REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 149 OF 2015

BETWEEN

GEOFFREY ANDARE ……..PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL ……. 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ……. 2ND RESPONDENT

AND

ARTICLE 19 – EAST AFRICA ……INTERESTED PARTY

JUDGMENT

1. In his petition dated 17th April 2015, the petitioner challenges the constitutionality of section 29 of the **Kenya Information and Communication Act, Cap 411A** (hereafter '**the Act**'). The basis of the challenge is that it criminalises publication of certain information in vague and overbroad terms, has a chilling effect on the guarantee to freedom of expression, and creates an offence without creating the *mens rea* element on the part of the accused person. The section provides as follows:

A person who by means of a licensed telecommunication system—

a. ***sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or***
b. ***sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person, commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or to both***.

2. The petitioner states that he has filed the petition on his behalf and in the public interest. It has been filed against the Attorney General (**AG**), a constitutional office created under Article 156 of the Constitution whose mandate includes representation of the government in civil suits, and the Director of Public Prosecutions (**DPP**), the constitutional office established under Article 157 of

the Constitution with the mandate to institute and oversee all criminal prosecutions in Kenya.

3. The petition was precipitated by the arraignment of the petitioner on 7th April, 2015 in **Milimani Criminal Case No. 610 of 2015, Republic vs Geoffrey Andare**. The petitioner was charged under section 29 of the Act with the offence of improper use of licensed telecommunication system contrary to section 29(b) of the Act. The particulars of the offence were that he, through his Facebook account, posted grossly offensive electronic mail with regard to the complainant, a Mr. Titus Kuria, in which he stated that "*you don't have to sleep with the young vulnerable girls to award them opportunities to go to school, that is so wrong! Shame on you"* knowing it to be false and with the intention of causing annoyance to the complainant.

Procedural History

4. The petitioner approached this court in person on 21st April 2015 with an urgent application seeking to stop his prosecution in the said criminal case. He was directed to serve the petition and application on the respondents, and the matter was scheduled for directions on 5th May 2015.

5. When the matter came up before the Court on that date, **Article 19 East Africa**, a non-governmental organization which stated that it is dedicated to protection of freedom of expression, applied and was permitted to participate in the matter as an interested party. Directions were also given with respect to the filing of responses and submissions, and the proceedings in Criminal Case No 610 of 2015 were stayed pending hearing and determination of the petition or further orders of the court.

6. On 26th June 2015, the matter was fixed for hearing on the 20th of July 2015, but on this day, the petitioner, who had instructed Learned Counsel, Mr. Ongoya, to act for him, applied for time to re-arrange his authorities before proceeding with the hearing. The matter was then re-scheduled for hearing on 22nd September 2015.
7. When the matter came up for hearing on 22nd September 2015, Mr. Kiprono, who was acting for the interested party and holding brief for Mr. Ongoya for the petitioner, indicated that Mr. Ongoya was requesting for an adjournment as he was bereaved, an application that was not opposed by the respondents. The matter was in the circumstances taken out of the hearing list and rescheduled for hearing on 11th November 2015.

8. On this day, however, Mr. Ongoya again sought an adjournment through a Mr. Githindu, this time on the basis that he was in Malindi facilitating a workshop for the Ethics and Anti-corruption Commission. The respondents requested the Court to give a judgment on the basis of the submissions on record, noting that this was the third time that the petitioner was requesting for an adjournment of the hearing of his petition. This judgment therefore pertains to the issues raised in the petition and the arguments for and against the petition as are contained in the written submissions of the parties.

The Petitioner's Case

9. The petitioner's case is that section 29 of the Act is vague and over-broad especially with regard to the meaning *of 'grossly offensive', 'indecent', 'obscene 'menacing', 'causing annoyance' 'inconvenience' or 'needless anxiety'*. He contends that the section offends the principle of legality which requires that a law, especially one that limits a fundamental right and freedom, must be clear enough to be understood and must be precise enough to cover only the activities connected to the law's purpose.

10. The petitioner further contends that besides the creation of vague criminal offences which leaves it to the court's subjective assessment whether a defendant is convicted or acquitted, the section offends the principle of legality that legislation ought not to be so vague that the subject has to await the interpretation given to it by judges before he can know what is and what is not

prohibited; and that the haziness of the definition of the offence under the section leaves too wide a margin of subjective interpretation, misinterpretation and abuse in determining criminal penalties.

11. He argues, further, that since none of the terms are defined in the Act or are capable of precise or objective legal definition or understanding, the result is that innocent persons are roped in as well as those who are not. It was his averment that the section does not tell persons such as himself on which side of the line they fall, and this enables authorities to be as arbitrary and as whimsical as they like in booking persons under the section.

12. The petitioner further contended that the provision is void for vagueness by imposing an offence without defining the target and the conduct sought to be prohibited; that sub-section (a) does not peg the commission of the offence on the intention or '*mens rea'* of the sender of the material allegedly causing harm, but merely whether the message is subsequently considered 'grossly offensive', 'indecent', 'obscene' or 'menacing' by an unnamed, indefinite and unspecified person.

13. The petitioner further argued that beside vagueness, the section has a chilling effect on his and the public's freedom of expression and the right to seek or receive information or ideas. In his view, freedom of expression extends to the right to send messages of the kind prohibited by the section, and while the section limits freedom of speech and expression, the limitation falls outside the four grounds for limitation under Article 33 (2) of the Constitution.

