

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL DIVISION
PETITION NO. 37 OF 2018

BLOGGERS ASSOCIATION OF KENYA..... PETITIONER

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTION..... 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
BABU OWINO..... 1ST INTERESTED PARTY
ARTICLE 19 EAST AFRICA..... 2ND INTERESTED PARTY

IN CHAMBERS ON 1ST FEBRUARY, 2018
BEFORE HON. MR. JUSTICE E.C. MWITA

ORDER

UPON READING the Notice of Motion application dated 31st January, 2018 presented to this Court on 1st February 2018 by counsel of the petitioners under Certificate of Urgency **AND UPON READING** the Supporting Affidavit of **JANE GACHANGO** sworn on the 31st January, 2018 and Annexures thereto **AND WHEREAS THIS MATTER** coming up in chambers;

IT IS HEREBY ORDERED:

1. **THAT** the Application and Petition be served on the Respondents immediately.
2. **THAT** the Respondents do file and serve responses to the Petition without delay and in any case not later than 14th February, 2018.
3. **THAT** Directions be on 19/2/2018.

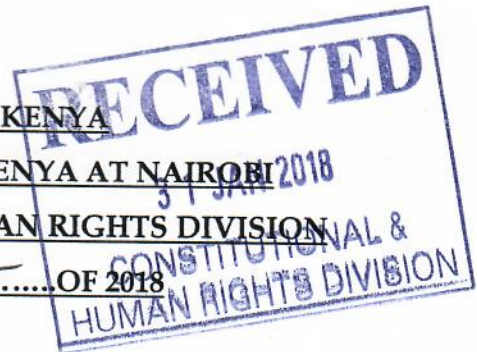
GIVEN under my Hand and Seal of this Honorable Court this 1st day of February, 2018.

ISSUED at Nairobi this..... day of 2018.

hmmmanabba
DEPUTY REGISTRAR
HIGH COURT OF KENYA, NAIROBI

CLIENT - BAKE

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 37 OF 2018



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Versus

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ATTORNEY GENERAL SECOND RESPONDENT
BABU OWINO.....1ST INTERESTED PARTY
ARTICLE 19 EAST AFRICA2ND INTERESTED PARTY

CERTIFICATE OF URGENCY

I HELLEN NGESSA an Advocate of the High Court of Kenya practising as such in the firm of Hellen Ngeessa & Partners Advocates of View Park Towers, 12th Floor Suite 13, P. O. Box 578-00100 Nairobi do certify that this matter is of utmost urgency deserving to be immediately brought before the duty judge, for reasons that:-

1. THAT this Petition questions the validity of section 77 and 94 of the Penal Code under which the 1st Interested Party has been charged in Milimani Chief Magistrates Court Criminal Case No. 1644 of 2017 Republic v Paul Ongili alias Babu Owino.
2. The Petitioner has also filed an application for conservatory orders freezing the proceedings under the two sections, against the 1st Interested Party, in Milimani Chief Magistrates Court Criminal Case No. 1644 of 2017 Republic v Paul Ongili alias Babu Owino in the pendency of this Petition.
3. THAT unless the Notice of Motion application for conservatory orders is certified urgent and promptly brought before the duty judge for directions the application will be rendered nugatory.

Dated at Nairobi this 31ST day of January 2018

HB1-

HELLEN NGESSA & PARTNERS
ADVOCATES FOR THE PETITIONERS

DRAWN AND FILED BY:

HELLEN NGESSA & PARTNERS ADVOCATES
VIEW PARK TOWERS, 12TH FLOOR SUITE 13
P. O. BOX 587-00100

NAIROBI.

TO BE SERVED UPON:

5. DIRECTOR OF PUBLIC PROSECUTION
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION
NSSF BUILDING, BLOCK A, 19TH FLOOR
P. O. BOX 30701-00100

