IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: KIAGE, MUCHELULE & KORIR, JJ.A.)

CIVIL APPEAL NO. 197 OF 2020

BETWEEN

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

AND

THE HON. ATTORNEY GENERAL ..... 1ST RESPONDENT
THE SPEAKER, NATIONAL ASSEMBLY ..... 2ND RESPONDENT
THE INSPECTOR GENERAL OF THE
NATIONAL POLICE SERVICE ..... 3RD RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 4TH RESPONDENT
ARTICLE 19 EAST AFRICA ..... 5TH RESPONDENT
KENYA UNION OF JOURNALISTS ..... 6TH RESPONDENT
LAW SOCIETY OF KENYA ..... 7TH RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Nairobi (J.A. Makau, J.) dated 20th February 2020

in

Constitutional Petition No. 206 of 2018)
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JUDGMENT OF THE COURT

1. The appeal before us arises from the judgment of the High Court (J. A. Makau, J.) dismissing the petition of the appellant (*The Bloggers Association of Kenya (**BAKE**)*) which sought, among other orders, to declare **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, 2018 (*"the Act"*)** unconstitutional. In the judgment, the learned Judge affirmed the constitutionality of the impugned provisions and the Act, finding

that they did not violate, infringe, or threaten constitutional rights and fundamental freedoms and were justified under **Article 24** of the **Constitution**. He, therefore, dismissed the petition and ordered each party to bear own costs of the litigation.

2. The appellant is dissatisfied with the judgment and has raised 42 grounds of appeal. We pay homage to **rule 88 (1)** of our Rules which requires that the memorandum of appeal should set forth the grounds of appeal concisely and without argument, and reduce the appellant's grounds of appeal to the following questions: *Did the learned Judge err by holding that* ***sections 22, 23, 24(1)(c), 27, 28 and 37 of the Act*** *do not violate the Constitution; Did the learned Judge err in determining that mens rea had been sufficiently provided for in* ***sections 16, 17, 31, 32, 34, 35, 36, 38(1) & (2), 39 and 41 of the Act****? Did the learned Judge 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 holding that there were sufficient safeguards in place? Did the learned Judge fail to appropriately apply the provisions of* ***Article 27(8) of the Constitution*** *in his determination of the constitutionality of* ***section 5 of the Act****? Was the Act enacted in breach of the Standing Orders of the National Assembly?* and, *did the learned Judge err in determining that the Act was passed in compliance with the Constitution*?

3. In summary, the appellant through the petition dated 29th May 2018 contended that: the Act as enacted contravened the

Constitution of Kenya, 2010; **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** denied, violated, infringed and threatened various rights and fundamental freedoms in the Bill of Rights in a manner not justified under **Article 24** of the **Constitution**, and were also inconsistent with the objects of the Act as enunciated in **section 3**; the process of the enactment of the Act was not in accordance with the Standing Orders of the National Assembly and the Constitution as the requirement for public participation by **Articles 10** and **118** of the **Constitution** was not adhered to; **Standing Orders No. 130, 131,** and **133** of the **National Assembly Standing Orders** were inconsistent with the Constitution for allowing inclusion of clauses in a bill without public participation; and, the language of the Act was ambiguous and lacked the specificity required of an Act that seeks to limit rights and fundamental freedoms.

4. Turning to the impugned provisions of the Act, the appellant asserted that the membership of the National Computer and Cybercrimes Co-ordination Committee (***"the Committee"***) established by **section 5** of the **Act** violated the two-thirds gender principle established under **Article 27(8)** of the **Constitution**, as the Committee would be a wholly male conclave.

5. **Sections 16, 17, 31, 32, 34, 35, 36, 38(1) & (2), 39** and **41** of the **Act** were faulted for curtailing the right to the freedom and security of the person guaranteed under **Article 29** of the

Constitution and hindering the right to a fair hearing under **Article 50** of the **Constitution** as they lacked clarity and specificity as to the reach and purpose of the offences, and failed to prescribe the *mens rea* element thus exposing innocent persons, pawns, victims of cyber-attacks and whistle blowers to the risk of prosecution and conviction. According to the appellant, the cited provisions were not enacted in compliance with **Article 24** of the **Constitution** which provides the circumstances under which rights and fundamental freedoms can be limited, and also offended the principle of legality which requires that a law, especially one that limits a right or fundamental freedom must be clear enough so as to be understood and must be precise enough to cover only the activities connected to the purpose of the law.

6. **Sections 22** and **23** of the **Act** were alleged to limit the provisions, rights, and freedoms under **Articles 24, 32, 33**, and **34** of the **Constitution** on account of lacking specificity and the use of vague and broad terminology. According to the appellant, these provisions, which carry heavy sentences, would hinder citizens' ability to participate in governance, limit the freedom of expression, and freedom of the media.

7. The appellant averred that **section 24(1)** of the **Act** limited the rights guaranteed by **Articles 31** and **32** of the **Constitution** in a manner inconsistent with **Article 24** of the **Constitution** by invading the sanctity of private relationships between adults and imposing criminal sanctions thereon.

8. As for **section 27** of the **Act**, the appellant asserted that it infringed **Article 33** of the **Constitution** in a manner inconsistent with **Article 24** of the **Constitution**. According to the appellant, the provision was vague and went beyond its intention, thus likely to overreach to those whose conduct was not the intended target.

9. **Section 28** of the **Act** was impugned for criminalising the use of the name, business name, trademark, or domain name of another person, thereby limiting the right to own property under **Article 40** of the **Constitution** and violating the freedom to express ideas and freedom of artistic creativity protected under **Article 33** of the **Constitution**. The appellant additionally asserted that the provision was vague and too broad, and therefore unreasonable and unjustifiable in an open and democratic society, thus inconsistent with **Article 24** of the **Constitution**.

10. **Section 37 of the Act** was alleged to lack clarity, thus criminalising personal autonomy, consensual transfer, publication, and dissemination of materials among adults, thereby violating the right to freedom of expression under **Article 33** of the **Constitution** in a manner that is inconsistent with **Article 24** of the **Constitution**.

11. **Section 40** of the **Act** was faulted for unjustifiably invading privacy by requiring attacks, intrusions and disruptions on a computer system or network to be reported to the Committee within 24 hours. According to the respondent, the provision

infringes on the right to privacy under **Article 31** of the **Constitution** by imposing obligations that are burdensome on private individuals without serving any public interest, thus failing the proportionality test.

12. As regards **sections 48, 50, 51, 52**, and **53** of the **Act**, the appellant claimed that they violated the right to privacy protected under **Article 31** of the **Constitution** in a manner that was unreasonable and unjustifiable, hence inconsistent with **Article 24** of the **Constitution**. According to the appellant, the said provisions violated rights and fundamental freedoms by not listing the factors to be proved to the court by police officers before a production order can issue; giving police officers power to demand information in certain circumstances without a court order; allowing the issuance of a court order to police officers for collection of traffic data in real-time for an unreasonable period of up to six months; and, failure to indicate as required by **Article 24(2)** of the **Constitution** that **Part IV** of the **Act** is intended to limit rights and the extent of such limitation. Specifically, **sections 51(4), 52(6)**, and **53(6)** were faulted for unjustifiably infringing on the right to information guaranteed by **Article 31** of the **Constitution** by allowing courts to order service providers to ensure confidentiality of any court order issued in enforcement of the Act.

13. The appellant impugned **section 49(3) & (4)** of the **Act** for allowing police officers to deny one access and opportunity to copy

information from a seized computer system, thus violating the right to property under **Article 40** of the **Constitution** and the right to be presumed innocent until proven guilty as guaranteed by **Article 50** of the **Constitution**.

14. Turning to the allegation that the Act was enacted in breach of the Constitution and the law, the appellant asserted that **section 23** of the **Act** was passed in contravention of **Standing Order Nos. 131** and **133** of the **National Assembly Standing Orders**, and the principle of public participation under **Articles 10** and **118** of the **Constitution**.

15. The 5th Respondent (Article 19 East Africa (Article 19 EA)), the 6th respondent (Kenya Union of Journalists (KUJ)), and the 7th respondent (Law Society of Kenya (LSK)) supported the petition.

16. The 1st respondent (The Attorney General) opposed the petition through a replying affidavit sworn on 20th June 2018 by the Deputy Solicitor General, Ms. Christine Agimba. Through the affidavit, the 1st respondent asserted that the Act was procedurally enacted, was constitutional, and adhered to national and international human rights standards. The 1st respondent averred that the Government's role was to protect its citizens and contended that the Act was in line with the Council of Europe Convention on Cybercrime (***"Budapest Convention"***), the African Union Convention on Cyber Security and Personal Data Protection

(***"AU Convention"***) and the International Convention on Civil and Political Rights (***"ICCPR"***).

17. The 1st respondent rejected the appellant's contention that the Committee established in **section 5** of the **Act** violated the two-thirds gender principle enunciated in **Article 27(8)** of the **Constitution**, asserting that the Committee envisaged in the section was yet to be constituted and the question of compliance or non-compliance with the provision was not ripe for adjudication. Further, that **section 5** was not unique to the Act, as similar provisions are found in other Acts of Parliament.

18. As regards the alleged violation of **Articles 24** and **50** of the **Constitution** by **sections 16, 17, 31, 32, 34, 35, 36, 38(1) & (2), 39** and **41** of the **Act**, the 1st respondent contended that **sections 16** and **17** which criminalised unauthorised interference and unauthorised interception clearly established *mens rea* by providing that an offence is only committed if the act is *"intentional"* and *"without authorisation"*. In respect to the alleged unconstitutionality of **sections 31, 32, 34, 35, 36, 38(1) & (2), 39**, and **41** of the **Act**, it was contended that the allegations were based on a misunderstanding of the meaning of *actus rea* and *mens rea* in offences. Further, that there was no elucidation by the appellant on his claim that the principle of legality was violated. Additionally, the provisions of the Act were clear and unlikely to net innocent persons, pawns, victims of cyber-attacks, and whistle blowers.

19. In response to the claim that **sections 22** and **23** of the **Act** limited the rights guaranteed by **Articles 32, 33**, and **34** of the **Constitution**, the 1st respondent averred that the provisions were concise and that the sentences prescribed by Parliament in a legislation could not found a claim of unconstitutionality. Further, that the ICCPR allowed for limitation of rights and that the right to freedom of expression is not absolute, as **Article 33(3)** requires every person to respect the rights and reputation of others.

20. Rejecting the appellant's assertion that **section 24(1)(c)** of the **Act** limited the rights guaranteed under **Articles 31** and **32** of the **Constitution** in contravention of the principles established in **Article 24** of the **Constitution**, the 1st respondent asserted that the section criminalised child pornography in affirmation of the requirement by **Article 53** of the **Constitution** that children be protected and the authority of **Article 19** of the **ICCPR** that the legislature can make laws to protect public morals and public order.

21. In answer to the appellant's attack on **section 27** of the **Act**, the 1st respondent stated that the provision is neither vague nor overboard and that the appellant did not specify the manner in which the offence of cyber harassment limited the rights guaranteed under **Article 33** of the **Constitution**.

22. Opposing the appellant's assertion that **section 28** of the **Act**, which creates the offence of cybersquatting infringes **Articles 33**

and **40** of the **Constitution**, the 1st respondent averred that there is no right for an individual to take possession of another person's property on the internet or any other computer network without authorisation. According to the 1st respondent, the provision aims at protecting property lawfully owned by others, and this cannot be said to be a violation of any person's rights.

23. The 1st respondent asserted that **section 37** of the **Act**, which outlaws the wrongful distribution of obscene or intimate images of another person, cannot be said to limit the right of freedom of expression under **Article 33** of the **Constitution**.

24. As to whether **section 40** of the **Act** infringed **Article 31** of the **Constitution**, the 1st respondent deposed that it did not, because the need for early reporting of cyber threats is to ensure remedial action to prevent catastrophic cyber-attacks.

25. On the alleged limitation of the rights under **Article 31** of the **Constitution** by **sections 48, 50, 51, 52** and **53** of the **Act**, the 1st respondent averred that the impugned provisions did not violate the Constitution because pursuant to **section 48** of the **Act**, a warrant issued by a court is a prerequisite for any search and seizure of stored computer data, thus searches are subject to judicial oversight. Further, that real-time collection and interception of data is not only necessary because of the nature of the cyberspace, but is also in conformity with **Articles 20** and **21** of the **Budapest Convention**. According to the 1st respondent, the

impugned provisions are reasonable and justifiable in an open and democratic society based on human dignity, and that courts are manned by judicial officers with the capacity to determine justifiable grounds for issuance of orders.

26. In response to the claim that **sections 51(4), 52(6)** and **53(6)** of the **Act** which provide for confidentiality of orders issued by court are violative of **Articles 24** and **35** of the **Constitution**, the 1st respondent stressed that confidentiality is necessary so that suspects are not tipped off, and that the impugned provisions do not limit the right to information.

27. Reacting to the appellant's attack on **section 49(3) & (4)** of the **Act** which authorises a police officer to deny a party the opportunity to make copies of seized data and materials, the 1st respondent contended that the provision does not violate **Articles 40** and **50** of the **Constitution** as alleged because any aggrieved party can move the court for appropriate orders.

28. Finally, in response to the appellant's claim that the Act was enacted in violation of the principle of public participation as enunciated in the Standing Orders of the National Assembly and the Constitution, the 1st respondent insisted that the Act was enacted in line with the Standing Orders of the National Assembly, as well as constitutional edicts.

