

The resuscitation of criminal defamation in Kenya and the ensuing consequences: An incisive examination of *Jacqueline Okuta v AG vis-à-vis BAKE v AG*

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Abstract

This case commentary examines the resuscitation of criminal defamation in Kenya under Sections 22 and 23 of the Computer Misuse and Cybercrimes Act, (Chapter 79C). It contextualises this development within the broader digital transformation, where social media and online platforms have revolutionised freedom of expression, participatory discourse, and democratic accountability. The commentary assesses the constitutionality and proportionality of criminal sanctions for false publication and defamation in light

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of the Constitution of Kenya (2010) and international human rights standards. By analysing the High Court decisions of Jacqueline Okuta v AG (2017) and BAKE v AG (2020), the study illustrates the tension between state interests in regulating harmful digital content and the imperative to safeguard freedom of expression. The commentary highlights the risks of overbroad and vague legal provisions being used to suppress dissent, silence critics, and facilitate strategic lawsuits against public participation (SLAPPs), especially in politically sensitive contexts.

Keywords: criminal defamation, cybercrime law, digital rights, freedom of expression, strategic lawsuits against public participation (SLAPPs)

Introduction

The advent of digital platforms – encompassing planetary infrastructures, systems, and technologies with distinctive socio-technical features, affordances and operational cultures – has fundamentally transformed the communication landscape.¹ These platforms have introduced novel modes of interaction, catalysed cultural shifts, transformed patterns of social exchange, and expanded the scope of human rights.² The shift to digital communication, characterised by decentralisation and real-time interactivity, has inaugurated diverse channels for content creation and dissemination. Platforms such as social media platforms, blogs, podcasts, streaming services, and online news outlets foster interaction patterns that emphasise speed, conciseness, and immediacy.³

The influence of digital media in individual and communal interaction has increased transparency in political processes, access to information and active citizen participation in democratic societies.⁴ Social media, through user-generated content, has increasingly displaced mainstream media and ushered a democratised media environment.⁵ Tellingly, users now contribute to and reshape public discourse via features such as ‘likes’, ‘shares’, and ‘comments’ which provide active

¹ Admire Mare, ‘Digital spaces, rights and responsibilities: Towards a duty of care model in Southern Africa’, 7 *Digital Rights Access to Information Series* (2023) 4.

² Admire Mare, ‘Securing digital rights in Southern Africa: A call to action for stakeholders’, 4 *Digital Rights South Africa* (2024) 5; Bernard Ngalim, ‘Regulating speech in the African digital marketplace of ideas’, *Tech Policy Press*, 25 October 2024; Mare, ‘Digital spaces, rights and responsibilities’, 3. See generally, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 23 April 2020, A/HRC/44/49.

³ Ling Han, ‘The rise of digital media: Transforming communication, culture, and commerce’, 22(72) *Global Media Journal* (2024) 2.

⁴ Han, ‘The rise of digital media: Transforming communication, culture, and commerce’, 2; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, para 31.

⁵ Victor Kapiyo, ‘Social media and content regulation’, in *State of internet freedom in Africa 2023: A decade of internet freedom in Africa – Recounting the past, shaping the future*, Collaboration on International ICT Policy for East and Southern Africa (CIPEA), 2023, 20.

feedback loops that sustain digital citizenship and reinforce awareness of digital rights and responsibilities.⁶

In this evolving ecosystem, individuals are no longer passive recipients of media, but active agents in shaping the prominence and circulation of information. The interactive nature of digital platforms has enabled individuals to share their views and find objective information immediately and inexpensively. As a result, digital spaces have emerged as veritable sites for achieving social justice and unlocking socio-political and economic freedoms,⁷ and promoting accountability and good governance.⁸

Moreover, digital media transcends geographical boundaries, allowing access to information and knowledge that was previously unattainable, and contributing to the discovery of the truth and progress of society.⁹ Within this framework, users are able to access information in real time, irrespective of their physical location.¹⁰ This universality of access has not only broadened the spectrum of communicative reach but has also contributed to the emergence of an interconnected global public sphere. As such, digital media is an integral avenue for exercise of freedom of opinion and expression, including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice.¹¹

⁶ Mare, 'Digital spaces, rights and responsibilities', 6.

⁷ Mare, 'Securing digital rights in Southern Africa', 6.

⁸ Felicia Anthonio, 'Internet shutdowns: A threat to human rights and democratic values in Africa', in *State of internet freedom in Africa*, 2023, 13; Nanjala Nyabola, 'Online activism and civic space in Africa in the age of the privatised internet', in *State of internet freedom in Africa* 2023, 29.

⁹ United Nations Human Rights Council, Resolution on the promotion, protection and enjoyment of human rights on the internet, 16 July 2012, A/HRC/RES/20/8, Article 2.

¹⁰ Wairagala Wakabi, 'Digital democracy vs digital authoritarianism: The battle of our times', *State of internet freedom in Africa*, 2023, 7.

¹¹ Universal Declaration of Human Rights, 10 December 1948, A/RES/217(III), Article 19; International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 19.

However, real-time dissemination and mass mobilisation challenge traditional controls, as billions share information reflecting their lived realities.¹² Concerns over the reliability and credibility of online content have led to increased state-imposed restrictions, including criminalisation of legitimate expression, thereby contributing to democratic regression and digital authoritarianism.¹³

While the proliferation of misinformation and disinformation presents urgent social challenges, this commentary advocates for the least restrictive measures to balance the rights and reputations of others with the preservation of freedom of expression. The study examines the re-criminalisation of defamation under the Computer Misuse and Cybercrimes Act (Chapter 79C), and assesses whether criminal sanctions for speech offences are legal, effective, necessary, and proportionate in a democratic society.

