

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL NO OF 2020

THE BLOGGERS ASSOCIATION OF KENYA (BAKE).....APPELLANT

and

1. THE HON.ATTORNEY GENERAL.....1ST RESPONDENT

2. THE SPEAKER, NATIONAL ASSEMBLY.....2ND RESPONDENT

3. THE INSPECTOR GENERAL

OF THE NATIONAL POLICE SERVICE.....3RD RESPONDENT

4. THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

ARTICLE 19 EAST FRICA.....1ST INTERESTED PARTY

KENYA UNION OF JOURNALISTS.....2ND INTERESTED PARTY

LAW SOCIETY OF KENYA.....3RD INTERESTED PARTY

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Honourable Mr. Justice James A. Makau) dated 20th February, 2020 in Constitutional Petition No. 206 of 2018

between

THE BLOGGERS ASSOCIATION OF KENYA (BAKE).....PETITIONER

versus

1. THE HON.ATTORNEY GENERAL.....1ST RESPONDENT

2. THE SPEAKER, NATIONAL ASSEMBLY.....2ND RESPONDENT

3. THE INSPECTOR GENERAL

OF THE NATIONAL POLICE SERVICE.....3RD RESPONDENT

4. THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

ARTICLE 19 EAST FRICA.....1ST INTERESTED PARTY

KENYA UNION OF JOURNALISTS.....2ND INTERESTED PARTY

LAW SOCIETY OF KENYA.....3RD INTERESTED PARTY

MEMORANDUM OF APPEAL

The Bloggers Association of Kenya (BAKE), the above-named appellant appeals to the Court of Appeal against the whole of the above-named decision on the following grounds, namely—

1. The Learned Judge erred in failing to interpret the Constitution in a manner that advances human rights and fundamental freedoms in the Bill of Rights as required by Article 259 (1)(b) of the Constitution.
2. The Learned Judge erred in applying the presumption of constitutionality to a legislation limiting fundamental rights and freedoms instead of strictly confining himself to the principles stated in Article 24 of the Constitution.
3. The Learned Judge erred in misapprehending the nature of the Appellant's claim with regard to Section 5 of the impugned Act. The Appellant's challenge was against the 2nd Respondent (The National Assembly) failing in its legislative duty to write in measures to uphold the gender rule.
4. The Learned Judge erred in introducing other limitations to the freedom of expression aside from those constitutionally allowed under Articles 24 and 33 of the Constitution.
5. The Learned Judge erred in faulting the appellant for not demonstrating the excessiveness of the limitation to the right to freedom of the expression on grounds that information is false. This is despite the Appellant specifically pleading the excessiveness and demonstrating the same in accurate detail.
6. The Learned Judge erred in placing the burden of showing that there were no less restrictive measures to criminalizing free speech on the Appellant contrary to Article 24(3) of the Constitution which places this burden on the Respondents.
7. The Learned Judge erred in equating information the State considers false to hate speech.
8. The Learned Judge erred in finding that there is a need to regulate false information without due consideration on how information would come to be termed as 'false'.
9. The Learned Judge erred in citing national security as being the reason to justify limitation of the freedom of expression under sections 22 and 23 of the impugned Act despite national security not being listed as one of the grounds in the impugned sections.

10. The Learned Judge erred in failing to find that two sections criminalizing the sane conduct was excessive and could lead to a chilling effect on the freedom of expression.
11. The Learned Judge erred in equating defamation to the categories of speech forbidden under Article 33 (2).
12. The Learned Judge erred in holding that the obligation of the respondents in protecting the reputation of individuals supersedes the right to freedom of expression.
13. The Learned Judge erred in applying a different standard to limit the freedom of speech over the internet other than that prescribed under Article 24 and 33 of the Constitution.
14. The Learned Judge erred in holding that the freedom of speech only covers speech which is considered truthful.
15. The learned Judge erred in holding that truth is a necessary condition to the exercise of the right to freedom of expression.
16. The Learned Judge erred in failing to hold that having two sections criminalizing the same conduct and prescribing exorbitant sentences would have a chilling effect on the freedom of expression.
17. The Learned Judge erred in failing to hold that where the contents of a section differ from the marginal note; the section becomes ambiguous thus failing the requirements under Article 24 of the Constitution.
18. The Learned Judge erred in upholding the outlawing of all forms of pornography including erotic representation in books, magazines, photographs, films etc of an erotic nature despite this being protected speech under Article 33 of the Constitution.
19. The learned Judge erred in determining that because the words used in section 29 of the Kenya Information and Communication Act (declared unconstitutional) are not the same as the ones used in section 23 of the impugned Act that their effects are not the same.
20. The learned judge erred in determining that section 23 of the Act is different from section 194 of the Penal Code which was declared unconstitutional.
21. The Learned Judge erred in failing to hold that Section 27 of the impugned Act is unconstitutional for being vague and over broad.