29. The 2nd respondent (The Speaker, National Assembly), opposed the petition through a replying affidavit sworn on 21st September 2018

by Mr. Michael Sialai, the Clerk of the National Assembly. Mr. Sialai reiterated the legislative authority of the National Assembly, as outlined in **Articles 93** and **109** of the **Constitution**, and avowed the legality of the Act, stressing that it was both legally and procedurally sound. He averred that there was compliance with the requirement for public participation in the enactment of the Act. Mr. Sialai further deposed that in determining the merit or otherwise of the petition, the High Court was to be guided by the doctrine of separation of powers; the State's duty of care to its citizenry; the principle of presumption of constitutionality of statutes; and the need to balance private rights and public interests.

30. Joseph Kipchirchir Boinnet, the Inspector General of the National Police Service, swore an affidavit on 20th June 2018 opposing the petition on behalf of the 3rd respondent (The Inspector General of the National Police Service). Through the affidavit, he deposed that the Act was enacted at the behest of various government institutions, including the National Police Service, with a view of curbing the menace of cyber-related offences which had become rampant in Kenya. He stated that the National Police Service was involved in the conception, drafting, and discussions before, during and after the enactment of the Act and that all the offences created by the Act are matters of concern in combating cybercrime.

31. A perusal of the impugned judgment indicates that the 4th respondent (The Director of Public Prosecutions) opposed the

petition through an affidavit sworn on 4th March 2019, but the affidavit is not part of the record of appeal before us.

32. When the appeal came up for virtual hearing on 17th September 2025, learned counsel Ms. Mercy Mutemi appeared for the appellant whereas learned counsel Mr Nyamodi, Mr. Thande Kuria and Mr. Patrick Barasa represented the 1st and 3rd respondents. Learned counsel, Mr. Kuiyoni holding brief for learned counsel Mr. Mwendwa was in attendance for the 2nd respondent, learned counsel Ms. Njoki Keng'aara appeared for the 4th respondent, while learned counsel, Mr. Kiprono represented the 5th respondent, and learned counsel, Mr. Ochiel Dudley, Mr. Nyawa Malizo and Ms. Claire Nyabutu appeared for the 6th and 7th respondents. They relied on their filed submissions and made oral highlights of the same during the hearing.

33. Ms. Mutemi, relied on written submissions dated 22nd February 2021 to urge the appeal. Central to the submissions was the argument that the learned Judge erred in applying the principle of presumption of constitutionality and assigning the burden of proof to the appellant, particularly in respect to a legislation limiting fundamental rights. According to counsel, a legislation that limits fundamental rights must meet the specific criteria set out in **Article 24** of the **Constitution**, failing which there can be no presumption of constitutionality. She submitted that the appellant's burden should have been limited to illustrating how the impugned Act infringes on fundamental rights. Counsel relied on

Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic & Another; Director of Public Prosecution & 6 Others (Interested Parties); Law Society of Kenya & Another (Amicus Curiae) [2015] KEHC 7074 (KLR) to reiterate that legislation that limits constitutional rights and fundamental freedoms must meet the criteria set in **Article 24** of the **Constitution**, and such legislation does not enjoy presumption of constitutionality.

34. Counsel proceeded to submit that **Article 33** of the **Constitution**, which guarantees the right to freedom of expression, can only be limited to the extent provided under **Article 33(2).** Counsel argued that by considering the *"best interest of the government and public order"*, the learned Judge in effect introduced an extra-constitutional limitation to the right to freedom of expression. Counsel contended that the phrase *"public order"* was vague and its introduction went against the principle enunciated in **Christopher Ndarathi Murungaru vs. Kenya Anti-Corruption Commission & Another [2006] KECA 341 (KLR)** that courts must stick to the path of democracy as chosen by the Kenyan people and reflected in the Constitution, even where the public hold a contrary position.

35. Regarding **sections 22** and **23** of the **Act**, counsel submitted that the learned Judge erred in relying on the definition of the word *"false"*. According to counsel, this was erroneous as it presumes there could be a universal truth on every topic imaginable. Counsel referred to **Chimanikire vs. Attorney General of Zimbabwe, CCZ**

247/09, to urge that such an interpretation was susceptible to netting information, which, though false, was made in good faith, and such a provision would be deployed for manipulation by undemocratic leaders. Counsel maintained that these sections would create a chilling effect leading to prior restraint, which is in effect censorship that goes against the very purpose of **Article 33** of the **Constitution**. She also argued that the yardstick for determining the offence of publishing false information under **section 23** of the **Act** was vague, arguing that even accurate information could result in prosecution. Counsel faulted the learned Judge's reliance on the concept of national security to justify the criminalisation of fake news, which she argued was contrary to the purpose of the national security organs established in Chapter Fourteen of the Constitution.

36. Counsel additionally took issue with the finding that the impugned provisions aligned with the requirement by **Article 33(3)** of the **Constitution** that every person exercising the right to freedom of expression shall respect the rights and reputation of others, arguing that there were less restrictive ways of achieving that goal. To buttress this submission, counsel relied on the High Court decision in **Jacqueline Okuta & Another vs. Attorney General & 2 Others [2017] KEHC 8382 (KLR)** to argue that the civil law of defamation provides adequate checks and balances to prevent the abuse of free speech. According to counsel, the appropriate interpretation of **Article 33(3)** of the **Constitution** is that speech that does not respect the rights and reputations of others remains

protected speech, unlike the kind of speech specifically prohibited by **Article 33(2)** of the **Constitution**. Reliance was placed on the decision of the ECOWAS Court in **Federation of African Journalists *et al* vs. the Republic of The Gambia, Judgment No. EWC/CCJ/JUD/04/18** directing Gambia to immediately repeal or amend criminal laws on libel.

37. Challenging the learned Judge's finding that **section 24** of the **Act** was constitutional, counsel contended that the judgment 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 Act or given any form of clarity.

38. Turning to **section 27** of the **Act**, counsel argued that the provision was ambiguous thus making it impossible for individuals to know beforehand the actions that were criminalised. She compared the impugned section to **section 66A** of the **Indian Information Technology Act** which was struck down by the Supreme Court of India in **Shreya Singhal vs. Union of India [2015] 5 SCC 1** on the basis that it was void for vagueness, and urged us to adopt the reasoning of the Indian Supreme Court and find the provision unconstitutional.

39. Counsel also submitted that 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**.

40. The appellant's counsel faulted the definition of the offence of cybersquatting under **section 28** of the **Act**, arguing that it was an impractical approach towards protection of intellectual property. According to counsel, similar trademarks can exist with respect to different products in different fields.

41. Turning to **section 37** of the **Act**, counsel posited that it is unconstitutional for limiting the freedom of expression by curtailing certain kinds of speech. Additionally, it was counsel's submission that the said provision was vague and did not pass muster under **Article 24** of the **Constitution** which requires any provision limiting the Bill of Rights to be clear and unequivocal. She faulted the learned Judge, asserting that the interpretation of **section 37** of the **Act** is subjective, leading to different outcomes from different judicial officers.

42. It was also counsel's assertion that the offences prescribed under **sections 16, 17, 31, 32, 34, 35, 36,38(1), 38(2), 39** and **41** of the **Act** did not disclose any element of *mens rea* and therefore had the possibility of netting innocent citizens. Counsel submitted that considering the complexity of cybercrimes, the use of the words *"unlawfully"* and *"without authorisation"* or *"knowingly"* does not sufficiently disclose *mens rea* in the offences. To persuade us, Ms. Mutemi referred us to **United States vs. X-Citement Video, Inc., 513 U.S. 64 (1994)** and proposed that there is a danger presented by the use of the word *"knowingly"* to evince *mens rea* as persons

not aware that they are dealing with prohibited material may be netted.

43. Regarding **sections 48, 50, 51, 52,** and **53** of the **Act**, counsel submitted that they limit **Article 31** of the **Constitution** in a manner inconsistent with **Article 24** of the **Constitution**. She urged us to adopt the reasoning in **Magajane vs. Chairperson, North West Gambling Board (CCT49/05) [2006] ZACC 8,** where in holding that warrantless inspections must be reasonable, the Constitutional Court of South Africa adverted to the three-pronged test for reasonableness thus: (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.

44. **Sections 23, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42**, and **45** of the **Act** were also attacked on the ground that they were not subjected to public participation. Counsel maintained that **Standing Order 133** of the **National Assembly Standing Orders** which allowed the National Assembly to amend these provisions after public participation offended the provisions of **Article 118** of the **Constitution**, hence the impugned provisions failed to meet the constitutional threshold on public participation.

45. Regarding **section 5** of the **Act**, counsel urged that the National Assembly failed to ensure that the membership provided therein

observed the two-thirds gender rule. Counsel maintained that **section 5** could lead to violation of the two-thirds gender rule. Asserting the importance of the two-thirds gender rule, counsel cited **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR**, where the importance of putting legislation in place to ensure unequivocal and immediate realisation of **Article 27(8)** was highlighted. As a result, Ms. Mutemi urged us to declare **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, 2018** unconstitutional for violating, infringing and threatening constitutional rights and fundamental freedoms.

46. Supporting the appeal, learned counsel, Mr. Kiprono, for the 5th respondent, asked us to adopt the three-tier test of legality, legitimate aim, and necessity and/or proportionality in determining the constitutionality of the impugned sections. According to counsel, the impugned provisions failed each of these tests. Counsel argued that **sections 22, 23,** and **27** of the **Act** failed the three-tier test due to the use of subjective and undefined terms such as *"false"*, *"misleading"*, *"panic"*, *"chaos"*, *"detrimentally affects"*, and *"grossly offensive"*. According to counsel, the failure to define these terminologies delegated the definition of criminal conduct to the subjective discretion of individual police and judicial officers, resulting in legal uncertainty. Counsel referred to **Geoffrey Andare vs. Attorney General & 2 Others**

[2016] KEHC 7592 (KLR) and **Singhal vs. Union of India (2013) 12 S.C.C. 73** to point out that similar provisions had been declared unconstitutional by courts in Kenya and India for being overly broad and vague, and that they were likely to curtail protected and innocent speech.

47. Buttressing her argument on the unconstitutionality of **section 22** of the **Act**, counsel submitted that criminalising *"false"* or *"misleading"* information did not conform with any of the legitimate aims specified in **Article 19** of the **ICCPR**. Regarding **sections 23** and **27** of the **Act**, counsel argued that while they appear to pursue legitimate aims of protecting public order, they are imprecise and cannot be deemed constitutional. According to counsel, any restriction on a right must pursue a legitimate aim such as the protection of national security, public order, or the rights and reputations of others as defined by international law and the Constitution.

48. Counsel also took issue with the penalties prescribed under the impugned provisions, which he termed as harsh and disproportionate to protecting individual reputation. Placing reliance on **Jacqueline Okuta & Another vs. Attorney General & 2 Others [2017] KEHC 8382 (KLR)**, counsel argued that there were less restrictive and sufficient civil remedies for protecting personal reputation. It was additionally the 5th respondent's view that the impugned judgment defied existing precedent, arguing that by upholding **section 23** of the **Act**, the learned Judge

effectively resurrected criminalisation of defamation, which had previously been declared unconstitutional.

49. Faulting the learned Judge for applying the presumption of constitutionality test, counsel cited **Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic & Another; Director of Public Prosecution & 6 Others (Interested Parties); Law Society of Kenya & Another (Amicus Curiae) [2015] KEHC 7074 (KLR)** to urge that under the Constitution, there can be no presumption of constitutionality for legislation that limits fundamental rights. According to counsel, it was the State that bore the burden of justifying such a law against the strict criteria set in **Article 24** of the **Constitution**.

50. Counsel maintained that **sections 22, 23** and **27** of the **Act** unconstitutionally created new and broad restrictions which are beyond the limitations available under **Article 33(2)** of the **Constitution**. According to counsel, **Article 33(2)** contained an exhaustive list of permissible limitations on freedom of expression. Counsel referred to the South African case of **Islamic Unity Convention vs. Independent Broadcasting Authority [2002] ZACC 3** to reinforce the principle that any limits on free expression must be justified and narrowly tailored to fit within the constitutional exceptions. In the end, counsel urged us to find that the High Court erred in law and in fact in upholding the constitutionality of **sections 22, 23**, and **27** of the **Act**. Counsel

therefore urged that we declare **sections 22, 23**, and **27** of the **Act** unconstitutional, null, and void.

51. Likewise, Mr. Ochiel Dudley, learned counsel, who led the attack for the 6th and 7th respondents, supported the appeal and referred to **Article 24(3)** of the **Constitution** to urge that the onus was on the State to prove that the limitations to rights and fundamental freedoms by the impugned sections were justified. Counsel referred to **National Assembly vs. Katiba Institute & 6 Others [2023] KECA 1174 (KLR)** to argue that under **Article 24** of the **Constitution**, limitation of rights was only permissible within structured and strict parameters of the law. Counsel faulted the learned Judge's application of the principle of presumption of legality, arguing that for a law that limits constitutional rights and fundamental freedoms to be constitutional, it must be clear and precise, intended for a legitimate aim, and should be the only available, less restrictive measure. To buttress this argument, he relied on **Jacqueline Okuta & Another vs. Attorney General & 2 Others [2017] KEHC 8382 (KLR)**.

52. Turning to **sections 22** and **23** of the **Act**, counsel argued that they were vague, did not serve a legitimate aim sufficient to override a fundamental right, and did not pass muster as the least restrictive means of curtailing fake speech. Counsel contended that the **National Cohesion and Integration Act**, already prescribed a less restrictive alternative for hate speech and negative ethnicity, making the broad criminalisation under **section 22** of the **Act**

unnecessary. Counsel relied on **Andama vs. Director of Public Prosecutions & 2 Others; Article 19 East Africa (Interested Party) [2021] KEHC 12538 (KLR)** to affirm that the civil remedy of defamation is the least restrictive alternative to criminal sanctions for false information.