14. It was also the petitioner's contention that since the definition does not refer to what the content of the message can be, but only the medium through which such information is disseminated, the public's right to information under Article 35 of the Constitution is directly affected. This is because the section further ropes in all information notwithstanding its artistic, academic or scientific value.

15. He further argued that since the message sent has to be grossly offensive, indecent, obscene or menacing or must have been sent for the purpose of causing annoyance, inconvenience or needless anxiety to another person, no distinction is made between mere discussion of a particular point of view which may cause anxiety or be annoying or inconvenient on one hand, and on the other hand, propaganda for war, incitement to violence, hate speech, or advocacy for hatred under Article 33 (2) (d) of the Constitution.

16. The petitioner argued therefore that the section does not amount to a reasonable and justifiable limitation of the freedom of expression as required under Article 24 of the Constitution. While the state was pursuing a legitimate objective, it has used means which are broader than is necessary to accomplish that objective, thereby violating his rights. For the DPP to enforce the provisions of the section at all, or against him in the pending criminal case, would be an insidious form of censorship which impairs a core value contained in Article 33 (1) of the Constitution.

17. In his written submissions, the petitioner contended, with respect to the question of *mens rea*, that section 29 does not provide any ascertainable standard of guilt to protect against arbitrary enforcement; that there is no indication of *mens rea* under the section, and that the net is cast so wide that the innocent are caught up as well. The petitioner has relied on the decision in **Elonis vs United States [2015] 13 183** in support of his argument that the absence of *mens rea* offends the central thought that a defendant must be blameworthy in mind before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, and guilty knowledge, among others. He submits further that although there are exceptions, the general rule is that a guilty mind is a necessary element in the indictment and proof of every crime.

18. The petitioner also called in aid the decision of the five-judge bench of this Court in the case of **Coalition for Reforms & Democracy & Others vs Republic of Kenya & 10 Others, Petition No 628 of 2014 consolidated with Petition Nos 630 of 2014 & 12 of 2015** and the decision in the

Canadian case of **R vs Oakes [1986] 1 SCR 103** to submit that section 29 unjustifiably limits freedom of expression. In his view, as was stated in **General Comment No. 34 (CCPR/C/GC/34)** and in various decisions, *inter alia*, **Charles Onyango-Obbo and Another vs Attorney General [2004] UGSC 1, S vs Mamabolo [2001] ZACC 17 2001** and as expounded by Ronald Dworkin **in Freedom's Law (1996) 200**, freedom of expression is a right that is essential to the enjoyment of other rights, for implicit in it is the right to receive information on the basis of which one can make decisions and choices. It was therefore not a right to be interfered with lightly.

19. According to the petitioner, the logical purpose for the limitation in section 29 must be to facilitate the development of the information and communications sector, particularly telecommunications services. It was his submission that the section fails the second limb of the Oakes test as the State has failed to show the nature and extent of the limitation to be reasonable or demonstrably justified.

20. In addition, it was his submission, based on the decision in **Chirau Ali Makwere vs Robert M. Mabera [2012] eKLR**, that because of the deleterious effects of propaganda for war, incitement to violence, hate speech and advocacy for hatred, sanctions are imposed on such conduct through criminal law and hence the delicate balance between the freedom of expression and the rights and fundamental freedoms of others.

21. He expressed the view that the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others is provided for in various legislation such as the Defamation Act, Cap 36 Laws of Kenya; the National Cohesion and Integration Act, 2008; and the Penal Code, Cap 63 Laws of Kenya. Section 29, in his view, has very little to do with the balancing act.

22. The petitioner therefore urged the Court to grant the following prayers:

a. ***A declaration that Section 29 of the Kenya Information and Communication Act, Cap 411A is unconstitutional and invalid for unjustifiably violating Article 33 and 50 (2) (n) of the Constitution;***

b. ***A declaration that the continued enforcement of section 29 by the 2nd respondent against the petitioner, violates the Bill of Rights and therefore militates against the public interest, the interest of the administration of justice and constitute an abuse to the legal process;***

c. ***Flowing from prayer (b), an injunction barring the 2nd respondent from carrying on with the prosecution of the petitioner in the proceedings in Milimani Criminal Case No. 610 of 2015; and***

d. ***An order that each party bears its costs in this petition brought partly in the public interest petition and in view of the subject matter***.

The Case for the Interested Party

23. The interested party supported the petition and filed submissions dated 12th June, 2015. The interested party relied on the decision in **Marbury vs Madison 5 U. S 137 (1803)** to submit that legality is a fundamental rule of criminal law that espouses that nothing is a crime unless it is clearly forbidden in law. It was its submission further that the principle of legality is not only a core value or human right but also a fundamental defence in criminal prosecution that ensures no crime exists without a legal ground. Accordingly, in its view, section 29 of the Act is vague and overreaching, is thereby lacking in certainty, and it restricts the right to freedom of expression. Its submission was therefore that the section is not reasonable and justified in a society that has proper respect for the rights and freedoms of the individual.

24. The interested party further observed that the words used in the section are not defined, thereby

leaving room for various interpretations. In its view, none of the terms used in the section would have a uniform meaning or interpretation among ordinary citizens because what is obscene to one person may be perfectly normal to another.