This case commentary proceeds as follows. This introduction lays the ground work on (criminal) defamation particularly in digital platforms. Section two sets out the digital rights within the right to freedom of expression and the precise ambit of its limitation. Section three analyses the case of *Jacqueline Okuta v AG and another* to arguing that criminal defamation based on personal interests goes against the principles of necessity and proportionality in limiting Article 33 of the Constitution of Kenya (2010).

Thereafter, Section four turns to *BAKE v AG and others* arguing that it incorrectly affirmed criminal defamation under Sections 22 and 23 of the Computer Misuse and Cyber Crimes Act. The fifth section closes by

¹² See generally, Claire Wardle and Hossein Derakhshan, *Information disorder: Toward an interdisciplinary framework for research and policy making*, Council of Europe Report DGI (2017) 09, 2017.

¹³ Mare, 'Securing digital rights in Southern Africa: A call to action for stakeholders', 6, defines digital authoritarianism as 'the use of digital media technologies by authoritarian regimes to surveil, repress, and manipulate domestic and foreign populations'; Nyabola, 'Online activism and civic space in Africa in the age of the privatised internet', 29-30; Ngamita, 'Internet freedom and new forms of censorship', *State of internet freedom in Africa*, 2023, 36; Aaron Olaniyi Salau, 'Social media and the prohibition of "false news": Can the free speech jurisprudence of the African Commission on Human and Peoples' Rights provide a litmus test?', 4 *African Human Rights Yearbook* (2020) 234.

depicting the weaponisation of Sections 22 and 23 of the Computer Misuse and Cyber Crimes Act against legitimate journalists, whistleblowers, and government critics and the use of strategic lawsuits against public participation (SLAPPs), which target people or groups for speaking out on matters of public concern.

The comparative reference to South Africa's recent repeal of criminal defamation underscores a global normative shift toward decriminalising speech offences and adopting proportionate civil remedies. Ultimately, this commentary concludes by advocating for legislative reform in Kenya to align statutory law with constitutional principles and international standards, emphasising the need for narrowly tailored civil liability frameworks that protect both reputational rights and democratic freedoms in the digital age.

Limitation of the right to freedom of expression through the law on false publication

Digital rights encompass access, participation, data security, and privacy within the digital space.¹⁴ They are underpinned by human-centred values, including dignity, respect, equality, justice, responsibility, informed consent, and environmental sustainability.¹⁵ These rights give people control and agency, and ensure that digital environments uphold fundamental freedoms and ethical principles intrinsic to democratic and inclusive societies.

Despite the recent emergence of digital rights, the rights draw from the broader human rights framework, and the fact that rights enjoyed offline must also be respected online.¹⁶ A core digital right is freedom of expression, which includes the freedom to seek, receive, and share

¹⁴ Mare, 'Securing digital rights in Southern Africa: A call to action for stakeholders', 7.

¹⁵ Mare, 'Securing digital rights in Southern Africa: A call to action for stakeholders', 7.

¹⁶ Bart Custers, 'New digital rights: Imagining additional fundamental rights for the digital era', 44 *Computer Law and Security Review* (2022) 2-3; Human Rights Council, Resolution on the promotion, protection and enjoyment of human rights on the internet, Article 2.

information and include ideas across all media.¹⁷ This freedom supports personal development, political awareness and participation in public affairs.¹⁸ It is essential to democratic governance as it allows people to discuss public affairs and critique matters relating to governance.¹⁹

Freedom of expression enables individuals to exercise other rights by allowing them to share information, voice dissents, and hold power to account on digital platforms. In *Robert Alai v AG and DPP*, the High Court observed that citizens have a democratic right to discuss government affairs and that they cannot exercise freedom of expression if they are barred from criticising their representatives.²⁰ Public criticism informs leaders when actions may not be in the national interest and requires public officers to tolerate scrutiny.²¹ In *Jacqueline Okuta and another v AG and DPP*, the High Court found that criminalising defamation chills speech, stifles the flow of information and is disproportionate in a democratic society.²²

¹⁷ Constitution of Kenya (2010), Article 33(1); African Charter on Human and Peoples' Rights, 1 June 1981, 1520 UNTS 217, Article 9; Universal Declaration of Human Rights, Article 19; International Covenant on Civil and Political Rights, Article 19; *Media Council of Tanzania and others v Attorney General of the United Republic of Tanzania*, (Decision on merits) 2 EACJ, First Instance (2019) para 58 it was observed that freedom of opinion and freedom of media are at the core of the fundamental and operational principles set out in Article 6 and 7 of the Treaty for the Establishment of the East African Community.

¹⁸ *Media Rights Agenda and Constitutional Rights Project v Nigeria (decision on merits)*, Communication Nos 105/93, 128/94, 130/94 and 152/96, ACmHPR (1998) para 54; African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019, Principle 1.

¹⁹ *Nevanji Madanhire and another v Attorney General* [2014] ZWCC 1, CCZ/2/14, 7; CCPR General Comment No 34: Article 19 on Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 2; *Khural and Zeynalov v Azerbaijan*, (Judgement on merits) 55069/11 ECtHR (2021) para 38; *R v Zundel* [1992] 2 SCR 731 at para 2 (Supreme Court of Canada), where it was noted 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'.

