

# Media Law Handbook for Journalists in Kenya

A guide intended for journalists elaborating on the law as it relates to  
the practice of the profession in Kenya.

# **Media Law Handbook for Journalists in Kenya**

*Edited by*

**Joseph Kihanya**

*LLB, LLM*

***Published by:***

Baraza Media Lab  
95 Riverside Drive, Nairobi  
Cell: +254 700 046 018  
Email: [info@barazalab.com](mailto:info@barazalab.com)  
[complaints@barazalab.com](mailto:complaints@barazalab.com)  
Website: [www.barazalab.com](http://www.barazalab.com)

***Supervisor***

Vanessa Gathecha  
Research Lead  
For enquiries: [vanessa@barazalab.com](mailto:vanessa@barazalab.com)

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Fax: +254 20 249 5067  
Email: [sales@lawafrica.com](mailto:sales@lawafrica.com)  
Website: [www.lawafrica.com](http://www.lawafrica.com)

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# Preface

This handbook will provide a guide for journalists by elaborating further on the law as it relates to the practice of the profession in Kenya.

**Chapter one** will examine the right to free speech as a constitutional guarantee and place the right in context.

**Chapter two** will identify and examine the state of defamation law including the defenses available in cases that concern this limitation to the constitutional right to free speech.

**Chapter three** will identify and examine major aspects of reporting of court proceedings.

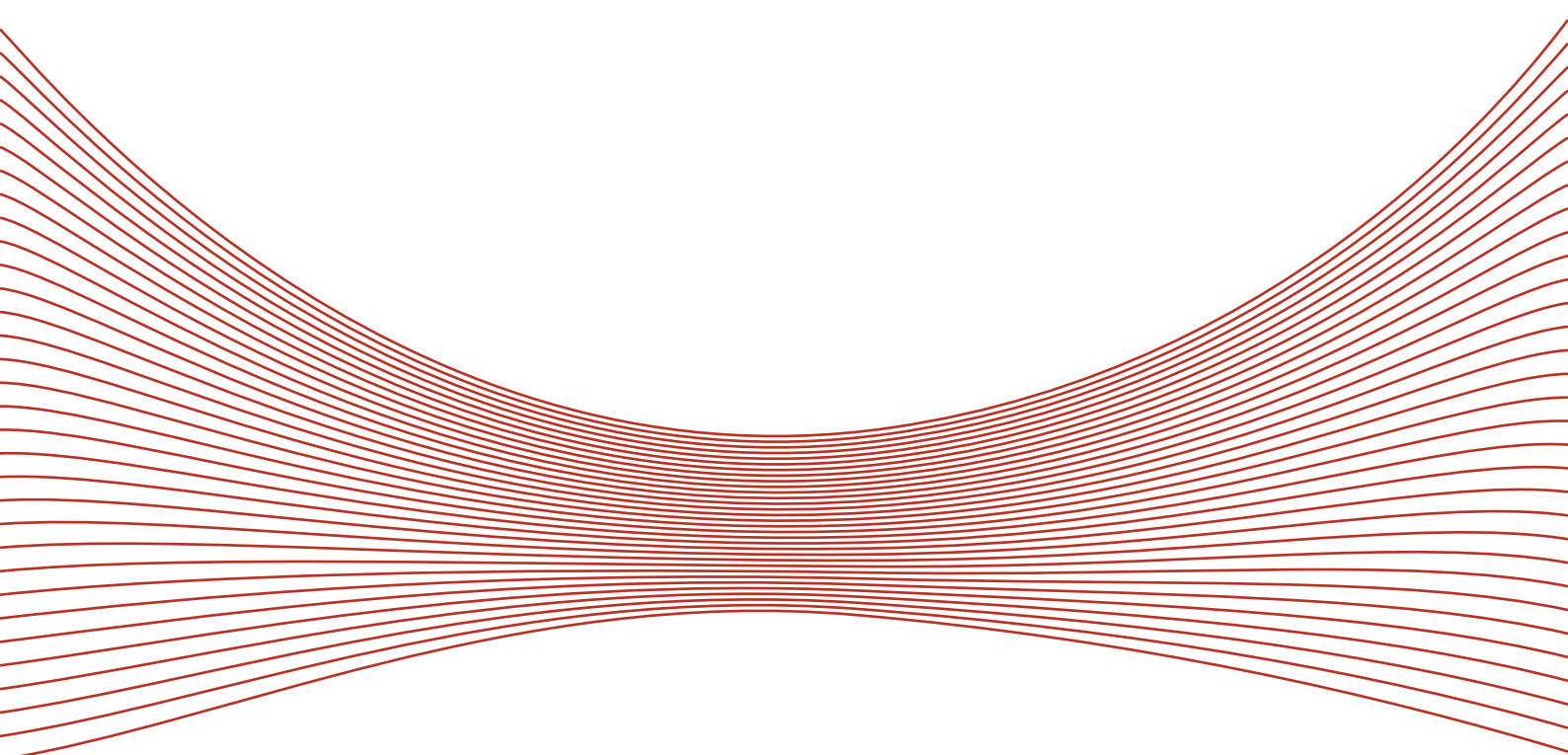
**Chapter four** will deal with aspects of free speech and societal standards as relates to race relations, incitement to hatred and obscenity.

**Chapter five** will cover the new media in the internet as a new predominant form of communication.

**Chapter six** will deal with specific media regulation and other statutory frameworks including elections laws, cybersecurity and the right to privacy.

**Chapter seven** will cover copyright law as it relates to the practice of journalism in Kenya.

**Chapter eight**, will be dedicated to a conclusion through a review of the landscape as at 2022 for journalism in Kenya with some suggestions for the future.



# Foreword

I am deeply honoured to write the foreword for this magisterial and timely *Handbook on Media Law Handbook for Journalists in Kenya*. The centrality of freedom of expression in a democratic polity cannot be gainsaid. Although all the rights and freedoms guaranteed in the Bill of Rights are critically important, Justice Benjamin Cardozo of the US Supreme Court observed many years ago, that freedom of expression constitutes “the matrix, the indispensable condition, of nearly every other form of freedom” (*Palko v Connecticut*, 302 U.S. 319 (1937)).

In Kenya, thanks to the 2010 Constitution, we are witnessing a concerted effort to hoist freedom of expression back on the pedestal. This, after a long and disastrous dalliance with colonial and post-colonial culture, laws and regulations that were decidedly hostile to free expression. In the colonial period, laws of sedition, national security and public order, incitement, censorship, civil and criminal defamation, as well as harsh regulation of the printing press, virtually destroyed the core of freedom of expression. Even after independence and the entrenchment of freedom of expression as a constitutional right, a perverse and authoritarian State, ill-drafted and overtly broad exceptions to the guaranteed freedom of expression, opaque and arbitrary licensing procedures, and continued enforcement of colonial anti-expression laws, combined to ensure that free expression was as illusory as it was in the colonial period.

One needs to cite a few random and outrageous examples to appreciate the extent to which free expression, which we all too often tend to take for granted, was neutered. A clergyman prosecuted and jailed for sedition for views expressed in his private diary. A university don prosecuted for possession of seditious literature and detained without trial because of a leaflet bearing the words, “*Don’t be fooled, reject these Nyayos*”. Four politicians prosecuted and jailed for sedition on account of being found in a room in a bar and in possession of a piece of paper bearing the innocuous words, “*Charles, coffee and tea*.” A printing press disabled and essential parts carted away for printing magazines critical of the Government of the day. Copies of magazine forcibly confiscated from news vendors because of their political content. Denial of broadcasting licenses for decades on such spurious reasons as lack of regulatory or policy framework. Prosecution, conviction and sentence of the entire leadership of the Law Society of Kenya for contempt of court for violating an overly broad and imprecise court order prohibiting them from making political statements. And many more such cases.

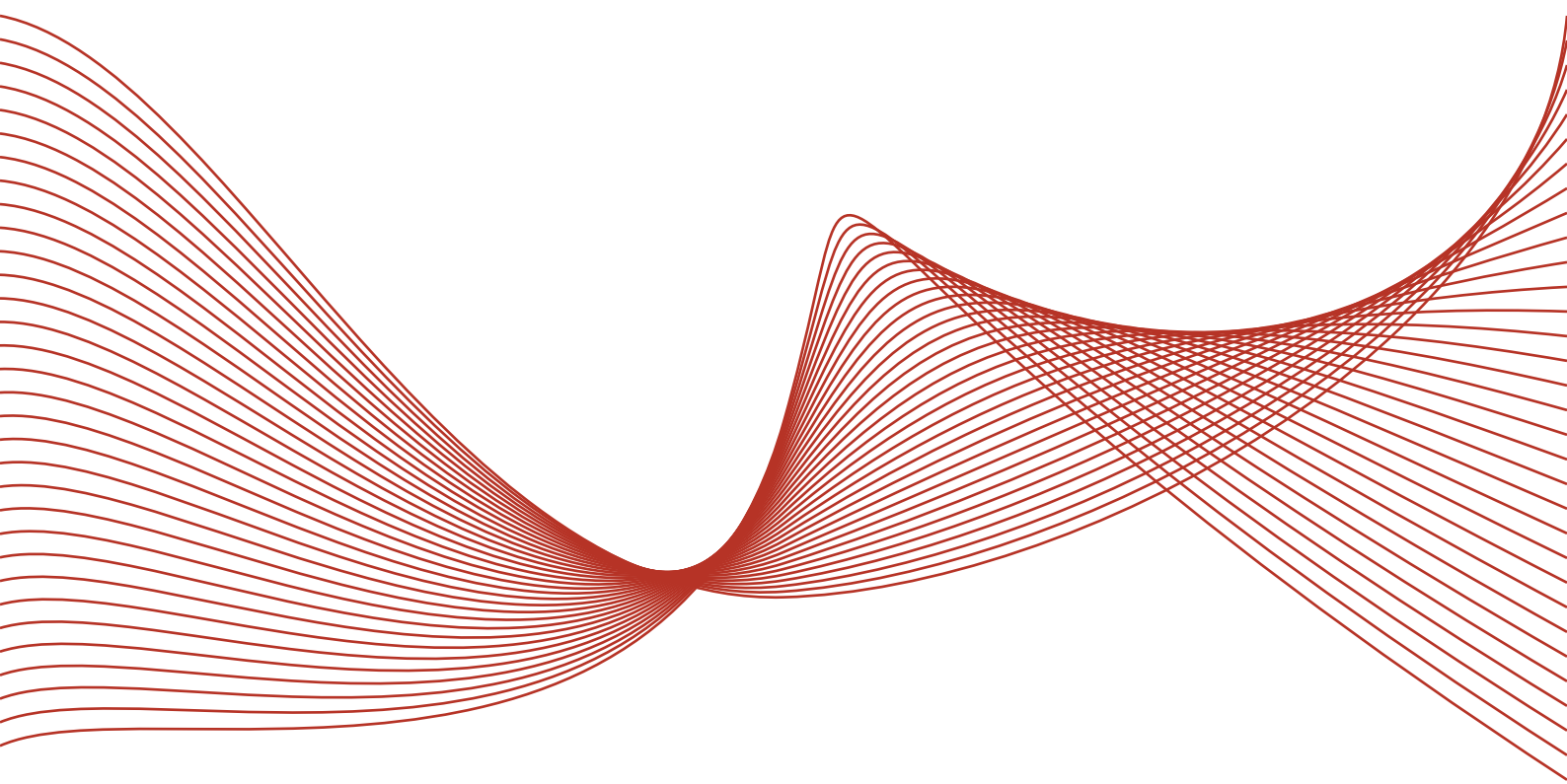
The 2010 Constitution took bold steps to unshackle freedom of expression in various ways. It introduced express and broad guarantee, not only of freedom of expression, but for the first time, freedom of the media; it articulated precise limitations and introduced presumptions in favour of expression; demanded that laws ante-dating the Constitution must pass constitutional muster for continued application; prescribed tools for its own interpretation; and provided a robust mechanism for enforcement of guaranteed rights.

In this magnificent work, my friend Joseph Kihanya, a distinguished lawyer with considerable experience in media and freedom of expression issues, unpacks the law on freedom of expression for journalists and media practitioners. Written in an engaging and accessible style, Mr. Kihanya presents various facets of the law as it interfaces with the media, starting with the constitutional underpinning of freedom of expression. In quick succession he addresses the impact of the law of defamation on freedom of expression, and the mechanics, limits and perils of reporting court proceedings. Addressed too is what in Kenya is commonly referred to as hate speech as well as the murky issue of obscenity. The phenomenal rise and impact of the internet and related issues of the right to privacy, copyright, and cybersecurity, are very well articulated too.

A distinct strength of the book is the elucidation of the most relevant pieces of legislation as well as dissection of some of the landmark decisions from our courts on freedom of expression. Although intended primarily for journalists, this book will be of immense value to legal practitioners, judges, policy makers, and even the ordinary Kenyan, who is interested to know the evolution and future of a right that is indisputably the lynchpin of virtually every other rights or freedom.

## **Kathurima M’Inoti**

Judge of Appeal  
Court of Appeal of Kenya and Appellate Division  
East African Court of Justice



# Introduction

*And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?... There have been not a few since the beginning of this Parliament, both of the Presbytery and others who by their unlicensed books to the contempt of an Imprimatur first broke that triple ice clung about our hearts, and taught the people to see the day: I hope that none of those were the persuaders to renew upon us this bondage which they themselves have wrought so much good by contemning.*

John Milton *Areopagitica*, 1644.

The continuation of history is much contributed to by the exercise of the right to free speech, through journalism, as one of the purveyors of a record of what mattered yesterday, today, and will matter in days and years to come.

Free speech has been hailed as one of the hallmarks, if not *sine qua non*, of democracy.<sup>1</sup> The United Nations<sup>2</sup> Declaration on Human Rights greatly emphasizes the freedom of speech under Article 19, which entitles everyone to hold opinions without interference and to seek, receive and impart information and ideas through any media, regardless of frontiers.<sup>3</sup> Free speech bears many forms from what we have come to regard as media output and includes such actions as dress, cultural expression, and the right to assembly and association amongst others. It is in the output of journalists through the press that this handbook concentrates on, as it relates to the interaction of the output with the law.

Free speech as a concept in popular parlance seems to be understood by many, yet it is in the legal, political and philosophical terms that it demands a nuanced examination in what we have come to refer to as liberties, guarantees, rights, immunities - with or without correlative duties.

The mass media<sup>4</sup> - the term *(any)media* borrowing heavily from international conventions such as the UN Declaration on Human Rights – play a highly important role in what we have come to regard as a corollary to freedom of speech and what is termed, freedom of the press.<sup>5</sup> In the United States, some commentators have observed that freedom of the press is protected, not for its own sake, in the First Amendment, but for societal purposes. This forms the bedrock of what has been termed a distinct principle of free speech. This principle recognizes that the state is distinctly restrained in its governmental power. When the state has to address by law conduct that affects speech, it must give preferential treatment to any action that it may propose that has restraint on speech. This is one of the ways in which the principle is capable of continuation as a distinct principle.<sup>6</sup>

1 Schauer, F, *Free Speech: A philosophical Enquiry* (Cambridge university Press, Cambridge, 1982) pp. 3-7.

2 The United Nations has in place a specialized agency with a specific mandate to promote “the free flow of ideas by word and image”. The United Nations Educational Scientific and Cultural Organization (UNESCO) works to foster free, independent and pluralistic media in print, broadcast and online. Media development in this mode enhances freedom of expression( freedom of expression, and its corollaries, *press freedom* and *freedom of information*, are the rights seen as crucial foundations of democracy, development and dialogue, and as preconditions for protecting and promoting all other human rights). See <https://en.unesco.org/themes/fostering-freedom-expression>.

3 See Schauer, F, in 1 above.

4 For a discussion on mass media, see The World Bank Group; Broadcasting, Voice, and Accountability; A Public Interest Approach to Policy, Law, and Regulation (2008).

5 The revolution that ensued with the printing press, invented in Germany by Joannes Gutenberg around 1440, has as much to lend itself to the developments that became the mass media as we know it today. <https://www.bl.uk/romantics-and-victorians/articles/print-culture>.

6 Lewis, A. *Freedom of the Press*. Anthony Lewis distinguishes between Britain and America as cited in Herman E.S and Chomsky, *Manufacturing consent. The Political Economy of the Mass Media*. Vintage Random House, 1988 page 297.

Journalism - the practice by which the collection and editing of news for presentation through the media, the public press; the academic study concerned with the collection and editing of news or the management of a news medium; the writing designed for publication in a newspaper or magazine; the writing characterized by a direct presentation of facts or description of events without an attempt at interpretation; the writing designed to appeal to current popular taste or public interest,<sup>7</sup> and the media(journalism) law framework in Kenya has had a colourful, angst-filled and chequered past to put it very mildly.

Accusations of the late Philip Ochieng in 1992<sup>8</sup> to that of Wyban Mwangi in 2020,<sup>9</sup> present a continuum, discernible in similar high and low epochs if one but only examines the landscape over the two journalist's timeline of lamentations. The Media Council of Kenya, with a representation in the Council, of the Editors Guild in Kenya, has traded concerns over journalism, with the former accusing the latter of betraying the public interest and violating the code of conduct of journalism in Kenya.<sup>10</sup>

The law and the practice of journalism, it seems, are and will always be in uneasy cohabitation. We intend to provide a snapshot of the legal landscape review in this handbook only to aid in an understanding of what one may expect. This handbook is, however, not legal advice. All persons are advised to seek an advocate of the High Court of Kenya's opinion on their peculiar circumstances.

The Government of Kenya in 1989, under a *de jure* one-party political system, took a legal and policy decision to have the Kenya Broadcasting Corporation under the Kenya Broadcasting Corporation Act, to assume the Government functions of producing and broadcasting programmes or parts of programmes by sound or television; to provide for the management, powers, functions, and duties of the Corporation; and for connected purposes. It was not envisaged therefore that any person other than the Government could be engaged in broadcasting. Indeed, as KBC had as its object to:

*... assume the broadcasting services of the Government operating under the Kenya Broadcasting Corporation (Nationalization) Act, 1967.*

The corporation was in 1988, prior to the current 1989 Act, the sole licensor of broadcasting receiving apparatus and no other person could use the word 'broadcasting'. The print press was under strict regulation and some publications were banned and printing presses were destroyed by the State.<sup>11</sup> As of 1997, sedition, as an offense was repealed from the Penal Code.<sup>12</sup>

7 Merriam-Webster Dictionary. <https://www.merriam-webster.com/dictionary/journalism> Accessed 22 February 2022.

8 *I Accuse the Press: An insider's view of the media and politics in Africa*. Paperback - 1 January 1992 by Philip Ochieng.

9 <https://www.theelephant.info/reflections/2020/02/20/i-accuse-the-press/> Accessed 22/02/2022.

10 Kenya: Media Council's Action a Serious Affront to Editorial Independence <https://allafrica.com/stories/202003030126.html> Accessed 22/02/2022.

11 Makali, D. Ed. 2003, *Media Law and Practice*. The Kenyan Jurisprudence. Nairobi: Phoenix Publishers Ltd, provides an insightful record of what the journalism and media landscape was before the Constitution of Kenya, 2010.

12 Sections 56, 57 and 58 of Chapter 63 Laws of Kenya. In 2012, however, additions to the law were made and now prohibited publications were to be punishable by up to Kenya Shillings five million as a fine Section 66A of Chapter 63 of the Laws of Kenya.

When the State changed to a multi-party system of democracy in 1992, the journalism and media environment sought a new and better lease of life. The postal and telecommunications sector policy statement issued in January 1997, by the Ministry of Transport and Telecommunications, recognised in the foreword that:

*...substantial demands for basic services remain unsatisfied and the disparity in the distribution of communication facilities between the rural and urban areas continues to widen... (and that for the sector) ... to fulfill its mission as a catalyst for the growth of the nation's agricultural, commercial and industrial sectors, then fundamental structural reforms must be initiated...*

These policy guidelines initiated the restructuring of the Kenya Posts and Telecommunications Corporation into three entities: Telkom Kenya, Postal Corporation of Kenya (Posta), and The Communications Commission of Kenya (A new regulatory authority for the sector. The Kenya Communications Act, 1998, and the Postal Corporation of Kenya, Act, 1998, were duly passed into law.

The Communications Commission of Kenya was to... assume the regulatory functions for the sector... (then be) discharged by KPTC. Remarkably, there was not a single mention of media or broadcasting in the policy statement or indeed in the Kenya Communications Act, 1998. The Telecommunications and Postal Sector Policy Statement of April 1999, whilst providing for an enhanced statement of policy guidelines in the telecommunications sector, tellingly, also did not mention the media or broadcasting. Further and as if in keeping with a pattern of non-acknowledgment of media and broadcasting, in particular, the next policy guidelines in the Telecommunications and Postal Sector Policy Guidelines of 3 December 2001 (whilst providing further for the telecommunications and postal subsectors), also did not provide for broadcasting.

