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Consumer Law and Policy in Kenya

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Abstract
This contribution seeks to examine the consumer protection law and policy in Kenya with a view to understand how consumer issues, such as product safety and product liability, are addressed as well as the remedies for defective goods. It also seeks to understand the available provisions on the safety standards of consumer products, such as mobile phones, by highlighting the consumer issues that arise for mobile phone users with particular reference to the services provided by mobile network operators (MNOs) – i.e., the financial services and products – and how the consumer protection regime has addressed them. It will conclude by examining how the Kenyan consumer law has manifested itself, either by its influence on other states' consumer laws and policies or the way(s) in which its own laws have been influenced by foreign and supranational consumer laws. References will be made with regard to the influence by the European Commission (EC) Product Safety Directive, the EC Product Liability Directive, the EC Consumer Sales Directive and the EC Unfair Commercial Practices Directive. Furthermore, this contribution will highlight the challenges encountered with respect to the achievement of a consumer protection regime in Kenya, as a result of the fragmentation of the law and policies.

Keywords Consumer protection · Product liability · Product safety · Kenya · Mobile financial services

Consumer Law, in Kenya, has undergone what would seem as a forward leap, with the enactment of the Consumer Protection Act (CPA) of 2012. This was primarily precipitated by the new constitution that was drafted in 2010, which created a new impetus for consumers to find recourse when aggrieved. To begin, this article will provide the historical context within which consumer legislation has developed in Kenya, by providing a brief socio-political context and background of the country. Kenya's total population is 46.73 million, residing within a total surface area of 580 367 km^2. Its gross domestic product was

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$ 74.94 billion in 2017 (Trading Economics 2017). Its economy is market-based and possesses a liberalized trade structure. In Kenya, household incomes are difficult to measure as they often do not provide an accurate reflection of the actual incomes; however, household consumption expenditure is usually taken to be a reliable indicator. The household expenditure in Kenya averages $34 per adult per month, nationally. However, there are differences between urban and rural areas as well as between counties and constituencies. The household expenditures per adult equivalent per month are $22 in rural areas, as compared with $61 in urban areas. The largest percentage of income in households is spent on food, which is an indicator of the poverty levels in Kenya. For every $1 that is spent, 45% goes towards food. Despite this fact, Kenya is seen as both the centre and the hub for finance, trade, communication and transportation links in East Africa. Additionally, its historical roots go back to around 2000 BC, when the Cushitic-speaking people from northern Africa settled in the part of East Africa that is now known as Kenya. The early settlers were predominantly farmers and herders, and the small indigenous population comprised the Bantu, the Eastern Cushites and the Nilotes – all of whom make up the largest population of Kenyans today. Due to its proximity to the Arabian Peninsula, Arab traders found it attractive and, thus, started frequenting the coastal region by the first century AD, alongside the Portuguese (led by Vasco da Gama). Thereafter, the scramble for Africa represented a period of aggressive European imperial expansion that began at the end of the nineteenth century, culminating at the start of the First World War.

The roots of the colonial history of Kenya go back to the Berlin Conference in 1885, where agreements were drawn over regions that the Europeans negotiated; as a result, East Africa was divided into various territories of influence. Kenya, named as the British East Africa Protectorate since 1895, was formed by officially declaring the area as a colony in 1905 (Tignor 1976). Progressively, the British began to advance inland in order to gain access to the fertile highlands along with providing greater access and security for Uganda, which was also a British colony. In doing so, a railway line was commissioned from Mombasa to Kisumu, which was built by thousands of Indian workers who were brought to Kenya and who, now, form the fabric of Kenyan society. This essentially meant that the British settlers occasioned a policy of land reallocation that allowed the expropriation of fertile land belonging to Africans, who were then evicted from their land and moved to reserves that were controlled by the British settlers. Because of the entrenched process of colonisation, Kenya's post-independence laws were influenced by English laws, particularly the various aspects of private law. These laws, inherited from Kenya's colonial regulatory framework, did not adequately enable consumers to seek redress. In any case, this legacy extends to this date, as it forms the basis of legal transplantation, is a term coined by scholar Alan Watson (2013), to indicate the moving of a rule or a system of law from one country to another as maintained by Watson, transplantation is the most fertile source of legal development. This transplantation is akin to what Okoth-Ogendo (2005) stated as the 'replacement of indigenous administration systems by a new regime based on the exigencies of colonial rule.' It is also similar to what MacAuslan (2000) stated as the application of English law as the basis of administration and the determination of civil and criminal matters in all its overseas territories. The implication of these actions meant that the colonial power was paradoxically translated to constitute the basic law of the colonised.

The journey towards creating the new consumer protection regime, however, stemmed from the fragmentation of the consumer law and policy, which led to regulatory gaps that created cases of 'regulatory arbitrage' amongst Kenyan service and product providers. The Constitution of Kenya (2010), however, brought a new promise of hope under Article 46(1),

which guaranteed consumer rights. Although there was no specific law dealing with consumer protection, rather, some aspects of consumer protection were covered in various pieces of the legislation.[1] Included amongst them were the Trade Descriptions Act; the Standards Act; the Weights and Measures Act; the Restrictive Trade Practices; the Monopolies and Price Control Act (now known as the Competition Act); the Foods, Drugs and Chemical Substances Act; the Pharmacy and Poisons Act; the Public Health Act; the Fertilisers and Animal Foodstuffs Act; and private law measures in the law of contract and the law of tort. However, these statutes did not empower a consumer to sue in the instance of a breach of obligations.

General Characteristics of Consumer Law in Kenya

Previously, there was no specific law dealing with consumer protection in Kenya. Instead, consumer protection was covered piece-meal within various pieces of legislation. The lack of a harmonised consumer legislation meant that the available consumer protection regime was contained within various statutes (public law measures) as well as in private law measures (Lande et al. 2011). This fragmentation highlighted the limits of the lack of a focused consumer protection legislation (Whittaker 2009).

