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A REVIEW OF THE STATE OF WHISTLEBLOWER PROTECTION AND DEFAMATION LAWS IN KENYA

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Acronyms and Abbreviations

APNAC	African Parliamentarians Network Against Corruption
APRM	African Peer Review Mechanism
ARA	Asset Recovery Agency
AUCPC	African Union Convention on Prevention and Combating Corruption
CAJ	Commission on Administrative of Justice
CBK	Central Bank of Kenya
CPP	Corruption Prevention Plan
CSOs	Civil Society Organizations
DIALs	Declaration of Income, Assets and Liabilities
EACC	Ethics and Anti-Corruption Commission
FRC	Financial Reporting Centre
GDP	Gross Domestic Product
IAOs	Integrity Assurance Officers
ICPAK	Institute of Certified Public Accountants in Kenya
IEC	Information and Education Materials
KENAO	Kenya National Audit Office
NACCSC	National Anti-Corruption Campaign Steering Corruption
OAG & DOJ	Office of the Attorney-General and Department of Justice
PDA	Public Disclosures Act
PIDA	Public Interest Disclosure Act
POEA	Public Officers Ethics Act
PPARB	Public Procurement Administrative Review Board
PPRA	Public Procurement and Regulatory Authority
PSIP	Public Service Integrity Programme

POCAMLA	Proceeds of Crime and Anti-Money Laundering Act
SADC	Southern African Development Community
SADES-K	Safeguarding Democratic Space in Kenya
TI-KENYA	Transparency International Kenya
UNCAC	United Nations Convention Against Corruption
WTA	Witness Protection Agency

Executive Summary

With support from Safeguarding Democratic Space in Kenya (SADES-K), Transparency International Kenya (TI-Kenya) in partnership with African Parliamentarians Network Against Corruption (APNAC) and Mzalendo Trust commissioned a study to review the state of whistleblower protection and defamation laws in Kenya. Consistent with the existing literature, the study established the following as some of the barriers to whistleblowing behaviour: legal liability, fear of retaliation, lack of confidence in accountability mechanisms and ignorance of related procedures and processes. It was reported that in an attempt to overcome the barriers in line with provisions of international and regional instruments advancing the fight against corruption, Kenya has enacted a number of sectoral laws and institutional frameworks. However, the existing legal framework is weak and ambiguous, thereby undermining promotion of whistleblowing behaviour. This calls for the amendment of some of the principal laws in the fight against corruption such as The Leadership and Integrity Act, 2012; The Anti-Corruption and Economic Crimes Act, 2003; The Public Officer Ethics Act, 2003; The Ethics and Anti-Corruption Commission Act, 2011; The Proceeds of Crime and Anti-Money Laundering Act, 2009; The Public Procurement and Asset Disposal Act, 2015; The Bribery Act, 2016; The Access to Information Act, 2015; and the Witness Protection Act, 2006.

Whereas there have been efforts to initiate a whistleblower protection legislation, it was reported that lack of political will and the fear that some top government officers would be exposed were some of the factors that have delayed the enactment of the law. Evidence from international and regional best practices such as Australia, the United Kingdom (UK), Ghana, Nigeria and South Africa show that individuals report and expose wrongdoings even if they may face retaliation because of whistleblowing protection laws in such countries. Consequently, a comprehensive whistleblowing protection law should be enacted purposively to encourage and facilitate whistleblowing, warn against victimizing whistleblowers, protect the whistleblower from reprisal for whistleblowing, provide punishment for victimizing whistleblowers, provide for punishment for observing yet not reporting wrongdoings and, perhaps, reward persons making disclosure of illegalities or misconducts

whether in person or anonymously for public interest and other related interests. The law should also provide protection for a whistleblower whose disclosure may be false but made in good faith. The foundation for the comprehensive law in Kenya that protects a whistleblower may be drawn from the guaranteed right to freedom of expression which includes the freedom to seek, receive or impart information or ideas without interference.

In the meantime, Civil Society Organisations (CSOs) should pursue the following activities to promote whistleblowing behaviour:-

- Continuously engage citizens in the fight against corruption through advocacy programmes throughout the country;
- Create online portals and other mechanisms for anonymous reporting of unethical practices;
- Act as a source of advice for whistleblowers through legal advice centres across the country;
- Create public awareness in print and social media about the existing whistleblowing mechanisms;
- Undertake advocacy programmes on whistleblowing and implement public awareness strategies through posters, workshops, talks and newspaper advertisements;
- Engage continuously in the improvement of the content of the Whistleblower Protection Bill currently before the Parliament;
- Advocate for the Whistleblowing policy to be a broad and comprehensive framework for fight against corruption.

The study clearly shows that the enactment and implementation of whistleblowing protection laws and civil society activities to draw support from citizens would advance the fight against corruption in Kenya.

1.0 Background of the Study

Whistleblowing is understood as a practice where citizens “disclose [in good faith¹] illegal, immoral or illegitimate [activities] particularly related to government corruption, wrongdoings and misconduct”.² Disclosure exposes government corruption and has been hailed as an effective means for combating it.³ Whistleblowing behaviour take two thrusts: externally directed to oversight bodies or internally directed to internal bureaucratic oversight mechanisms.⁴ In line with the existing literature, interviewed respondents identified the following as key determinants of whistleblowing behaviour: legal liability, fear of retaliation, lack of confidence in accountability mechanisms and ignorance of related procedures and processes. Of these factors, legal liability is one of the biggest barriers to whistleblowing because defamation laws act as a deterrence to potential whistleblowers.⁵ There is always a potential threat to whistleblowers by senior officials to use court systems to silence them.

Whistleblowing is not a new development in Kenya. Mr. David Munyakei is remembered for his role as a whistleblower on the Goldenberg Scandal in early 1990s during the Kenya African National Union (KANU) regime. Working at the Central Bank of Kenya (CBK) as a clerk authorizing transactions, Mr.

1 There is a general feeling from stakeholder that the idea of good faith should be qualified. During validation workshops it was observed that there is need to develop an objective assessment to determine good faith. This is important to ensure that people do not maliciously disclose information or provide information for monetary value.

2 Xuhung Su and Xing Ni (2018) Citizens on Patrol: Understanding Public Whistleblowing against Government Corruption, *Journal of Public Administration Research And Theory*, 2018, 406–422

doi:10.1093/jopart/muy011, p.406. It is also important to distinguish between whistleblowers and informers. There is a tendency to equate whistleblowers and informers, though the latter is always viewed in bad light. David Banisar offers two distinctions between the two concepts. The first distinction lies in “the liability of the person disclosing the information. Informants are often themselves involved in some sort of unethical enterprises and are using the disclosure of information as a means to reduce their liability, either voluntarily, or due to coercion. They are in a subordinate place as regards the body or person they are disclosing to and must follow their orders of face sanctions. In comparison, whistleblowing laws do not affect the liability of those that are involved in criminal enterprises...[sic]”. The second distinction is that informants are often motivated by monetary rewards while whistleblowers do not expect any benefits even though there are anti-corruption laws that allow whistleblowers to receive some rewards for their disclosures.

3 See Johnson, R (2004). *The struggle against corruption: A comparative study*. New York, NY: Springer; Kaufmann, Daniel, Aart Kraay, and Massimo Mastruzzi (2006). *Measuring corruption: Myths and realities*. *Development Outreach*, 8:124–37.

4 Janet Near and Miceli Marcia (1996). What Makes Whistle-Blowing: Myth and Reality. *Journal of Management* 22(3):507-526.

5 Lewis (2005). Whistleblowers and the Law of Defamation: Time for Statutory Privilege?

Munyakei discovered that Goldenberg International was receiving huge sums of money for phony exports of gold and diamonds in a country without viable mines worth talking about.⁶ According to export compensation scheme, exporters qualified for a government subsidy to enable them compete favorably on the international market. With no gold and diamonds in Kenya, Mr. Munyakei was suspicious of the transactions, yet the CBK kept on compensating Goldenberg International trading in phony gold.⁷ It was later discovered that the masterminds smuggled gold from Congo and then lied to the authorities that it was being exported at a higher price. In his submission to the Goldenberg Commission of Inquiry in 2003, Mr. Munyakei narrated the events that caused him to blow the whistle. "After 1992 elections this thing became very rampant and became open theft", he said.⁸ In total, Goldenberg International was paid more than Ksh. 60 billion, twenty percent (20%) of the country's Gross Domestic Product (GDP) at the time. In 1993, Mr. Munyakei approached Hon. Paul Muite and Hon. Peter Anyang Nyong'o with evidence of the illegal transaction made by CBK to Goldenberg International. The legislators tabled the evidence in Parliament exposing mega corruption at the time. Subsequently, Mr. Munyakei was incarcerated under the Official Secrets Act.

Mr. John Githongo is known for exposing top government officials involved in the Anglo-Leasing scandal during the formative years of The National Rainbow Coalition (NARC) regime. In Christopher Ndarathi Murungaru versus John Githongo (2019), the former Minister of Internal Security Christopher Murungaru accused the former Permanent Secretary in the Office of the President John Githongo of collaborating with the media to defame him through various publications. Justice Joseph Serگون ruled that "there was no iota of evidence presented by [Githongo] and his witness linking [Murungaru] to corrupt practices. Therefore, the contents of the dossier in the absence of evidence to establish their truthfulness or justification mean that the publication is and was defamatory".⁹ Consequently, Mr. Githongo was ordered to pay Ksh. 27 million for defaming Murungaru.¹⁰

6 Billy Kahora (2008). The true story of David Munyakei: Goldenberg Whistleblower, Kwani Trust, Nairobi Kenya.

7 Ibid.

8 Government of Kenya, Goldenberg Commission of Inquiry

9 Republic of Kenya, In the High Court of Kenya at Nairobi, Civil Suit No. 446 of 2006 Dr. Christopher Murungaru (Plaintiff) versus John Githongo (Defendant).

