



**Republic v Director of Public Prosecutions & 3 others; Unilevel Capital Limited & another (Interested Parties); Vital Quest International & 2 others (Exparte) (Application E078 of 2024) [2024] KEHC 12090 (KLR) (Judicial Review) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12090 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION E078 OF 2024  
J NGAAH, J  
OCTOBER 11, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATION ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**UNILEVEL CAPITAL LIMITED ..... INTERESTED PARTY**

**DR MERCY KORIR ..... INTERESTED PARTY**

**AND**

**VITAL QUEST INTERNATIONAL ..... EXPARTE**

**RICHARD TSADO BALA ..... EXPARTE**

**LOT ZIKO TSADO ..... EXPARTE**



## JUDGMENT

### Applicants' Application

1. The application before this Honourable Court is a motion dated 15 April 2024. The law under which it has been brought to court has not been specified on the face of the motion, but the applicants have sought the following orders:
  - “1. An order of certiorari does issue to bring to this court and quash the investigation of the applicants by the Director of Criminal Investigation and the resulting decision to blacklist the applicants at the Immigration Department and to put them on a no-fly list, for the offence of publication of false information under Section 23 of the *Computer Misuse and Cybercrimes Act*, 2018.
  2. An order of mandamus does issue compelling the Director of Criminal Investigation to de-blacklist the Applicants at the Immigration Department and to remove them from the no-fly list.
  3. A declaration does issue that Section 23 of the *Computer Misuse and Cybercrimes Act*, 2018 is vague and permits arbitrariness by the DCI and is therefore unconstitutional for violating Articles 24, 33, 47 and 50 (2) (n).
  4. A declaration does issue that the evidence from the Search of the Applicants' gadgets the DCI took from the Applicants on 6 January 2024 was not by a search warrant and is therefore illegally obtained evidence which is inadmissible in any proceedings and cannot support any decision.”
2. According to the statutory statement dated 11 April 2024 and an affidavit of even date sworn by Ziko Tsado, verifying the facts relied upon, the deponent is a Nigerian and director of the 1<sup>st</sup> applicant company which has business interests in Kenya. According to Tsado, the applicants are law abiding citizens and the nature of their company's business is what he has described as “sale of wellness product by e-commerce”. The “wellness products” are said to have been licensed by the Pharmacy and Poisons Board which is a body established under section 3 of the *Pharmacy and Poisons Act* cap. 244 to, inter alia, enforce the prescribed standards of quality, safety and efficacy of all medicinal substances manufactured, imported into or exported out of Kenya.
3. In order to get the target market, the 1<sup>st</sup> applicant entered into an agreement for hire with a company called Unilevel Capital Limited, which is a Dubai based firm, for “Generation of Leads”. The 1<sup>st</sup> applicant, it is contended, does not itself publish any advertisements, apparently marketing the “wellness products” because under clause 1.6 of the agreement, Unilevel accepted to “bear all responsibility before the law, for uncoordinated actions that entail consequences”. And in clause 3.1 Unilevel agreed “not to place” any “pages on the internet containing materials that violate generally accepted norms” or to “use photos or videos of cultural figures, medicine, and politics for increasing reach”. Again, in clause 5.3, Unilevel agreed to be “fully liable that the published information complies with the law”.
4. Sometime in September 2023, Unilevel published various adverts online one of which resulted in a criminal complaint by the 2<sup>nd</sup> interested party. On 1 November 2023, Tsado engaged lawyers to



write to the Directorate of Criminal Investigations (DCI) offering to cooperate with the investigators and supplied a copy of the advertisement contract showing that the 1<sup>st</sup> Applicant had hired an independent contractor to offer lead generation services. It is this third party who had published the posts complained of.

