worldbank.org/curated/en/557951468331029700/pdf/499600v40PUB0C101Official0Use0Only1.pdf on 8 September, 2020.
[195] R v Montila [2004] UKHL 50
[196]Murray K, 'In the shadow of the dark twin – proving criminality in money laundering cases,'2016.

borrowing from precedents. It is therefore important for law enforcers to look into predicate offences that could have resulted to the offence of money laundering, especially where the crime is financial, and underlying offences may give a hint on how it all began in the first place.

4.2. Manfred Walter Schmitt and another v Attorney General and 3 others [2014] eKLR: money laundering investigations and potential breaches of the rights to privacy

The petitioners, in this case, claimed that their fundamental rights to privacy and ownership of the property had been violated by the respondents. Manfred (first petitioner) was the director of Sparkyben Limited (the second petitioner), a company he had incorporated in Kenya. He had opened four accounts with Diamond Trust Bank, under his name and the company. Afterwards, he transferred Kshs 635,000,000, to them, through forty-five different transactions. According to him, the money was for investment and business activities. Diamond Trust Bank found this to be suspicious, therefore reported to the CBK.

The Banking Fraud and Investigations Department (BFID) was consequently instructed by the CBK to commence investigations. This was aimed at establishing the legality of the transactions. As a result, an application was made to court[197] to obtain warrants for the seizure and investigation of the petitioners' accounts. The warrants were issued accordingly and they proceeded with the investigations.

The applicants' filed a first application[198] opposing the investigation. The court revised the initial orders and declared that the CBK and BFID had no solid grounds to warrant the investigations. The BFID was also held to have acted unlawfully hence a violation of the petitioners' right to privacy. Nonetheless, the DPP still directed the BFID to undertake further investigations into the petitioners' accounts to establish the source of the money.

This led to a second application[199] opposing the DPPs' instruction. The petitioners felt that the respondents abused initial court orders, barring them from continuing with the investigations. The respondents had infringed the applicant's fundamental rights to privacy, jointly and severally in

[197]Miscellaneous Criminal Application No 2326 of 2012, Banking Fraud Investigations Unit v Manfred Schmitt, Sparkyben Limited and Diamond Trust Bank [2012] eKLR.
[198]Criminal Revision Application No 569 of 2012 Manfred Schmitt and Sparkyben Limited v Republic and Chief Magistrate court Nairobi [2012] eKLR.
[199]Manfred Walter Schmitt and another v Attorney General and 3 others [2014] eKLR.

violation of the constitution. This was still contrary to the Constitution of Kenya[200]. Additionally, they felt that the bank reported them maliciously to the CBK.

The judge held that the claim for malicious reporting failed as it was misplaced in the proceedings. This is because the bank acted by the Prudential Guidelines. He further also chose to ignore the applicability of the POCAMLA, since the application at the initial subordinate court was made under the Criminal Procedure Code[201]. According to him, the search conducted by the BFID infringed the petitioners' privacy rights and arbitrarily deprived them of their property.

He also stated the respondents acted unlawfully because the second court order had declared the warrants invalid. The bank together with the Attorney general was fined, and ordered to pay each of the petitioners five hundred thousand shillings as general damages.

The good judge erred by not considering the applicability of the POCAMLA in determining the case. This is the same for the law enforcers when they sought the first orders to investigate the applicants' accounts, which could have then resulted in the failure in terms of law enforcement. The banks reported the transactions as suspicious. The mere presence of such transactions allows investigations into them under the POCAMLA, by following the right procedures.

Money laundering by its very nature is a serious crime, hence the investigations ought to have been addressed using strong measures. For that reason, there may be circumstances where enforcement efforts may clash with individual privacy rights and concerns.

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It is also undeniable that the constitution guarantees every individual with the right to privacy[202], which also protects them from unwarranted and possession of their property, the non-disclosure of their affairs and non-infringement of their communications. However, the same rights are limited by section 17 of the POCAMLA which stipulates that its provisions shall take priority over any requirement as to secrecy on disclosure of information imposed by any other law. Therefore, where persons or individuals acting in accordance with this law, and in good faith, they will not be accountable for doing so. Therefore, this right is not absolute, especially when it comes to the investigation of money laundering offences.