25. Article 19 relied on the decision in **Grayned vs City of Rockford (1972) 408 US 104**; and **Black-Clawson International Ltd vs Papierwere Waldhof Aschaffenberg AG (1975) 2 WLR 513, [1975] 1AII ER 810, [1975] UKHL 2, 638** to submit that criminal laws must have a degree of certainty. In its view, section 29 of the Act fails to meet the legal requirements that an offence must be clearly defined in law because an ordinary man or woman cannot know from the wording of the section what acts and omissions will make him or her liable.

26. Article 19 therefore submitted, on the authority of the decision in **Aids Law Project vs Attorney General and 3 Others - Petition No. 97 of 2010** that to retain the section in the statute books would lead to an undesirable situation of the retention of legislation that provides for vague criminal offences which leave it to the court's subjective assessment on whether a defendant is to be convicted or acquitted.

27. Article 19 was further of the view that the undefined terms in the section net a very large amount of protected and innocent speech. It submitted by way of illustration that a person may discuss or even advocate by means of writing disseminated over the internet information or licenced telecommunications device content that may be a point of view pertaining to governmental, literary, scientific or other matters which may be offensive to certain sections of society. It was its submission that the section's net is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Were the section to remain in the statute books, the chilling effect on free speech is immeasurable.

28. Article 19 reiterated the position that in criminal law, a central ingredient to a crime is the requirement of a union of *actus reus* and *mens rea*. The *mens rea* requirement is the essential protection for the innocent while those who do not intend to commit wrongful acts should not suffer unwarranted conviction, or even prosecution. Its argument was therefore that the section casually imposes an offence without interrogating the intention and or frame of mind of the sender of the message at the time the message is sent. Further it only asks whether the message sent is considered grossly offensive, indecent, obscene or menacing by an unspecified person. In its view, to subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the Constitution's sense of justice; and no law which violates this fundamental instinct should endure, for crimes punishable with prison sentences ordinarily require proof of a guilty intent.

29. Article 19 further argued that the section offends Article 50 (2) (n) of the Constitution. It submitted that the section violates criminal law principles by not requiring a guilty mind as a precursor to guilt, and that its applicability has a chilling effect on the petitioner's and the public's freedom of expression.

30. With regard to the charges that the petitioner is facing, Article 19 submitted that one can deduce that the reason the DPP chose to ignore the entire message and zero in on specific words was to escape the requirement of *mens rea.* It observed that the entire post comprised of 197 words and three paragraphs, and the DPP was not at all concerned with the petitioner's frame of mind. In any event, the post, read wholesomely, reveals a frame of mind which is not hell bent on insulting anyone but rather concerned about public good and protecting the disenfranchised.

31. Article 19 further submitted that the section creates an offence without regard or reference to the mandatory requirements of Article 33 (2) of the Constitution. It contended that a plain reading of the section reveals that it purports to invent its own categories of limitation that are outside the constitutionally sanctioned limitations, and it is therefore unconstitutional for unjustifiably limiting freedom of expression.

32. While relying on **R vs Oakes (supra)**, Article 19 took the position that it lies upon the one seeking to limit a fundamental right in a free and democratic society to justify the upholding of any such limitation of rights. It urged the court to follow the decision in **Obbo and Another vs Attorney General (supra)** on the question of what amounts to a reasonable and justifiable limitation. It therefore prayed that the petition be allowed and the orders sought therein be granted.

The 1st Respondent's Case

33. In response to the petition, the Attorney General filed written submissions dated 23rd June, 2015 in which he urged the Court to dismiss the petition as it was a backdoor way of asking the Court to usurp the powers of the trial court and determine the sufficiency of the evidence against the petitioner.

34. In his submissions, the AG emphasised the principle of interpretation of statutes that was to the effect that a legislative enactment ought to be construed as a whole, and that in interpreting a statute, courts ought to adopt such a construction as will preserve the general legislative purpose underlying the provision. The AG relied in support on, among others, the decisions in **Edward Mwaniki Gaturu and Another vs Hon. Attorney General and 3 Others [2013] eKLR**; **Republic vs Lucas M. Maitha Chairman Betting and Licensing Board and 2 Others ex parte Interactive Gaming and Lotteries Limited [2015] eKLR**; and **Abdi Sitar Yusuf vs Attorney General and 2 Others [2013] eKLR** in which Courts had considered the principles applicable in constitutional and statutory interpretation.

35. With respect to the provision impugned in this petition, the AG submitted that the words used in the section are clear and their literal meaning clearly brings out the mischief which they were intended to cure, as well as the cure provided. In his view, there is absolutely no vagueness in the provision, nor is it overbroad as alleged. Its literal meaning ought therefore to be applied, and in any event, subsections (a) and (b) of section 29 complement each other.

36. The AG denied that section 29 violated Articles 33 and 50(2)(n) of the Constitution. With respect to Article 33, his position was that the freedom of expression guaranteed in the said Article is at the same time regulated by the same provision so that the persons who exercise the freedom do so in such a way or to such an extent that they do not violate the constitutional rights of others. The AG was of the view that the Kenya Information and Communication Act was intended to enable the state discharge its obligations with respect to the right to freedom of expression, but also to strike the balance between the enjoyment of the right and protection of the reputation of others.

37. With respect to the alleged violation of Article 50 (2) (n) of the Constitution, the AG submitted that the section guaranteed to everyone the right not to be convicted for an act or omission that was not, at the time it was committed, an offence under Kenyan or international law. He agreed with the general proposition that retrospective laws are contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the existing law. In the present case, it was his submission that the petitioner has not demonstrated any retrospective aspect of the provision of the Act in contention.