5. The DCI has never responded to the 1<sup>st</sup> applicant's letter or investigated Unilevel Capital Limited. Instead, according to Tsado, officers from the DCI have persistently harassed the applicants and their employees despite the fact that Unilevel Capital Limited which made the post has since apologised for the posts. According to Tsado, there is no factual or legal basis or reasonable suspicion to justify investigating the Applicants.
6. Further, it has been sworn, on 10 January 2024, this Honourable Court found in a bail ruling that the DCI had extorted Kshs. 2 million from the Applicants on 6 October 2023 through a former local director identified as Anne Wambui.
7. In these circumstances, the applicants believe that the investigation is unreasonable or made in bad faith, intended to achieve ulterior motives, and is being abused as a tool for settling of personal scores or vilification.
8. It has also been sworn that on 6 January 2024 the DCI officers picked two phones and two laptops from Tsado as soon as he arrived at the airport and was whisked away to the DCI offices. In the course of investigations, Tsado disclosed to the officers the password to his phones and laptops. The DCI has never returned Tsado's electronic devices and, thus, disrupted the 1<sup>st</sup> applicant's business operations.

### **Respondents' response**

9. Chief Inspector Nickson Kinyua swore a replying affidavit on behalf of the respondents. He has sworn that he is a police officer attached to the Directorate of Criminal Investigations Serious Crime Unit, performing cybercrime duties. He is also the investigation officer in respect to criminal Miscellaneous Application case number E480 of 2023 before this Honourable Court, at Milimani, that gave rise to the instant application.
10. According to Chief Inspector Kinyua, on 5 September 2023, the Directorate of Criminal Investigations, Serious Crimes Unit received a request to conduct investigations into a complaint by the 2<sup>nd</sup> interested party who is a medical doctor of both national and international repute and in good standing, alleging that she had discovered that an individual unknown to her had, without her consent, created posts on an online Facebook platform impersonating her and marketing pharmaceutical products online and, in the process, scamming unsuspecting Kenyans.
11. The investigations team commenced investigations into the complaint of Publication of False Information; computer fraud and Impersonation; contrary to respectively sections 23, 27 and 29 of the [Computer Misuse and Cybercrimes Act](#) No. 5 of 2018, amongst other offences, with a view to resolving, the complaint conclusively.
12. Initial investigations into the complaint revealed that a company named Vital Quest International limited, which turned out to be the 1<sup>st</sup> applicant in these proceedings, with the shared directorship of the 2<sup>nd</sup> and 3<sup>rd</sup> applicants, amongst others, was the suspicious company in question behind what the chief inspector of police has described as "detrimental & heinous operations and atrocities against the complainant therein and innocent citizens of the Republic".
13. On 13 September 2023, the investigators managed to seek and obtain from Kiambu [Law Courts vide Miscellaneous Application No. E343 of 2023](#), warrants to investigate the suspicious numbers



that featured in the investigations. The warrants were duly served upon the applicants on diverse dates between 13 and 20 September 2023. On 22 September 2023, through the assistance of the complainant, and some other unnamed person, the investigators were able to conduct an operation with a view to understanding the operating procedures of the malicious syndicate, as well as bringing them to book to deter their detrimental actions. In the course of the investigations, the investigators intercepted the applicants' operations and also managed to interview potential witnesses and interrogate persons of interest who included the 1<sup>st</sup> applicant's store manager. The investigators also took into their custody what they deemed as suspicious products and documents for forensic analysis. These items were duly entered in an inventory.

14. Following a court order obtained by the investigators, on 25 September 2023, the investigations team requested a digital forensic report from the Communication Authority of Kenya, in relation to analysis and preservation of the online malicious publications by the suspicious company. On 4 October 2023, the investigators placed a travel restriction with the department of immigration services in relation the directors of the suspected company.
15. On 6 January, 2024, one Tsado Lot Ziko of Passport No. B00291288, was apprehended at Jomo Kenyatta International Airport and taken to DCI for interrogation. He recorded a statement in the presence of his advocate, Mr. Ochiel J. Dudley, and also signed inventory and consent forms with respect to the confiscated gadgets which were to be subjected to forensic analysis. He was later released on a police cash bail of Kshs. 50,000/= and on condition that he would appear before the investigators whenever required.
16. The Digital Forensic Examination report would reveal whether the applicants are connected to the publication of the offensive publications. The investigations on the licensing of the applicants' business and the licensing of the premises where the pharmaceutical products are stored are yet to be completed. Upon conclusion of the investigations, the file will be forwarded to the 1<sup>st</sup> Respondent for perusal and advice.
17. It is the respondent's case that the applicants have not demonstrated that in undertaking the said investigations, the intended arrest and the arraignment of the applicants are contrary to or in excess of the powers conferred upon the respondents. Neither have they demonstrated how the law has been infringed, violated or contravened. Inspector Kinyua has been advised by the prosecution counsel which advice he believes to be true that section 24 of the *National Police Service Act*, cap. 84 requires that all complaints to the police be investigated for the innocent to be exonerated and the culpable to be charged and prosecuted. Further, he has been advised by the prosecution counsel, which advice he verily believes to be true, that the issues raised by the applicants are issues to be determined by the trial court in the event that they are charged.

