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**BATTLE AGAINST CORRUPTION: SIGNIFICANCE OF EFFECTIVE  
WHISTLEBLOWERS' PROTECTION LAW IN KENYA**

**LLB DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE  
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## ABSTRACT

Whistleblowing is one of the various key detection mechanisms used to uncover corruption in both public and private sectors. Whistle-blowers are those who give up information to the relevant authorities. However, they are often in danger of various threats to their life and safety by powerful individuals whom they intend to report. It is against this backdrop that this study highlights the importance of their protection through the enactment of laws in the fight against corruption.

A disappointing finding is made of the inadequacy of laws in existence in Kenya for the protection of whistle-blowers given the clear correlation between lower levels of corruption and the existence of such laws. And whilst the study finds that legislation is important, it also admits that implementation will be a challenge if the rule of law is not respected. Further, the substance of proposed laws should also be given due consideration and it is to this end that the paper highlights some key aspects (both substantive and procedural) that ought to be included in the drafting of such laws in Kenya.

## 1. INTRODUCTION

### 1.1 Background

*“It took some time for him to agree but in the end he felt it was his duty to the Kenyan people to speak out. Though he lives in exile now, Githongo badly wants to go home. Making it safe for him to do that will be a true test of Kenya's democracy.” BBC<sup>1</sup>*

Corruption leads to the stunted development and impoverishment of many countries.<sup>2</sup> From being widespread it became systemic, and corruption in has now reached cancerous proportions, with a demonstrable negative impact on the development process in many regions around the world. It undermines good government, fundamentally distorts public policy, leads to misallocation of resources, harms private sector development and economic growth, and significantly hurts the poor.<sup>3</sup>

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<sup>1</sup> ‘Fergal Keane: A fearless Kenyan whistle-blower’, BBC 9 February 2006 <http://news.bbc.co.uk/go/em/fr/-/2/hi/africa/4697612.stm>, on 28 January 2015.

<sup>2</sup> Stephanie H, *Corruption in Sub-Saharan Africa*, 2009.

<sup>3</sup> Kempe R H, Bornwell C, *Corruption and Development in Africa: Lessons from Country Case Studies*.

In Kenya, the impact of corruption is often manifested through political intolerance, problems of accountability and transparency to the public, low level of democratic culture, principles of consultation and participation dialogue among others.

One of the biggest challenges in preventing and fighting corruption lies in detecting and exposing bribery, fraud, theft of public funds and other acts of wrongdoing. Whistleblowing is one of the most effective ways of detecting wrongdoing and facilitating measures to minimise or to prevent further losses<sup>4</sup>

Transparency International<sup>5</sup> defines whistleblowing as, “the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations– which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action. The United Nations Convention against Corruption (UNCAC)<sup>6</sup> refers to a whistle-blower as “any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.”<sup>7</sup>

Whistle-blowers often take on high personal risk. They may be fired, sued, blacklisted, arrested, threatened or, in extreme cases, assaulted or killed. Protecting whistle-blowers from such retaliation will promote and ease the efficient exposing of corruption while also enhancing openness and accountability in government and corporate workplaces<sup>8</sup>

The revised Protocol on Preventing and Combating Corruption by the East Africa Commission, recommended as one of its preventive measures to combat corruption: “...that Partner States adopt measures and strategies to strengthen mechanisms for protecting whistle-blowers, witnesses, experts and victims who, in good faith, disclose acts of corruption”<sup>9</sup>

Whistle-blower protection is essential to encourage the reporting of misconduct, fraud and corruption. The risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected. This applies to both public and private sector environments, especially in cases of bribery. Protecting public sector whistle-blowers facilitates the reporting of bribery, as well as the misuse of public funds, waste, fraud and other forms of corruption. Protecting private sector whistle-blowers facilitates the reporting of corrupt acts committed by private individuals and companies.

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<sup>4</sup> Transparency International, *Stop harassment of whistleblowers: Clamp down on the corrupt*, January 2015.

<sup>5</sup> Transparency International is the global civil society organisation leading the fight against corruption.

<sup>6</sup> The United Nations Convention against Corruption (UNCAC) is a multilateral convention negotiated by members of the United Nations. It is the first global legally binding international anti-corruption instrument.

<sup>7</sup> Article 33, *United Nations Convention against Corruption*, 31 October 2003, Resolution 58/4.

<sup>8</sup> Transparency International, *International Principles for Whistleblower Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest*.

<sup>9</sup> Article 5, *EAC Protocol on Preventing and Combating Corruption*.

Encouraging and facilitating whistleblowing, in particular by providing effective legal protection and clear guidance on reporting procedures, can also help authorities monitor compliance and detect violations of anti-corruption laws.<sup>10</sup>

Providing effective protection for whistle-blowers supports an open organisational culture where employees are not only aware of how to report but also have confidence in the reporting procedures. It also helps businesses prevent and detect bribery in commercial transactions. The protection of both public and private sector whistle-blowers from retaliation for reporting in good faith suspected acts of corruption and other wrongdoing is therefore integral to efforts to combat corruption, promote public sector integrity and accountability, and support a clean business environment.<sup>11</sup>

Kenya has enacted the Witness Protection Act that only implicitly encompasses the protection of whistle-blowers. The Witness Protection Act at sec 3 provides:

*“...a witness is a person who needs protection from a threat or risk which exists on account of his being a crucial witness, who*

*(a) has given or agreed to give, evidence on behalf of the State...*

*(b) has given or agreed to give evidence, ... in relation to the commission or possible commission of an offence against a law of Kenya...*

*(c) is required to give evidence in a prosecution or inquiry held before a court, commission or tribunal outside Kenya...”*

According to the definition of whistle-blowers provided by UNCAC, this paper holds the view that a ‘witness’ under the witness protection Act may be inferred to include a whistle-blower.

The Kenya Revenue Authority also put in place a policy for whistle-blowers. This policy only relates to the staff of the Kenya Revenue Authority and it is not an Act of Parliament.

There are considerations to put in place a comprehensive legislation in Kenya specifically concerning whistle-blower protection.

This research holds the view that, though legislation is a step forward in the fight against corruption, a lot of research needs to be done in order that the legislation put in place is effective and not useless or detrimental to the current state of affairs. Uganda for example, has enacted the Whistle-blowers Protection Act, 2010, yet the corruption level in the country is very high.<sup>12</sup> The same can be said about South Africa which has enacted the Public

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<sup>10</sup> G20 Anti-Corruption Action Plan Action Point 7: *Protection of Whistleblowers*.

