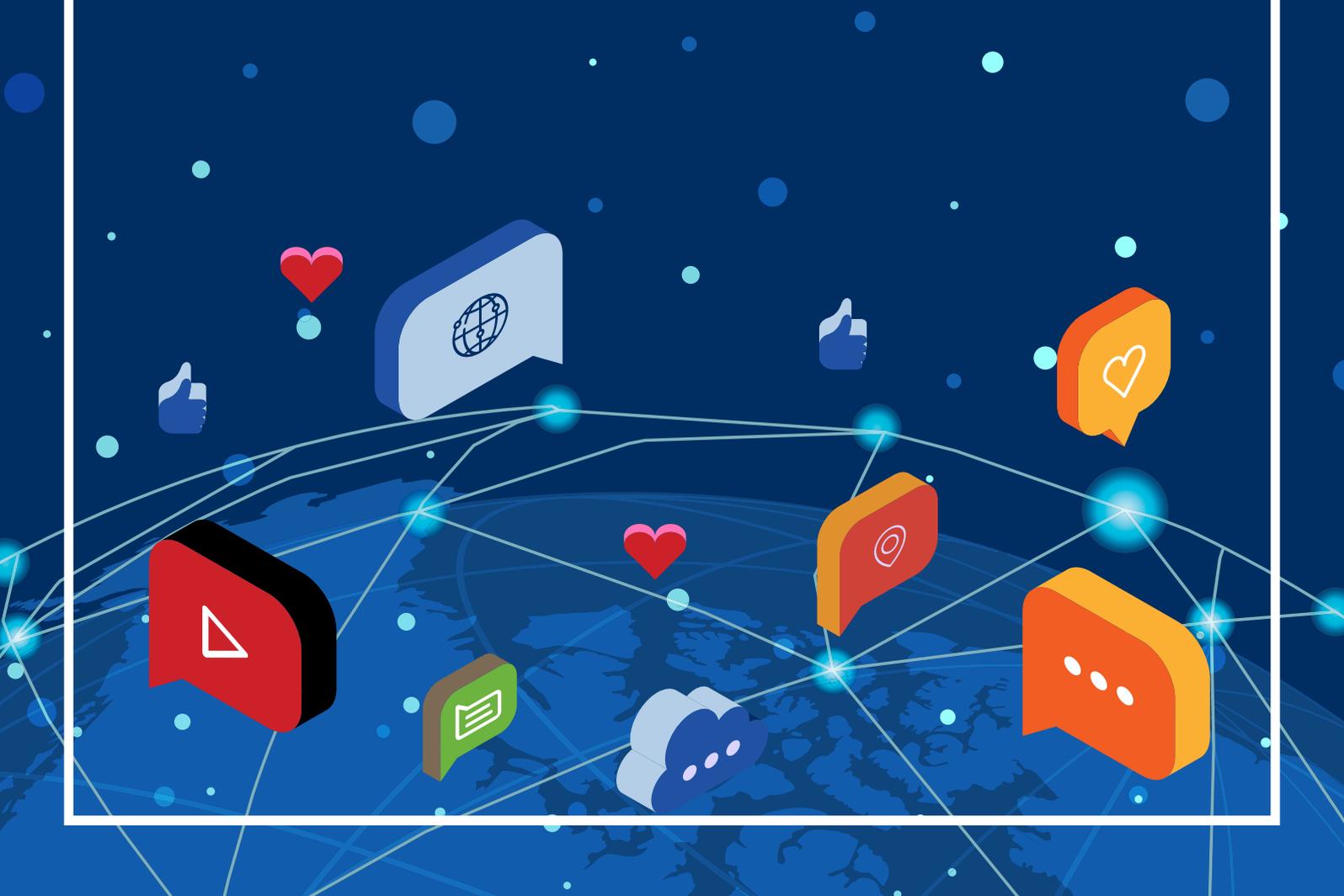


STATE OF THE INTERNET

IN KENYA 2019





Credits

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This research documents trends in digital rights in Kenya, legislation affecting digital rights, online human rights violations, legislation, court cases, the state of blogging in Kenya and emerging technologies. This report was produced as part of BAKE's iFreedoms Kenya program.

