

**The Use of
Strategic
Litigation
Against Public
Participation
(SLAPP) as a
Concept in Kenya
and Its Impact on
the Freedom of
Expression**





ABOUT MZALENDO

Mzalendo ('Patriot' in Swahili) Trust (hereafter 'Mzalendo') is a Kenyan non-partisan Parliamentary monitoring organization (PMO) whose mission is to “promote the realization of open, inclusive, and accountable Parliaments across Kenya and Africa”. We do so by creating and managing civic tech tools, producing evidence-based research, and leading and facilitating advocacy and partnerships with Parliaments, citizens and other relevant stakeholders. We believe that success in our work will build more effective and responsive legislation and political processes that ultimately support Kenya’s national development goals. Mzalendo’s 2021-2025 strategy comprises three broad thematic objectives that reflect the key principles of openness, inclusion and accountability undergirding COK, 2010.



FOREWORD AND ACKNOWLEDGEMENTS



Media freedom remains an integral pillar of democracy in Kenya. Both legacy (traditional) and digital media outlets are a crucial source of information and especially those on public affairs, which in turn influence public debate. These debates, held by the citizens, are necessary for upholding and pushing for accountability, openness and integrity within national and county governance systems.

The bedrock for media freedom in Kenya lies in Article 34 of the Constitution of Kenya which, read together with Article 33 that provides for freedom of expression. Despite these guarantees, there have been well-known forms of media restriction such as media outlet shutdowns and threats, which have had the effect of shrinking part of the civic space. In addition to these, there has emerged the rampant use of SLAPP suits to intimidate media.

Strategic Litigation Against Public Participation (SLAPP) suits are legal actions wielded as a weapon to threaten media outlets and individual journalists investigating and reporting on public interest matters. More importantly, in this era of digital media, they provide a breeding ground for misinformation and disinformation on public interest issues. They undermine media freedom progress and pose severe threats to gains made to achieve media freedom in Kenya, especially after the promulgation of the Constitution of Kenya 2010. Lastly, they negatively impact meaningful public participation as they dissuade public input into public affairs.

The findings in the report highlight incidences of SLAPP suits across the Kenyan legal landscape and provide recommendations towards the independence and protection of journalists and their right to media freedom. In turn, this has an impact on the civic space and especially public participation.

Further, I commend the valuable technical direction from Mzalendo staff; Philip Gichana and Sylvia Katua, together with support from Gitungo Wamere, Idah Knowles, Jefferson Gathumbi, Loise Mwakamba, Fredrick Ajok and Adisa Viola. In addition, we acknowledge the author of the report Mr. James Gondi for his efforts in the completion of this report. We would also like to express our deepest appreciation to the International Centre for Not-for-Profit Law, whose financial and technical support was invaluable towards the development of the study.

**Caroline Gaita,
Executive Director.**





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1. List of Acronyms



ADR	Alternative Dispute Resolution
AG	Attorney General
ECHR	European Convention for Human Rights
eKLR	Kenya Law Review
ICCPR	International Covenant on Civil and Political Rights
PLC	Public Limited Company
SLAPP	Strategic Litigation Against Public Participation





2. Executive Summary

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 key pillar in promoting democracy, rule of law, fair play, and informing society on matters that affect the citizenry. The civil society actors – including human rights defenders, women advocates, children, young people, minorities and indigenous people, trade unionists and journalists – should be able to express themselves freely in full security and effect change peacefully and effectively.

Strategic Litigation against Public Participation (SLAPP), through legal action, intimidates, threatens, and creates fear amongst persons who dare to speak out to defend the public interest, protect human rights and the environment, or report corruption and tax evasion practices. It undermines the right to freedom of expression and information. It therefore remains a threat to democracy and the rule of law in virtually every country.

Standing in the way of freedom of expression and freedom of the media, are SLAPP suits. These suits pose a systemic threat to the legal system by, among other factors, wasting the judicial time of the courts. They interfere with the course of justice as well as upholding of the rule of law. Moreover, they seek to slow the momentum of dissemination of information through gag orders and often seek vast amounts in compensation from their respondents.

Such fears create a muzzled media and a mum civil society devoid of an advocacy agenda. Even where a libel action is unlikely to succeed, the very spectrum of taking chances in court only to be handed down heavy damages induces media houses to make out-of-court settlements in undeserving cases.

A negative precedent towards freedom of expression was established by the Kenyan courts in *Kipyator Nicholas Kiprono Biwott v George Mbuggus & another [2000] eKLR*. On 22 March 2002, Nicholas Biwott, a cabinet minister in the Moi government, was awarded KES 20 million (approximately US \$256,410) for defamation as the High Court slapped a stinging indictment against Kenyan media houses over “unmitigated and defenceless character assassination”. Kalamka Ltd, the publisher of “The People Daily,” was sentenced to pay Biwott KES 10 million in compensatory damages and a similar sum in exemplary damages, following the publication of an article implicating Biwott in underhanded dealings involving the

award of tenders for the construction of the Turkwell Gorge Hydro-Electric Power Project.¹

Kakuzi PLC also sued the Kenya Human Rights Commission (KHRC) and the Ndula Resource Center (NRC) in March 2021 over a press release the two organizations released on February 14, 2021.² The press release was in response to a KES 696 Million settlement was made by Camellia PLC, the parent company of Kakuzi, regarding egregious human rights violations that were allegedly committed by Kakuzi, one of its subsidiary companies.³

The matter was, however, withdrawn after Kenya Human Rights Commission filed a response to the lawsuit.⁴ The rights body had, among others, accused the firm of bad corporate governance and gross historical and land injustices which have displaced more than 13 neighbouring communities within Murang’a and adjacent counties.⁵

Strategic litigation has been defined as the litigation of a public interest case that will have a broad impact on society beyond the specific interests of the parties involved. In this approach, strategic litigation serves as a powerful and innovative advocacy tool by serving as a mechanism for government accountability. National and international strategic litigation can be used as an invaluable instrument to protect civic space, public participation and open government. Muzzling public participation, on the other hand, attempts to stifle dissent and serves against the purpose of accountability in a functional democracy.

Key recommendations proposed are as follows:

i. Prompt dismissal of cases conceived to be

- 1 Kamau, Muthoni *Nicholas Biwott set record in libel claims* The Standard Newspaper available at <https://www.standardmedia.co.ke/m/article/2001247208/nicholas-biwott-set-record-in-libel-claims>
- 2 KHRC, (2021). *Kakuzi comes after its biggest critics – the Kenya Human Rights Commission and Ndula Resource Centre*. Press Release. Available at < <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/747-kakuzi-comes-after-its-biggest-critics-the-kenya-human-rights-commission-and-ndula-resource-centre.html>>
- 3 *ibid*
- 4 Wangui, Joseph, (2022). *Judge orders Kakuzi to bear costs of suit against rights body*. The Nation Newspaper. Available at < <https://nation.africa/kenya/business/judge-orders-kakuzi-to-bear-costs-of-suit-against-rights-body-3842482>>
- 5 *ibid*



- SLAPP suits and;
- ii. Raising awareness to litigants to embrace alternative dispute resolution mechanisms, such as the Media Complaints Commission





3. Introduction

Civic space is the environment that enables people and groups – or “civic space actors” – to participate meaningfully in the political, economic, social and cultural life of their societies. 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 basic 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 full security and effect change peacefully and effectively.