<sup>11</sup> G20 Anti-Corruption Action Plan Action Point 7: *Protection of Whistleblowers*.

<sup>12</sup> <https://www.transparency.org/cpi2014/results> on 15 February 2015.

Disclosures Act. On the other hand New Zealand, which also has relatively comprehensive laws on whistle-blower protection, is the second-least corrupt country in the world!<sup>13</sup>

### **1.2 Problem Statement**

One of the major challenges that are faced while trying to combat corruption is the authorities' inability to detect it. One of the ways of detecting corruption is the admission of testimonies given by whistle-blowers who report corruption as insiders or witnesses to the same.

There however needs to be adequate legislation that addresses: the threshold that needs to be met before such whistle-blower testimonies are admitted into evidence; protection of such whistle-blowers from the threats they and their families face as a result of "blowing the whistle"; lawful incentives for those willing to give up useful information; rewards for those who have given useful information and punishment to those who knowingly give up false or malicious information.

Further, for this legislation to be effective, it must be relevant to Kenya by taking into account the unique circumstances surrounding the corruption situation in Kenya. One of the temptations that may lead to ineffective whistle-blower protection laws would be their universal approach to combating corruption. This gives a rationale to the current (and highly problematic) transfer of laws from one country to another. Through a universal approach, corruption is seen as a worldwide phenomenon, thus making anti-corruption responses (which includes whistle-blower protection) universally applicable and replicable. This approach disregards the different circumstances that may surround a country's state of corruption. Without clear guidelines suited to the circumstances of the country and its citizens, attempts to minimise levels of corruption through the protection of those who "blow the whistle" through enactment of legislation, are void.

### **1.3 Research Questions**

1. How does whistleblowing aid in the fight against corruption?
2. What laws exist to protect whistle-blowers in Kenya?
3. What are the key principles that need to be upheld in order to evaluate how effective a whistle-blower protection law is?
4. What additional principles and provisions need to be considered in order to take into account the unique circumstances of corruption in Kenya?
5. What are the loopholes in the current law and what are the challenges in implementation?
6. What recommendations can be made to improve the existing laws or in enacting new ones?

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<sup>13</sup> <https://www.transparency.org/cpi2014/results> on 15 February 2015.

#### **1.4 Research Objectives**

1. To illustrate how whistleblowing aids in the fight against corruption.
2. To examine what laws (if any) exist to protect whistle-blowers in Kenya.
3. To define the parameters of a good whistle-blower protection law.
4. To demonstrate other considerations, unique to Kenya that need to be made before drafting the law.
5. To reveal the loopholes and challenges in the implementation of the current law.
6. To make useful recommendations for future whistle-blower protection laws in Kenya.

#### **1.5 Justification/Importance of the Study**

As mentioned in earlier sections, it is necessary to enact legislation on the management of whistle blowers and the information they give. This will legitimise any efforts to use that information before courts and tribunals and will formalise any endeavours to protect whistle-blowers, giving them the courage to come forward.

This study not only highlights the importance of such legislation and its direct correlation with lower levels of corruption but also illustrates the principles that should be considered while enacting such legislation in Kenya to make it most effective in Kenya.

#### **1.6 Scope and Limitations**

The scope of this research is limited to the significance of whistle blower protection legislation on combating corruption in Kenya. It does not explore what the legislation should contain but highlights the principles that are relevant to the Kenyan situation that should be considered in the drafting of such a law.

Further, this research is limited to external whistleblowing mechanisms and, as such, does not focus much on internal mechanisms of whistleblowing, for example, within private companies.

In addition, this paper provides a scrutiny of legal frameworks but does not undertake a concise examination of institutional frameworks.

Though this research shows a direct linkage between the levels of corruption and the effectiveness of disclosure mechanisms, it does not take into consideration many other factors that may also affect the levels of corruption.

### 1.7 Theoretical Framework

Various philosophies will explain this paper's position on whistleblowing and its scrutiny of the law.

This paper is of the view that whistleblowing is morally and legally justified; the whistleblower's motives and intentions notwithstanding. For this reason, this part explores the various philosophies that are in support of this position.

Utilitarianism: This theory was posited by Jeremy Bentham. From a utilitarian point of view, the action that produces the greatest amount of happiness and the least amount of harm would be the right action to take. Hence, a utilitarian faced with the dilemma on whether or not to blow the whistle on corrupt practices would have to weigh the outcomes of keeping silent versus those of blowing the whistle.

The availability of alternatives and whether the benefits of whistleblowing outweigh the cost determine the choice of whether or not to blow the whistle. According to Bentham (1996), acts that create the most amount of happiness for the majority should be treated as morally obligatory acts. Moreover, the utilitarian approach encourages one to treat others' wellbeing as a heavily weighted factor when making an ethical decision. Hence, whistleblowing should be considered as a duty when it is known that the consequences of non-disclosure will result in extremely negative impacts on the public.<sup>14</sup>

Keeping silent would likely result in the continuing fraudulent behaviour and if the fraud is discovered by any other means, this could cause a damaging effect for the 'whistle-blower' especially since whistle-blowers normally have so much insider information that they can be easily accused of being accomplices once the information has been discovered. On the other hand keeping silent would ensure his trust with fellow employee remains intact and a further advantage of keeping silent would be that the whistle-blower would not have to face the threat of reprisal by those undertaking corrupt activities.

Blowing the whistle would see an end to corrupt activities and also praise and possible reward for the whistle-blower. The harm would be the distrust he may face by fellow employees and the possible threat of reprisal by those against whom he has blown the whistle.

For a proper utilitarian, John Stuart Mill emphasises that the amount, intensity and duration of the happiness and harm have to be taken into consideration. Hence each circumstance might tip the scales either for or against the act of whistleblowing and this is where the law comes in.

A law that would ensure heftier rewards for the whistle-blower, protection for the whistle-blower against reprisal and possible punishment for those withholding crucial information would encourage whistleblowing from a utilitarian perspective by ensuring whistleblowing produces greater happiness and withholding information produces greater pain or harm.

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<sup>14</sup><http://www.ukessays.com/essays/philosophy/whistleblowing-occurs-when-an-employee-discloses-information-philosophy-essay.php#ixzz3tVH0W5Ak> on 3 November 2015.

