



MZALENDO



**THE EFFECT OF  
STRATEGIC LAWSUITS  
AGAINST PUBLIC  
PARTICIPATION (SLAPP)**

**ON FREEDOM OF EXPRESSION AND  
CITIZEN PARTICIPATION IN PUBLIC  
DIALOGUES IN KENYA**









## DISCLAIMER AND ACKNOWLEDGEMENTS

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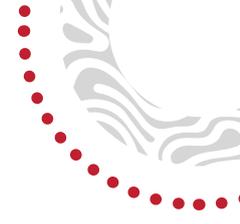
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## ABOUT THIS STUDY:

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This report is an output of Mzalendo Trust commissioned study on Strategic Lawsuits Against Public Participation - SLAPPs. The report seeks to secure a conducive legal, policy, and institutional environment for freedom of expression and citizen participation in public dialogues in Kenya. It aims to enhance awareness among policy makers and other duty-bearers on the effects of gag complaints on the freedom of expression and the right of citizens to participate in public discourses. Further, the report seeks to provide dialogue spaces for media practitioners, policy makers, journalists, and relevant duty bearers to influence them to explore other complaint mechanisms with litigation as a last resort in purported slander and libel cases.

### RESEARCHER:

**Ombok Otieno:** Renowned journalist, development consultant, human rights defender, and independent researcher.



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## ACRONYMS AND ABBREVIATIONS

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<b>AI</b>	Artificial Intelligence
<b>ATPU</b>	Anti-Terrorism Police Unit
<b>BBC</b>	British Broadcasting Corporation
<b>CA</b>	Communications Authority
<b>CS</b>	Cabinet Secretary
<b>DCI</b>	Directorate of Criminal Investigations
<b>DPP</b>	Director of Public Prosecutions
<b>EACC</b>	Ethics & Anti-Corruption Commission
<b>ICT</b>	Information Communication Technology
<b>IEBC</b>	Independent Electoral & Boundaries Commission
<b>IMF</b>	International Monetary Fund
<b>IPOA</b>	Independent Policing Oversight Authority
<b>JSC</b>	Judicial Service Commission
<b>KCAA</b>	Kenya Civil Aviation Authority
<b>KUSCCO</b>	Kenya Union of Savings and Credit Cooperatives
<b>KEMSA</b>	Kenya Medical Supplies Agency
<b>KICA</b>	Kenya Information and Communication Act
<b>MCK</b>	Media Council of Kenya
<b>MP</b>	Member of Parliament
<b>MTRH</b>	Moi Teaching and Referral Hospital
<b>NEMA</b>	National Environment Management Authority
<b>NYS</b>	National Youth Service
<b>ODPP</b>	Director of Public Prosecutions
<b>PAC</b>	Parliamentary Accounts Committee
<b>PIC</b>	Public Investments Committee
<b>SGR</b>	Standard Gauge Railway
<b>SLAPP</b>	Strategic Lawsuits Against Public Participation

## OVERVIEW

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Civic space is the environment that enables people and groups – or “civic space actors” – to participate meaningfully in their societies’ political, economic, social and cultural life. It is the legal and policy space within which people express views, assembles, associate and engage in dialogue with one another and with authorities about issues that affect their lives, from the quality of basic services to better institutions and respect for fundamental freedoms. This enables citizens to come together, share their interests and concerns and act to influence their societies.

Today, civic space is under pressure due to the spread of repressive laws and increased restrictions on freedoms to express, participate, assemble, and associate. States and other powerful actors deliberately get involved in litigation to suffocate public debate, free speech, and protest against significant developments. Thus, there has been an increase in strategic lawsuits against public participation (SLAPPs) worldwide.

## WHAT IS SLAPP?

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SLAPP are lawsuits alleging defamation that is brought to intimidate, burden, punish, or harass the defendant for speaking out against the plaintiff on matters of public interest.<sup>1</sup> SLAPPs enable powerful actors to misuse legal systems to discourage or prevent legitimate public criticism of their decisions and Activities.

SLAPP regularly “threatens to bring in the defamation law as well as misuse of data protection and privacy law” against free speech.<sup>2</sup> It can take many other forms including; defamation claims, criminal and civil suits, fabricated charges and claims for damages. Often, they are filed under the guise of protecting individual rights. Still, they exploit the legal system to infringe on freedom of expression, access to information and public participation.<sup>3</sup>

According to a UNESCO report, it is regarded as the misuse of the judicial system to attack freedom of expression. Incidents have been on the rise in different regions and have garnered significant attention from advocates and international bodies, particularly in Europe, given the severity of the trend there.<sup>4</sup> Sub-Saharan Africa is equally burdened by such trends.

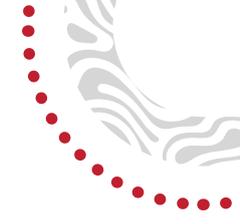
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1. “SLAPP suit.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/SLAPP%20suit>. Accessed 5 Mar. 2024.

2. United Kingdom Ministry of Justice (2022).

3. <https://www.mediadefence.org/resource-hub/resources/slapps-in-sub-saharan-africa/>

4. <https://unesdoc.unesco.org/ark:/48223/pf0000383832>



## EXECUTIVE SUMMARY

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This study aims to examine the prevalence and impact of SLAPP on media practitioners, human rights defenders, whistleblowers, and public-spirited individuals in Kenya. The research involved a literature review of relevant articles, interviews with media professionals and key informants from journalistic and human rights organizations, case studies, content analysis of defamation trends on the X platform, and reports on the subject.

It is also informed by a survey facilitated by Kobo Toolbox, constituting a sample of 105 respondents from 11 counties, including Nairobi, Homa Bay, Kajiado, Kilifi, Migori, Nakuru, Narok, Nyamira, Siaya, Uasin Gishu, and Vihiga counties. They represented diverse sectors: teaching, business and entrepreneurship, healthcare and nursing, media and communication, finance and accounting, research and consulting, manual and skilled labour, public service and administration and hospitality services. Others were either freelancers, self-employed or unemployed.

The report established that SLAPP, is an increasingly worrying threat to the freedom of expression and media. It shows that media professionals and human rights defenders have been sued several times to stop them from speaking against or exposing the ills of the government and influential individuals and entities. Encouragingly, despite the threats of SLAPP, citizens continue to actively engage in activism.

### SUMMARY OF KEY FINDINGS

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- SLAPP threatens freedom of expression and majorly targets human rights defenders, media professionals, and public-spirited individuals.
- SLAPP's aim is to silence those who expose corruption and abuse of office.
- 65% of respondents attributed such suits silence those who expose vices.
- 55% of litigant's actions were intended to conceal their abuse of public office.
- Women media professionals are targeted with sexual threats.
- Members of public are against SLAPP arrests:
  - 92.31% of respondents said arrests were unjustified.
  - 84% of SLAPP-related judgments were unfair.

The report recommends, among other measures, developing anti-SLAPP reforms, through reviewing existing defamation laws, and training journalists and human rights defenders on defamation, data protection and privacy laws.

# CHAPTER ONE: INTRODUCTION

## 1.1 Overview of the Chapter

This chapter briefly describes the study's background and the problem it seeks to address. It outlines the purpose, objectives, and significance of the research and the study's scope.

## 1.2 Background to the Study

### 1.2.1 Context Setting

Civic space is the environment that enables people and groups – or “civic space actors” – to participate meaningfully in their societies’ political, economic, social and cultural life. It is the legal and policy space within which people express views, assemble, associate and engage in dialogue with one another and with authorities about issues that affect their lives, from the quality of essential services to better institutions and respect for fundamental freedoms. Civil society actors – including human rights defenders, women advocates, children, young people, members of minorities and indigenous people, trade unionists and journalists – should be able to express themselves freely in complete security and effectively effect change.

Articles 34 and 35 of the Constitution of Kenya 2010 guarantee freedom and independence of the media and the right to access information. The media is a critical pillar in promoting democracy, the rule of law, fair play, and informing society on matters that affect the citizenry. The awarding of disproportionate damages against the media by Kenyan courts threatens media sustainability in Kenya. This is especially key as we hold Kenyan leaders accountable in a country where politicians and individuals in the public domain may institute civil defamation suits to stifle the media's reporting on matters of public interest and political discourse.

The right to freedom of expression is unalienable. It is protected by the Constitution of Kenya 2010 and the International Covenant on Civil and Political Rights. Strategic Lawsuits Against Public Participation (SLAPP) are a type of retaliatory lawsuit meant to suppress free speech on matters of public interest, pose a severe risk to the duty to protect the freedom of pluralist media, and undermine efforts to “create a conducive environment for participation in public debate.”<sup>6</sup> SLAPPs negatively impact the Republic of Kenya's internal environment and the rule of law because they limit the scrutiny of issues of public interest, whether they are of economic or political relevance.

A SLAPP suit is defined as:

- *a civil complaint or counterclaim (for monetary damages and injunction),*
- *filed against non-governmental individuals and/or groups,*
- *because of their communications to a government body, official, or the electorate,*
- *on an issue of some public interest or concern*

SLAPP actions “masquerade as conventional lawsuits.” They are normally filed as a cross-claim or counter-claims to a specific action, as a second lawsuit after another party’s initial lawsuit is dismissed, or as a first-party lawsuit against a party that has acted to harm the suing party’s interests without resorting to court. Although there are many different reasons for a SLAPP complaint, defamation is the most common litigation of SLAPP.

Business torts like obstructing contractual obligations or potential economic gains, antitrust, intentional infliction of emotional distress, invasion of privacy, civil rights violations, constitutional rights violations, conspiracy, nuisance, judicial process abuse, and malicious prosecution are some of them. Instead, they are typical “dispute transformation” strategies that utilize the judicial system to provide one side of a political conflict with the unilateral capacity to change both the forum and the subject matter of the conflict.

Even where it is evident that the case is weak both in structure and merit, the tactic of a SLAPP suit is to impose the costs of a legal defence until detractors give up fighting. The main objective is to quiet the opposition rather than to win the case.

### *1.2.2 Historical Review*

Before promulgating the Kenyan Constitution in 2010, incumbent governments were uneasy with the media houses and journalists that had been critical of them. Then, the government’s response to such media was predictable: bans and suspensions of publications and stories, and journalist arrests coupled with prosecution. Other forms of taming an errant press during that period included conducting media raids by raiding the printing press and unknown people buying all newspapers at dawn.

However, since the return of the multi-party system in 1991, the practice of using defamation lawsuits to control a rogue press gained ground. The media has been viewed as less sensational in articulating issues after promulgating the Constitution. This could be attributed to fear of potential repercussions in the event of misrepresentation of facts. The sources of information could also be reluctant to give information due to tracking people.

Strategic litigation has been central to global human rights activism for decades at domestic and international courts. It is a strategy that has been used to create long-lasting social change in laws and public policies to advance human rights. Around the globe, the United Kingdom has been a for-runner for SLAPP suits.

### *1.3 Statement of the Problem*

The bedrock for media freedom in Kenya lies in Article 34 of the Constitution of Kenya, which guarantees the freedom and independence of electronic, print and all other media types, subject to the limitations of freedom of expression under Article 33. Despite these guarantees, there have been well-known forms of media restriction, such as media outlet shutdowns and threats, which have shrunk part of the civic space.

In addition to these, there has emerged the rampant use of legal suits to intimidate media actors to proffer attacks on media outlets and individual journalists.

Strategic Litigation against Public Participation (SLAPP suit) refers to lawsuits brought by individuals and corporate entities aimed at dissuading their critics from continuing to produce negative publicity. SLAPP suits do not have any valid legal claims against the critics. People bring SLAPP suits because they can either temporarily prevent their critics from making public statements against them or, more commonly, to make critics spend all of their time and resources defending the SLAPP suits and, in most instances, exploiting archaic laws which are punitive and likely to award punitive damages in the name of defamation and libel.

Despite robust constitutional and legal frameworks, media actors alongside public-spirited citizens and civil society organizations have faced challenges from various orders issued by courts and punitive costs when exercising their freedom of expression through the various defamation or libel suits filed by individuals and corporations seeking to stop the public from receiving information. This has been exacerbated by the draconian defamation laws and wide discretionary powers judges have in arbitrating this kind of dispute.

#### *1.4 Purpose of the Study*

The purpose of this study is to inform the legal framework on the freedom of expression and freedom of media in Kenya. Consequently, secure a conducive legal, policy and institutional environment for the freedom of expression and citizen participation in public dialogues in Kenya. It also aims to enhance awareness among policy makers and other duty-bearers on the effects of gag complaints on the freedom of expression and the right of citizens to participate in public discourses. Further, the study seeks to provide dialogue spaces for media practitioners, policy makers, journalists and relevant duty bearers to influence them to explore other complaint mechanisms with litigation as a last resort in purported slander and libel cases.

