REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 214 OF 2018

CYPRIAN ANDAMA.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

ARTICLE 19 EAST AFRICA.....INTENDED INTERESTED PARTY

JUDGMENT

1. The petitioner herein, who describes himself as a Kenyan citizen residing and working for gain in Nairobi filed this petition against the respondents herein on 7th June 2018 seeking the following orders:

a) A declaration that Section 84D of the Kenya Information and Communication Act, 2009 is unconstitutional and invalid for unjustifiably violating Article 33 and 50(2)(n) of the Constitution.

b) A declaration that the continued enforcement of Section 84D by the first respondent against the petitioner, violates the Bill of Rights and therefore militates against the public interest, the interest of the administration of justice and constitute an abuse to the legal process.

c) Flowing from prayer (b), in injunction barring the first respondent from carrying on with the prosecution of the petitioner in the proceedings in Milimani Criminal Case Number 166 of 2018; Kiambu Criminal Case Number 686 of 2018 and Kiambu Criminal Case Number 687 of 2018.

d) ***An order that the respondents bear the petitioner's costs of this petition.***

2. The petitioner challenges the constitutional validity of Section 84D of the Kenya Information and Communication Act (KICA) Cap 411A of the Laws of Kenya on the basis that it creates an offence by criminalizing the publishing of obscene information in electronic form in vague and overbroad terms, and that in turn, the chilling effect produced by the offence limits the constitutionally guaranteed freedom of expression.

3. The application is supported by the petitioner's affidavit sworn on 7th June 2018 wherein he avers that he was on 23rd January and 26th April 2018 charged before Milimani and Kiambu Criminal Court with offences under the impugned Section 84D of

KICA for publishing obscene information in electronic form. He tendered the particulars of the various charge sheets as annexures to the supporting affidavit.

4. It is the petitioner's case that the impugned Section 84D of KICA limits his freedom of speech and expression. He further states that the said Section is vague, overbroad with regard to the meaning of "lascivious" or "appeals to the prurient interest" or "tends to deprave and corrupt persons" thereby offending the principle of legality in Article 50(2)(b) of the Constitution which requires that criminal law, especially one that limits a fundamental right must be clear enough to be understood and must be precise enough to cover only the activities connected to the law's purpose.

5. The petitioner contends that besides the creation of vague criminal offences, the impugned section leaves to wide a margin of subjective interpretation, misinterpretation and abuse in determining criminal penalties and adds that since none of the terms are defined or capable of precise or objective legal definition or understanding the result is that innocent persons may be arbitrarily arrested under the said section.

6. The petitioner states that apart from being vague, Section 84D 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. He argues that the right to information under Article 35 is directly affected since the section does not refer to what content of the message can be, but only to its effect and that the section therefore includes all information deemed as subversive or offensive and conducive to breach of the peace notwithstanding its artistic, academic or scientific value.

7. He maintains that the impugned section does not therefore amount to a reasonable and justifiable limitation of the freedom of expression in an open and democratic society based on human dignity, equality and freedom under Article 24.

8. The petitioner maintains that the enforcement of Section 84D by the second respondent against the petitioner in Milimani Criminal Case 166 of 2018, Kiambu Criminal Case Number 686 of 2018, and Kiambu Criminal Case Number 687 of 2018 would be an insidious form of censorship which impairs the core values contained in Article 33.

9. At the hearing of the petition the petitioner submitted that he had established a prima facie case on the constitutionality of Section 84D of KICA as he had proved that he was facing charges in Milimani Criminal Case No. 166 of 2018, Kiambu Criminal Case No. 686 of 2018 and Kiambu Criminal Case No. 687 of 2018.

10. He argued that the impugned section is unconstitutional for being vague, and overbroad contrary to Article 50 (2) (a) and for being an unjustifiable limitation of the freedom of expression under Article 33 of the Constitution.

11. He further submitted that this court, as the custodian of the Bill of Rights, is mandated to intervene where facts disclose a need to prevent a violation of rights and fundamental freedoms guaranteed under the constitution. For this argument, he cited the decision in the case of ***Bill Kipsang Rotich vs Inspector General of National Police Service [2013] eKLR.***

The interested parties' case.