10 Ibid.

Mr. Jacob Juma exposed scandals at the National Youth Service (NYS) and Eurobond during the formative years of the Jubilee government, and was later killed by unknown assailants¹¹ while Abraham Mutai, a blogger, was arrested for whistleblowing on corruption in Isiolo County.¹² Whereas the moves by these few individuals are laudable, according to Transparency International Kenya's, Bribery Index 2019, "a majority (87%) of participants who encountered bribery incidents while seeking service did not report it compared to 2017 where 94% stated that they did not report".¹³ Many have kept away from reporting corruption because there is a perception that nothing will be done even if they reported, while others fear victimization or simply did not know where to report.¹⁴

In attempting to overcome these barriers to whistleblowing, Kenya has put in place some measures to protect whistleblowers, such as the enactment of a Witness Protection Act, 2006 and the creation of a Witness Protection Agency in 2011. However, the Act does not have an admission criteria for whistleblowers who want to be witnesses making it a weak legal framework in providing protection to whistleblowers. This is one of the reasons why Kenya lags behind other African countries like Nigeria, Ghana, South Africa, Zambia and Rwanda that have enacted whistleblowing protection laws. The 2015 Attorney General's Task force report on the review of the policy and legal framework for whistleblowers also recommended strengthening "the legal and policy framework for anti-corruption, ethics and integrity by facilitating the enactment of the Whistleblower Protection Law."¹⁵

It is therefore timely that Kenya puts in place adequate measures to safeguard those who put their lives and livelihood at risk by disclosing corruption scandals to relevant authorities. Through support from the

11 Jacob Juma was killed by Flying Squad instructed by Jubilee, Raila claims, <https://citizentv.co.ke/news/jacob-juma-was-killed-by-flying-squad-instructed-by-jubilee-raila-claims-125783/> (accessed on 15 March 2021)

12 "Stop harassment of whistleblowers, clamp down on the corrupt", <https://www.transparency.org/en/press/stop-harassment-of-whistleblowers-clamp-down-on-the-corrupt> (accessed on 15 March 2021).

13 Transparency International- Kenya (2020) Bribery Index 2019, p.xi.

14 Interview, Director Preventive Service, Ethics and Anti-Corruption Commission, 21 January 2021.

15 Republic of Kenya (2015), Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya.

Safeguarding Democratic Space in Kenya project (SADES-K)¹⁶, Transparency International Kenya (TI-Kenya) in partnership with African Parliamentarians Network Against Corruption (APNAC) and Mzalendo Trust (Mzalendo) commissioned this study to review the existing policy, legal and institutional framework in Kenya that could pose additional risk of defamation to whistleblowers. The findings of the study will be used to engage policy makers with a view toward amending the offending laws and fast tracking the enactment of a whistleblower protection policy and law in Kenya.

¹⁶ SADES-K's seeks to advance "Kenya's ability to hold a national conversation on reforms and national cohesion, and to safeguard democratic gains, including protecting civil space, respect for human rights and observance of rule of law". As part of strengthening Kenya's governance reforms, TI-Kenya and its partners seek to promote transparency and accountability in both prosecution and adjudication of corruption and economic crimes cases and advocacy for policies and legislations that offer citizens a platform to engage in combating graft.

2.0 Objectives of the Study

Specifically, the study sought to:

- Review the policy, legal, and institutional framework, as well as the emerging jurisprudence on existing whistleblower protection and defamation mechanisms in Kenya.
- Incorporate a review of best practices from other countries' whistleblower protection mechanisms.
- Propose amendments necessary to strengthen whistleblower protection mechanism in Kenya.
- Make recommendations on what civil society organizations (CSOs) can do to ensure the laws are in place.

3.0 Methodology

Both secondary and primary data were collected in this study. Secondary data comprised published analyzed materials on whistleblowing and defamation while primary data was collected through document review and key informant interviews.

3.1 Document Review

The study team reviewed the following legal instruments on whistleblower protection:

- The United Nations Convention against Corruption (UNCAC).
- The African Union Convention on Preventing and Combating Corruption, 2003 (AUCPCC).
- Constitution of Kenya, 2010
- Anti-Corruption and Economic Crimes Act, 2003
- Ethics and Anti-Corruption Commission Act, 2011
- Leadership and Integrity Act, 2012
- Public Officer Ethics Act 2003
- Public Procurement and Asset Disposal Act 2015
- Access to Information Act 2016
- Proceeds of Crime and Anti-Money Laundering 2009
- Witness Protection Act 2006
- Bribery Act 2016
- Defamation Act 1970

The study consulted the following emerging jurisprudence on defamation:-

- Christopher Ndarathi Murungaru v John Githongo (2019) eKLR
- Henry Obwocha versus Head Link Publishers Ltd (2014) eKLR.¹⁷

¹⁷ <http://kenyalaw.org/caselaw/cases/view/108068> (Accessed on 13 April 2021).

- Samuel Ndungu Mukunya versus Nation Media Group Ltd & Another (2015) eKLR.¹⁸
- Christopher Obure versus Tom Oscar Olwaka & 3 Others Nairobi (2003).¹⁹
- Bauer Media Pty Ltd versus Wilson (No.2) (2018) VSCA 154.²⁰
- Rayney versus The state of Western Australia, (No. 9) (2017) WASC (Australian).²¹
- Nazerali versus Mitchell 2016 BCSC 81 (Canada).²²

The study reviewed the 2015 Attorney General Task Force Report on the legal, policy and institutional framework for fighting corruption in Kenya and the United Nations Convention Against Corruption (UNCAC) country Review Report recommendations on the need for whistleblower protection mechanisms. The study team also consulted the following international case studies on whistleblowing:

- The South African Supreme Court of Appeal, in City of Tshwane Metropolitan Municipality v Engineering Council of South Africa and another.
- Tshishonga v Minister of Justice and Constitutional Development and another (South Africa).
- Magagane v MTN Group Management Services (Pty) Ltd (South Africa).

3.2 Key Informant Interviews (KIIs)

Purposively sampled respondents knowledgeable on the subject participated in the study. The study team interviewed 43 respondents from government, CSOs and academia as indicated in the table below:

¹⁸ <http://kenyalaw.org/caselaw/cases/view/111144/> (Accessed on 13 April 2021).

¹⁹ <http://kenyalaw.org/caselaw/cases/view/172350/> (Accessed on 13 April 2021).

²⁰ <https://www.supremecourt.vic.gov.au/court-decisions/judgments-and-sentences/judgment-summaries/bauer-media-pty-ltd-v-wilson-no2-2018-1> (Accessed on 13 April 2021).

²¹ <https://globalfreedomofexpression.columbia.edu/cases/rayney-v-the-state-of-western-australia-no9/> (Accessed on 13 April 2021).

²² https://canadianmedialawyers.com/wpcontent/uploads/2019/05/Nazerali_v_Mitchell_2016_BCSC_810.pdf (Accessed on 13 April 2021).

ORGANIZATION	NO OF RESPONDENTS
The Ethics and Anti-Corruption Commission (EACC)	3
Office of the Attorney-General & Department of Justice (OAG&DOJ)	3
Commission on Administrative Justice (CAJ)	2
Witness Protection Agency (WTA)	1
The National Anti-Corruption Campaign Steering Committee (NACCSC)	3
Kenya National Commission on Human Rights (KNCHR)	1
Kenya Revenue Authority (KRA)	2
Justice and Legal Affairs Committee (JLAC) – National Assembly	1
Public Accounts Committee (PAC) – National Assembly	1
Justice, Human Rights and Legal Affairs Committee (Senate)	1
African Parliamentarians Network Against Corruption (APNAC)	3
National Intelligence Service	1
National Police Service	1
Financial Reporting Centre (FRC)	1
Asset Recovery Agency (ARA)	1
Mzalendo Trust	1
Transparency International-Kenya (TI-Kenya)	1
Law Society of Kenya (LSK)	3
Institute of Certified Public Accountants in Kenya (ICPAK)	1
Amnesty International- Kenya	1
United Nations Global Compact, Kenya	2
Kenya Private Sector Alliance (KEPSA)	2
HIVOS	1
ICJ-Kenya	2
Media Council of Kenya	1
University of Nairobi	3

Due to COVID-19, a majority of the respondents were interviewed on phone or through online meeting platforms like Zoom, Google Meet and Skype. As such the researcher was limited in studying facial expressions and body language.

3.3 Reliability and Validity

To ensure reliability and validity of data, the study team collected data from multiple sources. Information appearing in the documentary sources was cross-checked with that collected from key informants. Only the lead consultant was involved in data collection and this ensured consistency and accuracy of the information provided by respondents. Findings from the study were discussed at two levels. The first level validation was attended by representatives of CSOs, while the second level validation was attended by representatives of key government institutions involved in the fight against corruption.²³ The two groups met separately in order to maximally benefit from their perspectives and guarantee more honest reflections.

3.4 Data Analysis

The collected data was subjected to a thematic analysis along the four study's objectives (analytical framework) namely:-

- Review the policy, legal, and institutional framework, as well as the emerging jurisprudence on existing whistleblower protection and defamation mechanisms in Kenya,
- Propose amendments necessary to strengthen whistleblower protection mechanisms in Kenya,
- Incorporate a review of best practices from other countries' whistleblower protection mechanisms and
- Make recommendations on what Civil Society Organizations (CSOs) need to do to advance whistleblowing.

²³ The first validation workshop was held on 23rd February 2021 at Sarova Stanley Hotel, Nairobi, while the second validation workshop was held on 4th March 2021 at Hilton Hotel, Nairobi.

4.0 Key Findings

4.1 Study Area I: Review of International Instruments Supporting Whistleblowing

There are numerous international instruments that recognize the importance of whistleblowing. These include United Nations Convention Against Corruption (2005); UN Special Rapporteurs on Freedom of Opinion and Expression; Inter-American Convention against Corruption; Council of Europe Conventions; African Union Convention on Preventing and Combating Corruption; African Peer Review Mechanism; the Southern African Development Community (SADC) Protocol; Anti-Corruption Initiative for Asian-Pacific and the Organization for Economic Cooperation and Development (OECD). This section reviews the United Nations Convention Against Corruption because it is the “only legally binding universal anti-corruption instrument”.²⁴

4.1.1 United Nations Convention against Corruption 2005

The United Nations Convention against Corruption remains the most significant international instrument on whistleblowing.²⁵ Preparatory works of the Convention began in December 2000²⁶ and the final document was unveiled by the General Assembly in October 2003.²⁷ Articles 6, 13 and 39 of the Convention recommend that State Parties ensure the existence of an independent agency where the public can report corruption cases as well as receive anonymous reports from the public.²⁸ Further, Article 13 requires each State Party to “take appropriate measures within its means and in accordance with fundamental principles of its domestic law to promote the active participation of individuals and groups outside the public sector such as civil society, non-governmental organizations

24 <https://www.unodc.org/unodc/en/treaties/CAC/> (Accessed 13 April 2021).

