CIVIL SOCIETY
REFERENCE GROUP (CSRG)
In quest for a Conducive and Enabling Environment for CSOs in Kenya and the Region

DIGITAL SPACE
CASE DIGEST

Civic Space Protection Platform

ICNL
INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW

PROTECT

DIGITAL SPACE

CASE DIGEST

> “Let this judgment therefore send a strong message to the Parties and the World; the Rule of Law is thriving in Kenya and its Courts shall stand strong; fearless in the exposition of the law; bold in interpreting the Constitution and firm in upholding the judicial oath.”

Justices Isaac Lenaola, Mumbi Ngugi, Hedwig Ong’udi, Hillary Chemitei and Joseph Louis Onguto

Coalition for Reform and Democracy (Cord) & 2 others V Republic of Kenya & 10 others [2015] eklr [461]

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FOREWORD

The internet has enabled an expansion of civic space and a fuller enjoyment of fundamental rights, although this has not necessarily been welcome in all states. The right to receive, seek and impart information is well-entrenched under international law – through, for instance, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter) – as well as in many domestic laws across the continent. However, the reality on the ground in achieving the realization of the rights gives rise to concern. The growing importance of the internet in Africa has been accompanied by attempts of authoritarian governments to control the digital flow of information and communication through internet shutdowns, censorship, and surveillance. The increase in internet shutdowns, crackdown on human rights defenders, and civil societies in recent years in East Africa demonstrates the worrying trend of governments' attempts to restrict freedom of expression in the digital realm.

In Kenya, the freedoms of expression, access to information, the right to privacy and other fundamental freedoms are well entrenched in the Constitution. Despite this, Kenya still staggers towards limitation of digital rights in certain aspects. A raft of legislations, executive orders and actions in the digital space have been witnessed since 2010 thus limiting the civic space in Kenya. In March 2017, a report by Privacy International documented how the information acquired from unlawful communications surveillance is justified by the state as a response to counterterrorism - from surveilling, profiling, locating, tracking and arresting targets to abuse, torture, abduction and extrajudicial killing . There have also been concerns that human rights defenders (HRDs) and journalists are continuing to be surveilled by the government because of the nature of the work they do, including because such work can be critical of government, rather than for a valid law enforcement purpose. The government "periodically polices the internet for content that is perceived to be morally objectionable," and "has increasingly sought to have content removed online" and from social media profiles. The use of social media monitoring, the techniques and technologies that allow companies or governments to monitor social media networking sites creates potential for misuse by the government in identifying and targeting certain people and groups in society including HRDs and journalists.

With all the illegal state actions, the courts have been the only place of solace for the citizens, human rights defenders and civil society organizations. The CSOs and HRDs have successfully run to courts over the past years for reliefs for persons whose fundamental rights and freedoms have been violated by the state. It is upon this background that CSRG, through the Civic Space Protection Platform (CSPP) commissioned this publication to consolidate jurisprudence on the digital space in Kenya, which is relevant to the exercise of the freedoms of expression, access to information, the right to privacy and other fundamental freedoms. This publication is expected to be the tool for civic awareness and policy dialogue with key duty bearers. It will also serve as a useful resource for civil society, judicial officers and ICT practitioners.

John Benard Owegi
National Coordinator,
Civil Society Reference Group (CSRG).
May 31, 2021.

C/o Civic Space Protection Platform (CSPP).

Commonly Used Legal Terms And Definitions[1]

Amicus Curiae: A "friend of the court," or someone who is not a party to a case but who provides information or expertise to the court that can help clarify the issues in the case.

Certificate of urgency or emergency: An 'emergency' application may be filed when there is a likelihood of danger to those involved, either one of the parties. An 'urgent' application may be filed when a situation is not an 'emergency,' but may be time-sensitive, or needs to be heard quickly because of special circumstances. The court will decide whether the situation will be treated on an urgent basis.

Conservatory Orders: These enable the court to maintain the status quo or existing situation or set of facts and circumstances so that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the case and the trial was not a futile academic discourse or exercise.[2]

Damages: These are monetary amounts that may be awarded to a plaintiff in a civil lawsuit. Compensatory damages (special and general) are the most commonly awarded type of damages, as they are intended to compensate the plaintiff for loss of money or property due to the defendant's actions. Punitive damages are awarded as punishment for the misconduct of the defendant. Special Compensatory damages cover any expense or loss related to an injury.[3] General Compensatory Damages compensate an injured individual for non-monetary damages incurred in an injury claim. They are called general damages because they address harm that is "generally" sustained in an injury such as, for example, mental anguish.

Defendant: A defendant is a person or entity that is facing a civil lawsuit, or that has been accused of a crime. The word "defendant" is often used interchangeably with other terms including "accused" or "respondent." A criminal defendant has been charged with committing a crime, and is often placed in jail until bail is posted or the resolution of a trial. A civil defendant has been accused of a civil wrong, such as causing property damage, or failing to fulfill a contract, and may be ordered to pay monetary damages to the plaintiff.

Ex-parte: is a word in Latin meaning "for one party," referring to motions, hearings or orders granted on the request of and for the benefit of one party only.

Injunction: A court order compelling an individual or entity to do (mandatory), or to refrain from doing (prohibitory), a specified act.

- ***Preliminary Injunction:*** *A court order restraining a party from doing some specified thing, until the matter is settled, or until the court has issued a further directive.*
- ***Permanent Injunction:*** *A permanent injunction requires a person or entity to stop acting in a certain manner indefinitely, but it can also compel them to act or perform in a certain way. A permanent Injunction differs from a temporary injunction in that it is generally ordered by a court only after the court proceedings conclude.*[4]
- ***Mandatory injunction:*** *A mandatory injunction is an order that requires the defendant to act positively.*

Interlocutory: The term "interlocutory" is used to describe something that is decided while a case is still ongoing.

Interpartes: Between the parties.

Jurisdiction: Jurisdiction is the authority granted by law to the courts to hear a legal case. This includes the authority to rule on legal matters and provide judgments, according to the subject matter of the case, and the geographical region in which the matter took place.

Libel: Libel is a legal term that refers to the making of false and malicious statements about a person in some type of print or writing. This can include false and malicious statements made in writing, printed on signs, or published on a public forum. Publishing defamatory statements or pictures through the media is also considered libel.

Mens Rea: The concept of mens rea, which is Latin for "guilty mind," allows the criminal justice system to distinguish someone who set out with the intention of committing a crime from someone who did not mean to commit a crime. Mens rea refers to what the accused individual was thinking, and what his intent was at the time the crime was committed. A defendant must be blameworthy in mind before he can be found guilty.

Non-Derogable Rights: The term refers to a category of rights that cannot be suspended even when there is a public emergency.

1 For definitions, see https://legaldictionary.net/

2 Ibrahim, J, in Muslims For Human Rights (MUHURI) & 2 Others -vs- Attorney General & 2 Others High Court Petition No. 7 of 2011 in Nation Media Group Limited & 6 others v Attorney General & 5 others [2014] eKLR [14] http://kenyalaw.org/caselaw/cases/view/94342/

3 https://www.alllaw.com/articles/nolo/personal-injury/types-of-compensation.html

4 https://legaldictionary.net/injunction/#ftoc-heading-5

Plaintiff: Plaintiff is the term used to describe a party who initiates a court action, in order to seek a legal remedy. In some cases, the plaintiff is known as the "Petitioner," and the defendant is known as the "respondent."

Prima facie: Latin for "at first look," or "on its face," referring to a lawsuit or criminal prosecution in which the evidence before trial is sufficient to prove the case unless there is substantial contradictory evidence presented at trial.[5]

Prima facie case with a Likelihood of Success: There is a substantial likelihood that the party requesting the injunction will win the lawsuit, based on the facts of the case. A judge will not grant a preliminary injunction if he feels the lawsuit is petty.

5 https://dictionary.law.com/Default.aspx?selected=1598

INTRODUCTION

Over the last decade, the Judiciary has consistently played a significant role in safeguarding civic space as seen through their progressive rulings on the freedom of association, freedom of expression, peaceful assembly and public participation. Some of the rulings have affirmed the jurisdiction of the High Court in granting relief to persons whose fundamental rights and freedoms have been violated or are under threat as a result of actions in the civic or digital arena. The courts have also sought to establish a balance between the enjoyment of the right of freedom of expression, rights to privacy, protection of the public interest and protection of the rights and freedoms of others. In addition, they have cemented the principles on public participation.

The Civic Space Protection Platform (CSPP)[6] has put together this Case Digest on the Digital Space. The Case Digest, seeks to compile developing jurisprudence on the digital space in Kenya, which is relevant to the exercise of the freedoms of expression, access to information, the right to privacy and other fundamental freedoms.

The CSPP recognizes that the digital space is a crucial extension of the civic space. However, it is also a new and fast evolving arena, which poses a multiplicity of challenges to public and private actors such as cybercrime, cyber bullying, hacking, data interception, breach of privacy, surveillance and others.

In a number of instances, diverse actors have sought to provide guidance on how to best preserve and maximize the opportunities that these technologies bring while addressing their risks. In his 2011 report to the Human Rights Council, the then Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank la Rue asserted that 'the Internet has become a key means by which individuals can exercise their right to freedom of opinion and expression, as guaranteed by Article 19.[7] He underscored the applicability of international human rights norms and standards on the right to freedom of opinion and expression to the Internet as a communication medium. He noted that Article 19 of the Universal Declaration of Human Rights and the Covenant was drafted with foresight to include and to accommodate future technological developments through which individuals can exercise their right to freedom of expression. Hence, the framework of international human rights law remains relevant today and equally applicable to new communication technologies such as the Internet.[8]

The report further set out the exceptional circumstances under which the dissemination of certain types of information may be restricted. Any limitation to the right to freedom of expression must pass the following three-part, cumulative test: (a) It must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency); and (b) It must pursue one of the purposes set out in Article 19, paragraph 3, of the Covenant, namely (i) to protect the rights or reputations of others, or (ii) to protect national security or of public order, or of public health or morals (principle of legitimacy); and (c) It must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality).[9]

The courts in Kenya have presided over a number of cases that reflected the debates regarding fundamental rights in this digital era. The challenge for human rights jurisprudence and discourse is not only to bring both stability and a coherent framework to bear upon such complexities but also to adapt to them.[10] One thing that is consistent throughout the decisions in this digest has been the application of human rights norms and standards to the digital space. The Human Rights Council in its resolution 32/13 asserted the importance of applying a comprehensive human rights-based approach in providing and expanding access to the Internet.[11]

The legal framework to ensure that the fundamental rights and freedoms of association and to peaceful assembly, to opinion and expression, privacy amongst others are observed, respected, fulfilled and protected, exists in international and regional human rights treaties, as well as in Chapter 4 of the Constitution's Bill of Rights.[12] What is needed is a new understanding of how those texts apply in the digital era.

The Digest aims to provide a range of actors, including civil society, advocates and judges,tasked with the role of observing, respecting, protecting, promoting and fulfilling human rights and fundamental freedoms, with reference material that can help them in navigating this unique arena of the civic space. The Digest will also help in the development and application of human right principles in the digital space.

6 The Civic Space Protection Platform (CSPP) is a loose network of diverse civic actors (media, faith-based institutions, civil society formations, social movements, professional associations, academia, private sector associations, independent oversight commissions, trade unions, political parties, networks of human rights defenders and others) who are involved in or interested in safeguarding the civic space in Kenya. It is coordinated by the Civil Society Reference Group (CSRG), with technical support from the International Centre for Not-for-profit Law (ICNL). Currently, there are about 30 participating actors on the Platform.

7 Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur's Report), Human Rights Council, A/HRC/17/27, par 20, https://undocs.org/en/A/HRC/17/27

8 A/HRC/17/27 Par 21

9 Ibid par 24

10 Joyce, Daniel, Internet Freedom and Human Rights, *European Journal of International Law*, Volume 26, Issue 2, May 2015, Pages 493–514, https://academic.oup.com/ejil/article/26/2/493/423010

11 A/HRC/RES/32/13, par 5. Similarly, the Human Rights Council called upon all States to address security concerns on the Internet in accordance with their international human rights obligations and in a way that ensures freedom and security on the Internet. A/HRC/RES/32/13 par.8 https://undocs.org/A/HRC/RES/32/13

12 Article 21 (1) Chapter IV, Constitution of Kenya.

The digest, which contains five sections, lays out court decisions in the following broad categories: Right to privacy – state surveillance, interception of communications, data protection and registration of persons; National Security, Cybercrime and Computer Misuse; Independence/ Freedom of the Media; Use of Social Media; and Women and Online Violence.

The decisions reflect the court's reasonings as they weigh in the balance the freedom an individual has to express him/herself and impart information to others, against the respect for another's right to reputation and inherent dignity, the public interest and national security. They capture the judges' examination of the nature and extent of the limitations to fundamental freedoms in the Bill of Rights. The decisions also expose defective interpretations of the Constitution and address issues regarding the roles of the arms of government vis-à-vis the implementation of the Constitution. They clearly set out guidelines for constitutional analysis of statutes and point out the gaps, which exist in the legislative framework and that require to be sealed in order to ensure the effective protection of fundamental rights. The decisions bring to light the courts' detailed analysis of the issues involved and bold exposition of the constitutional position.

