

**An assessment into whether Kenya’s section 23 of the Computer Misuse  
and Cybercrimes Act unconstitutionally limits freedom of expression by  
how it criminalises false publications**

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By

Mwenda Celine Nkatha

134326

Prepared under supervision of

Claude Kamau

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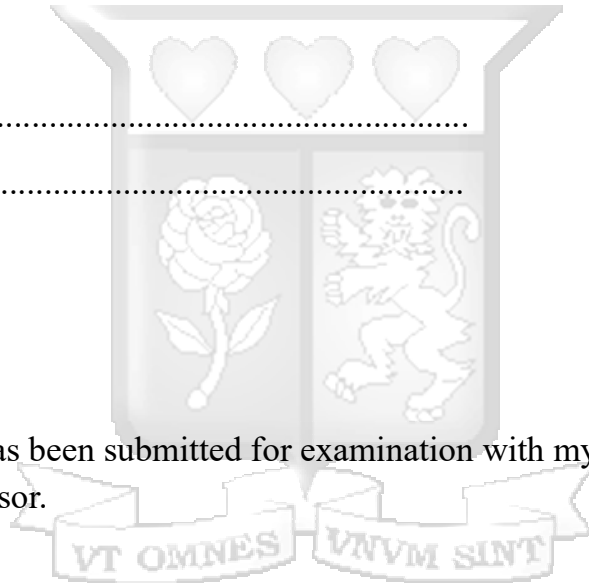
Declaration

I, MWENDA CELINE NKATHA do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.



Signed:.....

Claude Kamau

## Abstract

*This article addresses the complex issue associated with mitigating the proliferation of false information in the framework of Kenya's Computer Misuse and Cybercrimes Act, Section 23. It discusses the unintended consequences of efforts to criminalize false publications, particularly how it's employed as a tool for suppressing journalism, in light of the critical role that social media plays in democratic societies. The paper meticulously analyses the shortcomings of Section 23, which is perceived as being too broad and vague, and considers how it might infringe on an individual's right to free speech. The argument of this paper is that the parameters of section 23 is unclear and therefore it infringes on a person's ability to circulate and disseminate information freely which is constitutionally protected under the freedom of expression. The law under section 23 was ignorant on some intricate aspects of false information and freedom of expression. The problem that is information disorder is true and alive in Kenya, but there have been issues when considering the typology of false information and the nature of false speech in connection to free speech. While acknowledging the reality of information disorder in Kenya, the article closely examines the typology of false information, revealing nuances that challenge the current understanding of false speech in relation to free speech. This article offers recommendations that would reform Kenya's false reporting statute proposing a law that meets the legal standard of certainty and predictability of the law. The suggested reform aims to establish a law that meets legal standards of certainty and predictability, addressing the current ambiguity within Section 23. By advocating for a more nuanced approach, the article seeks to strike a balance between regulating false information and preserving the constitutionally protected right to free expression. This contribution aims to fortify the legal framework in the face of evolving challenges in the social media era.*

List of Abbreviations

BAKE- Bloggers Association of Kenya

LSK- Law Society of Kenya

POFMA- Protection from Online Falsehood and Manipulation Act

KICA- Kenya Information and Communications Act



List of Legal Instruments

*Computer Misuse and Cybercrimes Act* (Act No.5 of 2018)

*Constitution of Kenya* (2010)

*Penal Code* (Cap no. 63 of 1930)

*Kenya Information and Communications Act* (Act no.2 of 1998)

*Universal Declaration on Human Rights*, 10<sup>th</sup> December 1948.

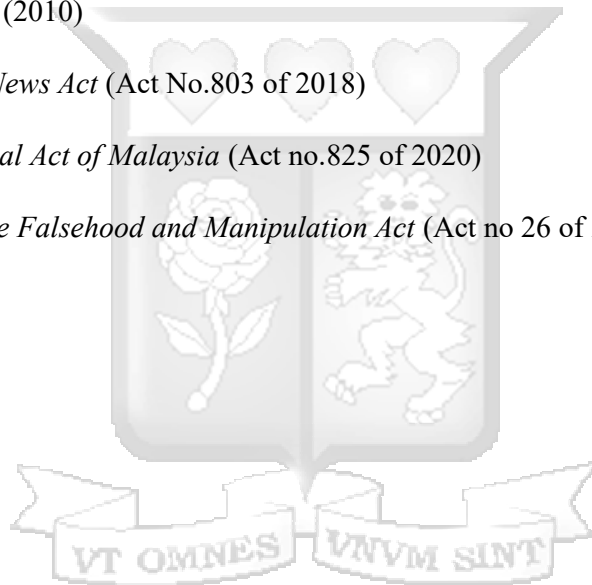
*European Convention of Human Rights*, 1950, ETS No. 005

*Constitution of Kenya* (2010)

*Malaysia Anti- Fake News Act* (Act No.803 of 2018)

*Anti- Fake News Repeal Act of Malaysia* (Act no.825 of 2020)

*Protection from Online Falsehood and Manipulation Act* (Act no 26 of 2019)



List of Cases

*Handyside v United Kingdom* (1976) European Court of Human Rights Judgement on 7<sup>th</sup> December 1976.

*Geoffrey Andare v The Attorney General & The Director of Public Prosecutions* (2015) eKLR.

*Cyprian Andama v Director of Public Prosecutions & 2 others* (2019) eKLR

*Bloggers Association of Kenya v Attorney General & 3 others* (2019) eKLR

*Sunday Times v United Kingdom* (1979) European Court of Human Rights Judgement on 6<sup>th</sup> November 1980

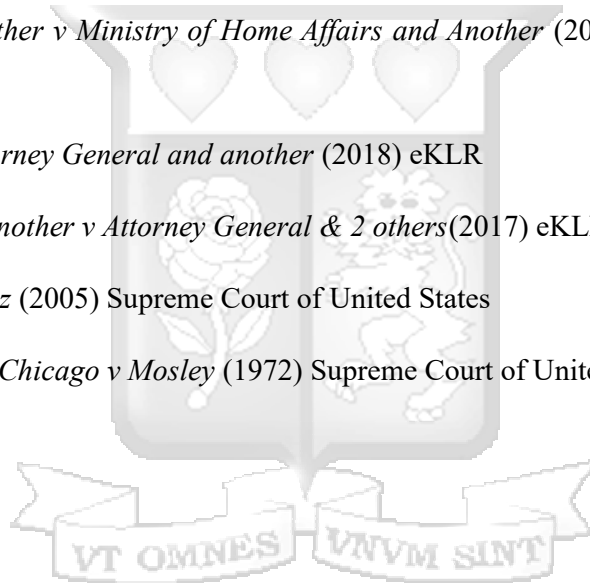
*Chavunduka and Another v Ministry of Home Affairs and Another* (2000) Supreme Court of Zimbabwe.

*Robert Alai v The Attorney General and another* (2018) eKLR

*Jacqueline Okuta & another v Attorney General & 2 others*(2017) eKLR

*United States v Alvarez* (2005) Supreme Court of United States

*Police Department of Chicago v Mosley* (1972) Supreme Court of United States



# CHAPTER 1 : INTRODUCTION

## 1.1 Background

Journalism, blogging and the media in general have become a great resource to Kenyans with the dissemination of news in times of crisis, significant information, and basic information as well.<sup>1</sup> The development of internet and social media platforms has played a significant role in the growth of media with the use of various websites and internet-based communication systems facilitating the publication process.<sup>2</sup> This development is important because, as of 2022, Kenya has an internet penetration rate of 85.2%<sup>3</sup> hence many internet users have access to the news circulated online. The nature of the publication process of the media requires the promotion of freedom of expression.<sup>4</sup> With accrescent internet advancements there has been a growth of information circulated online which has in turn led to information disorder that is characterised by distorted facts, manipulating information and sharing information without understanding the consequences.<sup>5</sup> From this, it is observed that circulation of false news threatens democracy because in a pool of information that are all seemingly accurate, it is difficult for citizens to distinguish what is true or false.<sup>6</sup> Various laws have tried and failed to regulate circulation of false news<sup>7</sup> because they were observed to be a means of silencing the people and especially news providers<sup>8</sup> as well as being disadvantageous to freedom of expression.<sup>9</sup> In this regard, the power of the media makes them an attractive target for illegitimate government control.<sup>10</sup> Laws criminalising false publications such as section 66 of the Penal Code<sup>11</sup> and section 29 of KICA<sup>12</sup> have been declared unconstitutional for infringing on freedom of speech on the basis that they were wide and vague. However, Section 23 of the Cybercrimes Act still remains enforceable despite attempts by Bloggers Association of Kenya to declare it unconstitutional because it clamps down on free speech : the High Court claimed

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<sup>1</sup> Mukangayi V, 'Role of New Media in Responsible Journalism in Kenya: A Case Study of Kenyan Bloggers', 1(5), *African International Journal of Management and Governance*, 2016, 1.

<sup>2</sup> Nyakundi E, 'Social Media in Kenyan Journalism: Benefits, Opportunities and Challenges', 19(12), *IOSR Journal of Humanities And Social Science*, 2014,91.

<sup>3</sup> Internet world stats-< <https://www.internetworldstats.com/>>- on 30<sup>th</sup> June 2022.

<sup>4</sup> *Handyside v United Kingdom* (1976) European Court of Human Rights Judgement on 7<sup>th</sup> December 1976.

<sup>5</sup> Kandell N, 'Information Disorder Syndrome and its Management' 58(224) *Journal of Nepal Medical Association*,2020,280.

<sup>6</sup> The Information Society Project and The Floyd Abrams Institute for Freedom of Expression, Yale Law School, Fighting fake news: Workshop report, March 2017, 3.

<sup>7</sup> See Section 66 Penal Code, Section 29 Kenya Information and Communications Act

<sup>8</sup> *Cyprian Andama v Director of Public Prosecutions & 2 others* (2019) eKLR para 62.

<sup>9</sup> *Geoffrey Andare v The Attorney General & The Director of Public Prosecutions* (2015) eKLR para 97.

<sup>10</sup> International Media Support, *Briefing Note 5: Regulation of Journalists*, 2015,2.

<sup>11</sup> *Cyprian Andama v Director of Public Prosecutions & 2 others* (2019) eKLR.

<sup>12</sup> *Geoffrey Andare v The Attorney General & The Director of Public Prosecutions* (2015) eKLR.

that the section is clear and in tandem with the article on freedom of expression<sup>13</sup> and argued that it was necessary to establish a law to regulate false information especially in a country as fragmented as Kenya<sup>14</sup>. Section 23 of the Cybercrimes Act states, “A person who knowingly publishes information that is false in print, broadcast, data or over a computer system, that is calculated or results in panic, chaos, or violence among citizens of the Republic, or which is likely to discredit the reputation of a person commits an offence and shall on conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding ten years, or to both”<sup>15</sup>. The decision to uphold the section led to various reactions of opposition. The Law Society of Kenya said, “It would be disastrous if, because of the chilling effects of threatened arrest and convictions under the Act, independent journalists are discouraged from publishing information online... ”.<sup>16</sup> If the section as is drafted is used to criminalise false publications, then it would create a problem for anyone using social media to exercise free speech due to its ambiguity, broadness and subjectivity. The European Court of Human Rights stated that a norm cannot be regarded as a law unless it is drafted with sufficient precision to allow citizens to predict outcomes of their actions.<sup>17</sup> It is observed that due to the wide reach of online news, as well as the ambiguity and subjectivity of what exactly constitutes false news, using legislations to regulate false news online has proven to be challenging.<sup>18</sup> The way section 23 criminalises false news introduces a gap in the law that is subject to abuse and misuse to limit freedom of speech.