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[200]Article 31(c), Constitution of Kenya (2010).
[201]Section 118 to 122, Criminal Procedure Code, 2009.
[202] Article 31, Constitution of Kenya (2010).

However, the Law enforcers erred in using illegal search warrants to conduct their investigations, this caused the evidence gathered to be inadmissible. In the case of *Ivanov v North West Gambling Board* [203], the judge stated that the correctness of the search and seizure applications depended on their legality. Consequently, if a court of law declared that it did not have any legal basis, it meant the warrants authorising the exercise were invalid. Therefore, any actions by law enforcement, even if done in good faith, becomes unlawful.

These facts highlight problems encountered in investigations of suspicious monetary transactions. They outline how enforcement can be difficult, especially where law enforces conducting unlawful searches and not relying on the POCAMLA in carrying out investigations. The consequence of their action resulted in the numerous petitions by the claimant opposing their actions.

The case also illustrates how banks encounter some difficulties in complying with the law. This relates to situations where deliberate efforts are made to comply with the law, but suits for infringement of various rights under the Constitution are brought against them. Yet reasonably, the only way the DPP and the BFID would have uncovered suspicious, would have been through access to the petitioners' financial records. The POCAMLA also states that cash transactions above US$ 10,000 ought to be declared and reported whether suspicious or not[204]. The amount of monetary transactions by the petitioners was Kshs 655,000,000 and therefore fell under that category. The bank followed the law by making the report. However, the back and forth applications to court opposing their investigative process, become an obstacle their efforts.

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4.3. Printwell Industries Limited v Barclays Bank of Kenya Limited [2013] eKLR: voluntary violations of the law by banks

The plaintiff, Printwell industries ltd, lost over two million shillings deposited in a fraudulent account by its unsuspected customers. This occurred after the defendants, Barclays bank ltd, allowed a sham company to open an account under their name.

From the facts, the evidence produced by the BFID revealed that there were two separate companies; one incorporated under the plaintiff's name (Printwell Industries Ltd), on 25 July 2006; and another using the same name, but incorporated on 4 June 2012. The latter being the sham

[203][2012] ZASCA 97.
[204]Section 44(6), Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).

company operating a bank account under the plaintiff's name. The dates show that the sham company was incorporated long after the plaintiff original company. This meant that, they would have had to confirm where correct payments had to be made, before clearing the cheques to be paid to the plaintiffs.

The defendants argued that they had abided by Prudential Guidelines while opening the disputed account. However, willful blindness was clearly exhibited by the bank officials who did not conduct proper verification of the sham company's documents. They also stated that the law did not mandate them to verify documents of incorporation.

The Judge found that the defendant had breached the law by failing to conduct proper due diligence, and allowed the issuance of temporary injunction to block the sham account, for investigations be conducted by the BFID.

From the facts, the bank failed in implementing customer due diligence as per section 45(1) of the POCAMLA, which mandates reporting institutions including bank to take reasonable measures to ascertain the true identity of any person or entity that seeks to enter into a business relationship with it. This is done by requiring their customers to produce to produce official records capable of establishing their true identity. Such include incorporation documents for companies.

The aim of this provision is to prevent fraudulent transactions that can promote money laundering offences. Furthermore, banks owe their customers a duty of care to prevent fraudulent transactions of any manner[205].This shields the customers from deceitful acts by agents or dishonest payment instructions[206].

A close examination of this application shows negligence on the part of the banks claim of not being required to verify incorporation the documents as obviously negligent and false. Additionally, the POCAMLA states that evidence of incorporation is a requirement when verifying the identity of a company[207]. Under the Prudential Guidelines 2013, clause 4 on AML obligations for institutions states; *'Institutions (...) are obligated verify customer identity; establish and*

[205] Karak Brothers Company Ltd v Burden (1972) All ER 1210
[206] Mbaluto J, ' Obligated: Examining the Duty of Care in Banking, https://www.oraro.co.ke/2018/06/27/obligated-examining-the-duty-of-care-in-banking/ on 17 September, 2020.
[207]Section 45(1)(b)(i), Proceeds of Crime and Anti Money Laundering Act (Act No 9 of 2009).

maintain customer record'[208]. Section 5[209] further indicates what is needed for proper customer identification and verification. These are dependent on the type of businesses their customers conduct. It also mandates banks to verify satisfactorily that it is dealing with a person who exist, whether transactions happen once or frequently[210].