#### *1.5 Objective of the Study*

Identify and document instances of SLAPP suits against journalists, human rights defenders, and public-spirited individuals who want to expose the chilling effects, including the gendered impacts such suits have on the lives of the victims.

#### *1.6 Significance of the Study*

This research is crucial to promoting democracy, transparency, and accountability in Kenya. The country cannot attain these if it disrespects the freedom of expression and freedom of the media as provided in Articles 33 and 34 of the 2010 Constitution. The study comes at a time when there are increasing SLAPP cases against journalists and human rights defenders. It, therefore, provides a basis for lobbying the legislators to safeguard these freedoms through progressive and transformative laws. Specifically, the study is significant to journalists, media professionals, human rights defenders, whistle-blowers, and public-spirited individuals facing SLAPP threats. It is also essential to State and non-State entities that advocate for protecting the freedom of expression and the media.

#### *1.7 Scope and Delimitation of the Study*

While the study on Strategic Lawsuits Against Public Participation (SLAPP) provides valuable insights into the dynamics of legal actions aimed at stifling free speech and civic engagement, several limitations should be acknowledged.

Firstly, the study relies heavily on reported cases and legal documentation, potentially leading to a biased sample that may not fully represent the extent of SLAPP actions, as many cases may go unreported or settle out of court. Additionally, the study may face challenges in capturing the evolving nature of SLAPP tactics, as legal strategies employed by those seeking to suppress public participation may adapt over time.

Furthermore, the research may not fully explore the psychological and emotional impact on the individuals targeted by SLAPP suits, which could provide a more comprehensive understanding of the phenomenon. Despite these limitations, the study contributes valuable insights into the broader knowledge of SLAPP and its implications for free speech and public participation.

The study needed lawyers who have represented institutions and individuals in more than one case in point. Many journalists shied away, fearing victimization by employers or the prominent people who sued them and their employers. They also feared getting re-traumatized or falling back into the depression that they had worked so hard to come out of. This is the very reason more on SLAPP should be done.

Getting Informants for interviews was also a challenge given the rainy season. In addition, it was difficult to fix appointments with informants, which affected reporting timelines. Informants also embargoed much information, including their lawyers' names, the media houses they worked for, or even the articles under question.

The draft report was validated by about thirty (30) participants, including journalists, human rights defenders, lawyers and human rights institutions.



# 2 CHAPTER TWO: LITERATURE REVIEW

## 2.1 Overview of the Chapter

This section analyses the related literature on understanding SLAPP, increased use of criminal defamation laws, and Kenya’s media freedom and freedom of expression laws.

## 2.2 Understanding SLAPP

In the 1970s, there was an explosion of “Strategic Lawsuits Against Public Participation (SLAPP)” in America.<sup>5</sup> The targets were typically not extremists or experienced activists but average, middle-class and blue-collar Americans who were sued for reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in an initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations.<sup>6</sup> Yet, these are among the most important political rights of citizens. The motive behind SLAPP is to deter citizens from exercising their political rights or punish them for doing so. SLAPP sends a clear message: that there is a “price” for speaking out politically. The price is a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings.<sup>7</sup>

In 2011, the Human Rights Committee provided guidance related to defamation in its comment on Article 19 of the ICCPR;<sup>8</sup> This interpretative document calls attention to the Covenant’s strong protection of expression in the context of public debate regarding public political figures and institutions, expressing concern about laws such as “lese majesty, desacato, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials”.<sup>9</sup>

The comment highlights that defamation laws should be designed in a way that does not serve to curtail free expression. It notes that States should consider the decriminalisation of defamation, clarifying that criminal law should only be applied to the most severe cases and that imprisonment is never an appropriate sanction. It recommends placing reasonable limits on damages to be paid by the losing party.<sup>10</sup> It explains that defamation laws should provide for truth as a defence and should not apply to expression that cannot be subject to verification (i.e. opinion). The Comment also reflects the importance of the standard of actual malice and of public interest as defenses. The Comment also notes that prohibiting displays of lack of respect to religions and belief systems is incompatible with the Covenant, except in the case of expressions amounting to advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence within the provisions of Article 20 of the ICCPR.<sup>11</sup>

5. Pring, G. (1989). SLAPPs: Strategic Lawsuits against Public Participation. *Pace Environmental Law Review*, 7(1). [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1535&context=pehr](https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1535&context=pehr)

6. *ibid.*

7. *ibid.*

8. United Nations Educational, Scientific and Cultural Organization, (2022). The “misuse” of the judicial system to attack freedom of expression. *World Trends in Freedom of Expression and Media Development*: <https://unesdoc.unesco.org/ark:/48223/pf0000383832>

9. *ibid.*

10. *ibid.*

11. *ibid.*

This is in line with the Human Rights Council Resolution 16/18 that had been adopted earlier in 2011 and is a position that would also be reflected in the Rabat Plan of Action on the Prohibition of Incitement to Hatred. More recently, through Resolution 39/6(2018)<sup>9</sup> and Resolution 45/18(2020), the Human Rights Council expressed concern for the misuse of defamation and libel laws (among other types of legislation) to restrict legitimate expression and interfere with journalists' work – especially through excessive criminal penalties – and urged States to revise and repeal them as needed to conform to international standards.<sup>12</sup>

### **2.3 Increased use of Criminal Defamation Laws**

The UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur for Freedom of Expression, the Special Rapporteur on Freedom of Expression and Access to Information in Africa and the OSCE Representative on Freedom of the Media have repeatedly called for criminal defamation laws to be abolished and civil ones to be favored, both through statements they issued individually, as well as through joint declarations.<sup>13</sup> Ten of their joint declarations contain recommendations concerning defamation and related offences. These call attention, among other aspects, to the problematic nature of criminal defamation legislation, blasphemy laws and those protecting the reputation of public figures, institutions and state symbols, the importance of ensuring the proportionality of civil sanctions, and the defense of opinion, proof of truth, fair comment and reasonable publication.<sup>14</sup>

However, in Central and Eastern Europe, there has been an increased use of criminal defamation laws, which are in force in 15 out of the region's 25 states, with a majority of them including the possibility of custodial sanctions. Ten countries have abolished all general provisions against defamation and insult, and four more have implemented partial decriminalization.<sup>15</sup>

Criminal defamation offences persist in 29 of the 33 Latin America and Caribbean states and continue to be weaponized against journalists and bloggers. In Western Europe and North America, criminal defamation remains in the statutes of 20 out of the 25 states, most retaining custodial sanctions. Between 2003 and 2018, five countries abolished criminal defamation and insult laws, and another partially repealed one.<sup>16</sup>

In Asia and the Pacific, 38 of 44 states retain criminal defamation, with six repealing it and one advancing a partial repeal. A breakdown of the data in the Issue brief shows that defamation is still a criminal offence in 39 of Africa's 47 countries.<sup>17</sup> As of December 2021, there were more than a million political prisoners around the world<sup>18</sup> and 302 journalists imprisoned<sup>19</sup>.

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12. *ibid*

13. *ibid*

14. *ibid*

15. *ibid*

16. United Nations Educational, Scientific and Cultural Organization.(2022).Defamation laws and SLAPPs increasingly "misused" to curtail freedom of expression.<https://www.unesco.org/en/articles/defamation-laws-and-slapps-increasingly-misused-curtail-freedom-expression>

17. *ibid*.

18. United States of America, Department of State(2021 ).Voices of Political Prisoners <https://www.state.gov/voices-of-political-prisoners/>

19. Committee to Protect Journalists.(2021 ). 302 Journalists Imprisoned.

[https://cpj.org/data/imprisoned/2020/?status=Imprisoned&start\\_year=2021&end\\_year=2020&group\\_by=location](https://cpj.org/data/imprisoned/2020/?status=Imprisoned&start_year=2021&end_year=2020&group_by=location)

In Africa, concerted efforts were made in the past decade towards scrapping repressive defamation laws, and campaigns have yielded some fruits. In 2014, the Decriminalisation of Expression Campaign was started by the Special Rapporteur on Freedom of Expression and Access to Information in Africa, Advocate Pansy Tlakula, along with organisations spanning the five regions of Africa: East, West, South, Central and North. Its goal is to end criminal defamation, insult, false news and sedition laws in Africa.<sup>20</sup> Insult, false news, sedition and certain types of defamation laws criminalise various types of expression, preventing the media from reporting fairly on matters of public concern and the community debating such issues.<sup>21</sup> These laws are used to arrest and jail journalists, bloggers and media owners, leading to self-censorship and a stifling of public debate on critical issues. Shutting down debate hurts democracies, both stable and emerging and slows economic and social progress.<sup>22</sup>

In 2014, the African Court on Human and Peoples' Rights issued a landmark judgment on a freedom of speech case, Lohé Issa Konaté v. Burkina Faso, that sending individuals to prison on defamation grounds violates the right to freedom of expression and criminal defamation laws should only be used in restricted circumstances. Further progress is required in decriminalizing defamation in Africa<sup>23</sup>.

For example, while defamation has been decriminalized in countries such as Ghana, Kenya and Sierra Leone, activists and journalists continue to be arrested and charged under ruthless laws. The Executive Director of the anti-corruption civil society organization "Alliance of Social Equity and Public Accountability", Mensah Thompson, was detained on February 9, 2022, and charged with publishing false news. The detention follows a complaint by the Armed Forces over a Facebook post in which Thompson claimed that the President and his family had used the presidential jet for a shopping trip to the UK. Thompson had reportedly retracted his statements and issued a public apology. He was arraigned the following day and was granted a 50,000 cedis bail (approximately 6,500 USD).<sup>24</sup>

Later, on February 10, 2022, Kwabena Bobbie Ansah, a radio host for Accra FM, was arrested on charges of publishing false news and of offensive conduct concerning a video he allegedly posted on social media where he claimed that the First and Second Ladies of Ghana, Mrs Rebecca Akufo-Addo and Mrs Samira Bawumia, fraudulently appropriated state land for the Rebecca Foundation, a non-profit organization. The police further accuse the radio host of failing to honor several invitations to assist the police with the investigation, which the radio presenter denies. Ansah was later released on bail of 50,000 cedis (approximately 5,600 USD)<sup>25</sup>.

In February 2017, the High Court of Kenya declared Section 194 of the Penal Code on criminal defamation unconstitutional in a case brought by Jacqueline Okuta and Jackson Njeru. Both had been pursued under Section 194 concerning their posts on the "Buyer Beware Kenya" Facebook page. However, in 2018, the Kenyan Parliament reintroduced criminal defamation under Section 23 of the Computer Misuse and Cybercrimes Act. This Act has been used to target online and offline bloggers, journalists, and other media practitioners.<sup>26</sup>

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20. Decriminalisation of eXpression. (2021). The Campaign. The Pan-African Decriminalisation of Expression Campaign. <https://www.doxafrica.org/the-campaign/>

21. *ibid.*

22. *ibid.*

23. See: <chrome-extension://efaidnbnmnnibpcjpcgIcIefindmkaj/https://www.african-court.org/en/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf>

24. See: <https://monitor.civicus.org/explore/Press-freedom-violations-surge-journalists-assaulted-arrested-prosecuted/>

25. See: <https://monitor.civicus.org/explore/Press-freedom-violations-surge-journalists-assaulted-arrested-prosecuted/>

26. See: <https://www.article19.org/resources/kenya-inordinate-damages-violate-media-freedom/>

## 2.4 Kenya's Laws on Freedom of Expression and Media

Several laws regulate freedom of expression and freedom of media in Kenya, as highlighted below:

### 2.4.1 The Constitution:

Article 33(1)(2) and (3) guarantee one the freedom to seek, receive or impart information or ideas. This freedom stops when it extends to propaganda for war, incitement to violence, hate speech, advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm, or is based on any ground of discrimination. And in exercising the right to freedom of expression, every person shall respect the rights and reputation of others.<sup>27</sup>

### 2.4.2 The Penal Code:

Section 181 of the Penal Code prohibits the “distribution and exhibition of indecent content with the potential to corrupt morals”, punishable by imprisonment for two years or a fine of Sh 7,000.<sup>28</sup> In February 2017, the High Court declared Section 194 of the Penal Code on criminal defamation unconstitutional in a case brought by Jacqueline Okuta and Jackson Njeru. Both had been pursued under Section 194 about their posts on the “Buyer Beware Kenya” Facebook page. The court held criminal defamation as an unnecessary, excessive, and unjustifiable restriction on freedom of expression in an open and democratic society.<sup>29</sup>

### 2.4.3 Computer Misuse and Cybercrimes Act (2018):

Section 22 provides that anyone who intentionally publishes ‘false, misleading or fictitious’ information that, among other things, is either a) likely to propagate war or incite others to violence; b) constitutes hate speech; or c) negatively impacts the rights or reputations of others. While clause (c) criminalizes “defamation”, clauses (b) and (c) criminalize a broad and ill-defined range of “hate speech”. It is punishable by up to two years’ imprisonment and/or a fine.<sup>31</sup>

Section 23 further criminalises anyone who “knowingly publishes” false information “that is calculated or results in panic, chaos or violence among citizens of the Republic, or which is likely to discredit the reputation of a person”, punishable by a prison sentence of up to ten years’ imprisonment and/or a fine.