38. Finally, it was the AG's submission that freedom of expression guaranteed under Article 33 is not absolute and can be limited pursuant to Article 24 of the Constitution. The provisions of the Act, which were intended to regulate freedom of expression, were therefore constitutional, and the present petition had no basis and ought to be dismissed.

The 2nd Respondent's Case

39. The DPP filed a replying affidavit sworn by Corporal Hannington Chumba on 19th May 2015. Corporal (Cpl) Chumba is a Police Officer attached to the Directorate of Criminal Investigation Department. He states that he was one of the officers investigating the complaint against the

petitioner.

40. Cpl. Chumba deposes that investigation into the matter forming the subject of the petition commenced following a complaint by a Mr Titus Kuria. The complaint was that the petitioner, Mr. Andare, of Umoja Estate had posted a malicious post on his Facebook page under the name *'Andare Jeffrey'* and on a group page *"Jukwa La Siasa Mathare 2014"*, accusing Mr. Kuria of misusing his position as a representative of a fund trust by the name CME Trust in Mathare Slums. The petitioner's post was that Mr. Kuria sleeps with vulnerable girls in order to offer them scholarships.

41. Cpl. Chumba avers that he visited the petitioner's Facebook account and verified that the account was genuine, and he retrieved the post, which he has annexed to his affidavit in evidence.

42. According to Cpl Chumba, the petitioner admitted having posted the malicious post when he was summoned to the police station. The posting, according to Cpl Chumba, was contrary to section 29(b) of the Kenya Information and Communication Act Cap 411A laws of Kenya. As a result, criminal charges were preferred against him in Milimani Criminal Case No 610 of 2015. Cpl. Chumba avers that this petition has therefore been filed in bad faith, is misconceived and an abuse of the court process, and is meant to defeat the cause of justice.

43. It is the DPP's case therefore that he independently reviewed and analyzed the evidence contained in the investigations file compiled by the Directorate of Criminal Investigations including the witness statements, documentary exhibits and statements of the petitioner as required by the law. On the basis of this review and analysis, the DPP gave instructions to prosecute the petitioner. His decision to prosecute was informed by the sufficiency of evidence on record and the public interest, and not on any other considerations.

44. The DPP contended that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in support of charges. He had properly exercised the state powers of prosecution vested in him by the Constitution, and in the exercise of such powers, he is only subject to the Constitution and the law, does not require the consent of any person or authority, and is independent and not subject to the direction or control of any person or authority. It was his contention further that the High Court would be crossing into the line of the independence of the DPP if it descended into the arena of determining whether there is a prima facie case against the petitioner.

45. In his written submissions, the DPP argues that Article 24 and 25 of the Constitution allow for the limitation of rights and fundamental freedoms, and set out the rights and fundamental freedoms that cannot be limited, respectively. His submission is that the right to freedom of expression is not one of the rights that cannot be limited under Article 25. The DPP cites Article 24 (1) and the decision in **Mutunga vs Republic (1986) KLR 167** to submit that constitutional rights and freedoms of the individual are subject to limitations designed to ensure that the enjoyment of these rights by any individual does not prejudice the rights and freedoms of others, or the public interest.

46. The DPP agrees with the AG that freedom of expression of any person which is protected under Article 33 is also regulated by the same Article. Consequently, any person who exercises the freedom is required to do so in such a way that the rights of others are not violated. The DPP cites the decision of Onyancha J in **John Ritho Kanogo & 2 Others vs Joseph Ngugi & Another Civil Suit No 589 of 2012** to submit that any person who exercises his freedom of expression in contravention of Article 33(3) may be called upon to account under the relevant statutes promulgated under the Constitution.

47. With respect to the petitioner's claim that his continued prosecution will violate his rights under various Articles of the Constitution, the DPP argues that he has at all times exercised the state prosecutorial powers in accordance with the law and within other provisions of the Constitution.

It is also his submission that the petitioner has not sufficiently demonstrated with particularity how these rights have been infringed and the damage suffered as required by the principles in **Anarita Karimi Njeru vs Republic (1976-1980) 1KLR 1272** and **Matiba vs AG (1990) KLR 666**.

48. With regard to the petitioner's prayer for an order barring his prosecution, the DPP argues that such an order is a discretionary remedy and is only available where a public body or official has acted in excess of its powers and requires the public body to cease from performing a certain act. His case is that there is no evidence in the present petition that the DPP has misused his powers or contravened the rules of natural justice as alleged by the petitioner. In his view, it is not enough for the petitioner to state that the respondents have not carried out sufficient investigations, for the quality and sufficiency of evidence gathered in an investigation can only be tested by a trial court before which the charges are brought.

49. The DPP further argues that this is not the appropriate forum for the petitioner to lodge the present petition, and submits that there is a danger in elevating every issue to a constitutional issue and avoiding the processes available for dealing with the issues at hand.

50. Finally, the DPP submits that there is no mischief or ambiguity in section 29 of the Act that justifies the invocation of the jurisdiction of this Court. He therefore prays that the petition be dismissed with costs.

Determination

51. Having read the pleadings and submissions of the parties in this matter, I believe that the first and main issue for consideration is whether section 29 of the Kenya Information and Communication Act is unconstitutional. I will thereafter consider the question whether there has been a violation of the petitioner's rights in his prosecution under the provisions of the Act, and whether prohibitory orders should issue against his prosecution.