It was therefore a feat worthy of an exclamation that the *Information and Communications Technology Sector policy guidelines* of 31 March 2006, for the first time, provided a clear position on matters broadcasting. The policy was the product of a long and arduous multi-stakeholder assignment that resulted in far-reaching policy statements and direction.

The Kenya Communications (Amendment) Act, 2008 was the product of the policy of 2006. Those persons who had hitherto been engaged in broadcasting now had a grand-fathering clause for broadcasting services, requiring the CCK to respect and uphold the vested rights and interests of parties holding broadcasting permits issued by the Minister prior to the commencement of the Act.

This law, and especially the provision requiring all in broadcasting to apply for licenses, raised considerable acrimony amongst those that held broadcasting permits. The three main television broadcasters carried out a spirited campaign against the Bill that became the Kenya Communications (Amendment) Act No. 1 of 2009. They did not want to apply for licenses for the fear and claim that denial was a possibility, and that their apparatus, once licensed could be taken over in emergency powers by the state. The campaign included an advertiser's announcement in two of the daily newspapers. The two main dailies were owned by the lead campaigners (The Nation Media Group Ltd and the Standard Group Ltd) and as such this was for all purposes an editorial edict.

This campaign resulted mainly in an amendment to the now, Kenya Information and Communications, Act, 1998. A deletion was made to erase any ability of the regulator to deal with broadcasting apparatus and licensees, as it was related to the consequences of the declaration of a state of emergency. A grand-fathering clause to transition all permit holders into the new licensing regime was also included.

On Monday 23 December 2013, after a judgment in the *Royal Media Services Ltd & 2 others v Attorney General & 8 others* [2013] eKLR case that had marked the start of the campaign against the migration from analog to digital terrestrial broadcasting, the three main media houses in Kenya withdrew their broadcasts. The screens of more than 4 million viewers went blank. On 14 February 2015, the main terrestrial free-to-air television broadcasters went off air, and viewers were informed that they:

*...regret to inform our viewers that our regular broadcasts are no longer on air. Despite the ruling of 13 February 2015, reinstating the license and frequencies for digital broadcasting, the CA... (Communications Authority of Kenya) ... has declined to allow us the requisite time to import our own transmitters and set-top boxes that will enable our viewers to receive our broadcasts on our platform as provided by the Self-Provisioning Digital Broadcasting Licence granted by the Supreme Court. Our channels are, as a result, not available on pay-TV or any digital platforms.*

After 19 consecutive days of this second wave of withdrawal of broadcasts, they resumed transmission on digital platforms. At the time of this goings-on, there were over 50 digital television stations on air through transmissions by licensed signal distributors.

On 27 August 2010, the Constitution of Kenya, 2010, was promulgated. This resulted in a new Constitution which faithfully reflected the wishes of the people of Kenya.<sup>13</sup> These wishes included good governance and the rule of law.<sup>14</sup> A new dawn for the constitutional governance (including broadcasting and television broadcasting) for Kenya was introduced by the Constitution of Kenya, 2010.

Article 34 on freedom of the media, as read with Article 33 on freedom of expression, and Article 24 on the limitations of the Bill of Rights, soon found itself before the courts for interpretation as to the new implications in policy and law that had hitherto been implemented under the former Constitution.<sup>15</sup>

On 11 March 2020, the Director-General of the World Health Organization declared COVID-19 a pandemic.<sup>16</sup> As part of the measures in response to the pandemic, it was declared in Kenya that the government would launch the Google Loon services project to provide internet<sup>17</sup> capacity to the population in the pandemic.<sup>18</sup>

13 The New Constitution of Kenya Promulgation [L.N. 133/2010] under The Constitution of Kenya and the Constitution of Kenya Review Act, 2008 (No. 9 of 2008).

14 The Constitution of Kenya under the Constitution of Kenya Review Act, 2008 (No. 9 of 2008) The New Constitution of Kenya Promulgation [L.N. 133/2010] At C35-155" ... (It)... recognises that is the culmination of two decades, where the people of Kenya have yearned for a new Constitution which amongst others establishes a free and democratic system of Government that ensures good governance, constitutionalism, the rule of law, human rights and gender equity.

15 Constitution of Kenya, 1969. [www.kenyalaw.org](http://www.kenyalaw.org).

16 Address by Dr Tedros Adhanom Ghebreyesus where he observed that the corona virus disease (COVID-19) had seen 118,000 infection cases in 114 countries, and that 4,291 people have lost their lives. <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>. Accessed 21/04/2020..

17 A vast computer network linking smaller computer networks worldwide (usually preceded by the). The Internet includes commercial, educational, governmental, and other networks, all of which use the same set of communications protocols. <https://www.dictionary.com/browse/internet>. Accessed 20/02/2022.

18 On 23 March 2020, the President announced that it had allowed Google Loon services to offer 4th Generation internet access in Kenya. <https://www.president.go.ke/2020/03/23/kenya-approves-roll-out-of-google-loon-4g-to-mitigate-coronavirus-work-disruptions/> Accessed 20/02/2022.

The latter response underscored the important place of the internet as one of the technologies that would need to be in use during what became a key measure to maintain communication when the physical movement of citizens and inhabitants was curtailed.<sup>19</sup> An aspect of internet use trends indicates that the majority of users are on what is referred to as mobile broadband<sup>20</sup> as against fixed broadband.<sup>21</sup>

It is in the ensuing days under the ‘lockdowns’, that media use and consumption through linear and other television and over the internet rose to truly pose a challenge. News and current affairs, entertainment and sports programming on television changed. Social media applications saw significant rises in usage. Governments worried<sup>22</sup> about the veracity within the communications and technology companies<sup>23</sup> looked to input in keeping “truth” in the communications. Globally, an *infodemic* had arisen and freedom of speech, in a digital era, was under examination.<sup>24</sup>

On 25 May 2020, Darnella Frazier, a 17-year-old in Minnesota, Minneapolis took a video of a white police officer, kneeling for eight minutes and forty-six seconds on the neck of George Floyd, a 46-year-old black man, and thus killing him. Darnella posted the video on a social media platform, Facebook.<sup>25</sup> The video galvanized the Black Lives Matter<sup>26</sup> movement in the United States of America and the world at large.

Through the United Nations, the global community was forced to further confront the entrenched racism against black human beings that has been ongoing for centuries. The Human Rights Council requested the High Commissioner for Human Rights, with the assistance of relevant Special Mandate Holders, to prepare a report on systemic racism, violations of international human rights law against Africans and people of African descent by law enforcement agencies, especially those incidents that resulted in the death of George Floyd and other Africans and of people of African descent, to contribute to accountability and redress for victims.<sup>27</sup> The world was transfixed by the aftermath of the incident and in places as far away as Oxford University, a statue of a man who had self-named territories in his name,<sup>28</sup> was removed, from Oriel College.<sup>29</sup> The power of the media, in the internet age, had truly arrived.

19 Kenya issued a curfew effective from 27 March 2020. <https://www.president.go.ke/2020/03/25/presidential-address-on-the-state-interventions-to-cushion-kenyans-against-economic-effects-of-covid-19-pandemic-on-25th-march-2020/>. Accessed 20/02/2022.

20 This is the use of high-speed internet via mobile or smart device. The term broadband - broad bandwidth - has generally referred to internet speeds of a certain rate being the downlink and uplink speeds. Different capacities of the delivery of varying speeds means the term is not fixed and technologies are always evolving and making internet speeds higher and higher. A broadband Commission has been established by the United Nations with clear goals on the need for broadband for all. <https://broadbandcommission.org>. Kenya had a mobile broadband penetration in 2018 of 35% as per Estimates based on GSMA, UN, Xalam Analytics data. (Penetration based on unique users and target population aged 10 and above and Broadband is defined as average download speeds of 256 Kbps or greater while the target download speeds by 2021 is 3 Mbps). Figure 4.1 of A strategy for doubling connectivity by 2021 and reaching universal access by 2030, Broadband Commission Working Group on Broadband for All: A “Digital Infrastructure Moonshot” for Africa, October, 2019.

21 This is generally the dedicated, physical links of high-speed internet, connected mainly to homes and offices. This term also has different connotations and various technologies are under use to deploy this. Fixed-broadband subscriptions refers to fixed subscriptions to high-speed access to the public internet (a TCP/IP connection), at downstream speeds equal to, or greater than, 256 kbit/s. This includes cable modem, DSL, fibre to-the-home/ building, other fixed (wired)-broadband subscriptions, satellite broadband and terrestrial fixed wireless broadband. A strategy for doubling connectivity by 2021 and reaching universal access by 2030, Broadband Commission Working Group on Broadband for All: A “Digital Infrastructure Moonshot” for Africa October 2019, page 35.

22 In Kenya the spread of misinformation was discouraged during the pandemic. The Computer Misuse and Cybercrimes Act, 2018 in Kenya criminalises publication of false information under section 23. For instance, Coronavirus: ‘Plandemic’ virus conspiracy video spreads across social media. A 26-minute on exploded across YouTube, Facebook, Twitter and other websites, in late April 2020, prompting an attempt to remove it. <https://www.bbc.com/news/technology-52588682>

23 WhatsApp, a social media application, owned by Facebook, for instance, limited the ability of users to forward messages one chat at a time, as a way to slow down the spread of rumours, viral messages, and fake news. <https://faq.whatsapp.com/en/web/26000253/Facebook-too-took-to-taking-down-pages-with-misinformation-and-fake-news>. Accessed 20/02/2022.

24 According to WHO (Situation report 13, 2 Feb 2020), the 2019-nCoV outbreak and response has been accompanied by a massive ‘infodemic’ - an over-abundance of information - some accurate and some not - that makes it hard for people to find trustworthy sources and reliable guidance when they need it. Kenya was ranked 28th on reliable news during the pandemic. <https://covid19obs.fbk.eu/> Accessed 20/02/2022.

25 <https://www.salon.com/2020/05/26/i-cant-breathe-video-shows-white-cop-with-his-knee-on-a-black-mans-neck-who-died-in-custody>. Accessed 20/02/2022.

26 #BlackLivesMatter was founded in 2013 in response to the acquittal of Trayvon Martin’s murderer. Black Lives Matter Foundation, Inc is a global organization in the US, UK, and Canada, whose mission is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes. <https://blacklivesmatter.com/Accessed> 20/02/2022.

27 Over and above the international Convention on the Elimination of All Forms of Racial Discrimination Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 that entered into force 4 January 1969, the United Nations Human Rights Council (an inter-governmental body within the United Nations system made up of 47 States responsible for the promotion and protection of all human rights around the globe), a resolution (A/HRC/43/L.50) on excessive use of force by law enforcement officers against Africans and people of African descent. <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25981&LangID=E>. Accessed 20/02/2022.

28 Cecil Rhodes, named colonies in Africa, in Southern and Northern Rhodesia, (renamed Zambia and Zimbabwe, in 1964 and 1980 respectively). <https://www.historic-uk.com/HistoryUK/HistoryofEngland/CecilRhodes>. Accessed 20/02/2022.

29 The governing body of Oriel College voted in favour of removing its statue of the Victorian imperialist, Cecil Rhodes. It also set up an independent inquiry into key issues following a student-led campaign that began four years ago, as a result of protests by the #RhodesMustFall campaign which started in 2015 in South Africa, and ignited by the #BlackLivesMatter demonstrations across the UK, which included the dramatic toppling of a statue of the slave trader, Edward Colston, in Bristol. <https://www.theguardian.com/education/2020/jun/17/end-of-the-rhodes-ccil-oxford-college-ditches-controversial-statue>. Accessed 20/02/2022.

In other news, A nine-year-old boy made nearly \$30m in a year from “unboxing” and reviewing toys and games on YouTube to hold the title of highest-paid YouTuber for the third year running,<sup>30</sup> and the 45th President of the United States was handed a permanent block from Twitter.<sup>31</sup> What does this all mean for journalists in Kenya? This is a substantial backdrop against which and the context within which this handbook is presented for use by journalists in Kenya.

In Kenya, the free speech principle is addressed in the Constitution mainly<sup>32</sup> in three Articles: namely Articles 33, 34 and 24. First, Article 33 on Freedom of Expression provides every person with the right to freedom of expression, to seek, receive or impart information or ideas, freedom of artistic creativity; and academic freedom and freedom of scientific research, subject to a limitation with a speech that constitutes propaganda for war, incitement to violence, hate speech, advocacy of hatred.

Second, a new and important right was introduced in the 2010 Constitution, under Article 34; it provides for freedom of the media, for the first time in Kenya.<sup>33</sup> More specifically, the right:

*... guarantees for freedom and independence of electronic, print and all other types of media and bars the state shall from exercising control over or interfere with any person engaged in broadcasting, the production or circulation of any publication, or the dissemination of information by any medium, penalise any person for any opinion or view or the content of any broadcast, publication or dissemination. Broadcasting and other electronic media have freedom of establishment within licensing procedures necessary to regulate the airwaves and other forms of signal distribution... (Emphasis supplied)*

Finally, Article 24 addresses the extent to which rights and fundamental freedoms in the Bill of Rights, including freedom of expression and freedom of the media, can be limited. Accordingly, all fundamental freedoms in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Journalism and the media are increasingly facing turbulent times. In 2021 and under the pressure of a pandemic in COVID-19, UNESCO has put out a report Journalism is a public good: world trends in freedom of expression and media development: global report 2021/2022.<sup>34</sup> In the report, journalism has been hailed as life-saving especially in the pandemic through the role journalists played in giving useful and fact-checked information for the health and well-being of the public. Journalists also helped keep governments accountable for their actions in tackling remedial measures to contain the pandemic. Disinformation, a phenomenon that was magnified as the pandemic took hold, was fought by good journalism. News and information from high-quality sources that could be and were tried and tested for veracity continue to be very crucial for a free and just society, as it has always been. The public has an interest that this situation persists. It is in this public interest that journalism attains a public good status.<sup>35</sup>

30 Ryan Kaji, 9, earns \$29.5m as this year's highest-paid YouTuber. <https://www.theguardian.com/technology/2020/dec/18/ryan-kaji-9-earns-30m-as-this-years-highest-paid-youtuber>. Accessed 20/02/2022.

31 Twitter says Trump ban is permanent – even if he runs for office again. <https://www.theguardian.com/us-news/2021/feb/10/trump-twitter-ban-permanent-social-media>. Accessed 20/02/2022.

32 It is to be noted that there are other articles of the Constitution of Kenya that bear upon freedom of expression. This will be examined given that in interpreting the Constitution, ... It is now well established that the Constitution must be read as a whole ... see *Olum & another v Attorney-General of Uganda* [2002] 2 EA 508 as quoted in *Royal Media Services Ltd & 2 others v Attorney General & 8 others* [2013] eKLR.

33 Article 34 Constitution of Kenya, 2010.

34 <https://unesdoc.unesco.org/ark:/48223/pf0000379826>

35 Public goods are generally defined as essential services or commodities—such as schools, roads, street lighting, and parks—available to everyone in society without exclusion. Because these goods are frequently expensive to produce while offering little financial return, states often play a role, directly through funding or indirectly through regulation, in ensuring their provision. <https://unesdoc.unesco.org/ark:/48223/pf0000379826>

Fundamentally:

*“...A free, pluralistic, and independent media, a global normative standard since the early 1990s, has remained as relevant as ever. These principles were connected to additional imperatives in the 2021 Windhoek+30 Declaration<sup>36</sup> on information as a public good. As a public good, information empowers citizens to exercise their fundamental rights, supports gender equality, and allows for participation and trust in democratic governance and sustainable development, leaving no one behind. The Declaration recognized the urgent need to address both the economic viability of media outlets whose sustainability is under great stress and the transparency of internet companies about how they treat content on their services... While trusted news sources saw a surge in readership and viewership during the global crisis, in many ways, journalism has emerged weaker. The pandemic delivered a massive blow to the already shaky economic foundations of the news media industry, intensifying a trend in declining advertising revenue, job losses, and newsroom closures.”*

In the 30th Anniversary of the Windhoek Declaration on 3 May 2021, the UNESCO member States unanimously adopted the call for freedom of speech and of the press as a public good.<sup>37</sup> These and other contexts are the historic times that this book is written in.

<sup>36</sup> The 1991 Windhoek Declaration, adopted by journalists from across the African continent at a seminar organized by UNESCO, marked the beginning of a remarkable expansion of freedom, pluralism, and independence in news. UNESCO. 2021. Windhoek+30 Declaration. <https://unesdoc.unesco.org/ark:/48223/pf0000378158>

<sup>37</sup> UNESCO. 2021. Windhoek+30 Declaration. <https://unesdoc.unesco.org/ark:/48223/pf0000378158>.

# Chapter One

## Freedom Of Expression And Freedom Of The Media

Free speech as we know has its roots in parliamentary privilege. In Kenya, our conceptualization of freedom of expression, as it was introduced in the independence Constitution in 1969, was based on the United States of America's legacy with the guarantee. The Constitution of Kenya, 1969,<sup>1</sup> under section 79, provided for freedom of expression.

The antecedents to this guarantee can be traced from the meanings of the word's freedom of speech and of the press over their developments in England, from as far back as 1215 AD, and later adopted by the United States at independence in 1789. Parliament as a gathering convened for barons who were mandated to advise the Crown sought immunity and a plea of pardon from anything that they spoke and of petitions they made to the King, as Bills, in their sittings. Parliament then sought to punish those who interfered with their deliberations by preventing their attendance and further punishing those who offended the Crown. In the Magna Carta, aspects of this right were recognized. A development also occurred where Parliament also began to punish its own. It was when the Crown sought to punish members of Parliament that the right matured as parliamentary privileges, punishable only by members of parliament as against themselves, as we know them today were invoked. Members of the August house are immune from suits against what they say in Parliament. By 1689 the English Bill of Rights recognized that freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. It is in the penchant for Parliament to seek to punish those who were citizens railing against their conduct, that gave rise to the claim for a right to criticize the government and laid the foundation for what is enjoyed today by many in democracies around the world.<sup>2</sup>

By the time of the Universal Declaration of Human Rights in 1948, it had become settled (Article 19) that:

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

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<sup>1</sup> The Constitution of Kenya Act, No. 5 of 1969. The 1969 Constitution provided as follows, at section 79(1):

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communications be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

Section 79(2), as the limitations clause, provided inter alia that:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision... (b) that is reasonably required for the purpose of the protecting the reputations, rights and freedoms of other persons or to private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence maintaining the authority and independence of the courts or *regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television.* (Emphasis supplied)

<sup>2</sup> See, generally, *The Virginia Declaration of Rights had the first guarantee of the right.* See D.S. Bogen, "The Origins of freedom of Speech and the Press" (1983) 42 Maryland Law Review 429, 429-35.

The International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations (of which Kenya is a party to) entered into force on 23 March 1976. It provides that everyone shall have the right to hold opinions without interference, and everyone shall have the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of their choice. The exercise of the rights provided for carries special duties and responsibilities for the respect of the rights or reputations of others and for the protection of national security or of public order (ordre public), or of public health or morals.<sup>3</sup>

The African [Banjul] Charter on Human and Peoples' Rights, adopted on 27 June 1981, in Nairobi, by the Organization of African Unity (now, the African Union), to which Kenya is a party, provides for the right of free speech in Article 9, in that every individual shall have the right to receive information and that every individual shall have the right to express and disseminate his opinions within the law.

These rights are enforceable through the African Commission on Human and Peoples' Rights, established within the African Union to promote human and peoples' rights and ensure their protection in Africa.

The philosophical underpinning of freedom of speech and how that freedom sits with freedom of the press calls for revelation. What then is free speech? Fredrick Schauer, in his seminal work, *Free Speech: A Philosophical Enquiry*,<sup>4</sup> posits that:

*'The free speech principle is a distinct principle. It is not however necessarily superior to other principles with distinct limitations on government power. Although there may be instances when it is given cognizance from a view on another general principle, say, the principle of liberty, or when it may be part of a wider principle of say democracy or equality, it is on the whole capable of standing on its own. It is this principle, which recognizes that the state is restrained in its governmental power in a distinct way when conduct that affects speech is in issue. That the state must give preferential treatment to any action that has a restraint on speech is one of the ways in which the principle is capable of continuation as a distinct principle, for if there were no greater justification required of the state in the exercise of its legitimate power, when that power is exercised in a manner that affects speech, then it would hardly be possible to claim that an independent free speech principle exists. Indeed, governments in a democratic society in exercise of power legitimately over conduct that affects speech, have to accord speech preferential treatment, for if this were not so then the principle would be "only an illusion"...'<sup>5</sup> (Emphasis supplied)*

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<sup>3</sup> Article 19..

<sup>4</sup> At section 29.

<sup>5</sup> The theory of freedom of speech or the free speech principle has been said to be grounded on the arguments from four main underpinnings: the argument of truth, the argument from democracy, the argument from utility and happiness of the person, and the argument from dignity of the person. Truth, or its best approximation, has been said to be best discerned from competing voices, narratives and opinions. Democracy as a way of societal governance is said to best assured by the exercise of exercise of the right to free speech by persuasion to a majority in societal aspirations. The human being, it is argued, is in search of happiness and that free speech is an aid in this quest. The autonomy of thought and expression of that thought, that is a desirable in human existence is viewed as a reason to advance the need for free speech..