²⁰ Petition No 174 of 2016, Judgment of the High Court at Nairobi, 26 April 2017 [eKLR] para 38.

²¹ *Khural and Zeynalov v Azerbaijan*, para 41.

²² Petition No 397 of 2016, Judgment of the High Court at Nairobi, 6 February 2017 [eKLR] 10; *Mineral Sands Resources (Pty) Ltd and others v Reddell and others* [2022] ZACC 37, para 1

Exercising freedom of expression involves the duties not to engage in propaganda for war, incitement to violence, hate speech and advocacy for hatred, and to respect the rights and reputation of others.²³ Additionally, Article 24 of the Constitution of Kenya (2010) requires a balance between individual rights and freedoms, and public order and safety.²⁴ Any limitation must be prescribed by clear and accessible law, serve a legitimate aim, be necessary, and be the least restrictive means required to achieve that aim in a democratic society.²⁵

False publication, or ‘fake news’ is the deliberate production and sharing of misleading and false information for political, economic or ideological benefit.²⁶ In Kenya, false publication is restricted in the Defamation Act (Chapter 36), the Penal Code (Chapter 63), and the Computer Misuse and Cybercrimes Act. The Defamation Act covers slander affecting official, professional, or business reputations;²⁷ slander imputing unchastity to women;²⁸ and slander of title or malicious falsehoods.²⁹ The Penal Code creates the offence of libel³⁰ and unlawful publication.³¹

where the South African Constitutional Court noted that, ‘One of the more positive features of our nascent democratic order is vibrant, vigilant and vociferous civil society participation in public affairs. In a truly broad based participatory democracy characterised by that kind of active participation, our Constitution’s aspirations and values find meaning in the lives of the populace for whose benefit the Constitution was ultimately enacted’.

²³ Constitution of Kenya (2010), Article 33(3); International Covenant on Civil and Political Rights, Article 19(3); African Charter on Human and Peoples’ Rights, Article 27(2); *Khural and Zeynalov v Azerbaijan*, para 45; Custers, ‘New digital rights’, 4 and 12.

²⁴ *Robert Alai v Attorney General and Director of Public Prosecutions*, para 45; *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 9.

²⁵ Constitution of Kenya (2010), Article 24; International Covenant on Civil and Political Rights, Article 19(3); Declaration of Principles on Freedom of Expression and Access to Information in Africa, Principle 9(1) and (2).

²⁶ Admire Mare, Hayes Mawindi Mabweazara and Dumisani Moyo, ‘“Fake news” and cyber-propaganda in sub-Saharan Africa: Recentering the research agenda’, 40(4) *African Journalism Studies* (2019) 4.

²⁷ Defamation Act (Chapter 36), Section 3.

²⁸ Defamation Act (Chapter 36), Section 4.

²⁹ Defamation Act (Chapter 36), Section 5.

³⁰ Penal Code (Chapter 63), Section 194.

³¹ Penal Code (Chapter 63), Section 197.

The Computer Misuse and Cybercrimes Act, on the other hand, introduces elements of criminal defamation in the digital space. Specifically, Section 22 of the Act criminalises the intentional publication of ‘false, misleading, or fictitious data or misinformation with intent that the data shall be considered or acted upon as authentic, with or without financial gain ... that negatively affects the reputations of others’. Section 23 criminalises knowingly publishing ‘information that is false in print, broadcast, data or over a computer system, that is calculated or results in panic, chaos, or violence among citizens of the Republic, or which is likely to discredit the reputation of any person’.

However, restricting freedom of expression requires more than precise legislation.³² The doctrine of necessity demands that the restriction must seek to achieve a legitimate purpose like protecting the rights and reputation of others or the protection of national security, public order, public health, or morality.³³ Defamation law legitimately seeks to shield people from unwarranted attacks, especially in the digital space with rapid information flow and limited checks and balances. In Kenya, affordable smartphones and mobile data plans have increased internet access and use, with citizens spending an average of three hours forty-three minutes per day on social media, far above global average.³⁴ Kenyans use digital media for interpersonal communication, entertainment, news, professional network, leisure, and civic engagement. These varied uses, coupled with long periods online, technological advances,

³² *Lohé Issa Konaté v Burkina Faso*, (Judgement on merits) No 004/2013, ACtHPR (2014) paras 126-131, where the African Court of Human and Peoples’ Rights found that the Penal and Information Codes were both ‘within the law’ and clear and concise; *Attorney General of Antigua and Barbuda and others v Leonard Hector* [1986] 2 AC 312 Court of Appeal, 15. Here, the Court noted that in determining substantive reasonableness in the restriction of freedom of expression, it should take into consideration many and varied factors. These include factors such as the nature of the right alleged to have been infringed, the purpose underlying the restriction, and the scope of the evil it seeks to remedy.

³³ Declaration of Principles on Freedom of Expression and Access to Information in Africa, Principle 9(3); International Covenant on Civil and Political Rights, Article 19(3).

³⁴ Margaret Njugunah, ‘Digital access: 17pc of Kenyans now use social media’, *Business Daily*, 3 August 2020.

and the ability to manipulate information, makes the digital environment vulnerable to misuse.³⁵

Bots, algorithms, and fake accounts can manipulate public opinion, causing real harm, including damage to reputation.³⁶ The sheer volume of online information, a history of misinformation, and limited civic space in Kenya make it difficult to judge the reliability of online information. With limited reliable information and media literacy, people rely on rumours and speculation to understand public affairs. Digital media enables mass production and rapid spread of false information, empowering individuals to create and distribute content.