Where banks deliberately turn a blind eye to requirements of carrying out proper customer due diligence, they fail in implementing the preventing the commission of money laundering and other financial crimes.

4.4. Republic v Ethics and Anti-Corruption Commission Ex parte Sanjay Shah [2016] eKLR

The case challenged the existence of a multi-agency taskforce formed to investigate corruption, money laundering and tax evasion by Charterhouse Bank. The task force comprised of representatives from CBK, KRA, the State Law Office, the Department of Governance and Ethics in the Office of the President and the defunct KACC. The said offences were discovered during a routine inspection by the CBK.

The applicant was the former managing director of the bank, who was suspected to have facilitated some of the offences. He wanted the court to compel the respondents to produce final report, in respect of Charterhouse Bank regarding investigated offences. The investigation had been done by KACC, a predecessor of the respondent. A provisional investigation report containing details of the findings was leaked erroneously. It implicated the petitioner and the Bank to the offenses investigated

Moreover, he questioned the authority of the inter-agency taskforce, especially the EACC formerly KACC in investigating tax related offences, that connected him money laundering. He argued that the mandate of the KACC was to enforce laws[211] pertaining to ethics and integrity, and not tax or banking laws. For that reason, they acted *ultra vires.*

The facts of the case shaded light on the challenges faced in multi-agency partnerships. The Police, KRA, CBK, EACC and the Criminal Investigations Department are institutional agents mandated to curb money laundering offences. Each one of them has been given a different role by its enabling

[208]Clause 4.2.5, Prudential Gidelines,2013.
[209]Clause5.6.2, Prudential Guidelines, 2013.
[210]Clause 5.6.3. (a) and (d), Prudential Guidelines, 2013.
[211]The Leadership and Integrity Act, and the Public Officers Ethics Act.

legislation on what duties they are to perform, but ironically the same statutes can duplicate their mandates. It is obvious that offence of tax evasion, could have been properly investigated by KRA as opposed to the EACC. However, section 45 (1) (d) of ACECA, allows the EACC to investigate offences tax related offences concerning unpaid fees or levies. The consequence of such provisions undeniably causes the duplicity of roles by law enforcement agents in their law enforcement efforts.

The Judge noted that there was a written agreement entered into by taskforce that allowing them to conduct joint investigations, nonetheless the mere absence of a proper clear legal framework that controls how such partnerships are to be controlled could have caused the clash between the EACC and the KRA.

The lack of cooperation between different agents involved can prevent a case from being brought to court or its completion in investigation. According to the Judge investigations for period of ten years was arbitrarily long, regardless of the cases' complexity. This caused problems such as the untimely leakage of the report before the completion of the investigation.

4.5. Republic v Heinz Andreas Schaller and Another [2016] eKLR

This case depicted the challenges of multi-agency cooperation over which law enforcement agency had the authority to confiscate criminal assets. The confiscation was to happen subject to a mutual assistance request by the Chief Public Prosecutor of the Republic of Germany.

The ARA made an application to court seeking orders of restraint, preservation and seizure of funds believed proceeds of crime and conduct money laundering investigations. The funds were held at Imperial Bank Limited and Barclays Bank of Kenya, under the names of the Respondents. A dispute arose between the National Police, the DPP and the ARA on where the seized funds should be kept. The ARA was of the opinion that they should be deposited in the Criminal Asset Recovery Fund (CARF), following sections 109 and 110 of the POCAMLA.

The state counsel, on behalf of the DPP and the Police argued that CARF was not a suitable mechanism to hold the funds. This was because the regulations governing the management of the

funds had not been implemented[212]. He was of the view that the DPP and the National Police Service be given the custody of the funds.

It was argued on behalf of the DPP that since the seized sums were subject to investigations, pursuant to mutual legal assistance requested by Germany, the said funds should have been held by the National Police Service. The National police service nonetheless did not have a fund for that purpose. This was clearly the jurisdiction of the ARA. The court ordered the said funds to be placed in an account managed by the National Police Service and the DPP pending the completion of investigations.