## 1.2 Statement of problem

Section 23 of the Cybercrimes Act is drafted in a manner that is very subjective and broad therefore making it very easy for it to be a tool used to curtail the news media who remain very important to a democratic state. Lack of precision and clarity when drafting section 23 has created a scenario where the law is used unjustly by infringing on citizens’ free speech liberty.

## 1.3 Research Objectives

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<sup>13</sup> *Bloggers Association of Kenya v Attorney General & 3 others* (2019) eKLR, para 67.

<sup>14</sup> *Bloggers Association of Kenya v Attorney General & 3 others* (2019) eKLR, para 45.

<sup>15</sup> Section 23, *Computer Misuse and Cybercrimes Act* (Act No.5 of 2018)

<sup>16</sup> Wambulwa A, ‘State opposes LSK case against arrest of bloggers’, *The Star* -<https://www.the-star.co.ke/news/2020-06-03-state-opposes-lsk-case-against-arrest-of-bloggers> on 3<sup>rd</sup> June 2020.

<sup>17</sup> *Sunday Times v United Kingdom* (1979) European Court of Human Rights Judgement on 6<sup>th</sup> December 1980.

<sup>18</sup> Zeng J, Chan C, Fu K and Sutcliffe D, ‘Censorship or rumour management? How Weibo constructs “truth” around crisis events’ 9(3) *The Policy and Internet blog; The Platform Society*, 2017, 230.

- 1.To analyse the typology of false news and determine whether the Cybercrimes as it is, is erroneous due its breadth and vagueness
- 2.To examine the scope of freedom of speech and its limitations and if false publication is protected under free speech.
- 3.To assess the inadequacies of the law in regulating false publications and whether criminalisation of false publication in section 23 of the Cybercrimes Act is amendable to make it legally acceptable.

#### **1.4 Research Questions**

- 1.Whether the provision of section 23 of the Cybercrimes Act is overly broad and vague
- 2.Whether freedom of speech ought to extend to protect false publications
- 3.Whether section 23 of the Cybercrimes Act can be amended to regulate false publications while protecting freedom of expression.

#### **1.5 Hypothesis**

- 1.The use of vague and broad terms in section 23 of the Cybercrimes Act renders the section unconstitutional because it violates free speech of citizens especially bloggers and journalists in an unlawful manner.
2. Freedom of expression as a fundamental right in a democratic society ought to be protected for all citizens and should extend to protect some forms of false publications so as to encourage the circulation of ideas and opinions.
3. A clear, precise, and unambiguous use of words is required so as to regulate false publications and an amendment of section 23 is demanded to ensure effective implementation and execution of the law by the cybercrime's coordination committee and courts so as to uphold free speech.

#### **1.6 Justification**

Examining the relation between an erred law and its effects on freedom of expression will be greatly important. My contribution will be useful to all internet and online users who depend on, or benefit from the circulation of news and information by journalist or bloggers. Furthermore, this paper will be beneficial to journalists and bloggers in understanding if their right to free speech has been improperly violated because there has been an increased trend in

detention and pointed attacks on journalist and bloggers by cybercrimes laws.<sup>19</sup> It also discusses ways in which free speech can be legally limited especially by legislations<sup>20</sup> which is essential as free speech is exercised on a day-to-day basis by almost everyone. This paper also aims to highlight a better version of section 23 of the cybercrimes Act that is more detailed and not detrimental to the rights of journalists or bloggers.

### **1.7 Conceptual framework: The application of Lon Fuller's principles of certainty and possibility of compliance as a desideratum of legality of a law**

My conceptual framework will be founded on the principle of legal certainty that is a requirement of rule of law as expressed by Lon Fuller's principles of law. The legal gap discussed throughout paper is caused by a lack of precision and certainty of the law as argued by my hypothesis.

In his book *Morality of the Law*, Fuller writes of a 'inner morality of the law' which refers to the principles of legality of a law that are indispensable to law making.<sup>21</sup> One of the principles he writes of is the principle of clarity which compels a law to clear in what it permits, prohibits or requires. This principle is widely recognized as the principle of legal certainty. It prescribes that a law ought to be clear, precise, unambiguous and its legal implications foreseeable.<sup>22</sup> In the context of legal modernity, it refers to idea that law must be adequately clear, so that the citizens are able to regulate their own behaviour, and they must be able to protect themselves against the arbitrary use of public power.<sup>23</sup> It is therefore correct to say that the principle of certainty is linked to the notion of predictability of legal consequences. According to Fuller's jurisprudence, this requirement of predictability is linked with the principle of possibility of compliance that prescribes that laws must not ask the impossible.<sup>24</sup> The requirement of possibility of compliance allows for the citizens to order their lives sufficiently so as to obey the law as is expected. The idea of predictability of legal consequence is vital to citizens so as

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<sup>19</sup> Amnesty international, *A Report on Endangered Voices Attack on Freedom of Expression In Nigeria*, 2019, 5.

<sup>20</sup> See Article 19, *International Covenant on Civil and Political Rights*, Article 29(2), *Universal Declaration of Human Rights*, Article 9, *African Charter on Human and People's Rights*.

<sup>21</sup> Waldron, Jeremy, 'The Rule of Law' in Edward N. Zalta and Uri Nodelman (eds) *The Stanford Encyclopaedia of Philosophy*, 2023 Fall Edition, Metaphysics Research Lab, Stanford University, 2023, 6.

<sup>22</sup> Lexis Nexis, 'What does legal certainty mean?' - <<https://www.lexisnexis.co.uk/legal/glossary/legal-certainty>> - 1.

<sup>23</sup> William B, 'Legal Certainty and Competition Law: Can They be Reconciled?', Stellenbosch University, Dissertation paper, 1, -<http://hdl.handle.net/10019.1/105091> - on December 2018.

<sup>24</sup> Fuller L, *Morality and the Law*, Yale University Press, New Haven, 1969, 62.

to know how to conduct their lives.<sup>25</sup> Due to the need to plan conduct within the realm of their freedom, expectations created by legislators or adjudicators when deciding or drafting policies that affect large groups need to be protected by the law drafted in accordance with legal certainty.<sup>26</sup> This principle has been vital in establishing a space that guides an individual to exercise their freedom and the scope of state power.<sup>27</sup> The principle of legal certainty is found to be linked with the rule of law. It is stated that one of the principles of rule of law prescribes that laws are to be clear and intelligible.<sup>28</sup> Rule of law, in this case, is important in so far as its advancement is interrelated to full realisation of human rights and fundamental freedoms.<sup>29</sup> Formal legal certainty is an inseparable feature in written laws, and it presents itself where a regulation is drafted and passed because it is clear and logical<sup>30</sup>. Clarity in drafted legislations refers to lack of doubts of the meaning of a term or the law or multiple conflicting interpretations of the law as well as laws whose enforcement and implementation cannot be influenced by conditions and circumstances that are subjective in nature.<sup>31</sup> A law that is passed despite being vague or too broad (an uncertain law) creates subjectivity of interpretation or confusion and such a law isn't beneficial to society. A law should be clear and sure as a requirement of justice.<sup>32</sup> A clear, specific, and unambiguous definition of terms used in section 23 of the Cybercrimes Act would ensure the implementation and execution of the objectives of the Act. To reiterate this, the International Media Standard wrote that it is not enough for a law to be passed but it has to be clear and accessible and if a law is unduly vague or granting excessive discretionary powers then it fails to meet the legal requirement for limiting free speech.<sup>33</sup> Therefore, due to legislators' disregard for legal certainty, the media in Kenya is faced with a problem that contravenes their freedom as a result of the ambiguity of the law.

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<sup>25</sup> Waldron J, 'The Concept and the Rule of Law', New York University School of Law, Public Law & Legal Theory Research Paper Series Working Paper No. 08-50, 24<sup>th</sup> September 2008,3,- <https://ssrn.com/abstract=1273005>- on 18<sup>th</sup> November 2008.

<sup>26</sup> Janderova J, Hubalkova P, 'Legal Certainty – Protected Values and Partial Objectives: The Case of the Czech Republic', 19(1), *Central European Public Administration Review*, 2021,64.

<sup>27</sup> Fenwick, M, Wrбка, S, 'The Shifting Meaning of Legal Certainty' in Fenwick M, Wrбка S, (eds) *Legal Certainty in a Contemporary Context*, Springer, Singapore, 2016,1.

<sup>28</sup> Bingham T, 'The Rule of Law, 1<sup>st</sup> ed, Penguin Books Limited, London,2011,20.

<sup>29</sup> United Nations, 'Rule of Law and Development',2020,2, - <https://www.un.org/ruleoflaw/rule-of-law-and-development> - on 30 September 2020.

<sup>30</sup> Braithwaite J, 'Rules and principles: A theory of legal certainty',27, *Australian Journal of Legal Philosophy*, 2002,47.

<sup>31</sup> Hunsu Y, 'The Concept of the Principles of Legal Certainty, Benefit and Justice in Environmental Management', V(II), *International Journal of Research and Innovation in Social Science*, 2021,633.

<sup>32</sup> Radbruch G, 'Statutory Lawlessness and Supra-Statutory Law' 26(1) *Oxford Journal of Legal Studies*, Oxford, 2006, 6.

<sup>33</sup> International Media Support, 'Briefing Note Series: Freedom of Expression', July 2014,5.

## 1.8 Literature review

### 1.8.1 On the typology of false information

The current advancement of technology has resulted to a growth of information circulated online which has in turn led to information disorder that is characterised by distorted facts, manipulating information and sharing information without understanding the consequences.<sup>34</sup> False information is regarded as a consequence of information disorder. O’Fathaigh et al. note that due to the societal and legislative pressure on false information there has been more research done on the whole concept of false information.<sup>35</sup> Notably, that there has been extensive literature done on false news, but little research has been done on the same in the legal sphere. Baade writes that so far there are various types of legal information defined but they should not be confounded for legal purposes.<sup>36</sup> Various articles define false information differently. Tambini et al argues that on one hand, there is an agreement that there is no clear legal definition on false information while on the other hand, states that definitions have been adopted to harmonise what is false information.<sup>37</sup> A difference in the definitions offered by scholars comes up due to the differentiated understanding of what is false news. Gelfert describes it on the basis of conception (deliberate or cultural)<sup>38</sup> while scholars such as Farkas and Schou define it on the basis of misinformation and disinformation.<sup>39</sup> Researchers have been keen to differentiate between misinformation and disinformation and deliberate or cultural conception based on the difference of intentionality of the fabricated content<sup>40</sup>. The description used in section 23 of the Cybercrimes Act arguably fits the description of disinformation. The most common understanding of disinformation as explained by Ksherti and Voas is that it as “a news article or message published and propagated through media, carrying false information regardless of the means and motives behind it”. O’Faithagh et al writes that the definitions offered by disinformation are criticized for being too broad and too

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<sup>34</sup> Kandell N, ‘Information Disorder Syndrome and its Management’ 58(224) *Journal of Nepal Medical Association*, 2020, 280.

