



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 397 OF 2016

In the matter of violation of the Constitution of Kenya 2010

AND

**In the matter of enforcement of the bill of rights particularly Article 33, 34 and 35 of the
 Constitution of Kenya 2010**

AND

In the matter of section 194 of the Penal Code, Cap 63, Laws of Kenya

BETWEEN

JACQUELINE OKUTA.....1ST PETITIONER

JACKSON NJERU.....2ND PETITIONER

VERSUS

HON. ATTORNEY GENERAL1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

ARTICLE 19 OF EAST AFRICA.....3RD RESPONDENT

JUDGEMENT

This petition brings into sharp focus the constitutionality or otherwise of the offence of criminal defamation created under the provisions of section 194 of the Penal Code.^[1] The petition raises fundamental questions such as whether or not criminal defamation is a ground on which a constitutional limitation on the rights of freedom of the expression, could be legally imposed. Does defamation law infringe the right of freedom of expression guaranteed under the constitution or is it one of the reasonable and justifiable limitations justifiable in an open democratic society? I shall attempt to answer these questions.

The Petitioners herein, **Jacqueline Okuta** and **Jackson Njeru**, moved this honourable court seeking the

following declarations:-

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

The petitioners concern is the constitutionality of the criminal defamation law in section 194 of the Penal Code.^[3] It is the petitioners case that the said section unjustly violates the freedom of expression by imposing sanctions on the civil wrong of defamation. The petitioners correctly aver that the constitution is the supreme law of the land and any law that is inconsistent with the constitution is void to the extent of the inconsistency, and any act or omission in contravention of the constitution is invalid.

It is also correctly pleaded that Article 2 (5) & (6) of the constitution expressly import treaties ratified by Kenya as well as the general rules of international law and makes them part of the laws of Kenya and that Article 24 of the constitution of Kenya, 2010 outlines the grounds for justifiable limitation of rights and that Article 24 (2) particularly provides that a law, even if patently justifiable, 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; and shall not limit the right or fundamental freedom so far as to derogate from its core essential content. The petitioners also aver that Article 33 (1) guarantees to every person the right to freedom of expression, which includes; freedom to seek, receive or impart information or ideas, but does not extend to propaganda for war, incitement to violence, hate speech; or advocacy of hatred under Article 33 (2) (d). The petitioner also cited the provisions of Article 33 (1) which guarantee to every person the right to freedom of expression.

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

The particulars of the charges against the first petitioner are that "on diverse dates between the month of March 2014 and April 2014 at unknown time and place within the Republic of Kenya, by electronic means of face book account Buyer beware-Kenya unlawfully published defamatory words concerning the complainants that the persons pictured and named therein were wanted for illegal possession and handling of property. Anyone with information regarding either of the three to get in touch with Face book page-100,000 Likes for justice to be done for Jacky and her Kids."

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

It is the petitioners case that section 194 cited above violates the right to freedom of expression by curbing the printing, writing, painting, gesticulation, speaking or sounding of certain words on grounds that no proximate relation to and stray beyond the orbit of limitations permitted by the constitution under Article 33 (2) (d). It is also the petitioners case that even though the freedom of expression is not absolute and can be limited for the protection of rights and reputations of others, criminal libel is not a reasonable or justifiable restriction on freedom of expression and added that it is a "disproportionate instrument for protecting the reputations, rights and freedoms of others" and that the remedy in tort is sufficient and less restrictive means of achieving the purpose, hence criminal sanctions on speech ought to be reserved for the most serious cases particularized under Article 33 (2) (d) and that the offence of criminal libel does not strike a balance between freedom of expression and the limitation clause in Article 24 but instead

arbitrarily and excessively invades the right in Article 24 which is not justifiable in a democratic society.

In their grounds of objection, the first Respondent states that the petition is an abuse of court process while the second Respondent stated that the petition is without merits.