Inter-agency collaboration if used correctly helps in mitigating some of the challenges encountered in the enforcement of the law. For this to work, research highlights some of factors thought to be important to enable the success of such collaborations which includes; establishing clear roles, openness and trust[213]. Nevertheless, where there is tolerance of ambiguity, poor role definition, and uncooperativeness, such partnerships do not succeed [214].This is portrayed in this scenario where the law is clear that recovered assets ought to be kept in the CARF, which is meant to be administered by the ARA[215].

However, the obvious lack of cooperation frustrated the enforcement of the POCAMLA and prevented the functionality of CARF, which is the adequate mechanism to for proper storage of criminal proceeds while investigations are underway. Government agencies including the DPP, are required to cooperate with the ARA to ensure the functionality of CARF.

4.6. Family Bank Limited and 2 others v Director of Public Prosecutions and 2 others [2018] eKLR

The applicants in this case contested whether the DPP had the authority to bring money laundering against them. They therefore sough conservatory orders that would prevent the intended prosecution. This was after Directorate of Criminal Investigation established that the applicants

[212]Regulations as contemplated under the provisions of Section 113 of the POCAMLA, dealing with the administrative operations of the funds. They were to be created by the Minister of Finance.
[213] Kevin M and Larissa G,'Barriers to asset recovery, an analysis of the key barriers and recommendations for action,'2011, https://star.worldbank.org/sites/star/files/Barriers%20to%20Asset%20Recovery.pdf on 1 October,2020.
[214] Kevin M and Larissa G,'Barriers to asset recovery, an analysis of the key barriers and recommendations for action,' 2011, https://star.worldbank.org/sites/star/files/Barriers%20to%20Asset%20Recovery.pdf on 1 October,2020.
[215]Section 111 of the Proceeds of Crime and Anti-Money Laundering Act (Act No 9 of 2009).

had breached section 44 of the POCAMLA, which mandating them to monitor and report any suspicious transactions.

They considered prosecution as discriminatory and selective[216] because CBK had already punished the appellants, by fining them one million shillings in accordance with the Prudential Guidelines. they were of the opinion that it was unjust for them to be taken through criminal prosecution. Additionally, the were a financially stable as a bank, whose prosecution would cause panic withdrawal of money from it by their customers.

The appeal however denied by the Judge. He stated that there was no evidence showing selective prosecution of family bank, because 27 other banks were also being investigated for the same offences. The DPP was therefore not barred by law from instituting criminal charges against them as he awaited the outcome of the other 27 banks, including some officials in the CBK.

Despite the failure of Family bank to abide by the law, the DPP applied his discretion under article 157 of the constitution, and entered into a plea bargain agreement with the Bank. The agreement allowed the Bank to pay back Kshs 24.5 million to the NYS, and a balance of Kshs 40 million to the Court as a fine for the money-laundering charges against the bank[217]. He still retained the option of prosecuting the bank officials who facilitated the offence. On the other hand, the consequence of this approach as observed by Ryder, is that it does not produce a strong deterrent effect. He notes that where corporations such as banks are not prosecuted deterrence is seldom achieved. Nonetheless, if both the bank and individuals are simultaneously prosecuted and convicted , stronger deterrence is achieved [218].

The case demonstrated how banks can put themselves in the negative limelight by no doing a plausible job in the prevention money laundering. The Bank and its officials deliberately violated the provisions of the POCAMLA, through financial transmission of criminal proceeds. It seems that the hefty financial penalties payable, in case of breach as indicated in the POCAMLA, did not

[216]Contrary to Article 27 of the Constitution of Kenya, 2010, which protects individuals from any form of discrimination.
[217]Court allows Family Bank plea bargaining deal in NYS case, Business Today,22 January,2019, https://businesstoday.co.ke/court-allows-family-bank-plea-bargaining-deal-nys-case on 2 August 2019.
[218]Ryder N 'Too scared to prosecute and too scared to jail?' a critical and comparative analysis of the enforcement of financial crime legislation against in the United States and the United Kingdom,' 83 *The Journal of Criminal Law, 6, 245-263, 2018.*

deter family bank from facilitating money laundering transactions. The POCAMLA spells out the monetary sanctions banks are liable to pay but, the frequency and level of the application of these sanctions by the law enforcers also affect the compliance or non-compliance of the banks to the law.