53. Counsel proceeded to urge that **section 27** of the **Act** failed to explicitly state its intention to limit a constitutional right, which was against a direct procedural requirement of the Constitution. Counsel maintained that **section 27** was filled with undefined and subjective terms and that the grounds for criminalising speech in this section do not align with the specific, high-bar exceptions to free expression listed in the Constitution, such as hate speech or incitement to violence. As regards **sections 28** and **37** of the **Act**, counsel submitted that they fail to transcend the constitutional standards regarding proportionality and vagueness. Counsel also argued that the offences prescribed under the said sections attract maximum fines of Kshs. 200,000 and or two years in prison, thus failing the proportionality test.

54. Counsel maintained that the trial court's entire analysis was built on a mistaken legal foundation by incorrectly placing the burden of proof on the citizen instead of the State. Counsel referred to **Cyprian Andama vs. Director of Public Prosecution & Another; Article 19 East Africa [2019] eKLR** to highlight the principle that statutory provisions creating an offence must be clear and unambiguous. The case of **Geoffrey Andare vs. Attorney**

General & 2 Others **[2016] eKLR** was cited to reiterate that a norm cannot be considered *"law"* unless it is formulated with sufficient precision to enable the citizen to foresee, to a reasonable degree, the consequences of a given situation. Counsel cited **National Assembly vs. Katiba Institute & 6 Others** **[2023] KECA 1174 (KLR)** to contend that vague laws can *"trap the innocent"* and impermissibly delegate policy matters to police, judges, and juries on a subjective basis, risking arbitrary enforcement. Still stressing the importance of legal precision, counsel referred to **General Comment No. 34 on Article 19; Freedoms of Opinion and Expression** to propose that a limitation provided by law should be accessible, formulated with sufficient precision for an individual to regulate their conduct, and provide adequate safeguards against unfettered discretion.

55. On their part, counsel for the 1st and 3rd respondents opposed the appeal, emphasising two principles: the presumption of constitutionality of statute and the justifiable limitation of rights. Leading the charge on behalf of the two respondents, Mr. Nyamodi submitted that all legislation is presumed lawful, thus placing the burden of rebutting the presumption on the appellant, which, he submitted, it failed to do. Turning to the argument that rights can be limited if it is reasonable and justifiable, counsel submitted that fundamental rights, including freedom of expression, are not absolute, referencing **Article 24** of the **Constitution** on permissible limitations and **Article 33(3)** of the **Constitution** regarding respect for others' rights and reputation. Adverting to the

case of **Commissioner of Income Tax vs. Menon [1985] KECA 84 (KLR)**, counsel posited that a legislation should be interpreted within its historical context.

56. Counsel argued that the contested provisions are reasonable and justifiable limits on free expression necessary in a democratic society. He emphasised that regulatory measures are crucial to combat the spread of false information, referring to such information as *"digital wildfires."* According to counsel, without limitations, there could be threats to national security and social cohesion, especially during elections. Citing the United States case of **Chaplinsky vs. New Hampshire 315 U.S. 568 (1942)**, counsel argued that even in strong free speech jurisdictions, some speech categories lack constitutional value due to their harmful impact. He distinguished between the **U.S. First Amendment** and **Article 33** of the **Kenyan Constitution**, arguing that the term *"false"* is not vague, as its meaning is clarified by the context of the Act. He also referred us to the Indian case of **Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. [1987] INSC 21** to argue that the meaning of the word *"false"* can be sufficiently clarified by looking at the text of the Act. Regarding the alleged restriction to the right to freedom of expression, counsel stated that criminal libel laws serve the legitimate purpose of protecting individual dignity and reputation, asserting that free speech does not mean freedom from consequences. Urging that rights can be limited, counsel cited **Articles 24(1)(d)** and **33(3)** of the **Constitution** and referenced the decision of the Supreme Court of

Appeal of South Africa in **Hoho vs. The State [2008] ZASCA 98,** which upheld the constitutionality of criminal defamation, and the judgment of the Canadian Supreme Court in **R vs. Lucas [1998] 1 S.C.R. 439**, which found the objective of criminal libel to be constitutionally valid.

57. Counsel defended **section 24** of the **Act** as fulfilling the State's constitutional duty under **Article 53** of the **Constitution**, which mandates the protection of children from abuse and exploitation, urging that the stringent measures against child pornography were justified. Counsel asserted that **sections 27** and **37** of the **Act**, which criminalises cyber harassment and wrongful distribution of intimate images, are specifically aimed at harmful conduct like online bullying. He pointed to **section 181** of the **Penal Code** to underscore the proposition that criminalisation of obscene publications is a longstanding aspect of Kenyan law.

58. Further, counsel for the 1st and 3rd respondents argued that the offences created by **sections 16, 17, 31, 32, 34, 35, 36, 38(1) & (2), 39,** and **41** of the **Act** have clear *mens rea* element which can be elicited from the specific words used in the statute. He cited jurisprudence from India in **R. Balakrishna Pillai vs. State of Kerala & Another [1996] AIR 901**, the United Kingdom in **R. vs. Morgan [1975] UKHL 3**, and the United States in **United States vs. X-Citement Video, Inc., 513 U.S. 64 (1994)** to argue that terms like *"knowingly"* and *"intentionally"* establish the necessary mental element of a crime.

59. According to counsel, the investigative powers under **sections 48, 50, 51, 52,** and **53** of the **Act** are necessary and proportionate to the challenges of policing cyberspace. He acknowledged that while these provisions impact the right to privacy, they include safeguards essential to investigating complex cybercrimes, which require specialised procedures due to issues such as perpetrator anonymity and the volatility of digital evidence. Counsel emphasised that the right to privacy is not absolute and that the Act incorporates judicial oversight to ensure that search and seizure powers are subjected to procedural checks. He defended **sections 51** and **52** of the **Act** as proportionate measures to prevent the loss of digital evidence vital to securing convictions, citing the Canadian Supreme Court decision in **R. vs. Vice Media Canada Inc [2018] SCC 53 (CanLII)**, which affirmed the need to balance the public interest in crime investigation with privacy rights.

60. Counsel argued that the challenge to **section 5** of the **Act** was premature and hypothetical, suggesting that any judicial finding that the future composition is unconstitutional for lacking gender equality would be no more than an advisory opinion. Relying on the High Court case of **Republic vs. National Employment Authority & 3 Others Ex-Parte Middle East Consultancy Services Limited [2018] KEHC 9449 (KLR)**, counsel submitted that courts should avoid resolving uncrystallised issues.

61. Regarding the appellant's challenge to the impugned provisions for alleged defectiveness in the legislative process, counsel maintained that the initial public participation was sufficient and that the National Assembly has the constitutional right to amend a bill during the enactment process. Counsel cited **Pevans East Africa Limited & Another vs. Chairman, Betting Control & Licensing Board & 7 Others [2018] KECA 332 (KLR)** to emphasise that Parliament should retain its legislative authority to make amendments before the final passage of a bill.

62. Similarly, Mr. Kuiyoni, learned counsel, for the 2nd respondent, opposed the appeal arguing that the High Court did not err, emphasising the principle of the presumption of constitutionality of legislation, which placed the burden of proving otherwise on the appellant. He referred to the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] KECA 445 (KLR)** to support this stance.

63. Counsel submitted that the High Court correctly applied the three-part test in **Article 24** of the **Constitution** in determining that the limitation on the right to freedom of expression was reasonable and justifiable. The case of **Law Society of Kenya vs. Attorney General & 2 Others [2019] KECA 344 (KLR)** was cited to buttress the case for valid limitations on privacy under **Article 31** of the **Constitution.** Also relied on was **Council of Governors & 5 Others vs. Senate & Another [2019] KECA 704 (KLR)** to emphasise that courts must respect the doctrine of separation of

powers and exercise restraint in questioning the policy choices of Parliament upon which the Constitution vests legislative authority. Counsel referred to the **African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention)** and **the Convention on Cybercrime, Council of Europe, ETS No. 185 (Budapest Convention on Cybercrime)** to buttress the need for specialised investigative procedures and to show that the Act fulfils Kenya's international obligations and aligns the investigative powers with global standards.

64. Still pressing for the dismissal of the appeal, counsel for the 2nd respondent submitted that **sections 16, 17, 31, 32, 34, 35, 36, 38(1), 38(2), 39,** and **41** of the **Act** contain sufficient *mens rea* elements to meet constitutional requirements, citing terms like *"intentional"*, *"unlawful"*, and *"willful"* as indicators of a clear mental state. He emphasised that these provisions protect against the criminalisation of innocent actions, ensuring only culpable conduct is penalized and placing the burden of proof on the prosecution. Comparing the impugned law to the **UK's Computer Misuse Act, 1990**, counsel submitted that the High Court rightfully recognised the existence of adequate safeguards for the right to privacy under **Article 31** of the **Constitution**, with justifiable limitations in accordance with **Article 24** of the **Constitution**. According to counsel, key safeguards include court-issued warrants for search and seizure (**section 48**), production orders (**section 50**), and regulated interception of content data (**section 53**). Counsel maintained that these powers are essential

for addressing the unique challenges of cybercrime and align with international standards, such as the **Budapest Convention**. He cited the case of **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11** to affirm the principle of separation of powers, arguing that courts should respect Parliament's legislative judgment unless clear constitutional inconsistencies are shown.

65. In response to the challenge to **section 5** of the **Act**, counsel submitted that the members of the Committee established under that section serve by virtue of the offices they hold, and are neither elected nor appointed to sit specifically on the Committee. Counsel argued that since the Committee had not been constituted, the challenge to the constitutionality of the Committee was not ripe.

66. It was also counsel's submission that the Act was passed in accordance with **Articles 94** and **109** of the **Constitution** and the **Standing Orders** of the **National Assembly**. According to counsel, Parliament properly exercised its exclusive legislative mandate. Counsel relied on **Cabinet Secretary for the National Treasury and Planning & 4 Others vs. Okoiti & 52 Others; Bhatia (Amicus Curiae) [2024] KESC 63 (KLR)** to urge that where substantive amendments are made pursuant to public participation, Parliament is not required to undertake fresh public participation. We were therefore urged to dismiss the appeal.

67. Also opposing the appeal was learned counsel, Ms. Keng'aara, for the 4th respondent, who commenced her submissions by citing **Ndyanabo vs. Attorney General [2001] E.A. 495** to highlight the principles of statutory interpretation. Asserting the constitutionality of **section 23** of the **Act**, counsel submitted that the provision was different from **section 194** of the **Penal Code**, which had been declared unconstitutional. According to counsel, while the impugned provision sought to protect the society from false publications, which is in the public interest, **section 194** protected individual interests. Counsel pointed out that the term *"publication"* was defined in **section 3** of the **Interpretation and General Provisions Act**, **Cap. 2**, hence **sections 22** and **23** of the **Act** were precise and clear, and thus in tandem with **Articles 24(1)(d)** and **33(3)** of the **Constitution**.

68. Rejecting the suggestion that some of the impugned provisions were similar to the quashed **section 29** of the **Kenya Information and Communication Act**, counsel asserted that they were not, arguing that the present provisions clearly established both the *actus reus* and the *mens rea* of the offences therein. Counsel maintained that the limitations established by the offences in question were within the ambit of **Article 24** of the **Constitution** and therefore constitutional. Counsel applauded the Act, terming it a safeguard for fundamental rights, like privacy, and the freedom of expression, which are mainly abused. According to counsel, the impugned Act struck a balance between the enjoyment of rights

and the need to protect the security of the State posed by the risks within the cyberspace.

69. Counsel reiterated the need to preserve the morals of the society by criminalising certain acts like child pornography, arguing that such crimes would lead to other crimes, including sex trafficking and defilement. Counsel referred to United States cases of **Miller vs. California, 413 U.S. 15 (1973)** and **Staples vs. United States 511 U.S. (1994)** to argue that it was impractical to require wrongdoing to be conscious to form a criminal offence and that offences related to public welfare did not require the *mens rea* element per se. Counsel therefore beseeched us to dismiss the appeal and uphold the constitutionality of the impugned provisions and the Act.

70. This is a first appeal and our role, sitting as a first appellate Court, is to re-evaluate, re-assess, and re-analyse the entire record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. Our stated mandate was succinctly captured by the Court in **Coalition for Reforms and Development (CORD) & 2 Others vs. Republic of Kenya & Another [2024] KECA 1955 (KLR)** as follows:

> **"As a first appellate Court, we are vested with the jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable sacrosanct right of the parties and unless restricted by law, the whole case is opened for rehearing on questions of fact and the law. The judgment of the appellate court must therefore, reflect its conscious application of mind and record**

findings supported by reasons, on all the issues arising. This, alongside the contentions put forth, and pressed by the parties for decision of the appellate court. In reversing a finding of fact, the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."