## Submissions

18. In considering the applicants' application and, in particular, the submissions filed by both the applicants and the respondents, I must begin by stating the obvious which is that the point of entry for a judicial review court to check the powers of subordinate courts or tribunals or such other bodies whose powers are subject to judicial review is the grounds upon which the application is made.
19. Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:
  - (2) 2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the



relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).

And Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

20. The grounds to which reference has been made in these provisions of the law have not been left to speculation. They were enunciated in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as “the grounds upon which administrative action is subject to control by judicial review”. These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

“My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.” That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. “Irrationality” by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred,



even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.”

21. In Kenya, the grounds for judicial review are now, apparently, codified in the *Fair Administrative Action Act*, 2015, in particular section 7(2) of the Act. This section reads:

- (2) A court or tribunal under subsection (1) may review an administrative action or decision, if-
- (a) the person who made the decision-
    - (i) was not authorized to do so by the empowering provision;
    - (ii) acted in excess of jurisdiction or power conferred under any written law;
    - (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
    - (iv) was biased or may reasonably be suspected of bias; or
    - (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person’s case;
  - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
  - (c) the action or decision was procedurally unfair;
  - (d) the action or decision was materially influenced by an error of law;
  - (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
  - (f) the administrator failed to take into account relevant considerations;
  - (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
  - (h) the administrative action or decision was made in bad faith;
  - (i) the administrative action or decision is not rationally connected to-
    - (i) the purpose for which it was taken;
    - (ii) the purpose of the empowering provision;
    - (iii) the information before the administrator; or
    - (iv) the reasons given for it by the administrator;
  - (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
  - (k) the administrative action or decision is unreasonable;
  - (l) the administrative action or decision is not proportionate to the interests or rights affected;
  - (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;



- (n) the administrative action or decision is unfair; or
- (o) the administrative action or decision is taken or made in abuse of power.

22. As I noted in High Court Application no. E010 of 2020, Republic versus Attorney General; ex parte Law Society of Kenya, Nairobi Branch, any of these statutorily prescribed grounds can easily be subsumed under any of the grounds of illegality, irrationality procedural impropriety and, of course, such other grounds that have gained traction with time as further grounds for judicial review. Even in enunciating the traditional grounds for judicial review, Lord Diplock was quick to add that further development of this area of law may yield further grounds on a case by case basis. The principle of proportionality, for instance, is an example of the later development of judicial review grounds.
23. That said, I would be hesitant to conclude that what we now refer to as the statutory grounds in section 7(2) of the Fair Administrative Act are statutory grounds as contrasted with the traditional grounds of judicial review, since, as I have noted, they are more or less, components of the traditional grounds except that they now have a statutory underpinning.
24. Turning back to the applicants' application, the grounds which have been expressed in the statutory statement as the grounds upon which judicial review reliefs are sought have been expressed as legitimate expectation; unreasonableness; and, inordinate delay. A further ground has been expressed as“(d) Section 23 of the *Computer Misuse and Cybercrimes Act*, 2018 permits arbitrariness and is therefore unconstitutional.”
25. Looking at the applicants submissions, this last “ground” appears to be the only “ground” upon which their application is hinged despite the fact the applicants have introduced the grounds of legitimate expectation, unreasonableness, and inordinate delay as other grounds upon which the judicial review reliefs are sought. An extract from the applicants' written submission illustrates my point better. The applicants commence their submissions as follows:

- “1. Only one unresolved question remains: whether section 23 of the *Computer Misuse and Cybercrimes Act*, 2018, is unconstitutional because it is vague and allows the DCI to act arbitrarily.”

