

PROMOTING BEST PRACTICE AMONG ACTIVISTS FOR MORE EFFECTIVE COLLABORATION IN DIGITAL RIGHTS LITIGATION IN KENYA

A Case Study of the Bloggers Association of Kenya (BAKE)
versus Hon. Attorney General & Three Others

Petition No. 206 of 2018

Background

The Computer Misuse and Cyber Crimes Act, 2018¹ was assented to by Kenya's President Uhuru Kenyatta on May 16, 2018. The objective of the Act is to protect the confidentiality and integrity of computer systems, prevent the unlawful use of computer systems, facilitate the detection, investigation, prosecution and punishment of cybercrimes, and facilitate international cooperation in dealing with computer and cybercrime matters.

Various organisations criticised the bill prior to its assent, calling it unconstitutional. Among these organisations were the Kenya ICT Action Network (KICTANet),² Article 19 Eastern Africa,³ the Bloggers Association of Kenya (BAKE) and the Centre to Protect Journalists (CPJ)⁴ who deemed numerous sections detrimental to Kenyan citizens' digital rights. They argued that it infringed on the privacy of individuals, freedom of expression, speech, opinion and access to information online.



¹The Computer Misuse and Cybercrimes Act, 2018, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ComputerMisuseandCybercrimesActNo5of2018.pdf>

²KICTANet Submission: Amendment of the Computer and Cybercrimes Bill 2017, <https://www.kictanet.or.ke/?p=36792>

³Article19, Kenya: Legal Analysis of the Computer and Cybercrimes Bill, 2017, <https://www.article19.org/wp-content/uploads/2018/04/Kenya-analysis-April-2018.pdf>

⁴Kenyan president should not sign cybercrime bill into law, May 10, 2018, <https://cpj.org/2018/05/kenyan-president-should-not-sign-cybercrime-bill-i.php>



Filing and Objectives of the Case

Within two weeks of the Computer Misuse and Cyber Crimes Act, 2018 passing, BAKE⁵ filed the Constitutional Petition No. 206 of 2018 challenging the constitutionality of the Act, stating that it violated, infringed and threatened fundamental freedoms protected in the Bill of Rights in the Constitution of Kenya, 2010.⁶ The petition cited the violation of the right to privacy;⁷ freedom of expression;⁸ freedom of artistic creativity and academic freedom of scientific research; freedom of belief and opinion;⁹ right to equality and freedom from discrimination;¹⁰ human dignity;¹¹ and the freedom of the media¹² under the Constitution and international human rights standards.

Specifically, BAKE submitted that section 5 of the Act (composition of the National Computer and Cybercrimes Committee), as well as sections 16 (unauthorised interference), 17 (unauthorised interception), 22 (false publications), 23 (publication of false information), 24 (child pornography), 27 (cyber harassment), 28 (cybersquatting), 29 (identity theft and impersonation), 31 (interception of electronic messages or money transfers), 32 (willful misdirection of electronic message), 33 (cyber terrorism), 34 (inducement to deliver electronic message), 35 (intentionally withholding message delivered erroneously), 36 (unlawful destruction of electronic messages), 37 (wrongful distribution of obscene or intimate images), 38 (fraudulent use of electronic data), 39 (issuance of false e-instructions), 40 (reporting of cyber threat), 41 (employee responsibility to relinquish access codes), 48 (search and seizure of stored computer data), 49 (record of and access to seized data), 50 (production order), 51 (expedited preservation and partial disclosure of traffic data), 52 (real-time collection of traffic data), and 53 (interception of content data) were inconsistent with the Constitution as they threatened to infringe on various rights and fundamental freedoms guaranteed in the Bill of Rights.

Further, the petition challenged the procedure of enactment of the Bill, stating that it was not in accordance with the National Assembly's Standing Orders¹³ and went on to state that the requirement for public participation under Articles 10¹⁴ and 118¹⁵ of the Constitution was not satisfactorily met. The petition was filed as urgent, seeking conservatory orders to suspend the coming into force of certain sections of the Computer Misuse and Cybercrimes Act 2018 pending the determination of the petition.

