

**WHISTLEBLOWER PROTECTION AND CORPORATE FRAUD: ANALYSIS OF THE  
ACCESS TO INFORMATION ACT**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore  
University Law School

BY

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## TABLE OF CONTENTS

<b>DECLARATION</b> .....	<b>iii</b>
<b>ACKNOWLEDGMENT</b> .....	<b>iv</b>
<b>LIST OF STATUTES</b> .....	<b>v</b>
<b>LIST OF CASES</b> .....	<b>vi</b>
<b>LIST OF ABBREVIATIONS</b> .....	<b>vii</b>
<b>ABSTRACT</b> .....	<b>vii</b>
<b>CHAPTER ONE: INTRODUCTION</b> .....	<b>1</b>
1.1. Background of the Study.....	1
1.2. Statement of Problem.....	3
1.3. Research Objectives .....	4
1.4. Research Questions .....	4
1.5. Hypothesis.....	4
1.6. Significance of The Study.....	5
1.7. Theoretical Framework .....	5
1.8. Literature Review.....	8
1.9. Research design and Methodology .....	10
1.10. Limitations .....	11
1.11. Chapter Breakdown.....	11
<b>CHAPTER TWO: THE STATUS QUO OF THE LEGISLATIVE FRAMEWORK ON WHISTLEBLOWING IN KENYA</b> .....	<b>13</b>
2.1. Introduction .....	13
2.2. International and Regional Legislative Framework.....	13
2.3. National Legislative Framework.....	14
2.3.2.1. Why Tort Law remedies are insufficient in addressing the aforementioned repercussions .....	16
2.4 Chapter two conclusion.....	21
<b>CHAPTER THREE: CORPORATE CULTURE AND WHISTLEBLOWER PROTECTION</b> .....	<b>22</b>
3.1. Introduction .....	22
3.2. What is corporate culture? .....	22
3.3. Types of corporate cultures and their impact on whistleblowing.....	24
3.3.1. Ethical corporate culture: A catalyst for effective whistleblowing.....	24
3.3.2. Toxic Corporate Culture: A barrier to whistleblowing.....	27
<b>CHAPTER FOUR: COMPARATIVE ANALYSIS OF KENYA’S WHISTLEBLOWER PROTECTION SYSTEM VIS A VIS THE USA AND UK SYSTEM</b> .....	<b>31</b>
4.1. Introduction .....	31
4.2. US whistleblower protection system.....	32

4.2.1. US public sector legislation.....	32
4.2.2. US private sector legislation .....	33
4.3. UK whistleblower protection system.....	34
4.4. Comparative analysis of the US, UK and Kenya.....	35
4.5. Chapter four conclusion .....	38
<b>CHAPTER FIVE: CONCLUSION .....</b>	<b>39</b>
5.1. Introduction .....	39
5.2. Summary of findings.....	39
5.3. Recommendations .....	40
5.4. Conclusion .....	41
<b>BIBLIOGRAPHY .....</b>	<b>42</b>



## DECLARATION

I, BRENDA NAMATSI ASHUMA, of admission number 145666, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

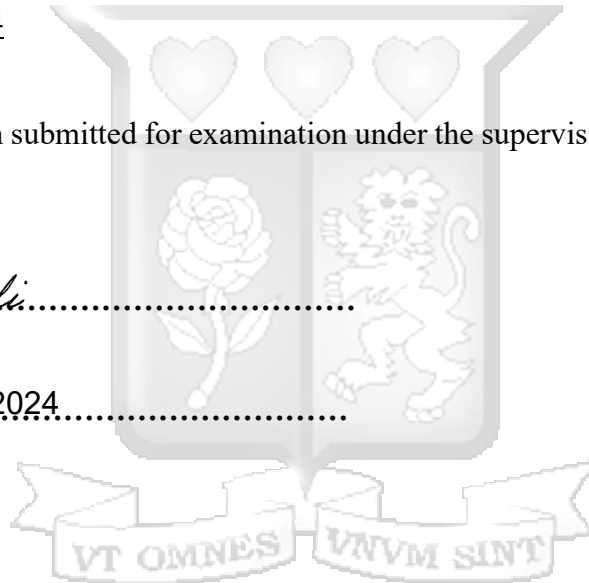
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Last but not least, I want to thank myself for believing in me, for doing all the hard work and never giving up.



## LIST OF STATUTES

### Kenyan Legislation

Access to Information Act 2016

Anti-Corruption and Economic crimes Act 2003

Bribery Act 2016

Constitution of Kenya 2010

Witness Protection Act 2012

### International and regional legislation

The African Union Convention on Preventing and Combating Corruption

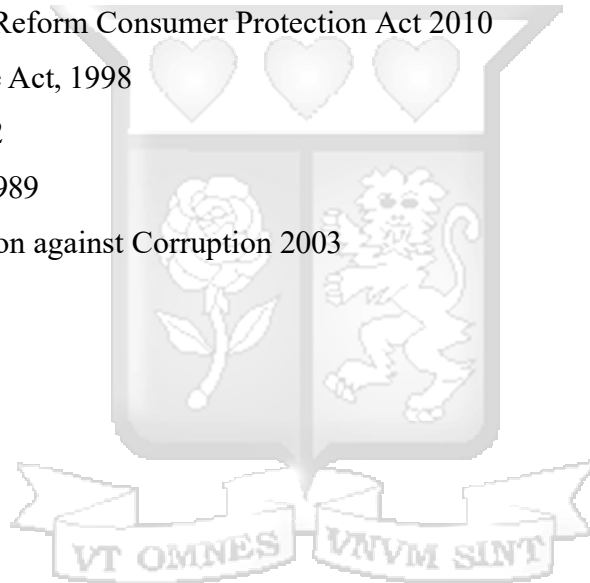
Dodd-Frank Wall Street Reform Consumer Protection Act 2010

Public Interest Disclosure Act, 1998

Sarbanes-Oxley Act 2002

Witness Protection Act 1989

United Nations Convention against Corruption 2003



## LIST OF CASES

### **National cases**

*Emy Amwanyi v Kenya Revenue Authority (2022)* eKLR

*Spencer Sankale Olochike vs Maasai Mara University, Transparency International Kenya & 22 others(Interested Parties) (2021)* eKLR

### **International Cases**

*Dodge v Ford Motor Co.*(1919),The Supreme Court of Michigan

*Parke v Daily News* (1962), High Court of England and Wales



## LIST OF ABBREVIATIONS

ATI	Access To Information
ACECA	Anti-Corruption and Economic crimes Act
CEBC	Center for Ethical Business Culture model
CEV	Corporate Ethical Virtue model
CoK	Constitution of Kenya
Dodd-Frank Act	Dodd-Frank Wall Street Reform Consumer Protection Act
EACC	Ethics and Anti-Corruption Commission
ECC	Ethical Corporate Culture model
FCA	False Claim Act
ILO	International Labour Organization
MBO	Management by Objectives
MBR	Management by Results
OECD	Organisation for Economic Cooperation and Development
OSC	Office of Special Counsel
OCSC	Office of Civil Service Commissioners
PIDA	Public Interest Disclosure Act
SARS	Severe Acute Respiratory Syndrome
SEC	Securities and Exchange Commission
SOX	Sarbanes-Oxley Act
UNCAC	United Nations Convention against Corruption
USA	United States of America
WPA	Whistleblower Protection Act

## ABSTRACT

*In an era where corporate integrity is paramount, the protection of whistleblowers emerges as a critical pillar in the fight against corporate fraud. Whistleblowing in the context of corporate fraud refers to the disclosure by organisation members of illegal, immoral, or illegitimate practices within an organisation, to individuals or organisations that may be able to effect action. Whistleblowers are often the unsung heroes in the battle against corporate fraud, risking their careers and personal safety to expose illegal activities hidden behind the facade of organisational loyalty. This research critically examines the legislative landscape governing the protection of corporate whistleblowers in Kenya, with a particular emphasis on the Access to Information Act. It argues that the Act's reliance on tort remedies is insufficient and fails to adequately safeguard corporate whistleblowers, particularly in cases of corporate malfeasance. Through a doctrinal and comparative analysis, this study recognises the correlation between corporate culture and whistleblowing then further evaluates the appropriateness of Kenya's laws and compares them to more robust systems in other jurisdictions, including the United States and United Kingdom. By proposing legislative reforms, this research seeks to fortify whistleblower protection, enhance the Act's effectiveness in addressing corporate fraud, and ensure the robust implementation of the constitutional right to access information.*



## CHAPTER ONE: INTRODUCTION

### 1.1. Background of the Study

Article 35 of the Constitution of Kenya (CoK) mandates that every citizen has the right to Access to Information (ATI) held by the state and other persons necessary for the protection of any right or fundamental freedom.<sup>1</sup> This constitutional right is further implemented by the enactment of the 2016 Access to Information Act (ATI Act), which provides a legal framework for public and private entities to proactively disclose information<sup>2</sup> and offers protection to persons who in good faith disclose information of ‘*public interest due to its relation to the protection of human rights, the environment, public health and safety, exposure of corruption or illegal actions and where the disclosure may assist in the protection of any right*’.<sup>3</sup>

Section 16 of the ATI Act safeguards whistleblowers by ensuring they are not penalised in their employment, contracts or other professional activities upon disclosure of confidential information that is of public interest.<sup>4</sup> However, they must have a reasonable belief in the truth of the information and those who provide false information are penalised.<sup>5</sup> Moreover, the section ensures that retaliation or adverse treatment against whistleblowers is actionable as a tort and that confidentiality terms in settlements do not prevent the disclosure of truthful information.<sup>6</sup>

Whistleblowers play a pivotal role in unveiling corporate fraud, which encompasses illegal and unethical activities such as payroll fraud, embezzlement of funds, theft of assets and corruption conducted by a company director or an individual acting in their capacity as an employee of the company.<sup>7</sup> By disclosing these transgressions, corporate whistleblowers facilitate the right to ATI by encouraging transparency, reducing illegality and acting as a deterrent by instilling a sense of accountability among wrongdoers thereby highlighting the potential consequences of their actions.

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<sup>1</sup> Article 35, *Constitution of Kenya* (2010).

<sup>2</sup> Section 3, *Access to Information Act* (2016).

<sup>3</sup> Section 2, *Access to Information Act* (2016).

<sup>4</sup> Section 16 (1), *Access to Information Act* (2016).

<sup>5</sup> Section 16 (3), *Access to Information Act* (2016).

<sup>6</sup> Section 16 (7), *Access to Information Act* (2016).

<sup>7</sup> Mutonyi M, ‘*Tackling the Problem of Corporate Fraud in the Kenyan Corporations through the Lens of Corporate Governance*,’ Published LLM thesis, University of Nairobi, Nairobi, 2019, 1.

Despite the essential function that corporate whistleblowers serve in combating corporate fraud, section 16 of the ATI Act falls short in providing comprehensive protection for these individuals. The section's reliance on tort law remedies does not take into account the immediate and more severe repercussions such as retaliation, threats to personal safety and job loss that whistleblowers often face.

A study done on 216 cases of alleged corporate fraud in the United States of America (USA) reported that in 45% of the cases, whistleblowers opted to remain anonymous to avoid adverse repercussions while 82% alleged that they were either dismissed, quit under pressure or had their responsibilities drastically changed after whistleblowing.<sup>8</sup> Furthermore, the 2023 Ethics and Anti-Corruption Commission (EACC) survey report highlighted that 86% of the respondents feared reporting unethical practices and corruption due to potential harassment, reprisal and fear of victimisation.<sup>9</sup>

In *Spencer Sankale Olochike vs Maasai Mara University, Transparency International Kenya & 22 others(Interested Parties) (2021) eKLR*, the petitioner, Sankale, served as the Chief Finance Officer at Maasai Mara University and was dismissed from his position on 17<sup>th</sup> June 2021.<sup>10</sup> This followed nearly two years of unemployment, attributed to his role as one of the whistleblowers of the 2019 'Masai Mara' heist.<sup>11</sup> Sankale claimed that the dismissal was a retaliatory action by the Maasai Mara University after he exposed massive corruption within the university's administration including the misappropriation of approximately Ksh. 190 million.<sup>12</sup> This illustrates the severe risks that whistleblowers face, including job loss.