Researcher

Renee Kamau

State of the Internet in Kenya 2019 Report

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS:	7
INTRODUCTION:	8
STUDY METHODOLOGY:	9
EXECUTIVE SUMMARY:	10
COUNTRY CONTEXT:	13
KEY ICT SECTOR INDICATORS:	16
STATE OF DATA CONSUMPTION IN KENYA:	19
BLOGGING IN KENYA:	20
SOCIAL MEDIA USE:	22
ICT LEGISLATIVE & POLICY DEVELOPMENTS:	26
POLICIES:	26
LAWS, BILLS AND LEGISLATIVE PROPOSALS:	30
COURT CASES & JURISPRUDENTIAL DEVELOPMENTS:	36
DATA PROTECTION & THE RIGHT TO PRIVACY:	41
FREEDOM OF EXPRESSION & OPINION:	46
FREEDOM OF THE PRESS:	54
THE DIGITAL ECONOMY:	56
EMERGING TECHNOLOGIES:	61
CONCLUSION:	62
RECOMMENDATIONS:	63



LIST OF ABBREVIATIONS

BAKE	The Bloggers Association of Kenya
CA	The Communications Authority of Kenya
ICT	Information and Communications Technology
KFCB	The Kenya Film Classification Board
KNBS	The Kenya National Bureau of Statistics
LGBTQ	Lesbian, Gay, Bisexual and Transgender
NIIMS	National Integrated Identity Management System

INTRODUCTION

The purpose of this project was to research, analyze, and compile a report on digital rights, digital journalism, digital publishing and the digital economy in Kenya. The main research goals were to document:

- new policies, laws, and proposed laws;
- court cases that touch on digital rights including strategic litigation on laws that may affect digital rights; and
- digital rights abuses by state actors and other non-state actors;
- media rights, digital journalism and digital publishing; and the digital economy.

By taking stock of these developments – both positive and negative – this report enables the reader to gauge what progress and/or declines have been made in the area of digital rights and freedoms. It will act as a benchmark against which civil society, government, citizens and the ICT community at large can assess and reposition themselves within the ecosystem to effectively respond to changing contextual realities. Further, the study will act as a learning document to promote understanding of the legal, regulatory and socio-political operating environment as pertains to the digital arena.



STUDY METHODOLOGY

The study methodology was entirely by literature review and was qualitative in nature. This entailed a review and analysis of relevant literature, including news articles and blog posts. The study was therefore limited by the availability of data on the subjects covered herein.

In addition, developments in the legal/regulatory environmental framework were included. This was useful in chronicling the state of blogging, social media and the internet writ large during 2019. Commentary was added to provide context on the status of the online sphere during the period under review.

EXECUTIVE SUMMARY

The year 2019 saw further decline in internet freedoms globally. Digital authoritarianism continued to rise with more countries adopting tools and measures for censorship and surveillance of internet users within their borders. While nations deployed these technologies, the adverse influence of top social media and news platforms also increased: propaganda as well as mis- and dis- information continued to proliferate, and the issues of data collection, protection and privacy remained a major concern. More critical was the damaging effect that the unregulated platforms had on electoral processes specifically and democracy in general. These spaces, while key vehicles for open discourse and free speech, were also exploited, “converting them into instruments for political distortion and societal control”, according to Freedom House ¹.

Even with these events taking place on the global stage, 2019 was a relatively good year for the online space in Kenya. This can be attributed to the fact that there were markedly fewer arrests and constitutional challenges to laws which may demonstrate a deceleration in the momentum witnessed in previous years of the onslaught on internet rights and freedoms. There were but two arrests and detentions relating to content posted online. One such incidence was the arrest of Robert Alai for disclosure of information relating to terrorist activities contrary to Section 27 of the Prevention of Terrorism Act. There were also instances of censorship of local songs by the Kenya Film and Classification Board. KFCB banned the public performance (outside of clubs and bars) of two songs which were deemed “dirty and unsuitable for public consumption, especially children”.