Jurisdiction

52. Before considering the substantive issues, however, it is important to consider first the question whether this petition is properly before me. This issue, which goes to the question of jurisdiction, was raised by the DPP and was supported by the AG. The position they take is that this Court lacks the jurisdiction to determine the present matter as to do so is to interfere with the independent exercise of the DPP's constitutional mandate, and further, that the matters at issue regarding the sufficiency of the evidence against the petitioner are within the mandate of the trial court.

53. The petitioner has relied in response on the decision in **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1; in Re the Matter of the Interim Independent Electoral Commission [2011] eKLR**; and **Samuel Kamau Macharia vs Kenya Commercial Bank Limited [2012] eKLR** to submit that this Court has the jurisdiction, pursuant to Article 23 and 165 (3) (b) of the Constitution, to deal with the matters raised in this petition. In his view, this petition raises matters beyond the jurisdiction of the trial court which have no relation with the weight, quality or sufficiency of evidence gathered and adduced at the trial in support of or in opposition to the charges. According to the petitioner, his case is that the provisions of a statute offend the Constitution, and the Court is duty bound to declare it unconstitutional should it so find.

54. It was also his argument that the Court, as the custodian of the Bill of Rights, is entitled to intervene where the facts disclose a need to prevent a violation of the rights and fundamental freedoms guaranteed under the Constitution as was held in **Bill Kipsang Rotich vs Inspector General National Police Service [2013] eKLR.**

55. The petitioner argued further that where the constitutional validity of the section of a statute under which the DPP has preferred charges is challenged on account of violation of the Constitution, it is

the duty of the Court to intervene and grant appropriate relief under Article 23 (3) of the Constitution.

56. Article 19 agrees with the petitioner that this Court has jurisdiction under Article 165 (3) (b) of the Constitution to determine the matter. It submitted that the petitioner is challenging the constitutionality of section 29 of the Kenya Information and Communication Act and not the conduct, mandate or powers of the DPP.

57. I agree with the parties in this matter on the question of jurisdiction, and I do not believe that there is much dispute on this point, that as the Court stated in the case of **The Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd (supra)**, jurisdiction is everything. Should the Court find that it has no jurisdiction, then it would be bound to down its tools and take no further step.

58. As is evident from the petitioner's pleadings, however, at the core of his case is the constitutionality of section 29 of the Kenya Information and Communication Act. It is, again I believe, undisputed, in light of the provisions of Article 165 of the Constitution, that the High Court has the jurisdiction to determine whether a provision of law is in any way in conflict with the Constitution. Article 165 (3)(b) and (d), which are relevnt for present purposes, provide that the High Court shall have-

a. **…;**
b. ***Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
c. **…;**
d. ***Jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of-***

i. ***The question whether any law is inconsistent with or in contravention of the Constitution;***

ii. ***The question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution;***
iii. **…**

59. It is thus evident that this Court is vested with the jurisdiction to interpret the Constitution and to determine whether any legislation is in conflict with the Constitution. That is the issue that the petitioner has placed before this Court. He has challenged, first, the constitutionality of section 29 of the Kenya Information and Communication Act which he alleges violates his right to freedom of expression. As a result, he contends that his prosecution under the said provision of the Act further violation his constitutional rights. In my view, these are matters that properly fall within the jurisdiction of this Court in accordance with Article 165 (3) (b) and (d) (i) of the Constitution.
60. The second jurisdictional question raised by the DPP relates to the orders that the petitioner seeks, which, in the DPP's view, would mean that the High Court is entering into an area reserved for the trial court. I believe that the circumstances under which the High Court would intervene in a trial before a subordinate court have been considered and are fairly well settled. It must be in circumstances where the continuation of the proceedings would amount to a violation of the rights of the petitioner. As was stated by the Court in the case of **George Joshua Okungu and Another vs Chief Magistrate Court Anti-Corruption Court Nairobi and Another Petition No. 227 and 230 of 2009:**

> ***[50.] "The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that***

> ***ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the Petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the Petitioner's Constitutional rights, the Court will not hesitate in putting a halt to such proceedings."***

61. In that case, the Court also cited with approval the words of the court in **Kuria & 3 Others vs Attorney General [2002] 2 KLR 69** in which the High Court had observed that:

> ***"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform... A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives…"***

62. I am satisfied that in the present case, should the Court find that the provisions of section 29 of the Act are unconstitutional, and that therefore the prosecution of the petitioner under its provisions violates or threatens to violate his constitutional rights, then the Court has the jurisdiction to grant the orders that he seeks. I will now turn to consider the substantive issue raised in the petition, the constitutionality of the said section.

Whether Section 29 of the Kenya Information and Communication Act is Unconstitutional

63. The petitioner and interested party have argued that section 29 of the Act is unconstitutional. Their argument is that the section is vague and overbroad, it has a chilling effect on the guarantee to freedom of expression, and it creates an offence without creating the *mens rea* element on the part of the accused person. The AG and DPP deny these allegations, with the AG maintaining that the section is constitutional and a permissible limitation under Article 24 of the Constitution.

64. Before embarking on an analysis and determination of this issue, it is useful to consider what the duty of the court is in determining whether the impugned provision is unconstitutional, and the principles that should guide the court in making its determination.