12. Through an application dated 29th June 2018 the interested party herein, Article 19-East Africa, sought and obtained the leave of the court to be admitted to this petition as an interested party.

13. The interested party thereafter filed written submissions in support of the petition which submissions were, at the hearing of the petition, highlighted by Mr. Ochiel, learned counsel for the interested party, who submitted that Section 84D of the Kenya Information and Communication Act does not give due regard to Article 33 of the Constitution and Article 19(3) of the ICCPR (International Covenant on Civil and Political Rights).

14. Counsel submitted that the impugned section creates an offence in terms that are vague, undefined and whose effect is arbitrariness in the application of criminal law against dissenting voices. Counsel highlighted the main issues for determination to be;

- ***Whether section 84D of KICA limits freedom of expression guaranteed under Article 33(1) of the Constitution.***

- ***Whether that limitation is reasonable and justifiable in an open and democratic society.***
- ***Whether the limitation serves a legitimate aim.***
- ***Whether the limitation is necessary in an open and democratic society.***
- ***The appropriate relief to be granted in the case.***

15. On the first issue, counsel submitted that it is not in doubt that the petitioner was arrested and arraigned before the court on charges under the impugned section and that he faces the risk of being jailed for at least 2 years or a fine of Kshs. 200,000/= in which case his rights under Article 33 of the Constitution have already been limited. On whether that limitation is reasonable and justifiable in an open and democratic society, counsel submitted that under Article 24(3) of the Constitution, the burden of proving that the limitation is justifiable rests with the respondents. For this argument, counsel relied on the decision in the case of ***R vs Oakes [1986] 1 R.CS*** wherein it was held that:

"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)

16. Counsel submitted that the impugned 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 is necessary/proportional. Counsel argued that for a norm to be characterized as law, it must be formulated with sufficient precision so that an accused person can know exactly what conduct would attract criminal sanctions as vagueness attracts arbitrariness thereby leaving an accused person at the mercy of the Director of Public Prosecutions or the court's subjective interpretation.

It was submitted that the impugned section has no proximate relation to the 4 grounds under which freedom of expression may be limited as provided for under Article 33(2) of the Constitution and thus does not serve a legitimate aim.

On the respondent's argument that the section is necessitated by the need to protect the reputation of others, counsel submitted that the preamble/title of the impugned Act does not state that its intention is to protect reputations but states that it is to facilitate the development of the information and communication sector. Counsel therefore argued that the Act does not satisfy the necessity test. For this argument counsel relied on the decision in the case of ***Jacqueline Okuta & Another vs Attorney General & 2 Others [2017] eKLR*** wherein it was observed that defamation is a subject of Defamation Act. It was further submitted that the impugned section fails the proportionality test on the two grounds of vagueness and necessity.

The 1st respondent's case

17. The 1st respondent opposed the petition through the replying affidavit of Chief Inspector **Kassim Baricho** sworn on 18th July 2018 wherein he confirms that the petitioner was indeed charged before both the Milimani Chief Magistrates Court for offences under the impugned section of KICA. He further avers that the petitioner is a habitual offender who has on several occasions been charged for misuse of electronic media platforms and that the orders sought in this petition are intended to make him evade accountability for offensive acts.

18. Miss Mwenda, learned counsel for the 1st respondent submitted the rights under Articles 33 of the Constitution can be limited. Counsel cited the decision in the case of ***Mutunga v Republic [1986] KLR 167*** wherein the court held that constitutional rights and freedoms are subject to limitation designed to ensure that the enjoyment thereof by any individual does not prejudice the rights and freedoms of others or public interest.

19. Counsel submitted that freedom of expression of any person as enshrined under Article 33 of the Constitution is at the same time regulated by the same provision such that the person who exercises the freedom does so in a manner that does not violate the constitutional and natural rights of other persons.

20. On interpretation of the statutes, counsel submitted that the court ought to adopt a construction that will provide the general legislative purpose underlying the provision. Counsel relied on the decision in the case of ***Edward Mwaniki Gaturu vs The Attorney General and 3 Others [2013] eKLR*** wherein it was held:

"One of the canons of statutory interpretation….is that provision of a statute ought to be read as a whole in order to ascertain the intention of the legislature. Further, words used in a particular provision may be used to clarify the meaning of the words of phrases used in the same context in other provisions within the Act. "The learned judge relied on Halsbury Laws of England, 4th Edition, Butterworth's 1995, Vol 444/ (1) para 1484 where it states that….

