REPUBLIC OF KENYA

IN THE HIGH COURT OF NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 174 OF 2016

ROBERT ALAI ……PETITIONER

VERSUS

THE HON ATTORNEY GENERAL……1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION ……2ND RESPONDENT

AND

ARTICLE 19 ……..INTERESTED PARTY

JUDGMENT

1. This petition is a challenge to the constitutionality of **Section 132** of the Penal Code**, Cap 63** Laws of Kenya. **Robert Alai**, the petitioner, was on 17th December 2014, arraigned before the Chief Magistrate's court at Kiambu, charged with the offence of undermining the authority of a Public Officer Contrary to Section 132 of the Penal Code. Particulars of the offence stated that; while using the open source website Twitter, the petitioner posted the words "**Insulting Raila is what Uhuru can do. He hasn't realized the value of the Presidency. Adolescent President. This seat needs Maturity"** which publication was calculated to bring into contempt the lawful authority of the President of the Republic of Kenya.

2. The petitioner felt the charge was a violation of his constitutional rights and filed this petition against the **Attorney General** and the **Director of Public Prosecution, the respondents,** seeking the following orders;.

a. A declaration that section 132 of the Penal Code is unconstitutional and invalid.

b. A declaration that the continued enforcement of section 132 by the second respondent against the petitioner is unconstitutional.

c. An order that each party bears its costs in this petition brought partly in the public interest and in view of the subject matter.

3. On 17th May, 2016, **Article 19** was enjoined in these proceedings as an **Interested party,** whose

participation was limited to filing and highlighting of submissions.

4. The second respondent filed a replying affidavit by **Inspector Moreen Kioko,** sworn on 3rd June 2016, and filed in court on the same day. It was deposed that on 15th December 2014, information was received that the petitioner had posted on face book words that were deemed to be an insult to the President. Investigations were conducted, witnesses interviewed, and evidence gathered. The investigation file was later sent to the 2nd respondent and charges preferred against the petitioner as recommended by the 2nd respondent

Petitioner's submissions

5. **Mr Ongoya**, learned counsel for the petitioner, highlighted their written submission, and told the court that, whereas **Article 1** places sovereignty in the people which they may exercise directly or indirectly through their democratically elected representatives, that power is also delegated to state organs under **Article 1(2)** and **(3)** of the Constitution. Learned counsel submitted that **section 132** of the Penal Code creates an offence known as "**Undermining authority of a Public Officer**", a law that was enacted at the height of the state of emergency and was meant to deal with a specific situation at the time.

6. Mr. Ongoya submitted that, the impugned **section** creates an offence which shifts the burden of proof to the accused, and contended that such a provision cannot survive in the face of the current constitution, which openly states that the country is a multi-party democracy **(Article 4(2),** with national values and principles enumerated under **Article 10,** which means people must have a wide latitude to speak about their government since that government is made of public officers.

7. In Mr Ongoya's view, people expressing themselves about their government or public officers should not stand to be charged for criticizing their government or the public officers. Learned Counsel argued that a provision which would force people to speak in low tones in a democratic society like **section 132** does**,** is unconstitutional. Counsel went on to contend that **section 132** limits freedom of expression contrary to **Article 23** of the constitution, Counsel argued that limitation to freedom of expression can only be done by a law, but such a law must be reasonable and justifiable. Counsel argued that the respondent had not justified the existence of the impugned **section 132.**

8. Mr Ongoya further submitted that there is no nexus between the limitation and the purpose of limitation as required by **Article 24(1),** and the respondent had not shown that there was such nexus or the purpose of limiting the freedom of expression or even justify the objective of **section 132,** in order to bring that justification within **Article 24(3).**

9. Learned Counsel contended that the alleged offence was a fair criticism in a free, open and democratic society, and that the criticism did not impair the capacity of the President to perform his duties under **Article 132** of the constitution. In counsel's view, the provision (section 132) is unconstitutional to the extent that it limits freedom of expression through fair criticism. Learned Counsel relied on the case of **Thulah Maseko and 3 others v The Prime Minister of Swaziland and 3 Others case No 2180 of 2009** for the proposition that the state has an obligation to justify existence of a law, and the case of **Andrew Mujuni Mwenda v Attorney General[2010] UGCC 5,** for the submission that the burden is on the respondent to prove that an impugned section(s) falls within acceptable limitations.