However, we did see attempts to re-introduce retrogressive Bills that had been resisted and criticized in the past. These included the Kenya Information and Communication (Amendment) Bill also known as the social media Bill which sought to regulate the use of social platforms and messaging applications; as well as the ICT Practitioners Bill which attempted to introduce broad registration and licensing requirements. It would be manifestly impractical to require that every social media user or IT professional in the country be registered. It would result in a number of absurdities and a waste of resources. Furthermore, it functions as a (not so) veiled attempt at muzzling freedom of expression which necessarily includes the freedom to seek, receive or impart information or ideas.

The year saw key developments in the sphere of digital identification. First was the Huduma Namba Registration which took place between April and May 2019. Huduma Namba or NIIMS would allow the government to collect a range of biometric data of all Kenyan citizens and foreign nationals within the country’s borders. However, a court case was brought by human rights organizations and other interested parties, challenging the constitutionality of the exercise and seeking a halt to the operationalization of the NIIMS system. The court ² did suspend core aspects of the registration process, but not before over 39 million persons had been registered. In addition, Kenya conducted its 8th Kenya Population and Housing Census, and it was the first paperless, where mobile technology was used during mapping and enumeration.

¹See *Freedom of the Net, 2019 report* available at <https://freedomhouse.org/report/freedom-net/2019/crisis-social-media>

²*Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* available at <http://kenyalaw.org/caselaw/cases/view/189189/>



Great strides were made in the policy environment with the passing of key guiding documents such as the ICT Policy, the Digital Economy Blueprint, the National Broadband Strategy, and the ‘Blockchain and AI’ Taskforce Report. Such policies and frameworks are necessary where a country seeks to transform its overall digital economic outlook. They identify digital ecosystem enablers that are necessary to leapfrog and transform a country’s digital economy. A thriving digital marketplace can accelerate economic growth, reduce poverty and ensure all her citizens have the basic needs as well as offering new job opportunities and trade platforms ³.

The state of the digital or online space was positively influenced by the enactment of two critical laws, namely the Data Protection Act and the Copyright (Amendment) Act in November and September respectively. The former was enacted to give effect to Article 31(c) and (d) of the Constitution; to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors, and other purposes. The later amended the principal act to introduce new relevant provisions.

As expected, the total data/Internet subscriptions increased and at the end of the year, stood at 39.6 million, of which 22.0 million subscriptions were on broadband ⁴. This increase can be attributed to the availability of both reasonably priced smartphones and data plans by telecoms. Similarly, the figure of active mobile subscriptions (SIM Cards) in the country increased, and at the end of the year 2019 stood at 54.5 million according to the Communications Authority. On the other hand, the census data ⁵ from the Kenya National Bureau of Standards showed that the number of mobile users over 3 years stood at 20.6 million (at the time of the report’s release). This disparity in reported numbers of mobile subscribers begs for mainstreaming and regularization of the methodology used to make these calculations.

Social media use and adoption continued to rise: it was reported that there were over eight million social media users in the country. The most common platforms in use in Kenya in 2019 were WhatsApp, Facebook and YouTube. In addition, the number of blogs increased as well as more content creators came onto the scene. The year was punctuated by a number of fake news posts and news stories which were primarily spread through social media, especially WhatsApp, Facebook, and Twitter. The spotlight was also shone on the importance of child protection in the digital age when a viral video of a young boy caused concern about children’s internet safety and cyberbullying.