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

Section 194 of the Penal Code provides that:-

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

It is the petitioners submissions that the operative words in the above section have no proximate relation to and stray beyond the orbit of limitations permitted by the constitution on freedom of expression under article 33 (2). The petitioners reiterate that criminal libel is not a reasonable or justifiable restriction on freedom of expression and that the civil tort under the defamation act is sufficient and provides far less restrictive means of achieving the required purpose. It is also submitted that the said provision denies the public the right to information that can be communicated through print, writing, painting, gesticulation, speech or sound.

The petitioners also submitted that section 194 would only be sustainable if it were consistent with the provisions of the constitution and in harmony with Kenya's human rights obligations under the relevant treaties. The petitioners cited the decision in *Coalition for Reforms and Democracy vs The Republic*^[5] where the court held that limitations to freedom of expression must be on grounds which are permitted under Article 33 (2) and that the state has a duty to demonstrate that the limitation is justifiable, and that freedom of expression is not a right to be interfered with lightly.

Also cited is the African Court on Human and Peoples Rights decision in *Konate vs Burkina Faso*^[6] where it was held that criminal defamation laws should only be used as a last resort when there is a serious threat to the enjoyment of other human rights in exceptional circumstances such as hate speech and incitement.

The interested party submitted that any law criminalizing defamation is a violation of freedom of expression and that criminal defamation laws are outdated and unduly harsh, hence they are unnecessary and disproportionate measures to protect the reputation of others and that they are ambiguous, vague or overly broad restrictions on freedom of expression and therefore impermissible and that such restrictions are only necessary and proportionate to secure the legitimate aim and insisted that criminal defamation proceedings violate the right to freedom of expression and that breach of defamation laws leads to a harsh sanction.

The interested party also cited the 2008 UN Special Rapporteur on Freedom of Opinion which described criminal defamation law as overly broad in scope and application and has turned into a powerful mechanism to stifle investigative journalism and silence criticism. Also cited is the Zimbabwean case of *Nevanji Madanhire and Another vs A.G.*^[7] where the court declared defamation laws as unconstitutional and the African Court on Human and Peoples Rights^[8] where the court found *inter alia* criminal penalties for defamation are inappropriate because the civil remedy is sufficient. It was also submitted that International and Regional bodies have called upon states to decriminalize defamation on numerous occasions.

Counsel for the second Respondent submitted that the section in question is constitutional in a democratic society to prevent individuals with ill motives from interfering with the rights of other persons and prayed

for the petition to be dismissed. Counsel for the first Respondent adopted the submissions of the second Respondent.

The exercise of certain rights (such as the right to a fair trial, freedom from arbitrary imprisonment, freedom of movement, freedom of expression, freedom of religion or the right to participate in public decision-making) is integral to citizenship in a democratic society. The protection of fundamental rights against arbitrary or excessive infringements is an essential feature of constitutional government, which is recognized both in international human rights law and in many national constitutions. Nevertheless, relatively few rights can be enjoyed in absolute terms. Most rights are subject to limitations that are necessary and reasonable in a democratic society for the realization of certain common good such as social justice, public order and effective government or for the protection of the rights of others. For example, freedom of expression may be limited to prevent people from shouting 'Fire!' in a crowded public place or by a prohibition against inciting violence against a specific individual or group. Likewise, freedom of movement is quite properly limited by traffic rules, by rules relating to lawful detention and imprisonment and by immigration rules. These rules may permit the state to infringe on individual freedom, but they may be justified if they do so only.

Article 33 (1) of the constitution provides that every person has the right to freedom of expression, which includes-

- (a) freedom to seek, receive or impart information or ideas;*
 - (b) freedom of artistic creativity; and*
 - (c) academic freedom and freedom of scientific research.*
- (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 exercise of the right to freedom of expression, every person shall respect the rights and reputations of others.*

Article 24 (1) provides for limitation of rights and fundamental freedoms. It provides that:-

- (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 reasonably and justifiable in an open 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.