The new consumer protection regime has stemmed from the constitution, which provided fair, honest and decent advertising. In fulfilling this mandate, the parliament enacted the Consumer Protection Act of 2012. Whilst the enactment of the new act is laudable, the persistent fragmentation of the current regulatory regime, that facilitates consumer protection, still exposes fundamental deficiencies in the institutional arrangements, such as the agencies which are tasked with enforcing the consumer laws. Furthermore, this fragmentation has heightened the challenges for consumers who might seek redress as a result of the regulatory arbitrage it has created. This shall be discussed in the context wherein it has brought potential harm to consumers, in the same way that product liability, in Kenya, is left out of the main Consumer Protection Act but contained in the Competition Act.

Established in 2010, the Constitution of Kenya (CoK) guarantees the rights of consumers in Article 46(1). These rights include the following: the right to have goods and services of reasonable quality; the right to the information necessary to gain full benefit from goods and services; the protection of their health, safety and economic interests; and the right to compensation for loss or injury, arising from defects in goods or services. These rights are representative of modern constitutions, as at least 24 countries have provided guarantees for consumer protection; this is often enshrined in those states' competition policies, just like those in Kenya.

Furthermore, the United Nations Conference on Trade and Development (UNCTAD), which is a UN body, works to help developing countries such as Kenya protect their consumers from abuse and curb regulations that stifle competition, as reported in 2013 – 'in many cases consumer protection has been constitutionally enshrined and some countries have recognised consumer rights as human rights' (United Nations 1985). Moreover, it further mandates the Parliament to enact legislations that provide consumer protection along with fair, honest and decent advertising. These are regarded as first-generation consumer laws. These

[1] Trade Descriptions Act, Standards Act, Weights and Measures Act, Restrictive Trade Practices, Monopolies and Price Control Act (now known as the Competition Act), the Foods, Drugs and Chemical Substances Act, the Pharmacy and Poisons Act, the Public Health Act, the Fertilisers and Animal Foodstuffs Act.

laws are generally applied to a broad spectrum of commercial activities, through contracts of sale which are defined in Section 3 of the Sale of Goods Act (Cap 31).[2]

This scattered legislation includes statutes that are aimed at controlling unfair terms in standard contracts as well as unconscionable terms, along with controlling unfair and misleading commercial practices, which also include misleading advertising or product liability claims against producers and/or manufacturers, importers, distributors and retailers. Perhaps not coincidentally, these laws are certainly transparently based on the four basic consumer rights that were set out in the declaration made by President Kennedy in March 1962. These comprised the right to safety, to information, to choice and to be redressed, all of which suggested and, to an extent, brought about the acceptance of the idea that consumer interests should transcend a purely economic focus (Weatherill 2013).

This was also manifested in the Constitution of Kenya Review Commission (CKRC), which proposed that consumer rights should be included as one of the protected rights in the Bill of Rights of the new Constitution of Kenya. The Bomas Draft, which was eventually rejected, also consisted of provisions on consumer rights, particularly Article 69 that mirrored Article 46 of the promulgated constitution. It is, therefore, evident that the development of the CPA has emerged out of the culmination of a greater push for the observation of consumer rights.

As a result of the new constitution in 2010, Kenya witnessed the commencement of more detailed sector-specific legislations including the enactment of the Competition Act, which unusually captured the provisions which are more archetypally found in specific consumer protection legislations. For instance, not only does the Competition Act have specific provisions for product liability and safety but it also identifies false and misleading representations to consumers or unconscionable conduct in relation to the supply of goods and services as a punishable offence. This act was established under Section 7 of the Competition Act No. 12 of 2010 (Act), and is charged with, inter alia, promoting and enforcing compliance with itself. Its main mandate is to protect consumers from unfair and misleading market conduct. In order to effectively deliver this mandate, the act was amended, in 2016, to include Section 70(A) which gives the authorities the power to not only initiate investigations on consumer violations in its own capacity but to also impose administrative remedies.

However, due to the scattered regulatory framework, each industry is separately regulated whilst still containing the elements that cover the issue of consumer protection. However, the fact still remains that the most important public law measures for consumers are constituted by the Consumer Protection Act and the Competition Act, since they cut across all sectors as well as provide a horizontal regulation that incidentally gets enacted as a sector-related rule. If there are sectoral laws as well an agency, established by these laws, that deals with consumer protection issues, then both can be applicable in resolving any consumer protection issues that may arise. This is evident in the following two cases: *Lucy Kimani* versus *Wananchi Group and Erick Maina Njuguna* versus *Viva Company*. In *Lucy Kimani* versus *Wananchi Group*, Lucy lodged a complaint against Wananchi Group, citing poor service with regard to their provision of internet services. She also complained that she was not getting any assistance despite numerous complaints. In *Erick Maina Njuguna* versus *Viva Company*, Erick alleged that Viva Company had violated a business agreement, on the marketing of short code 20242 and the keyword 'SMART services,' by failing to refund him (Kenya Shillings (Ksh.) 51 000, $1 is equivalent to 100 Kenya Shillings) for his work, as per the agreement between him and the agency. Both

[2] Sale of Goods Act (Cap 31) is a reproduction of the English Act of 1891, which was translated into Kenyan law by the colonial administration in 1931.

complaints were lodged with the Competition Authority. However, seeing that they fell under the telecommunications sector, the Competition Authority forwarded them to the Communications Authority which has the mandate to resolve any disputes that arise in the telecommunications sector. In summary, it can be said that in as much as the CPA and the Competition Act are applicable to all sectors as horizontal laws regarding consumer protection sectoral laws, based on their feasibility, will be applicable in addition to the two main laws (CPA and Competition Act).