<sup>35</sup> O’Fathaigh R, Helberger, Appelman N, ‘The perils of legally defining disinformation’ 10(4), *Internet Policy Review*, 10(4), 2018, 1.

<sup>36</sup> Björnstjern Baade, Fake News, and International Law, 29(4) *The European Journal of International Law*, 2019, 1358.

<sup>37</sup> Tambini D, ‘Media freedom, regulation and trust: A systematic approach to information disorder’, Council of Europe Conference of Ministers Responsible for Media, and Information Society, 2020, 19, <[16809a524f \(coe.int\)](#)>-on 29<sup>th</sup> May 2020

<sup>38</sup> Gelfert A, ‘Fake news: A definition’, 38(1) *Informal Logic*, 2018, 88.

<sup>39</sup> Farkas J, Jannick S, ‘Fake News as a Floating Signifier: Hegemony, Antagonism and the Politics of Falsehood, Javnost’ 25(3), *The Public*, 2018, 299.

<sup>40</sup> Karlova N, Fisher K, ‘A social diffusion model of misinformation and disinformation for understanding human information behaviour,’ 18(1), *Information Research*, 2013, 2-3.

vague.<sup>41</sup> Due to its subjectivity and political influence, the use of terms remains controversial. Therefore, a discussion on information disorder and specifically disinformation will be beneficial to understand the legal gap created by section 23 of the Cybercrimes Act.

### **1.8.2 On the scope of free speech and the place of false speech under the liberty**

Garton once captured the vitality of free speech in the quote, “The power of speech is what distinguishes us from other animals and from any machines yet invented. If we cannot express our thoughts and feelings, we can never realise our full humanity.”<sup>42</sup> Historically, free speech has been treasured as a ‘marketplace for ideas’ which was a term coined by Justice Olive Holmes who was a proponent of free speech. Various scholars have argued that due to the fundamental nature of this right, then there ought to be minimal state intervention. One of such works is by Gunatilleke who writes that freedom of speech is important especially for a meaningful democracy and therefore, this freedom can only be limited by the state so as to advance broader aims as provided by law.<sup>43</sup> He also opines that due to the nature and value of freedom of speech, it shouldn’t be limited without meeting a substantial burden of justification<sup>44</sup> Also, Stuart Mill writes that there should be no attempt to control the expression of one’s opinion unless it leads to an individual’s harm.<sup>45</sup> He also argues that to assume that because something is not true it should be suppressed is “to assume infallibly.”<sup>46</sup> However, Mill’s idea on an almost absolute freedom of expression has been criticised to be a utilitarian and consequentialist approach of someone who champions an almost absolute free speech and ignores the appropriate boundaries to freedom of expression.<sup>47</sup> I agree with the liberal understanding of free speech as a market of ideas as it supports growth of social and traditional media. To argue against Mills’ idea, Warburton write that there has to be limits to the freedom of speech and certain circumstances warrant for the freedom to be preserved.<sup>48</sup> I also agree with the importance of limitations to free speech to enable a balance between everyone’s fundamental rights and liberties. Even with such limitations, circulation of news and ideas

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<sup>41</sup> O’Fathaigh R, Helberger, Appelman N, ‘The perils of legally defining disinformation’ 10.

<sup>42</sup> Gash T, ‘Free Speech: Ten Principles For a Connected World’, 1<sup>st</sup> ed., Atlantic Books, London, 2016, 119.

<sup>43</sup> Gehan Gunatilleke, ‘Justifying Limitations on the Freedom of Expression’, 22(1) *Human Rights Review*, 2020, 92.

<sup>44</sup> Gehan Gunatilleke, ‘Justifying Limitations on the Freedom of Expression’, 93.

<sup>45</sup> Macleod, Christopher, “John Stuart Mill”, *The Stanford Encyclopaedia of Philosophy*, 20 - <<https://plato.stanford.edu/archives/sum2020/entries/mill/>>- in Summer 2020.

<sup>46</sup> Macleod, Christopher, ‘John Stuart Mill’, 21.

<sup>47</sup> Cohen R, ‘J.S. Mill’s Boundaries of Freedom of Expression: A Critique’, 32(1), *Philosophy*, 2017, 42.

<sup>48</sup> Warburton N, *Free Speech, a very short introduction*, 1<sup>st</sup> ed., Oxford University Press, Oxford, 2009, 10.

should not be detrimentally affected. A discussion on free speech legally and the place of false speech in any regime will be useful to understand where section 23 stands in terms of meeting requirements of freedom of expression.

### **1.8.3 On the criminalisation and regulation of false information and its effect on freedom of expression**

Wardle writes that despite the ease to ignore the trend of false news due to its popularity and history, there needs to be attempts to regulate the polluted streams of information that is in the modern technological world.<sup>49</sup> Many scholarly works have written on the need for legislators to draft laws limiting free speech in a legal manner. Vese observes that in light of the various legal instruments protecting freedom of speech, any restrictions on the operation of any electronic or internet-based systems are strictly to be within limits recognised by these instruments.<sup>50</sup> Moreover, he argues that restrictions should be content specific and adds that generic bans are incompatible with the law.<sup>51</sup> Leslie writes that to regulate false statements, the government must link the information to restricting a harm that it has the authority to do so, and strict scrutiny is required in laws limiting freedom of speech to be narrowly drafted.<sup>52</sup> Of a similar view, Shiffrin identifies a possibility that the legal regulations condemning lies can be made on a narrow or a specific level: the design of the laws and how it is applied in regulating false information will determine whether there ought to be concerns over government abuse of the said law.<sup>53</sup> Castro writes that there are 2 ways that the government regulates false news that may raise controversy, these are, by regulating the speech itself or prosecution of the perpetrator who fabricated the false content.<sup>54</sup> Section 23 of the Cybercrimes Act falls under the second type. Sugow writes that a more precise definition of terms in the Cybercrimes Act could lead to less concern on free speech as right<sup>55</sup> and concludes that it is possible to regulate fake news and preserve freedom of expression in Kenya if the law accounts for a more precise form of false information and employs non-legislative means to support the

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<sup>49</sup> Wardle C, *Information Disorder: Toward an interdisciplinary framework for research and policy making*, 1<sup>st</sup> ed., Council of Europe, Strasbourg Cedex, 2017, 10.

<sup>50</sup> Vese D, Regulating Fake News: The Right To Freedom Of Expression In The Era Of Emergency, 8(2), *Persona e Amministrazione*, 2020, 741.

<sup>51</sup> Vese D, Regulating Fake News: The Right To Freedom Of Expression In The Era Of Emergency, 741.

<sup>52</sup> Jacobs L, 'Freedom of Speech, and Regulation of Fake News', 70(1), *The American Journal of Comparative Law*, 2022, 285.

<sup>53</sup> Shiffrin S, *Speech Matters On Lying, Morality, and the Law*, 1<sup>st</sup> ed., Princeton University Press, Princeton, 2014, 123.

<sup>54</sup> Geoffroi Castro, 'A Thinker-Based Perspective on Free Speech and Fake News', 14.

<sup>55</sup> Sugow A, 'The Right to be Wrong: Examining the (Im) possibilities of Regulating Fake News while Preserving the Freedom of Expression in Kenya', *Strathmore Law Review*, 4(1), 2019, 39.

law.<sup>56</sup> This paper intends to deal with the issues that may arise from criminalising false information and will delve into the concerns expressed by the various scholars.

## **1.9 Methodology**

The research conducted throughout this paper will be a desk study of a qualitative nature. The main source of information relied on throughout the paper will be secondary sources of information such as books, journals, articles, case laws, advisory opinions, and such materials. In order to do this, the research relied on will mainly be secondary sources of information such as books, case law, advisory opinion and other scholarly works attempting to define the concept. Secondly, to answer the question of the scope free speech and false speech, an assessment into this right will be vital. The research dealing with this will mostly utilise primary sources of data such as the hard law dealing with the freedom itself as well as secondary sources of information dealing with the same. Finally, I will delve into the regulation false information; to do this, secondary sources of information will be relied upon.

## **1.10 Chapter Breakdown**

The first chapter of this study will be an introduction to the paper that is dealt with in this research proposal. It deals with a variety of sections that is essential for an understanding of this paper.

Chapter two will focus on the typology of false publication that is brought about by social media and how it is not heeded to under section 23 of the Cybercrimes Act.

The third chapter in this contribution will deal with the scope of freedom of speech and why some forms of false publication is protected by free speech.

Chapter four will deal with assessing the criminalisation of false publication is possible while upholding free speech.

The final chapter of this study will delve into conclusions and recommendations based on the findings.

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<sup>56</sup> Sugow A, 'The Right to be Wrong: Examining the (Im) possibilities of Regulating Fake News while Preserving the Freedom of Expression in Kenya', 46.

## **CHAPTER 2 : WHETHER SECTION 23 OF THE CYBERCRIMES ACT IS OVERLY BROAD AND VAGUE**

### **2.1 Introduction**

This chapter seeks to answer the first research question which is whether section 23 of the Cybercrimes Act is overly broad and vague. The first part of this chapter will aim at illuminating on laws surrounding the criminalisation of false publications so as to introduce the legal gap created by the lack of a precise and narrow definition while the latter part will deal with the first research question. This chapter will do so by qualitative research relying on both primary and secondary sources of information such as books, journals, articles, case laws, and such materials.

While many acknowledge that fabrication of information is not new, the growth of it has been accredited to technology and the fundamental changes it has introduced.<sup>57</sup> Pew Research Centre recorded that 55% of social media users in Kenya see false content as they surf through social media, statistics also show that more than half of those who see false content are concerned by the dark impact such content has on society.<sup>58</sup> This goes to show that certainly the problem of false information is worrying and requires legal attention in a precise manner. This chapter will delve into illuminating on whether section 23 is drafted without precision and certainty.

### **2.2 Relevant laws on false publications**

There have been various laws surrounding false publication and those that have attempted to or sought to criminalize the publication of false information within Kenya.

#### **1. Article 33 Constitution of Kenya**

Article 33 speaks to the freedom of expression that is the basis for all exchange of all information, opinions and ideas especially in a democratic society. It is a right recognised under the Bill of Rights, but it is not absolute as it is subject to certain limitations provided within the Constitution. The right to freedom of expression does not extend to propaganda of war, hate speech, advocacy of hatred or incitement to violence.<sup>59</sup>

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<sup>57</sup> Wardle C, Derakhshan H, 'Information Disorder: Toward an interdisciplinary framework for research and policy making' (ed.) 1<sup>st</sup> ed., Council of Europe, Strasbourg Cedex, 2010, 2.

<sup>58</sup> Pew Research Center, 'Exposure to incorrect information is widespread in most emerging economies surveyed' 2019, 1.

<sup>59</sup> Article 33, *Constitution of Kenya* (2010)

This freedom allows for the free circulation of information that is essential and therefore should only be limited according to the provisions of the law. This right is silent on false publications as a limitation, and it is the argument of this paper and other free speech proponents that it ought to protect false publications. This freedom forms the most fundamental ground upon which section 23 is challenged.

Evidently, a lack of precision in the law is a growing concern internationally for various jurisdictions mainly because false publication is a wide concept that entails a variety of types of false news that cannot all be subject to criminal sanctions lest the law be judged for being too harsh.