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

a)

b) 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; and

c) shall not limit the right or fundamental freedom so as to derogate from its core or essential content.

d) The State or 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

The sanctity and significance of Freedom of Speech and Expression in a democracy is not in doubt. Freedom of speech and expression in a spirited democracy is a highly treasured value. The media, Authors, philosophers and thinkers have considered it as a prized asset to the individuality and overall progression of a thinking society, as it permits argument, allows dissent to have a respectable place, and honours contrary stances. Needless to emphasize, freedom of speech has to be allowed specious castle, but the question is should it be so specious or regarded as so righteous that it would make reputation of another individual or a group or a collection of persons absolutely ephemeral, so as to hold that criminal prosecution on account of defamation negates and violates right to free speech and expression of opinion. Keeping in view the foregoing, I propose here and now to see how the constitutional conception has been understood by the Courts where democracy and rule of law prevail.

Bury in his work *History of Freedom of Thought* [9] has observed that freedom of expression is “*a supreme condition of mental and moral progress*” In the words of American Supreme Court, it is “*absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities*” [10]

The right to freedom of speech and expression has been described as the “*touchstone of individual liberty*” and “*the indispensable condition of nearly every form of freedom.*” [11] It must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand, the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions. The freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions and views with complete freedom and by resorting to any available means of publication, subject again to such restrictions as could be legitimately imposed under Article 24 of the constitution.

The right to uninhibited freedom of expression conferred by Article 33 is basic and vital for the sustenance of parliamentary democracy, which is a part of the basic structure of the Constitution. The “reasonable restrictions” are those which are meant to prevent the expression of a thought which is intrinsically dangerous to public interest and would not include anything else. The enabling power in Article 24 to impose reasonable restrictions on the right conferred by Article 33 is intended to safeguard the interests of the State and the general public and not of any individual, and, therefore, Article 24 cannot be regarded as the source of authority for Section 194 of the Penal Code which makes defamation of any person an offence. That apart, Article 24, being an exception to Article 34 needs to be construed narrowly

and it cannot constrict the liberal interpretation warranted to be placed on Article 33 of the Constitution. The schematic intendment in Article 24 is founded on the fundamental tenet of interests of the State and the public in general and hence, regard being had to the nature of fundamental rights and scope of reasonable restrictions to be imposed thereon, the exception has to be understood applying the principle of the latin maxim *noscitur a sociis* (which means that the **meaning** of a word may be known from accompanying words. ... Under the doctrine of **noscitur a sociis**, the **meaning** of questionable words or phrases in a statute may be ascertained by reference to the **meaning** of words or phrases associated with it). Criminal defamation aims to protect individual interest while the limitations under article 24 seek to protect public interest as opposed to person or individual interests.

The above maxim was ably discussed by the Supreme Court of India in *Ahmedabad Pvt. Primary Teachers' Assn. v. Administrative Officer and others*^[12], where it was stated that the maxim *noscitur a sociis* is a legitimate rule of construction to construe the words in an Act of the Parliament with reference to the words found in immediate connection with them. In this regard, we may refer to a passage from Justice G.P. Singh, *Principles of Statutory Interpretation*^[13] where the learned author has referred to the lucid explanation given by the court (Gajendragadkar, J.) in the said case. I find it appropriate to reproduce the passage below:-

"It is a rule wider than the rule of ejusdem generis; rather the latter rule is only an application of the former. ...The rule has been lucidly explained in the following words: " , , means that when two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general rule. "

The limitations provided under article 24 ought to read together, in the context of the entire article, the purposes and principles of the constitution and the fact that the limitations ought not to 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 and shall not limit the right or fundamental freedom so as to derogate it from its core or essential content. My discernment from the foregoing jurisprudence is that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

It is to be borne in mind that defamation of an individual by another individual is a civil wrong or tort, pure and simple for which the common law remedy is an action for damages. It has to be kept in mind that fundamental rights are conferred in the public interest and defamation of any person by another person is unconnected with the fundamental right conferred in the public interest and, therefore, Section 194 out to be construed outside the scope of Article 24 of the Constitution which in my view aims at largely protecting public interest.

Elucidating the same, I propound that defamation of a private person by another person cannot be regarded as a 'crime' under the constitutional framework and hence, what is permissible is the civil wrong and the remedy under the civil law. Section 194, which stipulates defamation of a private person by another individual, has no nexus with the fundamental rights conferred under article 33 of the Constitution, for Article 33 is meant to

include the public interest and not that of an individual and, therefore, the said constitutional provision cannot be the source of criminal defamation. I base this argument on two grounds:- **(i)** the common thread that runs through the various grounds engrafted under Article 33 (2) (a)-(d) are relatable to the protection of the interest of the State and the public in general and the word "defamation" has to be understood in the said context, and **(ii)** the principle of *noscitur a sociis*, when applied, "defamation" remotely cannot assume the character of public interest or interest of the crime inasmuch a crime remotely has nothing to do with the same.

The Supreme court of India in *Reserve Bank of India v. Peerless General Finance and*

Investment Co. Ltd. and others^[14] observed that:-

“Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual.”

It is not a sound principle in interpretation of statutes to lay emphasis on one word disjuncted from its preceding and succeeding words. A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim *noscitur a sociis* (meaning of a word should be known from its accompanying or associating words) has much relevance in understanding the import of words in a statutory provision.^[15]

There can be no doubt that the freedom of expression, coupled with the right to receive and impart information, is a core value of any democratic society deserving of the utmost legal protection. This right is prominently recognized and entrenched in virtually every international and regional human rights instrument. At its first session in 1946, the United Nations General Assembly declared that “Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.”^[16]

This sentiment is echoed with specific reference to the media by the Human Rights Committee (established under Part IV of the International Covenant on Civil and Political Rights 1976). In General Comment No. 34, issued at its 102nd session in July 2011, the Committee observed as follows, at para. 13:-

“A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.”

It certainly cannot be gainsaid that the offence of criminal defamation operates to encumber and restrict the freedom of expression enshrined in Article 33 of the Constitution. Does the offence of criminal defamation fall into the category of permissible derogations contemplated in Article 24 of the constitution, being a provision designed to protect the reputations, rights and freedoms of other persons. What is in issue for determination by this Court is whether or not it is a limitation that is reasonably justifiable in a democratic society.

Human rights enjoy a *prima facie*, presumptive inviolability, and will often ‘trump’ other public goods,’ Louis Henkin wrote in *The Age of Rights*:-^[17]

“Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society’s interest (and perhaps even in the individual’s own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary.”

A common way of determining whether a law that limits rights is justified is by asking whether the law is proportionate. Although it is commonly used by courts to test the validity of laws that limit constitutional rights, proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit important (even if not constitutional) rights and principles. Former President of the Supreme Court of Israel, Aharon Barak, said proportionality can be defined as ‘*the set of rules*

determining the necessary and sufficient conditions for a limitation on a constitutionally protected right by a law to be constitutionally protected'. [18]

Leading Authors G. Huscroft, B Miller and G Webber (eds) have authoritatively stated the jurisprudence of proportionality includes this 'serviceable—but by no means canonical—formulation' of the test:--

i. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?

ii. Are the means in service of the objective rationally connected (suitable) to the objective?

iii. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?

iv. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?[19]

According to the above authors, four sub-components of proportionality, a limitation of a constitutional right will be constitutionally permissible if **(i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ("proportionality *stricto sensu*" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.** It is my humble view that the tort of defamation provides a sufficient alternative by way of damages and in this regard, criminal defamation does not meet the third test.

Proportionality has been called the 'most important doctrinal tool in constitutional rights law around the world for decades'[20] and 'the orienting idea in contemporary human rights law and scholarship.' Proportionality has been received into the constitutional doctrine of courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, and South Africa, as well as the jurisprudence of treaty-based legal systems such as the European Court of Human Rights, giving rise to claims of a global model, a received approach, or simply the best-practice standard of rights adjudication.[21]

A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. Even if the objective is of sufficient importance and the measures in question are rationally connected to the objective, the limitation may still not be justified because of the severity of its impact on individuals or groups.[22]

A classic discussion of the principle of proportionality may be found in the 1986 Canadian Supreme Court case of *R v Oakes*. [23] This case concerned a statute, the *Narcotic Control Act*, which placed a legal burden of proof on the defendant, and so undermined the person's right, under the *Canadian Charter of Rights and Freedoms*, to be presumed innocent until proven guilty. Section 1 of the Canadian Charter guarantees the rights and freedoms in the Charter 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. [24] Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

a) The first criterion concerned the importance of the objective of the law. First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. 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 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.[25]

b) Secondly, the means chosen for the law must be ‘reasonable and demonstrably justified’, which involves ‘a form of proportionality test’ with three components: 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. 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.’^[26]

In each case, Dickson CJ said, courts will be ‘required to balance the interests of society with those of individuals and groups’.^[27] There are variations, but the language in *Oakes* is reflected in most proportionality tests.

In Australia, a kind of proportionality test is applied when courts consider the validity of a law that limits the constitutional right to political communication. In considering such laws, courts look at whether the law is ‘reasonably appropriate and adapted to serve a legitimate end.’^[28] In this context, the phrase ‘reasonably appropriate and adapted’ does not mean ‘essential’ or ‘unavoidable’, but has been said to be closer to the notion of proportionality.^[29] Professor Adrienne Stone has written that, in other circumstances, the ‘reasonably appropriate and adapted to’ formula has been used as ‘a very minimal standard of review’:^[30]

When employing the language of proportionality the High Court would ask whether the end could be pursued by less drastic means, and it has been particularly sensitive to laws that impose adverse consequences unrelated to their object, such as the infringement of basic common law rights. This kind of test resembles those employed in European Union law and in Canada.^[31] The penalty for criminal defamation is two years imprisonment. I have no doubt that this is a drastic measure yet the tort of defamation provides for a lesser drastic and equally sufficient remedy.

I may perhaps add that ‘Proportionality’ is a fluid test which requires those analyzing and applying law and policy to have regard to the surrounding circumstances, including recent developments in the law, current political and policy challenges and contemporary public interest considerations.

The test for determining whether a restriction is appropriate should be one of proportionality as used in international, regional and comparative human rights jurisprudence. A proportionality test is appropriate as it preserves rights, provides a framework for balancing competing rights and enables other important public concerns, such as national security and public order, to be duly taken into account.

I am aware that the test as to what is democratically reasonable and justifiable is not susceptible precise legal formulation.^[32] In my own appreciation, the test may well vary from one society to another depending upon its peculiar political organization and socio-economic

underpinnings. Nevertheless, as was recognized by Gubbay CJ in the often-cited case of *In re Munhumeso & Others*:^{-[33]}

“What is reasonably justifiable in a democratic society is an illusive concept – one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right.”

In another Zimbabwean case, *Nyambirai vs National Social Security Authority & Another*,^[34] Gubbay CJ elaborated the test as follows:-

“In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:-

(i) the legislative objective is sufficiently important to justify limiting a fundamental right;

(ii) the measures designed to meet the legislative object are rationally connected to it; and

(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”

Following the above tests, the question that follows is whether it is necessary to criminalize defamatory statements in order to accomplish what is otherwise an unquestionably legitimate objective? It seems logical to answer this question in two stages: firstly, what are the consequences of criminalizing defamation and, secondly, is there an appropriate and satisfactory alternative remedy to deal with the mischief of defamation?[35]

The practical consequences that would ordinarily flow from a complaint of criminal defamation are as follows; the accused person would be investigated and face the danger of arrest. This would arise even where the alleged defamation is not serious and where the accused has an available defence to the charge. Thereafter, if the charge is prosecuted, he will be subjected to the rigors and ordeal of a criminal trial. Even if the accused is eventually acquitted, he may well have undergone the traumatizing gamut of arrest, detention, remand and trial. Moreover, assuming that the accused has employed the services of a lawyer, he will also have incurred a sizeable bill of costs which will normally not be recoverable.[36]

I would accept that the foregoing tribulations are not peculiar to the offence of criminal defamation and would potentially be encountered by an accused person charged with any serious criminal offence. However, what is distinctive about criminal defamation, though not confined to that offence, is the stifling or chilling effect of its very existence on the right to speak and the right to know. This, in my view, is the more deleterious consequence of its retention in the Criminal Law Code.[37]

For example it cannot be denied that newspapers and modern communication methods play a vital role in disseminating information in every society, whether open or otherwise. Part and parcel of that role is to unearth corrupt or fraudulent activities, executive and corporate excesses, persons who are dangerous to the society and other wrongdoings that impinge upon the rights and interests of ordinary citizens. It is inconceivable that the citizens, the media and Civil Societies could perform investigative and informative functions without defaming one person or another. The overhanging effect of the offence of criminal defamation is to stifle and silence the free flow of information in the public domain. This, in turn, may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices.[38]

The chilling effect of criminalizing defamation is further exacerbated by the maximum punishment of two years imprisonment imposed for any contravention of section 194 of impugned section. This penalty, in my view, is clearly excessive and patently disproportionate for the purpose of suppressing objectionable or opprobrious statements. The accomplishment of that objective certainly cannot countenance the spectra of imprisonment as a measure that is reasonably justifiable in a democratic society.[39]

Another very compelling reason for eschewing resort to criminal defamation is the availability of an alternative civil remedy under the *actio injuriarum* in the form of damages for defamation. To my mind, this affords ample compensatory redress for injury to one's reputation. Thus, the invocation of criminal defamation to protect one's reputation is in my view unnecessary, disproportionate and therefore excessive and not reasonably justifiable in an open democratic society based on human dignity, equality and freedom. In any event article 24 (e) clearly provides 'the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. My interpretation of this provision is that the civil remedy is a less restrictive alternative and it is available.

In an article written by *Vinayak Bhardwaj and Ben Winks*,[40] commenting on a court decision similar to the case before me, the vital differences between criminal and civil liability are commendably highlighted. I take the liberty to quote extensively from this article and to associate myself with the propositions articulated therein:-[41]

“Civil law exists to provide relief and restitution when one person harms or threatens to harm

another's private interests. Criminal law exists to ensure retribution and protection of the public, by detaining offenders and deterring others from offending. For assault, imposing imprisonment or supervision is essential to protect the victims and the public at large. For damaging speech, however, the civil law is as effective, if not more so, in providing the public with proportionate protection from offenders.

Crucially, freedom of expression is constitutionally enshrined and encouraged, as the lifeblood of democracy. The freedom to wield fists and firearms enjoys no similar status in our supreme law. Thus the analogy between assault and defamation breaks down. It is an unreliable guide to finding an appropriate balance between the rights to dignity and free speech. It is also disputable that civil and criminal defamation impose equivalent limitations, and that the harsher consequences of criminal liability are neatly offset by the heavier burden of proof. There are important differences in practice and in principle.

First, a prosecution targets the journalist rather than the journal. A civil suit is aimed primarily at the defendant with the deepest pockets. Furthermore, while civil liability may be discharged within days, through payment or some other performance, criminal liability endures long after the sentence has been served, or even if the sentence has been suspended. Criminal liability is permanent and pervasive. It brands the accused with a mark so deep and indelible, it can be expunged only by presidential pardon. It stains every sphere of that person's life. He becomes a criminal, and must disclose that every time he applies for a job, a visa or even a bank account.

Even if the state does not discharge its onerous burden of proof, the very existence of the crime creates the risk of wrongful accusation, investigation, prosecution and even conviction, with all the associated inconvenience and scandal. These ills can barely be corrected on appeal, and thus the crime could easily be used to cow courageous journalists. It is this brand of public disapproval that criminal law rightly casts on murderers, rapists and thieves, precisely for its deterrent potency. The same objective could not and should not apply to injurious speech, the borders of which are elusive and essentially subjective.”

On the international scene, it significance to point out that the United Nations Commission on Human Rights is recorded as having decried recourse to criminal defamation in order to stifle free speech:-

“Detention as a sanction for the peaceful expression of opinion is one of the most reprehensible practices employed to silence people and accordingly constitutes a serious violation of human rights”.

Earlier in this judgement, I referred to General Comment No. 34 at para. 47, the Human Rights Committee stipulates the following guidelines on defamation laws vis-à-vis the application of Article 19 of the International Covenant on Civil and Political Rights:-

“Defamation laws must be crafted with care to ensure that they comply with paragraph 3 [the derogation clause in Article 19 of the Covenant], and that they do not serve, in practice, to stifle freedom of expression. Care should be taken by States Parties to avoid excessively punitive measures and penalties.

States Parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.”

The Committee endorsed and applied these strictures in a complaint by one Alexander Adonis against the Government of the Philippines. The complaint involved the imprisonment of a radio broadcaster for alleged defamation. In its decision in Communication No. 1815/2008, adopted on 26th October 2011 at its 103rd session, the Committee found as follows, at paras. 7.7 to 7.10:-

“The Committee takes note of the author's allegation that his conviction for defamation under the

Philippine Penal Code constitutes an illegitimate restriction of his right to freedom of expression because it does not conform to the standards set by article 19, paragraph 3, of the Covenant. The author maintains, in particular, that the criminal sanction of imprisonment established by the Philippine Revised Penal Code for libel is neither necessary nor reasonable Article 19, paragraph 3, lays down specific conditions and it is only subject to these conditions that restrictions may be imposed, i.e. the restrictions must be provided by law; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality

In light of the above, the Committee considers that, in the present case the sanction of imprisonment imposed on the author was incompatible with article 19, paragraph 3, of the Covenant.”

Turning to the regional sphere, the African Commission on Human and Peoples’ Rights, in Resolution 169 adopted on 24th November 2010, condemns criminal defamation in the specific context of journalism and the media, by emphasizing that:-

“criminal defamation laws constitute a serious interference with freedom of expression and impedes on [sic] the role of the media as a watchdog, preventing journalists and media practitioners to practice [sic] their profession without fear and in good faith;”

Accordingly, the Commission calls upon States Parties to the African Charter on Human and Peoples’ Rights:

“to repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments.”

By now, I am persuaded beyond doubt that having regard to all of the foregoing, I take the view that the harmful and undesirable consequences of criminalizing defamation, viz. the chilling possibilities of arrest, detention and two years imprisonment, are manifestly excessive in their effect and unjustifiable in a modern democratic society like ours.

Above all, I am clear in my mind that there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons. Thus, it is absolutely unnecessary to criminalize defamatory statements. Consequently, I am satisfied that criminal defamation is not reasonably justifiable in a democratic society within the contemplation of article 24 of the Constitution. In my view, it is inconsistent with the freedom of expression guaranteed by 33 of that Constitution.

Upon promulgation of the constitution of Kenya 2010, it was expected that certain provisions in our laws were to be amended to align them to the letter and spirit of the constitution, but almost seven years later we still have such provisions in our statutes!

I must reiterate that the principal issue for determination is the constitutionality of criminal defamation provided under section 194 of the Penal Code.^[42] The freedom of expression is secured under article 33 of the Constitution and for it to be limited, the limitation must fall within the scope and ambit of the provisions of article 24 of the constitution. Guided by my analysis of the law enumerated above, considering the international and regional instruments referred to in this judgement and the proportionality test discussed herein above, and considering the offence of criminal defamation and the drastic punishment prescribed for it and applying the tests discussed earlier, I find, as I hereby do, that it cannot be reasonably justifiable in a democratic society, hence, it offends the right to freedom of expression.