The applicants have then proceeded to single out issues for determination as follows:

“The following questions emerge for resolution concerning the validity of section 23 of the *Computer Misuse and Cybercrimes Act*, 2018:

- a) Does section 23 of the *Computer Misuse and Cybercrimes Act*, 2018 limit the freedom of expression under Articles 33(1)?
- b) Is the restriction of freedom of expression by section 23 of the *Computer Misuse and Cybercrimes Act*, 2018, a limitation “by law”?
- c) Is the limitation of freedom of expression by section 23 of the *Computer Misuse and Cybercrimes Act*, 2018 serve “a legitimate aim”?
- d) Is the limitation of freedom of expression by section 23 of the *Computer Misuse and Cybercrimes Act*, 2018 “necessary” in an open and democratic society?
- e) What are the appropriate reliefs in this Petition?



26. In a nutshell, the applicants are questioning the constitutionality of section 23 of *Computer Misuse and Cybercrimes Act*, 2018. As I understand the applicants, the respondents' actions are impugned not necessarily because the respondents have acted contrary to the law but because the law they are purportedly enforcing is what the applicants consider to be unconstitutional. I cannot attribute any other meaning to the introductory statement in their submissions suggesting that "section 23 of the *Computer Misuse and Cybercrimes Act*, 2018, is unconstitutional because it is vague and allows the DCI to act arbitrarily."

Simply put, the DCI's alleged arbitrary acts are as a result of what the applicants allege to be an unconstitutional law.

27. The trouble with the applicants' approach is that, in judicial review, it is the legality of the actions (or omissions) complained of that the court would be concerned about and not whether the law, empowering those actions or omissions, ought not to be in the statute books. The point is, the standard against which the impugned actions or omissions are measured, is the law as was at the time material to the applicants' application and not the law as it ought to be, in the applicants' view. Thus, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents cannot be faulted for enforcing the law as it then stood (and still stands) since, in doing so, they were and are merely discharging what the law says is their constitutional and statutory obligation.

28. Article 157(4) of *the Constitution*, for instance, gives the 1<sup>st</sup> respondent the power to direct the 2<sup>nd</sup> respondent to investigate any information or allegation of criminal conduct. This Article reads as follows:

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

29. And section 24 of the *National Police Service Act* spells out the functions of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents which include investigations of crimes and enforcement of law. This section reads as follows:

24. Functions of the Kenya Police Service

The functions of the Kenya Police Service shall be the—

- (a) provision of assistance to the public when in need;
- (b) maintenance of law and order;
- (c) preservation of peace;
- (d) protection of life and property;
- (e) investigation of crimes;
- (f) collection of criminal intelligence;
- (g) prevention and detection of crime;
- (h) apprehension of offenders;
- (i) enforcement of all laws and regulations with which it is charged; and
- (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.



And section 35 of the National Police Act states the functions of the 3<sup>rd</sup> respondent.

35. Functions of the Directorate

The Directorate shall—

- (a) collect and provide criminal intelligence;
- (b) undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;
- (c) maintain law and order;
- (d) detect and prevent crime;
- (e) apprehend offenders;
- (f) maintain criminal records;
- (g) conduct forensic analysis;
- (h) execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157(4) of *the Constitution*;
- (i) coordinate country Interpol Affairs;
- (j) investigate any matter that may be referred to it by the Independent Police Oversight Authority; and
- (k) perform any other function conferred on it by any other written law.

30. It is clear from the foregoing provisions that, among the functions of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are maintenance of law and order; investigations of crimes; apprehension of crimes; and, enforcement of all laws and regulations with which it is charged. No doubt, these laws with which they are charged to enforce include the *Computer Misuse and Cybercrimes Act* which creates the offences for which the applicants are being investigated.