## 2. Section 66 Penal Code

The now impugned section 66 of the Penal Code stated, “Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour.”<sup>60</sup>

The aforementioned provision was declared unconstitutional on grounds that it unjustifiably infringed on freedom of expression and one rationale provided by the court was that the section was excessively broad in a manner that could limit ones’ right to access information.<sup>61</sup>

This provision is strikingly similar to section 23 of the Cybercrimes mirroring in its broad and vague characteristic.

## 3. Section 29 Kenya Information and Communications Act

This particular provision created the offence of “*using a licensed telecommunication system to send a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; and sending a message that a person knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person.*”<sup>62</sup>

The section was declared unconstitutional on grounds that it was too broad and vaguely worded such that it infringed on freedom of expression particularly through social media and online platforms.<sup>63</sup>

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<sup>60</sup> Section 66, *Penal Code* (Cap no. 63 of 1930)

<sup>61</sup> *Cyprian Andama v Director of Public Prosecutions & 2 others; Article 19 East Africa (Interested Party)* (2021) eKLR

<sup>62</sup> Section 29, *Kenya Information and Communications Act* (Act no.2 of 1998)

<sup>63</sup> *Geoffrey Andare v The Attorney General & The Director of Public Prosecutions* (2015) eKLR.

This section is also similar to that of the Cybercrimes Act as it provides for the criminalisation of false publications in a similar manner. The inadequacy of the law exhibited under KICA is also present in the Cybercrimes Act.

## 2.3 How section 23 fails to meet the certainty required by law

### 2.3.1 The typology of false information

Despite the belief that the definition of false news is simple, it is observed To actually entails some complexity.<sup>64</sup> There has been various attempts to define the term has been observed to be a challenge especially for the legal sphere.<sup>65</sup> This is mainly because most definitions brought about as a result of scholarly works and research on the matter thus far have cautioned against their conflation for legal purposes.<sup>66</sup> Therefore, as a preliminary task, there needs to be an elucidation on the various definitions established by scholars, researchers and institutions so as to show how the lack of a definition usable in the legal sphere causes vagueness, overbreadth and subjectivity of the law. By elucidating the different types of false news, it will show the need for laws criminalising false publication to provide more narrow and precise definitions to prevent all types of false publications from the law's stringent effects.

#### 2.3.1.1 Classification based on intentionality

Wardle lists 7 types of problematic content classified under information disorder that sit loosely on a scale that measures intention; satire and parody, misleading content, imposter content, fabricated content, false connection, false context and manipulated content.<sup>67</sup> Tandoc has argued that these definitions involve a varying degree of falsehood and deception with satire and parody at the lowest on the scale.<sup>68</sup> Understanding all these variations of false news with the different degree of intentionality will reveal how a general law criminalising all forms of it is too severe and extreme. On the lower scale of intentionality, news satire is described as the most common operationalization of fake news that utilises humour to present news; it is characterised as news which is equal part entertaining and informative.<sup>69</sup> On a higher scale,

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<sup>64</sup> Rahmanian E, 'Fake news: a classification proposal and a future research agenda' 27(1) *Spanish Journal of Marketing*, 2023,63.

<sup>65</sup> Vese D, 'Regulating Fake News: The Right To Freedom Of Expression In The Era Of Emergency',740.

<sup>66</sup> Baade B, 'Fake News and International Law' 29(4) *The European Journal of International Law* ,2018,1358,

<sup>67</sup> Wardle C, 'Fake news; it's complicated' *First Draft* -<https://medium.com/1st-draft/fake-news-its-complicated-d0f773766c79-> on 16<sup>th</sup> February 2017,2.

<sup>68</sup> Tandoc E, Zheng W, Ling R , 'Defining 'Fake News': A typology of scholarly definitions',6(3) *Digital Journalism*,2017,4.

<sup>69</sup> Brewer P, Young D, Morreale M, 'The Impact of Real News about "Fake News": Intertextual Processes and Political Satire' 25(3) *International Journal of Public Opinion*,2013,325.

misleading and manipulative content just as its name suggests is content that is fabricated with the intention to mislead.<sup>70</sup> Most legitimate news sites are committed to advancing truthful information and avoid steering into circulation of inauthentic material. However, such content still finds a way to reach the society because some news sites seek to advance their profits or attract attention through such content.<sup>71</sup> This criterion on intentionality forms the divergence between how misinformation and disinformation is understood; while misinformation refers to sharing of false information without intent, disinformation refers to deliberate and intentional creation and sharing of false information.<sup>72</sup>

### 2.3.1.2 Classification based on conception

False news can be understood as information that is factually inaccurate.<sup>73</sup> According to Gelfert, when determining the conception of false news there are salient features that present themselves, but the deliberateness and the caricature of actual news are of core importance.<sup>74</sup> According to this criterion, false news is that which is deliberately constructed with the intention of deception. On the other hand, conception can be cultural in that false news includes that which is false with or without the intent to harm; it encompasses the whole culture of false information and envisages a wide range of false news.<sup>75</sup>

### 2.3.2 Why section 23 is deemed problematic because of its overbreadth and vagueness

One of the reasons provided for the strong criticism against provisions criminalising false publications is that they are too broad and leave room for subjective interpretation that will result in an arbitrary application of the law.<sup>76</sup> These reasons are founded on the lack of a proper definition of what false news is. Most laws criminalising false publications fail to clearly outline what type of false news is to subject to criminalisation leaving even the consequences of error or rumours or bona fide mistakes vulnerable to the chilling effects of such provisions.

#### 2.3.2.1 The problem of overbreadth

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<sup>70</sup> Wardle C, 'Understanding Information Disorder' First Draft-<https://firstdraftnews.org/long-form-article/understanding-information-disorder/>- on 2<sup>nd</sup> September 2022,3.

<sup>71</sup> Chen Y, Conroy N, Rubin V, 'Misleading Online Content: Recognizing Clickbait as "False News"', 1<sup>st</sup> ed. Association for Computing Machinery, New York, 2015, 15.

<sup>72</sup> Wardle C, Derakhshan H, 'Information Disorder: Toward an interdisciplinary framework for research and policy making,' 5.

<sup>73</sup> Allcott H and Gentzkow M, 'Social media and fake news in the 2016 election' 31(2) *Journal of Economic Perspectives*, 2017, 12.

<sup>74</sup> Gelfert A, 'Fake news: A definition', 96

<sup>75</sup> Sugow A, 'The Right to be Wrong: Examining the (Im) possibilities of Regulating Fake News while Preserving the Freedom of Expression in Kenya' 29.

<sup>76</sup> Media Defence, 'Criminalization of Online Speech' 2019, 19.

In the case of *Chavunduka and Another v Ministry of Home Affairs and Another*, the Supreme Court of Zimbabwe stated, “The use of the word “false” is wide enough to embrace a statement, rumour or report which is merely incorrect or inaccurate, as well as a blatant lie; and actual knowledge of such condition is not an element of liability; negligence is criminalised. Failure by the person accused to show, on a balance of probabilities, that any or reasonable measures to verify the accuracy of the publication were taken, suffices to incur criminal liability for publishing false information, even if the statement, rumour or report that was published was simply inaccurate.”<sup>77</sup> The sentiments in this case outrightly express the concern of overbreadth. In a situation where laws on false publications would encompass everything from misinformation to disinformation then it would prove problematic. Some laws have tried to combat this inadequacy by providing a narrower definition of what constitutes false publications. Attempts to provide for a more precise definition of false news in laws criminalising false publications would be a step in the right direction. As Wardle opined, fake news is not a specific item or group of items, it is an information system that encompasses a variety of misinformation and disinformation.<sup>78</sup> Therefore, it is undoubtedly problematic to information circulation if even the most harmless forms of false publications such as errors, rumours, mistakes, satire and such are subject to laws criminalising false news

#### 2.3.2.2 The problem of determining intentionality

Intention is of special importance in criminal jurisprudence because it speaks to the mens rea of an action. Mens rea is known to be the wrongful intent to performing an action under criminal law.<sup>79</sup> Section 23 of the Cybercrimes Act is drafted in a manner that seeks to provide that there is intention by stating that the person sharing the false information knowingly does so. However, in situations where false publications are shared or disseminated within the confines of one’s privacy it would be difficult for the state prove without reasonable doubt that the information was surely intended to harm as prescribed by section 23. It would be problematic for the state to prove with certainty that an accused person knowingly shared false information. It is observed that individuals are sometimes misled by fake news and share it unintentionally without knowing it to be false.<sup>80</sup> The court would intend to use the test for

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<sup>77</sup> *Chavunduka and Another v Ministry of Home Affairs and Another* (2000) Supreme Court of Zimbabwe

<sup>78</sup> Wardle C, ‘Fake News; It’s Complicated’, *First Draft*, 3.

<sup>79</sup> Sawye F, ‘Mens Rea’ 45(6) *Harvard Law Review*, 1932, 974.

<sup>80</sup> Zafarani R, Liu H, Zhou X, Shu K, Phoha V, “‘This is Fake! Shared it by Mistake’: Assessing the Intent of Fake News Spreaders, Association for Computer Machinery -<https://doi.org/10.1145/3485447.3512264>- on April 2022,3685.

failure or the virtual certainty test in order to ascertain the intention of disseminators.<sup>81</sup> However, this would prove difficult to do since, in order to identify intent, one would have to consider the author's intent as well as the audience that would receive the information and if they would perceive the information to be true both of which would prove difficult to do.<sup>82</sup> Section 23 relies on the audience believing that the false information is true and this belief results to the consequences described in the section such as panic, chaos or discredited reputation which would be difficult to do while also proving the disseminator's intention was to knowingly circulate false information. When the only mens rea requirement is knowledge, people may refrain from engaging in protected speech for fear of legal penalties, summarily, people may refrain from making statements that they believe to be true, for fear that the statement will turn out to be false and they will be unable to disprove the government's claim that they knew it was false. Due to the challenge of determining intentionality, it may lead to arbitrary application of law which is described as a court ruling based on a judge's discretion rather than a fair application of the law.<sup>83</sup> This connection is why the law has been criticized for being a weapon and a gag tool against the news media.

## 2.4 Conclusion

This section answers the first research question on whether section 23 of the Cybercrimes Act is overly broad and vague. It argues that false publications constitute a wide variety of information that are distinguishable from others either by varying degrees of intentionality or a difference in conception. Consequently, the Cybercrime Act fails to appreciate the layered nature of false publications and all sorts of legal issues that come with it. It does not establish a specific objective that section 23 should outrightly handle and thereby incorporating other forms of false news that may be too harsh to regulate. A definition has to be drafted, clearly establishing the scope of false publications to be dealt with by the Cybercrimes Act lest the law continues to be criticised for its harshness and being a draconian law.

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<sup>81</sup> Herring J, *Criminal Law: Texts, Cases and Materials*, 5<sup>th</sup> ed, Oxford University Press, Oxford, 2012, 136-179.

<sup>82</sup> Stewart E, 'Detecting Fake News: Two Problems for Content Moderation' 34(1), *Philosophy and Technology*, 2021, 935.

<sup>83</sup> Cornell Law School, Legal Inform Institute, -< <https://www.law.cornell.edu/wex/arbitrary>>- 1.