The following are key highlights drawn from the rulings:

Guidelines for determining the constitutionality of a disputed legislation or action:

1. In determining the constitutionality of a statute, a court must be guided by the object and purpose of the law in dispute. The object and purpose can be determined from the legislation itself.[13]

2. Where a legislation is challenged, it is the defendant's duty to show that there is a relationship between the limitation and its purpose; and that there are no less restrictive means available to achieve the purpose intended.[14]

3. The courts have laid down the main standards in determining constitutional validity of a law as "rationality", "reasonableness" or "proportionality". In determining the constitutionality of a law or provision of a law, the court is under a duty to consider the challenged law or provision alongside the Article(s) of the Constitution and determine whether it meets the constitutional validity test. In doing so, the court must also consider both the purpose and effect of the provision or the law, and determine whether the purpose of the provision or its effect, may lead to unconstitutionality of the law or provision.[15]

4. Laws should be clear and unambiguous, and especially so if they create a criminal offence. Further, they should not be so widely and vaguely worded as to net anyone who may not have intended to commit what is criminalized by the section.[16]

5. For a disputed law to meet the constitutional validity test set out in Article 24 of the Constitution, it must be reasonable and justifiable in an open and democratic society.[17]

Interpretation of the Constitution

6. The Constitution should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, and that contributes to good governance.[18]

7. The Constitution being the supreme law of the land must be interpreted liberally and holistically in order to give effect to its letter and its spirit,[19] and within its context. An interpretation of the Constitution that destroys one or some of its provisions or renders them ineffective, or results in illogical conclusions cannot be tolerated.[20]

Separation of Powers

8. The High Court has the jurisdiction to determine whether a provision of law is in conflict with the Constitution, in light of Articles 165 (3) (b) and (d) (i).[21]

9. The doctrine of separation of powers does not prevent the court from examining whether the acts of the Legislature and the Executive are inconsistent with the Constitution as the Constitution is the supreme law.[22]

10. Anything done by Parliament outside the confines of the Constitution and the law attracts the attention and action of the court.[23]

13 See Article 259 and Article 159(2) (e) of the Constitution, Geoffrey Andare v Attorney General & 2 others [2016] eKLR, (HC) [69]
14 Ibid
15 Cyprian Andama v Director of Public Prosecution & another; Article 19 East Africa (Interested Party) [2019] eKLR, (HC) [30]
16 Robert Alai v The Hon Attorney General & another
17 Ibid
18 See Article 259 and Article 159(2) (e) of the Constitution, Geoffrey Andare v Attorney General & 2 others [2016] eKLR, (HC) [69]
19 Francis Kigo Njenga v Standard Group Limited & another [2019] eKLR
20 Ibid
21 See Geoffrey Andare v Attorney General & 2 others [2016] eKLR
22 Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR
23 Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR

Jurisdiction of the court and Locus Standi (the right or capacity to bring an action or to appear in a court)

11. Article 22 of the Constitution confers on every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened, and in line with Article 23(2), the court is empowered to grant appropriate relief.[24]

12. Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where a statute has provided a remedy to a party, the court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. A court should examine whether the alternative remedy provides an effective answer to the litigant's complaint.[25]

13. A party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the court. He has a right to do so if there is a threat of violation or contravention of the Constitution.[26]

Requirements when seeking conservatory orders

14. Any applicant seeking conservatory orders ought to demonstrate an arguable prima facie case with a likelihood of success and also, show that in the absence of the conservatory orders, he is likely to suffer prejudice.[27]

15. A constitutional basis and strong and convincing reasons must be shown before the court can exercise its power to suspend legislation at an interlocutory stage.[28]

Guidelines for Public Participation

16. The need to involve the public in the legislative processes is grounded in the Constitution. The duty placed upon the legislature by the law is to inform the public of its business and provide an environment and opportunity for those who wish to have a say on the issue to do so.[29]

17. The time that is available for public participation must be considered in light of all the processes of the legislative process.[30]

18. Where the use of an omnibus bill[31] to effect disputed amendments is challenged, the court needs to consider the question whether the procedure has, in the circumstances of the particular case, limited the right of the public to participate in the legislature's business.[32]

Data Protection and Right to Privacy

19. Article 31 (c) of the Constitution provides for the right to informational privacy which includes privacy of private photographs of a person.[33]

20. The Bill of Rights' protection to privacy is an obligation of both State and non-State actors in terms of Article 20 of the Constitution.[34]

21. Accessing mobile telephone subscribers' information in a manner other than as provided under the law inherently infringes the right to privacy, a fundamental right guaranteed under the Constitution.[35]

22. Biometric data and GPS coordinates are personal, sensitive and intrusive data that require protection; and the collection of DNA and GPS co-ordinates for purposes of identification, is intrusive and unnecessary. To the extent, that it is not authorised and specifically anchored in empowering legislation, it is unconstitutional and a violation of Article 31 of the Constitution.[36]

23. The Data Protection Act has included most of the applicable data protection principles, but there are a number of areas in the Data Protection Act that require to be operationalized by way of regulations.[37]

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24 Standard Limited & 2 others v Christopher Ndarathi Murungaru [2016] eKL
25 Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR
26 Ibid
27 Nubian Rights Forum & 2 others v Attorney-General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) [2019] eKLR
28 Ibid
29 Ibid
30 Supra note 29
31 In general, an omnibus bill seeks to amend, repeal or enact several Acts, and it is characterized by the fact that it has a number of related but separate parts. One of the reasons cited for introducing an omnibus bill is to bring together in a single bill all the legislative amendments resulting from a policy decision to facilitate parliamentary debate.
32 Supra note 29
33 Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] eKLR
34 Ibid
35 Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR
36 Supra note 29
37 Supra note 29

1. RIGHT TO PRIVACY – STATE SURVEILLANCE, INTERCEPTION OF COMMUNICATIONS, DATA PROTECTION AND REGISTRATION OF PERSONS

Introduction:

This section contains four cases, which challenged the setting up of mechanisms or devices that can collect data from the public. They deal with issues related to the right to privacy, what actions amount to a violation of the right to privacy and whether the State and third parties have an obligation to safeguard information collected from the public. In these cases, the State had a responsibility to demonstrate that the interference alleged was neither unlawful nor arbitrary. Further it had to show that the restrictive actions were both necessary and proportionate to the specific risk being addressed. Some cases also look into the sufficiency of legal frameworks for the protection of data and sought to determine whether the amount of data sought was only the minimum necessary level of detail required. The cases also address the question of whether one must suffer a violation or a threat to their rights in order to rightly present their case before a court.

International Norms and Best Practice

In its resolution 68 adopted in 2013, the General Assembly affirmed that the rights held by people offline must also be protected online, and it called upon all States to respect and protect the right to privacy in digital communication. The Assembly also recognized that the exercise of the right to privacy is important for the realization of the right to freedom of expression and to hold opinions without interference, and is one of the foundations of a democratic society.[38]

International human rights law provides the universal framework against which any interference in individual privacy rights must be assessed. The International Covenant on Civil and Political Rights provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.[39] It further states that "Everyone has the right to the protection of the law against such interference or attacks."[40]

While the right to privacy under international human rights law is not absolute, any instance of interference must be "prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others".[41] Where such restrictions are made, "States must demonstrate their necessity and only take such measures as are proportional to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right."[42]

Privacy and expression are intertwined in the digital age, with online privacy serving as a gateway to secure exercise of the freedom of opinion and expression.[43] Article 19 of both the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights protects everyone's right to hold opinions without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. The Article provides a three-part test that requires restrictions to be: provided by law and be necessary to protect the rights or reputations of others, national security or public order, or public health or morals.[44] The principles, at a minimum, mean the following:[45]

(a) *Provided by law/legality:* any restriction must be formulated with sufficient precision to enable an individual to adjust his or her conduct accordingly. It must be made accessible to the public. It should not be excessively vague or overbroad such that it could give unrestricted discretion on officials;[46]

(b) *Necessity and proportionality:* the State has the burden of proving a direct and immediate connection between the expression and the threat. It must also show that the restriction it seeks to impose is the least intrusive option among those that might achieve the same protective function;

(c) *Legitimacy:* It should be limited in application to situations in which the interest of the whole nation is at stake.[47]

38 A/RES/68/167 "The right to privacy in the digital age" 21 January 2014, https://undocs.org/A/RES/68/167
39 International Covenant on Civil and Political Rights (ICCPR) Art 17(1), https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf
40 Article 17(2)
41. See Human Rights Council resolution RES/15/21 par.4, https://undocs.org/en/A/HRC/RES/15/21
42 Human Rights Committee, HRC general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 6. https://digitallibrary.un.org/record/533996?ln=en
43 A/HRC/23/40, par.24, https://undocs.org/A/HRC/23/40
44 See ICCPR Art 19(3)
45 Surveillance and Human Rights, A/HRC/41/35, par.24, https://undocs.org/A/HRC/41/35
46 The Right to Privacy in the Digital Age, A/RES/73/179, p.3: The General Assembly echoed these principles, noting that surveillance of digital communications must be consistent with international human rights obligations and must be conducted on the basis of a legal framework, which must be publicly accessible, clear, precise, comprehensive and non-discriminatory.
47 Promotion and protection of the right to freedom of opinion and expression, General Assembly A/71/373, par 18 https://undocs.org/en/A/71/373

Select Case:

I. Nubian Rights Forum & 2 others v Attorney-General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) [2019]

i. A summary of the case

On 31st December 2018, the President of the Republic of Kenya signed into law the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018. The Act aimed to amend several provisions of a number of statutes, among them the Registration of Persons Act (Cap 107 Laws of Kenya). The amendments to the Registration of Persons Act established a National Integrated Information Management System ("NIIMS") that was intended to be a single repository of personal information of all Kenyans as well as foreigners resident in Kenya.

The Nubian Rights Forum (the 1st petitioner), the Kenya Human Rights Commission (the 2nd petitioner), and the Kenya National Commission on Human Rights (the 3rd petitioner) sought various declarations, among others, that the proposed amendments to sections 3, 5 and 9 of the Registration of Persons Act were unconstitutional for infringing various provisions of the Constitution. They also sought several orders including, amongst others: to prohibit the respondents from installing and operationalizing the NIIMS process until policy, legal and institutional frameworks compliant with the Constitution are put in place.

The petitioners contended that:

- The disputed amendments significantly violated the right to privacy due to their intrusiveness, particularly the collection of DNA without consent; the absence of a legislative scheme on how to secure privacy or individual privacy rights; and the vagueness and lack of clarity by the disputed amendments to guide implementation;
- The linkage of registration to services violates numerous rights in a manner that is not justifiable in a free and democratic society, including the right to citizenship and all related rights – such as the right to movement; economic and social rights; and the right to property;
- The amendments limit the rights in a manner that is unjustifiable in a free and democratic society based on the non-derogable criteria stipulated in Article 24(1)[48];
- The amendments introduce changes to sections 3, 5 and 9 of the Registration of Persons Act illegally, unprocedurally and without public participation, contrary to the Constitution and the law;[49]
- The amendments were in bad faith, and posed serious and immediate threats to fundamental rights and freedoms protected under the Bill of Rights, particularly Article 31 on the right to privacy and Articles 10 and 118 on national values and public participation;
- There were no adequate and/ or proper safeguards for protection of the data and/or personal information intended for collection under the NIIMS system;
- The complex system would occasion challenges and/or obstacles to marginalized and/or minority groups such as the Nubians;[50]
- Section 3 and 9A(2)(c) and (d) of the disputed amendments essentially made every aspect of people's lives, including access to the right to education and health as well as related services, the protection of property, freedom of movement, right to receive public services, right to presumption of innocence, freedom from self-incrimination, right to privacy and security of the person, subject to surrender of personal information/data to the state.

The respondents contended that the objective of NIIMS is to capture and store data in a centralized digital database for effective and efficient administration which will facilitate accountability in various forms, curb wastage of resources and ease registration and identification of persons thereby improving the security of the country; that all fundamental rights and freedoms (except for the fundamental freedoms in Article 25) of the Constitution can be limited by statute in appropriate circumstances; and that any limitation to the right to privacy is reasonable and justifiable in an open and democratic society.

They also contended that the disputed amendments were formulated and enacted through a proper and justified legislative process. Further, that a robust legislative regime exists that guarantees the safety of data, including the Kenya Information and Communications Act, the Computer Misuse and Cybercrimes Act, 2018, the Access to Information Act, and the Registration of

48 Article 24 (1) of the Constitution provides the criteria that help to determine whether a limitation to fundamental rights is justifiable or not. It permits the limitations of fundamental rights except the rights under Article 25, which are non-derogable or cannot be limited.

49 They contended that it is only proper to use the procedure of a Statute Law Miscellaneous Amendment in cases of minor and non-controversial amendments. The respondents also failed to accord sufficient and effective public participation in passing the amendments.

50 They contended that the implementation of NIIMS based on the amendments will occasion denial of the nationality rights of members of the Nubian community and other marginalized groups (including some foreign nationals) who have been denied (directly or constructively) registration as nationals which is discriminatory.

Person's Act. Granting the orders sought would occasion irredeemable and irreparable loss and damage to the State and to the citizens of Kenya who are the beneficiaries of NIIMS. Further, the petitioners had not presented any evidence of an imminent threat to the privacy and security of the personal information to be collected through NIIMS or that any person had been discriminated against or is threatened with discrimination during registration under NIIMS. In addition, they alleged that the petitions threatened to restrict the National Assembly's constitutional mandate[51] in enacting the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018. Also, that the legality of the allegations could only be determined after a full hearing and not at the interlocutory stage.

ii. Key issues to be determined

- Whether the amendments to the Registration of Persons Act through Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 should be suspended pending the hearing and determination of the Petitions;
- Whether the respondents should be restrained from installing and implementing the National Integrated Information Management System (NIIMS) pending the hearing and determination of the Petitions.

iii. **Summary of the Judgement**

The court laid down the key principles that would guide its decision on whether or not to grant the restraining orders as follows;

a) Any applicant seeking conservatory orders ought to demonstrate an arguable prima facie case with a likelihood of success and also, that in the absence of the conservatory orders, he is likely to suffer prejudice;

b) The court has to decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether the petition or its bedrock will be rendered futile if a temporary conservatory order is not granted;

c) The court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order;

d) The court is not required to enter into a detailed analysis of the facts and the law during the interlocutory stage. Hence, the issues of whether the public participation was sufficient, or the extent and effect of the amendments made to the Registration of Persons Act, would have to await the final determination of the Petitions;

e) A constitutional basis and strong and convincing reasons must be shown before the court can exercise its power to suspend legislation at an interlocutory stage.

The court was satisfied that the petitioners had established a prima facie case as regards the likely prejudicial effect that would result from collection of personal data under NIIMS.

The court held that in the absence of proposals on how certain types of personal information would be protected, there was a risk of prejudice occurring to members of the public and their right to privacy by the disclosure of that data.

To avoid any violation of rights to privacy, and to preserve the bedrock of the Petitions, pending their hearing and determination, the court gave orders:

a) Suspending the inclusion of Deoxyribonucleic Acid (DNA) as one of the unique identifiers or attributes in the definition of "biometric" in section 3 of the Registration of Persons Act; as well as the definition and inclusion of "Global Positioning System co-ordinates" in section 3 and in section 5 (g);

b) Permitting the respondents to proceed with the collection of personal information and data under the National Integrated Information Management System (NIIMS) pursuant to the provisions of the Registration of Persons Act on condition that they could not:

- Compel any member of the public to participate in the collection of personal information and data in NIIMS.
- Set any time restrictions or deadlines as regards the collection of personal information and data in NIIMS.
- Set the collection of personal information and data in NIIMS as a condition precedent[52] for the provision of, or access to any government or public services or facilities.
- Share or disseminate any of the personal information or data collected in NIIMS with any third party.

51 Under Articles 1(1), 94 and 95 of the Constitution

52 A condition precedent is an event or state of affairs that is required before something else will occur.

DATED SIGNED AND DELIVERED AT NAIROBI, 1ST APRIL, 2019,

JUSTICES P. NYAMWEYA, MUMBI NGUGI, W. KORIR.

II. Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR

i. Background:

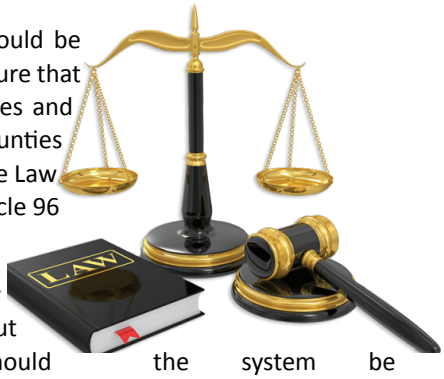
The Nubian Rights Forum (the 1st petitioner), the Kenya Human Rights Commission (the 2nd petitioner), and the Kenya National Commission on Human Rights (the 3rd petitioner), filed petitions in the High Court, claiming that amendments to the Registration of Persons Act were passed in violation of the Constitution and posed serious and immediate threats to fundamental rights and freedoms protected under the Bill of Rights. The petitions were subsequently consolidated for hearing. In 2019, the petitioners sought and received conservatory orders from the court, pending the full hearing and determination of the petition. [53]

The Petitioners' Case

The petitioners case was that the disputed amendments gave the Cabinet and Principal Secretaries extensive powers to gather personal information without limitations on the use of the information gathered, contrary to Article 94(6) of the Constitution. Even though the government had stated that it would not collect Deoxyribonucleic Acid (DNA) and Global Positioning System (GPS) coordinates, the legislative amendments did not limit the scope of data that can be captured and stored in the NIIMS database. The disputed amendments, which made the collection of DNA mandatory, would violate the constitutional right to dignity as DNA collection is invasive and should only be taken for specified and well recognized reasons.