Additionally, the fact that some officials of the CBK were also implicated in the crime, and were under investigations, brings out some of the challenges faced by the regulator in carrying out its supervisory role. This can be a contributory factor to weak enforcement of the POCAMLA.

It can be argued that where the DPP is often reluctant to prosecute the top executives involved in financial crimes including money laundering or even granted a full pardon, there is a shortcoming of law enforcement. Similarly, from the plea bargain agreement, the bank was shielded from any other criminal prosecution that resulted to the money laundering offences. As a result, the case has not laid down a strong precedence on the enforcement of the POCAMLA in the Kenyan banking sector.

4.7. Conclusion

The above case laws illustrate the struggles faced in the process of obtaining convictions against banks through investigations, prosecution and recovery illicit proceeds. It also evident that efforts are being made by the court to ensure implementation of AML in the banking sector. However numerous obstacles exist, both as a result of cases filed in the same courts challenging enforcement and use of discretionary powers in determination of the cases. Consequently, enforcement by the court is marginal, and hence are less convictions against banks.

Subsequently, there has not been strong deterrence against banking institutions as corporate bodies from facilitating the crime. This may result to the weakening of public confidence towards the financial sector, as noted by the Basle Committee on Banking Regulations and Supervisory Practices which stated that;

'*Public confidence in banks (...) can be undermined (...) as a result of inadvertent association by banks with criminals. In addition, banks may lay themselves open to direct losses from fraud, either*

through negligence in screening undesirable customers or where the integrity of their own officers has been undermined through association with criminals.'[219]

It would appear that for an effective enforcement of AML it would be better for banks to cooperate with the law enforcement agencies to ensure they to ensure such confidence is not destroyed. However, where there are also deficiencies in the process of ensuring the implementation of the enforcement measures against the offence, AML regime becomes fruitless.

[219]Mandy B, The global politics of illicit drug control, unpublished doctoral thesis, university of London, London 1994.

Chapter Five: Summary of Findings, Conclusion and Recommendations

5.0. Introduction

This chapter provides a summary of the findings of the study, and gives the conclusion and recommendations that can be adopted by the different institutions mandated to fight money laundering. From the conclusion, the study was able to confirm the hypotheses assumed in the introductory chapter.

5.1. Findings of the Study

This study aimed at critically analysing the enforcement procedures against money laundering in the Kenyan banking sector. Its findings are that Kenya appears to have the proper law enforcement procedures to curb the offence. These procedures range from: the prevention of the offence by banks against the infiltration of illicit money in their system; law enforcement agents' power to implement measures such as asset recovery, investigations into the offence, and prosecution of banks found to have violated the law.

The prevention role done by the banks entails filing of STRS, performing customer due diligence, and keeping customer records. Sanctions are supposed to cause deterrence to ensure banks actually have their internal controls in place, and prevent them from partnering with criminals who want to launder money through them.

These measures are complementary, but several problems nonetheless arise, making their success rate negligible. They stem from legal provisions and other external influences. These problems range from: deliberate violations of the law, rogue officials in the banking sector who may choose to facilitate illicit transactions, the duplicity of roles by different law enforcement agents hence causing conflicts or delays in enforcement, outdated technology used in investigation, and law suits opposing various actions of the law enforcement agencies. Consequently, it has bred several difficulties in ensuring the effectiveness of the AML regime in Kenya, such as fewer convictions of those culpable, especially in the banking industry.

From the study, it is clear that these deficiencies could be the reasons why banks may choose to engage in deliberate violations of the law, by making use of both the legal insufficiencies and the flaws in the enforcement measures. Consequently, it has made it easier for the gritty money launderers to find ways and means to bypass the law using the banks as conduits to launder money.

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The flaws in the enforcement measures have also had repercussions on the cases being brought to courts for determination. Subsequently, enforcement by the court has been marginal, and hence there are fewer convictions against banks. Therefore, there has not been a strong deterrence against banking institutions which has led to the lack of insufficient jurisprudence on the enforcement of the AML regime against banks in Kenya.