71. We have, as is required of us, faithfully applied our minds to the record, the extensive written and oral submissions, and the authorities cited by counsel for the parties, and we identify the following issues for determination:

    i. *Whether there were procedural violations during the passing of the contentious Act by the National Assembly;*

    ii. *Whether* ***section 5 of the Act*** *offends* ***Article 27(8) of the Constitution****;*

    iii. *Whether* ***sections 16, 17, 31, 32, 34, 35, 36,38(1), 38(2), 39 and 41 of the Act*** *sufficiently provide for mens rea; and*

    iv. *Whether the impugned provisions meet the justification threshold in* ***Article 24 of the Constitution****:*

        (a) Whether ***sections 48, 50, 51, 52 and 53 of the Act*** *pose a severe threat to the right to privacy for want of sufficient safeguards;*

        (b) Whether ***sections 22, 23, 24(1)(c), 27, 28 and 37 of the Act*** *violate the Constitution; and*

    v. *Whether the impugned provisions meet the constitutional threshold.*

72. Before we set out to determine the identified issues, it is imperative that we highlight certain principles that underpin constitutional

interpretation. The starting point is **Article 259(3)** of the **Constitution**, which expressly requires that "*every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking*." Preceding that principle is the stipulation in **Article 259(1)** that:

> **"(1) This Constitution shall be interpreted in a manner that -**
>
> **(a) promotes its purposes, values, and principles;**
>
> **(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
>
> **(c) permits the development of the law; and**
>
> **(d) contributes to good governance."**

73. In **Independent Electoral and Boundaries Commission vs. Kiai & 5 Others [2017] KECA 477 (KLR)**, the Court extensively considered and identified the principles of constitutional interpretation. We beg to quote the Court at length as follows:

> **"Interpretation of a Constitution entails an enquiry into the intention of the drafters to discern the meaning of its provisions. In enunciating the fundamentals, a delicate balancing act requires to be undertaken, of the textual, the contextual, the intent and purport, as well as the spirit of the Constitution.**
>
> **To begin with, the text is construed to establish the meaning of the words, and the language, care being taken to ensure that a literal or rigid interpretation is eschewed. This should be placed in context - that is, the objectives of the enactment...**
>
> **In contemplating the provisions, the intent and purport of the Constitution, the objectives and aspirations, as well as the mischief to be remedied, are also brought into focus.**

Yet another imperative is the principle of harmonious interpretation...

From this summation it is evident that, what is required is a purposive interpretation that brings into focus the principles, purposes, and peculiarities of the enactment, as well as the historical context and extrinsic materials that form an integral part of the constitution's existence.

A purposive approach was adopted in the interpretation of the Hong Kong Basic Law in the case of *Ng Ka Ling & Another v The Director of Immigration* *(1999)* 1 HKLRD 315.

The Hong Kong Supreme Court outlined the approach thus;

> ***"It is generally accepted that in the interpretation of a Constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because the Constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the Constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument."***

...the Supreme Court in the case of *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* *[2014] eKLR*, prescribed a purposive approach whenever the Constitution is to be interpreted...

In conjunction with the purposive approach, the Supreme Court has also advocated for the application of a holistic

interpretation as seen *In the Matter of Kenya National Human Rights Commission,* *Supreme Court Advisory Opinion Ref. No.1 of 2012* where it stated:

> ***"But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result."***

But that is not all. In pursuance of constitutional interpretation, yet another dynamic is constantly at play and requires consideration: the spirit of the Constitution...

We dare say that in the context of the Constitution, there is an ever-present spirit that relentlessly pervades its provisions. As a consequence, that spirit which *"... is always speaking..."* must be discerned as an integral part of interpreting the provisions of the Constitution.

Also envisaged as a component of the spirit, are the distinct political undertones that are interwoven into the fabric of various provisions...

Finally, in *Center for Rights Education and Awareness & Another v. John Harun Mwau & 6 Others* [2012] eKLR, *Githinji, JA,* with whom we respectfully agree, outlined other important principles of interpretation of the Constitution and stated that;

> **"*There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an***

absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise."

Ultimately, we are clear in our minds that, owing to the prescriptive requirements of Article 259, and the various pronouncements by the courts that we have adverted to, we are compelled to adopt a purposive approach when interpreting the Constitution, having regard to the intent and purpose, the historical socio-political context, the values, aspirations and the spirit of the Constitution. We do not agree with the appellant or the Attorney-General that in this appeal interpretation should be formalistic or restricted to the legal text alone and the literal meaning of the provisions, and neither do we subscribe to the proposition that a purposive or normative interpretation is strictly limited to the Bill of Rights only. The criticism directed at the High Court in this regard is not justified."

74. The cited authority provides a summation of the principles of constitutional interpretation which will guide our determination of this appeal. We appreciate that this appeal involves the interpretation of the Constitution and whether the impugned Act violates the Constitution. When assessing the constitutionality or otherwise of a statute, its provisions or regulations made

thereunder, courts are guided by two fundamental principles. First, is the rebuttable presumption that every Act of Parliament is constitutional, and the burden of proof lies on any person who alleges otherwise. According to the Court in **Coalition for Reforms and Development (CORD) & 2 Others vs. Republic of Kenya & Another (Civil Appeal No. 188 of 2015) [2024] KECA 1955 (KLR),** the basis of this presumption is that it cannot be the intention of the legislature to interfere with fundamental rights and freedoms. The party alleging unconstitutionality bears the burden with respect to the first step of the inquiry undertaken by a court, which entails proving that a statute expressly infringes on constitutional rights and freedoms. Once this onus is discharged, the burden shifts to the lawmaker to demonstrate that the impugned legislation does not violate rights or that any limitation of rights is justifiable in an open and democratic society. The second principle is that the court seized with the inquiry must determine the objects and purpose of the impugned statute, taking into account the intention expressed in the statute, and whether a provision's purpose and effect may result in an unconstitutional outcome.

75. The foregoing principles were elaborated by the Supreme Court in **Law Society of Kenya vs. Attorney General & Another [2019] KESC 16 (KLR**) as follows:

> **"37. At the forefront of these principles is a general but rebuttable presumption that a statutory provision is consistent with the Constitution. The party that alleges inconsistency has the burden of proving such a**

contention. In construing whether statutory provisions offend the Constitution, courts must therefore subject the same to an objective inquiry as to whether they conform with the Constitution...

38. In addition to the above, and to fully comprehend whether a statutory provision is unconstitutional or not, its true essence must also be considered. This gives rise to the second principle which is the determination of the purpose and effect of such a statutory provision. In other words, what is the provision directed or aimed at? Can the intention of the drafters be discerned with clarity? ....

39. Therefore intention is construed by scrutinising the language used in the provision which inevitably discloses its purpose and effect. It is the task of a court to give a literal meaning to the words used and the language of the provision must be taken as conclusive unless there is an expressed legislative intention to the contrary."

76. Similarly, in **Judges and Magistrates Vetting Board vs. Kenya Magistrates and Judges Association & Another [2014] KESC 4 (KLR),** the Supreme Court held that:

"88. Despite the fact that Courts have the power to grant appropriate reliefs including those under Article 23 of the Constitution, it is imperative in considering the question before us to look at the constitutional text (the provisions of Section 23 to the Sixth Schedule), the statutory context (the VJM Act and the Judicial Service Act, 2011), the intention of the provisions (if discernible), a consideration of broad purposive interpretation guided by our constitutional values and principles, precedent and developed judicial doctrine and considerations of justice, practicality and public policy based on our developing theory of constitutional interpretation."

77. The tools to be deployed by a court when confronted with the question of the constitutionality or otherwise of a legislation or its provisions were provided by the Supreme Court in **Munya vs. Kithinji & 2 Others [2014] KESC 38 (KLR)**, thus:

> **"166A. The lesson to be drawn from an endeavor on the part of Judges to appreciate the legislator's perspective, has been remarked in comparative judicial practice. We would cite, in this regard, the statement of Lord Simon, in Maunsell vs. Olins PARA 1975. AC 373:**
>
> *"The first task of a court of construction is to put itself in the shoes of the draftsman – to consider what knowledge he had and, importantly, what statutory objective he had …being thus placed…the court proceeds to ascertain the meaning of the statutory language."*
>
> **167. In Pepper vs. Hart PARA 1992. 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:**
>
> *"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required*

them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.""

78. We cannot exit this discussion before appreciating the fact that this appeal brings into sharp focus the place of **Article 24** of the **Constitution** in the enactment of laws by Parliament. The Article provides that:

"Limitation of rights and fundamental freedoms.

24. (1) A right or fundamental freedom 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, taking into account all relevant factors, including -

(a) the nature of the right or fundamental freedom;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom -

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the

legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service -

(a) Article 31 - Privacy;

(b) Article 36 - Freedom of association;

(c) Article 37 - Assembly, demonstration, picketing and petition;

(d) Article 41 - Labour relations;

(e) Article 43 - Economic and social rights; and

(f) Article 49 - Rights of arrested persons. Fundamental Rights and freedoms that may not be limited."

79. A perusal of the appellant's petition discloses that apart from the alleged violation of other constitutional provisions, its core claim was that the impugned provisions, though limiting rights and fundamental freedoms, failed the justification criteria established in **Article 24(1)** of the **Constitution**, which must be met before rights and fundamental freedoms can be limited. It is imperative to state that **Article 24** cannot be deployed to limit the rights ringfenced under **Article 25** of the **Constitution**.

80. **Section 36** of the **Constitution** of **The Republic of South Africa, 1996** is similar to **Article 24(1)** of our Constitution, and it provides as follows:

> **"Limitation of rights**
>
> **36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -**
>
> **(a) the nature of the right;**
>
> **(b) the importance of the purpose of the limitation;**
>
> **(c) the nature and extent of the limitation;**
>
> **(d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.**
>
> **(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."**

81. **Section 36** of the **Constitution** of **The Republic of South Africa, 1996** was considered by the Constitutional Court of South Africa in **Mlungwana & Others vs. The State and Another [2018] ZACC 45**, wherein it was held that:

> **"[57] The limitation of a right in the Bill of Rights needs to be justified under section 36. This justification analysis "requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment". This weighing-up must give way to a "global judgment on [the] proportionality" of the limitation. It is also well-settled that the onus is on the respondents to demonstrate that the limitation is justified...**
>
> **[59] The word "including" in section 36 implies that the list is not exhaustive."** [Annotations omitted]

82. Recently, Mathopo, J. of the Constitutional Court of South Africa in **South African Municipal Workers' Union vs. Minister of Cooperative Governance and Traditional Affairs and Another [2025] ZACC 4** further interpreted **section 36** as follows:

> **"[53] The fundamental issue before this Court is whether the impugned extension in terms of section 71B of the Systems Act is justifiable under section 36(1) of the Constitution. This requires a proportionality enquiry. The question to be asked is whether there is a limitation of a constitutional right and whether such limitation can be justified in terms of section 36(1) of the Constitution. This Court in *Makwanyane,* held that the balancing of different interests forms an inherent requirement of proportionality:**

"In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

As stated in *NICRO*, "[u]ltimately what is involved in a limitation analysis is the balancing of means and ends". ...

[58] In *Manamela*, this Court stressed that "[a]s a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be." ...

[59] It is trite that where the state seeks to limit constitutional rights in the Bill of Rights, it must support this by providing clear and convincing reasons...

[63] In my view, where there is an underlying policy for limiting the right, the Government is obliged to provide the Court with sufficient information to properly examine its purpose and by so doing assess the reasons for the limitation. In *NICRO*, it was said:

"In a case such as this where the government seeks to disenfranchise a group of its citizens and the purpose is not self-evident, there is a need for it to place sufficient information before the Court to enable it to know exactly what purpose the disenfranchisement was intended to serve. In so far as the government relies upon policy considerations, there should be sufficient information to enable the Court to assess and evaluate the policy that is being pursued."

[69] An important factor in the section 36(1) analysis is whether less restrictive means may be employed to achieve the legislative purpose...

[73] In my view, less restrictive means in the form of the targeted narrow limitation therefore exist, they have been tried, tested and they have proved to be workable..." [Annotations omitted]

83. We are persuaded that the principles identified in the South African cases are applicable to the interpretation of **Article 24** of our Constitution. From the cited authorities, we distil the principles governing the application of the justification factors in **Article 24** of the **Constitution** as follows:

(a) the justification analysis requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment;

(b) the word "including" in Article 24(1) of the Constitution implies that the list is not exhaustive;

(c) the conduct of a proportionality enquiry bringing into view issues as to the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question;

(d) the more serious the impact of the measure on the right, the more persuasive or compelling the justification provided must be;

(e) the State must provide clear and convincing reasons by way of evidence where it seeks to limit constitutional rights in the Bill of Rights; and

(f) the need to demonstrate that less restrictive means is not available or is inadequate.

We must add that the list is not exhaustive.

84. Even as we adopt these justification principles, we are alive to the fact that **Article 24(1)** of the **Constitution** provides another key justification for limiting rights to wit *"the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others".* We also appreciate that **Article 24(2)** establishes a high threshold that Parliament must surmount so as to justify the passing of a legislation limiting constitutional rights and fundamental freedoms.

85. Having stated the principles guiding constitutional and statutory interpretation, we will now consider the allegations made against the impugned provisions in line with the discussed principles.

86. ***(i) Whether there were procedural violations during the passing of the contentious Act by the National Assembly:***
In arguing this issue, the appellant asserted that **Clause No. 133** of the **National Assembly Standing Orders** offends **Article 118** of the **Constitution** by allowing amendments to be introduced to legislation after public participation. It is the appellant's contention that **section 23** of the **Act** was not subjected to public participation. This assertion is made on the backdrop of the fact that this provision was introduced during the Committee of the Whole House pursuant to **Standing Order Nos. 131** and **133**.

87. The 2nd respondent readily conceded that the amendment was made during the Committee of the Whole House. However, it was argued that subjecting every amendment to public participation would undermine the legislative process. It was also submitted that amendments made at the Committee of the Whole House were, in substance, within the parameters of the public participation process undertaken by the National Assembly Committee on Communication, Information and Innovation.