Applicable Principles

65. In **U.S vs Butler, 297 U.S. 1[1936],** the Court expressed the duty of a Court in determining the constitutionality of a provision of a statute in the following terms:

> ***"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."*** (Emphasis added)

66. It has also been held that in determining the constitutionality of a statute, a court must be guided by the object and purpose of the impugned statute, which object and purpose can be discerned from the legislation itself. The Supreme Court of Canada in **R vs Big M Drug Mart Ltd., [1985] 1 S.C.R. 295** enunciated this principle as follows:

> ***"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."***

67. See also the decision of the High Court in **Murang'a Bar Operators and Another vs Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011.**

68. I bear in mind also the provisions of Article 2 of the Constitution, which is emphatic that the Constitution is supreme, and any law that is inconsistent with the Constitution is void to the extent of the inconsistency.

69. With respect to the interpretation of the Constitution, Article 259 provides the manner in which the Constitution is to be interpreted. It requires that the Constitution should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, and that contributes to good governance. At Article 159(2) (e) the Constitution mandates the Court, in exercising its judicial authority, to protect and promote the purpose and principles of the Constitution.

70. In the case of **Tinyefuza vs Attorney General of Uganda, Constitutional Petition No. 1 of 1997 (1997 UGCC 3)**, the Court held that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other.

71. I am also mindful of the words of the Court in the case of **Ndyanabo vs Attorney General of Tanzania [2001] EA 495** with regard to the constitutionality of a statute. In that case, the Court observed that there is a general presumption that every Act of Parliament is constitutional, and the burden of proving the contrary rests upon any person who alleges otherwise.

72. However, with respect to provisions of legislation that limit or are intended to limit fundamental rights and freedoms, the Constitution itself qualifies the presumption. As was observed in the **CORD Case**:

> ***"[96.] However, we bear in mind that the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 …. there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article."***

73. I am duly guided by the judicial pronouncements and constitutional provisions with respect to the interpretation of the question whether legislation or part thereof is in conflict with the Constitution, and I now turn to consider the provision of section 29 of the Act against these principles.

Section 29 Kenya Information and Communication Act

74.The Kenya Information and Communication Act was enacted as an Act of Parliament to:

> **…provide for the establishment of the Communications Commission of Kenya, to facilitate the development of the information and communications sector (including broadcasting, multimedia telecommunications and postal services) and electronic commerce to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telcom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes.**

75.Section 29 thereof, which is titled **"Improper use of system"** provides that:

A person who by means of a licensed telecommunication system—

c. ***sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or***

d. ***sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person, commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or to both***.

76.As noted above, the petitioner challenges this provision on two levels. He argues, first, that it is vague and over broad, and the words contained therein are not defined, therefore leaving room for various interpretation.

77.I have considered the words used in the section. I note that there is no definition in the Act of the words used. Thus, the question arises: what amounts to a message that is *'grossly offensive'*, *'indecent' obscene'* or *'menacing character'*? Similarly, who determines which message causes 'annoyance', 'inconvenience', 'needless 'anxiety'? Since no definition is offered in the Act, the meaning of these words is left to the subjective interpretation of the Court, which means that the words are so wide and vague that their meaning will depend on the subjective interpretation of each judicial officer seized of a matter.

78.It is my view, therefore, that the provisions of section 29 are so vague, broad and uncertain that individuals do not know the parameters within which their communication falls, and the provisions therefore offend against the rule requiring certainty in legislation that creates criminal offences. In making this finding, I am guided by the words of the Court in the case of **Sunday Times vs United Kingdom Application No 65 38/74 para 49**, in which the European Court of Human Rights stated as follows:

> ***"(A) norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able- if need be with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail."***

79.As the Court observed in the **CORD case**, the principle of law with regard to legislation limiting fundamental rights is that the law must be clear and precise enough to enable individuals to conform their conduct to its dictates. The Court in that case cited with approval the words of **Chaskalson, Woolman and Bishop** in **Constitutional Law of South Africa, Juta, 2nd ed. 2014, page 49** where the learned authors stated that:

> ***"Laws may not grant officials largely unfettered discretion to use their power as they wish, nor may laws be so vaguely worded as to lead reasonable people to differ fundamentally over their extension."***

80. In my view, the provisions of section 29 are so wide and vague that they offend the requirements with regard to law that carries penal consequences.

Limitation of the Right to Freedom of Expression

81. The petitioner and Article 19 have argued that section 29 of the Act limits the right to freedom of expression. They argue that because of the fact that its provisions are so vague and overbroad, it has a chilling effect on the right to freedom of expression.

82. The respondents do not dispute that the provision limits freedom of expression. They argue, however, that its provisions are a justifiable limitation to the right of freedom of expression which is guaranteed under Article 33 in the following terms:

1. ***Every person has the right to freedom of expression, which includes-***

e. ***Freedom to seek, receive or impart information or ideas;***
f. ***Freedom of artistic creativity; and***
g. ***Academic freedom and freedom of scientific research.***

2. ***The right to freedom of expression does not extend to-***

a. ***Propaganda for war;***
b. ***Incitement to violence;***
c. ***Hate speech; or***
d. ***Advocacy of hatred that-***

i. ***Constitutes ethnic incitement, vilification of others or incitement to cause harm; or***

ii. ***Is based on any ground of discrimination specified or contemplated in Article 27 (4).***

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

83. It has been recognized that freedom of expression is an essential right, important for the enjoyment of other rights, and for a democratic society to thrive. In **Charles Onyango-Obbo and Another vs Attorney General (supra)**, the Supreme Court of Uganda (per Mulenga SCJ) underscored the importance of the freedom of expression in the following words:

> ***"Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with J.J. Rousseau's version of the Social Contract theory. In brief, the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the raison d'etre of the State is to provide protection to the individual citizens. In that regard, the state has the duty to facilitate and enhance the individual's self-fulfillment and advancement, recognising the individual's rights and freedoms as inherent in humanity….***
>
> ***Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance."*** (Emphasis added)

84. In the same decision, Odoki C J expressed the view that:

"The importance of freedom of expression including freedom of the press to a democratic society cannot be over-emphasised. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in government or authority to be brought to public scrutiny and thereby hold them accountable."