The CPA has been enacted to provide a general legal framework for the protection of consumers, through the prevention of unfair trade practices in consumer transactions, as well as for matters connected with and incidental thereto. Section 3(4) of the CPA lays down its purpose, which is to promote and advance the social and economic welfare of consumers. It does this by establishing a legal framework that is meant to achieve and maintain a consumer market that is fair, accessible, efficient, sustainable and responsible for the general benefit of consumers. It also aims at reducing and ameliorating any disadvantages experienced by consumers in accessing any supply of goods or services. Additionally, it aims to promote fair and ethical business practices. It also guarantees that consumer will be protected from all forms and means of unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices including deceptive, misleading, unfair or fraudulent conduct. Important also is that it aims at improving consumer awareness and access to necessary information with the goal of encouraging responsible and informed consumer choice and behaviour. It additionally promotes consumer confidence, empowerment and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism. Lastly it aims to provide a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions and redress for consumers. These mandates seem to mirror the South African Consumer Protection Act No. 68 of 2008, in so far as it is quite evident that the legal transplantation has occurred.

A key innovation of the CPA is that it introduces a new aspect regarding internet contracts as well as delineates procedures for cancellation, which reflects the global changes and advancements in technology. Furthermore, it facilitates the commencement of an action by a consumer whose rights have been infringed, thus providing *locus standi.* Therein, issues such as late delivery as well as other specific obligations are encapsulated; these shall be discussed in this contribution. However, what is most notably absent from the CPA is that it lacks provisions with respect to product liability and product safety. It is unclear whether it was by default or by design that these fundamental protectionary measures relating to the manufacture of products have been left out of the main legislation. In as much as the CPA does not contain provisions regarding product liability and safety, the same are contained in the Competition Act, which supplements the legal framework for consumer protection provided by the CPA. This can be justified by the fact that the Competition Act was enacted before the Consumer Protection Act. Since it contained provisions regarding product liability, there was no need to replicate the same in the Consumer Protection Act. The Competition Act further establishes the Competition Authority of Kenya, an agency mandated to guard against practices which would otherwise be disadvantageous to consumers on a more general level, as well as to protect against the dominance which may be as a result of the information asymmetries (which consumer protection measures seek to protect).

Due to the aforementioned situation, any consumer protection recourse is sought by collectively examining both the CPA and the Competition Act. Aside from these acts as well as the scattered pieces of legislation, there exist several institutions that are engaged in consumer protection and are under the supervision and coordination of regulatory agencies with respect to issues of consumer protection, such as the Competition Authority of Kenya and

the Kenya Consumers Protection Advisory Committee (established under Section 89 of the CPA). Furthermore, the CPA encourages the formation of accredited consumer organizations, which are societies registered under the Societies Act (CAP 108) for the purposes of consumer protection and related matters. One such consumer organization is the Consumer Federation of Kenya (COFEK), which is an independent, self-funded, multi-sectorial, non-political and non-profit Federation that is committed to consumer protection, education, research, consultancy, litigations, anti-counterfeit campaigns and business ratings on consumerism and customer-care issues. Also, there is the Consumer Unity and Trust Society (CUTS), which is a non-governmental organisation that deals with trade and development, along with investment and consumer protection as well as governance.

These agencies have been instrumental in advocating for and ensuring compliance with consumer protection laws and policies. COFEK has especially been at the forefront in ensuring consumer protection. This is evidenced in the various interventions it has made on behalf of consumers wherein their rights have been or are threatened with violation. An example is provided by the letter it wrote to Nakumatt Holdings on May 19, 2015 following complaints, by consumers, of discrepancies between the shelf and till prices in their stores. Similarly, COFEK sued the Kenya Electricity Generating Company (Kengen) and the Energy Regulatory Commission, following their decision to increase electricity charges by levying an additional five cents for every kilowatt per hour of electricity that was consumed. Moreover, COFEK accused Kengen of trying to raise money illegally to pay off its arrears of Kshs 630 billion to the Water Resource Management Authority, using the funds that were to be raised from the increase of electricity charges. COFEK argued that consumers cannot be compelled to pay for clearing private debts whose origins remain unclear.

The Competition Authority, through its Consumer Protection Department, has also been instrumental in ensuring compliance with regard to consumer protection. This department has dealt with the following two cases: *Beatrice Ndungu* versus *Safaricom Limited* and *Annie Waithera* versus *Naivas Supermarket Komarock*. In the former, Beatrice Ndungu complained of charges on *Lipa Na Mpesa* services about which the provider, Safaricom Ltd., had not informed consumers. This amounted to a violation of Section 56(4) of the Competition Act, which deals with the disclosure of charges. Thereafter, the authority ordered Safaricom to create awareness regarding the transactions costs of *Lipa na Mpesa* and change the Point of Sale (POS) materials in all petrol stations and merchant shops equipped with *Lipa na Mpesa* services to reflect the same.

Product Liability and Product Safety

The Kenya Consumer Protection Bill 2011 contained provisions regarding product liability and safety, based on Section 61 of the South African Consumer Protection Act. However, these provisions were not present in the final CPA that was drafted in 2012. Thereby, product liability and safety are governed under the Competitions Act, which offers public law measures with respect to these claims. These measures are complemented by private law measures that are contained in the common law principles of contracts and torts. Under the common law principles, if a manufacturer supplies unsafe goods to a consumer they shall be held liable for the defective product under the neighbourhood principle, established in *Donoghue* versus *Stevenson* (1932), wherein it was established that under certain circumstances, one man may owe a duty to another even though there is no contract present between them.

Both the CPA and the Competition Act do not directly prescribe safety requirements; these are contained in the Standards Act. The Standards Act is important for both product liability and safety. It constitutes a preventive measure under the issue of product liability, as it mandates the manufacture of good-quality and safe goods. It additionally provides standardisation and conformity assessments, both of which play an important role in the enforcement of product safety. This is because standardisation exerts pressure on manufacturers and producers to ensure quality, reliability and safety of their goods. Moreover, it minimizes mistakes and reduces faults. This, in turn, protects consumers by ensuring the availability of adequate and consistent quality of goods and services through the standardization of commodities, as well as by keeping consumers informed about the quality of goods in the market.