It is also notable that any defiance's on the part of banks cannot be accredited lack of legal instruments, but rather intentional violations of the laws by banks and loopholes in the same legal provisions such as lengthy court proceedings, amongst other difficulties that that make its actual enforcement challenging.

5.2. Conclusion

In light of the above findings, the Kenyan AML regime has adequately given the necessary measures to deter and curb the offence especially in the banking sector. It therefore appears that if banks actually observed the law, they would refrain from facilitating the transmission of illicit proceeds and cooperate with the law enforcement agencies. However, this has not been the case in Kenya. The deficiencies in the process of ensuring the implementation of the law and its enforcement have been minimal hence low compliance by banks.

This confirms the first hypothesis of the research, which assumed that Anti-Money Laundering Legislation has not deterred banks from facilitating the offence. It is illustrated in the cases where the banks deliberately breach the law, despite the hefty sanctions that would arise from such violations. Furthermore, the process of implementing additional measures such as asset recovery or conducting investigations becomes more difficult, for the law enforcement agents, where banks collaborate with criminals who want to launder money through them. Subsequently verifying the second hypothesis which was an assumption that in instances where banks collaborate with money launderers, enforcement of the Anti-Money Laundering Laws becomes difficult.

For the above reasons, this study makes the following recommendations that will help various institutions in fighting the crime.

5.3. Recommendations on the Enforcement of Money Laundering Laws in the Banking Sector

5.3.1. Prevention Measures Against Money Laundering by Banks

Banks should refrain from superficial compliance with the AML measures. There is evidence of superficial compliance where banks file reports on AML disclosure which are not true or fabricate reports to show compliance.

The Proceeds of Crime and Anti-Money Laundering regulations mandate banks to implement risk-based measures to curb money laundering. Section 6 indicates that reporting institutions ought to carry out risk analysis, in order to alleviate the risks connected to laundering. In line with these requirements, proper systems ought to be established. If well implemented, it will improve and enhance the accountability of banking institutions in preventing money laundering.

Such measures can ensure that thorough investigation of suspicious transactions is done. Indeed, proper systems will enable them to establish the correct grounds of suspicion. If a proper investigation is conducted, it then becomes easy for the FRC and the CBK to establish strong grounds for investigation and make recommendations to the DPP for prosecution.

Qualifications of Money Laundering Reporting Officers appointed in banking institutions should be indicated in the law or regulations curbing the offence. Such officers are crucial in ensuring the preventive measures against the offence function accordingly, but if the law is silent on their qualifications, banks create their standards, hence insufficiently skilled persons may be recruited into such positions. The law should therefore clearly set down the qualifications and experience needed for persons recruited in these positions.

5.3. Measures to be Adopted by Law Enforcement Agencies

5.3.1. Use of Alternative Sanctions to Complement Financial Sanctions

It has been suggested that non-financial sanctions can be successful in covering the deficiencies of financial sanctions. Such measures include naming and shaming corporate institutions found in violation of the law[220]. This will be an addition to the sanctions provided in the POCAMLA. The process of shaming causes adverse publicity and can deter corporations and their officials from engaging in criminal activities. It can amount to a more powerful and effective sanctioning regime, in deterring money laundering offences by banks.

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[220]Freiberg A , Department of Criminology, University of Melbourne, Vic Sentencing white collar criminals ,2000,https://pdfs.semanticscholar.org/0922/ff27754d70d0ff997be5fe47ceb599f81313.pdf on 4 August 2019.

Publication of the reported violations can be done on the CBKs' website. They would be highlighted in a manner that causes other institutions which envisage any misconduct is deterred. Such publicity can instill fear and prevent potential wrongdoing. Banks as business entities thrive on good reputational publicity to attract potential customers. They would be more diligent in preventing reputational damage as opposed to hefty fines, which if paid can be recovered via different business strategies. Similarly, officials who engage in the offences should be named and shamed to deter others from doing the same.

Punitive injunctions[221] can also be used where corporations are required to correct their internal control measures if they have failed. It can go as far as requiring them to implement proper procedures aimed at correcting their failures in preventing the crime. This can be done hand in hand with corporate probation orders to ensure that the injunctive orders are followed[222]. Under this mechanism, routine inspections will be conducted upon conviction, to monitor the activities. This can help in correcting defaults such as negligence and poor record-keeping, hence ensure the proper rehabilitation of companies for effective compliance with the law.