NAIROBI

6. ATTORNEY-GENERAL
OFFICE OF THE ATTORNEY-GENERAL
SHERIA HOUSE
P. O. BOX 40112-00100

NAIROBI

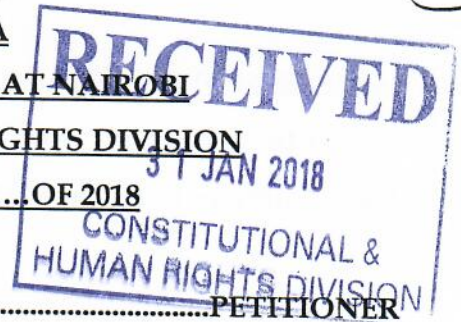
7. BABU OWINO

8. ARTICLE 19 - EASTERN AFRICA
2ND FLOOR, ACS PLAZA
LENANA ROAD
P. O. BOX 2653 - 00100

NAIROBI

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NOTICE OF MOTION

TAKE NOTICE that this Honourable Court shall be moved on the.....day of
..... 2018 at 9:00 o'clock in the forenoon or soon thereafter as the applicant
may be heard on an application FOR ORDERS:-

- a. This application be certified as urgent and heard ex parte in the first instance.
- b. Pending the hearing and determination of this application *inter-partes* a conservatory order does issue staying the proceedings against the 1st Interested Party in Milimani Chief Magistrates Court Criminal Case No. 1644 of 2017 Republic v Paul Ongili alias Babu Owino.
- c. That the Respondents bear the Petitioners' costs of this application.

WHICH APPLICATION is based on the following grounds:-

1. THAT the 1st Interested Party has been charged in Milimani Chief Magistrates Court Criminal Case No. 1644 of 2017 Republic v Paul Ongili alias Babu Owino with the offences of "subversion" under section 77(1)(F); as well as "offensive conduct conducive to breach of peace" under section 94(1) of the Penal Code, Cap 63.

2. THAT this Petition questions the validity of section 77 and 94 of the Penal Code under which the 1st Interested Party has been charged in **Milimani Chief Magistrates Court Criminal Case No. 1644 of 2017 Republic v Paul Ongili alias Babu Owino**.
3. THAT the Petitioner has also filed an application for conservatory orders freezing the proceedings in Milimani Chief Magistrates Court Criminal Case No. 1644 of 2017 Republic v Paul Ongili alias Babu Owino pending the determination of the validity of the two sections.
4. THAT the Petitioner is most apprehensive that unless a conservatory order is issued the Petitions will be rendered nugatory as the impugned trial would have proceeded to conclusion.
5. THAT if the allowing the proceedings in Milimani Chief Magistrates Court Criminal Case No. 1644 of 2017 to continue at this stage, would render the question of the constitutionality of Sections 77 and 94 academic thus defeating the administration of justice by way of effective enforcement of the Bill of Rights. The trial would have been carried out in violation or threatened breach of the Bill of Rights.
6. THAT failure to issue a conservatory order would ultimately make the Court's final decision a *mirage* as there can be no use of a favourable determination to the Petitioner if the proceedings continue and the 2nd Interested Party is convicted and jailed under Section 77 and 94 while this Petition is pending determination in Court.
7. THAT failure to grant a conservatory order preserving the proceedings in Milimani Chief Magistrates Court Criminal Case No. 1644 of 2017 would occasion great injustice as the freedoms sought to be vindicated in the Petition would be incomparably injured, a result which militates against the public interest in the exercise of the Second Respondent's mandate.

AND WHICH application is supported by the Supporting Affidavit of JANE GACHANGO and by such other grounds, reasons and arguments as may be advanced at the hearing of the application.

Dated at Nairobi this 31st day of January 2018

Hellen Ngessa & Partners

ADVOCATES FOR THE PETITIONER

DRAWN AND FILED BY:

HELLEN NGESSA & PARTNERS ADVOCATES
VIEW PARK TOWERS, 12TH FLOOR SUITE 13
P. O. BOX 587-00100
NAIROBI

TO BE SERVED UPON:

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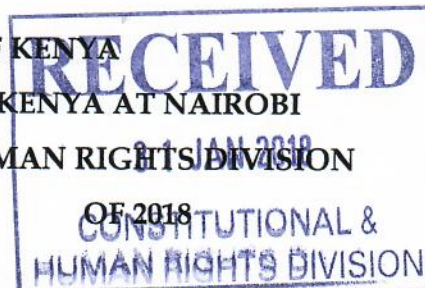
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NAIROBI

If any person served does not appear at the time and place mentioned above such orders shall be made and proceedings taken as the court deems just and expedient

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SUPPORTING AFFIDAVIT

I JANE GACHANGO a resident of Nairobi and c/o Hellen Ngessa & Partners
Advocates, View Park Towers, 12th Floor Suite 11, P. O. Box 587-00100 Nairobi
make oath and swear as follows:-