31. Upon conclusion of the investigations, the 1<sup>st</sup> respondent has the discretion, under Article 157(6) (a) of *the Constitution* to initiate criminal proceedings. This Article reads as follows:

157.

- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
  - (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

32. As far as I understand the respondents, the investigations are not yet complete. No doubt, the 1<sup>st</sup> respondent will exercise his discretion to charge or not to charge once he has studied the investigations file. Needless to say, the exercise discretion is not at the whim of the Director of Public Prosecutions but it is subject to the supervisory jurisdiction of this Honourable Court. This point was taken as early



as 1969 in *Inspector Shaaban bin Hussien and others versus Chong Fook Kam and another* (1969) 3 ALL ER 1626 where the Privy Council noted as follows:

“It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion... There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles prevail the discretion is subject indirectly to judicial control.”

33. There is no evidence and, indeed there is no suggestion that in investigating the applicants, any of the respondents has acted contrary to the provisions of Article 157 of *the Constitution*, section 24 and 35 of the *National Police Service Act* in a way that would invite intervention by a judicial review court to exercise its supervisory jurisdiction and either quash the decision to investigate or quash the investigations.
34. The undisputed facts are that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents acted on a complaint and initiated investigations to establish whether indeed an offence under the *Computer Misuse and Cybercrimes Act* had been committed. In the course of their investigations, they, among other things, apprehended one of the applicants as a suspect; they took statements and also collected evidence which they subjected to forensic analysis. I am satisfied that in exercising their mandate, the respondents acted intra vires Article 157 of *the Constitution* and sections 24 and 35 of the *National Police Service Act*.
35. To the extent that they acted within their mandate and to the extent that section 23 of the *Computer Misuse and Cybercrimes Act* has not been invalidated either because, it is unconstitutional, as the applicants argue, or for any other reason, for that matter, the actions of the respondents cannot be impeached on any of the grounds of judicial review.
36. To be precise, and taking cue from the Lord Diplock’s definition of the grounds of judicial review in *Council of Civil Service Unions versus Minister for the Civil Service* (supra) it has not been demonstrated that any of the respondents did not understand correctly the law that regulates their decision-making power of that they did not give effect to it. There is also no basis to argue that the respondents’ decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Again, there is no proof that the respondents failed to observe basic rules of natural justice or failed to act with procedural fairness towards the applicants. It has not been suggested that the respondents failed to observe procedural rules in any legislative instrument by which their jurisdiction is conferred. The actions the respondents took and the decisions they made were proportional to the complainant that was lodged and not outside the parameters of what the applicants or any other reasonable person would have legitimately expected.
37. As noted, the applicants’ gripe is with the law and, in particular section 23 of the *Computer Misuse and Cybercrimes Act*. Irrespective of the applicants’ reservations with this provision of the law, the Supreme Court has held that a declaration of nullity for inconsistency with *the Constitution* does connote that the previous acts under the nullified law ought to be invalidated as well. This was so held in *Suleiman Shahbal v Independent Electoral and Boundaries Commission and 3 Others* [2014] eKLR. In that case, the Supreme Court stated as follows;

“(42) The lesson of comparative jurisprudence is that, while a declaration of nullity for inconsistency with *the Constitution* annuls statute law, it does not necessarily entail that all acts previously done are invalidated. In general, laws



have a prospective outlook; and prior to annulling-declarations, situations otherwise entirely legitimate may have come to pass, and differing rights may have accrued that have acquired entrenched foundations. This gives justification for a case-by-case approach to time-span effect, in relation to nullification of statute law. In this regard, the Court has a scope for discretion, including: the suspension of invalidity; and the application of “prospective annulment”. Such recourses, however, are for sparing, and most judicious application – in view of the overriding principle of the supremacy of *the Constitution*, as it stands”.