Similarly, in *Emy Amwanyi v Kenya Revenue Authority (2022) eKLR* the court held that the petitioner was subjected to unjust retaliation and that her extended interdiction and subsequent

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<sup>8</sup> Dyck A, Morse A and Zingales L, 'Who Blows the Whistle on Corporate Fraud?' National Bureau of Economic Research, Massachusetts Avenue, LXV, No 6, 2007, 4-5

<sup>9</sup> Ethics and Anti-corruption Commission, 'National Ethics and Corruption Survey NECS): Evidence From Households in Kenya,' 15th December, 2023, 37.

<sup>10</sup> (2021) eKLR.

<sup>11</sup> Kiplagat R, 'Maasai Mara University Heist Whistleblower Spencer Sankale Sacked,' The Standard Media, 2021. <<https://www.standardmedia.co.ke/rift-valley/article/2001416123/maasai-mara-university-heist-whistleblower-spencer-sankale-sacked>>, 2021.

<sup>12</sup> Masinde S, 'Whistleblower Protection Legislation is Critical in the Fight Against Corruption,' Transparency International Kenya, June 23rd 2024.

criminal charges were as a result of her whistleblowing on the criminal activities at the Kenya Revenue Authority.<sup>13</sup> The court underscored the necessity for comprehensive legal reforms that apply retrospectively and protect whistleblowers irrespective of when they report the case.<sup>14</sup>

Moreover, David Munyakei, the Goldenberg Scandal whistleblower responsible for exposing financial fraud involving the Central Bank of Kenya (CBK), subsequently faced arrest and charges for disclosing confidential information to unauthorised persons.<sup>15</sup> He faced prolonged detention, denial of bail, dismissal from the bank and ongoing threats to his life led to his relocation to Mombasa in an attempt to escape the pressures and potential dangers associated with whistleblowing.<sup>16</sup> The *Report on the Judicial Commissioner on the Inquiry into the Goldenberg Affair* acknowledged Munyakei's plight, noting that his dismissal was deemed lawful due to the lack of Kenyan legislation protecting whistleblowers.<sup>17</sup>

The challenges faced by whistleblowers as evidenced by the statistics and cases above underscore the inadequacy of the current legislative framework regarding whistleblower protection. This legal gap not only undermines the effectiveness of the ATI Act in combating corporate fraud, but also impairs the broader objectives of transparency and accountability thus providing a basis for the aim of this research paper.

## 1.2. Statement of Problem

Section 16 of the ATI Act represents a significant advancement in promoting transparency and accountability within the corporate field by facilitating the disclosure of information on corporate fraud based on public interest.<sup>18</sup> However, its current position falls short in offering adequate protection to safeguard corporate whistleblowers due to the Act's reliance on tort remedies, which do not sufficiently address the full range of often severe risks faced by whistleblowers - such as retaliation, job loss, and threats to personal safety. The lack of a comprehensive protection framework not only leaves them vulnerable but also deters potential whistleblowers

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<sup>13</sup> (2022) eKLR.

<sup>14</sup> (2022) eKLR.

<sup>15</sup> eKLR '*Report of the Judicial Commissioner on Inquiry into the Goldenberg Affair*,' October 2005, 288.

<sup>16</sup> Maina K, '*Greedypendence: The Curse of Conviction*, Nation Africa, 26th October 2022.

<<https://nation.africa/kenya/news/greedypendence-the-curse-of-conviction-3989246>>

<sup>17</sup> eKLR '*Report of the Judicial Commissioner on Inquiry into the Goldenberg Affair*,' 2005

<sup>18</sup> Section 16, *Access to Information Act*, (2016).

from coming forward thereby undermining the Act's effectiveness in tackling corporate fraud. Therefore, this research aims to evaluate the effectiveness of the existing legal framework in safeguarding corporate fraud whistleblowers and advocate for legislative reform via a comparative analysis between Kenya laws *vis a vis* the United States of America (US) and United Kingdom (UK)

### **1.3. Research Objectives**

#### **General Objective**

The main aim of this study is to critically evaluate Kenya's existing legislative framework for corporate whistleblowing protection, particularly under the Access to Information Act. This study aims to identify gaps in the law and propose reforms to strengthen whistleblower protection, thereby enhancing transparency and accountability in corporate governance.

#### **Specific objectives**

1. To examine the appropriateness of the existing laws governing whistleblower protection in Kenya.
2. To examine the relationship between corporate culture and whistleblower practices
3. To conduct a comparative analysis of Kenya's Whistleblower protection system vis a vis the USA and UK and recommend reforms in Kenya.

### **1.4. Research Questions**

1. What is the appropriateness of the existing laws governing whistleblowing protection in Kenya?
2. What is the relationship between corporate culture and whistleblowing
3. How does the whistleblower legal protection framework in Kenya compare to that of the USA and UK?

### **1.5. Hypothesis**

This study tests the hypothesis that the current legislative framework for whistleblower protection does not satisfactorily safeguard whistleblowers under the ATI Act therefore

undermining the Act's effectiveness in addressing corporate fraud, hence there is need for reform.

## **1.6. Significance of The Study**

The significance of this study is based on the pivotal role of corporate whistleblowers in the enforcement and realisation of the right to ATI established by Kenya's ATI Act.<sup>19</sup> Their role is integral in promoting transparency, accountability and good governance by shedding light on information that may otherwise be concealed due to corruption, mismanagement and other forms of misconduct.<sup>20</sup> However without robust legal protections, these individuals face significant risks and threats to their personal lives leaving them vulnerable and discouraged from coming forward.<sup>21</sup> Therefore, by critically examining the appropriateness of the current legislative framework and undertaking a comparative analysis with more established systems, this study seeks to identify best practices and propose comprehensive legislative reforms thus enhancing the effectiveness of the ATI Act in addressing corporate fraud.

## **1.7. Theoretical Framework**

This study is primarily based on the stakeholder theory and the morality to whistleblowing theory.

### **1.7.1. Stakeholder theory**

The evolution of corporate governance has been marked by the longstanding debate between the shareholder primacy model and the stakeholder theory.<sup>22</sup> The debate began in the 1900's originating from the works of Adolf Berle and Merrick Dodd as they sought to define the objectives of the corporation.<sup>23</sup> Berle advanced the view that corporations exist solely to serve the interests of shareholders and ensure profit maximisation thus laying a foundation for the shareholder primacy model.<sup>24</sup> This position was reinforced in the United States case of *Dodge v*

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<sup>19</sup> Section 16, *Access to Information Act* (2016).

<sup>20</sup> Masinde S, 'Whistleblower Protection Legislation is Critical in the Fight Against Corruption.' 2024.

<sup>21</sup> Dyck A, Morse A and Zingales L, 'Who Blows the Whistle on Corporate Fraud?' 2007,

<sup>22</sup> Berle A and M Gardiner, 'The Modern Corporation and Private Property: The Military Roots of a Stakeholder Model of Corporate Governance,' 42 Seattle University Law Review, 2019, 541.

<sup>23</sup> Bratton W and Wachter M, 'Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation,' 34 University of Pennsylvania Carey Law School 99 . 2008, 122-134.

<sup>24</sup> Berle A and M Gardiner, 'The Modern Corporation and Private Property: The Military Roots of a Stakeholder Model of Corporate Governance,' 42 Seattle University Law Review, 2019, 541.

*Ford Motor Company*, where the court emphasised that a corporation's primary obligation is to maximise shareholder wealth.<sup>25</sup> Similarly, this sentiment was also reflected in the case of *Parke v Daily News Ltd.*<sup>26</sup>

Dodd on the other hand presented an alternative perspective, arguing that corporations owe duties not only to shareholders, but also to a wider constituency of stakeholders.<sup>27</sup> This debate was further propelled by the corporate scandals of the early 2000's such as Enron and WorldCom, which revealed the dangers of short term wealth maximisation associated with shareholder primacy.<sup>28</sup> Such events underscored the need for a broader and more inclusive framework of corporate governance, a role now filled by the stakeholder theory.

Proponents of the stakeholder theory argue that corporations are required to balance the interests of all the parties affected by their operations.<sup>29</sup> These stakeholders include employees, customers, suppliers, creditors and the community at large.<sup>30</sup> Unlike the narrow focus of shareholder primacy, the stakeholder theory acknowledges the independent nature of corporate success and the broader societal good.<sup>31</sup>

In the context of this study, this theory applies directly to the objectives of whistleblower protection by broadening corporate duty beyond just the shareholders and recognising that the interests of all employees should be taken into account, including the interest of protection of whistleblowers. Additionally, the theory supports proactive legal protections that address the risks that whistleblowers face including termination, harassment and reputational harm. A robust whistleblower protection regime that is grounded on the stakeholder principles of transparency and accountability would deter corporate fraud and safeguard broader societal interests.

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<sup>25</sup> *Dodge v Ford Motor Co.* (1919), The Supreme Court of Michigan.

<sup>26</sup> *Parke v Daily News* (1962), High Court of England and Wales.

<sup>27</sup> Bratton W and Wachter M, 'Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation,' 2008, 122-134.

<sup>28</sup> Millon D, 'Why is Corporate Management Obsessed with Quarterly Earning and What Should be Done About it?' 70 *George Washington Law Review* 890, 2002, 900-902.

<sup>29</sup> Heath J and Norman W, 'Stakeholder Theory. Corporate Governance and Public Management: What can the History of State-Run Enterprises Teach us in the Post-Enron era?' 53 *Journal of Business Ethics*, 2004, 247-248.

<sup>30</sup> Gibson K, 'The Moral Basis of Stakeholder Theory.' 26 *Journal of Business Ethics* 3, 2000, 245-257.

<sup>31</sup> Bratton W and Wachter M, 'Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation,' 2008, 122-134.

### 1.7.2. The Morality of Whistleblowing

The theory on the morality of whistleblowing outlines a structured approach to determining when whistleblowing is morally permissible or morally required. De George's theory distinguishes between three moral positions: whistleblowing as morally prohibited, morally permissible and morally required.<sup>32</sup> The theory rejects the notion that whistleblowing should be morally prohibited, acknowledging cultural resistance due to norms of loyalty within organisations.<sup>33</sup> Nonetheless, he argues that under certain circumstances, whistleblowing can be morally permissible or required.<sup>34</sup>

For whistleblowing to be morally permissible, De George outlines that first, the organisation's product or policy must pose a significant threat of serious harm to the public, whether to consumers, bystanders, or society at large. Second, the employee should first raise their concerns internally by reporting the issue to a supervisor, making their moral concerns known. Without this step, whistleblowing is not justifiable. Lastly, if internal channels fail to address the issue, the employee must exhaust all internal procedures, including escalating the matter to higher management, such as the board of directors.<sup>35</sup>

In addition to meeting the criteria for permissibility, whistleblowing becomes morally required on satisfaction of two further conditions: The whistleblower must have clear and credible evidence that would convince a reasonable observer that the company's actions are indeed dangerous or harmful.<sup>36</sup> Moreover, they must have a reasonable expectation that their public disclosure will result in the necessary corrective action. The potential benefits of whistleblowing must outweigh the personal risks involved.<sup>37</sup>

This theory is relevant to this study because by emphasising that whistleblowing can be morally required under certain conditions, the theory highlights the necessity for robust legal protections that support whistleblowers who act in good faith. It not only provides a moral justification for

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<sup>32</sup> De George R, *Whistle blowing, Business Ethics*, Macmillan Publishing Company 7 ed, New York, 1986, 221-38

<sup>33</sup> Hoffman M, McNulty R, *A Business Ethics Theory of Whistleblowing: Responding to the \$1 Trillion Question* 18, *Praxiology: The International Annual of Practical Philosophy and Methodology*, 2011, 3

<sup>34</sup> De George R, *Whistle blowing, Business Ethics* 393.

<sup>35</sup> De George R, *Whistle blowing, Business Ethics* 1986.

<sup>36</sup> De George R, *Whistle blowing, Business Ethics* 1986.

<sup>37</sup> De George R, *Whistle blowing, Business Ethics* 1986.

whistleblowing but also reinforces the call for legislative reforms that can effectively safeguard whistleblowers.

## 1.8. Literature Review

This section presents a review and evaluation of the literature related to this whistleblower protection.