It is one of the linguistics canons applicable to the construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as failing to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act….."

21. Counsel submitted that the petitioner had not sufficiently demonstrated the particulars of the specific rights that have been infringed and the damages suffered by the alleged infringement. On the prayer for orders of injunction to bar the 1st respondent from carrying on with the prosecution of the petitioner before Milimani and Kiambu Courts counsel submitted that an order of prohibition is only tenable where a public body or official has acted in excess of their powers and that in the instant case, there was no evidence of misuse of power or contravention of rules of natural justice. It was further submitted that orders to quash the 1st respondent's decision to institute criminal charges against the petitioner can only be obtained by way of judicial review.

The 2nd respondent's case

22. The 2nd respondent opposed the petition through the Grounds of Opposition filed on 19th June 2018 in which it listed the following grounds:

1. That the application and petition herein are an abuse of the court process, are misconceived, unfounded and otherwise an abuse of the court process.

2. That the applicant/petitioner portends that the Constitution has unsettled other laws of procedure and administration of justice. Particularly, the Kenya Information and Communication Act, Act No. 1 of 2009 Laws of Kenya (specifically Section 84D thereof).

3. That Article 33 of the Constitution is a self-contained provision of the law in respect to the right to freedom of expression. It provides for the right to freedom of expression and the limitations as to its exercise under Article 33(2) (d) (i) and 33(3) specifically.

a) Under Article 33(2) (d)(i) 'advocacy of hatred' has been defined to constitute ethnic incitement, vilification of others or incitement to cause harm and

b) In exercise of the right to freedom of expression, every person shall respect the rights and reputations of others.

4. That it is the trial court applying the law on the facts that has the capacity to determine whether the applicant/petitioner's writing vilified the persons he mentioned and/or injured their reputations.

5. That the application and petition herein are speculative. They speculate that the petitioner, who is the accused person in Milimani Criminal Case Number 166 of 2018 (Republic vs. Cyprian Nyakundi), Kiambu Criminal Case Number 686 of 2018 (Republic vs. Cyprian Nyakundi Andama), Kiambu Criminal Case Number 687 of 2018(Republic vs. Cyprian Nyakundi Andama) will be convicted

6. The petitioner has not discharged the presumption that Section 84D of the Kenya Information and Communication Act, Act No. 1 of 2009 Laws of Kenya is constitutional, as per the case of Ndyanabo v Attorney General [2001] EA 495;

7. That the 1st respondent is constitutional office holder with a definite constitutional mandate. Granting the orders sought through the application and petition herein will be tantamount to this court, at the behest, of the petitioners interfering with the exercise of constitutional powers by the 1st respondent.

8. That the High Court has no capacity to adjudicate upon the defenses in the criminal cases referred to herein, in the manner proposed in the application and petition herein.

23. At the hearing of the petition Mr. Moimbo, learned counsel for the 2nd respondent submitted that International Instruments and Article 33(2) (d) of the Constitution does not ratify the vilification of other people and further, that the freedom of expression is not an absolute right.

24. Counsel submitted that the mere fact that the term 'obscene' is not defined in the impugned Act does not mean that the Act is vague as the said Act is a replication of a similar law under the Indian Penal Code of 1860. While drawing comparative jurisprudence from the Indian Penal Code, counsel submitted that the sentence imposed under the impugned section is reasonable and proportionate.

25. Counsel submitted that there is distinct difference between constructive criticism which is protected under Article 33 of the Constitution and vilification and profanities which are issues that led to the filing of criminal charges against the petitioner.

Analysis and Determination

26. I have considered the petition filed herein, the responses thereto, submissions by respective counsel and the authorities that they cited. The main issue for determination is whether the impugned section of KICA is unconstitutional..