Other notable developments included the ‘Cybercrimes Act Case’. The Bloggers Association of Kenya (BAKE) (along with other interested parties) filed Constitutional Petition No. 206 of 2018 ⁶ challenging the constitutionality of the Computer Misuse and Cyber Crimes Act, 2018. The petitioners’ counsel argued that it violated, infringed and threatened fundamental freedoms protected in the Bill of Rights in the Constitution of Kenya. By way of update, the case had an unfortunate judgment outside of the reporting period: the suspension of 26 provisions lapsed when the case was dismissed in early 2020. An appeal has since been lodged by the Bloggers Association of Kenya and the other interested parties. Yet another was the ‘Huduma Namba Case’ judgment which halted the mandatory registration of persons into the NIIMS system for want of an adequate legal framework for data protection and privacy by the date of commencement. A third welcome development for the preservation of freedom of expression online was the declaration that section 84D of Kenya Information and Communication Act (KICA), which criminalized sharing vulgar information in electronic form, is unconstitutional ⁷ by the High Court sitting in Nairobi.

³Kenya Digital Economy Blueprint available at <https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf>

⁴<https://ca.go.ke/wp-content/uploads/2020/03/Sector-Statistics-Report-Q2-2019-2020-1.pdf>

⁵<https://www.knbs.or.ke/?wpdmpro=2019-kenya-population-and-housing-census-volume-i-population-by-county-and-sub-county>

⁶<http://kenyalaw.org/caselaw/cases/view/159286>

⁷<https://www.ifree.co.ke/2019/07/justice-wifrida-okwany-rules-that-section-84d-of-the-kica-act-is-unconstitutional/>

With regards to the digital economy, it was reported that 82.9% of the adult population has access to at least one financial product, according to the 2019 FinAccess Household Survey⁸. In addition, digital lending applications and services continued to boom, with approximately 49 digital lenders in Kenya in 2019. It is also worth noting the advent of Fuliza, a service which offers users an overdraft to MPESA users, by Safaricom in January 2019. The government also announced plans to tax digital market services by subjecting them to VAT. It also proposed a framework to tax over-the-top services. The government also made moves towards regulating two key industries – bus and taxi hailing apps, and online betting companies.

On the whole, the year saw less government interference than previous years, and it is hoped that decision-makers and sector players will continue to respect the rights of expression, opinion, the media, and privacy in the coming year(s).

⁸Document available at <https://fsdkenya.org/publication/finaccess2019/>



COUNTRY CONTEXT

The eighth decennial Kenya Population and Housing Census was conducted in 2019 by the Kenya National Bureau of Statistics⁹. KNBS revealed that the total enumerated population was 47,564,296, of which 23,548,056 were males, 24,014,716 were females and 1,524 were intersex. Females accounted for 50.5% of the total population. Further, it was reported to have grown to 47.6 Million in 2019 from 37.7 Million in 2009, while the intercensal growth rate has declined to 2.2% in 2019, from 2.9% in 2009. The average Household Size declined to 3.9 in 2019 from 4.2 in 2009.

According to the KNBS National Economic Survey¹⁰ for 2019, the real Gross Domestic Product (GDP) was estimated to have expanded by 5.4 per cent in 2019 compared to a growth of 6.3 per cent in 2018. The growth was spread across all sectors of the economy but was more pronounced in service-oriented sectors. The value of Information and Communication Technology sector expanded by 10.3 per cent from Ksh 387.2 billion in 2018 to Ksh 427.0 billion in 2019.

In July, the Betting Control and Licensing Board (BCLB) refused to renew operating permits for 19 gambling firms in a shake-up of the Sh200 billion industry, while the renewal of licenses for eight other betting firms as well as 13 casinos and six lotteries was deferred¹¹.

Outside of national statistics, other monumental events included the unfortunate Dusit D2 Al-Shabaab militant terrorist attack in which 20 people were killed¹²; the roll out of the new Competency Based Curriculum which is to replace the 8-4-4 system¹³; the introduction of new banknotes by the Central Bank of Kenya¹⁴; and the sporting event that made history when our Eliud Kipchoge broke the two-hour-marathon barrier (in 1:59:40)^{15,16}.