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 key pillar in promoting democracy, 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 is threatening the sustainability of media in Kenya. This is especially key as we hold Kenyan leaders to account, 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 an unalienable right. 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 serious risk to the duty to protect the freedom of pluralist media, and undermine efforts to “create a conducive environment for participation in public debate.”⁶ The Republic of Kenya’s internal environment as well as the rule of law is negatively impacted by SLAPPs because they limit the scrutiny of issues of public interest, whether they are of economic or political relevance.⁷

A SLAPP suit is defined as:

6 BORG-BARTHET, LOBINA, & ZABROCKA. (2021). The Use of SLAPPs to Silence Journalists, NGOs and Civil Society. Committees | European Parliament. Retrieved November 1, 2022, from <http://www.europarl.europa.eu/supporting-analyses>

7 ibid

1. a civil complaint or counterclaim (for monetary damages, and/or injunction),
2. filed against non-governmental individuals, and/or groups,
3. because of their communications to a government body, official, or the electorate,
4. on an issue of some public interest or concern.”⁸

Even by the courts, SLAPP actions can be difficult to spot since they “masquerade as conventional lawsuits.”⁹ They can be filed as a cross-claim or counterclaim in 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 court¹⁰. Although there are many different reasons for a SLAPP complaint, defamation is the most common litigation of SLAPP.¹¹ 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 as well.¹² They are instead, typical “dispute transformation” strategies that utilize the judicial system to provide one side of a political conflict the unilateral capacity to change both the forum and the subject matter of the conflict.¹³

Even where it is obvious that the case is weak both in structure and on merit, the tactic of a SLAPP suit is to impose the costs of a legal defence until detractors give up fighting.¹⁴ The main objective is to quiet the

8 George W. Pring, (1989) SLAPPs: Strategic Lawsuits against Public Participation, 7 Pace Envtl. L. Rev. 3. Available at: <https://digitalcommons.pace.edu/pelr/vol7/iss1/11>

9 Kathryn W. Tate, California’s Anti-Slapp Legislation: A Summary of and Commentary on Its Operation and Scope, 33 Loy. L.A. L. Rev. 801 (2000). Available at: <https://digitalcommons.lmu.edu/ltr/vol33/iss3/1>

10 Ibid

11 Ibid

12 Ibid

13 George W. Pring, (1989) SLAPPs: Strategic Lawsuits against Public Participation, 7 Pace Envtl. L. Rev. 3. Available at: <https://digitalcommons.pace.edu/pelr/vol7/iss1/11>

14 A SLAPP in the Face for Accountability: The Abuse of Corporate



opposition rather than to win the case.¹⁵

Prior to the promulgation of the Constitution of Kenya 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/or 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. All these occurred prior to the promulgation of the Constitution of Kenya 2010.

However, since the return of multi-party system in 1991, the practice of using defamation lawsuits to control a rogue press gained ground.¹⁶ Upon the promulgation of the Constitution, the media has been viewed as less sensational in articulation of issues. 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 of people as well.

Turning to domestic and international courts, strategic litigation has been central to global human rights activism for decades. It is a strategy that has been used to create long lasting social change in laws and public policies with the goal of advancing human rights. Globally, the United Kingdom has been the preferred destination for SLAPP suits.

From Nyamboga’s paper referenced below¹⁷, depicts that in the 1920s, a few and far apart defamation cases had been set against the Press¹⁸. One of the oldest weekly newspapers, the Mombasa Mail was sued for libel for publishing a controversial article and was suspected to have been an in-house fabrication¹⁹.

Albeit greater exploration shall be had in later chapters in this review for this is merely the introduction

and this decadence shall be explored in landmark cases in our jurisdiction and foreign ones as well. It is common legal knowledge that much of defamation laws’ evolution has been through common law²⁰. Although this has allowed for flexibility in doctrinal development, it has also resulted in multiple inconsistencies that have not evaded criticism despite the benefit of age.²¹

Power – ActionAid International available at <https://actionaid.org/stories/2019/slapp-face-accountability>

15 Ibid

16 Nyamboga, D. E. (2015, November). Defamation Litigation and Its Impact on Journalists’ Exercise of Freedom of Expression at Two Newspaper Publications in Kenya. THE INTERNATIONAL JOURNAL OF HUMANITIES & SOCIAL STUDIES, 5. Retrieved September 23, 2022, from www.theijhss.com

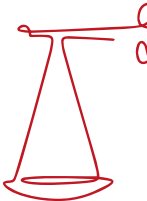
17 Ibid

18 Ibid

19 Ibid

20 Ibid

21 Mvatie Joy ONLINE DEFAMATION: BALANCING REPUTATIONAL HARM AND THE FREEDOM OF EXPRESSION AND THE MEDIA (2021)





4. Methodology

This chapter looks at the study design, the research methodology that was employed in this study. It also seeks to illustrate the data collection process, analysis, validation and reporting process. Variations would also be taken into consideration.

Data Collection Methods and Data Sources

The consultant, in conjunction with Mzalendo Trust, facilitated desk research, where they collected a mix of primary and secondary data from the relevant literature. This was coupled with administering five (5) key informant interviews as well as one focus group discussions with the media stakeholders. All these were undertaken to obtain secondary data to identify the bases for existing gaps in the contemporary literature.

Focus Group Discussions (FGDs)

Focus group discussions helped the study gain insights of the civil society and the media fraternity from the national levels regarding their experiences in the strategic litigations against public participation. FGDs are more effective in facilitating open conversation on matters that would prove sensitive like self-censorship, legislative review of the media laws, surveillance of journalists, criminal defamation and other related matters. Accordingly, one FGD was conducted in Nairobi with the media fraternity.

Key Informant Interviews (KII)

The study employed key informant interviews to gather data from the relevant stakeholders and institutions. The information from these sources helped to explore key issues regarding the role of the media in the society. Interviews focused on identifying, profiling, classifying, and getting the stakeholders classification matrix and getting their recommendations for appropriate action. Challenges regarding SLAPP suits and opportunities in decriminalizing defamation were also explored with this method. Respondents were also asked to explain their perspectives on the current legal framework, policies and resolution mechanisms in place. A total of 5 key informant interviews were conducted with the different people that play a key role in the media council. The list included representatives of Kakuzi PLC, Kenya Human Rights Commission, the Kenya Correspondents Association, the Media Complaints Commission, freelance journalists and the civil society.

Kakuzi PLC gave an overview of Operating Grievance

Mechanism (OGM) to address grievances from the employees and members of the community. The Kenya Human Rights Commission KII gave their account of the suit they faced from Kakuzi PLC. The key challenges KHRC faced included diversion of resources from their primary work of human rights advocacy to work in defense of the suit. The Kenya Correspondents Association noted an increase in threats of legal action against correspondents in the counties, whereas the freelance journalists observe a challenge in forwarding stories with anonymous sources to their editors. The Media Complaints Commission highlighted their mandate, then recommended sensitization of the arbitration efforts in the public domain.



5. Legislative and Regulatory Framework



5.1 Defamation in itself

The history of defamation is a long one and the preference would be to discuss its essence before discussing its rationale in this and other jurisdictions. Defamation as a tort, or civil wrong, continues to be very widespread. In terms of modern human rights law, defamation can be understood as the protection against “unlawful attacks” on a person’s “honour and reputation” contained in Article 17 of the ICCPR.²²

The Defamation Act (CAP 36) is a codification of common law principles on the torts of defamation, namely libel and slander. It sets out the exceptions to some principles and constitutive elements of the law on the tort of defamation. It also sets out the available defences to the said tort.

In looking at the Defamation Act, it must be borne in mind that defamation law is composed mostly of common law principles that have changed over time and continue to evolve.²³ Excluding explicit introductions such as the minimum sentence for libel as set out under section 16A of the Defamation Act, the contribution of the legislature to the establishment of defamation law has been rather minimal. However, legislation can be used to check excesses that can arise out of its application and curtail freedom of expression.

Both Article 19 of the ICCPR and Article 10 of the ECHR use the identical words “rights and reputations of others” (although not in the same order), as a legitimate ground for limiting the right to freedom of expression.²⁴ Narrowing down to the African Charter on Human and People’s Rights, Article 9 reiterates the freedom of individuals to receive information and to express their opinions within the law²⁵.

The Constitution of Kenya (2010), which unequivocally guarantees “the right to freedom of expression, which includes—(a) freedom to seek, receive, or impart information or ideas; (b) freedom of artistic creativity; and (c) academic freedom and freedom of scientific research,” makes reference to this topic prominently in the country’s current constitutional system.²⁶ As a result, Kenya’s constitutional arrangement is consistent with her duties under international human rights law, at least in terms of the right to free expression.

