Prosecuting Bank Fraud in Kenya: Challenges faced by the Banking Sector

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Abstract
This paper investigates the challenges faced by the banking industry in Kenya while dealing with fraud and analyses the structural and institutional weaknesses of public sector organs in prosecuting fraud cases in the banking industry. It provides a contextual insight into the practical institutional obstacles that slow down progress in securing convictions against fraudsters in Kenya. Using in depth interviews with 17 bank managers a number of challenges in the prosecution of fraud were identified, including the duration of time taken to prosecute fraud cases and problems associated with these delays, the high rates of acquittals and the lack of objective courts in Kenya. Key weaknesses in the structural and institutional framework that were cited by the bank managers as exacerbating the magnitude of these challenges in dealing with fraud in Kenya included weak law enforcement, lack of industry co-operation, absence of adequate law provisions and lack of well trained police officers, expert prosecutors and judges to deal with banking fraud. These findings suggest that improving the institutional infrastructure to support fraud prosecution will require a combination of restructuring the legal and judicial system, and advancing training for police, attorneys, and judges on issues of banking fraud amongst other measures.

Key Words: Banking, fraud, Kenya, structural and institutional weaknesses.

Introduction
The global banking industry is integrated in ways that would have been unimaginable three decades ago due to globalisation, which is defined as the process of expanding and integrating markets, regulatory frameworks, and international institutions from country to country in order to create a more integrated world governance and economic framework (Busch, 2009). The rapidly expanding pace of globalisation, driven by factors such as establishment of the World Trade Organisation (WTO) and subsequent lowering of market and competition barriers, has led to increased capital mobility and increased ability of the financial services sector to meet the needs of individuals and companies around the world (Busch, 2009). The increasing rate of globalisation, however, combined with expansion of technology and other factors, has also increased the rate of fraud and new fraud activities (Zagaris, 2010). These new fraud opportunities can often be extremely difficult to detect due to their technological sophistication. In this environment, the financial services industry, particularly banks, face significant challenges and spend considerable resources to identify and combat fraud (Kranacher, Riley & Wells, 2011). Examples of these challenges include weak internal controls, employee collusion, overriding of controls, and lack of segregation of duties. These can often be exacerbated by corrupt political systems and weaknesses in the regulatory and institutional frameworks that are in place. In some countries, there is political interference in the operations of banks, inadequate laws to prosecute fraud, and weak institutional structures such as the courts and the Police force. Even where there is significant regulatory support, the regulatory framework of any given country cannot be expected to stop or even necessarily significantly reduce the incidence of fraud in the banking industry (Hoffman, 2002).

In Kenya, the 1970s saw a mushrooming of financial institutions as the government encouraged the establishment of local banks. However, lax banking laws, inadequate supervisory capacity by the Central Bank of Kenya (CBK) and non-compliance with the banking laws by some banks linked to or owned by politicians, resulted in deficiencies of the banking system leading to several bank failures (37 bank failures as at 1998) in the
1980s and 1990s (Mwega, 2003). These inefficiencies have also created opportunities for widespread banking fraud (Business Daily, 2012) with 45% of the banking firms having suffered from economic crime (PWC, 2014). In 2010, Kenyan banks lost a total of K.Shs 2.461 billion (US$27.5 million) mostly to cheque and bank transfer frauds (Daily Nation, 2010; KTN, 2010). Interestingly, the majority of these fraudulent activities (80% of total frauds) were committed by employees (Daily Nation, 2010; KTN, 2010).

The objective of this article is to investigate the challenges faced by the banking industry in Kenya while dealing with fraud and analyse the structural and institutional weaknesses of public sector organs in prosecuting fraud cases in the banking industry. Like Silverstone and Sheetz (2004) this study adopts a broader definition of fraud, taking the view that individuals and organisations commit fraudulent acts to obtain money, property, or services; to avoid the payment or loss of money or services; and to secure personal or business advantage. Fraud therefore covers criminal offences that involve the use of deception for personal gain at the detriment or loss of another person, and includes theft, bribery, corruption, forgery, embezzlement, misappropriation, conspiracy, collusion, money laundering, extortion and concealment of material facts (Chartered Institute of Management Accountants, 2008; Theft Act, 1978; Fraud Act, 2006; Kenya Laws Online, 2013).