The categorical moral theory that was posited by Immanuel Kant will also justify this paper's position on whistleblowing. According to Kant, there is a single moral obligation, which he called the "Categorical Imperative", and it is derived from the concept of duty. Kant defines the demands of the moral law as "categorical imperatives". Categorical imperatives are principles that are intrinsically valid; they are good in and of themselves; they must be obeyed by everyone in all situations and circumstances, if our behaviour is to observe the moral law.<sup>15</sup>

From the Kantian perspective, employees should have a duty to blow the whistle on unethical or illegal acts because it is the right thing to do. They are morally responsible for informing the public and/or stakeholders about the wrongdoings because the motive of moral action is more important than the potential consequences of not whistleblowing. Such courage to go against all odds and the possibility of punishment or reprisal is necessary if those who are privy to immoral business practices are to make a positive contribution to the society.<sup>16</sup> Kant did not explicitly state that whistleblowing should be a duty in all circumstances. However, what is clear from him is that he expects truth telling and the "good will" of the moral agent. Hence, based on these principles, one can will that an employee should blow the whistle if he/she has information of others' or the organization's intentional wrongdoings.<sup>17</sup>

The theoretical framework underlying the manner in which laws will be examined in this research will be the Classical Natural Law theory as expounded by St. Thomas Aquinas.

The theme that generally runs through this theory is one that postulates that: An unjust law is not law. The meaning of this statement may seem easy to understand but the concept of what is 'just' and what is 'unjust' may be a bit more complex to grasp. The natural law theory, however, sets out some guiding principles on acts that are considered just. These guiding principles are then meant to inform the formulation of laws in order for the laws to be valid. Laws that are not based on these principles are considered unjust and, therefore, do not merit being accorded the status of law. St. Thomas Aquinas aptly describes law as:

*"...a certain ordinance of reason for the common good, made by him who has the care of the community with the power to coerce others to obey it, and promulgated."*<sup>18</sup>

According to Aquinas, the fact that law should have the ordinance of reason means that law should have a goal or an end in mind (Greek: telos). A second fundamental concept is the concept of common good that stipulates the importance of law being formulated for the good of all citizens. Aquinas also explains that a law may be devoid of the nature of law even if it was tailored for the common good but is disproportionately imposed on the people. Thirdly, the coercive power the law should have in order that its implementation is effective. Lastly is the fact that a law should be promulgated that is, it should be made known to those it binds.

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<sup>15</sup> Immanuel Kant, *Foundations*, 421.

<sup>16</sup> Masaka D, 'Whistleblowing in the Context of Zimbabwe's Economic Crisis', *Electronic Journal of Business Ethics and Organization Studies* 12, (2007) .

<sup>17</sup> Padgett B, *Educating the Whistle-blower*, 2009.

<sup>18</sup> St. Thomas Aquinas, *Classical Natural Law Theory: Law (in general)*, 1227-74.

The meaning of law set out by Aquinas on Natural Law theory, is the meaning this research will attach to what constitutes an effective legal framework for the protection of whistle-blowers. Hence, in order to scrutinise the effectiveness of the Witness Protection Act, for example, this paper will go beyond simply investigating whether or not witnesses have been protected but will also dissect the validity of the law through the lens Aquinas' provides that is: What is its end? Does it serve the common good? What is its coercive power? And how well was it promulgated (made known) to the people?

Aquinas' postulation that any law that does not fit into the above description does not merit the accordance of legal status, will also be the position this research takes regarding laws that are not suitable to the 'common good' of a country. In this study, these are the laws that seek to undermine the act of whistleblowing such as the Official Secrets' Act. The spirit of such laws that allow the government to keep certain information from the public is normally well-intentioned for the security of the citizens but many times the power of such laws is invoked in order to justify the government's discreet behaviour for actions which a democratic society would not approve if they were made aware of such actions. Aquinas' theory is alive to such circumstances where a just law is used for unjust purposes: he explains that a law may be devoid of the nature of law even if it was tailored for the common good but is disproportionately imposed on the people. Such will be the stance taken by this paper to nullify the power of laws that are misused to serve unjust purposes.

Also underlying this research will be the right to freedom of expression and information by whistle-blowers who speak out in order to expose public or private sector improprieties. The sanctioning of whistleblowing by governmental agencies would curtail these freedoms.<sup>19</sup>

The right of the public to know is fundamental in any society that is governed by the rule of law. As Governments hold information in trust for the public, it follows that the public has the right of access to the information that the State holds.<sup>20</sup> David O'Brien writes that the public has the legal right to investigate and examine the conduct of affairs.<sup>21</sup>

An equal but opposite entitlement would be the protection of the public interest. The government may, in the public interest limit the right of information or expression. For example, if the government feels that any information once published, may be a threat to national security it may curtail the right to freedom of expression by the person in possession of that information and; consequently it also curtails the freedom of this information to the public. The problem lies in the fact that; since the government has discretion in deciding what type of information is classified then once it decides to classify any piece of information, that decision is final.

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<sup>19</sup> Inger H, *Freedom of Expression, Whistleblowing and the Canadian Charters*, 2015.

<sup>20</sup> African Network of Constitutional Lawyers, *Towards Promoting Access to Information in Kenya* April 2011.

<sup>21</sup> David O'Brien, *The Public's Right to Know: The Supreme Court and the First Amendment*.

This research will be buttressed by the right to freedom of expression and information as enshrined in The Constitution of Kenya.<sup>22</sup>

## **2. LEGAL FRAMEWORK FOR THE PROTECTION OF WHISTLEBLOWERS.**

### **2.1 How does whistle-blower Protection Law aid in the fight against corruption?**

Whistleblowing is considered one of the most effective ways of preventing, detecting and remedying corruption as has been demonstrated by a lot of the research that has been done on the importance of whistleblowing.