The case was filed at the High Court, which had on previous occasions shown its judicial independence and defense of the constitution, having struck down similar provisions that threatened freedom of expression in previous cases.¹⁶

Collaboration

BAKE works in the protection of digital space and digital media. Its engagement started when the Computer and Cybercrimes Bill, 2017 was first published in July 2017. As the bill progressed through the various stages of the National Assembly, BAKE leadership felt that its constituency of bloggers and journalists would be adversely targeted if the law came into effect.¹⁷

⁵ Bloggers Association of Kenya, <https://bake.co.ke/>

⁶ Justice Chacha Mwita Suspends 26 Sections of the Computer Misuse and Cybercrimes Act, <https://www.blog.bake.co.ke/2018/05/29/justice-chacha-mwita-suspends-26-sections-of-the-computer-misuse-and-cybercrimes-act/>; Bloggers Association of Kenya (Bake) v Attorney General & 5 others [2018] eKLR, <http://kenyalaw.org/caselaw/cases/view/159286/>

⁷ Article 31 of the Constitution of Kenya provides for the right to privacy which includes the right not to have one's person, home or property searched, possessions arbitrarily seized, information relating to family or private affairs unnecessarily revealed or privacy of communications exposed.

⁸ Article 33. The right to freedom of expression under the article includes the right to seek, receive or impart information or ideas and extends to artistic and academic work and research.

⁹ Article 32(1) of the Constitution provides that every person has the right to freedom of conscience, religion, thought, belief and opinion.

¹⁰ Article 27 of the Constitution provides for equality and freedom from discrimination of individuals before the law.

¹¹ Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity respected and protected.

¹² Article 34 of the Constitution of Kenya provides for freedom of electronic, print and all other types of media.

¹³ National Assembly Standing Orders, <http://www.parliament.go.ke/sites/default/files/2018-09/The%20National%20Assembly-4th%20Edition.pdf>

¹⁴ Article 10(2) of the Constitution lists democracy and participation as one of the national values and principles that bind all state organs and officers.

¹⁵ Article 118 (1) (b) of the Constitution requires parliament to facilitate public participation and involvement in the legislative and other business of parliament and its committees.

¹⁶ Geoffrey Andare v Attorney General & 2 others [2016] eKLR, <http://kenyalaw.org/caselaw/cases/view/121033/>; <http://kenyalaw.org/caselaw/cases/view/130781/>

¹⁷ BAKE To Challenge the Constitutionality of the Computer Misuse and Cybercrimes Act, <https://www.blog.bake.co.ke/2018/05/17/bake-to-challenge-the-constitutionality-of-the-computer-misuse-and-cybercrimes-act/>



Unfortunately, the bill was quickly passed and assented into law by the President, and it was to come into effect on May 30, 2018. This left BAKE with only 14 days to challenge the law. Given the urgency, BAKE did not have time to consult widely with partners and stakeholders. However, prior to the filing of the case, BAKE had organised a training for lawyers on digital rights in October and December 2017 to build the legal fraternity's understanding of technology issues.¹⁸ Following the training, a WhatsApp group was created to continue discussing these issues. Members in the group were among the first to be consulted when the Computer Misuse and Cybercrimes Act was signed into law. BAKE also reached out to Article 19¹⁹ and the Kenya Union of Journalists (KUJ),²⁰ seeking their partnership on the petition. However, due to time restrictions, under a certificate of urgency BAKE quickly drafted and filed the petition, only two days before the coming into force of the Computer Misuse and Cybercrimes Act, 2018.

After filing the petition at the High Court, BAKE consulted subject matter experts to explore ways of strengthening the case in court, including through evidence-based legal arguments, experiences from other jurisdictions, and expert evidence. Those consulted included Lawmark Partners LLP, a law firm specialising in legal research and interpretation of the Constitution and statutes; the Centre for Intellectual Property (CIPIT), with expertise in research on privacy and information controls; and the Media Legal Defense Initiative (MLDI) which supported the case's fundraising and documentation efforts. Meanwhile, the United Nations (UN) Special Rapporteur for Freedom of Expression Professor David Kaye profiled BAKE's case;²¹ Kikao Law helped with interpretation of Intellectual Property (IP) issues; and an academic from the Multimedia University supported with research on the technology aspects of the case. Various journalists, bloggers²² and media houses²³ were also engaged to publicise the case from May 2018. Online tools such as Google Drive and Google Docs were embraced to share and collaborate on documents with the various teams, alongside the use of email and Skype for communication.