This participatory media environment blurs the line between producers and consumers and reshapes the public sphere. In societies with restricted civic space, social media hosts both genuine and fake news. These vulnerabilities necessitate legislative measures to protect the rights and reputations of others.³⁷ Accordingly, Kenya's laws on false information address legitimate concerns about problematic online behaviour and appropriately limit the freedom of expression.

Necessity and proportionality of criminal defamation: A case for *Jacqueline Okuta v AG*

Evidently, the restriction of freedom of expression in the digital space may, in some cases, serve a legitimate public interest. However, it is essential to evaluate whether these restrictions are appropriate for their intended purpose. They must also be the least intrusive means

³⁵ Blaise Pascal Andzongo Menyeng, 'Disinformation in Africa: A threat to internet freedom and democracy', *State of Internet Freedom in Africa 2023*, 60.

³⁶ Ngamita, 'Internet freedom and new forms of censorship', 36; Bruce Mutsvairo and Saba Bebawi, 'Journalism educators, regulatory realities, and pedagogical predicaments of the "fake news" era: A comparative perspective on the Middle East and Africa', 74(2) *Journalism & Mass Communication Educator* (2019) 147 defines [a bot] as a 'software that systematically posts automated attention grabbing [publications] to promote a person, product, or ideology, which has courted controversy for purportedly acting as grounds for potential manipulation among [digital media] users'.

³⁷ Kapiyo, 'Social media and content regulation', 20.

available and proportionate to the interest they seek to protect.³⁸ For a limitation to meet the threshold of necessity and proportionality, it must arise from a pressing and substantial need that is relevant, sufficient, and demonstrable.³⁹

Moreover, there must exist a connection between the restricted expression and the protected interest, such that the benefit derived from safeguarding that interest outweighs the harm occasioned to freedom of expression, especially in view of the severity of the sanctions imposed. A limitation is deemed unreasonable where it is excessively harsh, arbitrary in its application, or overreaches the legitimate purpose it purports to serve.⁴⁰

In *Jacqueline Okuta and another v AG and another*, the petitioners challenged Section 194 of the Penal Code arguing that it infringed upon the right to freedom of expression protected by Article 33 of the Constitution of Kenya (2010), and that imposing criminal penalties for defamation, a civil wrong, was unnecessary, excessive, and undermined democratic values.

The case arose from two instances where statements posted on Facebook led to criminal charges for alleged defamation. The petitioners contended that criminalising such speech was disproportionate and that civil remedies, such as damages, were sufficient and less restrictive. They also argued that criminal defamation laws are vague, overly broad, and subject to arbitrary enforcement, failing constitutional standards of clarity, necessity, and proportionality.⁴¹ The state defended Section 194, claiming it served a legitimate aim by protecting individuals from reputational harm and discouraging malicious speech.⁴²

³⁸ *Karen Kandie v Alassane BA and another*, Petition 2 of 2015, Judgement of the Supreme Court, eKLR para 79. See generally *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Republic of Zimbabwe* (2009) AHRLR 235 (ACHPR 2009).

³⁹ Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019, Principle 9(4).

⁴⁰ *Attorney General of Antigua and Barbuda and others v Leonard Hector*, 15.

⁴¹ *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 2 and 3.

⁴² *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 3 and 4.

However, Justice John Mativo found that constitutional restrictions on freedom of expression should only apply to expressions threatening public interest, not solely individual reputation, and that civil remedies are available and effective for such cases.⁴³ He applied the proportionality test and determined that criminal sanctions for defamation failed both the necessity and proportionality requirements.⁴⁴ He concluded that civil remedies adequately address reputational harm without the punitive consequences associated with criminal law.⁴⁵

The High Court highlighted the ‘chilling effect’ of criminal defamation, which discourages robust public discourse, investigative journalism, and legitimate criticism which is an essential element of democracy.⁴⁶ Ultimately, the Court held that criminal defamation is an outdated, excessive, and constitutionally indefensible method of protecting reputation. It declared Section 194 of the Penal Code invalid for being inconsistent with the constitutional guarantee of freedom of expression under Article 33, affirming that civil remedies are the appropriate means for addressing defamation.⁴⁷

Although criminal laws regulating online expression are often justified on the basis of protection of individual reputation, preservation of national security, or prevention of terrorism, in practice, criminal defamation has frequently been misapplied to suppress content deemed undesirable by governments and powerful actors.⁴⁸ This misuse has contributed to a culture of self-censorship, undermining the democratic function of open critique. Accordingly, it is imperative to assert that the imposition of criminal sanctions on individuals for seeking, receiving, or imparting information or ideas can seldom be justified as a proportionate means of protecting the rights or reputation of others.

⁴³ *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 5.

⁴⁴ *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 10-12.

⁴⁵ *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 12.

⁴⁶ *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 11.

⁴⁷ *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 13.

⁴⁸ Antonio Zappulla, ‘Foreword’, in Joel Simon, Carlos Lauría and Ona Flores, ‘Weaponising the law: Attacks on media freedom’, Thomson Reuters Foundation, 2023, 2.