This article is divided into six sections. The next section outlines the literature on banking fraud. Section 3 provides an overview of the banking industry and fraud prosecution. Section 4 outlines the research methods adopted by the study and Section 5 presents the findings. Finally, Section 6 presents discussions and Section 7 contains the conclusion.

**Fraud Literature**

There exists a number of fraud theories that are used to explain the fraudulent behaviour of individuals – Fraud Triangle (Cressey, 1973); Theory of Differential Association (Sutherland, 1939); Fraud Scale (Albrecht, Howe & Romney, 1983); Job Dissatisfaction Theory (Hollinger and Clarke, 1983); the Fraud Diamond (Wolfe & Hermanson, 2004) – and a variety of eclectic theories (Riahi-Belkaoui & Picur, 2000). Two of the eclectic theories that are worth mentioning are the conflict and consensus approaches (Carey, 1978, cited by Riahi-Belkaoui & Picur, 2000; Riahi-Belkaoui & Picur, 2000) and the ecological theory (Riahi-Belkaoui & Picur, 2000) as both these theories can be linked to political, economic and legal dimensions of society which affects prosecution of fraud and law making. Both theories hypothesise that laws develop from general public opinion reflecting the popular will of the society. The conflict approach suggests that laws are influenced and passed by interest groups to their benefit. This suggests that accounting interest groups give the impression that they are in control of problematic situations when they really are not. As a result the regulations that are enacted for checking fraudulent reporting and white-collar crime are weak. The conflict approach proposes that the origins of fraudulent accounting practices may be connected to the political and economic development of a society (Carey, 1978, cited by Riahi-Belkaoui & Picur, 2000). In comparison, the consensus approach suggests that rather than emerging from and then exacerbating conflict between special interest groups, laws emerge from and then encourage cooperation between these groups, improving access to justice to all within the society (Riahi-Belkaoui & Picur, 2000). Under the consensus model, the origins of fraud are still connected to political and economic development, but rather than accounting interest groups being positioned as being weak, they are positioned as being actors in a consensus-building approach. The ecological theory blames the occurrence of corporate fraud, white-collar crimes and audit failures
on the weak social organisation of accounting as a discipline and the failure of the general public to act effectively as an agent of social control by being indifferent to crime (Riahi-Belkaoui & Picur, 2000).

Drawing from these theories, prior studies argue that fraud results from complex interactions of internal and external industry factors as well as ethical and sociocultural factors (Aguilar, Gill, & Pino, 2000; Bakre, 2007). Internal industry factors can include information sharing, inter-bank competition, organisational characteristics, insider involvement, internal controls, and information technology. Zahra, Priem & Rasheed (2007) found that fraud opportunities exist within organisations for highly placed insiders to steal company information and use the same to their advantage. Such insider involvement makes it difficult to uncover fraud and to successfully prosecute or win a conviction against the perpetrators because highly placed executives can easily cover their tracks. Internal controls are set up to deter and prevent fraud. However, most internal controls are inadequate to prevent fraud especially where insiders are involved as they can override the controls. Besides auditors do not proactively audit to detect fraud (Silverstone and Davia, 2005; Wells, 2004).

In a study on individual and organisational characteristics influencing fraud Holtfreter (2005) found that organisational characteristics such as the type of ownership, size and nature of an organisation have a bearing on fraudulent practices in organisations. Research into structural differences between large and small banks indicates that large banks tend towards a more rigid institutional structure and less informal information sharing and development (Berger, Miller, Peterson, Rajan & Stein, 2005), which could influence their choice of formal or informal networking, while smaller banks choose to use informal and soft information channels.

Barth, Lin, Lin & Song (2009) found evidence to suggest that greater banking competition and information sharing helps the process of curtailing fraudulent lending activities among the banks. This study also revealed that organisational characteristics such as the ownership structure of firms impact on fraudulent lending practices.

The external industry factors include institutional and legal framework such as regulation and law enforcement as well as the general governance environment (Aguilar et al., 2000; Barth et al., 2009). Research by Becks & Fuchs (2004) has provided evidence that net interest margins and overhead costs are twice as high in Kenya as in the rest of the world due to the deficient legal and institutional environment, the relatively small size of the banks and problems related to fraud and insecurity. The deficient legal and institutional environment is not only responsible for the high overhead costs and low productivity of the Kenyan banks but also explains the high losses arising from loans (Beck & Fuchs, 2004). Such loan losses lead to an increase in credit risk, reduces securitisation of assets, and ties down receivables to one bank. Strengthening the legal and institutional framework can improve the lending environment by reducing interest rate spread.