The paper '*Who Blows the Whistle on Corporate Fraud?*' conducts an empirical analysis of whistleblowing in large USA corporations between 1966 and 2004.<sup>38</sup> The authors emphasise that numerous whistleblowers, particularly employees, face weak incentives and significant personal risks when reporting corporate fraud. The study highlights that both reputational and monetary incentives play a crucial role in motivating individuals to blow the whistle given the high costs of whistleblowing and risks involved.<sup>39</sup> Moreover, *qui tam* statutes which offer significant financial rewards to whistleblowers are praised for effectively motivating employees to report cases of fraud.<sup>40</sup>

The variation of the cost-benefit trade-offs among different types of whistleblowers is also pointed out and the paper gives an example of journalists who often reap substantial career advantages from blowing the whistle on corporate fraud while in contrast, employees bear significant risks and often encounter serious retaliation and derive minimal gain.<sup>41</sup> Despite the paper's strengths in conducting a thorough empirical study and the study's examination of the role of monetary incentives in whistle blowing, it has notable limitations that this study seeks to address. The paper is primarily finance based and does not fully address the necessary legal reforms required to offer comprehensive protection to corporate whistleblowers.<sup>42</sup>

Furthermore, the study primarily lacks a more extensive global perspective by only focusing on the US. The paper's lack of a Kenyan perspective limits the applicability of previous legal research to the Kenyan context thus emphasising the significance of this research. By focusing

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<sup>38</sup> Dyck A, Morse A and Zingales L, '*Who Blows the Whistle on Corporate Fraud?*' 2007, 2.

<sup>39</sup> Dyck A, Morse A and Zingales L, '*Who Blows the Whistle on Corporate Fraud?*' 2007, 3.

<sup>40</sup> Dyck A, Morse A and Zingales L, '*Who Blows the Whistle on Corporate Fraud?*' 2007, 3

<sup>41</sup> Dyck A, Morse A and Zingales L, '*Who Blows the Whistle on Corporate Fraud?*' 2007, 4.

<sup>42</sup> Dyck A, Morse A and Zingales L, '*Who Blows the Whistle on Corporate Fraud?*' 2007.

on the legal gap under section 16 of the ATI Act, this research aims to complement the financial perspectives presented in the paper and seeks to advocate for a more holistic approach to safeguarding whistleblowers.

Gerry Ferguson in chapter 12 of his book '*Global Corruption: Law, Theory and Practice*,' discusses the pivotal role of whistleblowers in exposing corruption and promoting accountability in both public and private sector organisations. This is evidenced by the analysis of notable cases such as Dr. Jiang Yanyong's exposure of the Chinese government cover-up of the Severe Acute Respiratory Syndrome (SARS) and Allan Cutler's revelation of the Canadian scholarship scandal. Ferguson points out that the effectiveness of whistleblowing is dependent on the existence of robust legal frameworks that ensure that the disclosures are acted upon and protect whistleblowers from retaliation.

The chapter also highlights the concept of '*best practices*' in whistleblower protection, emphasising that effective protection requires societies that uphold the rule of law, transparency and accountability. The key areas in best practices include the scope and clarity of legislation, mechanisms of disclosure, protection of whistleblowers' identity, protection against retaliation and remedies for affected whistleblowers.<sup>43</sup>

According to Mary Ramirez in her article '*Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*,' the law is frequently manipulated by those in power in an attempt to dilute protections intended to safeguard whistleblowers. She highlights that despite legislative efforts made to improve the protection, these reforms are often weakened by political and economic interests. The article argues that the existing laws are ineffective by requiring whistleblowers to navigate complex legal landscapes thereby discouraging them from coming forward. Through a well-structured, integrated statute, Ramirez believes that an omnibus legislation would offer a more comprehensive and unified approach to whistleblower protection. The seizing of political opportunities like supportive reform coalitions could lead to more

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<sup>43</sup> Ferguson G, 'Whistleblower Protections' in '*Global Corruption: Law, Theory & Practice*,' 3ed, University of Victoria, Canada, 2018, 1008-1069

effective and durable whistleblower protection, balancing the needs of employers, society and government.<sup>44</sup>

Onyango in his article '*Whistleblowing behaviours and anti-corruption approaches in public administration in Kenya*,' highlights that whistleblowing is often neglected due to the complex dynamics within public institutions, such as autocratic leadership, parochial management and centralised decision making, which discourage transparency and foster an environment where whistleblowing is deemed to be anti-organisational. The article further states that non-existent legislation makes it risky for individuals to expose corruption, especially at a local level where cultural retaliation is common. Moreover, Onyango argues that whistleblowing is often viewed as disloyalty despite being an act of integrity and loyalty to public interest. The article points out that whistle blowing is a behavioural issue that relies on individual motivations, personal integrity and organisational citizenship rather than bureaucratic rules.<sup>45</sup>

### **1.9. Research design and Methodology**

In conducting this research, a doctrinal and comparative research methodology were employed in the gathering and analysing of relevant sources to comprehensively examine the legal framework regarding the topic under study. The doctrinal research entails a systematic and theoretical examination of legal principles, statutory provisions and case law to address the research questions posed regarding the adequacy of the legal framework surrounding the protection of corporate fraud whistleblowers. This method therefore involves both primary secondary sources of data, such as statute, case law, reviewed journals, books and articles.

In addition, the comparative aspect of this study involves an in-depth analysis of the whistleblower protection systems in the United States and the United Kingdom, which are jurisdictions renowned for their robust legal framework. By juxtaposing Kenya's legislative provisions with the best practices, the study seeks to highlight gaps, identify areas of reform and propose legislative improvements tailored to Kenya's context.

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<sup>44</sup> Ramirez M, '*Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power.*' University of Cincinnati Law Review, 76, 1, 2007.

<sup>45</sup> Onyango G, '*Whistleblowing Behaviours and Anti-corruption approaches in public administration in Kenya*,' University of Nairobi, 9, 2021.

These research methodologies ensure a thorough and nuanced understanding of the research problem, grounded in both doctrinal legal analysis and international comparative perspectives, thereby enhancing the study's contribution to legal reform.

### **1.10. Limitations**

The study relies exclusively on doctrinal analysis of legal texts, case law, and secondary sources, and does not include empirical fieldwork or interviews with practitioners, whistleblowers, or affected parties. As a result, the conclusions might not completely reflect the complexities, difficulties, or real-world effectiveness of these legal measures, which could be more thoroughly understood through direct interaction and observation of relevant stakeholders.

### **1.11. Chapter Breakdown**

This research paper is divided into the following chapters:

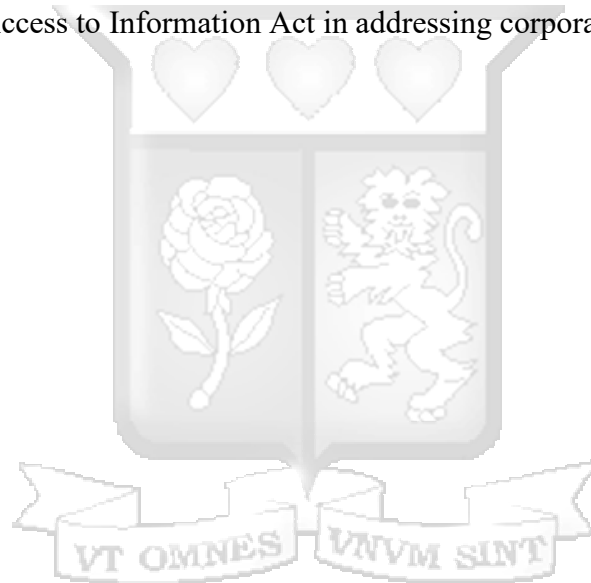
**Chapter 1: Introduction:** This chapter provides a general overview and analysis of the study. It begins with background information on the issue, leading up to the statement of the problem. The chapter also presents the study's objectives, hypothesis, research questions, theoretical framework, and methodology. Additionally, it includes a review of relevant literature, the justification for the study, and a breakdown of the chapters.

**Chapter 2: Examination of the appropriateness of the existing laws governing whistleblower protection in Kenya:** This chapter evaluates the existing legal framework for whistleblower protection in Kenya and assesses how well the current laws safeguard whistleblowers and identifies any gaps or shortcomings in providing adequate protection against retaliation or other adverse consequences.

**Chapter 3: Corporate culture and whistleblowing:** This chapter delves into the critical interplay between corporate culture and whistleblower practices, highlighting how organisational environments shape employees' willingness to report unethical behaviour. The chapter defines corporate culture within the context of whistleblowing and examines the barriers that toxic corporate culture creates with regards to the same.

**Chapter 4: Comparative analysis of Kenya’s whistleblower protection system vis-a-vis USA and UK:** This chapter conducts a comparative analysis of Kenya’s whistleblower protection system against that of the USA and UK. By examining different models and approaches used internationally, this chapter highlights similarities, differences, and best practices that could inform potential reforms in Kenya’s legal framework

**Chapter 5: Recommendations and Conclusions:** This chapter summarises the findings from the previous chapters and presents recommendations for legislative reforms to enhance whistleblower protection in Kenya. It concludes with a synthesis of key insights and suggestions for improving the effectiveness of the Access to Information Act in addressing corporate fraud and safeguarding whistleblowers.



## **CHAPTER TWO: THE STATUS QUO OF THE LEGISLATIVE FRAMEWORK ON WHISTLEBLOWING IN KENYA**

### **2.1. Introduction**

This chapter undertakes a detailed examination of the appropriateness of the current laws governing whistleblower protection in Kenya. It first carries out an analysis of the International and regional legislative framework, focusing on the United Nations Convention against Corruption (UNCAC) and The African Union Convention on Preventing and Combating Corruption (AUCPCC).

It then transitions to an analysis of the national legislative framework, exploring key provisions of the Constitution of Kenya, Access to information Act, Witness Protection Act, Anti-Corruption and the Economic crimes Act (ACECA), the Bribery Act of Kenya and the Public Officer Ethics Act (POEA). This chapter will identify the gaps and shortcomings within the current framework, highlighting areas where reforms are necessary to ensure robust legal protections for whistleblowers in Kenya.

### **2.2. International and Regional Legislative Framework**

#### **2.2.1. United Nations Convention against Corruption and The African Union Convention on Preventing and Combating Corruption**

Article 33 of the UNCAC, which Kenya signed and ratified on 9<sup>th</sup> December 2003, mandates state parties to adopt national laws that protect individuals who report corrupt practices in good faith and reasonable grounds from any unjustified treatment.<sup>46</sup> Additionally, UNCAC encourages states to simplify administrative procedures in order to facilitate public access to the competent decision-making authorities for reporting of these offences.<sup>47</sup> Moreover, it acknowledges that most cases of corruption remain undiscovered unless witnesses to such activities come forward with information. This reflects the convention's broader objectives to promote transparency, accountability and integrity.

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<sup>46</sup> Article 33, United Nations Convention against Corruption, 31 October 2003, UNTS 2349.

<sup>47</sup> United Nations Convention against Corruption 31 October 2003, UNTS 2349.

The AUCPCC, ratified by Kenya on 3<sup>rd</sup> February 2007, provides a regional framework for anti-corruption efforts across Africa.<sup>48</sup> Article 5(5) of the AUCPCC requires state parties to adopt legislative measures that protect informers and their identities in cases of corruption and related offences.<sup>49</sup> Article 5(6) further emphasises the requirement for implementation of measures that enable citizens to report these instances without the fear of reprisal.<sup>50</sup> These provisions reflect the convention's overarching objectives of transparency, accountability and the prevention and eradication of corruption.<sup>51</sup>

While both the UNCAC and the AUCPCC set out important standards for the protection of whistleblowers and the promotion of transparency, the two conventions are not self-executing meaning their effectiveness is contingent upon the actions taken by state parties to incorporate their provisions into national law. This dissertation argues that despite the ratification of these conventions in Kenya, the current existing legislative framework remains inadequate to fully comply with the requirements set out in the aforementioned conventions.

Consequently, Kenya must adopt further legislative reforms that ensure the robust protection of corporate fraud whistleblowers and encourage public reporting of corporate fraud thus enhancing the overall transparency and accountability of both public and private sectors, in line with international best practices.

The following section will carry out an analysis of the national legislative framework governing corporate fraud whistleblower protection in Kenya and their shortcomings.