27. In determining this case, the starting point is the principle that there is a rebuttable presumption of legality of statutes based on the understanding that the Act or provision was intended to serve the people and is therefore constitutional. Courts have therefore held the view that declaring a statute to be unconstitutional is a grave issue and that the court should be slow to do so. **(See *Mount Kenya Bottlers Limited & 3 Others vs. A.G & Others, [2012] eKLR*).**

28. The above principle was well stated in the case of ***Hamdarada Nakhana Union of India Air (1960) 354***, as follows;

"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.

29. The principle of presumption of constitutionality of statutes was 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, however, always on the person challenging the legislation to prove the unconstitutionality alleged.

30. In determining the constitutionality of a statute or provision of a statute, the court is under a duty to consider the impugned legislation 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 Section or the Act, and determine whether the purpose of a provision or its effect, may lead to unconstitutionality of the statute or provision. This the position that was adopted in the case of ***R v Big M Drug Mart Ltd 1985 CR 295***, thus;

"Both purpose and effect are 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."

31. The principle was similarly 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 *Muranga Bar Operators Association & another Vs. Minister of state for Provincial Administration and Internal Security & another; (petition No. 3 of 2011) 2011 eKLR.

32. Article **2 (3)** of the Constitution stipulates that the Constitution is the supreme law of the land and declares that any law or conduct inconsistent with it is null and void to the extent of its inconsistency. The supremacy of the Constitution and the guarantees in the Bill of Rights add depth and content to the rule of law. When upholding the rule of law, the courts are required not only to have regard to the strict terms of regulatory provisions but also to uphold the values underlying the Bill of Rights.

33. I appreciate that determining the issues raised by the petitioners will involve the interpretation of the section 84D of KICA that is alleged to be unconstitutional, and also the relevant provisions of the Constitution that are alleged to be offended by the section complained of. To effectively address the said issues, this court is alive to the fact that there are principles governing such interpretation.

34. Before dealing with the issues that arose in the petition, it is important to set out the principles that guide Constitutional interpretation. In interpreting the constitution, the first port of call is the Constitution itself. *Under Article* **259** *of the constitution, the court is enjoined to interpret the constitution 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 in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article* **159 (2) (e)** *of the Constitution to protect and promote the purposes and principles of the Constitution. Through case law, various courts in different jurisdictions have also expressed themselves on the manner in which the provisions of the Constitution and Acts should be interpreted.*

35. In ***Ndyanabo vs. Attorney General [2001] 2 EA 485*** the Tanzania Court of Appeal held that in interpreting the Constitution, the Court would be guided by the general principles that, (i) the Constitution was a living instrument with a soul and consciousness of its own, (ii) fundamental rights provisions had to be interpreted in a broad and liberal manner, (iii) there was a rebuttable presumption that legislation is constitutional, (iv) the onus of rebutting the presumption rested on those who challenged that legislation's status save that, (v) where those whom supported a restriction on a fundamental right relied on a claw back or exclusion clause, the onus was on them to justify the restriction.

36. In ***Kigula and Others vs. Attorney-General [2005] 1 EA 132*** the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are as follows (1) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (3) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realize the full benefit of the rights guaranteed; (4) that in determining constitutionality both purpose and the effect are relevant; and (5) that Article 126(1) of the Constitution of the Republic of Uganda enjoins Courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people. See also ***Besigye and Others vs. The Attorney-General [2008] 1 EA 37*** and ***Foundation for Human Rights Initiatives vs. Attorney General HCCP NO. 20 of 2006 (CCU) [2008] 1 EA 120.***

37. In ***Olum & Another vs. Attorney General (1) [2002] 2 EA 508*** the Uganda Court of Appeal held that in order to determine the constitutionality of a statute, the Court had to consider the purpose and the effect of the impugned statute, or section thereof and that if the purpose was not to infringe a right guaranteed by the constitution, the Court had to go further and examine the effects of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the constitution, the statute or section in question would be declared unconstitutional. The Court further held that in interpreting the constitution, the constitutional interpretation principle of harmonization, which was to the effect that all the provisions of the constitution concerning an issue should be considered together, would be applied and in addition the widest construction possible, in their contexts, had to

be given to the words used according to their ordinary meaning and each general word held to extend to all ancillary and subsidiary matters. Moreover, constitutional provisions were to be given a liberal construction unfettered by technicalities because though the language of the constitution did not change, changing circumstances may give rise to new and fuller import to the meaning of the words used.