Defamation deals with publication of an untrue statement whose outcome is character assassination and a damaged reputation. The Kenyan legal system, upon damage of an individual’s reputation, offers compensation to the aggrieved party. Depending on the quantum of the amount involved, any amounts sought of less than KES 20M is squarely under the jurisdiction of the magistrate’s court. Amounts totaling KES. 20M and above are determined at the High Court of Kenya.

5.2 A Look at Public Participation in the Constitution of Kenya, 2010.

According to Kenya Draft Policy on Public Participation, public participation is the process by which citizens, as individuals, groups, or communities (also known as stakeholders), participate in the management of public affairs, engage with the government and other non-state actors, and provide oversight in the provision of services, the development of new projects, and other issues pertaining to their governance and the public interest, either directly or through representatives who have been freely chosen.²⁷ One of the main goals of devolution as envisaged in the current constitutional dispensation is to provide powers of self-governance to the people and promote their participation in the exercise of the powers of the State and in making choices affecting them on a daily basis²⁸. Public participation is one of

22 Media Legal Defence Initiative/ International Press Institute. (2015, February). Freedom Of Expression, Media Law and Defamation. A REFERENCE AND TRAINING MANUAL FOR EUROPE, 56. (D. R. Carver, Ed.) Oxford Brookes University. Retrieved 2022

23 MEDIA COUNCIL OF KENYA. (2020). MEDIA SECTOR LEGISLATIVE REVIEW. Nairobi: Media Council of Kenya. Retrieved October 12, 2022

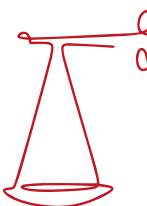
24 Media Legal Defence Initiative/ International Press Institute. (2015, February). Freedom Of Expression, Media Law and Defamation. A REFERENCE AND TRAINING MANUAL FOR EUROPE, 56. (D. R. Carver, Ed.) Oxford Brookes University. Retrieved 2022

25 The African Charter on Human and People’s Rights, Article 9

26 Jarso, James Forole. “The Media and the Anti-corruption Crusade in Kenya: Weighing the Achievements, Challenges, and Prospects.” American University International Law Review 26 no. 1 (2010): 33-88.

27 The Office of The Attorney-General, (2018). Kenya Draft Policy on Public Participation. Republic of Kenya. Available at < <https://statelaw.go.ke/wp-content/uploads/2020/07/Kenya-Draft-Policy-on-Public-Participation.pdf>>

28 County Governance Toolkit: Public Participation. Available at < <https://countytoolkit.devolution.go.ke/public-participation#:~:>



the national principles and ideals of governance, as per Article 174(c) of the constitution²⁹.

The right to information is critical to public participation and the functioning of a democracy. It is a constitutional right (Article 35 (1)), which is implemented through the Access to Information Act of 2016.³⁰ Citizens have the right to access information held by the state and relevant private entities under the Constitution.³¹ Other legislation also provides for information access, which is essential for achieving meaningful and effective public participation.³² Citizens are empowered and enabled to hold duty bearers accountable when they have access to information.³³

SLAPP suits actively play a role to curtail the spirit of constitutionalism. This is done by way of effecting gag orders, seeking disproportionate amounts in compensation and distorting information.

text=It%20is%20one%20of%20the,174c%2C%20Constitution%20of%20Kenya >

29 ibid
30 Ibid
31 Ibid
32 Ibid
33 Ibid



6. Findings



6.1 Overview of SLAPP Suits

SLAPP generally refers to a lawsuit filed by powerful subjects (e.g., a corporation, a public official, a high-profile businessperson) against non-government individuals or organisations who expressed a critical position on a substantive issue of some political interest or social importance,³⁴ quantifying it as an abuse of the legal system. The purpose of SLAPP is to deplete the target's financial, psychological and emotional resources and silence dissenting opinions in order to prevent public engagement on matters of public interest.³⁵ By disguising themselves as routine civil lawsuits, they tend to divert attention from concerns of corporate social responsibility and transform sensitive matters of public interest into complex private legal matters.³⁶ The target may range from journalists, civil society actors, activists, researchers and members of the public. The thematic areas revolve around professional accountability, corporate social responsibility, respect for human rights, corruption and climate change.

This excerpt³⁷ shows even with the laws to safeguard rights today that are exploited, through nefarious means of SLAPP suits with the purpose to they can either temporarily prevent their critics from making public statements against them or more commonly to make critics spend all their time and resources defending the SLAPP suits³⁸.

To this effect, there are still several laws that are inconsistent with the work of the media, especially on its primary role as the custodian of the public with regard to dissemination of information. These laws include the Books and Newspapers Act, the Penal Code, notably sections 40 (1), 66, 66A, 67, 96, and 194–200. There have also been attempts to restrict media freedoms under the Security Amendment Act of 2014, the Prevention of Terrorism Act, and the Parliamentary Powers and Privileges Bill.³⁹ Numerous me-

dia organizations and individual journalists have been the victims of corporate and individual excesses, such as the withdrawal of advertisements due to editorial content or the intimidation or harassment of journalists.⁴⁰ As a result, the media's independence has been somewhat undermined, and some journalists have lost their jobs.⁴¹ Additionally, a number of journalists with an independent mindset have been lost due to problems with media ownership.⁴²

As a result, many individuals and corporate entities would obtain gag orders against members of the public. Most notably in May this year, Justice Koome amended rules that govern proceedings of the Supreme Court and banned litigants, their advocates, and agents from expressing their opinions or predicting the outcome of a case involving the election of the President.⁴³ This directive was eventually quashed by the High Court for not adhering to public participation requirements.⁴⁴

6.2 How do SLAPP inhibit freedom of expression/civic space in Kenya and other parts of the world?

SLAPP suits pose a multitude of challenges to understanding critical areas of law including slander, freedom of speech, and civil procedure, and Anti-SLAPP statutes remain “a highly litigated type of legislation” in many jurisdictions.

On a global scale, a total of 355 cases that bear the hallmarks of SLAPPs were brought or initiated by business actors from January 2015 till May 2021.⁴⁵ Of these cases, 304 were brought against individuals, 38 against organizations, and 13 against both individu-

[downloads/MEDIA%20SECTOR%20LEGISLATIVE%20REVIEW%202021.pdf](#)

34 Info Note on SLAPPs and FOAA Rights, 2017, available online at <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx>.

35 Ibid

36 Ibid

37 Ibid

38 Ibid

39 Media Council of Kenya, (2020). Media Sector Legislative Review. Available at <https://www.mediacouncil.or.ke/sites/default/files/>

40 Ibid

41 Ibid

42 Ibid

43 Gitonga N. (2022). Blow for CJ as court overturns her gag orders. People Daily. Available at <https://www.pd.co.ke/august-9/blow-for-cj-as-court-overturns-her-gag-orders-145271/>

44 Ibid

45 Business and Human Rights Resource Centre, (June 2021) SLAPPed but not silenced: Defending Human Rights in the face of Legal Risks. Available at < https://media.business-humanrights.org/media/documents/2021_SLAPPs_Briefing_EN_v657.pdf>



als and organizations.⁴⁶ 224 of the 355 cases involved criminal charges, 106 civil and 25 were a combination of both criminal and civil charges.⁴⁷

Even if the prosecution is certain to fail, it might nevertheless result in significant disruption since records and computers might be taken for investigations, in addition to the associated financial and other costs such as diversion of man-hours in defence of the suit. Vinci Construction took action against Sherpa, a Paris-based organization created to protect and defend victims of economic crimes. On the construction sites for the Qatar 2022 World Cup, Sherpa has revealed abuses in the working conditions of migrant laborers hired by Vinci and its subcontractors⁴⁸.