### 2.4.4 Prevention of Terrorism Act (2012):

This Act is used mainly to crackdown on human rights defenders and citizen activists. It includes acts of compelling government or international organisation to do, or refrain from any act as terrorist attacks, yet protests are held to push for change or end of repression and discriminatory activities.<sup>32</sup> Further, Section 19 restricts freedom of the media. It criminalises disclosure of information on ongoing investigations with a punishment of not more than 20 years, without an option of a fine.<sup>33</sup>

### 2.4.5 Security Laws (Amendment) Act (2014):

The Act amends the Prevention of Terrorism Act by adding two extremely punitive provisions.

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27. See: [https://klrc.go.ke/index.php/constitution-of-kenya/112-chapter-four-the-bill-of-rights/part-2-rights-and-fundamental-freedoms/199-33-freedom-of-expression#:~:text=\(3\)%20In%20the%20exercise%20of,rights%20and%20reputation%20of%20others.](https://klrc.go.ke/index.php/constitution-of-kenya/112-chapter-four-the-bill-of-rights/part-2-rights-and-fundamental-freedoms/199-33-freedom-of-expression#:~:text=(3)%20In%20the%20exercise%20of,rights%20and%20reputation%20of%20others.)

28. See: [file:///C:/Users/USER/Downloads/Penal\\_Code\\_cap\\_63.pdf](file:///C:/Users/USER/Downloads/Penal_Code_cap_63.pdf)

29. <https://www.article19.org/resources/kenya-inordinate-damages-violate-media-freedom/>

30. See: <chrome-extension://efaidnbnmnibpcjpcglclefindmkaj/http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ComputerMisuseandCybercrimesActNo5of2018.pdf>

31. *ibid*

32. See: <http://www.kenyalaw.org/lex/actview.xql?actid=No.%2030%20of%202012>

33. *ibid*

**Section 30(a)** sends an individual found to have published or uttered a statement likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism to prison for not less than 14 years.

**Section 30(f)** states that “Any person who, without authorization from the National Police Service, broadcasts any information which undermines investigations or security operations relating to terrorism commits an offence and is liable on conviction to a term of imprisonment for a term not exceeding three years or to a fine not exceeding Kes 5 Million, or both.”

#### **2.4.6 Media Council Act (2013):**

**Sections 3 & 4** require that media enterprises, journalists, media practitioners, foreign journalists and consumers of media services exercise the right to freedom of expression within the limits of reflecting the interests of all sections of society, being accurate and fair, accountable and transparent, respectful of personal dignity and privacy of others, demonstrate professionalism and respect for the rights of others, and be guided by the national values and principles of governance set out under Article 10 of the Constitution.<sup>34</sup> Individuals who fail to comply with the Act are fined up to Sh 200,000 or imprisoned for not less than six months, while media companies and principal officers or staff of the media companies directly responsible for the acts or omissions constituting the offence are penalised with a fine of up to Sh 2 million or jailed for a term not exceeding two years or to both.<sup>35</sup>

The Act also establishes a Complaints Commission to mediate or adjudicate disputes between the government and the media and between the public, the press, and intra-media on ethical issues. It also ensures adherence to high standards of journalism as provided in the code of conduct for journalism in Kenya, as well as achieving impartial, speedy, and cost-effective settlement of complaints against journalists and media enterprises without fear or favour.<sup>36</sup>

#### **2.4.7 Kenya Information and Communications (Amendment) Act (2013):**

Establishes Communications and Multimedia and Appeals Tribunal, which investigates complaints against any publication, the conduct of a journalist or media enterprise or anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise.<sup>37</sup>

#### **2.4.8 Defamation Act, CAP 36:**

Under the law, a defamatory statement means libel, slander, title, slander of goods, and other malicious falsehoods. The Act allows the court to award damages as it may deem just. It states that in the case where libel is in respect of an offence punishable by death, the amount awarded shall not be less than Sh 1 million. If the offence is punishable by imprisonment for under three years, the amount assessed shall not be less than Sh 400,00.<sup>38</sup>

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34. See:chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://mediacouncil.or.ke/sites/default/files/regulations/Media%20Council%20Act%20-%20Act%20No.%2046%20of%202013.pdf

35. *ibid.*

36. *ibid.*

37. See:chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2013/KenyaInformationandCommunications\_Amendment\_Act2013.pdf

38. See:http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2036#:..:text=In%20any%20action%20for%20libel%20or%20slander%20the%20defendant%20may,words%20complained%20of%2C%20before%20the



# 3 CHAPTER THREE: STUDY DESIGN & METHODOLOGY

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## *3.1 Overview of the Chapter*

This chapter documents the locale of the study, study design, target population, sample and sampling techniques that were employed to generate the sample of the study, description of research instruments, validity, piloting of the research instruments, description of data collection and analysis, study ethical considerations, validation of the draft report and report finalisation and presentation.

## *3.2 Locale of the Study*

The study was carried out within Nairobi City County. However, respondents were drawn from 10 counties, including Homa Bay, Kajiado, Kilifi, Migori, Nakuru, Narok, Nyamira, Siaya, Uasin Gishu, and Vihiga. The study utilised the internet and digital platforms to reach out to respondents outside Nairobi City County.

## *3.3 Study Design*

The study adopted a mixed-method research design, facilitating primary and secondary data collection through quantitative and qualitative methods. The data was organised into themes, triangulated, and interpreted to provide meaning to the findings. The use of the mixed method research offered different types of information, thus increasing the study's credibility. By triangulating the quantitative and qualitative findings, this mixed-methods approach offered a nuanced understanding of SLAPP, shedding light on its legal dynamics, socio-political implications, and potential avenues for mitigating its chilling effect on public participation.

## *3.4 Target Population*

The study targeted men and women who have been victims of SLAPP suits for exercising their freedom of speech and working within the limits of freedom of media. These were:

- Journalists
- Human rights defenders
- Whistle-blowers
- Public Spirited Individuals
- Organizations that focus on the rights of journalists, media freedom and human rights

The research respondents were identified in consultation with the Mzalendo trust team, who also supported the booking of interviews, mobilisation and logistics of the respondents.

## *3.5 Study Implementation Phases*

The study was implemented in three main phases: An inception phase, a Data Collection phase and a Data analysis, synthesis and report writing phase.

### 3.5.1 Phase 1: Inception Phase

The inception phase had the following key activities.

#### 3.5.1.1 Literature Review/Desk Research.

This entailed a review of the available secondary data on SLAPP, the motive behind SLAPP and the impact of SLAPP on democracy. The document reviewed:

- Legal framework guiding on freedom of speech and freedom of media, namely the 2010 Constitution, Penal Code, Computer Misuse and Cybercrimes Act (2018), Prevention of Terrorism Act (2012), Security Laws (Amendment) Act (2014), Media Council Act (2013), and Defamation Act Chapter 36.
- List of journalists, media professionals, human rights defenders, whistle-blowers, and public-spirited individuals who've become victims of SLAPP.
- List of organizations that focus on the rights of journalists, media freedom and human rights.
- Court rulings of 'SLAPPed' individuals.
- There were 74 articles and multiple reports by United Nations agencies and reputable journalistic and human rights organizations.

The literature review findings were incorporated into the inception report, development of the study tools and during the synthesis and reporting phase. The literature review findings complemented the data collected from the field, thereby enabling the triangulation of findings.

3.5.1.2 Prepare an inception report, draft research tools, and present it to the Mzalendo Trust for review and input. The inception report and data collection tools were given to Mzalendo Trust, which provided feedback that was incorporated to ensure that the inception report was aligned with study objectives and that the study tools were designed to collect data necessary for answering the study questions.

### 3.5.2 Phase 2: Data Collection Phase

#### 3.5.2.1 Collection of Primary Qualitative Data

The primary data collection phase started upon approval of the inception report and data collection tools by the Mzalendo Trust project team. Data was collected for two months, from October 10, 2023, to December 10, 2023. The process was guided by a flexible field plan, allowing interviews to be rescheduled due to unforeseen challenges.

The study adopted a mixed-methods approach, incorporating both quantitative and qualitative research methods. The data collection process involved administering questionnaires using the Kobo Toolbox. A total of 105 questionnaires representing 49 women and 56 men were administered, and respondents from 11 counties: Nairobi, Homa Bay, Kajiado, Kilifi, Migori, Nakuru, Narok, Nyamira, Siaya, Uasin Gishu, and Vihiga counties, participated in the study.

The respondents represented diverse sectors, including teaching, business and entrepreneurship, healthcare and nursing, media and communication, finance and accounting, research and consulting, manual and skilled labor, public service and administration and hospitality services. Others were either freelancers, self-employed or unemployed. Primary data was also collected through in-depth interviews involving 42 (22 women and 20 men) journalists, human rights defenders, whistle-blowers, and key informants from media and human rights organizations.

These interviews provided valuable insights into the lived experiences of SLAPP targets. This study further adopted a content analysis approach reviewing defamation trends on X[formerly twitter], which provided further information on dynamics around SLAPP threats.

### 3.5.2.2 Data Sampling of Qualitative data collection respondents

Snowballing sampling and purposive sampling techniques were used to generate sample respondents for qualitative data. The technique allowed for the selection of respondents based on their lived experiences, experience and knowledge. The sampling process was guided by the values of inclusivity and equality to ensure the participation of men and women. Key Informant Interviews (KIIs), questionnaires, content analysis and case studies were also utilized to collect qualitative data.

**Table 1: Targeted Number of Key Informant Interviews (KIIs) for study**

NO.	Respondent Category	Number of KIIs Planned	Held
1	Heads of correspondents, reporters, editors, foreign journalists, bloggers, community/grassroots media and new media organizations.	7	2
2	Women journalists	10	7
3	Men journalists	10	4
4	Women human rights defenders	20	15
5	Men human rights defenders	20	13
6	Media monitoring entities/media rights organizations	1	1
	Total KIIs	68	42(62%)

Face-to-face interviews were held with key informants. However, virtual meetings were held in some cases, whereas physical meetings were not possible.

### 3.5.2.3 Collection of Primary Quantitative Data

Quantitative data was collected through a questionnaire administered through Kobo Toolbox. A total of 105 questionnaires representing 49 women and 56 men were administered, and respondents from 11 counties: Nairobi, Homa Bay, Kajiado, Kilifi, Migori, Nakuru, Narok, Nyamira, Siaya, Uasin Gishu, and Vihiga counties, participated in the study. The respondents represented diverse sectors, including teaching, business and entrepreneurship, healthcare and nursing, media and communication, finance and accounting, research and consulting, manual and skilled labour, public service and administration and hospitality services. Others were either freelancers, self-employed or unemployed.

### 3.5.3 Validity and Piloting of Research Tools

The content and face validity of the research tools were ascertained by sharing the tools with the Mzalendo research team for feedback and approval. Piloting was done by administering the tools to a few research respondents who did not participate in the study, after which the tools were revised for use in the main study.

### ***3.5.4 Data Quality Control***

The research team observed data quality throughout the data collection period. The KIIs and workshop discussions were audio-recorded (after securing consent from the participants). Interview notes were also taken where the recording was not consented to. Before the data was analyzed, it was cleaned to remove any inconsistencies, incomplete records, and other errors to ensure the statistical report was accurate.

### ***3.5.5 Research Ethical Considerations***

The study was undertaken professionally and within the internationally agreed research ethics of:

**Informed Consent:** Informed Consent is a voluntary agreement to participate in research. It is a process in which the participant understands the survey and its risks. Informed consent was sought from participants before participation in the Research exercise.

**Confidentiality:** The research team-maintained confidentiality throughout the research process. Survey details were not divulged to any third parties without Mzalendo Trust's permission.