85. **Once it is recognised that section 29 of the Act limits a right that is as important as the right to freedom of expression undoubtedly is, then the state must bring the law imposing such limitation within the rubric of Article 24 of the Constitution.**

86. **Article 24 provides as follows:**

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

87. **A critical provision for this petition is Article 24(2) of the Constitution which states as follows:**

2. ***Despite clause (1), a provision in legislation limiting a right or fundamental freedom—***

(a) in the case of a provision <u>enacted or amended</u> on or after the effective date, is not valid <u>unless the legislation specifically</u>

<u>expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;</u>

a. ***<u>shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation;</u> and***

b. ***shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.***

88. **Finally, Article 24(3) imposes a duty on the state, in circumstances such as presently before me, in the following terms:**

(3)The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

89. In other jurisdictions part of, the criteria set out in Article 24 has been applied in cases where the question of the constitutionality of statutes was at issue, and is of assistance to this court even were article 24 not applicable. In the Canadian case of **R v. Oakes (supra),** the Court was considering the question whether section 8 of the Narcotic Control Act, which had been found to be unconstitutional for violating section 11 of the **Canadian Charter of Rights and Freedoms**, was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society. In reaching the conclusion that it was not, the Court enunciated the criteria to be followed in answering the question as follows:

> ***"69.To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.***
>
> ***70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".***

90. I have set out above the nature of the right to freedom of expression, and its importance in a free and democratic society. The respondents have asserted that the limitations in section 29 are justified in a free and democratic society. The questions that beg, bearing in mind the express provisions of Article 24 and the criteria in **R vs Oakes** are: what is the purpose of the limitation, and how important is it? What is the relationship between the limitation and its purpose? Are there less restrictive means to achieve the purpose intended?

91. The respondents' argument, as I understand it, is that the purpose of the provision in the legislation was to protect the reputation of others. As a result, section 29 was inserted to criminalise the use of "*licensed telecommunication systems*."

92. I have set out elsewhere above the stated purpose of the **Kenya Information and Communication Act**. Aside from being intended to establish the Communication Commission of Kenya (now, subsequent to the 2013 amendments, the Communication Authority of Kenya), and to provide for the transfer of the assets of the former Kenya Posts and Telecommunication Corporation to the Commission, its stated objectives relate to the regulation of the telecommunication system in Kenya, and ***"to facilitate the development of the information and communications sector (including broadcasting, multimedia telecommunications and postal***

services) and electronic commerce".

93. As section 24, which deals with the issuance of telecommunication licences illustrates, the Act may not have been intended to apply to individual users of social media or mobile telephony. Section 24 titled **"Telecommunication licences"** provides as follows:

> ***(1) The Commission may, upon application in the prescribed manner and subject to such conditions as it may deem necessary, grant licences under this section authorising all persons, whether of a specified class or any particular person to—***
>
> ***(a) operate telecommunication systems; or***
>
> ***(b) provide telecommunication services, of such description as may be specified in the licence.***

94. Individuals such as the petitioner and others who post messages on Facebook and other social media do not have licences to "***operate telecommunication systems"*** or to provide telecommunication "***as may be specified in the licence."***

95. Be that as it may, section 29 imposes penal consequences in terms which I have found to be vague and broad, and in my view, unconstitutional for that reason. Even if they were not, could the provision be permissible under Article 24?

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

97. As was observed in the **CORD case**, the state is entitled to impose limitations on the right to freedom of expression. However, such limitations must be on grounds which are permitted in the Constitution, which under Article 33(2) are propaganda for war, incitement to violence, hate speech, or advocacy of hatred. In that case, the Court stated as follows:

> **"[259]** ***As we understand it, the State can (and we believe, does) penalize the broadcast or publication of any expression that falls under Article 33(2), namely propaganda for war, incitement to violence, hate speech and advocacy to hatred. This new offence under the Penal Code that seeks to punish "insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace" thus limits the freedom of expression to a level that the Constitution did not contemplate or permit, and in a manner that is so vague and imprecise that the citizen is likely to be in doubt as to what is prohibited***."

98. I agree with the view expressed in the **CORD case**. Section 29 imposes a limitation on the freedom of expression in vague, imprecise and undefined terms that go outside the scope of the limitations allowed under Article 33 (2) of the Constitution. The respondents have not been able to show that such limitations are permissible under Article 24, or that they are the least restrictive means available. If the intention is to protect the reputations of others the prosecution of mean spirited individuals who post defamatory statements on social media does not achieve that. I believe that libel laws provide for less restrictive means of achieving this purpose - see the case of **Arthur Papa Odera vs Peter O. Ekisa, Civil suit No 142 of 2014** in which the reputation of the plaintiff, who alleged defamation in postings on social media by the defendant, was vindicated in a civil process by an award of Kshs.5m in damages to the plaintiff against the defendant for libel.