## **CHAPTER 3: WHETHER FREEDOM OF SPEECH PROTECTS THE PUBLICATION OF FALSE INFORMATION**

### **3.1 Introduction**

This chapter tackles the second research question which is whether free speech extends to protect false publication . It also aims to show why a general and unspecific law criminalising false publications would be inadequate and the need for a more precise law to guard against impeding on free speech. The chapter will do so by relying on various sources mostly on an analysis of the law as it is as well as delving into theories surrounding false publications. It seeks to show, through various arguments, that some forms of false speech are constitutionally protected and that the only way to properly criminalise false publication is through a detailed law that targets false publications that fall outside the protection of free speech.

### **3.2 Freedom of speech and its limitations**

The terms freedom of expression and freedom of speech are used interchangeably to represent a wide umbrella concept seeking to protect a widely recognised political idea and legal principle.<sup>84</sup> Freedom of expression or speech is a fundamental human right recognised both domestically and internationally. The Constitution of Kenya provides for this right under article 33 and it is subject to limitations also prescribed within the provision.<sup>85</sup> Internationally, the Universal Declaration of Human Rights reads that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.<sup>86</sup> Also, the European Convention of Human Rights provides that everyone has a right to freedom of expression including freedom to hold and receive opinion, however, it also recognises that the right is not absolute and provides that it can be limited for a variety of reasons.<sup>87</sup> The law provides that any limitation to a right recognised under the constitution ought to be governed by a guiding principle of either reasonableness or of proportionality. In Kenya, this test is provided for under article 24 that prescribes that a right may be limited only

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<sup>84</sup> Brown T, ‘Freedom of speech: challenges and the role of public, private and civil society sectors in upholding rights’ In Focus,-<[Freedom of speech: challenges and the role of public, private and civil society sectors in upholding rights - House of Lords Library \(parliament.uk\)](#)>- 2021,2.

<sup>85</sup> Article 33, *Constitution of Kenya* (2010)

<sup>86</sup> Article 19 *Universal Declaration on Human Rights*, 10<sup>th</sup> December 1948.

<sup>87</sup> Article 10, *European Convention of Human Rights*, 1950, ETS No. 005

to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.<sup>88</sup> The application of this is observed in the case of *Robert Alai v The Attorney General and another* where the court held that the defendants failed to show that section 132 of the Penal Code was not a reasonable and justified limitation on free speech rendering it unconstitutional.<sup>89</sup> The second test which is of proportionality, entails that a limitation is to be based on a public reason which the citizens see as valid.<sup>90</sup> A typical proportionality test assesses whether a limitation on a right can be ‘justified by reference to gains on some other interest or value’.<sup>91</sup> The proportionality test was used in the case of *Jacqueline Okuta & another v Attorney General & 2 others* to hold that the section that criminalises defamation violated free speech.<sup>92</sup> These tests express that in the instances where a right is to be limited it can only be done so in a manner that is justified as either reasonable and promotes public’s interest. This discourages legislators from enacting laws that limit rights and also provide grounds to challenge any law that may seek to limit a right. The appellants in the case of *BAKE v The Attorney General and 3 others* sought to challenge section 23 of the Cybercrimes Act on the grounds of lacking reasonableness and justification, however, the court held that the said section passed the test because it limited free speech for the sake of protecting the society against false publications.<sup>93</sup> The stance of the court in this case is that free speech may be limited for the sake of guarding against all false publications but that is a controversial stance to take in light of the complexities and fundamentals associated with false publications. The court in *United States v Alvarez* was of a different opinion on the place of false information in regards to free speech as compared to the court in the BAKE case ; the court herein stated that “The short answer to why lies are constitutionally protected is that, outside of a few narrow and formally recognized categories of unprotected speech, the First Amendment is neutral regarding the content of the speech it defends,” Justice Kennedy also noted that “some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”<sup>94</sup> The difference in understanding of the place of false speech under freedom of expression would be a reason why the court in the case of BAKE fails

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<sup>88</sup> Article 24, *Constitution of Kenya*(2010)

<sup>89</sup> *Robert Alai v The Attorney General and another* (2018) eKLR

<sup>90</sup> Rawls J, ‘*Political Liberalism: Expanded Edition*,’ Columbia University Press, New York, 2005,229.

<sup>91</sup> Urbina F ‘Is it Really That Easy? A Critique of Proportionality and ‘Balancing as Reasoning’ 27(1)*Canadian Journal of Law & Jurisprudence*,2014,173.

<sup>92</sup> *Jacqueline Okuta & another v Attorney General & 2 others*(2017) eKLR

<sup>93</sup> *BAKE v The Attorney General and 3 others* (2019)eKLR ,Para 64

<sup>94</sup> *United States v Alvarez* (2005) Supreme Court of United States.

to see section 23 as a harsh law and why this paper argues that the complexities of false speech is such that some forms of it are protected by free speech and that a broad and general criminalisation of false speech would be dangerous to enforce and would also violate the free speech right. In support of the sentiments expressed in the Alvarez case, it is the argument of this paper that some forms false publications are constitutionally protected as to be reasoned in the following section.

### **3.3 Whether section 23 of the Cybercrimes Act violates freedom of expression by how it criminalises false publications**

The scope of freedom of speech is clear and precise when basically understood to mean that every person has a right to articulate their opinions and ideas.<sup>95</sup> However, it becomes problematic when seen from the perspective of its role in protecting false information. Laws criminalising false publication have been criticized for disregarding free speech but the issue of whether false information is actually protected by this right is a murky topic for most. One of the first comprehensive arguments on the freedom of speech was John Milton's where he argued that freedom of speech should not be used to only allow truth and censor other information but it is necessary to allow the flow of information for individuals to obtain whatever is best for them.<sup>96</sup> Of a similar view, Holmes, views free speech as a "marketplace of ideas", and for this reason false or misleading speech should be allowed to exist unrestrained with other information.<sup>97</sup> The marketplace of ideas argument is perfectly fit to argue for free circulation of information on social media including the dissemination of some forms of false publications that the Cybercrimes Act intends to limit. There are arguments for regulation of every type of false publications such as, the idea that false speech has little to no value to free speech and also the reasoning by those that justify speech on grounds of autonomy often make truth a moral requirement of speech.<sup>98</sup> However, as expressed by Holmes and Milton, free speech is not exclusive to truthful information, in fact, truth is not a pre-condition to free speech and any other interpretation allowing for only truth to be protected by free speech would be erroneous. America's Supreme Court opines that false speech does little to add to the value of

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<sup>95</sup> Amnesty Organization, 'Why is Freedom of Expression Important?' 2020,1.

<sup>96</sup> Milton J, *Areopagitica, a speech of Mr. John Milton for the liberty of unlicenc'd printing, to the Parliament of England*, (Jebb ed.) 1<sup>st</sup> ed, Cambridge University Press, Cambridge, 1644,3.

<sup>97</sup> Tompros W, Crudo R, Pfeiffer A, Boghossian A 'The Constitutionality Of Criminalizing False Speech Made On Social Networking Sites In A Post Alvarez, Social Media-Obsessed World' 31(1) *Harvard Journal of Law & Technology*, 2017,87.

<sup>98</sup> Kaul V, 'Freedom of speech in liberal and non-liberal traditions',48(4) *Philosophy and Social Criticism*,2022,460.

the marketplace of ideas but there is still a concern that prohibiting false speech would also be detrimental to valuable speech since it will cause people to be cautious with the circulation of information out of fear of violating the law.<sup>99</sup> It is noted that a minimal principle of this right is that the government should not interfere with speech that does not have any threat of harm.<sup>100</sup> As outlined in the previous chapter, there are many forms of false publication some of which pose no threat to the public, therefore such publications are constitutionally protected by freedom of speech and should not be subject to intervention for the sake of protecting and promoting this right. Also, in matters of policy, the Constitution sets out the requirements of free speech that the legislature and executive ought to follow in creating and implementing the policy.<sup>101</sup> This is reflected under article 33 of the constitution that outlines the provisions of free speech and its limitations and article 24 that prescribes that a limitation to any right in this case being the freedom of expression should be reasonable and justifiable. It would be difficult or somehow impossible to prove that criminalising some forms of false publications is a constitutionally permissible limitation to free speech. The common understanding as expressed in *Police Department of Chicago v Mosley* is that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.<sup>102</sup> It has been observed that various laws on limitations of rights seemingly have a silent agreement that does not allow for the limitation of free speech based on content unless it is already provided for within the constitution because it would be easy to suppress disfavoured ideas or opinions by the lawmakers.<sup>103</sup> The Kenyan law has already been clear in establishing the types of content outside the protection of freedom of speech through the limitations provided for under article 33 as well as other laws prohibiting defamation, slander and libel. Outside the aforementioned categories, any law that seeks to target an expression based on its content would be subject to a strict scrutiny analysis to show that the regulation is the least restrictive means to target the speech.<sup>104</sup> This ensures that any content-based regulation is the most necessary and most efficient way to ensure a just and reasonable outcome. Allowing the government to prohibit the

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<sup>99</sup> Brannon V, 'False Speech and the First Amendment: Constitutional Limits on Regulating Misinformation' Congressional Research Service, -<https://crsreports.congress.gov/product/pdf/IF/IF12180>- on 1<sup>st</sup> August 2022, 1

<sup>100</sup> Greenawalt K, 'Free Speech Justifications' 89(1) *Columbia Law Review*, 1989,120.

<sup>101</sup> Kenyon A, 'A Positive Freedom of Public Speech? Australian Media Law Reform and Freedom of Political Communication' in Levy R, O'Brien M, Rice S, Ridge P And Thornton M, *New Directions for Law in Australia*, Australian National University Press, Australia,2017,436.

<sup>102</sup> *Police Department of Chicago v Mosley* (1972) Supreme Court of United States

<sup>103</sup> Eduardo A, 'Why (most) lies are protected speech, and why they should stay that way' The Fire Organisation,-<https://www.thefire.org/news/why-most-lies-are-protected-speech-and-why-they-should-stay-way>- on 29 June 2023,1.

<sup>104</sup> Brannon V, 'False Speech and the First Amendment: Constitutional Limits on Regulating Misinformation' 2.

circulation of other forms of false information would be begging for its abuse of power. Strikingly, it has been observed that the courts are inconsistent in determining whether free speech protects false speech or not since the answer depends on the circumstance; in some cases, it will depend on the contextual analysis while at other times it will depend on balancing interests.<sup>105</sup> This difference can also be observed domestically by the difference in the Robert Alai case and the BAKE case. The main argument in this chapter and as properly phrased by Barendt, is that citizens should not be subjected to any limitation that interfere with the enjoyment of that right illegally.<sup>106</sup> If such a limitation exists beyond the constitutionally allowed scope under article 24 and 33 and it restricts speech based on its content, then it would amount to censorship which is in violation of free speech. The constitution, under article 33, outrightly provides the limitations of free speech, any further limitations to the right ought to be in line with the test provided under article 24, therefore, any law that fails to meet the standard set out in the aforementioned sections while still providing restrictions on content is illegitimate. As explained in the previous chapter, false speech entails a wide typology of content and criminalising every form of false speech as intended by section 23 of the Cybercrimes Act would surely be violating free speech. It is noted that just like every other political and civil right, the free speech is based on the idea that freedoms can be achieved by limiting interference by public actors.<sup>107</sup> Therefore, it would be awry for the government to legislate laws criminalising false publication on the belief that false speech is subject to limitations of freedom of expression.