10. Counsel argued further that, rights are for enjoyment and not limitation, and faulted the respondents for attempting to suppress the enjoyment of the right through the impugned **section 132**. Mr Ongoya once again referred to a decision from Nigeria in the case of **Nwankwo Vs. The state 1983, (1) NGR336** to support his argument that **section 132** is untenable in the face of the freedom of expression

guaranteed by the constitution. He made further submission that the manner in which section 132 is crafted, shifts the burden of proof to the accused, (Petitioner), which impairs fair trial under **Article 50(2)(a)** of the constitution, and is therefore a backward step in a free democracy. According to counsel, **Article 33** gives the right for freedom of expression and the right is limited by **Article 33(2)**. But that the respondents had not shown that the alleged post violated **Article 33(2).**

Interested Party's Submissions

11. **Mr. kiprono,** learned counsel for the interested party, supported the position taken by the petitioner that **section 132** is unconstitutional, and that it contravenes **Articles 25, 50** and **33** of the Constitution. Counsel submitted that, the words used in the section are vague and ambiguous and relied on the decision in the case of **Grayne Vs City of Rockford [1972] 405 US 104** to support this position. Counsel again referred to the case of **Geoffrey Andare Vs Attorney General (2015) eKLR** to support the position that a law must be clear and precise. It was also argued that **section 132** limits the freedom of expression contrary to **Article 33** of the Constitution and relied on the case of **Sanskar Marathe v The State of Maharastra and Another**. It was contended on behalf of the interested party that **Article 24** places a burden on the person limiting freedom of expression to justify such limitation and referred to the case of **R v Oakes [1986] ISCR 103** to support this position, and faulted the respondents for failing to justify the limitation imposed by **section 132.**

12. On whether the limitation is reasonable, counsel submitted that it was not and referred to the case of **Obbo & Another v Attorney General [2004]IEA 265**. Reference was also made to **Article 19** of the **Universal Declaration of Human Right [UDHR], Article 9** of the **African Charter on Human and Peoples Rights** and **Article 19** of the **International Convention of Civil and Political Rights (ICCPR)** to support the submission that there is freedom of opinion and expression.

13. It was further contended that Section 132 unjustifiably limits the freedom of expression to the extent that it derogates that right contrary to **Article 24 (2) (b)**. Mr. Kiprono referred to the case of **Boucher V the King {1951} SCR 265** to support his position that freedom of speech cannot be limited . Learned counsel concluded that criticism of public officers is not a crime since the more senior a public servant officer, the more criticism will be directed at him and one should be prepared to tolerate such criticism.

1st Respondent's submissions

14. The 1st respondent relied on their written submissions. It was submitted for the 1st respondent that the petitioner misinterpreted **section 132** of the penal code, and **Articles 33(1), 50(2) (a)** (i) of the constitution. It was further argued that, **Article 33** does not provide an absolute right but has limitations in **sub-Article 2 (3)**. It was submitted that the petitioner had not shown that his rights have or are being violated, that **Section 132** does not shield public officers from criticism, that it does not contravene **Article 33** of the constitution but also that **Article 33** does not give one *freedom* to act in whatever manner he/she likes while exercising freedom of expression. The 1st respondent cited **Article 33(3)** to support the argument that the freedom of expression is not absolute.