Additionally, this law provides a certification mark which constitutes certain marks of quality. These marks enable the potential consumers of to make an informed choice regarding the purchase of the goods and also to be sure that they are getting the true and clear value of their money. In this way, consumers are protected to the extent that they are guaranteed the safety and quality of the goods, through the quality marks of the bureau that are affixed on them. It is hoped that these certification marks will inform the consumers about the safety of the goods, thus enhancing their own safety. The Standards Act also has also established the Kenya Bureau of Standards (KEBS), which is a corporate body tasked with enforcing safety standards. This agency is tasked with ensuring that goods are not only safe for consumption but also meet the standard requirements as stipulated in the Standards Act. KEBS also provides standardisation marks which are to be placed on manufactured goods. Furthermore, it is mandated to inspect the quality of imported goods. In order to protect Kenyan manufacturers from unfair competition, KEBS has implemented guidelines, termed as the Pre-Export Verification of Conformity (PVoC), to the Standards Programme for exports to Kenya. This ensures that all consignments contain a certificate of conformity prior to their shipment. Furthermore, KEBS ensures that liability is conferred on the manufacturers of products in cases where the imported products are rendered unsafe.

Under Kenyan law, product liability is essentially a common law remedy obtained through contract- and tort-based remedies. In the contract-based remedies, only the parties involved in the contract can sue, whereas tort-based remedies form a part of the law of negligence. Additionally, product liability also falls under the Sale of Goods Act.[3] This act provides a statutory protection by inserting terms into contracts for the sale of goods, the breach of which entitles one to certain remedies. The implied conditions in a contract of sale assert that the goods should be merchantable and the purpose for which the goods were bought had been made knows the goods must be fit for the purpose. If the supplier or manufacturer breaches the implied conditions, they will be held liable. The issue of liability under the Sale of Goods Act is strict, and it is irrelevant whether the retailer is to blame for the defect and may have lacked the opportunity to discover the defect. Additionally, the liability is not limited to the consequent protection against injury to person or property. This means that in appropriate circumstances, there can be a liability with regard to economic loss. Therefore, if a person purchases an electric item that has a fault, for example, they can sue the retailer if they suffer from injury as a result of the fault. On the contrary, the Competition Act only provides product liability with respect to goods instead of services. For instance, the courts have held the opinion that to succeed regarding the merits in product liability, the plaintiff must establish that the defendant sold

[3] Sale of Goods Act (Cap 31).

the product in the course of his/her business, and that the product was, then, rendered unreasonably dangerous when put to a reasonable use without the prior knowledge of its characteristics.

Consumer Products and Liability for Defective Goods

The liability with regard to defective consumer products is ingrained both in the CPA and the Competition Act. Firms which have been proven to supply substandard or injurious products will normally be liable to face punitive measures that include recalling such defective goods from the market, repairing defects, replacing faulty products or issuing refunds to aggrieved customers. In addition, such firms would be required to publicly disclose the nature and danger of the defects of their products in conjunction with the Competition Authority, which was established under the Competition Act. The Competition Act prescribes liability with respect to unsuitable goods, where 'an undertaking, in trade, supplies goods manufactured by the undertaking to another person who acquires the goods for re-supply' and where a person (who may or may not be the same person who acquired the goods from the undertaking) supplies the goods, either by way of sale or by auction, to a consumer. It also discusses where exactly the liability for defective goods lies. It prescribes that where a person, in trade, supplies manufactured goods which are found to have a defect, as a result of which an individual may suffer loss or injury, such person is liable to compensate the individual for the loss or injury suffered by the latter. It also states that an individual who suffers loss or damage may recover their compensation through legal measures. Furthermore, it goes on to discuss the liability for manufacturers – if a person wishes to institute an action for compensation but does not know who manufactured the goods, he or she may issue, to a supplier or each supplier of such goods as known to him or her, a written request demanding the particulars required to identifying the manufacturer; if this is unsuccessful, the liability is vested in the supplier. This provision is crucial especially in cases where the defect causes injury, since most of the problems that arise in relation to product liability mainly comprise a manufacturing defect. The complaint procedure regarding product safety and liability is channelled through the Consumer Protection Department. However, considering that consumer protection is still in its infancy in Kenya, the consumer protection department has not dealt with many cases yet. One such complaint, received by the Competition Authority, was made by Annie Waithera against Naivas Supermarket, Komarock branch. Annie Waithera complained that she purchased a Hot Point Dispenser from Naivas' Komarock branch, which subsequently developed a leak in less than a month from the date of purchase. Thereafter, the competition authority ordered Naivas to replace the complainant's defective Hot Point Dispenser with a new one.

Consumer Law and Policy in Telecommunication Services

In Kenya, the regulation of telecommunications has mainly focused on the supply-related side of the market. The mobile network operators (MNO), particularly Safaricom – which, as it stands, contains the largest customer base – has been the main focus of this regulation. A MNO is the telecommunications company that provides and extends the functionality of wireless network messaging to provide payment services that enable customers to remit funds to each other, which can be settled through its own established agent network. Individual payment

transactions occur entirely within the MNO and do not require the service user to have a bank account. Herein, regulation has mainly focused on licencing the access to and the use of networks as well as market entry, interconnection and control over retail as well as wholesale pricing. This goes in tandem with the regulation of global universal services which need to build-out networks and make access available, whilst at the same time ensuring that the prices remain reasonable. The Communications Authority of Kenya is the agency that principally regulates the telecommunications industry. Its main aim is to protect and safeguard the interests of consumers in relation to the provision of Information Communication and Technology (ICT) services and equipment. Basically, this is the regulatory authority with respect to the communications sector in Kenya. Established by the Kenya Information and Communications Act 1998, it is responsible for facilitating the development of the Information and Communications sectors that include broadcasting, multimedia, telecommunications, electronic commerce, and postal and courier services.