### 3.4 Conclusion

This chapter answers the second research question which is whether freedom of expression extends to protect false publications. It does so by relying on various cases, laws and theories to bring out its argument. It argues that some forms of false speech are protected by false speech and that information circulating in the media should not be regulated without any legitimate foundation. The right to free speech seeks to facilitate circulation of information but it is also subject to certain limitations. Laws seeking to limit this right ought to meet certain tests discussed within the chapter lest they are infringing on the right. The position of this paper is that section 23 of the Cybercrimes Act violates free speech because as it is drafted, it extends

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<sup>105</sup> Chemerinsky E, 'False Speech and the First Amendment' 71(1) *Oklahoma Law Review*, 2018,6.

<sup>106</sup> Barendt E, *Freedom of Speech*, 2<sup>nd</sup> ed., Oxford, Oxford University Press, 2005,30.

<sup>107</sup> Gregorio G, *Digital Constitutionalism and Freedom of Expression* in Gregorio G (ed) *Digital Constitutionalism in Europe*, 1<sup>st</sup> ed, Cambridge University Press, Cambridge, 2022, 4.

to limit some forms of false publications such as error, satire or parody which amounts to a violation of the constitution.



## **CHAPTER 4 : WHETHER SECTION 23 OF THE CYBERCRIMES ACT CAN BE AMENDED TO REGULATE FALSE PUBLICATIONS WHILE PROTECTING FREEDOM OF EXPRESSION**

### **4.1 Introduction**

This section intends to answer the third research question that is ,whether section 23 of the Cybercrimes Act can be amended to regulate false publications while protecting freedom of expression in light of the discussions and arguments raised in the previous chapters. It intends to do so by relying on primary such as cases and laws as well as secondary sources of information. There will also be a comparative analysis of the laws regulating false publications in Kenya and Singapore to show how the law can properly regulate false publications. It will go to show why the Cybercrimes Act as it is, is not the proper solution to the problem that is false news and how Kenya can emulate and adopt from Singapore’s false reporting statute to amend section 23 of the Cybercrimes Act.

### **4.2 False reporting statutes**

False news is increasingly becoming one of the main social issues brought about by technology. It is observed that the trend threatens democracy because in a pool of information that are all seemingly accurate, it is difficult for citizens to distinguish what is true or false.<sup>108</sup> Wardle writes that despite the ease to ignore the trend of false news due to its popularity and history, there needs to be attempts to regulate the polluted streams of information that is in the modern technological world.<sup>109</sup> Amnesty international, in its latest report emphasised the relationship between free speech and false news ; within this report, it documented various repressions with criminal sanctions imposed by governments around the world against journalists and social media users.<sup>110</sup> These statutes — often referred to as “false reporting statutes” — proscribe the circulation of false reports. <sup>111</sup>Many states have false reporting statutes that impose criminal liability on those that circulate false publications. Responses to the problem of false publication are growing in magnitude and causing identifiable harm to the public as observed from the

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<sup>108</sup> The Information Society Project and The Floyd Abrams Institute for Freedom of Expression, Yale Law School, Fighting fake news: Workshop report, March 2017, 3.

<sup>109</sup> Wardle C, Information Disorder: Toward an interdisciplinary framework for research and policy making, (ed.)1<sup>st</sup> ed., Council of Europe, Strasbourg Cedex,2017, 10.

<sup>110</sup> Amnesty International, ‘The State of The World’s Human Rights’, 2021.

<sup>111</sup> Tompros W, Crudo R, Pfeiffer A, Boghossian A ‘The Constitutionality Of Criminalizing False Speech Made On Social Networking Sites In A Post Alvarez, Social Media-Obsessed World’ 31(1) *Harvard Journal of Law & Technology*, 2017,82

various false reporting statutes established in Kenya, most of which have been declared unconstitutional due to their detrimental effect on freedom of expression; These statutes include the impugned section 66 of the *Penal Code* and section 29 of *Kenya Information and Communications Act*.<sup>112</sup> Also, there is section 23 of the Cybercrimes Act that has been criticized all through this paper and causing somewhat of a debacle. Other countries outside Kenya are seen to establish false reporting statutes. In Malaysia, there was the Anti Fake News Act which attached criminal liability to persons who knowingly disseminate fake news.<sup>113</sup> However, this Act was repealed by the Anti- Fake News Repeal Bill of 2020 in a bid by the government to abolish harsh laws and protect a free media.<sup>114</sup> Latin America has also had laws criminalizing false publications that forced platforms to remove false content without judicial orders but this was found to be incompatible with article 13 of the American Convention on Human Rights on free speech.<sup>115</sup> Notably, most of these laws have been either repealed or declared in violation of free speech leading to a debate on whether criminalization of false publications is truly the best means of regulating free speech. Freiwald regards the problem of the prevalence of false publications as a serious online issue that threatens social welfare therefore requiring legal redress.<sup>116</sup> Despite this dire requirement, the means of regulations raises question, especially the improper criminalisation of false news. Due to the speed and wide reach of information circulated online , as well as the ambiguity and subjectivity of what exactly constitutes false news, using statutes to regulate false news online has proven to be challenging.<sup>117</sup> Criminalising false publications within the constitutional limits requires a vast knowledge on the typology of false news as well as the fundamentals of freedom of expression which has been exacting for legislators drafting false reporting statutes thus far. Calls for state intervention in matters of online false publications are very problematic as most laws and policies are drafted in a manner that not only ignore to redress the problem but also creates a situation where rights are infringed upon. However, imposition of criminal liability for circulation of false publications and its detrimental effect to free speech is not to mean that the government should be excluded from its regulation but instead it is a matter of the scope of

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<sup>112</sup> Section 29, *Kenya Information and Communications Act* (Act no.2 of 1998)

<sup>113</sup> Short title, *Malaysia Anti- Fake News Act* (Act No.803 of 2018)

<sup>114</sup> Anti- Fake News Repeal Act of Malaysia (Act no.825 of 2020)

<sup>115</sup> Palais Des Nations, 'Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur for freedom of expression of the Inter-American Commission on Human Rights' 2020,2.

<sup>116</sup> Freiwald S, 'Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation', 14(2) *Harvard Journal of Law and Technology*, 2001, 588.

<sup>117</sup> Zeng J, Chan C, Fu K and Sutcliffe D, 'Censorship or rumour management? How Weibo constructs "truth" around crisis events' 9(3) *The Policy and Internet blog; The Platform Society*, 2017, 230.

their involvement.<sup>118</sup> The Media Defence observes that while countries are quick to establish laws and policies that criminalise false information online and in print, many of these countries have failed to strike a balance between regulating false speech and upholding the freedom of expression.<sup>119</sup> It is also argued that there is little basis for arguing that non-commercial false statements that are governed through government restrictions are constitutionally permissible.<sup>120</sup> The continuous scepticism and adamant rejection of vague and broad false reporting statutes that seek to criminalise false news goes to show that perhaps it is not the proper solution to the problem. The government needs to go a step further to ensure that false reporting statutes established in their countries correctly redress the issue of disinformation without violating free speech. The argument emphasized all through this paper, more so this chapter, is that the regulation of false publications requires more certainty and special attention to the specificities of the problem that is false publications so as to be effective. The following section of this chapter will intend to show how Kenya could legitimately regulate false publications.

### **4.3 How a more precise law is required to legitimately regulate false publications under the Cybercrimes Act**

In this section, I will proceed to demonstrate the resolution to a legitimate and effective false reporting statute by comparing how false publication is regulated in Kenya and Singapore. Singapore is a city-state located in Asia with a population of 5.5 million with various ethnic diversity, it is a republic with a unitary parliamentary system based on the Westminster Democracy with a president as the head of state.<sup>121</sup> Its legal system can be traced back to the English Legal System and it has evolved over the years.<sup>122</sup>

#### **4.3.1 Why Singapore is a proper comparator to Kenya**

Despite the slight political and legal difference between Singapore and Kenya, it is both affected by the global issue of false publications. The circulation of false news has been characterised as a social problem with negative externalities that threaten people's trust in the

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<sup>118</sup> Pickard V, 'Toward a People's Internet: The Fight for Positive Freedoms in an Age of Corporate Libertarianism' in Edström M, Kenyon A and Svensson E (eds), *Blurring the Lines: Market-driven and Democracy-driven Freedom of Expression*, Nordicom, Gothenburg, 2016, 61.

<sup>119</sup> Media Defense, 'Criminalization of Online Speech' 2019,20

<sup>120</sup> Schauer F, 'Facts and the First Amendment', 57(4) *University of California, Los Angeles Law Review*, 2010,897

<sup>121</sup> Leinbach T, Kennard A, Winstedt R, 'Singapore' Britannica-<https://www.britannica.com/place/Singapore> - on 30<sup>th</sup> December 2023

<sup>122</sup> Ministry of Law Singapore, *Our Legal System*, 2018,1.

news and the media's crucial role in a democratic state therefore necessitating a legal solution to the problem.<sup>123</sup> Therefore, the issue of online falsehoods is one that necessitated reactions from both Kenya and Singapore besides their legal and political differences. Singapore enjoys a significant level of public trust in both the government and mainstream media. Nevertheless, this trust exists within a media environment that is relatively regulated especially with the proliferation of false publications online that is comparable to Kenya's.

#### 4.3.1.1 The problem of false information as faced by both Kenya and Singapore

As of recently, research shows that a third of Kenyans on social media are unable to access accurate information evidencing the pervasive and alarming issue in Kenya's media.<sup>124</sup> This issue became greatly prevalent during the 2017 election that was characterised by digital false publications that occurred on a wide scale.<sup>125</sup> During this period, the then Cabinet Secretary for Information, Communication and Technology, Joe Mucheru, remarked that there were 70 cases of inaccurate, misleading or sensational news reported to the Media Council of Kenya.<sup>126</sup> Following that election period, Kenya passed the Cybercrimes Act with section 23 of the Act specifically set out to combat the issue of online falsehoods.

Also, moved by the global concerns around false publications, Singapore joined in the list of governments that have prompted a legislative answer to the problem having highlighted a number of cases on dissemination of false information.<sup>127</sup> The Report of the Select Committee on Deliberate Online Falsehoods noted that it was appointed to examine and report on the serious challenge that is false publications faced by many countries, including Singapore.<sup>128</sup> The Committee determined that the presence of intentional online falsehoods constitutes a real and serious challenge for Singapore with the advent of the internet, making it more difficult to counteract these falsehoods compared to the past. A study conducted during the COVID-19 Pandemic in Singapore showed that 6 in 10 people had received fake news on social media;

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<sup>123</sup> Butler A, 'Protecting the Democratic Role of the Press: A Legal Solution to Fake News' 96(2) *Washington University Law Review*, 2018, 419.

<sup>124</sup> Portland Communications, *The reality of fake news in Kenya*, 2017, 6

<sup>125</sup> Mutisya M, 'Influence of Disinformation on the Kenya Electoral Process', *Election Observation Group* -< <https://elog.or.ke/wp-content/uploads/2022/05/Policy-Brief-Influence-of-disinformation-on-the-Kenya-Electoral-process-1.pdf> >- on May 2022.