Use of Media

After filing the petition, BAKE published a press release²⁴ that was shared widely on its website²⁵ and on social media platforms²⁶ to further drum up support for the case and keep the public informed. The case was covered extensively by local and international media.²⁷ Initially there was no communications strategy, as BAKE relied on its expertise of working in the communication sector to share information about the case.

Later, BAKE realised that its external messaging had to be crafted clearly, as there were several requests from the mainstream media (print, radio and TV stations) and international media such as the BBC, to discuss the challenges with the law and the reasons for challenging it. BAKE thus developed a communication strategy with the objective of creating wider public awareness of the case, simplifying the issues with relevant examples, and unpacking the provisions of the Act which it deemed unconstitutional. Under the strategy, BAKE also published a press statement before and after every court

¹⁸ Training Kenyan lawyers on online freedom of speech, <https://www.mediadefence.org/case-study/training-kenyan-lawyers-online-freedom-speech/>; Internet & the Law training workshop for Kenyan lawyers, <https://www.ifree.co.ke/2017/09/internet-the-law-training-workshop-for-kenyan-lawyers/>

¹⁹ <https://www.article19.org/regional-office/eastern-africa/>

²⁰ <http://www.kenyaunionofjournalists.org/>

²¹ Speech Police: The Global Struggle to Govern the Internet (Columbia Global Reports) <https://www.amazon.com/Speech-Police-Struggle-Internet-Columbia/dp/0999745484>

²² 26 sections of the Cybercrimes law have been suspended after BAKE files case, <https://hapakenya.com/2018/05/30/26-sections-of-the-cybercrimes-law-have-been-suspended-after-bake-files-case/>; BAKE to Challenge the constitutionality of the Computer Misuse and Cybercrimes Act, <https://sokodirectory.com/2018/05/bake-to-challenge-the-constitutionality-of-the-computer-misuse-and-cybercrimes-act/>

²³ Cyber crime law 'to remain suspended', <https://www.nation.co.ke/news/Cyber-crime-law-remain-suspended/1056-4790552-1449mlu/index.html>; The fight against controversial computer law now headed to Court, <https://www.standardmedia.co.ke/business/article/2001281042/state-enforces-harsh-cybercrimes-law-as-groups-turn-to-courts>

²⁴ BAKE is successful after court suspends 26 sections of the Computer Misuse and Cybercrimes Act, <https://www.ifree.co.ke/2018/05/bake-is-successful-after-court-suspends-26-sections-of-the-computer-misuse-and-cybercrimes-act/>

²⁵ BAKE Website, www.bake.co.ke; and iFreedoms, <https://www.ifree.co.ke/blog/>

²⁶ BAKE Facebook Page, www.facebook.com/BakeKenya; Twitter Page, <https://twitter.com/bakekenya?lang=en>

²⁷ President Kenyatta signs into law the Computer Misuse and Cybercrimes Bill, 2018, <https://www.capitalfm.co.ke/business/2018/05/president-kenyatta-signs-law-computer-misuse-cybercrimes-bill-2018/>; The benefits of the Computer and Cybercrime Act that no one is debating, <https://www.nation.co.ke/oped/blogs/dot9/walubengo/2274560-4574758-mikfea/index.html>; Kenya's new cybercrime law opens the door to privacy violations, censorship, <http://theconversation.com/kenyas-new-cybercrime-law-opens-the-door-to-privacy-violations-censorship-97271>; The Uncertain Future of the Computer Misuse and Cybercrimes Act, 2018, <http://www.dalynamdar.com/the-uncertain-future-of-the-computer-misuse-and-cybercrimes-act-2018/>; Legal Alert | Kenya | High Court Suspends the Computer Misuse and Cybercrimes Act, 2018, <https://www.africalegalnetwork.com/legal-alert-kenya-high-court-suspends-computer-misuse-cybercrimes-act-2018/>



appearance to update the public on the progress of the case in May 2018,²⁸ July 2018,²⁹ September 2018,³⁰ August 2019³¹ and October 2019.³² The consistency in communication simplified reporting for media houses and helped the public to keep abreast of the case.