25 UN Convention on Anti-Corruption http://www.unodc.org/unodc/en/crime_convention_corruption.html (Accessed 22 December 2020).

26 Resolution 55/61 of 4 December 2000.

27 Resolution 58/4 of 31 October 2003.

28 Articles 6, 13 and 39 of UNCAC.

and community-based organizations in the fight against corruption”.²⁹ Article 32 on the “Protection of witnesses, experts and victims” provides for protection of witnesses and experts and their relatives from retaliation including limits on disclosure of their identities”.³⁰ Another provision on whistleblowing is Article 33 on “Protection of reporting persons” which envisions countries adopting protection measures for reporting of corruption by any person. It states:

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.³¹

Indeed, the UN Office on Drugs and Crime’s “Anti-Corruption Toolkit” recognizes that Article 33 is rooted in the 2000 Convention against Transnational Organized Crime which only safeguards witnesses and experts. The Anti-Corruption Toolkit comprehensively covers whistleblowing and suggests “legal and administrative measures for reporting and protection including compensation, creation of ombudsman institutions to receive complaints, the creation of hotlines, and limits on libel and confidentiality agreements”.³² Kenya was the first country to ratify the UNCAC in Mexico in 2003. With regard to the implementation of the Convention there is some progress in respect to provisions of Article 13. First, in partnership with CSOs, anti-corruption agencies have implemented community based anti-corruption advocacy programmes in local communities aimed at enlisting citizen support in the fight against corruption.³³ Second, some progress has been made with regard to developing and formalizing anti-corruption curricula for basic and higher learning institutions.³⁴ Third, CSOs have representation in the National Anti-Corruption Campaign Steering Committee (NACCSC)

29 Article 13 of UNCAC.

30 Article 32 of UNCAC.

31 Article 33 of UNCAC.

32 United Nations Office on Drugs and Crime, *The Global Campaign Against Corruption: Un Anti-Corruption Toolkit*, 3rd Edition, September 2004. Available at http://www.unodc.org/unodc/corruption_toolkit.html (Accessed on 22 December 2020).

33 David Gathii, Director, National Anti-Corruption Campaign Steering Committee, ‘Status of the Utilization of the Private Sector in the fight against corruption in Kenya’, Paper presented at the 16th UNAFEI UNCAC Training Programme.

34 Ibid.

which affords them opportunity to fight corruption.³⁵ However, from an insider's perspective, implementation efforts have been curtailed by "inadequate financial capacity and budget constraints and inadequate capacity in terms of human resources".³⁶ Other challenges include "weak legal frameworks, staff capacity limitation, public lethargy in getting involved in the fight against corruption, negative public perception, limited technical capacity to deal with the new laws such as mutual legal assistance and no proper legislation to provide for the protection of whistleblowers".³⁷ From an outsider's view, implementation has been curtailed by "the judicial process being too slow, high political interest, weak legal framework, slow process of implementing the Auditor General's reports, lack of seriousness in sentencing corrupt individuals and lack of integrity by Kenya's elect leaders".³⁸ Other challenges include "questionable integrity of staff within the relevant institutions charged with the fight against corruption and lack of political will and hostility from the legislature and the judiciary."³⁹

4.2 Study Area II: International Best Practices on Whistleblowers Protection

Whistleblowing laws are increasingly becoming ubiquitous legal practice across the globe. International entities like Transparency International (TI) and The Committee of Ministers of the Council of Europe have recommended best practices on whistleblowing. Some countries like the UK and New Zealand have developed comprehensive laws on whistleblowing while others such as Australia, Hungary, Croatia and Macedonia (just like Kenya) have developed sectoral laws. All these cases provide an opportunity for Kenya to draw best practices to develop whistleblowing legislation.

35 Ibid.

36 Interview, Officer, EACC, 13th April 2021.

37 Interview, Officer, EACC, 12th April 2021.

38 Interview, Former Employee of TI-K, 15th December 2020.

39 Interview, Governance Expert, University of Nairobi 17th January 2021.

Conceptualizing Whistleblowing

A comprehensive conceptualization of whistleblowing is provided by the Antigua and Barbuda Freedom of Information Act. The attributes of whistleblowing include: “a serious threat to the health or safety of an individual or a serious threat to the public or the environment; the commission of a criminal offence; failure to comply with a legal obligation; a miscarriage of justice; corruption, dishonesty or serious maladministration, abuse of authority or neglect in the performance of official duty; injustice to an individual; unauthorized use of public funds”.⁴⁰

Procedures for Disclosures

The UK and New Zealand have more comprehensive whistleblowing laws outlining internal procedures that must be adhered to before any disclosure of any information to the public.

Good Faith

In line with most of the international treaties promoting whistleblowing, most whistleblower laws require that the disclosure should be done in “good faith” to avoid airing malicious or vexatious information. According to one legislator:

However, good faith presents a considerable challenge to promotion of whistleblowing practices by paying attention to the intention of the reporter as opposed to the content of the information. Some whistleblowers may have varied motives which may entail dissatisfaction with the way they might have been treated and their interests in disclosing the wrongdoing. I think the attention should be on the content as opposed to the intention of the reporter.⁴¹

Internal Disclosures

As an administrative measure, organizations in the UK, New Zealand and Canada are mandated to embrace procedures for initial handling of internal disclosures. This requirement encourages

⁴⁰ Freedom of Information Act, 47.

⁴¹ Personal interview, 17 January 2021.

employees who notice any illegal activities to report to the established authorities as well as for these authorities to handle the matter before they evolve into a bigger problem. The Public Concern at Work, a UK whistleblowing charity, describes internal disclosure as “‘absolutely at the heart’ [of the Public Interest Disclosure Act [PIDA]...] as it emphasizes the vital role of those who are in law accountable for the conduct or practice in question. It does this by ensuring that they are made aware of the concern, so they can investigate it”.⁴²

External Disclosures

As an alternative to internal disclosures, most jurisdictions with whistleblowing laws provide a platform to disclose to an external agency within the government. The evidential threshold in this form is higher than internal disclosures. It therefore follows that external disclosures must be made where an individual strongly feels that disclosing information internally may lead to the destruction of evidence or internal procedures not bearing any fruit.

External Bodies

Most jurisdictions with comprehensive whistleblowing laws allow disclosure to external bodies. In Antigua there is an Information Commissioner where whistleblowers can disclose information.⁴³ The UK law allows disclosures to legal practitioners so that whistleblowers can obtain advice on rights.

The Media

The media have been recognized by many jurisdictions as a last resort in the promotion of whistleblowing practices. The laws in Canada and the UK allow for disclosures to the media upon meeting the required standards. This requirement makes it hard for whistleblowers to obtain protection and deters public disclosures.⁴⁴

⁴² Public Concern at Work (UK), Public Interest Disclosure Act 1998 Annotated Guide, February 2003.

⁴³ Freedom of Information Act, 2004, § 47.

⁴⁴ See e.g. Council of Europe, Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information; Chapultepec Declaration; OAS Declaration of Principles on Free Expression; African Union, Declaration on Principles of Free Expression.

Protections

Protection covers confidentiality/protection of identity, anonymity, protection of employment status, compensation and legal sanctions.

Confidentiality/Protection of Identity

Most jurisdictions safeguard the identity of the whistleblower especially in the context where the employee feels that there will be retaliation in the event the information is disclosed. The Public Disclosures Act in New Zealand requires those charged with receiving protected disclosures to “use his or her best endeavors not to disclose”⁴⁵ the identity of the whistleblower except where it is “essential to the effective investigation, essential to prevent risk to public health or public safety, or it is essential having regard to the principles of national justice.”⁴⁶ In the US, the Whistleblower Protection Act disallows the Office of Special Counsel (OSC) from revealing the identity of the whistleblower except when the OSC “determines that the disclosure of the individual’s identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.”⁴⁷ However, one interviewed source reported that “confidentiality may provide a false sense of security. There are typically only a small number of people in an organization who would be aware of the disclosed wrongdoings, so it would not be difficult to identify them. In many cases, the employee will have raised concerns about potential wrongdoing already.”⁴⁸

Anonymity

Some jurisdictions mandate the body receiving anonymous disclosures to disregard them while others either recommend against or outrightly prohibit their use. A governance expert observed that “anonymity fuels mistrust and makes the powerful unaccountable. However, anonymity may be also useful in some cases, especially in Africa in countries with weak legal systems or where there are concerns about physical harm or social ostracization.”⁴⁹ The US Sarbanes-Oxley law

45 Id at 4.22

46 PDA §19.

47 5 U.S.C. § 1213(h)

48 Interview, Officer, Amnesty International Kenya, 7 January 2021.

49 Interview, Governance Expert, University of Nairobi 7 January 2021.

requires companies to establish “anonymous, confidential” hotlines. In some jurisdictions the right of anonymity is anchored within the Constitutional framework. In Sweden, the Constitution grants public employees a right of anonymity.⁵⁰

Protection of Employment Status

Tied to the protection of employment status is whether the burden of proof rests with the employer or the employee. In the UK the burden of proof rests on the duration of service of the employee. If one has been an employee for a duration exceeding one year, “then the employer must prove the dismissal had nothing to do with the disclosure; if they have been employed less than one year, the employee must prove that it did.” The redress available depends on retribution taken against the employee. Most jurisdictions provide for a return to employment if the aggrieved employee had been dismissed. In the UK, a whistleblower can seek a court injunction to be allowed to return to work within seven days of lodging the complaint. In the US and South Korea, a whistleblower can seek transfer to other comparable jobs if he/she demonstrates possible harassment at the current work station.

Compensation

Most jurisdictions provide for compensation to the whistleblower in the context where court injunctions cannot address the harm suffered. The compensation may range from lost salary to money for suffering. In the UK, a 56-year-old man was awarded £278,000 for successfully arguing that finding a job would be difficult after disclosing illegal activities of his former employer.⁵¹

Legal Sanctions

Some jurisdictions enforce criminal charges against those who take revenge against whistleblowers. For instance in Hungary, Article 257 of the Criminal Code on “Persecution of a Conveyor of an Announcement of Public Concern” requires:

⁵⁰ Freedom of the Press Act, Chapter 3.