15. The 1st respondent went on to contend that **Section 132** does not contravene **Article 50 (2) (a)**, on the presumption of innocence, but that section only shifts evidential burden of proof as opposed to criminal burden of proof . Further submission was to the effect that the Section does not contravene **Article 24 (2)** of the constitution since it was not enacted after the effective date. It was the 1st respondent's contention, therefore, that Section 132 seeks to punish a person who contravenes **Article 33 (3)** of the constitution by doing something that is ***calculated to bring into contempt, excite defiance or disobedience to lawful order,*** that the petitioner's conduct was against **Article 33** of the

constitution and therefore, to that extent, **Section 132** does not offend **Article 24 (2).** The 1st respondent relied on the decisions in the case of **John Ritho Kanogo& 2 others v Joseph Ngugi & Another (2015) eKLR, Islamic Unity Convention V Independent Broadcasting Authority 2000 (4) SA 294 ICC, Chirau Ali Mwakwere V Robert M, Mabera & 4 Others {2012} eKLR, Peter Wafuka Juma & 2 Others V Republic {2014} eKLR,** and **Thuita Mwangi & 2 Others V Ethics and Anti-Corruption Commission & 3 Others {2013}eKLR,** to support their arguments.

2nd Respondent's submissions

16. The 2nd Respondent equally filed written submissions. It was submitted that the intention of the legislature in enacting **section 132** was to preserve dignity of public officers. In the 2nd respondent's view, the charge against the petitioner under **section 132** is a matter for evidence which the trial court will decide on. The 2nd respondent agreed with the 1st respondent that freedom of expression is not absolute but is limited by **Article 33 (3).** He also supported the position taken by the 1st respondent that **Section 132** does not offend the constitution, but protects Public Officers and the accompanying authority. Reference was made to **Article 232** which provides for Values and Principles of the Public Service and submitted therefore; declaring **Section 132** unconstitutional would be exposing public officers to ridicule and vilification,

17. Finally, the 2nd respondent submitted that he performs duties and functions given to him by the constitution **(Article 157),** and has mandate to bring prosecution against anyone who has committed an offence to protect public interest. The 2nd respondent concluded that prosecution against the petitioner was undertaken pursuant to his constitutional mandate hence **Section 132** is not unconstitutional.

Analysis and Determination

18. I have considered the petition, responses thereto, submissions by respective counsel and authorities cited. This petition challenges the constitutionality of **Section 132** of the Penal Code. The impugned Section provides as follows;

"Any person who, without lawful excuse, the burden of proof whereof shall be upon him, utters, prints, publishes any words or does any act or thing, calculated to bring into contempt, or to excite defiance of or disobedience to, the lawful authority of a public officer, is guilty of offence and is liable to imprisonment for a term not exceeding three years."

19. The petitioner was charged in **Criminal Case Number 3626 of 2014** at Kiambu Chief Magistrate's court, with the offence of **undermining the authority of a public officer** 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."***

20. Counsel for the petitioner submitted that **Section 132** cannot stand the constitutionality test in the face of the current constitution and the Bill of Rights. According to counsel, **Section 132** is incompatible with the sovereign power of the people, for shielding government officials from public scrutiny, and that it violates the right to utter, print or publish certain words that are not within the limitations contained in **Article 33 (2) (d)** of the constitution, thereby limiting the freedom of speech and expression, that it violates the principle of law on the burden of proof under **Article 50 (2) (a)**, which requires that the burden of proof in criminal law is on the prosecution, and that it also undermines **Article 25 (c)** on non-derogable right to fair trial.

21. When the constitutionality of a statute or provision of a statute is called to question, the court is under

obligation to employ the constitutional mirror laying the impugned legislation or provision alongside the Article(s) of the constitution and determine whether it meets the constitutional test. The court must also check both the purpose and effect of the Section or the Act, and see whether any of the two could lead to the provision being declared unconstitutional. That is to say, the purpose of a provision or effect thereof, may lead to unconstitutionality of the statute or provision.

