Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party) (Petition E016 of 2023) [2024] KEHC 2890 (KLR) (18 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2890 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

PETITION E016 OF 2023

SM MOHOCHI, J

MARCH 18, 2024

BETWEEN

KATIBA INSTITUTE ..... 1ST PETITIONER

LAW SOCIETY OF KENYA ..... 2ND PETITIONER

INTERNATIONAL COMMISSION OF JURISTS ..... 3RD PETITIONER

BLOGGERS ASSOCIATION OF KENYA ..... 4TH PETITIONER

KENYA UNION OF JOURNALISTS ..... 5TH PETITIONER

AFRICA CENTER FOR OPEN GOVERNANCE ..... 6TH PETITIONER

ARTICLE 19: GLOBAL CAMPAIGN FOR FREE EXPRESSION (ARTICLE 19 EAST AFRICA) ..... 7TH PETITIONER

KENYA HUMAN RIGHTS COMMISSION ..... 8TH PETITIONER

TRIBELESS YOUTH ..... 9TH PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

JOSHUA OTIENO AYIKA ..... INTERESTED PARTY

Sections 77(1) and (3) of the Penal Code declared unconstitutional for limiting the right to freedom of expression and being broad and vague

The petition challenged the constitutional validity of section 77 of the Penal Code on the ground that it limited the freedom of expression through the vaguely worded offence of subversion. The court held that the provisions of the said section 77 were over broad and vague, and they limited the right to freedom of expression and there was

lack of clarity as to the purpose and intent. The court finally declared sections 77(1) and (3)(a), (b), (c), (d), (e), (f), and (g) of the Penal Code as unconstitutional.

Reported by Kakai Toili

Constitutional Law *– constitutionality of statutes – constitutionality of section 77(1) and (3) of the Penal Code – where section 77 of the Penal Code provided for the offence of subversive activities - whether sections 77(1) and (3) were unconstitutional for limiting the right to freedom of expression and being over broad and vague - whether the derogation of the freedom of expression in section 77(1) was a derogation envisioned under article 24(2) of the Constitution on the limitation of rights and fundamental freedoms – Constitution of Kenya, 2010, articles 24 and 33; Penal Code, Cap 63, sections 77(1) and (3).*

Constitutional Law *– interpretation of the Constitution – factors to consider in constitutional interpretation - what were the factors to consider in constitutional interpretation – Constitution of Kenya, 2010, article 259.*

Constitutional Law *– constitutionality of statutes - factors to consider in determining the constitutionality of statutes - what were the factors to consider in determining the constitutionality of statutes.*

Brief facts

The interested party using his verified twitter/x handle account posted among other statements that people should prepare for an army to take over Government for 90 days then there would be elections. The interested party was subsequently arrested and charged with subversive activities contrary to section 77(1) (a) of the Penal Code. It was the 1st and 2nd respondents' contention as particularized on the interested party's charge-sheet, that the words were prejudicial to the public order and security of Kenya and which information was calculated to cause panic and chaos among citizens of Kenya.

The petition challenged the constitutional validity of section 77 of the Penal Code, Cap 63. The petitioners claimed that the section limited the freedom of expression through the vaguely worded offence of subversion. The petitioners sought for among other orders a declaration that, section 77(1) and (3) of the Penal Code were unconstitutional.

Issues

i. Whether section 77(1) and (3) of the Penal Code was unconstitutional for limiting the right to freedom of expression and being over broad and vague.
ii. Whether the derogation of the freedom of expression in section 77(1) of the Penal Code on subversive activities was a derogation envisioned under article 24(2) of the Constitution on the limitation of rights and fundamental freedoms.
iii. What were the factors to consider in constitutional interpretation?
iv. What were the factors to consider in determining the constitutionality of statutes?

Relevant provisions of the Law

(1) Any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a subversive intention, or utters any words with a subversive intention, is guilty of an

(3) For the purposes of this section, "subversive" means—

(a) supporting, propagating (otherwise than with intent to attempt to procure by lawful means the alteration, correction, defeat, avoidance or punishment thereof) or advocating any act or thing prejudicial to public order, the security of Kenya or the administration of justice;

(b) inciting to violence or other disorder or crime, or counselling defiance of or disobedience to the law or lawful authority;

(c) intended or calculated to support or assist or benefit, in or in relation to such acts or intended acts as are hereinafter described, persons who act, intend to act or have acted in a manner prejudicial to public order, the security of Kenya or the administration of justice, or who incite, intend to incite or have incited to violence or other disorder or crime, or who counsel, intend to counsel or have counselled defiance of or disobedience to the law or lawful authority;

(d) indicating, expressly or by implication, any connexion, association or affiliation with, or support for, any unlawful society;

(e) intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya:

Provided that the provisions of this paragraph do not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities;

(f) intended or calculated to bring into hatred or contempt or to excite disaffection against any public officer, or any class of public officers, in the execution of his or their duties, or any naval, military or air force or the National Youth Service for the time being lawfully in Kenya or any officer or member of any such force in the execution of his duties:

Provided that the provisions of this paragraph do not extend to comments or criticisms made in good faith and with a view to the remedying or correction of errors, defects or misconduct on the part of any such public officer, force or officer or member thereof as aforesaid and without attempting to bring into hatred or contempt, or to excite disaffection against, any such person or force; or

(g) intended or calculated to seduce from his allegiance or duty any public officer or any officer or member of any naval, military or air force or the National Youth Service for the time being lawfully in Kenya.

Held

1. The transformative constitutional design deliberately appreciated that Kenyans wanted a break from the dark past, the entire system of law was a colonial hand-down with very minor and cosmetic variations that were intended for self-preservation and colonial repression. The need to align legislation with the Constitution entailed a continuous scrutiny and examination of statutes and provisions thereof that were no longer fit for purpose.
2. The developing precedent on constitutional interpretation from the superior courts had evolved and coalesced as follows:
    a. Article 259 of the Constitution as a mandatory principle obliged courts to protect and promote the spirit, purposes, values and principles of the Constitution, advance the rule of Law, human rights and fundamental freedoms in the Bill of Rights and contribute to good governance while permitting development of the law.
    b. The Constitution must be construed holistically, liberally, purposively and in a broad manner so as to avoid a narrow and rigid interpretation tainted with legalism.
    c. The Constitution must be interpreted in a contextual manner, such that courts were constrained by the language used and so could not impose a meaning that the text was not reasonably capable of bearing. Furthermore, constitutional interpretation did not favour a formalistic or positivistic approach but a generous construction of the text in order to afford the fullest possible constitutional guarantees.
    d. In considering the purposes, values and principles while interpreting the Constitution, courts must take into account the non-legal phenomena by reflecting on the history of the text.
    e. Constitutional interpretation demanded that no one provision of the Constitution should be segregated from the others or be considered alone. The provisions were to be interpreted as an integrated whole so as to effectuate the greater purpose of the Constitution.
    f. Where there was an impugned provision in a statute the same must as much as possible be read in conformity with the Constitution to avoid a clash.
    g. The court ought to examine the object and purpose of the Act (statute) and if any statutory provision read in its context could reasonably be construed to have more than one meaning the court must prefer the meaning that best promoted the spirit and purposes of the Constitution.
    h. The principles of interpretation required that the words and expressions used in a statute be interpreted according to their ordinary literal meaning in the statement and in the light of their context.

3. When the constitutionality of a statute or provision of a statute was called to question, the court was under obligation to employ the constitutional mirror laying the impugned legislation or provision alongside the article(s) of the Constitution and determine whether it met the constitutional test. The court must also check both the purpose and effect of the section or the Act, and see whether any of the two could lead to the provision being declared unconstitutional. That was to say, the purpose of a provision or effect thereof, may lead to unconstitutionality of the statute or provision.
4. Where criminal prosecution had been undertaken by the Director of Public Prosecutions under the mandate conferred by article 157(6) of the Constitution, the court could only interfere under article 157(11) thereof where any of the principles in that sub-article were flouted.
5. Any law that conflicted with the Constitution was void to the extent of the inconsistency, and any act or omission in contravention of the Constitution was invalid. There was also a rebuttable presumption of legality, that an Act or provision was intended to serve the people and was therefore constitutional. The onus was always on the person challenging legislation to prove the unconstitutionality alleged.
6. The offence as created by section 77(1) and (3) of the Penal Code was a felony offence. The offence created was a derogation to the freedom of expression and the court was thus called upon to determine whether that derogation was a reasonable and a justifiable limitation of the freedoms of expression in an open and democratic society based on human dignity, equality and freedom under article 24 of the Constitution.
7. Freedom of expression and the rights to information were the cornerstone of any democratic State and every person had the right to freedom of expression, which included, freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.
8. As a derogation, the right to freedom of expression did not extend to, propaganda for war; incitement to violence; hate speech; or advocacy of hatred that;-
    a. constituted ethnic incitement, vilification of others or incitement to cause harm; or
    b. was based on any ground of discrimination specified or contemplated in article 27(4).
9. While there was no cogent evidence or material placed before the court in regard to the tweets by the interested party being subject to limitations under article 24(2) of the Constitution and that the tweet was a propaganda for war and incitement to violence as justification of the constitutionality of the provision by the 2nd and 3rd respondents, the tangent was a chilling reminder of the liberal and broad interpretation on making a decision to prosecute that led to prosecution for a felony and the possibility for abuse of such provision.
10. The purported breach of law or illegal act created by section 77 of the Penal Code, could not be discerned in the provision itself, the section encompassed any person who did, attempted to do, made any preparation to do, conspired with any person to do, with a subversive intention, or uttered any word(s) with a subversive intention and a secondary definition as contained in section 77(3) on "subversive" where in a tautologous language to "*Wanjiku*", the meaning of "subversive" took in quite a variety of activities, and that its contents were therefore so broad and wide that it was vague or indefinite.
11. The purported breach of law or illegal act created by section 77 of the Penal Code ultimately failed to define what subversive intention would constitute. The only stark aspect of that provision was where automatically under section 77(1) an offence was created without ingredients and the need for the intention or knowledge of wrongdoing that constituted part of a crime "*mens rea*", whereby any person who uttered any words with a subversive intention was guilty of an offence and was liable to imprisonment for a term not exceeding seven years.
12. The last limb of section 77(1) of the Penal Code created a derogation to the right to freedom of expression as the human conduct of uttering was ordinarily in human expression and that the derogation was blanket in form, "subversive intention" remained undefined leaving the prosecutor to

conjure and even with the definition of "subversion" under section 77(3) it remained a mystery what conduct would constitute an offence where one uttered any words with a subversive intention.