Breuer (2006) also suggests that banking activities are not only affected by banking supervision and regulation but also by the legal, political, sociological and economic institutional infrastructure of the country. Supporting this view, Barth et al. (2009) established that the legal environment; that is objective courts and better law enforcement, has a significant impact on fraudulent lending practices. The absence of adequate laws,
prudential guidelines, objective courts and other institutions is a particular problem in
developing countries (Barth et al., 2009). In many developing countries such as Kenya, the
weaknesses in the institutional infrastructure are exacerbated by the ethical and socio-
cultural factors such as bribery (Bakre, 2007; Transparency International, 2013). These have
implications for what is considered to be acceptable business practice (Zahra et al., 2007)
and influence the way institutions are managed and run as well as providing guidance
regarding the acceptance of fraud (Aguilar et al., 2000).

Information technology is an overarching internal and external factor that influences
the degree of fraud in an organisation. It can be used as a positive factor in detection
and prevention of fraud. However, information technology is also highly vulnerable to
inefficiency and ineffectiveness if it is not implemented properly (Fernandez & Gonzales,
2005).

**Kenyan Banking industry and fraud prosecution**

The banking sector is comprised of 43 commercial banks, 1 mortgage finance company, 9
Micro Finance Banks, 2 representative offices of foreign banks and 101 foreign exchange
bureaux which are all private and mostly locally owned (Bank Supervision Report, 2013).
30 of the commercial banks are locally owned institutions and there are 14 foreign owned
institutions (Bank Supervision Report, 2008). The locally owned banks included three
state-owned or primarily state owned institutions. The foreign owned banks consisted of
10 locally incorporated foreign banks and 4 branches of foreign incorporated banks. These
banks are regulated under the Companies Act (Chapter 486), the Banking Act (Chapter 488)
and the Central Bank of Kenya Act (Chapter 491) of the Laws of Kenya. The supervisory
responsibility of the banking system rests with the Central Bank of Kenya (CBK) which also
has a responsibility for monetary policies in Kenya as provided for by Central Bank Act.
Other than formulating or implementing monetary policies the CBK fosters the liquidity,
solvency and proper functioning of the banking and financial systems in Kenya (Bank
Supervision Report, 2013). With the advent of local financial institutions in the 1970’s the
demands placed on the CBK changed. Financial institutions began to mushroom but they
were often fraudulently and incompetently managed and lacked the required capitalisation
(Brownridge, 1998). This can be blamed on the relaxed regulatory and supervisory systems
prevalent and operating in the banking and financial systems at this time, which cultivated
a culture of poor governance and weak management in the industry. Clear laws, rules
and regulations need to be set up to legislate and regulate the banking industry to enable
effective legal enforcement (Gikandi and Bloor, 2010).

A major problem in the Kenyan banking sector is that fraud is becoming widespread
(Business Daily, 2012). The Banking Fraud Investigations Department (BFID) has attributed
the increase in banking fraud to a number of reasons, including banks’ unwillingness to
tackle the fraud problem, poor response time to arrest warrants issued to banks by the
relevant authorities, weak surveillance of bank halls and ATM lobbies, and the lack of
independence in the forensic auditing function (Technology Banker, 2012). Additionally,
there is an absence of laws especially in relation to credit card fraud which allows
fraudsters to carry out fraudulent activities with ease, with very light sentences handed
by the courts. Further, banks have been slow to report fraud, while courts are not prudent
or fail to convict the perpetrators. The conviction rates for fraud are reported to be very
low. For example, anecdotal evidence shows that in the second quarter of 2010, out of 102
fraud cases brought before the court, only 8 cases were finalised with 5 convictions and
2 cases were withdrawn (Technology Banker, 2012). This indicates that there is a problem with fraud prosecution in Kenya and might explain the reluctance of banks in reporting fraudulent activities and in pursuing criminal prosecutions.