22. This position was stated in the case of R **v Big M Drug Mart Ltd 1985 CR 295**, thus;

"Both purpose and effectare relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of legislation, object and its ultimate impact are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

23. This principle was applied in the case of **Olum and another v Attorney General [2002] 2 E A** , where the Constitutional Court of Uganda stated;

*"**To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the constitution, the impugned statute or section thereof shall be declared unconstitutional…" (see Muramga Bar Operators Association & another Vs. Minister of state for Provincial Administration and Internal Security & another; (petition No. 3 of 2011) 2011 eKLR.***

24. In the case of **US Vs. Butter, 297 USI {1936},** it was stated that ***where an act of Congress is appropriately challenged as being unconstitutional, the judicial branch has only one duty; to lay the Article of the constitution involved beside the statute challenged and decide whether the latter squares with the former*.**

25. There is also a rebuttable presumption of legality, that the Act or provision was intended to serve the people and is therefore constitutional. This principle was well stated in the case of **Hamdarada Nakhana Union of India Air (1960) 354**, that;

"In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and, the elected representatives in a legislature and it enacts laws which they consider to be reasonable for purposes for which they were enacted, presumption is therefore in favour of the constitutionality. In order to sustain the presumption of constitutionality, the court may take into account matters of common knowledge, the history of the times and may assume every state or facts as existing at the time of legislation.

26. This was also applied locally in the case of **Nairobi Metropolitan PSV Saccos Union Limited & 25 others vs County of Nairobi Government & 3 others [2013] eKLR**. The onus is always on the person challenging the legislation to prove the unconstitutionality alleged.

27. **Article 19 (1)** of the constitution states that the Bill of Rights is an integral part of Kenya's democratic state, and is the framework for social, economic and cultural policies. **Clause 3** states that

the rights and fundamental freedoms in the Bill of Rights (a) ***belong to each individual and are not granted by the state*****; and (c)** ***are subject only to the limitations contemplated in the constitution.***

28. Freedom of expression and opinion is a constitutional guarantee. It is one of the fundamental rights and freedoms under the constitution. **Article 33** provides;

1. "Every person has the right to freedom of expression, which includes;-

a. Freedom to seek, receive, import information or ideas;

b. Freedom of artistic, creativity and;

c. Academic freedom and freedom of scientific research

2. The right to freedom of expression does not extend to-

a. Propaganda for war;

b. Incitement to violence

c. Hate speech or

d. Advocacy of hatred that

i. Constitutes ethnic incitement, vilification of others, or incitement to cause harm, or;

ii. Is based on any ground of discrimination specified or contemplated in Article 27 (4)

3. In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others."

29. The limitation contemplated under **Article 27 (4)** is one based on **race, sex, pregnancy, mental status, health status, ethnic or social origin, colour, age** among others. It is therefore correct to say, that freedom of expression is not absolute but again, it is only subject to limitations contained in the constitution. The crime committed by the petitioner, according to the respondents, was publication of words that "***were calculated to undermine the authority of a public officer",*** the public officer here being the president of the Republic of Kenya.

30. Kenya is a democratic state with a democratically elected leadership. The people of Kenya have a democratic right to discuss affairs of their government and leadership because of their right to freedom of expression guaranteed by **Article 33** of the constitution. They cannot be freely expressing themselves if they do not criticize or comment about their leaders and public officers.

31. **Article 33(2)** limits this freedom of expression and any expression that is not in accord with **Clause (2)** is limited. It must be appreciated that only through public criticism do citizens make their leaders know that certain actions may not be in the interest of the nation, and such criticism helps public officers understand the feelings of the citizens and following this criticism, leaders may act to address the concerns the criticism is directed at. In the case of **Edmonton journal Vs Alberta {1989} 45 CRR 1,** the Supreme Court of Canada (Corey J), underlined the importance of freedom of expression when it state that; ***it is difficult to imagine a guaranteed right more important to a democratic society than***

freedom of expression. Indeed a democratic society cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. And again, in the case of **Manika Ghandhi Vs Union of India {1978} 2 SCR 621**, the Supreme Court of India stated that;-

"Democracy is based essentially on a free debate and open discussion for that is the only corrective of government of actions in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential."

32. In another case, that of **Rangrajam Vs. Jigjiram** it was stated **that *in a democratic society it is not necessary that everyone should sing the same song. Freedom of expression is the rule and it is generally taken for granted. Everyone has a fundamental right to form his own opinion on any issue of general concern. He can form and inform by any legitimate means.***

33. More importantly, public officers have to tolerate criticism in an open and democratic state because people usually exercise the right granted to them by the constitution. A legislation's purpose should not be to suppress this right.

