AN ANALYSIS OF THE LEGAL FRAMEWORK GOVERNING THE REGULATION OF SOCIAL MEDIA AND ITS USE AS EVIDENCE IN KENYAN COURTS

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore University Law School

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DECLARATION

I, **ATTOGOH RANDY OMONDI**, do hereby declare that this dissertation is my original work and that to the best of my knowledge and belief, it has not been previously been submitted to any university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: … Attogoh …

Date: ……15 July 2021…

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

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DR FRANCIS KARIUKI

ABSTRACT

Social media is currently the most used medium for communication, storage and transmission of information. Legal, commercial and also criminal activities are carried out on social media. As a result, there is the need for its regulation. This paper focuses on social media regulation in the criminal justice system and on its treatment as evidence. It is the duty of the state to ensure that regulation of social media upholds the guarantee of freedom of expression, access to information while still upholding the right of an accused to a fair trial and respect for the court process. Legislation is key in ensuring that these objectives are met. A key component of the right to a fair trial is the rules of evidence. Social media evidence is evidence derived from social media platforms and it has become increasingly prevalent. However, there is an inconsistency from the courts who are struggling with the traditional rules of evidence and adapting to newer technologies. To guarantee a fair trial, the rules of evidence must take into account new developments in technology and should not unfairly disadvantage social media evidence.

This study proposes that social media regulation and social media evidence may benefit from legislation. The research will look at the various statutes in Kenya and the interpretations by the courts. It will also move a step further and look at approaches by other jurisdictions. The research methodology used is review of literature. A comparative analysis is also employed. As will be revealed by the study, legislation on social media regulation and social media evidence proves beneficial to ensuring respect of the court proceedings and respect of an accused right to fair trial. The risk of regulation is the limitation of free speech and access to information. This study recommends that this risk can be offset by legislation as well.

LIST OF ABBREVIATIONS

ACHPR	African Convention on Human and People's Rights
CRC	Convention on the rights of the Child.
ECHR	European Convention on Human Rights
ECmHR	European Commission of Human Rights
ECT	Electronic communications and Transactions
NetzDG	Network and Communications
ECtHR	European Court of Human Rights
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Right
UN	United Nations
UNTS	United Nations Treaty Series

LIST OF LEGAL INSTRUMENTS

International treaties

International Covenant on Civil and Political Rights (adopted on 16 December 1966) 999 UNTS 171 (ICCPR)

International Covenant on Economic Social and Cultural Rights (adopted on 16 December 1966) 999 UNTS 171

United Nations General Assembly, *Universal Declaration of Human Rights*

Regional treaties

African Charter on Human and People 's Rights (adopted on 27 June 1981)

European Convention on Human Rights (adopted on 4 November 1950)

Legislation

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

Contempt of Court act (Act no 46 of 2016).

Electronic Communications and Transactions act (act no. 25 of 2002 South Africa).

*Evidence Act Kenya (*Act no. 19 of 2014).

Telemedia Act (Germany).

The Constitution of Kenya (2010)

LIST OF CASES

British Steel Corporation v Granada Television ltd, House of Lords (1981)

Equity Bank v West LnK MboLimited (2013) eKLR

Howard and Decker Witkoppen Agencies and Fourways Estates ltd v De Sousa (1971), Constitutional Court of South Africa.

Idris Abdi Abdullahi v Ahmed Bashane and 2 others (2018) eKLR.

Jacqueline Okuta and another v Attorney General (2017) eKLR.

Kenya Human Rights Commission v Attorney General and another (2018) eKLR

Lawrence v. Texas (2003), The Supreme court of the United States

Mable muruli v Wycliffe Ambetsa Oparanya and 3 others (2013) eKLR

Mavlonov and Sa'di v. Uzbekistan, CCPR Comm. No. 1334/2004, 9 April 2009

Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 Others [2014] eKLR

Ndovlu v Minister of Correctional services and another (2006), Constitutional court of South Africa

R v Sussex exparte McCarthy (1924), United Kingdom House of Lords

R v Trupedo (1920), Appeal Division 58 of South Africa

R v West Australian Newspapers Ltd, exparte Director of Public Prosecutions (1996),16 WAR 518,538.

Republic v Mark Lloyd Stevenson (2016) eKLR

Republic v. Barisa Wayu Mataguda (2011) eKLR.

Robert Alai v Attorney General and others (2017) eKLR.

S v Ndiki (2006), Constitutional Court of South Africa

William Odhiambo Odour v Independent Electoral and Boundaries Commission and 2 others (2013) eKLR

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1. Background of the Study

Social media through the Internet has revolutionized the ability to communicate across geographic, political and religious divides. Today, anyone can reach millions of users at an instant. Although this is useful, it has broadened the harm and infringement of rights that happen online. Enforcement of criminal law online is rare due to investigatory challenges, online anonymity, inadequate policies and the treatment of social media evidence. Moreover, social media companies are reluctant in enforcing their own terms and conditions. There is need for effective regulation of online platforms and services to combat with online harms. This study will focus on the infringement of an accused right to fair trial in Criminal cases resulting from an underregulated social media and the unfavorable legislation that fails to cater for the flexible nature of social media evidence.[1]

From the 1st of October 2018 to the 13th of October 2018, Kenyans on social media swarm around the controversial story of the gruesome murder of Monica Kimani. There was suspicion that a trained assassin had been hired to murder Monica Kimani in her apartment in Kilimani. Rumors of the involvement of illegal currency, a possible connection to a black-market sale of gold and the involvement of a popular media personality, Jacque Maribe circled round social media making the story a trending hot topic. [2]

Social media responded with equal veracity as expected and satisfied the public's demand of acquiring every piece of information on the accused persons. All in a bid to discover details of what truly transpired.[3] In Monica Kimani's murder case, the accused were Joseph Irungu and Jacque Maribe. Their financial status, background information, social media pages, family ties and

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[1] Theil S, 'The Online Harms White paper: Comparing the UK and German approaches to regulation' 11 *Journal of media law* 1, 2019, 2.
[2] Wamugunda D, 'We need to have proper value systems 'Daily Nation, 18 October 2018, 3.
[3] Maritim D, 'How trial by media undermines the right to fair trial' The Standard, 13 October 2018, 4.

even private messages were exposed on social media and widely shared on different online platforms. There was the emergence of publications, blogs and comments online that shared unverified information on the case. Some made predictions as to how the courts should reach its determination in the matter and posted a wide array of evidence. In support of this. The published pieces seemed to suggest that Joseph Irungu, was guilty. This was done through allegedly leaked screenshots of photos and videos from his social media platforms. An example was the photographs of him in combat training abroad suggesting that he had the skill and means to kill Monica Kimani.[4] All this created an entertainment value that made the story thrive on social media.

Deborah Serani, a researcher in psychoanalysis explains the obsession social media has with issues of crime and violence. The phrase used to explain this is *'if it bleeds, it leads'*.[5] Serani explains that fear based information portrayed in media and social media aims at grabbing the viewers' attention through a 'teaser' and then spiking interest in the following reveals. Information on social media is equated to an endless series of teasers hence the unending interest. Serani argues that the effect of this in the long term is that the social media user is dependent and eager for fear-based information which presents unverifiable evidence. As illustrated in the case of Monica Kimani, criminal proceedings attract curiosity and sparks debate on social media especially when it involves prominent persons, sex, murder, and children. The comments, the investigative blogs and reports on social media raise fundamental questions about social media evidence and the need for social media regulation to protect the right to a fair trial.[6]

Article 50 of the constitution of Kenya provides the right to fair hearing as among the fundamental rights and freedoms. It is a fundamental safeguard that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms. This right entails two aspects.

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[4] Maritim D, 'How trial by media undermines the right to fair trial' The Standard, 13 October 2018, 5.

[5] Serani D, 'If it bleeds it leads: the clinical implications of fear based programming in News media' 2008, 243 - www.Researchgate.net/publication/247898920_If_It_Bleeds_It_Leads_The_Clinical_Implications_of_Fear-Based_Programming_in_News_Media> on 21 July 2020.

[6] Naylor B, 'Free trial or free press: legal responses to media reports of criminal trials' 53 (3) *The Cambridge Law Journal*, 1994.
See Also Isaacson R, 'Free trial and free press: An opportunity for coexistence' 29 (3) *Stanford Law Review*, 1977.

Institutional aspect comprising of the assurance of an independent and impartial tribunal and procedural aspect focusing on a public and fair hearing[7]

The right is recognized worldwide through codification in several international Human rights instruments; the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human rights (UDHR) article 10 and the African Charter on Human and People's rights article 7. This right is non-derogable and an absolute right, meaning that it is not subject to any limitation.[8]

On the other hand, The Bill of rights in the constitution guarantees the freedom of expression and right to access information.[9] The listed freedoms are the basis upon which media and social media operate and exists in Kenya. These freedoms are subject to limitations laid out in article 24 of the constitution. Moreover, article 33 (2) as read with article 27(4) of the constitution outlaws certain messages such as ethnic incitements, discrimination based on race, sex, pregnancy moral status health status, color, age, religion, conscience, culture dress and birth.[10]

In majority of democratic countries, Media scrutiny is considered a safeguard of democracy and against miscarriages of justice occasioned by the Government.[11] Therefore, any restriction on freedom to access information and to publish such information prima facie appears unlawful and suspicious.[12] This is because the adversarial judicial system in Kenya and other jurisdictions is based on the principle that 'justice should not only be done but should manifestly and undoubtedly be seen to be done.[13]

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[7] Smith J and Gompers M 'Realizing justice; The development of Fair Trial Rights in China' 2(4) *East Asia Law review*, 2007, 32.
[8] Article 24, Constitution of Kenya (2010)
[9] Franceschi L and Lumumba PLO, *The Constitution of Kenya 2010: A, Introductory Commentary,* Strathmore University Press, Nairobi, 2014, 172.
[10] Franceschi L *et al*, *The Constitution of Kenya 2010: A, Introductory Commentary,* 172.
[11] Resta G, 'Trying cases in the media: A comparative Overview' *Law and Contemporary Problems,* 2008, 39 - https://www.jstor.org/stable/27654683- on 14 May 2020.
[12] Resta G, 'Trying cases in the media: A comparative Overview' 45.
[13] *R v Sussex exparte McCarthy* (1924), United Kingdom House of Lords.