In Kenya, the Office of the Attorney General (AG) is the office within the public sector that prosecutes fraud. It is worth noting that in Section 14 of the Kenya Police Act (Chapter 84 of Kenya Laws) prosecution is not mentioned as one of the roles of the Kenyan Police force. This therefore means that police prosecutorial powers are delegated powers vested by the Office of the AG (Mwalili, n.d.), consequently giving the police no real direct power to prosecute cases. The Police Prosecution Branch is under the Department of Criminal Prosecutions (popularly referred to as the CID). The Attorney General's office is a constitutional office and one of the main roles of the AG is to act as the Chief Public Prosecutor. The AG's Office is also responsible for appointing public prosecutors, normally qualified lawyers who have some legal training. However, often there are problems undermining the AG's ability to prosecute fraud cases. Firstly, fraud in Kenya is often prosecuted by people without legal training. There is a shortage of qualified prosecutors in the country and in some instances the AG has resorted to appointing police prosecutors (police inspectors) who act as prosecutors even though they are not lawyers (Mwalili, n.d). Police prosecutors undergo four months training before beginning their role as prosecutors. A number of initiatives have been made to improve the judicial system through appointment of more judges, new physical facilities and amendment of relevant laws (Waweru & Kalani, 2009). Secondly, the structural independence of enforcement institutions from political authorities also determines the degree of independence of the enforcement institutions. In Kenya political authorities have been known to interfere with the independence of enforcement institutions such as the police and the courts, greatly hampering effective prosecution of fraud cases.

**Research Methodology**

The interpretivist inquiry can be best applied to explore or build up an understanding of something, which in our case is fraud, of which there exists little knowledge (Henn, Weinstein and Foard, 2009). According to those who support the interpretivist inquiry there are no absolute answers (Candy, 1991; Mezirow, 1996) as there are alternative ways of understanding social phenomena such as fraud. Instead of using a research instrument, like a questionnaire, the researcher is the instrument (Patton, 1990; Brannen, 1994). This makes the use of interviews appropriate for the issues being studied in this research. An interpretive approach also considers and acknowledges the processes by which the individual makes sense of their world and allows for the researcher’s role in knowledge construction to become more explicit. Moreover, given the sensitive, broad and complex nature of fraud issues interviewing is suitable for this study.

This study uses data drawn from field interviews involving bank managers from different banks. A total of 17 bank managers whose roles involved fraud prevention and detection participated in the interviews. This group represented key organisational staff such as internal auditors/managers, fraud investigators/managers, operational risk managers, information systems managers, security personnel, financial crime team members and forensic auditors among others. As stated by Krambia-Kapardis (2004) when surveying corporate victims of fraud it is essential to decide the appropriate person in the organisation to respond as failure to do so may lead to a low response rate. The choice of whom to talk with, where, when, about what, and why, places limits on the conclusions
we finally draw and how confident others feel about them (Miles and Hubermann, 1994). By sampling people we can get at the characteristics of settings, events and processes. However, determining the appropriate person(s) as respondents can be hampered by practicalities, such as, being able to gain access to them. The managers were selected using snowball sampling which was facilitated through personal networks and through an initial field survey. Snowball sampling identifies cases of interest from people who know people who know which cases are information-rich (Patton, 1990). Both a formal and informal network was exploited to find suitable respondents. Interviewees were chosen from a cross section of large, small, public, local, national, regional and international banks operating in the capital city of Kenya, Nairobi, within constraints of availability of time and access to interviewees.

Interviews took place in the offices of the respective banks and lasted between 30 – 60 minutes. These were recorded using a digital recorder and later transcribed and edited to eliminate errors, correct grammar, digressions and repeated information. The interviews were analysed, coded and common themes identified using the analytical procedure proposed by Miles and Huberman (1994). To preserve anonymity and confidentiality pseudo names have been used in place of the interviewees’ names and the specific names or sizes of the banks have not been identified. However, the type of bank, namely; local, national, regional and international have been preserved. As this study was a small part of a much larger study only one question from the larger study was relevant. Interviewees’ were asked to outline the challenges the banks faced in preventing, detecting, investigating and prosecuting fraud. This study has focused on the interviewees’ responses regarding the challenges faced by banks in prosecuting fraud.

Findings
This section presents the key findings from the interviews held with the bank managers. The findings are grouped into structural and institutional issues and prosecution challenges.

