REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL NO. 197 0F 2020

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

VERSUS

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

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

3. THE INSPECTOR GENERAL

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

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

ARTICLE 19 EAST AFRICA…….1ST INTERESTED PARTY

KENYA UNION OF JOURNALISTS……2ND INTERESTED PARTY

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

APPELLANT'S SUBMISSIONS

Background

1. The Computer Misuse and Cybercrimes was assented to law on 16th May 2018 having been considered and passed by the National Assembly between October 2017 and April 2018.

2. On 29th May 2018, the appellant filed Petition 206 of 2018 challenging sections 3, 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52 and 53 of the Act for being inconsistent with the Constitution as they deny, violate, infringe and threaten various rights and fundamental freedoms in the Bill of Rights in a manner that is not justified under Article 24.

3. Further, it was the appellant's case that the requirement of public participation was not satisfactorily met during consideration of the Bill and that Standing Orders 130, 131, and 133 of the National Assembly Standing Orders are inconsistent with the Constitution in so far as they allow the inclusion of clauses to a bill without public participation.

4. On the same date the court suspended the 26 impugned Sections for the period of the hearing and determination of the suit.

5. The respondents maintained that the Act meets constitutional muster and that it was passed to protect and promote public interest.

6. Where the Act had limited rights and fundamental freedoms, it was the respondents' case that it had done so in accordance with the Constitution.

7. On 20th February 2020, the court dismissed the Petition in its entirety and allowed those sections to acquire the force of law.

8. Aggrieved with the determination of the court, the appellant herein filed a Notice of Appeal on 21st February 2020 and later a Memorandum and Record of Appeal challenging the decision of the High Court.

Issues for determination

The appellant frames the following issues for determination -

I. Did the learned judge err by holding that sections 22, 23, 24(1)(c), 27, 28 and 37 do not violate the Constitution;

II. Did the High Court err in determining that mens rea in sections 16, 17, 31, 32, 34, 35, 36,38(1), 38(2), 39 and 41 of the Act had been sufficiently provided for

III. Did the High Court fail to appreciate the severity of the threat to the right to privacy posed by sections 48, 50, 51, 52 and 53 of the Act by ruling that there are sufficient safeguards in place;

IV. Did the High Court fail to appropriately apply the provisions of Article 27(8) of the Constitution in its determination of the constitutionality of Section 5 of the Act?

V. Did the High Court err in determining that the Computer Misuse and Cybercrimes Act was passed in accordance with the Constitution

Presumption of Constitutionality and Burden of Proof

9. At the onset, the learned judge wrongly applied the presumption of constitutional validity in this case since the impugned act is one that limits fundamental rights and freedoms (Paragraph 14 of the judgement). Under the provisions of Article 24 of the Constitution there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article **(CORD & 2 others v Republic of Kenya &10; others [2015] eKLR)**

10. The learned judge, having wrongly presumed the constitutionality of the impugned Act erroneously placed the burden of rebutting this presumption on the Petitioner. Under Article 24, the Petitioner's burden is to illustrate how the impugned Act infringes on fundamental rights after which the burden of proof is transferred to the respondents to show compliance with ALL the requirements under that Article.

I. Did the learned judge err by holding that sections 22, 23, 24(1)(c), 27, 28 and 37 do not violate the Constitution

11. The Constitution of Kenya, 2010 in Article 33 provides that every Kenyan is entitled to the right to Freedom of Expression.

12. This right is not absolute. However it is only limited to the exhaustive list in Article 33(2) that is: propaganda for war; incitement to violence; hate speech; or advocacy of hatred that (a) constitutes ethnic incitement, vilification of others or incitement to cause harm; and (b) is based on any ground of discrimination specified or contemplated in Article 27 (4).

13. Article 33(3) states that in the exercise of the right to freedom of expression every person shall respect the rights and reputation of others. This provision is a condition and not a limitation to the exercise of the freedom of expression.

14. At paragraph 40 of the judgement, the learned judge introduced an extra-constitutional limitation to the right to Freedom of Expression to wit 'best interest of government to preserve public order.'

15. This new standard makes a mockery of the Constitution which has listed the grounds for limiting Freedom of Expression in an exhaustive list in Article 33 (2) as read with Article 24.