13. The purported derogation to the right to freedom of expression created in section 77(1) of the Penal Code existed prior to the promulgation of the Constitution and would thus not be a derogation envisioned under article 24(2) of the Constitution.

14. The court took judicial notice of the legal framework subsisting with regard to Public Order Act, Cap 56, an Act of Parliament to make provision for the maintenance of public order, and for purposes connected therewith and the Official Secrets Act Cap 187, an Act of Parliament to provide for the preservation of State secrets and State security, the National Cohesion and Integration Act of 2008 and Act to provide for specific legislation limiting the right the right to freedom of expression to, propaganda for war; incitement to violence; hate speech; or advocacy of hatred that;-
    a. constituted ethnic incitement, vilification of others or incitement to cause harm; or
    b. was based on any ground of discrimination specified or contemplated in article 27(4) of the Constitution.

15. The framework and legislation derogating the right to freedom of expression created offences that were misdemeanors in classification with a penalty of imprisonment for a term not exceeding three (3) years or a fine of not more than Kshs 1,000,000 for the offence of hate speech and the offence of incitement to ethnic contempt.

16. Section 77(1) and (3) of the Penal Code was a colonial legacy which limited freedom of expression through the vaguely worded offence of subversion. The provisions of the section 77 were over broad and vague, and they limited the right to freedom of expression and there was lack of clarity as to the purpose and intent.

17. The limitation in section 77 of the Penal Code was not provided for by law. The section was vague and over-broad firstly by not explicitly limiting the freedom of expression but adding the limitation on to other acts or conduct, there existed a confusing definition of subversion especially about the meaning of "prejudicial to public order, security of Kenya and administration of justice", "in defiance of or disobedience to the law and lawful authority; unlawful society" or "hatred or contempt or excite disaffection against any public officer or any class of public officer". None of the terms used in the offence were defined or capable of precise or objective legal definition or understanding.

18. The 1st and 3rd respondents had not justified the necessity of the provisions in section 77 of the Penal Code as pursuing a legitimate aim, and being strictly necessary in an open and democratic society, that provision served no legitimate aim and was not strictly necessary in an open and democratic state. In fact, there existed less restrictive measures in derogation to the freedom of expression.

19. The interested party elected to spectate on the sidelines, and did not participate by filling any submissions, thereby making it difficult to issue any orders of prohibition, however having found the provisions of section 77 of the Penal Code to be unconstitutional, no criminal prosecution may be sustained under that provision and the 1st respondent had the constitutional mandate to determine whether or not to proceed with the prosecution of the interested party with regard to the facts alleged against him should they disclose an offence under any other provision of law.

Petition allowed.

Orders

i. *A declaration was issued that, sections 77(1) and (3)(a), (b), (c), (d), (e), (f), and (g) of the Penal Code, Cap 63, were unconstitutional.*

ii. *A declaration was issued that, the continued enforcement of sections 77(1) and (3)(a), (b), (c), (d), (c), (e) (f), and (g) of the Penal Code by the respondents against the interested party or any member of the public was unconstitutional.*

iii. *No orders as to costs.*

Citations

Cases

1. Adrian Kamotho Njenga v Kenya School of Law (Petition 398 of 2017; [2017] KEHC 2158 (KLR); [2017] eKLR) — Followed
2. Aids Law Project v Attorney General & 3 Others (Petition 97 of 2010; [2015] eKLR; [2015] 1KLR 188) — Mentioned
3. Anarita Karimi Njeru v Republic (Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR); [1979] eKLR; (1967-80)) KLR 1272) — Mentioned
4. Andama v Director of Public Prosecutions & 2 others; Article 19 East Africa (Interested Party) (Constitutional Petition 3 of 2019; [2021] KEHC 12538 (KLR); [2021] eKLR) — Mentioned
5. Center for Rights Education and Awareness & Caucus for Women's Leadership v John Harun Mwau & 6 others (Civil Appeal 74 & 82 of 2012; [2012] KECA 101 (KLR); [2012] eKLR) — Followed
6. Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10; others (Petition 628, 630 of 2014 & 12 of 2015 (Consolidated); [2015] eKLR) — Mentioned
7. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated); [2014] eKLR) — Followed
8. Cyprian Andama v Director of Public Prosecution & Attorney General;Article 19 East Africa (Interested Party) ;Article 19 East Africa (Interested Party) ;Article 19 East Africa (Interested Party) (Petition 214 of 2018; [2019] KEHC 4927 (KLR); [2019] eKLR) — Mentioned
9. Dari Limited & 5 others v East African Development Bank (Civil Appeal 70 of 2020; [2023] KECA 454 (KLR)) — Mentioned
10. Eunice Nganga & another v Law Society of Kenya & another (Petition 235 of 2017; [2019] eKLR) — Mentioned
11. Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others (Petition 18 & 20 of 2014; [2014] KESC 11 (KLR); [2014] eKLR) — Followed
12. Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (Petition 2B of 2014; [2014] eKLR) — Mentioned
13. Geoffrey Andare v Attorney General (Petition 149 of 2015; [2016] eKLR) — Followed
14. In the Matter of Interim Independent Electoral Commission (Constitutional Application 2 of 2011; [2011] eKLR; [2011] 2 KLR 32) — Followed
15. Jacqueline Okuta & another v Attorney General & 2 others (Petition 397 of 2016; [2017] eKLR) — Followed
16. Jomo Kenyatta & 5 others v Regina (Criminal Appeal 276, 277, 278, 279, 280 & 281 of 1953; [1954] KESC 1 (KLR); [1954] eKLR) — Applied
17. Karen Njeri Kandie v Alassane Ba & Shelter Afrique (Petition 2 of 2015; [2017] KESC 13 (KLR); [2017] eKLR) — Followed
18. Law Society of Kenya v Kenya Revenue Authority & another (Petition 39 of 2017; [2017] eKLR) — Followed
19. Law Society of Kenya v National Assembly & 2 others; Association of Professional Societies In East Africa & another (Interested Parties) (Petition 215 of 2020; [2022] KEHC 10070 (KLR)) — Mentioned
20. Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission (Civil Appeal 290 of 2012; [2013] KECA 445 (KLR); [2013] eKLR) — Mentioned
21. Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others (Petition 486 of 2013; [2013] eKLR) — Followed

22. National Assembly v Katiba Institute & 6 others (Civil Appeal 243 of 2018; [2023] KECA 1174 (KLR)) — Mentioned
23. Robert Alai v The Hon Attorney General & another (Petition 174 of 2016; [2017] KEHC 6090 (KLR); [2017] eKLR) — Followed
24. Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others (Civil Appeal 172 of 2014; [2017] KECA 751 (KLR); [2017] eKLR) — Followed
25. Wanuri Kahiu & Creative Economy Working Group v CEO - Kenya Film Classification Board Ezekiel Mutua, Kenya Film Classification Board, Attorney General; Article 19 East Africa (Interested Party); Kenya Christian Professionals Form (Proposed Interested Party) (Petition 313 of 2018; [2020] KEHC 6500 (KLR); [2020] eKLR) — Mentioned
26. Andrew Mujuni Mwenda v Attorney General ([2010] UGCC 9 (25 August 2010)) — Mentioned
27. Major General David Tinyefuza v Attorney General (Constitutional Petition No. 1 of 1996) [1997] UGCC 3 (25 April 1997)) — Applied
28. Nwankwo v State ([1983]1 NGR 336) — Mentioned
29. State v Ivory Trumpet Publishing Co Ltd ([1984] 5 NCLR 73) — Mentioned
30. Hyundai Motor Distributors (PTY) & others v Social No & others ((CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079 ; 2001 (1) SA 545 (CC) (25 August 2000)) — Applied
31. Boucher v the King ([1951] S.C.R. 265) — Mentioned
32. R v Oakes ([1986] 1 SCR 103) — Mentioned
33. Peta v Minister of Law, Constitutional Affairs and Human Rights ((Constitutional Case 11 of 201 6) [2018] LSHC 3 (18 May 2018).) — Mentioned
34. Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe (Communication No. 284/03) — Mentioned
35. Maseko and Others v Prime Minister of Swaziland and Others ((2180 of 2009) [2016] SZHC 180 (16 September 2016)) — Mentioned
36. Grayned v Rockford (408 U.S. 104 [1972]) — Mentioned

Statutes

1. Computer Misuse And Cybercrimes Act (cap 79C) — section 23 — Interpreted
2. Constitution of Kenya — Preamble ; article 1; 2; 2(6); 21(1); 23; 24; 24(3); 33; 33(2); 34(2)(b); 35(1); 50(2)(n); 156; 157; 165(3)(d);169; 245 — Interpreted
3. Criminal Law Amendment Act, 2003 (No. 5 of 2003) — section 9 — Cited
4. Defamation Act (cap 36) — Cited
5. Films And Stage Plays Act (cap 222)
6. Kenya Information And Communications Act (cap 411A) — section 29 — Cited
7. Magistrates' Courts Act (cap 10) — section 6 — Cited
8. National Cohesion And Integration Act (cap 7N) — Cited
9. Non-Governmental Organizations Co-Ordination Act (cap 134)
10. Official Secrets Act (cap 187) — Cited
11. Penal Code Act (cap 63) — section 77(1); 77(3)(a); 77(3)(b); 77(3)(c); 77(3)(d); 77(3)(e); 77(3)(f); 77(3)(g); 132 — Unconstitutional
12. Public Order Act (cap 56) — Cited
13. Statutory Instruments Act (cap 2A) — Cited
14. Penal Code (cap 120) — section 39(1)(a); 40 — Cited
15. Criminal Code (cap 77) — section 50(2); 51; 52 — Cited
16. Criminal Code (R.S.C., 1985, c. C-46) — section 59; 60 — Cited
17. Constitution — section 14(2) — Cited

International Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 — article 9; 27(2)

2. General Comment No. 34 on Article 19; Freedoms of Opinion and Expression
3. International Covenant on Civil and Political Rights (ICCPR), 1966 — article 19

Advocates

None mentioned

JUDGMENT

Background

1. On the July 16, 2022 the interested party, Joshua Otieno Ayika, using his verified Twitter/X Handle Account @Ayika_Joshua posted the following message;

> " I am not a prophet, neither am I a soothsayer but get it from me, in between Wednesday - Friday next week, we might have the army taking over from this "Biblical Regime'". Prepare for an army to take over government for the next 90 days then we shall have elections"

2. The aforesaid words as are contained in a "tweet", that gave rise to, the Chief Magistrate Court at Makadara, Criminal Case No E4457 of 2023 - *Republic v Joshua Otieno Ayika* whereby the interested party was arrested on July 21, 2023 and arraigned and chargedon July 24, 2023, with "Subversive Activities" contrary to section 77 (1) (a) of the *Penal Code*, cap 63.