Structural and Institutional Issues
One of the questions the interviewees were asked was concerning the challenges they face in the process of fraud prevention. Out of four areas, namely prevention, detection, investigation and prosecution, the last area, prosecution, raised a number of issues.

The most frequent topics identified within the interviews were the structural and institutional issues that banks faced in trying to deal with fraud. Banks indicated that there were only weak provisions for fraud detection and prosecution available, that the legal basis for fraud prosecution was inadequate, that prosecutorial, legal and law enforcement knowledge of fraud was lacking, and that the legal process was exceptionally difficult and extended. These factors often moderated against the use of the court system in dealing with fraud. Prosecuting fraud can be a difficult task and can challenge judicial systems. The study raised some legal issues in respect to prosecution and legal enforcement.

Prosecution Challenges
The prosecution challenges are highlighted below and the themes cover legal problems regarding the length of time it takes to prosecute fraud, the high acquittal rate, issues surrounding the police force and the justice system.
Length of time taken to prosecute cases
Concern was raised by some interviewees over the unduly long period of time banks had to wait for a case that was before the court to be concluded. Many cases dragged on, remaining unresolved for many years (Adam – a national bank). In the process of the delays some witnesses relocate, material evidence is lost, fraudsters bribe their way out, bank staff forget the facts of the case and people even lose interest in the cases (Joshua – International Bank). Legal prosecution takes time and some of the fraudsters are well-connected and easily disappear in the course of the case investigation and prosecution (Ruth – Regional Bank).

The workload in the judiciary is high resulting in work backlogs. Courts do not plan and schedule cases properly, affecting the speed of determination of cases. At times the court can line up several cases and unrealistically expect to hear from all the witness on the same day. Additionally the police are lax with issuing court bonds and summons. This causes delays of even up to 7-8 years (Caleb and Simon - Local Banks; David – Regional Bank).

Consequently cases become difficult to follow - the police are prone to frequent transfers, lawyers persistently seek adjournments, prosecution witnesses that have been relied on can die, be compromised, made to disappear or move on and are no longer available to give evidence (Solomon – Local bank; David – Regional bank).

The long duration of time taken in prosecutions raises issues concerning delays and adjournments of fraud cases as well as witness and police fatigue. Eventually it costs the banks especially in terms of lost time and undermines the value of deterrence.

High rate of acquittals
A judicial issue raised through the interviews was the high rate of case acquittals. Some interviewees explained how they have flagged up this issue within the industry and externally with the Police Commissioner. Acquittals mainly arise on grounds of technicalities because the police do not bond some witnesses or the case is not proved as a result of the police and prosecutors having no time to sit, read the file and to understand the cases. This high rate of acquittals frustrates the efforts made by banks in arresting and prosecuting fraudsters who even subsequently try to sue the bank after their acquittal. At the same time fraudsters remain undeterred as they know they can buy their way out of the legal system. Corruption in the judicial system was cited as a challenge. The criminals use the proceeds of fraudulent stolen money to bribe the court officers. The interviewees recounted cases where fraudsters with connections in the judicial system successfully won court acquittals. (Moses – International Bank; David – Regional Bank; Titus – a national bank)

It is clear that the judicial system can be strengthened and appropriate action be taken so that all cases are duly scrutinised as a measure to reducing acquittal rates.

The legal system
Interviewees also described challenges they faced in prosecution because of the legal system – the police, prosecutors and the case judges. They described the working of the legal system as not being up to speed, time consuming and as not yielding any successful prosecutions (Abraham – International Bank; Joseph – Local Bank).
Some of the bank managers commented about the absence of good, skilled and knowledgeable prosecutors who can handle fraud cases within the legal system. Thus:

“Here we have a big issue. The government investigators are not up to standard. Their investigation skills are low or poor I can say.” (Joshua – International bank)

“Courts are slow and sometimes prosecutors and even the judges are not conversant with fraud investigations.” (Titus – a national bank)

“We have to take cases to prosecutors who are external investigators and are not at times very conversant with the kind of cases that we handle; and of course trying to prosecute the same through the court you find that the prosecutors may not be conversant with the kind of cases that come through the bank... the judges and magistrates are equally not conversant with the bank cases (Simon – International Bank)