⁵¹ Focus on Whistleblowing, id.

The person who takes a disadvantageous measure against the announcer because of an announcement of public concern, commits a misdemeanor, and shall be punishable with imprisonment of up to one year, labor in the public interest, or fine.⁵²

In the US, the Federal Criminal Code enforces a criminal penalty for those who revenge against a whistleblower who discloses any criminal act to a relevant body. It states that:

Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.⁵³

A local whistleblowing expert observed that “criminal penalty sends out a strong message that an activity is not to be tolerated. However, it also sets a very high threshold that is not likely to be used in many cases”.⁵⁴

Oversight and Enforcement

Adequate oversight is an essential requirement for whistleblowing, for example creating a single independent body to examine disclosures and cases of retribution. In the US, the Whistleblower Protection Act of 1989 established the Office of Special Counsel (OSC) as an independent body to investigate “prohibited personnel practices” including failing to take action due to whistleblowing. The OSC can recommend disciplinary action against the public body involved and forward the cases to the Merit Systems Protection Board. The law also allows the OSC to “receive reports from whistleblowers for violations of law, rules and regulations, waste of public funds, mismanagement, abuse of authority and dangers to public safety or health and forward them to the agency or to the Attorney General within 15 days if it is meritorious”.⁵⁵ In Canada, the 2005 Public Servants Disclosure

⁵² Article 257 of the Criminal Code, Hungary.

⁵³ The Federal Criminal Code, the US.

⁵⁴ Interview, Expert, 7 January 2021.

⁵⁵ The Whistleblower Protection Act of 1989, the US.

Protection Act established the Office of the Public Sector Integrity Commissioner who receives “complaints of wrongdoings, investigates wrongdoings and reports of reprisals from whistleblowers, and issues recommendations to heads of public authorities”.⁵⁶

Rewards

Some jurisdictions reward whistleblowers for disclosing wrongdoing, especially in cases of corruption. One expert observed that “such provisions are unnecessary as they erode the public interest principles of legislation”⁵⁷, while another observed that “there is a positive aspect in it as it is one of the few cases where whistleblowers are not considered to be victims”.⁵⁸ In South Korea, the Anti-Corruption Act provides that individuals disclosing corruption must receive a fifth of the amount recovered. According to the Anti-Corruption Informant Rewards and Protection Regulation in Taiwan, “if a person is convicted of a penalty of 15 years to life imprisonment or the death penalty, the person can receive New Taiwan Dollars (NT\$) 4.5 million to 6 million (US\$140,000-\$180,000)”.⁵⁹ In Nepal, the Prevention of Corruption Act provides that the anti-corruption agency can set out “an appropriate reward to the person assisting it in connection with inquires, investigation or collection of evidences in the offences punishable under this Act”.⁶⁰

Balance between National Security and Whistleblowing

In comparative justifications, the balance between national security and whistleblowing remains a challenge because the relevant agencies charged with safeguarding national security are shrouded with excessive secrecy and weak external oversight. Whistleblowing in most jurisdictions is challenged by laws on official secrets. In the US, the 1999 Intelligence Community Whistleblower Protection Act provides that employees can report to the House and Senate Intelligence Committees and the agency’s Inspector General, but the rights of intelligence employees are not protected. Indeed, there has been a rise in cases of “threats against whistleblowers who reveal information on

56 Home page: http://www.pso-bifp.gc.ca/index_e.php (Accessed 22 December 2020).

57 Interview, Expert, 7 January 2021.

58 Interview, Expert, 8 January 2021.

59 Anti-Corruption Informant Rewards and Protection Regulation, Taiwan.

60 The Prevention of Corruption Act, 2059 (2002 A.D.).

mismanagement of agencies such as the NSA and FBI and abuses by military contractors”.⁶¹ The whistleblowers are often under threat of losing security clearances which obstructs their normal work.⁶² In some jurisdictions, whistleblower laws override laws limiting protection for whistleblowers. For example, in New Zealand, the PDA overrides other laws limiting protection for whistleblowers, except in the cases of national security where the guidelines for disclosure are more limited.

4.3 Study Area III: Review of Regional Instruments Supporting Whistleblowing

There are numerous regional instruments that recognize the importance of whistleblowing. These include the African Union Convention on Preventing and Combating Corruption; African Peer Review Mechanism (APRM) and the Southern African Development Community (SADC) Protocol. This section reviews the African Union Convention on Preventing and Combating Corruption (AUCPCC) because it has generally accepted “regional standards and codes to be considered when assessing good governance in any AU member state”.⁶³

4.3.1 The African Union Convention on Preventing and Combating Corruption

The African Union Convention on Preventing and Combating Corruption (AUCPCC) came into force in June 2003. Article 5 on “Legislative and other Measures” encompasses “provisions on whistleblowing, protection of witnesses and sanctions for false reporting”. It says that state parties should “adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities”.⁶⁴ Further, Article 6 states that state parties should “adopt measures that ensure citizens report instances of corruption without fear of

61 See Project on Government Oversight, Homeland and National Security Whistleblower Protections: The Unfinished Agenda, April 28, 2005.

62 Ibid.

63 André Mbata Mangu (2012) Good governance and democratic leadership for an African Renaissance: A reflection on AU member states’ compliance with the AUCPCC, International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity, p.22.

64 Article 5 of AUCPCC. <http://www.africa-union.org/root/au/Documents/Treaties/Text/convention%20on%20Combating%20Corruption.pdf> (Accessed 22 December 2020).

consequent reprisals”.⁶⁵ However, Article 7 requires that the state parties “adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences”.⁶⁶ Indeed, “the threat of such punishment is effective deterrent to honest whistleblowers who expose the guilty because even truthful assertions may be very difficult to prove”.⁶⁷

According to the Kenyan government, its involvement “in these international anti-corruption instruments has helped the country develop appropriate legal instruments that compare well with international best practices and standards on the fight against corruption and the promotion of ethics and integrity in the public service and the society generally”.⁶⁸ In the case of whistleblower protection, this has not yet happened. A member of The Law Society of Kenya observed that- Despite the exhortations of these international instruments, there is still no effective mechanism for the legal protection of whistleblowers in Kenya. Beyond ratification governments would need to establish and strengthen institutional and legal mechanisms on the domestic fronts if the fight is to be won. The failure of Kenya to establish the required mechanism (through an enabling legislation, for instance) has led to the ineffectiveness of the whistleblowing provisions of the Conventions in the country.⁶⁹

4.4 Study Area IV: Regional Best Practices on Whistleblowing Protection

At the regional level, some countries like South Africa, Sierra Leone, Mauritius, Ghana and Nigeria have developed comprehensive policies and laws on whistleblowing.

65 Article 6, Ibid.

66 Article 7, Ibid.

67 Peter W. Schroth (2005) The African Union Convention on Preventing and Combating Corruption, *Journal of African Law*, 2005, 49 (1), p.34.

68 Republic of Kenya (2015). Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, p.34.

69 Interview, Officer, Office of Director of Public Office, 13 April 2021.

Internal Disclosures

As an administrative measure, organizations in South Africa are mandated to embrace procedures for initial handling of internal disclosures. This requirement encourages employees who notice any illegal activities to report to the established authorities as well as for these authorities to handle the matter before they evolve into a bigger problem.

External Bodies

The South African Protected Disclosures Act (PDA) provides for disclosures to the Public Protector and the Auditor General.⁷⁰

The Media

The South African PDA allows for disclosures to the media upon meeting the required standards. This requirement makes it hard for whistleblowers to obtain protection and deters public disclosures as well as promoting internal disclosures.⁷¹

Confidentiality/Protection of Identity

The South African PDA safeguards the identity of the whistleblower especially in the context where the employee feels that there will be retaliation in the event the information is disclosed. The South African review of the PDA states that “if identities were not protected, people would tend to blow the whistle anonymously.”⁷²

Anonymity

In Sierra Leone, the Anti-Corruption Agency has set up a web site for anonymous disclosures,⁷³ while the Mauritius Prevention of Corruption Act in particular admits anonymous reports.⁷⁴

⁷⁰ Section 8 (1), South African Protected Disclosures Act.

⁷¹ See e.g. Council of Europe, Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information; Chapultepec Declaration; OAS Declaration of Principles on Free Expression; African Union, Declaration on Principles of Free Expression.

⁷² South African Law Reform Commission, Protected Disclosures. Discussion Paper 107, June 2004, at 4.51.

⁷³ See <http://www.anticorruption.sl/anonymous.html>

⁷⁴ Prevention of Corruption Act, 2002 §43.

Protection of Employment Status

The South African PDA sets out the following extensive list of harms that are prohibited:

being subjected to any disciplinary action; being dismissed, suspended, demoted, harassed or intimidated; being transferred against his or her will; being refused transfer or promotion; being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage; being refused a reference or being provided with an adverse reference, from his or her employer; being denied appointment to any employment, profession or office; being threatened with any of the actions referred to paragraphs (a) to (g) above; or being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.⁷⁵

In South Africa, a dismissal following a disclosure is deemed to be an “automatically unfair dismissal”.⁷⁶

Compensation

In South Africa, compensation for lost employment is equated to what the aggrieved party would have earned during the two active years in employment.⁷⁷

Rewards

The Whistle Blowing Policy 2016 in Nigeria provides “that a whistle blower, who aids the recovery of assets stolen, may be rewarded up to five percent of the amount stolen, if the information by the whistle blower leads to the recovery of assets”⁷⁸, while Ghana implements a reward system through its Whistleblower Act.⁷⁹ An official at the Kenya Revenue Authority reported that the internal policy on whistleblowing has a provision for the whistleblower to get a percentage as an award.⁸⁰

75 Section 1 (VI), South African Protected Disclosures Act.

76 Ibid.

77 Ibid.

78 <https://www.eajournals.org/wp-content/uploads/The-Effectiveness-of-the-Whistle-Blowing-Policy-in-Combating-Corruption-in-the-Nigerian-Public-Sector.pdf> (Assessed on 22 March 2021).

79 <https://www.whistleblowers.org/whistleblower-laws-around-the-world/>(Assessed on 22 March 2021).