## **2.3. National Legislative Framework**

### **2.3.1. The Constitution of Kenya**

As the supreme law of the Republic, the examination of the legislative framework appropriately begins with the CoK hence providing the foundation for all subsequent whistleblower protection laws in Kenya. The preamble of the CoK emphasises the commitment to nurturing and

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<sup>48</sup> The African Union Convention on Preventing and Combating Corruption, 01 July 2003.

<sup>49</sup> Article 5(5), The African Union Convention on Preventing and Combating Corruption, 01 July 2003.

<sup>50</sup> Article 5(6), The African Union Convention on Preventing and Combating Corruption, 01 July 2003.

<sup>51</sup> Article 2, The African Union Convention on Preventing and Combating Corruption, 01 July 2003.

protecting the well-being of the individual, the family, communities and the nation as a whole.<sup>52</sup> It articulates the aspirations of Kenyans for a government rooted in the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.<sup>53</sup> The fulfilment of these ideals is intrinsically linked to the protection of whistleblowers, as safeguarding those who expose corruption and wrongdoing is crucial for upholding the rule of law.

Additionally, those principles are echoed in Article 10 which enshrines human dignity, human rights and social justice as key national values and principles of governance.<sup>54</sup> Furthermore, Article 35 of the CoK mandates that every citizen has the right to access to information held by the state and other persons necessary for the protection of any right or fundamental freedom.<sup>55</sup> These provisions not only establish rights but create societal obligations to protect whistleblowers.

Relatedly, Article 50 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>56</sup> Chapter 6 of the CoK also enshrines the values of transparency, integrity and accountability.<sup>57</sup> Whistle-blower legislation would hence complement Chapter 6 by encouraging disclosure of untoward activities by persons in authority.

The CoK provides a strong foundation for whistleblower protection via its emphasis on transparency, accountability and ATI. While the CoK may not delve into specific provisions for protecting whistleblowers, it serves as a precursor for the various statutes that are discussed in the subsequent sections that elaborate more on these constitutional ideals.

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<sup>52</sup> Preamble, *Constitution of Kenya* (2010).

<sup>53</sup> Preamble, *Constitution of Kenya* (2010).

<sup>54</sup> Article 10, *Constitution of Kenya* (2010).

<sup>55</sup> Article 35, *Constitution of Kenya* (2010).

<sup>56</sup> Article 50, *Constitution of Kenya* (2010)

<sup>57</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.

### 2.3.2 Access to Information Act

The enactment of the ATI Act further implements the Constitutional rights governing whistleblower protection. The Act provides a legal framework for public and private entities to proactively disclose information<sup>58</sup> and offers protection to persons who in good faith disclose information of public interest.<sup>59</sup> While section 16 of the Act safeguards whistleblowers by ensuring they do not face penalties in their employment, contracts or other professional activities upon disclosure of confidential information that is of public interest, it requires reasonable belief in the truth of the information and penalises those who provide false disclosures.<sup>60</sup>

Section 16 covers various issues, including legal violations and corruption, and allows whistleblowers to take action against retaliation as a tort.<sup>61</sup> However, its reliance on tort law remedies inadequately addresses the immediate dangers whistleblowers may face, such as threats to personal safety and job loss, highlighting the need for a more comprehensive protection framework.

#### 2.3.2.1. *Why Tort Law remedies are insufficient in addressing the aforementioned repercussions*

A tort refers to an act or omission that results in injury or harm to another and constitutes civil wrong for which courts impose liability.<sup>62</sup> Its main aim is to restore the injured party to their original position before the harm occurred.<sup>63</sup> The main remedies under tort law include compensatory damages, injunctions, restitution and specific performance.

Whilst tort law remedies are an important mechanism for whistleblower protection, they are insufficient in addressing the full scope of risks faced by whistleblowers for the following reasons. First and foremost, tort law remedies are reactive rather than proactive due to the fact that they only come into play after the harm has occurred by imposing costs on those responsible

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<sup>58</sup> Section 3, *Access to Information Act* (2016).

<sup>59</sup> Section 2, of the *Access to Information Act* describes public interest information as information that relates to the protection of human rights, the environment, public health and safety, exposure of corruption or illegal actions and where the disclosure may assist in the protection of any right’.

<sup>60</sup> Section 16 (3), *Access to Information Act* (2016).

<sup>61</sup> Section 16 (7), *Access to Information Act* (2016).

<sup>62</sup> *Cornell Law School*, Legal Information Institute

<sup>63</sup> Daniel A, ‘*Strict Liability and the Aims of Tort Law: a doctrinal, comparative, and normative study of strict liability*,’ Maastricht University, 2020.

for injuries.<sup>64</sup> The system imposes costs on tortfeasors only after their actions have resulted in injuries.<sup>65</sup> It focuses on compensating victims post incident, meaning they do not actively prevent the occurrence of harm.

This means that whistleblowers have to endure the repercussions of retaliation before seeking redress. Consequently, the reactive nature does little to prevent or minimise the actual risks thus leaving whistleblowers vulnerable following disclosure. Instead, implementing policies that preemptively address the risks would encourage individuals to report corporate fraud misconduct, fostering a culture of accountability without fear of personal repercussions.

Furthermore, the burden of proof under tort law is placed on the plaintiff thereby meaning that the system requires whistleblowers to bear the burden of proving the harm caused to them.<sup>66</sup> The claimant must prove on a preponderance of the evidence that the defendant has injured them which can be legally and financially demanding especially after facing dismissal or harassment.<sup>67</sup> The plaintiff is required to present sufficient evidence to establish a tort by the defendant.<sup>68</sup> This requirement creates a significant barrier for whistleblowers, who may lack the resources necessary to gather compelling evidence against often well-resourced defendants, such as employers or corporations.

Additionally, tort law's focus on compensatory damages often overlooks non-monetary risks such as personal safety and psychological trauma which are often immediate concerns for whistleblowers. The system's aim in monetary compensation rather than focusing on the immediate and severe repercussions to personal safety fails to provide preventative measures that could protect whistleblowers from the consequences of their disclosure.

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<sup>64</sup> Lemann A, 'Coercive Insurance and the soul to Tort Law,' Marquette University Law School, 2016, 73.

<sup>65</sup> Lemann A, 'Coercive Insurance and the soul to Tort Law,'.

<sup>66</sup> Parisi F, Frezza G, 'Burdens of Proof in Establishing Negligence: A Comparative Law and Economics Analysis' University of Minnesota Law School, 2023, 78.

<sup>67</sup> Ripstein A, 'Theories of the Common Law of Torts,' The Stanford Encyclopaedia of Philosophy, 2022.

<sup>68</sup> Parisi F, Frezza G, 'Burdens of Proof in Establishing Negligence.'

Consequently, to create a more sufficient framework, it is essential to introduce more proactive protective measures akin to those provided under witness protection programs, that would supplement the tort law remedies that are outlined under section 16 of the ATI Act. For instance, whistleblowers who face credible threats to their personal safety could benefit from measures such as secure relocation, where they are moved to undisclosed locations so as to mitigate potential harm. Additionally, legal frameworks could provide for the issuance of new identification for whistleblowers in extreme cases thus ensuring they are shielded from harassment by the parties that are implicated by their disclosures. These measures of witness anonymity and secure identity protection are integral in safeguarding these individuals and ensure that whistleblowers can report wrongdoing without fear of retaliation.

Moreover, it is imperative that criminal penalties be imposed on entities that are found culpable of retaliating against whistleblowers. The act should encompass penalties such as fines, imprisonment or a combination thereof, that would serve as a robust deterrent underscoring the gravity with which retaliatory actions are viewed under the law. Such measures not only uphold the integrity of whistleblower protection mechanisms but also promotes a culture of transparency and accountability within organisations and institutions.

In conclusion, the reliance of section 16 of the ATI Act on tort law remedies falls short based on the reactive nature, coupled with the burden of proof on the whistleblower. These create substantial barriers to seeking redress and fail to protect against personal safety threats and psychological trauma. To foster a culture of accountability, there is an urgent need for a more robust protective framework that not only addresses retaliation after the fact but also proactively safeguards whistleblowers from harm, encouraging individuals to come forward without fear.

#### **2.3.4. Anti-Corruption and Economic crimes Act**

The ACECA was enacted in 2003 to provide for the prevention, investigation and punishment of corruption, economic crime and related offences.<sup>69</sup> Section 65 provides for the protection from any liability of informers who provide assistance or disclose information related to corruption or economic crimes to the Commission or an investigator, provided the information was given in

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<sup>69</sup> *Anti-Corruption and Economic crimes Act* (2003).

good faith.<sup>70</sup> It also safeguards the identity of whistleblowers during prosecutions or proceedings related to corruption, requiring the court to conceal their identity unless it is necessary for justice to be served.<sup>71</sup>

While the ACECA plays a key role in whistleblower protection, its exclusive focus on corruption and economic crimes limits the scope of protection as it does not extend to other forms of corporate fraud. Moreover, the Act does not define who an ‘informer’ is thus leaving it unclear whether this term actually encompasses whistleblowers and leads to the lack of awareness on who qualifies as a whistleblower. It also does not address the broader consequences that whistleblowers face hence emphasising the need for a more holistic approach, backed by stronger enforcement mechanisms and broader applicability.

### **2.3.5. Witness Protection Act**

The 2012 Witness Protection Act can be considered to implicitly provide for the protection of whistleblowers based on the fact that the definition of a ‘witness’ under section 3 can be inferred to include a whistleblower.<sup>72</sup> However, its preamble unequivocally provides that the Act’s mandate is to provide protection of witnesses in criminal cases and other proceedings, to establish a Witness Protection Agency and provide for its functions.<sup>73</sup>

The Witness Protection Act primarily focuses on the protection of witnesses in criminal cases, and its provisions do not expressly cater to the needs of whistleblowers, who may be involved in various forms of corporate fraud, not limited to criminal proceedings.

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<sup>70</sup> Section 65, *Anti-Corruption and Economic crimes Act* (2003).

<sup>71</sup> Section 65, *Anti-Corruption and Economic crimes Act* (2003).

<sup>72</sup> Section 3, *Witness Protection Act* (2012): (1) For the purposes of this Act, 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 in— (i) proceedings for an offence; or (ii) hearings or proceedings before an authority which is declared by the Minister by Order published in the Gazette to be an authority to which this paragraph applies; (b) has given or agreed to give evidence, otherwise than as mentioned in paragraph (a), in relation to the commission or possible commission of an offence against a law of Kenya; (c) has made a statement to— (i) the Commissioner of Police or a member of the Police Force; or (ii) a law enforcement agency, in relation to an offence against a law of Kenya; (d) is required to give evidence in a prosecution or inquiry held before a court, commission or tribunal outside Kenya— (i) for the purposes of any treaty or agreement to which Kenya is a party; or (ii) in circumstances prescribed by regulations made under this Act. (2) A person shall be a protected person for the purpose of this Act if that person qualifies for protection— (a) by virtue of being related to a witness; or (b) on account of a testimony given by a witness; or (c) for any other reason which the Director may consider sufficient.

<sup>73</sup> *Witness Protection Act* (2012)

### **2.3.6. Bribery Act**

Section 2 of the 2016 Bribery Act defines a whistleblower as ‘*a Person who makes a report to the Commissioner or the law enforcement agencies on acts of bribery or other forms of bribery.*’<sup>74</sup> Additionally, section 21 provides for the protection of whistleblowers in cases of bribery by prohibiting intimidation or harassment for providing information or testimony.<sup>75</sup> It further stipulates that those who retaliate against these individuals face fines of up to one million Kenya Shillings or imprisonment for up to one year.<sup>76</sup> Furthermore, whistleblowers are entitled to protection as per the Witness Protection Agency, and law enforcement agencies must implement mechanisms to safeguard their identities.<sup>77</sup> Disclosure of informants' information that leads to harassment also constitutes an offence, punishable by similar fines or imprisonment.<sup>78</sup>

Despite being a foundational framework for whistleblower protection, the Act’s limited scope and applicability with regards to its protective measure only being limited to bribery cases, this Act leaves out other forms of corporate fraud or corruption outside of bribery. This research aims to address these deficiencies by proposing that an effective whistleblower protection should be part of a comprehensive legal framework that encompasses various forms of corporate misconduct.