⁹Document available at <https://www.knbs.or.ke/?p=5621>

¹⁰Available at <https://s3-eu-west-1.amazonaws.com/s3.sourceafrica.net/documents/119905/KNBS-Economic-Survey-2020.pdf>

¹¹<https://www.businessdailyafrica.com/news/Job-cuts-loom-as-19-betting-firms/539546-5179532-m0sbo8z/index.html>

¹²<https://www.bbc.com/news/world-africa-46902564>

¹³<https://www.businessdailyafrica.com/datahub/What-2-6-3-3-3-new-curriculum-offers-learners/3815418-4939604-7qclt8z/index.html>

¹⁴<https://www.centralbank.go.ke/2019/06/01/launch-of-the-new-generation-banknotes/#:~:text=The%20Central%20Bank%20of%20Kenya,cease%20to%20be%20legal%20tender.>

¹⁵<https://www.nytimes.com/2019/10/12/sports/eliud-kipchoge-marathon-record.html>

¹⁶To celebrate this successful feat, Safaricom changed their M-Pesa logo for seven days to show their loyalty and support for World marathon record holder Eliud Kipchoge. The new logo featured five letters spelling Kipchoge's first name, "Eliud" and the numbers "1:59" to denote the challenge. See <https://kenyanwallstreet.com/safaricom-rebrands-mpesa-logo-in-celebration-of-eliud-kipchoge/>

GLOBAL & REGIONAL CONTEXT

Outside the country, other developments took place that were relevant to our own digital space. In April 2019, Google announced¹⁷ that it officially began the process of shutting down and deleting all consumer accounts on its Google+ social network platform. This shut down would be the end of the tech giant's bid to compete with Facebook and Twitter. The phase out of Google+ was reportedly due to "low usage" and its failure to meet the company's expectations for user growth and mainstream pickup¹⁸. Additionally, the social network was said to be turning into a security liability for Google - the company disclosed two significant data leaks that could have exposed information for tens of millions of Google+ users to outside developers¹⁹.

In 2019, Facebook owned WhatsApp made changes with the goal of maintaining the image of a 'private messaging app' rather than one infamous for the spreading of fake news. The changes included a restriction that when one forwards a message, they can choose to share it with up to five chats at one time. The company added that when a message is forwarded through a chain of five or more chats, meaning it's at least five forwards away from its original sender, the message is labeled with a double arrow icon . These messages can only be forwarded to one chat at a time, as a way to help keep conversations on WhatsApp intimate and personal. This also helps slow down the spread of rumors, viral messages, and fake news²⁰.

The moves made by Facebook are a welcome change as the country does indeed have a hate speech as well as mis- and dis-information problem, especially around the electioneering period. In the past, Facebook has been reluctant to self-regulate or moderate content posted on its own platform as well as that of its subsidiaries Instagram and WhatsApp. The platforms owned by the global tech giant have been used to spam users with 'forwarded as received' messages, spread propaganda and fake news about prominent individuals including influencers, entrepreneurs and politicians in Kenya.

¹⁴<https://www.centralbank.go.ke/2019/06/01/launch-of-the-new-generation-banknotes/#:~:text=The%20Central%20Bank%20of%20Kenya,cease%20to%20be%20legal%20tender.>

¹⁵<https://www.nytimes.com/2019/10/12/sports/eliud-kipchoge-marathon-record.html>

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¹⁷<https://support.google.com/googlecurrents/answer/9195133?hl=>

¹⁸<https://www.theverge.com/2019/4/2/18290637/google-plus-shutdown-consumer-personal-account-delete>

¹⁹<https://www.fastcompany.com/90299903/google-is-shutting-down-in-phases-before-its-gone-for-good-on-april-2>

²⁰<https://faq.whatsapp.com/general/coronavirus-product-changes/about-forwarding-limits/?lang=en>



One trend in internet control in Africa in 2019 included social media blockage and internet throttling. In particular, governments in the Democratic Republic of Congo²¹, Egypt²², Sudan²³, and Zimbabwe²⁴ shut down the internet in all or some parts of their countries to silent critics and protesters. Internet shutdowns are becoming a popular tactic in times of crisis, arguing they are necessary for public safety or curbing the spread of misinformation²⁵.