80 Interview, Officer, Kenya Revenue Authority, 15 January 2021.

4.5 Study Area V: Kenya's Legal Framework

It is established that currently Kenya has no overarching legislation on whistleblowing protection. Instead, provisions to safeguard persons who disclose information on corruption are scattered in the Constitution and fragmented in various laws such as The Leadership and Integrity Act No. 19 of 2012; Anti-Corruption and Economic Crimes Act No. 3 of 2003, the Public Officer Ethics Act No. 4 of 2003, Ethics and Anti-Corruption Commission Act No. 22 of 2011, Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009, Public Procurement and Asset Disposal Act No. 33 of 2015; Bribery Act No. 47 of 2016, Access to Information Act No. 31 of 2016 Witness Protection Act No. 16 of 2006.⁸¹ In 2014, the Office of Attorney General and Department of Justice in partnership with a number of stakeholders developed a Draft Whistleblower Protection Bill. Following the delay by the Cabinet to approve the Bill, two members of Parliament have sponsored near similar Bills namely Whistleblower Protection Bill and Protected Disclosure Bill.⁸² Each of these Bills is detailed below.

4.5.1 The Constitution of Kenya 2010

The spirit of whistleblower protection is present in provisions on good governance, access to information, witness protection and anticorruption reforms. Chapter Six of the Constitution remains the backbone of anti-corruption reforms. It requires State officers to be guided in their day-to-day conduct by principles of leadership and integrity, including being objective and impartial in ensuring that decisions are not influenced by corrupt practices and demonstrating the commitment to the public interest through honesty in the execution of public duties and the declaration of any personal interest that may conflict with public duties and being accountable to the public for decisions and actions.

⁸¹ Other complementing laws include: Commission on Administrative Justice Act No. 23 of 2011; National Police Service Act, No. 11 of 2011; Elections Act No. 24 of 2011; Election Offences Act, No. 37 of 2016; Public Finance Management Act No. 18 of 2012; Political Parties No. 11 of 2011; Mutual Legal Assistance Act No. 36 of 2011; County Governments Act No. 17 of 2012; National Payment Systems Act No. 39 of 2011; Public Appointments (Parliamentary Approval) Act. No. 33 of 2011; Prevention of Organized Crimes Act. No. 6 of 2010; Public Audit No. 34 of 2015 and The Penal Code (Cap 63).

⁸² Whistleblower Protection Bill was sponsored by Hon. Irene Kasalu, while the Protected Disclosure Bill was sponsored by Hon. Muriuki Njagagua.

Article 10 provides “national values and principles of governance such as rule of law, democracy, participation of the people, integrity, transparency and accountability”⁸³, while Article 232 of the Constitution of Kenya provides the values and principles of public service, including “high standards of professional ethics; accountability for administrative actions; transparency and provision to the public of timely, and accurate information”⁸⁴ which are key in the promotion of whistleblowing behaviour. With respect to access to information, Article 35 on the right to access to information states that: “(1) Every citizen has the right of access to- (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom”⁸⁵, thereby allowing citizens confidence to ask for and disclose information related to corrupt practices.

With regard to provisions of the Constitution that guarantee witness protection, Article 50(8) provides for the protection of “witnesses or vulnerable persons”⁸⁶ in a free and democratic society. Article 29 provides for the freedom and security of persons from any physical or psychological harm.⁸⁷ Article 50 (7) provides for the right to a fair hearing where “the court may allow an intermediary to assist a complainant or an accused person to communicate with the court.”⁸⁸ Furthermore, Article 48 guarantees the right to access to justice while Article 50 (9) provides for the need for Parliament to enact legislation to provide “for the protection, rights and welfare of victims of offences.”⁸⁹ However, these Constitutional provisions guarantee the “accused” more than the whistleblower.

Finally, in Article 33 (3), the Constitution appears to inform the potential whistleblowers that they must exercise due diligence before disclosing any information. The Article brings forth issues of defamation, slander and libel stating “that in exercise of [the] freedom, every person should respect

83 Article 10 of the Constitution of Kenya, 2010.

84 Article 232 of the Constitution of Kenya, 2010.

85 Article 35 of the Constitution of Kenya, 2010.

86 Article 50 (8) of the Constitution of Kenya, 2010.

87 Article 29 of the Constitution of Kenya, 2010.

88 Article 50 (7) of the Constitution of Kenya, 2010.

89 Article 50(9) of the Constitution of Kenya, 2010.

the rights and reputation of others”.⁹⁰ In other words, the disclosed information should not be malicious, vindictive, or aimed at disparaging the honour of a person.

4.5.2 The Public Officer Ethics Act (POEA), No. 4 of 2003

The Act was enacted to promote ethics and performance standards of public officers. It is anchored on the understanding that public officers hold key positions of authority and trusts and may be mandated to manage public resources. Key in promotion of whistleblowing behaviour, Part III of the Act provides for “a general code of conduct and ethics to be observed by all public officers in order to protect the people’s right to transparent, accountable, efficient and responsive service delivery”.⁹¹ Part IV requires “the Public Officer to submit a declaration of income, assets and liabilities for themselves, their spouse(s) and dependent children under the age of 18”.⁹² These declarations are submitted to a designated Responsible Commission. Thus far, in line with the provisions of this Act, “Codes of Conduct and Ethics for various institutions have been developed to govern the conduct of public officers”.⁹³ Given that there are public entities that were established by the Constitution of Kenya 2010 which have not been designated as Responsible Commissions in the POEA such as County Governments, Chapter fifteen (15) Commissions and Independent Offices, these entities are considered to be Responsible Commissions in line with Section 3 (11) of POEA and by virtue of exercising disciplinary control over the public officers under their jurisdiction.

However, Section 41 of the Act seems to undermine whistleblowing practices as it stipulates that “A person who, without lawful excuse, divulges information acquired in the course of acting under the Act is guilty of an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a terms not exceeding five years or to both”.⁹⁴ According to one legislator “the irony is that this Section of the Act discourages whistleblowing, while at the same time the rest of the Act purports to introduce and standardize the ethical code and standards of public officials”.⁹⁵

⁹⁰ Article 33 (3) of the Constitution of Kenya, 2010.

⁹¹ The Public Officer Ethics Act, p.4.

⁹² The Public Officer Ethics Act, p.12.

⁹³ Interview, Official, EACC, 21 January 2021.

⁹⁴ Section 41, The Public Officer and Ethics Act.

⁹⁵ Interview, Hon. Shakeel Shabbir, MP- Chair, APNAC, Kenya, 16 January 2021.

Other challenges include “lack of clarity among some state officers with respect to the designated Responsible Commission to which they are required to submit their declaration to; inadequate capacity by Responsible Commissions to manage the declarations submitted by public officers under their jurisdictions; absence of administrative procedures for management of Declaration of Income, Assets and Liabilities (DIALs); lack of standardized administrative action taken by the Responsible Commissions against non-compliant officers; manual submission of the declarations reducing efficiency in the analysis of the data”.⁹⁶

For this Act to promote whistleblowing behaviour, a legal expert observed that there is need to define the term “public officer” in the Act to be consistent with Constitution.⁹⁷ Whereas the Bill is silent on who a public officer is, the Constitution defines a public officer as “...any state officer, or ...any person, other than a State Officer, who holds a public office”.⁹⁸ A senior officer at the EACC observed that “an effective DIALs system would complement the fight against corruption and unethical conduct because it would serve as a deterrent to public officers and also as an investigative tool to uncover and prosecute corrupt individuals and illicit wealth accumulation.”⁹⁹ Thus, to enhance compliance with declaration of income, assets and liabilities, the officer recommended that “administrative procedures should be reviewed so that Responsible Commissions can customize the generic administrative procedures developed by the EACC for standardization of management of DIALs across the public sector”.¹⁰⁰

4.5.3 The Leadership and Integrity Act No. 9 of 2012

The Act was enacted in line with the requirements of Article 80 of the Constitution, to provide for “procedures and mechanisms for effective administration of Chapter Six of the Constitution”.¹⁰¹

⁹⁶Report on the Status of Compliance by Responsible Commissions in submission of returns to EACC and enforcement of Part IV of the Public Officer Ethics Act, 2003 on Declaration of Income, Assets and Liabilities for the year 2017, Ethics and Anti-Corruption, August 2019.

⁹⁷ Interview, Officer, Office of the Director of Public Prosecutor 18 January 2021.

⁹⁸ Article 260 of the Constitution of Kenya,.

⁹⁹ Interview, Senior Officer, EACC 14 April 2021.

¹⁰⁰ Ibid.

¹⁰¹ Leadership and Integrity Act, p.4.

The law is premised on the understanding that State officers are the custodians of the state and are thus entrusted to oversee governance processes and, therefore, their conduct should be beyond reproach. The Act details provisions on enforcing Chapter Six and gives prescriptions of the sanctions for the breach of the law. Key in promoting whistleblowing behaviour is Part II of the Act that provides “a general Leadership and Integrity Code”¹⁰² for State officers, which among other issues covers public trust, financial integrity and conflict of interest. It further outlines specific enforcement measures and penalties to ensure all State officers follow the Code.¹⁰³

The Act has two Schedules to be completed by the State officers before assuming the offices. Perhaps the most important attribute of the First Schedule on “Self-Declaration Form” are the moral and ethical questions. In the Second Schedule, the officer is expected to disclose publicly his “interests” before assuming the office. These “interests” include but are not limited to any existing contracts for “goods and services, directorships in public or private companies, and land or property in their possession”. Thus far, in line with the provisions of the Act, “Specific Leadership and Integrity Codes have been developed in a number of public entities.”¹⁰⁴ However, there are inconsistencies between some of the provisions of this Act and the Ethics and Anti-Corruption Commission Act, thereby failing to provide a solid basis for promotion of whistleblowing behaviour. For instance, Section 21(4) of the Act “on holding State officers personally liable for certain violations”¹⁰⁵ is contrary to Section 20 of the Ethics and Anti-Corruption Commission Act “on protection from personal liability, thereby shielding them from unethical practices”¹⁰⁶ such as “conflict of interest, fraud and theft of resources, misuse of power, misuse and manipulation of information”.¹⁰⁷

The Act should also clearly define and outline the mandate of each of the bodies involved in enforcing the leadership and integrity law. The Act should “clearly provide for clear sanctions against unethical