34. In applying the purpose and effect principle, the court has to look at the history and circumstances under which the impugned provision or legislation was enacted. The **marginal notes** to **section 132** show that the section was introduced in **1958,** at the height of the state of emergency, a turbulent period in the history of this country. The purpose was to suppress dissent among the natives with the object of protecting and sustaining the colonial government in power then. However, the resultant effect was to instill fear and submission among the people. This cannot be the object of **section 132** in the current constitutional dispensation when people enjoy a robust Bill of Rights that has opened the democratic space in the country, and in particular, when **Article 20(2)** stresses that ***every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.*** People have the right to exercise the right to freedom of expression to the greatest extent, subject only, to the limitation of that right under **Article 33 (2)** or any other provision in the constitution.

35. The **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. In a democratic state, constructive criticism of public or state officers is the hallmark of democracy and the means for public accountability. Criminalizing criticism is not in accord with a transformative constitution, since senior public officers should routinely be open to criticism. Dissent in opinion should not amount to a crime otherwise this is in effect, suppressing the right to hold different opinion from those in public office.

36. Article 73 provides that ***the authority assigned to a state officer is a public trust to be expressed in a manner consistent with the purpose and objects of the constitution, demonstrates respect for the people, brings honour to the nation and dignity to the office, and vests in the state officer the responsibility to serve people rather than the power to rule them.*** Public office reposes on the public officer servant leadership, and therefore, the right to criticize public officers should not be criminalized merely as a means of suppressing dissent. Several judicial decisions support this position. In the **Malawian case of Harry Nakandawire & Another, Criminal case number 5 of 2010**, the accused had been charged with the offence of being member of an unlawful society and publishing materials deemed to undermine the Government of Malawi. In acquitting the accused, the court stated;-

"*It must not be forgotten that our constitution guarantees freedom of speech/expression, opinion, conscious and association. Freedom of speech/expression should not, in our view, be restricted to speaking about only those things that delight the power that be. It must extend to the freedom to speak about even those things that have the capacity/potential to displease, indeed annoy. Persons, institutions should not therefore be barred from expressing themselves on any issue merely because doing so will discomfort certain quarters for the remedy in such instances, is not to bar expression but to allow those offended to pursue civil suits…People must be free to hold and impact even unpopular and for minority opinions…" (emphasis)*

37. In Nigeria, there was the case of **Nwankwo Vs. State 1983 (1) NGR 366,** The appellant had been charged with publishing and distributing a sedition publication contrary to **section 1 (1) (c)** of that country's Penal Code, and for publishing a book critical of a State Government and its administration. The appellant was convicted and on appeal, the court stated, that:-

"***The law of Sedition contained in ss. 50-52 of the criminal code was no longer compatible with the guarantee of freedom of expression in s. 36 of the 1979 Federal Constitution. The 1979 constitution was different in the alteration it made to the role of the president and the state governors who were now politicians elected after canvassing the electorate for votes, and who must therefore tolerate political attacks. Prosecution for sedition could now only be justified under s. 41 of the constitution if there were a threat to public order which was clearly not the case here. If the governor…believed the allegations to be untrue, he could resort to the law of defamation but not to a prosecution for sedition…"(emphasis)***

38. The cases above aptly capture the situation at hand. Section 132 criminalizes any suggestion that would appear to displease those in public office. This is not what our transformative constitution stands for. The point that public officers must tolerate criticism was also made in the case of **Hector Vs. Attorney General of Antigua and Barbuda & Another (1991) LRC (const) 237 (PC) [1990] 2 ALLER 102** where the Privy counsel stated;-

" In a free and democratic society, it is almost too obvious to need stating that those who hold office in government and who are responsible to public administration, must always be open to criticism. An attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time, it is no less obvious that the very purpose of criticism leveled to those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office."(emphasis}