3. The interested party was also charged on the second count with "Publication of false information" contrary to section 23 of the *Computer Misuse and Cyber Crimes Act*, 2018.

4. It was the 1st and 2nd respondents contention as particularized on the interested party's charge-sheet, that the words were prejudicial to the public order and security of Kenya and which information was calculated to cause panic and chaos among citizens of the Republic of Kenya.

5. This petition questions the constitutional validity of section 77 of the *Penal Code*, cap 63. Petitioners question the place, in a modern democratic state like Kenya, of a colonial legacy which limits freedom of expression through the vaguely worded offence of subversion. Petitioners submit that the offence of "subversion" under section 77 violates article 1, 2, 33, and 50(2) (n) of the *Constitution*.

6. Feeling, aggrieved by the eminent threat of this criminal provision to bloggers, journalists and online activists, the petitioners challenged the constitutional validity of section 77 of the *Penal Code* by this petition dated August 6, 2023 and filed August 8, 2023.

7. Katiba Institute, the 1st petitioner, is a Constitutional Research, Policy, and Litigation Institute formed to further the implementation of Kenya's 2010 *Constitution*.

8. Law Society of Kenya, the 2nd petitioner, is Kenya's premier bar association, a statutory body with membership of all practicing advocates. It has the mandate to advise and assist members of the legal profession, the government and the larger public in matters relating to the administration of justice in Kenya.

9. International Commission of Jurists-Kenya (ICJ-Kenya) the 3rd petitioner, is an international, non partisan, and non-profit registered professional society with long-established and well-recognized expertise in the rule of law.

10. Blogger Association of Kenya, the 4th petitioner is a community organization representing Kenyan online content creators and empowers online content creators to improve the quality of content created on the web.

11. Kenya Union of Journalists, the 5th petitioner, seeks to improve the working of conditions of journalists. With membership from freelances, writers and reporters, editors, sub-editors, and photographers drawn from broadcast, print and online, the organization protects and promote media freedom, professionalism, and ethical standards in the media industry.

12. Africa Center for Open Governance (AFRICOG), the 6th petitioner, is an independent non-profit organization. They provide cutting edge research and monitoring on governance and public ethics issues in both the public and private sectors. They aim to address the structural causes of the crisis of governance in East Africa.

13. Article 19 East Africa, 7th petitioner, is duly registered under the *Non-Governmental Organizations Coordination Act* as a non-governmental organization in Kenya working to promote and protect freedom of expression and access to information media freedom, and attendant rights in Eastern Africa. both offline and online and contributes to protecting and promoting these rights and freedom by focusing on four thematic areas of Digital Rights, Media Freedom, Civic Space Transparency, and Protection.

14. Kenya Human Rights Commission (KHRC), 8th petitioner, is a non-governmental Organization whose objective include promoting human rights and fundamental freedoms, good governance, and democracy.

15. Tribeless Youth, the 9th petitioner, is a legal resident of Nakuru County and a youth initiative established in 2016 to promote peaceful coexistence among the youth in Kenya.

16. Director of Public Prosecutions, the 1st respondent, is a constitutional office established by article 157 of the *Constitution of Kenya*, 2010 with the responsibility for public prosecution of criminal offences in Kenya.

17. Inspector General of National Police, the 2nd respondent, is a constitutional office established under article 245 of the *Constitution of Kenya*, 2010 and mandated to superintend the investigation of offences or to enforce the law against any person or persons.

18. Attorney General, the 3rd respondent, is a constitutional office created under article 156 of the *Constitution* and sued in these proceedings as principal legal advisor to the Government.

19. Otieno Ayika, the interested party is a lawyer charged with the offence of subversive activities contrary to section 77(1)(A) of the *Penal Code* cap 63 in Makadara Chief Magistrate Criminal Case E4457 of 2020 *Republic v Joshua Otieno Ayika*.

20. The petitioners crave under article 23 for the following relief(s);

    i. A declaration be and is issued that, section 77(1) and (3)(a), (b), (c), (d), (e), (f), and (g) of the *Penal Code*, cap 63 is unconstitutional;

    ii. A declaration be and is issued that, the continued enforcement of section 77(1) and (3)(a), (b), (c), (d), (c), (e) (f), and (g) of the *Penal Code* by the respondents against the Interested party or any member of the public is unconstitutional.

    iii. An order of prohibition be and is issued restraining the Respondents from enforcing section 77(1) and (3) (a), (b), (c), (d) (e) (f) and (g) of the *Penal Code*, cap 63 in Makadara Chief Magistrates Court Criminal Case E4457 of 2023 - Republic Joshua Otieno Ayika, or in any other matter in any subordinate court within the Republic of Kenya;

    iv. A costs order to deter future violation of the freedom of expression by the respondents.

21. This matter came up before court on the October 13, 2023 whereby counsel for the petitioner sought the court's leave to abandon an interlocutory application for conservatory orders to argue the main petition, a request conceded to, by Ms J Chepkurui senior state counsel. The court thus issued directions including the petition being heard and determined by way of written submissions and parties were afforded timelines to comply.

22. On the November 17, 2023, the matter was mentioned to determine compliance by the parties and fix judgment date. The 1st and the 3rd respondent filed their written submissions on the November 16, 2023 while petitioners ultimately filed their written submissions on the November 30, 2023.

Case for the Petitioners

23. That the preamble to the *Constitution of Kenya, 2010*, bespeaks the aspiration of Kenyans for a government based on the essential values of human rights, democracy and the rule of law. Under article 2, the *Constitution* is the supreme law and it binds all persons and all State organs at both levels of government.

24. In addition, no person may claim or exercise State authority unless authorized under the *Constitution*. Ultimately, any law that conflicts with the *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

25. That the impugned section 77 of the *Penal Code* provides that;

    1. Any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a subversive intention, or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

    2. (Repealed by *Act 5 of 2003*, s 9.)

    3. For the purposes of this section, "subversive" means –

        a. supporting, propagating (otherwise than with intent to attempt to procure by lawful means, the alteration, correction, defeat, avoidance or punishment thereof) or advocating any act or thing prejudicial to public order, the security of Kenya or the administration of justice;

        b. inciting to violence or other disorder or crime, or counselling defiance of or disobedience to the law or lawful authority;

        c. intended or calculated to support or assist or benefit, in or in relation to such acts or intended acts as are hereinafter described, persons who act, intend to act or have acted in a manner prejudicial to public order of the security of Kenya or the administration of justice, or who incite, intend to incite or have incited to violence or other disorder or crime, or who counsel, intend to counsel or have counselled defiance of or disobedience to the law or lawful authority;

        d. indicating, expressly or by implication, any connection, association or affiliation with, or support for, any unlawful society;

        e. intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya:

Provided that the provisions of this paragraph do not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities;

f. intended or calculated to bring into hatred or contempt or to excite disaffection against any public officer, or any class of public officers, in the execution of his or their duties, or any naval, military or air force or the National Youth Service for the time being lawfully in Kenya or any officer or member of any such force in the execution of his duties: Provided that the provisions of this paragraph do not extend to comments or criticisms made in good faith and with a view to the remedying or correction of errors, defects or misconduct on the part of any such public officer, force or officer or member thereof as aforesaid and without attempting to bring into hatred or contempt, or to excite disaffection against, any such person or force; or

g. intended or calculated to seduce from his allegiance or duty any public officer or any officer or member of any naval, military or air force or the National Youth Service for the time being lawfully in Kenya.

26. That from the respective parties' cases the following five (5) issues emerge:

a. What is the normative content and importance of freedom of expression in a democracy?

b. Does section 77 of the *Penal Code* limit the freedom of expression under articles 33(1).

c. Is the limitation of freedom of expression by section 77 a limitation by law"?

d. Is the limitation of freedom of expression by section 77 serve a legitimate aim"?

e. Is the limitation of freedom of expression by section 77 necessary" in an open and democratic society?

f. What are the appropriate reliefs in this petition?

27. With regards to the 1st issue the petitioners submit that, the normative content of freedom of expression and its importance in a democracy flows from the *Constitution of Kenya* and International Human Rights Law and in assessing whether the limitation of a right was reasonable and justifiable, a court should consider the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, and the fact that the need for enjoyment of the right by one individual did not prejudice the rights of others, as well the consideration of the relationship between the limitation and its purpose, and whether there were less restrictive means to achieve that purpose. The Supreme Court, *Karen Njeri Kandie v Alassane Ba & another* [2017] eKLR.

28. That Kenya is a state party to the *International Covenant on Civil and Political Rights* (the "ICCPR") whose article 19 entitles everyone to;

> " freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

29. Article 9 of the *African Charter on Human and Peoples' Rights* (the "African Charter") entitles every individual to "right to receive information" and to express and disseminate his opinions within the law". Under article 2(6) both treaties form part of the laws of Kenya.