In a recent state-of-the-nation address to the country on corruption, President Uhuru Kenyatta urged the Attorney-General to speed up efforts to enact Whistle-blower Protection legislation.<sup>23</sup>

Such legislation facilitates the disclosure of wrongdoing which is crucial to the detection of corrupt practices. Mr. Peter Bennett, national President of Whistle-blowers Australia, said that public interest disclosure laws are about exposing official misconduct and facilitating the release of information in the public interest.<sup>24</sup> According to a report on best practice for whistle-blower protection legislation by Transparency International, the overarching goal of whistle-blower legislation is to provide citizens with a safe alternative to silence and to empower them to report wrongdoing by providing adequate legal protection. Effective whistle-blower protection legislation will also specify the channels through which one may blow the whistle if they suspect corrupt activity. Without such legislation, such disclosure mechanisms are haphazard making the information harder to verify. Such facilitation is especially important in the Kenyan context where bureaucracy is predominant in most government offices. Further, this objective is in keeping with the United Nations Convention against Corruption, to which Kenya is a party. UNCAC obliges State Parties to simplify administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities.<sup>25</sup>

A potential whistle-blower will be discouraged from giving up information if undertaking to do so would be unreasonably tedious. Hence, in a nutshell, whistle-blower protection legislation makes it as easy as possible for potential whistle-blowers to blow the whistle increasing the chances that they will make that choice.

Another objective of enacting such legislation is the protection of whistle-blowers against potential retaliation. One of the major potential deterrents for reporting corruption or other wrongdoings is the fear of reprisals. The 2007 US National Business Ethics Survey

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<sup>22</sup> Article 33-35, *Constitution of Kenya* (2010).

<sup>23</sup> <https://www.youtube.com/watch?v=AkXggtSSNIM> on 1 December 2015.

<sup>24</sup> Bennett P, *Transcript of Evidence*, 27 October 2008, 32.

<sup>25</sup> Article 10, *United Nations Convention against Corruption (UNCAC)*, 27 Jan 1999.

conducted by the Ethics Resource Centre found that 36 % of the employees interviewed that did not report corruption did so because they feared retaliation.<sup>26</sup>

If potential whistle-blowers can trust that the law would protect them, this fear of retaliation will no longer be a reason to keep silent thereby encouraging them to blow the whistle while also instilling fear in those who plan to retaliate. It must be noted that the law can only achieve this end if the rule of law is respected and hence complied with. Without respect for the rule of law, the authority and meaning of any law are lost. As mentioned earlier in the theoretical framework (Chapter Two), the findings in this paper rely heavily on the coercive nature of law for their validity.<sup>27</sup>

Effective whistle-blower protection laws are also important as they ensure that public interest disclosures are properly assessed, investigated and acted upon. Legislation is important as it specifies to which authority whistle-blowers can give up information and the mandate of those authorities. Further such legislation would specify the procedure for collection of information, investigation and prosecution. Without such legislation or clearly spelt out guidelines accountability may be difficult as authorities will have overlapping mandates and will be unaccountable for those tasks which have not been explicitly laid down.

Symbolically, enacting such legislation in Kenya would also promote a culture of transparency, integrity and accountability. Transparency, integrity and accountability are some of the values that are enshrined in Chapter 6 of the Kenyan constitution<sup>28</sup>. Normally laws are passed when the society is notoriously committing certain acts that are implicitly assumed to be wrong. These acts are then explicitly condemned by legislation in order to 'remind' the society of values that would otherwise be deemed to be obvious. Such is the case in Kenya and the inclusion of Chapter 6 in our constitution. Whistle-blower legislation would hence complement Chapter 6 by encouraging disclosure of untoward activities by persons in authority.

Effective legislation also sanctions those who disclose untrue information in bad faith hence preventing abuse and misuse of available protections for personal advantage or vendettas. Unfortunately, not all whistle-blowers are brave heroes willing to give up information only for the sake of public interest. This paper advocates for provisions in legislation that incentivise whistle-blowers to report wrongdoing – some of these incentives include rewards to whistle-blowers in cases of successful conviction and pardons and plea bargains for whistle-blowers who may be involved in the corrupt activities. Such incentives make it

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<sup>26</sup> <https://www.ethics.org/research/nbesorder-form.asp> on 2 November 2015.

<sup>27</sup> St. Thomas Aquinas: “[the law should be] made by someone who has the care of the community and the power to coerce others to obey. Coercive power, such as the law should have, in order to prove an efficacious inducement to virtue” Classical Natural Law Theory, *The Angelic Doctor*, 1227-74.

<sup>28</sup> Under chapter six of the constitution, article 73 advocates for a leadership that upholds personal integrity, objectivity and impartiality; a leadership that is selfless, promotes public integrity and supports the spirit of the Law. Further to this, Article 75 clearly affirms that whether in public places, official places, in private or in association with other persons, a state officer shall behave in a manner that avoids demeaning the office he or she holds. Article 79 stipulates that Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.

tempting for persons who may not even have a valid complaint to take advantage of the reward opportunity for their own personal interests. Hence, the reason why whistle-blowers can also be easily associated with informers who are usually involved in unethical behaviours and receive favours or remuneration for disclosure, using disclosure as a way to reduce liability either voluntarily or through coercion.<sup>29</sup> To this end, the African Union Convention on Preventing and Combating Corruption Article 5(7) provides that: “[State Parties should] adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences.”

It is important to note that legal frameworks cannot operate without proper institutional frameworks (constituting ethical and principled individuals) which are required to implement the letter and spirit of the law. As mentioned earlier, however, this paper does not offer a critic of the institutional frameworks as much as it does the law.

## 2.2 What laws exist to protect whistle-blowers in Kenya?

Unfortunately, there is no comprehensive law in Kenya that exists to protect whistle-blowers. There are however sectional provisions in various laws that allude to whistle-blower protection.

There is strong international pressure to adopt whistleblowing laws, and recommendations have been introduced in many international instruments, encouraging state parties to adopt measures to protect disclosures of wrongdoings. Most of these recommendations relate to anti-corruption instruments, such as the Council of Europe Anti-Corruption Conventions, the Inter-American Convention against Corruption, the African Union Convention on Corruption, the Anti-Corruption Initiative for Asia-Pacific, the OECD Guidelines, the Southern African Development Community (SADC) Protocol, the United Nation Convention against Corruption (UNCAC), among others.

For example, Article 33 of the United Nations Convention against Corruption (UNCAC), to which Kenya is privy<sup>30</sup>, requires states parties to adopt national laws to protect any person reporting corrupt practices in good faith and on reasonable grounds from any unjustified treatment.<sup>31</sup> The key objective of UNCAC is to promote and strengthen measures to prevent and combat corruption more efficiently and effectively. Article 32 of the UNCAC states that:

***Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established***

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<sup>29</sup> Transparency International, *Good Practice in Whistleblowing Protection Legislation*, 9.

<sup>30</sup> Kenya became a signatory of the United Nations Convention against Corruption on 9 December 2003.