Therefore, whilst discussing the development of consumer law and policy regarding telecommunications in Kenya, one cannot ignore the effect of mobile phone and the provision of financial services that arise from its use. It is well-documented fact that Kenya's telecommunications industry has developed quite interestingly, as MNOs are providing not only telecommunications products and services but also financial services. This has expanded the need for consumer protection within the telecommunications industry, as consumers face several issues that arise out of this aforementioned relationship. Moreover, this proliferation has increased access to financial services for the unbanked and under-banked population in Kenya.[4] The consumer concerns that this contribution will focus on, as emerging and relating to consumer protection, is about the provision of mobile credit. An example is Safaricom, which not only provides telecommunications services but is also a mobile money issuer. The introduction of M-Pesa extended the provisions of telecommunications to the realm of financial services. M-Pesa is a mobile money service provided by Safaricom that effects payments through mobile devices. At the time when M-Pesa was launched, there was no specific regulation in Kenya that identified MNOs as a distinct type of financial institution. However, because of a letter of 'No Objection' issued by the Central Bank, Safaricom was allowed to additionally provide financial services.

Safaricom issues stored value to its M-Pesa customers, who are simultaneously customers of their telecommunication services. Commonly, customer funds are held in a prepaid account either by the MNO itself or as a subsidiary in a bank account (in this case, a commercial bank account). Although in some jurisdictions the MNO is the business owner (the entity which assumes the bulk of the financial risk and the operational responsibility of offering the service), a partner bank formally holds the licence. If the funds are post-paid, the MNO can provide a short-term credit or a payment service to its customers in a manner similar to some three-party payment card schemes. In this model, the issuer (having a relationship with the cardholder) and the acquirer (having a relationship with the merchant) is evaluated as the same entity. This means that there is no need for any monetary charges between the issuer and the acquirer. Since it is a franchise setup, there is only one franchisee in each market which provides the incentive in this model.

Since the advent of mobile payments and the concomitant financial services issued by MNOs in 2007, there are now almost 20 digital credit products in Kenya whilst several other providers

[4] The terms 'unbanked' and 'under-banked' will be used in this paper to refer to people who do not have a bank account or who rely on alternative financial services.

and products are launching recurrently. These products provide an increased household liquidity as well as loans to small business owners. M-Shwari is a bank account that offers a combination of savings and loans, resultant from the collaboration between the Commercial Bank of Africa and the MNO Safaricom, through M-Pesa. This collaboration combines the strengths of both Commercial Bank of Africa (CBA) and Safaricom's MPesa, which also provides access to its large customer subscription as well as the customer airtime/M-Pesa usage history and date. It also uses the CBA's account opening and credit scoring data and markets the product through above-the-line advertising and promotions. Safaricom has incorporated the M-Shwari menu in the M-Pesa SIM toolkit, which is an important feature with respect to the microcredit market. The provision of digital short loans, through MNOs, has increased the consumer protection concerns particularly since these microloans are provided to a majority of low-income earners in Kenya, where the critical mass regarding financial access and inclusion lies. Amongst the first of these issues are the high interest rates associated with these products. If borrowers fail to pay back their digital loans, the loan is usually rolled over and the nominal interest rate is applied to the full balance which, in turn, increases the effective annual percentage rate. There are several major companies that target the microloan market – M-Shwari, M-Co-op Cash and KCB M-Pesa are linked to large commercial banks. Amongst them, M-Shwari is the most prevalent and provides a savings account as well as loans from the Commercial Bank of Africa, through the M-Pesa mobile platform. Most others use divergent approaches where, for instance, customers have to download an application on their phone. Then, the branch uses algorithms to analyse data and determine the credit score as well as the loan threshold. However, these methods have left consumers in very precarious situations as they have used questionable tactics in the lending process, for instance, the Mjiajiri model, which is a model similar to a pyramid scheme which requires users to pay a Kshs 200 as an initial registration fee, after which the users earn commissions of Ksh 40 for recruiting others to register for loan access; the user's available loan size increases as he or she recruits more members.

Therefore, micromobile links lending to future payrolls will lend up to 50% of a borrower's monthly salary. This model is similar to payday lending in the USA, which often results in a debt cycle where the high-fee, short-term nature of the loans means that customers must continue borrowing to pay off their previous loans and the associated fees. Whilst the bank issues the savings accounts and loans, it leverages its banking assets, its capital requirements, its regulatory compliance and its reports to the credit bureau. All these are risks that the bank takes in the provision of microcredit as well as the losses due to non-performing loans. The main concerns regarding consumer protection are that whilst these microcredit facilities are targeted towards low-income earners, there is an information asymmetry that exists in terms of the credit that is issued. It has been found that M-Shwari users do not critically understand the full cost of the transactions that are involved. The facilitation fees have typically been converted to an annual percentage rate of approximately 90% and are almost double of the average microfinance rates in Kenya.

Conversely, banks are required to report in their advertising the respective pricing schedules that they have for any loan facilities which have been issued. However, this is not applicable for microcredit obtained through mobile devices. This would ideally be deemed as misleading and constitute a mispresentation. Closely related to the above issue, the Kenyan credit reference bureaus have a very scant and often incomplete information about most digital lenders who are non-banked, as the lenders are not required to report this information to the credit reference bureaus. As a result, the MNOs are unable to gather information about how many and what type of other loans the borrowers obtain. Thus, even when a borrower

excessively borrows from numerous MNO lenders, the other MNOs may be unable to tell the extent of his or her debt. This can lead to a digital loan crisis. Wherein borrowers take on more credit than they can manage, this creates debt cycles which have potentially negative repercussions on consumers.