30. In this regard, Kenya has an obligation under article 21(1) to observe, respect, protect promote and fulfil the right to freedom of expression secured by article 35(1) when includes:

a. freedom to seek, receive or impart information or ideas;

b. freedom of artistic creativity; and

c. academic freedom and freedom of scientific research.

31. Kenya firstly a democratic state with a democratically elected leadership and it must therefore be appreciated that it is only through criticism that citizens make their leaders know when their actions may not be in the interest of the nation. Such criticism then helps public officers understand the feelings of the citizens. Citizens cannot be freely expressing themselves if they do not criticize or comment about their leaders and public officers. Free speech is the last bastion against irresponsible governments in which politicians tend to wield inordinate power and influence to silence their critics.

32. Indeed, one can say that the most heinous crimes against citizens have been committed by politicians because their baseness and perversity were hidden from the public scrutiny. In this regard, this court is invited to take judicial notice of the fact that,

> " excesses of the state that were experienced during the repressive years of single party regime were perpetuated by the outright muzzling of the freedom of expression in order to Suppress dissent by the citizens". *Cyprian Andama v Director of Public Prosecution & another Article 19 East Africa (Interested Party)* [2019] eKLR

33. On the second issue as to whether section 77 of the *Penal Code* limits freedom of expression? The petitioners submit that, no one can reasonably deny that section 77 of the *Penal Code* impairs freedom of expression by criminalizing and punishing

> " any person" "who utters" "any words" with a "subversive intention".

34. For good reason, respondents do not deny that section 77 of the *Penal Code* limits freedom of expression under article 33. From the record, for his speech, Ayika, the interested party has been investigated, arrested, charged, and is being prosecuted. If convicted he would be liable to imprisonment for a term not exceeding seven (7) years.

35. The petitioners concede that, the right to freedom of expression is not absolute. However, freedom of expression is limited under article 33(2) to: propaganda for war, incitement to violence, hate speech, or advocacy of hatred under article 33(2)(d). Therefore, by its purpose and effect, section 77 of the *Penal Code* limits freedom of expression and is unconstitutional unless proved to be reasonable and justifiable.

36. As to whether the limitation of the freedom of expression by section 77 is either "reasonable" nor "justifiable" in an open and democratic society? The petitioners maintain that, having found that section 77 of the *Penal Code* limits freedom of expression under article 33, the court must then conduct the three-part test required by article 24. As to whether section 77 of the *Penal Code*: is provided by law, pursues a legitimate aim, and is strictly necessary in an open and democratic society.

37. Under article 24(3) the onus of proving that a limitation on a right or freedom is reasonable and demonstrably justified in an open and democratic society lies on the respondents. *Robert Alai v Attorney General* [2017] eKLR at para 56; *R v Oakes* [1986] 1 SCR 103.

38. The respondents bear the burden of satisfying this court that section 77 of the *Penal Code* is not "provided by law"; (i) serves a legitimate aim; and is it necessary in an open and democratic society. However, section 77 does not meet any of the three core tests:

> "it is vague and cannot amount to a law; it does not serve any legitimate aim; and it is overbroad and not the least restrictive measure hence is not necessary in an open and democratic society".

39. As to whether the limitation in section 77 of the *Penal Code* is "provided by law"? The petitioners contend that, the principle of legality in article 50(2)(n) requires that a criminal law especially one that limits a fundamental right and freedom must be clear enough to be understood and must be precise enough to cover only the activities connected to the law's purpose.

40. Secondly *General Comment No 34 on Article 19; Freedoms of Opinion and Expression* at paragraph 25 explains that a limitation "provided by law", requires that the measure be imposed pursuant to a law that:

    d. is accessible to the public,

    e. is formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly, and

    f. provides adequate safeguards against unfettered discretion.

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

42. Against this background, the petitioners posit that, the limitation in section 77 of the *Penal Code* is not "provided by law". The section is vague and over-broad especially about the meaning of "prejudicial to public order, security of Kenya and administration of justice", "in defiance of or disobedience to the law and lawful authority; unlawful society" or "hatred or contempt or excite disaffection against any public officer or any class of public officer". None of the terms used in the offence are defined or capable of precise or objective legal definition or understanding.

43. Consequently, innocent persons are roped in, as well as those who are not. Persons, including the interested party, are not told clearly on which side of the line they fall enabling the authorities to be as arbitrary and as whimsical as they like in booking government critics under section 77 of the *Penal Code*.

44. The principle of legality, that a vague norm cannot be regarded as law, is well settled by a long line of authorities from this court. A law which creates a criminal offence, should be clear, concise, and unambiguous. *Andama v Director of Public Prosecutions* (2021] KEHC 12538 (KLR). Instead, legislation ought not to be too vague that the subjects must await the interpretation given to it by the judges before they can know what is and what is not prohibited. *Aids Law Project v Attorney General* (2015] eKLR at para 67 Criminal law should not be so widely and vaguely worded that it nets anyone who may not have intended to commit what is criminalized by the section. *Cyprian Andama v Director of Public Prosecution & another; Article 19 East Africa (Interested Party*) [2019) eKLR.

45. Vagueness is why this court in *Andare v Attorney General* (2015] eKLR nullified section 29 of the *Kenya Information and Communications Act* and why in *Robert Alai v Attorney General* (2017) eKLR at paragraph 56 this court found section 132 of the *Penal Code* unconstitutional.

46. Recently, in *National Assembly v Katiba Institute & 6 others* (Civil Appeal 243 of 2018) [2023] KECA 1174 (KLR) (6 October 2023) Judgment) (citing *Grayned v Rockford* 408 US 104 [1972] the Court of Appeal explained that

> "vague laws may trap the innocent by not providing fair warning, second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application".

47. Besides, vague legislation offending the principle of legality in article 50(2)(n), a core part of the absolute right to fair trial, yet section 77 of the *Penal Code* has a chilling effect on the public's right to freedom of expression that guarantees the freedom to seek, receive or impart information or ideas. The section therefore ropes in all information deemed to be subversive notwithstanding its artistic, academic, political, or scientific value. It also serves the purpose of silencing critics of government from expressions their opinions, fears, frustrations, desires, imaginations, and facts.

48. Petitioners submit that once the court determines that a limitation in criminal legislation is not provided by law, then that should be the end of the article 24 analysis. All the three components are conjunctive.

49. As to whether the limitation of freedom of expression by section 77 of the *Penal Code* does not pursue a "legitimate aim" under article 33(2)? The petitioners submit that in the case of *Robert Alai v Attorney General* [2017| eKLR at para 50 and 55 citing *Thulah Maseko v The Prime Minister of Swaziland* (2016] SZHCn 180 it was held that it is the duty of the respondents to produce legal argument, requisite factual material and policy considerations to show that a limitation of a fundamental freedom is justified:

> "If the government wishes to defend the particular enactment, it then has the opportunity-indeed an obligation-to do so. The obligation includes not only the submission of legal argument but the placing before court of the requisite factual material and polio considerations. The respondents have been found woefully wanting on this front. They have not submitted any evidence or material of whatever nature in justification of the limitation in question. That being the case, the conclusion is, in my view, inescapable that the respondent have failed to satisfy this court that the restrictions and limitations imposed on the applicants' Freedom of speech or expression are either reasonable or justifiable. Besides, the deeming provisions of subsection 3 of section 3 are plainly contrary to the constitutionally entrenched right of being presumed innocent until proven otherwise."

50. Article 33(2) is a self-contained provision providing both the normative content as well as the limitations to the right to freedom of expression on four grounds – propaganda for war, incitement to violence, hate speech, or advocacy of hatred under article 33(2)(d). (See *Coalition for Reforms & Democracy v Republic of Kenya* [2015] eKLR; *Andare v AG* [2016] eKLR).

51. Therefore, by criminalizing the 'uttering' of any 'words' with a 'subversive intention', section 77 limits the freedom of expression - on grounds alien to article 33(2) and the inevitable conclusion in so far as the impugned section 77 is divorced from article 33(2), it does not serve any legitimate aim.

52. That, the respondents might submit that section 77 of the *Penal Code* is necessary for the protection of others reputation, and for their protection from “hate speech", and from "advocacy of hatred which constitutes ethnic incitement, vilification of others or incitement to cause harm, or advocacy based on any ground of discrimination specified or contemplated under article 27(4)".

53. The reality is that reputation of others is protected by the *Defamation Act*, cap 36 while hate speech and advocacy of hatred are the subject of the *National Cohesion and Integration Act*, 2008.

54. That, the section also bears no relation whatsoever to article 19 of the *ICCPR* and article 27(2) of the *African Charter*. Here, the respondents were expected to demonstrate in response that, section 77 (1), 3(a), (b), (c), (d) (f) and (g) *Penal Code*, cap 63 pursues a "legitimate aim" in line with article 33(2) of the *Constitution*. The respondents have failed to strictly prove, by legal argument, requisite factual material and policy considerations that section 77 of the *Penal Code* pursues any “legitimate aim" they have failed.

55. As to whether section 77 of the *Penal Code* is not strictly "necessary " in an open and democratic society and if there are other least restrictive measures? The petitioners are of the view that, article 24(1) requires a proportionality analysis that inter alia takes into account the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; 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 the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

56. There are in fact less restrictive means to achieve the reputation-protection purpose through civil claims under the *Defamation Act*, cap 36. The use of criminal penalties not only imposes a criminal sanction where a civil remedy suffices, but also has a chilling effect on the petitioner and the public's right to seek or receive information or ideas under article 35. As a result, the disadvantages of the use of a criminal sanction in section 77 are not proportionate to or absolutely necessary to achieve the purpose of protecting reputations.