**Do No Harm Principle:** The Do No Harm principle of conflict sensitivity was observed. The principle states that the actions and behaviours of humanitarian actors have consequences on the individual and group dynamics and context in which humanitarian assistance is provided. Therefore, the study was conducted professionally and neutrally without leaving the respondents in a worse situation.

### ***3.5.6 Phase 3: Analysis, Syntheses and Reporting***

Qualitative data analysis involved transcription, coding, categorisation, charting, mapping connections between categories, and exploring patterns of meaning or emerging themes. Quantitative data was analysed using google excel forms. After examining the qualitative and quantitative data sets, both were merged to allow for comparisons and interpretation and to establish the extent to which the results converged, diverged, related, or could be combined to understand the study objectives better.

### ***3.6 Stakeholders' Validation and presentation of the Final report***

The draft report was validated on Tuesday, February 6, 2024. The participants represented those who participated in the study. It aimed to ensure that the report findings and recommendations are credible and that there is stakeholder buy-in to enhance the utility of the study findings. After the validation, the final report was prepared and presented to Mzalendo Trust.



# 4 CHAPTER FOUR: SUMMARY OF FINDINGS

## 4.1 Overview of the Chapter

This chapter presents data analysis that examines SLAPP’s impact. The chapter documents findings, interpretations, and discussions guided by the objective of this study. Results from KIIs and content analysis are presented under key themes, while data from the questionnaire is presented in the tables, bar charts, and pie charts. The findings are discussed alongside the reviewed literature to corroborate the findings with the present study. This chapter has four significant areas: data collection response rate, demographic information of the respondents, and conclusions as guided by the objective.

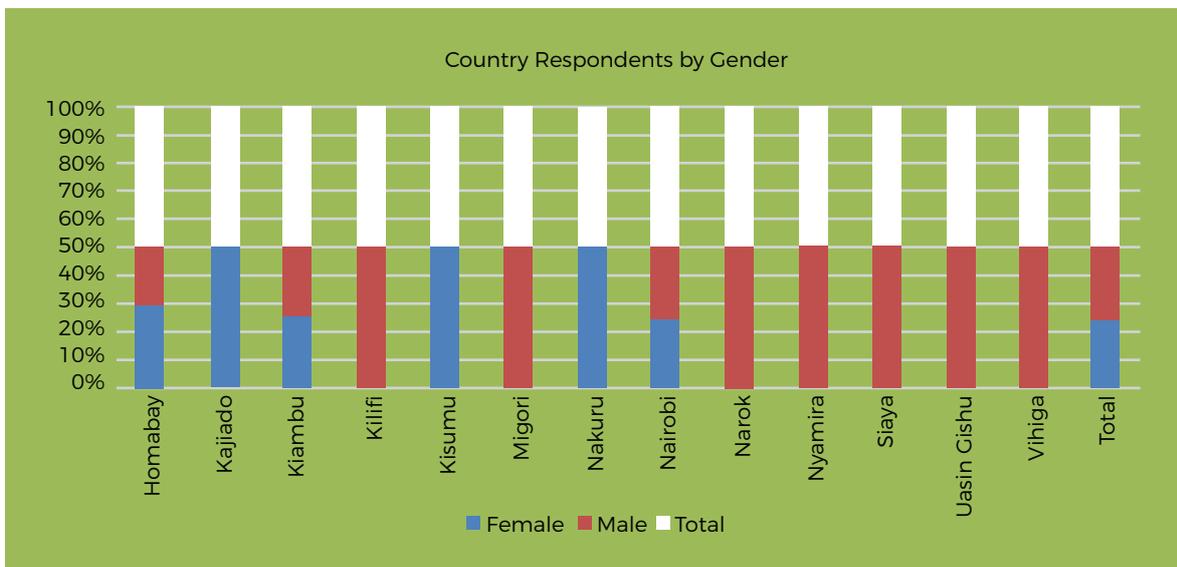
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## 4.2 Data Collection Response Rate

The data response rate was at 62% of the targeted respondents. This provided sufficient data for the analysis, interpretation and making critical recommendations to relevant key stakeholders.

## 4.3 Demographic Information of Respondents

The study reached 105 respondents in 11 counties: Nairobi, Homa Bay, Kajiado, Kilifi, Migori, Nakuru, Narok, Nyamira, Siaya, Uasin Gishu, and Vihiga counties. The breakdown is captured in the chart 1.0 below. Of the 105 respondents, 53% were men and 47% women.



#### 4.4 Manifestations and Triggers of SLAPP

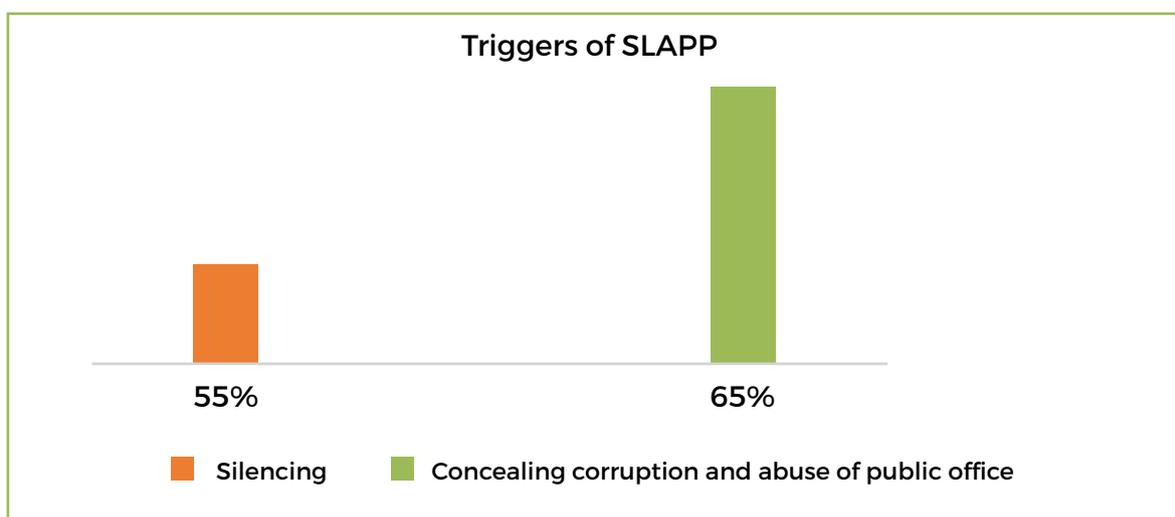
Threats of SLAPP afflicted most of the human rights defenders, media professionals, and public-spirited individuals interviewed. The interviewees testified to being sued multiple times. One example came from an investigative journalist; where, about twenty of the stories he has published in the past 10 years ended up in court with a defamation suit.



*I expose corruption, financial impropriety, and corrupt procurement deals. My stories touch on politicians, big businesses and the who-is-who in Kenya and beyond. Nobody will be happy with my stories. I have been sued so often that every time I write a novel, I consciously know it is a candidate for a lawsuit.....<sup>39</sup>*

**Table 1.0: Triggers of SLAPP**

Respondents from various sectors affirmed the prevalence of SLAPP at 94.29%, with most revealing direct knowledge of individuals sued or charged by government officials, businesses, or politicians.



Corruption and abuse of office were the reasons behind the gagging. 65% said the litigants' actions intended to conceal corruption and abuse of public office. 55% of the respondents attributed the suits to silence those who expose the vice.

This study recognized a pattern where women are targeted with sexual violence threats. One key informant shared an experience of a public-spirited woman in Northeastern Kenya:



*She exposed corruption in her county for the year 2022/2023. The following day, elders visited her parents and threatened to send men to rape her.*

In another case, a former bureau chief for a mainstream media house deployed in the Rift Valley region recounted a case where one of the woman correspondents was threatened with rape by a sitting Member of Parliament.

39. The journalist has won two cases. The rest are dragging in court.

#### 4.5 Common charges levelled against human rights defenders, media professionals, and public-spirited individuals.

According to the study, human rights defenders, media professionals, and public-spirited individuals were found to be primarily charged with defamation. Four of the 11 (six men and five women) journalists interviewed said they had faced defamation charges. They included two women and two men journalists. However, three journalists (two women and a man) admitted to failure to cross-check facts. For one of the women journalists, the court ruled in favor of the plaintiff and awarded Kes. 6 Million in damages. The rest of the cases are still pending in court.

Defamation was also profoundly mentioned by KII's. In some cases, individuals they had assisted through protesting against their arrest, fundraising for their bail, filing an appeal against the court judgement or reading about in the mainstream media and X (formerly Twitter), were accused of spreading rumors or falsehoods. They were also charged with portraying the plaintiffs as dishonest, corrupt, evasive, living a life of hypocrisy, and damaging their reputation.

In response to the question "What was she/he charged with?" out of 150 mentions, "defamation" topped the list 72 times, constituting 48% of the cases; "false accusation" followed with 54 mentions, representing 36% of the mentions, and "professional misconduct" was noted at 37 times, accounting for 24%.

Figure 1.2 below displays the variances.

Common charges levelled against human rights defenders, media professionals, and public spirited individuals.

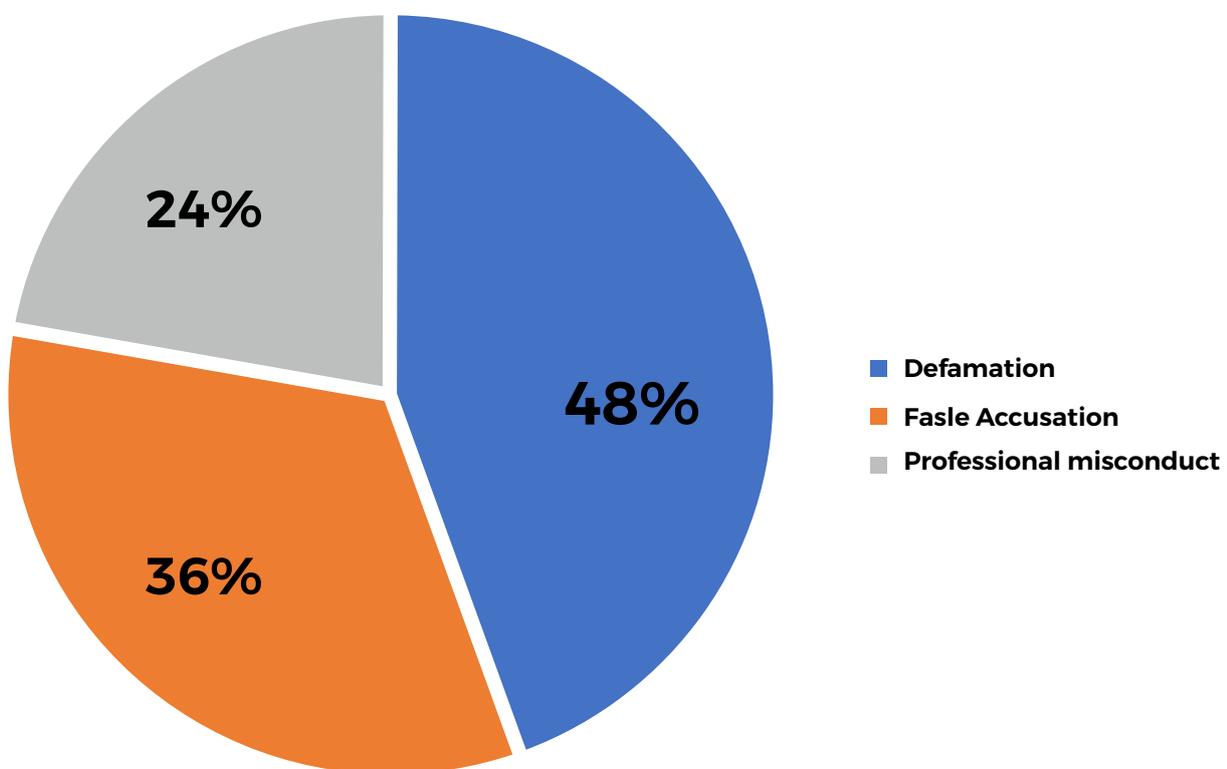


Figure 1.2 Common charges levelled against human rights defenders, media professionals, and public-spirited individuals

A content analysis conducted on X, using the words “gagged, media, activist, whistleblower, and defamation”, revealed a worrying trend of individuals targeted for exposing fraud, corruption, and negligence. In worst-case scenarios, they are arrested and victimized.

#### 4.5.1 Cyprian Nyakundi

On 22 December 2023, Cyprian Nyakundi, an influential blogger, posted on X that the Kenya Union of Savings and Credit Cooperatives (KUSCCO) was under investigation by the Central Bank of Kenya over fraud. A day later, he shared a court injunction obtained by KUSCCO Chief Executive Officer George Ototo restraining him from publishing further content.