The incessant loans pushed to customers and borrowers, wherein they receive offers through some unsolicited messages detailing how much money they have been qualified to borrow, has driven customers to extract unnecessary loans. The main challenge for consumers is to have an understanding of the loans that are offered to them, together with the unclear disclosure of interest rates, the associated fees and the terms of repayment. All these offers are available on the most basic phones. However, the terms are only available through a web link, which requires internet connection to be accessed and read. What highlights this problem is that most of these digital loans are bundled with other products and their associated fees are not fully disclosed to the customers. These include the case of bundling loans with credit life insurance, which offers a cover for the balance of the loan upon the death of the borrower. These policies may not be necessarily redeemed, even in the unlikely event where the borrower dies. Furthermore, whilst the borrowers consent to the use of their data for calculating the loans, it is unlikely they will read the full terms. The lender may use these conditions and evaluate the available data about them and their phone use. In these cases, the ensuing challenges for consumers arise from the lack of full knowledge of the products as well as from the fact that customers do not have an understanding of the way in which their data are being used to provide targeted financial services. It also brings forth issues of consent regarding the financial services and products under offer.

Consumer protection with regard to financial products has been largely scant, particularly in relation to consumer credit. At the statutory level, Kenya has adopted the electronic transactions legislation. However, this is not considered sufficient for the needs of all commercial operators, including those of the mobile payment providers (Blechman 2016). Particularly in 2011, Kenya adopted the National Payment System Bill which mostly contains regulatory content but explicitly allows the use of electronic means for providing payment services. The liability of a mobile network operator is limited in several ways, including the losses arising from 'particular circumstances,' even if it is known by the operator. Also, the mobile network operator is not liable for technical malfunctions resulting 'from circumstances beyond reasonable control.' Consequently, useful elements for the purpose of assessment may be found in the contractual provisions of the two major mobile network operators that offer payment services: Safaricom's M-Pesa and, perhaps, Airtel's Airtel Money. Similar transactions attract different levels of protection. Additionally, similar disputes are subject to resolution by different schemes. The Banking Act gives authority to the Central Bank of Kenya (CBK) to regulate banking activities but does not define the specific mandate for consumer protection beyond regulating the interest of consumers. The Banking Act and the Banking Regulations of 2006 have implications on consumer protection in Kenya, as they regulate not only the limits of the interest recovered from defaulted loans but also the misleading advertisements with regard to deposits. A bank requires an approval by the Minister of Finance if it wishes to increase its bank rates thus prohibiting the charging of fees on savings and fixed deposit accounts. The Banking Regulations of 2006 delineate the procedures that must be followed with respect to increasing the rate of banking and other fees. The particular rules governing the unlawful, misleading and comparative advertising as well as recourse mechanisms are left to individual banks. In practice, it is mandatory to provide the disclosure of prices and the conditions of different financial services.

Since mobile payments and, consequently, mobile financial services have been successful in the sense that they have managed to include those who have been financially excluded, particularly under an undefined regulatory space, there has been no specific regulation regarding the mobile financial services offered by MNOs. However, the National Payment System Department (NPSD) of the CBK has provided an oversight on mobile payments regarding the integrity of information technology, along with the service delivery systems that protect customers from operational failures. The Restrictive Trade Practices, Monopolies and Price Control Act of 1989 was the most comprehensive legislation relating to competition in Kenya, prior to the implementation of the Competition Act. Although this act does not empower consumer advocacy organisations to lodge a complaint or obtain provisions regarding consumer welfare, the Public Complaints Commission does provide a third-party recourse for the consumers of public sector services.

The Kenya Information and Communications Consumer Protection Regulations has outlined the rights and responsibilities of consumers and contains specific provisions that define the obligations of services related to complaint handling, information disclosure, billing practices and data privacy. The particular risks that affect consumers are varied, containing system problems which comprise operational risks pertaining to the technology-based performance issues and even company failures. All these are risks that directly bring forth the consumer protection concerns. This leaves consumers to ascertain what kind of protection is accorded to them with each new mobile microcredit facility.

However, what needs to change is the explicit inclusion, in their contracts, of the full consumer rights provided by the microcredit offered through mobile phones, in the same way that other payment systems, such as credit cards, offer them. The only provision that can, in some way, form the consumer protection framework is contained in Section 50 of the CPA, which deals directly with Credit Agreements. It aims to ensure that a consumer is equipped with sufficient protection in relation to his or her credit agreements. Financial institutions within the banking industry have mainly used this provision. However, its extension into the realm of microcredit provided by MNOs has largely been scant. What needs to be disseminated within mobile microcredit users is particularly contained in Section 60 of the aforementioned act, which asserts that if the lender invites a borrower to defer the payment, he or she must disclose whether the interest will accrue on any unpaid amount. If such interest is found to accrue, the lender must disclose the interest rate, in the absence of which the lender is treated as a waiver of the interest. Furthermore, as default charges have been prohibited under Section 61, it remains unclear whether the mobile microcredit has been included in this measure of prohibition.

Therefore, the existence of two regulatory regimes, from a consumer's perspective, for a single product and service may result in a separation of protection (Malala 2013). Mobile payment users and, in this case, mobile microcredit borrowers may not fully understand which of the regulations apply to a loan transaction and how these may differ, depending on the payment method and platform used, the parties involved in the payment transaction and the nature of the purchased product. This lack of understanding is rooted in the fact that there is a divergence of the bodies involved in the provision of microcredit, banks and MNOs. As a result, the consumers of these products are left confused as to what kinds of redress mechanisms are available to them.