It is in the furtherance of this trite philosophical underpinning of this principle, free speech - as regulated by states - then, that a way of legally limiting the exercising of freedom of expression/speech (freedom of the press), is possible.<sup>6</sup> The press plays an important role in the enjoyment of the right to freedom of speech by society in that they embody a significant mechanism for the full attainment of the right to democracy, especially. It is likely that the press plays an integral role by assembling the views and opinions of many members of the society and having those views and opinions communicated in different times, space and reach. The individual person therefore needs a medium that facilitates the fullest expression of his speech. The medium - the media - is in a position of trust in society to carry out this function. If this function is to be limited or curtailed, it is by extension, a curtailment of the right of the individual in his expression. The limitations must then be within acceptable bounds, as rights are not absolute.

As mentioned earlier, On 27 August 2010, the Constitution of Kenya, 2010, was promulgated resulting in a new Constitution faithfully reflecting the wishes of the people of Kenya,<sup>7</sup> for good governance and the rule of law.<sup>8</sup>

Freedom of expression as provided under section 33, has not been the subject of serious contention in the Supreme Court of Kenya but it is in the High Court in the case of *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR, wherein the judge, John M. Mativo, in finding criminal libel (section 193 of the Penal Code.) unconstitutional had this to say at pages 12-14:

*Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand, the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions. The freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions and views with complete freedom and by resorting to any available means of publication, subject again to such restrictions as could be legitimately imposed under Article 24 of the constitution.*

*The right to uninhibited freedom of expression conferred by Article 33 is basic and vital for the sustenance of parliamentary democracy, which is a part of the basic structure of the Constitution. The "reasonable restrictions" are those which are meant to prevent the expression of a thought which is intrinsically dangerous to public interest and would not include anything else. The enabling power in Article 24 to impose reasonable restrictions on the right conferred by Article 33 is intended to safeguard the interests of the State and the general public and not of any individual, and, therefore, Article 24 cannot be regarded as the source of authority for Section 194 of the Penal Code which makes defamation of any person an offence. That apart, Article 24, being an exception to Article 34(sic 33) needs to be construed narrowly and it cannot constrict the liberal interpretation warranted to be placed on Article 33 of the Constitution.*

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6. A coinage for media generally from the revolution that ensued with the printing press, invented in Germany by Joanes Gutenberg. The notion that the press should be free could have emerged only after the press itself had become commonplace. The invention led to the proliferation of books, newspapers, and other publications that spread ideas faster and farther than ever before. However, because of the potential for these ideas to challenge official power structures, some political and religious authorities actively suppressed publications that they deemed subversive. An early defense of press freedom was made by the poet John Milton in his 1644 pamphlet *Areopagitica*, written in response to the British Parliament's passage of a law requiring the government to approve all books prior to publication. <https://www.britannica.com/story/250-years-of-press-freedom>.
  7. The New Constitution of Kenya Promulgation [L.N. 133/2010] under The Constitution of Kenya and the Constitution of Kenya Review Act, 2008(No. 9 of 2008).
  8. The Constitution of Kenya under the Constitution of Kenya Review Act, 2008 (No. 9 of 2008). The New Constitution of Kenya Promulgation [L.N. 133/2010.] At C35-155" ... (It)... recognises that is the culmination of two decades, where the people of Kenya have yearned for a new Constitution which amongst others establishes a free and democratic system of Government that ensures good governance, constitutionalism, the rule of law, human rights and gender equity.

The schematic intendment in Article 24 is founded on the fundamental tenet of interests of the State and the public in general and hence, regard being had to the nature of fundamental rights and scope of reasonable restrictions to be imposed thereon, the exception has to be understood applying the principle of the latin maxim *noscitur a sociis* (which means that the **meaning** of a word may be known from accompanying words. ... Under the doctrine of *noscitur a sociis*, the **meaning** of questionable words or phrases in a statute may be ascertained by reference to the **meaning** of words or phrases associated with it). Criminal defamation aims to protect individual interest while the limitations under article 24 seek to protect the public interest as opposed to a person or individual interests... It certainly cannot be gainsaid that the offence of criminal defamation operates to encumber and restrict the freedom of expression enshrined in Article 33 of the Constitution. Does the offence of criminal defamation fall into the category of permissible derogations contemplated in Article 24 of the constitution, being a provision designed to protect the reputations, rights and freedoms of other persons? What is in issue for determination by this Court is whether or not it is a limitation that is reasonably justifiable in a democratic society. The practical consequences that would ordinarily flow from a complaint of criminal defamation are as follows; the accused person would be investigated and face the danger of arrest. This would arise even where the alleged defamation is not serious and where the accused has an available defence to the charge. Thereafter, if the charge is prosecuted, he will be subjected to the rigors and ordeal of a criminal trial. Even if the accused is eventually acquitted, he may well have undergone the traumatizing gamut of arrest, detention, remand and trial. Moreover, assuming that the accused has employed the services of a lawyer, he will also have incurred a sizeable bill of costs which will normally not be recoverable.

*I would accept that the foregoing tribulations are not peculiar to the offence of criminal defamation and would potentially be encountered by an accused person charged with any serious criminal offence. However, what is distinctive about criminal defamation, though not confined to that offence, is the stifling or chilling effect of its very existence on the right to speak and the right to know. This, in my view, is the more deleterious consequence of its retention in the Criminal Law Code.*

*For example, it cannot be denied that newspapers and modern communication methods play a vital role in disseminating information in every society, whether open or otherwise. Part and parcel of that role is to unearth corrupt or fraudulent activities, executive and corporate excesses, persons who are dangerous to the society and other wrongdoings that impinge upon the rights and interests of ordinary citizens. It is inconceivable that the citizens, the media and Civil Societies could perform investigative and informative functions without defaming one person or another. The overhanging effect of the offence of criminal defamation is to stifle and silence the free flow of information in the public domain. This, in turn, may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices.*

*The chilling effect of criminalizing defamation is further exacerbated by the maximum punishment of two years imprisonment imposable for any contravention of section 194 of the impugned section. This penalty, in my view, is clearly excessive and patently disproportionate for the purpose of suppressing objectionable or opprobrious statements. The accomplishment of that objective certainly cannot countenance the spectra of imprisonment as a measure that is reasonably justifiable in a democratic society. ... the availability of an alternative civil remedy under the actio injuriandum in the form of damages for defamation, affords ample compensatory redress for injury to one's reputation. Thus, the invocation of criminal defamation to protect one's reputation is in my view unnecessary, disproportionate and therefore excessive and not reasonably justifiable in an open democratic society based on human dignity, equality and freedom. (Emphasis supplied)*

These findings by the judge should form the basis of contestation and tests before the courts in future on freedom of expression, on some of the general law provisions that will be examined in Chapter 6. The findings are illuminating and lay a clear basis for the manner in which freedom of expression is to be limited. It would be of great interest if some aspects of general law, that falls within the limitations as contemplated in Article 24, were to be tested on these findings. It would be of interest too, to have these findings examined against those of Odunga, J in *Phinehas Nyagah v Gitobu Imanyara* [2013] eKLR at paragraph 15 wherein he stated that Article 33 is the constitutional fulcrum of the law of defamation.

In matters media freedom, however, it is in history of the right as it evolved in the constitutional making processes, that one discerns crucial nuances. Firstly, under the *Bomas Draft*<sup>9</sup> Freedom of the media under Article 50 provided that:

*Freedom and independence of electronic, print and other media of all types are guaranteed...*

*(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that – (a) are designed to ensure the necessary regulation of the airwaves and other forms of signal distribution; and (b) are independent of control by Government, political interests or commercial interests.*

*...(5) Parliament shall enact legislation that – (a) makes reasonable provision for equitable allocation of airtime by State-owned and other specified categories of broadcasting media, to political parties either generally or during election campaigns; (b) regulates freedom to broadcast in order to ensure fair election campaigning, and (c) provides for the establishment of a body which shall be independent of government or political control and reflective of the interests of all sections of the community, and which shall set media standards, and regulate and monitor compliance with those standards.* (Emphasis supplied)

These provisions were in direct response to the opaque licensing frameworks under the KPTC Act<sup>10</sup> and the inequitable access to broadcasting under the KBC Act.<sup>11</sup>

Secondly, under the Referendum, 2005 (popularly known as the ‘Wako Draft’) provided under Article 50:

*Freedom and independence of electronic, print and other media of all types are guaranteed...*

*(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that – (a) are designed to ensure the necessary regulation of the airwaves and other forms of signal distribution; and (b) are independent of control by Government, political interests or commercial interests.*

*(4) All State media shall be independent and impartial and shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions.*

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<sup>9</sup> The Draft Constitution of Kenya [Bomas Draft], 15 March 2004. [Constitution of Kenya Review Commission. Adopted by the National Constitution Conference on 15 March 2004] [https://katibaculturalrights.files.wordpress.com/2016/04/kenya\\_4\\_draft\\_constitution\\_bomas\\_draft\\_2004.pdf](https://katibaculturalrights.files.wordpress.com/2016/04/kenya_4_draft_constitution_bomas_draft_2004.pdf) . It is noteworthy that the first Conference to consider the first draft did not take off as Parliament was dissolved and it is not until April 2003 that the second attempt delivered this draft. This draft was, however, not put forth, as 3 cases stopped the process that would have led to its consideration for adoption. See <http://www.cgd.or.ke/documents/Transition%20Booklet.pdf> and <http://katibainstitute.org/Archives/index.php/2005-referendum>.

<sup>10</sup> Chapter 411 Laws of Kenya.

<sup>11</sup> Chapter 221 Laws of Kenya. The ruling party KANU, had monopoly access and coverage, especially during the period 1982 and 1990 as KANU was the only legal political party.

*(5) Parliament shall enact legislation that – (a) makes reasonable provision for equitable allocation of airtime by State-owned and other specified categories of broadcasting media, to political parties either generally or during election campaigns; (b) regulates freedom to broadcast in order to ensure fair election campaigning; and (c) provides for the establishment of a body which shall be independent of government or political control and reflective of the interests of all sections of the community, and which shall set media standards and regulate and monitor compliance with those standards... (Emphasis supplied)*

Thirdly, a review of the two provisions under the Revised Harmonised Draft Constitution of Kenya of 2010<sup>12</sup> had Article 39 on Freedom of the media reading as follows:

*(1) Freedom and independence of electronic, print and other media of all types are guaranteed.*

*...(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that— (a) are designed to ensure the necessary regulation of the airwaves and other forms of signal distribution; and (b) are independent of control by government, political interests or commercial interests...*

*...(5) Parliament shall enact legislation that provides for the establishment of a body which shall— (a) be independent of government or political control; (b) reflect the interests of all sections of the society, and (c) set media standards and regulate and monitor compliance with those standards.* (Emphasis supplied)

The last sub-article (5) had been transformed through brevity or other concerns<sup>13</sup> to read quite differently from the previous two drafts. These are key highlights of the evolution of the freedom of the media under the part on Rights and Fundamental Freedoms.

Firstly, the right and freedom of the media was an all-new freedom imbued with historical underpinnings on the part of a guaranteed freedom, freedom of establishment of the media, freedom from control by the state and or penalties for opinions, broadcasting regulation, and the need for an independent regulator. These underpinnings are reflected in the sub-Articles 1, 2, 3, 4 and 5. Whereas sub-Articles 1, 2 and 3 of the fundamental freedom remained intact all through the drafts to the current Constitution, sub-Articles 4 and 5 and in the case of the Wako Draft, sub-Article 6, under it, changes that were of significant import. The changes are as highlighted in the emphasis above in relation to the current Article 34 to the Constitution of Kenya, are germane, as they are examined below.

Under the Revised Harmonised Draft Constitution of Kenya of 2010:

*...(5) Parliament shall enact legislation that – (a) makes reasonable provision for equitable allocation of airtime by State owned and other specified categories of broadcasting media, to political parties either generally or during election campaigns; (b) regulates freedom to broadcast in order to ensure fair election campaigning; and (c) provides for the establishment of a body which shall be independent of government or political control and reflective of the interests of all sections of the community, and which shall set media standards, and regulate and monitor compliance with those standards.* (Emphasis supplied)

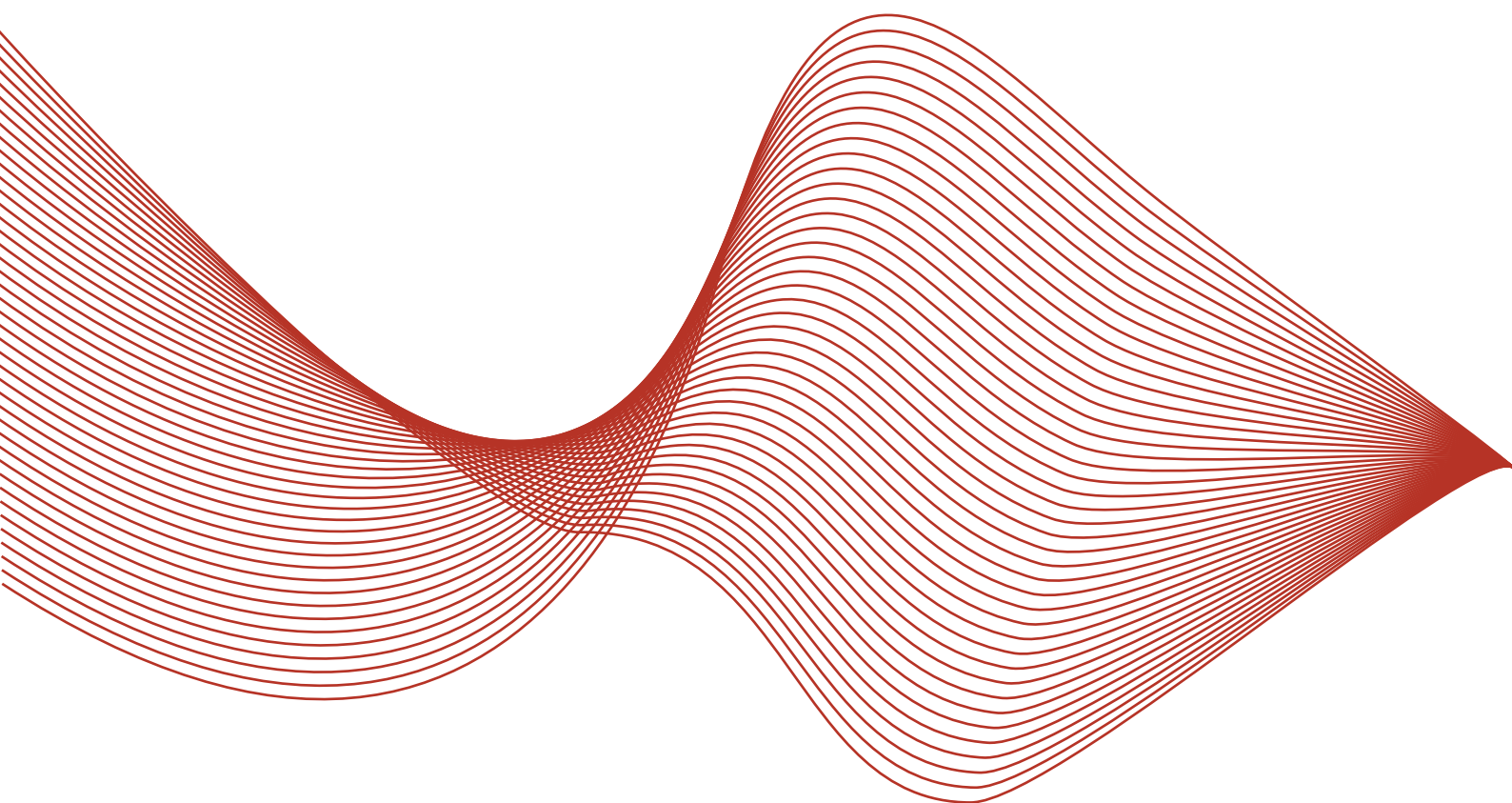
13. The Harmonized Draft Constitution of Kenya as reviewed by the Committee of Experts on Constitutional Review, pursuant to section 32(1)(c) of the Constitution of Kenya Review Act, 2008 and presented to the Parliamentary Select Committee on Constitutional Review on 8 January 2010. [http://kenyalaw.org/Downloads/the\\_revised\\_harmonised\\_draft\\_constitution\\_of\\_kenya.pdf](http://kenyalaw.org/Downloads/the_revised_harmonised_draft_constitution_of_kenya.pdf).

14. It is not clear from the report of the Committee of Experts what the concern with the previous drafts were.

From the foregoing, it is clear that the various amendments that the Article underwent were borne out of concerns emanating from history. The history was one that took cognizance of the dominant place of the Kenya Broadcasting Corporation,<sup>14</sup> the lack of impartiality of the programming of the corporation, the need to preserve diversity and plurality of opinions in broadcasting and especially, during election campaigns amongst others.

This then is the backdrop to which the new rights of freedom of expression and of the media were to be enjoyed and actualised by the state.

This right has been affirmed in the Supreme Court of Kenya in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. This case will be examined in detail in chapter six on media regulation.



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<sup>14</sup> Set up under the Kenya Broadcasting Corporation Act.

# Chapter Two

## Defamation

The term defamation may be defined as the publication of false material of and concerning a person which exposes them to hatred, ridicule and contempt, causing them to be lowered in the estimation of others, or to be shunned and avoided by an appreciable member of the general public or community.

Defamation is a tort in that it is a common law civil wrong that arises out of a duty of care which arises by virtue of the position of the publisher with respect to the person defamed. Defamation is the term used to cover the two terms libel and slander. Slander is differentiated from libel in that the latter is embodied in a permanent form. Slander is, therefore, what is spoken or is in a transient form.

Under libel, it is presumed that the claimant has suffered loss and damage whilst under slander the claimant has to claim the loss and prove it specifically.

Defamation law has as its social foundation, a strain on the legal consequences of speech in a democratic society. Many commentators have viewed the common law foundations of this tort as evolving with such undue complexity as to render clear logical conclusions unattainable.<sup>15</sup> This is especially, poignant in the United States of America, as the holding in the *New York Times Co. v Sullivan* 376 U.S.254 (1964), illustrated the tensions between the law of defamation and the First Amendment to the Constitution. The decision was further reinforced and the constitutional legitimacy of defamation law tested and defined in *Gertz v Robert Welch, Inc* 418 U.S.323 (1974).<sup>16</sup> Kenya has yet to have any case that directly answers the social foundations of defamation law in keeping with the Kenyan society and the Constitution of Kenya 2010, despite the holding in *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR.

The Defamation Act in Kenya and in most jurisdictions covers broadcasts and other live performances captured in transient form further restricting the manifestations of actions in slander as opposed to libel. Still, further exceptions in which the claimant is treated as if he were in a libel action and therefore need not prove his actual damage are in sections 3, 4 and 5 of the Defamation Act Chapter 36 Laws of Kenya (termed injurious falsehoods) and concern; words calculated to disparage the plaintiff in his office, profession, calling, trade or business; or imputing unchastity to any woman or girl; or in relation to title, goods or other malicious falsehood are calculated to cause pecuniary damage to the plaintiff.

Consequently, it is rare that actions based on slander are brought forth. The Constitution of Kenya at Article 25, 33(3) and 34(1) and 34(5) (c) provides the bedrock from which defamation law emanates. As stated by Odunga, *J* in *Phinehas Nyagah v Gitobu Imanyara* [2013] eKLR at paragraph 15:

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15. In the United Kingdom, the Faulkes Committee, in the Report of the Committee on Defamation, Cmnd.5909 (1975) is a good example of the acknowledgement of the enduring tensions between defamation law and a free press.

16. See generally, Frederick Schauer, *Social Foundations of the Law of Defamation. A Comparative Analysis*. Journal of Media Law & Practice 3-23 (1980).

*Article 33(1)(a) provides that every person has the right to freedom of expression, which includes the freedom to seek, receive or impart information or ideas. However, clause (3) provides that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. This, in my view, is the constitutional fulcrum of the law of defamation. Accordingly, the law of defamation is not just anchored on a statutory enactment but has been given a constitutional underpinning as well. In a tort for defamation the Court is, therefore, under a duty to balance the public interest with respect to information concerning the manner in which its affairs are being administered with the right to protect the dignity and reputation of individuals.*

Defamation as a tort, is a law that provides legal restrictions on the limit of the freedom of speech on all and further thus the press or the media to publish what they wish. Defamation in Kenya is further governed by the Common law as modified by the Defamation Act, Chapter 36 of the Laws of Kenya.

The three main elements of a defamation action are:

- (a) Publication;
- (b) Identification;
- (c) “Of and Concerning” the Plaintiff (the person with a claim in defamation);

## (a) Publication

Before a defamation action is commenced the words complained of (referred to as defamatory matter) must be made by a person (titled a defendant in the ensuing action) to another person other than the plaintiff (the claimant in the action) in Kenya. The Defamation Act in Kenya does not define publication and, therefore, who may be deemed a publisher for purposes of defamation. However, at common law, all those persons who participated in the publication of the words complained of are liable to defamation actions as publishers.