39. Yet again, in the case of **Andrew Mujuni Mwenda & 2 Others V Attorney General, petition Nos. 12/2005 and 3 of 2006 (CCU),** the petitioner challenged provisions of **Sections 39 (1) (a)** and **40** of the Penal Code terming them contrary to **Article 29 (1) (a)** of the Ugandan constitution. The Constitutional court stated:-

"…Our people express their thoughts differently depending on the environment of their birth, upbringing and education. While a child brought up in an elite and God fearing society, may know how to address an elder or a leader politely, his counterpart brought up in a slum environment may make annoying and impolite comments, honestly believing that, that is how to express himself/herself. All these different categories of people in our society enjoy equal rights under the constitution and the law. And they have equal power of one vote each… during elections, voters make annoying and character assassination remarks and yet in most cases false, and yet no prosecutions are preferred against them. The reason is because they have a

right to criticize their leaders rightly or wrongly. That is why…leaders should grow hard skins to bear…"

40. The above decisions amplify the fact that it is no longer tenable to use laws that *prima facie*, are oppressive to the public for the sole purpose of protecting the dignity of public officers, thereby, violating people's right to freedom of expression. Any stifling of this right is by any means unconstitutional.

41. There was a further submission that **section 132** contravenes **Articles 25 (c)** of the constitution. **Article 25 (c)** provides that ***despite any other provision in the constitution, the right to fair trial shall not be limited.*** Under this Article, the right to fair trial is non-derogable. **Article 50 (2) (a)** provides that ***Every person has the right to be presumed innocent until the contrary is proved.*** . The impugned **Section 132** provides that a person charged under that section has the burden to prove that he/she uttered, printed or published the words with a lawful excuse. That clearly shifts the burden of proof of the lawfulness of the acts complained of to the accused. It is always the duty of the prosecution to prove a criminal case against the accused, a burden that never shifts.

42. To the extent that the section derogates the right to a fair hearing by shifting the burden of proof to an accused is, contrary to **Article 50(2)(a)** of the constitution. An accused has a right to remain silent during his trial, and not to say anything that would incriminate him. That is the import of **Article 50(2)(i**) which provides that ***every person has a right to remain silent and not to testify during the proceedings.*** While **clause 2 (l)** provides that an accused ***has the right to refuse to give self incriminating evidence***. These are constitutional rights that guarantee the right to a fair trial which cannot be limited under **Article 25(c).** It is therefore clear that, **section 132,** to that extent, derogates these rights, and is therefore inconsistent with not only Article 50(2) (a) (i) and (l), but also Article 25 (c) of the constitution.

43. In the case of **R Vs. Oakes [1986]1 R.CS,** the Supreme Court of Canada stated as follows on the importance of presumption of innocence:-

" The presumption of innocence lies at the very heart of the criminal law and is protected …this presumption has enjoyed longstanding recognition at common law and has gained widespread acceptance as evidenced from its inclusion in major International human rights documents… The right to be presumed innocent until proven guilty requires at a minimum that; an individual be proven guilty beyond reasonable doubt, the state must bear the burden of proof; and criminal proceedings must be carried out in accordance with lawful procedures and fairness." (emphasis)

44. **Article 2 (1)** states that ***the constitution is the Supreme law of the Republic,*** **and clause 4 thereof states that** ***any law that is inconsistent with the constitution is void to the extent of the inconsistency.***

45. Furthermore, any limitation to a fundamental right must be reasonable and justifiable. In the present case, the limitation to freedom of expression by **section 132** must be justified. This being a democratic society, limitation of a right must not only be reasonable but also justified by the party seeking to limit that right. Such limitation must strike a balance between the provision limiting the right and **Article 24** of the constitution.

46. Article 24 (1) provides, that ***a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and 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 the nature of the right or fundamental freedom ;*** the importance and the purpose of limitation, the

nature and the extent of limitation, the need to ensure that the enjoyment of the right and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relationship between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

47. Article 24(1) requires that there be reasonable and justifiable reasons for the limitation to a right. The first respondent filed grounds of opposition to the petition, and stated that the petitioner had misinterpreted and misapprehended **Articles 1, 33(1) 50 (2) (a),** and that the right under **Article 33 (1)** was not absolute since it was curtailed by **clause (2)** and **(3)** of the same Article. It is true that the right to freedom of expression is limited by **clause (2)** and **(3).** However, that limitation should be in terms of the two sub-Articles. It was upon the respondent to show that the limitation by **section 132 over the actions by the petitioner** was contrary to **Article 33(2)** and **(3)**. This was not the case in this petition because the respondent did not show how Article 33 (2) was violated, by utterance of the words complained of.