As noted in *Jacqueline Okuta*, the legitimate aim of limiting freedom of expression is to preserve state and societal interests, not to safeguard the private reputations of individuals.⁴⁹ Criminal defamation, by its very nature, is primarily concerned with personal reputation and therefore fails to satisfy the public interest threshold required for the curtailment of constitutional rights. Consequently, to employ criminal sanctions to protect individual reputations is not only antithetical to democratic values but also undermines the transformative intent of the Constitution.⁵⁰

In assessing the proportionality of restrictions on freedom of expression in the digital sphere, it is imperative to weigh the adverse impact such restrictions may have on the internet's capacity to foster robust discourse and civic participation, against their purported utility in protecting other legal interests.⁵¹ Given the distinctive architecture of digital media, it must be recognised that regulatory approaches deemed legitimate and proportionate for traditional media may not necessarily be so in the online context. For instance, in matters involving defamation, the instantaneous and interactive nature of digital platforms empowers affected individuals to exercise the right of reply promptly mitigating harm without the need for coercive legal sanctions.

Accordingly, it is important to review all criminal content-based restrictions in line with international human rights standards.⁵² In particular, statutes criminalising sedition, insult, and the publication of false news should be repealed and replaced with civil remedies that are themselves necessary, proportionate, and narrowly tailored.⁵³ The

⁴⁹ *Jacqueline Okuta and Another v Attorney General and Director of Public Prosecutions*, 5.

⁵⁰ Menyeng, 'Disinformation in Africa', 62.

⁵¹ Joint Declaration on Freedom of Expression and the Internet by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Co-operation in Europe Representative on Freedom of the Media, the Organisation of American States Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 1 June 2011, Principle 1(b).

⁵² Declaration of Principles on Freedom of Expression and Access to Information in Africa, Principle 22(1).

⁵³ Declaration of Principles on Freedom of Expression and Access to Information in Africa, Principle 22(2)-(3).

jurisprudential consensus holds that defamation between private individuals has long been recognised as a civil wrong or tort, with the appropriate recourse lying in an action for damages under common law.⁵⁴ Elevating such matters to the level of criminal offences is not only disproportionate but constitutes a misapplication of the constitutional framework, which is designed to protect rights in the public interest rather than resolve personal grievances through penal mechanisms.⁵⁵

The criminalisation of defamation lacks constitutional foundation, as Article 33(2) of the Constitution of Kenya (2010) is anchored in the collective interest of the state and the general public, and not in the sensitivities of private individuals.⁵⁶ Applying the doctrine of *noscitur a sociis* (meaning that ‘the meaning of a word is known by accompanying words’),⁵⁷ it becomes evident that defamation does not bear the requisite public harm dimension akin to incitement to violence, hate speech, or propaganda for war – offences that fundamentally threaten public order.⁵⁸ As such, criminal defamation – when unrelated to state security or public peace – cannot be properly categorised as a constitutionally legitimate limitation on the right to freedom of expression.

Resuscitation of criminal defamation in Kenya: The peculiarity of *BAKE v AG and others*

In *BAKE v AG and others*,⁵⁹ a judgement issued in 2020, 3 years after *Jacqueline Okuta*, the High Court was once again confronted with the complex legal and constitutional questions surrounding criminal defamation. The petition challenged the constitutionality of Sections 22 and 23 of the Computer Misuse and Cybercrimes Act, arguing that the provisions reintroduced the offence of criminal defamation, which had

⁵⁴ F Reginald Scott, ‘Publishing false news’, 30(1) *Canadian Law Review* (1952) 39.

⁵⁵ *Lohé Issa Konaté v Burkina Faso*, para 150.

⁵⁶ *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 6.

⁵⁷ *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 6.

⁵⁸ *Jacqueline Okuta and another v Attorney General and Director of Public Prosecutions*, 4 and 6.

⁵⁹ *Bloggers Association of Kenya (BAKE) v Attorney General and 3 others*, Petition No 206 of 2019, Judgment of the High Court at Nairobi, (2020) eKLR.

been declared unconstitutional under Section 194 of the Penal Code in *Jacqueline Okuta*, and that the structure of Section 23 of the Act bore semblance to Section 29 of the Kenya Information and Communications Act (Chapter 411A) which was declared unconstitutional in *Geoffrey Andare v Attorney General and 2 others*.⁶⁰

The petitioner contended that the impugned provisions infringe Articles 32 and 33 of the Constitution of Kenya (2010), which guarantee the rights to freedom of conscience, religion, thought, belief, opinion, and expression. It was further submitted that these rights echo Article 19 of both International Covenant on Civil and Political Rights (ICCPR) and Universal Declaration of Human Rights (UDHR), protecting the right to hold opinions without interference, and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The petitioner submitted that the Constitution of Kenya (2010) does not privilege any type of opinion or expression, nor does it condition the enjoyment of freedom of expression on the truth of the statements made.⁶¹ The petitioner argued that Sections 22 and 23 of the Computer Misuse and Cybercrimes Act impose a preliminary filter or threshold before one is entitled to express oneself, thus amounting to an unconstitutional limitation.

In determination, the High Court under Justice JA Makau acknowledged that Article 32 of the Constitution of Kenya (2010) imposes on the state a primary obligation of neutrality towards the content of ideas expressed by individuals. It emphasised that the state must, in principle, ensure that no person, opinion, or mode of expression is excluded *a priori* from the public sphere. Nonetheless, the Court reiterated that the right to freedom of expression is not absolute, and that Article 24 of the Constitution allows for its limitation, provided that such restriction is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.⁶²

⁶⁰ *BAKE v Attorney General and 3 others*, para 27.