<sup>31</sup> Article 33, *United Nations Convention against Corruption*: Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

*in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.*

Likewise, The African Union Convention on Preventing and Combating Corruption<sup>32</sup>, to which Kenya is also party has as one of its objects to promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors. Article 5(5) and 5(6) of this convention requires parties to enforce mechanisms that protect informers and their identities from reprisals. Article 5 states inter alia that:

*[State Parties should] Adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities and adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.*

Notably, the aforementioned international instruments are not self-executing and hence their effectiveness is dependent on actions taken by state parties to implement legislative and other measures required of them.

Unfortunately, Kenya has been very inactive in this regard. In fact only in 2010 did Kenya enact a Witness Protection (Amendment) Act after numerous Kenyan human rights organisations and international bodies, such as the European Union, urged the country's government to reform laws to better protect state witnesses in post-election violence court cases.<sup>33</sup>

Further, Article 50 of the Constitution of Kenya, under the Bill of Rights, not only provides for the protection of identity of witnesses and vulnerable persons in the interests of fair hearing before a court or tribunal, but also obliges Parliament to enact legislation providing for the protection, rights and welfare of victims of offences.<sup>34</sup>

To this end, the Witness Protection Act has been enacted. Its mandate is: "to provide for the protection of witnesses in criminal cases and other proceedings, to establish a Witness Protection Agency and provide for its powers, functions, management and administration, and for connected purposes."<sup>35</sup> One of the key provisions of the Witness Protection Act 2006 provides for anonymity and criminalises disclosure of witness identity or location.<sup>36</sup>

In furtherance of section 36(2) of the Witness Protection Act, the Witness Protection Rules of Court were finally gazetted creating a much more conducive and secure environment for

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<sup>32</sup> *African Union Convention on Preventing and Combating Corruption*, Adopted by 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003.

<sup>33</sup> Many witnesses were either killed or disappeared without a trace, while others fled to neighbouring countries, because they received threats from those whom they saw as perpetrators during the post-election violence in 2007 that saw more than 1,000 people killed and 300,000 others displaced.

<sup>34</sup> Article 50(9), *The Constitution of Kenya*, 2010

<sup>35</sup> The Witness Protection Act 2006 came into force in September 2008, with the Witness Protection Unit commissioned on 3 March 2009.

<sup>36</sup> Sec 23-24, *Witness Protection Act* (No 16 of 2006)

witnesses in proceedings to testify. Chief Justice Willy Mutunga gazetted the Witness Protection Rules 2015 on October 30, 2015.<sup>37</sup>

The Anti-Corruption and Economic Crimes Act was enacted in 2003 to provide for the prevention, investigation and punishment of corruption, economic crime and related offences. This Act, under sec 65 provides for the protection of informers from any liability arising from disclosure and concealing of the person's identity during proceedings. It states:

***No action or proceeding, including a disciplinary action, may be instituted or maintained against a person in respect of—***

***(a) assistance given by the person to the Commission or an investigator; or***

***(b) a disclosure of information made by the person to the Commission or an investigator***

***(2) Subsection (1) does not apply with respect to a statement made by a person who did not believe it to be true.***

***(3) In a prosecution for corruption or economic crime or a proceeding under this Act, no witness shall be required to identify, or provide information that might lead to the identification of, a person who assisted or disclosed information to the Commission or an investigator.***

***(4) In a prosecution for corruption or economic crime or a proceeding under this Act, the Court shall ensure that information that identifies or might lead to the identification of a person who assisted or disclosed information to the Commission or an investigator is removed or concealed from any documents to be produced or inspected in connection with the proceeding.***

Other laws that deal with witness protection are the Penal Code which prescribes a three-year sentence for witness intimidation,<sup>38</sup> which is specifically criminalised for sexual offences. And the Sexual Offences Act, which also provides for witness anonymity and other protective measures.<sup>39</sup>

Other policies have also been used for protection of whistle-blowers in respective organizations. For example the Kenya Revenue Authority (KRA), has a policy on whistle-blowers that is limited to permanent and temporary employees of KRA.

In conclusion, the aforementioned laws merely scratch the surface of whistle-blower protection even though they were worth mentioning in order to acknowledge the current state of affairs. In the next chapter, a proper critic will be made of these laws to identify the loopholes that render them unsuitable to effectively protect whistle-blowers.

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<sup>37</sup> Oredi C, *Rules on witness protection to boost justice system*

<http://www.standardmedia.co.ke/ureport/story/2000183777/rules-on-witness-protection-will-boost-justice-system>, on 28 November 2015.

<sup>38</sup> Sec 238, *Kenya Penal Code* (Act 54 of 1960)

<sup>39</sup> Sec 31, Republic of Kenya, *Witness Sexual Offences Act* (Act 3 of 2006)

### 3. DISCUSSION

#### 3.1 Key elements of effective whistle-blower protection legislation

This paper is of the view that an effective whistle-blower protection Legislation is one that is comprehensive as opposed to one that is sectoral. Comprehensive legislation is one that has been drafted and enacted exclusively for the protection of whistle-blowers of all sectors; legislation that is sectoral is one that has lightly touched on the protection of the whistle-blowers of a particular sector for particular types of disclosures. Sectoral legislation is also one that only has particular sections of a law provide for protection of whistle-blowers, witnesses or informers and may only provide for a specific type of protection such as protection from liability or concealment of identity.

According to these definitions, Kenya's laws on whistle-blower protection are sectoral. Keeping in mind the different circumstances in other countries; those that have lower rates of corruption have comprehensive whistle-blower protection laws.<sup>40</sup>

Discussed in this part, are some elements of the comprehensive legislation. These elements have been informed by *three authoritative* reports namely: one by David Banisar on 'Whistleblowing International Standards and Developments'; another by Transparency International on 'International Principles for Whistle-blower Legislation' and; An OECD (Organisation of Economic Cooperation and Development) report that includes a compendium of practices and guiding principles necessary for whistle-blower laws to be effective. These standards take into account the diversity of legal systems in G20 countries. This offers sufficient flexibility to enable countries like Kenya to effectively apply such principles in accordance with their own legal systems.

As mentioned earlier comprehensive whistle-blower protection laws are normally free-standing as opposed to being sections of other laws making them easier to implement. At this moment, the only law in Kenya that remotely relates to whistle-blower protection is the Witness Protection Act and as mentioned earlier, the general gist of this law was enacted to protect witnesses to the Post-Election Violence experienced in Kenya in 2007-2008 and hence protection of whistle-blowers is only provided for implicitly, if at all.