The Contempt of court act Kenya assented to in 2016 lists the instances in which a person can be found guilty of the offence of contempt of court.[14] among the instances is causing an obstruction or disturbance in the course of a judicial proceeding. Social media comments and prejudicial publications do qualify as disturbance. This is because such publications and comments share unverified information and evidence that paint the accused as guilty, an infringement of the duty of the courts.

The *Sub judice* rule also regulates the publication of matters which are under consideration by the courts in Kenya. The *Sub judice* principle is drawn from common law and is latin for 'under judicial consideration'. The sub judice rule restricts public discussions of matters pending or active before the courts.[15] the aim of the rule in criminal proceedings is to protect criminal trials from contamination by inadmissible and irrelevant material about defendant. [16] when applying the sub judice rule, the courts balance between the competing rights; public interest in criminal matter, right to fair trial versus freedom of speech and discussion of matters of public interest.[17]

In English law, sub judice is used to describe material that would pre judice the court proceedings by publication. The Contempt of court act in England explains that social media involvement in a court proceeding should be regulated when the case is active. [18] For criminal proceedings, the case is active from the moment the accused is arrested, summons is issued, or a person has been charged. These proceedings remain active until the accused is either convicted or acquitted. The contempt of court is premised on the possibility that a judge may be influenced by material published about a matter in consideration. [19]

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[14] Section 27, *Contempt of Court Act* (Act no 46 of 2016).
[15] Eady D and Smith A, *Aldridge, Eady and Smith on contempt*, 4th ed, Thomson Reuters, 2011, 96.
[16] Hews R, 'Twitter Trials and Facebook Juries: An analysis of the Australian Sub Judice Rule and the Regulation of Prejudicial publicity on Social media During High profile Criminal trials' conference organized by Queensland University of Technology, Brisbane,2019, 26.
[17] *R v West Australian Newspapers Ltd, exparte Director of Public Prosecutions* (1996)16 WAR 518,538.
[18] Section 2, *Contempt of Court Act of England* (1981).
[19] Obonyo L and Ernoe N, 'Journalists and the rule of law' Kenyan section of the International commission of jurists, Nairobi, 2011, 19.

Unrestricted social media is injurious to the right to fair trial in numerous ways; Pre-judicial comments are made on social media sites; bloggers and cyber journalists publish unverified information concerning the case; and pieces of unverifiable evidence are surfaced online making it hard to authenticate the pieces of social media evidence.

The growth of social media platforms and the use of internet has significantly grown in the recent years in Kenya. According to the 2017/2018 Communication Authority of Kenya report, the number of mobile data subscriptions in Kenya currently stands at 40.7 million, 38 percent more than in the same period the previous year, with the internet penetration in the country at 83 percent based on the Internet World Statistics. This indicates that majority of Kenyans now have access to the internet through their mobile phones, computers and internet enabled devices. This has led to the growth of internet consumption in Kenyan homes, offices and on the go. [20]

Access to the internet is almost at par both in the rural and urban areas both averaging between 40-50 percent with majority of Kenyans spending between 30 minutes to three hours on the internet daily. While most Kenyans use social media to stay in touch with friends and family, the survey found the main reason Kenyans use social media is to access and air out views on news, politics, and entertainment.[21] This clearly demonstrates the need for the regulation of internet platforms, services and the reform in legislation on social media evidence.

Many jurisdictions grappled with the issue of regulation of social media because of the restrictions on the freedom of speech and the right to access information. The more contentious issue dealing with regulation has been who takes responsibility for pre-judicial comments published online? And who's task is it to regulate content online? Another question raised is on who should take responsibility over undesirable content online. Is it the owner of the account, the Internet service provider or the server? Traditional law holds publishers responsible for what they publish.

[20] Communication Authority of Kenya, *Report on Social Media use in Kenya*, 4 March 2018, 45.
[21] Communication Authority of Kenya, *Report on Social Media use in Kenya*, 4 March 2018, 45.

However, with current technology, it is unclear who the publisher may be online. This has led to certain legislators placing the burden of responsibility on social media and internet sites.[22]

The proliferation of social media has caused more activities carried out through social media hence the need to regulate this source of evidence. Social media as a source of evidence is classified as electronic evidence. Electronic evidence is provided for under the evidence act of Kenya and the relevant sections are section 106B and 78A which provide for the conditions of admissibility and the factors to be considered when attaching weight to electronic evidence. The courts have struggled with adapting to the new type of evidence and it has affected the perceptions of admissibility, hearsay, best evidence rule and evidential weight. It is noteworthy that this type of evidence is increasingly pre-valent in criminal litigation, bankruptcy proceedings and commercial litigation. [23]

This study will analyze the laws in Kenya regulating social media to understand why social media is highly unregulated and the effect on the justice system. The study will also provide an assessment of the law in Kenya on social media evidence and recommend policy changes.

1.2. Statement of the problem

Social media is highly unregulated in Kenya and it affects judicial processes and the constitutional guarantees of a right to fair trial. Moreover, the evidentiary rules for the admissibility of social media evidence are too exclusionary and rigid to cater for the rapid technological changes in electronic evidence. By comparing social media regulation and rules of electronic evidence in Kenya to that in Germany and South Africa respectively, the study will make recommendations aimed at improving the situation in Kenya.

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[22] Hews R, 'Twitter trials and Facebook juries; an analysis of the Australian sub judice rule and the regulation of prejudicial publicity on social media during high profile criminal trials' Published PHD Thesis, Queensland University, Brisbane, 2019 39.

[23] Watney M, Admissibility of electronic evidence in Criminal proceedings: An outline of the South African Legal position 1(2) *Journal of information, Law and Technology*, 2009, 14.

1.3. Justification for the study

Unrestricted use of Social media to express opinions, facts and views on an ongoing judicial proceeding is detrimental to the accused presumption of innocence, impartiality of the court and to a large extent the reliability of social media evidence.[24] There has been relatively low progress in the Kenyan jurisdiction in regulating social media due to the lack of a specific legislation. Currently, the courts use multiple legislations for regulating social media.

Previous studies have focused on mainstream media reporting, focusing more on the broadcasting news channels. On the issue of evidence, previous studies have focused on classifying countries as either taking the exclusionary or inclusionary approach to social media evidence. This study covers an unexplored area under the sub judice rule where public discussion requires regulation on online platforms.[25] It also explores the issue of social media evidence by analysing the relevance and effectiveness of the current evidence law in Kenya.[26] By undertaking a comparative study the dissertation will provide recommendations on an approach to regulation that Kenya may adopt.

1.4. Significance of the study*

This study analyses the current law on use of social media as evidence in court and conducts a comparative study to provide guidance on the best policies to adopt to cater for this novel type of evidence. The results of the study will guide lawmakers and policy makers who intend to regulate social media and provide suitable admissibility rules for it through formulating policies and laws.

1.5. Aims and Research Objectives

1.5.1 Aim

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[24] Ashwoth A, ' Four threats to the presumption of innocence' 12 (3) *South African Law Journal,* 2006, 63.

[25] Balkin J, 'Digital speech and democratic culture: a theory of freedom of expression for the information society' 79 (1) *New York University Law Review*, 1990.

[26] Peter Mwaura: Relax, judges told over sub judice rule' *Daily Nation, 29* August 2014 - https://nation.africa/kenya/blogs-opinion/opinion/relax-judges-told-over-sub-judice-rule-1019042?view=htmlamp> on 10 March 2020.

This study attempts to establish a basis for the regulation of social media and its use as evidence in Kenyan courts. To do this, it analyses the current legal framework in Kenya and compares it to advanced jurisdictions.

1.5.2 Research Objectives

The research objectives are:

1. To analyze the legal framework in Kenya governing the regulation of social media.
2. To analyze the admissibility and evidential weight of social media evidence in Kenya.
3. To determine whether the Legal Framework in Kenya is effective in regulating social media and whether it provides its admissibility as evidence before the courts.

1.6. Hypothesis

This study assumes that unregulated social media involvement in ongoing cases affects the right to fair trial and the credibility towards social media evidence in Kenya.

1.7. Research Questions

1. Is the legal framework in Kenya governing the regulation of social media and its admissibility as evidence before the courts effective?

2. What are the international best practices on regulation of social media and its rules of admissibility as evidence?

1.8 Theoretical Framework

Social media shapes public opinion, which is shaped by individual experiences, surroundings, and their culture.[27] No doubt that social media in the contemporary world creates an environment where views and thoughts are published resulting in the formation of a culture. In this study, the

[27] Mbiti D N, *Foundations of school administration,* Oxford University Press, Upper Hill, 2007.

culture created is that of infringement of the functions of the judiciary and the court process by painting an accused as guilty and presenting unverifiable evidence. This research will discuss the 'ecocultural theory' by John Berry[28] And the 'social contract theory' by Jacques Rousseau.

The eco-cultural theory explains how man's culture, which is defined as a perception the world, is influenced by his surroundings and interactions. Social media plays a large role in today's interactions. Social media can hence be used to cause injustice in a judicial proceeding through pre-judicial comments, fake evidence, harassment of judges and undue pressuring of judges.

The social contract theory justifies the regulation of social media. Social media is premised on the freedom of speech which is not absolute in Kenya. The Social contract theory explains that in some instances, like the protection of fair trial rights in this case, the social contract is that of government providing limits of free speech to protect fair trial rights and judicial independence.