16. Public order is a vague and outlandish excuse given to protect tyrannous governments when violating human rights.

17. As decided in **Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & another Civil Appl. No. 54 of 2006 [2006] eKLR (pg. 7)**

'…the Constitution of the Republic is a reflection of the supreme public interest and its provisions…The Kenyan nation has chosen the path of democracy; our Constitution itself talks of what is justifiable in a democratic society… It has opted for the rule of law…The courts must stick to that path even if the public may in any particular case want a contrary thing…'

(a) Fake news offences (Section 22 and 23) (paragraphs 43-66 of the judgement)

18. The famous words of Justice Lewis F. Powell in the American Supreme Court case of **Gertz v Robert Welch Inc. 418 U.S. 323 418** come to mind when discussing fake news–

'Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas'.

19. In reviewing the constitutionality of the fake news provisions in the Act (Section 22 and 23)(see paragraphs 40 to 45) the learned judge in obvious contravention of Article 24(3), placed a burden on the petitioner to demonstrate other ways the respondents would have achieved their objective without violating human rights. This burden is squarely placed by Article 24(3) on the respondents who must bear the responsibility of justifying provisions limiting human rights.

20. Further, the learned judge simplistically relied on the definition of the word 'false' to hold that Sections 22 and 23 are not ambiguous. This is erroneous as it presumes there could be a universal truth on every topic imaginable. It also endorses that only those who speak this 'truth' are to enjoy protection under Article 33, making it a potent tool for manipulation by undemocratic leaders. This position would also net in information, though false, published in good faith (**Chimanikire v Attorney General of Zimbabwe, CCZ 247/09 (22 July 2014)**.

21. In considering a similar provision the Supreme Court of Zimbabwe in **Chavunduka & Choto v. Minister of Home Affairs & Attorney General [2000] JOL 6540 (ZS) (pg. 15)** opined that the use of the word 'false' in statute is wide enough to embrace an opinion, a statement, rumor or report which is merely incorrect or inaccurate, as well as a blatant lie; and actual knowledge of such condition is not an element of liability. Negligence is therefore criminalized. It is also not always possible to categorize statements as 'fact' or 'opinion' (e.g. in cases of figures of speech, metaphor, and comedy).

22. The net effect of Section 22 and 23 is to create a chilling effect leading to prior restraint which is in effect censorship that goes against the very purpose of Article 33. Independently, both of these sections cause a chilling effect. The fact that the two provisions criminalize the same conduct with different penalties is further proof of this chilling effect.

23. The learned judge also failed to consider using 'that is calculated or results in panic, chaos or violence' (Section 23) as a yardstick to determine the offence of publishing false information to be a vague measure given that even true information can spur these reactions (see **Chavunduka)**. What then is to stop the respondents from labelling an accurate journalistic piece on corruption as fake news in order to gag the media and save criminals from public uproar?

24. The learned judge at paragraph 45 of the judgement in justifying the criminalization of fake news further makes vague reference to national security without showing how freedom of expression affects the latter. National security as addressed in Chapter Fourteen of the Constitution refers to a specific security apparatus. It is no longer a word to be used in a cavalier manner to limit human rights as was done in past constitutional regimes. A similar error is seen in how the learned judge conflates fake news with hate speech which is a false equivalent since the latter is already listed under Article 33(2) as unprotected speech.

(b) Criminal defamation (Sections 22 and 23) (paragraph 54-56; 65 of the judgement)

25. The learned judge erroneously held that the condition stipulated in Article 33(3) amounts to a limit of the right to freedom of expression equivalent to those listed under Article 33(2). As a result, the

learned judge concluded that criminal defamation is an acceptable limitation to the freedom of expression.

26. This position runs afoul of Article 33(3) and Article 24(1) as there are less restrictive ways of achieving the same goal (i.e., protection of reputation). In civil law, there exists a perfect remedy for defamation which benefits the plaintiff **(Jacqueline Okuta & Another v Attorney General & 2 Others [2017] eKLR pg. 13)**. Checks and balances are written into defamation procedures to prevent abusing that process to constrain free speech. Prescribing a criminal offence for defamation is therefore disproportionate and not necessary in a democratic society.

27. The appropriate interpretation of Article 33(3) is that speech that does not respect the rights and reputations of others, will remain protected speech unlike the speech in Article 33(2). However, such speech may give rise to liability for instance under Article 31 should it violate the right to privacy or in a civil court in the case of defamation. Article 33(2) and 33(3) must therefore be treated differently when legislating on freedom of expression.

28. The ECOWAS Court in directing Gambia to immediately repeal or amend criminal laws on libel, sedition and false news in line with its obligations under international law expounded on the chilling effect these criminal sanctions have and how excessive of a burden these provisions place on citizens who would wish to participate in public discourse **(Federation of African Journalists et al v. the Republic of The Gambia, Judgment No. EWC/CCJ/JUD/04/18 (13 February 2018), pg. 47-48)**.