“We don’t have good prosecutors. The prosecutors do not also try and understand the case thoroughly. They do not read the files and get back to you. This makes us spend a lot of time in ensuring when our cases are going for hearing you seek an appointment to see the prosecutors to explain the process and what happened. That forensic investigation is what is lacking.” (Moses – International bank)

There seems to be an issue of lack of public commitment to anti-fraud strategies as there are hardly any skilled or knowledgeable government fraud investigators and prosecutors. An apparent lack of equipment, outdated government agency facilities e.g. forensic laboratories and lack of specialised forensic expertise is one of the challenges that hampered prosecution of fraudsters (Solomon - Local Bank)

**Cost Vs Benefit**

Other than the challenges raised by the legal system the legal fees at times do not compensate for time and money lost. The time required is often too much in comparison to the losses incurred. So in case of theft of small amounts the legal fee may even cost more than the amount the bank is trying to recover from the fraudster with the decision that most banks will not prosecute for small amounts (Joseph – Local bank)

One interviewee commented:

“Again looking at these cases, you don’t recover any money, if money is lost there is no recovery.... whether you take a person to court or not the money is never recovered.” (Caleb – Local bank)

The banks do not find it beneficial to take legal action where the cost of prosecution (legal fees etc.) is greater than the amount recoverable from the fraud. As prosecution is a measure of deterrence, we can infer that striking a trade-off between deterring fraud and the costs associated with deterring fraud is an issue in fraud risk management. Meanwhile it would appear that banks seem to be making conscious decisions not to prosecute fraud cases as a cost reduction measure.

**Frequent transfer and slackness of the police force**

The regular transfer of police staff who are investigating and prosecuting cases within
the central bank fraud unit has greatly reduced the speed at which some of the cases are concluded. This seems like a bit of a double-binder because, as seen earlier when cases take longer transfers are more likely and so cases will take even longer resulting in a potentially cumulative process.

For example in one case a bank, with the help of the police, was able to identify culprits of fraud and theft through closed circuit television cameras. But before long the police officer who was working on the case was transferred and the new policeman appointed to follow up the case did not have the same passion as his predecessor and consequently the case fell through (Solomon – Local bank).

The police have sometimes been lax and unprofessional in their investigations allowing fraud culprits to get away with crime, which gives the impression that one can commit fraud and not face any consequences (Jacob – Local bank). Another interviewee expressed the fact that they seek to avoid going to the police by putting up their own structures in place (Elijah – International bank).

These above cases reveal that police apathy and lack of interest and professionalism in following up cases work against quick resolution of cases. An interviewee observed that there were not many challenges when it came to internal investigations because their team is well trained. However, he indicated that once a report is made externally the police do not carry out the investigations properly:

"... Most of the police are in a hurry and not ready to sit down with the internal investigators to understand a case and the process. They don't see the need why they should understand the whole process first before they look at what offence has been committed. This leads to the case evidence not being properly compiled." (Moses – International)

Another concern to the banking industry is the high turnover of police personnel at the BFID (which falls under the Central Bank, Police Unit) charged with the responsibility of investigating banking fraud cases.

"Because they are given good allowances by Central bank, I think the police are using that to take their relatives, so if you are there you only get to stay for a short time and they move you. We were talking to the Commissioner (of Police) and we were saying “this is a high turnover for a department like this!” Because today if someone is there for two years ....now we feel we are comfortable that the person understands the financials. Suddenly you find that the last overhaul was 6 or was it 3 months ago... they overhauled everyone from that department right from the head. Now all these people they have brought some are from uniform and they have not known investigation. You try to explain something to him/her and they say “you know I am in a hurry, give me the exhibit document”. That defeats the purpose." (Moses – International)

"We have a police unit that falls under the Central Bank of Kenya – BFID. It is understaffed and serving the entire banking industry and you find that it does not manage to serve well. There are also frequent transfers of these police officers; they get experience and before you know it they are transferred and they bring new people who do not know the cases well." (David – Regional bank)
The researcher while carrying out the research confirmed what Moses reported above. On visiting the BFID all the personnel were recently transferred after just 3 months in office. Moses suggests that there is some form of nepotism where police officers are appointed through connections (family or otherwise) implying that there are problems within the system.