57. That the principle of proportionality requires that even if the state is concerned with a legitimate aim, it should adopt measures which are proportionate to that objective. That in the case of *Jacqueline Okuta v Attorney General* [2017] eKLR this court crystallized the following four sub-components of proportionality, holding that a limitation of a constitutional right will be constitutionally permissible if:

    i. it is designated for a proper purpose;

    ii. the measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose;

    iii. the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and

    iv. there is a proper relation ("proportionality stricto sensu" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right

58. That in the *Okuta Case*, this court found that defamation of a private person by another person cannot be regarded as a 'crime' under the constitutional framework and hence, what is permissible is the civil wrong and the remedy under the civil law.

59. Similarly, while nullifying section 29 of *KICA* in *Andare*, this court reached the same conclusion on the efficacy of civil remedies:

> " the respondents i.e. [the State] were under a duty to demonstrate that the provisions of section 29 were permissible in a free and democratic society. They were also under a duty to demonstrate the relationship between the limitation and its purpose, and to show that there were no less restrictive means to achieve the purpose intended. They have not done this."

60. Comparatively, the African Commission on Human and Peoples' Rights, in *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* Communication No 284/03 set out the following questions relevant to determining if a measure such as section 77 is proportionate:

i. Were there sufficient reasons supporting the action?

ii. Was there a less restrictive alternative?

iii. Was the decision-making process procedurally fair?

iv. Were there any safeguards against abuse?

v. Does the action destroy the very essence of the Charter rights in issue?"

61. Also, in the Canadian case of *R v Oakes* [1986] 1 SCR 103 the Supreme Court of Canada identified three elements to the test of proportionality as follows:

i. The measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective (the suitability criteria);

ii. The means, even if rationally connected to the objective, should impair "as little as possible" the right or freedom in question (the necessity criteria); and

iii. There must be a proportionality between the effects of the measures which are responsible for limiting the right or freedom, and the objective which has been identified (the proportionality sensu stricto criteria)

62. In the ultimate analysis, assuming there were a credible relation between limitation of speech through section 77 of the *Penal Code* and the protection of others reputation, the state in pursuing that objective has used means which are not proportional to, that objective. There are not only less restrictive measures, but also section 77 of the *Penal Code* lacks a mens rea and is therefore vague and overbroad as to impair the freedom of expression more than necessary.

63. Further, the state has failed to show how a penal sanction, is a necessary and proportionate limitation to freedom of expression in the circumstances of this petition.

64. Although section 77 was *amended in 2003*, it was enacted during the colonial period and was meant to stifle dissent against the colonial rulers. Secondly, the Kenyan Law on subversion" has its roots in colonial-era law against sedition and similar activities.

65. Many of sedition-type laws in use in Africa today are relics of colonialism that were originally introduced to buttress colonial rule and repress demands for national self- determination and independence.

66. For instance, much of the language in section 77 of the Kenyan *Penal Code* can be found in Swaziland's Sedition and Subversive Activities at 1938, which was declared unconstitutional in *Thulah Maseko*

v The Prime Minister of Swaziland [2016] SZHCn 180; and also, in sections 39(1)(a) and 40 of the *Ugandan Penal Code* declared unlawful in *Andrew Mujuni Mwenda v Attorney General* [2010) UGCC 5.

67. In *State v Ivory Trumpet Publishing Co Ltd*, [1984] 5 NCLR 73 the Nigerian High Court considered whether punishing the defendant for having exercised his right to freedom of expression to criticize the Governor of Anambra State of Nigeria was reasonably justifiable in a democratic society in the interests of public safety or public order. The High Court adverted to the history of the section, holding:

> " any law which penalises any person for making such publication [...] concerning the person of a Governor of a State in Nigeria is not reasonably justifiable in a democratic society in the interests of public order or safety."

68. Again, the Nigerian Federal Court of Appeal followed this reasoning in the case of *Nwankwo v State* [1983]1 NGR 336 where the appellant had been charged over a book he had written which was allegedly seditious against the Governor and Government of Anambra State. The Federal Court of Appeal considered sections 50(2), 51 and 52 of the *Nigerian Criminal Code* inconsistent with the provisions of the 1979 Constitution that recognized the right to freedom of expression, since the President and Governors were elected politicians:

> " Those in public office should not be intolerant of criticism.
>
> Where a writer exceeds the bounds there should be a resort to the law of libel where the plaintiff must of necessity put his character and reputation in issue. Criticism is indispensable in a free society:"

69. That, in Canada, section 59 and 60 and of the *Canadian Criminal Code* has not been applied in over half a century since the landmark case of *Boucher v R* [1951] SCR 265 before the Supreme Court of Canada in 1951. In this case, the Supreme Court considered the history of the law of sedition and reasoned that, up to the end of the 18th Century it was, in essence,

> " a contempt in words of political authority or the actions of authority. If we conceive of the governors of society as superior beings, exercising a divine mandate, by whom laws, institutions and administrations are given to men to be obeyed, who are, in short, beyond criticism, reflection or censure upon them or what they do implies either an equality with them or an accountability by them, both equally offensive."

70. However, the Supreme Court of Canada noted that since governments are now democratically elected, they are accountable to the public for their actions. This has had an impact on the offence of seditious libel, which now required a direct incitement to disorder and violence. Then the law was further developed to include a requirement that there be "seditious intention". The Supreme Court further reasoned that:

> " [there is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this is for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life."

71. That, the court should therefore find and hold that section 77 of the *Penal Code*is not necessary in an open and democratic society. The section is not carefully designed or narrowly drafted to achieve

any "legitimate aim'" under article 33(2), article 193) of the *iccpr*, or article 9 and 27(2) of the *Banjul Charter*.

72. That, the offence of "subversion" is unnecessary in a modern, democratic society. It is an antiquated means of suppressing and penalizing expression of political dissent, which amount to a violation of the right to freedom of expression under international law.

73. That, the prosecution of the interested party, whose political expression is strongly protected under article 33 and international law demonstrates that this law is drafted in such a way that allows for the suppression of speech that is critical of those in power. Such law inhibits and curtail speech that underpins and strengthens a democratic society.

74. Petitioners beseech the court to allow the petition as prayed and to grant the following orders:

    i. A declaration be and is hereby issued that, section 77(1) and (3)(a), (b), (c), (d) (e) (f) and (g) of the *Penal Code*, cap 63 Laws of Kenya are unconstitutional;

    ii. A declaration that, the continued enforcement of section 77(1) and (3) (a), (b), (c), (d) (e) (f) and (g) of the *Penal Code* by the respondents against the interested party or any member of the public is unconstitutional;

    iii. An order of prohibition be and is hereby issued restraining the respondents from enforcing section 77(1) and 3 (a), (b), (c), (d), (c), (f) and (g) of the *Penal Code* cap 63 in Makadara Chief Magistrate's Criminal Case No E4457 of 2023; *Republic v Joshua Otieno AyIka* or in any other matter in any subordinate court within the Republic of Kenya

    iv. A cost order to deter future violation of freedom of expression by the respondents

Case for the 2nd and 3rd Respondents

75. The 2nd and 3rd respondents, the Inspector General of Police and the Director of Public Prosecutions, opposed the petition by filing "Grounds of Opposition" dated August 14, 2023 and written submissions dated November 3, 2023 and Ms J Chepkurui Senior State Counsel argued their joint case.

76. The 2nd and 3rd respondents, premise their opposition on the following grounds;

    i. That the instant petition and application does not meet the threshold of specificity of the actual violation to warrant the orders sought as set out in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & others*, Caca 290 of 2012 (2012 eKLR and *Anarita Karimi Njeru v Republic* (1967-80)) KLR 1272, in which it was held as follows:

> "However, our analysis cannot end at the level of generality. It was the High Court 's observation that the petition before it was nor the epitome of precise, comprehensive or elegant drafting. Yet the principles of *Anarita Karimi Njeru* underscore the importance of defining the dispute to be decided by court".

    ii. That the offense in which the interested party is charged with in Makadara Chief Magistrates Court Criminal Case No E4457 of 2023 is an offence recognized in law under section 77 of the *Penal Code* hence the same should be allowed to proceed to its logical conclusion.

    iii. That the instant petition and application offends the provisions of article 169 of the *Constitution* and section 6 of the *Magistrates Courts Act* no 6 of 2015 which establishes the Magistrates Court and gives it jurisdiction to hear and determine such matters.

iv. That the instant application does not meet the requirements for the grant of conservatory orders as was established by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR.

v. That it is general principle that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge the legislation's status. The petition does not raise any ground of illegality of the section.

77. That, section 77 states that, any person who does or attempts to do or makes any preparations to do or conspires with any person to do any act with a subversive intention or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

78. That subversive has been defined under sub-section 3 to mean supporting, propagating (otherwise with an intent to procure by lawful means the alteration, correction, defeat, avoidance or punishment thereof) or advocating any act or thing prejudicial to public order, the security of Kenya or the administration of justice, or who incite, intend to incite or have incited to violence or other disorder or crime. This section is specific, clear and free from ambiguity.

79. That article 33(2) limits the right to freedom of expression as the same does not extend to propaganda for war, incitement to violence, hate speech or advocacy of hatred. The interested applicant's tweet was meant to incite violence.

80. That it is in public interest that this petition and application be dismissed with cost to the 2nd and 3rd respondents.

81. That the section enables the state to penalize journalists, bloggers for opinions or views. broadcast, publications contrary to article 34(2)(b).

82. That the petitioner contends that, section 77 is not a reasonable/justifiable limitation of the freedoms of expressions in an open and democratic society based on human dignity, equality and freedom under article 24, the 2nd and 3rd respondents, rely on the grounds of opposition dated August 14, 2023 in opposing the instant petition, submitting that, the petition is frivolous, mischievous and an abuse of court process.

83. That, section 77 of the *Penal Code* is constitutional and thus the reliefs sought ought not to be granted. That the sovereignty and dignity of the people of Kenya must be respected and Kenya's security protected.

84. That "Subversion" has been defined as "an attempt to overthrow a government that has been legally established". Section 77 defines subversive activities as:

> " any person who does or attempts to do or makes any preparations to do or conspires with any person to do any act with a subversive intention, or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years."

85. That the interested party has been charged, with the offense of subversion under section 77 of the *Penal Code*, in Makadara Chief Magistrate's Court Criminal Case No E4457. The Same is on-going.