29. Even if the learned judge's reasoning in paragraph 56 were to be believed, criminal defamation does not offer a solution to the difficulties posed by 'cyber libel'. It wouldn't make it easier to find the publishers of defamatory information; it would make it harder. The mayhem caused on arrest of a suspect would cause further defamation and cause even greater harm. This harm cannot be compensated in a criminal process where the end result is either a fine or imprisonment without a monetary award or retraction to the plaintiff as would be in a civil suit.

30. It is also apparent that the learned judge holds allegiance to the traditional and outlawed justifications for limiting human rights as is evident in paragraph 61 in his reference to 'public morality, public order and general welfare' as appropriate interests in limiting human rights, a position that mocks the Constitution of Kenya, 2010.

31. If everything that an individual states or posts on the internet is subjected to an arbitrary test of truthfulness in order for it to be protected speech then freedom of expression does not exist for that individual.

Use of ambiguous and overbroad terms

(c) Pornography (Section 24) (Paragraph 66-72 of the judgement)

32. The learned judge in his determination failed to appropriately determine that the use of ambiguous terms in criminal legislation was constitutionally inexcusable as the provisions fail the first test under Article 24; 'prescribed by law'.

33. On criminalization of (adult) pornography, the learned judge contradicts himself. He first affirms that the purpose of section 24 should be drawn from the marginal notes where it is clear the offence relates to 'child pornography'. He proceeds to later affirm that the offence should apply to all pornographic material including that which is not directly defined in Section 2 of the Act. He failed to appreciate the danger of the use of the words '*erotic, lewd and designed to arouse sexual interest'* which are not defined in the impugned Act or given any form of clarity. Reading materials, television programs and even educational material would be subject to this offence.

(d) Cyber harassment (Section 27 of the Act) (Paragraphs 73-75 of the judgement)

34. The learned judge fundamentally erred by failing to subject Section 27 to any constitutional test choosing instead to make an unsupported declaration that the freedom of expression does not extend to speech that amounts to harassment of another person (paragraph 75).

35. He failed to apply himself to the ambiguous language used in Section 27 which makes it impossible for an individual to know beforehand what conduct is criminalized by that section.

36. Section 27 is comparable to Section 66A of the Indian Information Technology Act struck down by the Supreme Court of India on the basis that it was void for vagueness and caused a chilling effect. Like Section 27, it criminalized the 'sending offensive messages.' (Shreya Singhal v. Union of India (2015) 5 SCC 1, para 69, 82)

(e) Cyber-squatting (Section 28 of the Act) (Paragraphs 76-80 of the judgement)

37. The learned judge erred in holding that limiting the type of words that an individual can use on the internet does not encroach on Articles 32, 33 or 35 of the Constitution.

38. The manner in which Section 28 defines the offence of cybersquatting is all encompassing of innocent use of words that may be registered elsewhere. It is an impractical approach towards intellectual property since for trademarks, similar trademarks can exist with respect to different products in different fields. A domain name infringing on another person's intellectual property is best dealt with under civil law where detailed procedures on first registration are provided for.

39. The learned judge's failure to appreciate the vagueness and overreach of Section 28 and his subsequent declaration focusing only on the right to property severely undermines Article 32, 33 and 35.

(f) Obscene images (Section 37) (Paragraphs 81-85 of the judgement)

40. The learned judge wrongfully held that the petitioner had failed to demonstrate how Section 37 limits freedom of expression yet the section curtails certain kinds of speech.

41. Article 24 requires that any provision limiting the bill of rights be clear and unequivocal yet the learned judge at paragraph 85 suggests that the interpretation of Section 37 ought to be subjective, differing from judicial officer to judicial officer. This goes against the principle of legality which requires that individual must be aware of the criminalized conduct beforehand.

II. **Did the High Court err in determining that *mens rea* in sections 16, 17, 31, 32, 34, 35, 36,38(1), 38(2), 39 and 41 of the Act had been sufficiently provided for (paragraphs 87-96)**

42. The learned judge at paragraph 93 held that the 'offender' need not know the consequences of their actions at the time of the commission of the crime but knowing that their actions will cause a computer to perform the function is enough to determine that the *mens rea* element has been met.

43. This position grossly misconstrues the operationalization of simple computer instructions. For example. While computer users have control of the commands issued to the system, it is not always the case that they will be in control of the instructions executed by the system.

44. The learned judge's rationale fails to consider the complex manner in which cybercrime is carried out. For instance, social engineering schemes bait innocent people into clicking a link that will frame them for cybercrime. In such a case, following the learned judge's reasoning, victims of cybercrime would be held liable while the actual perpetrators walk away scot free.