1. THAT that I am the Petitioner's General Manager, duly authorised, familiar with the facts and competent to swear this affidavit.
2. THAT the Petitioner has filed this Application on its own behalf and in the public interest under Article 23 of the Constitution of Kenya.
3. THAT I am aware that on 27th September, 2017 in Milimani Chief Magistrates Court Criminal Case No. 1644 of 2017 Republic v Paul Ongili alias Babu Owino. The 1st Interested Party was charged under section 77 and 94 of the Penal Code with the offences of subversion and offensive conduct conducive to the breach of peace, respectively. I annex a copy of the charge sheet marked as "JG-1"
4. THAT the Petitioner gravely fears that similar charges could be brought against bloggers, journalists and online activists.

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5. THAT I believe based on legal advice that sections 77 and 94 of the Penal Code threaten the freedom of expression and freedom of the media under Articles 33(1) and 34 of the Constitution.

6. THAT I depose this affidavit in support of the Application based on facts within my knowledge and believing it to be in accordance with the Oaths and Statutory Declarations Act, Cap 20.

Sworn at Nairobi this...31st...day of...JANUARY...2018 by:-

JANE GACHANGO

Before me

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)

)

)

DEPONENT

KARIUKI NJUGUNA
ADVOCATE
&
COMMISSIONER OF OATHS
P.O. BOX 19933-00100 NAIROBI

DRAWN AND FILED BY:

HELLEN NGESSA & PARTNERS ADVOCATES

VIEW PARK TOWERS, 12TH FLOOR SUITE 13

P. O. BOX 587-00100

NAIROBI

TO BE SERVED UPON:

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OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION

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3. BABU OWINO

4. ARTICLE 19 - EASTERN AFRICA

2ND FLOOR, ACS PLAZA

LENANA ROAD

P. O. BOX 2653 - 00100

NAIROBI

THIS IS THE EXHIBIT MARKED....
 REFERRED TO IN THE ANNEXED
 Affidavit of
 Declaration
 SWORN BEFORE ME THIS
 DECLARED
 DAY OF 21/11/2017
 COMMISSIONER FOR OATHS

CHARGE SHEET

POUCE CASE NO 12/10/17
 DATE TO COURT 24/11/17
 COURT FILE 09/16/17

First Name	Surname or Father's Name	Identity Certificate No	Sex	Nationality	Age	Address including district and location where apprehended
PAUL	alias BABU OWINO		M	KENYAN	A	C/O PARLIAMENT NAIROBI

SUBVERSION CONTRARY TO SECTION 77 (1) (F) OF THE PENAL CODE

PAUL ONGILI alias BABU OWINO

On the 24th day of September, 2017 at Stage 46, Kawangware, Dagoretti North Sub County within Nairobi County without lawful excuse uttered the words to wit, "Kama Gaddafi alifolewa na wananchi, kama Gbagbo alifolewa na wananchi, kama Yahya Jammeh alifolewa na wananchi, wewe ni nani? Wewe ni mtoto wa mbwa..." which words were calculated to excite disaffection against the Presidency.

(OTHER COUNTS SEE OVERLEAF)

Date of Arrest	Without or with warrant	Date Apprehension Report to Court	Bond or Bail and Amount	Is Application made for Summons to issue
25/09/2017	W/O	26/09/2017	CUSTODY	///////

REPUBLIC THROUGH THE NATIONAL POLICE SERVICE | DCI HEADQUARTERS

TO BE STATED

Officer in Charge

25 SEP 2017
 [Signature]
 [Stamp]

FAV. CROQUIS DEL FANTASMA

On the 8th of August 2013, I learned from the Chief Executive for Consistency, William Hadden, that in the absence of a written policy, we must not deliver Court orders and would not be able to do so until we have a Court order in place. I was told that the Court order was in place as of 11th August 2013. I was told that the Court order was in place as of 11th August 2013. I was told that the Court order was in place as of 11th August 2013.