88. The High Court, at paragraphs 140 and 147 of its judgment, in agreeing with the averments and position of the National Assembly, referred to this Court's decision in **Pevans East Africa Limited & Another vs. Chairman, Betting Control & Licensing Board & 7 Others [2018] KECA 332 (KLR)** and the Supreme Court's decision in **Speaker of the Senate & another vs. Attorney-General & Another; Law Society of Kenya & 2 Others (Amicus Curiae) [2013] KESC 7 (KLR)** to back its holding.

89. **Article 118** of the **Constitution** mandates Parliament to facilitate public participation in the legislative process. In giving effect to this obligation, **Standing Order No. 127 on Committal of Bills to Committee and Public Participation** was put in place. **Standing Order No. 127(3)** obligates the relevant departmental committee to facilitate and oversee public participation on a bill after the first reading. As correctly appreciated by the learned Judge of the High Court, the existing jurisprudence is that not every amendment made after the public participation phase of a legislation should be

subjected to fresh public participation. The Supreme Court, this Court, and the High Court have generally agreed that subjecting every amendment to a fresh round of public participation would interfere with the legislative process, thereby stifling it. To reiterate and protect the place of public participation in the legislative process, the Supreme Court in **Cabinet Secretary for the National Treasury and Planning & 4 Others vs. Okoiti & 52 Others; Bhatia (Amicus Curiae) [2024] KESC 63 (KLR)** devised a two-pronged test to determine whether an amendment should be subjected to fresh public participation. The Court held that:

> **"Flowing from the foregoing, it emerges that in determining whether a new provision or an amendment to a Bill in the post-public participation phase should be subjected to a fresh round of public participation, a number of principles ought to be taken into account: Firstly, the breadth and character of amendments to a Bill post-public participation is of importance. There is a distinction between substantive (material) amendments and minor (trivial/inconsequential/ clerical/incidental) amendments. Secondly, the breadth and character of amendments form a basis for a consideration of whether or not Parliament has an obligation to conduct further amendments. Thirdly, as an established rule, where minor amendments have been made to a Bill, further public participation on those amendments would be unnecessary."**

90. The Supreme Court went ahead to differentiate between substantive and minor amendments and to hold that in determining whether the final version of a bill is a substantive amendment of a previous version or not, the two versions should be compared. The Supreme Court defined a substantive

amendment as *"…one that changes the substance or meaning of an existing provision, particularly by addressing policy questions, altering the purpose, scope, or content of a provision, by adding new provisions or removing old ones."* On the other hand, a minor amendment was defined as a technical and conforming amendment whose effect is to resolve ambiguities, remove doubts, bring obsolete provisions into conformity with modern practice, and facilitate improvement in the form and manner in which the law is stated. The latter amendment should not be subject to new public participation, while the former ought to be.

91. Even as we say so, we must still reiterate that public participation remains a key element in our legislative process, and it serves as the cornerstone of not only our democratic process but also one of the values and principles of governance enshrined under **Article 10** of the **Constitution**. The Supreme Court in **British American Tobacco Kenya PLC vs. Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party) [2019] KESC 15 (KLR)** and **Communications Commission of Kenya & 5 Others vs. Royal Media Services Ltd & 5 Others [2014] KESC 53 (KLR)** has underscored the place of public participation in our legislative process and we need say no more.

92. With the foregoing in mind, we note that the appellant's primary complaint in respect of lack of public participation revolved around

section 23 of the **Act**, which was introduced at the Committee of the Whole House as **Clause 12A**. According to the appellant, the provision is related to **section 22** of the **Act**, which already existed and had been subjected to public participation. It was the appellant's view that **section 23** ought to have been referred back to the relevant departmental committee for harmonization.

93. We note that **section 23** established a new criminal offence altogether. However, it is apparent that **sections 22** and **23** are somehow similar. Whereas **section 22(1)** created a distinct offence, **section 23** created a not dissimilar offence. It is therefore our considered view that **section 23** fell into the same genre with the offence created by **section 22(1)** of the **Act**. As such, the amendment introduced by **section 23** was not substantive and did not require a fresh round of public participation. The enactment of **section 23** did not thus offend **Standing Orders No. 131** and **133** as alleged by the appellant.

94. Our finding is in consonance with the Supreme Court holding in **Cabinet Secretary for the National Treasury and Planning & 4 Others vs. Okoiti & 52 Others; Bhatia (Amicus Curiae)** (supra). In that case, the Supreme Court underscored the centrality of the power of the legislature to amend bills during the legislative process, thus:

> **"It is important to appreciate that a key feature of the legislative process is the ability of legislators to propose and make amendments to a Bill. Amendments allow legislators to refine the Bill, add and subtract, improving**

its workability and addressing any omissions in the original draft. It also provides an opportunity for legislators to present alternative proposals, enabling them to express different policy and political viewpoints on the issues the Bill addresses and to ensure the proposals are not inconsistent with the Constitution. In essence, the ability to propose amendments reflects the core legislative and representative roles of lawmakers..."

95. We therefore come to the same conclusion as the learned Judge of the High Court that the introduction of **section 23** to the Act during the sitting of the Committee of the Whole House did not violate the principle of public participation. It goes without saying that the appellant did not allege insufficiency of public participation on the entire Act, and we will end our discussion on this issue by rejecting the appellant's challenge to the Act for want of public participation.

96. Further, in light of the holding of the Supreme Court in **Cabinet Secretary for the National Treasury and Planning & 4 Others vs. Okoiti & 52 Others; Bhatia (Amicus Curiae)** (supra), we find that the appellant did not precisely state how **Standing Order No. 133** was inconsistent with **Article 118** of the **Constitution** by allowing post-public participation amendment to a bill. Shortly, we shall address the constitutionality of each and every impugned provision.

97. ***(ii) Whether section 5 of the Act offends Article 27(8) of the Constitution;***

According to the appellant, **section 5** of the **Act** violated the two-thirds gender rule enunciated in **Article 27(8)** of the **Constitution**. **Section 5(1)** of the **Act** provides the composition of the National Computer and Cybercrimes Co-ordination Committee (the Committee) established under **section 4** as follows:

> **"(a) the Principal Secretary responsible for matters relating to internal security or a representative designated and who shall be the chairperson;**
>
> **(b) the Principal Secretary responsible for matters relating to information, communication and technology or a representative designated in writing by the Principal Secretary responsible for information, communication and technology;**
>
> **(c) the Attorney-General or a representative designated in writing by the Attorney-General;**
>
> **(d) the Chief of the Kenya Defence Forces or a representative designated in writing by the Chief of the Kenya Defence Forces;**
>
> **(e) the Inspector-General of the National Police Service or a representative designated in writing by the Inspector-General of the National Police Service;**
>
> **(f) the Director-General of the National Intelligence Service or a representative designated in writing by the Director General of the National Intelligence Service;**
>
> **(g) the Director-General of the Communications Authority of Kenya or representative designated in writing by the Director-General of the Communications Authority of Kenya;**
>
> **(h) the Director of Public Prosecutions or a representative designated in writing by the Director of Public Prosecutions;**

(i) the Governor of the Central Bank of Kenya or a representative designated in writing by the Governor of the Central Bank of Kenya; and

(j) the Director who shall be the secretary of the Committee and who shall not have a right to vote."

98. The 1st, 2nd, 3rd, and 4th respondents who opposed the appeal argued that the alleged unconstitutionality was speculative as the Committee had not been constituted and no constitutional breach had therefore occurred. The learned Judge in his judgment accepted this argument. In agreeing with the learned Judge, we find that at the time the petition was instituted, the Committee had not been established and the question as to whether its composition was offensive or not to the principle laid in **Article 27(8)** of the **Constitution** that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender was indeed speculative, premature and not justiciable. Whether or not the composition of the Committee would violate the Constitution is not determinable by the offices that contribute members to the Committee, but by the actual representatives sent to the Committee by the contributing bodies. We say so because the section provides for the appointment of a designee to represent a substantive member. **Section 5**, as drafted, is therefore harmless and constitutional. It is only once the Committee is constituted that the issue raised by the appellant may come to live. On this issue, we find that there was no imminent threat to the Constitution that the learned Judge was required to address.

99. **(iii) Whether the impugned sections 16, 17, 31, 32, 34, 35, 36, 38(1) and (2), 39, and 41 of the Act violate Articles 24, 29, and 50 of the Constitution**

To give context, **section 16** creates an offence of unauthorised interference with a computer system, while **section 17** creates an offence of unauthorised interception of a telecommunication system. **Sections 31, 32, 34, 35,** and **36** create the offences of interception of electronic messages or money transfers, wilful misdirection of electronic messages, inducement to deliver electronic messages, intentionally withholding messages delivered erroneously, and unlawful destruction of electronic messages. **Sections 38(1) & (2), 39**, and **41,** respectively, criminalise fraudulent use of electronic data, issuance of false e-instructions, and failing to relinquish codes and access rights to an employer upon termination of employment. The appellant decries the use of the words *"intentionally"*, *"knowingly"*, and *"unlawfully and without authorisation"* in the impugned provisions to denote the *mens rea* aspect of the offences therein. According to the appellant, these sections only describe the *actus reus* aspect of the offences without giving direction on the *mens rea* elements required to prove them. To the appellant, without the *mens rea* element, it is unclear what conduct the sections target.

100. The appellant additionally asserted that these sections curtail the freedom and security guaranteed to a person under **Article 29** of the **Constitution** and hinder the realisation of the right to a fair

hearing under **Article 50** of the **Constitution**. Further, that the lack of clarity and specificity as to the purpose and reach of the offences is inconsistent with **Article 24** of the **Constitution**, which requires a limitation of a right to be clear and specific about the extent to which the right or freedom is being curtailed. According to the appellant, these provisions also offend the principle of legality and are likely to net innocent citizens.

101. The learned Judge, in addressing this issue, held as follows:

> **"92. I am of the view that in respect of computer integrity crimes, the essential ingredient in determining *mens rea* on the part of the offender is that he or she must have been aware at the time of compromising the integrity of the computer that the access is unlawful and/or unauthorized. A quick consideration in all offences complained of under the section, the *mens rea* element is present, through the use of certain words in each section; that is, as follows:-**
>
> **a. Section 16 – "intentionally and without authorisation"**
>
> **b. Section 17 – "intentionally and without authorisation"**
>
> **c. Section 31 – "unlawfully destroys or aborts"**
>
> **d. Section 32 – "wilfully misdirects"**
>
> **e. Section 34 – "inducement to deliver electronic message not specifically meant for him"**
>
> **f. Section 35 – "intentionally hides or detains"**
>
> **g. Section 36 – "unlawfully destroys or aborts"**
>
> **h. Section 38 (1) – "knowingly and without authority"**

i. Section 38 (2) – "materially represents any fact"

j. Section 39 – "issues false electronic transactions"

k.Section 41 – "subject to contractual agreement."

102. It is important to appreciate that whereas in most crimes the guilty act (*actus reus*) and a guilty mind (*mens rea*) ought to be established for a conviction to ensue, strict liability offences do not require proof of *mens rea* for conviction to occur. We, however, appreciate that in respect to the appeal before us the impugned offences are serious and attract harsh penalties, thus making proof of *mens rea* a necessity. In the circumstances, the question we need to answer is whether the words identified by the learned Judge sufficiently denote *mens rea*.

103. In determining whether the impugned provisions meet the constitutional standards of clarity, certainty, and fair notice, the Court is required to examine both the text of the statute and the legal meaning attributed to the terms used therein. The **10th Edition of Black's Law Dictionary** (**"the Dictionary"**) at page 1834 defines the word *"wilful/willful"* thus:

> **"Voluntary and intentional, but not necessarily malicious. A voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong. The term *willful* is stronger than *voluntary or intentional;* it is traditionally the equivalent of *malicious, evil or corrupt."***

104. At page 1003 the Dictionary defines the term *"knowingly"* as follows:

> **"In such a manner that the actor engaged in prohibited conduct with the knowledge that the social harm that the law was designed to prevent was practically certain to result; deliberately... A person who acts *purposely* wants to cause the social harm, while a person who acts *knowingly* understands that the social harm will almost be certainly a consequence of the action, but acts with other motives and does not care whether the social harm occurs."**

105. The word *"unlawful"* is at page 1771 of the Dictionary, defined as follows:

> **"1. Not authorized by law; illegal...2. Criminally punishable...3. Involving moral turpitude."**

106. Finally, the Dictionary at page 932 defines the term *"intentional"* thus:

> **"Done with the aim of carrying out the act."**

107. It is not sufficient to define those words without understanding their relationship with the legal term *"mens rea"*. That term receives long salutation at page 1134 of the Dictionary, and we cite the relevant parts of the definition as follows:

> **"[Law Latin "guilty mind"] The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime... Mens rea is the second of two essential elements of every crime at common law, the other being actus reus. Under the Model Penal Code, the required levels of mens rea – expressed by the adverbs *purposely, knowingly, recklessly*, and *negligently* – are termed "culpability**

requirements." – Also termed *mental element; criminal intent; guilty mind.*"

108. Upon consideration of the legal meaning of the terms *willfully, knowingly, unlawfully and intentionally*, it readily emerges that they onboard the *mens rea* element in the impugned provisions. First, by the use of the terms *"intentionally"* and *"knowingly",* the lawmaker satisfied the fundamental principle that criminal liability must be anchored on a culpable mental state. Secondly, the word *"intentionally"* imports a requirement that the accused acted with a deliberate purpose to bring about the prohibited result, while the term *"knowingly"* requires proof of awareness of the nature of the conduct or the surrounding circumstances. In our view, the words used in the Act satisfy well-established *mens rea* standards in criminal law and provide clear notice to the public of the mental element required for conviction. Even in the Penal Code, these phrases have been used in numerous provisions.