This threat to the public sphere is enlivened by the increasing number of high-profile examples of SLAPP suits used against journalists from across nations. For instance, at the time of her assassination, Maltese investigative journalist, Daphne Caruana Galizia, was facing forty-seven (47) civil and criminal libel suits, filed in various jurisdictions, from Malta, to the UK and the US. and, in Poland, since the Law and Justice (PiS) party came to power in 2015, the country's second-largest daily newspaper Gazeta Wyborcza has received over fifty-five (55) legal threats because of its work. The cases are brought by powerful state actors such as the Deputy Prime Minister and PiS chairman, Jarosław Kaczyński; the state television broadcaster, Telewizja Polska S.A.; and other state-owned companies and individuals with close ties to the governing party.⁴⁹

SLAPP suits are detrimental in a functional democracy in that the defendants must secure resources to defend themselves. The civil society has to use some of their grants to hire a lawyer to put up a spirited defence. This is worse in small CSOs and individual human rights.

There is also time spent towards the defence of the case as opposed to the civil society and the media partaking their roles in holding the people in posi-

46 Ibid pg.7

47 Ibid pg.7

48 Sherpa, (2017), SLAPPs brought by VINCI against Sherpa: A New Victory. Paris. Available at < <https://www.asso-sherpa.org/slapps-brought-by-vinci-against-sherpa-a-new-victory>>

49 INFORM'S BLOG | The International Forum for Responsible Media Blog. (2022). Strategic Lawsuits Against Public Participation: a SLAPP in the face for free speech. What are SLAPPs? – Peter Coe. Retrieved September 27, 2022, from inform.org: <https://inform.org/2021/11/02/strategic-lawsuits-against-public-participation-a-slapp-in-the-face-for-free-speech-what-are-slapps-peter-coe/>

tions of responsibility to account. There is also potential risk sub judice of the court processes, so CSO actors must keep quiet in an on-going case.

Although the SLAPP suits are decreasing in the national level, they are expected to increase due to the existence of county governments against county media correspondents. This is primarily based on seeking accountability on the utilization of county resources.

In the digital age, there is an increased output of stories and there is an inherent danger of heightened digital surveillance. At the same time, the media fraternity and the members of civil society are subjected to attacks and threats to muzzle them. They could be subjected to online abuse such as trolls and attack against their reputation and character assassination via social media platforms. This could leave them demoralized and may cloud their judgment in ethical reporting.

Above all, there is a need by the media owners to protect the interests of their business – specifically on advertising revenues. This would mean that editors find it difficult to approve stories that would attract libel, translating to little analysis of issues affecting the members of the public.

6.3 Selected Landmark SLAPP suits in Kenya and other jurisdictions

In Kenya, plenty of landmark cases highlight these precedents:

6.3.1 Kipyator Nicholas Kiprono Biwott V George Mbuguss and Kalamka Ltd, Civil Case No. 2143 of 1999⁵⁰

Facts:

The plaintiff claimed that on 10th March 1999, the defendants 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.*”⁵¹ The plaintiff 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.

50 KIPYATOR NICHOLAS KIPRONO BIWOTT V GEORGE MBUGUSS AND KALAMKA LTD, CIVIL CASE NO. 2143 OF 1999 (HIGH COURT OF KENYA 1999). Retrieved SEPTEMBER 26, 2022

51 KIPYATOR NICHOLAS KIPRONO BIWOTT V GEORGE MBUGUSS AND KALAMKA LTD, CIVIL CASE NO. 2143 OF 1999 (HIGH COURT OF KENYA 1999). Retrieved SEPTEMBER 26, 2022



He further added that the initial circulation of the published article was limited to Kenya and outside Kenya to those who read it, but after the filing of the case, the circulation had a bigger effect regionally and internationally. It was circulated through the internet

He stated that his subsequent participations and interactions with a magnitude of foreign affairs counterparts did make the article damage his reputation and honour more when it was published on the internet. Where he states, “interact with Heads of State in the East African Community, COMESA and NEPAT – i.e., New Africa Partnership Development Initiative.”

Ruling:

The Court found in favour of the plaintiff and awarded KES 20 million Kenyan Shillings 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 and carried an imprisonment term of not less than 5 years, and upon conviction the offender shall, - “unless the court otherwise orders, be liable to be adjudged to be forever incapable of being elected or appointed to any public office and to be incapable for seven years from the date of the conviction of being registered as an elector, or of voting at an election, of members of any public body in Kenya, and if at the date of the conviction he has been elected as a member of any public body in Kenya, and if at the date of the conviction he has been elected as a member of any public body his seat shall be vacated from that date ...”

The court unequivocally stated that,

“... a charge of corruption is serious, and the charge is even more serious when the person said or understood to be corrupt is one already holding an elective office as a Member of Parliament, and a cabinet minister, as Hon. Biwott is. I have to consider the award of compensatory damages in light of this as well as his own evidence on oath and submissions. I would wish to point out here that the facts and circumstances of this case are peculiar to this case. They were not the same facts which arose in HCCC No. 1067 of 1999 or in MACHIRA’s case, but the principles are the same, and it is those principles that I am following because they are relevant and applicable in this case. I am also adopting the various cases quoted in HCCC No.1067/99 and MACHIRA’s case for the same reason.”⁵²

52 KIPYATOR NICHOLAS KIPRONO BIWOTT v GEORGE MBUGUSS

In summary, the court awarded Biwott KES 20M. Justice Joyce Aluoch stated that the publication on Biwott was tantamount to “*unmitigated and defenceless character assassination.*”

6.3.2 European Court of Human Rights: Case of Nagla v. Latvia⁵³

The case concerned the search by the police of a well-known broadcast journalist’s home, and their seizure of data storage devices. Her home was searched following a broadcast she had aired in February 2010 informing the public of an information leak from the State Revenue Service database.

The Court found a violation of Article 10 (Freedom of expression) emphasising that the right of journalists not to disclose their sources could not be considered a privilege, dependent on the lawfulness or unlawfulness of their sources, but rather as an intrinsic part of the right to information.

6.3.3 Sunday Times versus United Kingdom⁵⁴

The case concerned the injunction served on the Sunday Times restraining publication of news about the pending civil proceedings brought by parents of children born with severe deformities through the taking of thalidomide by women during pregnancy⁵⁵.

The Court found a violation of Article 10 (freedom of expression); this is the first judgment concerning freedom of expression and information via the press⁵⁶.

6.3.4 Wanuri Kahiu & another v CEO - Kenya Film Classification Board Ezekiel Mutua & 2 others; Article 19 East Africa (Interested Party) & Kenya Christian Professionals Form (Proposed Interested Party) [2020] eKLR ⁵⁷

AND KALAMKA LTD, CIVIL CASE NO. 2143 OF 1999 (HIGH COURT OF KENYA 1999). Retrieved SEPTEMBER 26, 2022

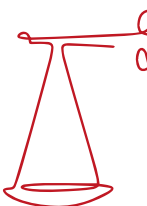
53 COUNCIL OF EUROPE | The European Convention on Human Rights. (2013, July 16). Freedom of expression: landmark judgments. (COUNCIL OF EUROPE) Retrieved September 27, 2022, from COUNCIL OF EUROPE: <https://www.coe.int/en/web/human-rights-convention/expression1>

54 EHRR (1979) Sunday Times v United Kingdom 2 EHRR 245. Loveland: Constitutional Law, Administrative Law and Human Rights 8e: Online Casebook. Available at < https://learninglink.oup.com/static/5c0e79ef50eddf00160f35ad/casebook_196.htm>

55 ibid

56 ibid

57 Wanuri Kahiu & another v CEO - Kenya Film Classification Board Ezekiel Mutua & 2 others; Article 19 East Africa (Interested Party)



The petitioner contested the constitutionality of sections 4,6,7,8,9,12,13,16,30 and 35 of the Films and Stage Plays Act, Cap 32 (**"the Act"**); section 5(i), (ii),(iii),(iv) and (v) of the Kenya Film Classification Board's Classification Guidelines,2012 (**"the Guidelines"**); and ultimately, the decision to ban the film **"Rafiki"** under the aforesaid sections.⁵⁸

The respondents maintained that their decision to restrict the film Rafiki was not arbitrary and did not violate the 1st Petitioner's rights under Article 47.⁵⁹ On the issue of the freedom of expression, the respondents reiterated that the right is a qualified right and therefore can be interfered with by the State, and that the limitation set out in the Films and Stage Plays Act, Cap 22 were reasonable and justifiable.⁶⁰

The court found that the Film and Stage Plays Act and Kenya Films classifications Guidelines 2012 were constitutional, legal, valid and the limitations implied therein were reasonable and justified in a democratic society. Further, the court regarded that the right to freedom of expression was not absolute, and the limitations provided under Article 33(2) of the Constitution and which the petitioners relied on were not exhaustive. The right to freedom of expression is limited by law under the Films Act, in pursuant of pressing and substantial concern and the means adopted for limitation, being Administrative prior classification was necessary, reasonable and justifiable in an open and democratic society.