The petitioners were concerned that the Nubian community and other marginalised persons, who were already experiencing challenges accessing identity cards, would be excluded further as NIIMS would be linked to the provision of essential government services.

They further averred that IDEMIA, the company tasked with data collection under NIIMS, had been implicated regarding lack of proper delivery of services in Kenya and other countries such as Ghana. Further there was no public record of the procurement process for the design of NIIMS, and the tender could have been awarded before the disputed law was enacted.



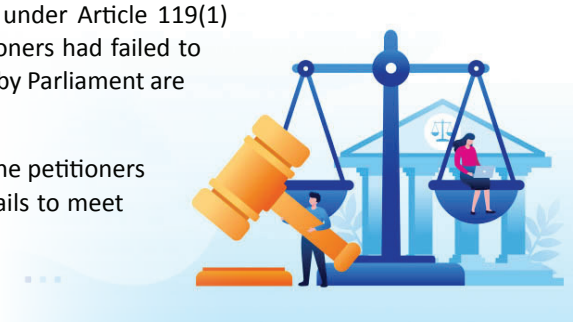
They also asserted that substantive amendments with far-reaching consequences should be enacted through a substantive Act and not through a miscellaneous amendment procedure that denied the concerned communities an adequate opportunity to know about the issues and participate in the law-making process as required under the Constitution. Further, counties have a direct interest in the registration of persons and thus failure to submit the Statute Law (Miscellaneous Amendments) Bill to the Senate for consideration was a violation of Article 96 of the Constitution.

The disputed amendments did not comply with core data protection principles. They imposed extensive mandatory requirements for citizens' personal information without connected safeguards, which would expose the citizens' privacy to incredible risks should the system be compromised in any way. Further, there was no law in force to guarantee the privacy provisions in the Constitution and there were insufficient safeguards in the existing laws to protect the data that would be collected.

The Respondents' Cases

The respondents' case was that the petitions do not disclose any threat of violation of the Constitution and that they were based on misconceptions. They asserted that the disputed amendments were made following a proper and justified legislative process. Further, the allegation that the Nubians have faced discrimination in the registration process, lacked a factual and legal basis.

They stated that the petitioners failed to explore the option provided under Article 119(1) of the Constitution on the Petition to Parliament. In addition, the petitioners had failed to invalidate the presumption of constitutionality, that is, that laws enacted by Parliament are presumed to be constitutional.



They asserted that the right to privacy is not an absolute right and that the petitioners had not demonstrated how the limitation in the disputed amendment fails to meet the requirements of Article 24 of the Constitution.

53 See Nubian Rights Forum & 2 others v Attorney-General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) [2019], above.

The respondents contended that there was no constitutional requirement to involve the Senate during the enactment of the disputed law, since national security, immigration and citizenship, national statistics and data on population were functions of the national government.

The 2nd and 3rd respondents (the Cabinet Secretary and Principal Secretary of the Ministry of Interior & Co-ordination of National Government) contended that since the Government of Kenya has a legal and constitutional responsibility to provide services to the people of Kenya, it is required to undertake adequate planning and decision-making based on reliable data regarding its citizens and other persons within the country. Further, NIIMS was crucial for improvement of provision of security; facilitation of early detection of fraudulent activities; assurance in financial transactions; and enhancement of tax collection.

They submitted that Kenya has a robust legislative framework on the protection of privacy, personal information and integrity of ICT systems. The petitioners had not demonstrated what feature of NIIMS would make registration of marginalized communities more difficult. Further, they claimed that procurement of the hardware components of the NIIMS registration kits was conducted in strict compliance with the Constitution and procurement laws.

The 7th respondent (The Kenya Law Reform Commission) stated that the consolidated petitions were filed exceedingly late. If the orders sought were granted, they would occasion irredeemable and irreparable loss and damage to the State and to the citizens of Kenya who were in the process of implementing various provisions of the amended laws. Also, the orders sought in the Petitions were contrary to public interest and the constitutional values of the doctrine of separation of powers as the legislative function is vested exclusively in Parliament. Similarly, the 6th respondent (the Speaker of the National Assembly) contended that the process of national registration of persons is a policy decision solely within the mandate of the Executive and enacted by Parliament.

The justification put forward by the respondents for the collection of biometric data was that the right to privacy is not an absolute right, that biometric data is necessary as the most settled method of identification, and that reliable data is necessary for the State to provide services and security to its citizenry. The respondents also maintained that the biometric data being collected is necessary for the purpose of creating a digitized national population register as a single source of personal information on all Kenyan citizens and residents.

ii. Issues for Determination

- Whether the legislative process leading up to the enactment of Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 was constitutional;
- Whether the amendments to the Registration of Persons Act violate and/or threaten violation of the right to privacy contrary to Article 31 of the Constitution;
- Whether the amendments to the Registration of Persons Act violate and/or threaten violation of the right to equality and freedom from discrimination contrary to Article 27 of the Constitution in respect of Nubians and other marginalised communities.

Preliminary Issues: Jurisdiction of the Court

In determining the issue of jurisdiction, the court asserted that Parliament can only successfully raise the defence of separation of powers or parliamentary privilege by proving that it had complied with the Constitution and the law. Anything done by Parliament outside the confines of the Constitution and the law attracts the attention and action of the court.

The court also laid out guidelines for determining whether a disputed legislation or action is unconstitutional as follows: the provisions of the Constitution must be interpreted in line with Article 259(1), which obliges the court to interpret it in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance. The Constitution should also be interpreted in a holistic manner that entails reading one provision alongside other provisions, and considering the historical perspective, purpose, and intent of the provisions in question.

iii. Summary of Judgement

On the issue of:

1. Whether the Legislative Process was Constitutional, and specifically,
    a. Whether there was Public Participation, the court held that:
        i. The need to involve the public in the legislative processes is grounded in the Constitution. The duty placed upon the legislature by the law is to inform the public of its business and provide an environment and opportunity for those who wish to have a say on the issue to do so;

ii. Parliament has the discretion on the method to be used in collecting views from the public, stakeholders and experts;

iii. There were efforts made by the National Assembly in facilitating public participation when using the omnibus bill mechanism in the Statute Law (Miscellaneous Amendments) Bill;

iv. The time that was available for public participation must be considered in light of all the processes of the legislative process;

v. Sufficient time was afforded for public participation on the enactment of Statute Law (Miscellaneous Amendments) Act 2018;

vi. There was sufficient public participation in the circumstances of the Petitions.

b. Whether the use of an Omnibus Bill to effect the Disputed Amendments was constitutional. The court held that:

i. Whenever the issue of the use of an omnibus bill arises, the question is whether the procedure has, in the circumstances of the particular case, limited the right of the public to participate in the legislature's business;

ii. The procedure employed by the 6th respondent in the stakeholder engagement of the omnibus bill during the Committee Stage by various committees in parliament, facilitated public participation.

iii. The use of an omnibus bill to enact the impugned legislation was not unconstitutional.

c. Whether the Bill was one concerning counties and therefore required involvement of the Senate: The court held that the disputed amendments did not require the involvement of the Senate in their enactment. The Fourth Schedule of the Constitution gives a wide array of functions to the counties. Those functions do not include a national population register.

2. Whether there is Violation and/or Threatened Violation of the Right to Privacy.

On the issue of:

a. Whether the personal information collected is excessive, intrusive, and disproportionate, the court held that:

i. Biometric data and GPS coordinates required by the disputed amendments are personal, sensitive and intrusive data that require protection;

ii. The collection of DNA and GPS co-ordinates for purposes of identification, is intrusive and unnecessary. To the extent, that it is not specifically authorised in legislation, it is unconstitutional and a violation of Article 31 of the Constitution;

iii. The biometric data collected under NIIMs is necessary for identification, and will be used for verification purposes in relation to other existing databases;

iv. The benefits of NIIMS stated by the respondents are in the public interest and not unconstitutional.

3. Whether there is a Violation of Children's Rights to Privacy. The Court held that:

i. There are no special provisions in the disputed amendments, and no regulations that govern how the data relating to children is to be collected, processed and stored in NIIMS;

ii. The legislative framework on the protection of children's biometric data collected in NIIMS is inadequate and needs to be specifically provided for.

4. Whether the Disputed Amendments are an Unnecessary, Unreasonable and Unjustifiable Limitation. The Court held that:

i. Other than the collection of DNA and GPS coordinates, the other biometric data that is required to be collected by the amendments is necessary for purposes of identification, and there is thus no violation of the right to informational privacy under section 31(c) of the Constitution;

ii. Although a legal framework for protection of personal data now exists in Kenya (Data Protection Act), there are

inadequacies in the said legal framework in terms of operationalisation, and also in terms of the implementation and operationalisation of NIIMS, to guarantee the security of the data that will be collected in NIIMS;

iii. The provision for collection of DNA and GPS coordinates in the disputed amendments, without specific legislation detailing out the appropriate safeguards and procedures in the collection, and the manner and extent that the right to privacy will be limited in this regard, is not justifiable;

iv. An inadequate legislative framework for the protection and security of the data is a limitation to the right to privacy, in light of the risks it invites for unauthorized access and other data breaches.

5. Whether there are Sufficient Legal Safeguards and Data Protection Frameworks

i. The Data Protection Act has included most of the applicable data protection principles, and applies to the data collected under the disputed amendments;

ii. There are a number of areas in the Data Protection Act that require to be operationalized by way of regulations;

iii. While there is in existence a legal framework on the collection and processing of personal data, adequate protection of the data requires the operationalisation of the said legal framework;

iv. There is no specific regulatory framework that governs the operations and security of NIIMS;

v. The legal framework on the operations of NIIMS is inadequate, and poses a risk to the security of data that will be collected in NIIMS.

6. Whether there was a Violation of the Right to Equality and Non-Discrimination

The court was unable to find a basis for faulting the disputed amendments on the basis that they had resulted in violation of the right to equality and non-discrimination. The disputed legislation did not contain a differentiation between members of the Nubian community and other marginalised groups as compared with other Kenyans and while the possibility of this exclusion was recognised, it was not in itself, a sufficient reason to find NIIMS unconstitutional.

On the issue of exclusion, the court held that there is a need for a clear regulatory framework that addresses the possibility of exclusion in NIIMS. Such a framework will need to regulate the manner in which those without access to identity documents or with poor biometrics will be enrolled in NIIMS.

DATED, SIGNED AND DELIVERED AT NAIROBI, 30TH JANUARY, 2020.
JUSTICES P. NYAMWEYA, MUMBI NGUGI, W. KORIR

III. **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR**

i. A summary of the case

The petition challenged the intended installation by the first respondent (Communications Authority of Kenya - CAK), of a device in the networks of the third, fourth and fifth respondents (Safaricom Ltd., Airtel Networks Kenya Ltd. and Orange-Telkom Kenya respectively) who are mobile network providers. The petition challenged the legality of the manner in which the device was introduced.

The petitioner (Kenya Human Rights Commission) claimed that:

- The CAK introduced a generic device management system (DMS) for spying on mobile and communication devices of Kenyans without public consultations and or public participation;
- The DMS will access the networks of the mobile service providers and therefore the devices and device information of the mobile service subscribers;
- The DMS will infringe the subscribers right to privacy, as guaranteed under Article 31 of the Constitution and that the limitation is unjustifiable;
- The system will infringe on citizens' rights under guaranteed Article 40, 46, 47 and 50;
- CAK does not guarantee the confidentiality of the information accessed and or obtained;
- The proposal to block the phone gadgets was undertaken without affording the affected persons a hearing.

The 1st respondent (CAK) contended that the petitioner did not demonstrate that it intended to obtain any information for unlawful purposes; that the petitioner did not demonstrate how the DMS will limit fundamental rights or had breached subscriber information; that CAK has a mandate to monitor compliance with the Kenya Information and Communication Act (KICA); that DMS was justifiable under Article 24(10) of the Constitution as it was a continuation of efforts to control or stop the

proliferation of illegal devices; and that DMS can only access information on a mobile service provider network if it is granted authorization by the mobile service providers.

The third respondent, Safaricom Limited raised its concerns with CAK about the risk of unconstrained access by third party entities to the records of its subscribers but the concerns were not adequately addressed. Safaricom Ltd. therefore concluded that its subscribers were at risk of having their personal details, telecommunications, short message services, social media messaging and data exchanges interfered with by installation of the DMS device.

Safaricom also contended that the decision to install the device without consultation was arbitrary, and contrary to rights guaranteed rights under Article 31, 47 and 40 of the Constitution. Further, that the law does not grant CAK power to arbitrarily interfere with communication devices by tapping, listening to, surveillance or intercepting communications related data. They asserted that intercepting communication is a violation of the right to privacy and a telecommunication operator is required to keep its subscribers' details in a secure and confidential manner and not to disclose them as provided under section 27A (3) of the KICA Act. In addition, it was required to protect the right to privacy of its subscribers, in line with Regulation 15 of the Kenya Information and Communications (Consumer Protection) Regulations, 2010.[54]

ii. Key issues for determination

- Whether the DMS system threatens or violates the Right to Privacy of the subscribers of the third, fourth and fifth respondents;
- Whether the limitation meets the Article 24 constitutional analysis test, i.e. whether there is a "valid, rational connection" between the limitation and a legitimate public interest to justify it;
- Whether the process leading to the decision of the acquisition and installation of the DMS system in the first, second and third respondents' Mobile Networks was subjected to adequate public participation;
- Whether CAK violated the petitioners Right to a Fair Administrative Action;
- Whether the installation of the DMS falls within the statutory mandate of the CAK.

iii. **Summary of Judgement**

While acknowledging that technological change had given rise to concerns which were not present several decades ago, the court proposed that its task was to impart constitutional meaning to individual liberty in an interconnected, digital world. It also opined that the right to privacy has evolved to include state obligations related to the protection of personal data since innovations in information technology have enabled novel forms of collecting, storing, and sharing personal data.

The court held as follows. On the issues:

a. Whether the DMS system threatens or violates the Right to Privacy of the subscribers of the third, fourth and fifth respondents:

   That data held by the third to fifth respondents can only be released under the circumstances permitted by the law, and in particular section 27A of Kenya Information and Communications Act (KICA). CAK did not demonstrate that the DMS fits any of the circumstances contemplated under the section, nor did they rebut the position taken by the petitioner and Safaricom on the capabilities of the DMS;

b. Whether the limitation meets the Article 24 analysis test:

   For the DMS system to meet the Article 24 analysis test, it must not only be lawful, but also reasonable and justifiable in an open and democratic society. Accessing mobile telephone subscribers' information in a manner other than as provided under the law infringes the right to privacy under the Constitution;

c. Whether the installation of the DMS falls within the statutory mandate of the CAK:

   The mandate of combating counterfeit goods is vested in the Anti-Counterfeit Agency and not the CAK. The mandate of promoting standardisation is vested in the Kenya Bureau of Standards (KBS). A statutory body can only perform functions vested on it by the law. The CAK, purporting to perform the functions which are not expressly provided for under its enabling statute is ultra vires[55] its functions;

d. Whether the process leading to the decision of the acquisition and installation of the DMS system was subjected to adequate public participation:

54 The Regulation protects consumer privacy by requiring the operator not to monitor, disclose or allow any person to monitor or disclose the content of any information of any subscriber transmitted through the licensed systems by listening, tapping, storage or other kinds of interception or surveillance of communications and related data.