### **2.3.7. Public Officer Ethics Act**

Section 41 of the 2003 POEA stipulates that any individual who discloses information obtained during the execution of their duties under the Act, without a lawful excuse, commits an offence and is liable of a fine not exceeding five million shillings or to imprisonment upon conviction.<sup>79</sup>

This provision criminalises the unauthorised disclosure of information acquired in the course of official duties and thus outlaws whistleblowing. The contradictory provision creates uncertainty to public officers and discourages public officers from reporting cases of corporate fraud due to the potential legal consequences. It fosters fear and uncertainty thus undermining the efforts to promote transparency and accountability. Therefore, this Act highlights a critical gap within

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<sup>74</sup> Section 2, *Bribery Act* (2016).

<sup>75</sup> Section 21(1), *Bribery Act* (2016).

<sup>76</sup> Section 21 (2), *Bribery Act* (2016).

<sup>77</sup> Section 21 (3),(4), *Bribery Act* (2016).

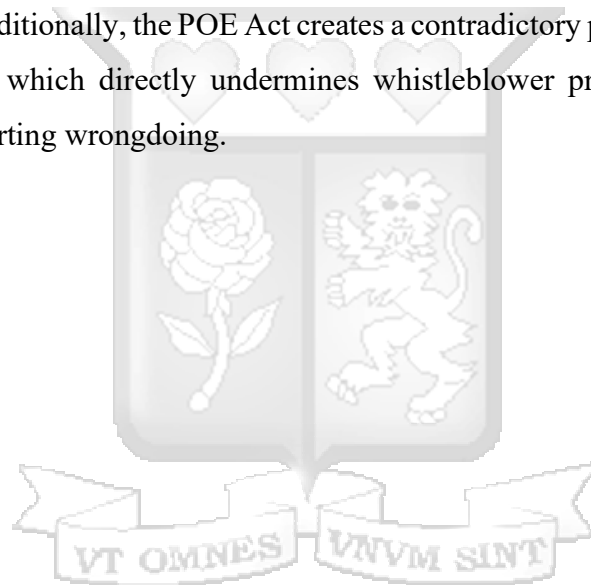
<sup>78</sup> Section 21 (5), *Bribery Act* (2016).

<sup>79</sup> Section 41, *Public Officer Ethics Act* (2003).

whistleblower protection thus advocating for a more comprehensive legislative framework to safeguard public officers who disclose information in the public interest.

## **2.4 Chapter two conclusion**

In conclusion, this chapter demonstrates that while international frameworks like the UNCAC and AUCPCC set fundamental standards for whistleblower protection, Kenya's current existing laws fall short of fully implementing those standards. Kenya's current legal framework lacks a single, comprehensive whistleblower protection law but instead has various provisions in different laws that indirectly address it, mostly in the context of corruption and economic crimes which does not cover all the various forms of corporate fraud and the full range of repercussions faced by corporate fraud whistleblowers. Additionally, the POE Act creates a contradictory provision that criminalises unauthorised disclosure, which directly undermines whistleblower protection and discourages public officers from reporting wrongdoing.



## **CHAPTER THREE: CORPORATE CULTURE AND WHISTLEBLOWER PROTECTION**

### **3.1. Introduction**

Corporate culture plays a pivotal role in determining the effectiveness of whistleblowing mechanisms and influences whether employees feel empowered or dissuaded from exposing corporate fraud. Chapter three seeks to explore the dual role of corporate culture, as both a facilitator and a barrier to whistleblowing. Within the Kenyan context, although the ATI Act provides for tort law remedies to address retaliation against whistleblowers, these remedies are inherently reactive and fail to prevent harm. Therefore, this chapter critiques the Act's failure in promoting ethical corporate environments and underscores how toxic corporate culture amplifies the risks faced by whistleblowers. By examining the interplay between corporate culture, whistleblower protections and the ATI Act, this chapter highlights the Act's shortcomings and advocates for supplementary legislative reforms that integrate ethical corporate practices to create a more robust protection framework.

The chapter is divided into three sections. The first section provides an overview of corporate culture by defining its key components and exploring its influence on organizational behaviour. The second section examines ethical corporate culture and emphasises how such environments can complement the protections offered under the ATI Act. Finally the third section focuses on corporate culture, highlighting its role in suppressing disclosure and promoting corporate fraud.

### **3.2. What is corporate culture?**

Corporate culture is often misunderstood as the mere observable elements of an organization and being synonymous with its physical environment, compliance frameworks, managerial structures or documented practices.<sup>80</sup> However, according to Benjamin Rooji and Adam Fine, organizational culture extends beyond tangible expressions to include the complexities of intangible and interpretative aspects of such corporate culture.<sup>81</sup>

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<sup>80</sup>Rooji B, Fine A, 'Toxic Corporate Culture: Assessing Organisational Processes of Deviancy,' Volume 8 Administrative Sciences Journal 23, 2018, 5.

<sup>81</sup> Rooji B, Fine A, 'Toxic Corporate Culture: Assessing Organisational Processes of Deviancy,' 5.

Additionally, drawing from Clifford Geertz corporate culture is not a material fact or something that can be captured in a static manner, it is a dynamic system of shared interpretations and meanings within a social group.<sup>82</sup> It is a collection of shared beliefs, values, customs and behaviours that shape the unique identity of an organization and guide its operations. It influences both internal dynamics such as motivation and collaboration, and external relations such as reputation and adaptability.<sup>83</sup> A strong corporate culture provides the foundation for an organization's success by fostering an environment that promotes innovation, consistency and effective performance.<sup>84</sup>

Edgar Schein model of organisational culture stipulates that corporate culture exists in three interconnected levels:<sup>85</sup> The first level are the artifacts and behaviours which are the tangible and visible manifestations of a company's culture including its physical elements, observable behaviours and codified rules. They include the published codes of ethics or employee evaluation frameworks that may reflect the organization's stated values but not necessarily its deeper cultural dynamics.<sup>86</sup>

The second level are the espoused beliefs and values which entails the organization's stated principles and beliefs that are often articulated via mission statements, formal policies and vision documents. The values outline the employee's expected conduct and how the organisation externally positions itself. They often indicate what the organization claims to prioritise but may not always align with its practices.<sup>87</sup>

The third level are the basic underlying assumptions that are deeply embedded and often unconscious beliefs and norms that form the foundation of an organisation's culture. They represent the taken for granted behaviours and shared understanding that employees rely on to navigate their work environment. Unlike artifacts or espoused values, assumptions are rarely

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<sup>82</sup> Geertz C, *The Interpretation of Cultures*, '1, Basic Books, United States, 1973, 5.

<sup>83</sup> Molenaar K, Brown H, Caile S, Smith R, *Corporate Culture: A study of firms with outstanding construction safety* ASSE Foundation Research, July 2002, 1.

<https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=f3a04726dc0e1d9b5fef6f22758b20d6d61501d6>

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<sup>84</sup> Molenaar K, Brown H, Caile S, Smith R, *Corporate Culture: A study of firms with outstanding construction*, '2.

<sup>85</sup> Schein E, *Organisational culture and Leadership*, '10 Juni Khyat Journal 7, May 2020, 2.

<sup>86</sup> Schein E, *Organisational culture and Leadership*, '3.

<sup>87</sup> Schein E, *Organisational culture and Leadership*, '3.

articulated but are evident in how employees behave and make decisions and are the most potent drivers of organisational behaviour.<sup>88</sup>

Schein emphasises that the alignment of the three levels is critical for creating a cohesive and effective organizational environment, therefore building trust, motivation and ensuring organisational success. Conversely, misalignment occurs when the visible artifacts or stated values conflict with the underlying assumptions of the organisation hence leading to reduced morale, confusion and undermines organisational integrity.<sup>89</sup>

### **3.3. Types of corporate cultures and their impact on whistleblowing**

#### **3.3.1. Ethical corporate culture: A catalyst for effective whistleblowing**

In the context of this framework, corporate culture can be categorised into two types: ethical corporate culture and unethical or toxic corporate culture.<sup>90</sup> Ethical corporate culture encompasses the ethical dimensions of an organisation's values, practices and behavioural norms that guide its members in fostering and maintaining ethical conduct.<sup>91</sup> It is a multisystem framework that emphasises the integration of ethical principles into everyday decision making and operations.<sup>92</sup> It not only supports compliance with ethical norms, but also enhances collaboration, trust and sustainable practices among stakeholders, thereby contributing to the overall integrity and success of the organisation.<sup>93</sup>

Ethical corporate culture plays a pivotal role in encouraging individuals to report misconduct without the fear of retaliation. A robust ethical culture ensures that whistleblowers perceive their organisation as supportive of transparency and accountability, thereby creating a safe environment where concerns can be raised and addressed effectively. This alignment between corporate ethics and whistleblower protection underscores the necessity for organisations to

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<sup>88</sup> Schein E, 'Organisational culture and Leadership,' 4.

<sup>89</sup> Schein E, 'Organisational culture and Leadership,' 5.

<sup>90</sup> Chadegani A, Jari A, 'Corporate Ethical Culture: Review of Literature and Introducing PP Model,' 36 Procedia Economics and Finance, 2016, 52.

<sup>91</sup> Giberson R, Resick C, 'Leadership and organisational culture: Linking CEO characteristics to cultural values,' 24(2) Journal of Business & Psychology, 2009, 123-137.

<sup>92</sup> Malik M, Nawaz M, 'The Role of Ethical Leadership in Whistleblowing Intention among Bank Employees: Mediating Role of Psychology,' 7 Review of Integrative Business and Economics Research 4, 2018, 243.

<sup>93</sup> Chadegani A, Jari A, 'Corporate Ethical Culture: Review of Literature and Introducing PP Model,' 53.

prioritise ethical culture as a foundation of safeguarding the rights of whistleblowers, promoting accountability and enhancing public trust.

Various frameworks for understanding ethical corporate culture have been identified in prior studies and they include the Corporate Ethical Virtue model (CEV) developed by Kaptein, The Center for Ethical Business Culture model (CEBC) by Jondle *et al* and the Ethical Corporate Culture model (ECC) by Schwartz's.

Kaptein's CEV model identifies eight dimensions that are essential for fostering an ethical workplace:<sup>94</sup> Clarity in establishing ethical guidelines, congruency in aligning leadership actions with ethical principles, feasibility by providing resources to support ethical behaviour, supportability through encouraging and sustaining ethical practices, transparency in ensuring the visibility and accountability of actions, discussability which is the openness to discuss ethics and sanction ability that entails fair rewards and punishments.<sup>95</sup>

These dimensions, categorised as self-regulating, self-providing and self-correcting capacities, create a strong ethical culture that supports whistleblower protection and encourages whistleblowers to confidently report misconduct without fear of reprisal. Such culture aligns with Kenya's legal framework by fostering transparency, accountability and trust.

The CEBC model by Jondle *et al* offers a holistic framework for ethical business culture by distinguishing between formal and informal cultural elements.<sup>96</sup> The formal aspects include leadership, policies, rewards and decision-making processes while the informal elements encompass norms, role models and organizational language. Moreover, the model identifies five dimensions that provide a comprehensive framework for fostering a culture of accountability in

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<sup>94</sup> Huhtala M, Kangas M, Kaptein M, 'The Shortened Corporate Ethical Virtues scale: Measurement invariance and mean differences across two occupational groups' Business Ethics: A European Review, 2018, 1-9.

<sup>95</sup> Huhtala M, Kangas M, Kaptein M, 'The Shortened Corporate Ethical Virtues scale: Measurement invariance and mean differences across two occupational groups,' 1-9.

<sup>96</sup> Jondle D, Ardichvili A, Mitchell J, 'Modelling Ethical Business Culture: Development of the Ethical Business Culture Survey and its Use to Validate the CEBC Model of Ethical Business Culture,' 119, Journal of Business Ethics 2014.

organisations, which directly supports the development of robust whistleblower protection mechanisms.<sup>97</sup>

These dimensions are mission and value driven clarity, stakeholder balance, leadership effectiveness, process integrity and a long-term perspective prioritising the best interests of clients. By embedding these principles, organisations can create an environment that encourages employees to report unethical practices, ensuring transparency and trust are upheld.