86. It is the 2nd and 3rd respondents, submission that, the criminal case should proceed to full hearing and a judgement delivered. The petitioner should not be allowed to use the instant petition as a leeway to escape punishment for his action's utterances. The 2nd and 3rd respondents, submit on the following grounds:

i. Whether subversion is incompatible with the sovereignty of the people of Kenya because it shields the government and public officers from criticism?

ii. Whether section 77 of the *Penal Code* is unconstitutional for violating the right to freedom of expression to an individual or journalist/bloggers?

iii. Whether the section is a reasonable or justifiable limitation of the freedom of expression under article 24 of the *Constitution*?

iv. Whether the section offends the principle of legality in article 50(2)(n) of the *Constitution.* The police should be allowed to conduct their duties? and

v. Who should bear the costs of this suit?

87. On the 1st issue as to Whether subversion is incompatible with the sovereignty of the people of Kenya because it shields the government and public officers from criticism. The 2nd and 3rd respondents submit that; article 1 of the *Constitution* guarantees the sovereignty of the people of Kenya. This article also protects the security of Kenyans.

88. That section 77 was enacted by the Republic of Kenya in its legislative sovereignty and it is the 2nd and 3rd respondents submission that, the section was enacted to cushion against activities that would interfere with the Kenyan security. In the instant case, the tweet by the interested party was, and is, a security threat. That, the allegation that the offence of subversion is incompatible with the sovereignty of Kenyans should be disregarded.

89. Reference is made to the case of *Dari Limited & 5 others v East African Development Bank* (Civil Appeal 70 of 2020) (2023] KECA 454 (KLR) (20 April 2023) in which JK M'inoti, Dr KI Laibuta and Judge M Gachoka stated as follows:

> "in the particular context of this appeal, we do not appreciate how recognition and enforcement of a foreign judgment from a reciprocating state can be deemed a diminution of sovereignty. On the contrary, the Act was passed by the Republic of Kenya in exercise of its legislative sovereignty. The country decided, in exercise of that sovereignty, to recognize and enforce judgments of superior courts of other sovereign states that have reciprocated in recognizing and enforcing judgments from superior courts of Kenya. Rather than being an erosion of sovereignty, in our view, the enactment of the Act by the Republic of Kenya was an incident, a manifestation of sovereignty".

90. On the 2nd and 3rd issue as to whether section 77 of the *Penal Code* is unconstitutional for violating the right to freedom of expression to an individual or journalist/bloggers? And whether the section is a reasonable or justifiable limitation of the freedom of expression under article 24 of the *Constitution*? The 2nd and 3rd respondents submit that; section 77 is constitutional as it does not violate the petitioner's freedom of expression. The freedom of expression, as envisaged under article 33, is not absolute. It is subject to limitations which are clearly stated under sub-article. Article 33 states as follows-

> "(1) Every person has the right to freedom of expression, which includes
>
> (a) freedom to seek, receive or impart information or ideas;
>
> (b) freedom of artistic creativity; and
>
> (c) academic freedom and freedom of scientific research.

(2) The right to freedom of expression does not extend to

(a) propaganda for war;

(b) incitement to violence;

(c) hate speech; or

(d) advocacy of hatred that-

(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or

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

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

91. The tweets by the interested party are subject to limitations under sub-article 2. It is our submission that the tweet was a propaganda for war and incitement to violence. It should not be treated as a criticism of the government. Any allegations to that effect to be dismissed.

92. Article 24, on the other hand, limits the rights generally. The limitations should be through law, reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors. The factors are stated to include:

i. The nature of the right or fundamental freedom.

ii. The importance of the purpose of the limitation.

iii. The nature and extent of the limitation.

iv. The need to ensure that the enjoyment of rights and fundamental freedoms by the individual does not prejudice the rights and freedoms of others.

v. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

93. That the *Constitution* under article 33(2) limits the freedom of expression. This has been demonstrated earlier in these submissions. The limitations are justifiable and reasonable on the ground that, the same are meant to protect the rights of Kenyans and further ensure protection of their security hence ensure enjoyment of rights. That, the tweets in question were aimed at propagating war and violence and not criticism of government. The argument that section 77 is vague, is baseless. The section is crystal clear on what is being regulated thus enabling Kenyans to regulate their actions and speech.

94. Reliance is placed on the case of *Dari Limited & 5 others v East African Development Bank* (Civil Appeal 70 of 2020) (2023] KECA 454 (KLR). In this case Judges M'inoti, Dr KI Laibuta and M Gachoka, stated as follows:

> " The apparent interpretation of the above provision is that Parliament purposefully intended that restrictive trade practices be regulated within the context of professional associations such as the petitioner and the interested parties. Furthermore, it is discernable from a reading of the impugned section that the Act in no way dictates or determines how the said associations are to carry out their mandate or business in light of their enabling legislations.

The Act expressly speaks to restrictive trade practices that it wishes to regulate in the context of consumer protection in view of professional associations.

113. In the circumstances of this case I find the case of *Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi acting for or on behalf of Association of Kenya Insurers & 5 others v Commissioner of Domestic Taxes & 2 others* [2014] eKLR pertinent and valuable. The 2 Judge bench pronounced itself as follows:

> " 32. The legislature is the law-making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the Constitution, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court license to declare it unconstitutional."

95. That JA Makau, in *Wanuri Kahiu & another v CEO - Kenya Film Classification Board Ezekiel Mutua & 2 others; Article 19 East Africa (Interested Party) & Kenya Christian Professionals Form (Proposed Interested Party)* (2020] eKLR stated as follows:

> " The petitioners urge the court to find that the restriction of film "*Rafiki*" by Kenya Film Classification Board amounts to violation of the 1st petitioner 's right to freedom of expression guaranteed under article 33 of the *Constitution of Kenya*; whereas the Board has urged this court to find that the Film's Act is constitutional in terms of article 24 of the *Constitution*. The Board further is of the view that at all material times, it has acted within the four corners of the law as provided under the constitution, relevant international treaties that has been ratified by Kenya and principally by the *Films Act*.
>
> 147. lt is worthwhile to note that the Guidelines, 2012, though not yet published in the gazette as provided under the *Statutory Instrument Act*, has been formulated pursuant has the powers donated by the *Films Act*, with a view to meet the objectives as provided therein. I am satisfied that this court has residual powers to adopt the measured and proportionate approach in favour of public order and public interest in the face of the current pressing and substantial societal needs. I have accordingly found the decision to "Restrict" the film "*Rafiki*" is in good faith, constitutional, valid and pursuant to the provision of the *Film Act*"

96. Reference is made to the case of *Peta v Minister of Law, Constitutional Affairs and Human Rights* (Constitutional Case 11 of 2016) [2018] LSHC 3 (18 May 2018). The honorable Judges in dealing with a similar issue had this to say-

> " It is clear that section 14 does not confer an absolute and unconditional freedom of expression. Freedom of expression must be enjoyed without prejudicing the rights of other persons, which is why under section 14(2) the Constitution allows for promulgation of laws which may curtail freedom of expression for the sake of protecting matters itemized in that subsection which include among others, individuals' reputational interests. This model of guaranteeing a right and then providing circumstances for its curtailment is based on article 19 of the *International Covenant on Civil and Political Rights* (1CCPR) .... Constitutional

Requirements for a Valid Legislative Enactment section 14(2) of the *Constitution* is the source of the impugned provisions of the Act. Like every other legislative enactment, it is subject to two very important constitutional constraints. The first constraint is that there must be rational connection between the legislation and the achievement of a legitimate government purpose. Secondly, any legislative enactment must not infringe upon constitutionally protected rights and freedoms except where such limitation is provided or allowed by the *Constitution*. Section l4(2) of the *Constitution* provides, in relevant part, that

> " nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section.." (My emphasis)

Section 14(2) authorizes an abridgement of the freedom of expression to cater for the enumerated circumstances, which includes among others, protection of reputations. However, section 14(2) crucially, in terms of the concept "any law", requires that such a limitation of freedom of expression guarantee must have a legal foundation. Such a law must evince the following characteristics. Firstly, the law must be written in easy and accessible manner. It must be formulated with sufficient precision to enable the citizens to regulate their conduct accordingly with reasonable certainty".

97. The 2nd and 3rd respondents contend that, in determining the constitutionality of a section, the court has to consider the purpose and effect of the impugned statute or section thereof. Every legislation is deemed constitutional and the burden of proving the same lies on the person alleging the same. It is our humble submission that section 77 was enacted to regulate the manner in which Kenyans communicate so as to secure national security of each person in Kenya. The petitioner has failed to demonstrate how section 77 of the *Penal Code* is unconstitutional hence we pray that the petition be dismissed with cost.

98. Reference is made to the case of *Eunice Nganga & another v Law Society of Kenya & another* (2019) eKLR. JEC Mwita stated as follows-

> " First, there is a rebuttable presumption that a statute or provision is constitutional and that the burden is always on the person alleging constitutional invalidity to prove the alleged unconstitutionality. The reasoning behind this principle is that the legislature being people's representative understands the problems people face and, therefore the laws enacted are intended for resolving those problems. In that regard, the court held in *Ndynabo v Attorney General of Tanzania* [2001] EA 495 that an Act of Parliament is presumed constitutional and that the burden is on the person who contends otherwise to prove the contrary.
>
> 32. Second, to determine constitutional validity, the court has to examine the purpose or effect of the impugned statute or provision. The purpose of enacting a legislation or the effect of implementing it may lead to nullification of the statute or its provision if found to be inconsistent with the constitution."