109. Additionally, the phrase *"unlawfully and without authorisation"* further limits criminal liability by establishing an objective boundary between permissible and impermissible computer access. In our view, the wording requires proof that an accused person lacked legal right or permission to access or interfere with the system. This language serves a critical limiting function. It confines criminal liability to those who cross an objective boundary, for instance, a password, access credential, or other access control mechanism, that signals a clear withdrawal of

consent. The phrase does not encompass mere breaches of workplace policies, contractual terms of service, or other informal user expectations. When properly construed, it targets conduct that involves bypassing or defeating access barriers, thereby reserving criminal sanction for intentional culpable intrusions. This element narrows the offence to conduct involving circumvention of technological or permission-based access barriers, thereby excluding accidental, trivial, or policy-based infractions.

110. In advancing their case, the appellant relied on the United States Supreme Court decision in **United States vs. X-Citement Video, Inc., 513 U.S. 64 (1994).** We have read the decision, and we find that, as opposed to the appellant's argument, in that case, the Supreme Court affirmed the use of the word *"knowingly"* to connote *mens rea*. The majority in that case held that:

> **"Our reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them. The landmark opinion in *Morissette v. United States,* 342 U. S. 246 (1952), discussed the common law history of *mens rea* as applied to the elements of the federal embezzlement statute. That statute read: "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States . . . [s]hall be fined." Perhaps even more obviously than in the statute presently before us, the word "knowingly" in its isolated position suggested that it only attached to the verb**

"converts," and required only that the defendant intentionally assume dominion over the property. But the Court used the background presumption of evil intent to conclude that the term "knowingly" also required that the defendant have knowledge of the facts that made the taking a conversion-i. e., that the property belonged to the United States. See also *United States* v. *United States Gypsum Co.,* 438 U. S. 422, 438 (1978) ("[F]ar more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement")." [Annotations omitted]

111. The Judges proceeded to add that:

> **"*Morissette,* reinforced by *Staples,* instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct...**
>
> **A final canon of statutory construction supports the reading that the term "knowingly" applies to both elements. Cases such as *Ferber,* 458 U. S., at 765 ("As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant"); *Smith* v. *California,* 361 U. S. 147 (1959); *Hamling* v. *United States,* 418 U. S. 87 (1974); and *Osborne v. Ohio,* 495 U. S. 103, 115 (1990), suggest that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts. It is therefore incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress. *Edward J DeBartolo Corp.* vs. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 575 (1988)."**

112. The scienter requirement referred to in the cited authority required the proof of a culpable mental state of the accused person. Scienter

is a legal term denoting the intent or knowledge of wrongdoing. The prosecution is required to prove the existence of a mental state showing that the accused person acted with knowledge of the illegality or with reckless disregard for the truth. Scienter requirement is applicable where intent is a crucial element of the offence. The culpable mental state encompasses knowledge of wrongdoing, intent to deceive, or at least reckless disregard for the truth when committing a fraudulent or wrongful act. It is a requirement or standard that prevents accidental or negligent acts from being criminalised. In **United States vs. Morris, 928 F.2d 504 (2d Cir. 1991)**, the United States Supreme Court addressed the scienter requirement in the 1986 amendment to the **Computer Fraud and Abuse Act**. In that case, the Court affirmed that the terms *"knowingly"* and *"intentionally"* satisfied the scienter requirement, holding that:

> **"According to the Senate Judiciary Committee, Congress changed the mental state requirement in section 1030(a)(2) for two reasons. Congress sought only to proscribe intentional acts of unauthorized access, not "mistaken, inadvertent, or careless" acts of unauthorized access.**
>
> **Also, Congress expressed concern that the "knowingly" standard "might be inappropriate for cases involving computer technology." The concern was that a scienter requirement of "knowingly" might encompass the acts of an individual "who inadvertently 'stumble[d] into' someone else's computer file or computer data," especially where such individual was authorized to use a particular computer. The Senate Report concluded that "[t]he substitution of an 'intentional' standard is designed to focus Federal criminal prosecutions on**

> **those whose conduct evinces a clear intent to enter, without proper authorization, computer files or data belonging to another." Congress retained the "knowingly" standard in other subsections of section 1030. *See* 18 U.S.C. § 1030(a)(1), (a)(4).**
>
> **This use of a *mens rea* standard to make sure that inadvertent accessing was not covered is also emphasized in the Senate Report's discussion of section 1030(a)(3) and section 1030(a)(5), under which Morris was convicted."** [Annotations omitted]

113. We are persuaded by the cited authorities, which reaffirm the legitimacy of the use of the phrases complained of by the appellant before us. The use of such phrases in a provision connotes the requirement of proving that which is alleged to have been done in violation of the law was done consciously. It obligates the prosecution to prove the accused's culpable mental state and thus excludes innocent or negligent acts for which guilt cannot be attributed. The appellant's contention that the challenged provisions have the possibility of netting innocent persons is therefore defeated. We thus affirm the learned Judge's conclusion that the provisions incorporate *mens rea* in the offences and, as a result, are constitutional.

114. ***(iv) Whether the impugned provisions meet the justification threshold in Article 24 of the Constitution:***

(a) Whether sections 48, 50, 51, 52 and 53 of the Act pose a severe threat to the right to privacy for want of sufficient safeguards;

Against these provisions, the appellant contended that the real-time collection of traffic data under **section 52** for a period of six

months constitutes a severe violation of the right to privacy and human dignity. The appellant relied on the object of the Act as stipulated under **section 3** as being to protect the right to privacy, and not to limit it, and argued that **sections 48, 50, 51, 52** and **53** actually limit the right to privacy in a manner that is unreasonable and unjustifiable in an open and democratic society. The appellant maintained that **Part IV** of the **Act** is therefore inconsistent with the object of the Act. Additionally, the appellant asserted that **Part IV** of the **Act** fails to indicate, as required under **Article 24(2)** of the **Constitution**, that it intends to limit the right to privacy, the nature of the limitation, and the extent to which the right to privacy will be curtailed. In that regard, the appellant submitted that the failure to espouse the nature and extent of the limitation makes it impossible for any court approached by the police to objectively determine whether to grant the orders under **sections 48, 50, 52**, and **53**. Further, that allowing police officers to obtain information without a court order is a threat to the right to privacy, as this power is prone to abuse.

115. The provisions complained of are contained in **Part IV (sections 47-56)** of the **Act**, indexed as *"Investigation Procedures"*. In summary **section 48** authorises a police officer to move the court for search and seizure orders; **section 49** provides for the making of an inventory of any recovered items and creates an offence for obstructing an authorised officer from conducting a search; **section 50** allows the court, upon application, to issue a compelling order for the production of computer data or subscriber

information; **section 51** provides for expedited preservation and partial disclosure of traffic data to a police officer; **section 52** grant courts authority to issue an order to a police officer to collect or record real-time traffic data for a period not exceeding six months, and to order the service provider not to disclose the existence of the order to any person; **section 53** provides for interception, recording and collection of content data with court permission; **section 54** creates offences for the obstruction or abuse of the powers under the Part; **section 55** provides for the right to appeal against any order issued under the Part; and **section 56** provides for confidentiality and limitation of liability for service providers.

116. The appellant argued that the learned Judge erred by determining that **sections 48, 50, 51, 52**, and **53** of the **Act** have in-built safeguards for ensuring that due process is followed. The learned Judge was faulted for allegedly stating that the nature of cybercrimes warrants less protection of fundamental rights and freedoms. According to the appellant, this position failed to take into account the sophisticated nature of online systems, their vulnerability, and the value of the personal information processed through them, and in the appellant's view, therefore, the investigation of cybercrimes calls for more stringent oversight procedures compared to other offences. According to the appellant, the learned Judge misapprehended the holding in **Magajane vs. Chairperson, North West Gambling Board** (supra).

117. The appellant beseeched this Court to evaluate whether **sections 48, 50, 51, 52**, and **53** of the **Act** improperly restrict the right to privacy under **Article 31** of the **Constitution**. We begin by observing that the right to privacy is an all-encompassing right as it covers human dignity, autonomy, and freedom of thought. Specifically, in respect to the appeal before us, the right to privacy includes the right not to have the privacy of one's communications infringed. No doubt, the right extends to the protection of data, communications, and digital identities. The appellant argued that the impugned provisions grant law enforcement agencies excessive surveillance powers without adequate safeguards, thereby posing a potential threat of State intrusion. Although it is accepted that Parliament exercised its constitutionally recognised legislative authority in enacting a law to combat cybercrimes, **Article 24** of the **Constitution** allows limitation to rights and fundamental freedoms only if they are reasonable and justifiable in an open and democratic society. The question, therefore, is not whether the provisions interfere with the right to privacy, but whether such interference complies with the strictures imposed by **Article 24** of the **Constitution**. Ultimately, the inquiry centres on proportionality: whether the means used by the legislature overly compromised the right to privacy in achieving the objective of punishing cybercrimes.

118. It can no longer be disputed that cybercrimes and related offences present serious threats to economic, security, personal safety, and the integrity of information systems. As such, the State has a

constitutional obligation to take reasonable measures to address the threats. To determine whether these measures meet the proportionality test, we will start by considering the containment measures undertaken by other jurisdictions in respect of these emerging crimes. In **Klass and Others vs. Germany, (Application No. 5029/71), 6 September 1978,** the European Court of Human Rights recognised that secret surveillance may be necessary in democratic societies. Still, it emphasised that such powers must be accompanied by sufficient guarantees to prevent abuse. In that regard, the Court held that:

> **"Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime...**
>
> **50. The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law."**

119. Again, the European Court of Human Rights in **Roman Zakharov vs. Russia (Application No. 47143/06)**, **4 December 2015**, while invalidating a Russian surveillance provision that permitted broad interception powers without adequate judicial oversight or independent supervision, held that:

> **"That being said, the Court does not lose sight of the fact that prior judicial authorisation for interceptions is required in Russia. Such judicial authorisation may serve to limit the law-enforcement authorities' discretion in interpreting the broad terms of "a person who may have information about a criminal offence", "a person who may have information relevant to the criminal case", and "events or activities endangering Russia's national, military, economic or ecological security" by following an established judicial interpretation of the terms or an established practice to verify whether sufficient reasons for intercepting a specific individual's communications exist in each case. The Court accepts that the requirement of prior judicial authorisation constitutes an important safeguard against arbitrariness. The effectiveness of that safeguard will be examined below...**
>
> **Nonetheless, I have voted for admissibility and for the finding of a violation of Article 8 of the Convention on account of the fact that the fundamental importance of safeguards to protect private communications against arbitrary surveillance, especially in the non-criminal context, was never addressed in the domestic proceedings... As a national judge, I cannot ignore the fact that a widespread suspicion exists in Russian society that surveillance is exercised over political and economic figures, including human rights activists, opposition activists and leaders, journalists, State officials, managers of State property – in other words, over all those who are involved in public affairs...**

This judgment could serve as a basis for improving the legislation in the sphere of operational and search activities and for establishing an effective system of public control over surveillance... This is even more obvious if there are no other means available to protect democracy and the rule of law. This is an important role which the judiciary must play in civil society."

120. More recently, in **Big Brother Watch and Others vs. The United Kingdom, Applications nos. 58170/13, 62322/14 and 24960/15, 25 May 2021,** the same Court reaffirmed that bulk interception regimes must contain safeguards on authorisation, scope, duration, data retention, and oversight mechanisms. In that regard, the Court opined that:

"334. In cases where the legislation permitting secret surveillance is contested before the Court, the lawfulness of the interference is closely related to the question whether the "necessity" test has been complied with and it is therefore appropriate for the Court to address jointly the "in accordance with the law" and "necessity" requirements. The "quality of law" in this sense implies that the domestic law must not only be accessible and foreseeable in its application, it must also ensure that secret surveillance measures are applied only when "necessary in a democratic society", in particular by providing for adequate and effective safeguards and guarantees against abuse (see Roman Zakharov, cited above, § 236; see also Kennedy, cited above, § 155).

335. In this regard it should be reiterated that in its case-law on the interception of communications in criminal investigations, the Court has developed the following minimum requirements

that should be set out in law in order to avoid abuses of power: (i) the nature of offences which may give rise to an interception order; (ii) a definition of the categories of people liable to have their communications intercepted; (iii) a limit on the duration of interception; (iv) the procedure to be followed for examining, using and storing the data obtained; (v) the precautions to be taken when communicating the data to other parties; and (vi) the circumstances in which intercepted data may or must be erased or destroyed (see Huvig, cited above, § 34; Kruslin, cited above, § 35; Valenzuela Contreras, cited above, § 46; Weber and Saravia, cited above, § 95; and Association for European Integration and Human Rights and Ekimdzhiev, cited above, § 76). In Roman Zakharov (cited above, § 231) the Court confirmed that the same six minimum safeguards also applied in cases where the interception was for reasons of national security; however, in determining whether the impugned legislation was in breach of Article 8, it also had regard to the arrangements for supervising the implementation of secret surveillance measures, any notification mechanisms and the remedies provided for by national law (see Roman Zakharov, cited above, § 238).”

The Court went on to add that:

“338. As to the question whether an interference was “necessary in a democratic society” in pursuit of a legitimate aim, the Court has recognised that the national authorities enjoy a wide margin of appreciation in choosing how best to achieve the legitimate aim of protecting national security (see Weber and Saravia, cited above, § 106).”