Schwartz's ECC model emphasises three core dimensions that are essential to fostering an ethical corporate environment.<sup>98</sup> The first is core ethical values that represent the shared principles such as respect, responsibility, trustworthiness and fairness which permeate an organisation's policies, processes and practices thus forming a moral foundation for decision making. Next is the Formal Ethical Programs dimension that includes institutionalised mechanisms that ensure ethical conduct is structurally and operationally supported like code of ethics, ethics training and reporting systems such as an ethics hotline. Lastly Schwartz highlights the 'tone at the top' which refers to the ethical leadership where leaders exemplify virtuous behaviour hence creating a culture where integrity and accountability are the norm.<sup>99</sup>

The ECC model offers practical insights into the establishment of corporate environments that encourage and safeguard individuals who report unethical practices. By embedding core values and providing critical infrastructure for secure and confidential whistleblowing mechanisms, the model fosters trust and accountability thus ensuring employees feel secure and supported in raising concerns.

The frameworks discussed above highlight the crucial role of an ethical corporate environment in ensuring that employees feel empowered to report misconduct without fear of retaliation. However, while the Kenyan ATI Act allows for legal remedies via tort actions, it fails to mandate organizations to adopt proactive measures such as anonymous reporting channels and

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<sup>97</sup>Jondle D, Ardichvili A, Mitchell J, 'Modelling Ethical Business Culture: Development of the Ethical Business Culture Survey and its Use to Validate the CEBC Model of Ethical Business Culture.'

<sup>98</sup>Schwartz M, 'Developing and sustaining an ethical corporate culture: The core elements' 56(1) Business Horizons, 2013, 39-50.

<sup>99</sup> Schwartz M, 'Developing and sustaining an ethical corporate culture: The core elements' 39-50.

whistleblower hotlines that align with the discussed ethical frameworks and would supplement the tort law remedies under section 16 of the Act. By failing to integrate these preventive measures, the Act exacerbates the vulnerability of potential whistleblowers and inadvertently fosters a culture where corporate fraud can thrive unchecked. The synergy between ethical corporate culture and legal provisions would enhance the effectiveness of whistleblower protection and ultimately promote transparency and accountability within organizations.

### **3.3.2. Toxic Corporate Culture: A barrier to whistleblowing**

Toxic corporate culture is an organisational environment where unethical behaviour, systemic rule-breaking and non-compliance are normalised or implicitly condoned.<sup>100</sup> This type of culture does not necessarily arise from explicit criminal intent but from broader organisational practices that either enable, obstruct or neutralise compliance.<sup>101</sup> Toxic organisational culture fosters a workplace where the pursuit of goals such as profit efficiency consistently outweighs adherence to compliance standards thus undermining accountability and transparency.

Toxic corporate culture can manifest itself in multiple ways including organisations developing norms that directly oppose legal norms such as encouraging cost cutting over compliance.<sup>102</sup> Moreover, it also develops via normalisation of deviance where the gradual erosion of standards enables harmful behaviours to become routine and are no longer perceived as violations. Toxic corporate cultures also suppress dissent through intimidation or dismissiveness, making it difficult for whistleblowers to raise concerns or access formal reporting channels.<sup>103</sup>

Additionally, toxic corporate culture could portray itself as an obstruction of compliance where organisations often lack robust reporting mechanisms that enable individuals to report wrongdoing effectively.<sup>104</sup> Consequently, employees may face significant barriers to whistle blowing and are viewed as traitors rather than protectors of the public interest.<sup>105</sup> Consequently,

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<sup>100</sup> Rooji B, Fine A, 'Toxic Corporate Culture: Assessing Organisational Processes of Deviancy,' 5.

<sup>101</sup> Rooji B, Fine A, 'Toxic Corporate Culture: Assessing Organisational Processes of Deviancy,' 5.

<sup>102</sup> Farooqi S, Abid Ghulam, Ahmed A, 'How Bad it is to be good: Impact of organisational ethical culture on whistleblowing (the ethical partners),' 12 Arab Economic and Business Journal 2, 2017,10.

<sup>103</sup> Rooji B, Fine A, 'Toxic Corporate Culture: Assessing Organisational Processes of Deviancy,' 8.

<sup>104</sup> Ocansey E, Ganu J, 'The Role of Corporate Culture in Managing Occupational Fraud.' 8, Research Journal of Finance and Accounting, 24, 2017, 104

<sup>105</sup> Rooji B, Fine A, 'Toxic Corporate Culture: Assessing Organisational Processes of Deviancy,' 6.

such organisational culture fosters an environment where employees fear retaliation, harassment and reputational damage for exposing corporate misconduct.<sup>106</sup>

Castellano *et al.* describe Managing by Objective (MBO) as a prevalent management style in most organisations that emphasise the establishment of specific, measurable goals for employees, whose performance is then evaluated based on their performance and their ability to achieve the set targets.<sup>107</sup> Additionally, Managing by Results (MBR) builds upon MBO by putting more emphasis on the final results rather than the processes or methods used to achieve them. It prioritizes performance metrics and outcomes, often disregarding the systemic or environmental factors influencing those results.<sup>108</sup>

While these systems aim to drive productivity and accountability, both systems often foster an internal competitive atmosphere due to their overemphasis on individual goal achievement.<sup>109</sup> The competitiveness undermines organisational cohesion and ethical behaviour and also contributes to fear and barriers between individuals and departments.<sup>110</sup> The intense pressure to meet goals, combined with fear of failure encourages unethical practices such as falsification of records or misrepresentation of achievements.<sup>111</sup> Furthermore, these management systems suppress transparency and accountability due to the competitive environment discouraging employees from reporting misconduct, as whistleblowing may jeopardize their performance metrics or personal rewards.

Wells Fargo, a prominent California based US bank, engaged in widespread fraudulent practices including the opening of 3.5 million unauthorised customer accounts and enrolling over 528,000 customers in online bill payment services without their consent. Initially, the bank framed these

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<sup>106</sup> Ocansey E, Ganu J, 'The Role of Corporate Culture in Managing Occupational Fraud.' 105.

<sup>107</sup> Castellano J, Rosenzweig K, Roehm H, 'How Corporate culture impacts unethical distortion of financial numbers,' 5 Management Accounting Quarterly, 4, 2004, 38.

<sup>108</sup> Castellano J, Rosenzweig K, Roehm H, 'How Corporate culture impacts unethical distortion of financial numbers,' 39.

<sup>109</sup> Castellano J, Rosenzweig K, Roehm H, 'How Corporate culture impacts unethical distortion of financial numbers,' 6

<sup>110</sup> Castellano J, Rosenzweig K, Roehm H, 'How Corporate culture impacts unethical distortion of financial numbers,' 40.

<sup>111</sup> Castellano J, Rosenzweig K, Roehm H, 'How Corporate culture impacts unethical distortion of financial numbers,' 40.

actions as isolated cases of misconduct of individual employees at local branches, resulting in the dismissal of over 5300 staff members. However, further scrutiny revealed a systemic issue that was rooted in the bank's corporate culture and performance driven incentives, which pressured employees across all levels to achieve unrealistic sales targets.<sup>112</sup>

Wells Fargo's toxic culture was characterised by an aggressive performance management system that prioritised growth and profits above all else. Employees faced relentless pressure to meet excessive sales quotas, failure to which resulted in punitive measures such as public reprimands or mandatory coaching sessions that served more as intimidation tactics with threat of termination. One of the employees recounted how the fear of losing their job led to severe stress and another employee highlighted the psychological toll of working under such a regime. The toxic environment culminated in extreme behaviours where employees resorted to fraudulent practices in order to meet their sales targets.<sup>113</sup>

This case exemplifies how toxic corporate culture can suppress dissent and thus create significant barriers to whistleblowing. Despite the widespread nature of the fraudulent practices, the corporate structure and performance driven incentives discourage employees from raising concerns about the unethical practices. Employees feared retaliation, job loss and reputational harm hence leaving them trapped in a system where reporting misconduct was not a viable option. This case underscores the critical need for organisations to foster ethical corporate cultures that prioritise transparency and accountability over short term financial gains. It also illustrates the importance of robust whistleblowing mechanisms, supported by a culture that encourages employees to report unethical practices without fear.

Toxic corporate culture is also evident in organizational environments with strict hierarchical structures whereby the power imbalances often create significant barriers to whistleblowing practices.<sup>114</sup> The hierarchical system leads to employees in a subordinate position frequently experiencing intimidation from those in positions of authority which often exacerbates feelings

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<sup>112</sup>Tayan B, 'The Wells Fargo Cross-selling Scandal,' Research paper No. 17, 2016 ,3 <[https://papers.ssm.com/sol3/papers.cfm?abstract\\_id=2879102](https://papers.ssm.com/sol3/papers.cfm?abstract_id=2879102)> on 14th January 2019.

<sup>113</sup> Tayan B, 'The Wells Fargo Cross-selling Scandal, 5.

<sup>114</sup> Schneewei C, 'Hierarchical structures in organisations: A conceptual framework,' 86 European Journal of Operational Research 1, 1995, 7.

of vulnerability and powerlessness. Employees at lower levels may perceive whistleblowing as an act of moral courage but as one fraught with professional peril. The risks associated with reporting misconduct becomes increasingly tangible when the same individuals who wield authority are complicit in unethical actions.

In such environments, unspoken expectations emerge whereby employees are meant to either ignore or condone the misconduct of their superiors. Such tacit acceptance is often enforced by social and professional pressures that further silence potential whistleblowers. The fear of retaliation or career stagnation outweighs the perceived benefits of exposing wrongdoing hence leading to a systemic suppression of reports and consequently enabling corporate fraud to flourish unchecked. Furthermore, the inability to challenge those in authority becomes a critical impediment to transparency and accountability. Thus, a hierarchy marked by power imbalances not only discourages whistleblowing but also perpetuates a cycle of corrupt malfeasance.

In the Kenyan context, toxic corporate culture is compounded by the ATI's failure to provide comprehensive protection to whistleblowers by focusing on post retaliation remedies. Section 16's focus on addressing retaliation after the fact, fails to protect whistleblowers from the systemic pressures and intimidation they may face within such unethical environments. The lack of proactive legal provisions that supplement section 16 forces employees to remain fearful of reporting misconduct, especially in hierarchical organisations where power imbalances exacerbate the risk associated with whistleblowing.

### **3.4. Chapter 3 conclusion**

This chapter underscores the critical role that corporate culture plays in shaping whistleblowing practices. It demonstrates that an ethical corporate culture, rooted in transparency, accountability and strong leadership, fosters an environment where employees feel empowered to report misconduct without fear of retaliation. Moreover, ethical corporate culture can complement the remedies under section 16 of the ATI Act to ensure comprehensive protection of whistleblowers. Conversely, toxic corporate culture exposes whistleblowers to significant risks and is elaborated by section 16's failure to incorporate proactive preventive measures that are supplementary to the tort law remedies

## CHAPTER FOUR: COMPARATIVE ANALYSIS OF KENYA'S WHISTLEBLOWER PROTECTION SYSTEM VIS A VIS THE USA AND UK SYSTEM

### 4.1. Introduction

This chapter provides a comprehensive comparative analysis of the whistleblower protection systems in Kenya vis a vis the US and UK, with a focus on the legislative and institutional frameworks. This analysis primarily relies on the US and UK systems firstly due to the fact that the Organisation for Economic Cooperation and Development recognises them as among the most comprehensive whistleblower legislative regimes in the world.<sup>115</sup>

Additionally, both systems align with the general characteristics of best practices in whistleblower protection legislation.<sup>116</sup> These include a clear and well defined scope of legislation, mechanisms that facilitate secure and effective disclosure, robust protection of identity of whistleblowers, protection measures against retaliation and comprehensive remedies to address any harm that they may suffer as a result of their disclosure.

The US system is supported by a plethora of laws that govern both the public and private sector. This includes the public sector Whistleblower Protection Act (WPA)<sup>117</sup> that is complemented by the private sector Sarbanes-Oxley Act (SOX)<sup>118</sup> and Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).<sup>119</sup> The US system also includes proactive measures, financial incentives and strong institutional support that have proven effective in encouraging and protecting whistleblowers.

Furthermore, the UK system is considered to be one of the most developed due to its adoption of a single disclosure regime, the Public Interest Disclosure Act (PIDA), for both the private and public sector.<sup>120</sup> By analysing the US and UK systems, Kenya can gain insights into best

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<sup>115</sup> Organisation for Economic Cooperation and Development, 'Whistleblower Protection', *OECD Integrity Review of Italy: Reinforcing Public Sector Integrity, Restoring Trust for Sustainable Growth*, OECD Publishing, Paris, 2013, 90.