99. That J Ong'undi in the case of *Law Society of Kenya v National Assembly& 2 others; Association of Professional Societies In East Africa & another (Interested Parties)* (Petition 215 of 2020) 2022/ KEHC 10070 (KLR), in deciding on a similar issue, stated as follows:

> "In interpreting a statute, the first principle is the general presumption that Acts of Parliament are enacted in conformity with the Constitution as affirmed by the Court of Appeal of Tanzania in the *Ndyanabo v Attorney General case* (*supra*) in the following words:
>
> > "Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that possible, legislation should receive such a construction as will make it operative and not inoperative"
>
> 106. Secondly, this court is required to examine the purpose and effect of the impugned Statute as stated in the case of *Geoffrey Andare v Attorney General & 2 others* (2016] eKLR. The court at paragraph 66 held as follows:
>
> > "It has also been held that in determining the constitutionality of a statute, a court must be guided by the object and purpose of the impugned statute, which object and purpose can be discerned from the legislation itself.
> >
> > The Supreme Court of Canada in *R v Big M Drug Mart Ltd*, [1985] I SCR 295 enunciated this principle as follows:
> >
> > > "Both purpose and effect are relevant in determining constitutionality";

100. On the issue as to whether the section offends the principle of legality in article 50(2)(n) of the *Constitution*. The 2nd and 3rd respondents submit that, the police should be allowed to conduct their duties. That article 50(2)(n) stipulates that an accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya or a crime under international law.

101. In the instant case, the interested party has been charged with the offense of subversion under section 77 of the *Penal Code* in Makadara Chief Magistrate's Court Criminal Case No E4457 of 2023. This was on 24.7.2023 while the tweets were tweeted on 16.7.23. The *Penal Code* commenced in 1930. It is therefore clear that the acts were committed when the offense was recognized in Kenya. There is thus no violation of article 50(2)(n) of the *Constitution*. We further submit that the criminal case should be heard and determined by the subordinate court. The petition herein should not be a bar to the conclusion of the same.

102. The 2nd and 3rd respondents submit that, the onus of proving that section 77 of the *Penal Code* is unconstitutional lies on the petitioners who has however, failed to discharge this mandate.

103. That, the National Security of any society is paramount and should be safeguarded. Section 77 has safeguarded this by illustrating what amounts to subversion hence regulating the conduct of every Kenyan in terms of speech. The section does not bar any individual from criticizing the incumbent government as alleged by the petitioners. The tweets by the interested party, as illustrated above, were (and are) aimed at propagating war and violence hence causing insecurity which in the end would deny other Kenyans their right to enjoy the rights guaranteed to them by our *Constitution*. The rights and freedoms are not absolute and each citizen has a duty to ensure that his/her conduct does not infringe

on others rights. In the instant case the interested party failed to take this into account before tweeting his tweets on July 16, 2023. The tweets were not aimed at criticizing the government as alleged.

104. The 2nd and 3rd respondents submit that article 33 of the *Constitution*, guarantees freedom of speech but the same is limited according to sub-article 2 and article 24 of the Constitution which the 2nd and 3rd respondents contend they have demonstrated in submissions urging that, this petition lacks merit and should be dismissed with costs to 2nd and 3rd respondents.

Determination

105. It is not far from our lips and eyes that independent Kenya inherited from the colonial state a repressive system, Sedition criminal prosecution was the hall mark of post-independence Kenya, "*mwakenya*" and "*pambana*" prosecutions, nyayo house torture and this dark chapter of the nation constrains this court to recall the same owing to the response to this petition by the 1st and the 3rd Respondent.

106. It is noteworthy that chapter IX of the *Penal Code* relates to Unlawful Assemblies, Riots and other Offences Against Public Tranquility, the provisions of sections 70 to section 76 were repealed by Act No 4 of 1968 some of which provisions, were utilized in the case of *Jomo Kenyatta & 5 others v Regina* [1954] eKLR where by the pre-independence African leaders were prosecuted and convicted for the offence of being members of an unlawful Society, namely the Mau Mau Society of managing or assisting in the management of the same unlawful society contrary to sections 70 and 71 of the *Penal Code*. It is therefore safe to conclude that chapter IX was intended as a regime instrument for self-preservation. In the above case, the court allowed the appeal on the basis that the prosecutions were initiated, conducted and concluded without the consent of the governor.

107. If I could quote the former President the Late Mwai Kibaki when serving as Finance Minister in response to a direct question relating to "sedition charges" stated that;

> " It is true that writers and social critics all over the world want to write and critically comment on what is going on in their own country of origin. But one of the most terrible things about the modern world is how writers have had to immigrate to another nation in order to be able to comment on what is going on in their own country of origin. And it is tragedy because it means that societies are themselves becoming intolerant whereas the true freedom in any democratic system should be as we, are trying to do in this country: We have not succeeded yet, but we are trying- that those who differ and those who take a different view of the society we live in must be able to point that picture they see, so that we can have many pictures of the kind of Kenya we are living in now .... at least let us give encouragement to those who spend their lifetime writing, commenting on the society that we live in. There is not very much that we do but at least we can give them that particular kind of recognition. "

108. With the promulgation of the constitution on the September 27, 2010 was the conferment of a unique jurisdiction of this court which is most profound flowing from article 165(3)(d)(i) the;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

109. The High Court is conferred upon with the profound jurisdiction to hear questions relating to interpretation of the constitution and determination of whether any law is inconsistent with or in contravention of this Constitution.

110. The transformative constitutional design deliberately appreciates that Kenyans want a break with the dark past, the entire system of law was a colonial hand-down with very minor and cosmetic variations that were intended for self-preservation and colonial repression. To echo the findings in *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR the need to align legislation with the constitution shall entail a continuous scrutiny and examination of statutes and provisions thereof that are no longer fit for purpose.

111. The developing precedent on constitutional interpretation from the superior courts[1] has now evolved and coalesced as follows;

i. Article 259 of the *Constitution* as a mandatory principle obliges courts to protect and promote the spirit, purposes, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance while permitting development of the law.

ii. The *Constitution* must be construed holistically, liberally, purposively and in a broad manner so as to avoid a narrow and rigid interpretation tainted with legalism.

iii. The *Constitution* must be interpreted in a contextual manner, that courts are constrained by the language used and so cannot impose a meaning that the text is not reasonably capable of bearing. Furthermore, constitutional interpretation does not favour a formalistic or positivistic approach but a generous construction of the text in order to afford the fullest possible constitutional guarantees.

iv. In considering the purposes, values and principles while interpreting the *Constitution*, courts must take into account the non-legal phenomena by reflecting on the history of the text.

v. Constitutional interpretation demands that no one provision of the *Constitution* should be segregated from the others or be considered alone. The provisions are to be interpreted as an integrated whole so as to effectuate the greater purpose of the *Constitution*.

vi. Where there is an impugned provision in a Statute the same must as much as possible be read in conformity with the *Constitution* to avoid a clash.

vii. The court ought to examine the object and purpose of the Act (Statute) and if any statutory provision read in its context can reasonably be construed to have more than one meaning the court must prefer the meaning that best promotes the spirit and purposes of the Constitution. See *Tinyefuza v Attorney-General* Const Pet No 1 of 1996 (1997 UGCC 3) and *Re Hyundai Motor Distributors (PTY) & others v Social No & others* (2000) ZACC 12 2001(1) SA 545.

viii. The principles of interpretation require that the words and expressions used in a statute be interpreted according to their ordinary literal meaning in the statement and in the light of their context. See *Adrian Kamotho Njenga v Kenya School of Law* (2017) eKLR and *Law Society of Kenya v Kenya Revenue Authority & another* (2017) eKLR.

112. When the constitutionality of a statute or provision of a statute is called to question, the court is under obligation to employ the constitutional mirror laying the impugned legislation or provision alongside

[1]
- *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR
- The *Interim Independent Election Commission* [2011] eKLR
- *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR
- *Centre Human Rights and Awareness v John Harun Mwau & 6 others* (2012) eKLR

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

113. Where criminal prosecution has been undertaken by the Director of Public Prosecutions under the mandate conferred by article 157(6) of the *Constitution*, the court can only interfere under article 157(11) thereof where any of the principles in that sub-article are flouted. That sub-article, for avoidance of doubt, provides as follows;

> "(1) ....
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> (2) ....
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> (3) ....
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> (4) ...
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> (5) ...
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> (6) ...
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> (7) ...
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> (8) ...
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> (9) ...
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> (10) ...
>
> (11) In exercising the powers conferred by this article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

114. This court reiterates the above finding and will take the same approach in this matter. But to address the specific complaints in the instant petition, it is best to address each of the issues raised separately as I hereby do below.

> Prayer (a) - A declaration be and is issued that section 77(1) and (3)(a), (b), (c), (d), (e), (f), and (g) of the *Penal Code*, cap 63 is unconstitutional;
>
> > Article 32 provides for the freedom of conscience, religion, belief and opinion.
> >
> > Article 33 provides for freedom of expression;
> >
> > Article 36 provides for the freedom of association;
> >
> > Article 49 provides for the rights of arrested persons and
> >
> > article 50 provides for fair hearing.

115. This court ascribes with the dictums that, any law that conflicts with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

116. There is also a rebuttable presumption of legality, that the Act or provision was intended to serve the people and is therefore constitutional. As reaffirmed in the case of *Nairobi Metropolitan PSV Saccos*

Union Limited & 25 others v County of Nairobi Government & 3 others [2013] eKLR. The onus is always on the person challenging the legislation to prove the unconstitutionality alleged.