⁶¹ *BAKE v Attorney General and 3 others*, paras 28, 29, 30, 59.

⁶² *BAKE v Attorney General and 3 others*, para 36, 37.

The High Court referenced *Özgür Gündem v Turkey*, where the European Court of Human Rights acknowledged that the effective exercise of freedom of expression may require not just non-interference by the state but positive measures to protect individuals from violations by third parties. These include obligations to strike a fair balance between the general interest of the community and the rights of individuals.⁶³ In this context, the Court observed that the state has a legitimate role in ensuring the safety and integrity of information flows, particularly in the digital age, where misinformation has a unique and expansive impact.⁶⁴

Concerning Section 22 of the Computer Misuse and Cybercrimes Act, which criminalises intentional publication of false, misleading or fictitious data intended to be acted upon as authentic, the High Court considered whether the limitations it imposes are proportionate. It found that assessing proportionality entails not only examining the impact of such restrictions on private citizens, but also understanding their broader systemic effects, especially within the digital environment where the rapid dissemination of information can cause irreparable harm.

The High Court observed that the petitioner had failed to demonstrate that the limitation imposed by Section 22 was excessive in relation to the purpose it sought to achieve. The High Court found that the compelling state interest in protecting national security, public order, and the rights of others, justified preventive restrictions to inhibit the dissemination of information that is harmful to the public at large. The High Court stressed that the existence of less restrictive means must be established to invalidate a legislative measure; yet in the instant case, no viable alternative to achieving the legislative objective was proposed.⁶⁵

The High Court went on to scrutinise Section 23 of the Computer Misuse and Cybercrimes Act, distinguishing it from Section 29 of Kenya Information and Communications Act, which had been invalidated for being overly broad and vague, particularly in its use of subjective lan-

⁶³ *BAKE v Attorney General and 3 others*, para 38 citing *Özgür Gündem v Turkey* (Judgement on merits) 23144/93, ECtHR, (2000).

⁶⁴ *BAKE v Attorney General and 3 others*, para 39.

⁶⁵ *BAKE v Attorney General and 3 others*, paras 40, 41 and 42.

guage such as ‘grossly offensive’, ‘indecent’, or ‘menacing’. The High Court noted that unlike Section 29 of Kenya Information and Communications Act, Section 23 of the Computer Misuse and Cybercrimes Act was precise, narrow in scope, and directly targeted the misuse of computer systems for disseminating harmful falsehoods. The Court noted that Section 23 of the Computer Misuse and Cybercrimes Act applied universally, unlike Section 29 of the Kenya Information and Communications Act which was restricted to individuals licensed to operate telecommunications systems.⁶⁶

Further drawing upon *County Government of Kiambu and another v Senate and others*, the High Court underscored the role of judicial interpretation in adapting the law to new societal contexts, especially in the face of evolving technologies and communications systems. It cautioned against static interpretations of constitutional rights, observing that legislation must be flexible enough to address contemporary challenges such as cybercrime, misinformation, and mass disinformation campaigns.⁶⁷

In addressing the petitioner’s broader concerns, the High Court noted that while Articles 32 and 33 of the Constitution protect all expressions, Article 33(2) clearly outlines exceptions for propaganda for war, incitement to violence, hate speech, and advocacy of hatred. Furthermore, Article 33(3) provides that every person must respect the rights and reputations of others in exercising the right to freedom of expression. The Court also referred to Article 19(3) of the ICCPR, which permits lawful restrictions on freedom of expression in the interests of public order, the protection of reputation, or the general welfare in a democratic society.

The High Court upheld the provisions noting that freedom of expression, just like other rights, has a negative dimension (restricting arbitrary state interference) and a positive dimension (requiring the state to protect individuals from harm, including malicious online abuse). It

⁶⁶ *BAKE v Attorney General and 3 others*, para 47.

⁶⁷ *BAKE v Attorney General and 3 others*, para 51.

stated that the state has a legitimate interest in ensuring the authenticity, safety, and integrity of digital communications in light of increasing cyber threats. Expression may be restricted when it infringes the reputation, dignity, or security of others, especially online, because digital content spreads quickly and can cause amplified harm. Any such restriction must be assessed through a proportionality test that weights individual rights against the public interest.⁶⁸

The High Court went on to note that preventive measures against harmful online content are justified when the state demonstrates a compelling interest and when no equally effective, less restrictive alternative exist. The Court concluded that the petitioners failed to propose a less restrictive yet equally effective alternative to the legal measures established in Section 22 of the Computer Misuse and Cybercrimes Act.

With respect to Section 23 of the Computer Misuse and Cybercrimes Act, the High Court distinguished cyber libel from traditional forms of defamation: internet posts can be shared globally with a single click, meaning reputational damage can be far greater than with conventional media. The Court noted that the technological distinction justifies criminalisation of defamation in the digital space. The Court also noted that while defamation involves speech, constitutional protection to freedom of speech is not absolute.⁶⁹ The state has an obligation to shield individuals from deliberate character assassination or falsehoods, and the anonymity and reach of cyberspace warrant heightened protection.