There is to be found a defence of innocent dissemination at common law, though. This arises where a person is able to show, on the usual standard of proof, that they did not know or suspect and would not have reasonably and with due diligence known or suspected that the matter, which they published, contained the words complained of. This covers disseminators such as newspaper vendors, messengers, letter carriers and perhaps persons involved in the manual publication processes in the old sense of operating type-presses. Re-publication is publication for purposes of defamation and all persons involved in making the words known to third parties are liable to a defamation action.

Publication on the internet and especially with reference to social media, is considered publication for purposes of defamation. It is also considered that wherever the publication may be downloaded is the place of publication. A plaintiff may, therefore, choose to sue in more than one country if the material was downloadable in those countries (jurisdictions). The monetary sum of damages due to a plaintiff will, however, revolve around the number of persons, to whom the publication was available to so as to provide a basis for the “community”.

## (b) Identification

The words, as published, must of necessity identify the person claiming to have been defamed (referred to as the plaintiff). There are various ways that this can be achieved in order for the plaintiff to prove this. The plaintiff may show that indeed they were identified by their name. This is usually the most common occurrence in defamation actions.

The plaintiff may also show that specified third parties to whom the defamatory matter were published were capable, through extrinsic facts not perhaps known to all recipients of the words, of identifying the plaintiff from say, the description given of the place they work, live, their physical appearances etc.

In terms of a class or a group, it is generally the law that unless a person can identify himself as part of a class or group as singled out, usually through extrinsic facts as stated hereinabove, then it may not be possible for a defamation action to lie. A class or group is therefore not capable of being defamed as such. However, if a specific part of the group or class is ascertainable apart from the class or group and is capable of identification, then action may lie from any member of the said class or group notwithstanding that some of the members of the group or class are expressly stated as not to be included in the words complained of.

## (c) “Of and Concerning the Plaintiff”

This is a most crucial element of a defamation action that a plaintiff must make out as the other two hereinabove. It may be that the plaintiff is identified in the publication but that the words are not published of and concerning him. Is it then possible for a defendant to say for instance that the words complained of referred to a person with a similar name to the plaintiff or plaintiffs and that, therefore, only that other person or persons can sue for defamation? The answer is no. The intention on the part of the publisher is therefore not a consideration in defamation proceedings. Indeed, the publication may be quite unintentional and the publisher may actually be unaware of the actual defamatory matter but as long as a person is capable of showing that they were identified and the words were of and concerning them a defamation action is made out.

If words as read are capable of being understood to refer to the plaintiff and are so understood it is presumed that they were indeed actually so understood. If words complained of are published relating to more than one person and are found to defame each of them in their respective localities and circumstances known to them because the words are so understood to refer to each of them, then all persons so defamed may maintain an action against the publisher irrespective of the fact that indeed the intention was to publish another person other than the persons so defamed and still capable of such reference from the words published. What standards are used in construing the words complained of? To arrive at the conclusion that the words or imputations thereof are “Defamatory” (or that they are defamatory matter)?

This is answered by through two questions:

- (1) To whom should the words have effect on?
- (2) What should be the effect of the words?

### *(1) To whom should the words have effect on?*

If a person claiming to be defamed can show that the words had the effect on any of the following, then a publication will be deemed to have had the effect on the person so described as to make out an element in defamation.

- Right thinking members of the community.
- Ordinary members of the community or the general public.
- An appreciable and reputable section of the community

### *(2) What should be the effect of the words?*

This is now settled and is made out by the person claiming to be defamed if any one, or a combination of any or all three is shown as the effect on the persons described above.

- The plaintiff was exposed to hatred, ridicule and contempt.
- The plaintiff was lowered in the estimation of others.
- The plaintiff was shunned and avoided.

How does one establish meaning of defamatory matter? Or put another way, how is the publication deemed defamatory?

It is established that in a publication, words or pictures may only convey a meaning as that which may be discernible by the persons who are stated above. There are however instances when a publication may carry a hidden meaning. This meaning may in turn be appreciable to all or to only a special class of persons in a community.

Three ways are therefore used:

- (1) The ordinary and natural meaning of the words.
- (2) Implications from reading between the lines. It involves the drawing of imputations.
- (3) Legal or true innuendo. This is the establishment by the plaintiff of the existence of extrinsic facts, which cause the matter to be defamatory.

## **Criminal Libel**

The High Court in the case of *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR, John M. Mativo, J. found criminal libel under section 193 of the Penal Code, unconstitutional.

## **Defences to Defamation Actions**

### **(a) Justification**

At common law the truth of the defamatory matter charged is a complete defence and it is the only defence that came to be and is considered as constituting the term “justification”. This is embodied in Kenya, albeit as qualifying the common law truth defence in the Defamation Act at section 14. It is a defence that is available best to meet a defamation claim but is rarely invoked by media persons due to certain technicalities including the shielding of informers. Truth alone, therefore, is a defence to a defamation action. Actionable defamation presumes a false statement and therefore, there can be no action on true statements.

## (b) Privilege

### Absolute and Qualified - (Fair Report privilege)

This is to be found in two forms, which exist at both common law and under the Defamation Act. There is absolute privilege and qualified privilege. The latter has many categories under common law and under statute law. Under the Act, the absolute privilege is found in section 6, 9 and 10 as regards judicial proceedings and parliamentary reports, respectively. At section 11 in relation to extracts of parliamentary reports, the privilege becomes qualified in that, the defendant must show that the publication was made bona fides and without malice.

The Constitution at Article 117 provides freedom of speech and debate in Parliament. The Common law provides for immunity of suits in defamation on anything said in judicial proceedings by judges, magistrates, advocates and witnesses. See *Munster v Lamb* (1883) 11 QBD 588.

Qualified privilege is to be found in section 7(1) and 7(2), the latter in relation to publication of court proceedings and other matters embodied in Part I and Part II of the Schedule to the Act. Both defences are also in section 8(2) with regard to wireless broadcasts. This defence was elaborated on by the Court of Appeal in *Kaira Mutwiri Kioga & another v Standard Limited & 3 others* [2015] eKLR in a case that involved the publication by the respondents, which publication was not shown to have been false. The Court went on to state that at page 8:

*But even if it had been proved, it appears to us, and we so hold, that the publication by the respondents fell under the defence of qualified privilege that they raised. That defence is provided for in Section 5(sic 7) of the Defamation Act, (Cap. 36) as follows:*

*“7(1) Subject to the provisions of this Section the publication in a newspaper of any such report on such matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice;*

*(2) In an action for libel in respect of the publication of any such report or other matter as is mentioned in Part II of the Schedule to this Act, the provisions of this Act shall not be a defence if it is proved that the Defendant has been requested by the Plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.*

*(3) Nothing in this Section shall be construed as protecting the publication of any matter the publication of which is prohibited by law, or any matter which is not of public concern and the publication of which is not for the public benefit”.*

*That Section is followed by section 7A which provides for a right of reply whereunder a person aggrieved by a newspaper publication may provide a rebuttal or clarification which the newspaper is bound to carry with the same prominence the impugned publication and at the earliest.*

The difference between the two types of privilege is that, in absolute privilege the presence or absence of malice or the lack of good faith does not affect the defence. Under qualified privilege the presence or absence of malice or the lack of good faith affects the defence. Malice is to be determined if the published words were deliberate or reckless or even negligently ignoring of facts. See *J P Machira v Wangethi Mwangi and Nation Newspapers*, Civil Appeal No. 179 of 1997.

The absolute privilege that is covered under section 6 with regard to court proceedings requires that although a report need not be complete or accurate in every respect, it must be substantially accurate. The test is whether the report substantially alters the impression a person at the proceedings would have gained had he been present.

At common law, there is a defence that is rarely relied on by the media, which also rests in the category of qualified privilege and covers situations where both the defendant publisher and the recipient(s) of the defamatory material have a duty, correlative, based on legal, social or moral considerations or other interest, in relation to the publication. The difficulty, which is appreciable immediately, is that the media may not show that this kind of duty existed between them and either their readers or listeners. The defence is only available for cases involving individuals and small groups.

### (c) Comment

This is by far the most common of defence available to the media. It requires elaboration. This is a defence that is available under statute as well as under common law. The Defamation Act provides for the same in a more amending than declaratory manner at section 15 under the title, fair comment. It can be defined as a matter that has the character of comment in that it is an expression of opinion based on some other material, and the opinion is one, which an honest man might hold on the basis of that material. At common law it must be shown that the defamatory matter on which the defence is sought against meets certain tests. Where the matter published comprises statements of fact and comment based on those facts, the facts must of necessity be true. As the Court stated in *Kagwiria Mutwiri Kioga & another v Standard Limited & 3 others* [2015] eKLR at page 9:

*Those headlines themselves did not, in our view, contain facts. They were expressions of opinion. The test to be applied to them is one of honesty. If the opinions were honestly held by the respondents, culpability does not attach. We think that the opinion of Lord Denning MR. in SLIM v Daily Telegraph [1968] 1 All E.R. 497 is apposite:*

*“If [the writer] is an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations; no matter that his opinion was wrong or exaggerated or prejudiced, and no matter that it was badly expressed so that other people read all sorts of innuendos into it, nevertheless he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it... I stress this, because the right of fair comment is one of the essential elements of freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to ‘write to the newspaper’ [or write in the newspaper, as is the case herein] and the newspaper should be free to publish his letter [or article]. It is often the only way to get things put right. The matter must of course be one of public interest. The writer must get his facts right; and he must honestly state his real opinions. But that being done, both he and the newspaper should be clear of any liability.*

*They should not be deterred by fear of libel actions...” We are fully satisfied that the learned Judge was right in holding as he did that there was nothing shown by Kioga to remove the articles complained of from the protection of the rolled up defence they mounted, of qualified privilege and fair comment without malice on a matter of public interest. That being so, the claim for defamation had to fail and so does this appeal on that critical point. (Emphasis supplied)*

Where the matter is published based on the basis of conduct that has become public knowledge it may not be necessary that the comment should contain the statements of facts on which it is based on. The basis of the comment must however be identified to allow the recipient to know them or provide an avenue to ascertain them. This identification may be in the published defamatory matter or may be upon inference drawn from the nature of the comment and the notoriety of the circumstances it is made. The publisher must prove the conduct or so much of it as is the basis of the comment. A comment may also be on a publication that is privileged in which case it would be possible to comment on the published privileged material without losing on the defence. The report then forms the basis of the comment. The opinion or comment must be on matter that is in the public interest. As to whether both the facts/conduct/performance and opinion /comment must meet the public interest test the courts have yet to decide that. It is assumed that proof of either would sustain the defence.

Under the Defamation Act, the requirement to prove truth of the facts has been relaxed by section 15 and the defendant now need not prove the truth of every allegation. If such of the allegations of fact are proved in relation to the expression of opinion is fair comment on them, then the defence will hold. On the question of “fairness” it is required that the defendant, if the author of the comment hold the view honestly for fairness in the comment to be established.

The defence will also fail despite having complied with the proper material for comment, in the public interest and honestly held opinion of the author tests, if the person complained against is actuated by malice by publishing matter in the form of comment, which is not comment at all.

The defence fails because then the matter published is not comment and not because of the malice. Malice on its own therefore, cannot defeat the defence if all other tests are met. Where the defendant publishes matter that meets all the tests but for the ‘honest opinion of author’ test, and does not purport to hold the opinion itself expressed by the author, the defence will still succeed.

This is the basis of the comment defence by strangers that is available for publishers of letters to the editor pages and or paid advertisements. The defence of fair comment will thus be established if:

- i. The defamatory material contains one or more comments or opinions as opposed to statements of fact.
- ii. There must exist, expressly or impliedly the substratum, which is true or put forward as true or on reliance of a privileged occasion, to which the comment refers.
- iii. The defamatory material must be matter of public interest. The opinion expressed must be fair in that it could be held by an honest man and was actually held by the defendant.

### (d) Publication without Malice or Gross Negligence

It is an additional defence under the Act at section 12 for a newspaper publisher in a libel action to show that the libel was inserted in the publication without malice and without gross negligence and that before or immediately after a suit in defamation there was a full apology and the publisher has on filing a defence, paid into court money by way of amends.

### (e) Unintentional Defamation

It is generally the law at common law that the intention of the publisher is irrelevant in relation to any particular person and not another in the sense of “of and concerning the plaintiff”. The Defamation Act however at section 13(1) allows that a publisher may make an offer for amends before or after a suit is filed and once accepted, this is a complete bar to a suit or further action in a defamation suit. If the offer for amends is not accepted the publisher must prove that the offer was made within reasonable time of receipt of notice of possible defamation of the plaintiff and that there was innocence in the publication and that there is a continuance of the offer for amends. An offer of amends is an offer for a publication of a correction of words complained of and an apology to the plaintiff.

The offer of amends once accepted, allows the publisher to only be liable for costs and expenses incurred by the plaintiff on an indemnity basis. No damages are therefore due. On the other hand, the non-acceptance of an offer for amends will be accepted in the reduction of any damages due to the plaintiff. There is however, no general right of an apology over and above a broad inference of the provisions of section 7(2) of the Defamation Act, although this may be ordered by the court, but a right of correction exists for the plaintiff, at all times.

# Chapter Three

## Reporting Court Proceedings

In a democratic society one of the tenets, in the course of the administration of justice, has been the requirement that all judicial proceedings be held in public. Article 50 of the Constitution of Kenya, 2010, guarantees every person a fair and public hearing of any disputes that can be resolved by the application of law. This requirement has even been enshrined in constitutions as the basis of this right in reporting court proceedings and is viewed as a fundamental component of the rule that justice must not only be done, but must be seen to be done. There is however a fundamental difference between, the English system of criminal justice, wherein many aspects on the restrictions relating to reporting criminal cases occurs. This is the trial by jury-12 members of the general public-who render verdicts as directed by the presiding judicial officers. In Kenya, unless, in the case of murder trials,<sup>17</sup> where assessors (mostly 2 or three), would render an assessment, to aid the presiding officer in the High Court of Kenya, all cases are before a single magistrate or judge.

It is to be appreciated, therefore, that where Kenya borrows its common law on contempt of court, in relation to reporting of courts proceedings, there is not as much a fear of what has been termed as “trial by media”- through exposing jurors to newspaper, radio and television reportage of criminal trials. As such, the restrictions are less stringent than in the United Kingdom. The restrictions are there nevertheless. In essence, the law of contempt of court prevents the publication of what is and would be proven to be the truth, for the benefit of a fair trial, to the accused. Indeed, this restriction has been accorded judicial recognition in *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR wherein at paragraph 73, the court held:

*The restriction shows that although freedom of expression is a fundamental right, protection of freedom of others and the administration of justice are more important than the unrestricted enjoyment of one's own freedoms. In this regard, it is the right to a fair trial contained in Article 50(2) of the constitution that is being protected. This limitation, in my view, is justifiable on grounds that although judges as rational men and women may not be swayed by what they hear or read regarding a party to a case before them, the general public may not and, therefore, the right to fair trial in our judicial system would suffer prejudice due to negative comments that a publication may contain. In that regard, it is becoming (sic) necessary to restrict what can be published about those in the process of a trial as the right to fair and unbiased public hearing outweighs the enjoyment of one's own rights. The limitation is justifiable in an open and democratic society.*

The journalist, therefore, would appear to have a right to report on the court proceedings in tandem with the privilege accorded by common law and statute with regard to defamation without much difficulty. See *Munster v Lamb* 11 QBD 588. However, as with all rights, the same are exercised with regard to other rights and responsibilities. These other rights and public policy considerations provide a basis for the exemption to the right to report court proceedings and to access courts for journalists as they may. Hearings in camera are a feature of these considerations. This is so in cases for instance touching on national security. See Article 50(8) of the constitution.

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<sup>17</sup> Before 2007, Sections 262 and 263 of the Criminal Procedure Code (Chapter 75 laws of Kenya), provided for this procedure, but by Act No. 7 of 2007, trial with the aid of assessors was repealed and removed from our statutes.

The media may be allowed, within certain limits to publish what was heard in camera. At other times, a complete ban on reporting may be imposed on in camera proceedings.

There are, therefore, under common law and statute to be found instances when certain aspects of court proceedings may not be published in the interests of justice. The courts therefore are, dependent on the nature of the case and the statute or matter in issue, generally granted power to issue three main orders:

- Restrict the publication of certain aspects of the court proceedings until after a certain period of time.
- Prevent the publication of names of parties to court proceedings.
- Restrict the publication of information relating to children.

There are also complete bans that vary from case to case and on application mainly relating to:

1. Committal proceedings before magistrate's courts.
2. Proceedings relating to sexual offences and indecency.
3. Divorce cases
4. Documents made available under disclosure orders.

As a corollary to the open court rule, the public and in essence journalists, therefore, have a right to access court documents that are not sealed by order of the court under the above exceptions. A breach of the restrictions may expose the journalist to another aspect of the restriction on the publication of court proceedings that is known as contempt of court. In Kenya the statutes that have provisions relating to restrictions on the publication of material in relation to court proceedings are the Children Act, 2001, where at section 4, and for the Survival and best interests of the child, In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration, to the extent that this is consistent with adopting a course of action calculated to:

- a. safeguard and promote the rights and welfare of the child;
- b. conserve and promote the welfare of the child;
- c. secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

Under the Marriage Act, parties may seek court orders for sealing of a part of the proceedings, especially, those that affect children.

## Contempt of Court

The underlying theme of contempt of law is the protection of the administration of justice. The Constitution provides as follows:

*Article 50(8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.*

Whereas there are other aspects of contempt of law that exist, the most common and that which the majority presume to be the effect of this law relates to the protection of the authority and prestige of the court.

This aspect of contempt of law has evolved from the medieval age in the United Kingdom to its present state although in a much-limited form. The blaze of glory that was to be maintained of the courts has rightly been reduced and in very rare circumstances will the courts be found to be punishing contemnors on this aspect otherwise known as “scandalising the court” also from the medieval *scandalum magnatum*. Contempt of court is there to punish interference with the administration of justice in that, the courts must be left free to decide on matters before them unimpeded by outside interference. Publication by the media may amount to either criminal or civil contempt. This largely depends on the order made. It is in the reporting of criminal courts however that the greater risk exists.

At common law three heads exists of punishable criminal contempt.

1. Interfering with “pending or imminent” court proceedings.
2. Contempt in the face of the court.
3. Scandalizing the Court.

Other contempt that is punishable includes:

- 1) Failure to comply with a court order.
- 2) Improper use of documents disclosed during proceedings.

It is in the category of interfering with “pending or imminent” court proceedings that most journalistic endeavours will face the risk of punishment. This aspect is also covered under common law in that a person is guilty of contempt of court if he publishes material that is calculated to prejudice or interfere with proceedings that at the time of the publication were pending or imminent and that the publisher intended to so prejudice or was at least reckless in that he was aware that future proceedings and that he knew the nature of what was published. This is perhaps best exemplified by what is referred to as “trial by media”.

The four elements key to the contempt is.

- i. Strict liability in that no damage need to be proved.
- ii. A publication.
- iii. Active proceedings
- iv. A substantial risk of serious prejudice. Under the substantial risk element, the following are key to determination of the risk involved. The court, the date of hearing, place of trial, content circulation, undermining or intimidating witnesses, the parties or an assessor, anticipating a verdict.

The Director of Public Prosecution is the only one allowed to institute contempt of court proceedings that are criminal in nature on behalf of the state. The Constitution states:

*Article 157(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.*

There are defences available to criminal contempt under any of the following heads:

- (I) Innocent publication.
- (II) Fair and accurate contemporary reports published in good faith.
- (III) Discussion of public affairs.

Punishment for contempt of court is usually through fines and or imprisonment or both subject to the contempt in issue. Injunctions are also commonly obtained with reference to specific breaches of matters in proceedings depending on the rights that might be infringed by a publication.

There was an attempt to provide a statutory framework in Kenya for contempt of court, which floundered, as the Act was declared unconstitutional, with the court observing in *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR at paragraphs 65:

*...The fact that the power to punish for contempt is inherent and not granted by statute, follows the recognition by the constitution in Article 159 that judicial authority is derived from the people and vests in, and is exercised by the courts and tribunals established by or under the Constitution. Judicial authority having been derived from the people, the judiciary serves the public and courts make pronouncements for and on behalf of the people. In doing so, courts act only in accordance with the constitution and the law as demanded by Article 160(1) of the constitution. In that respect, therefore, the powers of the courts must be viewed from the supremacy clause in Article 2(1) of the constitution so that any attempt to limit the power to punish for contempt violates a foundational constitutional value on judicial authority. Any legislation on contempt must be in addition to but not in derogation of the constitution for such limitation or derogation will surely be unconstitutional...*

It is in the Contempt of Court Act's attempt at section 30, which sought to deal with contempt by Public Officers, and shielding of state officers from conviction of contempt of court for execution of duties in good faith, and section 35 that sought to provide that a Court shall not initiate contempt proceedings in relation to a decision made or directions given by a Speaker of a House of Parliament in the performance of his or her official responsibilities, that it ultimately failed. The High Court of Kenya, in 2018, held that:

*...Sections 30, and 35 of the impugned contempt of court Act No 46 of 2010 are inconsistent with the constitution and are therefore null void and that the entire contempt of court Act No 46 of 2010 is invalid for lack of public participation as required by Articles 10 and 118(b) of the constitution and encroaches on the independence of the Judiciary...*

The common law thus persists in Kenya.