117. That the Impugned section 77 of the *Penal Code* provides that;

(a) Any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a subversive intention, or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

118. It is thus apparent and explicit that the offence as created by section 77(1) and (3) of the *Penal Code* is a felony offence for the purposes of this section, "subversive" means –

i. supporting, propagating (otherwise than with intent to attempt to procure by lawful means, the alteration, correction, defeat, avoidance or punishment thereof) or advocating any act or thing prejudicial to public order, the security of Kenya or the administration of justice;

ii. inciting to violence or other disorder or crime, or counselling defiance of or disobedience to the law or lawful authority;

iii. intended or calculated to support or assist or benefit, in or in relation to such acts or intended acts as are hereinafter described, persons who act, intend to act or have acted in a manner prejudicial to public order or the security of Kenya or the administration of justice, or who incite, intend to incite or have incited to violence or other disorder or crime, or who counsel, intend to counsel or have counselled defiance of or disobedience to the law or lawful authority;

iv. indicating, expressly or by implication, any connection, association or affiliation with, or support for, any unlawful society;

v. intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya:

Provided that the provisions of this paragraph do not extend to comments or criticisms made in good faith and with a view to the removal of any causes of hatred or enmity between races or communities;

vi. intended or calculated to bring into hatred or contempt or to excite disaffection against any public officer, or any class of public officers, in the execution of his or their duties, or any naval, military or air force or the National Youth Service for the time being lawfully in Kenya or any officer or member of any such force in the execution of his duties:

Provided that the provisions of this paragraph do not extend to comments or criticisms made in good faith and with a view to the remedying or correction of errors, defects or misconduct on the part of any such public officer, force or officer or member thereof as aforesaid and without attempting to bring into hatred or contempt, or to excite disaffection against, any such person or force; or

vii. intended or calculated to seduce from his allegiance or duty any public officer or any officer or member of any naval, military or air force or the National Youth Service for the time being lawfully in Kenya

119. It is explicit and apparent that, the offence thereby created is a derogation to the freedom of expression and this court is thus called upon to determine whether this derogation is a reasonable and a justifiable limitation of the freedoms of expression in an open and democratic society based on human dignity, equality and freedom under article 24.

120. This court is well guided when deploying the purpose and effect test holding in the case of *Robert Alai v Attorney General & Another* [2017] eKLR where the court held that: -

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

121. The Supreme Court, in the case of *Karen Njeri Kandie v Alassane Ba & another* (2017] eKLR emphasized the need to establish the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, and the fact that the need for enjoyment of the right by one individual did not prejudice the rights of others, as well the consideration of the relationship between the limitation and its purpose, and whether there were less restrictive means to achieve that purpose.

122. It goes without saying that, Freedom of expression and the rights to information are the cornerstone of any democratic state and that every person has the right to freedom of expression, which includes, freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.

123. As a derogation, the right to freedom of expression does not extend to, propaganda for war; incitement to violence; hate speech; or advocacy of hatred that—

a. constitutes ethnic incitement, vilification of others or incitement to cause harm; or

b. is based on any ground of discrimination specified or contemplated in article 27(4).

124. The 2nd and 3rd respondents admit and contend in submission, that "subversion" is compatible with the sovereignty of the people of Kenya because it shields the government and public officers from criticism and that, article 1 of the *Constitution* guarantees the sovereignty also protects the security of Kenyans and that, the section was enacted to cushion against activities that would interfere with the Kenyan security. In the instant case, the 'tweet' by the interested party was, and is, a security threat.

125. The 2nd and 3rd respondents have provided the definition of "Subversion" as "an attempt to overthrow a government that has been legally established" it is noteworthy that this word remains without definition in law and that the definition of "Subversive activities" under section 77(3) remains silent as to what subversion is.

126. The 2nd and 3rd respondents submit that, the 'tweets' by the interested party are subject to limitations under article 24(2) and that the 'tweet' was a propaganda for war and incitement to violence as such it should not be treated as a criticism of the government.

127. While there is no cogent evidence or material placed before this court in regard the 'tweets' by the interested party being subject to limitations under article 24(2) and that the 'tweet' was a propaganda for war and incitement to violence as justification of the constitutionality of the provision by the 2nd and 3rd respondents, this court finds the tangent to be a chilling reminder of the liberal and broad interpretation on making a decision to prosecute that leads to prosecution for a felony and the possibility for abuse of such provision.

128. The purported breach of law or illegal act created by section 77 of the *Penal Code*, cannot be discerned in the provision itself, the section encompasses any person who does, attempts to do, makes any preparation to do, conspires with any person to do, with a subversive intention, or utters any word(s) with a subversive intention and a secondary definition as contained in sub-section (3) on "Subversive" where in a tautologous language to "*Wanjiku*", the meaning of "Subversive" takes in quite a variety of activities, and that its contents are therefore broad and wide that it is vague or indefinite.

129. The purported breach of law or illegal act created by section 77 ultimately fails to define what "subversive intention" would constitute. The only stark aspect of this provision is where automatically under section 77(1) an offence is created without ingredients, need for the intention or knowledge of wrongdoing that constitutes part of a crime "mens rea", whereby

> "any person who utters any words with a subversive intention is guilty of an offence and is liable to imprisonment for a term not exceeding seven years".

130. The last limb of section 77(1) creates a derogation to the right to freedom of expression as the human conduct of uttering is ordinarily in human expression and that this derogation is blanket in form, "subversive intention" remains undefined leaving the prosecutor to conjure and that even with the definition of "Subversion" under section 77(3) it still remains a mystery what conduct would constitute an offence where one utters any words with a subversive intention.

131. This court would hasten to add that the purported derogation to the right to freedom of expression created in section 77(1) existed prior to the promulgation of the *constitution* and would thus not be a derogation envisioned under article 24(2).

132. On the scope of limitation of rights and freedoms under article 24 of the *Constitution*, the Court of Appeal in the case of *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2017 eKLR (Civil Appeal 172 of 2014) held that:

> "While article 19(3)(c) recognizes that the rights and fundamental freedoms in the Bill of Rights are only subject to the limitations contemplated in the *Constitution*, article 25 identifies only four rights and fundamental freedoms that cannot be limited. It follows that by article 24 the rest of the rights and fundamental freedoms under the Bill of Rights are enjoyed and guaranteed subject to strict terms of limitations.
>
> First, it must be demonstrated that the limitation is imposed by legislation, and even then only when it is shown that the limitation is reasonable and justifiable in an open democratic society. Further it must be based on dignity, equality and freedom, taking into consideration the nature of the right or fundamental freedom sought to be limited, the importance of the

purpose of the limitation, its nature and extent, the enjoyment by others of their own rights as well as a consideration whether there are less restrictive means to achieve the purpose".

133. This court takes judicial notice of the legal framework subsisting with regard to *Public Order Act*, cap 56, an Act of parliament to make provision for the maintenance of public order, and for purposes connected therewith and *Official Secrets Act* cap 187, an Act of parliament to provide for the preservation of state secrets and state security, The *National Cohesion and Integration Act* of 2008 and Act to provide for specific legislation limiting the right the right to freedom of expression to, propaganda for war; incitement to violence; hate speech; or advocacy of hatred that—

a. constitutes ethnic incitement, vilification of others or incitement to cause harm; or

b. is based on any ground of discrimination specified or contemplated in article 27 (4).

134. I equally note that the framework and legislation derogating the right to freedom of expression creates offences that are misdemeanor in classification with a penalty of imprisonment for a term not exceeding three (3) years or a fine of not more than Kshs 1,000,000/- for the offence of Hate Speech and the offence of incitement to ethnic contempt.

135. It therefore goes without say that, section 77(1) and (3) of the *Penal Code* is a colonial legacy which limits freedom of expression through the vaguely worded offence of subversion.

136. I have no doubt in my mind and fully associate myself with the sentiments of this court in the case of *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR

> " 78. It is my view, therefore, that the provisions of section 29 are so vague, broad and uncertain that individuals do not know the parameters within which their communication falls, and the provisions therefore offend against the rule requiring certainty in legislation that creates criminal offences. In making this finding, I am guided by the words of the court in the case of *Sunday Times v United Kingdom* Application No 65 38/74 para 49, in which the European Court of Human Rights stated as follows:
>
> > " (A) norm cannot be regarded as "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 situation may entail."
>
> 79. As the court observed in the *CORD case*, the principle of law with regard to legislation limiting fundamental rights is that the law must be clear and precise enough to enable individuals to conform their conduct to its dictates. The court in that case cited with approval the words of Chaskalson, Woolman and Bishop in *Constitutional Law of South Africa, Juta*, 2nd ed. 2014, page 49 where the learned authors stated that:
>
> > " Laws may not grant officials largely unfettered discretion to use their power as they wish, nor may laws be so vaguely worded as to lead reasonable people to differ fundamentally over their extension."

137. This court thus finds that, the provisions of the section 77 of the *Penal Code* are over broad and vague, and that they limit the right to freedom of expression and there is lack of clarity as to the purpose and

intent and. the limitation in section 77 is not "provided by law". The section is vague and over-broad firstly by not explicitly limiting the freedom of expression but adding the limitation on to other acts or conduct , there exists confusing definition of "subversion" especially about the meaning of "prejudicial to public order, security of Kenya and administration of justice", "in defiance of or disobedience to the law and lawful authority; unlawful society" or "hatred or contempt or excite disaffection against any public officer or any class of public officer". None of the terms used in the offence are defined or capable of precise or objective legal definition or understanding.

138. The 1st and 3rd respondents have not justified the necessity of the provisions in section 77 of the *Penal Code* as pursuing a legitimate aim, and being strictly necessary in an open and democratic society I accordingly find that the said provision serves no legitimate aim and is not strictly necessary in an open and democratic state. In fact, there exists least restrictive measures in derogation to the Freedom of expression.

139. The Interested party elected to spectate on the sidelines, and did not participate by filling any submissions, thereby making it difficult to issue any orders of prohibition, however having found the provisions of section 77 of the *Penal Code* to be unconstitutional, it therefore follows that, no criminal prosecution may be sustained under the said provision and the 1st respondent has the constitutional mandate to determine whether or not to proceed with the prosecution of the interested party with regard to the facts alleged against him should they disclose an offence under any other provision of law.

140. Consequently, this court finds in favor of the petitioners allowing the petition and issues the following orders;

    a. A declaration is hereby issued that, section 77 (1) and (3)(a), (b), (c), (d), (e), (f), and (g) of the *Penal Code*, cap 63 is unconstitutional;

    b. A declaration is hereby issued that, the continued enforcement of section 77 (1) and (3)(a), (b), (c), (d), (c), (e) (f), and (g) of the *Penal Code* by the respondents against the Interested party or any member of the public is unconstitutional.

    c. There shall be no costs, this being a public interest matter.

    It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 18TH DAY OF MARCH 2024.

.....

MOHOCHI S. M.

JUDGE