48. Secondly, there was a replying affidavit by **Inspector Moreen Kioko** sworn on 3rd June 2016. The deponent did not in any way try to justify the limitation by **section 132** as required by **Article 24(1)** of the constitution. Neither did the deponent say that the limitation was reasonable nor justified. **Article 24** is in mandatory terms that the purported limitation must be justifiable in an open and democratic society based on human dignity, equality and freedom. Further, **Article 24 (3)** places an obligation to the state or person seeking to justify a particular limitation to demonstrate to the court or tribunal or other authority that the requirements of Article 24 have been satisfied. The only justification that section 132 meets is that it is a law, limiting this fundamental right, and not more.

49. The **R Vs. Oakes case** (supra) sufficiently addressed this point on the need to prove that the limitation is reasonable and justifiable in the following words;

"*The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed rights are clearly exceptions to the general guarantee. The presumption is that Charter rights are guar anteed unless the party…can bring itself within the exceptional criteria justifying their being limited….two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting, a Charter right, must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure the trivial objectives or those discordant with the principle of a free and democratic society gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Secondly, the party invoking it must show the means to be reasonable and demonstrably justified…*"

50. The principle enunciated above is that constitutionally guaranteed rights should not be limited except where the limitation is reasonable, justifiable and the objective of that limitation is intended to serve the society. The standard required to justify limitation, is high enough to discourage any limitation that does not meet a constitutional test. And that limitation to a right is an exception rather than a rule.

51. In the Swaziland case of **Thulani Maseko vs. Prime Minister of Swaziland & others (2180/2009 {2016} SZHCn180 (16th September, 2016),** the court dealt with a law which was said to be inconsistent with the constitution. The court stated that it was the duty of the government to show that any limitation of a fundamental freedom was justified. The court stated;

"*It is not insignificant to note that the 2nd respondent nowhere in his affidavit states why the limitation is necessary and what purpose is meant to achieve or serve or what mischief it is meant to address or curb. He merely states that the limitation or restriction is reasonably required '…in the interest of certain public purposes'…The averred 'interests' and public purposes' are not disclosed. This, in my judgment, is not an adequate answer to the challenge."*

52. I respectfully agree with the above observation and hold that the respondent herein has not sufficiently demonstrated that the limitation by section 132 was justified.

53. The court in the above case then cited the case of **Moise Vs. Greater Commission Transitional Local Council; Minister of Justice and Constitutional Development, intervening (Women's Legal Centre as Amicus Curiae) 2001 (4) sa 481 (CC)** and stated;

"If the government wishes to defend the particular enactment, it then has the opportunity-indeed an obligation-to do so. The obligation includes not only the submission of legal argument but the placing before court of the requisite factual material and policy considerations."

54. The court then stated at page 25:

"*The respondents have been found woefully wanting on this front. They have not submitted any evidence or material of whatever nature in justification of the limitation in question. That being the case, the conclusion is, in my view, inescapable that the respondent have failed to satisfy this court that the restrictions and limitations imposed on the applicants' Freedom of speech or expression are either reasonable or justifiable. Besides, the deeming provisions of subsection 3 of section 3 are plainly contrary to the constitutionally entrenched right of being presumed innocent until proven otherwise."*

55. The jurisprudence emerging from the above decisions is that it is the duty of the state to justify the derogation of a constitutional right. In the present case, the state has not even in the remotest sense, attempted to show that the limitation was reasonable and justifiable, as required by **Article 24 (3).** No material or policy considerations were placed before court to justify the limitation. The right to freedom of expression being a constitutional right, can only be limited in accordance with the constitution itself, and where it is limited by statute, that statute or statutory provision must meet the constitutional test of reasonableness and justifiability.