102 Leadership and Integrity Act, p.7.

103 Leadership and Integrity Act, P. 19.

104 Interview Officer, EACC, 21 January 2021.

105 Section 21(4), Leadership and Integrity Act.

106 Section 20, Ethics and Anti-Corruption Commission Act.

107 Interview, Officer, EACC, 21st January 2021.

behaviour like theft of resources, misuse of power which a State officer or a Public officer may be exposed to, or the procedures of invoking the same once it is proved that a State officer or Public officer has violated the various requirements of the Code. The sanctions would act as deterrence”.¹⁰⁸

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

This Act provides “for the prevention, investigation and punishment for corruption and economic crime”¹⁰⁹ offences. The Act details various measures to be applied in the fight against corruption including “investigation, prosecution, prevention, education, and asset recovery” which contribute to promotion of whistleblowing behaviour. The Act contains key provisions on the investigation and punishment of corruption and economic crimes such as “appointment of Special Magistrates, investigation of corruption, definition of corruption offences and the applicable penalties, compensation, recovery of improper benefits and procedures for recovery of unexplained assets”;¹¹⁰ which, if successfully implemented, could have far reaching implications on whistleblowing behaviour. According to one legislator “Section 65 of the Act “provides protection for assistants, informers, witnesses and investigators, excluding whistleblowers”.¹¹¹ In addition, the Act “does not define an informer, thereby making it difficult to determine whether it means the same thing as whistleblower”.¹¹²

Whereas this is the main Act that contains corruption offences, it does not mention the role and protection of a whistleblower or even an informer in combating corruption.¹¹³ Interviewed legal experts observed that:

To effectively promote whistleblowing, the Anti-Corruption and Economic Crimes Act should be reviewed to criminalize acts of corruption which have not been criminalized in line with requirements of regional and international anti-corruption instruments to which Kenya is a

108 Interview, Legal Practitioner, 17 January 2021.

109 Anti-Corruption and Economic Crimes Act, p.7.

110 Anti-Corruption and Economic Crimes Act, p.8

111 Section 65, Anti-Corruption and Economic Crimes Act, p.31.

112 Interview, Hon. Shakeel Shabbir, MP-Chair, APNAC, Kenya 16 January 2021.

113 Interview, Officer. EACC, 21 January 2021.

party, such as UNCAC, and AUCPCC. The acts envisaged include, inter-alia; trading in influence, abuse of position, bribery in the private sector, laundering the proceeds of corruption/economic crime and illicit enrichment. The Act should expand the scope of offences to include private sector corruption such as commercial bribery, kickbacks, corporate fraud, collusion and insider trading. Further, the Act should increase the penalties for corruption, economic crimes and related offences to act as deterrence to corrupt practices.¹¹⁴

4.5.5 Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009

The Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) establishes a solid legal framework for dealing with proceeds obtained from all crimes including corruption as well as provisions for dealing with laundering of such proceeds. Section 54 of the Act establishes the Asset Recovery Agency (ARA) for “seizure and confiscation of the proceeds of crime”.¹¹⁵ One officer at the Agency observed “that the institution is understaffed yet it is required to perform key functions in the fight against corruption, further noting that there is duplicity of roles between the agency and the EACC”.¹¹⁶ Section 21 of the POCAMLA establishes the Financial Reporting Centre (FRC) responsible “for receiving, analyzing and disseminating information on suspicious transactions and other reports and to make information collected by it available to investigative and other authorities to facilitate the administration and enforcement of the laws of Kenya”.¹¹⁷ A senior officer at FRC observed that some of the challenges that undermine the centre in the effort towards promotion of whistleblowing behaviour include non-automated government databases forcing FRC to conduct manual searches on suspected cases of corruption. Furthermore, improper data collection initiatives lead FRC not to publish any reports regarding their work.¹¹⁸

To address these challenges it was recommended that the Act should “incorporate the EACC which is the principal agency mandated to prevent and combat corruption with respect to proceeds

114 Consolidated views from legal experts, November- December 2020.

115 Section 54, Proceeds of Crime and Anti-Money Laundering Act, p.30.

116 Interview, Official, Asset Recovery Agency, 18 December 2020.

117 Section 21, Proceeds of Crime and Anti-Money Laundering Act, p.18.

118 Interview, Officer, Financial Reporting Centre, 22 December 2020.

derived from corruption and economic crime”.¹¹⁹ The Act should harmonize the functions of the Asset Recovery Agency (ARA) and the EACC to eliminate overlaps in jurisdictions and ensure seamless coordination in the fight against corruption. During a stakeholder validation workshop it was observed that to promote harmonization, constant engagements between the key entities could be useful in realizing their core mandates. It was also suggested that FRC should “adopt clear record management practices and automate filing and submissions of the forms to enhance compliance and reduce the logistical costs”.¹²⁰

4.5.6 Ethics and Anti-Corruption Commission Act No. 22 of 2011

The Act principally provides for the establishment of the Ethics and Anti-Corruption Commission, its functions and powers, and procedures for the nomination and appointment of Commissioners, Secretary and staff.¹²¹ Section 11 of the Act details some of the functions of the Commission which are critical in the promotion of whistleblowing behavior, including:

developing and promoting standards and best practices in integrity and anti-corruption; working with other State and public offices in the development and promotion of standard and best practices in integrity and anti-corruption; receiving complaints on the breach of the code of ethics by public officers; investigating and recommending to the Director of Public Prosecutions the prosecution of any acts of corruptions or violation of codes of ethics or other matter prescribed under the Act or any other law enacted pursuant to Chapter Six of the Constitution; recommending appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conducts; raising public awareness on ethical issues and educate the public on the dangers of corruption and enlisting and fostering public support in combating corruption; monitoring the practices and procedures of public bodies to detect corrupt practices and securing the revision of methods of work or procedures that may be conducive to corrupt practices.¹²²

119 Ibid.

120 Ibid,

121 Ethics and Anti-Corruption Commission Act, p. 5.

122 Section 11, Ethics and Anti-Corruption Commission Act.

The main shortcoming of this Act is that Section 20 “on protection from personal liability”¹²³ is contrary to Section 21(4) of the Leadership and Integrity Act “on holding State officers personally liable for certain violations”¹²⁴, thereby shielding them from unethical practices such as “conflict of interest, fraud and theft of resources, misuse of power, misuse and manipulation of information”.¹²⁵

The EACC should enhance its engagement with citizens so as to increase public confidence in the institution thereby promoting whistleblowing behaviour. Enhance inter-agency collaboration through continuous engagements and dialogue in the fight against corruption; this would also increase public confidence in the institution, thereby promoting whistleblowing behaviour. Finally, the mandate of EACC should be “expanded to investigate claims of discrimination by whistleblowers and award them for their disclosure if it results in significant money being returned to the Treasury; investigate the claims and make recommendations to the authorities who are required to take action, including initiating criminal proceedings; receive complaints of retaliation and can order the public body to restore the public servant and prevent any future victimization”.¹²⁶

4.5.7 Public Procurement and Asset Disposal Act No. 33 of 2015

The Act establishes the Public Procurement and Regulatory Authority (PPRA) to, among other functions, “monitor, assess and review the public procurement and asset disposal system to ensure that they are in conformity with the national values”¹²⁷ and other provisions including Article 227 of the Constitution on public procurement. In addition, Section 3 of the Act sets out the “guiding principles for public procurement and asset disposal for state organs and public entities.”¹²⁸ These principles are drawn from the Constitution. To ensure accountability, Section 41 outlines grounds for barring a person from participating in procurement or asset disposal proceedings. They include:

[Where the person] Has committed an offence under the Act; has committed an offence relating

123 Section 20, Ethics and Anti-Corruption Commission Act.

124 Section 21 (4), Leadership and Integrity Act.

125 Interview, Officer, EACC, 21 January 2021.

126 Ibid.

127 Section 8, Public Procurement and Asset Disposal Act, p.17.

128 Section 3, Public Procurement and Asset Disposal Act, p.15.

to procurement under any other Act or law of Kenya or any other jurisdictions; has breached a contract for procurement by a public entity including poor performance, has in procurement or asset disposal proceedings given false information about his or her qualifications, has breached a code of ethics issued by the authority pursuant to Section of this Act or the code of ethics of the relevant profession regulated by an Act of Parliament, has defaulted on his or her tax obligations, is guilty of corrupt or fraudulent practices, is guilty of a serious violation of fair employment laws and practices.¹²⁹

Further, Section 66 of the Act provides that a person to whom this Act applies shall not be involved in any “corrupt, coercive, obstructive, collusive or fraudulent practices or conflict of interest”¹³⁰ in any procurement or asset disposal proceedings. One officer at ICPAK observed that whereas PPRA handles administrative investigations and is able to keep the identification of the person confidential, it does not “provide strong linkage between the procurement policy decisions and operations between national and county governments, thereby laying ground for corrupt practices and by extension undermining whistleblowing behaviour at the local level”.¹³¹ Indeed as opined by one official at the Office of the Auditor General, “mismanagement of public resources at the two levels of government is rooted in weak public procurement practices”.¹³²

An additional subsection 66A should be inserted under Section 66 requiring the procuring entities to establish a register of interests to serve as a means of verifying interests and building the culture of accountability in the public procurement process. These actions would go a long way in promoting whistleblowing behaviour. Finally, based on the level of corruption seen in public procurement in Kenya there is need to empower and protect procurement professionals who highlight corruption in procurement.

129 Section 41, Public Procurement and Asset Disposal Act, p.27.

130 Section 66, Public Procurement and Asset Disposal Act, p.38.

131 Interview, Officer, ICPAK 8 January 2021. Some of the respondents at the county level observed that whistleblowing is not done in good faith. Some staff in counties are used to by political rivals of the Governor. However, they observed that counties are yet to develop legislation to support whistleblowing.

132 Interview, Officer, Office of the Auditor General 8 January 2021.

4.5.8 Bribery Act No. 47 of 2016

The Bribery Act provides a framework for the prevention, investigation and punishment of bribery.

Section 9 (1) of the Act “makes it mandatory for all public and private entities to put in place procedures appropriate to their size, scale and nature of operations, for the prevention of bribery and corruption”.¹³³ It is one of the acts that provides for whistleblowing albeit for bribery practices. However, according to a legal officer at the AG’s office “implementation [of the Act] has been hampered by lack of regulations.”¹³⁴ The office should fast track the completion, gazettelement and adoption of the Bribery Regulations and Guidelines to ensure full implementation.¹³⁵

4.5.9 Access to Information Act No. 31 of 2016

The Act provides:

a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles; provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and by other law; promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information; provide for the protection of persons who disclose information of public interest in good faith; and provide a framework to facilitate public education on the right to access information under [the] Act.¹³⁶

Section 16 of the Act protects “potential whistle blowers by providing that a person shall not be penalized in relation to employment or holding an office as a result of disclosing information that was obtained in confidence in the course of the activity”.¹³⁷ The Act specifies that the disclosure should be in the public interest and should be made to a law enforcement agency.¹³⁸ The Act goes

¹³³ Section 9 (1), Bribery Act.