Additionally, the scope of comprehensive laws is not limited to either the public or private sector as corruption can occur in either of these sectors. Neither is a comprehensive protection law limited to whistle-blowers of particular disclosures. This does not discourage organizations to enact other specified regulations and guidelines that are in accordance with and complement the main comprehensive law. Transparency International recommends that both the employees in public and private sectors should receive protection from retaliation, accessible channels to disclose wrongdoing and mechanisms for reporting that encourage reform.

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<sup>40</sup> Compare the G20 report on whistle-blower protection laws (2014) and the Transparency International 2014 Corruption index (annexed as appendix 1 to this paper).

Further, the threshold for whistle-blower protection should be a “reasonable belief of wrongdoing” – protection should be granted for disclosures made with a reasonable belief that the information is true at the time it is disclosed. Protection extends to those who make inaccurate disclosures made in honest error, and should be in effect while the accuracy of a disclosure is being assessed.

Comprehensive laws should also give clear definitions of what constitutes wrongdoing and should not limit these definitions to anti-corruption or crime but are also inclusive of other actions of unethical behaviour. This allows the law to protect persons who disclose a wide range of untoward actions. A recommended definition of who a whistle-blower is has been offered by Transparency International: Whistleblowing – the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action.

Moreover, the scope of protection should include protection from retribution of all kinds and proper anonymity and preservation of confidentiality. The burden of proving that an action taken by an employer was not out of retribution should fall on the employer. However, those who have been found to knowingly give false information should be liable to appropriate sanctions.

Likewise, laws should provide for immunity from liability arising from any disclosure made in good faith. Such immunity shall include those related to libel, slander and copyright laws.

Whistle-blower rights enshrined in the enacted law should override any loyalty or confidentiality agreements between whistle-blowers and their employers.

Laws should have adequate provisions to cater for the resources required by whistle-blowers for their protection and that of their families or any of who may be endangered by the disclosed information.

Internal whistleblowing mechanisms should be understandable and publicly displayed. Investigations should also be carried out in a prompt and independent manner. These regulations should also provide for the option of whistle-blowers to explore external mechanisms if they are not satisfied with the procedure and outcome of investigations.

On sensitive disclosures, Principle 19 of the Transparency International Report provides that there should be specialised reporting and protection mechanisms should be undertaken. It says: where a disclosure concerns matters of national security, official or military secrets, or classified information, special procedures and safeguards for reporting that take into account the sensitive nature of the subject matter may be adopted in order to promote successful internal follow-up and resolution, and to prevent unnecessary external exposure. These procedures should permit internal disclosures, disclosure to an autonomous oversight body that is institutionally and operationally independent from the security sector, or disclosures to authorities with the appropriate security clearance. External disclosure (i.e. to the media, civil society organisations) would be justified in demonstrable cases of urgent or grave threats to

public health, safety or the environment; if an internal disclosure could lead to personal harm or the destruction of evidence; and if the disclosure was not intended or likely to significantly harm national security or individuals.

Lastly, is the establishment of oversight authorities under these laws; most comprehensive laws, such as those in US and Canada provide for oversight by bodies charged with advising whistle-blowers and receiving their complaints.

### 3.2 Loopholes in the current Kenyan legislation

This part is a discussion that critiques the laws (mentioned in an earlier chapter). The standards to be used will be the elements of good law discussed in the immediately preceding part.

None of the existing laws that somewhat refer to whistle-blower protection in Kenya are comprehensive (exclusively dedicated to addressing whistle-blower protection). The most closely related legislation is the Witness Protection Act Cap 79 to which senior personnel in the attorney-general's office admit that the witness protection legislation is not designed with whistle-blowers in mind<sup>41</sup>. They hope future whistle-blower legislation will be provided to complement whistle-blower dismissal protection provided by the Anti-Corruption and Economic Crimes Act 2003, which provides no penalty for the offence.<sup>42</sup>

The scope of the current laws and the protection they offer is quite limited. For example, the Kenya Revenue Authority's policies only relate to officers of KRA while the Witness Protection Act prioritises the protection of witnesses in criminal proceedings. The Anti-Corruption and Economic Crimes Act only provides protection from liability and concealment of an informer's identity, it does not provide for protection from retaliation neither does it specify the exact instances of immunity from liability.

None of the current legislation explicitly refers to whistle-blowers and hence there is none that expressly defines who a whistle-blower is. Even the Anti-corruption and Economics Act does not define an "informer"; thereby making it difficult to determine whether it means the same thing as whistle-blower.<sup>43</sup> Without such clear definition authorities who would otherwise be tasked with protecting them are unable to as they don't know what exactly constitutes whistleblowing. Even more importantly the public who may be potential whistle-blowers don't know that they could be and hence are ignorant of any protection that may be available to them, further perpetuating the culture of silence that is counterintuitive in the fight against corruption.

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<sup>41</sup> The long title of the Witness Protection Act states that the Act mainly provides for protection of witnesses in criminal cases: An Act of Parliament to provide for the protection of witnesses in criminal cases and other proceedings to establish a Witness Protection Agency and provide for its powers, functions, management and administration, and for connected purposes.

<sup>42</sup> Sec 65, *Anti-Corruption and Economic Crimes Act* (Act 3 of 2003)

<sup>43</sup> . Kichana P, *Kenyan Laws Cannot Protect Whistle Blowers*, 2007

Additionally, none of the laws have provisions that state the primacy of the protection law over any confidentiality agreements a whistle-blower may have with their employer. Such provisions are important as potential whistle-blowers may assume confidentiality agreements they have with their employers override the law, hence, they hesitate to 'blow the whistle'.

Our laws do not provide for specialised protection mechanisms for specific disclosures. This is important as the threats faced by a whistle-blower in a private office who reports mismanagement of funds are not the same as those faced by a whistle-blower who reports money-laundering in a government office. The intensities of the threats are different and this should be reflected in the differentiated protection mechanisms.

The ambiguity of the amount of time a whistle-blower shall receive protection is not specified in the Kenyan law.<sup>44</sup> Too much focus lies in protection during proceedings in court while little or no focus is made on protection before and after proceedings.

Further, the current absence of any avenues to review an admission decision is also of concern. The Witness Protection Agency whose mandate is specified in the Witness Protection Act is not perceived by potential witnesses as independent as senior government officials constitute the board. If a potential whistle-blower wants to report corruption within the government, it would be unlikely that they will trust an agency made of senior government officials to protect him/her.