1.7.1. Eco-cultural theory

John Berry explains that it is difficult to separate man from his eco-cultural experiences since culture is adapted to one's ecological space.[29]The environment and culture of man determines the decisions he will make and the view he or she takes. Social media has created an online environment where people from all over the world can freely interact. This environment has the potential to shape one's views and influence their decisions.[30]

Social media is now part of man's culture,[31] At least in this modern age. Social media can shape man's beliefs and views of issues that surround him in the society. The portrayal of an accused as guilty on social media influences the public's view of the matter under judicial consideration. Judges are part of the community and although they are required to be impartial and make a ruling based on evidence, judges are influenced by external factors in making decisions, personal biases,

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[28] Mbiti D N, *Foundations of school administration, 63.*
[29] Logan RK, 'The biological foundation of media ecology' 6 (1) *Explorations in media,* 2007, 19-34.
[30] Logan R K, ' The biological foundation of media ecology, 22.
[31] Sawyer R 'The impact of new social media on Intercultural adaptation' 21(2) *Intercultural communication Studies* 2011, 242.

ideological foundations, religion, political influences and judicial philosophy. The least discussed factor is public pressure.[32]

Though somewhat isolated from politics and the volatility of the electorate, judges may still be swayed by special-interest pressure, the mass media, and public opinion as all these are heavily influenced by social media. When opinions of the population change, the court's interpretation is likely to keep up with these changes or the courts face the danger of losing their own relevance.[33]

1.7.2. Social contract theory

The theory by French philosopher Jean Jacques Rousseau explains that man is born free but is always in chains. The theory explains that man's moral and political obligations are dependent upon the agreement to form a society they live in. Rousseau presupposed that human beings were born to enjoy freedom wherever they are and in whatever they do.[34] Explaining Immanuel Kant's thought on the social contract theory, Weber states that individuals remain free, only to submit their will to the law which represents the public will. [35]

Weber explains that for each part of the liberty the individual had to give up when a society was established, it received a corresponding part of another individual's liberty, so that in the end, after the society has been established, each member has received adequate compensation and additional forces and strengths to preserve what he or she owned.[36] This theory explains the justification for the limitation of the freedom of speech resulting from the social contract. Freedom of speech is limited in this case for the preservation of the public will. This is a justification for the regulation of social media.

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[32] Ashenfelter E, Theodore E and Stewart J 'Politics and the Judiciary: The influence on judicial Background on court outcomes' 24 *The journal of legal studies* 2, 1995, 267.
[33] *Lawrence v. Texas* (2003), The Supreme court of the United States.
[34] Gray P, 'Reviewed work: the social contract by jean Jacques Rousseau, Willmore Kendall' 70 *Political Science Quarterly* 3, 1995, 443.
[35] Gray P, 'Reviewed work: the social contract by jean Jacques Rousseau, Willmore Kendall' 446.
[36] Weber H, *Shaping Internet Governance: Regulatory challenges*, 2010 ed, Springer-Verlag, London, 2010, 173.

1.8. Literature review

It is undeniable that the tension between social media and fair-trial rights has reached a concerning degree in most parts of the world.[37] Criminal trials are under the spotlight and create curiosity especially when prominent persons, children or murder is involved. Social media influences public opinion on the justice system and if this power is unregulated, social media becomes a trail in itself where unverified evidence is presented, accused is presented as guilty and the court system is undermined.

1.8.1. Social media's infringement on the right to fair a trial

Brian Cutler examines the impact that pre-trial publicity has on the publics' and the juror's view and attitude towards the accused.[38] In the study, the authors conclude that the portraying of an accused as guilty before trial was dependent on the amount of information about the accused published before the trial.[39]

Vaster man Peter discusses how media can create public outrage especially in criminal matters through the concept of media-hype.[40] This concept is that numerous events (crime) are reported under the same denominator creating a chain of events of a similar kind. This in effect broadens the issue in the public discourse creating an outrage. Consequently, this might taint the accused presumption of innocence and influence the judicial officers to side with the public view. This is because a single act is painted as a continuous trend that needs immediate remedy[41]Judges are human beings hence are influenced by their surrounding environment and beliefs in making judgements.

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[37] Weber H, *Shaping Internet Governance: Regulatory challenges*, 174.

[38] Cutler B, 'The pre-judicial impact of pre-trial publicity'21(5) *Journal of Applied Social Psychology,*2006,350.

[39] Mueni B, The impact of media coverage of criminal trials on the impartiality of the courts' Published, Strathmore University, Nairobi, 2018, 9.

[40] Vastennan P, ' Media-hype: Self-reinforcing news waves, journalistic standards and the construction of social problems' 20 (1) *European Joumal of Communication* 2005, 513.

[41] Peer E and Gamliel E, ' Heuristics and biases in judicial decisions ', 114.

1.8.2. Legal framework for regulation of social media interference in criminal proceedings Kenya

The offence for interference with ongoing judicial proceedings has always been that of contempt of court. In making a determination on contempt of court, the court grapples with the balancing of competing freedoms and rights namely, freedom of expression and right to fair trial.

Freedom of media and social media is guaranteed under the Bill of Rights, Chapter 4 of the Constitution of Kenya 2010 as part of freedom of expression.[42] It is a fundamental human right provided in the Universal Declaration of Human Rights. Media are free to seek, receive and impart information or ideas as guaranteed in Article 19 of the UDHR. However, this freedom is tied to some responsibility in order to protect the rights and freedoms. Both Article 33 (2) of the constitution and Article 29 (2) of the UDHR limit the freedom provided in Article 33 and Article 19 respectively. They both recommend limitations determined by law to ensure that other rights and freedoms are respected.[43] Case in point is the right to a fair trial. Most states have developed laws that regulate media. The reason has been to limit the freedom so that it does not infringe on other fundamental rights.[44]

The *sub judice* rule prevents the publication of material that is pre-judicious in an ongoing trial. Rachel Hews in her thesis on *sub judice* describes it as the law prohibiting contempt by words dating back to 14th Century England. She states that it was designed, in part, to prevent the use of words to abuse a party to a suit. Moreover, that the view of the courts was that there was nothing 'of more consequence, than to prejudice the minds of the public against persons concerned as parties in a case before the case was heard'. These notions formed the basis of the *sub judice* rule, the principal purpose of which is to prevent interference with the administration of justice. [45]

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[42] Article 33, *Constitution of Kenya (2010).*

[43] Bosire J, 'An investigation on Cyber journalism in relation to media freedom in Kenya' 49.

[44] Obonyo L and Ernoe N, 'Journalists and the rule of law' Kenyan section of the International commission of jurists, Nairobi, 2011, 19.

[45] Hews R, 'Twitter trials and Facebook juries; an analysis of the Australian sub judice rule and the regulation of prejudicial publicity on social media during high profile criminal trials, 45.

The contempt of court act 2016 lists four instances in section 27 whereby one can be found to be in contempt of court. The fourth is the obstruction or disturbance of the course of a judicial proceeding. Social media comments and publications that are pre-judicial qualify as obstruction or disturbance. The act prescribes strict liability in relation to the offence of contempt of court. This means that conduct is treated as contempt of court regardless of the intention to do so.[46] The contempt of court act has provided clear guidelines; it clearly describes the offence, the jurisdiction of the courts and the penalties for infringement.

The Computer misuse and Cybercrimes act of Kenya criminalizes fake news by outlawing 'false publications' and 'publication of false information'. This is through article 22 which further introduces a fine of 5 million shillings or 2 years in prison or both. The fake news includes fake information that is likely to discredit the reputation of a person, cause chaos and disrupt public order.[47] Some provisions of the act are problematic in the sense that public order is no longer a limitation to the freedom of expression. Furthermore, the word panic and chaos are highly subjective and in *Jacqueline Okuta and another v Attorney General and 2 others* the court declared that it is unconstitutional for an offence to prescribe criminal defamation. [48]

Mutemi argues that the approach taken to criminalize all unpleasant online conduct encroaches on the preserve of civil law which leads to overburdening. Moreover, he states that the aim of criminal law is to protect the general interests of the public and not serve private interests. Civil laws offer the perfect remedies for this.[49]

1.8.3. Social media evidence in Kenya

An emerging issue faced by courts is the use of social media posts and comments as evidence in court. In Kenya, social media evidence is classified under electronic evidence which is provided

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[46] Section 10, *Contempt of Court Act* (Act no 46 of 2016).
[47] Section 22 and 23, *Computer misuse and Cybercrimes Act* (Act no 5 of 2018).
[48] *Jacqueline Okuta and another v Attorney General* (2017) eKLR.
[49] Mutemi M " Taming the internet: the good, the bad and the ugly parts of the computer misuse and cybercrimes act 2018, the elephant https://www.theelephant.info/features/2018/05/24/taming-the-internet-the-good-the-bad-and-the-ugly-parts-of-the-computer-misuse-and-cybercrimes-act-2018/ accessed on 1 August 2020.

for under the evidence act of Kenya. Sections 106B and 78A of the evidence act of Kenya provide for the admissibility of electronic evidence and the evidentiary weight attached to that evidence. [50] Section 78A of the Evidence Act unconditionally provides for the admissibility of electronic messages and digital material even if they are not in their original form.[51] In Kenya, courts have had conflicting opinions on the interpretation of the said sections and in particular, section 106 B (4) of the evidence act which provides that a certificate is a requirement for admissibility of electronic evidence.[52]

The judge in the case of *Mable Muruli v Wycliff Oparanya* interpreted the said section as being procedural and invoked article 159 of the Kenyan constitution which provides that justice ought to be administered without undue regard to procedural technicalities.[53] The judge in the case of *William Oduor v Independent Electoral and Boundaries Commission* had an opposed this view and declared that the requirement for the production of a certificate for admissibility of evidence is a mandatory provision. This is the current law in Kenya.[54] A comparative study with South Africa reveals that both jurisdictions have an exclusionary approach to social media evidence. However, South Africa gives the judges a level of discretion in admitting evidence unlike in Kenya. This makes the laws in South Africa better at adapting to changing situations and variability of electronic evidence.[55]

In 2019, Kenya attempted to introduce a social media bill. The Kenya information and communication (amendment) bill did not pass into law in Kenya. However, it was introduced as an attempt to regulate social media use in Kenya. This was the first piece of legislation that aimed to regulate social media directly. The law received an uproar from large sections of the Kenyan public. The bill required creators and administrators of social media groups to notify the Communications authority of Kenya of their intention to form a group and the administrators

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[50] *The Evidence act Kenya (*Act no. 19 of 2014).
[51] *Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 Others* [2014] eKLR.
[52] Section 106B (4), *Evidence Act Kenya (*Act no. 19 of 2014).
[53] *Mable muruli v Wycliffe Ambetsa Oparanya* and 3 others (2013) eKLR.
[54] *William Odhiambo Odour v Independent Electoral and Boundaries Commission and 2 others* (2013) eKLR.
[55] Tonder G, 'The admissibility and Evidential weight of electronic evidence in South Africa Legal proceedings: A comparative perspective' University of Western Cape, Western Cape, 2013, 14.

would be required by law to strictly control 'undesirable content' and approve all content published on sites. Failure to do this would lead to fine of not less than shillings 200,000 a prison term of not exceeding 6 months or both. It also required that bloggers get licensing for blogs from the Communications Authority of Kenya[56] Human rights lawyer Demas Kiprono argued that the amendment sought to limit freedom of expression, association, and freedom of assembly online.[57]

1.8.4. Argument for regulation of speech on social media

John Stuart Mill discussed the purpose of controlling speech and his conclusion was that to protect fundamental freedom of others, restraint should be practiced when communicating to an audience. The implication of this is that one's freedom of speech should be limited if he or she is a nuisance to other people's freedoms. He further explains that opinions are tied to human nature and that they are not necessarily evil. However, Mill explains that opinions lose their immunity when the circumstances in which they are expressed instigate a mischievous act.[58]

Moreover, Hills and Michalis argue that the role of regulation is to achieve public policy objectives that ensure protection of public interest.[59] William Blackstone argues that media freedom cannot be absolute. The need for limitations upon media freedom is important as is the provision for the same freedom.[60] He agrees with Stuart Mill on the issue of regulation.