Weak legal enforcement and poor industry co-operation
Investigating fraud at times requires the assistance of a third party, which in the case of this study is either another bank or a law enforcement institution like the police. This study revealed that there is little industry or agency co-operation between banks. And at the same time the police are not quick with assisting in bringing culprits to book. Adam (a National Bank) and Caleb (Local Bank) observed that there is little cooperation within the banking industry and this makes it difficult to investigate frauds which involve getting information and evidence from other banks. The process of collecting information and evidence are hampered by legal processes causing a lack of faith in the institutions like the courts and the police.

A number of interviewees observed that credit card fraud was on the increase. However, they also pointed out that in Kenya the legal environment that banks operate in has made it difficult for banks to prosecute card frauds. The bankers regret that even when you successfully uncover card skimmers, especially those who happen to be employees of organisations that have been victims of card fraud, it is very difficult to prosecute them as there is no credit card legislation in Kenya. One manager explained the present situation this way:

"The Attorney General is in the process of drafting Credit Card Legislation. They have borrowed heavily from the South African and UK legislation. They are putting it together. The legislation has still not yet reached the Parliament but it is at an advanced stage because I know we are actively involved including other stakeholders. But that has been our major challenge.....we still recover this crime but we can't successfully prosecute because of lack of legislation." (Moses - International bank)

Without legislation the banks have no teeth to fight this type of fraud. This is a great setback for the banking industry as it continues to suffer this fraud relentlessly. The fraudsters are aware that they can get away with it and will therefore keep exploiting the loophole created by lack of legislature.

Other institutional issues
The interviews also revealed that international banks are more likely than local and national banks to pursue the prosecution of fraudsters. However, there is the possibility that international banks may be following wider policies and are able to ignore the costs and problems arising from the legal structure in Kenya (Berger et al, 2005). In particular, availability of resources to fight fraud is likely to be very different between international, national and local banks because international banks have far more financial, technical and human resources. This supports Holtfreter's (2005) suggestion that the size and nature of an organisation can affect its fraud management.

Discussion
One of the major issues identified by participants was a lack of institutional capacity on the part of the Kenyan government to deal with the problem of fraud. Some of the problems
identified included lack of interest, capacity and skills on the part of police and prosecutors, an inefficient and ineffective court system, and lack of sufficient laws to address problems like credit card fraud. This inadequacy in the Kenyan laws revealed through this study supports research on e-banking done by Gikandi and Bloor (2010) who found that the absence of clear legal regulations in Kenya poses a challenge of significant importance in the banking industry. Problems including lengthy and expensive proceedings, long recesses, and long periods between fraud identification and prosecution led to reduction of willingness to prosecute fraud on the part of banks, which often used civil settlements or dismissal instead. However, many of the participants expressed frustration with this, and indicated that they would prefer that there was a consistent legal approach in place that they could use.

The legal external environment, including laws, regulations, and institutions (Aguilar et al., 2000) is obviously going to be one of the major factors in how well banks can fight fraud using a legal enforcement approach. Legal enforcement can occur at the local, national, or international level (Macey & O’Hara, 2003). The majority of issues in this case were national, with low international involvement. Two areas that did emerge were the legal environment for lending (Barth et al., 2009) and the problems associated with competence of police investigation and criminal prosecution (Wilhelm, 2004). The study confirmed the BFID’s observation (Technology Banker, 2012) that fraud in Kenya was on the increase due to the absence of law (especially for credit cards), inadequate court sentences, and low conviction rates all resulting in weak fraud prosecution. This finding also supports the view expressed by Barth et al (2009) that the lack of adequate laws, better law enforcement, objective courts and other institutions are factors that need to be addressed in developing countries if the legal, political, sociological and economic institutions are to improve (Breuer, 2006).

However, this study also supports the BFID’s observation that banks are unwilling to prosecute fraudsters especially where the cost of prosecution outweighs the benefits that would accrue to the concerned bank. Banks are therefore opting not to pursue and prosecute what they consider to be ‘small’ frauds (Technology Banker, 2012).

The findings of this study also identified that banks faced prosecution problems because the public prosecutors were not trained or qualified and did not understand the process of fraud investigation. This supports the fact that the AG’s Office, which is responsible for public prosecution, often suffers from a shortage of qualified and legally trained lawyers. They resort to appointing prosecutors who lack the necessary training and qualifications (Mwalili, n.d.). There is therefore need for the AG’s Office to improve training of public prosecutors.