The Supreme Court failed to provide a guide into this area of the law, rightly so perhaps, in the case of *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR where at paragraph 19, it held that:

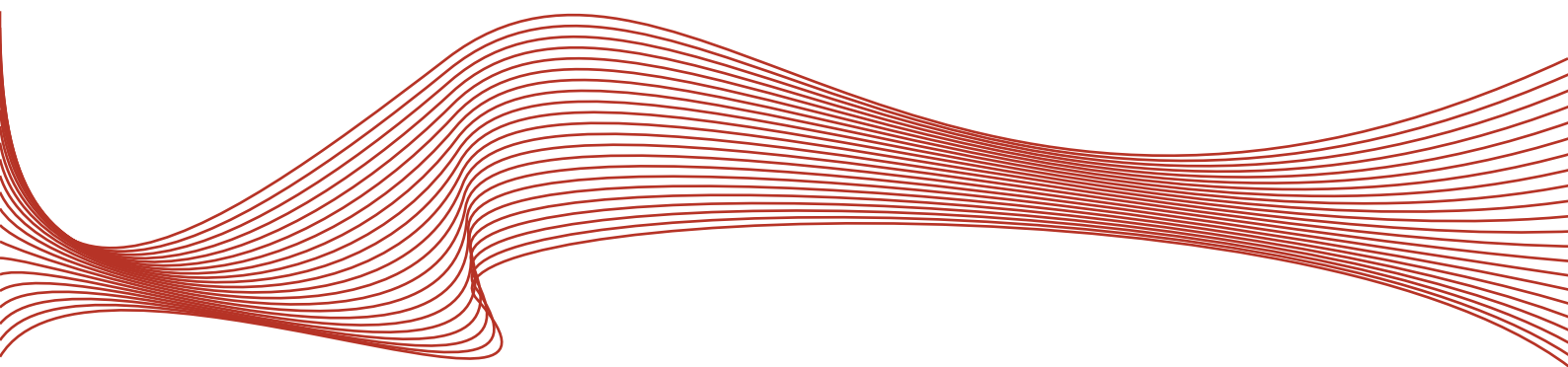
*...We may draw example from the law relating to contempt even though we are not applying it in this instance. In what circumstances would an Advocate be adjudged guilty of contempt of the Court, or of wilful insult of a Judge and at paragraph 23 it observed that... In the matter before us, Senior Counsel Mr. Abdullahi had set out to question this Court's jurisdiction. While it is allowable that the argumentation could properly have been made with all vigour, it would ill-become legitimate cause to be attended with offensive melodrama, sustained with denigrating depictions such as: "exercising illegitimate political power.*

*The purpose of this Ruling is limited to depicting the face of grumpy and ill-tempered behaviour before the Supreme Court: signalling lines of caution, and prescribing governing principles for future situations... at paragraph 27 the court went on to admit the unsatisfactory state of affairs in the guide to the power of the courts as regards contempt... We have taken note that the functioning of the reparatory aspect of the Contempt of Court Act (section 24A), at the moment, and with regard to the operations of the High Court and the Court of Appeal, admits of uncertainty quite apart from the fact that we are not applying them here but we affirm such not to be the case as regards the Supreme Court's competence, which is founded upon the Supreme Court Act, 2011... at paragraph 28, the court went on to state(in passing)... There is no doubt that an act in contempt of the Court constitutes an affront to judicial authority; and the Court has the liberty and empowerment to mete out penalty for such conduct, in a proper case. The object is, firstly, to vindicate the Court's authority; secondly, to uphold honourable conduct among Advocates, in their standing as officers of the Court; and thirdly, to safeguard its processes for assuring compliance, so as to sustain the rule of law and the administration of justice.*

There was no analysis of the import of the powers of the courts over advocates (or litigants/general public) and the right to freedom of expression under Article 33 of the Constitution of Kenya, 2010.

## Protection of Journalistic Sources

The journalist, in his every day endeavours seek to unearth information that is not generally available to the public. In his work he, therefore, may seek to protect the sources of his information. There has arisen therefore a query as to whether if called as a witness, the journalist can refuse to disclose his source citing journalistic ethics and thereby risking punishment for contempt of court. There is no general privilege for journalist or other holders of confidential information to refuse to disclose it when the court believes that it is necessary evidence, in particular with regard to criminal behaviour. It is a delicate balance that is required, for other interests are involved which are in keeping with preserving certain confidences, in particular circumstances, that also are in favour of the public interest, be maintained.



# Chapter Four

## Race Relations, Incitement to Hatred and Obscenity

These Chapter contains some of the most contentious tensions in society with regard to the social foundations of the law on certain specific categories of speech and their relationship with the constitutional foundations of the state.

### Blasphemy (Blasphemous Libel)

The crime of blasphemy, though not stated as such can be described as that which relates to speech or publication of any matter blaspheming God. This includes by denying his existence or providence, or contumeliously reproaching Jesus Christ, or vilifying or bringing into disbelief or contempt or ridicule Christianity in general or any doctrine of the Christian religion or the Bible. The speech or publication must be coached in words that are scurrilous, indecent or offensive that is likely to shock and outrage the feelings of Christian believers. The effect of the words must be that a breach of the peace obtains.

The result of the speech or publication must be to deprave the public morals, to go against the very fabric of society or cause civil strife. The test as set therefore for any successful prosecution is very high and would go to show why it is not a very likely occurrence that one would be maintained in modern-day society. Indeed it may very well not stand the requirements of the limitation under Article 24 of the Constitution.

In Kenya, the *Penal Code* at sections 134 and 138 provides for the crimes of insults to religion by destruction or defilement of religious place of worship and the writing, with deliberate intent to wound religious feelings of any persons, respectively. The latter is more likely to meet with the definition of blasphemous libel in Kenya. The crime is a misdemeanour and the sentence on conviction is a year's jail. The Christian faith is the basis of this crime, a British historical phenomenon, although, in Kenya, the crime can be committed against any religion.

In *Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others* [2015] eKLR, the High Court in Kenya had occasion to consider the legitimacy and propriety of cultural practices that were challenged on amongst others, the Children Act and the constitutional guarantees of freedom of religion.

## Obscenity, Indecency and Pornography

The terms, obscenity and indecency have traditionally been used as a means of defining legal controls over material that involves nudity and or sexually explicit material. The terms as applied have further drawn controversy as the courts tried to apply the legal as well as the ordinary meaning of the words. The term obscenity in its ordinary meaning is that which offends against the recognized standards of propriety or modesty in a community. Decency has the same meaning although with a lesser degree to obscenity. The definitions according to the Shorter Oxford English Dictionary are as that which is offensive to modesty or decency; expressing or suggesting lewd thoughts; or offensive to the senses or the mind; disgusting, filthy for obscenity and for indecency, unbecoming; in extremely bad taste; unseemly; and offending against the propriety or delicacy; immodest; suggesting or tending to obscenity for indecency. Where the terms are not defined by statute therefore, the courts will apply these ordinary meanings. However, at common law the definition of obscene was that which tended to deprave and corrupt those whose minds were open to immoral influences and into whose hands a publication may fall under the offence of obscene libel. In Kenya the same position in terms of definition obtains under the offence to be found under Section 181 of the *Penal Code* and Section 84D of the Kenya Information and Communications Act, 1998, Cap. 411A, Laws of Kenya. The interrelation between pornography and art is one that has not been in question in Kenya's judicial system and therefore, one can only guess what the interrelation would entail. What is important to note is that what may be found to be pornographic may indeed be found to be obscene and punishable by law.

## Incitement to Hatred

This is mostly covered under the so-called anti-hate speech and specifically, anti-racial vilification, laws. The subject has split commentators on this subject over the years and the controversy does not look like ending soon. It makes it an offence for any person to display, publish or distribute written material that is threatening, abusive, or insulting if he intends thereby to stir up racial hatred or having regard to all the circumstances racial hatred is so stirred up thereby. Kenya has only recently enacted specific legislation under the National Cohesion and Integration Act No. 12 of 2008 and further any more offences would be dealt with under the Penal Code. The National Cohesion and Integration Act No. 12 of 2008 provides for instance as follows; Section 62:

*(1) Any person who utters words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race, commits an offence and shall be liable on conviction to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or both.*

*(2) A newspaper, radio station or media enterprise that publishes the utterances referred to in subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding one million shillings.*

Race hate speech poses one on the most intractable problems of free speech theory and it is unlikely that a consensus even with legislation in place will ever emerge satisfactorily given the dynamics involved in its resolution in a democratic society. Successful prosecutions will lay a bedrock for the boundaries of these crimes under the new Constitution in keeping with the limitation on freedom of expression and of the media under Article 33(2) (c).

The case of *Sudi Oscar Kipchumba v Republic (Through National Cohesion & Integration Commission)* [2020] eKLR, exemplifies the difficult task of successful prosecutions for hate speech. The Court, Ngugi, J, held, albeit *obiter dicta*, that:

*“...the argument that the interests of public order, peace, and security necessitate the pre-charge detention of the Applicant because his speech has led to “demonstrations against him” does not meet the high threshold of “compelling test” required by our Constitution. The reason given appears illogical when set against the granted remedy: hold the Applicant without charging him for seven days then release him. There is no indication how holding the Applicant for precisely seven days will dissipate the public order, peace and security risk his alleged utterance caused. I have noted that there is no allegation that the Applicant has threatened to make like utterances if they are, indeed, capable of inciting the public. In any event, the Applicant has demonstrated a willingness to abide by the condition not make any comments akin to the ones the State finds insalubrious and capable of inciting the public... There is a second reason to worry about the a contextual and simplistic pitting of “public order, peace and security” against the personal liberty interests and autonomy of the Applicant. It is that the logic espoused by this simplistic pitting is a dangerous anti-liberty ethos which was rejected by the Constitution of Kenya, 2010. I clearly expressed this reasoning in Joseph Thiongo & 17 others v Republic [2017] eKLR and it is sufficient to reproduce here at length the relevant paragraphs:*

*45. The Defence would be correct to argue that such a blunt response to the break down in law and order would be tantamount to sacrificing the rights of the Accused Persons in order to secure peace and security for the rest of society. Needless to say, our Constitution no longer countenances such an approach. Such was the approach to Law and Order that justified the authoring into our law books the infamous, Public Order and Security Act: the logic that it is necessary to simply detain some “dangerous” citizens in order to maintain law and order for the rest of the society. That logic has been substituted in our Constitution with the opposite logic: that every Accused Person is presumed innocent, and entitled to bail (and not to remain in remand) unless compelling reasons are shown.*

It is perhaps in these cited penchant for detentions, without much more, that there has been under development of any principles for the trial of hate speech cases in Kenya. We may perhaps caution that the experience with the highly emotive “G” word-genocide, a much higher crime, has been acknowledged by some commentators, as to its failures to adequately account for the crime of its necessary corollary of its prevention, in hate propaganda.<sup>18</sup>

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See generally, Schabas, William. A., *Hate Speech in Rwanda; The Road to Genocide*. 46 McGill Law Journal, 141. (2000).

# Chapter Five

## The Internet

The information revolution, owes its genesis to the research conducted by the Defence Advanced Research Projects Agency (DARPA). While developing the ARPANET (a pioneering network for sharing digital resources among geographically separated computers). A demonstration in 1969 led to the Internet, as we know it today. In 1989, Sir Tim Berners Lee, invented the world wide Web, (as we know it today), when he wrote the first web client and server in 1990. His specifications of URIs, HTTP, and HTML were the bedrock of the internet growth we have today. It is this system that he stated at the 25th anniversary of his proposal that we have to live with and guard jealously:<sup>19</sup>

*At the heart of the web is the link, represented by banal strings of characters, notably those that start with http://. When we link information in the web, we enable ourselves to discover facts, create ideas, buy and sell things, and forge new relationships at a speed and scale that was unimaginable in the analogue era. These connections transform presidential elections, overturn authoritarian regimes, power huge businesses and enrich our social networks. Through this concept of linking, the web has grown up significantly in 25 years, from a collection of interlinked static documents to a much richer environment of data, media and user interaction. Millions of developers are using this open web platform to create distributed applications that can run on desktops, phones, tablets, televisions, automobiles, digital billboards, watches... everywhere.*

The internet has created what has been referred to as the networked information economy. This economy, as observed in the *Wealth of Networks*, differs fundamentally with the mass media - of which television is a main stay – in the network architecture. The hub-and-spoke architecture with unidirectional links to the end points is what the mass media is. It comprises largely of communication from a very small number of people to an audience that is many times this number. It is in the new networked economy where new recipients of the communication restrained by physical (technology) and cultural (language) links are now occurring.

The new architecture is a distributed one with multidirectional connections amongst all possible nodes in the environment. The other underlying difference of the two systems is the cost.<sup>20</sup> There is almost an elimination of costs as a barrier to communications.

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<sup>19</sup> For a history of the birth of the internet see <https://www.darpa.mil/about-us/timeline/modern-internet> and <https://www.wired.co.uk/article/tim-berners-lee>.

<sup>20</sup> Benkler, Yochai, 2006. *The Wealth of Networks; How Social production transforms markets and Freedom*, Yale University Press, New Haven and London. Chapter 6 at page 198 and Chapter 7 at page 224.

The United Nations has been involved in strengthening the sustainability of this economy. The UN General Assembly Resolution 56/183 (21 December 2001) endorsed the holding of the World Summit on the Information Society (WSIS) in two phases, in Geneva from 10 to 12 December 2003, and in Tunis, from 16 to 18 November 2005. These summits observed and declared principles which are best captured by Principle 55 of the Geneva Declaration:

*We reaffirm our commitment to the principles of freedom of the press and freedom of information, as well as those of the independence, pluralism and diversity of media, which are essential to the Information Society. Freedom to seek, receive, impart and use information for the creation, accumulation and dissemination of knowledge are important to the Information Society. We call for the responsible use and treatment of information by the media in accordance with the highest ethical and professional standards. Traditional media in all their forms have an important role in the Information Society and ICTs should play a supportive role in this regard. Diversity of media ownership should be encouraged, in conformity with national law, and taking into account relevant international conventions. We reaffirm the necessity of reducing international imbalances affecting the media, particularly as regards infrastructure, technical resources and the development of human skills.*

This is the paradigm that will persist for the long term.

## Access to Information, Privacy, Data Protection and Cyber-Security

After efforts that's started in 2000 by especially the International Commission of Jurists (Kenya) section, the Access to Information Act became effective in 2016. It provides a framework for the access of public information from public entities and information from private entities under certain circumstances - (a) the protection of the rights of a person.<sup>21</sup> It is an Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes with the objects of give effect to the right of access to information by citizens as provided under Article 35 of the Constitution; (b) provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles; (c) provide a framework to facilitate access to with any right protected by the Constitution and any other law; (d) promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information; (e) provide for the protection of persons who disclose information of public interest in good faith; and (f) provide a framework to facilitate public education the right to access to information under this Act.<sup>22</sup> The Act shields private information being information about a person's race, gender, age, marital status, national, ethnic or social origin amongst other attributes being disclosed.<sup>23</sup> The Act limits the unwarranted invasion of the privacy of an individual without proper authority.<sup>24</sup> The Act is enforced by the Commission on Administrative Justice,<sup>25</sup> a constitutional commission created by force of Article 248 and Article 59 of the Constitution of Kenya, 2010.

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<sup>21</sup> Section 4(1) Access to information Act.

<sup>22</sup> Preamble and section 3 on objects of the Access to information Act.

<sup>23</sup> Section 3 of the Access to information Act defines further what is personal information.

<sup>24</sup> Section 6(1)(d), Access to Information Act.

<sup>25</sup> Commission on Administrative Justice Act, (No. 23 of 2011).

Article 31 of the Constitution of Kenya, 2010, has provided now explicitly for the right to privacy. Data protection is now a fundamental freedom within the Bill of rights. It is a marked departure from the position in the former constitution. It provides that every person has the right to privacy, which includes the right not to have—

- (a) Their person, home or property searched;
- (b) Their possessions seized;
- (c) *Information relating to their family or private affairs unnecessarily required or revealed; or*
- (d) The privacy of their communications infringed. (Emphasis supplied)

Prior to 2019, the lack of a data protection framework, or a larger privacy framework, similar with the lack of a framework for the right of access to information, gave the courts ample room to exercise interpretation and enforcement of the rights. This was carried out within the ambit of the rights under Article 31 and 35, respectively and the limitations allowed under article 24, of the Constitution of Kenya, 2010.

The right of access to information was held to exist for citizens, as against State organs or public with a constitutional obligation for them to provide information to citizens as of right under the provisions of Article 35(1)(a), even in the absence of legislation setting out the parameters for access to information. This was in the case of *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others* [2013] eKLR.

An Act to actualize the right has since been enacted in the Access to Information Act. (No. 31 of 2016).

An Act to actualize the right has since been enacted in the Access to Information Act (No 31 of 2016). The High Court has had occasion to review the application of this Act in the case of *Khelif Khalifa; Wanjiru Gikonyo v Principal Secretary, Ministry Of Transport; others Katiba Institute; The Commission on Administrative Justice as interested Parties* (Constitutional Petition No. E 032 of 2021). In response to a request for information by the petitioners which request included, all agreements and contracts entered into including loan agreements, concession agreements, guarantees and/or collateral for financing, construction, management, operation and maintenance/servicing of the Standard Gauge Railway (SGR), any concessions, agreements and or MOU relating to the operation of the SGR including; (i) Take or Pay Agreement between Kenya Railways and Kenya Ports Authority, and (ii) Agreement with Africa Star Railway Operation Company Ltd and all documents considering relating to the viability, economic, social, cultural and environmental impacts, including:

- (i) Feasibility studies.
- (ii) Strategic Environmental Assessment.
- (iii) Environmental Social Impact Assessment.

Cultural Heritage Assessment, the respondents in the petition contended that upon receiving the request for information responded to the letters and explained that the information sought relates to contracts between the two governments; that the agreements have non-disclosure clauses; that the information falls under section 6(1), (2) of the Access to Information Act; that the Petitioners have failed to establish the necessity of the documents; that if granted the orders will endanger national security; that the information is protected under section 3(6), (7) of the Official Secrets Act; and, lastly, that the petitioners had not exhausted available dispute resolution mechanism under the Access to Information Act.

The Court in directing disclosure observed that:

*“...the Access to Information Act entails those public authorities are no longer permitted to § #39; play possum § #39; with members of the public where the rights of the latter are at stake. Discovery procedures and common-law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution, as manifested in Article 35 is to subordinate the organs of State to a new regimen of openness and fair dealing with the public. Two of the objects of the Act must be emphasized. Firstly, the Act seeks to establish voluntary and mandatory mechanisms or procedures to give effect to the right to access to information in a manner that enables persons to obtain access to records of public and private bodies swiftly, inexpensively and effortlessly as soon as reasonably possible. Secondly, it seeks to promote transparency, accountability and effective governance of all public and private bodies...”*

Unless overtured on appeal, this holding will provide a guide to many on the exercise of the right under Article 35 of the Constitution of Kenya, 2010.

In the case of data protection, five court cases are of importance:

### **(a) HIV and AIDS Prevention and Control Act, Case**

The enactment of section 24 of the HIV and AIDS Prevention and Control Act, No. 14 of 2006 (hereinafter referred to as the Act) which came into effect on 1 December 2010 pursuant to Legal Notice No. 180 of 2010 led to the case of *Aids Law Project v Attorney General & 3 others* [2015] eKLR. The contention and claim was that the offence created by Section 24 of the HIV Aids Prevention and Control Act, No. 14 of 2006 is so wide and vague to come within the group of laws that are an unacceptable discrimination against persons by way of their health status and therefore inconsistent with the Constitution of Kenya, 2010 in that it violates the rights guaranteed under Article 9 of the ICCPR, incorporated by Article 27 of the Constitution of Kenya, 2010.