<sup>126</sup> Chepkwony M, 'Tackle fake news to win back trust, media challenged' Standard Digital -< <https://www.standardmedia.co.ke/article/2001305578/tackle-fake-news-to-win-back-trust-media-challenged> >- on 8 December 2018

<sup>127</sup> Hew J, "'POFMA,' Politics, And the Press in Singapore' Centre for International Media Assistance, 2019, 1 -< <https://www.cima.ned.org/blog/pofma-politics-and-the-press-in-singapore/> >- on 17 December 2019

<sup>128</sup> The Report of the Select Committee on Deliberate Online Falsehoods, *Executive Summary*, 19<sup>th</sup> September 2018,1.

this is just one example of the problem that is false publications and how it has affected Singapore.<sup>129</sup>

#### 4.3.1.2 The false reporting statutes in Kenya and Singapore

Kenya's reaction to the growth of false publications on social media was section 23 of the Cybercrimes Act. This section seeks to curtail false publications by criminalizing it.<sup>130</sup> It imposes the possibility of criminalization of up to ten years or a fine of no more than five million Kenyan shillings or both. In support of this section, the Majority Leader of the National Assembly intimated the need for regulation of false news.<sup>131</sup> However, this law has been criticized widely for being too harsh due to its broad and vague nature as it was outlined in the *BAKE* case.<sup>132</sup>

In Singapore with the rise of social media and the proliferation of false news, a legislation was introduced to combat online falsehoods and misinformation, the Online News Licensing Scheme (ONLS), that required news sites to remove prohibited content which included material objectionable on grounds such as public interest, morality, order, security, national harmony, or violations of applicable Singapore laws, within 24 hours upon receiving a takedown notice from authorities.<sup>133</sup> The Minister for Communications and Information stated that the aim for this law was to ensure Singaporeans access accurate information.<sup>134</sup> Subsequently, the 2019 Protection from Online Falsehoods and Manipulation Act (POFMA) was enacted, granting substantial authority to the government and ministers to combat the problem of online falsehoods.<sup>135</sup>

#### 4.3.1.3 The impact of the false reporting statutes in Kenya and Singapore

Since March 2020, when COVID-19 first appeared, Article 19 documented no less than 10 cases involving the arrest or threat of prosecution of journalists, online communicators, and

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<sup>129</sup> Hui Min C, '6 in 10 people in Singapore have received fake COVID-19 news likely on social media survey' Channel News Asia, 21<sup>st</sup> May 2020, -< [https://www.ntu.edu.sg/docs/default-source/corporate-ntu/hub-news/6-in-10-people-in-singapore-have-received-fake-covid-19-news-likely-on-social-media4401d3c6-e6a5-483b-a049-30f548c57478.pdf?sfvrsn=4a0fbd8b\\_3](https://www.ntu.edu.sg/docs/default-source/corporate-ntu/hub-news/6-in-10-people-in-singapore-have-received-fake-covid-19-news-likely-on-social-media4401d3c6-e6a5-483b-a049-30f548c57478.pdf?sfvrsn=4a0fbd8b_3)>- accessed on 20<sup>th</sup> December 2023.

<sup>130</sup> Section 23, *Computer Misuses and Cybercrimes Act* (Act no 5 of 2020)

<sup>131</sup> National Assembly Hansard Report, 21 March 2018, 9.

<sup>132</sup> *Bloggers Association of Kenya v Attorney General & 3 others* (2019) eKLR

<sup>133</sup> Lovells H, 'Singapore announces new licence for online news sites', *Lexology*, 2013, 1, -< <https://www.lexology.com/library/detail.aspx?g=fe899a95-13db-4fd2-af8b-1c45b84e2524> >- on 25 June 2013.

<sup>134</sup> Carson A, Fallon L, 'Singapore's approach to online misinformation' in Carson A and Fallon L (eds) *Fighting Fake News: A Study of Online Misinformation Regulation in the Asia Pacific*, 1<sup>st</sup> ed, La Trobe University, Melbourne, 2021, 16.

<sup>135</sup> The Report of the Select Committee on Deliberate Online Falsehoods, *Executive Summary*, 19<sup>th</sup> September 2018, 1.

human rights defenders, whom are all accused under Section 23 of the Act for allegedly spreading 'false and alarming information' on social media.<sup>136</sup> This provision that is the basis of the charges are challenged for significantly limiting the rights to freedom of expression. The Law Society of Kenya (LSK), along with other organizations such as BAKE, contested the constitutionality of this provision on grounds that it encroaches upon freedom of expression but without success.<sup>137</sup>

On the other hand, from the implementation of POFMA, the POFMA Office has issued a total of 51 correction directions, including 11 targeted correction directions, four declarations of online locations, three disabling orders, one general correction direction, and one access blocking order; according to the minister of law Singapore, these directives, do not necessitate the removal of false information, aiming to promote informed and responsible discussions without impinging on free speech.<sup>138</sup> The difference between the two systems show the juxtaposition of the impact that false reporting statutes have had on each of these individual countries and how Kenya is lacking in the same.

#### 4.3.2 Salient proposals from POFMA that can be adopt to an amendment of the Cybercrimes Act

Unlike Kenya, the false reporting statute in Singapore is a more detailed tool for regulation of false publications. Also dissimilar to Kenya that attempts to deal with the complexities of false publications through one section of the law, Singapore dedicates an entire act to the same which is keener to ensure on clarity of the law.

- i. A statute specifically for online falsehood

The first suggestion put forth is for a comprehensive law addressing disinformation, inspired by Singapore's Protection from Online Falsehoods and Manipulation Act (POFMA). An overview of the Act shows that it aims to protect public interest, applies to specific false publications which is false statements of facts as opposed to opinions, intends to use other tools of regulation outside of criminalization such as correction notices and protection from criminal liability for those who engage in false publications in good faith.<sup>139</sup> Just an amendment of the

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<sup>136</sup> Article 19 East Africa, 'Kenya; Briefing on Attacks Against Journalists' 2021, 4.

<sup>137</sup> *Bloggers Association of Kenya v Attorney General & 3 others* (2019) eKLR

<sup>138</sup> Mahmud H, 'IN FOCUS: Has POFMA been effective? A look at the fake news law, 1 year since it kicked in' Channel News Asia, 3<sup>rd</sup> October 2020,-< [IN FOCUS: Has POFMA been effective? A look at the fake news law, 1 year since it kicked in - CNA \(channelnewsasia.com\)](#)>- accessed on 20<sup>th</sup> December 2023

<sup>139</sup> Ministry of Law Singapore, *Protection from Online Falsehood and Manipulation Act Brochure*,2019, Snapshot,1.

law will be an underservice to the regulation of false publications in Kenya. For Kenya, this proposed law aims to address the intricate aspects of false news and provide regulation mechanisms. Therefore, it would be essential to repeal section 23 of the Cybercrimes Act and subsequently draft a proper false reporting statute that could borrow substantially from POFMA.

ii. A precise definition of the subject matter of regulation

One substantial distinction of POFMA that is dissimilar to Kenya is on the clarity of the subject matter of regulation ; the act applies to false statements of facts communicated in Singapore and a direction can only be given on the same if it is in the public interest to do so.<sup>140</sup> The Act goes on to describe what a statement of fact is and what a false statement of fact entails.<sup>141</sup> This a step further than what is provided for in the Cybercrimes Act that simply calls for the criminalization of false publications without providing for definitions.<sup>142</sup> As submitted in the afore chapters of this paper, the government should not seek to regulate all forms of false publications especially those without sinister or manipulative motives since it would amount to censorship which is in violation of free speech.<sup>143</sup> Also, the second and third chapters in this paper concludes that some forms of false publications ought to be protected by free speech and the government of Singapore is keen to appreciate this as indicated by a clarity of definitions within POFMA. Kenya should draft a false reporting statute with a provision for the definition of the subject matter that is relevant to the statute while targeting misinformation and harmful forms of false publications rather than the use of the blanket term “false publications.”

iii. Alternative means of regulating false publications

Another important distinction between POFMA and Cybercrimes Act that Kenya could emulate is the means of regulating false publications. Section 23 of the Cybercrimes Act intends to do so by criminalizing false publications, however, POFMA goes beyond this to introduce other means of regulation. Aside from criminalization, POFMA establishes other means of regulation such as correction orders in the form of targeted correction orders, declared online locations, disabling orders, general correction direction and an access blocking order.<sup>144</sup> This move is preferred to the criminalization of all forms of false publication as the only means of

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<sup>140</sup> Ministry of Law Singapore, *Protection from Online Falsehood and Manipulation Act Brochure*, 2019, 1.

<sup>141</sup> Section 2(2), *Protection from Online Falsehood and Manipulation Act*, (Act no 26 of 2019)

<sup>142</sup> Section 23 , *Computer Misuses and Cybercrimes Act* (Act no 5 of 2020)

<sup>143</sup> *Hustler Magazine, Inc. v. Falwell* (1988) The Supreme Court of United States

<sup>144</sup> Part 3, *Protection from Online Falsehood and Manipulation Act* (Act no 26 of 2019)

regulation, as it is less stringent and harsh and would help the population to access true information. These means have been vital to controlling and ordering false publication in Singapore. Correction directions mandate the posting of a correction notice and factual link alongside the false information. Targeted correction directions involve Internet intermediaries in notifying Singapore users who accessed false information. General correction directions extend the correction notice to all of an intermediary's Singapore users. Declared online locations must display a notice about their history of spreading falsehoods. Disabling orders and access blocking orders compel recipients to restrict Singapore users' access to online locations containing false statements. The criminalization of false publications has been criticized for being too harsh and severe, on that account, alternative means of regulation is recommended for Kenya to encourage free speech while combating the infodemic characterized by misleading publications.

#### iv. Collaboration with Intermediaries

Under section 23 of the Cybercrimes Act, a person found to circulate false publications that meet the requirements of the section, would be criminally liable under the Act. On the other hand, POFMA provides for the regulation of internet intermediaries to prevent the risk of abuse of online falsehoods.<sup>145</sup> With this tool, an internet intermediary such as social media site or a website may be issued with a direction prescribed by part 4 of the Act to regulate false publications.<sup>146</sup> This way, instead of imposing criminal liability to perpetrators of false publications, the government through the Act can work in collaboration with internet sites to regulate and correct false publications online.

