REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E573 OF 2024

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 36, 38, 39, 40, 47, 48, 49, 57, 73, 165(3) AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULE 4 & 10 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 (MUTUNGA RULES)

BETWEEN

LAW SOCIETY OF KENYA.....PETITIONER

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

-AND-

MORARA DAVID KEBASO.....INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. This matter comes before this Court as a fundamental constitutional challenge to the legal regime governing public order and the right to freedom of expression in Kenya. At its heart lies the constitutionality of Section 95(1)(b) of the Penal Code, Cap. 63, which criminalizes any person who brawls or otherwise creates a disturbance in a manner likely to cause a breach of the peace. The Petition under consideration is dated 15th October 2024.

2. The Petitioner, the Law Society of Kenya, a statutory guardian of the rule of law and the administration of justice, invokes the jurisdiction of this Court under Articles 22, 23, and 165(3) of the Constitution to impugn the provision. The Petitioner contends that Section 95(1)(b) is an antiquated, vague, and overbroad relic of colonial governance, wholly inconsistent with the ethos of a modern democratic State. It further submits that the continued existence and enforcement of the provision illustrated by the arrest and intended prosecution of the Interested Party, Mr. Morara David Kebaso, for statements made at a political forum—constitutes a grave and unjustifiable infringement upon the constitutional right to freedom of expression and the foundational principle of legality.

3. The Respondents, the Director of Public Prosecutions, the Inspector General of Police, and the Attorney General oppose the Petition. In their grounds of opposition and written submissions, they assert that Section 95(1)(b) is a clear, necessary, and proportionate instrument for the maintenance of public order. They maintain that the provision targets disorderly conduct rather

than speech per se, that its ambit has been clarified through decades of judicial interpretation, and that any limitation imposed on expression is reasonable, justifiable, and consonant with the imperatives of a democratic society, which must reconcile individual liberty with collective security. This judgment is thus called upon to resolve the profound tension between the imperatives of public tranquility and the inviolable right to robust and unfettered expression in a constitutional democracy.

4. The events giving rise to this Petition are straightforward and, for the most part, undisputed. On 4th October 2024, the Interested Party was present at a public participation forum held at the Bomas of Kenya, convened to consider the proposed impeachment of the Deputy President of the Republic of Kenya, Rigathi Gachagua. During the course of this politically charged assembly, the Interested Party is alleged to have uttered the words: *"kufa dereva kufa makanga."* While the precise meaning and implications of this utterance may be subject to contextual interpretation, the primary concern of this Court lies not in the semantic content of the statement itself, but in the manner in which the State elected to respond thereto.

5. On 8th October 2024, the Interested Party was apprehended and formally booked at Lang'ata Police Station under OB Number 22/08/10/24. He was charged with creating a disturbance likely to cause a breach of the peace, contrary to Section 95(1)(b) of the Penal Code, Cap. 63. The draft charge sheet, annexed to the Supporting Affidavit of Florence W. Muturi, particularizes that the alleged offence was committed "by uttering the

words… which elicited a reaction from the public." Thereafter, the Interested Party was released on a free bond, pending arraignment at the Kibera Law Courts.

6. The Petitioner therefore seeks the following reliefs from this court:
    a. ***A DECLARATION be and is hereby issued that Section 95 (1) (b) of the Penal Code, Cap 63 Laws of Kenya is unconstitutional;***
    b. ***A DECLARATION that the continued enforcement of Section 95 (1) (b) of the Penal Code by the Respondents against the Interested party and/or any other person is unconstitutional;***
    c. ***An ORDER OF PROHIBITION be issued restraining the Respondents from enforcing section 95 (1) (b) against the Interested Party herein.***
    d. ***Costs of this Petition***.