38. Taking cue from this decision, even if section 23 of the *Computer Misuse and Cybercrimes Act* was to be nullified, it does not necessarily follow that the respondents’ actions or decisions taken prior to the nullification, are thereby tainted on any grounds of judicial review. Considering that in investigating the applicants and taking such actions or decisions as would be necessary in the course of their investigations, the respondents were merely executing their constitutional and statutory mandates in enforcing criminal justice, it can safely be concluded, as was stated by the Supreme Court, that prior to annulling-declaration, assuming there is a case for such a declaration, “situations otherwise entirely legitimate may have come to pass.”
39. Speaking of the constitutionality of section 23 of the *Computer Misuse and Cybercrimes Act*, the applicants have urged that Kenya is a state party to the International Covenant on Civil and Political Rights. Article 19 of that Convention entitles everyone to “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice”. Article 9 of the African Charter on Human and Peoples’ Rights also entitles every individual to the “right to receive information” and to “express and disseminate his opinions within the law.” The two treaties form part of Kenya’s laws by dint of Article 2(6) of *the Constitution*. Accordingly under Article 21(1), the state has the obligation to observe, respect, protect, promote, and fulfil the right to freedom of expression secured by Article 33(1) of *the Constitution*. The freedom of expression includes the freedom to seek, receive or impart information or ideas; the freedom of artistic creativity; and academic freedom and freedom of scientific research.
40. It is submitted that section 23 of the *Computer Misuse and Cybercrimes Act* impairs freedom of expression by criminalising and punishing anyone who “publishes false information” that is “calculated or results in panic, chaos, or violence among citizens of the Republic” or which is “likely to discredit the reputation of any person”. The penalty is a “fine not exceeding five million shillings or imprisonment for a term not exceeding ten years, or to both”.
41. Nonetheless, the applicants concede that the right to freedom of expression is not absolute. However, freedom of expression is limited under Article 33(2) to: propaganda for war, incitement to violence, hate speech, or advocacy of hatred under Article 33(2)(d).
42. It is urged that by its purpose and effect, section 23 limits freedom of expression and is unconstitutional. It is urged that the limitation of the freedom of expression by section 23 is neither “reasonable” nor “justifiable” in an open and democratic society.
43. All I can say about the constitutionality of section 23, amongst several other provisions of the *Computer Misuse and Cybercrimes Act*, is that it is a question that this Honourable Court has pronounced itself upon in Constitutional Petition No. 206; the Bloggers Association of Kenya versus Attorney General & Another (2020) KEHC 7924 (KLR). In that petition, the constitutionality of certain provisions of the *Computer Misuse and Cybercrimes Act*, including section 23 thereof, were impugned by the petitioners. To be precise, they challenged those provisions as being unconstitutional.



44. This Honourable Court (Makau, J., as he then was) singled out issues for determination, with respect to those provisions of the [Computer Misuse and Cybercrimes Act](#) as, inter alia:

- “c) Whether section 5 of the Act is in violation of Article 27 of [the constitution](#)?
- d) Whether section 22, 23, 23, 24(1) (c), 27, 28 and 37 of the Act Limit Article 32, 33 and 34 of [the Constitution](#) in a manner inconsistent with Article 24 of [the Constitution](#) of Kenya 2010?
- e) Whether sections 16, 17, 31, 32, 34, 35, 36, 38(1), 38(2), 39 and 41 of the Act are inconsistent with [the constitution](#) by failing to prescribe the mens rea element of the offence they create?
- f) Whether section 48, 50, 51, 52 and 53 of the Act limit Article 31 of [the constitution](#) in a manner inconsistent with Article 24 of [the Constitution](#) of Kenya 2010?”

45. In dismissing the petition, the court made the following orders:

150. Having considered the petition herein, I find the same is unmerited and I proceed to make the following orders:-

- a) The [computer misuse and Cybercrimes Act](#) 2018 is valid and does not violate, infringe or threaten fundamental rights and freedoms and is justified under Article 24 of [the constitution](#).
- b) Sections 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52, and 53 of the [Computer Misuse and Cybercrimes Act](#) are constitutional and do not violate, infringe and/or threaten fundamental rights and freedoms.
- c) The petition is accordingly dismissed.”