38. A similar holding was made in ***Obbo and Another vs. Attorney General [2004] 1 EA 265***, in which the Supreme Court of Uganda held that no laws, rules or regulations let alone decisions of any authority which are in conflict with the provisions of the Constitution can stand in opposition to those constitutional provisions since the constitution is the supreme law of the land. The Court's view was that the Uganda Constitution is to be interpreted both contextually and purposefully since it is an ambulatory living instrument designed for the good governance, liberties, welfare and protection of all persons in Uganda. The task of expounding a Constitution is crucially different from that of construing a statute as a statute defines present rights and obligations. It is easily enacted and easily repealed. A Constitution by contrast is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and when joined by a bill or charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

39. The petitioner and the interested party submitted that the impugned section cannot stand the constitutional validity test in the face of the current constitution and the Bill of Rights which expressly protects the freedom of expression and access to information under Articles 33 and 35 respectively. According to the petitioner and the interested party, the impugned section is vague, overbroad, attracts arbitrariness and does not satisfy the three part test set out under Article 24 of the Constitution.

40. **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.***

41. Freedom of expression and opinion is fundamental right and freedom guaranteed under **Article 33 of the Constitution which** provides as follows;

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."

Article 35 of the Constitution on the other hand stipulates as follows:

"(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicize any important information affecting the nation."

42. The fundamental question which arises is the standard by which the constitutional validity of the challenged Section should be judged. Courts have laid down two the main standards in determining constitutional validity as follows:-

a) ***The first is the "rationality" test. This is the standard that applies to all legislation under the rule of law;***

b) ***The second, and more exacting standard, is that of "reasonableness" or "proportionality", which applies when legislation limits a fundamental right in the Bill of Rights. Article 24 (1) of the Constitution provides that such a limitation is valid only if it is "reasonable and justifiable in an open and democratic society."***

43. Kenya is a democratic state with a democratically elected leadership and it must therefore be appreciated that it is only through criticism that citizens make their leaders know when their actions may not be in the interest of the nation. Such criticism then helps public officers understand the feelings of the citizens. **In other words, the citizens** cannot be freely expressing themselves if they do not criticize or comment about their leaders and public officers. **Article 33** of the Constitution guarantees freedom of expression and limits this freedom of expression to any expression that is not in accord with **Clause (2)** .

44. Courts in different jurisdictions have held that free speech is the last bastion against irresponsible governments in which politicians tend to wield inordinate power and influence to silence their critics. Indeed one can say that the most heinous crimes against citizens have been committed by politicians because their baseness and perversity was hidden from the public scrutiny. In this regard, this court takes judicial notice of the fact that excesses of the state that were experienced during the repressive years of single party regime were perpetuated by the outright muzzling of the freedom of expression in order to suppress dissent by the citizens.

45. The importance of freedom of expression was captured by the Supreme Court of the United Status in ***New York Times vs Sullivan 376 U.S 254 (1964)*** wherein it was held that the circulation of ideas should be uninhibited, robust and wide open in a democratic society. In the case of ***Edmonton journal Vs Alberta [1989] 45 CRR 1,*** the Supreme Court of Canada underscored the importance of freedom of expression when it stated 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."***

46. 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."

47. It is therefore important for public officers to tolerate all manner of criticism in an open and democratic state because people usually exercise the right granted to them by the constitution in which case, legislation's purpose should not be to suppress this right.

48. In applying the purpose and effect principle, I will now turn to consider the circumstances under which the impugned provision or legislation was enacted. The preamble of the KICA indicates that it was enacted in 2009 to provide for the establishment of the Communications Commission of Kenya, to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telcom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes.

49. The challenged section 84D of KICA stipulates as follows:

84D 'Publishing of obscene information in electronic form'

Any person who publishes or transmits or causes to be published in electronic form, any material which is lascivious or appeals to the prurient interest and its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied therein, shall on conviction be liable to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years, or both.