<sup>116</sup> Organisation for Economic Cooperation and Development, 'Whistleblower Protection', *OECD Integrity Review of Italy: Reinforcing Public Sector Integrity, Restoring Trust for Sustainable Growth*, 2013, 93.

<sup>117</sup> Witness Protection Act, 1989.

<sup>118</sup> *Sarbanes-Oxley Act*, 2002.

<sup>119</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, 2008.

<sup>120</sup> Public Interest Disclosure Act, 1998.

practices & strengthen its legislative & institutional framework to better promote transparency and accountability.

Therefore, this section will be divided into two main sections, the first section will provide brief summaries of the U.S and U.K whistleblower protection laws and thereafter, section two will outline the comparisons between the two systems vis a vis the Kenyan System.

## **4.2. US whistleblower protection system**

### **4.2.1. US public sector legislation**

#### **4.2.1.1. The Whistleblower Protection Act (WPA), 1989**

The U.S whistleblower protection system is underpinned by a comprehensive set of laws that encompasses both the public and private sectors.<sup>121</sup> A cornerstone of the public sector's legislation is the WPA which explicitly outlines its main purpose under section 2 as to protect Federal employees from retaliation and prevent misconduct within government operations.<sup>122</sup> The WPA mandates that employees should not face adverse consequences upon whistleblowing and establishes the Office of Special Counsel (OSC), which specialises in handling whistleblower complaints.<sup>123</sup> Notably, the act prioritises the protection of employees over pursuing disciplinary actions against offenders which encourages whistleblowing.

The whistleblower's obligations under the WPA are limited as they are required to disclose information that falls within a specific category of wrongdoing outlined in law and to direct the disclosure to any appropriate party. They must also report the misconduct outside their usual job responsibilities or bypass standard communication channels and report to someone other than the perpetrator of the wrongdoing. Additionally, they are required to have reasonable belief of wrongdoing and have experienced adverse employment action.<sup>124</sup>

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<sup>121</sup> Ferguson G, 'Whistleblower Protections' in '*Global Corruption: Law, Theory & Practice,*'

<sup>122</sup> Section 2, Witness Protection Act, 1989.

<sup>123</sup> Section 2, Witness Protection Act, 1989.

<sup>124</sup> Ferguson G, 'Whistleblower Protections' in '*Global Corruption: Law, Theory & Practice.*' 1032

### **3.2.1.2. The Federal False Claims Act (FCA), 1863**

The FCA, also known as the Lincoln law, serves as one of the most potent whistleblower laws in the US and the government's primary weapon in combating fraud.<sup>125</sup> One of its key features is the *qui tam* provision which allows any individual or non-governmental organisation, known as *qui tam relators*, to initiate a lawsuit under seal in the US District Courts on behalf of the US government.<sup>126</sup> The FCA is arguably the most effective law given that it not only shields whistleblowers from retaliation and grants them a private right of action, but it also provides substantial financial incentives which enable successful whistleblowers to endure job loss or career setbacks.<sup>127</sup> By prioritising confidential and timely disclosures of fraud while incentivizing private legal efforts, the FCA has cultivated an extraordinary public-private partnership, yielding over \$59 billion in government recoveries since its 1986 amendments, and establishing itself as a cornerstone of whistleblower law and a model for effective fraud deterrence.<sup>128</sup>

### **4.2.2. US private sector legislation**

In addition to the public sector protection discussed above, the 2002 Sarbanes Oxley Act (SOX) and the Dodd-Frank Act offer private sector legislation with regards to the same.

#### **4.2.2.1. Sarbanes Oxley Act, 2002**

The SOX was passed as a response to the significant fraud in financial markets involving companies like Enron and Worldcom in the 1990s and 2000s. Section 806 prohibits publicly traded companies from engaging in retaliatory actions against employees who lawfully assist in investigation of fraud by Federal regulators, congress or supervisors as well as filing or contributing to legal proceedings addressing shareholder fraud.<sup>129</sup> This section follows the common internal reporting as an appropriate channel for initial whistleblowing which minimises organisational costs, facilitates the prompt investigation and correction of the corporate fraud and maintains employer-employee relationships.<sup>130</sup>

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<sup>125</sup> 'A Guide To The Federal False Claims Act,' Whistleblower Law Collaborative.

<sup>126</sup> 'The False Claims Act,' National Whistleblower Centre.

<sup>127</sup> Ferguson G, 'Whistleblower Protections' in 'Global Corruption: Law, Theory & Practice.,' 1035.

<sup>128</sup> 'A Guide To The Federal False Claims Act,' Whistleblower Law Collaborative.

<sup>129</sup> Section 806, *Sarbanes-Oxley Act*, 2002.

<sup>130</sup> Dworkin T, 'SOX and Whistleblowing' 105 Michigan Law Review 8, 2007, 1760.

SOX defines retaliation as encompassing discharging, demoting, suspending, threatening, harassing ‘or any other manner discriminating against the whistleblowers which statutorily encompasses a broader definition of prohibited retaliation than most state whistleblower laws.<sup>131</sup> Section 301 of the SOX introduces a distinctive mandate for audit committees to implement procedures that allow employees to anonymously submit concerns regarding questionable auditing or accounting matters which sets it apart from other statutes.<sup>132</sup> Additionally it requires these committees to establish systems for the proper retention and handling of such reports.<sup>133</sup>

#### **4.2.2.2. Dodd-Frank Wall Street Reform and Consumer Protection Act**

In response to the 2008 global financial crisis, the Dodd-Frank Act was enacted, and it represents a significant milestone in financial sector regulation and whistleblower protection. Section 922 offers rewards to whistleblowers who provide information that leads to enforcement actions by the Securities and Exchange Commission (SEC) resulting in sanctions over \$1 Million , including those related to violations of the Foreign Corrupt Practices Act (FCPA).<sup>134</sup> To qualify for an award, disclosures must be based on a reasonable belief that the information pertains to a breach of consumer financial protection laws or regulations enforced by the Bureau of Consumer Financial Protection.

### **4.3. UK whistleblower protection system**

#### **4.3.1. Public Interest Disclosure Act (PIDA), 1998**

The PIDA is widely regarded as one of the most effective and expensive whistleblower protection legislation globally, often serving as a model for other jurisdictions.<sup>135</sup> Its framework is particularly lauded for its three-tiered disclosure model where each tier gradually requires a higher threshold of conditions that the whistleblower must satisfy to obtain protection.<sup>136</sup> Tier one is internal disclosures to employers or Ministers of the crown, tier two is regulatory disclosures to prescribed bodies and tier three pertains to wider disclosures to the media, police,

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<sup>131</sup> Section 806, *Sarbanes-Oxley Act*, 2002.

<sup>132</sup> Section 301, *Sarbanes-Oxley Act*, 2002.

<sup>133</sup> Section 301, *Sarbanes-Oxley Act*, 2002.

<sup>134</sup> Section 922, *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 2008.

<sup>135</sup> Ferguson G, ‘Whistleblower Protections’ in ‘*Global Corruption: Law, Theory & Practice*,’ 1039.

<sup>136</sup> Organisation for Economic Cooperation and Development, ‘Whistleblower Protection,’ 96.

members of parliament and non-prescribes regulators.<sup>137</sup> This model aims to encourage whistleblowing and resolution of concerns within the organisation while providing safeguards for employees who are forced to escalate matters externally.

The PIDA stipulates that the whistleblower must have a reasonable belief that the information is substantially true, that the disclosure was made in good faith and not done for personal gain.<sup>138</sup> They must also demonstrate that the disclosure was reasonable under the circumstances.<sup>139</sup> The incremental increase in the threshold for conditions to be met by the whistleblower acknowledges the gravity of the disclosure and the potential harm to both the whistleblower and the organisation.<sup>140</sup> Additionally, the PIDA also protects whistleblower confidentiality and allows for appeals to the Employment Tribunal hence further safeguarding those who disclose

#### **4.4. Comparative analysis of the US, UK and Kenya**

The whistleblower protection systems in the US and UK exhibit significant differences from the Kenyan system with the US and UK offering far more comprehensive and structured frameworks than Kenya.

##### **4.4.1. Scope and structure of Protection**

US and UK whistleblower systems are more extensive as compared to the Kenyan system which is more limited in scope and narrowly tailored with focus on certain crimes to the exclusion of others.<sup>141</sup> The US had national laws that are specialised and tailored to different contexts, that is the WPA protects federal employees, while the Sarbanes-Oxley Act (SOX) and the Dodd-Frank Act cover corporate fraud and financial misconduct in the private sector. Additionally, the UK's PIDA provides a single, unified regime for both the public and private sectors.

Both systems prioritise comprehensive protections for all types of whistleblowers whereas in contrast, Kenya's system is more fragmented and narrowly tailored to specific public sector misconduct or corruption related issues such as the ATI Act and the ACECA. The lack of

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<sup>137</sup> Organisation for Economic Cooperation and Development, 'Whistleblower Protection,' 96.

<sup>138</sup> Ferguson G, 'Whistleblower Protections' in 'Global Corruption: Law, Theory & Practice,' 1039.

<sup>139</sup> Ferguson G, 'Whistleblower Protections' in 'Global Corruption: Law, Theory & Practice,' 1039.

<sup>140</sup> Organisation for Economic Cooperation and Development, 'Whistleblower Protection,' 96.

<sup>141</sup> Organisation for Economic Cooperation and Development, 'Whistleblower Protection,' 90.

coherence in Kenya's legislative approach creates confusion for whistleblowers, who may struggle to identify which laws apply to their situation, leading to hesitation in coming forward. Kenya should adopt a National Whistleblower protection law that is more unified and comprehensive thus enhancing clarity and efficiency.

#### **4.4.2. Burden of proof in retaliation cases.**

Under the US WPA, the burden of proof in retaliation cases lies on the employer to demonstrate that the adverse actions were unrelated to the employee's whistleblowing.<sup>142</sup> This shifts the onus from the whistleblower, who may face significant challenges in proving retaliation, to the employer, making it easier for whistleblowers to seek justice. Similarly, under the Dodd-Frank Act, whistleblowers are protected from retaliation, and the burden of proof is effectively on the employer to show that the retaliatory action was not tied to the whistleblower's disclosure.

In contrast, section 16 of Kenya's ATI Act relies on tort law where the burden of proof rests on the whistleblower who must prove on a preponderance of the evidence that the defendant caused them harm.<sup>143</sup> This places an undue burden on the whistleblower, who is already at a disadvantage due to the lack of institutional support and financial resources. Kenya should adopt a similar approach to the US and UK systems by shifting the burden of proof from the employee to the employer thus making it easier for them to seek redress

#### **4.4.3. Financial incentives.**

One of the most notable features of the US system is its inclusion of financial incentives for whistleblowers. The FCA provides substantive financial incentives, awarding whistleblowers 15% to 30% of recoveries due to civil penalties and treble damages.<sup>144</sup> Similarly, in the Dodd-Frank Act, whistleblowers are awarded a percentage of the recoveries resulting from their disclosures, creating a strong financial motivation to report wrongdoing. These financial rewards not only help whistleblowers endure potential career and financial setbacks but also encourage greater participation in holding wrongdoers accountable.<sup>145</sup>

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<sup>142</sup> Ferguson G, 'Whistleblower Protections' in *'Global Corruption: Law, Theory & Practice.'* 1032

<sup>143</sup> Section 16, Access to Information Act (2016)

<sup>144</sup> *'The False Claims Act,'* National Whistleblower Centre.

<sup>145</sup> Ferguson G, 'Whistleblower Protections' in *'Global Corruption: Law, Theory & Practice.'* 1032

In contrast, the Kenyan system lacks financial incentives to mitigate the personal and professional risks of whistleblowing. This omission significantly weakens the effectiveness of the system, as potential whistleblowers may be deterred by the risks of job loss or professional retaliation without any compensatory benefits. Kenya should consider incorporating financial incentives especially in areas that are prone to corporate fraud as a means of encouraging disclosures.

#### **4.4.4. Confidentiality and anonymity**

Confidentiality and anonymity are critical elements of an efficient whistleblower system and are key in protecting whistleblowers from retaliation. The US system, particularly under the SOX and Dodd-Frank Act, include robust confidentiality provisions and mandate secure mechanisms for anonymous reporting. Additionally, the WPA offers protections for those who disclose information under confidentiality agreements, ensuring their identities are shielded from exposure. The UK's PIDA also places a strong emphasis on protecting the confidentiality of whistleblowers, with procedures in place to allow for anonymous reporting and subsequent investigations without disclosing the identity of the whistleblower.