22. The Learned Judge erred in failing to hold that Section 28 of the impugned Act is unconstitutional for being vague and over broad.
23. The Learned Judge erred in finding that section 28 of the impugned Act is concerned with the protection of intellectual property when the content of the section goes beyond restricting use of intellectual property to forbidding the use of common words and names.
24. The Learned Judge erred in failing to hold that section 37 is unconstitutional for being vague and over broad as the words obscene and intimate are not defined in the Act.
25. The Learned Judge erred in fact by holding that the Appellant had conceded that the State had a legitimate aim in prescribing section 22, 23, 24, 27, 28 and 37 of the impugned Act yet the Appellant had submitted to the contrary.
26. The Learned Judge erred in holding that offenders need not know the consequences of their conduct as prescribed in sections 16, 17, 31, 32, 34, 35, 36, 38(1), 38(2), 39 and 41 of the Act.
27. The learned Judge erred in failing to appreciate the nature of online and cyber attacks where third parties manipulate innocent system users to carry out criminal conduct. The innocent users are the ones that would be netted under sections 16, 17, 31, 32, 34, 35, 36, 38(1), 38(2), 39 and 41 of the Act.
28. The learned Judge erred in holding that sections 16, 17, 31, 32, 34, 35, 36, 38(1), 38(2), 39 and 41 of the Act adequately prescribe the required *mens rea* to constitute criminal conduct.
29. The learned Judge erred in applying a different and more restrictive standard in limiting the right to privacy while investigating cybercrimes than is required under Article 24.
30. The learned Judge erred in failing to hold that despite the medium used, human rights must always be protected to the highest degree and their limitation must be only in accordance with the constitution.
31. The learned Judge erred in taking judicial notice of matters he ought not to have taken judicial notice of as guided by section 60 of the Evidence Act. In doing so, the Learned Judge crossed the line as arbiter and instead appeared to make the respondent's case for them.
32. The learned Judge erred in failing to hold that the use of the word 'shall' in section 50 (2) obligates a judicial officer to always grant a production order

whenever sought thereby denying the court an opportunity to exercise independent discretion.

33. The learned Judge erred in failing to appreciate that traffic data is of an even more intimate nature than subscriber data and therefore requiring more protection.
34. The learned Judge erred in holding that it would be reasonable for police officers to bypass judicial oversight where the information required is traffic data.
35. The learned Judge erred in holding that the import of section 51 is only for police officers to access information required to identify the service providers involved in the transmission of communication. This is factually incorrect from the wording of section 51.
36. The learned Judge erred in failing to appreciate that content data is of an even more intimate nature than traffic and subscriber data and therefore requires more stringent safeguards to uphold the right to privacy.
37. The learned Judge erred in holding that failure to detail limitation of the right to privacy as one of the objects of the Act is not constitutionally fatal to Article 24 of the Constitution.
38. The learned Judge erred in failing to hold that sections 23, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 and 45 unduly expanded the subject of the bill and therefore had to be subject to public participation independently.
39. The learned Judge erred in determining that the Computer Misuse and Cybercrimes Act was passed in accordance with the Constitution and the National Assembly standing orders.
40. The learned Judge erred in determining the impugned provisions of the Act protect the public interest.
41. The learned Judge erred in determining the Computer Misuse and Cybercrimes Act 2018 is valid and does not violate infringe or threaten fundamental rights and freedoms and is justified under Article 24 of the Constitution.
42. The learned Judge erred in holding sections 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52 and 53 of the Computer Misuse and Cybercrimes Act are constitutional and do not violate, infringe and/or threaten fundamental rights and freedoms and in dismissing the petition.

It is proposed to ask the Court for an order that—

1. This Honourable Court declares that Sections 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52 and 53 of the Computer Misuse and Cybercrimes Act unconstitutional for violating, infringing and threatening fundamental rights and freedoms.
2. This Honourable Court issues an injunction order restraining the respondents from implementing the impugned sections.

DATED at **NAIROBI** this 20th day of March 2020



NZILI & SUMBI

ADVOCATES FOR THE APPELLANT

To: – The Honourable the Judges of the Court of Appeal

Copies to be served on—

1. THE HON. ATTORNEY GENERAL
STATE LAW OFFICE
SHERIA HOUSE, HARAMBEE AVENUE
NAIROBI
2. S.M MWENDWA ADVOCATE
PARLIAMENT BUILDINGS
NAIROBI
3. V.A. NYAMODI & COMPANY ADVOCATES
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4. OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
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6. KENYA UNION OF JOURNALISTS
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7. OCHIEL DUDLEY

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OFF PARKLANDS ROAD,

NAIROBI

Lodged in the Registry at Nairobi on the day of, 20

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Registrar