The court also noted that if the guidelines were to be overturned, there would be a great deal of practical harm because the Board's decisions would be in jeopardy and the nation as a whole, particularly children and young adults, would be exposed to audio-visual material that might be detrimental to public order, decency, and the public interest.

When the final determination on the merits was made, the ban was upheld, and the Court held that the Board's actions in limiting the filmmaker's freedom of expression were constitutional as they sought to protect the Kenyan public's moral values.

6.3.5 Uhuru Muigai Kenyatta V Nairobi Star Publications Limited [2013]

& Kenya Christian Professionals Form (Proposed Interested Party) [2020] eKLR

58 ibid

59 ibid

60 ibid

This case was lodged on 7th May 2012 in relation to a published story on the 24th of April 2012 in a local daily newspaper, **"The Nairobi Star"**, in which there was a cover photo with the headline, **"Uhuru denies links to Njenga Gunman."** This was in response to links of the then Deputy Prime Minister to Mungiki leader Maina Njenga.

One of the issues for determination was the petitioner's claim of a tort in defamation. The finding of the court was that the claim was not so serious as to attract Constitutional sanctions. Eventually, the dispute was referred to the Media Council for arbitration as it was determined to be a civil dispute.

6.3.6 Martha Karua V The Standard Limited & Another [2007]

This civil suit was lodged in response to the article in the **"Sunday Standard"** titled **"Bedroom Spells Danger for Kibaki State House"** published on the 4th of January,2004. The plaintiff made a prayer to the court for permanent injunction, apology and damages for defamation in relation to the publication of the article. The petitioner alleged that each of the defendants falsely and maliciously authored, printed and published or caused to be printed or published words the Plaintiff considered being defamatory. The petitioner maintained that, because of the said article, she suffered loss and damage and was greatly embarrassed, and her credit, reputation and standing had been injured and brought to disrepute as a result of which she asked for the orders prayed for in the plaint.

The defendants jointly stated that they admitted publishing the article complained of but denied that the same was done either falsely and/or maliciously. Further, the defendants wanted strict proof by the Plaintiff, of what she was saying, including proof that the Plaintiff's reputation has been seriously damaged and that she has suffered distress and embarrassment. The defendants added that the plaintiff's actions are a matter of public interest, public concern and scrutiny. Kenyans as taxpayers have a right to know the whereabouts and activities engaged in by the Plaintiff in the discharge of her public duty. The Defendants were media operators, are exercising their constitutional rights in disseminating information with respect thereof to the public. As such an injunction against them cannot issue as claimed or at all without derogating on their freedom of speech as enshrined in section 79 of the Constitution of Kenya.

The court ultimately determined that the plaintiff had failed to establish any libel or defamation. As a



result, none of the prayers made in the Plaint could be granted. Consequently, there were no exemplary or aggravating damages, general damages, apology, permanent injunction, fees, or interests granted. The whole suit brought by the plaintiff was dismissed.

6.3.7 The Jailing of a TUKO.co.ke Editor

In a more recent case, where the Star Newspaper (Kenya) tagged an event with a striking headline, “Tuko Editor sentenced to 6 months in jail over NYS story.”⁶¹ Here, a senior editor at TUKO.co.ke was given a 6-month prison term or a KES 50,000 fine for allegedly publishing a false story about the ongoing NYS graft case. He was sentenced by Senior Principal Magistrate Eunice Nyutu in both his professional and personal capacities. Nyutu stated in her decision that the penalty would serve as a deterrence to other journalists, editors, and media organizations against publishing false material. She pointed out that the witness’s reputation had been harmed by the TUKO narrative that had been published. The court called TUKO and KBC managing editors into the case for fabricating a report regarding a witness for the prosecution who was being questioned by the defence.⁶²

To protest the magistrate’s decision as being unfair, the media house moved to the High Court to request a stay of the sentence order. The Kenya Union of Journalists (KUJ), the Media Council of Kenya (MCK), and Amnesty International were among the parties who supported the protest. The matter was, at the time of authoring the report, in High Court as the judgment from the magistrate’s court was set aside.⁶³

6.3.8 Kakuzi PLC v Kenya Human Rights Commission & Ndula Resource Centre

Kakuzi PLC sued the Kenya Human Rights Commission (KHRC) and Ndula Resource Centre (NRC) over a press statement issued by the two organizations on 14th February 2021. The bone of contention was to seek redress for communities and workers impacted

by land rights violations, severe human rights and labour rights abuses. Kakuzi has often thwarted the attempts by the KHRC and NRC to get justice for victims who have reported to the two organisations about harm caused by Kakuzi guards over the years. This was after KHRC and NRC won KES. 1B in a landmark suit filed in the UK court.

“The KHRC and NRC are highly aware that the suit by Kakuzi is a strategic lawsuit against public participation (SLAPP) intended to intimidate the two organisations, as we discussed earlier. Kakuzi’s main aim is to burden the KHRC and NRC with legal costs and to undermine and thwart advocacy against injustices it is accused of committing. The intended result is to cause KHRC and NRC to abandon their activism against the company by suffocating their right to freedom of expression. The two organisations are confident that this suit will be seen for what it is – frivolous litigation whose main intention is to harass and silence human rights defenders.”⁶⁴

Kakuzi Holdings PLC has since set an Operational Grievance Mechanism (OGM) to address grievances from the members of the public and among the staff internally. The proposed OGM, however, has been viewed to bear several flaws: it is only applicable at the company’s discretion; Kakuzi is not in a rush to implement it; it is not based on the Kenyan Constitution or other frameworks for governance or human rights; and lastly, it is only an internal framework and, as such, falls short of the standards necessary to hold the company accountable for serious violations. It has two tiers, where tier one deals with internal matters of the organization as well as minor offences, whereas tier two deals with egregious human rights violations and also serves as the appellate level for tier 1 cases.

The effectiveness of the OGM is still under consideration due to perceptions that it does not serve the interest of the community as they are run by the company. Cases filed in the OGM have all been determined in favour of Kakuzi.

6.3.9 Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR

This petition brought into focus whether the criminal defamation offense established by section 194 of the

61 Wambulwa, A. (2022, September 26). TUKO editor sentenced to 6 months in jail over NYS story. (The Star) Retrieved September 27, 2022, from The Star: <https://www.the-star.co.ke/news/2022-09-26-tuko-editor-sentenced-to-6-months-in-jail-over-nys-story/>

62 Kenya, MOJA. (2022, September 26). Tuko Editor Sentenced To 6 Months Over NYS Story | KenyaMOJA.com. (K24TV) Retrieved September 27, 2022, from KenyaMOJA.com: <https://www.kenyamoja.com/video/tuko-editor-sentenced-6-months-over-nys-story-k24-video-175203>

63 Nation, (2022), High Court sets aside five days jail term against Tuko editor Dicadus Malowa. Available at < <https://nation.africa/kenya/news/high-court-sets-aside-five-days-jail-term-against-tuko-editor-dicadus-malowa-3974416>>

64 Kenya Human Rights Commission. (2021, June 06). Kakuzi comes after its biggest critics – the Kenya Human Rights Commission and Ndula Resource Centre. (KHRC) Retrieved October 12, 2022, from KHRC: <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/747-kakuzi-comes-after-its-biggest-critics-the-kenya-human-rights-commission-and-ndula-resource-centre.html>