The court found and held, at paragraph 87-88:

*that whereas those who suffer from HIV/AIDS are legally required to disclose their status to “sexual contacts” the later are not under any duty to keep such information confidential. To that extent we agree that section 24 is in contravention of Article 31 of the Constitution to the extent that the right of others to disclosure of such information has the likelihood of prejudicing the right to privacy unless corresponding obligations are placed on the recipients of the information with respect to adherence to the confidentiality principle. It is therefore imperative that the duty to disclose the information, being a limitation on the right to privacy, strictly falls within the confines of Article 24 of the Constitution and that having considered the foregoing it is our view and we so hold that section 24 of the HIV and AIDS Prevention and Control Act, No. 14 of 2006 does not meet the principle of legality which is a component of the rule of law.*

## (b) Kenya Legal and Ethical Network on HIV & AIDS (KELIN), Case

In the Kenya Legal and *Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others* [2016] eKLR, the contention and claim was that the 23 February 2015, declaration, by the National Government, through the President and a directive to all County Commissioners to collect up to-date data and prepare a report *inter alia* on all school going children living with the Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) was in the act of collecting the names of persons living with HIV/AIDS in a format that links their names to their HIV status is unconstitutional and a violation of fundamental rights and freedoms under Articles 27, 28, 29, 31, 43, 47 and 53 of the Constitution.

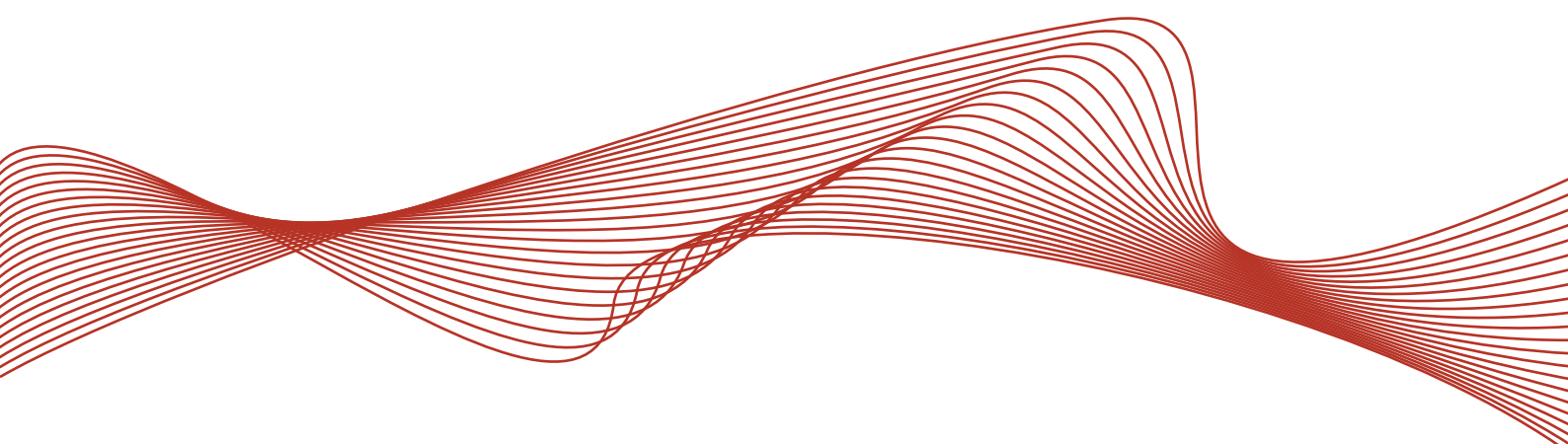
The court found and held that (at paragraph 78,82 and 105):

*In the event all I can surmise, reasonably so, is that to the extent that there is no evidence that any consent was obtained prior to the collection of data, I am satisfied that the directive would have amounted to compulsory testing which would be a violation of the right to privacy... I also heard the Respondents to claim that the data so acquired pursuant to the directive, would not be published and therefore there cannot be a violation of the right to privacy. It may well be true that the data would not be publicly published but it is my finding that the manner in which the data was being collected is an infringement on the right to privacy and while the efforts of the Government are commendable, I am in agreement with the Amicus Curiae that the Government should formulate other means of collecting the intended data without threatening or breaching the right to privacy of the targeted group... I must agree with them that the manner in which the directive is being implemented defeats the best interest of the child. I say so because the linking of a child's name with his/her HIV status in the data matrix, in my view, does not protect the best interest of the child and despite the good intentions of the Respondents, it is not in line with the best interests of the child to have the child's status disclosed without protecting the identity of the child. Breach of the right to privacy is in essence a violation of this principle. The court ordered that a codification of the names collected as a result of the directive dated 23 February 2015 be stored in a manner that does not link the names of persons named therein with their HIV status in a public document.*

## (c) Mobile Management System (DMS) by the Communications Authority of Kenya (CAK), Case

The proposed installation of a device called Mobile Management System (DMS) by the Communications Authority of Kenya (CAK), the information and communications regulator, through a contractor over licensed communications infrastructures and the potential heralding of an era of public control and eavesdropping of peoples' privacy by intercepting and recording of communication and mobile data was an issue. The Court of appeal in *Communications Authority of Kenya v Okiya Omtata Okiiti & 8 others* [2020] eKLR, disagreed with the High Court decision that had held amongst others that the decision to set up connectivity links between the DMS was unconstitutional, null and void, to the extent that it was arrived at unilaterally, without adequate public participation and that it is a threat to the right to privacy of the first, second and third interested parties subscribers and a gross violation of their constitutionally and statutory protected consumer rights, held that:

*... We think the Judge over concentrated only on the interpretation of an aspect of the term 'access' in a narrow sense in regard to retrieving data which he took to mean intrusion of privacy to communication. He, however, did not consider other aspects of 'access' such as making use of the resources to address the challenges at hand. We state this cautiously, noting that in accessing the data there was fear that the right to privacy was likely to be infringed which seems to have preoccupied the Judge. The right to privacy is important but the issues of abuse by unscrupulous mobile operators also needed to be tackled so as to strike a balance between securing the right to privacy and dealing with the problem without infringing the right to privacy. In undertaking the DMS, which was agreed by all the parties was in pursuit of the appellant's mandate to regulate the mobile communication sector, the appellant had a duty to abide by the law. It is clear to us that there was no concrete evidence that the DMS was going to spy or intrude on private communication.*



## (d) Bloggers Association of Kenya (BAKE) Computer Misuse and Cybercrimes Act, Case

The High Court held in *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR, a case contesting numerous provisions of the Computer Misuse and Cybercrimes Act, 2018, at paragraph 106, 131 and 132, whilst holding that the Act is valid and does not violate, infringe or threaten fundamental rights and freedoms and is justified under Article 24 of the constitution and that:

*Article 31 of the constitution provides that every individual has a right not to have their person, home or property searched. However, under Article 24 of the constitution this right can be limited to the extent that, the limitation is reasonable and justifiable in an open democratic society. It should be borne in mind that one of the most important tools in the prevention investigation and detection of a crime and collection and gathering of evidence is a search warrant. Search warrants are not peculiar to the computer misuse and Cybercrimes Act 2018. Section 118 of the Criminal Procedure Code (Cap. 75) Laws of Kenya and section 19 of the Police Act provide for search warrants. Sections 48,50,51,52 and 53 of the Act relate to search and seizure, disclose of data, expedited prosecution, and disclosure and collection of traffic data and content data. And that the safeguards provided by Section 53(2) of the Computer Misuse and Cybercrimes Act, 2018, to ensure that due process is followed include:*

- a. An officer is required to obtain a Court order allowing him/her to collect or record content data in real-time or compel a service provider to collect or assist the officer in the collection of the data;*
- b. The Court must be satisfied with the grounds and explanations provided for under Section 53(2) of the Act before issuing the order;*
- c. The time within which the officer may collect content data in real time has been limited to nine (9) months;*
- d. An extension of the time given in (c) above, may be given once the Court is satisfied that there are reasonable grounds to grant the same. These grounds are provided for under Section 53(5) of the Act.*
- e. In granting the order, the Court may require the service provider to keep confidential the order and execution of any power provided under Section 52 of the Act.*

At paragraph 132 the court observed that:

*Upon consideration of the impugned sections 48, 50, 51, 52 and 53 of the Act as well as Article 37 of the Constitution of Kenya, I find that the impugned sections contain adequate safeguards to ensure the rights of the individual are well balanced against the rights of the public in the investigation of offences under the Act. I find that the petitioner has failed to demonstrate that any right has been infringed or is threatened with infringement. Further, accordingly, section 3 of the Act does not give the limitation of the right to privacy as one of its objects. I find the petitioner's argument, that it should have been included in the objects of the Act, cannot make a statute unconstitutional.*

## (e) Nubian Rights Forum National Integrated Identity Management System, Case

The background to the *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others* (Interested Parties) [2020] eKLR case (paragraph 1-4), which is currently under appeal to the Court of Appeal was the enactment on limited to 20 November 2018, by the National Assembly of the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018. The President of the Republic of Kenya gave his assent to the said Act on 31 December 2018, and it commenced operation on 18 January 2019. Several provisions of a number of existing statutes, among them the Registration of Persons Act (Cap. 107 of the Laws of Kenya) (hereinafter referred to as “the Act”) saw amendments to the Act establishing a National Integrated Identity Management System (hereinafter “NIIMS”). Section 9A was introduced to the Act by the amendments:

*“9A (1) There is established a National Integrated Identity Management System.*

*(2) The functions of the system are:*

*“9A (1) There is established a National Integrated Identity Management System.*

*(2) The functions of the system are:*

- a. To create, manage, maintain and operate a national population register as a single source of personal information of all Kenyan citizens and registered foreigners resident in Kenya;*
- b. To assign a unique national identification number to every person registered in the register;*
- c. To harmonise, incorporate and collate into the register, information from other databases in Government agencies relating to registration of persons;*
- d. To support the printing and distribution for collection of all national identification cards, refugee cards, foreigner certificates, birth and death certificates, driving licenses, work permits, passport, and foreign travel documentation, student identification cards issued under the Births and Deaths Registration Act, Basic Education Act, Registration of Persons Act, Refugees Act, Traffic Act and the Kenya Citizenship and Immigration Act and all other forms of government issued identification documentation as may be specified by gazette notice by the Cabinet Secretary;*
- e. To prescribe, in consultation with the various relevant issuing authorities, a format of identification document to capture the various forms of information contained in the identification documents in paragraph (d) for purposes of issuance of a single document where applicable;*
- f. To verify and authenticate information relating to the registration and identification of persons;*
- g. To collate information obtained under this Act and reproduce it as may be required, from time to time;*
- h. To ensure the preservation, protection and security of any information or data collected, obtained, maintained or stored in the register;*
- i. To correct errors in registration details, if so, required by a person or on its own initiative, to ensure that the information is accurate, complete, up to date, and not misleading; and*
- j. To perform such other duties which are necessary or expedient for the discharge of functions under this Act.*
- k. The Principal Secretary shall be responsible for the administration, coordination and management of the system.”*

Section 3 of the Act on interpretation was also amended to include the following new definitions:

*“Biometric” means unique identifiers or attributes including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves and Deoxyribonucleic Acid in digital form;*

*“Global Positioning System coordinates” means the unique identifier of precise geographic location on the earth, expressed in alphanumeric character being a combination of latitude and longitude;*

*“Physical form” means existing in a form that one can see and touch;*

*“Principal Secretary” means the Principal Secretary in the ministry responsible for matters relating to registration of persons.”*

A petition was made to declare that implementation of Sections 3, 5 & 9 of the Registration of Persons Act as amended by the Statute Law Miscellaneous (Amendment) Act, 2018 is unconstitutional because the State has failed to provide statutory framework to protect the right to privacy and protection of data.

The Court disposed-off the petition by giving orders and declarations that:

- i. The collection of DNA and GPS co-ordinates for purposes of identification is intrusive and unnecessary, and to the extent that it is not authorised and specifically anchored in empowering legislation, it is unconstitutional and a violation of Article 31 of the Constitution.*
- ii. Consequently, in so far as section 5(1)(g) and 5(1)(ha) of the Registration of Persons Act requires the collection of GPS coordinates and DNA, the said subsections are in conflict with Article 31 of the Constitution and are to that extent unconstitutional, null and void.*
- iii. The Respondents (The executive arm of government) are at liberty to proceed with the implementation of the National Integrated Identity Management System (NIIMS) and to process and utilize the data collected in NIIMS, only on condition that an appropriate and comprehensive regulatory framework on the implementation of NIIMS that is compliant with the applicable constitutional requirements identified in this judgment is first enacted.*

All these cases were determined before the courts could have recourse to the interpretation of the facts of the petitions as against the provisions of the Data protection Act, 2019. The Court of Appeal, MAY, yet have an opportunity to decide case number five, on appeal through the lens of the Data Protection Act, 2019. This latter, is an Act to give effect to Article 31(c) and (d) of the Constitution, to establish the Office of the Data Protection Commissioner, to make provision for the regulation of the processing of personal data and to provide for the rights of data subjects and obligations of data controllers and processors came into operation in Kenya. There are currently three sets of Draft regulations under consideration for enactment through the Office of the Data Protection Commissioner. There are also in force the, Data Protection (General) Regulations, 2022, Data Protection (Compliance And, Enforcement), Regulations, 2022 and the Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2022.

# Chapter Six

## Media Specific Regulation

The regulation of the media in Kenya follows the policies of 2009,<sup>26</sup> in the case of Media policy guidelines and the ICT Policy guidelines of 2020, under implementation.

### Print Press Regulation

Kenya regulates its print press through the Books and Newspapers Act. These legislations require the payment of certain fees and the maintenance of certain bonds for publications to continue in the business of publishing. They also require the deposit of copies of all publications with a registrar. It is in the amounts that should be so paid and the deposit as bonds to be maintained that the press is seemingly curtailed. The bond amount required is KShs. 1,000,000.00 The penalties under the offence in the Act for failure to comply with sections of the Act is KShs. 20,000.00 or six months imprisonment or both.

### Broadcasting Regulation

Before the enactment of the Kenya Information and Communications (Amendment) Act, 2008 (Act No. I of 2009, assented to on 30 December, 2008 and commencing on 2 January, 2009), there was a legal lacuna in the licensing of broadcasting in Kenya.<sup>27</sup>

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26. 26 The framework in the Kenya Media Policy Guidelines published in 2008, primarily sought to provide a policy, post the passage of the Media Act, 2007. The Media Act, 2007 was the culmination of processes by civil society and the media, with Government participation, to create a 'regulatory' framework, especially for the print press, despite their general media emphasis. The policy guidelines gave this background as follows: Recent Developments on Media Policy in Kenya Important events particularly the advent of multiparty politics in 1992 led the government to consider the introduction of press laws. In 1993 a "Task Force on Press Laws" was appointed, to address issues relating to information access and dissemination, ethical and professional standards for journalists and their enforcement, self-regulation of the media and media ownership, licensing and development. The task force submitted its recommendations to the Attorney General in November 1998. In 2001, a Code of Conduct for journalists and the mass media, was finalized by the Media Industry Steering Committee comprising stakeholders from the Kenya Union of Journalists, Media Owners Association, Editors Guild of Kenya, the Alternative Press, Kenya Correspondents Association, Media NGOs and the state media. The Code has subsequently been reviewed many times with the last version being launched in April 2006 by the Media Council of Kenya. In early 2006, the International Council of Jurists, the Media Owners Association, the Kenya Union of Journalists and other stakeholders developed a Draft Media Bill aimed at establishing the Media Council of Kenya.

27. 27 The Kenya Posts and Telecommunications Act (Repealed) at section 86 provided for the Licensing of radio communication and "... Any person who—  
 ... (a) establishes or uses any radio communication station or possesses radio communication apparatus without a licence issued by the Managing Director; or  
 ... (2) A radio communication licence may be granted subject to such conditions, including the payment of any prescribed fee, as the Managing Director may think fit including in particular, in the case of a licence to establish a station, conditions as to the position and nature of the station, the purposes for which, the circumstances in which and the persons by whom the station may be used and the radio communication apparatus which may be installed or used therein; and, in the case of any other licence, conditions as to the radio communication apparatus which may be installed or used, the places where, the purposes for which, the circumstances in which and the persons by whom such apparatus may be used". The Minister had powers under section 12 to... (a) give directions of a general nature to the Board to the operation of the undertaking of the Corporation...". These two provisions gave rise to the scenario earlier stated in the case of *Republic v Communications Commission of Kenya Ex-Parte East Africa Televisions Network Limited* [2001] eKLR.

The policy and strategic framework adopted in Kenya as of 2006<sup>28</sup> largely representing best practices in the environment that is the market and structure for broadcasting have had the largest effect so far in this media sector. The policy was to foster pluralism, efficiency and fair competition and increased reliance on market forces in the provision of broadcasting services. Consequently, competition in the sub-sector would be enhanced through licensing of more radio and television stations. The Government was to establish a framework within which different players would be licensed in various market segments to promote efficiency. Licences for broadcasting will be issued for a National Public Broadcasting Service which service will be provided by the Kenya Broadcasting Corporation, operating commercially, with universal service obligations, and with Government support to sustain its universal service obligations with the second category in Private Broadcasting Services.

The granting of licences for private broadcasting services was to ensure the development of a diverse and pluralistic broadcasting landscape. CCK was to be fair and equitable in the grant of licences and allocation of frequencies. The discretion in the issuance of permits and the potential for the Minister to issue more permits than the CCK would accommodate in the issue of radio-frequency licences led to a most unsatisfactory environment. The matter is perhaps best captured in a case that revolved around a dispute over the change of shareholding of a company, East African Television Network Limited (EATN) where shareholders contested.<sup>29</sup> The acquisition of shareholding by the African Broadcasting Network (a company then said to be held wholly by the Nation Media Group Ltd) into EATN then triggered the dispute and brought in the Minister.

When the first proposal for a broadcasting regulatory framework was proposed in 2001, it was against the backdrop of a previous attempt at getting a fair and equitable framework<sup>30</sup> for the accessing of broadcasting services generally and television broadcasting in particular. The Kenya Communications (Amendment) Bill, in 2007, to allow for exactly such an equitable framework was opposed by mainstream television licensees<sup>31</sup> and was withdrawn from Parliament. The Kenya Communications (Amendment) Bill 2007, had been presented to Parliament with a view to the implementation of the policy guidelines of 2006.<sup>32</sup>

Two years later, in 2009, the policy guidelines 2006 were implemented by law in the Kenya Information and Communications (Amendment) Act, 2008 (Part III of the Act). A new framework for the regulation of broadcasting was thus, outlined. However, a section of the media did not take the passage of the Act as a progressive free speech and democratic governance step and took to the courts to challenge the law. The legal proceedings are what is referred to here as the Media Owners case<sup>33</sup> Prior to the case, some television broadcasting stations carried out a spirited campaign that included an interruption of the live broadcasts of the national Jamhuri Day celebrations on 12 December 2008 in a bid to exert pressure on the President not to give assent to the Act.<sup>34</sup>

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28 Republic of Kenya Gazette Notice Number 2431, Nairobi, 31 March 2006. Information & Communications Technology Sector Policy Guidelines.

29 Ahmed Rashid Jibril v East African Television Network Limited and others in the High Court of Kenya at Nairobi (Milimani Commercial Courts) Civil Case 651 of 1998.

30 The IPPG reforms were too little.

31 These were those issued under what has been observed to be a potentially opaque framework under the Kenya Posts and Telecommunications Act. The main television broadcasting licensees were the Royal Media Services, the Nation media Group and the Standard Group Limited.

32 The Kenya Gazette Notice Number 2431, Nairobi, 31 March 2006. Information & Communications Technology Sector Policy Guidelines. Section 4.1.

33 Petition No. 244 of 2011, Media Owners Association v Attorney General, the Ministry of Information and Communication and the Communication Commission of Kenya ("the Media Owners case"). See also Royal Media Services Ltd v Attorney General & 2 others [2013] eKLR.

34 Citizen TV carried a split-screen as the President was leading the National celebrations.

Broadcasting services would be licensed for; (a) Free-to-air radio, (b) Free-to-air television, (c) Satellite-free-to-air radio, (d) Satellite-free-to-air television, (e) Satellite-subscription television, (f) Satellite-subscription radio, (g) Terrestrial-subscription television, (h) Subscription Cable television, (i) Low power radio, and (j) Signal distribution, services.

The Kenya Information and Communications Act, 1998, as amended, provided for the following licences which formed the basis of the commercial strategies that were adopted in the market regime. Broadly these fell into three categories: public, private broadcasting, and community broadcasting.

These licence categories would be in the following classes: free-to-air radio, free-to-air television, subscription radio, subscription television, subscription management, and any other class of licence as may be determined in accordance with the Regulations and signal distribution services. Section 46B and 46O of the Kenya Information and Communications Act, 1998. Section 2 of the Act defined some of these services as distinct market segments and included:

*‘Broadcasting signal distribution’ - the process whereby the output signal of a broadcasting service is taken from the point of origin, being the point where such signal is made available in its final content format, from where it is conveyed to any broadcast target area by means of a telecommunication process and includes multi-channel distribution;*

*‘Subscription broadcasting services’ which includes, among other services, cable broadcasting and multi-channel satellite distribution services from foreign territories that are offered through subscription;*

*‘Subscription management services’ - a service which involves the provision of support services to a subscription broadcasting service which may include, among other services, subscriber management support, subscription fee collection, call centres, sales and marketing, and technical and installation.*

*‘Terrestrial broadcasts’ means the services that are broadcast from a transmitter situated upon the earth’s surface within the country;*

*“Terrestrial digital signal distributor” as any person who provides network facility operator services for multimedia broadcasting. A special category of signal distribution known as a Self-Provisioning licence (SPL) class was issued after the Digital Migration case to a consortium of the three incumbents known as the African Digital Network Ltd.*

These definitions suffice to capture in Kenya, any broadcasting services which, by the wide interpretation boundaries of the definitions, requires that any person who has to engage in any form of ‘broadcasting’ is subject to a licensing framework. Over-the-top services<sup>35</sup> and social media platforms, including video-sharing platforms, are not captured in these definitions to constitute broadcasting.