I therefore find and hold that the petitioners have succeeded in demonstrating that the offence of criminal

defamation is not reasonably justifiable in a democratic society, hence criminal sanctions on speech ought to be reserved for the most serious cases particularized under Article 33 (2) (a)- (d) of the constitution aim at protecting public interest. Consequently, I allow this petition and enter judgement as prayed in the petition in terms of the following declarations:-

i. A declaration be and is hereby issued that section 194 of the Penal Code, cap 63, Laws of Kenya is unconstitutional and invalid to the extent that it covers offences other than those contemplated under Article 33 (2) (a)- (d) of the Constitution of Kenya 2010; and.

ii. A declaration be and is hereby issued that any continued enforcement of Section 194 of the Penal Code, Cap 63, Laws of Kenya by the Second Respondent against the petitioners herein would be unconstitutional and/or a violation of their fundamental right to the freedom of expression guaranteed under article 33 (1) (a)-(c) of the constitution of Kenya 2010.

Orders accordingly

Right of appeal 30 days

Dated at Nairobi this 6th day of February 2017

John M. Mativo

Judge

[1] Cap 63, Laws of Kenya

[2] Ibid

[3] Ibid

[4] Ibid

[5] {2014}eKLR

[6] African Court on Human and People's Rights App No 004/2013

[7] Const. Application No CCZ 78/12

[8] Lone Issa Konate vs The Republic of Burkina Faso

[9] {1913} , p.239.

[10] See Speiser v. Randall {1958} 257 US 513 (530)

[11] Palko v. Connecticut {1931} 283 US 359 (369)

[12] {2004} 1 SCC 755

[13] 13th Edn. 2012 p. 509

[14] {1987} 1 SCC 424

[15] K. Bhagirathi G. Shenoy and others v. K.P. Ballakuraya and another {1999} 4 SCC 135

[16] Resolution 59(I) of 14 December 1946

[17] Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 4.

[18] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 3.

[19] G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak:

[20] Kai Moller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709, 709.

[21] For recent discussions of proportionality in the UK High Court, see *R (Lord Carlile) v Home Secretary* [2014] 3 WLR 1404, [28]–[34] (Lord Sumption); *Bank Mellat v HM Treasury [No. 2]* [2014] AC 700, [68]–[76] (Lord Reed); and *R (Nicklinson) v Ministry of Justice* [2014] 3 All ER 843, [168] (Lord Mance).

[22] Parliamentary Joint Committee on Human Rights, 'Guide to Human Rights' (March 2014) 8 <http://www.aph.gov.au/joint_humanrights/>.

[23] *R v Oakes* [1986] 1 SCR 103 [69]–[70].

[24] The Victorian Charter similarly provides: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—(a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve': *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2). See also, *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

[25] *R v Oakes* [1986] 1 SCR 103 [69]–[70].

[26] *Ibid*

[27] *Ibid*

[28] This is part of the second limb of the *Lange* test. 'The test adopted by the Court in *Lange v Australian Broadcasting Corporation*, as modified in *Coleman v Power*, to determine whether a law offends against the implied freedom of communication involves the application of two questions: 1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect? 2. If the law effectively burdens that freedom, is the law *reasonably appropriate and adapted to serve a legitimate end* in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment of the Constitution to the informed decision of the people?': *Hogan v Hinch* (2011) 243 CLR 506, [47] (French CJ) (emphasis added).

[29] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [85] (Gummow, Kirby and Crennan JJ).

[30] Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 677.

[31] Ibid

[32] Supra foot note 7

[33] 1994 (1) ZLR 49 (S) at 64B-C

[34] 1995 (2) ZLR 1 (S) at 13C-F

[35] Supra note 7

[36] Ibid

[37] Ibid

[38] Ibid

[39] Ibid

[40] In the Mail & Guardian of 1 to 7 November 2013

[41] Also reproduced in the Zimbabwean case referred in foot note 7 above

[42] Supra