Outcome

The application and petition was certified urgent and on May 29, 2018 Honourable Chacha Mwita granted interim conservatory orders, suspending 26 clauses in the Computer Misuse and Cyber Crime Act.³³ The suspended sections are 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. A hearing date is yet to be set for the case. However, the orders granted remain in force pending the hearing.

Lessons Learned

- The initial win at the preliminary stage of the case was groundbreaking. BAKE's determination and focus in the case is a demonstration that even while digital rights may be a new concept, public interest litigation is a viable avenue for their defense.
- Whereas there is value in leveraging networks and partnerships from different stakeholder groups on such cases, there remains a gap in the legal fraternity's understanding of technology issues and their effective participation in relevant cases. Hence, training for lawyers in technology and human rights as BAKE did is key for collaborative litigation.
- Furthermore, the case demonstrates the importance of fostering strategic partnerships to reap widespread benefits before, during and after litigation. However, this may not always be possible in time-sensitive rapid response cases. For instance, BAKE initially worked with partners with diverse competencies, and only went solo when time was of the essence to the entire litigation process.
- Resource constraints made the organisation of the case as well as evidence gathering and stakeholder engagement difficult. Involvement of stakeholders to leverage and maximise expertise, human and financial resources is thus important.
- Research and documentation is key to informing litigation. Collecting data on an ongoing basis – as BAKE did on arrests, intimidation and prosecution of critical voices in Kenya³⁴ – can be helpful in building a case.
- There is limited precedent and case law on strategic litigation in Africa. BAKE had to rely heavily on European Union case law as a reference point.
- Some of the challenges encountered are external and can be considered as delay tactics. For instance, since the case was filed in May 2018, there were routine transfers of two of the judges with the case moving from one judge to another, and is currently being heard by a third judge. Further, there were several interim applications during the proceedings of the case. This led to delays in setting a hearing date for the case. Meanwhile, due to the busy judicial calendar, court appearances were few and far in between. Despite having had at least 15 court appearances, the case was yet to be set for a full hearing. This has led to fatigue among the legal counsel, and dimmed public energy and attention on the case. Collaborative litigators need to continuously undertake contingency plannings as part of their case strategies.

²⁸ Justice Chacha Mwita Suspends 26 Sections of the Computer Misuse and Cybercrimes Act, <https://www.blog.bake.co.ke/2018/05/29/justice-chacha-mwita-suspends-26-sections-of-the-computer-misuse-and-cybercrimes-act/>

²⁹ Justice Wilfrida Okwany Orders that 26 Sections of the Cybercrimes Law to Remain Suspended Until October 1st, <https://www.blog.bake.co.ke/2018/07/04/justice-wilfrida-okwany-orders-that-26-sections-of-the-cybercrimes-law-to-remain-suspended-until-october-1st/>

³⁰ Government Reintroduces Suspended Cybercrimes Law Provisions Through the Finance Act 2018, <https://www.blog.bake.co.ke/2018/09/25/government-reintroduces-suspended-cybercrimes-law-provisions-through-the-finance-act-2018/>

³¹ An Update of our Case Against the Computer Misuse and Cybercrimes Act, <https://www.blog.bake.co.ke/2019/08/08/an-update-of-our-case-against-the-computer-misuse-and-cybercrimes-act/>

³² New Update On The Bake Cybercrimes Case, <https://www.blog.bake.co.ke/2019/10/24/new-update-on-the-bake-cybercrimes-case/>

³³ Legal Alert | Kenya | High Court Suspends the Computer Misuse and Cybercrimes Act, 2018, <https://www.africalegalnetwork.com/legal-alert-kenya-high-court-suspends-computer-misuse-cybercrimes-act-2018/>

³⁴ <https://www.ifree.co.ke/>