06-11-78

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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO OF 2018

RECEIVED
31 JAN 2018
CONSTITUTIONAL &
HUMAN RIGHTS DIVISION

IN THE MATTER OF THE CONTRAVENTION OF THE CONSTITUTION OF
KENYA, 2010

AND

IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS
PARTICULARLY ARTICLES 29, 33; 36; AND 50(2)(n) OF THE CONSTITUTION
OF KENYA, 2010

AND

IN THE MATTER OF SECTION 77 AND 94 OF THE PENAL CODE, CAP 63

BETWEEN

BLOGGERS ASSOCIATION OF KENYA.....PETITIONER

Versus

DIRECTOR OF PUBLIC PROSECUTION..... FIRST RESPONDENT
ATTORNEY GENERAL SECOND RESPONDENT
BABU OWINO.....1ST INTERESTED PARTY
ARTICLE 19 EAST AFRICA2ND INTERESTED PARTY

PETITION

TO THE HIGH COURT OF KENYA:-

The Petition of Bloggers Association of Kenya is as follows:

1. The Petitioner, *Bloggers Association of Kenya* (BAKE) is a community organization of Kenyan online content creators and that seeks to empower online content creation and improve the quality of web content. The Petitioner brings this Petition on its own behalf and in the public interest. The second Petitioner is an advocate, citizen, and believer in the rule of law.
2. The Petitioner has grave apprehension about the threat to freedom of expression and the media imposed by the sections 77 and 94 of the Penal Code. The offences of 'subversion' and 'offensive conduct conducive to the breach of peace', created

under the two sections could be used to charge bloggers, journalists and online activists to the detriment of the Petitioner and its members.

3. The Petitioner's address of service for the purposes of this petition is c/o Hellen Ngessa & Partners Advocates of View Park Towers, 12th Floor Suite 11, P. O. Box 587-00100 Nairobi.
4. The Petition is filed against the Director of Public Prosecutions (DPP), as the constitutional office established under Article 157 of the Constitution concerned with the institution and oversight of all criminal prosecutions in Kenya; the Attorney General (AG) as the constitutional office created under Article 156 of the Constitution whose mandate includes representation of the government in civil suits.
5. The 1st Interested Party, having been charged under sections 77 and 94 of the Penal Code, is enjoined as having a legitimate stake and identifiable interest in the subject matter of the Petition.
6. The 2nd Interested Party, a registered Non-Governmental Organization (NGO) with interest in implementation, promotion and protection of freedom of expression, opinion and access to information, is similarly enjoined as having a legitimate stake and identifiable interest in the Petition.
7. The immediate cause for concern in this Petition filed under Article 23 of the Constitution is the constitutionality of the offence of "subversion" under sections 77(1) and (2) (a) (b) (c) and (f) of the Penal Code for violating: freedom of expression under Articles 33(1); freedom of association under Article 36; and the principle of legality espoused in Article 50(2)(n) requiring any law which limits a fundamental right and freedom not to be vague or over broad.
8. The offence of "threatening breach of the peace or violence" created under section 95(1) of the Penal Code is similarly impugned for violating the freedom of expression under Article 33(1).

Legal Foundation and Constitutional Background

9. The Preamble to the Constitution of Kenya, 2010 bespeaks the aspiration of Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.
10. Through the concept of popular sovereignty in Article 1(1) the Constitution locates all sovereign power in the people of Kenya to be exercised only in accordance with the Constitution, including directly by the people.
11. Under Article 2, the Constitution is the supreme law of the land and it binds all persons and all State organs at both levels of government. In addition, no person may claim or exercise State authority except as authorised under the Constitution. Ultimately, any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
12. Article 2(5) of the Constitution also expressly imports the general rules of international law and makes them part of the law of Kenya.
13. Article 3 of the Constitution behoves the Respondents like all Kenyans and State organs to respect, uphold and defend the Constitution.
14. The national values and principles of governance in Article 10 bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution or enacts, applies or interprets any law. The National values and principles of government pertinent to this petition include "*human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised*".
15. That apart, Article 20 (3) (a) and (b) requires the Court not only to *develop the law* to the extent that it does not give effect to a right or fundamental freedom, but also to adopt the interpretation that *most favours* the enforcement of rights and fundamental freedoms.