Conversely, Kenya's system lacks an express provision for anonymity and its confidentiality mechanisms, such as those under the Witness Protection Act, are primarily limited to criminal cases and exclude most forms of corporate fraud. This gap makes whistleblowers more vulnerable to retaliation, thus dissuading many from coming forward. Kenya should introduce more comprehensive confidentiality provisions including anonymous reporting so as to enable disclosure without fear.

#### **4.4.5. Institutional framework**

The US and UK systems are supported by dedicated, well-resourced institutions designed specifically to protect whistleblowers. More specifically, in the US, the WPA establishes the OSC which serves as an independent federal investigative and prosecutorial agency that handles disclosures within the executive branch of the federal government from federal employees and

safeguards whistleblowers from prohibited personnel practices.<sup>146</sup> The institution is well resourced and specialised, enabling them to provide robust support to whistleblowers and enforce anti-retaliation measures effectively. Similarly, the UK has the Office of Civil Service Commissioners which serves as an independent body that may receive public sector disclosures as a last resort.

In contrast, the Kenyan system lacks a specialised body and relies on general-purpose institutions like the EACC and Witness Protection Agency that lack the capacity to provide targeted whistleblower protection and have limited mandates and resource constraints. Kenya ought to establish an independent whistleblower protection agency modelled after the US's OSC or the UK's independent oversight bodies

#### **4.5. Chapter four conclusion**

In conclusion, the comparative analysis of Kenya's whistleblower protection framework vis-a-vis the systems in the US and UK reveals significant gaps in scope, institutional support and legislative coherence. While the US and UK systems demonstrate robust mechanisms, including comprehensive protections, financial incentives and confidentiality safeguards, Kenya's framework remains fragmented, narrow focused and under-resourced. These deficiencies deter whistleblowing, weaken accountability and limit the fight against corporate fraud. Drawing from the practices of the US and UK, Kenya should adopt a unified whistleblower protection law hence not only strengthening the legal and institutional framework, but also promote transparency, accountability and a culture of ethical governance

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<sup>146</sup> Witness Protection Act, 1989.

## CHAPTER FIVE: CONCLUSION

### 5.1. Introduction

This chapter consolidates the salient findings of the preceding chapters to offer a comprehensive conclusion to the research. It is divided into two main sections with section one providing a detailed summary of each of the foregoing chapters and section two presenting a robust set of recommendations based on the best practices of whistleblower protection legislation in the UK and US.

### 5.2. Summary of findings

Chapter one establishes the foundational background context for the study by highlighting the inadequacies in Kenya's whistleblower protection framework, more specifically under the ATI Act. It presents statistics on the current status quo of alleged corporate fraud in various countries and presents Kenyan case studies that highlight the inadequate legislative protection of whistleblowers in Kenya. It identifies the sole reliance on tort law remedies and the lack of proactive measures as critical challenges that hinder the effective protection of whistleblowers. The chapter also discusses the theoretical framework underpinning the study and its connection to whistleblowing.

Chapter two analysed the existing international and regional legislative framework governing whistleblower protection in Kenya. It emphasised that while these laws highlight critical standards regarding the protection of whistleblowers, the current legal framework is conversely fragmented and not unified and their limited scope and reactive nature leaves whistleblowers vulnerable to retaliation. The chapter underscores the insufficiency of tort law remedies under the ATI Act and critiques its reliance of tort law,

Chapter three explored the interplay between corporate culture and whistleblowing practices. It identified ethical culture as a catalyst for effective whistleblowing by fostering trust, transparency and accountability. On the other hand, it highlights toxic corporate culture, characterised by performance driven incentives and hierarchical suppression, was found to deter whistleblower practices and perpetuate corporate fraud. The chapter delves into the various

frameworks for understanding corporate culture which outline certain ethical characteristics that encourage employees to report unethical practices

Chapter four provides a comprehensive comparative analysis of Kenya's whistleblower protection framework vis-a-vis the US and UK systems. The two systems outline the best legislative practice with regards to whistleblower protection as they have a plethora of unified laws that include financial incentives, institutional support, reporting mechanisms and have provisions for confidentiality and anonymity. The chapter emphasises that Kenya should adopt similar practices so as to enable the effective protection of those who report unethical corporate misconduct. The chapter concludes that Kenya's fragmented legislative framework falls short of international standard and requires comprehensive reform.

### **5.3. Recommendations**

Based on the findings of this research, the following recommendations are proposed to address the legislative and institutional gaps in whistleblower protection in Kenya.

Kenya should enact a standalone whistleblower protection law that consolidates all the existing provisions and introduces comprehensive safeguards. This legislation should align with the best practices as elaborated by the US and UK legislative system. It should provide clear definitions regarding whistleblowers to eliminate ambiguities and expand protection to cover all forms of corporate misconduct. Moreover, the legislation should ensure confidentiality and anonymity of whistleblower's identity to protect them from harassment or harm. It should also establish penalties for retaliation against whistleblowers and provide mechanisms for redress.

Additionally, inspired by the US False Claims Act and Dodd-Frank act, Kenya should introduce financial incentives so as to encourage whistleblowers. These could include monetary rewards for individuals whose disclosure leads to the recovery of public funds or the successful prosecution of corporate crimes. It could also include a fund supported by fines imposed on violators to finance these incentives hence ensuring sustainability.

Furthermore, organizations should be mandated to establish robust internal reporting frameworks that allow employees to report misconduct anonymously and confidentially. The mechanism should also include whistleblower hotlines and provide feedback mechanisms to assure whistleblowers that their concerns are being addressed. Kenya should adopt the UK's tiered disclosure system that encourages internal resolution while allowing escalation to external bodies.

The Kenyan legislative system should also consider the amendment of section 16 of the ATI Act in order to enhance the legal remedies available to whistleblowers beyond tort law. The reliance on tort law remedies should be supplemented with proactive legal protections such as broader remedies that address non-economic harms, such as threats to personal safety and psychological trauma or provisional relief including injunctions to prevent retaliation while cases are investigated. In addition to that, criminal penalties for entities found guilty of retaliatory actions against whistleblowers should also be considered.

#### **5.4. Conclusion**

The recommendations outlined above provide a pathway for Kenya to establish a comprehensive and effective whistleblower protection framework. By addressing legislative gaps, fostering ethical corporate cultures and integrating best practices, these measures will not only enhance the ATI Act's effectiveness, but also contribute to a culture of transparency, accountability and good governance. Implementing these reforms is crucial to safeguarding whistleblowers and ensuring their invaluable role in combating corporate fraud is recognised and supported.

## BIBLIOGRAPHY

### BOOKS

- Ferguson G, 'Whistleblower Protections' in 'Global Corruption: Law, Theory & Practice,' 3ed, University of Victoria, Canada, 2018.
- Geertz C, 'The Interpretation of Cultures,' 1, Basic Books, United States, 1973.

### JOURNAL ARTICLES

- Dyck A, Morse A and Zingales L, 'Who Blows the Whistle on Corporate Fraud?' National Bureau of Economic Research, Massachusetts Avenue, LXV, 6, 2007.
- Ramirez M, 'Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power.' University of Cincinnati Law Review, 76, 1, 2007.
- Lemann A, 'Coercive Insurance and the soul to Tort Law,' Marquette University Law School, 2016.
- Parisi F, Frezza G, 'Burdens of Proof in Establishing Negligence: A Comparative Law and Economics Analysis' University of Minnesota Law School, 2023.
- Chadegani A, Jari A, 'Corporate Ethical Culture: Review of Literature and Introducing PP Model,' 36 Procedia Economics and Finance, 2016.
- Berle A and M Gardiner, 'The Modern Corporation and Private Property: The Military Roots of a Stakeholder Model of Corporate Governance,' 42 Seattle University Law Review, 2019.
- Heath J and Norman W, 'Stakeholder Theory. Corporate Governance and Public Management: What can the History of State-Run Enterprises Teach us in the Post-Enron era?' 53 Journal of Business Ethics ,2004.
- Millon D, 'Why is Corporate Management Obsessed with Quarterly Earning and What Should be Done About it?' 70 George Washington Law Review 890, 2002.
- Bratton W and Wachter M, 'Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation,' 34 University of Pennsylvania Carey Law School 99 . 2008.
- Gibson K, 'The Moral Basis of Stakeholder Theory.' 26 Journal of Business Ethics 3, 2000.
- Huhtala M, Kangas M, Kaptein M, 'The Shortened Corporate Ethical Virtues scale: Measurement invariance and mean differences across two occupational groups' Business Ethics: A European Review, 2018.

- Schwartz M, 'Developing and sustaining an ethical corporate culture: The core elements' 56(1) Business Horizons, 2013
- Jondle D, Ardichvili A, Mitchell J, 'Modelling Ethical Business Culture: Development of the Ethical Business Culture Survey and its Use to Validate the CEBC Model of Ethical Business Culture,' 119, Journal of Business Ethics 2014.
- Rooji B, Fine A, 'Toxic Corporate Culture: Assessing Organisational Processes of Deviancy,' Volume 8 Administrative Sciences Journal 23, 2018.
- Schein E,' Organisational culture and Leadership,' 10 Juni Khyat Journal 7, May 2020.
- Farooqi S, Abid Ghulam, Ahmed A, 'How Bad it is to be good: Impact of organisational ethical culture on whistleblowing (the ethical partners),' 12 Arab Economic and Business Journal 2, 2017.
- Ocansey E, Ganu J, 'The Role of Corporate Culture in Managing Occupational Fraud.' 8, Research Journal of Finance and Accounting, 24, 2017.
- Malik M, Nawaz M, 'The Role of Ethical Leadership in Whistleblowing Intention among Bank Employees: Mediating Role of Psychology,' 7 Review of Integrative Business and Economics Research 4, 2018
- Castellano J, Rosenzweig K, Roehm H, 'How Corporate culture impacts unethical distortion of financial numbers,' 5 Management Accounting Quarterly, 4, 2004.
- Giberson R, Resick C, 'Leadership and organisational culture: Linking CEO characteristics to cultural values,' 24(2) Journal of Business & Psychology, 2009
- Schneewei C, 'Hierarchical structures in organisations: A conceptual framework,' 86 European Journal of Operational Research 1, 1995.
- Molenaar K, Brown H, Caile S, Smith R, 'Corporate Culture: A study of firms with outstanding construction safety' ASSE Foundation Research, July 2002.
- Dworkin T, 'SOX and Whistleblowing' 105 Michigan Law Review 8, 2007.

## **REPORTS**

- Ethics and Anti-corruption Commission, 'National Ethics and Corruption Survey (NECS): Evidence From Households in Kenya,' 15th December, 2023.
- 'Report of the Judicial Commissioner on Inquiry into the Goldenberg Affair,' October 2005.
- Organisation for Economic Cooperation and Development,' Whistleblower Protection,' ,OECD.

Integrity Review of Italy: Reinforcing Public Sector Integrity, Restoring Trust for Sustainable Growth, OECD Publishing, Paris, 2013.

## RESEARCH PAPERS

Tayan B, 'The Wells Fargo Cross-selling Scandal,' Research paper No. 17, 2016 ,3 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2879102](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2879102)> on 14th January 2019.

## DISSERTATIONS AND THESIS

Mutonyi M, 'Tackling the Problem of Corporate Fraud in the Kenyan Corporations through the Lens of Corporate Governance,' Published LLM thesis, University of Nairobi, Nairobi, 2019.

Onyango G, 'Whistleblowing Behaviours and Anti-corruption approaches in public administration in Kenya,' University of Nairobi, 9, 2021.

Daniel A, 'Strict Liability and the Aims of Tort Law: a doctrinal, comparative, and normative study of strict liability,' Maastricht University, 2020.

## ONLINE SOURCES

Kiplagat R, ' Maasai Mara University Heist Whistleblower Spencer Sankale Sacked,' The Standard Media, 2021.

<<https://www.standardmedia.co.ke/rift-valley/article/2001416123/maasai-mara-university-heist-whistleblower-spencer-sankale-sacked>>, 2021.