As to the independence of the regulator, sections 3 to 7 of the Kenya Information and Communications Act, 1998 sought to meet these requirements in 2009, prior to the amendments contained in the Kenya Information and Communications Act, 2013. An independent broadcasting regulatory system to licence and oversee this industry is crucial in a democratic society as it creates faith in fairness in licensing.<sup>36</sup>

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<sup>35</sup> These are audio-visual content delivered on the ‘open’ internet rather than over a managed IPTV (internet Protocol Television) architecture.

<sup>36</sup> Section 3.4 of the CommonIalth Guidelines.

On 9 December 2009, Kenya took a giant step towards setting the pace for migration from analogue to digital broadcasting when H.E. the President of the Republic of Kenya, Mwai Kibaki, launched the digital signal at the Kenya Broadcasting Corporation's headquarters in Nairobi, officially paving way for existing analogue TV stations to be broadcast on DVB-T digital platform. One multiplex was activated on UHF channel 26 and accommodated a total of 16 standard definition TV channels and 4 radio services.<sup>37</sup> The availability of a wider range of services and applications, the availability of premium (conditional access–subscription) services and applications such as first-run films and sport, improved formats such as wide screen, high definition and surround sound, improved sound and picture quality, programme associated data, metadata or even independent services like web pages, easier access – particularly to specialist material, and easier selection of programming, was now made possible.

The incumbent television broadcasting services licensees sought declarations from the High Court in various cases, amongst others that their rights as broadcasters under Articles 33 and 34 of the Constitution have been infringed and threatened with violation by the demand for digital migration. Also, that a declaration that the Petitioners' right of establishment as television broadcasters protected by Article 34(3) of the constitution is violated and rendered meaningless by the failure to issue the petitioners with digital signal distribution licenses and digital frequencies, and that a declaration that the proposed switch off date of 13 December 2013 was punitive and against public interest and would disenfranchise the public's right to receive information, a declaration that the petitioners are entitled to be issued with a broadcast signal distribution license and digital frequencies by the Government; and an order compelling the Government to issue them with digital broadcast signal distribution licenses and digital frequencies.

One of the contentions in the *Royal Media case*,<sup>38</sup> the Digital Migration case I, II and III<sup>39</sup> and the *Nation Media case*,<sup>40</sup> was the nature and constitution of this regulatory body that is the Communications Authority of Kenya, the precursor to the Communications Commission of Kenya.<sup>41</sup>

In the *Royal Media case*, Royal Media Services Ltd, challenged that CCK was not the licensing body contemplated for establishment under Article 34(5) and that the body so contemplated had yet to be established.

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37. International Telecommunications Union, Report ITU-R BT.2140-3 (05/2011). Transition from analogue to digital, Geneva, 2011, terrestrial broadcasting by the ITU in its BT Series Broadcasting service (television). Page 52.

38. *Royal Media Services Ltd v Attorney General, Minister of Information & Broadcasting & Communication Commission of Kenya* [2013] eKLR.

39. I is in the High Court, the case of *Royal Media Services Ltd & 2 others v Attorney General & 8 others* [2013] eKLR, II is, in the Court of Appeal, the case of *Royal Media Services Limited & 2 others v Attorney General & 8 others* [2014] eKLR and III is the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR. This last case is the case at the Supreme Court on appeal from the Court of appeal.

40. *Nation Media Group Limited & 6 others v Attorney General & 9 others* [2016] eKLR.

41. CCK was established under section 3 of the Kenya Information and Communications Act (Act No. 2 of 1998). with the initial mandate to: "licence and regulate telecommunications, radio communication and postal services" which mandate was extended by the Kenya Communications (Amendment) Act, No. 1 of 2009 to include "facilitate the development of the information and communications sector (including broadcasting multimedia telecommunications and postal services) and electronic commerce" and to "licence and regulate postal information and communication services in accordance with the provisions of the Act".

The judge, however, found that the provisions of section 7(1) of the Sixth Schedule provided the grounding that the Kenya Information and Communications Act, 1998 and all the regulations made thereunder were to remain in force subject to the Constitution and the transitional provision, and that the CCK was established by legislation in force and was empowered to, *inter alia*, licence and regulate postal, information and communication services.<sup>42</sup> Further, the entire Constitution as read with Article 34, meant that the statutes in force governing media (sic broadcast) regulation remain in force, subject to such modifications as are necessary to bring it in conformity with the Constitution.<sup>43</sup>

The High Court of Kenya, firstly in a single judge bench (Majanja J) in the Royal media case dismissed the petition as well as in the *Digital Migration case I*. A three-judge bench of the High Court in the *Nation media case* (Lenaola, Ngugi, Korir JJ), dismissed the petitions with great analysis and more succinctly than the Supreme Court. Lenaola, J (in a judgment in this case delivered on 22 July 2016, after the *Digital migration case III*, in the *Media Owners case*<sup>44</sup> also dismissed a petition on similar grounds. In the *Nation media case*<sup>45</sup> for instance, (whose judgment was delivered on 26 May 2016, after the conclusion of the *Digital migration case III* in the Supreme Court) arising out of the similar vein of contentions by the petitioners on the constitutionality of the regulatory body<sup>46</sup> as in Royal media case, the court dismissed the petition. Section 5B (2) and (3) of the Kenya Information and Communication (Amendment) Act reproduced the provisions of Article 33 (2) of the Constitution, and it would be absurd to declare it unconstitutional.<sup>47</sup> The body contemplated under Article 34(5) to be free from government, political and commercial interests was created through the independent appointment processes under section 6B of the Act.<sup>48</sup>

This then was the stated law at the time of the hearing of the Digital Migration case III<sup>49</sup> where the Supreme Court traced similar contentions on unconstitutionality and lack of independence by the petitioners on the regulatory body. The Supreme Court also, traced the legal interpretations and holdings on this issue by the High Court, in the first instance and the Court of Appeal on the second instance.

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42. 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.

43. ...I find and hold that the CCK is properly constituted and empowered to carry out its statutory responsibilities including regulation contemplated under Article 34 until such time as the body contemplated under Article 34(5) is established. (per Majanja J) *Royal Media Services Ltd v Attorney General, Minister of Information & Broadcasting & Communication Commission of Kenya* [2013] eKLR.

44. *Media Owners Association & another v Attorney General & 2 others* [2016] eKLR by a ruling dated 22 July 2016 agreed with the Supreme Court as effectively having determined the question of the constitutionality of CCK.

45. *Nation Media Group Limited & 6 others v Attorney General & 9 others* [2016] eKLR. In this case, the nature and constitution of this regulatory body that is the Communications Authority of Kenya, the precursor to the Communications Commission of Kenya was in issue challenged amendments to the law in the Kenya Information and Communications Amendment Act, 2013. The petitioners challenged various provisions of the impugned legislation on the basis that they violated or threatened to violate their rights under Articles 33 and 34 of the Constitution.

More specifically, they were aggrieved by the process set out in KICA, 2013 relating to the appointment of the chairman and members of the Communications Authority. They contended that the granting of discretionary powers to the Cabinet Secretary over the choice of candidates from whom to select the final appointees was contrary to the independence of the regulatory authority envisioned under Article 34 (3) and (5) of the Constitution and various other principles and values in the Constitution as well as those underlying an independent media guaranteed by the Constitution. By extension, the argument was to the effect that the right to freedom of expression guaranteed under Article 33, was hindered because of the unconstitutionality of the regulatory body that was now created under the Act, to issue licences and impose standards in broadcasting. The petitioners' contentions with regards to sections 5(C), 5B (2) and (3) of KICA 2013 (Section 6 and 7 of the Act were also in issue as corollary to the challenged sections) were found to be unwarranted.

46. The petitioners base their claim with regard to the independence of the regulatory authority on the provisions of Article 34(5) of the Constitution. At para 183.

47. Paragraph 182.

48. Paragraph 194.

49. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR.

The Supreme court, on final appeal, agreed with the High Court.<sup>50</sup> The circumstances of CCK, as the body entitled under the Constitution and the law to continue to regulate the media and airwaves in accordance with the Constitution and [the] existing law, were regarded as intact until the transition was completed by implementation of the Kenya Information and Communications (Amendment) Bill, 2013.<sup>51</sup> In the Court of Appeal, the judges in the Digital migration case II had made holdings that were flawed: Nambuye, JA, for instance, in analysing the issue of whether CCK as then constituted, was the body envisaged under Article 34(5) of the Constitution, considered the composition of CCK under the 1998 and 2009 Acts,<sup>52</sup> and held that the CCK was controlled by Government. She held:

*[I] find that the key operative words in Article 34(5) [are] ‘independent of the government’. CCK as at the time of execution of its mandate in relation to litigation giving rise to this appeal was not independent of the Government. It, therefore, had no legitimacy to do what it did.*<sup>37</sup>  
(Emphasis supplied)

Maraga, JA, for his part, held as follows:

*In my view, if that were the case, Section 7(1) of the Sixth Schedule to the Constitution would be otiose. In its place, there would have been a provision suspending conformity [to] the Constitution until after the expiry of the period of 3 years in the Fifth Schedule. But as I have said, that is not the case. The operation of the entire Constitution, including Section 7(1) of the Sixth Schedule, commenced on the effective date, that is 27 August, 2010. Article 262 of the Constitution makes that very clear. It directs that ‘the transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date.*

*CCK AS then constituted to him did not meet the criteria under Article 34(5) of the Constitution,<sup>53</sup> according to Maraga JA, relying on the persuasive authority of the Jamaican case, Director of Public Prosecutions v Mollison UKPC 6 (22 January 2003) which interpreted a provision in the Jamaican Constitution similar to Section 7(1) of the Sixth Schedule, and concluded:*

*...that in this case, immediately after the commencement of the 2010 Constitution and at least before making any major decisions like the implementation of the RRC-06 Agreement with far-reaching implications, the Government was obliged to strictly comply with the letter of the Constitution by altering the composition of CCK to align it with Article 34(3)(b) of the 2010 Constitution even before the requisite legislation was passed. ...What I see instead is a modus operandi as though the Constitution did not exist.*<sup>54</sup>

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<sup>50</sup> *Ibid* 258, at paragraphs [122] The petitioners in the High Court submitted that the CCK, as it was then constituted, was not independent of Government control, and hence lacked a basis in law for issuing a BSD licence. The learned trial Judge (Mr David Majanja) in the High Court of Kenya had taken note of the fact that Article 34(5) of the Constitution, as read together with Article 261(1) of the Constitution, and the Fifth Schedule to the Constitution, requires Parliament to enact legislation establishing an independent body to regulate the media, within three years of the promulgation of the Constitution. The judge did take judicial notice of the enactment of the Kenya Information and communications (Amendment) Act, 2013 that was then awaiting presidential assent. *Royal Media Services Ltd & 2 others v Attorney General & 8 others* [2013] eKLR para 82.

<sup>51</sup> Paragraph 84.

<sup>52</sup> Kenya Communications Act, 1998 and Kenya Communications (Amendment) Act, 2008 (Act 1 of 2009).

<sup>53</sup> *Royal Media Services Limited & 2 others v Attorney General & 8 others* [2014] eKLR Para 149.

<sup>54</sup> Paragraph 85-86.

If this holding is to be interpreted strictly, it is difficult to consider how else this compliance could be achieved other than and only if CCK, (The CCK was renamed as the Communications Authority by the Kenya Information and Communications Amendment, Act, in 2013), as it was then established, was to be changed in constitution by a law passed by Parliament and assented to by the President, after the passage of the Constitution of Kenya, 2010.

Musinga, J.A, the third of the three-judge bench held that the CCK, as then constituted, was not the body contemplated by Article 34 of the Constitution, as its members are appointed either by the President or the relevant Minister. He was of the view that had the trial Judge correctly interpreted the relevant transitional provisions, that is, Section 7(1) of the Sixth Schedule to the Constitution, he would have concluded that CCK, as constituted then, did not meet the constitutional threshold to regulate airwaves and undertake licensing of signal distribution. To him the attribute ‘independent’, signified a body whose composition either did not include Government representation, or if it did, then such representation was insignificant.<sup>55</sup>

The Supreme court judges in overturning the above referenced analysis by the Court of Appeal, further reinforced the constitutionality of the Communication Commission of Kenya.

It was clear to the Supreme Court that, Article 34(5)(a), apprehended the pervasive power and influence government, political, commercial interest making them a threat to the operations of the media. Their intrusive nature, if not checked, could distort the operations of a body which is meant to set standards and regulate the operations of the media.<sup>56</sup> Independence, therefore, was crucial.<sup>57</sup> The Supreme Court, whilst understanding the logic and assumptions of the Court of Appeal, was clear that whereas it was quite logical to assume that licensing procedures cannot be independent, unless the licensing organ is itself independent, it was also not illogical to assume that licensing is itself not just a process, but a standard, that was required to be met by conditions set out for the public interest. Under the circumstances, neither, Article 34(3) nor Article 34(5) could therefore be the basis for declaring the CCK unconstitutional.<sup>58</sup>

The Supreme Court thus found that the contentions on the regulatory body were based on a wrong interpretation of the constitutional guarantees under Article 34. The judges did not however, say what Articles of the constitution would be used to declare the regulatory body unconstitutional. The question is one for posterity and the answer may only be deduced from other case law and sources, what the body contemplated by Article 34 (5) is, under the law in Kenya. In the failure to clearly answer this question, the Supreme court stands to question.

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55. Paragraph 94.

56. Paragraph 131-132.

57. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR, paragraph 167. The several independent Commissions and offices are intended to serve as “people’s watchdogs” and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the “independence clause” ... “For due operation in the matrix, “independence” does not mean “detachment”, “isolation” or “disengagement” from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest...” [emphasis supplied] Re the matter of the Interim Independent Electoral Commission (IEBC); Sup. Ct. Advisory Opinion No. 2 of 2011; [2011] eKLR at para 59 and 60.

58. Paragraph 177-181.

The Supreme Court analysis as to the constitutional principles in issue did not include the analysis of the High Court in the *Digital Migration case I*. The High Court took judicial notice that the Media Owners case was pending at the High Court when it concluded its judgment in the *Digital Migration case I*.<sup>59</sup> The court would seem to have left a path for appeals on these contestations.<sup>60</sup> Only section 6B (10), in suggesting that the President and the Cabinet Secretary will be selecting, shortlisting, and appointing the chairperson and members of the Board would seem to be in conflict with sections 5 which mandates the selection and shortlisting to the selection panel. There was still no violation of Article 34(5) of the Constitution.<sup>61</sup>

The Court of Appeal, holdings were thus overturned. The newly named Communications Authority of Kenya (previously CCK) has thus been found to be established within constitutional dictates and thus met the criteria under examination.<sup>62</sup> These cases underpin the status of the regulatory environment of the media in Kenya. Of note for broadcasting is the Kenya Information and Communication (Broadcasting) Regulations 2009. Under these regulations, the *Programming Code for Free-to-Air Radio and Television Services* has been enforced since 2015. In 2019, the Communications Authority developed the *Programming Code for Broadcasting Services in Kenya*, 3rd edition. It covers such matters as a watershed period in relation to the classification system of programs by the Film and Classifications Board under the Film and Stage Plays Act, Chapter 222 laws of Kenya; good taste and decency of programming content; privacy and fairness; hate speech; elections coverage; local content quotas, amongst other areas of concern for broadcast licencees.

The Kenya Information and Communications Act, 1998 also creates at section 102, the Communications and Multimedia Appeals Tribunal that is set up to hear complaints against any publication or conduct of a journalist or media enterprise; to hear appeals against the decisions of the industry regulators, the Communications Authority of Kenya and the Media Council of Kenya, and complaints by any citizen who is aggrieved by an action or decision of licensees who are telecommunications service providers under the Kenya Information and Communication Act.

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59. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR.

60. At paragraph 200 the court took judicial notice of the cases in *Nation Media Group Ltd, Standard Group Ltd, and Royal Media Services Ltd v A.G, Speaker of the National Assembly, Speaker of the Senate, Cabinet Secretary Ministry of Information Communications and Technology and Communications Authority of Kenya*, High Court Petition No. 30 of 2014; and *Kenya Editors Guild, Kenya Union of Journalists and Kenya Correspondents Association v Republic*, High Court Petition No. 31 of 2014 and observes at 204 that in our considered view, such court challenges will continue until a balance that aligns the legislation to the Constitution is found. In the meantime, there is no legal vacuum as I have upheld, the constitutionality of the CCK and its independence to consider and issue licences under Article 34(3) of the Constitution continues.

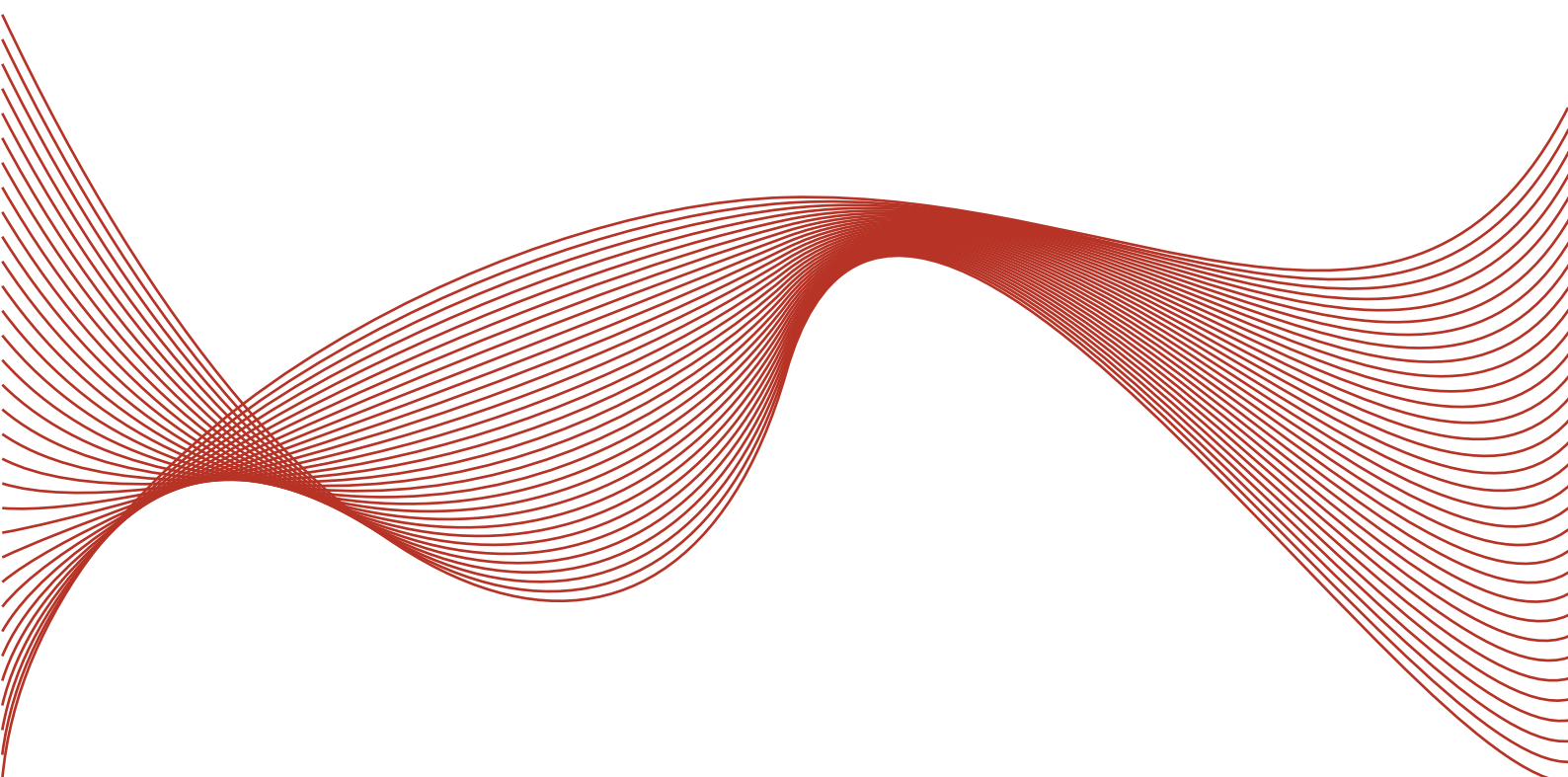
61. At paragraph 195-205.