Merrill John studies the freedom of expression and in his conclusion, he is against regulation of media. His conclusion is that total freedom of expression creates authentic journalism and propagation of the truth. However, his study is based on traditional media and the findings are not necessarily true when social media is considered. It is a lot harder to verify information posted on

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[56] Kenya Information and Communications (amendment) Bill, 2019.

[57] Kiprono D, 'Proposed Bill on Social media regulation unnecessary' The Star -< https://www.the-star.co.ke/opinion/2019-09-25-proposed-bill-on-social-media-regulation-unnecessary/>- accessed on 1 August 2020.

[58] Manga C, 'The protection of freedom of expression in Public service media in Southern Africa: a Botswana perspective' 5 (65) *The modern law review*, 2002, 650.

[59] Manga C, 'The Protection of freedom of expression in Public Service media in Southern Africa:a Botswana perspective' 651.

[60] Blackstone W, *Commentaries on the Laws of England* Volume IV (1765-69) at 151-2. Quoted in Franklin M, *The First Amendment and the Fourth* Estate, Foundation Press, New York, 1981, 10.

social media. it is harder to trace the publisher or the source of information as social media thrives on anonymity.

Iaconelli's argument is similar to Merrill John's. He discusses the importance of unrestricted freedom of expression and opinion in an adversarial court system. He posits that because the system is based on the principle that justice should be done openly, then the public ought to have the freedom of expression freely.[61]

1.8.5. Challenges facing regulation of social media

Kreimer argues that in the internet and social media era, communication utilizing the cyber pathways is a challenge to regulators. A perhaps difficult issue that governments grapple with is whether to sanction the listener or the speaker. Furthermore, Speakers on the internet and social media can hide their identities and can extend the reach of their communications into foreign jurisdictions. Regulators have fallen back on alternatives predicated on the fact that the Internet is difficult to regulate.[62]

The Internet's resistance to direct regulation of speakers and listeners rests on a complex chain of connections and emerging regulatory mechanisms have begun to focus on the weak links in that chain. Instead of attacking users directly, governments have sought to enlist private actors within the chain as proxy censors to control the flow of information.[63]

1.8.6. Who bears responsibility for pre-judicial content online?

Litchman and Posner argue that internet service providers should bear the responsibility for undesirable content entering public networks. They posit that "Service providers should therefore

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[61] Jaconeli J, *Open justice; a critique of the public trial*, 2nd ed, Oxford university press, Oxford 2002,364.
[62] Wu P, 'Impossible to Regulate: Social Media, Terrorists, and the Role for the U.N' 16 (1) *Chicago Journal of International Law*, 284, 2015.
[63] Bosire J, 'An investigation on Cyber journalism in relation to media freedom in Kenya' 49.

bear some responsibility not only for stopping malicious code, but also for helping to identify individuals who originate it"[64]

1.8.7. To what manner and extent should social media be regulated?

Eipsten in studying two guarantees of the American constitution namely the right to free speech on one hand and content-based restrictions on the other and how they affect one another concluded that some laws need to be put in place to enable fair judgement of cases in court. The use of alternatives such as cross-examination, which protect the integrity of the trial process without suppressing speech combined with exceptional measures such as judicial orders which can be employed to restrict no more speech than necessary, will ensure that more information of public concern will enter the internet space without affecting the court proceedings. [65]

The Book *Law and Borders* explains that the cyberspace requires rules distinct from laws governing the physical and geographically defined territories. This is because the cyberspace is bounded by screens and passwords, not necessarily physical borders. [66]

Kobrin posits that in order for the regulation of cyberspace to be effective, there is need for cooperation between the public and the private sector. He adds that a hybrid or integrative scheme involving self-regulation of social media platforms with government oversight and enforcement is the most effective method of regulation.[67]

While the cited studies show the need for social media regulation and an adoption of suitable evidentiary rules for social media evidence, they go only as far as highlighting the need to regulate social media, forming evidentiary rules, and both legal and practical challenges of doing. The cited studies do not reveal nor propose regulatory models to achieve the goal of social media regulation

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[64] Litchman G and Posner A 'holding internet service providers accountable' 14 *Supreme Court Economic Review*, 2004,221 - https://www.jstor.org/stable/3655313?seq=1>- on 1 August 2020.
[65] Eipsten R, 'The Fundamentals of Freedom of speech' 10 *Harvard Journal of Law* 53, 1987
[66] Johnson R and Post D, 'Law and Borders- The rise of law in cyberspace' *Stanford Law Review* 48, 1997, 1402.
[67] Kobrin S, Territoriality and the Governance of cyberspace' 32 Journal of international business studies 4, 2001, 698.

and adoption of suitable social media evidence rules. This study will conduct a comparative analysis of the Framework in Kenya with that of Germany and South Africa to provide a model or best practices that Kenya ought to adopt.

1.9. Research Methodology

The method of research will be a qualitative study that will involve desk research. The categories that shall be consulted in this study are primary sources, secondary sources, and a comparative study.

Primary sources entailing the constitution of Kenya, relevant local legislation and case law will be analyzed. These will help in understanding the law governing social media regulation, social media evidence and the scope of protection of the accused right to fair trial in Kenya. Article 50, 33 and 34 of the Kenyan constitution will be studied as they are the foundation of the competing rights, that is freedom of expression, right to information and the right to a fair trial. Legislation such as the Contempt of court act, Computer misuse and cybercrimes act will be examined to determine their effectiveness in social media regulation in criminal proceedings. The relevant sections of the Evidence act will be studied to access the treatment of social media evidence in Kenya. Case law interpreting these provisions will be analyzed as well to find out how the courts interpreted the provisions of the law.

Moreover, the study will examine international law focusing on conventions and treaties relevant to the study. The International Covenant on Civil and Political Rights, the Universal declaration of Human rights and The African Charter on human rights will be examined since it is ratified and applies as law in Kenya by virtue of article 2(6) of the 2010 constitution.

Secondary sources entailing scholarly articles, conference papers, research papers and journal articles will be used to understand the theoretical and conceptual concepts around the freedom of expression, the right to fair trial, the *sub judice* rule and the regulation of social media in Kenya and in other jurisdictions.

Kenya lacks legislation on social media regulation. A contributing factor to the lack of regulation of social media involvement in judicial process. Kenya will be compared to Germany which enacted a social media law, the Network Enforcement act that came into force on October 2017. It is chosen as a comparative study because of the success of the regulation framework compared to other jurisdictions. The regulatory approach taken by Germany is of regulating online platforms instead of individual social media users. The comparative study will help identify the advantages and disadvantages of the approach and recommend what Kenya can adopt when coming up with legislation on social media regulation.

The provisions of the Evidence act of Kenya that provide rules for social media evidence will be compared to the rules in South Africa. South Africa is preferred as a comparative study because it has an exclusionary approach to evidence, a similar approach to Kenya. Moreover, it is an advanced jurisdiction in regard to electronic evidence both on technology used and precedence set by their courts of law.

Both Physical and online libraries will be used. The physical library will be the Strathmore Law school library. Online sources such as Jstor, Hein Online, Cambridge Law Journals and Lexis Nexis will be used as well.

The study is purely qualitative. The data will be analyzed in accordance with the research objectives, statement of the problem and the hypothesis.

1.10. Limitations

This study is limited in two aspects; First, it ignores the cultural aspects of a jurisdiction that informs the perception and view on the discourse of 'free press versus right to fair trial'.

Second, the number of jurisdictions considered will be limited since there are numerous jurisdictions and to consider all is beyond the scope of this study.

1.11. Chapter breakdown

1.11.1. Chapter One – Introduction

This chapter contains the structure and contents of the research proposal. It states out the research questions, objectives, hypothesis, literature review, theoretical framework as well as the methodology.

1.11.2. Chapter Two – Legal Framework of Social media regulation in Kenya

This chapter will deal with the legal framework of social media regulation in Kenya focusing on its interference in criminal proceedings

1.11.3. Chapter Three – Admissibility of social media evidence in Kenya

This chapter will discuss the legal framework of social media evidence in Kenya focusing on interpretation of evidence rules by the courts

1.11.4. Chapter Four -Comparative study between Kenya, South Africa, and Germany

This chapter explores the best practices from other jurisdictions.

1.11.5. Chapter Five –Findings, recommendations, and Conclusion

This chapter will present the findings, propose recommendations and conclude the study.

CHAPTER TWO

LEGAL FRAMEWORK GOVERNING SOCIAL MEDIA IN KENYA

2.1. Introduction

Chapter one introduced the background to this study by demonstrating how social media posts and publications have posed challenges to the criminal justice system in Kenya. The murder of Monica Kimani has been used to demonstrate this. It laid out the problem: is the Kenyan legal system effective in regulating social media? And how do the courts deal with social media evidence? This chapter will discuss the legal framework governing social media regulation in Kenya.

The chapter will also discuss local legislation such as the Kenya Information and Communications Act, the Computer and Cybercrimes Act and the Contempt of Court Act in analysing the legal framework governing social media regulation. The proposed social media bill that was rejected by parliament will also be discussed. The contemporary issue of the use of social media posts as evidence in court will necessitate a study of the evidence act.