121. Moving to India, the Supreme Court in **Justice K. S. Puttaswamy (Retd.) & Anr. vs. Union of India & Others AIR 2017 SC (CIV) 2714** affirmed that though the right to privacy was a fundamental right, it was subject to restriction in certain circumstances:

> **"73. It would be useful to turn to The European Union Regulation of 201630. Restrictions of the right to privacy may be justifiable in the following circumstances subject to the principle of proportionality:**
>
> **(a) Other fundamental rights: The right to privacy must be considered in relation to its function in society and be balanced against other fundamental rights.**
>
> **(b) Legitimate national security interest**
>
> **(c) Public interest including scientific or historical research purposes or statistical purposes**
>
> **(d) Criminal Offences: the need of the competent authorities for prevention investigation, prosecution of criminal offences including safeguards against threat to public security;**
>
> **(e) The unidentifiable data: the information does not relate to identified or identifiable natural person but remains anonymous. The European Union Regulation of 2016 31 refers to 'pseudonymisation' which means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person;**

(f) The tax etc: the regulatory framework of tax and working of financial institutions, markets may require disclosure of private information. But then this would not entitle the disclosure of the information to all and sundry and there should be data protection rules according to the objectives of the processing. There may however, be processing which is compatible for the purposes for which it is initially collected."

However, the Court reiterated the need for a robust legal regime, pointing out that:

"180. While it intervenes to protect legitimate state interests, the state must nevertheless put into place a robust regime that ensures the fulfilment of a three-fold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate state aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary state action. The pursuit of a legitimate state aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not re-appreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be

pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary state action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the three-fold requirement for a valid law arises out of the mutual inter-dependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other..."

122. In **People's Union for Civil Liberties (PUCL) vs. Union of India AIR 1997 SC 568**, the Supreme Court of India decried the lack of procedural safeguards in telephone interception in **section 5** of the **Indian Telegraph Act** and held that:

"But the substantive law as laid down in Section 5(2) of the Act must have procedural backing so that the exercise of power is fair and reasonable. The said procedure itself must be just, fair and reasonable. It has been settled by this Court in Maneka Gandhi vs. Union of India, that "procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself". Thus, understood, "procedure" must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes".

31. We are of the view that there is considerable force in the contention of Mr. Rajinder Sachar, Mr. Kapil Sibal and Dr. Rajiv Dhawan that no procedure has been prescribed for the exercise of the power under Section 5(2) of the Act. It is not disputed that no rules have been framed

under Section 7(2)(b) of the Act for providing the precautions to be taken for preventing the improper interception or disclosure of messages. In the absence of just and fair procedure for regulating the exercise of power under Section 5(2) of the Act, it is not possible to safeguard the rights of the citizens guaranteed under Articles 19(1)(a) and 21 of the Constitution of India."

123. In South Africa, the Constitutional Court in **AmaBhungane Centre for Investigative Journalism NPC and Another vs. Minister of Justice and Correctional Services and Others; Minister of Police vs. AmaBhungane Centre for Investigative Journalism NPC and Others (CCT 278/19; CCT 279/19) [2021] ZACC 3** declared sections of the **Communications and Provision of Communication Related Information Act 70 of 2002** unconstitutional to the extent that they failed to ensure adequate safeguards for an independent judicial authorisation of interception. The Court reiterated that a law authorising surveillance should include transparency and accountability mechanisms acceptable within a constitutional democracy.

124. The key principle emerging from these decisions is that prior judicial authorisation alone may not suffice; adequate supervision and controls are equally important. **Big Brother Watch and Others vs. The United Kingdom** (supra) underscores the need for narrowly tailored powers and structured oversight, principles that are equally relevant to the interpretation of the impugned provisions that are the subject of the appeal before us. What also emerges from the reviewed decisions is that even though the

surveillance powers of the State are constitutionally permissible, such powers should be exercised within clearly defined and narrowly tailored boundaries surrounded by robust safeguards. These principles resonate with **Article 24** of our Constitution, which demands proportionality and justification for any limitation of a right or fundamental freedom.

125. We now proceed to consider each impugned provision in **Part IV** of the **Act** in detail. **Section 48** of the **Act** allows law enforcers, with court approval, to search, access, seize, and copy data from computer systems, with the assistance of those in control of the systems. While this provision aims to facilitate cybercrime investigation by preserving digital evidence, it raises concerns regarding the right to privacy under **Article 31** of the **Constitution** due to the potential invasion of personal data. In such circumstances, judicial oversight is emphasised to prevent arbitrary intrusions. The tools for judicial oversight are provided under **section 48(1) & (2)** which obligates the police officer or authorised person to demonstrate that a specified computer system or part of it, computer data storage medium, program or data is reasonably required for the purpose of a criminal investigation or criminal proceedings before an order can issue. Also, the search warrant issued by the court should identify the police officer or authorised person; direct the police officer or authorised person to seize the data in question; and direct the police officer or authorised person to search any person identified in the warrant, enter and search any premises identified in the

warrant, or search any person found on or at such premises. There is thus clear requirement for specificity in the search warrants, and the court orders must be laser focused, limit access to necessary data, ensure proportional searches, and ascertain that the assistance requested does not infringe on the right against self-incrimination. Although we find nothing unconstitutional with regard to **section 48**, courts must act with circumspection while exercising the powers therein. Overly broad or disproportionate use of the powers therein can easily violate constitutional rights. Fortunately, the High Court retains the authority to quash such actions should it deem that they contravene **Articles 31** and **50** of the **Constitution**.

126. **Section 50** allows investigative authorities, with a court order, to compel service providers to disclose subscriber information and traffic data for cybercrime investigations. While the appellant and the supporting respondents argued that this violates the right to privacy under **Article 31** and fails to meet **Article 24** requirements, the respondents opposed to the appeal countered that the provision is essential for investigating cyber offences and has adequate safeguards. Subscriber information is indeed personal data, and its disclosure violates privacy rights. It should, however, be appreciated that cybercrimes pose unique challenges as evidence is often digital, stored remotely, and easily altered. Access to metadata is crucial for effective law enforcement, as cybercriminals hide their identities online. Invoking **section 50** requires court approval, ensuring judicial oversight and preventing

abuse. It concerns subscriber and traffic data, not the content of communications, and any excesses can be challenged under **Articles 22** and **23** of the **Constitution**. Considering the manner in which it is couched, we are satisfied that the provision serves a legitimate and important objective, is rationally related to the aim of the Act and has adequate judicial oversight measures that ensure that any limitation to the right to privacy is reasonable, necessary and not only proportionate but also specific to the investigations being undertaken at the time. We therefore find that it aligns with the Constitution.

127. The salient features validating sections **48 and 50** above are clearly applicable to **sections 51, 52** and **53** of the **Act**. Perhaps the unique provision is **section 53**, which allows for access to content data. **Sections 51** and **52** concern only data that is not, per se, intrusive, such as traffic data. However, even with **section 53**, there is robust oversight, transparency, and precise procedures. Here, for an order to issue, the police officer or authorised person must, in making an application, state the reasons making him believe that the content data being sought is in possession of the person in control of the computer system; identify and state the type of content data suspected to be found in such computer system; identify and state the offence in respect of which the warrant is sought; state if they have authority to seek real-time collection or recording on more than one occasion; and explain measures to be taken to prepare and ensure that the real-time collection or recording is carried out while maintaining the

privacy of other users, customers and third parties and without the disclosure of information and data of any party not part of the investigation. The applicant is also required to state how the investigation may be frustrated or seriously prejudiced unless real time collection or recording is permitted; and state the manner in which they shall achieve the objective of the warrant whether through real-time collection or recording by the person in control of the computer system. These requirements are sufficient to ensure that a warrant is only sought when a real crime is disclosed. As already opined, the role of the Judiciary cannot be underestimated in ensuring that applications for warrants under these provisions meet the threshold for the exercise of judicial discretion and that the orders issued are specific and operate within well-demarcated boundaries that confine them to the constitutional threshold.

128. We therefore find that the impugned provisions are amenable to a narrow and purposive construction that confines their operation to circumstances of demonstrated necessity, subjects them to strict judicial scrutiny, and requires a close nexus between the investigative measure and the alleged offence. In our view, **Part IV** of the **Act** does not authorise unchecked surveillance or arbitrary intrusion into private life. Rather, the provisions therein establish a framework within which cybercrimes may be investigated, subject always to the supremacy of the Constitution and the obligation of all State actors to proceed in a manner that respects, protects and promotes fundamental rights and freedoms.

129. Our conclusion above does not end the appellant's challenge to the provisions **Part IV** of the **Act** because there were other arguments put forth by the appellant against the provisions. Of these other arguments, the first contention was that **section 50(2)** of the **Act** denies a court discretion as it provides that it *"shall issue an order"* upon an application for a production order by a police officer or an authorised person. On this argument, our understanding of that provision is that the word *"shall"* is used in relation to the possible orders that a court can issue and not to command the court to issue the orders sought, thereby taking away its independence or discretionary power. We say no more.

130. The second argument was that the real-time collection of traffic data under **section 52** for a period of six months constitutes a severe violation of the right to privacy and human dignity. We indeed appreciate the appellant's contention that collection of data for a long period of time poses a real threat to the target of the action. However, the length of the period may be necessitated by the kind of crime under investigation. The fact that collection will be over a length of time does not of itself render the provision unconstitutional. In that regard, the European Court of Human Rights held in **Roman Zakharov vs. Russia** (supra) that:

> **"The Court has held that it is not unreasonable to leave the overall duration of interception to the discretion of the relevant domestic authorities which have competence to issue and renew interception warrants, provided that adequate safeguards exist, such as a clear indication in the domestic law of the period after which**

an interception warrant will expire, the conditions under which a warrant can be renewed and the circumstances in which it must be cancelled..."

We are persuaded by the holding and are thus unconvinced that the length of the period of surveillance does not of itself render the provision unconstitutional.

131. The third and final argument by the appellant was that allowing police officers to obtain information without a court order is a threat to the right to privacy, as this power is prone to abuse. The appellant has a point. As was observed by the Constitutional Court of South Africa in **Magajane vs. Chairperson, North West Gambling Board** (supra), warrantless searches should be the exception rather than the norm. In stressing the importance of a search warrant, the Court observed that:

"Exceptions to the warrant requirement should not become the rule. A warrant is not a mere formality. It is the method tried and tested in our criminal procedure to defend the individual against the power of the state, ensuring that police cannot invade private homes and businesses upon a whim, or to terrorise. Open democratic societies elsewhere in the world have fashioned the warrant as the mechanism to balance the public interest in combating crime with the individual's right to privacy.[95] The warrant guarantees that the state must justify and support intrusions upon individuals' privacy under oath before a neutral officer of the court prior to the intrusion. It furthermore governs the time, place and scope of the search, limiting the privacy intrusion, guiding the state in the conduct of the inspection and informing the subject of the legality and limits of the search. Our history provides

much evidence for the need to adhere strictly to the warrant requirement." [Footnotes omitted]

132. Nevertheless, it goes without saying that there are situations that call for prompt action thus making it impossible for the investigative authority to move the court for orders. This was appreciated by the Court in **Magajane vs. Chairperson, North West Gambling Board** (supra) as follows:

> **"Of course, the law recognises that there will be limited circumstances in which the need of the state to protect the public interest compels an exception to the warrant requirement. In certain cases regulatory inspections aimed at protecting the public health, safety and general welfare will require such an exception."**

In the circumstances, we do not find merit in the appellant's argument that all investigative steps should be preceded by the issuance of a court order.

133. In the result, we find **sections 48, 50, 51, 52**, and **53** of the **Act** constitutional. Just like with any other provisions of the law, judicial officers and judges must be keen so as to ensure that the implementation of the provisions do not infringe on rights and fundamental freedoms. We emphasise that courts called upon to authorise or review actions under these provisions bear a heightened constitutional responsibility. They must ensure that surveillance orders are specific, time-bound, and narrowly tailored, and that the collection and retention of data does not exceed what is strictly required for the investigation at hand.

134. ***(b) Whether sections 22, 23, 24(1)(c), 27, 28 and 37 violate the Constitution;***

Section 22 of the Act criminalises intentional publication of false, misleading or fictitious data or misinformation with the intent that the data or information shall be considered or acted upon as authentic. **Section 23**, on the other hand, makes it an offence to publish information that is false in print, broadcast, data or over a computer system that is calculated or results in panic, chaos, or violence, or which is likely to discredit the reputation of any person. The appellant contends that **section 22(2)** limits the right to expression under **Article 33** of the **Constitution**. Regarding **section 23**, the appellant contends that it offends **Article 24** of the **Constitution** as it does not offer the meaning of the word *"publish"*, thereby failing the test of specificity. According to the appellant, these sections also offend **Articles 32** of the **Constitution** on freedom of belief and opinion and **Article 34** of the **Constitution** on the freedom of the media. It is also the appellant's contention that these provisions carry disproportionate sentences while criminalising false publication which is not among the matters listed in **Article 33(2)** to which the freedom of expression does not extend. **Section 23** is additionally faulted for incorporating the words *"panic"* and *"chaos"*, which the appellant terms as broad and vague.

135. **Article 32** protects the right to freedom of conscience, religion, belief and opinion, **Article 33(1)** guarantees freedom of expression, including the right to seek, receive and impart information, while

Article 33(2) withdraws protection for speech or communication that amounts to propaganda for war, incitement to violence, hate speech, and advocacy of hatred likely to cause harm or discrimination. **Article 34**, on its part, protects the independence of the media from control or interference by the State.