62. The Statute Law (Miscellaneous Amendments) Act, Number 18 of 2018 Kenya Gazette Supplement Acts, 2018 Nairobi, dated 4 January 2019 changed the underpinning of these holding by deleting in section 6 the expression “in accordance with section 6B “ and inserting a new subsection immediately after subsection (1)- (2) so that in appointing the members of the Board under subsection (I), (e) the Cabinet Secretary shall ensure that the appointees to the Board reflect the interests of all sections of society; equal opportunities for persons with disabilities and other marginalised groups; and that not more than two-thirds of the members are of the same gender. Further the all-crucial section 6B was deleted. These amendments to the Kenya Information and Communications Act, 1998, are under challenge in the High Court of Kenya, (an injunction is in place against the implementation thereof), with a high likelihood of invalidation granted the holding of the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR and the High Court judgment in *Nation Media Group Ltd, Standard Group Ltd, and Royal Media Services Ltd v. A.G, Speaker of the National Assembly, Speaker of the Senate, Cabinet Secretary Ministry of Information Communications and Technology and Communications Authority of Kenya*, High Court Petition No. 30 of 2014. An injunction has already been obtained on the appointments sought to be made pursuant to the amendments. <https://www.nation.co.ke/news/Court-halts-appointment-CA-board/1056-5094866-1a18dz/index.html> 01/05/2019.

## The Media Council of Kenya

The Media Council of Kenya Act, 2013 is an update of the repealed Media Act, 2007. The framework in the Kenya Media Policy Guidelines published in 2008,<sup>63</sup> primarily sought to provide a policy, post the passage of the Media Act, 2007.<sup>64</sup> The Media Act, 2007 was the culmination of processes by civil society and the media, with Government participation, to create a ‘regulatory’ framework, especially for the print press, despite their general media emphasis.<sup>65</sup> The Media Council of Kenya Act, 2013 borrows heavily from the repealed 2007 Act, and makes provision for a complaints commission and a framework for the accreditation of journalist and media enterprises.

The Media Complaints Commission enforces a *Code of Conduct for Media Practice*. The code provides guidelines for matters such as Accuracy and fairness, Independence, Integrity and Conflict of interest, Accountability, Opportunity to Reply, Journalism sources, confidentiality, Misrepresentation, Obscenity, taste and tone in reporting, covering ethnic, religious and sectarian conflict, privacy, protection of children, hate speech, recording interviews and telephone conversations amongst other areas of media practice.



63. Gazette Notice Number 12071 dated 13 November 2009 at page 3283.

64. Chapter 411B (now repealed by the Media Council Act, 2013).

65. The policy guidelines gave this background as follows: Recent Developments on Media Policy in Kenya Important events particularly the advent of multiparty politics in 1992 led the government to consider the introduction of press laws. In 1993 a “Task Force on Press Laws” was appointed, to address issues relating to information access and dissemination, ethical and professional standards for journalists and their enforcement, self-regulation of the media and media ownership, licensing and development. The task force submitted its recommendations to the Attorney General in November 1998. In 2001, a Code of Conduct for journalists and the mass media, was finalized by the Media Industry Steering Committee comprising stakeholders from the Kenya Union of Journalists, Media Owners Association, Editors Guild of Kenya, the Alternative Press, Kenya Correspondents Association, Media NGOs and the state media. The Code has subsequently been reviewed many times with the last version being launched in April 2006 by the Media Council of Kenya. In early 2006, the International Council of Jurists, the Media Owners Association, the Kenya Union of Journalists and other stakeholders developed a Draft Media Bill aimed at establishing the Media Council of Kenya.

# Chapter Seven

## Copyright Law

The economic imperatives of the media markets are based to a large extent on the exploitation of copyright law.

This point is brought out succinctly in the analysis by C. Edwin Baker in *Media, Markets, and Democracy*.<sup>66</sup> He argues that once produced, media content is a public good. The media product or service is non-excludable and non-depletable or non-rivalrous as one's consumption does not deny another the same. Maximum value would therefore result from allowing consumption without charge for the content, although a consumer should pay for any marginal cost involved in access. Just as with other public goods, this poses a difficulty in that if any audience members who value and seek to consume the content, at zero-price, this regime would provide no economic incentive for creation and would fail to encourage production. Intellectual property is the answer to this challenge.

From John Locke and his property theory,<sup>67</sup> it can be argued<sup>68</sup> that one interpretation is that society rewards labour with property purely on the instrumental grounds that we must provide rewards to get labour. On the other hand, a normative interpretation of this labour theory says that labour should be rewarded. Under either interpretation, intellectual property is justifiable. A positive justification for property on labour theory is founded because granting people property rights in goods procured through their labour increase[s] the common stock of mankind, (mankind's collective wealth). However, if this new wealth remains the private property of the labourer, it does not increase the common stock and if it can be appropriated at will by others, the labourer will realize quickly that he has no motivation to produce the property and increase the common stock. The labourers may make a donation to the common, (thereby making increasing the common stock a philanthropic act) or, better still, is to make this added value potentially part of the common stock by introducing the money economy.<sup>69</sup> Accordingly, the labour justification in a 'Lockean' theory of property, lays possible the grounds for asserting that *propertizing* ideas under Locke's approach is possible on three fronts: first, that the production of ideas requires a person's labour; second, that these ideas are appropriated from a 'common' which is not significantly devalued by the idea's removal; and third, that ideas can be made property without breaching the non-waste condition. People will work to produce ideas and the value of these ideas - especially since there is no physical component -- depends solely upon the individual's mental work.<sup>70</sup> Thus, is borne the law of copyright and its protection of the property of the individual, through their mental work. This is the stock of media products.

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66. Baker, C Edwin, *Media Markets and Democracy*, Cambridge University Press, 2004.

67. See J. Locke, Second Treatise of Government, 138-40, in Two Treatises of Government P. Laslett rev. ed. 1963 3d ed. 1968.

68. See Justin Hughes, "The Philosophy of Intellectual Property" 77 Geo. L.J. 287 (1988) II. A Lockean Justification.

69. *Op cit*, at 287. In depicting the transition to a money economy, Locke assumes that: (1) the individual is capable of appropriating more than she can use; (2) the individual will be motivated to do so; and (3) nothing is wrong with this other than waste. Locke condemned waste as an unjustified diminution of the common stock of potential property. To allow goods to perish after appropriating them -- and thereby removing them from a state in which others could have made use of them -- violates "the Law of Nature." Locke justifies the allocation of property in this more advanced money economy by tacit consent. For Locke, positive laws that manifest "disproportionate and unequal possession of the Earth" derive their authority from the tacit consent that people have given to be governed.

70. At paragraph 287.

The law of copyright protects ideas and information that has been expressed into a certain form and or reduced to a particular medium. There is, therefore, as such no copyright in ideas or for that matter news. Once the idea or news is reduced into a certain form, however, transitory, copyright vests, which may only allow others to use the material subject to certain restrictions. This poses the biggest risk on internet and hence social media in particular, as the public do not have an appreciation that the new realm is no different from the old realm in terms of how copyright vests and is protected.

In Kenya the Copyright Act, 2001 in similar fashion to the Industrial property Act 2001 were passed by the Kenyan Parliament for compliance with Kenya's obligations under the WTO and TRIPS. These Acts provide protection for all those IPRs that are mandated under TRIPS. Kenya is also signatory to, the International Convention for the protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention, 1961), the Paris Convention for the Protection of Industrial Property (Paris Convention, 1967), the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention, 1971), and the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty, 1989). It is however, in TRIPS that all intellectual property rights are protected even beyond the earlier conventions although, certain aspects of the conventions are sometimes amended to conform to demands by new technologies.

The Copyright Act, 2001(As amended), protects under Kenyan law, literary, artistic, dramatic, musical, sound recordings, films, broadcasts and cable programmes, works.

The need to have copyright protected equally in most regions is a desired goal of the ever-shrinking global trading in intellectual property. Under the statutes of one country protection is accorded to those authors in a different country, whose country has signed reciprocal agreements with it. Copyright deals with the exclusive rights to do certain things with the works under protection. Such rights are mainly commercial and include the right to-

- 1)Reproduce the work in material form.
- 2)Publish the work.
- 3)Perform the work.
- 4)Communicate the work to the public.
- 5)Make an adaptation of the work.
- 6)Commercially rent the work.

The above rights vary in relation to the work in issue but it should be of note that these economic rights are said to be held by the authors (owners of the copyright in the works in the first instance).

## Licences and Assignment

Copyright owners may exercise any of the rights indicated above either through themselves or through others to whom permission has been granted. Such permission is referred to as a licence. The copyright owners may also, assign their rights over the works for certain periods of time and for certain particular acts. The assignees then become owners of the copyright for that period and for the acts over the works. This is what is referred to as assignment.

## Collecting Societies

Licences for copyright are mostly issued by collecting societies or collective management associations. These are societies or limited liability companies or NGOs that have the right to collect royalties on behalf of their members who hold various rights in the different works under copyright law in exchange for the exercise of the rights held by the copyright owner. Different societies for instance, represent authors and publishers, composers and music publishers, visual artists, sound recording companies and owners of copyright in audio-visual materials. In Kenya, the Music Copyright Society of Kenya is the most prominent of collecting societies.

## Moral Rights

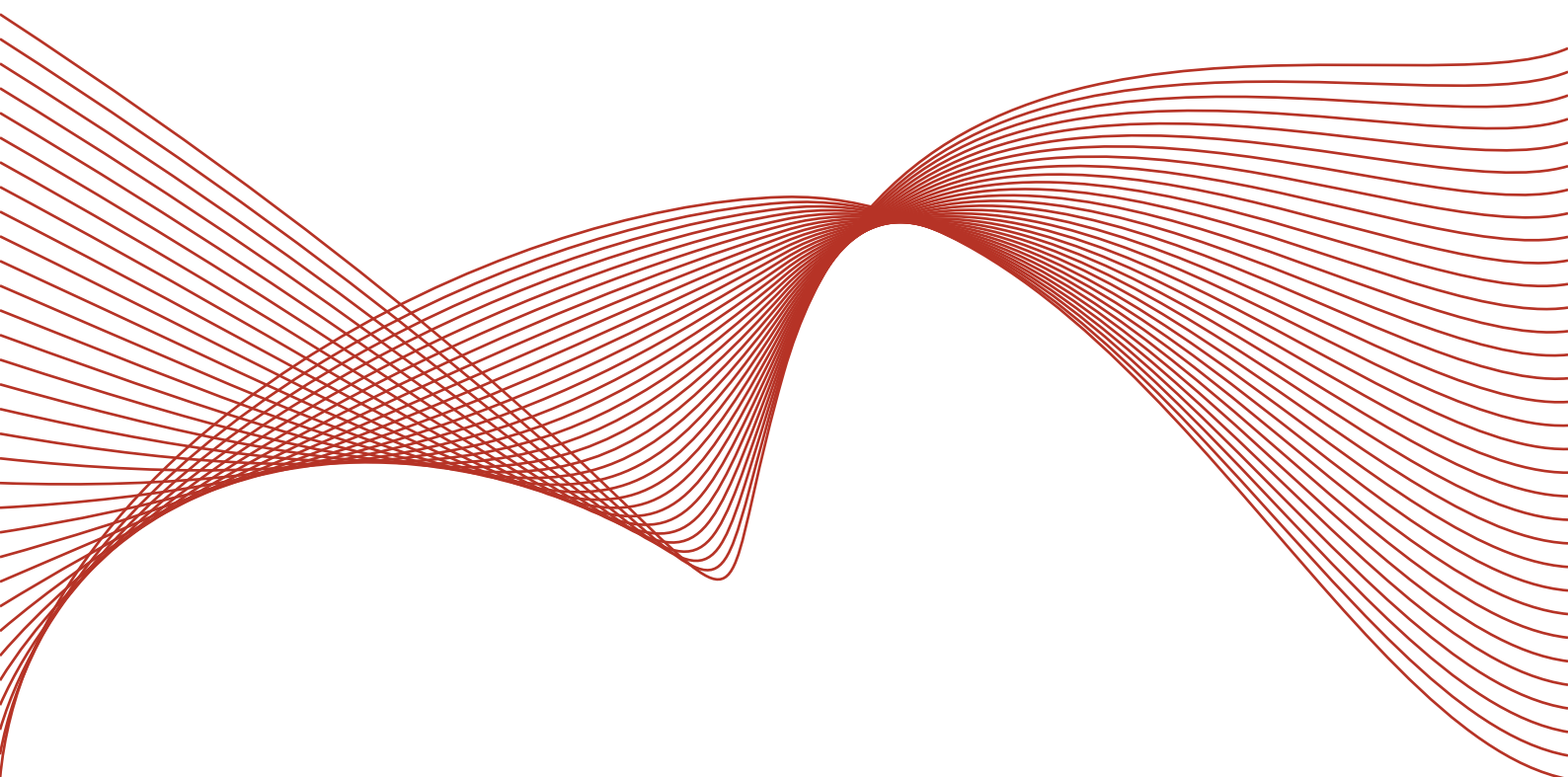
Over and above the economic rights and as a result of the section 6 of the Berne Convention another set of rights that is now protected under copyright law is what is referred to as moral rights. These are the twin rights of paternity (the right to be identified as an author of a work) and integrity. (The right to protect a work from derogatory treatment). The rights have emanated from the basis that the works are personal to the authors and that, therefore, certain inalienable rights attach to the works irrespective of the use in the exploitation of the more common economic aspect of copyright. The moral rights as such cannot be transferred but they may at times be waived. Kenyan law presently protects these moral rights.

## Exceptions to Infringement of Copyright

There are instances when the law on copyright deems that others may exercise certain rights without recourse by the copyright owner. These instances, then form exceptions to infringement and may be termed as defences. These instances allow journalists to do much of their job. These are contained in section 26(1) of The Copyright Act, 2001 and include:

- (a) Subject to acknowledgement of the source-
  - Scientific research,
  - Private use,
  - Criticism and review,
  - Reporting of current affairs,
- (b) Reproduction and distribution of copies, or inclusion (including incidental inclusion) in a film or broadcast, of an artistic work situated in a place where it can be viewed by the public.
- (c) Inclusion subject to acknowledgement of the source of not more than two passages in a collection of literary or musical works if collection is to be used in an educational institution.
- (d) Broadcasts of a work or a reproduction thereof for purposes of a systematic instructional activity in an educational institution.
- (e) Reading or recitation in public, subject to acknowledgement of the source, of a reasonable extract from a published literary work.
- (f) Broadcasting of a literary, musical or artistic work already lawfully made accessible to the public which works are under no license by a collecting society.
- (g) Any use of a work for purposes of judicial proceeding.

The Kenya Copyright Board is required under the Copyright Act, 2001 to maintain a data bank of authors and their works by registering copyright works. The registration is voluntary. Non registration does not deny authors any rights under the Act. Copyright subsists to the benefit of the author for Literary, musical or artistic work other than photographs for the period of the life of the author plus fifty years, for Audio-visual works and photographs fifty years from the end of the year in which the work was either made, first made available to the public, or first published, whichever date is the latest, for Sound recordings ,fifty years after the end of the year in which the recording was made, for broadcasts, fifty years after the end of the year in which the broadcast took place whereafter the work falls into the public domain.<sup>71</sup>



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<sup>71</sup> See <https://copyright.go.ke/>.

# Chapter Eight

## Conclusion

On 25 April 2022, Elon Musk, acquired majority stake of twitter. He had this to say:

*I hope that even my worst critics remain on Twitter, because that is what free speech means.*

Commentary on this acquisition and its aftermath, will put a huge spotlight on freedom of speech in the age of the internet. The law continues to play catch-up on the developments enabled by technology. The architecture of the media system is now in platforms and applications. So far, there have been notable strides, especially through the interactivity of consumers, that most licencees in the media regulatory framework have had to contend with. It is the future of an empowered citizenry. Laws on many aspects of media law and practice are in an ever-changing paradigm. The practice of journalism is changing as this environment changes. The amount of data or information created, captured, copied, and consumed worldwide by 2025 is projected to grow to more than 180 zettabytes (one zettabytes is one sextillion bytes, 8,000,000,000,000,000,000 bits).<sup>72</sup>

The media will have to choose how to survive in this era, where a majority of this information is created out of the newsroom. It is the future of a networked information society. The Constitution of Kenya, 2010 and laws thereunder, will have lots to contend with in this new paradigm. A human rights-based approach to laws in this space should guide this bright future for democratic governance.

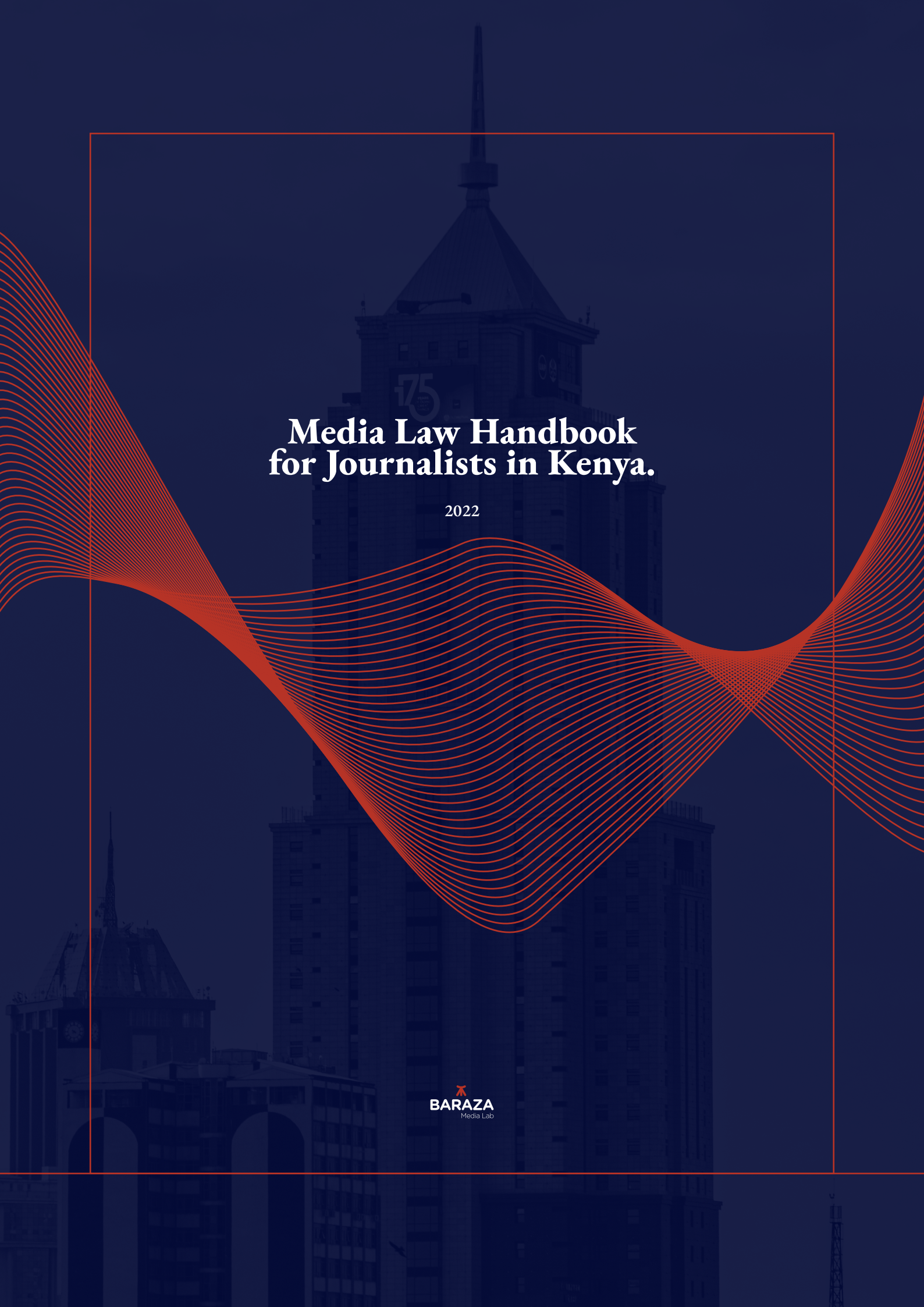
*The book is an update of a paper presented at the Continuing Legal Education seminar organised by the Law Society of Kenya in Eldoret on 1 July 2011, which paper was an update of The Journalists' Hand Kit in Kenya, 2005, by ICJ (K) and the Author and in a small part an on-going project, freedom of speech and broadcasting regulation in the migration from analogue to digital transmission of terrestrial television, by the writer. My gratitude to the Baraza Media Lab Foundation and ICJ (Kenya). Acknowledgements go to Baraza Media Lab Foundation and C. Wangui.*

*Any errors or omissions are to be borne by the writer and when made known, will be appreciated.*

*The law is as stated as at 30 May 2022.*

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<sup>72</sup> See <https://www.statista.com/statistics/871513/worldwide-data-created/>.



# Media Law Handbook for Journalists in Kenya.

2022