2.2. Freedom of expression in International law

As highlighted in the first chapter, there is a need to regulate social media involvement in criminal cases. The regulation ought to be balanced with the guarantees of freedom of expression and the right to information guaranteed in chapter four of Constitution of Kenya and in International conventions such as the UDHR and the ICCPR.

The constitution of Kenya applies international law directly as Kenyan law without the need for domestic legislation.[68] This means that post 2010, Kenya shifted from a dualist to a monist state.[69] Freedom of expression is recognized internationally in article 29 of the UDHR, article 19 of the ICCPR, the ICESCR, article 5 of the ICERD and article 12 of the CRC. This study will discuss freedom of expression in the two major treaties: the UDHR and the ICCPR.

The UDHR can be termed as the central case for international human rights law because all major international human rights treaties draw their provisions from it. It acts as a standard for Human rights instruments. However, the UDHR is not a legally binding document. The UDHR in article 19 defines freedom of expression as the freedom to hold opinions, to share and receive information.[70] Freedom to express opinions and ideas is considered essential at an individual level as it contributes to the development of a person and is the foundation of democracy in a state. Free speech is a precondition to the enjoyment of other rights such as the right to vote, free assembly, freedom of association and free press. [71]

The ICCPR in article 19 expresses the freedom of expression using the same broad terms as the UDHR. Freedom of expression is stated not only as the freedom to express opinions and ideas but also freedom to receive information.[72] The ICCPR has been widely ratified and 168 states are party to it. THE ICCPR in article 19(2) provides for a limitation on the freedom of expression provided that it is provided by law, is necessary for the protection of the rights of others, for national security, public health and morals.[73] Freedom of expression has also been expressed in regional agreements such as article 13 of the American convention of Human rights and article 9 of the African charter of Human Rights.

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[68] Article 2(5) and (6), *Constitution of Kenya* (2010).
[69] Kabau T and Njoroge C, 'The application of international law in Kenya under the 2010 constitution: critical issues in the harmonization of the legal system' 44 (3) *The Comparative and International Law journal of Southern Africa*, 2011, 295.
[70] Article 19, *Universal Declaration of Human Rights,* 10 December 1948
[71] Azzizudin M, 'Freedom of Speech as an international norm' 16(1) *Asian Journal of Political Science*, 2008, 3.
[72] Article 19, *International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171.
[73] Article 19, *International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171.

The scope of Freedom of expression is wide and is the basis of the right to information. This was held in *Mavlonov and Sa'di v Uzbekistan* where a majority of the Committee made the finding that a member of the public has the right to receive journalistic information as does the editor and journalist had the right to impart information.[74] Resolution 59 of the United Nations General assembly recognized the right to information as being integral to the freedom of expression.

2.3. Freedom of Expression and under the Kenyan legal system.

Freedom of expression is enshrined in the bill of Rights, Chapter Four of the Constitution of Kenya. Article 33(1) states that

"*Every person has freedom of expression, which includes- (a) freedom to seek, receive or impart information or ideas; (b) freedom of artistic creativity; and (c) academic freedom and freedom of scientific research*."

Freedom of expression is extended to the media and the constitution further strengthens this by expressly stating it in article 34. The two freedoms are intertwined. The state is prevented from penalizing individuals or media houses for publishing their opinions to the public as long as it is done lawfully. Freedom of expression is not an absolute right under the constitution of Kenya. The freedom is limited when the opinion is an incitement for violence, propaganda for war, hate speech, discrimination or it tramps on the rights of others.[75]

In *Robert Alai v Attorney General and others*, the court ruled that the freedom of expression meant that Kenyans had the democratic right to publicly discuss the affairs of government and this right would be curtailed if they were not allowed to comment and criticize about leaders and public officials. In this case, the petitioner had criticized the president via a twitter comment and had been charged in court as having contravened section 132 of the penal code that outlawed publishing or making comments that would bring into contempt the lawful authority of a public officer. The court declared section 132 of the penal code unconstitutional since prevented public scrutiny of

[74] *Mavlonov and Sa'di v. Uzbekistan*, CCPR Comm. No. 1334/2004, 9 April 2009.
[75] Article 24, *Constitution of Kenya* (2010).

public officers hence incompatible with the concept of sovereignty of people, freedom of expression and the values of the constitution such as social justice and enforcement of human rights.[76]

Freedom of expression ideally would then mean the freedom to use social media freely to publish posts and comments on what is happening around us. This freedom is subject to limitation as outlined in article 24 of the Constitution of Kenya which lists the instances of limitation. Of interest to this paper will be the limitation: interfering with the rights of others. In this case the right would be the right to a fair trial. Article 24 goes on to state that the limitation ought to be reasonable and justifiable in an open and democratic society, be based on human dignity, equality and freedom taking into account all relevant factors.[77]

Publishing information freely on social media is a manifestation of one's freedom of expression in a democratic society. The limitations provided ensure that this freedom is not used to infringe the rights and freedoms of others. The publishing of information concerning an ongoing trial is a manifestation of this freedom. However, as illustrated by the case concerning the murder of Monica Kimani, lack of restriction to this freedom violates the affects the right of the accused to a fair trial.

2.4. Legislation in Kenya regulating social media

2.4.1. Contempt of court act 2016

The aim of the act is to uphold the dignity and authority of the Court; ensure compliance with the directions of Court, and to preserve an effective and impartial system of justice.[78]

Section 27 of the Act outlines the instances in which a person can be found guilty of the offence of Contempt of Court which includes a person who assaults, intimidates or threatens a judicial

[76] Robert Alai v Attorney General and others (2017) eKLR.
[77] Article 24, *Constitution of Kenya* (2010).
[78] *Contempt of Court Act* (Act no 46 of 2016).

officer, disobeys directions of court, shows disrespect with reference to legal proceedings, causes an obstruction in the course of a judicial proceeding.[79]

Section 28 of the Act prescribes punishment for the offence. Accordingly, a person who is convicted of Contempt of Court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both. The Court may also order that the accused person be detained in police custody until the next Court session.

The act prescribes strict liability in relation to the offence of contempt of court. This means that conduct is treated as contempt of court regardless of the intention to do so.[80] The contempt of court act has provided clear guidelines; it clearly describes the offence, the jurisdiction of the courts and the penalties for infringement. It provides common law defenses to the strict liability rule in addition to the defense of 'having no reason to believe that the proceedings were pending at the time of publication'.[81]

Despite having statute on contempt of court, the power of the court to punish for contempt is inherent without It being derived from the constitution or statute.[82] This was the holding of Justice Musinga in *Equity bank v West Lnk Mbo Limited* where the court ruled that the court does not get the power to punish for contempt from statute. The contempt of court act only facilitates the courts' exercise of that power. The same was held in *Kenya Human Rights commission v Attorney General and another* where the court stated that the power to punish for contempt was inherent and recognized by the constitution of Kenya article 159 which provides that the judiciary's power is drawn from the people. [83]

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[79] Section 27, *Contempt of Court Act* (Act no 46 of 2016).
[80] Section 10, *Contempt of Court Act* (Act no 46 of 2016).
[81] Section 12, *Contempt of Court act* (Act no 46 of 2016).
[82] *Equity Bank v West LnK MboLimited* (2013) eKLR.
[83] *Kenya Human Rights Commission v Attorney General and* another (2018) eKLR.

2.4.2. Computer misuse and Cybercrimes act

Section 22 of the act prescribes the offence of publishing fake news with the intent to deceive people who may believe it as true.[84] It is problematic to establish and prove intent to deceive. It is worth noting that laws banning any kind of speech are always in conflict with the constitutional provision on the freedom of speech. Freedom of speech is not an absolute right and the limitations are provided for in the constitution. The limitations are; speech amounting to propaganda for war, incitement to violence, hate speech, advocacy for ethnic hatred or discrimination, or fake news that negatively affects the rights and reputations of others.[85] The limitation should also take into account the factors laid out in constitution; ought to be reasonable, justifiable in a democratic society, based on human dignity and is necessary.[86]

Section 22 (2) of the act lays out instances where freedom of expression is limited similar to the instances laid out in article 33 of the constitution. This means that fake news and prejudicial publications are an offence if they amount to propaganda for war, incitement to violence, hate speech, advocacy for ethnic hatred, advocacy for discrimination, or if it negatively affects the rights and reputations of others.[87]

2.4.3. Kenya's attempt at regulating social media

In. October 2019, the Kenya Information and Communications bill was tabled in parliament. The bill was to introduce provisions that would require stringent regulations on the use of social media in Kenya. The regulations included the registration of bloggers, registration of Whatsapp group administrators and the obligation for Whatsapp group administrators to regulate content in the various groups.[88]

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[84] Section 22, *Computer Misuse and Cybercrimes Act (*Act no 5 of 2018).
[85] Article 33, *Constitution of Kenya (2010).*
[86] Article 24, *Constitution of Kenya (2010).*
[87] Mutemi M, 'Taming the Internet: the good, the bad and the ugly parts of the Computer Misuse and Cybercrimes act' *The Elephant, 24 May 2018* -< https://www.theelephant.info>- on 20 September 2020.
[88] Kiprono D, 'Proposed Bill on social media regulation unnecessary' -< https://www.the-star.co.ke>- on 22 September 2020.

The bill proposed that bloggers had a mandatory requirement to obtain a license from the Communications Authority of Kenya. The bill defined blogging to include collecting, writing, editing and presenting news on social media platforms. This definition is wide and ambiguous. This means that ordinary social media users are captured in this definition. The bill required that all social media platforms operating in Kenya to have a physical office in Kenya and obtain a license from the Communications authority of Kenya. the bill also proposed that a social media operator would be required to store data and provide the said data to the Communications Authority of Kenya upon demand.[89]

The bill further required social media users to ensure the content they publish is accurate and not injurious to the receiving party.[90] The bill required Whatsapp group administrators to censor content on the groups and approve members who are part of a Whatsapp group. The penalty for contravention of these provisions was set at a fine not exceeding sh200,000 or imprisonment for a year. The posting of degrading content would lead to a further fine of sh500,000 or imprisonment not exceeding 2 years.[91]

The bill caused an uproar from members of the public and did not advance to the next reading. The proposed bill had serious implications on the freedom of expression online and proposed criminalization of unfair and inaccurate content. It provided limits to the freedom of expression that are not envisioned in the Constitution of Kenya under article 33. The bill's attempt at criminalizing 'unfair' and 'inaccurate' information goes against freedom of expression and the ruling in *Jacqueline Okuta and another v Attorney General and 2 others* that declared criminal defamation in section 194 of the penal code unconstitutional.[92]

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[89] Mwathe D, 'Highlights on proposed law introducing strict regulation of social media' 16 October 2019- https://www.bowmanslaw.com/country/kenya/ >- on 22 September 2020.