The reasoning of the Court drew heavily on *Hoho v The State* where the Supreme Court of Appeal of South Africa upheld the constitutionality of criminal defamation.⁷⁰ However, South Africa repealed the offence through Section 34(1) of the Judicial Matters Amendment Act, 2023, marking a significant shift in the legal position. The explanatory memorandum to the South Africa Judicial Matters Amendment Bill, 2023 clarified that the repeal of criminal defamation would not affect

⁶⁸ *BAKE v Attorney General and 3 others*, paras 57, 64, 39, 45, 56 and 40.

⁶⁹ *BAKE v Attorney General and 3 others*, paras 42, 56 and 36.

⁷⁰ *BAKE v Attorney General and 3 others*, paras 54 and 55 citing *Hoho v The State* (493/05) [2008] ZASCA 98.

civil liability for defamation, which remains governed by delictual principles.⁷¹

The Department of Justice and Constitutional Development of South Africa justified this legislative reform by citing concerns raised by international human rights bodies and comparative foreign jurisdictions regarding the chilling effect of criminal defamation laws – particularly on investigative journalism and public dissent. It was noted that alternative remedies, such as civil damages and the offence of *crimen injuria* (meaning the crime of unlawfully and intentionally impairing another person's dignity or privacy),⁷² are available to protect individual dignity without imposing the severe sanctions associated with criminal prosecution.⁷³

In this light, the continued reliance on *Hoho* warrants critical reassessment. Although Justice Piet Streicher, in *Hoho* acknowledged the gravity of criminal sanctions compared to civil penalties, he erred in reasoning that the heightened evidentiary threshold in criminal law (*i.e.*, proof beyond reasonable doubt) sufficiently offsets the impact on freedom of expression.⁷⁴ This position fails to account for the qualitative distinctions between civil and criminal liability – particularly the stigma, punitive consequences, and permanent records associated with criminal conviction.

Moreover, the assertion that criminal sanctions are reasonable so long as the accused knew their conduct was unlawful overlooks evolving international human rights standards. While Justice Streicher might not had the benefit of General Comment No 34 of the United Nations Human Rights Committee on Freedom of Opinion and Expression (2011), and the Declaration of Principles on Freedom of Expression and Access

⁷¹ Publication of Explanatory Summary of the Judicial Amendment Bill 2023, Notice 1678 of 2023, Government Gazette No 48217, 21, 2.35.2.

⁷² South African Law Commission, Chapter 2: South African Legal Response to the Phenomenon of Stalking or Predatory Behaviour, Issue Paper 22, SAFLII, archived 22 November 2008, para 2.22.

⁷³ Publication of Explanatory Summary of the Judicial Matters Amendment Bill 2023, 21, 2.35.2.

⁷⁴ *Hoho v The State*, para 33.

to Information in Africa (2019) issued by the African Commission on Human and Peoples' Rights since the *Hoho* judgement was delivered in 2008, and Justice Makau in *BAKE* ignored these instruments that discouraged the criminalisation of defamation, urging states to adopt civil remedies that are both necessary and proportionate.⁷⁵

Conclusively, the 2010 Resolution on Repealing Criminal Defamation Laws in Africa calls on African States to repeal criminal defamation laws or insult laws, as they constitute a serious interference with freedom of expression and impede the role of the media as a watchdog, preventing journalists and media practitioners from practicing their profession without fear and in good faith.⁷⁶

The impact of Sections 22 and 23 of the Computer Misuse and Cybercrimes Act

The provisions of the Computer Misuse and Cybercrimes Act have been invoked to stifle internet freedom during critical events including detention of bloggers, journalists, whistleblowers, and government critics, with the motive of locking up information. The Directorate of Criminal Investigations (DCI) has applied these provisions against people who create or share online content touching on Kenyan politics or alleged corruption.⁷⁷ Such enforcement has resulted in arbitrary arrests, selective prosecutions, intimidation and harassment targeting journalists

⁷⁵ General Comment No 34, CCPR, para 9; Declaration of Principles on Freedom of Expression and Access to Information in Africa, Principle 22(3).

⁷⁶ African Commission on Human and Peoples' Rights, Resolution on Repealing Criminal Defamation Laws in Africa, 24 November 2010, ACHPR/Res.169(XLVIII)10, Preamble 12; World Association of News Publishers (WAN-IFRA), 'Declaration of Table Mountain calling on African governments as a matter of urgency to review and abolish "insult" and criminal defamation laws', 16 February 2011.

⁷⁷ Joseph Ndunda, 'Court releases 22-year-old man arrested for impersonating President Ruto on social media', *The Eastleigh Voice*, 25 April 2025; ARTICLE 19 Eastern Africa, 'Freedom of expression and the digital environment in Eastern Africa: Monitoring report January-December 2020', 2021, 12.

and bloggers,⁷⁸ and the removal or disabling of online posts and websites.⁷⁹

These actions suggest that anti-cybercrime laws are being weaponised to silence legitimate expression and restrict access to critical and pluralistic information, rather than to uphold legitimate regulatory objectives.⁸⁰ The resulting ‘chilling effect’ undermines public confidence in the justice system and disturbs the balance between protecting reputations and ensuring open, democratic discourse.

The same legal framework has also been used for SLAPPs, which target people or groups for speaking on matters of public concern.⁸¹ Human rights defenders, journalists, and civic-minded individuals are frequently prosecuted for defamation in Kenya. Notably, in 2023, blogger Cyprian Nyakundi faced a court injunction and legal restraint after alleging the Kenya Union of Savings and Credit Cooperatives was under investigation for fraud.⁸² Similarly, in 2020, Dr Godwin Agutu, after raising concerns about the misuse of COVID-19 donations, was later arrested on unrelated charges, highlighting the risks faced by those who publicly question authority or expose wrongdoing.⁸³

These suits are often designed not to win on the merits but to waste respondents’ time and resources and discourage them from comment-

⁷⁸ Kapiyo, ‘Social media and content regulation’, 20; Ngamita, ‘Internet freedom and new forms of censorship’, 33.