5.3.2. Use of Statistical Data by the FRC

An important factor in the prevention of crime is the ability to collect statistical data. The use of statistics allows a country to assess risks, anticipate criminal behavior, identify trends, and allocate resources to more vulnerable sectors. The FRC is an important intermediary for other law enforcement organs, as it gathers crucial data that can be used as evidence by them. Such data could be used in predictive policing[223]. The process entails taking data from different sources such as banks and carrying out an analysis, which is then used to prevent and respond more effectively to future crime[224]. This is through the results obtained in the analysis of the STRs.

Predictive policing will allow law enforcers to focus on what might happen, therefore effectively deploy resources before the occurrence of crime. This can only be done by the creation of a

[221]Baldwin R, Enforcing regulation, *Understanding Regulation,* Oxford University Press, 2012, 251-252.
[222]Baldwin R, Enforcing regulation, *Understanding Regulation,* Oxford University Press, 2012, 251-252.
[223]Pearsall B, 'Predictive policing: the future of law enforcement?' *National Institute of Justice Journal,* 266,2010.
[224]Pearsall B, 'Predictive policing: the future of law enforcement?'266.

database that shows new, or previously unknown patterns and trends of the crime[225]. The STRs gathered by the FRC, contain a lot of information that can be used in predictive policing.

Furthermore, STRs framework appears to be fragmented because the information is processed first by banks, then reported to the FRC for analytical purposes, then later referred for investigation upon suspicion of an offence to other agencies, causes delays in enforcement.

Such delays can also be prevented if the FRC becomes part of the law enforcement by being given additional prosecution powers. The consequence of this approach is that it will work under the ODPP. If its officers would share in the ODPP's prosecutorial powers, its officers can be given prosecutorial powers, and the supervisory role concerning AML be left to the CBK.

The World Bank indicates that Financial Intelligence Centers with have prosecutorial powers, can easily avail information to the police or the prosecutors. This then increases their capability to reduce any delays encountered in enforcement. This is likely to facilitate the timely implementation of the law when it is needed because data is easily pooled with criminal intelligence from the prosecutor's office[226].

Additionally, the FRC should also come up with measures that can mitigate defensive reporting by banks. If their database contains excessive reports that cannot be used to develop intelligence, its results in the poor investigation of the crime, and the failure of the prosecution [227].

5.3.3. Asset Recovery and Confiscation

The ARA should ensure proper coordination of criminal and civil confiscation mechanisms. Where civil recovery powers are exercised, but criminal prosecution is still possible, both techniques should be employed. It can be done by running parallel files, where one is aimed to obtain a criminal conviction for a predicate offence and another civil conviction to confiscate illicit proceeds[228].

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[225]Pearsall B, 'Predictive policing: the future of law enforcement?'266.
[226]The World Bank Group, role of the financial intelligence unit, http://pubdocs.worldbank.org/en/834721427730119379/AML-Module-2.pdf on 25 September 2019.
[227]Yeoh P, 'Enhancing effectiveness of anti-money laundering laws through whistleblowing,' 17 *Journal Money Laundering Control* 3, 327-342.
[228]Gaturi W, Anti-Money laundering legislation in Kenya: Inadequacies, unpublished LLM thesis, University of Nairobi, 2014.

The legislature should also aim to consolidate of the existing roles of EACC and ARA into one. It will then cause the ARA to specifically deal with the recovery of criminal proceeds since corruption offences form part of predicate offences of money laundering. The existing framework creates conflicting jurisdictions since the ARA and EACC can perform asset recovery. This will eradicate the possibility of confusion regarding their roles, and competencies in asset recovery of criminal proceeds. It will also avoid the duplication of roles in the work of asset recovery.

Any corrupt offences that resulted in money laundering should be investigated and prosecuted by the ODPP. It will reduce any potential conflicts that can arise where discretionary powers had already been exercised by the EACC or the Attorney General, not to pursue the case.