45. Such an individual may have 'intentionally' clicked on the link but they had no intention of committing whatever crime was committed upon the clicking of the link, therefore negative the requirement of a guilty mind.

46. The learned judge further erred in finding that failing to prescribe a specific mens rea is the prerogative of Parliament and not within the jurisdiction of the court to interfere. On the contrary, it is the duty of the court to interpret and uphold the constitution and protect the people from laws that may work against them.

47. The manner in which these sections are framed does not disclose to the public the kind of mental element that would cause them to be faced with the criminal sanctions provided for in the Act.

48. Therefore sections 16 and 17 which are claimed to have their *mens rea* in the word 'intentionally' may result in the arrest of innocent individuals who lacked the adequate intent to commit a crime.

49. Further the use of the terms 'unlawfully and without authorization' do not sufficiently disclose what the *mens rea* is. There must be a law prohibiting an action for it to be termed as unlawful otherwise how the individual knows the conduct giving rise to the offence.

50. Lastly the use of the word 'knowingly' is also not a sufficient *mens rea* element as the person may be knowingly doing a thing that causes the effect described in the Act without knowing that their action would produce such results. For example, a person deleting an email does it knowingly yet any deletion of an email could be a potential basis for an offence under Section 38(1).

51. The difficulties presented by the use of the word 'knowingly' as a *mens rea* qualifier were considered in **United States v X-Citement Video, Inc., 510 U.S. 1163**. The danger is that would sweep within the ambit of the statute actors who had no idea that they were even dealing with the prohibited material.

52. Given the forgoing, it is blatant that the learned judge erred in determining that the impugned sections prescribed proper *mens rea* and are constitutional in nature.

III. Did the High Court err in determining that Sections 48, 50, 51, 52 and 53 of the Act limit Article 31 of the Constitution in a manner inconsistent with Article 24 of the Constitution of Kenya 2010

53. The impugned Act envisions the collection of three different kinds of data; subscriber information (Section 50) **(R v. Spencer, [2014] 2 S.C.R. 212)**; traffic data (Sections 51 and 52) and content data (Section 53). The learned judge failed to appreciate that all three categories of data call for different levels of protection of private information owing to the privacy risk involved.

54. The court erred in determining that section 48,50,51,52 and 53 of the impugned law has built in safeguards ensuring that due process is followed.

55. In paragraph 107 of the judgement, the learned judge errs by stating that the nature of cybercrime warrants less protection of fundamental rights and freedoms. In his holding, the oversight procedures in the investigation of cybercrime ought to be less stringent than those of offences committed offline.

56. This position fails to take into account the sophisticated nature of online systems, their vulnerability and the value of personal information pursing through online systems. For this reason, investigation of cybercrime calls for more stringent oversight procedures than other offences would.

57. The learned judge thoroughly misinformed himself in paragraph 108 of the judgement by taking judicial notice of opinions set forth by the respondents as though they were uncontroverted facts contrary to section 60 of the Evidence Act.

58. Section 48 allows a police officer to apply for a search warrant if they have indeterminate reasonable grounds to believe that there may be in a specified computer system or part of it data that is reasonably required for criminal investigation.

59. The court in paragraph 109 erred in stating that the limitation to privacy is justifiable because it allows law enforcement to access data pertaining to their investigation only. There are no safeguards under Section 48 to ensure that the information that is retrieved by law enforcement will be only that which pertains to their investigation therefore there is no guarantee that privacy of the individual will remain protected.

60. The learned judge failed to address the gaps in Section 50 to wit; what kind of order a police officer requiring subscriber data should apply for and what elements they need to produce as evidence. Further, the use of 'shall' in Section 50(2) in directing the court to grant the order sought interferes with the independence of judicial officers.

61. This means that the learned judge has no option but to grant the warrant once the indeterminate reasonable grounds are presented to them. There are no explicit reasons stated in the section that would require a police officer to make an application for a production order.

62. Further, the learned judge erred in determining that Section 51 is proportionate in terms of the means it uses to achieve the stated purpose. Section 51 allows for police officers to bypass judicial authority and serve a notice to person to undertake expeditious preservation of traffic data that the person has access to and to disclose the traffic data to the police officers which data is to be preserved for thirty days. This period may be extended by a court order. This is an extremely disproportionate means for achieving the result of preventing data from being destroyed.