99. In the circumstances, it is my finding that the provisions of section 29 of the Kenya Information

and Communication Act are also unconstitutional for violating Article 33 of the Constitution, and therefore null and void.

Absence of *Mens Rea*

100. The petitioner and Article 19 argue that section 29 of the Act is unconstitutional and violates Article 50(2)(n). Their argument, as I understand it, is, first, that the absence of the requirement of *mens rea* offends the central thought that a defendant must be blameworthy in mind before he can be found guilty.

101. I believe that it is not in dispute that crimes involve both blameworthy acts and blameworthy mental elements or state of mind on the part of the accused person. In **R. Balakrishna Pillai vs State of Kerala, Criminal Appeal No. 372 of 2001**, the Indian court addressed its mind to the question of mens rea vis-à-vis criminal offences. While quoting Blackstone, the court observed that:

> ***"To consider yet another aspect, the general principle of criminal jurisprudence is that element of mens rea and intention must accompany the culpable act or conduct of the accused. In respect of this mental element generally, the Blackstone's Criminal Practice describes it as under:***
>
> ***"In addition to proving that the accused satisfied the definition of the actus reus of the particular crime charged, the prosecution must also prove mens rea, i.e., that the accused had the necessary mental state or degree of fault at the relevant time. Lord Hailsham of St Marylebone said in Director of Public Prosecutions v. Morgan [1976] AC 182 at p.213 : 'The beginning of wisdom in all the "mens rea" cases is as was pointed out by Stephen J in Tolson (1889) 23 QBD 168 at p.185, that 'mens rea' means a number of quite different things in relation to different crimes'. Thus one must turn to the definition of particular crimes to ascertain the precise mens rea required for specific offences."***
>
> ***The author then comments:***
>
> ***"Criminal offences vary in that some may require intention as the mens rea, some require only recklessness or some other state of mind and some are even satisfied by negligence. The variety in fact goes considerably further than this in that not only do different offences make use of different types of mental element, but also they utilise those elements in different ways."***

102. In this case, I believe the petitioner and the interested party are correct in relation to section 29(a) of the Act. The section criminalises the act of sending a ***"message or other matter that is grossly offensive or of an indecent, obscene or menacing character…"*** It does not require the mental element on the part of the sender of the message that would render his or her act criminal in nature. The offence appears to be premised on how others interpret the message. Section 29(b) does contain both elements of a criminal offence in that it criminalises the sending of a message that the sender ***knows*** "*to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person*". However, as I have already found that the provisions of the section are over broad and vague, and that they limit the right to freedom of expression and are therefore unconstitutional, I believe that the arguments in respect of *mens rea* and *actus reus* are moot.

103. The petitioner and Article 19 have also challenged section 29 on the basis that it violates the petitioner's rights under Article 50 (2) (n) of the Constitution which provides that:

> ***Every accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time it was committed or omitted***

was not-

i. ***An offence in Kenya; or***
ii. ***A crime under international law***.

104. It is not clear from the submissions before me in what way the provisions of section 29 offend against this Article. However, as I have already found the provision unconstitutional for other reasons, I believe this question is also moot.

Disposition

105. The petitioner has sought three main orders from this Court:

> **a)** ***A declaration that Section 29 of the Kenya Information and Communication Act, Cap 411A is unconstitutional and invalid for unjustifiably violating Article 33 and 50 (2) (n) of the Constitution;***
>
> ***b) A declaration that the continued enforcement of section 29 by the 2nd respondent against the petitioner, violates the Bill of Rights and therefore militates against the public interest, the interest of the administration of justice and constitute an abuse to the legal process;***
>
> ***c) Flowing from prayer (b), an injunction barring the 2nd respondent from carrying on with the prosecution of the petitioner in the proceedings in Milimani Criminal Case No. 610 of 2015;*** and

106. Article 23(3) of the Constitution grants this court power to issue "appropriate orders" in a petition brought under Article 22 of the Constitution. In this case, the Court was concerned with the constitutionality of section 29 of the Kenya information and Communication Act, and has come to the conclusion that the section is unconstitutional for being couched in overbroad and vague terms that violate or threaten the right to freedom of association guaranteed under Article 33 of the Constitution. I have, however, not found a violation of the petitioner's rights under Article 50(2)(n).

107. Consequently, the orders that commend themselves to me are as follows:

a. I declare that section 29 of the Kenya Information and Communication Act is unconstitutional;

b. I direct each party to bear its own costs of the petition.

108. The Director of Public Prosecutions has the constitutional mandate to determine whether or not to proceed with the prosecution of the petitioner with regard to the facts alleged against him should they disclose an offence under any other provision of law, and this Court will therefore not issue prohibitory orders directed against the DPP.

109. However, in light of the findings of this Court, the Director of Public Prosecutions cannot continue to prosecute the petitioner under the provisions of section 29 of the Kenya Information and Communications Act.

Dated, Delivered and Signed at Nairobi this 19th day of April 2016

MUMBI NGUGI

JUDGE

Mr. Ongoya instructed by the firm of Ongoya & Wambola & Co. Advocates for the petitioner.

Ms. Wawira instructed by the State Law Office for the 1st respondent.

Ms. Kihara instructed by the Director of Public Prosecution for the 2nd respondent.

Mr. Kiprono instructed by Article 19.