55 Acting beyond its legal power or authority.

There was inadequate public participation prior to the attempt to implement the DMS system. The public whose data is held by the third, fourth and fifth respondents and whose constitutional right to privacy is at risk in the event of a breach, should as of necessity have been involved in the engagements;

e. Whether CAK violated the Petitioners Right to a Fair Administrative Action:

That the DMS was introduced in a manner not in conformity with the law and that was tainted by illegality. CAK violated the provisions of Article 47 and the Fair Administrative Action Act [56] as the subscribers and the general public were never involved at all nor supplied with reasons for the decision;

f. Whether the challenged decision violates consumer rights of the subscribers of the third, fourth and fifth respondents:

That the DMS was introduced in a manner that was inconsistent with the constitutionally and statutory guaranteed rights of the consumers and/or subscribers of the third, fourth and fifth respondents.

SIGNED, DATED, DELIVERED AT NAIROBI ON 19TH APRIL, 2018.
JOHN M. MATIVO, JUDGE

IV. Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR

i. A summary of the case or facts

The 2nd respondent (Equity Bank) was about to introduce a new thin SIM, which would sit between the microchip of the primary SIM card, and the SIM card socket of a mobile phone handset. The petitioner was an account holder with Equity Bank is a member of the public whose personal data is held by Equity Bank. He feared that the introduction of the thin SIM would result in uncontrolled transmission of personal data to third parties without the consent of mobile handset and thin SIM owners.

The petitioner claimed a violation of Articles 31(c) and (d) and 46 of the Constitution on the grounds that:

- The decision to roll out the Thin SIM technology was made in the absence of a data protection law and would violate his right to privacy;
- Recourse for violation of constitutional rights lay with the High Court and not a tribunal as alleged by the respondents;
- That Parliament's Parliamentary Committee on Energy and Information and Communication halted the roll out of the thin SIM technology, pending satisfaction regarding privacy and data protection;
- That the thin SIM presents security vulnerabilities which transcend the scope of the user by making it possible for personal and sensitive data such as PIN numbers and encryption keys to be accessed by third parties, to his prejudice;
- That the Data Protection Bill 2012 has yet to become law.

The 1st and 2nd respondents (Fineserve Africa Ltd. and Equity Bank)[57] contended that the Thin SIM only relies on the primary SIM for anchorage and space in the mobile handset and does not have the technical capacity to interfere with or intercept the services or connections of the Primary SIM. They also contended that the purpose of the Thin SIM was to provide additional services and convenience to users, especially those who were poor and marginalized, and could not afford two phones. In addition, the petitioner had not proved that his rights to privacy and consumer protection rights under the Constitution had been violated.

They asserted that the court had no jurisdiction to determine the petition and that the matter should have been filed before the Appeals Tribunal established under section 102 of the Kenya Information and Communications Act. Also, that the petitioner had not exhausted all the alternative remedies provided by Statute.

They contended that before the technology was approved, they conducted due diligence measures including regulatory checks by the 3rd and 4th respondents (Communications Authority of Kenya-CAK and Central Bank of Kenya), the China National Computer Quality Supervising Test Centre and the Bank Card Test Centre of China. Further, that the 1st respondent's Thin SIM technology is optional and available only to customers who sign up for the service. Finally, that the technology did not need the enactment of any data protection law as it can be sufficiently regulated by the contract between the 2nd respondent

56 Fair Administrative Action Act, No 4 of 2015

57 The 1st respondent is a subsidiary of the 2nd respondent and intended to use the thin SIM technology provided by the 1st respondent to provide efficient, affordable and convenient banking and communication services targeting low income earners in Kenya.

and its customers as well as the Kenya Information and Communications Act 1998, The Kenya Information Communications (Amendment) Act 2013, The Banking Act, The Central Bank Act and The National Payments Systems Act, 2011.

The 3rd respondent, the Communications Authority of Kenya (CAK) contended that in light of concerns raised regarding the Thin SIM card, it conducted sufficient due diligence including consulting the Global System for Mobile Communication Association (GSMA) on the proposed technology; researching on global best practices concerning overlay SIM technology; and convening a stakeholders' conference at its offices to engage the four Mobile Network Operators (MNOs) i.e. Safaricom, Airtel Kenya, Yu Mobile and Orange Telkom, the 1st respondent, 2nd respondent among others. Having considered all the information obtained, the CAK decided to grant a limited approval for the use of the Thin SIM. It also claimed that the petitioner had other remedies available to him under Part IX of the Consumer Protection Act, 2012, The Kenya Information and Communication (Amendment) Act, 2013; and that the enjoyment of privacy rights under the Constitution, does not depend on the enactment of the data protection law. Also, that the legislative mandate of the State is exercised by Parliament and the Judiciary can only intervene in very limited circumstances. The 4th respondent also contended that the petitioner had failed to provide any evidence of vulnerabilities of the Thin SIM technology and that no one had been compelled to subscribe to the technology.

ii. Key issues to be determined

- Whether there is another dispute resolution mechanism for the issues raised in the Petition;
- Whether the introduction of the Thin SIM technology is a threat to the constitutional safeguards in Articles 31 and 46 of the Constitution (right to privacy and consumer rights, respectively);
- Whether Kenya has an obligation to adopt legislative and other measures to give effect to the protection of the right to privacy.

ii. **Summary of the Judgment:**

The court held that the Appeals Tribunal established under the Kenya Information and Communication Act does not have the jurisdiction to determine whether the actions would violate the petitioner's rights under Articles 31 and 46 of the Constitution. The jurisdiction lies in the court under Articles 22, 23(3) and 165(3)(d) of the Constitution.

The court also acknowledged that where a statute has provided an alternative effective remedy to a party, the court must exercise restraint and first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided in the relevant statute.

It was also held that:

- A party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the court. He has a right to do so if there is a threat of violation or contravention of the Constitution;
- Though the petitioner is not an account holder with the 2nd respondent, he can institute court proceedings claiming a violation of the Constitution generally and even in the public interest;[58]
- The alleged threat to right of privacy was not proved;
- Since only those customers that expressly consent to the Thin SIM will use it, there cannot be a violation of privacy;
- From the findings of all the technical bodies, the Thin SIM technology is relatively safe in banking and any risks would be dealt with by the relevant bodies;
- The trial period is under strict regulation and surveillance by the Communications Authority of Kenya and there is a mechanism to compensate any person who suffers liability out of the use of the Thin SIM.

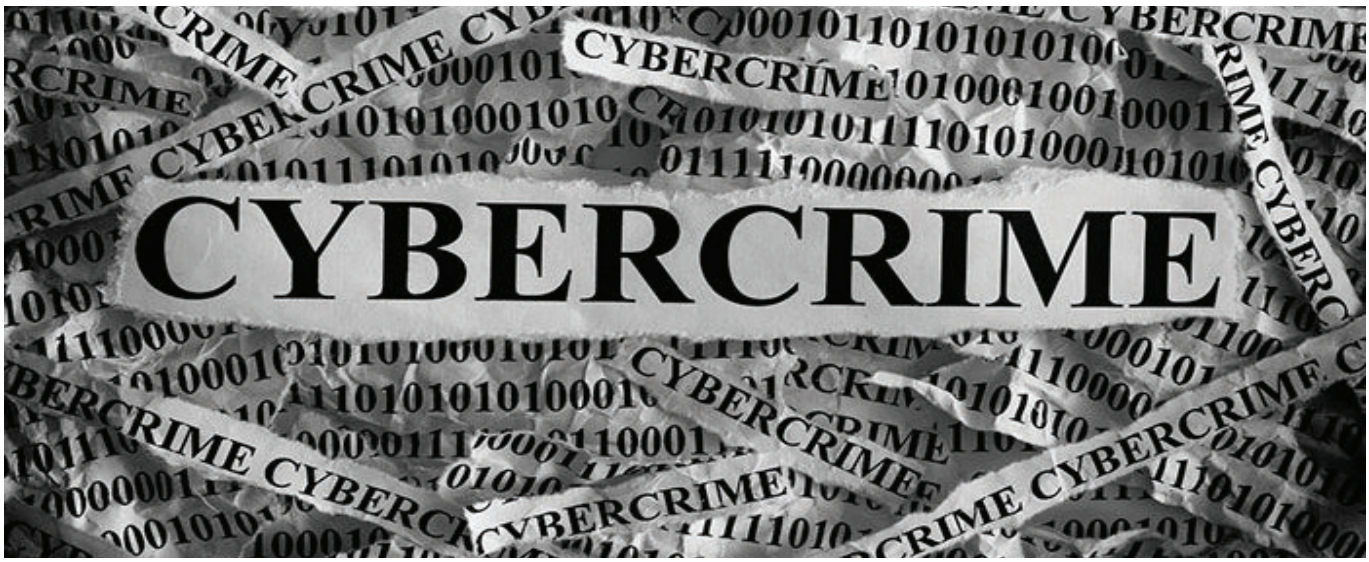
DATED, DELIVERED AND SIGNED AT NAIROBI, 29TH MAY, 2015. ISAAC LENAOLA, JUDGE

58 According to Article 258(2) of the Constitution, a person need not act on his own behalf to institute court proceedings claiming that the Constitution has been contravened.

2. NATIONAL SECURITY, CYBERCRIME AND COMPUTER MISUSE

Introduction

The three cases in this section challenge the constitutionality of laws or actions fortifying national security. The courts considered whether the purposes for the limitations of fundamental freedoms, were justifiable in a free and democratic society and met constitutionally accepted criteria. Further, they examined whether the actions or legal restrictions complained of were in line with due process requirements or subject to independent supervision. They also reflected on the broader effect of the laws or actions on fundamental freedoms, such as the "chilling effect" on the right to freedom of opinion and expression.



International Standards

In a report to the General Assembly, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression expressed his concern that legitimate online expression was being criminalized in violation of the international human rights obligations of States, through the application of existing criminal laws or through the creation of new laws specifically designed to criminalize expression on the internet. Such laws were often justified on the basis of protecting an individual's reputation, national security or countering terrorism, but in practice were used to censor content that the government and other powerful entities do not like or agree with.[59]

The first principle of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information[60] asserts that "No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government."[61] The second principle further notes: A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force. [62]

In particular, a restriction that seeks to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.[63]

Principles 7 goes on to list expression that should not constitute a threat to national security as including, among others, expression that:

- Advocates non-violent change of government policy or the government itself;
- Constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agencies or public officials.

59 A/HRC/17/27, par.34
60 Johannesburg Principles on National Security, Freedom of Expression and Access to Information https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf
61 Ibid, Principle 1 (d)
62 Ibid, Principle 2 (a)
63 Supra note 67, principle 2(b)

In addition to legal restrictions aimed at protecting national security, the Human Rights Council has expressed concern about "the emerging trend of disinformation and of undue restrictions preventing internet users from having access to or disseminating information at key political moments, with an impact on the ability to organize and conduct assemblies.[64] In order to be permissible, targeted surveillance may occur only on the basis that such activities are adopted openly; are time-limited; operate in accordance with established international standards of legal prescription, legitimate aim, necessity and proportionality; and are subjected to continued independent supervision that includes robust mechanisms for prior authorization, operational oversight and review. Individuals and groups should be notified if their rights are breached by surveillance, and effective remedies should be guaranteed.[65]

Select Case:

I Bloggers Association of Kenya (BAKE) v Attorney General & 5 others [2018] eKLR

i. **A Summary of the case or facts**

On 29th May 2018, the petitioner, Bloggers Association of Kenya (BAKE) filed an application[66] seeking conservatory orders to suspend the coming into force of certain sections of the Computer Misuse and Cybercrimes Act 2018 ("the Act") pending the hearing and determination of the petition. The court issued orders that suspended the coming into force of the entire Act.

On 25th June 2018, the court modified the orders issued on 29th May 2018, limiting the conservatory orders only to disputed sections of the challenged Act, as opposed to the entire Act. Despite the variation, the respondents went ahead and sought to set aside the conservatory orders in their entirety on the basis that the disputed orders issued on 29th May 2017 had the effect of deciding the petitioner's application without hearing all the parties to the petition contrary to Article 50(1) of the Constitution. They further contended that the conservatory orders essentially suspended the coming into force of the entire Act including those provisions that are not under constitutional scrutiny. Also, that the orders had the effect of creating a lacuna in the cybercrimes law as offences committed during the suspension of the Act, including offences meant to facilitate the protection of data under sections 14, 16, 18, 28, 31, 38 and 39, could not be prosecuted. [67]

The respondents also asserted that the petitioner failed to demonstrate any imminent threat to violation of their rights and that the disputed conservatory orders were granted without considering the public interest as the suspension had adverse effects on the respondent's obligations regarding cyber space under international law.

The petitioner stated that the court lacked the jurisdiction to hear the application. Further, that:

- The respondents had not established sufficient grounds to warrant the setting aside of conservatory orders;
- The court should maintain the conservatory orders till the petition is heard and determined as the challenged Act posed a threat to the citizens' right to freedom of expression and lifting the orders would expose them to possible prosecutions whose consequences may not be mitigated by any other means;
- The orders sought, if granted, would amount to an appeal from the decision of 29th May.

ii. Key issues to be determined

- Whether the Act passes the constitutional test;
- Whether the respondent satisfactorily demonstrated that it will be irreparably injured if the orders are not set aside;
- How to strike the delicate balance between protecting the petitioner's rights and the public interest.

iii. Summary of the Judgment

The court held that:

- Nothing can be of greater public interest than the court playing its constitutional mandate of ensuring that the individual rights and freedoms under the Constitution are protected and that all laws conform to the Constitution;

64 See Human Rights Council resolution 38/11. The promotion and protection of human rights in the context of peaceful protests https://www.right-docs.org/doc/a-hrc-res-38-11/

65 General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/HRC/41/41, Par 77 https://undocs.org/A/HRC/41/41

66 The application was a Notice of Motion, under certificate of urgency

67 This was the case since the laws under which the offences earlier existed were repealed by the Act. For example, for the prosecution of crime there was Sections 83U, 83V, 83X, 83Z, 84A, 84B, 84F of the Kenya Information Communication Act and Section 16 of the Sexual Offences Act, 2011.

- The respondent did not demonstrate that the disputed sections of the Act are consistent with the Constitution;

- The decision on whether or not to grant conservatory orders rests entirely within the discretion of the court handling such an application and to interfere with that discretion would be equivalent to hearing an appeal from the decision of a court with equal authority.

DATED, SIGNED AND DELIVERED AT NAIROBI 1ST OCTOBER, 2018. W. A. OKWANY, JUDGE

UPDATE ON THE FINAL DECISION

Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties) [2020]

The High Court, in its final decision on February 20, 2020, lifted the suspension of the 26 disputed provisions of the Computer Misuse and Cybercrimes Act, 2018 and upheld the entire Act as constitutional.

The Case had sought to determine, amongst other things, whether:

- Section 22, 23, 24(1) (c), 27, 28 and 37 of the Act limit Article 32, 33 and 34 of the Constitution in a manner inconsistent with Article 24 of the Constitution of Kenya 2010;[68]

- Section 48, 50, 51, 52 and 53 of the Act limit Article 31 of the Constitution in a manner inconsistent with Article 24 of the Constitution of Kenya 2010;

- The orders sought in the petition are in the public interest.