Penal Code is constitutional.⁶⁵ The petition raised important issues like whether or not criminal defamation qualifies as a basis for a constitutional restriction on the right to freedom of expression.⁶⁶ Further, the petitioners argued that by imposing penalties on the civil wrong of defamation, the aforementioned clause unjustly undermined the right to free expression.⁶⁷ The petitioners rightly argued that the constitution is the highest law of the land, and that any statute that is inconsistent with it is unlawful to the extent of the inconsistency.⁶⁸ They also correctly argued that any act or omission that violates the constitution is unconstitutional.⁶⁹

The case in Kenya arose from the indictment of two petitioners, Jacqueline Okuta and Jackson Njeru, who were each charged with criminal defamation for allegedly publishing defamatory statements on their Facebook account “**Buyer beware-Kenya**.”⁷⁰ The case complaint was based on a post in which the complainants were pictured and named as being wanted for illegal possession and handling of property, and misuse of a telecommunication device.⁷¹

The petitioners argued that criminal libel was not a reasonable or justifiable restriction on freedom of expression and added that it was a “disproportionate instrument for protecting the reputations, rights and freedoms of others” and that the remedy in tort is sufficient and less restrictive means of achieving the purpose, hence criminal sanctions on speech ought to be reserved for the most serious cases.⁷²

A key question is what impact the decision will have in East Africa from Kenya’s High Court, and possibly in the wider African region. “The judgment follows and references the landmark decision of the **African Court on Human and Peoples’ Rights in the case of Lohé Issa Konaté v. Burkina Faso** but goes further than that Court’s finding that criminal defamation laws should only be used as a last resort when there is a serious threat to the enjoyment of other hu-

man rights in exceptional circumstances such as hate speech and incitement.”⁷³ It does so by finding that “any continued enforcement of criminal defamation laws by the government would be a violation of the fundamental and constitutionally guaranteed right to the freedom of expression.”⁷⁴

This agrees with the minority dissenting opinion in the African Court case, in which 4 of the 10-judge bench found that the “‘State’s duty to enforce collective security, morality and common interest’ cannot justify the criminalization of expression of speech by way of criminal defamation laws of any kind, whether punishable by incarceration or not. Access to civil action, civil sanctions together with specifically defined crimes for safeguarding national security, public peace and the common interest should be sufficient.”⁷⁵

In order to prevent people with ulterior intentions from interfering with the rights of others, the Respondent argued that section 194 of the Penal Code is constitutional in a democracy and prayed for the petition to be dismissed.⁷⁶ Additionally, the respondents argued that most rights are subject to restrictions that are fair and necessary in a democratic society to realize some common good, such as social justice, public order, and efficient government, or to protect the rights of others.⁷⁷

The court found that the constitutionally permissible limitation of a constitutional right is one that meets the following criteria: (i) it is designated for a proper purpose; (ii) the measures taken to implement the limitation are rationally connected to the achievement of that purpose; (iii) the measures taken are necessary because no other actions would achieve the same goal with a lesser degree of limitation; and

65 Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR.

66 ibid

67 ibid

68 ibid

69 ibid

70 ibid

71 ibid

72 ibid

73 Nani Johansen Reventlow, C. A. (2017, February 8). Kenyan Court Knocks Down Criminal Defamation, Safeguards Freedom of Expression. (H. L. Clinic, Producer) Retrieved October 1, 2022, from CYBERLAW CLINIC: <https://clinic.cyber.harvard.edu/2017/02/08/kenyan-court-knocks-down-criminal-defamation-safeguards-freedom-of-expression/>

74 Judge Mativo of the High Court of Kenya pronounced in his judgment in Jacqueline Okuta & Anor vs. AG & Others

75 Nani Johansen Reventlow, C. A. (2017, February 8). Kenyan Court Knocks Down Criminal Defamation, Safeguards Freedom of Expression. (H. L. Clinic, Producer) Retrieved October 1, 2022, from CYBERLAW CLINIC: <https://clinic.cyber.harvard.edu/2017/02/08/kenyan-court-knocks-down-criminal-defamation-safeguards-freedom-of-expression/>

76 Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR.

77 ibid



(iv) there must be a proper relation (“proportionality *stricto sensu*” or “balancing”)⁷⁸. The court saw that criminal defamation does not pass the third condition because the tort of defamation offers a suitable substitute in terms of damages and compensation.⁷⁹

The court determined that the petitioners were successful in showing that the crime of criminal defamation is not rationally justifiable in a democratic society and that, as a result, criminal sanctions on speech should only be used in the most serious situations as specified in Article 33 (2) (a) through (d) of the Constitution, which protects the public interest.⁸⁰

6.3.10 Conclusion

From these cases, one can see the decadence of defamation suits against the freedom of expression. Both on local and foreign jurisdiction, the freedom of expression must be safeguarded and for it be alienated from any one person, for any reason, it has to be done through the highest regard of the law.

The greatest concern is that the case of *Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR*, there are charges that could come up in court as the *misuse of telecommunication device* to inhibit free speech. This could lead to confiscation of laptops and mobile phones during investigations once articles are published and are deemed to be defamatory in law.

6.4 The Comparative Jurisprudence on SLAPP Suits Globally

The Kenyan case showcases the capability of strategic litigation as an efficient tool in bringing about social change where piling efforts have failed. It reinforces the efforts of other national courts in Africa like Zimbabwe that have decriminalized defamation twice, once under its previous and once under its current constitution.⁸¹ Other countries in the region, such as Ghana, abolished criminal defamation laws through law reform.⁸² This is in line with the continental campaign to decriminalize defamation by the African Union Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Efforts to do the same in East Africa have

78 *ibid*

79 *ibid*

80 *ibid*

81 *ibid*

82 *ibid*

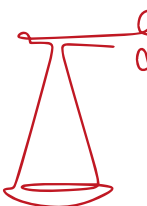
so far been without result, especially where countries like Uganda previously upheld the constitutionality of criminal defamation laws on grounds that they are “relevant” in protecting reputation.

A challenge to Uganda’s criminal defamation laws is currently pending before the East African Court of Justice. The case, brought on behalf of the now-deceased Ugandan journalist Ronald Ssemuusi, argues that his conviction to a prison sentence of one year was in violation of Uganda’s obligations under the East African Community Treaty.⁸³ “The matter has garnered much interest from the international community, with not only the African Union and United Nations Special Rapporteurs on freedom of expression having requested to make amicus submissions in the case, but also a coalition of 20 African and international NGOs.”⁸⁴ It will be interesting to see what impact the Kenyan judgment might have on the case. If the East African Court rules in favour of Ssemuusi, the judgment will positively impact all East African Community countries, which include Kenya, Tanzania, Uganda, Rwanda Burundi, and South Sudan.

Anti-SLAPP regulations can also be grounded on international and regional principles protecting freedom of expression and of speech, such as the above mentioned First Amendment and Art. 10 ECHR, as well as under Art. 19 of the International Covenant on Civil and Political Rights and Article 9 of The African Charter on Human and People’s Rights.

83 Justin BORG-BARTHET, B. L. (2021). The Use of SLAPPs to Silence Journalists, NGOs and Civil Society. European Parliament’s Committee on Legal Affairs. Retrieved October 1, 2022, from [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU\(2021\)694782_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf)

84 *ibid*



7. Legal, Policy and Institutional Reforms to Limit the Effect of SLAPP Suits



7.1 Judicial Precedent on Decriminalization of Defamation

Given the nature of SLAPPs, it is not possible to quantify the incidence of the phenomenon or the full extent of its impact in economic or democratic terms.⁸⁵ Fortunately, efforts to create more space for free expression in Africa have been strengthened by the Kenyan Judiciary. In the case of **Jacqueline Okuta & Anor vs. AG & others**, the High Court of Kenya on 6 of February 2017 annulled **section 194 of the Penal Code** that provides for the offence of criminal defamation.⁸⁶ This decision is important in safeguarding the fundamental rights of Kenyans. This is by considering the need to hold the government officials accountable in their duties. It curtails the abuse of criminal law provisions by political figures to restrict speech they consider unfavourable. Journalists especially have been victims of criminal defamation sanctions for exposing corruption and unlawful activities of public officials.