50. The petitioner's case is that he has already been charged before both Milimani and Kiambu Law courts with offences under the impugned section of the Act to wit; Publishing of Obscene information in Electronic form contrary to section 84D of the Kenya Information Communication Act No. 1 of 2009. The particulars of the offences were stated to be as follows:

a) In Milimani Criminal Case Number 166 of 2018. That on 23rd day of January 2018 at unknown place within the Republic of Kenya through social media to wit twitter account handle @C-Nyakundi published obscene information to wit; ***"Tell me it's not true that the forefront sheep of God Matiangi bought a side bitch a house! I hope si public resources zinatumika. Every child has a weakness na hiyo weakness Ni eve Fruit",*** *words which were meant to deprave and corrupt public.*

b) In Kiambu Criminal Case No.686 of 2018. That on 16th day of April 2018 at unknown place within the Republic of Kenya through social media to wit twitter account handle @C-Nyakundi published obscene information to wit; ***"Kirinyaga idiots voted for this commercial sex worker, hoping for radical transformation. What's the difference between this Malaya and Betty Kyalo who had Joho finance her new spa" Malaya in Malaya only the degrees vary",*** words which were meant to deprave and corrupt the public.

c) In Kiambu Criminal Case No.686 of 2018.That on 1st day of April, 2018 at unknown place within the Republic of Kenya through social media to wit twitter account handle @C-Nyakundi published obscene information to wit; ***"Sonko TheKivisi ananunua tanks of oxygen, na anawika ati vile amefanya kazi, yet these same tanks zinakuwanga na wasee wa welding mtaani, umbwa wewe @MikeSonko. Fanya kazi, wacha umalaya na pombe. Hio umakanga yako ya Eastlands pelekea nyanyako,"*** words which were meant to deprave and corrupt the public.

51. *Black's Law Dictionary defines* ***'lascivious'*** *as follows:* ***"(Of conduct) tending to excite lust; lewd; indecent; obscene."***

'Prurient' *on the other hand is defined as* ***"Characterized by, exhibiting, or arousing inappropriate, inordinate, or unusual sexual desire; having or showing too much interest in sex <films appealing to prurient interest>."***

52. The impugned was enacted in 2009, less than a year to the promulgation of the new and transformative Constitution 2010 that introduced a wide array of fundamental rights and freedoms under the Bill of Rights including the freedom of expression that is the main subject of this petition. It is also worthy to note that the impugned Act was enacted following the advent of electronic mode of communication and at a time when the government was used to forms of communication that it could easily access and control. Needless to say, electronic media then presented an amorphous, if not an 'unruly monster' which the government could not easily get hold of and to my mind, this probably explains the introduction of the impugned Act and section geared towards an attempt at controlling the kind of information that could be circulated through the electronic media also referred to as the social media.

53. Looking at the title of the impugned section, one notes that its purpose was to rein in on the publishing of obscene information. However, it is clear that its resultant effect has been to instill fear and submission among the people considering the hefty fines and long prison terms that the persons charged under the impugned section may face in the event of a conviction. My take is that this cannot be the object of any law in the face of 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) of the Constitution** emphasizes 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.*** Under the current Constitution, 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.

54. As seen from the constitution itself, the freedom of expression and to hold opinion is not absolute and can only be limited by the Constitution. 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.

55. A reading of Article 24(1) of the Constitution shows that requires that there be reasonable and justifiable reasons for the limitation to a right. The respondents' argument and position was that **Article 33 (1) of the Constitution is** not absolute since it was curtailed by **clause (2)** and **(3)** of the same Article. My finding is that while it is true that the right to freedom of expression is limited by **clause (2)** and **(3), such** limitation should be in terms of the two sub-Articles. It was therefore upon the respondent to show that the limitation by the impugned **section over the publications allegedly made 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 the publications complained of and 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 84D of KICA meets is that it is a law, limiting this fundamental right, and not more. This point was aptly addressed in the case of ***R Vs. Oakes case*** (supra) 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…"

56. In advancing the principle that it was the duty of the government to show that any limitation of a fundamental freedom was justified the court in Swaziland stated as follows in the case of ***Thulani Maseko vs. Prime Minister of Swaziland & others 2180/2009 [2016] SZHCn180***;

"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."