The petitioners had contended, amongst other grounds, that:

- Section 23, which criminalizes publication of false information[69] is vague and overloaded and has a chilling effect on members of the fourth estate, whistleblowers, bloggers, members of the civil society, academics, political opponents, amongst others, with the resultant effect that the freedom of expression and freedom of the media as guaranteed under Article 33 and 34 of the Constitution of Kenya are curtailed;

- The offences created by sections 16,17,31,32,34,35,36,38(1), 38(2), 39 and 41 of the Act lack the element of mens rea and are therefore unconstitutional;

- Section 48,50,51,52 and 53 of the Act, will disproportionately limit the right to privacy, through their attempt to bypass judicial oversight by making it optional to apply for a court order while searching and seizing data stored on a computer system;

- Section 57 of the Act violates right to privacy in a manner that is inconsistent with Article 24 of the Constitution of Kenya, 2010.

The court found that:

- The words used in section 23 of the Act are neither broad, nor vague but should be read in their proper context alongside the other words as per the rules of interpretation of statute;

- The petitioner failed to demonstrate that any other measure could possibly be taken that would realize the objective of section 22[70] of the Act, which provides for the offence of false publication;

- The disputed sections of the Computer Misuse and Cybercrimes Act are constitutional and do not violate, infringe and/or threaten fundamental rights and freedoms and are justified under Article 24 of the Constitution;

- The offences created by sections 16,17,31,32,34,35,36,38(1), 38(2),39 and 41 are clear and unambiguous and prescribe the actus reus and mens rea in the offences they create. Hence, none of the sections offend the principle of legality and they are therefore not inconsistent with the Constitution;

- Preventive protection is warranted for the purpose of preventing the dissemination of information that is harmful to the public at large;

- It is necessary to establish a law to regulate and control the spread of false information which could pose a threat to the national security of the country;

68 See the provisions on http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%205%20of%202018

69 The section criminalises "*information that is false in print, broadcast, data or over a computer system, that is calculated or results in panic, chaos or violates among citizens of the Republic or which is likely to discredit the reputation of a person,*"

70 Section 22 of the Act provides for the offence of false publication, http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%205%20of%202018

- The impugned sections (48,50,51,52 and 53) contain adequate safeguards to ensure the rights of the individual are well balanced as against the rights of the public in the investigation of offences under the Act. The petitioner failed to demonstrate that any right has been infringed or is threatened with infringement;
- In view of the safeguards provided, section 57 does not limit the right to privacy in a manner that is inconsistent with Article 24 of the Constitution;
- The petitioner failed to demonstrate the extent to which the limitation (in section 22 on false publication) is excessive in relation to the objective to protect public interest.

The Bloggers Association of Kenya (BAKE) has filed an appeal, seeking to review the decision. They contend that Kenyans will be susceptible to unnecessary arrests, harassment as well as prosecution during the Covid-19 pandemic for publishing information related to the illness.

In August, 2020 the Law Society of Kenya filed a notice of motion seeking conservatory orders to suspend the enforcement of 26 provisions in the Computer Misuse and Cybercrimes Act, pending the hearing of the appeal. The LSK claimed that bloggers, activists, journalists and whistleblowers will be discouraged from publishing information on suspected violation of the Ministry of Health Covid-19 guidelines with grave public health consequences. The Court of Appeal dismissed the motion.

DATED, SIGNED AND DELIVERED AT NAIROBI, 20TH FEBRUARY, 2020.
J. A. MAKAU, JUDGE.

II **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others [2015] eKLR**

i. **Factual Background**

In response to terrorist attacks in Kenya, the State published the Security Laws (Amendment) Bill on 8th December, 2014 and shortly after, enacted the Security Laws (Amendment) Act, No 19 of 2014 ("SLAA'). The SLAA came into force on 22nd December, 2014. It amended the provisions of twenty-two other Acts of Parliament concerned with matters of national security, including the Penal Code and the Prevention of Terrorism Act.

The first petitioner, CORD (Coalition for Reform and Democracy)[71] moved to court on 23rd December, 2014 seeking orders to stay the operation of the Act. The Director for Public Prosecutions (DPP) and other parties enjoined to the proceedings also filed their responses. CORD's case was that the disputed Act was invalid on the grounds that:

- The period for publication was reduced from 14 days to 1 day which deprived the members of the public of their right to public participation in the legislative process;
- The Security Laws (Amendment) Bill 2014 was tabled for the 2nd reading without completion of the public participation phase contrary to Standing Order No. 127;
- The Bill contained substantial and controversial amendments but its Memorandum of Objects and Reasons stated that the Bill was for making minor amendments;
- The Supplementary Order Paper was unprocedurally before the House. It was distributed when the House had already sat, contrary to Standing Order No. 38(2), which required that the Paper be availed to Members of the National Assembly at least one hour before the House meets;
- Debate during the vote on the Bill was chaotic and not conducted in accordance with the Rules of Debate in the Standing Orders;
- The Bill was only debated in the National Assembly but it should have been discussed by both the National Assembly and the Senate.

The 2nd petitioner (Kenya National Commission of Human Rights)[72] and third petitioner's (Samuel Njuguna Ng'ang'a)[73] case was that the integrity of the entire process leading to the passing of the legislation was wanting and the final product lacked any legitimacy and legality; section 48 of SLAA that capped the number of refugees in Kenya at 150,000, would be difficult to implement without breaching international human rights law and refugee law and specifically the principle of non-refoulement; [74] SLAA is unconstitutional and the amendments made to the various pieces of legislation directly contravened certain provisions within the Bill of Rights including the right to fair trial (which under Article 25 of the Constitution, cannot be limited), judicial independence and production of electronic evidence in court.

71 The Coalition for Reforms and Democracy is a coalition of multiple political parties, and served as the official opposition party.
72 a constitutional commission established pursuant to the provisions of Article 59 of the Constitution.
73 An Advocate of the High Court and a citizen of Kenya who filed Petition No. 12 of 2015 alleging a threat of violation of his constitutional rights and freedoms by SLAA
74 The international human rights law principle guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm.

The interested parties, Kituo cha Sheria, Katiba Institute and Article 19 Eastern Africa[75] contended that the State failed to fulfil its duty to show that there were compelling reasons to warrant the limitation of rights, as required by Article 24 of the Constitution; the provisions of sections 12, 64 and 69 of the SLAA impact negatively on the freedom of expression and privacy under the Constitution (Articles 31, 33 and 35); section 69 of SLAA which amends the Prevention of Terrorism Act[76] by permitting national security organs to intercept communication for the purpose of detecting, deterring and disrupting terrorism is an introduction of arbitrary mass surveillance and violates Article 31 of the Constitution on the right to privacy.

The interested parties also contended that section 12 of SLAA, which amends the Penal Code,[77] criminalizes the publication of certain information in vague and overbroad terms, and imposes heavy punishments in the event of a conviction, leading to the chilling effect. Further, section 64 of SLAA, which introduces sections 30A and 30F to the Prevention of Terrorism Act,[78] is vague and uses broad terminologies which are incapable of precise or objective legal definition and understanding, and section 30 (F) (1) does not meet the internationally accepted standards on prior censorship of freedom of information on account of national security.[79]

The respondents opposed the petition on the grounds that the SLAA was procedurally enacted, and did not limit fundamental rights or violate the Constitution. They also contended that the petitions had no basis in law but contained unwarranted speculation and unfounded mistrust; that freedom of the media is not an absolute freedom and the limitations of Articles 33 and 34 are justifiable in an open and democratic society; and that the purpose of the law is to protect the public from terrorism and any limitations of rights contained in section 12 of SLAA and section 66A of the Penal Code are reasonable and justifiable in an open and democratic society.

The interested parties that opposed the Petition (Terror Victims Support Initiative) contended that the mere possibility of abuse is not a ground to declare a legislation unconstitutional. Further, the petition offended the doctrine of separation of powers. Also, the Constitution itself, under Article 24(1), permits the limitations of fundamental rights, save for the rights stipulated under Article 25.

ii. Key issues to be determined

The petition challenged the constitutionality of SLAA and asked the court to determine several issues related to the process of the enactment of SLAA as well as its contents, including:

a) Whether the court has jurisdiction to determine the petition. And if the process of enactment of SLAA was in violation of the Constitution;

b) Whether SLAA is unconstitutional for violation of the right to freedom of expression, the right to freedom of the media, the right to privacy, the rights of an arrested person, the right to fair trial, entitlement to citizenship and registration of persons, and the right to freedom of movement and the rights of refugees;

c) Whether the provisions of the Act are unconstitutional for violating the provisions of Articles 238, 242 and 245 of the Constitution with regard to national security, appointment and tenure of office of the Inspector General of Police, creation of the National Police Service Board and the appointment and tenure of the National Intelligence Service Director General and the Deputy Inspector General of Police;

d) Whether any limitation in the disputed amendments to various Acts of Parliament contained in SLAA is justifiable in a free and democratic society.

iii. Summary of the Judgement

The Courts emphasized that a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the court.[80] Hence the matter was justly, or rightly before them.

They pondered the need to balance the right to information with the corresponding duty to bar terrorists from using media reports to promote their aims. They emphasised that the State has to be innovative in fighting terrorists but within the framework of the Constitution and particularly the Bill of Rights.[81]

75 Civil Society Organisations.
76 By introducing a new Section 36A
77 By adding Section 66A
78 The section prohibits publication of information or photographs related to terrorism acts without authority from the National Police Service. It places prior restraint on media freedom and violates the fundamental right of citizens to access information held by the State.
79 As contained in Principles 3 and 23 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N Doc. E/CN.4/1996/39.
80 In line with the Constitution, Article 22, 165(3) (d) and 258.
81 Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others [2015] eKLR, (HC) [459]

The court maintained that a party alleging a violation of a constitutional right or freedom must demonstrate that the exercise of a fundamental right has been impaired, infringed or limited. Then, it is up to the party which would benefit from the limitation to prove that the limitation is justified by the realities it is confronted with, and that they have a rational connection with the purpose they are intended to meet.

The court held as follows, on the key legal issues:

(a) *On whether the court has jurisdiction to determine the petitions,* that the doctrine of separation of powers did not prevent the court from examining whether the acts of the Legislature and the Executive were inconsistent with the Constitution as the Constitution is the supreme law;

(b) *On whether the process latter to the enactment of SLAA was in violation of the Constitution, that:*

- The Speakers of the National Assembly and the Senate concurred that the SLAA did not concern counties;
- There was reasonable public participation in the process leading to the enactment of SLAA;
- There was no violation of Standing Orders of the National Assembly;
- The presidential assent to the Bill was constitutional.

(c) *On whether the disputed provisions of SLAA were unconstitutional for violating the Bill of Rights:*

- Section 12 of SLAA which introduces section 66A to the Penal Code is an unjustifiable limitation on freedom of expression and of the media and therefore unconstitutional. The court could not find any rational connection between the limitation contemplated by section 12 of SLAA and the stated object of the legislation i.e. national security and counter terrorism;
- Section 64 of SLAA which introduced sections 30A and 30F to the Prevention of Terrorism Act are unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution;
- Section 56 of SLAA, the new Section 42 of the National Intelligence Service Act, section 69 of SLAA and Section 36A of the Prevention of Terrorism Act are constitutional and do not violate the right to privacy guaranteed under Article 31 of the Constitution;
- Section 15 of SLAA which introduced Section 36A to the Criminal Procedure Code (CPC) is constitutional and does not breach the right of arrested persons, as provided for under Article 49 of the Constitution, and the right to fair trial as provided for under Article 50(2) of the Constitution;
- Section 16 of SLAA and Section 42A of CPC are unconstitutional as they violate the right of an accused person to a fair trial, i.e. to be informed in advance of the evidence of the prosecution.

(d) Whether the process of enactment was flawed and unconstitutional for lack of reasonable public participation, that the National Assembly acted reasonably in the manner in which it facilitated public participation on SLAA and it would be too much to insist that every Kenyan's view ought to have been considered prior to the passage of SLAA.

(e) Whether any limitation in the disputed amendments to various Acts of Parliament contained in SLAA is justifiable in a free and democratic society, that while section 56 of SLAA as well as section 69 of SLAA do limit the right to privacy, they are justifiable in a free and democratic state, and have a rational connection with the intended purpose i.e. the detection, disruption and prevention of terrorism.

"We are clear in our mind that surveillance in terms of intercepting communication impacts upon the privacy of a person by leaving the individual open to the threat of constant exposure. This infringes on the privacy of the person by allowing others to intrude on his or her personal space and exposing his private zone."

DATED, DELIVERED AND SIGNED AT NAIROBI 23RD FEBRUARY, 2015.
JUSTICES ISAAC LENAOLA, MUMBI NGUGI, HEDWIG ONG'UDI, HILLARY CHEMITEI, JOSEPH LOUIS ONGUTO.

III. Standard Newspapers Limited & another v Attorney General & 4 others [2013] eKLR

i. Factual Background

On or about 0015 hours on the morning of 2nd March, 2006, heavily armed and hooded officers of the 2nd respondent (the Commissioner of Police) operating under the instructions of the 3rd respondent (The Minister in Charge of Internal Security) unlawfully raided the offices of the 2nd petitioner (Baraza Limited)[82] situated on the 6th, 13th and 17th floors of the I & M Bank Tower, vandalised and destroyed Kenya Television Network's (KTN's) broadcasting and other equipment. The officers further proceeded to arbitrarily arrest, detain, torture and degrade the employees of the 2nd petitioner and also confiscated KTN's broadcasting and other equipment thereby shutting down its transmissions.

On the same date at about 0120 hours, hooded and armed officers of the 2nd respondent raided Standard Group's premises along Likoni Road, broke down doors to the printing press, and seized items. They did not give the petitioners a chance to ascertain or verify any of the items that were seized and despite demand, did not provide an inventory of the items collected from the premises.

The petitioner contended that:

- The raids, wanton destruction and vandalism of their equipment and arbitrary confiscation of their property was an affront to the rule of law and in gross violation of their rights as enshrined under sections 70, 75, 76 and 79 of the repealed Constitution;
- The raids were carried out by the 2nd respondent's officers under the supervision of the 3rd respondent without any search warrants or lawful orders and that the said raids crippled their ability to do their legitimate business and caused them substantial loss and damage.

The respondents opposed the petition on the grounds that the raid on the petitioners' premises was triggered by an offence contrary to section 66 of the Penal Code[83]; and after conducting a search at the petitioner's premises, the Special Crimes Prevention Unit officers recovered records containing very sensitive information, which if published, would have threatened national security thus the officers had no opportunity to obtain search warrants as they sought to prevent the commission of the offence. Further, the police officers were empowered under section 20 of the Police Act to enter any premises and carry out a search if they had reason to believe that there is information or some necessary reason to help the police to conduct their duties under the Act. They also maintained that fundamental rights were not absolute but subject to the respect for the rights of others and for the public interest.

ii. Key issues to be determined

- Whether the respondents, in carrying out the search and seizure violated the petitioners' rights guaranteed under the Constitution.

iii. Summary of the Judgment

The court observed that while the police have a duty to prevent commission of crimes, they must abide by the law. The court also maintained that while the right to privacy is not absolute and must be balanced against the intended purpose for intrusion, such limitation should not be one that will risk stripping off the very core of the right or freedom. The manner in which the search and seizure is carried out must not expose persons to further violation of other rights. It reflected on the notion of 'public interest' and 'national security' and remarked that these are multi-faceted and capable of varied interpretations.[84]

The court held that:

- The search and seizure carried out by agents of the respondents against the petitioners on the night of 2nd March 2006 was arbitrary and in breach of the petitioners' rights to privacy under section 76 of the former constitution;
- It was an unlawful search as it violated the law and the due process requirements with regard to search and seizure including those found in:

82 The owner and operator of an independent television station known as the Kenya Television Network or KTN

83 The section criminalizes the publication of alarming publications including any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace.