#### 4.5.2 Dr. Godwin Agutu

NTV interviewed Dr Godwin Agutu on August 16, 2020, in an exposé about financial and non-financial donations for the COVID-19 response. During the interview, Dr Godwin said that about three-quarters of Jack Ma's donation to Kenya was sold to Tanzania, raising questions about accountability.

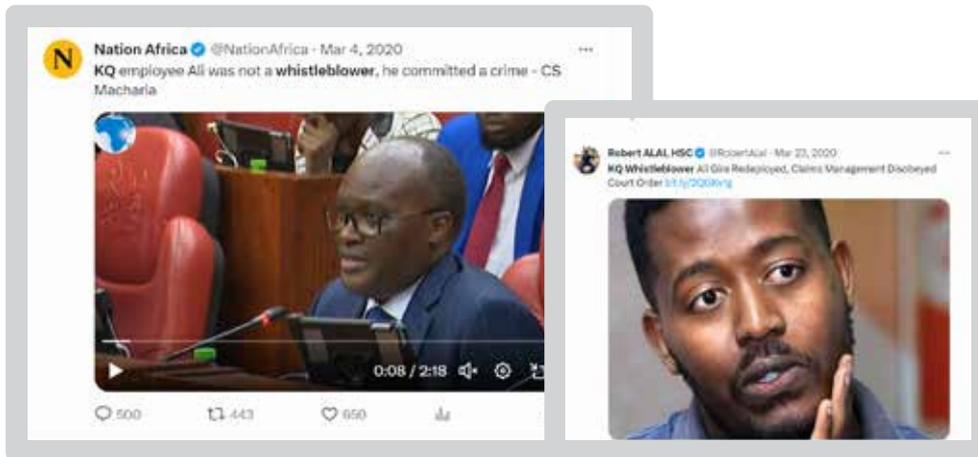


Days later, he was arrested alongside two other men for kidnapping a city businessman. According to a report by the National Africa Report, the Directorate of Criminal Investigation officers said the accused had impersonated Kenya Revenue Authority and Ethics and Anti-Corruption Commission officers. They were charged with abducting a businessman and demanding a bribe for evading tax.

#### 4.5.3 Ali Gire

In 2020, Ali Gire, who was an assistant security agent at Jomo Kenyatta International Airport (JKIA), shared a video of a China Southern Airlines plane landing at the Airport

with passengers from China at a time when countries across the world had banned flights (from China) because of the Covid-19 pandemic. For his actions, Ali Gire was suspended, redeployed, and branded a criminal.



#### 4.5.4 Boniface Mwangi

Boniface Mwangi, a renowned human rights defender, has led protests, was injured in the process, sued several times for defamation by influential individuals, and even arrested for his human rights defence work. He has been taken to court on many occasions, slapped with charges, released on bail, or restricted from publishing against individuals.

On June 1, 2009, Boniface was physically assaulted and arrested at Nyayo stadium when he tried to protest while President Mwai Kibaki was speaking. *“I spent one night in jail, went to court, and was released on cash bail. Then I had a court case for a whole year.”*



Photo credits: Boniface Mwangi Facebook Account

On 14 May 2013, Bonface Mwangi was arrested outside Parliament in Nairobi during a demonstration against Members of Parliament who had demanded higher wages. The protestors had intended to occupy Parliament but were dispersed, beaten by police and arrested.

In 2016 Bonface Mwangi was sued by the then Deputy President, William Ruto, following his tweets accusing the DP of murder, corruption, and land grabbing. In October 2016, Deputy President Ruto sued Bonface for defamation. He accused him of defaming his name by linking him to the murder of the late billionaire business mogul Jacob Juma. At some point, Bonface had to go into exile for fear of his life, disrupting his family life and causing him social rejection.



**Photo credits:** Boniface Mwangi Facebook Account

**Left:** Boniface shows a laceration of a tear gas canister on his chest fired at him by the police during a peaceful demonstration against police killings during the 19 October 2017 demonstrations in Nairobi. **Right:** Boniface was arrested during the protests.

#### **4.5.5 Fredrick Odhiambo Ojira**

On 13th January 2021 Fredrick Odhiambo Ojira was among those allegedly protesting at Uganda House, calling on the Ugandan Government to denounce police brutality and respect human rights law during the presidential elections in Uganda.

The police also arrested Mr. Khalid Hussein the Executive Director of HAKI Africa, as well as Yassah Musa and Beatrice Waithera. The four human rights defenders were later freed on cash bail and charged in court with unlawful assembly.



**Photo credit:**

<https://www.kenyans.co.ke/news/61097-4-kenyans-arrested-outside-ugandan-embassy-over-election-drama?page=8>

In another incident, on 9th May 2022, police in Siaya County arrested and later released human rights defender Fredrick Odhiambo. According to police records, the activist was held at a cell in Siaya police headquarters over traffic offences. However, Ojira said police arrested him at Siaya police headquarters, where he had gone to seek an audience over a missing person's case. The police later released Fredrick from custody.

#### 4.5.6 Edwin Kiama (Mutemi wa Kiama)

Edwin Kiama was arrested on 6th June 2020 on allegations that he corrupted the title of a book on Uhuru's speeches. The alleged change was from *Uhuru Kenyatta: Legacy of Democracy and Development* to *Uhuru Kenyatta My Life in Crime* before publishing its extracts on social media.

The book, authored by Prof Peter Kagwanja, is a collection of selected speeches by President Kenyatta during his first term of office. Kiama was later freed by Senior Principal Magistrate Boaz Ombewa of Kibera Law Courts on Sh50,000 bond and ordered to be appearing before the DCI's Special Service Unit's Nairobi regional offices as and when required during investigations.<sup>41</sup>



**Photo credits:** <https://www.mwakilishi.com/article/kenya-news/2021-04-07/popular-activist-mutemi-wa-kiama-arrested-over-widely-shared-posters>

Similarly, in April 2021 Kiama made a public notice asking the world to stop lending money to Kenya and said he would not apologize for being a Kenyan. In his posters, he warned the International Monetary Fund (IMF) and the world against issuing loans to Kenya. Consequently, he was arrested, and his phones and laptops were confiscated.

The court released him unconditionally after the prosecution failed to provide sufficient evidence for his prosecution. Senior resident magistrate Jane Kamau set him free and ordered that the cash bail of Sh500, 000 deposited in court be refunded to him.<sup>42</sup> The court barred Kiama from mentioning the International Monetary Fund.<sup>43</sup>

41. Read: <https://nairobi.news.nation.co.ke/news/activist-who-corrupted-the-title-of-book-on-uhurus-speeches-freed-on-bond>

42. Read: <https://www.the-star.co.ke/news/2021-04-20-activist-kiama-released-over-lack-of-sufficient-evidence/>

43. Read: <https://www.tuko.co.ke/408019-edwin-kiama-kenyans-demand-release-activist-accused-cyberbullying-uhuru-ruto.html>

#### 4.5.7 John Githongo

Before founding Inuka Kenya Trust, a grassroots advocacy group, John Githongo worked as a journalist and in an official government capacity, exposing and fighting domestic corruption.

On 8 April 2006, former minister Dr Christopher Murungaru sued John Githongo for publishing a report referred to by media as “The Githongo Dossier” ostensibly addressed to H. E. Mwai Kibaki, who was then the President of the Republic of Kenya. Githongo was ordered not to publish defamatory matters against Murungaru both in speech, writing and through media and to pay Kes. 20 million shillings for general damages, Kes. 5 million shillings for aggravated damages and Kes. 2 million shillings for exemplary damages, bringing it to a total of Kes. 27 million shillings.<sup>44</sup>

Later, in May 2022, three judges of the Appellate Court said the payment of Kes. 27 million for damages was high and slashed the amount to be paid by Dr. Githongo to Kes. 10 million.

#### 4.5.8 Khelef Khalifa

Police summoned MUHURI (Muslim for Human Rights) chairman Khelef Khalifa for questioning the government’s orders for importers to haul cargo from Mombasa port to the hinterland by Standard Gauge Railway. On 31st January 2022, he was held for close to five hours by the Anti-Terrorism Police Unit at the Coast Police headquarters.<sup>45</sup>

Khalifa, among other colleagues, was charged on 18 February 2021 for causing a disturbance at the Kenya Ferry Services. He was protesting the “M-Pesa only” toll introduced at the crossing channel. In October 2020, Kenya Ferry Services introduced a cashless system linked to Safaricom. MUHURI argued that this would automatically lock out users who were not subscribed to Safaricom. He was released on cash bail of about Kes. 20,000.<sup>46</sup>

#### 4.5.9 Human Rights Activists sentenced to probation for protesting COVID-19 theft

On February 22, 2022, Lucas Fondo, Francis Auma, Tirus Mukami, Felix Otieno and Nato Michael were sentenced to six-month probation for allegedly “participating in prohibited gatherings around the country on 25 August 2020 and additionally failing to adhere to social distancing rules that are set out in the covid-19 Public Health Rules.” The activists peacefully demonstrated against the abuse of Covid-19 funds in the country and denounced the ineffectiveness and lack of transparency in the management of public resources.<sup>47</sup>

### 4.6 SLAPP Cases:

#### 4.6.1 General Perceptions of SLAPP

The majority of those interviewed were against the arrests. An overwhelming 92.31% of respondents opined that such arrests were unjustified, while only 7.69% believed otherwise. This stark contrast suggests a clear consensus among the surveyed population on the validity of government, business, or political entities resorting to arrests in these scenarios, as shown in Table 1.3.

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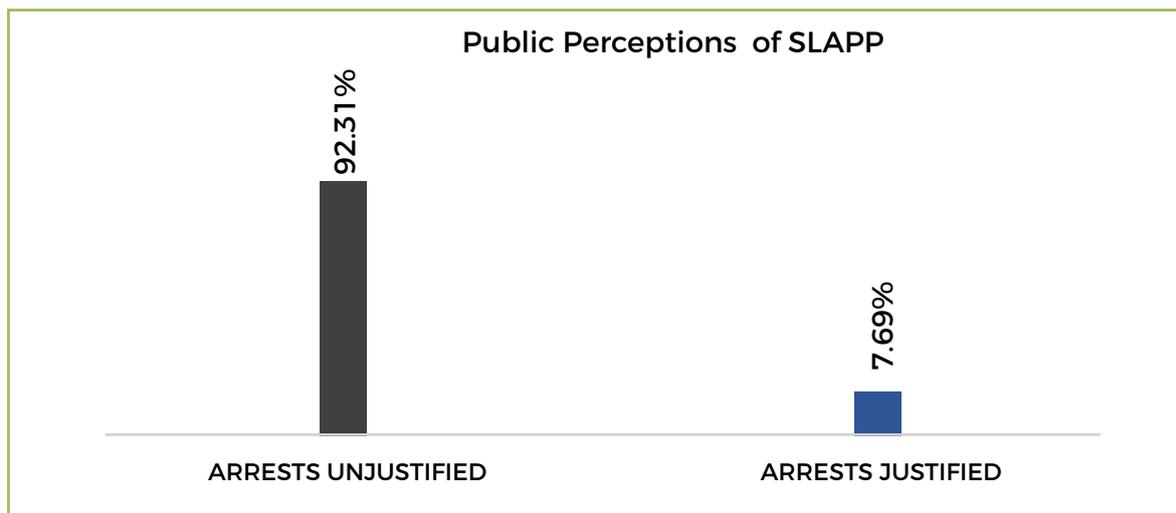
44. See: <https://www.businessdailyafrica.com/bd/economy/court-reduces-githongo-murungaru-graft-link-to-sh10m-3824476>

45. Watch: [https://youtu.be/zXn\\_ncis9wl](https://youtu.be/zXn_ncis9wl)

46. Read: <https://www.the-star.co.ke/counties/coast/2022-02-22-magistrate-lifts-arrest-warrants-for-two-mombasa-activists/>

47. Read: <https://www.the-star.co.ke/counties/coast/2022-02-21-three-activists-sentenced-for-protesting-covid-19-fund-theft>

**Table 1.3: Public Perception of SLAPP**



The high percentage of respondents opposing such actions implies concern for freedom of expression, human rights, and media independence. This finding highlights a potential tension between the perceived role of these institutions and the public’s expectation of safeguarding fundamental rights and democratic values. Further exploration of the specific cases or contexts that prompted these survey responses could provide valuable insights into the nuanced dynamics at play and inform discussions on civil liberties, governance, and the rule of law within the surveyed community.

#### 4.6.2 Fairness of Case Proceedings

Respondents were asked to express their personal feelings about the progress of their cases. Only 14% of the respondents thought the judgements were fair, 84% thought they were not.