⁷⁹ ARTICLE 19 Eastern Africa, ‘Freedom of expression and the digital environment in Eastern Africa’, 12.

⁸⁰ Edetaen Ojo, ‘Emerging issues in digital rights in Africa: A discussion paper for the African Declaration on Internet Rights and Freedoms (AfDec) coalition’, Association for Progressive Communications, 2024, 13; Mare, ‘Securing digital rights in Southern Africa’, 6.

⁸¹ *1704604 Ontario Ltd v Pointes Protection Association* [2020] 2 SCR 587, 4. This term originated from the United States of America, see, Penelope Canan and George W Pring, ‘Studying strategic lawsuits against public participation: Mixing quantitative and qualitative approaches’, 22(2) *Law & Society Review* (1988) 386.

⁸² Mzalendo Trust, ‘The effect of strategic lawsuits against public participation (SLAPP) on freedom of expression and citizen participation in public dialogues in Kenya’, 2023, 27.

⁸³ Mzalendo Trust, ‘The effect of strategic lawsuits against public participation (SLAPP) on freedom of expression and citizen participation in public dialogues in Kenya’, 27.

ing on public issues.⁸⁴ They often take the form of defamation, abuse of process or malicious prosecution cases. Unlike vexatious litigation, which involves a pattern of baseless suits, a single SLAPP can be enough if its goal is to suppress public participation.⁸⁵

Canadian courts have recognised the potential abuse of SLAPPs and have developed safeguards against the potential abuse. A court may dismiss a case if it stems from an expression on a matter of public interest.⁸⁶ Nonetheless, proceedings may continue if the underlying claim has a real prospect of success, is supported by credible evidence and lacks any valid defence.⁸⁷ The claimant must also show substantial harm from the expression, and the public interest in allowing the case must outweigh the chilling effect on free speech and civic engagement.⁸⁸

Some jurisdictions provide statutory SLAPP defences. South Africa's Constitutional Court addressed similar concerns in *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*.⁸⁹ Although South African law lacks an explicit SLAPP defence, the Court held that courts have inherent authority to prevent abuses of its processes. Litigation is abusive when it is used for ulterior purposes, such as silencing public participation or imposing punitive costs.

Courts assess abuse by examining the legal merits of the claim, the claimant's motive and the foreseeable consequences. Even if a claim appears legally sound, judges must consider whether the true aim is to chill constitutionally protected rights. In recognising the alignment between SLAPP-type litigation and the abuse of process doctrine, the South African Constitutional Court created jurisprudential space for the invocation of a SLAPP defence in appropriate circumstances.⁹⁰

⁸⁴ *Mineral Sands Resources (Pty) Ltd and others v Reddell and others* (CCT 66/21) [2022] ZACC 37, para 42.

⁸⁵ *Mineral Sands Resources (Pty) Ltd and others v Reddell and others*, para 80.

⁸⁶ 1704604 *Ontario Ltd v Pointes Protection Association*, 25.

⁸⁷ 1704604 *Ontario Ltd v Pointes Protection Association*, 8.

⁸⁸ 1704604 *Ontario Ltd v Pointes Protection Association*, 11.

⁸⁹ *Mineral Sands Resources (Pty) Ltd and others v Reddell and others*, paras 84-88.

⁹⁰ *Mineral Sands Resources (Pty) Ltd and others v Reddell and others*, paras 83 and 89-102.

Conclusion

The re-criminalisation of defamation in Kenya through the Computer Misuse and Cybercrimes Act presents a significant challenge to constitutionalism, democratic discourse, and the realisation of digital rights. While the state has a legitimate interest in protecting individuals from reputational harm and interdicting the spread of harmful digital content, such restrictions must meet the threshold established in Article 24 of the Constitution. The jurisprudence in *Jacqueline Okuta v AG and DPP* compared to *BAKE v AG and others*, reveals an unsettling trend of using criminal defamation as a tool for silencing dissent, curbing criticism of public officials, and shrinking civic space.

The latter decision, when juxtaposed against international and comparative human rights standards, exposes a misalignment between domestic judicial reasoning and the evolving consensus on the decriminalisation of speech-related offences. The global shift, including South Africa's recent repeal of criminal defamation, underscores the growing recognition that civil remedies offer a more appropriate and constitutionally sound response to reputational harm, especially in a digital age marked by rapid dissemination, heightened interactivity, and the potential for robust counter-speech.

Moreover, the selective enforcement of these provisions, particularly against journalists, bloggers, whistleblowers, and government critics, illustrates how vague and overbroad laws can be weaponised to stifle legitimate expression, distort the purpose of criminal justice, and chill public participation. The increasing use of these provisions in SLAPPs further entrenches a culture of fear, legal intimidation, and institutional mistrust. Therefore, Kenya must reassess the continued criminalisation of defamation in light of its constitutional framework, its obligations under international human rights law, and the practical realities of digital communication. Legislative reform should aim to repeal criminal defamation and related speech offences, replacing them with narrowly tailored civil remedies that safeguard both reputational rights and the foundational freedom of expression.