84 Ibid [46] For example, while it is in the public interest that crime be prevented and investigated and those found guilty brought to book, it is also in the public interest that citizens are not subjected to arbitrary searches and seizures that in essence act to violate other fundamental rights and freedoms and make a mockery of the constitutional protection to privacy.

a. Section 118 of the Criminal Procedure Code: Police officers conducting a search and seizure are required to obtain a search warrant, which is furnished by a judicial officer upon proof on oath that there is reasonable suspicion of commission of an offence. Further, any evidentiary material that may be obtained from the place in respect of which the warrant has been issued is to be placed before the court, and the court is to determine the mode of disposal;

b. Section 19 of the Police Act,[85] which requires a police officer, if suspicious of the commission of a crime to apply to a Magistrate for a summons, warrant, search warrant or other legal process and to provide the requisite material to enable the court to supply them with search warrants.

- The respondents' actions in carrying out the raid on the petitioners' premises had no lawful justification. Section 20 of the Police Act requires a police officer who chooses to enter and search without a warrant to set down in writing the reason for the belief, which should have been produced in court. This was not done.

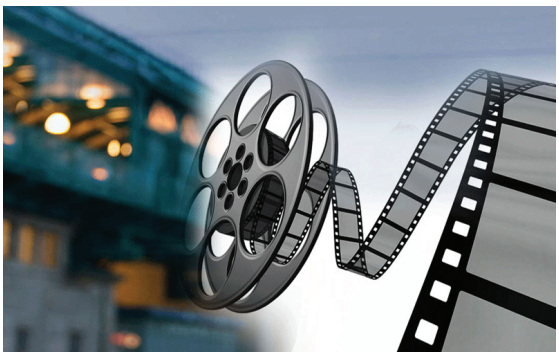
DATED, DELIVERED AND SIGNED AT NAIROBI, 17TH OCTOBER, 2013.

MUMBI NGUGI, JUDGE.

85 Chapter 84 of the Laws of Kenya, now repealed.

3. FREEDOM OF OPINION, FREEDOM AND INDEPENDENCE OF THE MEDIA

Introduction



In this section the courts examined the freedom or independence of the media and its limitations and whether media dispute resolution mechanisms are suitable for awarding remedies to victims of human right violations. They also canvassed the issue of interpretation of the Constitution.

International Human Rights Standards

The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[86]

In a report to the Office of the High Commissioner for Human Rights (OHCHR) the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, points out that states have a primary duty to ensure enabling environments for the exercise of the freedom of opinion and expression. The duty to ensure freedom of expression obligates States to promote, inter alia, media diversity and independence and access to information.[87]

In the information and communication technology context, this means that States must not require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extralegal means. Any demands, requests and other measures to take down digital content must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under Article 19 (3) of the International Covenant on Civil and Political Rights. Particularly in the context of regulating the private sector, State laws and policies must be transparently adopted and implemented.[88]

Article 19(1) requires protection of the right to hold opinions without interference. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion. The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of Article 19, paragraph 1. Any form of effort to coerce the holding or not holding of any opinion is prohibited.[89]

Article 19(2) protects all forms of expression and the means of their dissemination. They include all forms of audio-visual as well as electronic and internet-based modes of expression.[90]

Select Case:

I Francis Kigo Njenga v Standard Group Limited & another [2019] eKLR

i. **Brief Facts of the case**

The plaintiff, Hon. Francis Kigo Njenga instituted a suit against the defendants, the Standard Group Limited and Alphonce Shiundu complaining that his reputation and standing in the society had been damaged by the defendants' publication of an article referring to him, which was false and malicious. The article was penned by the 2nd defendant, who was an employee of the 1st defendant.

The defendants challenged the court's jurisdiction to hear the case. They contended that:

- An aggrieved party who feels that his or her reputation has been damaged by the media can only seek redress from the Media Council, which is the body mandated to set and ensure compliance with media standards under Article 34 (5) of the Constitution;
- In line with Article 34 (1) (a) and (b) of the Constitution, the state was prohibited from exercising control over or interfering with or penalizing any person engaged in the broadcasting or print media except where the matter related to the limitations specified under Article 33 (2) of the Constitution.

86 Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, par. 13 https://undocs.org/CCPR/C/GC/34
87 Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35, par 6, https://undocs.org/en/A/HRC/38/35
88 Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/32/38, Par 85, https://undocs.org/en/A/HRC/32/38
89 Supra note 90. General Comment No. 34, Article 19: Freedoms of opinion and expression, par 9, 10
90 Id. par. 12

The plaintiff opposed the preliminary objection on the grounds that nothing in the Constitution limited the jurisdiction of the High Court to hear and determine his case and that the preliminary objection was incompetent. Also, the Constitution should be interpreted as a whole and that Article 33 (3) should be read together with Article 24 which provides that the enjoyment of rights and freedoms of an individual should not prejudice the rights and fundamental freedoms of others.

ii. Key issues to be determined

- Whether the High Court had jurisdiction to hear and determine the plaintiff's suit.

iii. Summary of the Judgment

The court held that:

- The Constitution being the supreme law of the land must be interpreted liberally and holistically in order to give effect to its letter and its spirit;
- Article 34 (5) of the Constitution does not oust or remove the civil jurisdiction of the High Court to try all suits of a civil nature[91] which includes suits for defamation.[92]

DELIVERED AT NAIROBI 24TH MAY, 2019.

C. W. GITHUA, JUDGE.

II Standard Limited & 2 others v Christopher Ndarathi Murungaru [2016] eKLR

i. **A summary of the case or facts**

On 29th October 2012 the High Court at Nairobi dismissed a preliminary objection raised by three appellants, namely, The Standard Ltd. (the publisher of the Standard and Standard on Sunday newspapers), and its two employees or journalists, Ben Agina and David Ohito. The three contended that the High Court did not have jurisdiction to entertain a defamation claim against them because of the freedom of the media guaranteed by Article 34(2) of the Constitution.

Aggrieved by the ruling, the appellants appealed and continued to argue that in line with the Constitution of 2010, only the Complaints Commission established by the Media Council Act, 2013 had jurisdiction to entertain complaints and claims against the media.

They contended that:

- Article 34 prohibited the State in mandatory terms from exercising control over or interfering with or penalizing the media in the discharge of its functions;
- Freedom of the media is only subject to specific limitations found in Article 33(2) (d) of the Constitution, that is, propaganda for war, incitement to violence, hate speech or advocacy of hatred;
- Article 33(3), also limits the freedom of expression to respect for the rights and reputations of others, which is in the nature of a tort, and is not applicable to freedom of the media. Further, the Constitution ousted the jurisdiction of the courts to entertain tortious claims against the media, including defamation claims;
- Under the Constitution the media is a special person with rights and freedoms that are superior to the rights and freedoms of other persons under Article 33;
- Consistent with the limitation, Article 34(5) requires Parliament to enact legislation to provide for an independent body (the Media Complaints Commission established by the Media Council Act, 2013) responsible for regulating the media, setting media standards and monitoring compliance. That body is also a tribunal within the meaning of Article 159(2) of the Constitution and is responsible for hearing and determining defamation cases.

The respondent, Dr. Christopher Ndarathi Murungaru, who was the Cabinet Minister in charge of Internal Security at the time of the Anglo Leasing Scandal, averred that the two publications were defamatory of him and prayed for an order of injunction to restrain the appellants from publishing further defamatory material linking him to corruption or the scandal.

91 Civil: Those issues concerned with private relations between members of a community rather than criminal, military, or religious affairs.

92 This jurisdiction is granted to the High Court by *Section 5* of the *Civil Procedure Act* and reinforced by *Article 165 (3) (a)* of the *Constitution,* which gives the court original and unlimited jurisdiction in both civil and criminal cases.

He opposed the appeal on the grounds that freedom of the media guaranteed by the Constitution is limited by Article 33 (3), which requires that in the exercise of freedom of expression every person shall respect the rights and reputations of others. The phrase "every person", includes the media.

He also contended that Article 28 recognised the inherent dignity of every person and the right to have that dignity respected and protected; that Article 165 (3) of the Constitution vests in the High Court jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and that Article 23 empowered the court, in upholding and enforcing the Bill of Rights, to grant a range of remedies including declaration of rights, injunctions, conservatory orders and compensation awards. However, the mandate of the Complaints Commission is very limited and does not include the power to award damages in the event of defamation. Further, nothing in the Constitution ousts or limits the jurisdiction of the High Court to hear and determine defamation claims.

ii. Key issues to be determined

- Whether the High Court had jurisdiction to hear and determine the plaintiff's suit.
- Whether the Constitution had ousted the jurisdiction of the courts to entertain defamation claims against the media.

iii. Summary of the judgment

The courts maintained that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit. An interpretation of the Constitution that destroys one or some of its provisions, renders them ineffective and/or results in illogical conclusions cannot be tolerated. It was held that:

- Article 165 (3) (b) of the Constitution confers a special jurisdiction on the High Court to enforce rights and fundamental freedoms;
- Article 22 of the Constitution further confers on every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened, and in line with Article 23(2), the court is empowered to grant appropriate relief;
- The Media Complaints Commission has no powers, under section 38 of the Media Council Act to award the kind of remedies that the Constitution avails for violated or infringed rights and fundamental freedoms including a person's right to reputation and dignity.

DATED AND DELIVERED AT NAIROBI, 25TH NOVEMBER, 2016.

JUDGES OF APPEAL:

ASIKE-MAKHANDIA, W. OUKO, K. M'INOTI

4. USE OF SOCIAL MEDIA: BALANCING THE RIGHT OF FREEDOM OF EXPRESSION AND PROTECTION OF THE RIGHTS AND FREEDOMS OF OTHERS.

Introduction

The cases in this section concern a number of issues including the constitutionality of legislative provisions that criminalise expressions or opinions and the impact of the disputed restrictions on the freedom of expression and other fundamental freedoms. The cases also canvass principles for determining the constitutional validity of disputed laws or actions, online content moderation and striking the right balance between the freedom of expression and the rights of others.

International Standards

In a report to the Office of the High Commissioner for Human Rights (OHCHR) addressing the regulation of user generated online content, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, underscored the applicability of a human rights-based approach to user generated content moderation. He noted that any limitations on freedom of expression must meet the well-established conditions of legality, necessity, proportionality and legitimacy.[93]

The report further stipulates that any restrictions pursuant to Article 20 (2) of the Covenant - which requires states to prohibit "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" - must still satisfy the cumulative conditions of legality, necessity and legitimacy.[94]

Moreover, any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.[95]

In its General Comment, the Human Rights Council during its 102nd session urged state parties to consider the decriminalization of defamation.[96] Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. With regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence.[97]

Principle 7 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, provides that "No one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government or its agencies."[98]

Select Case:

I. Vimalkumar Bhimji Depar Shah vs Stephen Jennings & 5 Others [2016]

i. A summary of the case

On 20th May, 2015, the 3rd defendant, Presten Mendanhall, on behalf of the 2nd defendant, RG African Land Limited, wrote a letter to several of the plaintiffs' business associates disparaging the plaintiff's good reputation by painting the plaintiff (Vimalkumar Bhimji Depar Shah) as a person who does not respect any legal process; manipulates the judiciary and is willing to engage in corrupt practices including demanding for bribes. These allegations injured the plaintiffs' character and reputation.

The plaintiffs sought by way of prohibitory injunction, to restrain the defendants from posting on any electronic media, or publishing, or disseminating defamatory words or content relating to them. They also sought a mandatory injunction, compelling the defendants to erase and remove from their various posts, websites, blogs or electronic and social media the

93 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35 par. 7, https://undocs.org/en/A/HRC/38/35
94 Id, par. 8
95 A/HRC/17/27, par. 24 https://undocs.org/en/A/HRC/17/27
96 CCPR/C/GC/34, par 47 https://undocs.org/CCPR/C/GC/34
97 Ibid, See also concluding observations on the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6)
98 Supra note 61, principle 7, https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf

defamatory words, statements, or content relating to the plaintiffs. In addition, the plaintiffs sought orders to direct Google and Twitter to assist in implementing the orders.

The plaintiffs contended that:

- The 1st defendant, Stephen Jennings, delivered a speech that was defamatory of him to a large audience of influential investors, at a Mind-speak forum that was hosted by the 2nd defendant (RG Africa Land Ltd.) on 9th June. The 5th defendant Aly Khan Satchu fielded questions to the 1st defendant, encouraging him to utter further defamatory statements regarding the 1st plaintiff;

- The 1st and 5th defendant posted and published the defamatory statements on the internet, distributed leaflets and posted messages online;

- The 6th defendant, Cyprian Nyakundi, a blogger, reproduced the defamatory words in his blogs and on various twitter platforms @c-nyakundi with 611,900 or more followers;

- The 3rd defendant, after a failed bid to extort shs. 40 million from the plaintiffs, threatened and continued publishing false and defamatory statements about the plaintiffs and posted over 30 defamatory posts on his blog and on Twitter under various hash tags.

The defendants opposed the application on the grounds that:

- The main suit was legally weak and fatally defective and the applicants had no prima facie case with a probability of success;

- The remedy sought (interlocutory injunction) by the plaintiffs could not be granted since the defendants were relying on the defence of justification, fair comment and qualified privilege;

- The words complained of were truthful and not defamatory; and

- The defendants' constitutional right to express their opinions should not be curtailed by unreasonable and whimsical demands by the plaintiffs.

The 6th defendant contented that he was exercising his right of free expression under Article 33 of the Constitution; that this right overrides the plaintiff's private right; and that a mandatory injunction would impede his freedom of expression.

ii. Key issues canvassed

- The nature and extent of the limits of the freedom of speech and expression under Article 33 of the Constitution. The court had to balance between the freedom to express oneself and impart information to others against the respect for others' right to reputation and inherent dignity. Article 33 limits the freedom of expression and subjects it to another person's rights to inherent dignity and the protection of their reputation;

- Admissibility of electronic evidence: The transcribed material from websites, Twitter handles and other electronic or digital formats, which the plaintiffs produced as publications of the defamatory words, should have been accompanied by certificates of transcription. The plaintiffs should have sought leave to play the CDs containing the alleged defamatory material in court as contemplated in sections 106A-106I of the Evidence Act.[99]

iii. Summary of the Judgment

The court held that the plaintiffs established a prima facie case with a probability of success that the defendants should be restrained by way of a prohibitory injunction, to remain in force for a period of twelve months, from publishing any defamatory statements or words, of and concerning the plaintiffs.

The court observed that "To refuse to grant an interlocutory injunction would be granting a license to the defendants to engage in highly inflammatory defamatory publications that are likely to injure the plaintiff's reputation. The 1st - 5th defendants are business moguls just as the plaintiffs and a possibility of business rivalry playing out cannot be ruled out."