5.3.4 Investigation and Prosecution of Money Laundering Offences by Banks

The ODPP should adopt modern technologies in reporting, investigating, and prosecuting money laundering and its predicate offences. Such technology may include forensic analysis of data and wiretapping in investigations. This will help in making the prosecution of money laundering effective since launders also use advanced technology. Where prosecution of cases is successful, useful jurisprudence and precedents may emanate from them. Such will contribute immensely to any future amendments of the POCAMLA.

In circumstances where plea negotiations are entered into between the banks and the DPP, he should ensure that the banking officials involved in the offences, are prosecuted and convicted if found guilty. This will make banks serious in preventing the occurrence of the offence, or even facilitating it. Moreover, there are lower chances of the occurrence of a systemic risk, if senior officials or employees working in banking institutions, suspected of committing the offence are prosecuted.

Premature confiscation or freezing of assets should be avoided by the ARA. This can be done by refraining from reactive probes and conducting sufficient investigations of cases. Consequently, it can assist in the prevention of numerous petitions filed in court opposing the actions of law enforcers

It is also important that due process is observed while investigations are done. Law enforcers should respect the constitutional rights of individuals and institutions while enforcing the law. If

law enforcers use their powers correctly by keeping in mind the constitutional rights of individuals, it can reduce some of the obstacles faced in the enforcement of the law.

The DPP should not shy away from prosecuting corporations specifically, banks found to have violated AML laws. Corporations dislike the repercussions that may transpire as a result of such proceedings which have a reputational impact. Where he fails to proceed with such cases, there are possibilities of weakening the deterrent effects of the law, especially if violations are done deliberately by corporations.

5.4.4. Establishment of a Proper Framework on Multi Agency Partnerships

There is a need to have a clearly defined framework for multi-agency partnerships in fighting money laundering. This will address the challenges of the multiplicity of roles. Additionally, it may resolve different conflicts that may arise in the performance of their different roles. Moreover, if the framework is anchored in the law, it will supersede simply written agreements on partnerships, which may easily be breached.

Where there is clarity on the specific functions and roles of the agencies involved in curbing the offence, it eradicates the problems of agencies taking up functions that they should not, in what is already clearly defined by the law. This can result in continued levels of improvement and cooperation between all the agencies involved in the enforcement process.

Such frameworks can improve trust and coordination among agencies, and reduce duplication of roles and can help build trust and lead to more effective action against money laundering.

5.4. Measures to be Adopted by the Government

The government should provide incentives to banks to encourage them to comply with AML measures. Such incentives can be financial or non-financial. Where financial incentives are chosen, tax rebates can be used by providing taxation reliefs if a bank implemented the necessary tools and internal controls against money laundering. This can help in providing financial reliefs for high costs incurred in implementing AML measures and possibly encourage other banks to comply with the law.

Additionally, it should also provide law enforcement agencies with adequate resources, that will ease their operations in enforcing the measures against money laundering, especially in the

investigation of the offence. Such include modern technology to carry out forensic analysis while conducting investigations, and training financial experts who can assist in the same. This can improve the kind of evidence presented by the prosecution and increase the chances of their success in court.

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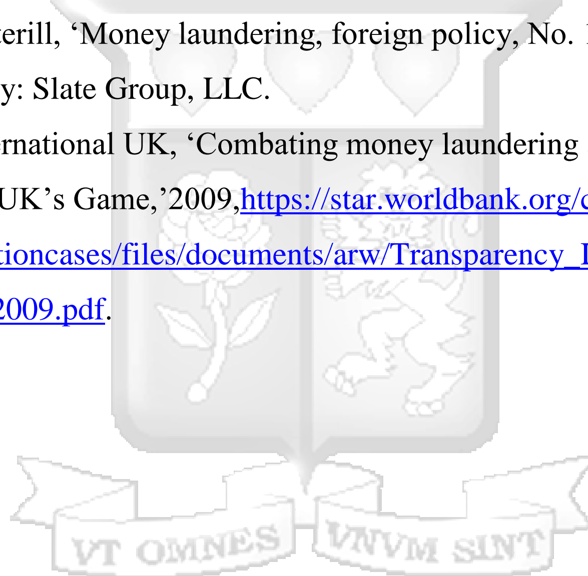

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