Furthermore, in 2008, the Communications Commission of Kenya (CCK) created a Consumer Affairs Division, and by 2010, it issued the Kenya Information and Communications Consumer Protection Regulations. These regulations outline the rights and responsibilities of consumers and contain specific provisions that define the obligations of service

providers related to complaint handling, information disclosure, billing practices, data privacy and other issues. The rules also require service providers to submit, for approval, a commercial code of practice that defines their policies and procedures relating to compliance with the provisions. Although the regulations are recent and untested, they indeed represent the most comprehensive set of consumer protection regulations issued by a regulator in Kenya.

Therefore, the current state of consumer protection regulation presents a distinction between its state and its practice. As mentioned, neither the regulations nor the authority to regulate the sector are formally established by law. The CBK and the MNOs have worked with the notion that the regulatory structure of the industry will be clarified in the future, with the National Payments Systems Act and the subsequent regulations. This lack of formality in the current regulatory framework has implications for consumers, for example, with regard to which regulatory body should be appealed if a problem cannot be resolved with a merchant. This is especially present since consumers have already adapted mobile payment services for uses that exceed the current regulatory definition by the MNOs, such as storing their value for a short time – similar to the way in which a bank customer would use a current account. Moreover, other supporting service providers in the mobile payment system are building and deploying new services based on the mobile payment platform.[5] Banks, for example, are linking physical bank accounts with the mobile accounts and some of them are even enabling providers to link the subscribers' funds to their bank accounts.

Interaction Between Consumer Law in Kenya and Foreign/Supranational Laws and/or Agencies

Kenya's consumer law and policy has been influenced, to a slight extent, by foreign and supranational laws and agencies as well as regional policies. This is particularly since Kenya is a Member of the African Consumer Protection Dialogue, which is an initiative that was engendered by the African governments. It is also a Member of the United Nations, which provided them the initial guidelines for consumer protection. Additionally, it is a former British Colony – the fragmented pieces of legislation that dealt with consumer protection were legally transplanted from the UK's legislations. Ideally, this transplantation exemplifies the movement of a rule or a system of law from one country to another and, as maintained by Watson (2013), is the most fertile source of legal development.

In a number of countries, the consumer protection legislation is included in the competition law but is separated in others. It is surprising that all the national competition laws within the region (apart from South Africa's) include consumer protection provisions in their legislation. This is evident in national competition laws of a diverse range of countries including Poland, France, Canada, India, Lithuania, Venezuela and Australia.[6] Even in countries where competition laws and consumer protection laws are separated, the links between them are often recognised by assigning the administration of the laws to a single authority, as is the case in Algeria, Hungary, Peru, the United Kingdom and the USA. Any of these two approaches can be followed by Kenya. Section 3 of the CPA prescribes that the Advisory Committee as well as

[5] Examples include KOPOKOPO Inc., which provides low-cost software services, using mobile money repayment mechanisms, to small- and medium-sized enterprises.

[6] This is stated in the United Nations Guidelines for Consumer Protection, the Manual for Consumer Protection and the United Nations Conference on Trade and Development.

any person or court may consider, when interpreting or applying this act, an appropriate foreign and international law whilst at the same time being aware of the international conventions, declarations or protocols relating to consumer protection.

Furthermore, Kenya is party to the Economic Partnership Agreement (EPA) between the European Union (EU) and the Eastern African Community (EAC).[7] The EPA does not contain any rules or policies on consumer protection and the only closely related provision is Article 3 of the agreement, which comments that ‘the parties undertake to conclude the negotiations in trade related issues such as coming up with a competition policy within five years upon entry into force of the agreement.’ In as much as the EPA does not have an express provision on consumer protection, it is expected that this agreement will enhance consumer protection in Kenya. Since the EU contains robust consumer protection policies, this should foster the improvement of the products that are traded between Kenya and other EU countries.

In addition, seeing that there will be high-quality products coming from the EU, Kenya’s manufacturing sector might be compelled to standardize its products. Additionally, Kenyan manufacturers will also need to produce high-quality products for exportation into EU countries, which must meet the standards set out in their consumer protection policy. Other than the above reference to the EPA between EAC and the EU, Kenya’s consumer protection law has not been influenced by foreign law to a great extent. As such, it is important to compare Kenya’s consumer protection law with that of another country or a supranational body in order to highlight the areas where Kenya’s consumer protection law can improve.

The comparison, therefore, is between Kenya and the European Union’s policy regarding consumers. The justification behind this comparison is based on the fact that Kenya is a member of the EU-EAC Economic Partnership Agreement and, as a result, the EU’s consumer protection policy discussed above is likely to influence consumer protection in Kenya. Additionally, the EU’s consumer protection policy is quite comprehensive. Thus, the Kenyan consumer protection law should borrow quite a lot from them, especially on issues regarding product safety, telecommunications, mobile phone contracts and consumer sales law. Regarding product safety, the starting point for EU’s product safety is that every consumer product that is put on the market needs to respect certain requirements regarding the information provided to consumers, the measures to avoid safety risks, the monitoring of product safety and the traceability. Businesses should not only place safe products on the market but also inform their consumers about any risks associated with the products that they supply. Moreover, they have to make sure that any dangerous products present on the market can be traced so they can be removed to avoid any risks that consumers might face. Additionally, the EU’s policy on consumer protection provides certain general product safety standards as well as sector-specific product safety standards in its various directives.

As such, even if a product is not covered by a sector specific legislation, the general rules regarding product safety apply to and complement that legislation (although this arises due to the scarce existence of sector-specific consumer laws). Therefore, the general product safety standards are included in the General Product Safety Directive 2001/95/EC (GPSD), which aims to ensure that only safe consumer products are sold throughout the EU. Similarly, specific rules exist for the safety of particularly electrical and electronic goods and cosmetics along with other specific product groups. According to the EU’s product safety standards, safety is, first and foremost, the responsibility of producers, as they are obliged to manufacture and

[7] The East African Community is a regional organisation that aims to have a common Customs Union, a Common Market and a Monetary Union.

consequently put safe products out on the market. If a product poses a serious threat to health and safety, the national competent authorities (including market surveillance authorities as well as customs) are obliged to immediately share this information with the European Commission, via the European rapid alert system for non-food dangerous products (RAPEX), in order to prevent them from being circulated in the markets and reaching the consumers.