136. The impugned **sections 22 and 23** provide as follows:

> **"22. False publications**
>
> **(1) A person who intentionally publishes false, misleading or fictitious data or misinforms with intent that the data shall be considered or acted upon as authentic, with or without any financial gain, commits an offence and shall, on conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years, or to both.**
>
> **(2) Pursuant to Article 24 of the Constitution, the freedom of expression under Article 33 of the Constitution shall be limited in respect of the intentional publication of false, misleading or fictitious data or misinformation that -**
>
> **(a) is likely to -**
>
> **(i) propagate war; or**
>
> **(ii) incite persons to violence;**
>
> **(b) constitutes hate speech;**
>
> **(c)advocates hatred that -**
>
> **(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or**
>
> **(ii) is based on any ground of discrimination specified or contemplated in Article 27(4) of the Constitution; or**

(d) negatively affects the rights or reputations of others.

23. Publication of false information

A person who knowingly publishes information that is false in print, broadcast, data or over a computer system, that is calculated or results in panic, chaos, or violence among citizens of the Republic, or which is likely to discredit the reputation of a person commits an offence and shall on conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding ten years, or to both."

137. In **Handyside vs. United Kingdom (Application no. 5493/72) 7 December 1976**, the European Court of Human Rights, while upholding the right to freedom of expression, held that:

> **"From another standpoint, whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's "duties" and "responsibilities" when it enquires, as in this case, whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society"."**

138. The principle above was reiterated by the same Court in **Zana vs. Turkey, (68/1996/688/880), 25 November 1997,** where it was held that:

> **"1. The Court reiterates the fundamental principles which emerge from its judgments relating to Article 10:**
>
> **(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to**

paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly..."

139. It is also indeed correct, as held by the Supreme Court in **Communications Commission of Kenya vs. Royal Media Services Ltd [2014] eKLR**, that media freedom does not shield the press from *"laws of general application"* that impose responsibility for harmful conduct. On the other hand, the decision of the United States Supreme Court in **Garrison vs. Louisiana, 379 U.S. 64 (1964)** also rings true that:

> **"Even in Livingston's day, however, preference for the civil remedy, which enabled the frustrated victim to trade chivalrous satisfaction for damages, had substantially eroded the breach of the peace justification for criminal libel laws. In fact, in earlier, more violent, times, the civil remedy had virtually pre-empted the field of defamation; except as a weapon against seditious libel, the criminal prosecution fell into virtual desuetude.' Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that ". . . under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation."...**

The Reporters therefore recommended only narrowly drawn statutes designed to reach words tending to cause a breach of the peace, such as the statute sustained in *Chaplinsky* vs. *New Hampshire,* 315 U. S. 568, or designed to reach speech, such as group vilification, "especially likely to lead to public disorders," such as the statute sustained in *Beauharnais* vs. *Illinois,* 343 U. S. 250. Model Penal Code, *supra,* at 45.""

140. The Court went on to warn that:

"Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood...

"The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration."

141. Our assessment of **sections 22** and **23** of the **Act** is that they are so broad, wide, untargeted, akin to unguided missiles, and likely to net innocent citizens. They are aimed at patrolling the social media space and are likely to net the originators of what is sought to be criminalised, as well as innocent forwarders who may not even be aware that the information they are publishing is false. These provisions are a danger to the social media warriors who are on

sentinel duty day and night, forwarding information without even reading what they are forwarding. In a world without universal truths or falsities, the offences may be difficult to prove. Indeed, false information is better than no information at all. In **Salov vs. Ukraine (Application no. 65518/01) 6 September 2005**, Mr. Sergey Petrovich Salov, a lawyer, who was an agent of a presidential candidate disseminated an article in a forged newspaper stating that the sitting president, who was also a candidate, had died. He was arrested, tried and convicted for participating in a dishonest electoral campaign by disseminating false information. His appeals through the municipal appellate hierarchy were dismissed. He then moved to the European Court of Human Rights, alleging violation of various rights. In finding that Mr. Salov's trial had violated **Article 10** of the **European Convention on Human Rights** on freedom of expression, the Court held that:

> **"104. According to the Court's well-established case-law, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest.... This freedom is subject to the exceptions set out in Article 10 § 2, which must, however, be construed strictly. The need for any restrictions must be established convincingly.**
>
> **105. The test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see Sunday Times *v. the***

***United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction...**

107. Lastly, the Court reiterates that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed....

108. The Court observes that one of the requirements flowing from the expression "prescribed by law" is the foreseeability of the measure concerned. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.... The degree of precision depends to a considerable extent on the content of the instrument at issue, the field it is designed to cover, and the number and status of those to whom it is addressed."

142. **Sections 22** and **23** cast a wide net despite history teaching us that what we may hold to be false today may turn out to be true tomorrow. For instance, Galileo Galilei was tried and convicted by the Roman Inquisition for stating the truth (that the earth revolves around the sun) in an era where the correctness of his statement was deemed a falsity. These provisions risk criminalising satire, opinions and journalistic inaccuracies. We are aware that some obnoxious characters would be better taken care of by the

impugned provisions, however, the risk posed by the provisions to innocent citizens is enhanced and the provisions as drafted cannot be allowed to stand. If the intention of the legislature was to criminalise the genre of speech prohibited in **Article 33(2)** of the **Constitution**, then we are of the view that the impugned provisions, as drafted, have not succeeded in achieving that purpose. Indeed, it was submitted by the appellant, without much resistance by those opposed to the appeal, that the **National Cohesion and Integration Act, 2008**, has already criminalised what was sought to be criminalised by the two provisions. We therefore find that **sections 22** and **23** of the **Act** have failed to pass constitutional muster.

143. Next is the challenge to **section 24(1)(c)**. The appellant argued that the provision went beyond the scope of **section 24**, which addresses the issue of child pornography. According to the appellant, this provision limits the right to privacy under **Article 31** in a manner inconsistent with **Article 24** of the **Constitution**. The impugned provision is couched as follows:

> **"24. (1)A person who, intentionally -**
>
> **a) publishes child pornography through a computer system;**
>
> **b) produces child pornography for the purpose of its publication through a computer system;**
>
> **c) downloads, distributes, transmits, disseminates, circulates, delivers, exhibits, lends for gain, exchanges, barters, sells or offers for sale, lets on hire or offers to let on hire, offers in another way, or make**

available in any way from a telecommunications apparatus pornography; or

d) possesses child pornography in a computer system or on a computer data storage medium,

commits an offence and is liable, on conviction, to a fine not exceeding twenty million or to imprisonment for a term not exceeding twenty-five years, or both."

144. What we heard the appellant to be saying is that the omission of the word "child" from the offence created under **section 24(1)(c)** is intentional because the provision is aimed at outlawing adult pornography. It was also the appellant's submission that the definition of the term ***"pornography"*** under **section 2** of the **Act** is vague and would essentially include materials in books, periodicals, motion pictures and television scenes. **Section 2** defines pornography thus:

> **""pornography" includes the representation in books, magazines, photographs, films, and other media, telecommunication apparatus of scenes of sexual behaviour that are erotic or lewd and are designed to arouse sexual interest;"**

145. On the challenge to **section 24(1)(c)**, we agree with the learned Judge's finding. The mere fact that a provision appears widely cast is not a ground for declaring it unconstitutional. The provision, which must be read inconsonance with the other provisions in **section 24** on child pornography, is clear that what is sought to be prohibited is child pornography and pornography is clearly defined in the Act. Indeed, the definition of pornography in the Act

is similar to that in the **10th Edition of Black's Law Dictionary** which at page 1349 defines pornography as follows:

> **"Material (such as writings, photographs, or movies) depicting sexual activity or erotic behaviour in a way that is designed to arose sexual excitement."**

146. It is our finding that **section 24(1)(c)** serves a legitimate and important aim by regulating the downloading, circulation, sale, and distribution of child pornographic material. That the entire **section 24**, including **sub-section (1)(c)** focuses on criminalising child pornography can be discerned from the marginal note of the section which reads "child pornography". Marginal notes can be used to interpret statutory provisions as was succinctly explained by this Court in **Commissioner of Lands & Another vs. Coastal Acquaculture Limited [1997] KECA 394 (KLR)** thus:

> **"The role of marginal notes in legislation deserves a brief comment. Marginal notes are often found at the side of sections in an Act. They purport to summarize the effect of the sections, and have sometimes been used as an aid to construction. Whilst it is true that marginal notes are not part of the Act, some help might be derived from them to show what the sections to which they relate, are dealing with."**

Also see the decision of the Supreme Court in **Stanbic Bank Kenya Ltd vs. Santowels Ltd [2024] KESC 31 (KLR)**.

147. We therefore find no difficulty in rejecting the appellant's argument that the failure to include the term ***"child pornography"*** in **section 24(1)(c)** of the **Act** renders the provision applicable to adult pornography. It is therefore our finding that the provision

serves a legitimate and important aim by regulating the downloading, circulation, sale, and distribution of pornographic material, which helps prevent access by minors. The provision is rationally connected to its objective, and the argument that it is overbroad misinterprets the Constitution's requirement for proportionality. Less restrictive measures would fail to protect against the harm caused by unregulated channels of sexually explicit material involving children. Thus, the limitation is reasonable, proportional and justifiable, and therefore in compliance with **Article 24** of the **Constitution**.

148. As regards **section 27**, the appellant's objection is that the words "*detrimentally affects that person*" and "*indecent or grossly offensive*" are vague. According to the appellant, by using these words, the impugned provision limits the right under **Article 33** beyond the scope anticipated under **Article 33(2)** and therefore offends **Article 24** of the **Constitution**. The impugned section provides as follows:

> **"27.(1) A person who, individually or with other persons, wilfully communicates, either directly or indirectly, with another person or anyone known to that person, commits an offence, if they know or ought to know that their conduct -**
>
> **(a) is likely to cause those persons apprehension or fear of violence to them or damage or loss on that persons' property; or**
>
> **(b) detrimentally affects that person; or**
>
> **(c) is in whole or part, of an indecent or grossly offensive nature and affects the person."**

149. We agree with the learned Judge that the limitation prescribed by this provision is necessary and justified. Where Parliament prescribes an offence, as is the case herein, it is not for the court to question the objective of the legislature but to assess whether the enactment is constitutional. It seems that the objective of Parliament in this instance was to protect against cyberspace harassment. In as much as it is claimed to limit the freedom of expression, the appellant failed to show how it impinges that right or that the provision is irrational. Instead, the appellant argued, without evidence, that the provision goes beyond the scope of what is constitutionally enshrined. Perhaps, the words of the Supreme Court of India in **Shreya Singhal vs. Union of India (2015) 5 SCC 1** will better speak for us thus:

> **"28. As stated, all the above factors may make a distinction between the print and other media as opposed to the internet and the legislature may well, therefore, provide for separate offences so far as free speech over the internet is concerned. There is, therefore, an intelligible differentia having a rational relation to the object sought to be achieved that there can be creation of offences which are applied to free speech over the internet alone as opposed to other mediums of communication."**

150. We therefore find that the intention of **section 27** is clear. It is aimed at addressing the harmful conduct occasioning harassment through an internet-enabled platform which the legislature had the mandate to address. We thus find that the section is constitutionally sound.

151. The appellant also sought to have **section 28** declared unconstitutional on the ground that the offence of cybersquatting can best be dealt with under the intellectual property law regime. On this, it must be recalled that under **Article 40(5)** of the **Constitution**, the Kenyan State is mandated to support, promote, and protect the intellectual property rights of its citizens. The legislature has a constitutional duty to protect property rights, maintain economic order, and safeguard the public from deceptive practices, especially in the fast-growing digital space. Cybersquatting is harmful conduct, not deserving of constitutional protection. It is the duty of the courts to distinguish between lawful commercial activities and bad-faith exploitation when constitutional rights like freedom of expression or property are invoked. In our view, **section 28** targets only intentional deception and does not suppress legitimate uses such as fair use or parody. Thus, it criminalises abusive behaviour while allowing lawful speech and commerce. Balancing individual autonomy with the need for secure digital environment clearly favours regulation. Cybersquatting undermines trust in digital commerce, infringes proprietary rights, and facilitates fraud. The Constitution does not protect unlawful exploitation of technological loopholes for personal gain. Even if cybersquatting implicates the right to freedom of expression and the right to property, the limitations imposed by the provision are reasonable and justified. It is also important to appreciate that restricting rights is acceptable to prevent fraud and protect the rights of others. The application of

criminal law to online misconduct is necessary, and cyberspace cannot be a law-free environment, a virtual jungle or wild west devoid of criminal sanctions essential to deter its abuse. As such, we reject the appellant's challenge to **section 28** of the **Act**.

152. We have gleaned certain principles from the authorities cited in this judgment and before we conclude, it necessary to recommend that in the implementation of the Act, courts and other State actors must always be specific about the offence for which an interception order or any other order is sought; specify the period of interception; be keen on how the data is to be examined, used and stored; protect the data from third parties; and provide for the eventual erasure or destruction of the digital evidence. Courts, in particular, must be alive and alert to the risk that the Act can be deployed for political purposes and must carefully scrutinise every application before granting any order.

153. In the end, this appeal partially succeeds to the extent that we find **sections 22** and **23** of the **Act** unconstitutional for being too broad to the extent that they are likely to net innocent persons. It is only to this extent that we vary the learned Judge's judgment. Otherwise, all the other grounds of appeal are found to be without merit and are hereby dismissed.

154. With regard to the costs of this appeal, we hold the view that this is a matter of public interest and considering the importance of the arguments advanced by the parties in the continuing construction

of our constitutional architecture, for which we thank and commend learned counsel for their industry in research and erudite submissions, the appropriate order is to direct the parties to meet their own costs of the appeal, which we hereby do.

155. It is so ordered.

Dated and delivered at Nairobi this 6th day of March 2026.

P. O. KIAGE

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR