REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 3 OF 2019
CYPRIAN ANDAMA……PETITIONER
-VERSUS-
DIRECTOR OF PUBLIC PROSECUTIONS……1ST RESPONDENT
ATTORNEY GENERAL……..……2ND RESPONDENT
INSPECTOR GENERAL OF POLICE……3RD RESPONDENT
-AND-
ARTICLE 19 EAST AFRICA……INTERESTED PARTY

JUDGEMENT

1. The Petitioner, Cyprian Andama, identifies himself as a blogger and social media activist. He is the accused person in Kiambu Chief Magistrate's Court Criminal Case No. 689 of 2018 having been charged under Section 66 of the Penal Code, Cap. 63 with the offence of publishing alarming information. The particulars of the charge being that on the 11th April, 2018 he published a "false rumor" on his twitter handle to the effect that "**Kenya power is being looted by jubilee through Ken Tarus who got the job as the Managing Director with fake papers. This country is being led with criminals**." (*sic*)
2. The Petitioner has brought this petition to challenge the constitutionality of Section 66 of the Penal Code on the ground that it limits his rights to freedom of expression and fair trial under Articles 33 and 50(2) of the Constitution respectively.

3. The Director of Public Prosecutions, the Attorney General and the Inspector General of Police are named as the respective 1st to 3rd respondents. Article 19 East Africa was named as an Interested Party but did not participate in the proceedings.
4. The impugned Section 66 of the Penal Code provides:

**66. Alarming publications**

**(1) Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour.**

**(2) It shall be a defence to a charge under subsection (1) if the accused proves that, prior to publication, he took such measures to verify the accuracy of the statement, rumour or report as to lead him reasonably to believe that it was true.**

5. It is the Petitioner's averment that the words "**likely to cause fear and alarm to the public or to disturb public peace**" are vague and overboard in that it leaves a margin for subjective interpretation of the provision and can easily be misused to charge people.
6. The Petitioner additionally deposes that he was arrested on 14th May, 2018

from his house in Rongai and detained without charge at Muthaiga Police Station beyond the 24 hours allowed by the Constitution hence resulting in a violation of his rights.

7. Through the petition dated 8th January, 2019 the Petitioner therefore prays for:

    **a) A declaration that section 66 of the Penal Code is unconstitutional and invalid for unjustifiably violating Article 33 and 50(2)(n) of the Constitution;**

    **b) A declaration that the 3rd Respondent violated the Petitioner's rights of an arrested person under Article 49;**

    **c) Damages against the 3rd Respondent for violation of the Petitioner's fundamental rights and freedoms;**

    **d) An order for the Respondents to bear the Petitioner's costs of this Petition.**

8. The 2nd Respondent opposed the petition through grounds of opposition dated 6th February, 2019. The other respondents did not file any pleadings. It is the 2nd Respondent's case that the right to freedom of speech is not absolute and is reasonably limited by Articles 33(2)(d)(i) and 24 of the

Constitution. The 2nd Respondent also contends that all Acts of Parliament are presumed to be constitutional and the Petitioner has failed to rebut the presumption of constitutionality of the impugned provision. This Court is therefore urged to dismiss the petition.

9. The Petitioner filed submissions dated 6th February, 2019 in support of his case. According to the Petitioner although the freedom of expression is not an absolute right, the limitation is in the context of Article 33(2) of the Constitution which provides that the right does not extend to propaganda for war, incitement to violence, hate speech, or advocacy of hatred.

10. The Petitioner, in reliance on the decision of the Canadian Supreme Court in **R v Oakes [1986] 1 SCR 103,** submits that it is the duty of the respondents to satisfy the court that the impugned section limits the right to freedom of expression in a reasonable and justifiable manner in an open and democratic society.

11. The Petitioner refers to Paragraph 25 of **General Comment No. 34, Article 19 Freedoms of Opinion and Expression of the International Covenant on Civil and Political Rights** and urges that the principle of legality requires that a law that limits a fundamental right and freedom must be accessible to the public, formulated with sufficient precision to enable an individual to regulate his or her conduct and provide adequate

safeguards against unfettered discretion. It is the Petitioner's case that Section 66 of the Penal Code does not meet the stated criteria.

12. According to the Petitioner, the impugned provision is so vague, broad and uncertain so that individuals cannot know the parameters of their communication and it therefore catches both the innocent and those who are not. Reliance is placed on the decision in **Aids Law Project v Attorney General [2015] eKLR** for the proposition that legislation ought not to be too vague to the extent that subjects have to await its interpretation by the judges before they can know what is and what is not prohibited. Also cited in support of the submission is the declaration of unconstitutionality of Section 29 of the Kenya Information and Communications Act in **Andare v Attorney General [2015] eKLR** for being vague and overboard. Further reliance is placed on the decision of **Robert Alai v Attorney General [2017] eKLR** which declared Section 132 of the Penal Code unconstitutional for being unclear and ambiguous.

13. It is also submitted by the Petitioner that the impugned law undermines the right to receive and impart information protected under Article 35 of the Constitution as it includes all information under **"false statement, rumour, or report which is likely to cause fear and alarm to the public or to disturb the public peace"** notwithstanding artistic, academic or

scientific value of the information.

14. It is the Petitioner's assertion that the impugned provision does not serve a legitimate aim that is consistent with Article 33(2) of the Constitution. The Petitioner relies on **Robert Alai v Attorney General [2017] eKLR** and **Maseko & others v The Prime Minister of Swaziland & others [2016] SZHC 180** for the submission that it is the duty of the respondents to produce legal argument, requisite factual material and policy considerations demonstrating that a limitation to a fundamental freedom is justified.

15. The Petitioner submits that though the impugned section seeks to protect the reputation of individuals and deter hate speech and advocacy of hatred, the reputation of individuals is already 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. It is therefore the Petitioner's assertion that the impugned law does not meet the criteria of proportionality envisioned under Article 24(1) of the Constitution as limitations to fundamental rights and freedoms ought to be the least restrictive.

16. Still urging that the impugned provision fails the test of proportionality, the Petitioner refers to the decision in **Jacqueline Okuta v**

Attorney General [2017] eKLR as providing four sub-components of proportionality which a law must meet in order to pass constitutional muster. He states that the law should be designated for proper purpose; be rationally connected to the fulfillment of that purpose; be the least restrictive; and balance between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.

17. The 2nd Respondent filed submissions dated 19th September, 2019 in opposition to the petition. The Attorney General's case is that the impugned provision merely requires that people are mindful of others and exercise restraint when publishing information and the Petitioner is therefore adopting a self-serving approach in asking for a declaration that the provision is unconstitutional. It is the 2nd Respondent's argument that the challenged law merely calls upon the publisher of a statement to do a reasonable self-assessment of the impact of their statement on others.

18. The 2nd Respondent contends that the Petitioner ignored the defence in Section 66(2) and opted to rush to the constitutional court to avoid prosecution. The 2nd Respondent's position is that the Petitioner is circumventing justice by refusing to clear himself in the criminal court.

19. It is the Attorney General's case that the rights and freedoms under

Article 33 are not absolute and the Petitioner violated his rights and freedoms thereunder by failing to respect the rights of others as what he published was highly offensive and vilified the person identified therein. The decision in the case of **Christopher Ndarathi Murungaru v Standard Limited & 2 others [2012] eKLR** is cited as holding that rights under Article 33 are not absolute and they should be exercised in a way that ensures protection of the reputation of others.

20. The 2nd Respondent, in reliance on the decisions in **Hamdard Dawakhana v Union of India (1960) AIR 554** and **Ndyanabo v Attorney General of Tanzania [2001] EA 495,** submits that the doctrine of presumption of constitutionality requires that statutes should be presumed to be constitutional until proved to the contrary and the onus is on the person alleging constitutional invalidity to prove the allegation. It is the Attorney General's assertion that the Petitioner has failed to discharge this onus.

21. Relying on the decision in **Sunday Times v United Kingdom Application No. 65,** the 2nd Respondent maintains that the impugned law has been drafted to enable the citizens regulate their conduct.

22. In dismissing the Petitioner's claim that the impugned Section 66 of the Penal Code violates Article 50(2)(n) of the Constitution, which requires

that an accused person should only be convicted of an offence which was an offence in Kenya or a crime under international law at the time it was allegedly committed or omitted, the Attorney General points out that the provision has never been declared unconstitutional and it therefore creates an offence in Kenya. The Court is therefore urged to dismiss the petition.

23. The core issues in this petition are the constitutionality of Section 66 of the Penal Code and whether the Petitioner's right to be presented to Court within the time stipulated in Article 49(1)(f) of the Constitution was violated by the respondents.

24. Article 2 stipulates that the Constitution is the supreme law of the land and declares that any law inconsistent with it or any act or omission in contravention of the Constitution is void to the extent of inconsistency and invalid. The supremacy of the Constitution is therefore the backbone of the rule law. In determining whether a legal provision is constitutional or not courts are required to consider the text of the Constitution as well as the principles and values.

25. Article 259 of the Constitution enjoins courts to interpret the Constitution in a manner that promotes its purposes, values and principles; advances the rule of law, human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good

governance.

26. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the principles and purposes of the Constitution.

27. Time and again courts have stated the principles governing the interpretation of constitutions. In **Susan Kigula & 416 others v Attorney General [2005] UGCC 8** the Ugandan Constitutional Court held that the principles of constitutional interpretation are:

**"(1) It is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions. The widest construction possible, in its context, should be given according to the ordinary meaning of the words used. (The Republic vs EL manu (1969) EA 357)**

**(2) The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other (Paul K. Ssemogerere and 2 others vs A.G Const. Appeal No 1 of 2002.)**

**(3) All provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument (South Dakota vs**

North Carolina, 192, US 268 (1940) LED 448.)

(4) A Constitution and in particular that part of it which protects and entrenches Fundamental Rights and Freedoms are to be given a generous and purposive interpretation to realise the full benefit of the right guaranteed.

(5) In determining constitutionality both purpose and effect are relevant [Attorney General vs Salvatori Abuki, Constitutional Appeal No 1 of 1998]

(6) Article 126(1) of the Constitution of the Republic of Uganda enjoins courts in this country to exercise judicial power in conformity with law and with the values, norms and aspirations of the people (emphasis added.)".

28. Article 19(1) the Constitution states that the Bill of Rights is an integral part of Kenya's democratic state, and is the framework for social, economic and cultural policies. Article 19(3) states, *inter alia,* that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State, and are subject only to the limitations contemplated in the Constitution.

29. Freedom of expression is a right and fundamental freedom guaranteed under Article 33 of the Constitution 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.

30. The importance of the right of freedom of expression was expressed by the Supreme Court of the United States in **New York Times v Sullivan 376 U.S. 254 (1964)** wherein it was held that "**the circulation of ideas should be uninhibited, robust and wide-open in a democratic society.**"

31. In the case of **Edmonton Journal v Alberta (Attorney General) [1989] 2 SCR 1326,** the Supreme Court of Canada underscored the importance of the freedom of expression when it stated that:

**"It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized."**

32. There is also a clear link between the freedom of expression and democracy. This link was recognized by the Ugandan Supreme Court in **Charles Onyango Obbo & another v Attorney General [2004] UGSC 81** when it held that:

**"Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression. This is as true in the new democracies as it is in the old ones."**

33. It is, however, important to appreciate that Article 33 itself has put limits on the right to the freedom of expression. The right does not extend to propaganda for war; incitement to violence; hate speech; or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination specified or contemplated in Article 27(4).

34. The right of freedom of expression should also be exercised while respecting the rights and reputation of others. This position is further solidified by Article 24 which provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and only to the extent that the limitation is reasonable and justifiable in an open and democratic

society based on human dignity, equality and freedom, taking into account, among other factors, the nature of the right or fundamental freedom; the importance and the purpose of limitation; the nature and the extent of limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relationship between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

35. The question therefore is whether Section 66 of the Penal Code, which limits the right to expression, has met the conditions for limitation of rights and fundamental freedoms set in Article 24 of the Constitution. It is a well-established principle of law that the onus of proving that a limitation on any constitutional right is reasonable and justified in a free and democratic society is upon the party seeking to uphold the limitation. For instance, in **R v Oakes [1986] 1 SCR 103,** the Canadian Supreme Court stated that:

**"The onus of proving that a limitation on any *Charter* right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed**

rights are clearly exceptions to the general guarantee. The presumption is that *Charter* rights are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria justifying their being limited."

36. In limiting constitutional rights and fundamental freedoms, the legislature ought to establish the necessity of such limitations and demonstrate that there is no less invasive means of attaining the objective. In that regard the Court in **Oakes** (supra) held that:

"Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not

**arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportion¬ality between the effects of the limiting measure and the objective the more severe the deleterious effects of a measure, the more important the objective must be."**

37. It is appreciated that the impugned provision being a pre-2010 enactment did not benefit from the scrutiny required by Article 24. It is therefore the duty of this Court to apply the Article 24 standard to the provision in order to determine whether it violates or does not violate Article 33 of the Constitution.

38. The Attorney General's response to the petition and submissions merely reiterate the provisions of the impugned law and fail to give any justification for the upholding of the limitation. The respondents therefore failed to discharge the onus cast upon them once the Petitioner demonstrated that the provision was unconstitutional as it limited the right to freely express oneself. The Attorney General did indeed point out that the right under Article 33 is not absolute. That was not enough. He needed to go an extra mile to demonstrate that the constitutional limitations to the

right of freedom of expression were applicable to the impugned law.

39. Even with the failure by the Attorney General to discharge the stated mandate, this Court still has a duty to examine the constitutionality of the impugned provision. One of the ways of finding out if a given law is constitutional is to consider the purpose and effect of that provision. This formula was highlighted by the Constitutional Court of Uganda in **Zachary Olum & another v Attorney General [2000] UGCC 3** as follows:

**"To determine the constitutionality of a section of a statute or Act of Parliament, court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the court has to go further and examine the effect of its implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional."**

40. In the Zimbabwean case of **Nyambirai v National Social Security Authority & another 1995 (2) ZLR 1 (S),** it was held that in determining if a limitation to a fundamental right is permissible the Court would consider three criteria: (1) whether the legislative objective was sufficiently important to justify limiting a fundamental right; (2) whether the measures

designed to meet the legislative objective were rationally connected to it; and (3) whether the means used impaired the right or freedom no more than was necessary to accomplish the objective.

41. Looking closer at the impugned provision, one has to first appreciate that the Penal Code was enacted before Kenya attained its independence. It cannot be denied that the post-colonial period is different from that of colonial times. Whereas presently there is in place a Constitution with an entrenched Bill of Rights, this was not the case at the time of the enactment of the impugned provision. The question is whether such an offence is sustainable in the present democratic dispensation. Does the offence impede enjoyment of constitutional rights and fundamental freedoms?

42. The impugned provision states that **"any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanor."** The law makes it possible for an accused person to be convicted for any statement that is deemed to be untrue without placing the onus on the prosecutor to establish the untruthfulness of the statement.

43. The Court of Appeal of Tanzania addressed the conditions that a law limiting constitutional rights should meet in **Kukutia Ole Pumbun & another**

v The Attorney General & another [1993] TZCA 14 and held that:

"… a law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will have special requirements; first, such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principal of proportionality. The principle requires that such a law should not be drafted too widely so as to net everyone including even the untargeted members of the society. If the law which infringes a basic right does not meet both requirements, such law is not saved by article 30 (2) of the Constitution, it is null and void. And any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms with these requirements, otherwise the guaranteed rights under the Constitution may easily be rendered meaningless by the use of the derogative or clawback clauses of that very same Constitution."

44. Canada had a provision almost similar to ours in section 181(2b) of

their criminal code that read that **"[e]very one who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment."** In declaring the provision unconstitutional the majority members of the Supreme Court of Canada in **R v Zundel [1992] 2 S. C. R. 731** held that:

**"The first difficulty results from the premise that deliberate lies can never have value. Exaggeration -- even clear falsification -- may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., `cruelty to animals is increasing and must be stopped'. A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie; consider the case of Salman Rushdie's *Satanic Verses*, viewed by many Muslim societies as perpetrating deliberate lies against the Prophet…**

The second difficulty lies in the assumption that we can identify the essence of the communication and determine that it is false with sufficient accuracy to make falsity a fair criterion for denial of constitutional protection. In approaching this question, we must bear in mind that tests which involve interpretation and balancing of conflicting values and interests, while useful under s. 1 of the *Charter*, can be unfair if used to deny *prima facie* protection.

One problem lies in determining the meaning which is to be judged to be true or false. A given expression may offer many meanings, some which seem false, others, of a metaphorical or allegorical nature, which may possess some validity. Moreover, meaning is not a datum so much as an interactive process, depending on the listener as well as the speaker. Different people may draw from the same statement different meanings at different times. The guarantee of freedom of expression seeks to protect not only the meaning intended to be communicated by the publisher but also the meaning or meanings understood by the reader: *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at p. 767, and *Irwin Toy*, *supra*, at p. 976. The result is that a statement that is true on one level or for one person may be false on

another level for a different person…

A second problem arises in determining whether the particular meaning assigned to the statement is true or false. This may be easy in many cases; it may even be easy in this case. But in others, particularly where complex social and historical facts are involved, it may prove exceedingly difficult."

45. It is an established principle of law that a legal provision which creates a criminal offence, should be clear, concise and unambiguous. In the case of **Andrew Mujuni Mwenda v Attorney General [2010] UGSC 5,** the Ugandan Supreme Court expressed this principle thus:

"But that does not solve the fundamental criticism that the wording creating the offence of sedition is so vague that one may not know the boundary to stop at, while exercising one's right under 29(I) (a)…It is so wide and it catches everybody to the extent that it incriminates a person in the enjoyment of one's right of expression of thought…We find that, the way impugned sections were worded have an endless catchment area, to the extent that it infringes one's right enshrined in Article 29(1) (a)."

46. I find section 66 to be excessively broad as it is capable of

prohibiting the publishing of false statements as well as opinions honestly believed to be truthful hence limiting the citizens' right under Article 35 to access information. A law that limits constitutional rights without any justification violates the Constitution and ought to be removed from the penal laws.

47. I also find that the impugned law is in contravention of Article 50(2) of the Constitution which provides that "**every accused person has the right to be presumed innocent until the contrary is proved**." The impugned section requires an accused person to prove lack of knowledge of the falsity of his statement, report or rumour and to show that he took reasonable measures to verify the truthfulness of his statement, rumour or report. The general rule is that in a criminal trial, the onus of proof remains on the State throughout and does not shift to the defence.

48. In **Charles Onyango Obbo (supra),** the Ugandan Supreme Court struck out of their penal book a provision which was word for word with Section 66 of our Penal Code. In doing so, the Court observed that:

**"With due respect, the suggestion that the provision in section 50(2) is merely procedural, regulating the time for presentation of the defence case is erroneous. The provision places on a person on trial for that**

offence the onus of proving lack of guilty knowledge. Far from being *'what obtains in adversarial criminal justice system',* it is an exception to the general rule that in a criminal trial, the onus of proof remains on the prosecution throughout, and does not shift to the defence. Furthermore, I should point out and stress that by the definition of the offence, liability for conviction, let alone for prosecution, does not depend on any actual occurrence of public fear or alarm or disturbance of public peace. Liability for prosecution depends on the state prosecutor's perception of the impact the expression is likely to have on the public; and liability for conviction depends on whether the court is persuaded to share the same perception."

49. In the pretext of providing a defence, the impugned Section 66 of the Penal Code at subsection (2) disingenuously shifts the burden of proof from the prosecution to the accused person. The provision places the burden of establishing innocence on the accused person by stating that **"it shall be a defence to a charge under subsection (1) if the accused proves that, prior to publication, he took such measures to verify the accuracy of the statement, rumour or report as to lead him reasonably to believe that it was true."** The requirement shifts the responsibility of proving innocence

upon the accused person. Once the legal burden shifts it presents an issue of unconstitutionality for contravening the principle of presumption of innocence until the contrary is proved.

50. In **Oakes** (supra), the Court set the test for determining the legitimacy of a reverse onus provision as follows:

**"To determine whether a particular reverse provision is legitimate, Martin J.A. outlined a two-pronged inquiry. First it is necessary to pass a threshold test which he explained as follows, at p. 146:**

**The threshold question in determining the legitimacy of a particular reverse onus provision is whether the reverse onus clause is justifiable in the sense that it is reasonable for Parliament to place the burden of proof on the accused in relation of an ingredient of the offence in question. In determining the threshold question consideration should be given to a number of factors as: (a) the magnitude of the evil sought to be suppressed, which may be measured by the gravity of the harm resulting from the offence or by the frequency of the occurrence of the offence or both criteria; (b) the difficulty of the prosecution making proof of the presumed fact, and (c) the relative ease with which the accused may prove or disapprove the presumed fact. Manifestly, a reverse onus**

**provision placing the burden of proof on the accused with respect to a fact which is not rationally open to him to prove or disapprove cannot be justified.**

**If the reverse onus provision meets these criteria, due regard having been given to Parliament's assessment of the need for the provision, a second test must then be satisfied. This second test was described by Martin J.A. as the "rational connection test". According to it, to be reasonable, the proven fact (e.g., possession) must rationally tend to prove the presumed fact (e.g., an intention to traffic). In other words, the proven fact must raise a probability that the presumed fact exists."**

51. If the State (prosecution) cannot prove the falsity or otherwise of a statement with all the resources available to it, how can an accused person be able to do so? What the impugned provision does is to excessively limit the freedom of expression without any justification and to that extent it becomes unconstitutional.

52. Further to this, liability for prosecution and conviction under Section 66 appears not to be dependent upon any actual occurrence of public fear or alarm or disturbance of public peace. It all depends on the State's perception of the possible impact the expression may have on the public

and if the Court can be persuaded positively. As was held in **Chipenzi & others v The People (HPR/03/2014) [2014] ZMHC 112 (3 December 2014),** this law is intended to forestall a danger, which is both remote and uncertain, arising out of the "false statement." How does the state prove in this instance that the false statements caused 'fear and alarm" to the general public yet human beings are made of different temperaments with some who are more excitable at the least provocation?

53. It is noted that in **Chipenzi (supra),** the Zambian High Court declared unconstitutional Section 67 of that country's Penal Code which read as follows:

**"Any person who publishes, whether orally or in writing or otherwise any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb public peace, knowing or having reason to believe that such statement, rumour or report is false is guilty of a misdemeanor…"**

54. In reaching the decision, Chali, J held that:

**"Indeed it is trite that every right and freedom is subject to reasonable legal restrictions. Hence the derogations we observe under Article 20 (3). However, the derogations thereunder stipulate that where a law takes**

away the guaranteed right and that law is "shown not to be reasonably justifiable in a democratic society" then that law is unconstitutional and therefore not permissible and ought not to remain on the statute books."