99 Electronic evidence is subject to manipulation. Hence, the Evidence Act stringently provides for standards on how such evidence is to be adduced. http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2080#KE/LEG/EN/AR/E/CHAPTER%2080/sec_106B

The prayer for a mandatory injunction and for Google and Twitter to assist in enforcement of the order by way of removal or deletion of the defamatory publications from the various websites and or Twitter handles was declined as they were neither parties to the law suit nor government law enforcement agencies and granting the mandatory orders at that preliminary stage would be similar to issuing final orders.

DATED, SIGNED AND DELIVERED, 10TH AUGUST, 2016.

R. E. ABURILI, JUDGE.

II. Geoffrey Andare v Attorney General & 2 others [2016] eKLR

i. A summary of the case

The petitioner (Geoffrey Andare) challenged the constitutionality of section 29 of the Kenya Information and Communication Act, Cap 411A, Laws of Kenya, on the basis that it violates his right to freedom of expression. Prior to the petition, the petitioner had been charged in a lower court,[100] under section 29(b)[101] of the Act, with the offence of improper use of a licensed telecommunication system. He was accused of posting, in his Facebook account, grossly offensive electronic mail about the complainant, Mr. Titus Kuria, in which he stated that "you don't have to sleep with the young vulnerable girls to award them opportunities to go to school, that is so wrong! Shame on you" knowing it to be false and with the intention of causing annoyance to the complainant.

The petitioner and the Interested Party's (ARTICLE 19 Eastern Africa) case was that section 29 of the Act:

- Is vague and over-broad with regard to the meaning of 'grossly offensive', 'indecent', 'obscene 'menacing', 'causing annoyance' 'inconvenience' or 'needless anxiety';
- Offends the principle of legality which requires:
    a. That a law, especially one that limits a fundamental right and freedom, must be clear enough to be understood and must be precise enough to cover only the activities connected to the law's purpose;
    b. That legislation ought not to be so vague that the subject has to await the interpretation given to it by judges before he can know what is and what is not prohibited.
- Does not peg the commission of the offence on the intention or 'mens rea'[102] of the accused hence offending Article 50 (2) (n) of the Constitution and criminal law principles;
- Has a chilling effect on the guarantee to freedom of expression, which extends to the right to send messages of the kind prohibited by the section;
- Falls outside the four allowed grounds for limitation of the freedom of expression under Article 33 (2) of the Constitution and that the State failed to show that the nature and extent of the limitation of the freedom of expression was reasonable or justified as required under Article 24 of the Constitution;
- Directly affects the public's right to information under Article 35 of the Constitution as it ropes in all information notwithstanding its artistic, academic or scientific value.

The 1st respondent - the Hon. Attorney General - asserted that the freedom of expression guaranteed under Article 33 is not absolute and can be limited pursuant to Article 24 of the Constitution. Further, the words used in the section were clear and intended to enable the state to strike the balance between the enjoyment of rights by any individual and protection of the rights and freedoms of others, or the public interest.

The 2nd respondent - Director of Public Prosecutions (DPP) – cautioned the court to ensure that petitioners were not seeking to avoid judicial processes by classifying them as "constitutional" and warned that the High Court risked hampering the independence of the DPP if it proceeded to determine whether there was a prima facie case against the petitioner in the criminal court case. Also, they maintained that the petitioner had not sufficiently demonstrated how their rights had been infringed and the damage suffered.

100 In Milimani Criminal Case No. 610 of 2015, Republic vs Geoffrey Andare

101 Section 29 of the Act provides: *A person who by means of a licensed telecommunication system—sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person, commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or to both.*

102 The concept of *mens rea* requires that the accused must be blameworthy in mind before he can be found guilty.

ii. **Key issues canvassed**

- Whether section 29 of the Kenya Information and Communication Act is unconstitutional;
- Whether the petitioner's rights were violated in his prosecution under the Act.

iii. **Summary of the Judgment**

The court asserted that the Constitution provides the manner in which it is to be interpreted. It should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, and that contributes to good governance.[103] In determining the constitutionality of a statute, a court must be guided by the object and purpose of the law in dispute. The object and purpose can be determined from the legislation itself.[104]

The court ruled that:

- Section 29 of the Kenya Information and Communication Act is unconstitutional. It is couched in overbroad and vague terms that violate or threaten the right to freedom of association guaranteed under Article 33 of the Constitution;
- The High Court has the jurisdiction to determine whether a provision of law is in conflict with the Constitution, in light of Articles 165 (3) (b) and (d) (i);
- Section 29 offends against the rule requiring certainty in legislation that creates criminal offences;
- The respondents failed to demonstrate that the provisions of section 29 were permissible in a free and democratic society; that there was a relationship between the limitation and its purpose, and there were no less restrictive means available to achieve the purpose intended;
- The Director of Public Prosecutions cannot continue to prosecute the petitioner under the provisions of section 29 of the Kenya Information and Communications Act.

DATED, DELIVERED AND SIGNED AT NAIROBI, 19TH APRIL, 2016.

MUMBI NGUGI, JUDGE.

III. **Cyprian Andama v Director of Public Prosecution & another; Article 19 East Africa (Interested Party) [2019] eKLR**

i. A summary of the case

The petitioner (Cyprian Andama) challenged the constitutional validity of Section 84D of the Kenya Information and Communication Act (KICA) on the basis that it criminalizes the publication of obscene information in electronic form in broad, vague terms thus limiting the freedom of expression. The petitioner had already been charged before lower courts (Milimani and Kiambu Law Courts) with offences under the challenged section of the Act.

The petitioner contended that:

- Section 84D of KICA limits his freedom of speech and expression;
- The section has a chilling effect on the constitutional right to freedom of expression and the right to seek or receive information or ideas under Article 35 of the Constitution, since the section includes all information notwithstanding its artistic, academic or scientific value;
- The section is vague and overbroad with regard to the meaning of "lascivious" or "appeals to the prurient interest" or "tends to deprave and corrupt persons", leaving a wide margin of subjective interpretation and abuse in determining criminal penalties;
- Innocent persons may be arbitrarily arrested under section 84D since none of the terms are defined or capable of precise or objective legal definition or understanding;
- The challenged section does not amount to a reasonable and justifiable limitation of the freedom of expression under Article 24 of the Constitution;
- The enforcement of section 84D by the Attorney General against the petitioner in the lower courts is a form of censorship which impairs the core values in Article 33;

103 See Article 259 and Article 159(2) (e) of the Constitution, Geoffrey Andare v Attorney General & 2 others [2016] eKLR, (HC) [69]
104 Geoffrey Andare v Attorney General & 2 others [2016] eKLR, (HC) [65]

- The court, as custodian of the Bill of Rights, is mandated to intervene where facts reveal a need to prevent a violation of fundamental freedoms under the Constitution.

The interested party's (Article 19) case was that the disputed section does not satisfy the three-part test set out under Article 24 of the Constitution which provides that the limitation must be provided for under the law, must have a legitimate aim, and must be necessary and proportional. Further, the challenged section has no immediate relation to the 4 grounds that allow freedom of expression to be limited under Article 33(2) of the Constitution and thus does not serve a legitimate aim.

The respondents contended that the petitioner sought to evade accountability for offensive acts, through filing the petition. Also, that:

- The rights under Articles 33 of the Constitution can be limited to ensure that their enjoyment by any individual does not prejudice the rights and freedoms of others or public interest;
- The petitioner did not present evidence of the specific rights infringed and the damages suffered;
- There was no evidence of misuse of power or violation of rules of natural justice by a public body and hence an order of prohibition was not merited;
- The lower trial court had the capacity to determine whether the petitioner's writing injured the reputations of the persons mentioned;
- If the court granted the orders sought, it risked interfering with the exercise of constitutional powers by the 1st respondent;
- It was necessary to distinguish constructive criticism which is protected under Article 33 of the Constitution, from vilification and profanities, which led to the criminal charges against the petitioner.

ii. Key issues for determination

- Whether section 84D of KICA limits the freedom of expression guaranteed under Article 33(1) of the Constitution;
- Whether the limitation serves a legitimate aim and is reasonable, justifiable and necessary in an open and democratic society;
- Whether Article 33 (2) of the Constitution was violated by the publications;
- Whether the state, as required by Article 24 (3) of the Constitution, demonstrated to the court that the provision had a legitimate aim and was necessary and proportional.

iii. Summary of the Judgment

The court sought to establish the standard for determining the constitutional validity of the disputed laws. They observed that courts have laid down the main standards in determining constitutional validity as "rationality", "reasonableness" or "proportionality". In determining the constitutionality of a law or provision of a law, the court is under a duty to consider the challenged law or provision alongside the article(s) of the Constitution and determine whether it meets the constitutional validity test. In doing so, the court must also consider both the purpose and effect of the provision or the law, and determine whether the purpose of the provision or its effect, may lead to unconstitutionality of the law or provision.[105]

The court concluded that section 84D of Kenya Information Communication Act violates the Constitution and is invalid. It was held that:

- The respondent did not sufficiently demonstrate that the limitation by section 84D of KICA was justified;
- The disputed section is unconstitutional to the extent that it flouts the citizens right to freedom of expression guaranteed under Article 33 of the Constitution;
- The disputed section violates the right to a fair hearing, which is guaranteed under Article 50(2)(b) of the Constitution, by providing for an offence in such broad and unclear terms, subjecting it to unpredictable interpretation by the court or Director of Public Prosecution. The right to a fair trial or hearing cannot be limited;
- Though the purpose of the disputed section was to control or limit the use of obscenities in communication; its effect was to suppress the freedom of expression by creating the fear of consequences of a charge under the said section;

105 Cyprian Andama v Director of Public Prosecution & another; Article 19 East Africa (Interested Party) [2019] eKLR, (HC) [30]

- The continued enforcement of the section against the petitioner was a violation of the petitioner's fundamental right to freedom of expression.

"I find that dissent in opinion or thought should not amount to a crime otherwise this is in effect, suppressing the right to hold different opinion from those in public office."[106]

DATED, SIGNED AND DELIVERED IN OPEN COURT, NAIROBI, 31ST JULY, 2019.

W. A. OKWANY, JUDGE.

I. Robert Alai v The Hon Attorney General & another[107]

i. Factual Background

Robert Alai, the petitioner, was charged with the offence of undermining the authority of a Public Officer contrary to Section 132 of the Penal Code when he posted on Twitter, the words "Insulting Raila is what Uhuru can do. He hasn't realized the value of the Presidency. Adolescent President. This seat needs Maturity". On 17th December, 2014, he was arraigned before the Chief Magistrate's court at Kiambu.

The petitioner claimed that the charge was a violation of his constitutional rights and filed the petition against the Attorney General and the Director of Public Prosecution, seeking a declaration that section 132 of the Penal Code (Cap 63 Laws of Kenya) is unconstitutional and invalid, and that the continued enforcement of section 132 by the second respondent against him is unconstitutional. The petitioner also contended that Section 132 of the Penal Code:

- Is incompatible with the sovereign power of the people, as it shields government officials from public scrutiny and fair criticism;
- Violates the freedom of speech and expression as it limits the utterance or publication of words that are not limited in Article 33 (2) (d) of the Constitution;
- Does not meet the requirements in Article 24(1)[108] of the Constitution, as there is no link between the limitation and the purpose of the limitation;
- Undermines Article 25 (c) of the Constitution which provides that the right to a fair trial cannot be infringed. It also violates the principle of law on presumption of innocence under Article 50 (2) (a) of the Constitution, by shifting the burden of proof from the prosecution to the accused.

The interested party (Article 19) contended that a law must be clear and precise but the words used in the section were vague and ambiguous. They also asserted that criticism of public officers is not a crime and public officers should be prepared to tolerate criticism.

The respondents contended that: freedom of expression is not absolute but is limited by Article 33 (3) and that the petitioner's conduct contravened Article 33 of the Constitution; the petitioner had not shown that his rights have been or are being violated; since Section 132 of the Penal Code was enacted prior to the 2010 Constitution, it does not contravene Article 24 (2) of the Constitution; the trial court should decide on the case in which the petitioner was charged under section 132, as it is a matter for evidence; and Section 132 does not offend the Constitution, but protects public officers and the accompanying authority and declaring the section unconstitutional would expose public officers to ridicule and vilification.

ii. Key issues for determination

- Whether criticism of a public officer is a ground for limiting a fundamental right in the Constitution;
- Whether the challenged provision meets the constitutional (mirror) test;
- Whether both the purpose and effect of the challenged section could lead to the provision being declared unconstitutional;
- Whether the limitation imposed on the freedom of expression by section 132 was justified by the party seeking to limit that right.

106 Okwany, W.A. Judge, in Cyprian Andama v Director of Public Prosecution & another; Article 19 East Africa (Interested Party) [2019] eKLR, (HC) [65]

107 Robert Alai v The Hon Attorney General & another [2017] eKLR

108 It provides that "A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose".

iii. **Summary of the Judgment**

The court held that:

- Section 132 of the Penal Code violates the Constitution and is invalid. Continued enforcement of the section against the petitioner is a violation of the petitioner's rights;
- Section 132 does not define the words "undermining authority of a public officer" leaving it to the subjective view of the person said to have been undermined and/or the court;
- The respondent did not show how the words complained of violated the limitations to the freedom of expression under Article 33 (2) of the Constitution;
- The respondent did not demonstrate, as required by Article 24 (3), that the limitation imposed by Section 132 on the freedom of expression was reasonable and justifiable and that the objective of the limitation was intended to serve the society;
- The challenged section is inconsistent with Articles 33, 50 (2) (a), (i), (l) and 25 (c) of the Constitution, in that it suppresses the freedom of expression, shifts burden of proof to an accused, denies an accused the right to remain silent and conflicts with the right to fair hearing.

The court pointed out that laws should be clear and unambiguous, and especially so if they create a criminal offence. Further, they should not be so widely and vaguely worded as to net anyone who may not have intended to commit what is criminalized by the section.[109] They emphasized that Article 20 (2) of the Constitution is clear that every person has the right to enjoy the rights and fundamental freedoms to the greatest extent consistent with the nature of the right or fundamental freedom.

DATED, SIGNED AND DELIVERED AT NAIROBI ON 26TH APRIL, 2017.

E. C. MWITA, JUDGE.

V. **Media Council of Kenya v Eric Orina [2013] eKLR**

i. **A summary of the case**

The respondent (Eric Orina) sent defamatory emails to the applicant (the Chairman of the Media Council of Kenya), persistently over a period of three weeks in August 2012. The applicant sought a temporary injunction to restrain the respondent from writing, printing and publishing, further defamatory statements against it and its Council members, pending the hearing and determination of the case.

The applicant contended that the respondent's defamatory emails were published on-line, in a portal known as JACKAL NEWS, which was accessed by many subscribers. They also claimed that the respondent's allegations were not only wrong and erroneous, but also damaging to the Media Council's reputation and to its function that caters for the best interest of the members and general public at large.

The respondent opposed the application on the grounds that as an insider, he was "blowing the whistle" in a justified and fair manner as the matter was related to the Council's integrity, transparency and accountability to the public. Further, any injunction issued by the court to restrain the respondent from continuing to publish and expose the applicant's acts of misconduct would impede the public interest and the public right of fair comment as well as his personal rights. He also asserted that the applicant had failed to show that it is entitled to a temporary injunction and that it had suffered or will suffer any loss or damage that cannot be sufficiently compensated in damages. Also, that by failing to join the publisher, the "JACKAL NEWS", as a party to the case, the applicant showed that it filed the application to stifle the respondent from publishing the applicant's misconduct.

ii. **Key issues for determination**

Whether the respondent when exercising the right to freedom of expression, should ensure that the rights and reputations of others are respected and embraced.