THE PETITIONER'S CASE

7. The Petitioner's case constitutes a comprehensive challenge to the constitutional validity of Section 95(1)(b) of the Penal Code, Cap. 63. At the outset, the provision is portrayed as a historical relic, a vestige of a bygone era of subjugation. It is averred that the section was introduced into Kenyan law in the 1960s, during the exigencies of the colonial State of Emergency, with the express purpose of suppressing African dissent and anti-colonial agitation. The law, it is contended, was not conceived as a neutral instrument for the maintenance of public order, but rather as a tool of political control a character it allegedly retained in the post-independence KANU era, as illustrated by the Petition's reference to the Mwakenya trials.

8. Central to the Petitioner's argument is the contemporary constitutional framework. It is submitted that Section 95(1)(b) constitutes a direct and substantial infringement of the right to freedom of expression, guaranteed under Article 33(1) of the Constitution. By criminalizing the creation of a disturbance "likely to cause a breach of the peace" through undefined conduct, the law is said to target and penalize expressive activity itself.

9. The arrest of the Interested Party for his utterances is relied upon as tangible evidence of the law's suppressive application. The Petitioner contends that such limitation exceeds the permissible bounds of expression. Article 33(2) provides an exhaustive and narrowly drawn list of unprotected speech, including propaganda for war, incitement to violence, hate speech, and advocacy of hatred. Section 95(1)(b), by contrast, is overbroad, potentially criminalizing lawful political criticism, satire, offensive speech, or mere alarm, thereby chilling the "uninhibited, robust, and wide-open" debate essential to a vibrant democracy, as recognized in ***New York Times Co. v. Sullivan, 376 U.S. 254 (1964).***

10. A further pillar of the Petition is the allegation that Section 95(1)(b) is vague and overbroad, contravening the principle of legality enshrined in Article 50(2)(n). The Petition dissects the statutory language: "in any other manner creates a disturbance", "in such a manner", "likely to cause", and "breach of the peace." None of these terms are defined within the Penal Code, nor do they carry a settled and objective legal meaning. This absence of precision fails to provide fair notice to citizens regarding prohibited conduct—a

fundamental requirement of criminal law. Moreover, the law vests excessive discretion in law enforcement officials, inviting arbitrary application against government critics and dissenting voices, while leaving the determination of guilt to the subjective assessment of individual judicial officers. Reliance is placed on the decisions in ***Andare v. Attorney General [2015] eKLR*** and ***Robert Alai v. Attorney General [2017] eKLR*,** where similarly vague penal provisions were invalidated for failing to provide ascertainable standards of guilt.

11. The Petitioner further invokes the structured proportionality test under Article 24, asserting that the burden of justification rests squarely upon the Respondents. It is contended that the Respondents cannot discharge this heavy burden. The purported limitation is not "provided by law" due to its vagueness, and it does not pursue a legitimate aim consistent with Article 33(2). Even assuming that the preservation of public order constitutes a legitimate objective, the law is neither necessary in a democratic society nor narrowly tailored, nor the least restrictive means to achieve that aim, particularly given the availability of more precise statutory provisions addressing genuine threats to public safety.

12. In support of its submissions, the Petitioner draws upon comparative and international jurisprudence, including the Canadian proportionality framework established in ***R v. Oakes [1986] 1 S.C.R. 103***, and the reasoning of the ECOWAS Court in ***Federation of African Journalists and Others v. The***

Gambia, Judgment No. ECW/CCJ/JUD/04/18 (2018), to underscore the high threshold that must be met to justify restrictions on freedom of expression.

THE RESPONDENTS' CASE

13. The 1st Respondent, the Director of Public Prosecutions, opposes the Petition on both procedural and substantive grounds. Procedurally, it is contended that the Petition fails the specificity test articulated in ***Anarita Karimi Njeru v. Republic (1979) 1 KLR 154.*** The 1st Respondent argues that the Petition constitutes a scattergun invocation of numerous constitutional provisions, without clearly demonstrating how each has been infringed by the Respondent's actions, or in what manner. Substantively, the 1st Respondent defends the clarity of the impugned provision. Reliance is placed on ***Ikise Ole Neusiet v. Republic (2021) eKLR,*** which in turn cites ***Mule v. Republic (1983) KLR 246***, to assert that the ingredients of the offence are well-settled: the prosecution must prove both the creation of a disturbance and that such disturbance was likely to cause a breach of the peace. It is submitted that the mere utterance of words does not constitute the offence; accordingly, the law does not inherently criminalize expression.

14. In addition, the 1st Respondent advances the procedural argument that the Petitioner ought to have enjoined the National Assembly, as the law-making body, implying that the DPP, whose mandate is prosecution, is not the proper respondent to a challenge to the validity of legislation which he is duty-bound to enforce.

15. The 3rd Respondent, the Attorney General, presents a more comprehensive substantive defense. The Respondent emphasizes the interplay between Articles 33 (freedom of expression), 24 (limitation of rights), and 50(2)(n) (principle of legality). On the right to freedom of expression, the 3rd Respondent concedes that the right under Article 33(1) is not absolute and underscores the internal limitations enumerated in Article 33(2). It is argued that Section 95(1)(b) does not target the content of speech, but rather its likely consequences specifically, conduct that is likely to provoke imminent violence or public disorder. In support, reliance is placed on the American "fighting words" doctrine in ***Chaplinsky v. New Hampshire, 315 U.S. 568 (1942),*** whereby speech which by its very utterance inflicts injury or tends to incite an immediate breach of the peace is not constitutionally protected. The Interested Party's words, uttered in the politically charged forum of an impeachment hearing and provoking a public reaction, are advanced as an exemplar of such unprotected speech.

16. On the question of proportionality under Article 24, the 3rd Respondent submits that Section 95(1)(b) pursues the legitimate, pressing, and substantial objective of preserving public order and tranquility. The limitation is, it is argued, proportionate: the nexus between prohibiting disturbances likely to cause a breach of the peace and the objective of public order is rational and direct; the impairment of the right is minimal, as the law captures only conduct verging on imminent disorder rather than peaceful dissent; and the prescribed penalty of six months' imprisonment constitutes a modest and reasonable deterrent. Reliance is placed on ***Wanuri Kahiu &***

Another v. CEO Kenya Film Classification Board, Ezekiel Mutua & 2 Others; ***Article 19 East Africa (Interested Party) & Kenya Christian Professionals Forum (Proposed Interested Party) [2020] eKLR*** for principles governing proportionality in the context of freedom of expression.

17. Regarding the challenge of vagueness under Article 50(2)(n), the 3rd Respondent contends that the terms "brawls," "disturbance," and "breach of the peace" are ordinary English words, whose meaning is well-understood in society and clarified through a consistent line of judicial precedent. Reliance is placed on ***Hassan v. Republic [2023] KEHC 27360 (KLR)*** and ***Alex Nzalu Ndaka v. Republic [2019] eKLR*** to demonstrate that courts have repeatedly applied and interpreted the provision, thereby providing sufficient certainty. The law is therefore said to be clear, with its application safeguarded by judicial discretion to prevent arbitrariness. The court is urged, accordingly, to dismiss the Petition as lacking merit and constituting an abuse of process.

18. The 2nd Respondent, the Inspector General of Police, though duly served, did not file any substantive response, leaving the legal defense to the 1st and 3rd Respondents.

ANALYSIS AND DETERMINATION

19. Having considered the pleadings, submissions, and authorities adduced by the respective parties, the Court identifies the following issues for determination:

i. ***Whether the Petition, as filed, satisfies the threshold of specificity required of constitutional petitions.***

ii. ***Whether Section 95(1)(b) of the Penal Code, Cap. 63, constitutes an infringement of the right to freedom of expression guaranteed under Article 33 of the Constitution.***

iii. ***Whether Section 95(1)(b) of the Penal Code is impermissibly vague and overbroad, thereby violating the principle of legality enshrined in Article 50(2)(n) of the Constitution.***

iv. ***In the event that an infringement is established, whether such limitation amounts to a reasonable and justifiable restriction on the right to freedom of expression under Article 24 of the Constitution.***

v. ***What relief, if any, should properly be granted in the circumstances of this case.***

Whether the Petition, as filed, satisfies the threshold of specificity required of constitutional petitions.

20. The objection by the 1st Respondent regarding the specificity of the Petition warrants first attention, as it goes to the very propriety of these proceedings. The principle in ***Anarita Karimi Njeru v Republic (1979) 1 KLR 154*** is a cornerstone of our constitutional jurisprudence. It requires that a person seeking redress for a constitutional violation must set out with a reasonable degree of precision the facts complained of, the specific provisions of the Constitution alleged to have been infringed, and the manner in which they are alleged to be infringed.

21. This doctrine is not a mere technicality to be wielded as a procedural trap. Its profound purpose, as elaborated in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR***, is to ensure due process, substantive justice, and the proper exercise of jurisdiction by defining the issues in controversy with sufficient clarity for the respondent to answer and the court to adjudicate effectively.

22. Having meticulously perused the Petition dated 15th October 2024, the Supporting Affidavit of Florence Muturi, and the Petitioner's written submissions, I am satisfied that the Petition meets the required threshold. The impugned statutory provision, Section 95(1)(b) of the Penal Code, is clearly identified. The factual matrix namely, the arrest and intended prosecution of the Interested Party on 8th October 2024 for utterances made on 4th October 2024 at the Bomas of Kenya is fully detailed. The constitutional provisions alleged to have been infringed—Articles 33 (freedom of expression), 50(2)(n) (principle of legality), and 24 (limitation of rights) are expressly specified, providing sufficient clarity for the Respondents to respond and for the Court to adjudicate effectively.

23. While the Petition's introductory recital of constitutional articles is broad, the body of the Petition and subsequent submissions have distilled and crystallized the core constitutional grievances with admirable clarity. The 1st Respondent cannot credibly claim to be unaware of the case it must meet. As

the Court of Appeal noted in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR***:

> ***"We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."***

24. The primary function of pleadings is to define the issues in controversy. This function has been amply fulfilled in the present Petition. Having regard to the clarity with which the impugned provisions, the factual circumstances, and the constitutional rights alleged to have been infringed have been set out, this Court finds that the Petition satisfies the threshold required of a constitutional petition

Whether Section 95(1)(b) of the Penal Code, Cap. 63, constitutes an infringement of the right to freedom of expression guaranteed under Article 33 of the Constitution

25. This issue lies at the very epicenter of the constitutional storm. Article 33(1) of our Constitution proclaims a powerful guarantee:

"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."

26. This right is not a mere privilege; it is the indispensable foundation upon which a democratic and open society is built. It is the engine of public discourse, the mechanism for holding power to account, and the conduit for the peaceful expression of societal grievances and aspirations. The Supreme Court of Canada, in ***Edmonton Journal v Alberta (Attorney General) [1989] 2 SCR 1326***, stated profoundly that: -

> ***"It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized...."***

27. This sentiment resonates with equal, if not greater, force in our own constitutional landscape, born from a history of suppressed voices.

28. The critical inquiry is whether Section 95(1)(b) of the Penal Code limits this sacrosanct right. The Respondents' argument that the provision targets only

conduct and not speech is a distinction without a meaningful difference in this context, and one that is fundamentally discredited by the facts of this very case. The provision criminalizes creating a disturbance "in any other manner." This phrase is deliberately expansive and encompasses a universe of actions, including pure verbal expression. The state's own contemplated charge against the Interested Party is the most damning evidence of this. The particulars of the offence allege no physical act of violence, no brawl, no property damage. The sole foundation for the charge is that he "did create disturbance… by uttering the words." The state explicitly links the criminality to the speech act and the public's reaction to it. Therefore, as applied and as plainly written, Section 95(1)(b) is a law that imposes criminal liability, with a penalty of imprisonment, for speech deemed likely to cause a disturbance. This constitutes a direct and potent limitation on the freedom of expression.

29. The nature of this limitation is particularly malign because it operates in the shadowy realm of potential effects rather than the specific content of speech. The Constitution itself, in Article 33(2), has drawn a bright line around the categories of speech that are deemed so harmful as to be excluded from protection: propaganda for war, incitement to violence, hate speech, and advocacy of hatred. These are content-based definitions of a narrow class of highly dangerous expression.

30. Section 95(1)(b), in stark contrast, employs a hazy, effect-based standard; speech that is likely to cause a breach of the peace. This standard is untethered from the constitutional taxonomy of unprotected speech. It can,

and as history shows it has, been used to criminalize speech that is merely controversial, offensive, irritating, or critical of authority, but which falls far short of inciting imminent lawless action. The danger is palpable: a law that allows the state to punish speech because an audience might react disruptively to it places the right to speak at the mercy of the possibly volatile temperament of the listeners.

31. This turns the First Amendment principle articulated in ***Terminiello v Chicago, 337 U.S. 1 (1949)***, on its head that speech is often provocative and challenging, and that is why it must be protected. The Petitioner's fear that this law shields public officials from criticism is not fanciful, it is a logical consequence of a provision that penalizes speech which stirs public feeling. The court in ***Andama v Director of Public Prosecutions & 2 others; Article 19 East Africa (Interested Party) [2021] KEHC 12538 (KLR)*** while quoting the Ugandan Supreme Court in ***Charles Onyango Obbo & another v Attorney General [2004] UGSC 81*** rightly identified that meaningful participation in governance, the hallmark of democracy, is assured only through the optimal exercise of freedom of expression. The Court in the above case stated as follows: -

> **"Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy,**

is only assured through optimal exercise of the freedom of expression. This is as true in the new democracies as it is in the old ones."

32. A law that suppresses speech which causes a "disturbance" in a political forum directly attacks this optimal exercise.

Whether Section 95(1)(b) of the Penal Code is impermissibly vague and overbroad, thereby violating the principle of legality enshrined in Article 50(2)(n) of the Constitution

33. The challenge to Section 95(1)(b) on grounds of vagueness and overbreadth strikes at another foundational constitutional principle: legality. Article 50(2)(n) guarantees every accused person the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence under Kenyan or international law. This embodies the age-old doctrine of *nullum crimen*, *nulla poena sine lege certa*; no crime, no punishment without a clear law.

34. A criminal law, to be valid, must be sufficiently clear, precise, and accessible to give ordinary citizens fair notice of what conduct is prohibited. It must also provide explicit standards to govern law enforcement, preventing arbitrary and discriminatory application. Vague laws offend these principles because they fail to define the criminal offence with sufficient definiteness, leaving citizens to steer far wider of the unlawful zone for fear of transgression, a phenomenon known as the chilling effect.

35. A rigorous examination of the text of Section 95(1)(b) reveals a provision riddled with fatal indeterminacy. The offence is committed when a person "brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace." Each of the operative phrases is a vessel of ambiguity. What constitutes a "disturbance" in a legal sense? Does it require noise? Commotion? Emotional upset? Could a silent, powerful political slogan on a placard create a "disturbance"? The phrase "in any other manner" offers no limiting principle, expanding the offence to an open-ended array of behaviours. Most critically, what does "likely to cause a breach of the peace" mean? "Likely" implies a probability, but of what degree? Is it a mere possibility, a more probable than not chance, or a virtual certainty? And what is the constitutional definition of a "breach of the peace"? Does it require actual violence, or merely a threat thereof, or could it encompass any disruption of public tranquility? The Penal Code is silent.

36. The Respondents' defence, relying on cases like ***Mule v Republic (supra)*** and ***Ikise Ole Neusiet v Republic (Supra)*****,** is unpersuasive. Those cases do not define the terms. They merely assume their meaning and proceed to apply them to specific facts. They illustrate the application of vagueness, they do not cure it. Asserting that courts have interpreted the provision for decades confuses the existence of precedent with the existence of clarity. A string of cases applying a vague law does not make the law any less vague, it merely demonstrates a history of judicial officers filling the legislative void with their own subjective judgments. This is precisely what the principle of legality seeks to avoid.

37. As the High Court held in ***Geoffrey Andare v Attorney General & 2 others [2016] KEHC 7592 (KLR)***, regarding vague provisions of the Kenya Information and Communications Act as flows;

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

38. The above reasoning is directly on point. The provision in ***Robert Alai v The Hon Attorney General & another (Supra)*** which criminalized "undermining the authority of a public officer," was struck down for identical reasons: it was "too general, vague and wide" and failed to provide citizens with a clear boundary for their conduct.

39. Furthermore, the law is grievously overbroad. It is not narrowly drawn to capture only speech that incites imminent unlawful action, a category which may be constitutionally prescribable under strict scrutiny, as seen in ***Brandenburg v Ohio, 395 U.S. 444 (1969).*** Instead, it covers any disturbance likely to cause a breach of peace, a standard so elastic it can criminalize a vast spectrum of protected expression, including vigorous political debate, peaceful protest, and artistic performance that may provoke strong reactions.

40. This overbreadth worsens the chilling effect, causing citizens and the media to self-censor rather than risk criminal penalty for venturing near an invisible line. The ECOWAS Court in ***Federation of African Journalists v The Gambia (supra)*** strongly recognized that vague and overbroad speech laws force this kind of self-censorship and are incompatible with democratic society. The arrest of the Interested Party for a political slogan at an impeachment forum is a textbook manifestation of this chilling effect. When the state can arrest a person for words uttered in a political debate, the very essence of democratic engagement is imperiled.

41. Therefore, Section 95(1)(b) fails to qualify as a law "provided by law" as required by Article 24(1), as it lacks the essential quality of precision, and it directly infringes the principle of legality under Article 50(2)(n).

If an infringement is found, whether such infringement constitutes a reasonable and justifiable limitation on the right to freedom of expression under Article 24 of the Constitution

42. The finding that Section 95(1)(b) limits the right to freedom of expression does not automatically render it unconstitutional. Article 24 provides a safety valve, permitting the limitation of rights if such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. However, this is no mere formality. The burden of proving that a limitation meets this high standard rests unequivocally on the state, a principle firmly entrenched in our law through Article 24(3) and affirmed by the seminal proportionality analysis in ***R. v. Oakes (supra).*** The Respondents, as agents of the state, have shouldered this burden, and this court must rigorously assess whether they have discharged it.

43. The Respondents argue that the legitimate aim of the law is the preservation of public order. There can be no quarrel that public order is a weighty and legitimate objective in any society. However, in the specific context of limiting freedom of expression, the Constitution itself in Article 33(2) has already delineated the specific facets of public order that justify such limitation: namely, speech that constitutes incitement to violence. A law that seeks to preserve public order by restricting speech on grounds other than those specifically enumerated in Article 33(2) such as causing a disturbance or being "likely to cause a breach of the peace" is, by necessary implication, pursuing an objective that is over-inclusive and not precisely aligned with the constitutional scheme for balancing expression and public order. The aim, as

framed by the law, is therefore of questionable legitimacy in this specific context.

44. Even assuming, for the sake of a comprehensive analysis, that preserving public order from disturbances likely to cause a breach of peace is a legitimate aim, the proportionality analysis still leads to the inescapable conclusion that the limitation is unjustifiable. The first step is rational connection as there is undoubtedly a rational link between prohibiting disturbances and maintaining order. The law, however, catastrophically fails the minimal impairment or necessity test. To be necessary, a limiting law must be narrowly tailored to achieve the objective, impairing the right no more than is essential.