Respondents expressed overwhelming fear for the “freedoms of expression space”, as indicated by the repetitive use of this sentiment, highlighting a profound personal concern about the impact of an individual’s arrest, charges, or conviction on the broader landscape of free speech. The repeated articulation of this fear emphasizes the respondent’s deeply rooted apprehension about potential restrictions on open discourse and transparency within society.

Additionally, the specific concerns that citizens, media houses, journalists, and institutions may withhold information that is in the public interest and that impunity will grow to underscore broader anxiety about the potential consequences of legal proceedings on democratic values and accountability. The respondent’s fear of freedom of expression reflects personal concerns and worry about the health of democratic principles and the functioning of societal institutions.

Respondents were asked further perception questions, including how they felt about arrest charges and conviction rate: whether courts or laws are used to stifle the freedom of expression, and whether human rights defenders/journalists/public-spirited individuals should be protected against frivolous suits.

- 88.24% of respondents indicated that courts and laws had been employed as instruments of constraint on the open expression of ideas and opinions. The significant majority expressing this sentiment suggests a deep-seated concern about the potential misuse of legal mechanisms to curtail the fundamental right to free speech. The minority response of 11.76 %, stating no, means a small portion of respondents do not perceive the courts or laws as actively stifling freedom of expression.
- 92.16 % of respondents firmly believed that human rights defenders, journalists, and public-spirited individuals should be protected from frivolous suits. This resounding endorsement of protection underscores the respondents’ recognition of these individuals’ essential role in advocating for human rights, promoting transparency, and fostering public awareness.

#### 4.6.3 Convicted or Acquitted

From the study, 48.54% of the respondents revealed that “they were arrested, charged and finally convicted”, while only 35.91% said they were acquitted. Alarming, 15.53% of respondents expressed uncertainty, and lack of clarity or information on the final legal outcomes, most alluding to a combination of different factors, including complexity of legal cases, differing perspectives on the definition of conviction, and varying levels of awareness among surveyed individuals.

#### 4.7 Elaborate examples of SLAPP Cases:

##### 4.7.1 Cyprian Andama v Director of Public Prosecutions (Petition 214 of 2018 - Kenya Law)

Cyprian Andama filed a case against the Director of Public Prosecution (DPP), the Attorney General, and Article 19. He wanted the court to declare that Section 84D of Kenya Information and Communication Act (KICA) Cap 411A was unconstitutional (hindering his freedom of expression and the right to a fair hearing), that its enforcement on him by the DPP be revoked and for the court to issue an injunction barring the DPP from carrying on with the prosecution of the petitioner in the proceedings in Milimani Criminal Case Number 166 of 2018; Kiambu Criminal Case Number 686 of 2018 and Kiambu Criminal Case Number 687 of 2018.

Section 84D of Kenya Information and Communication Act (KICA) Cap 411A is as follows:

#### Requirement for a license

(1) No person shall—

(a) operate an electronic certification system; or

(b) update a repository or administer a sub-domain in Kenya’s top-level domain (.ke ccTLD), except in accordance with a licence granted under this Act.

(2) A person who contravenes this section commits an offence and shall be liable on conviction to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three years, or both.

The office of the DPP on 23rd January and 26th April 2018 charged Cyprian before Milimani and Kiambu Criminal Court with offences under the impugned Section 84D of Kenya Information and Communication Act (KICA) Cap 411A for publishing obscene information in electronic form.

The office of the DPP representative confirmed in court that Cyprian was indeed charged before the Milimani Chief Magistrates Court for offences under the impugned section of KICA. He further avers that the petitioner is a habitual offender who has on several occasions been charged for misuse of electronic media platforms and that the orders sought in this petition are intended to make him evade accountability for offensive acts. That Cyprian's enjoyment and exercise of freedom of expression was a prejudice to the rights and freedoms of others or public interest.

The outcome of case proceedings: The court ruled that:

- a) Section 84D of KICA as unconstitutional and invalid.
- b) The continued enforcement of Section 84D of KICA by the Attorney General against Cyprian was unconstitutional and a violation of his fundamental right to freedom of expression.
- c) An injunction be in place barring the DPP from carrying on with the prosecution of Cyprian in the proceedings in Milimani Criminal Case Number 166 of 2018; Kiambu Criminal Case Number 686 of 2018 and Kiambu Criminal Case Number 687 of 2018.

#### **4.7.2 Jacqueline Okuta v Attorney General (Petition 397 of 2016 - Kenya Law)**

Jacqueline Okuta and Jackson Njeru filed a petition against the Attorney General, the Director of Public Prosecution (DPP) and Article 19 of East Africa seeking the following declarations: -

- a) A declaration that section 194 of the Penal Code [2] is unconstitutional and invalid; and
- b) A declaration that any continued enforcement of Section 194 by the DPP against them (petitioners) would be unconstitutional.

The petition was triggered by the arraignment of Jacqueline in Kwale Criminal Case No. 532 of 2016 and Jackson in Nairobi Milimani Criminal Case No. 549 of 2016 whereby they were both charged with the offence of criminal defamation under section 194 as read with section 36 of the Penal Code [4] for allegedly making and or publishing allegedly defamatory statements of and concerning the complainant in the said cases.

Section 194 of the Penal Code provides that: -

*Any person who, by print, writing, painting or effigy, or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, is guilty of misdemeanor termed libel.*

The particulars of the charges against Jacqueline are that “on diverse dates between the month of March 2014 and April 2014 at unknown time and place within the Republic of Kenya, by electronic means of face book account ‘Buyer beware-Kenya’ unlawfully published defamatory words concerning the complainants that the persons pictured and named therein were wanted for illegal possession and handling of property.”

The particulars of the charges facing Jackson are that using the Face book account 'Buyer Beware' on 31st March 2016 to unlawfully publish the following words with intent to defame one Cecil Miller to wit: *"Jackline Okuta vs Cecil Miller (Baby Daddy) sad news coming my way after four years since being charged, numerous hearings, adjournments and seven judgement a member of this group Jacki Okuta alias Nyako Maber has been guilty of misuse of telecommunication device. She is currently at Langata Womens prison I am waiting for her lawyer and mother to call me and will brief the group..... For the evil has no future, the lamp of the wicked will be put out proverbs 24:20."*

In their submissions, Jacqueline and Jackson questioned the constitutionality of the offence created under section 194 in an open democratic society which in their view unjustifiably violates freedom of expression by imposing a criminal sanction on the civil wrong of defamation. They also maintained that they acted on their personal interest and in public interest.

In their grounds of objection, the Attorney General states that the petition was an abuse of court process while the DPP stated that the petition was without merits.

**Outcome of case proceedings:** The court found and held that Jacqueline and Jackson succeeded in demonstrating that the offence of criminal defamation was not reasonably justifiable in a democratic society, hence criminal sanctions on speech ought to be reserved for the most serious cases particularized under Article 33 (2) (a)- (d) of the constitution aim at protecting public interest.

The following declarations were given:

- i) A declaration that section 194 of the Penal Code, cap 63, Laws of Kenya was unconstitutional and invalid to the extent that it covered offences other than those contemplated under Article 33 (2) (a)- (d) of the Constitution of Kenya 2010, and.*
- ii) A declaration that any continued enforcement of Section 194 of the Penal Code, Cap 63, Laws of Kenya by the DPP against Jacqueline and Jackson would be unconstitutional and/or a violation of their fundamental right to the freedom of expression guaranteed under article 33 (1) (a)-(c) of the constitution of Kenya 2010.*

#### **4.7.3 Robert Alai v Attorney General (Petition 174 of 2016 - Kenya Law)**

Robert Alai filed a petition against the Attorney General and the Director of Public Prosecution (DPP). Article 19 later became an interested party of the case whose participation was limited to filing and highlighting of submissions.

Robert's petition challenged the constitutionality of Section 132 of the Penal Code, Cap 63 Laws of Kenya. On 17 December 2014, he was arraigned before the Chief Magistrate's court at Kiambu, charged with undermining the authority of a Public Officer Contrary to Section 132 of the Penal Code. Particulars of the offence stated that while using the open-source website Twitter, Robert posted the words *"Insulting Raila is what Uhuru can do. He hasn't realized the value of the Presidency. Adolescent President. This seat needs Maturity"* a publication that was calculated to bring into contempt the lawful authority of the President of the Republic of Kenya.



## A political journalist sacked following frequent defamation suits:

“It was depressing. I stayed out for two years without a job, and I can tell you it was not easy. Of course, I’m a man; I had to keep a brave face, but sometimes I’d feel so down. I would ask myself, why me? But you know I had to accept my fate and move on.”

Eric Oduor, Secretary General of the Kenya Union of Journalists, cited a case where a journalist who was ordered to pay Kes. 2 Million in damages had to be declared bankrupt to save him from the damage liability. The damages were way too high for him to pay.

Henry Maina, former Commissioner of the Media Complaints Commission gives his take on politicians, businesspersons, prominent individuals using SLAPP against human rights defenders: *“Political elites in Kenya rarely use SLAPP in its original form. Instead, they appropriate the criminal justice system to hound journalists, human rights defenders, and any publicly spirited citizens.”*

# CHAPTER FIVE: SAFEGUARDING FREEDOM OF EXPRESSION AND MEDIA

## 5.1 Citizen Activism

Despite the SLAPP threats, the study established that Kenyans actively engage in citizen activism. Out of a total of 200 responses:

- “Reached to the media to protest” was mentioned 86 times,
- “Visited journalist/HRD in custody/court for solidarity” occurred 77 times,
- “Organized a demonstration” was noted 62 times, and
- “Other specify” appeared five times.

The presence of “other specify” in 5 instances suggests that the categories may not explicitly capture additional, diverse forms of activism.

This data underscores a community actively advocating for media freedom, expressing solidarity with journalists and human rights defenders. In addition, they utilize various channels, including protests and demonstrations, to amplify their voices and address issues of concern.

## 5.2 Parliament and Freedom of Expression

Despite Parliament’s crucial role in enacting laws protecting freedom of expression, the findings suggest that it failed to do so. A majority (73.53%) of the respondents said it was time for Parliament to enact or amend laws that fully protect human rights defenders, journalists, and public-spirited individuals.

Another concern raised was that many sections of laws on freedom of expression prescribed harsh punishments. The interviewees said the Official Secrets Act (Cap 187), Penal Code (Cap 63) and Kenya Information and Communication Act such as section 46H which grants Communications Commission of Kenya authority to regulate broadcasting; this power can be abused to control and censor the media.

Eric Oduor, Kenya Union of Journalists, Secretary General, notes:

*“There are over 20 laws that ought to be reviewed to align them with the Constitution... For example, the Media Complaints Commission should be the first point of call on defamation matters; equivalent to what happens in political parties, you can’t go to court before you go through the Political Parties Disputes Tribunal...”*

Nearly 10% of the journalists believed that the laws weren’t the problem. One of the male journalists who chose to remain anonymous explained why:

*“I don’t think the problem is the law; the problem is lawyers. External lawyers keep checking for stories to file for defamation; they then cut deals with internal lawyers. Defamation cases are merely money-making avenues for lawyers. This intimidates and deters journalists and citizens from freedom of expression, ultimately giving room for corruption and impunity. It kills media and citizen participation in watchdog work.”*

### 5.3 Media Council, Media Houses, Media Owners, and Freedom of Media

One of the roles of the Media Council of Kenya is to promote media freedom, however, nearly 90% of the interviewed journalists said they have not felt its impact. Some key informants suggested strengthening the Media Complaints Commission to enable it to handle defamation cases.

Eric Oduor, Secretary General of Kenya Union of Journalists, said the Media Complaints Commission ought to be at the level of the Political Parties Disputes Tribunal whereby it has a mandate to handle all complaints against the journalists and media houses, only allowing those unhappy with the decision of the Commission to proceed to court.

Respondents expected the Media Council of Kenya to protect journalists and media houses rights, support journalists who were sued, and ensure they adhered to professional conduct. Journalists interviewed for this study expressed varied views regarding how media houses respond to defamation cases. Journalists whose work had attracted suits mentioned that, in some instances, the top management abandoned the journalist, which bred internal conflicts.

Journalists who attract suits are considered a threat to the commercial interests of a company, such that the board makes quick decisions to have them sacked.

“I was the top performing journalist; my editors stood by me when the board wanted to have me sacked. That became a major conflict between my editor, editor-in-chief and the board. But the decision had already been made. The board said I had to go since I had tainted the company’s name and made it lose money.”