16. Article 24 outlines the grounds for justifiable limitation of rights and Article 24(2) particularly provides that a law, even if patently justifiable, shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
17. Equally, Article 33 (1) guarantees to every person the right to freedom of expression, which includes: freedom to seek, receive or impart information or ideas. This protection, the Petitioner recognizes, does not extend to propaganda for war; incitement to violence; hate speech; or advocacy of hatred under Article 33(2) (d).
18. Article 34 (2) (b) forbids the State from penalising any person for any opinion or view or the content of any broadcast, publication or dissemination, outside Article 33 (2).
19. Article 50 (2) (a) and (n) provide that every accused person has the right to a fair trial which includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law.
20. Articles 94 (1) and (2) decrees that the legislative authority of the Republic is derived from the people. Parliament, in legislating, is beholden to protect the Constitution and to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

Facts of the Petition

21. The Petition is triggered by the indictment of the 1st Interested Party on 27th September, 2017 in Milimani Chief Magistrates Court Criminal Case No. 1644 of 2017 Republic v Paul Ongili alias Babu Owino on charges of subversion and offences conducive to the breach of peace.

22. In Count 1 of the main charge, the 1st Interested Party was indicted for the offence of "subversion" under section 77(1)(F) of the Penal Code, Cap 63. In the alternative charge to Count 1, the Petitioner was charged with the offence of incitement to violence contrary to section 96(2) of the Penal Code, Cap 63. In Count 2 the 1st Interested Party was charged with the offence of "offensive conduct conducive to breach of peace" contrary to section 94(1) of the Penal Code, Cap 63.

23. The particulars of the offences are as follows:

i. Count 1 - Subversion contrary to section 77(1)(F) of the Penal Code

Paul Ongili alias Babu Owino on the 24th day of September, 2017 at stage 46, Kawangware, Dagoretti North Sub County within Nairobi County, without lawful excuse uttered the words to wit: "*Kama Gadaffi alitolewa na wananchi, kama Gbagbo alitolewa na wananchi, kama Yahya Jammeh alitolewa na wananchi, wewe ni nani? Wewe ni mtoto wa mbwa*" which words were calculated to excite disaffection against the presidency.

ii. Alternative Charge: - Incitement to Violence Contrary to Section 96(c) of the Penal Code

Paul Ongili alias Babu Owino on the 24th day of September, 2017 at stage 46, Kawangware, Dagoretti North Sub County within Nairobi County, without lawful excuse uttered the words to wit: "*Kama Gadaffi alitolewa na wananchi, kama Gbagbo alitolewa na wananchi, kama Yahya Jammeh alitolewa na wananchi, wewe ni nani? Wewe ni mtoto wa mbwa*" which words were calculated to lead to disobedience of lawful authority.

iii. Count 2: Offensive conduct conducive to breach of the peace contrary to section 94(1) of the Penal Code

Paul Ongili alias Babu Owino on the 24th day of September, 2017 at stage 46, Kawangware, Dagoretti North Sub County within Nairobi County, without lawful excuse uttered abusive words to wit: "*Wewe*

ni mtoto wa mbwa" which words were intended to provoke a breach of the peace.

24. Section 77 of the Penal Code is in the following terms:

77. Subversive activities

- (1) Any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a subversive intention, or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.
- (2) ...
- (3) For the purposes of this section, "subversive" means:-
 - (a) supporting, propagating (otherwise than with intent to attempt to procure by lawful means the alteration, correction, defeat, avoidance or punishment thereof) or advocating any act or thing prejudicial to public order, the security of Kenya or the administration of justice;
 - (b) inciting to violence or other disorder or crime, or counselling defiance of or disobedience to the law or lawful authority;
 - (c) intended or calculated to support or assist or benefit, in or in relation to such acts or intended acts as are hereinafter described, persons who act, intend to act or have acted in a manner prejudicial to public order, the security of Kenya or the administration of justice, or who incite, intend to incite or have incited to violence or other disorder or crime, or who counsel, intend to counsel or have counselled defiance of or disobedience to the law or lawful authority;

- (d) indicating, expressly or by implication, any connexion, association or affiliation with, or support for, any unlawful society;

- (e) intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya:

Provided that the provisions of this paragraph do not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities;

- (f) intended or calculated to bring into hatred or contempt or to excite disaffection against any public officer, or any class of public officers, in the execution of his or their duties, or any naval, military or air force or the National Youth Service for the time being lawfully in Kenya or any officer or member of any such force in the execution of his duties:

Provided that the provisions of this paragraph do not extend to comments or criticisms made in good faith and with a view to the remedying or correction of errors, defects or misconduct on the part of any such public officer, force or officer or member thereof as aforesaid and without attempting to bring into hatred or contempt, or to excite disaffection against, any such person or force; or

- (g) intended or calculated to seduce from his allegiance or duty any public officer or any officer or member of any naval, military or air force or the National Youth Service for the time being lawfully in Kenya.