An existing loophole under Section 41 of the Public Officer Ethics Act, 2003 states that "A person who, without lawful excuse, divulges information acquired in the course of acting under the Act is guilty of an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment." Ironically, this section outlaws whistleblowing, while at the same time the rest of the Act purports to introduce and standardise the ethical code and standards of public officials.<sup>45</sup>

Another challenge that may face the implementation of whistle-blower protection legislation in Kenya is the fact that other laws may have provisions that counteract the promotion of whistleblowing; one such law is the Official Secrets Act. The Official Secrets Act criminalises disclosure of government documents and requires civil service employees to sign an oath of secrecy. Civil service careers can thus be used on their own or to accompany physical threats when deterring civil service whistle-blowers. Justice Bosire cited the effect of the law and the oath on silencing the civil service in his investigation of the Goldenberg affair.<sup>46</sup> According to Mwalimu Mati from Mars Group "Corruption cannot be won when we have the Official Secrets Act because we all know that corruption thrives and flourishes in secrecy and that is why when David Munyakei exposed the Goldenberg scandal, he lost his job because of this law"

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<sup>44</sup> Institute For Security Studies, *The Justice Sector Afterthought: Witness Protection In Africa*, 113

<sup>45</sup> Kichana P, *Kenyan Laws Cannot Protect Whistle Blowers*, 2006.

<sup>46</sup> Report of the judicial commission of enquiry into the Goldenberg Affair chaired by Justice Bosire (The Goldenberg Report), Nairobi: *Kenya Gazette 2005*, 842,

Awareness levels in the public of avenues for whistleblowing and protection mechanisms are relatively low. The media should thus be actively engaged in order to better inform the public of developments in law and institutions connected with whistleblowing.

#### 4. ANALYSIS

##### 4.1 Principles of special consideration for the Kenyan situation

The best Whistle-blower Protection Legislations are unlikely to make a difference in countries which have a bad record on protecting the freedom of information, freedom of expression and anti-corruption.

The implementation of Whistle-blower Protection Legislation also implies a strong and independent judiciary that has the resource, capacity and independence to effectively prosecute whistleblowing related offences.

"In countries where witness protection programmes operate successfully, one finds that these programmes are greatly reliant on a well-oiled and operating criminal justice system. In African countries, like in most developing countries, the criminal justice system is usually under pressure to perform and is greatly under-skilled and under-resourced. To ensure that witnesses are effectively protected in these countries, one needs to follow a more pragmatic approach as we need to find local solutions to local problems." Gerhard Van Rooyen, UNODC Witness Protection Adviser.

Whistle-blower laws can only work in a democratic society which supports transparency, disclosure and accountability. A whistle-blower who wishes to disclose bribery, corruption and patronage networks may live in a dictatorship with no rule of law, governed by secrecy, fear, reprisal and death. Whistle-blower laws must be seen in the context of culture. They cannot be exported to hostile environments. A precondition for whistle-blower laws is the rule of law, including an independent legal system and an independent judiciary.

The threat to whistle-blowers in Kenya who are involved in high level cases of corruption cannot simply be mitigated by adopting protective measures. A degree of integrity and efficiency is required throughout the judicial process to ensure that prosecution is not undermined at the investigative, prosecutorial or judicial stages of the criminal justice process.

In Kenya, the capacity of the National Police Service<sup>47</sup>, the office of the Inspector General of police and the office of the Directorate of Public Prosecutions, as well as the judiciary, must be sufficiently enabled to competently and independently investigate, prosecute and adjudicate politically sensitive cases of corruption.

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<sup>47</sup> Article 244 of the Constitution requires the National Police Service to prevent corruption and promote and practice transparency and accountability.

## 4.2 Additional Recommendations

As mentioned earlier a more independent agency should be created for the protection of whistle-blowers; an agency that potential whistle-blowers will trust to protect them against reprisal for a myriad of cases ranging from those against the government officials to those against private companies.

Creation of awareness and education that lauds the act of whistleblowing could go a long way to destigmatise whistle-blowers in society who may be seen as traitors. In some societies, the act of reporting may be seen as an act of treason and betrayal. In countries emerging from civil war, conflicts or authoritarian regimes such as South Africa, there is often a stigma attached to reporting others' actions, inherited from the use and abuse of informants during the previous regime.<sup>48</sup>

The AU Convention on Preventing and Combating Corruption however obliges State Parties (Kenya included) to adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitization of the media, and the promotion of an enabling environment for the respect of ethics.<sup>49</sup> Kenya has made strides towards this end for example by holding the 2015 Whistle-blower of the year awards in celebration of the International Anti-Corruption Day<sup>50</sup>

Still on awareness, a recent study in the United State showed that creation of awareness on whistle-blower laws did more in exposing corruption than the quantity and quality of the laws themselves.<sup>51</sup>

Creating awareness goes hand in hand with promulgation of the law to the public as St. Thomas Aquinas posited in his Classic Natural Law Theory where he says that a law ought to be notified to those who it purports to govern for it to obtain its binding force.

Civil society can play a supportive role in promoting effective implementation of whistleblowing laws. Civil society groups offer legal advice to employees on whether and how to blow the whistle and accompany them along the process. They can also contribute to addressing resistance to whistle-blower protection laws through awareness raising, training and advocacy on issues of accountability, transparency and integrity.<sup>52</sup>

The judiciary should also ensure it takes into consideration the safety of witnesses when making rulings and orders. Judges should refrain from granting bail to suspects who a clearly a risk to witnesses who testify against them. Further trials should be expedited. The longer the trial is, the harder it is to sustain protection efforts for witnesses. It is important to note

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<sup>48</sup> Transparency International, *Good Practice for Whistleblowing Protection Legislation*, 9.

<sup>49</sup> Article 5(8), *African Union Convention on Preventing and Combating Corruption*.

<sup>50</sup> This event was held on 9 December 2015 - Seven whistle blowers drawn from different sectors and parts of the country received awards for their actions in service of Chapter Six of the Constitution.

<sup>51</sup> Goel R K, Nelson M A, *Effectiveness of whistle-blower laws in combating corruption*, 2013.

<sup>52</sup> Transparency International, *Good Practice in Whistleblowing Protection Legislation*, 9.

however, that legislation should not only provide for protection during trial but also after trial for as long as the witness requires protection.