In a contemporary democratic society, the detrimental and unwanted effects of criminalizing defamation—namely, the terrifying prospects of being arrested, detained, and serving two years in prison—have been regarded to be clearly excessive in their impact and indefensible in totality.⁸⁷

Judge Mativo noted that from the promulgation of the Constitution of Kenya in 2010, it was expected that certain provisions in Kenya's existing laws were to be amended to align them to the letter and spirit of the Constitution. Albeit, seven years later, this expectation had not been met. Relying on regional and international standards on freedom of expression, the

Court concluded that criminal defamation is unconstitutional, reasoning that sanctions arising out of any contravention were clearly excessive and patently disproportionate for the purpose of suppressing objectionable or opprobrious statements. The Court further held that imprisonment as a sanction was not “reasonably justifiable in a democratic society”⁸⁸ and that the availability of civil remedies afforded sufficient redress for injury to one's reputation and honour.

In East Africa, criminal defamation continues to prominently feature in Penal Codes of African countries. The first court in the region to declare criminal defamation violates the right to freedom of expression is the High Court of Kenya.

7.2 The Complaints Commission

The Media Council of Kenya established the Complaints Commission under section 27 of the Media Council Act (No. 46 of 2013). Its services are free and independent of the Media and Government. In general, complaints taken before this commission must constitute a breach of the Code of Conduct for the Practice of Journalism in Kenya (Second Schedule, The Media Act).

The mandate of the complaints commission is as follows:

1. *Mediate or adjudicate in disputes between the government and the media and between the public and the media and intra media on ethical issues.*
2. *Ensure the adherence of high standards of journalism as provided for in the code of conduct for the practice of journalism in Kenya.*
3. *Achieve impartial, speedy and cost-effective settlement of complaints against journalists and media enterprises, without fear of favour.*

The commission comprises of a Chairperson, who holds a judicial office in Kenya or who is an advocate of High Court of Kenya of not less than 10 years

85 Justin BORG-BARTHET, B. L. (2021). The Use of SLAPPs to Silence Journalists, NGOs and Civil Society. European Parliament's Committee on Legal Affairs. Retrieved October 1, 2022, from [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU\(2021\)694782_EN.pdf](chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf)

86 Nani Johansen Reventlow, C. A. (2017, February 8). Kenyan Court Knocks Down Criminal Defamation, Safeguards Freedom of Expression. (H. L. Clinic, Producer) Retrieved October 1, 2022, from CYBERLAW CLINIC: <https://clinic.cyber.harvard.edu/2017/02/08/kenyan-court-knocks-down-criminal-defamation-safeguards-freedom-of-expression/>

87 Judge Mativo of the High Court of Kenya pronounced in his judgment in *Jacqueline Okuta & Anor vs. AG & Others*

88 Judge Mativo of the High Court of Kenya pronounced in his judgment in *Jacqueline Okuta & Anor vs. AG & Others*



standing, and six other persons with knowledge and experience in any one of the following areas, journalism, media policy and law, media regulation, business practice and finance, the performing arts or entertainment, advertising practice or related social sciences.

Since 2009, the Complaints Commission has handled a cumulative total of 300 cases. As at the time of compilation of the report, less than 5 cases are pending before the commission. They have mediated on eight (8) cases which have resulted in apologies. The complaints commission are visible via stakeholder engagements, radio shows, meetings and raising awareness through regional meetings. Above all, the commission operates ADR free of charge.





8. Conclusion

Even where a libel action is unlikely to succeed, the very spectrum of taking chances in court only to be handed down heavy damages induces media houses to make out-of-court settlements in undeserving cases.

In the Key Informant Interviews, the study noted that SLAPP affects sources of information due to fear of litigations. The precedents set by the courts on compensation and sentencing have led to self-censorship by the media. This is necessitated by their need to play safe and limit publication of hard-hitting news. Moreover, it is increasingly difficult to publish stories that rely on anonymized sources.

The emergence of the modern times, and review by 'the people' of our fundamental rights is enabling socio-economic change in our court systems and laws. In this study, we see an emerging trend, from the late 2000s, the growth in Kenya in its legal parameters to take caution when alienating one's fundamental rights, In this case the right to the freedom of speech.

Section 7(2) of the Defamation Act, it provides for conditional privilege on certain reports including those concerning a fair and accurate report on the findings or decisions of such various associations such as those for promoting arts and sciences; for protection interests of any trade, business, industry or profession; for promoting or safeguarding the interests of any game, sport or pastime; and reports of public meetings.

Section 7(2) of the Defamation Act, clearly states that the provision of the section shall not be a defence where it is proved that the defendant has been requested by the plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to the circumstances. Forcing a newspaper to publish a response, whether denial or reply is a tedious requirement as newspapers do not have control over the proceedings to which they are not active participants. "The protection is, as such, insufficient."⁸⁹

Thus, as observed, Anti-SLAPP suits in the Kenyan jurisdiction have been used in several cases. In **Jacque-**

89 MEDIA COUNCIL OF KENYA. (2020). MEDIA SECTOR LEGISLATIVE REVIEW. Nairobi: Media Council of Kenya. Retrieved October 12, 2022

line Okuta & Anor vs. AG & Others, Justice Mativo explains in vivid language that unalienable rights must be dealt with the highest regard when alienating these rights from someone. Therefore, a duty is held by the courts, in this case, to ensure a just process.

Republic v. Makali & 3 others is a notable example of where a libel suit was used to silence the press. One of the cases cited were where one paper was forced to close in 1922 following a successful libel suit by one of the biggest landowners in the country whom it reported as having criticized the colonial government.

There is little doubt to suggest that during the same period the media became increasingly timid and cautious in their reporting of and concerning prominent personalities. The self-censorship was apparent in reports about wrongdoing or certain activities that could attributed to "a son of a prominent politician."⁹⁰

Makali may well be right in his claims, but what was clear is that his conclusions were not based on a pragmatic analysis. The media style of presentation of news, which he claims is testimony of the chilling effect the "mind-boggling" libel awards had on journalists, could have been informed by the media's coming to terms with the legal requirement not to treat persons suspected of crime as criminals.

90 Nyamboga, D. E. (2015, November). Libel Litigation and Its Impact on Journalists' Exercise of Freedom of Expression at Two Newspaper Publications in Kenya. THE INTERNATIONAL JOURNAL OF HUMANITIES & SOCIAL STUDIES, 5. Retrieved September 23, 2022, from www.theijhss.com



9. Recommendations



- i. There needs to be a sensitization to the members of the public and the Judiciary to adopt mediation of the complaints commission as the first instance mechanism before seeking redress with the courts. And with this, there must be standardization of the remedies one may seek in the legal systems.
- ii. Parliament should move with speed to repeal and amend sections of the Penal Code, the Defamation Act, the Books and Newspapers Act and the Preservation of Public Security Act (Specifically as enumerated under Annexure 1 of the study).
- iii. The role of the Media Complaints Commission remains unknown by many members of the public and needs to be publicized to enhance its use as a reconciliatory mechanism. Further, the Multimedia Appeals Tribunal also provides an opportunity for those who are aggrieved by media entities to air out their grievances before pursuing litigation.
- iv. The swift dismissal of claims that meet the definition of SLAPP is the main tenet of anti-SLAPP action. Strategic litigation is a suit that would deter the dissemination of knowledge to the public, hence courts should exercise their authority to order SLAPPs to be dismissed as early in the process as practicable.
- v. Private companies should put up remedial mechanisms to proactively address human rights violations and other complaints as these would reduce the need to resort to unnecessary litigation geared towards protecting their image at the expense of protecting the freedom of expression as a right enshrined in the Constitution.

Annexure 1

Specific Laws and sections proposed for Review

- **Defamation Act, Cap. 36**

The Defamation Act is essentially a codification of common law principles on the torts of defamation, namely libel and slander. It sets out the exceptions to some principles and constitutive elements of the law on the tort of defamation. It also sets out the available defences to the said tort.

Sections 3-5 of the legislation set out some types of slander and excludes the requirement for the need to prove special damage in a claim. These are: slander affecting official, professional or business reputation; slander of women especially with regard to their chastity; and slander of titles, goods or other malicious falsehoods. Section 6 and 7(1) touch on the absolute privilege accorded to certain reports including those of judicial proceedings of legislative bodies, international organisations and inquiries.