¹³⁴ Legal Officer, Office of the Attorney General, during Validation Workshop, Hilton Hotel on 21 March 2021.

¹³⁵ At the time of writing this report, these regulations were due for public participation.

¹³⁶ Section 3, Access to Information Act.

¹³⁷ Section 16, Access to Information Act.

¹³⁸ Section 6 (4), Access to Information Act.

ahead to list matters that are considered of national interest to include “violation of human rights, corruption, mismanagement of funds, conflict of interest, and abuse of office”.

Although this Act provides for the rights of access to information, the study team noted several limitations. First, some related statutes like the Evidence Act, the Official Secrets Act and The National Assembly (Powers and Privileges) Act contain prohibitive requirements for the disclosure of information that is in the possession of the government. As one of the representatives of CSOs observed “it is unclear whether he or she should lodge an application directly with the Office of the President or the Speaker. Alternatively, should the application to the President in particular be sent to the Head of Civil Service, the Ministry or Government department that holds the information, with a request that it forwards it to the President for consideration for approval?”¹³⁹ Second, is the absence of a clear criteria of information that can be released and the process of appealing. These gaps give “officials a lot of latitude in the sense that they are the ones who decide the circumstances under which information could be released or withheld from the public”.¹⁴⁰ Finally, is the culture of secrecy in the public service. It was noted despite the Constitutional gains with regard to transparency in government operation still there are “difficulties of obtaining information from the government owing to reluctance by officials to release data in their possession. History suggests that the government has not always been keen to release information that is in its custody. Threats to national security are often cited to justify with-holding information”.¹⁴¹

To address these challenges, it was recommended “removal of the requirement for consent from the high-ranking public officials before they can gain access to certain categories of information. A set of rules is necessary to guide the discretion of government officials, especially with regard to threats to national security”.¹⁴² As one respondent noted “both the degree of likelihood that harm will occur, and the gravity of the harm if it does in fact occur must be assessed by the government official”.¹⁴³

139 Email communication, A Representative of Civil Society Organizations, 10 April 2021.

140 Ibid.

141 Ibid.

142 Ibid.

143 Interview, A Legal Practitioner, 17 December 2020.

An independent and impartial court or tribunal should be established to hear applications for appeal or review lodged by any dissatisfied individual seeking access to information. Finally, continuous training and re-training on ethics and international and regional best practices could be adopted to root out the culture of secrecy.

4.5.10 Witness Protection Act 2006

The Act provides “for the protection of identity or location of witnesses in criminal cases”¹⁴⁴ and related proceedings. Crucially, the Act established a Witness Protection Programme giving the Attorney General (AG) the sole responsibility for decisions on admission. Through a 2011 amendment to the Act, the Witness Protection Agency (WPA) was established as the institutional framework for “special protection on behalf of the state to witnesses who are facing potential risks or intimidation due to their cooperation with prosecution and other law enforcement agencies”.¹⁴⁵ The amendment also transferred the AG’s powers to the WPA’s director and created a Witness Protection Advisory Board (comprising the Ministers of Justice and Finance, the Director-General of the National Intelligence Service (NIS), Inspector-General of Police Service, the Director of Public Prosecution (DPP) and the chairperson of the KNCHR) to approve the unit’s budget and advice on the exercise of agency power.

Unfortunately, Section 3 of the Act only guarantees protection to witnesses. In other words, only persons agreeing to testify in court are the beneficiaries of the Act and not whistleblowers who are not within a criminal trial framework. The implication of this is that the Act does not protect whistleblowers except when they are ready to testify in a judicial process as witnesses. According to former employee of WPA, the agency faces a number of challenges including inadequate funding. Therefore, they are unable to attract highly trained personnel as well as protect witnesses. Consequently, witnesses are afraid to report because with no resources they are at risk of being discovered. WPA is also “bedeviled by corruption, lack of public

¹⁴⁴ Witness Protection Act, p.5.

¹⁴⁵ Ibid.

awareness, state control and misunderstanding of the mandate of the agency.”¹⁴⁶

The overall gaps in the legislation detailed above have provided an opportunity to agitate for an overriding whistleblowers protection regime in the country. Indeed one representative of a CSO working on anti-corruption reforms observed that “CSOs have been advocating for the enactment of a stand-alone whistleblower law arguing that it would ensure certainty, clarity and seamless application of the public information disclosure framework”.¹⁴⁷

4.5.11 Defamation Act

This is the principal legislative instrument on the tort of defamation. It sets “out types of slander that are actionable per se, that is without proof of damages. This includes, slander in respect of words calculated to besmirch a plaintiff in any office, profession, calling, trade or business held or carried on by him”.¹⁴⁸ Section 5 of the Act introduces an interesting “third exception to the general rule of actionability of slander only on proof of special damages”.¹⁴⁹ It establishes that slander of title, slander of goods or other malicious falsehood is also actionable per se. That is where the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form. Despite its existence, the Defamation Law has witnessed little usage in the Kenyan courts of law. This is partly due to:

the inability of the statute to pronounce itself authoritatively on quintessential issues in relation to the tort of defamation. For instance, in most cases sampled, judicial officers revert to United Kingdom precedent, as well as common law books to ascertain what exactly is a defamatory issue or statement. While this is not entirely wrong, it would be prudent for the statute to have a provision

146 Interview, Former Employee, Witness Protection Agency, 22 December 2020. Others include unclear witness protection procedures and poor infrastructural procedures of reaching witnesses, lack security, lack of physical facilities such as safe houses, escort services and audio gargets to protect witnesses, major courts being located in major cities limits access to legal systems by rural folk and reluctance of some witnesses to leave their homes for the witness protection program. For comprehensive report, see, Wilson Kiprono (2013) Challenges facing implementation of Witness Protection Program, A Ph.D Thesis in Sociology, Egerton University, <http://ir-library.egerton.ac.ke/jspui/bitstream/123456789/2044/1/Challenges%20facing%20implementation%20of%20witness%20protection.pdf> (accessed 06 March 2021).

147 Interview, Officer, Amnesty International-Kenya, 7 January 2020.

148 Defamation Act, (Amended version, 2012).

149 Section 5, Defamation Act.

*effectively outlining the scope and meaning of the term 'defamation' so as to provide a basis for reference. This would give guidance to the courts on the term's usage as well as provide a foundation for judicial evolution of the scope of the term along a judicial precedential line in the Kenyan Legal jurisdiction. The proviso would in essence provide a legal foundation and give judicial officers the confidence to develop jurisprudence with a firm and well established statutory basis. Also there is apparent lack of awareness on the existence of the statute. Legal practitioners and a number of judicial officers seem not to be aware that the statute actually exists and is active.*¹⁵⁰

Section 16 of the Act gives judicial officers wide discretion in arriving at the award that is payable in a successfully argued defamation action. The discretion has allowed some courts to award disproportionately high damages, thereby acting as a deterrent to potential whistleblowers. In *Christopher Ndarathi Murungaru versus John Githongo (2019)*, the former Minister of Internal Security Mr. Murungaru accused former Permanent Secretary in the Office of the President Mr. Githongo of collaborating with the media to defame him through various publications. Justice Joseph Sergon ruled "there was no iota of evidence presented by [Githongo] and his witness linking [Murungaru] to corrupt practices. Therefore the content of the dossier, in the absence of evidence to establish their truthfulness or justification, mean that the publication is and was defamatory".¹⁵¹ Consequently, Mr. Githongo was ordered to pay Ksh. 27 million for defaming Mr. Murungaru.¹⁵² This case illustrates legal liability that undermines whistleblowing practices. Following the high legal liability, it was recommended that:

the statute be reviewed in relation to remedies so as to provide clear and succinct remedies. On monetary remedies, judicial officers should retain the discretion to quantify the harm suffered in monetary terms, subject to a cap. The cap should be set by the Chief Justice, in consultation with the Minister in Charge of Affairs of Justice and the head of the body representing the interests of Lawyers. The cap should be reviewed from time to time but not later than a period of 5 years. On non-monetary remedies, the following non-monetary remedies should be allowed: order of apology,

¹⁵⁰ Interview, Legal Expert, University of Nairobi 8 January 2021; Also interview with Officer at the Office of Attorney General and Department of Justice, 19 January 2021.

¹⁵¹ Republic of Kenya, In the High Court of Kenya at Nairobi, Civil Suit No. 446 of 2006 Dr. Christopher Murungaru (Plaintiff) versus John Githongo (Defendant).

¹⁵² Ibid.

retraction of statement order, order for pull down of defamatory material.¹⁵³ This is especially in relation to defamation arising from online publications. Order of clarification and correction, judicial officers should be vested with the power to order a correction of any misstated fact in a defamatory statement. Finally, there need to ensure that protected disclosures are not considered as a slander and defamation.¹⁵⁴

4.5.12 Other Key Government Institutions Key in Whistleblowers Protection

Given that the fight against corruption requires a multi-faceted approach and coordination between relevant agencies, in theory the involvement of other institutions in addition to the EACC, ARA, FRC and WPA would be key in promoting whistleblowing behaviour. These institutions include: the Presidency¹⁵⁵, the Council of Governors,¹⁵⁶ the Office of the Director of Public Prosecutions (ODPP)¹⁵⁷; the Judiciary¹⁵⁸; the Office of the Attorney-General and Department of Justice (OAG & DOJ)¹⁵⁹; the Office of Auditor General¹⁶⁰; the National Treasury¹⁶¹; Parliament¹⁶²; the Commission on Administrative Justice (CAJ)¹⁶³; the National Anti-Corruption Campaign Steering Committee (NACCSC)¹⁶⁴; the National Intelligence Service (NIS)¹⁶⁵; the Criminal Investigations Department (CID)¹⁶⁶ and the Inspectorate of State Corporations.¹⁶⁷

153 For instance, section 13 (1) of the UK Defamation Act, 2013 gives the court power to order an operator of a website to remove a (defamatory) statement.