57. I am in agreement with the above observation and hold that the respondent herein did not sufficiently demonstrate that the limitation by section 84D of KICA was justified. To the extent that the impugned provision purports to suppress dissent, is in my view, a derogation of Article 33 of the constitution. The impugned provision also contravenes Article 25 (c) to the extent that it limits the right to a fair trial as enshrined in Article 50 (2) (b). To my mind, any alleged discomfort or displeasure with the petitioner's publication could have been addressed by less restrictive means, such as a civil suit for defamation, other than blanket curtailment of a fundamental right. My finding therefore is that the impugned section is unconstitutional considering that even though its purpose was to control/limit use of obscenities in communication, and its effect has been to infringe on the freedom of expression guaranteed by the Constitution by creating the fear of the consequences of a charge under the said section.

58. There was a further submission that **the impugned section is vague and over broad. The petitioner** argued that for a norm to be characterized as law, it must be formulated with sufficient precision so that an accused person can know exactly what conduct would attract criminal sanctions as vagueness attracts arbitrariness thereby leaving an accused person at the mercy of the Director of Public Prosecutions or the court's subjective interpretation. **It is a fundamental tenet of natural justice that an accused person must be informed, in very clear terms, of the charges that he faces so as to enable him to prepare his defence adequately. This principle is aptly captured under Article 50 of the Constitution which provides for the rights of every accused person and at 50(2) (b) stipulates as follows on the non-derogable right to fair trial:**

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

59. Courts have held the view that criminal statutes that are couched in unclear terms are unconstitutional. This was the position taken in the American case of ***Ignatius Lanzetta Vs The State of New Jersey 306 US 888 at 893*** **it was held that:**

"...Criminal Statute which defines the offence in such uncertain terms that persons of ordinary intelligence cannot in advance tell whether a certain action or cause of conduct would be within its prohibition is subject to attack of unconstitutionality as violative of the provisions as to due process and the Clause which requires that the accused be informed of the nature and cause of the offence with which he is charge."

60. In the Tanzanian case of ***Pumbun Vs The Attorney General [1993] 2 LRC 317 at p.323,*** the Court of Appeal approved the holding in ***DPP Vs Pete [19911 LRC (Const) 553*** that:

"A law which seeks to limit or derogate from the basic rights of the individual on grounds of public interest will be saved by Article 30 (2) of the Constitution (our Article 43) only if it satisfies two essential requirements: First, such a law must be lawful in a sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions and provide effective controls against abuse by those in authority by those using the law. Secondly the limitation imposed by such a law must not be more than is reasonably necessary to achieve the legitimate objective. This is what is also known as the principle of proportionality. The principle requires that such a law must not be drafted too widely so as to net everyone including even the untargeted members of society. If a law which infringes a basic right does not meet both requirements, such a law is not saved by Article 30 (2) of the Constitution, it is null and void."

61. In the present case, I find that the impugned section provides for an offence in such broad and unspecific terms such that the person charged under it may not know how to answer to it. I say so because both the impugned act and section do not define the meaning of the words; "obscene" or " ***any material which is lascivious or appeals to the prurient interest"*** and neither does it explain how or who shall determine if the publication will have ***"effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied therein"*** thereby leaving the words to the subjective interpretation by the investigative agencies, the prosecution or the court that will ultimately try the case.

62. It is trite that a law, especially one that creates a criminal offence, should be clear and unambiguous. It should not be so widely and vaguely worded that it nets 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)."

63. 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…"

64. It is therefore beyond this court's comprehension how a court of law trying a criminal case will determine how a publication can have effect that tends to deprave not only persons who read it but also those likely to read, see or hear the matter contained or embodied in it. In effect therefore, the impugned section is so wide and endless in its application that it refers to publications that target everyone including those who are yet to read, see or hear of it or what it embodies. To my mind, such an all-encompassing and vague statutory provision introduced prior to the enactment of the new Constitution, as an instrument of repression for the protection and cover up of felonies and scandals committed by those in power has no place in a free and democratic society that is governed by the rule of law.

65. A plain reading of the particulars of the charges that were filed against the petitioner in the various courts reveals that the petitioner may have been unhappy about the misuse of power and public funds by public officers and the outcome of an election in Kirinyaga county. Granted, the publisher/petitioner may have used very strong and impolite words in expressing his displeasure. Assuming that the targets of the publication are public officers, I find that, as observed in the cases that I have already cited in this judgment, a democratic state should acknowledge constructive criticism of public or state officers as the hallmark of democracy and the means for public accountability in which case, criminalizing criticism is not in accord with our transformative Constitution, since senior public officers should routinely be open to criticism. 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.