56. Section 132 does not define the words "undermining authority of a public officer". This leaves the words too general, vague and wide to the extent that it is not clear when a person is said to have undermined a public officer's authority. Neither does it show how the act complained of hindered public officer from performing his obligations under that office. A law, especially one that creates a criminal offence, should be clear and unambiguous. It 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. This principle was stated in the case of **Andrew Mujuni Mwenda Vs. Attorney General (Supra),** where the court stated, thus:-

" The section does not define what sedition is. It is so wide and it catches everybody to the extent that it incriminates a person in the enjoyment of one's right of expression of thought…The way impugned sections were worded, have an endless catchment area to the extent that it infringes ones right enshrined in Article 29 (1)) (a)."

57. The above principle was echoed in the case of **Geoffrey Andare Vs Attorney General {2015}**

eKLR, where the court stated;-

"…The principle of law with regard to legislation limiting fundamental rights is that the law must be clear and precise enough to enable individuals to conform their conduct to its dictate…"

58. In the case of **Jacquline Okota & Another Vs. Attorney General & 2 others {2017} eKLR, Mativo J**, dealt with the issue of criminal defamation as a limitation of freedom of expression under section 194 of the Penal Code and stated that; ***The freedom of expression is secured under Article 33 of the constitution and for it to be limited; limitation must be within the scope and ambit of the provisions of Article 24 of the constitution.***

59. This petition has raised a significant question of whether criticism of a public officer is a ground for limiting a fundamental right enshrined in the constitution. As seen from the constitution itself, the freedom of expression and to hold opinion, can only be limited by the constitution. Criminalizing criticism is a curtailment of the right to speak about public officers and it derogates ones right to hold opinion. The Bill of Rights in our transformative constitution is clear that rights are for enjoyment as opposed to curtailment. The impugned provision, to the extent that it purports to suppress dissent, is in my view, a derogation of Article 33 of the constitution. The same provision contravenes Article 25 (c) to the extent that it limits the right to a fair trial as enshrined in Article 50 (2) (a). Any alleged discomfort can be addressed by less restrictive means than curtailment of a fundamental right.

60. The people of Kenya gave themselves a constitution with a robust and progressive Bill of Rights. A provision such as Section 132 of the Penal Code is too retrogressive to fit in a modern, open and democratic society. It is too wide in scope, punitive in intent and suppressive in effect to be tolerated by our constitution.

61. I have weighed the impugned section *visa vis* the constitution, and also taken into account judicial pronouncements on the right to freedom of expression. The constitution protects people's rights and prohibits laws that unreasonably and unjustifiably infringe those rights. From all these, it is clear to me that the impugned section (132) is inconsistent with Articles 33, 50 (2) (a), (i), (l) and 25 (c) of the constitution, in so far as it suppresses freedom of expression, shifts burden to an accused, denies an accused the right to remain silent and derogates the right to fair hearing . Article 20 (2) of the constitution is also clear that every person has the right to enjoy the rights and fundamental freedoms to the greatest extent consistent with the nature and the right or fundamental freedom. It is a value and principle of our constitution (Article 2 (4) that laws which are inconsistent with it are invalid to the extent of the inconsistency.

62. Having given due consideration to the petition herein, and taking into account provisions of Article 259 which propound promotion of values and principles of the Constitution, including advancement of the rule of law, Social Justice and Enforcement of fundamental freedoms and human rights, I come to the inescapable conclusion 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. Consequently, I allow the petition dated 29th April, 2016, and make the following orders;

1. A declaration is hereby issued that Section 132 of the Penal Code is unconstitutional and invalid.

2. A declaration is hereby issued that the continued enforcement of Section 132 of the Penal Code by the second respondent against the petitioner herein is unconstitutional and a violation his fundamental right to freedom of expression.

3. Each party do bear their own costs.

Dated, Signed and Delivered at Nairobi this 26th Day of April, 2017

E C MWITA

JUDGE