#### v. Codes of Practice

Also, an important feature to be borrowed from POFMA is subsidiary legislation targeted towards collaboration with various intermediaries. Section 48 of POFMA provides for a requirement for Codes of Practice that are to be issued to intermediaries such as internet, digital or advertising intermediaries.<sup>147</sup> The purpose of this Code of Practice is to establish guidelines specific types of intermediaries to fulfill certain objectives such as detecting, controlling, and safeguarding against mischievous behavior and other forms of misuse of online accounts while prioritizing credible sources of information.<sup>148</sup> Section 23 of the Cybercrimes

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<sup>145</sup> Part 4, *Protection from Online Falsehood and Manipulation Act* (Act no 26 of 2019)

<sup>146</sup> Section 20, *Protection from Online Falsehood and Manipulation Act* (Act no 26 of 2019)

<sup>147</sup> Section 48, *Protection from Online Falsehood and Manipulation Act* (Act no 26 of 2019)

<sup>148</sup> Section 48(1), *Protection from Online Falsehood and Manipulation Act* (Act no 26 of 2019)

Act missed this completely as it fails to appreciate the possible success of working in conjunction with internet intermediaries to curb disinformation.

vi. Administrative Institutions

Under the Cybercrimes Act, the Cybercrimes Coordination Committee is the body responsible for the enforcement of the Act.<sup>149</sup> This committee deals with any claims under issue under this Act which includes a lot more than just false publications. Under POFMA, this is mandated to the POFMA Office which is tasked with its administration.<sup>150</sup> This sixth proposal is the requirement of an administrative body under the proposed statute that deals with issues of online falsehoods. Within this body, there ought to be a tribunal to address such claims that may need litigious attention; this would help prevent an overload on the court system with new claims and ensure that adjudicators possess sufficient expertise in handling disinformation cases.<sup>151</sup>

#### 4.4 Conclusion

This chapter sought to answer the third research question on whether section 23 of the Cybercrimes act could be amended to regulate free speech legitimately and properly. It raises the argument that false reporting statutes are demanded to be more precise and clearer so as to legitimately regulate misinformation. A comparative analysis between the false reporting statute in Kenya and Singapore is also done to propose the striking down of section 23 and subsequently, drafting of a proper false reporting statute in Kenya that employs improvements inspired by POFMA. Like POFMA, a Kenyan false reporting statute should aim to prevent the spread of false information, counteract its effects, and empower measures to identify and prevent deceptive information online.

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<sup>149</sup> Part II, *Computer Misuse and Cybercrimes Act* (Act No.5 of 2018)

<sup>150</sup> POFMA Office, About POFMA Office, -< <https://www.pofmaoffice.gov.sg/about-us/> >- accessed on 30<sup>th</sup> December 2023

<sup>151</sup> International Centre for Non-Profit Law, *Disinformation and Freedom of Opinion and Expression*, 2021

## **CHAPTER FIVE: CONCLUSION**

### **5.1 Introduction**

This chapter intends to provide a conclusion to the paper by summarizing the findings cumulatively and proposing recommendations. It aims to reflect on the various arguments presented in the paper in chapters two and three and advance possible suggestions to deal with the issues as brought forth under chapter four. The recommendations suggested within the former chapter and reiterated within this chapter will aim at developing better legislation to regulate false information that has escalated within the social media era. The paper conclusively aims to provide guidance on how to improve Section 23 of the Cybercrimes Act in a manner that does not infringe on freedom of expression.

### **5.2 Summary of Findings**

This paper examined the constitutionality of section 23 of the Cybercrimes Act in view of the freedom of expression. This section summarily highlights the findings of the various chapters.

#### **5.2.1 Chapter one**

The first chapter highlighted that although social media is essential in a democratic country to promote free speech and a free media, it has been threatened by the crackdown on false publications. Kenya's attempt to criminalize false publications has been observed as a tool used by the government to suppress journalists and bloggers. Various laws established in Kenya aiming to regulate false publications all raise concerns about their effects on free speech. Freedom of the media is inherently linked to freedom of expression, and concerns over any law illegitimately impeding freedom of expression are vital. Section 23 of the Cybercrimes Act has been observed as a worrisome law. It has been characterized as vague and broad, thereby creating a harsh and stringent law in the social media era.

#### **5.2.2 Chapter two**

Chapter two of this paper addressed why Section 23 of the Cybercrimes Act is considered vague and broad. It discusses the typology of false information by providing the current varying classifications recognized by scholars. It also highlights that there is no agreed definition of false information, especially from a legal perspective. It discusses the issues associated with a vague definition and the lack thereof in the case of section 23, as it creates a scenario where even harmless false information or false information shared in good faith, such as errors, satire,

and parody, are vulnerable to liability associated with criminalizing false publications. It therefore argues that there is an urgent need for precision in terms and definition in so far as false publications are concerned so as to protect free speech and free media and that the lawmakers needs to appreciate the concept of legal certainty in this regard.

### 5.2.3 Chapter three

Chapter three discussed the relationship between free speech and false publications by addressing whether free speech ought to extend to false publications. It analyzes how some types of false publications are protected by free speech to allow the circulation of ideas and information. The chapter outlines that false information, in itself, is not provided as a limitation of freedom of expression in the constitution. It argues that false information, if not misleading or harmful, is protected by freedom of expression and a distinction ought to be made by legislators to target the regulation of disinformation so as to avoid an infringement of the right.

### 5.2.4 Chapter four

The fourth chapter delved into the criminalization of false publications and dealt with whether Section 23 of the Cybercrimes Act can be amended to regulate false publications while protecting freedom of expression. It shows how a false reporting statute in Kenya can be improved by comparing it to Singapore's 'Protection from Online Manipulation Act.' The section highlights areas captured within POFMA that are ignored within the Cybercrimes Act, which, if implemented, would make it more detailed and precise to allow for enjoyment of free speech while still regulating false publications

### 5.2.5 Chapter five

This current chapter aims at providing a summary of all the chapters within this paper and providing an overview of the findings of conclusions for the betterment of regulating false publications in Kenya

## 5.3 Recommendations

The paper proposes six recommendations aimed towards the improvement of regulation of false publication within the realm of free speech.

### 5.3.1 A comprehensive false reporting statute

The first recommendation proposed is the enactment of a comprehensive law to address online falsehood. This paper has revealed a number of issues associated with section 23 of the

Cybercrimes Act that are associated with the lack of attention to the whole aspect of false publication and what it legally entails. . A false reporting statute has to be exhaustive so as to dispel concerns over possibly infringing on free speech. False reporting statutes must intricately balance the protection of free speech with the necessity to curb the dissemination of deliberately false information. Simply amending the existing law would not adequately address the complexities of dissemination of false publication in Kenya. A comprehensive approach considers the nuances of false reporting, distinguishing between innocuous errors and intentional falsehoods that pose tangible harm. Therefore, the proposed law aims to tackle the nuanced aspects of false information and establish effective regulation mechanisms. Consequently, it is imperative to repeal section 23 of the Cybercrimes Act and subsequently draft a robust false reporting statute that draws substantially from the provisions of POFMA.

#### 5.3.2 A precise definition of the subject matter of regulation

Secondly, there ought to be a detailed definition of false information and what it entails, so as to identify what exactly is to be regulated under Section 23 of the Cybercrimes Act. By incorporating clear and precise language, Section 23 of the Cybercrime Act can effectively target harmful disinformation while safeguarding the fundamental right to engage in open discourse. From the discussion on the typology of false information, it is clear that under Section 23 of the Cybercrimes Act, no distinction as to the type is made. Detailed statutes ensure clarity by defining the boundaries within which speech may be regulated, thereby avoiding ambiguity that could lead to arbitrary or overreaching restrictions. The lack of definition in the Cybercrimes Act has created a scenario where the law has been challenged for being too broad and vague. A distinction ought to be made on which false publication is being targeted so as not to infringe on freedom of expression. It's crucial for these laws to outline specific criteria or standards for determining falsity, considering context and intent while preserving the core principles of free expression. Maintaining a balance between upholding the freedom of expression and restraining the circulation of deceitful content that could potentially cause tangible harm or violate the rights of individuals remains important. This proposed definition aims to safeguard the authenticity of information while concurrently upholding the fundamental liberty to articulate information and participate in transparent conversations. It underscores the necessity to navigate the fine line between defending the unrestricted flow of ideas and addressing the dissemination of misleading or intentionally false information that might lead to detrimental consequences.

### 5.3.3 Alternative means of regulating false publications

Thirdly, based on the comparison between POFMA and the Cybercrimes Act, it is recommended that Kenya adopts a regulatory approach similar to POFMA's. Unlike the Cybercrimes Act, which primarily relies on criminalizing false publications, POFMA introduces a variety of regulatory measures beyond criminalization. While criminalizing false publications can serve as a deterrent, it's equally crucial to explore alternative regulatory avenues beyond punitive measures, such as those implemented within POFMA. Emphasizing these alternative approaches complements the criminalization of false publications by addressing the source and enhancing resilience against misinformation in a more multifaceted manner. These measures include correction orders, declared online locations, disabling orders, general correction directions, and access blocking orders. This multifaceted approach is preferable to sole reliance on criminalization, as it offers a less punitive and restrictive means of regulation, thereby facilitating access to accurate information for the population. These regulatory measures, as demonstrated in Singapore, have proven effective in controlling and organizing false publications. Given the criticism levelled against the harshness of criminalizing false publications, adopting alternative regulatory measures would strike a balance between promoting free speech and combating the dissemination of misleading information, especially amid the infodemic prevalent in society.

### 5.3.4 Collaboration with intermediaries

Fourth, as opposed to solely relying on imposing criminal liability for circulating false publications, Kenya could explore leveraging the regulation of internet intermediaries to address the dissemination of false information online. This approach empowers the government to collaborate with internet intermediaries, such as social media platforms or websites, to regulate and correct false publications through prescribed directions outlined in the Act. By utilizing this tool, Kenya can effectively mitigate the risks associated with the spread of online falsehoods without resorting solely to criminal prosecution. This collaborative approach not only enables swift action against false publications but also promotes cooperation between the government and internet intermediaries to safeguard the integrity of online information dissemination.

### 5.3.5 Establishment of codes of practice

Another proposal is to introduce subsidiary legislation modelled after POFMA's approach. Specifically, Kenya could consider implementing a provision similar to Section 48 of POFMA,

which mandates the issuance of Codes of Practice targeted at collaborating with various intermediaries. These intermediaries may include internet, digital, or advertising intermediaries. The purpose of these Codes of Practice would be to establish specific guidelines for intermediaries to fulfill certain objectives, such as detecting, controlling, and safeguarding against mischievous behaviour and other forms of misuse of online accounts, while prioritizing credible sources of information. Section 23 of the Cybercrimes Act lacks such provisions, thereby missing the opportunity to leverage collaboration with internet intermediaries to combat disinformation effectively. By incorporating this feature into the legal framework, Kenya can enhance its capacity to address the challenges posed by false information dissemination in the digital realm.

#### 5.3.6 Administrative institutions

The sixth proposal advocates for the creation of an administrative body under the proposed statute in Kenya. The purpose of this would be to establish a dedicated administrative body tasked with addressing issues related to online falsehoods. Unlike the Cybercrimes Coordination Committee, which manages a broad range of claims under the Cybercrimes Act, this body should include a tribunal dedicated to resolving claims related to online falsehoods. By establishing such a tribunal, the aim is to alleviate potential burdens on the court system arising from an influx of new claims and ensure that adjudicators possess specialized expertise in handling disinformation cases. This approach would enhance the efficiency and effectiveness of addressing online falsehoods while providing a specialized forum for resolving disputes in this aspect.

#### 5.4 Conclusion

This chapter concludes that while the intent of Section 23 within the Cybercrimes Act is to safeguard against the dissemination of false information, its broad scope risks violating the fundamental right to freedom of expression. The law in its current form poses a significant threat to open discourse by subjecting individuals to undue limitations and possible legal repercussions for the expression of opinions or unintentional dissemination of inaccurate information. Striking a balance between regulating disinformation and preserving free speech is imperative. Therefore, amendments or clarifications within Section 23 are necessary to ensure that it targets deliberate and malicious dissemination of false information without stifling the exchange of diverse viewpoints. A more nuanced approach, coupled with alternative

regulatory methods, should be considered to address false information while preserving the fundamental right to engage in open discourse.



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