66. Moreover, courts have held the view that the manner in which people express their thoughts is not uniform and may vary depending on their context, background and upbringing. To my mind, this means that the mere use of impolite language, which is really the case in this petition, should not necessarily be criminalized. This was the position adopted by the Ugandan constitutional Court in the case of ***Andrew Mujuni Mwenda & 2 Others V Attorney General, petition Nos. 12/2005 and 3 of 2006 (CCU)*** **wherein** 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 and it was held:-

"…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…"

67. The above cited case resonates well with the instant case to the extent that the impugned section criminalizes the use of impolite, annoying or character assassinating remarks that would appear to displease those in public office a scenario that it at cross purpose with the intent and spirit of our transformative constitution.

68. There can be no denying that the subjects of criticism in the impugned publication are public/state officers. Article 73 of the Constitution 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***. My humble view is that public office bestows 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. As I have already noted in this judgment, there are several judicial decisions support this position. One example is the **Malawian case of *Harry Nakandawire & Another, Criminal case number 5 of 2010***, wherein the accused was 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)

69. In the Nigerian of case of ***Nwankwo Vs. State 1983 (1) NGR 366,*** the appellant was charged with the offence of 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)***

70. 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 council 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}

71. The above decisions are a confirmation of the fact that it is no longer acceptable 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.

72. My finding, therefore, is that the impugned section is unconstitutional to the extent that it infringes on the citizens right to freedom of expression guaranteed under Article 33 of the Constitution and derogates the right to a fair hearing by providing for an offence in such broad and unclear terms thereby making it subject to the arbitrary and subjective interpretation by the Director of Public Prosecution or the court contrary to **Article 50(2)(b)** of the Constitution. I wish to reiterate that under **Article 25(c) of the Constitution,** the right to a fair trial cannot be limited.

73. I have carefully considered the impugned section *visa vis* the constitution, and also taken into account judicial pronouncements on the right to freedom of expression. As I have already stated in this judgment, the people of Kenya gave themselves a new Constitution with a robust and progressive Bill of Rights in 2010 after the enactment of the impugned Act in 2009. The said Constitution protects people's rights and prohibits laws that unreasonably and unjustifiably infringe on those rights. Section 7 of the Sixth Schedule of the Constitution stipulates that "***all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."*** It is therefore my finding that a provision such as Section 84D of KICA is too retrogressive to fit into the modern, open and democratic society envisaged under the current Constitution. The impugned section is too wide in scope, punitive in intent and suppressive in effect to be tolerated by our transformative Constitution. I reiterate that it is clear to me that the impugned section is inconsistent with Articles 33, 50 (2) (b) and 25 (c) of the Constitution, in so far as it suppresses freedom of expression and denies the accused the right to fair trial through vagueness and ambiguity.

Disposition

74. Having regard to the findings and observations that I have made in this judgment and having given due consideration to the petition herein, taking into account provisions of Article 259 which provides for the 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 find that Section 84D of Kenya Information Communication Act violates the Constitution and is invalid. I further find that continued enforcement of the section against the petitioner herein is a violation of the petitioner's rights. Consequently, I allow the instant petition and make the following orders;

a) ***A declaration is hereby issued that Section 84D of KICA is unconstitutional and invalid.***

b) A declaration is hereby issued that the continued enforcement of Section84D of KICA by the second respondent against the petitioner herein is unconstitutional and a violation his fundamental right to freedom of expression.

c) Flowing from order (b) hereinabove, an injunction barring the first respondent from carrying on with the prosecution of the petitioner in the proceedings in Milimani Criminal Case Number 166 of 2018; Kiambu Criminal Case Number 686 of 2018 and Kiambu Criminal Case Number 687 of 2018.

d) Each party shall bear their own costs.

Dated, Signed and Delivered in open court at Nairobi this 31st day of July 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr Moimbo for 2nd respondent

Mr. Moimbo for Mwenda for 1st respondent

Mr Wambugu for Ochiel for interested party.

Court Assistant - Fred