55. The right under Article 33 of the Constitution is so important and should only be limited in accordance with the parameters clearly expressed in that provision. In passing a limiting law, the legislature should demonstrate that the limitation is for the purposes stated therein and nothing more.

56. The importance of the right to freely express oneself was well-stated by the Supreme Court of Zimbabwe in **Re Munhumeso & others (1994) I L.R.C. 284; [1994] (1) ZLR 49 (S)** thus:

**"Freedom of expression, one of the most precious of all the guaranteed freedoms, has four broad special purposes to serve:**

**(i) It helps an individual to obtain self-fulfillment;**

**(ii) It assists in the discovery of truth;**

**(iii) It strengthens the capacity of an individual to participate in decision making; and**

(iv) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change."

57. Similarly, in **Charles Onyago Obbo (supra)** the essence of the right of the freedom of expression was expressed thus:

"From the foregoing different definitions, it is evident that the right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas or truthful information. Subject to the limitation under Article 43, a person's expression or statement is not precluded from the constitutional protection simply because it is thought by another or others to be false, erroneous, controversial or unpleasant. Everyone is free to express his or her views. Indeed, the protection is most relevant and required where a person's views are opposed or objected to by society or any part thereof, as "false" or "wrong"."

58. It is the 2nd Respondent's submission that the statement made by the Petitioner vilified another person in the process. Indeed, the freedom of speech has limitations to the extent that one should exercise it while respecting the reputation of others. However, I am in agreement with the

Petitioner that the protection of individuals' reputation is provided under the Defamation Act, Cap. 36. In order to protect the freedom of expression, it is important to embrace civil remedies which are less restrictive and equally restrain those who are intent on damaging the reputation of others by inflicting monetary loss through award of damages. To put criminal sanctions over matters that may simply be defamatory is to act against the principle of proportionality which requires that measures taken to limit a fundamental right and freedom should be **"necessary"** and should only be imposed where **"there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation"** as per **Jacqueline Okuta v Attorney General [2017] eKLR.**

59. In reaching my decision, I am also persuaded by the decisions in the already cited cases of **Zundel, Charles Onyango Obbo,** and **Chipenzi** which all found provisions similar to our Section 66 of the Penal Code unconstitutional. I am, nevertheless, alive to the fact that Kenyans exercise their rights vigorously and sometimes to the annoyance of others. Despite this trait, Kenyans are better off unrestrained by colonial relics like Section 66 of the Penal Code. Citizens should not quake in their boots under the watchful eye of State which sometimes target persons based on considerations not aligned to the rule of law. The right to express oneself

should not be impaired to the extent that it cannot be exercised without trepidation of criminal sanctions. The National Cohesion and Integration Act, 2008 adequately takes care of any person who attempts to exceed the limits placed on the freedom of expression by Article 33.

60. I have carefully considered the impugned provision against the Constitution. I have also taken into account the relevant judicial pronouncements. This country has a Constitution with a robust and progressive Bill of Rights which should not be stymied by criminal laws inherited from the pre-independence period or even the pre-2010 constitutional epoch. The Constitution protects the people's rights and prohibit the enactment of laws that unreasonably and unjustifiably infringe on those rights.

61. Section 7 of the Sixth Schedule of the Constitution stipulates that "**all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.**" It is therefore my finding that a provision such as Section 66 of the Penal Code is too retrogressive to fit into the modern open democratic society envisaged under the current Constitution. The impugned provision leaves room for speculative prosecution where the prosecutor hopes that the trial

court perceives the law in the manner the prosecutor understands it.