In the Kenyan context, the Competition Act provides guidelines on product safety standards and unsafe goods. This act makes it an offence for any person to trade or supply goods that do not comply with the prescribed safety standards or goods that are declared to be unsafe by an enforced notice. It further reiterates the need to comply with the standards by making it an offence for any person to trade or supply goods without complying with the set standards. The act further imposes an obligation on the Competition Authority to publish a notice where certain goods are placed under investigation, or where there is the need to warn consumers about the possible risks associated with the use of specified goods. Upon the completion of investigations and as soon as practicable, the Competition Authority is required to publish a notice in at least one daily newspaper announcing the results of the investigation and proposing the action that is to be taken in relation to the goods in question. The Competition Act also provides the information standards for products that include the nature and the main characteristics of the product; the need for a service, part, replacement or repair; and the consumer's rights or risks that he or she may face according to the Competition Authority. Furthermore, it provides the main characteristics that should be provided in relation to product safety and standards, which include the benefits and risks of the product, the composition and the accessories of the product, the date of manufacturing of the product, its fitness for its purpose, its usage, the results to be expected from its use and the results and material features of tests or checks carried out on the product.

Based on the aforementioned account, it is clear that Kenya's consumer protection law on product safety, as contained in the Competition Act, is quite comprehensive and similar to the EU's own consumer protection policy. This is especially with regard to the general product safety standards. However, the Kenyan consumer protection law is found to be quite wanting when it comes to sector-specific product safety, which is not as elaborate as the EU's related policy and standards. Notably, one key area of improvement for Kenyan consumer protection law lies in relation to the sector-specific product safety standards. The experts in the different sectors need to come up with product safety standards that complement and enrich the general product safety standards which are already in place. In this light, the EU's consumer protection policy is a great document to borrow from, as it provides the different directives that affect the specific sectors.

With regard to telecommunications and mobile phone contracts, it is important to observe the advances in telecommunication services and to identify how consumers are consequently protected. Constant developments in digital technology are fundamentally changing the way in which consumers interact and shop online. Consumer protection in the digital market is one of the main priorities of European policymakers, who aim to systematically take into account the rights and needs of consumers in a rapidly changing digital environment. The European Union has placed a general legislation in this area, especially regarding matters that affect contracts and similar issues. However, even more importantly, the EU has developed specific legislations in this area, which are as follows: Directive 2000/31/EC on certain legal aspects of information society services particularly electronic commerce in the Internal Market; Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services; Directive 2002/58/EC concerning the processing of personal data and the protection of

privacy in the electronic communications sector; Regulation (EU) No 524/2013 related to online dispute resolution relating to consumer disputes; and finally, Directive 2002/65/EC concerning the distance marketing of consumer financial services. The aforementioned legislations facilitate mobile phone contracts and other telecommunication issues, as they ensure that the consumers' data, which is released and used in the digital market, are protected from abuse. Moreover, in Kenya's situation, Section 31 of the CPA discusses the disclosure of information on internet agreements, wherein before a consumer enters into an internet agreement the supplier has to disclose the prescribed information to the consumer. Sections 32 and 33 require a supplier to deliver to a consumer, who enters into an internet agreement, a copy of the agreement in writing within a prescribed period after the consumer enters into the agreement.

Conclusion

Constitutional law is often used to enshrine or administer the basic and fundamental consumer rights as well as provide certain guiding principles, such as the responsibilities of state and the public authorities (Groussot and Petursson 2012). These roles should also include adequate, comprehensive and effective legal as well as institutional frameworks aimed at consumer protection. It is also compelling to note that since the constitution lays down the supreme law of the jurisdiction, since it takes precedence over all other laws, it thereby strengthens, legitimizes and prioritizes any rights that it guarantees. Whilst Kenya's constitution guarantees the same, as it promulgates the supreme law of the land, it should also encompass an array of institutional mechanisms which ensure that the specific CPA is anchored and enforced. As mentioned, the absence of the provisions regarding product liability and product safety in the act begs the question of whether it is fit for this purpose. Although the Consumer Protection Act is supposed to have filled the gaps present in instituting consumer law, it should also push the state to play a pivotal role in ensuring that there are adequate trade-offs that do not stifle businesses' liberty to operate legitimately or hinder consumers from exercising their individual choices. Hence, the case for consumer protection can be strengthened if it is anchored by constitutional provisions. A somewhat ideal consumer protection law and policy should facilitate provisions for fair trade. It should also have a more consumer-related human-rights-based approach in its dissemination and enforcement.

The CPA has led to the establishment of the Kenya Consumers Protection Advisory Committee in Section 23. Additionally, this aids in 'the formulation of policy related to consumer protection, accredit consumer organisations, advise consumers on their rights and responsibilities investigate complaints and establish conflict resolution mechanisms amongst other duties.' The consumer law and policy in Kenya is still nascent – the Act is still in its infancy. However, it can be said that the framework for consumer protection has been in place. Whether it encapsulates the needs for product safety and liability, is a question that must be discussed and debated. An alternative form of redress is that the Act provides the possibility of class action lawsuits, that is heavily borrowed from US legislation, which redress for product liability and safety in cases where redress is determined by state laws. The Consumer Protection Act ushers in a new dawn for consumer protection in Kenya. Due to still being in its infancy, it will take some time for its full effects to be experienced. Undoubtedly, however, suppliers will need to be more conscious of the consumer rights. However, there should be an express mandate within the act itself for consumer redress mechanisms which, as stated in the UNCTAD (2018) guide on consumer protection, must be affordable, accessible and independent.

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