Inter-Agency cooperation is very important as many institutions are involved if there is to be proper whistle-blower protection. Such cooperation should not compromise the independence of the agency tasked with the protection of whistle-blowers.

To encourage whistleblowing, some G20 countries have adopted rewards systems, including monetary rewards. In the U.S., for example, the False Claims Act, allows individuals to sue on behalf of the government in order to recover lost or misspent money, and can receive up to 30 percent of the amount recovered. The Dodd-Frank Act also authorises payment rewards to individuals who provide the Commission with original information that leads to successful SEC enforcement actions (and certain related actions). Rewards may range from 10 percent to 30 percent of the funds recovered. Korean law also provides monetary rewards for whistle-blowers who disclose acts of corruption. The (Anti-Corruption and Civil Rights Commission of Korea)<sup>53</sup>

All these measures require adequate financial, technical and human resources to ensure they are implemented effectively. This may mean an overhaul of the whole system (legal and institutional frameworks). From the above recommendations, developed below, is a checklist<sup>54</sup>. It may be used by all relevant stakeholders in Kenya to determine how effective a proposed legislation on whistle-blower protection is.

- a) Is there comprehensive and clear legislation in place to protect from retaliation, discriminatory or disciplinary action, employees who disclose in good faith and on reasonable grounds, suspected acts of wrongdoing or corruption to competent authorities?
- b) Are there effective institutional frameworks and clear procedures and channels in place for facilitating the reporting of wrongdoing and corruption?
- c) Are protected disclosures and persons afforded protection clearly defined?
- d) Are retaliatory actions clearly defined and the protection afforded robust and comprehensive?
- e) Are remedies and sanctions for retaliation clearly outlined?
- f) Is awareness-raising regularly undertaken to encourage the reporting of wrongdoing and corruption and to disseminate existing information on the protection of whistle-blowers?
- g) Is the effectiveness in practice of the whistle-blower protection framework periodically evaluated and reviewed?

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<sup>53</sup> [http://www.acrc.go.kr/eng\\_index.html](http://www.acrc.go.kr/eng_index.html), on 3 Dec 2015.

<sup>54</sup> Organisation for Economic Cooperation and Development, Clean, *Whistle-blower Protection: Encouraging Corruption*, July 2012.

## 5. CONCLUSION

To conclude this study is the appalling account of a brilliant clerk who passed a chance to enter the military as a cadet for a job in the Central Bank of Kenya (CBK), David Munyakei blew the whistle on the Goldenberg Scandal. He noticed that Goldenberg International was receiving massive sums of money for alleged export of gold and diamonds. He leaked official CBK documents to opposition members of parliament and so initiated a lot of outrage that was the reaction to the multibillion shilling scandal. He was arrested, released, and then fired from his job at the CBK. He fled to Mombasa where he hid for four years. Within that time, he converted to Islam and married Mariam Ali Muhammad Hanii. He emerged from hiding in 1998. After (National Rainbow Coalition) NARC took over in 2002, they used him for Public Relations and he testified before the Goldenberg Commission. Munyakei died in 2006 a poor and dejected man. The scandal for which he sacrificed what would have been an illustrious career is still a blemish for which justice may never be achieved. Everyone received a slap on the wrist, a few went to prison for months, and everyone but the Kenyan taxpayer went home richer. Munyakei's heroic story is serialised in Billy Kahora's book 'The True Story of David Munyakei.' Although the two were most likely unrelated, there is said to be some link between his troubles and the death of his mother.<sup>55</sup>

Whether or not Munyakei would have suffered as much as he did if a Whistle-blower Protection law was enacted at that time is debatable. However, given the disregard of the rule of law then (and now); it is quite likely that legislation would not have made much of a difference in a society where the rule of law is subordinate to the rule of the rich and powerful.

Nevertheless, a lot has to be said about brave souls like his, who in spite of the lack of protection from the law or other avenues still risk everything to expose corruption. As the former executive director of Transparency International – Kenya aptly put it: "The Goldenberg scandal made Kenya a poorer country, financially, structurally and morally. Acts of corruption like this one owe their exposure to the courage and integrity of only a few individuals such as Lagat<sup>56</sup> and Munyakei. The Transparency International Integrity Awards recognise that – perhaps even more important than laws administered from the top – ultimately it is individuals adhering to their principles and fighting against corruption that will turn the tide in Kenya."

Even then, it would not be accurate to dismiss the importance of law in the protection of whistle-blowers. Many jurisdictions have passed legislation to protect public sector and sometimes private sector employees who make public interest disclosures. These include

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<sup>55</sup> Owaahh, <http://owaahh.com/kenyan-whistleblowers/> on 1 November 2015.

<sup>56</sup> Constable Lagat was one of the police officers on duty at the airport one night in 1991 when a director of Goldenberg International arrived, carrying a suitcase full of gold. Constable Lagat bravely refused orders from senior officials whom he suspected of trying to cover up illegal actions. Even after he was forced to appear before the Criminal Investigations Department the Constable did not budge, refusing to give into corrupt officials - he felt that he would be breaking the rules.

Australia,<sup>57</sup> Canada, France, India, Japan,<sup>58</sup> New Zealand,<sup>59</sup> South Africa,<sup>60</sup> the United Kingdom, and the United States. All these countries are doing relatively well on the corruption perceptions index.<sup>61</sup> (See appendix 1: CPI 2014).

Similarly, using a well-informed approach, Kenya would also benefit greatly from the enactment of such whistle-blower protection legislation.

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<sup>57</sup> All jurisdictions except for the Commonwealth have stand-alone acts that provide for the establishment of whistleblowing systems and some form of legal protection against reprisals.

<sup>58</sup> *Whistleblower Protection Act 2004* (Japan), See Leon Wolf, 'New Whistleblower Protection Laws for Japan' (2004) 17 *Journal of Japanese Law* 209.

<sup>59</sup> Protected Disclosures Act 2000 (New Zealand).

<sup>60</sup> Protected Disclosures Act 2000 (South Africa); Campbell J, *Dare I Blow the Whistle? Is Adequate Protection Given to South African Employees in Terms of the Protected Disclosures Act 26 of 2000?*, 2004

<sup>61</sup> The corruption perceptions index is a yearly score by Transparency International that ranks countries on how corrupt their public sectors are seen to be. It captures the informed views of analysts, businesspeople and experts in countries around the world. The latest one released at the time of writing this paper was the 2014 index.

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