#### Concerns raised by Respondents:

- 18% of respondents stated that most media owners are under the control of state agencies, and that they have failed to prioritize media independence and protection of their employees.
- 11% of respondents stated that the failure of media owners to offer their employees legal support implies poor management and a lack of proper structures to safeguard rights of employees.

### 5.4 Judiciary as an Impartial Adjudicator

24% of the respondents said the judiciary had failed to adhere to the rule of law in protecting citizens’ human rights. The suggestion to drop or dismiss suits that lack merit was prominent, constituting 18% of responses. Most respondents cited poor investigations, unfair rulings, reduced charges, and bribery as deterrents to access to justice.

Most of the journalists, human rights defenders, and public-spirited individuals interviewed experienced or knew someone who had received threats of suits and arrests before making public their reports or holding protests, these serving as a warning of using the Judiciary to cripple their work.

Corruption is also increasingly being recognized as a tool for perpetuating injustice against human rights defenders, mainstream and new media professionals, and public-spirited individuals. This was a concern identified by 84% of the interviewees.

A political journalist sacked in 2019 after the media company was sued three times by politicians whom he had linked to corruption in his stories said underhand dealings are common in defamation cases:



*“External lawyers will keep checking for stories to file for defamation. Then, they cut deals with the internal lawyers and extend this to magistrates and judges. Defamation cases are merely money-making avenues.”*

#### 5.4.1 Expert Corner: Harun Ndubi, Advocate of the High Court

**What is your take on laws when filing suits against freedom of expression?**

I have an issue with the law and with judges. In SLAPP suits, matters are not usually interpreted by judges in a way that promotes the human right of freedom of expression. Article 20 (3) (b) is not traditionally upheld in the filed suits.

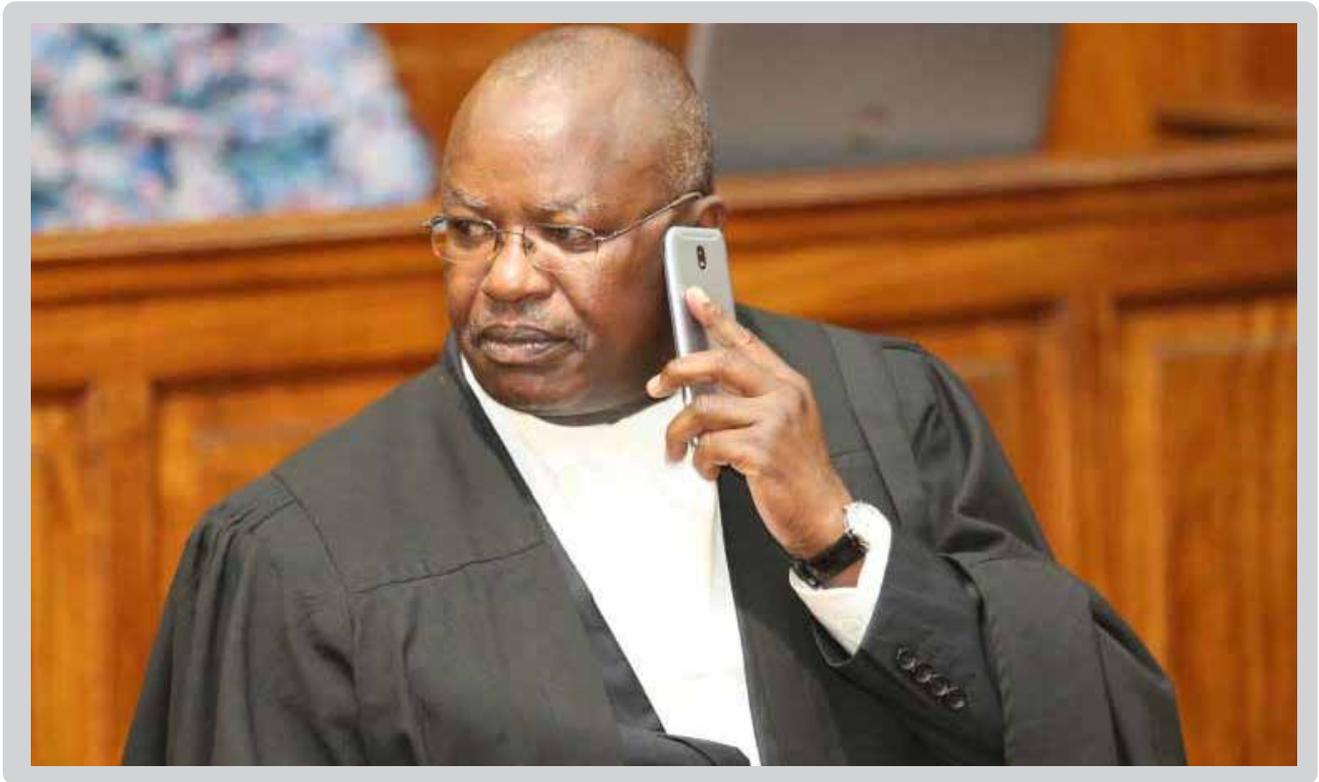


Photo Credits: <https://www.standardmedia.co.ke/article/2001311971/lawyer-harun-ndubi-faces-charges-over-recklessness>

**Article 20 (3) (b)** In applying a provision of the Bill of Rights, a court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

Concerning laws, Judges sometimes use their discretion to make wrong judgements. However, they don't get punished like petitioners.

**Article 160 (5):** A member of the Judiciary is not liable in an action or suit for anything done or omitted to be done in good faith in the lawful performance of a judicial function.

Judges are subject to judicial action if it comes out that they made judgements in bad faith. One of the indicators showing that either a judgment was made in bad faith or a judge is incompetent is when a higher court annuls the court decision of a lower court. However, according to the Constitution, the removal of a judge can only be initiated by a person in the Judicial Service Commission.

**Article 168 (2)** The removal of a judge may be initiated only by the Judicial Service Commission acting on its motion or petitioning any person to the Judicial Service Commission.

**What should be done about Laws in Kenya that intimidate and deter citizens from freedom of expression and ultimately give room to corruption/impunity or kill citizen participation in governance watchdog work?**

If the Judicial Service Commission (JSC) doesn't initiate the removal of a judge, the future litigants of judgements made in bad faith will suffer for it. Thus, a gap exists because of the lack of another party to initiate the removal of judges based on incompetencies. There should be a constitutional declaration allowing the public to be in a position to begin the removal of incompetent judges. Since the Judiciary cannot act on its own accord, government institutions need to improve the law on such matters.

**Civil and media spaces seem to be shrinking worldwide as more authoritarian regimes suppress alternative views and dissenting voices. Is the world witnessing a resurgence in dictatorship, and how is this affecting the news business?**

That's true. Democracy has been in retreat globally since around 2007 – the year we had our national near-death experience as Kenyans around the post-election violence that year – at least, that's what experts like Stanford's Larry Diamond have compellingly argued. Authoritarianism has become far more sophisticated, and the most successful autocrats hold elections and create and dominate all the institutions associated with a more liberal and accountable system of governance. Life was easier when we had outrageous autocrats like Mobutu and Bokassa. Today's figures are far more sophisticated: they are good with media, are refined in foreign affairs and domestically can intimidate, bribe and kill while making it look like it is about something else entirely.

While life has become far more unpleasant for the media globally, the 'hit them over the head' model is complemented by the 'bribe editors and squeeze their bottom line by manipulating advertising, etc' model. What's interesting is the extent to which service sector actors working towards repression have globalised – banks, law firms, security consultants, PR companies, reputation launderers – they have no borders.

We must ask ourselves whether the model of democracy we have today in Africa, which dates back to the early 1990s, is tired of its current permutation. It worked brilliantly between 1990 and around 2010. Economic and political liberalisation yielded many of the great freedoms we enjoy today. It transformed economies that had stagnated in the 1970s and 1980s. Across the continent, though, all the polls show discontent with the current situation among young Africans – they want more democracy. Contemporary democracies are not delivering public goods near the pace our young population expects. There is a profound scepticism with power and suspicion of the West, particularly among this African demographic; we are witnessing their powerful sentiments across the Sahel, especially on social media. Ironically, those celebrating coups in the Sahel today are the most vociferous about corruption and sadly don't remember their parents dancing in the streets for new dictators in the 1990s.

## 5.5 Human Rights Institutions

The respondents strongly advocate for human rights institutions to play an active role in safeguarding and defending human rights in Kenya. Continuous support for human rights defenders (HRDs) and ensuring the protection of their rights was reported by 24% of the respondents. 12% believed that such institutions should stand firm in defending the rights of all Kenyans and avoid being manipulated by the government or politicians. Additionally, 8% of the respondents said human rights institutions should engage in advocacy and projects promoting freedom of expression and justice for all.

### 5.5.1 Threats against Women Rights Defenders

SLAPP is the seen, recorded and traceable threats to freedom of expression. However, women human rights defenders (WHRDs) often face unseen, unrecorded and untraceable threats. Three grassroots WHRDs based in Nairobi and Elgeyo Marakwet were interviewed for this study. They reported cases where visits to their homes by strangers would be followed by calls from unknown callers. They also cited warnings of being burnt in their houses with their families or kidnapping their children and intentionally targeting their husbands with sarcasm as a way of firing them up to dissuade them from doing their work. They, however, said, for their security, they would not report these threats to the police.

In other cases, the WHRDs are forced to make the painful decisions of going into hiding, leaving behind their children and spouses.

*“In 2020, I was at the forefront protesting the government’s intention to evict us from our ancestral land. But the threats I got from the powerful people in the government were too much. said a WHRD from Elgeyo Marakwet.*

Threats to sue WHRDs have been experienced in plantation farms, hotels and EPZs. Whistle Blowers and survivors of rape and other forms of sexual harassments are forced to sign Non-Disclosure Agreements aimed at gagging them ipso facto. They are also sometimes promoted or relieved of their employment citing faked medical health reports.

## 5.6 Emerging Evidence Countering Abuse of Defamation Legislation

Defamation actions often serve as legal intimidation, suppressing free speech.<sup>48</sup> Threats of defamation suits instill fear among journalists, human rights defenders, whistle-blowers, and public-spirited individuals, thus discouraging them from exposing corrupt individuals, misuse of public resources, money laundering, oppressive government tactics, unfair trade practices and police brutality, among many other intolerable acts. With self-censorship, the powerful get their way and continue to uncontrollably leisure in impunity. There are, however, several ways this can be stopped. In this section, we will elaborate on the tactics used by journalists and human rights defenders in other countries to fight back suppression of free speech and oppression through defamation suits.

### 5.6.1 Ways Perpetrators Suppress Freedom of Speech and Media

Martin and Gray (2005) identify five ways freedom of speech and freedom of the media can be suppressed, and five ways of counterattack. Perpetrators often use the following tactics:<sup>49</sup>

#### Covering up the action

They eliminate or hide the evidence. They intimidate any person with the evidence by threatening to harm them or their families. In other cases, they buy the silence of the affected families or communities through bribes or promises to educate their children or secure them jobs. In worst cases, journalists, witnesses, human rights defenders and whistleblowers are killed.

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48. Martin, B. and Gray, T. (2005). How to make defamation threats and actions backfire. *Australian Journalism Review*, 27(1), pp. 157-166

49. *ibid.*

## Devaluing the target

Often, perpetrators play the gaslighting trick. They attempt to cast doubts on the aggrieved and even question the circumstances under which they were injured, harmed or abused. For instance, they will examine the whistle blower's mental status or the media house's political inclination that reported the violation.

## Reinterpreting the action

An individual trying to get away with a crime will find new concepts and manipulated information to attempt to create a unique impression of the actual events. In this case, they would deny the already public information and present what is in their favor.

## Using official channels

They can suggest or advocate for establishing a commission of inquiry to make the public believe they are well-intended at finding the truth. However, the outcome of the process is long predetermined to conceal the evidence and abet impunity.