[90] Africa Centre for Media Excellence, 'Uproar over proposed law to further regulate social media in Kenya' 26 September 2019 -https://acme-ug.org/- on 20 September 2020.

[91] Mwathe D, 'Highlights on proposed law introducing strict regulation of social media' Bowmans Blog, 16 October 2019 - https://www.bowmanslaw.com/insights/intellectual-property/highlights-on-proposed-law-introducing-strict-regulation-of-social-media> accessed on 22 September 2020.

[92] *Jacqueline Okuta and another v Attorney General and 2 others,* (2017) eKLR.

2.5. Conclusion

The legal system in Kenya lacks legislation dedicated to the regulation of social media. The legislations discussed above do not substantively deal with regulating social media hence why social media still remains highly unregulated. The framework in Kenya is based on punishing individual offenders who violate the stipulated rules. The challenges are: first, it is impossible to prosecute every single person who makes pre-judicial comments on social media. This is because of the number of active users. Second, social media is accessed worldwide, and different states have different laws. Attempting to prosecute a foreigner raises jurisdictional issues which complicate the process. In the next chapter, the study will provide a study of the rules of evidence for social media evidence in Kenya and how the courts have interpreted such rules.

CHAPTER THREE

KENYAN LAW AND SOCIAL MEDIA EVIDENCE

3.1. Introduction

This chapter will provide an overview of admissibility and the evidential weight given to social media evidence within the Kenyan jurisdiction. Social media is a result of computer programs, computer applications and is powered by computers. As a result, social media evidence is classified under electronic evidence. Electronic evidence denotes evidence generated electronically either by a computer or a machine. The evidence act of Kenya provides for the admissibility of electronic evidence in section 106B of the evidence act. Section 78A lists the factors taken into consideration when assessing the evidentiary weight.[93]

The term 'computer' is defined as any device that receives, stores and processes data or information applying stipulated processes to the data and supplying results of that data.[94] In essence, the functions of a computer as stipulated in the evidence act are

a) receiving information
b) recording and storing information
c) processing information
d) producing and supplying information

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[93] *Mable muruli v Wycliffe Ambetsa Oparanya* and 3 others (2013) eKLR.
[94] Section 2, *Evidence Act Kenya (*Act no. 19 of 2014).

Consequently, any information or document generated by a computer will be taken as electronic evidence. This chapter will focus on the following issues: (1) admissibility of social media evidence as provided in the Kenyan law; (2) the factors used in assessing the weight of evidence presented and (3) proving authenticity of social media evidence in the Kenyan courts of law.

3.2. Admissibility of social media evidence in Kenya

This part will elaborate on the relevant legal provisions governing the admissibility of electronic evidence and the decided cases on the specific legal provisions.

The Evidence act of Kenya provides for the admissibility of electronic records. The Evidence Act does not provide further definition of 'electronic messages' and 'digital material'. Interpretation of such categories of evidence is left to the courts. Moreover, although all electronic messages and digital material are now ostensibly admissible, the weight of such evidence remains a subjective determination. [95]

Social media evidence such as tweets, Facebook posts, Instagram comments are electronic evidence by virtue of section 78A and 106B of the Evidence act.[96] Section 78A provides that electronic evidence is admissible as long as It fulfills other necessary conditions laid out this section. In attaching weight to electronic evidence, the following factors are to be considered by the court:

> (a) The reliability of the manner in which the electronic and digital evidence was generated, stored or communicated
>
> (b) The reliability of the manner in which the integrity of the electronic and digital evidence was maintained;

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[95] Maritim P, 'A comparative study on the admissibility of digital evidence in criminal courts in Kenya'-< https://su-plus.strathmore.edu/handle/11071/5242>- accessed on 12 December 2020.
[96] Section 106B, *Evidence Act Kenya (*Act no. 19 of 2014).

(c) The manner in which the originator of the electronic and digital evidence was identified; and

(d) any other relevant factor.[97]

This section also states that the court will not deny evidence based solely on the fact that it is not in its original form.[98] Section 78A of the Evidence Act therefore unconditionally provides for the admissibility of electronic messages and digital material.

The act in section 106 B states that proper authentication of the evidence ought to be done before its admissibility. Justice J Ngugi stated that the purpose for authentication was to demonstrate to the courts that there is reasonable probability that the evidence is what the proponent claims it to be.[99] The conditions for admissibility in the case computer output (information contained in an electronic record) are that the output must have been produced during regular use; The output must be of the type expected in ordinary use ;The computer operating the output must be operating properly or that the accuracy of the computer was not affected; Where multiple computers are involved, those operating in succession and considered as one.

Section 106B (4) provides that for electronic evidence to be deemed admissible, it must be accompanied by a certificate. This mandatory nature of this provision has been subject to debate in the Kenyan courts. The certificate should:

identify the electronic record containing the statement and describing the manner in which it was produced; giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer; dealing with any matters to which conditions mentioned in subsection (2) relate purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or management of the relevant activities.

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[97] Section 78A (3), *Evidence Act Kenya (*Act no. 19 of 2014).
[98] Section 78A (2), *Evidence Act Kenya (*Act no. 19 of 2014).
[99] *Republic v Mark Lloyd Stevenson* (2016) eKLR.

In *Mable muruli v Wycliffe Ambetsa Oparanya* and 3 others, Justice Chitembwe stated that the requirement in section 106B (4) was a procedural matter and that the court had jurisdiction to either enforce it or not based on the circumstances of either case. The issue in the case was on the admissibility of CD's produced as evidence without the authentication of a certificate. The reasoning was based on article 159(1) of the constitution of Kenya which provides that justice will be administered without undue regard to technicalities and that the courts duty was to evaluate the probative value of the evidence provided without ruling out on procedural issues. Furthermore, articles 47, 50 and 105 of the constitution required the courts to administer justice fairly, balancing between both parties. The striking out of evidence based solely on procedure would be in contravention of these articles.[100]

This was not the case in *Nonny Gathoni Njenga & another v Catherine Masitsa & another* where the judge declared that the lack of a certificate as a requirement in section 106B (4) of the evidence act meant that the DVD evidence was inadmissible. Justice Ogola was of the view that section 106B (4) was a mandatory provision. This was the similar holding in the case of *Idris Abdi v Ahmed Bashane*. The court stated that the certificate was important in proving authenticity of the CD video recording. The lack of it meant that the video recording could not be admitted as Evidence before the court. This is regardless of the fact that the provision requiring production of a certificate is a purely procedural matter. The court went further to state that section 78A and 106B had to be read and complied conjunctively. The content of the certificate would aid and satisfy the court as to reliability of generation of the electronic record/evidence; the integrity of the process and the origin of the content.[101]

In *Republic v. Barisa Wayu Mataguda*, the State attempted to enter into evidence a DVD containing CCTV footage relevant to the alleged crime. The evidence was submitted without any certificate of authenticity. The court recognized the DVD as electronic evidence governed by section 106 of the Evidence Act but denied the State's request. The court held that it was

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[100] *Mable Muruli v Wycliffe Ambetsa Oparanya* and 3 others (2013) eKLR.
[101] *Idris Abdi Abdullahi v Ahmed Bashane and 2 others* (2018) eKLR.

abundantly clear from the Evidence Act that 'for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of S. 106B(4)'. Interestingly, the court further stated: 'If this CCTV footage was available then it amounted to primary evidence and could very easily and simply have been produced as evidence.[102]

3.3. Authenticity of social media evidence in Kenya

This issue is discussed partly in admissibility of electronic evidence. However, authenticity of evidence is concerned with the party's compliance with the requirements provided by the provisions in the Evidence act.

As discussed above, Section 78A of the evidence act makes it explicit that electronic is admissible provided that it fulfills the other requirements for such admission. This section does not negate the requirement of establishing the relevance of a particular piece of evidence nor does it obviate the need for the authentication of such evidence. This section outlines the factors to be taken into account in accessing the weight and the authenticity of such evidence. The factors outlined are: the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated; the reliability of the manner in which the integrity of the electronic and digital evidence was maintained; the manner in which the originator of the electronic and digital evidence was identified; and any other relevant factor.[103]

In the case of *Republic v Mark Lloyd Stevenson*, the high court had to determine whether digital evidence (an email) was properly excluded by the lower courts for lack of authentication. The facts of the case are that the accused was an Australian man charged with the offence of obtaining funds by false pretenses from several individuals. The evidence adduced in the lower court was that of an email from the accused to the respective individuals. The high courts' ruling on the issue before

[102] *Republic v. Barisa Wayu Mataguda (2011) eKLR.*
[103] Section 78A (3), *Evidence Act Kenya (*Act no. 19 of 2014).

it was that the evidence adduced in the lower court was properly excluded from evidence because it was not properly authenticated. [104]

According to the court, authentication is required when 'real' evidence as opposed to is adduced in court and the same applies in the case of e-evidence and other documents to be admitted in a trail. Justice Ngugi described several scenarios of what authentication would have looked at in the case before him:

a. *authentication through circumstantial evidence. This is evidence of appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances of receiving and sending of the email or;*
b. *through testimony by the recipient that the sender closed with a nickname known only by the recipient or;*
c. *through a testimony that the author of the email called the testifying party to discuss the same requests that had been made in the email or;*
d. *An expert testimony that the email was retrieved from the author's hard drive*
e. *Through technological footprints such as IP addresses where a service provider can testify that the IP address where the email is sent is the residence or the business premises of the opponent.*[105]

3.4. Conclusion

This chapter provides an overview of the issue of admissibility and authenticity of electronic evidence/social media evidence in Kenya. The legal environment is changing and various types of electronic evidence such as social media evidence are increasingly being introduced and tendered as evidence in court. The Evidence act in Kenya section 78A and 106B provide for the admissibility and authenticity of such evidence. This chapter has examined the legal provisions and highlighted the application through decided cases.