109 Ibid [56]

ii. **Summary of the judgment**

The court held that the applicant had a prima facie case with a probability of success and that since the applicant is not a private person but a public body, any damage done to it in respect to its reputation, can sufficiently be compensated with damages.

The court also noted that the respondent, through his publications, sought to assert the right to freedom of speech and free expression, and that the applicant should have been more tolerant with him, since the Council was set up for the purpose of protecting those rights. It asserted that free speech should not be restrained and even where there is clear evidence that a publication is likely to cause injury to an individual, and in order to protect the right to free speech, the court would still be forced to deny the injunction, in anticipation that the injury will be compensated.

DATED AND DELIVERED AT NAIROBI, 22ND AUGUST, 2013.
D. A. ONYANCHA, JUDGE.

VI. **Shawn Bolouki & another v Dennis Owino [2019] eKLR**

i. Summary of the case

The plaintiffs (Shawn Bolouki and the Aga Khan University Hospital) contended that:

- The defendant (Dennis Owino) posted a defamatory article on his Twitter handle @kinyabo that had over sixty-five thousand (65,000) followers, which words had injured their reputations as a senior executive in the health care profession and premier health facility respectively;
- Since the defendant did not establish the truth before publishing the offending article and had failed to provide proof that a racist policy exists, he had not demonstrated fair comment or justification;
- Once reputation was lost, the same could not be compensated by way of an award of damages;
- The freedom of expression for those engaged in publishing, communicating and disseminating information is limited as it should respect the reputation of others;

Pending the hearing and determination of the case, the plaintiff sought the following orders:

- A temporary injunction directed at Dennis Owino (the defendant) restraining him from posting on any electronic media or publishing the defamatory words;
- A mandatory injunction directed at the defendant compelling him, his agents, servants or otherwise to erase and remove from their posts, websites, blogs or other forms of electronic and social media the defamatory words relating to the plaintiffs;

The defendant contended that the grant of an interlocutory injunction would amount to a restriction of his freedom of expression and that the publication was of public interest as it concerned health provision to the general public and thus it outweighed the plaintiffs' private interests.

ii. Key issues for determination

- Whether the plaintiff had satisfied the criteria set out in Giella vs Cassman Brown Co Ltd so as to be granted an interlocutory injunction pending the hearing and determination of the case;
- Where to strike a balance while ensuring that neither the plaintiffs nor the defendant's rights in respect of the freedom of expression were infringed and/or contravened.

iii. Summary of the Judgment

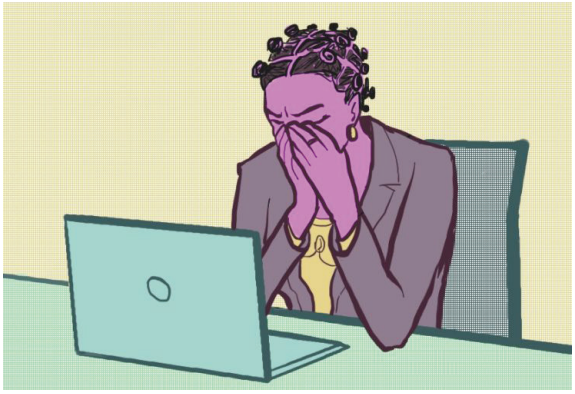
The court held that:

- The plaintiffs had demonstrated that in the event an interlocutory injunction was not granted, and they were ultimately successful in their case against the defendant, they would suffer irreversible harm that would not be compensated by way of damages;
- That there were no special circumstances to warrant the court granting a mandatory injunction. A determination of whether the publication was defamatory or not could only be considered during the full trial. The court could not therefore order for the erasure and removal of any publication from the defendant's posts, websites, blogs or other forms of electronic and social media.

DATED AND DELIVERED AT NAIROBI, 31ST JANUARY, 2019.

J. KAMAU, JUDGE.

5. WOMEN AND ONLINE VIOLENCE



Introduction

The three cases summarized here concern women, aggrieved through the publication of defamatory material on online media. They sought legal redress including court declarations, injunctions, orders to pull down content and compensation amongst other remedies. The courts analysed the women's right to privacy vis- à-vis public interest.

International Human Rights Standards

Online and ICT-facilitated forms of violence against women have become increasingly common, particularly with the use, every day and everywhere, of social media platforms and other technical applications.[110]

Online violence against women encompasses acts of gender-based violence that are committed, facilitated or aggravated by the use of ICTs, including online threats, harassment, gross and demeaning breaches of privacy, such as "revenge pornography".[111]

The protection of women from violence is addressed in various human rights instruments, including the Universal Declaration of Human Rights, the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of Persons with Disabilities and the International Convention for the Protection of All Persons from Enforced Disappearance.[112]

Even though the core international human rights instruments, including those on women's rights, were drafted before the advent of ICT, they provide a global and dynamic set of rights and obligations with transformative potential, and have a key role to play in the promotion and protection of fundamental human rights, including a woman's rights to live a life free from violence, to freedom of expression, to privacy and data protection, to have access to information shared through ICT, and other rights that are protected under the international human rights framework.[113]

In her 2018 thematic report on online violence against women, the Special Rapporteur on violence against women, its causes and consequences, warned that the use of information and communications technology without adopting proper human rights-based approach could contribute to an increase in gender-based discrimination and violence against women and girls. She called for the recognition of the principle that human rights, including women's human rights, which are protected offline should be protected online[114]

In its general recommendation No. 35 (2017) on gender-based violence against women, the Committee on the Elimination of Discrimination against Women made clear that the Convention on the Elimination of All Forms of Discrimination against Women was fully applicable to technology-mediated environments, such as the Internet and digital spaces, as settings where contemporary forms of violence against women and girls were frequently committed in their redefined form.[115]

Paragraph 3 of Article 19 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the following grounds: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals; and they must conform to the strict tests of necessity and proportionality. For the purposes of paragraph 3, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.[116] and it must be made accessible to the public.

Any measures to eliminate online violence against women must comply with international human rights law, including the criteria for permissible restrictions to freedom of expression provided under Article 19 (3) of the International Covenant on Civil and Political Rights.[117]

110 Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/32/42/Corr.1, https://undocs.org/en/A/HRC/32/42/Corr.1

111 Human Rights Council, Report of the Working Group on the issue of discrimination against women in law and in practice, A/HRC/23/50, para. 66. https://undocs.org/A/HRC/23/50

112 A/HRC/32/42 par 26, https://undocs.org/en/A/HRC/32/42/Corr.1

113 Ibid par.3

114 Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective A/HRC/38/47 par. 17, https://undocs.org/en/A/HRC/38/47

115 Ibid, par. 50

116 CCPR/C/GC/34, par. 22, https://undocs.org/CCPR/C/GC/34

117 Promotion, protection and enjoyment of human rights on the Internet: ways to bridge the gender digital divide from a human rights perspective, A/HRC/35/9, par.58, https://undocs.org/A/HRC/35/9

Select Case:

I. Anne Waiguru v Google Inc & 2 others [2014] eKLR

i. A summary of the case

On or about the 14th of April 2014, a story titled 'CONFIRMED: It is Anne Waiguru who wanted to sleep with Janet's Mbugua's Boyfriend Gor Samelango" was created, posted and published in an online publication, the "Daily Post". The post included the petitioner's photo prominently.

The petitioner (Anne Waiguru) contended that:

- The said post was defamatory of her character;
- She had a right to seek legal redress but could not exercise that right without the information held by the respondents, Google Inc., and Google Kenya Ltd, about the owners, authors and publishers of the "Daily Post", being provided;
- There is a connection between the two respondents similar to that of principal/agent;
- The 2nd respondent (Google Kenya Ltd.) had the burden of proving that it did not have the information sought.

The 1st respondent (Google Inc.) contended that the petitioner did not have a cause of action [118]against the 2nd respondent as the 2nd respondent did not have access to details about the identity of the internet site "Daily Post". Further, the petition did not disclose any violation of the petitioner's fundamental rights and freedoms by the 2nd respondent.

The 2nd respondent's case was that the 1st and 2nd respondents are separate legal entities and that it did own or operate the platform that hosted the offending website but the 1st respondent did.

i. Key issues for determination

- Whether the information sought by the petitioner can only be availed by the 1st respondent;
- Whether or not the 1st respondent had some influence and interlinkages over the 2nd respondent;
- Whether the 2nd respondent has any role in regard to the information being sought by the petitioner.

ii. Summary of the Ruling

The court asserted that striking out pleadings or a party in a Constitutional Petition should be done in the clearest of cases and this was not one such case. It held that:

- The involvement of the 2nd respondent in the petition was necessary as the relationship between the two respondents formed the background of the Petition;
- The court did not see how the 2nd respondent would suffer any prejudice by participating in the proceedings;
- It would be inappropriate to consider the liability of the 2nd respondent at that interlocutory stage.

DATED, DELIVERED AND SIGNED AT NAIROBI, 5TH DECEMBER, 2014 BY ISAAC LENAOLA, JUDGE
Note: This case was eventually settled out of court and did not proceed to the final hearing.

II. **Charity Wanjiku Muiruri v Standard Group Limited & 2 others [2019] eKLR**

i. Factual Background and Parties Contentions

On or about 7th April, 2013, Kenya Television Network (KTN) aired it's investigative programme titled "Jicho Pevu: Gharuri ya Saitoti" in which the plaintiff appeared in a clip at a party with Artur Magaryan and Artur Sargasyan, commonly known as Artur Brothers or Armenian Brothers. The Artur Brothers were alleged to be assassins and involved in other criminal activities and had captured public interest.

118 In the legal system, a "cause of action" is a set of facts that gives an individual or entity the right to seek a legal remedy against another. https://legaldictionary.net/cause-of-action/

The plaintiff (Charity Wanjiku Muiruri) contended that there was no explanation why she was featured in the said programme as she was on duty on behalf of the 1st defendant (The Standard Group Limited), who was her employer, when she appeared next to the Artur Brothers. Further, that her appearance in the footage was out of context and disparaged her reputation by portraying her as a person involved in drugs and other criminal activities.

As a consequence of the alleged defamatory publication, she lost job opportunities and opportunities to enhance and grow her career as a media personality. She claimed that the defendants continued to repeat the disputed programme on KTN's other platforms including YouTube and KTN's website. Also, that immediately after the Jicho Pevu programme, she became the No. 1 trending topic on Twitter and social media was awash with extremely negative and insulting comments which depicted her as a person of loose morals.

The defendants contended that the broadcast of the feature Jicho Pevu: Gharuri ya Saitoti was done in public interest due to the circumstances regarding the suspected killing of a prominent Kenyan personality. Further, that the excerpts complained of did not make any reference to the plaintiff and that the feature was neither defamatory of the plaintiff nor did it cause any substantial damages. They averred that they were not responsible for the acts of third parties in respect of social media publications.

ii. Key issues for determination

- Whether a reasonable man watching the disputed programme would perceive it as defamatory;
- Whether the defendant adduced evidence to establish any truth in the publication of the clip complained.

iii. Summary of the Judgment

The court held that the plaintiff, on a balance of probabilities, proved her case. A reasonable man watching the programme complained about, would perceive it as defamatory. There was evidence of repeats of the programme and online presence of the programme complained of but no evidence to establish any truth in the publication of the clip complained.

DATE, SIGNED AND DELIVERED AT NAIROBI, 24TH OCTOBER, 2019.

JUSTICE THURANIRA JADEN.

III. **Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] eKLR**

i. **A summary of the case**

The petitioner (Roshanara Ebrahim) was crowned Miss World Kenya 2015, a position that entitled her to participate in Miss World Beauty Pageant slated for December 2016. By a Press Release of 29th July 2016, the 1st and 2nd respondent (Ashley's Kenya Ltd. and Terry Mungai), organisers of the Miss World Kenya, announced the dethronement of the petitioner for alleged breach of their Code of Conduct. The allegation of breach was based on nude photographs of the petitioner given to the organisers by the petitioner's boy-friend, the 3rd respondent.

The petitioner sought amongst other orders, a declaration that the harassment, intimidation, intended or threatened publication of private and confidential photographs by the respondents was unconstitutional, unlawful and a violation of her fundamental rights in Articles 28, 29, 31, 35 and 47 of the Constitution. She also sought an injunction restraining the respondents from posting, publishing or broadcasting on social media or any other media, private and confidential photographs or information on her in their possession and; a declaration that her purported dethronement by the 1st respondent was unlawful and a violation of her right to fair administrative action under Article 47 of the Constitution.

The 1st and 2nd respondents contended that:

- This was a contractual issue between the petitioner and the 1st respondent and the remedy, should be sought in the Commercial Division of the court;
- Where there is an avenue for redress, the petitioner ought to invoke those remedies pursuant to Article 10 on the principle of the Rule of Law;
- The petitioner did not comply with the arbitration clause of the contract before approaching the court;
- The petitioner was granted an opportunity to defend herself.

The 3rd respondent (Frank Zahiten) contended that:

- The dispute between the parties was a commercial, defamation, personal dispute clothed as a constitutional petition;
- The petitioner had waived her right to privacy by taking the subject photographs as selfies and voluntarily sending them to him using a communication gadget;
- As an alcoholic and drug abuser, the petitioner was not a role model fit to represent the Country in the Miss World pageantry.

ii. **Key issues for determination**

- Whether the petitioner's right to fair hearing before her dethronement had been violated, as well as her right to privacy, through the leakage of her private photographs;
- Whether the petition raised constitutional issues or was a commercial dispute, a defamation claim and private personal disagreement between the parties, clothed as a constitutional petition.

iii. Summary of the Judgment

The court asserted that Article 31 (c) of the Constitution provides for the right to informational privacy which includes privacy of private photographs of a person. In taking selfie nude pictures using a mobile phone or other communication gadget, a person does not thereby waive her right to privacy. She only exposes herself to the risk and danger of the photographs being transmitted to and viewed by other persons through the communication networks by unauthorised access and publication, or by authorised access but unauthorised publication. The court held that:

- The petitioner's crown was lawfully terminated in accordance with the contract. Her right was to a procedurally fair process of selection as Miss World Kenya and, any termination should have been in accordance with contract;
- There was no evidence that the mechanisms for the enforcement of the petitioner's rights under the contract were inadequate or ineffectual;
- The petitioner's claim against the 1st and 2nd respondents is a commercial matter for hearing and disposal by the Commercial Division of the court;
- The petitioner did not waive her right to protection of privacy by taking nude photographs. She did not consent to the dissemination of her nude pictures to third parties. Her expectation that private photographs would remain a private matter between her boyfriend and herself was not unreasonable;
- It is the 3rd respondent who published the private photographs of petitioner;
- The petitioner's case against the 3rd respondent was properly a human rights issue of breach of the right to privacy under Article 31 (c) of the Constitution. The Bill of Rights' protection to privacy is an obligation of both state and non-state actors in terms of Article 20 of the Constitution;
- In forwarding the private photographs of the petitioner to the 2nd respondent, the 3rd petitioner violated the petitioner's right to privacy of information under Article 31 (c) of the Constitution, and the petitioner was entitled to compensation in damages.

The court ordered the respondents, their agents or employees or persons under their control not to publish the photographs.

DATED AND DELIVERED ON 7TH DECEMBER, 2016.

JUSTICE EDWARD M. MURIITHI.

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