### *5.6.2 Ways Targets can Prevent Suppression of Freedom of Speech and Media*

## Exposing what happened

Publicizing the defamation threat or suit is a powerful tool. For example, if a public official threatens to sue over criticisms, the critic can report the criticisms, plus the threat, through leaflets, emails, and websites.<sup>50</sup>

## Validating the target

When people are sued or threatened with defamation actions, the implication is that they have broken the law and done something objectionable. In addition, in some cases, defendants are verbally abused, often via rumors.<sup>51</sup> To resist this devaluation process, defendants and their allies should do everything possible to present an honest, conscientious, upright image. Depending on the case, they can present themselves as defenders of the truth, straight speakers, and conscientious objectors to censorship.<sup>52</sup>

## Emphasizing the injustice involved

Defamation actions serve to redefine an issue as one of damage to reputation. Defendants must emphasize that freedom of speech and media are central matters.<sup>53</sup>

## Avoiding or discrediting official channels

Because many believe the legal system provides justice, defamation law is a powerful ally of censors. However, once inside the court, matters of justice are submerged by procedural matters; the issue of censorship is not even on the agenda. Therefore, the courtroom is an unpromising venue for producing outrage.<sup>54</sup> Defendants must avoid putting much effort into legal niceties and instead think about publicity and mobilising support.<sup>55</sup> Every stage of the legal process is a potential angle for publicity about the original matter. Supporters should emphasise that the courts do not necessarily deliver moral justice.<sup>56</sup>

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50. *ibid.*

51. *ibid.*

52. *ibid.*

53. *ibid.*

54. *ibid.*

55. *ibid.*

56. *ibid.*

## Resisting and exposing intimidation and bribery.

To make defamation actions backfire, it is vital to overcome feelings of being intimidated and to proceed with publicity. Defamation actions can instead be considered opportunities for revealing what opponents will do to stop free expression.

<sup>57</sup>

Due to their financial or personal circumstances, some people cannot stand up against defamation threats and actions. But others are. To oppose oppressive uses of defamation laws, it is helpful to find indigent advocates of free speech: people with few financial assets but a willingness to speak out, for example, by writing accounts, circulating leaflets or sending emails. Ways to reward such individuals, such as through fame or subsidised housing and food, need to be found.<sup>58</sup>

### 5.7 Conclusion

This report demonstrates that SLAPP is a worrying trend in Kenya despite the existence of the Constitution and other laws that promote freedom of expression and media. For a long time, the impact of SLAPP has not been known yet; it drives individuals to depression and mental anguish, leading to joblessness and isolation. Instead of being enablers of suppressing freedom of expression and that of the media, Parliament, Judiciary, Media Council of Kenya, media owners and human rights institutions ought to work together to promote democracy, transparency and accountability.

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57. *ibid*59. d.

58. *ibid*.



## CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

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The study report makes the following conclusions and recommendation to key stakeholders:

### **6.1 MEDIA COUNCIL OF KENYA, MEDIA HOUSES AND OWNERS:**

- Train media professionals on defamation and the Code of Ethics for the Practice of Journalism to enable them to avoid defamatory content and also ensure they have evidence for defence when sued.
- They should develop mechanisms and procedures to safeguard media professionals and human rights defenders. The mechanisms should be appropriate and free from manipulation.
- Collaborate with Parliament to create laws that advance freedom of media and protect media professionals from unnecessary defamation suits and excessive damages.
- Engage with the Judiciary to establish procedures for filing defamation suits to eliminate frivolous charges against media professionals and media houses.
- Create proper structures for defamation cases, including covering the media professionals' legal costs.

### **6.2 JUDICIARY:**

- Review all laws regulating freedom of media and freedom of expression to remove provisions that defy the spirit of the Constitution.
- Refresher courses for judicial officers and access to justice stakeholders on defamation laws will enable them to deal more effectively with cases brought against media professionals and human rights defenders. These would include conferences, colloquiums, and Continuous Professional Development (CPDs) under the auspices of the Judiciary Training Institute and the Kenya School of Law.

### **6.3 PARLIAMENT:**

- Review all laws relating to freedom of expression and the media to ensure they align with the Constitution.
- Define more effective policies and procedures for detecting and penalising frivolous defamation claims.
- Legislative amendments and policy formulations, particularly anti-SLAPP (Strategic Lawsuit Against Public Pa Anti-SLAPP legislation, are essential for combating unjustifiable cases that stifle public participation and free speech.

- Establish a pro bono legal representation system to assist individuals targeted by SLAPP (Strategic Lawsuit Against Public Participation) lawsuits.

#### **6.4 HUMAN RIGHTS ORGANISATIONS:**

- Reinforce the call to end frivolous charges meant to silence individuals for speaking against societal injustices and ills.
- Partner with journalists, news organisations, and researchers to monitor and report human rights violations.
- Help raise awareness and educate the public on the importance of freedom of expression and freedom of the media.
- Join hands with unions, media organisations, and LSK to tackle SLAPP issues in a more visible and coordinated way.
- More attention and support to WHRDs and Journalists affected by SLAPPs
- Initiate a study/review existing studies focusing on the SLAPP cases at the timing, contexts, and trends and understanding the rulings and judgments taken
- Ensure comprehensive sensitisation programs be implemented to educate politicians and businesspeople about the appropriate procedures to follow when facing grievances. Emphasis should be placed on distinguishing between civil and criminal cases, ensuring that disputes are handled through the proper legal channels.
- Promote the development of communication strategies targeting individuals who are considering or have opted for SLAPP suits. These strategies should aim to educate and inform these individuals about the negative impacts of SLAPP suits on freedom of speech, public participation, and democratic processes.
- Diversify the risk faced by public-spirited individuals who may be vulnerable to SLAPP by encouraging them to form coalitions or alliances with like-minded individuals, organisations, and communities to collectively advocate for common causes and share the burden of legal risks.
- Train journalists and HRDs with physical and digital security skills, including social media mobilisation tools during physical or social media attacks.

# Annexes

## Annex 1

### Brief

Strategic Lawsuit Against Public Participation (SLAPP suit) refers to lawsuits brought by individuals and entities to dissuade their critics from continuing to produce negative publicity. SLAPP suits do not have any true legal claims against the critics. People bring SLAPP suits because they can either temporarily prevent their critics from making public statements against them or more commonly to make critics spend all of their time and resources defending the SLAPP suits.

### Example:

Kipyator Nicholas Kiprono Biwott V George Mbuguss and Kalamka Ltd, Civil Case No. 2143 of 1999 50

Biwott claimed George Mbuguss and Kalamka printed and published or caused to be published words which were defamatory of the plaintiff on the front page of the issue of the People Newspaper headed, "The untold story on Mio- Nyachae." He claimed that by reason of the publication of the said words, the plaintiff suffered character assassination, credit and reputation and was brought into public scandal, odium and contempt.

The Court found in favour of the plaintiff and awarded KES 20 million as damages for libel. In this case, the libel was in respect of an allegation of corruption, which is a felony under Cap. 65, Laws of Kenya.

### KEY INFORMANT INTERVIEW GUIDE LAWYERS WHO GOT INVOLVED IN SOME OF THE CASES.

1. Who is/was your client?
2. How long ago?
3. What is/was the case about?
4. How long did/has it taken?
5. Did you win? What made you win?
6. If you lost, what made you lose?
7. Identify Media laws that are colonial that lead to gagging freedoms of expression
8. What should be done about Media Laws in Kenya that intimidate and deters citizens from freedom of expression and ultimately give room to corruption/ impunity or kill citizen participation in governance watchdog work

### MEDIA

- a) Name of Media House
- b) Title/position of Respondent
- c) How long ago
- d) What is/was the case about?

- e) How long did/has it taken?
- f) Did you win? What made you win?
- g) If you lost, what made you lose?
- h) What was the impact of the win on the media fraternity/your media house?
- i) What was the impact of the loss to the media fraternity/your media house?
- j) Identify Media laws that are colonial that lead to gagging freedoms of expression
- k) What should be done about Media Laws in Kenya that intimidate and deter citizens from freedom of expression and ultimately give room to corruption/impunity or kill citizen participation in governance watchdog work
- l) Is there a standout case you may wish to highlight, that stands out as a frivolous one and only sought to gag the media in question
- m) How did the case affect the social, economic and emotional life of the journalist and her/his family?

### **JOURNALIST/HRD/Spirited public**

1. Name
2. Title/position of Respondent/journalist
3. Gender
4. Age
5. Disability
6. Freelance or employed by a Media house/Human rights institution?
7. How long ago?
8. What is/was the case about?
9. How long did/has it take/n?
10. Did you win? What made you win?
11. What was/is the impact of the win to you and the cause you were championing?
12. If you lost, what made you lose?
13. How did you feel after the loss/win?
14. How did your social life change after the win/loss?
15. Did your economic status change? If yes, how? If no, how did you manage to maintain the status quo?
16. Was your mental health affected? If yes, how? If no, how did you manage to protect your mental health?
17. Did you receive professional help to regain good mental health?
18. Who covered the cost of the therapists?
19. How long did you see the therapist?
20. Did you receive support from your family? What about friends?
21. What was the impact of the win on you? Media house?
22. What was the impact of the loss on the media fraternity/your media house?
23. What was the impact of the loss on the media fraternity/your media house?

24. Identify Media laws that are colonial that lead to gagging freedoms of expression
25. What should be done about Media Laws in Kenya that intimidate and deters citizens from freedom of expression and ultimately give room to corruption/ impunity or kill citizen participation in governance watchdog work

### 3.3 SURVEY

1. County
2. Subcounty
3. Gender
4. Disability
5. Level of education
6. Occupation
7. Have you ever heard of someone/colleague/human rights defender or public-spirited individuals being sued or charged for raising public interest matters?
8. What was the matter was he/she raising?
9. Why do you think he/she was arrested?
10. What was the public/leaders reaction to the arrest?
11. Was it right for the government to arrest him/her?
12. What was she/he charged with?
13. Was he/she finally convicted?
14. If not, what is the status of the case?
15. On a personal level, how did/do you feel about his/her arrest/charges and conviction or progress of the case?
16. Do you feel courts/laws have been used to stifle the freedom of expression?
17. Should human rights defenders/journalists/public spirited individuals be protected against frivolous suits?
18. What should Parliament do in this regard?
19. What should Media Council of Kenya do?
20. What should the Judiciary/judges/magistrates do regarding the frivolous suits/charges?



## Annex 2

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### A. BIODATA

21. Name (optional)
22. County
23. Subcounty
24. Gender
25. Disability
26. Level of education
27. Occupation

### B. QUESTIONS

1. Have you ever heard of someone/colleague/human rights defender/media or public-spirited individuals being sued or charged by the government, business, or politicians for raising public interest matters? For example, corruption or abuse of public office?

A) Yes ( ) No ( )

2. If yes, what was the matter was he/she raising?

Corruption ( ) Abuse of public office ( ) Any other please specify \_\_\_\_\_

3. Why do you think he/she/media house/HRD was arrested? To be gagged ( ) Fairness ( ) I don't know ( ) Any other please specify \_\_\_\_\_

4. What was the public/leaders' reaction to the arrest?

Reached to the media to protest ( ) Organized a demonstration ( ) Supported the defense of the media/journalist/HRD ( ) Visited journalist/HRD in custody/court for solidarity

5. Was it right for the government/business/politician to arrest him/her/media house? Yes ( ) Please justify No ( ) Please justify \_\_\_\_\_ I cannot tell/not competent enough to say ( )

6. What was she/he charged with? Defamation ( ) False accusation ( ) Professional misconduct ( ) If any other please specify \_\_\_\_\_

7. Was he/she/media house finally convicted? Yes ( ) No ( ) I don't know ( )

28. If not, what is the status of the case?

29. If yes, do you think the judgement was fair Yes ( ) No ( ) I cannot tell/not competent to comment ( )

30. On a personal level, how did/do you feel about his/her arrest/charges and conviction or progress of the case?

Feared for the freedoms of expression space ( ) Feared that citizens, media houses, journalists and institutions will not make public knowledge of what they know that is supposed to be of interest to the public ( ) Feared that impunity will grow ( )

31. Do you feel courts/laws have been used to stifle the freedom of expression? Yes ( )  
Please explain \_\_\_\_\_ No ( ) Please explain \_\_\_\_\_
32. Should human rights defenders/journalists/public-spirited individuals be  
protected against frivolous suits? Yes ( ) Please explain \_\_\_\_\_ No ( ) Please  
explain \_\_\_\_\_ Indifferent ( ) Please explain \_\_\_\_\_
33. What should Parliament do in this regard? \_\_\_\_\_
34. What should Media Council of Kenya do? \_\_\_\_\_
35. What should the Judiciary/judges/magistrates do regarding the frivolous suits/  
charges? \_\_\_\_\_
36. What should Media houses do? \_\_\_\_\_
37. What should human rights institutions/Agencies do? \_\_\_\_\_
38. What should KUJ do? \_\_\_\_\_
39. What should Media Owners do? \_\_\_\_\_



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## CONTACTS

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ACK Garden House, 2nd Floor,  
Wing A | 1st Ngong Avenue  
P. O. Box 21765 - 00505 Nairobi

**T:** +254 (0)726 464 063

**E:** [info@mzalendo.com](mailto:info@mzalendo.com)

**W:** [www.mzalendo.com](http://www.mzalendo.com)

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