46. Being a decision from a court of coordinate jurisdiction, I am not bound by the decision and it would have been open for me to consider the constitutionality of section 23 of the [Computer Misuse and Cybercrimes Act](#) and either follow and adopt the decision in petition No. 206 of 2019 or, if I have reasons to come to reach a contrary opinion, to depart from it. However, I note that the decision is the subject of an appeal in the Court of Appeal. I gather this information from a ruling delivered by the Court of Appeal in Civil Application No. 102 of 2020; Law Society of Kenya versus Kenya Bloggers Association and 6 Others [2020] KECA 456 (KLR) in which the Law Society of Kenya sought to stay of the judgment of this Honourable Court pending the hearing and determination of the Appeal.

47. In the introductory part of the ruling, the court noted as follows:

“The Law Society of Kenya (LSK) (hereinafter applicant) has moved this Court pursuant to Rules 5(2)(b) of the Rule of this Court for orders inter alia;-

“(c) That pending the hearing and determination of this application an ex parte conservatory order to and is hereby issued suspending enforcement of Section 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52 and 53 of the [Computer Misuse and Cybercrimes Act](#), 2018 by the 4<sup>th</sup> respondent and 5<sup>th</sup> respondents;

(d) In the alternative, pending the hearing and determination of the intended appeal, a conservatory order do and is hereby issued suspending enforcement of section 22 (false publications) and 23 (publication of false information) of



the *Computer Misuse and Cybercrimes Act*, 2018 by the 4th respondent and 5th respondent.”

48. The application was eventually dismissed but I reproduce this excerpt here only to stress the point that that the Court of Appeal is seized of the same question that the applicants want this Honourable Court to determine. I presume that the appeal has not been heard because, first, my search on the Kenya Law website has not yielded any result that a final judgment on the appeal has been rendered and published for public consumption and, second, if the appeal had been heard and determined, either of the parties in this suit would have brought the decision of the Court of Appeal to my attention.

49. Without belabouring the point, I would not venture to interrogate the question of the constitutionality of section 23 of the *Computer Misuse and Cybercrimes Act* when the same question is pending for determination in the Court of Appeal. In the Supreme Court decision in *Law Society of Kenya versus Attorney General & Central Organisation of Trade Unions* [2019] KESC 16 (KLR) the Supreme Court fell short of reprimanding a judge of this Honourable Court for disposing of case in which the material issue in that case was pending for disposal in the appellate courts. The Court noted as follows:

“ 91. 91. The present Appeal was straight-forward and we have settled the questions placed before us for determination. However, before we conclude we must take note of a matter that was brought to our attention at the hearing of this Appeal. While this matter was before us awaiting determination, E.K. Ogola J, on 10<sup>th</sup> June 2019, in the High Court of Kenya at Mombasa, rendered a decision in the case of *Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party)*, Constitutional Petition No. 196 of 2018 [2019] eKLR. Broadly, some of the issues for determination in that matter included whether the WIBA was unconstitutional in light of *the Constitution* 2010.

92. We are greatly dismayed that the learned Judge did not take judicial notice of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision of the Court of Appeal to the apex court on matters whose determination may well have been binding on him. The learned judge ought to have held his horses and acknowledge the hierarchy of the courts and await for this court to pronounce itself before rendering himself, if at all. As we perceive it, his judgment has created unnecessary confusion in the application of WIBA and cannot be allowed to stand as it may [may or is] also be contrary to this Judgement. The findings and Orders expressed in that judgment must therefore be read in the context of the decision of the Court of Appeal and our finding and Orders in this appeal. That is all there is to say on that matter.”

50. Taking cue from the Supreme Court’s pronouncement, it is only prudent that I avoid delving into the question of the constitutionality of section 23 or any other provision of the Computer Misuse and Cyber Crimes Act that constitute the subject of the appeal in the Court of Appeal.

In the final analysis, and for reasons I have given, I do not find any merit in the applicants’ application. It is hereby dismissed with costs. Orders accordingly.

**SIGNED, DATED AND UPLOADED ON THE CTS ON 11 OCTOBER 2024**

**NGAAH JAIRUS**



**JUDGE**