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[104] *Republic v Mark Lloyd Stevenson (*2016) eKLR.
[105] *Republic v Mark Lloyd Stevenson (*2016) eKLR.

CHAPTER FOUR

COMPARATIVE STUDY

4.1. Introduction

This chapter explores how other jurisdictions deal with the issue of social media regulation and social media evidence. The jurisdictions to be considered are Germany and South Africa. These jurisdictions are chosen since the courts have made significant comments on the issue of social media evidence and social media regulation.

4.2. Germany's approach to social media regulation

Germany enacted the Network Enforcement Law to keep online users safe and manage online harms content.[106] This section will focus on the following issues: the Scope of regulation of online platforms and harms; the obligations placed on online platforms; the sanctions placed on violations and the extent of blocking undesired content online.

4.2.1. Scope of regulation

The Network Enforcement Law in Germany specifies which services and platforms are regulated. The NetzDG applies to social media networks having more than two million users in Germany. A Social media network is defined as an internet platform that provide users with opportunity to

[106] Theil S, 'The Online Harms White paper: Comparing the UK and German approaches to regulation' 11 (1) *Journal of media law,* 13, 2019.

share content online to themselves and to the public.[107] This definition excludes platforms that offer individualized communication services like email, messaging apps and news websites that are editorialized. The defined scope of application allows the regulator to have specified area and scope of regulation. The approach by NetzDG of having a narrower and defined scope for regulation seems to be the best when approaching regulation since the regulator focuses on specific platforms hence creates specific standards suitable for such online platforms. The exemption of certain companies and platforms from regulation either partially or entirely ensures that the regulation is achievable.[108]

4.2.2. Regulation of Online harms

Under the NetzDG, content online is illegal if it violates the provisions of the German criminal code. [109]This would mean that liability for defamation can occur even when the publication does not fall under definition of hate speech and is not based on attributes such as religion, race, ethnic origin, gender, sex, sexual orientation and disability. This is because the specific words might be prohibited in the German criminal code but when put into context, do not amount to hate speech. An example is that in Germany, the description of a specific abortion doctor's work as 'babycaust' might attract criminal liability for hate speech even though the publication when put into context would not necessarily amount to hate speech.[110]this is an effect of the strict law on social media regulation.

4.2.3. Obligations placed on online platforms

The Obligations in the NetzDG are based on creating an effective complaints management system and establishing reporting standards on activities undertaken by online companies. The complaints management system ensures that online companies block illegal content within a required time.

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[107] Danya H, 'Governing Hate Content Online: How the *Rechtsstaat* Shaped the Policy Discourse on the NetzDG in Germany' 3752.
[108] Danya H, 'Governing Hate Content Online: How the *Rechtsstaat* Shaped the Policy Discourse on the NetzDG in Germany' 3752.
[109] https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law on 29 September 2020.
[110] https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law on 29 September 2020.

The blocking of the content makes it unavailable in Germany. The NetzDG requires social media companies to delete certain content without undue delay once they are made aware of such content. Failure to do this makes them liable under private and criminal law.[111] The deadlines for deletion vary depending on whether the content is 'manifestly illegal' or 'illegal content'. The deadline for the former is twenty-four hours upon notification while the latter has a seven-day deadline.[112] The obligation is not only to delete content but to preserve it as evidence for the purpose of law enforcement.[113]

On the creation of a complaints system, section 3 of the NetzDG makes provision for online companies to set up and fund a separate independent quasi-judicial body in charge of regulating the industry provided that:

1. the decisions of the body are binding and
2. the body is accredited by the ministry of justice.

This approach seems similar to the suggestion by Facebook founder on the establishment of a 'Facebook Supreme Court' that will operate as a quasi-judicial body in charge of handling disputes arising on Facebook.[114]

4.2.4. Sanctions for violation

The NetzDG provides fines as the primary sanction. The imposition of fines is dependent on two separate proceedings. The first is the declaration of the content on the particular social media platform as illegal by a court. The second proceeding is a determination of the online platforms adherence to complaints management system, blocking of illegal content and the reporting rules.

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[111] Section 10, *Telemedia Act (Germany).*
[112] Section 10, Telemedia act (Germany).
[113] Section 3(2) *Telemedia Act (Germany).*
[114]Klonich K, 'How to make Facebook "supreme court" work' New York Times, 17 November 2018 - https://www.nytimes.com/2018/11/17/opinion/facebook-supreme-court-speech.html 2 October 2020.

The persistent failure in the complaints' management infrastructure system leads to imposition of fines by the regulator.[115]

4.2.5. The extent of blocking content online

The major critic of social media regulation is that it leads to a deletion policy that is too aggressive. A deletion policy that is too aggressive leads to 'overblocking' which is defined as the blocking of content that is legal and permissible by the relevant laws. [116]'Overblocking' is not necessarily done by the regulator. The imposition of fines by the NetzDG could lead to social media companies deleting questionable but not illegal content so as to reduce the risk of subjection to fines.[117] Such actions violate the freedom of expression of the users whose content is deleted and leads to politicization of the blocking process.

This indirectly affects users who reduce the exercise of their freedom of speech because of fear of sanctions. Wenzel Mischaki of the Human Rights Watch in Germany cites the NetzDG as the best social media law in most aspects but flawed in this regard. He explains that there is a large burden placed on online platforms and companies to identify what amounts to illegal content online and to delete them so as to avoid large fines. This process is not subject to judicial oversight hence lack of accountability in the cases of suppression of lawful content online.[118]

4.3. South Africa's approach to social media evidence

The standards of admissibility of electronic evidence outlined in section 106B of the evidence act of Kenya with standards set in South Africa. The comparative study will focus on the following issues: a) rule on admissibility and authenticity of electronic evidence b) rule on production of original and c) the evidential weight attached to the electronic evidence. In this chapter, an assumption will be made that the evidence discussed was lawfully obtained. The admissibility of

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[115] Theil S, 'The Online Harms White paper: Comparing the UK and German approaches to regulation' 17.
[116] Ofcom, 'Site-blocking' to reduce online copyright infringement: a review of sections 17 and 18 of the Digital Economy Act' -< https://assets.publishing.service.gov.uk>- on 2 October 2020.
[117] Theil S, 'The Online Harms White paper: Comparing the UK and German approaches to regulation' 20.
[118] https://www.hrw.org/news on 28 September 2020.

electronic evidence in Kenya is guided by section 106B and 78A of the evidence act. In South Africa, the admissibility of electronic evidence is provided for in the Electronic Communications and Transactions act 25 of 2002.[119] Not only does the act in South Africa provide for electronic evidence but also for various legal issues related to electronic evidence that will be discussed below. This is not the case for the Evidence act in Kenya.

4.3.1. Rule on admissibility and authenticity of electronic evidence

The admissibility of evidence is based on the principle that all facts relevant to a case must be proved.[120] The admissibility of data messages/electronic evidence is provided for in section 15(1) of the Electronic Communications Act which states that the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence on the mere grounds that it is constituted by a data message or if it is, the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.[121] This section does not mean however, that every data message is admissible.

The interpretation of this section has led to the distinction between computerized 'real' and 'hearsay' evidence. The interpretation is based on the reading of section 15(1) with 15(2) and (3) which provides that when the probative value of a evidence depends on the credibility of a computer or a computer system, the 'hearsay' evidence will be admissible in court and the weight of the evidence will be dependent on other factors.[122] The case of *S v Ndiki* and others shifts the focus to a protocol approach and discusses 'real' electronic evidence as real evidence in common law whose admissibility is dependent on subsection 2 of section 15[123]

In this case, the accused were charged with theft and fraud. The offense was connected to the supply of medical equipment to the ministry of health. The evidence relied upon were computer printouts. The court in its ruling stated that the computer printouts contained certain printouts that

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[119] *The Electronic Communications and Transactions act* (act no. 25 of 2002).
[120] R v Trupedo (1920), Appeal Division 58 of South Africa.
[121] Section 15, *The Electronic Communications and Transactions act* (act no. 25 of 2002).
[122] *Ndovlu v Minister of Correctional services and another* (2006), Constitutional court of South Africa.
[123] S v Ndiki (2006), Constitutional court of South Africa

contained documentary evidence and the computer was used to make typed 'hearsay' evidence. However, the courts concluded that such evidence was real evidence and had no hearsay involved since the computer program can produce data without human intervention. [124]

The rule on evidence in South Africa is that any party who produces a document is required to prove to the court its authenticity by adducing evidence of authorship or possession depending on the purpose for which the evidence was tendered. Justice Human stated that the law in relation to the proof of private documents requires that the document be identified by a witness who is either (i) writer or signatory thereof, or (ii) the attesting witness, or (iii) the person in whose lawful custody the document is, or (iv) the person who found it in possession of the opposite party, or (v) handwriting expert.[125]In terms of the Electronic Communications and Transactions act, the person responsible for the data message must establish its authenticity.

4.3.2. The rule on the production of original

The general rule is that only the original document is admissible to prove the contents of a document.[126] This is general is subject to exceptions as is other general rules. In South African law, originality is a requirement for admissibility. However, secondary evidence may be admitted in certain circumstances that are the subject of discussion in this section.

The circumstances when secondary evidence will be admitted are;

a. When it is the only means of proving the document;
b. If the original document is destroyed;
c. in possession of the opposing party;
d. If it is impossible or inconvenient to produce the original or when;

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[124] S v Ndiki (2006), Constitutional court of South Africa

[125] *Howard and Decker Witkoppen Agencies and Fourways Estates ltd v De Sousa* (1971), Constitutional Court of South Africa.

[126]Tonder G, 'The admissibility and Evidential weight of electronic evidence in South Africa Legal proceedings: A comparative perspective' University of Western Cape, Western Cape, 2013, 17.

e. It is permitted by statute.[127]

The requirement for originality is set in section 14 of the Electronic Communications and Transactions act. Section 14(1) of the act provides that the where the law requires information to be provided or retained in its original form, the requirement is met if: The integrity of the information when it was first generated till it was passed has passed assessment in the terms provided in subsection (2) or The information is capable of being displayed or produced to the person to whom is to be presented.