25. Section 94 on the other hand provides:-

94. Offensive conduct conducive to breaches of the peace
- (1) Any person who in a public place or at a public gathering uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned is guilty of an offence and is liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both.
 - (2) In this section, "public gathering" means—
 - (a) any meeting, gathering or concourse of ten or more persons in any public place; or
 - (b) any meeting or gathering which the public or any section of the public or more than fifty persons are permitted to attend or do attend, whether on payment or otherwise; or
 - (c) any procession in, to or from a public place.

26. The Petitioner fears that the sections 77 and 94 are a threat to free speech and media freedom because they could be used to charge bloggers, journalists and online activists. The Petitioner therefore impugns the validity of the two sections on the following specific grounds:

Particulars of Unconstitutionality

(i) Violation of the Right to Freedom of Expression - Article 33

27. First, the Petitioners aver that the stated object of the offences of subversion and breach of the peace are incompatible with the sovereignty of the people of Kenya because it shields government and public officials from criticism, restricts

discussion of public affairs, and denies the defence of truth. The sections are inconsistent with and violative of, Article 1(1) of the Constitution.

28. Second the Petitioners assert that the two sections violate the right to freedom of expression by criminalising the *uttering* of certain words on grounds that have no proximate relation to the limitations permitted by the Constitution on the freedom of expression under Article 33(2) - propaganda for war, incitement to violence, hate speech, or advocacy of hatred under Article 33(2) (d).
29. Section 77 purports to punish, with a mandatory imprisonment for a term not exceeding seven years "any words with a subversive intention" whose scope extends to words that are deemed to be:-
 - i. 'prejudicial to public order, the security of Kenya or the administration of justice';
 - ii. in defiance of or disobedience to the law or lawful authority;
 - iii. indicating, expressly or by implication, any connexion, association or affiliation with, or support for, any unlawful society; or
 - iv. intended or calculated to bring into hatred or contempt or to excite disaffection against any public officer, or any class of public officers, in the execution of his or their duties
30. For its part, section 94 with no reference to Article 33(2) criminalizes the expression in a public place or at a public gathering of threatening, abusive or insulting with intent to provoke a breach of the peace or whereby a breach of the peace is likely.
31. Third, the principle of legality espoused in Article 50(2)(n) requires precision in penal provisions, especially those that limit fundamental rights and freedoms. Criminal legislation must be clear enough to be understood and precise enough to cover only the activities rationally connected to the law's purpose.

32. To the contrary, the sections 77 and 94 are vague and over-broad especially with regard to the meaning of "prejudicial to public order, security of Kenya or administration of justice"; "in defiance of or disobedience to the law or lawful authority"; "unlawful society" or "hatred or contempt or excite disaffection"; "threatening, abusive or insulting words"; "a breach of the peace".
33. Since the terms used in sections 77 and 94 are undefined and as they are incapable of precise or objective legal definition and understanding the result is that innocent persons are roped in as well as those who are not enabling the authorities to be as arbitrary and as whimsical as they like in booking critics and dissenting voices under sections 77 and 94.
34. The haziness of the two sections leaves it to the court's subjective assessment whether a defendant is convicted or acquitted. The sections require a subject to await the interpretation given by the court before he can know what is and what is not prohibited. Thus the sections permit too wide a margin of subjective interpretation, misinterpretation and abuse in determining criminal penalties.
35. Beside vagueness, sections 77 and 94 have a chilling effect on the Petitioner and the public's freedom of expression. Also, the right to seek or receive information or ideas is infringed as such chilling effect denies the public the benefit of many shades of grey in terms of various opinions that could be expressed about public officers and at public places and gatherings. In fact, the protection of the freedom of expression extends to the expression of views and opinions that could offend, shock or disturb the majority such as the kind prohibited by the two sections.
36. Similarly, that one is liable if he utters words "intended or calculated to bring into hatred or contempt or to excite disaffection against any public officer, or any class of public officers, in the execution of his or their duties", shows that no distinction is made on one hand between mere advocacy of a particular point of view which may bring into hatred or contempt or to excite disaffection and on the other hand, propaganda for war, incitement to violence, hate speech, or advocacy of hatred.