45. Section 95(1)(b) is a blunt instrument. It employs vague, sweeping language that captures a wide range of protected expression alongside genuinely threatening conduct. Kenya is not lacking in precise legal tools to address genuine threats to public safety without indiscriminately chilling speech. The Penal Code itself contains offences like affray, riot, and incitement to violence. The Public Order Act regulates assemblies. These laws, while also requiring careful application, are more precisely focused on actual or imminent threats to security. A narrowly tailored law would require proof that the speech was intended and likely to produce imminent lawless action, a standard that protects robust debate while allowing the state to act against true threats. Section 95(1)(b), with its low threshold of a "disturbance" that is

"likely" to cause a breach of peace, is not that law. It is not the least restrictive means.

46. Finally, a balancing of the effects reveals a profound disproportionality. On one side of the scale is the law's contribution to public order, a contribution that is speculative and can be achieved through more precise means. On the other side is the severe cost it imposes on democratic society, the chilling of political discourse, the stifling of criticism of public officials, and the instillation of fear in citizens who wish to participate in public debate. The historical context of this law, as a colonial-era tool for suppressing dissent, amplifies this chilling effect. It carries the stigma of oppression.

47. The High Court in ***Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party) [2024] KEHC 2890 (KLR)***, while emphasizing this point, quoted the Nigerian Federal Court of Appeal eloquently in ***Nwankwo v State [1983]1 NGR 336*** while striking down sedition laws, stated as follows: -

> ***"Those in public office should not be intolerant of criticism. Where a writer exceeds the bounds there should be a resort to the law of libel where the plaintiff must of necessity put his character and reputation in issue. Criticism is indispensable in a free society."***

48. The six-month penalty, though not lengthy, is a potent weapon for harassment and the suppression of dissent. The balance tilts decisively

against the law. Its effects on the essential right to free expression are disproportionate to its putative benefits.

49. Consequently, the Respondents have failed to demonstrate that Section 95(1)(b) is a reasonable and justifiable limitation in an open and democratic society.

CONCLUSION

50. In summation, this court finds and holds as follows:
    a. The Petition is properly before the court, having met the required specificity.
    b. Section 95(1)(b) of the Penal Code constitutes a direct limitation on the right to freedom of expression guaranteed under Article 33 of the Constitution.
    c. The provision is impermissibly vague and overbroad, failing to provide the clarity and precision demanded by the principle of legality under Article 50(2)(n), and thus fails to be "provided by law."
    d. The Respondents have not discharged the heavy burden of proving that this limitation is reasonable and justifiable under Article 24 of the Constitution.
    e. The law is disproportionate and its chilling effect on political discourse outweighs its purported benefits to public order.

51. The Petition therefore succeeds.

52. Consequently, this court makes the following orders:

a. A declaration be and is hereby issued that Section 95(1)(b) of the Penal Code, Cap 63 of the Laws of Kenya is inconsistent with and in contravention of Articles 33, 50(2)(n) and 24 of the Constitution of Kenya, 2010, and is therefore unconstitutional, null and void ab initio.

b. A declaration be and is hereby issued that the continued enforcement, application, or reliance upon Section 95(1)(b) of the Penal Code by the Respondents, their agents, servants, or any person acting under their authority, against the Interested Party, Morara David Kebaso, or any other person, is unconstitutional, unlawful, and invalid.

c. An order of prohibition be and is hereby issued, restraining the 1st and 2nd Respondents, their officers, agents, servants, or any person claiming authority under them, from arresting, charging, prosecuting, convicting, or otherwise subjecting the Interested Party, Morara David Kebaso, to any legal process or penalty under or pursuant to the provisions of Section 95(1)(b) of the Penal Code in relation to the events of 4th October 2024 at the Bomas of Kenya, Lang'ata, or on any other basis whatsoever.

d. Each party shall bear their own costs.

Orders accordingly. File closed accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF FEBRUARY 2026.

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BAHATI MWAMUYE MBS

JUDGE

In the presence of: -

Counsel for the Petitioner – Mr. Bosire

Counsel for the 1st Respondent – Mr. Oruki h/b Mr. Mulati

Counsel for the 2nd and 3rd Respondent – Mr. Kaumba

Counsel for the Interested Party – No appearance

Court Assistant – Ms. Lwambia