Moreover Section 14 of Chapter 84 of the Laws of Kenya (Kenya Police Act) needs to be revised to give the police prosecutorial powers which they currently do not have. This would enhance the role of the police and give them direct power to prosecute fraud (Mwalili, n.d.). As a consequence the police institution will be strengthened and law enforcement would improve.

The weakness of laws related to banking fraud in Kenya is not unique. In fact, the conflict and consensus approach to fraud identifies weak structural regulation of white-collar crime such as fraud as the outcome of institutions wanting to appear to be in control when in fact they are not (Carey, 1978 as cited by Riahi-Belkaoui and Picur, 2000). Under this
model, the social inequalities that cause conflict are also responsible for lack of effective legislation in order to prevent the crime from occurring. Under the ecological model of fraud, fraud actually occurs in the banking industry because the industry is the site of social disorganisation (Riahi-Belkaoui and Picur, 2000). Kenya may be particularly prone to social disorganisation due to general weakness and disorganisation of special interest groups, including accounting associations and other interest groups, which could otherwise promote the banking industry's interest in making laws. While larger international banks reported willingness to prosecute (likely due to greater resources), little is being done to take definite measurable steps in improving legal institutions or provide training for prosecutors or policy. Large banks are structurally different from small banks proving that organisational characteristics such as type of ownership and size influence the way fraud is dealt with by the banks (Holtfreter, 2005; Berger et al., 2005).

Legal issues included a lack of appropriate institutions and legal structures, lack of knowledge regarding fraud in the investigative and prosecution systems, and lack of appropriate laws to combat fraud. These are known issues within the literature (Aguilar et al., 2000; Macey & O'Hara, 2003; Wilhelm, 2004). In Kenya, the judicial and court system do not operate efficiently and there is no proper system in place for fraud case reporting. Even though a number of initiatives have been made to improve the judicial process (Waweru & Kalani, 2009) more still needs to be done to improve legislature and efficiency in the justice system, as well as reduce corruption. One of the major issues found in this study was the length of time required for prosecution, which served as a significant deterrent to its use.

The Government of Kenya can create an enabling environment for tackling fraud by addressing the structural deficiencies, the institutional and political hurdles. This will go a long way to improving the effectiveness of fraud prosecution.

**Conclusion**

The objective of this study was to investigate the challenges faced by the Kenya’s banking industry in prosecuting fraud and to analyse the structural and institutional weaknesses of public sector organs in prosecuting fraud cases within the banking industry. To investigate the challenges 17 bank managers whose roles included fraud prevention and detection were interviewed.

The challenges faced by the banking industry in prosecuting fraud ranged from police and court related issues such as unduly long periods of time taken to prosecute fraud cases, high acquittal (or low conviction) rates, poorly skilled and largely unqualified prosecutors and judges and frequent transfers and high turnover of the police force. Other challenges arose from structural and institutional weaknesses such as weak legal and law enforcement by the courts and police force, weak industry cooperation and inadequate law provisions. These findings suggest that improving the institutional infrastructure to support fraud prosecution will require a combination of restructuring the laws and judicial system, with advancing training for police, attorneys, and judges in issues of banking fraud among other measures. There is a case for reforming the public sector institutions that directly deal with fraud cases. Banks in Kenya need to develop effective and efficient means of fraud prevention and detection. This, combined with an efficient prosecution process, the prospects of criminal repercussions and adequate sentencing will go a long way in deterring fraud in the banking industry.
It is often simpler, when coming from a context where there is strong respect for the rule of law and strong policing and legal institutions, to place blame on banks and other companies that do not use the court system or other legal methods to address the problem of fraud. However, as the interviews with bank management and fraud investigators revealed, the situation is not as simple as that. Simply, without the strong policing and prosecution institutions that are generally present in most Western countries, but which are noticeably lacking in Kenya, it is often a rational business decision not to prosecute for fraud rather than to prosecute for fraud, as it is both simpler and less costly to do so. This research provides a valuable means of identifying the influence of the institutional environment on organisational decision making e.g. in prosecuting fraud cases.

Future research could consider a quantitative research covering all the banks in Kenya. Alternatively this study can be extended into a cross border study involving other African countries or even compared with a developed country to understand if these same issues arise.
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