62. A citizen intending to express an opinion that may be unpopular with the rulers cannot predict with certainty whether or not the provision will be used to silence him or her. In other words, the law is so wide in its catchment area that it cannot be said who will and who will not be netted by it. What amounts to fear and alarm to the public or what is likely to disturb public peace is undefined and it is therefore difficult for an individual to freely express oneself without the risk of committing the offence created by the impugned law. It is therefore my finding and determination that Section 66 of the Penal Code violates Articles 33, 35 and 50(2)(a) of the Constitution as it unjustifiably suppresses freedom of expression, denies citizens the right to receive and impart information and denies the accused the right to fair trial. It is a law that has no place in a just and democratic society.

63. Another issue to be determined in this petition is whether the respondents violated the Petitioner's rights under Article 49(1) of the Constitution. The Article provides for the rights of an arrested person as follows:

**An arrested person has the right—**

(a) to be informed promptly, in language that the person understands, of—

(i) the reason for the arrest;

(ii) the right to remain silent; and

(iii) the consequences of not remaining silent;

(b) to remain silent;

(c) to communicate with an advocate, and other persons whose assistance is necessary;

(d) not to be compelled to make any confession or admission that could be used in evidence against the person;

(e) to be held separately from persons who are serving a sentence;

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

**(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and**

**(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.**

64. The Petitioner pleaded that he was detained on 14th May, 2018 by the 3rd Respondent for a period of three days at Muthaiga Police Station without cause. A perusal of the letter dated 16th May, 2018 from the Director of Public Prosecutions to the Senior Assistant Director of Public Prosecutions, Kiambu ODPP County Office, which is exhibited as CAN-3 in the Petitioner's affidavit in support of the petition clearly shows that the Petitioner was **"detained at the Muthaiga Police Station pursuant to an application for extension of custodial period which was granted by the Kiambu Chief Magistrates Court."** It is thus apparent that the Petitioner was in police custody on the strength of a court order. This contradicts the Petitioner's claim that he was held by the police and later released without being presented in court. There is no other evidence presented to this Court by the Petitioner to show that he was presented to Court outside the period allowed by the Constitution.

65. The Petitioner also pleaded that the 3rd Respondent at the time of his

arrest did not notify him of the reasons for arrest, the right to remain silent, and the consequences of not remaining silent as per Article 49(1)(a) of the Constitution. However, the Petitioner did not provide any evidence to support this claim. I thus find this allegation unproved as it was not supported by any evidence. The Petitioner's claim that his rights under Article 49 were violated fails in totality.

66. The Petitioner seeks compensation upon the Court finding that his rights were violated. His prosecution under Section 66 of the Penal Code commenced prior to the determination of the unconstitutionality of the said provision through this petition. His prosecution was therefore constitutional in light of the doctrine of the presumption of constitutionality of statutes. In such a situation, compensation is not recommended. In saying so, I rely on the decision of **Anthony Njenga Mbuti & 5 others v Attorney General & 3 others [2015] eKLR** where the Court after declaring a statutory provision unconstitutional declined to award damages stating that:

**"The petitioners have prayed for compensation for the violation of their rights through the application of the peace bond to them. The Court recognises that an injustice has been done, over many decades, to many**

**people. It was an injustice that resulted from provisions in the law, whose constitutionality had not been tested. In the circumstances, it would place an undue burden on the taxpayer to order that the State pays compensation to the petitioners, for then it would need to make similar recompense to all those others who have been subjected to the peace bond statutes. In the circumstances, I am not able to make any orders for compensation to the petitioners."**

I therefore decline to award damages to the Petitioner for his prosecution in respect of an offence whose constitutionality had not been challenged or determined at the time of his prosecution.

67. Costs are a matter of the court's discretion and given that the petition raises a matter of great public interest and importance, it is only fair that the parties herein bear their own costs of the proceedings. It is so ordered.

68. In summary orders are issued as follows:

a) A declaration is hereby issued that Section 66 of the Penal Code is unconstitutional and invalid for unjustifiably violating Articles 33 and 50(2)(a) of the Constitution; and

b) The parties to bear their own costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 13th day of May, 2021.

W. Korir,

Judge of the High Court