63. In **Magajane v Chairperson, North West Gambling Board (CCT49/05) [2006] ZACC**, it was held that warrantless inspections must be reasonable. The Court articulated a three-pronged test for reasonableness: (1) there must be a substantial government interest, (2) the absence of a warrant requirement must be necessary to further the regulatory scheme and (3) the statute must serve as a constitutionally adequate substitute for a warrant. The latter part of the test requires that the statute must alert the subject of the search that the inspection is lawful and limited in scope. Additionally, the inspection must be limited in time, place and scope. Finally, the administrative inspection may not serve as a pretext to avoid the warrant requirements for criminal searches. However, the inspections may have the same ultimate purpose as parallel criminal statutes and inspectors can discover evidence of crimes. These conditions are not met under Section 51.

64. The court in its judgement quoted the aforementioned case and misapplied its findings by determining that Section 51 met these conditions and would only serve to protect people from intrusion into their privacy.

65. The court in paragraph 125 erred in determining that Section 52 of the Impugned Act does not limit the right to privacy in a manner inconsistent with Article 24. Section 52 of the Act provides that a police officer may collect real-time traffic data for a period of six-months subject to the conditions laid out in the section.

66. Six months is an extremely long period of time to allow law enforcement to collect real-time data, it is disproportionate to any desired goal under the section. Real- time traffic data is incredibly sensitive and private information that should be handled with the most care and protection.

67. The collection of this data for such a period of time is a severe violation to the right to privacy that is enshrined in the Constitution.

68. In addition to the above, the court erred in determining that Section 53 of the Act provides sufficient safeguards to ensure the protection of privacy of individuals.

69. Under Section 53 of the Act, a police officer may apply for a court order permitting the collection of content data in real-time. Despite the so-called safeguards in the section, the collection of this information could interfere with the privacy of individuals who are not under investigation and inadvertently get caught up in the collection of the information.

70. This is because the data is being collected for a period of up to nine months and in that time, there is no telling how much data may be collected and if there will be any oversight to ensure that only the proper data subject's information is being collected.

71. It is therefore the appellant's contention that the determination made by the court in paragraph 132 that all the above-mentioned sections contain adequate safeguards to protect the right to privacy was an erroneous one.

IV. Did the High Court fail to appropriately apply the provisions of Article 27(8) of the Constitution in its determination of the constitutionality of Section 5 of the Act?

72. The Learned Judge failed to appreciate that the Petitioners quarrel with Section 5 of the Act was the Parliamentary drafters' failure to comply with their obligation under Article 27 (8) of the Constitution and ensure that there was a provision catering to gender equality.

73. Article 27(8) of the Constitution provides that the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

74. The court in paragraph 22 erred in determining that the question of the unconstitutionality of Section 5 of the Act was premature as the failure to legislate according to Article 27 (8) is already manifest.

75. The obligation created in Article 27 (8) is that measures must be taken to prevent gender discrimination by taking steps to ensure that it does not occur without relying on the benevolence of individual office holders to nominate different genders.

76. This obligation was further espoused in the case of **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR** where the court outlined the importance of putting legislation in place to ensure unequivocal and immediate realization of Article 27 (8).

77. The obligation under Article 27(8) is a positive one which enjoins the State to be proactive in order to address historical gender discrimination.

78. When prescribing membership to any statutory bodies Parliament has a duty to write into that membership the observance of the two-third gender rule and avoid constructions similar to Section 5 of the Act that could lead to a violation of the two-third gender rule.

V. Did the High Court err in determining that the Computer Misuse and Cybercrimes Act was passed in accordance with the Constitution

79. The High Court in paragraph 147 of its judgement determined that the Computer Misuse and Cybercrimes Act was passed in accordance with the Constitution and the National Assembly Standing Orders.

80. The Court also in the same vein erred in determining that Sections 23, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 and 45 of the Act are constitutional despite not being subjected to public participation.

81. Article 118 of the Constitution provides that Parliament shall facilitate public involvement and participation. Standing Order 133 on the other hand provides for the Committee of the Whole procedure which the appellant avers is a means of the National Assembly evading public participation. This is because at this stage, members of the National Assembly are allowed to introduce new Clauses to the Bill that has been tabled. After their introduction, these clauses are not subjected to any public participation and they area passed as is.

82. This is in clear contravention of Article 118 of the Constitution therefore any product of this process should be declared unconstitutional.

83. In addition, Standing Order 133 is unconstitutional for failing to adhere to Article 118 of the Constitution.

84. The impugned law was therefore passed in an unconstitutional manner thereby rendering it unconstitutional.

Remedies

a. The appellant prays for a declaration that Sections 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52 & 53 of the Computer Misuse and Cybercrimes Act are unconstitutional for violating, infringing and threatening fundamental rights and freedoms;

So your humble appellant prays.

DATED at **NAIROBI** this 22nd day of February 2021

NZILI AND SUMBI ADVOCATES

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