In looking at the Defamation Act, it should be borne in mind that defamation law is composed mostly of common law principles that have changed over time and continue to evolve. Save, therefore, for explicit introductions such as the minimum sentence for libel as set out under section 16A of the Act, the contribution of the legislature to the establishment of defamation law has been rather minimal. Legislation can, however, be used to check excesses that can arise out of its application and curtail freedom of expression.

Section 7(2) grants conditional privilege on certain reports including those concerning a fair and accurate report on the findings or decisions of such various associations such as those for promoting arts and sciences; for safeguarding interests of any trade, business, industry or profession; for promoting or safeguarding the interests of any game, sport or pastime; and reports of public meetings.

Section 7(2) also states that the provision of the section shall not be a defence where it is proved that the defendant has been requested by the plaintiff to publish, in the newspaper in which the original publication was made, a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to the circumstances.

Forcing a newspaper to publish a response, whether a denial or reply, is an onerous requirement as newspapers do not have control over the proceedings to which they are not active participants. The protection is, as such, inadequate.

Section 7A provides for a right of reply in the same newspaper that is accused of publishing a defamatory story, to be published within the next possible edition, provided that the right of reply is not sought for after six months of the publication. The clause provides an opportunity for feedback but would work for



the benefit of both the media and the offended persons if made a mandatory pre-defamation procedure.

Section 16A confers on the Courts the discretion to assess damages payable in defamation cases, with a cap on a minimum of KES 1 million where the offence to which the libel relates is one punishable by death and KES 400,000 in respect of offences punishable by a term of not less than three years imprisonment.

This discretion has consistently been used in a very oppressive manner, with the Courts awarding damages on a scale that threatens to bring down media houses. Since the award of the *High Court in Kipyator Nicholas Kiprono Biwott v Clays Limited & 5 others [2000] eKLR*, the courts have increasingly made hefty awards running into several million as damages against the media and journalists.

Overall, the Act needs to be reviewed with several reform options possible.

- **Penal Code**

The Penal Code is one of the oldest legislations in the statutes. The legislation was enacted in 1930 just when the colonial government was getting entrenched following the declaration of Kenya as a British colony in 1920. It has overtime undergone several amendments, the latest being in 2014, vide the Security Laws (Amendment) Act, No. 19 of 2014.

The legislation contains several provisions that directly and indirectly impact on the exercise of the freedom of expression and the media. Section 40(1) includes the definition of treason, the act of imagining the death or harm on a president. Paragraph (b) thereof outlaws publishing of such imaginations. To the extent that the provision outlaws imagination and publication of such imaginations, it violates the freedom of expression and is therefore unconstitutional.

Section 52 empowers the Cabinet Secretary to prohibit certain publications from being imported into the country and to declare certain publications prohibited. To this end, the legislation establishes a board known as Prohibited Publications Review Board comprising of the Attorney General or his representative, the Director of Public Prosecutions or his representative, the Commissioner of Police (read the Inspector General [of Police]) or his representative, the Director of Medical Services or his representative, two persons from the religious community, and any other two persons of good standing, character and integrity to be appointed by the Cabinet Secretary.

The purpose of the Board is to review and advise the Cabinet Secretary on any prohibited publications. The Cabinet Secretary is required under subsection 7 to forward to the Board within 21 days of prohibition, a copy of the prohibited publication for consideration. He/she is bound to act in accordance with the advice given by the Board. The offence for being in possession or control of a prohibited publication is imprisonment for a term not exceeding three years. This provision is dangerous and inimical to the freedom of expression under Article 33. It violates the certainty principles of criminal law. It also is an affront of freedom of thought. Giving the Cabinet Secretary such wide powers and discretion breeds a conducive environment for abuse of the said powers. This provision should as such be repealed in its entirety for being non-compatible with the Constitution.

Section 66 of the Act creates the offence known as alarming publications which states that any person who publishes any false statement, rumour or report which is likely to cause alarm to the public or disturb the peace is guilty of a misdemeanour. The provision is speculative and therefore goes against the principle of certainty that underlies the principles of criminality, and such, the section should be repealed.

Section 66A was introduced vide the Security Laws (Amendment) Act, No.19 of 2014. It attempts to outlaw publication of disturbing material such as injured or dead persons, where the same is likely to cause fear or alarm to the general public. The provision was found to be unconstitutional in *Petition No. 628 of 2014: Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015] eKLR*. It should, therefore, be deleted from the statute books.

Section 96 of the Act provides that any person who, without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints or publishes any words, or does any act or thing, indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated:

- (a) to bring death or physical injury to any person or any class, community or body of persons;
- (b) or to lead to the damage or destruction of any property;
- (c) or to prevent or defeat by violence or by other unlawful means the execution or enforcement of any written law or to lead to defiance or disobedience of any such law, or of any lawful authority, is guilty of an offence and is liable to imprisonment for a term not



exceeding five years.

The imposition of the burden of proof on the accused goes against the principles of fair process, which requires that the burden of proof should initially lie with the prosecution. The provision should be amended to impose the burden upon prosecution in any event.

Section 194 provides for the definition of libel and criminalises it. Sections 195-200 make further provisions with regards to what constitutes defamation in various circumstances. The section was declared unconstitutional in the case of *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR to the extent that it does not include the grounds prohibited under Article 33 (2) (a-d) of the Constitution.

Overall, the above-highlighted provisions violate the basic tenets of freedom of expression and therefore need to be repealed and expunged from the statute books.

- **The Books and Newspapers Act, Cap. 111**

Section 8 of the The Books and Newspapers Act, Cap. 111, requires publishers to submit returns of newspapers within 14 days of the first publication and subsequently in January of every year.

The provision is retrogressive and impracticable. Whereas the Cabinet Secretary has the discretion to determine the use of the copies of the books delivered to him, no regulations have ever been enacted to prescribe how the books received would be used. The provision gave the then Minister (Cabinet Secretary now) a blanket discretion to deal with the intellectual property of the author, including the right of distribution, without any checks. It is notable that to date, no rules have been published on how to handle the newspapers post-delivery by the publisher. Neither has the provision ever been enforced. The case of *Tony Gachoka v the Attorney General & Others* [2013] eKLR, where the journalist was arrested, detained and arraigned in Court on charges of failing to deliver a copy of newspaper to the registrar, for example, shows how application of the said section by an oppressive state can be used to curtail individual liberties.

- **Preservation of Public Security Act, Cap. 57**

The legislation was enacted in 1960 at the height of agitation for Kenya's independence. By design, it was intended to provide a framework for suppression of rebellion and unrest. Just like many other colonial laws, post-independence governments have managed to keep the legislation in the law books.

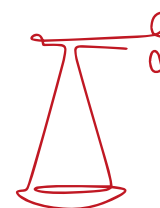
The Act grants sweeping powers to the President to rule by executive decree in the form of subsidiary legislation promulgated under the Act. Section 3 (1) and (2) of the Act provides that:

- If at any time it appears to the President that it is necessary for the preservation of public security to do so, he may by notice published in the Gazette declare that the provisions this Part of this Act shall come into operation in Kenya or any part thereof.*
- Where a notice under subsection (1) of this section has been published, and so long as the notice is in force, it shall be lawful for the President, to the extent to which the provision of this Act is brought into operation, and subject to the provisions of the Constitution, to make regulations for the preservation of public security.*

Under section 4 of the Act, among the items that the Regulations made by the President may touch include:

The censorship, control, or prohibition of the communication of any information, or of any means of communicating or of recording ideas or information, including any publication or document, and the prevention of the dissemination of false reports.

The sweeping powers conferred on the President remain a threat to the freedom of expression and the media, both directly and indirectly. The legislation provides a window for the President to circumvent Constitutional provisions and engage in unilateral law-making which could work to the detriment of journalists.



**The Use of
Strategic
Litigation
Against Public
Participation
(SLAPP) as a
Concept in Kenya
and Its Impact on
the Freedom of
Expression**