154 Interview, Legal Practitioner, 22 December 2021.

155 Provide necessary political will and “deep state good will” in the fight against corruption fighting corruption.

156 Offers a platform sharing of information on the performance of counties with regard to the fight against corruption. According to officers at EACC, many counties are yet to institute whistleblowing measure of lack of national legislation

157 Article 157 of the Constitution, 2010 and the Anti-Corruption and Economic Crimes Act, 2003 mandates the ODPP to prosecute criminal cases.

158 Interpret relevant laws pertaining corruption.

159 Oversee policy, legal and institutional reforms; promote economic governance and empowerment; promote the fulfillment and protection of human rights; undertake administrative management and capacity building; and enhance access to justice.

160 Auditing accounts of national and county government agencies.

161 In line with provisions of Chapter Twelve of the Constitution and the provisions of the Public Finance Management Act, 2012 (PFMA).

162 Making relevant laws for the fight against corruption.

163 Check cases of maladministration, thus likely to receive complaints from whistleblowers.

164 Conduct national wide advocacy towards eradicating corruption.

165 Responsible for security intelligence and counter-intelligence operations in the fight against corruption

166 Detect, prevent and investigate crime.

167 Report to the Auditor-General mismanagement of public resources by state corporations.

In an effort to enhance coordination and collaboration in the fight against corruption, the NACCSC works closely with the EACC “to oversee the conduct of a mass anti-corruption awareness campaign throughout the country, with a view to creating a cultural renaissance that cherishes zero tolerance to corruption and insists on transparency and accountability in the management of public affairs”.¹⁶⁸ Its strength lies in partnership with Civil Society Organizations (CSOs) and Non-State Actors (NSAs) to enhance effective anti-corruption awareness campaigns.¹⁶⁹ However, lack of formal channels of communication between the government and CSOs has rendered the partnership ineffective.¹⁷⁰ In November 2015, a Multi-Agency Team (MAT) was established bringing together the EACC, the ODPP, the DCI, the NIS, the FRC, the ARA and the KRA in an effort to fight corruption. However, according to one respondent “unhealthy tiff, suspicion and endless cycle of blame-game between the executive, the investigative arms, and the judiciary have derailed efforts to accelerate the fight against corruption in Kenya”.¹⁷¹ In an effort to strengthen and harmonize the legal framework so as to enhance efficiency in the fight against corruption, Kenya adopted National Ethics and Anti-Corruption Policy in 2018.

4.5.13 National Ethics and Anti-Corruption Policy 2018

The Policy defines and clearly sets out strategies and actions for implementation in the fight against corruption in the long-term. The overall objective of the policy is to “reduce levels and prevalence of corruption and unethical practices in Kenya by providing a comprehensive, coordinated and integrated framework for the fight against corruption and promotion of ethics”.¹⁷²

The policy identifies the strategies for enhancing the fight against corruption in Kenya. These include prevention of corruption through the process of detecting and identifying corruption and maximizing them; communication of all forms of conduct which constitute corruption; effective and fair enforcement of anti-corruption laws and competent exercise of jurisdiction by law enforcement agencies; protection of crimes; asset recovery which will make corruption unattractive by depriving those who engage in economic crime of the assets acquired corruptly; and international cooperation

¹⁶⁸ Interview, Officer, NACCSC 27 November 2020.

¹⁶⁹ Interview, Officer, NACCSC 7 January 2021.

¹⁷⁰ Interview, Mr. Elijah Ambasa, APNAC-Kenya 13 April 2021.

¹⁷¹ Interview, Officer, KHCR 13 April 2021.

¹⁷² National Ethics and Anti-Corruption Policy 2018, P.5.

which encompasses varied assistance in prevention, investigation and prosecution of offenders; specific forms of mutual legal assistance in gathering and transforming evidence for use in court; freeing seizure and confiscation of proceeds of corruption. Others include public education, training and awareness which is recognized as a critical strategy in fighting corruption and promoting ethics and integrity in society. Indeed, the policy recognizes that this strategy has “enhanced public participation in the fight against corruption through reporting of corruption and whistle blowing”.¹⁷³ Whereas the Policy provides a framework for combating corruption, according to the Justice and Legal Affairs Committee (JLAC) of the National Assembly “there is need for relevant authorities to strengthen the capacity of all agencies involved in the fight against corruption to facilitate the fast-tracking of investigation, prevention and adjudication of corruption, economic crimes cases and incidents of violations of ethics in the conduct of public affairs”.¹⁷⁴

4.5.14 Quest for Whistleblowing Protection Law

In 2014, the Office of the Attorney-General and Department of Justice together with a number of stakeholders developed a Draft Whistleblower Protection Bill. Following the delay by the cabinet to approve the Bill, two members of Parliament have sponsored near similar Bills. While they are similar, they have different names: The Whistleblower Protection Bill is sponsored by Hon. Irene Kasalu, while the Protected Disclosure Bill is sponsored by Hon. Muriuki Njagagua. The Bills have not been debated in Parliament. The Whistleblower Protection Bill is at the committee stage (pre-publication scrutiny), while the Protected Disclosure is at the Parliamentary Budget Office to ascertain whether it is a money Bill.¹⁷⁵ The draft Bills entrust the Commission on Administrative Justice (CAJ) with the enforcement of the Legislation. They also make it mandatory for private and public institutions to develop whistleblowing policies internally. Specifically the bills seek “to facilitate the disclosure and investigation of significant and serious matters in or relating to public or private bodies, which an employee or any other person believes may be unlawful, dangerous to the public or prejudicial to the public interest; enhance ethics and integrity in public and

173 National Ethics and Anti-Corruption Policy 2018, P.20.

174 Republic of Kenya (2019). Report on Sessional Paper No. 2 of 2018 on the National Ethics and Anti-Corruption Policy, Departmental Committee on Justice and Legal Affairs, The National Assembly.

175 Interview, Officer, APNAC, 15 April 2021.

private bodies, and among State officers and Public officers in the case of public bodies; protect all persons who make disclosures under the Act.”¹⁷⁶ Others include “manage, investigate, conduct and reprisals; promote public confidence in the administration of public and private bodies; enhance the procedures and mechanisms for promoting the administration of justice; provide a framework for public participation in preventing and combating improper conduct; reward persons who contribute to preventing and combating improper conduct”.¹⁷⁷ Interviewed Members of Parliament pointed out the lack of political will at the highest levels of government as the main obstacle in the enactment of a whistleblower protection legislation. If the Executive and the Presidency were interested in enacting whistleblowing protection law they would have mobilized support from MPs. However, the fear that some top government officers may be exposed has delayed clearance of the Bill at the cabinet level.¹⁷⁸

176 Ibid, p.8-9.

177 Ibid.

178 Interview, MPs members of APNAC, 18-20th January 2021. Also Officer, Office of the Director of Public Prosecution.

5.0 Conclusion

Kenya currently lacks an overarching whistleblowing protection law, yet the Constitution, anti-corruption agencies enabling Acts deal with issues bordering on whistleblowing. Thus, that Kenya needs a comprehensive whistleblowing protection system cannot be gainsaid. Evidence from international and regional best practices from countries such as Australia, New Zealand, the UK and South Africa demonstrate that individuals are ready and willing to disclose wrongdoings at the risk of retaliation because of the tight safeguards contained in whistleblowing protection laws that are in place in such countries. A recent study observes that:

a comprehensive law enacted purposively to encourage and facilitate whistle blowing, warn against victimizing whistle blowers, protect the whistle blower from reprisal for whistle blowing, punishment for victimizing whistle blowers, punishment for observing yet not reporting wrongdoings, and perhaps, reward persons making disclosure of illegalities or misconducts whether in person or anonymously for public interest and other related interests. This law should also provide protection for a whistle blower whose disclosure may be false but understandable under the circumstances.¹⁷⁹

The foundation for the comprehensive law in Kenya that protects whistleblowers may be drawn from the guaranteed right to freedom of expression including the right to seek, receive and share information and ideas without interference. There are two bills at preliminary stages in parliament that are largely modeled along the principles of international and regional best practices mainly comprehensiveness in scope, disclosure procedures, protection against retribution, protection of free speech, confidentiality, outside agency, waiver of liability, no sanctions for misguided or false reporting, compensation and rewards. Hopefully, once enacted and subsequently implemented the outcome of disclosures under it will deter potential law breakers.

¹⁷⁹ Antonia Omosefe Ugowe, Akintunde Adidemi Adebayo. 'The Role of Whistleblowing for Public Interest and the Protection of Whistle blower in Nigeria', Commonwealth Law, Bulletin, 2019.

6.0 Recommendations

For government:

1. Enact a whistleblower protection legislation for the meantime, CSOs could pursue comprehensive protection of whistleblowers.
2. Review the Witness Protection Act 2006 and extend protection to whistleblowers under the Act.
3. Review the Public Officer Ethics Act (POEA), No. 4 of 2003 and amend Section 41 of the Act which undermines whistle blowing.
4. Review section 65 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 to provide protection for whistle blowers.
5. Fasttrack the enactment of the False Claims Bill to provide an avenue for members of the public who have information needed to investigate, report, and institute legal proceedings in civil courts to recover assets lost through false claims.
6. Increase funding to the Witness Protection Agency to strengthen their capacity to provide protection to witnesses. Demonstrated propoer protection of witnesses is crucial strategy to encourage whistleblowing behavior.

For Civil Society Organizations:

1. Continuously engage citizens in the fight against corruption through advocacy programmes throughout the country.
2. Create portals for anonymous reporting of unethical practices on their websites to facilitate whistle-blowing.
3. Establish legal advice centers to provide legal advice to whistleblowers.
4. Undertake public awareness activities on the existing whistleblowing mechanisms though print and social media.
5. Develop advocacy programmes and undertake public awareness on through posters, workshops,

talks and newspaper advertisements to encourage a culture of whistleblowing.

6. Continuously engage in the improvement of the content of the Whistleblower Protection Bill currently before the Parliament with a view to ensuring the bill(s) incorporate international principles on whistleblower legislation.

For the private sector:

1. Put in place whistleblower policies and provide for whistleblower and mechanisms procedures to encourage whistleblowing within private sector organizations.
2. Participate and support the advocacy initiatives led by civil society organisations aimed at pushing for enactment of whistleblower protection legislation in Kenya.

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