The integrity of the information is assessed based on an assessment of whether the information remained complete and unaltered in the light of the purpose for which the information was generated and having regard to all other relevant circumstances.[128]

4.3.3. Evidential weight given to social media evidence

The evidential weight attached to evidence is in the discretion of the courts.[129] The ECT act states that information that is in the form of a data message must be given evidential weight and in accessing the weight of the data message, the following factors may be taken into account: the reliability of the manner in which the data message was generated; the reliability in which the integrity of the data message was maintained; the manner in which the originator was identified; any other relevant factors.[130]

In S v Ndiki and others, the court stated that the accuracy of a computer was an important factor in attaching weight to evidence. Any doubt on the accuracy of an operating system affects the

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[127] Tonder G, 'The admissibility and Evidential weight of electronic evidence in South Africa Legal proceedings: A comparative perspective' University of Western Cape, Western Cape, 2013, 20.
[128] Hoffmann LH & Zeffert DT, *South African Law of Evidence,* 4th ed, Butterworth South Africa, Cape Town, 1989,77.
[129] Section15(2), *The Electronic Communications and Transactions act* (act no. 25 of 2002).
[130] Section 15(3), *The Electronic Communications and Transactions act* (act no. 25 of 2002).

reliability and the weight attached to the evidence. There is need for expert help in understanding the technical procedures on accuracy and reliability of the electronic evidence.[131]

4.4. Conclusion

Regulation of social media may have positive effects on free online expression when legislation is carefully drafted. Lack of this leads to the suppression of free and open discourse and a violation of fundamental human rights. Moreover, admissibility of social media evidence in courts requires the judges' to be afforded a high level of discretion when evaluating its admissibility. This is to ensure flexibility of the rules to fit the rapid technological advances.

On social media regulation, the NetzDG has a more limited and defined scope of regulation compared to Kenya's legal framework. It regulates social media companies by providing compliance rules where the companies have to block, suspend and delete content on their sites that are unlawful. As such, the framework in the NetzDG is a good case study for Kenya in that it is a single legislation enacted to regulate social media and it approaches regulation at the social media companies' level, making regulation achievable.

On admissibility of social media evidence, South Africa's foundation in regard to the law of electronic evidence is similar to Kenya's. It is noteworthy that South Africa has made steps in the adoption of the model law through their legislation. South Africa was chosen as comparative study because it takes an exclusionary approach to evidence, a similar approach to Kenya's. Unlike Kenya, South Africa affords the courts a level of discretion on admissibility and on the evidential weight given to electronic evidence as outlined insection 15 of the ECT act. The same position was adopted in the case of *S v Ndiki* where the courts interpreted section 15 of the ECT act as giving the courts some level of discretion in admitting and affording weight to electronic evidence laid out before it.This is not the case in Kenya where section 106B (4) is interpreted as a mandatory provision for admissibility of electronic evidence as decided in the case *William Oduor v IEBC*. South Africa's approach of eliminating the mandatory rules of the admission of electronic evidence

[131]Tonder G, 'The admissibility and Evidential weight of electronic evidence in South Africa Legal proceedings: A comparative perspective' University of Western Cape, Western Cape, 2013,22.

and giving the judge's discretion in admitting such evidence ensures that such type of evidence is not discriminated against through stricter rules. This ensures that credible social media evidence is not struck out based on procedural matters like the lack of a certificate, which is the position in Kenya.

CHAPTER FIVE

FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1. Introduction

This chapter seeks to present the findings of the study and propose recommendations on how to address social media regulation and the treatment of social media evidence by the courts. Finally, this chapter will conclude the study by reflecting on the objectives, the statement of the problem and the hypothesis and discern if each has been addressed.

5.2. Findings

a. Social media regulation would need to balance the freedom of expression, right to access information with respect for court proceedings and an accused right to fair trial

Regulation of social media through legislation should be lawful. Lawful in this case means the consideration of the balancing of the freedom of expression and right to access information with the right to a fair trial for the accused which includes presumption of innocence and respect for the court proceedings. The balancing of the rights is provided for in the Kenyan Constitution and the applicable international laws such as the ICCPR and UDHR. The freedom of expression and right to access information are not absolute rights and the state can limit these rights when they infringe

other people's rights such as the right to fair trial. The basis of social media regulation is drawn from this provision.

b. Social media is highly unregulated in Kenya due to the lack of legislation dedicated to its regulation

Social media regulation in Kenya is focused on regulating at the individual level based on violation of the existing laws. It is almost impossible to prosecute every individual who posts pre-judicial content online and violates the sub judice rule because of the use of pseudonyms and the worldwide reach of social media which raises jurisdiction issues The regulatory framework is spread out among different acts such as the contempt of court act, computer and cybercrimes act, Kenya information and communications act burdening enforcement of the law...

c. The German model for social media regulation best addresses the Kenyan situation

In Germany, social media is regulated by placing the burden on social media companies, not individuals and is provided for in a single piece of legislation, The NetzDG. The NetzDG sets criteria determining which companies are eligible for regulation. The criteria is based on factors such as number of users online and type of content provided. The act elaborates on what is termed as illegal online activity and it establishes compliance rules that companies have to follow so as to be compliant to avoid fines and penalties. The methods of compliance include blocking of illegal content posted online within certain time frames, the deletion of comment, images and pages within the required timeframe, the suspension of accounts that post illegal content and bi-annual reporting to the state agency on compliance rules and methods employed by the company.

d. Admissibility of Social media evidence in Kenya is unfairly burdened by strict and mandatory rules

This study contends that social media evidence is key in the discussion on social media regulation. This is because the right to a fair trial includes the adducing of evidence. Social media evidence is a novel type of evidence in Kenya and due to its nature, it is burdened by authenticity issues. The failure to regulate social media content in Kenya coupled with inflexibility of the state and courts

to adapt to technological advances has led to mistrust of social media evidence. The mistrust has led to enactment of unfavorable rules on admissibility of social media evidence and strict interpretations by the courts on the same rules. In Kenya, social media evidence is provided for under electronic evidence in the evidence act. The rules of admissibility and evidential weight of electronic evidence are strict and the courts have interpreted them as being mandatory. In particular, the mandatory requirement in section 106B (4) of a certificate to prove that the device was functioning properly has limitations such as determining the device used and identifying the proper authority to determine if the device and the social media site were properly functioning.

e. The courts' discretion in admitting evidence is maintained for social media evidence in South Africa

South Africa takes a more favorable approach. The courts in South Africa like in Kenya, adopt an exclusionary approach to electronic evidence. However, the courts in South Africa appreciate the rapid technological changes that such type of evidence undergoes and have ruled that the courts have discretion in the interpretation of the rules of admissibility and assigning weight to electronic evidence. This approach is better since it does not give electronic evidence special requirements unlike the other types. Hofman states that all types of evidence have to be treated similarly to avoid discrimination. As such, the judges' discretion in admission of evidence ought to be maintained even in electronic evidence

5.3. Recommendations

If the model for regulation is to be effective, it needs to solve the issues with the current regulatory framework in Kenya. The first issue is the lack of legislation regulating social media. Second, the limitations on jurisdiction when the offender is not Kenyan or within Kenya. Third is the impossibility of prosecuting individual social media users.

5.3.1. Enactment of a legislation dedicated to social media regulation

Kenya should adopt the German model which places social media regulation under a single legislation and shifts the focus of regulation from the individual to social media companies. The

latter makes regulation possible and cheaper. The legislation should include the posting of prejudicial comments and content that is against the sub judice rule as a social media offence. Moreover, the legislation should provide compliance methods that social media companies must abide by and prescribe sanctions for non-compliance.

5.3.2. The legislation should establish a Criteria determining which social media companies are subject to regulation

The legislation should define the scope of application in terms of what social media companies are subject to regulation. The criteria for regulation should be based on factors such as the number of users online, the amount of time spent by users of the site and the type of content that is posted on the platform. In Germany, the platforms subject to regulation are those with more than two hundred thousand users and offer

5.3.3. The legislation should also provide compliance rules for companies and sanctions for non-compliance

The preferred compliance methods are: timely blocking illegal content online, suspension of accounts that post illegal content, establishment of a complaints mechanism where users can send complaints and a body for reviewing complaints. A requirement for bi-annual compliance reports by the social media companies to the prescribed state agency is focal to compliance rules. The sanctions for non-compliance should be in the form of fines and retraction of operating licenses.

5.3.4. Elimination of the mandatory rules on admissibility of social media evidence

The legislation should introduce provisions that favor the admissibility of electronic evidence in the Kenyan courts. In particular, the mandatory nature of the rules for admissibility of electronic evidence laid out in section 106B (4) of the evidence act of Kenya should be eliminated and the judges' discretion should be restored in admission of this type of evidence. This is to ensure that there is no special requirements for social media evidence which frustrate presenting such evidence.

5.4. Conclusion

The study sought out to achieve the following objectives; first, to analyse the legal framework in Kenya governing the regulation of social media in criminal proceedings. This objective was achieved in chapter two which analysed the provisions of relevant International law, the constitution of Kenya and applicable statutes. Second, to analyse the legal framework of social media evidence in Kenya, this objective was met in chapter three which analysed the provisions in statute on admissibility and evidential weight of social media evidence. The third objective was to look into how other jurisdictions deal with social media regulation and social media evidence. This was achieved in chapter four where a comparative analysis of German and South African approaches was done. The fourth objective was to propose recommendations on how to regulate social media and social media evidence in Kenya. The study recommends legislation focusing on the specific recommendations outlined in chapter four.

The problem the study sought to address was whether the laws in Kenya adequately provided for regulation of social media and social media evidence. The study highlights the need for a single legislation dedicated to social media regulation. This legislation should place the burden of fault for pre-judicial content online to respective social media companies and should prescribe compliance rules for such companies together with sanctions for non-compliance. On social media evidence, the mandatory requirements for admission should be removed and judges' discretion restored. As a result, the study has answered the hypothesis that by the enactment of legislation regulating social media and social media evidence, there will be less interference from online activity in criminal proceedings and favorable treatment of social media evidence by the courts.

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