Another trend was the continued use of surveillance and spyware. Chinese tech giant Huawei was implicated in an August 15, 2019 exposé²⁶ by The Wall Street Journal. The dossier described how the company's technicians assisted the Uganda Police to hack into the encrypted communications of an opposition figure. The investigative piece also detailed how Huawei staff helped Zambian authorities to access the phones and social media pages of a group of opposition bloggers who were tracked and arrested²⁷. In addition, the Financial Times reported²⁸ that Rwanda paid up to USD 10 million to the NSO Group to spy on government critics and dissidents through WhatsApp. When denying the accusation Rwanda president Paul Kagame stated that they only spy on "our enemies" using "human intelligence". He added, "I wouldn't spend my money over a nobody [Rwandan exiles] yet we have sectors like education to spend such money"²⁹.

²¹<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24057&LangID=E>

²²<https://www.hrw.org/news/2019/09/27/egypt-hundreds-arrested-nationwide-crackdown>

²³<https://www.hrw.org/news/2019/06/12/sudan-end-network-shutdown-immediately>

²⁴<https://www.accessnow.org/zimbabwe-orders-a-three-day-country-wide-internet-shutdown/>

²⁵<https://www.hrw.org/news/2019/12/19/shutting-down-internet-shut-critics>

²⁶<https://www.wsj.com/articles/huawei-technicians-helped-african-governments-spy-on-political-opponents-11565793017?mod=e2tw>

²⁷<https://cipesa.org/2019/12/africa-in-the-crosshairs-of-new-disinformation-and-surveillance-schemes-that-undermine-democracy/>

²⁸<https://www.ft.com/content/d9127eae-f99d-11e9-98fd-4d6c20050229>

²⁹<https://cipesa.org/2019/12/africa-in-the-crosshairs-of-new-disinformation-and-surveillance-schemes-that-undermine-democracy/>

KEY ICT SECTOR INDICATORS

Mobile Subscriptions:

At the beginning of the year (January to March 2019), the number of active mobile subscriptions in the country stood at 51.0 million up from 49.5 million registered at the end of 2018 by the Communication Authority (CA). Subsequently, mobile penetration rose to 106.8 per cent at the end of the period. Mobile penetration level of above 100 per cent is attributed to multiple SIM ownership by consumers whose aim is to take advantage of the competing voice and/or data plans offered by the various service providers³⁰. As of 31st December 2019, the number of active mobile subscriptions (SIM Cards) in the country stood at 54.5 million translating to mobile (SIM) penetration of 114.8 percent. It is said that mobile (SIM) penetration in the country is high partly due to multiple SIM ownership by consumers. This indicator is different from that on mobile phone use penetration that is determined through national surveys³¹, according to the regulator.

Other studies present a similar picture with regards to the high use of mobile phones. The two main factors which have been attributed to this rise in mobile subscriptions are the affordability of smartphones and reasonably priced cell phone data plans. Jumia, a popular e-commerce platform in Kenya reported a continuous decrease in the average price of smartphones. In its Kenya Mobile Report of 2019³², it announced that average amount spent to purchase a smartphone on the platform in 2014 stood at 186 USD, which reduced to 97 USD in 2016 and 86 USD in 2018 respectively. “The rise of affordable entry-level devices from brands continues to remain a key driver of smartphone adoption”, the report³³ stated.

It should be remembered when consuming these statistics that CA’s own access gap study report³⁴ showed that there are close to 200 administrative locations without access to even 2G networks and others where 3G networks are only available to 50% of the population.³⁵ Certainly, this has been highlighted by the World Bank in its Kenya Economic Update³⁶ for 2019. The report which focused on “accelerating Kenya’s digital economy” recorded that Kenya faces a significant digital divide, with 44% of the urban population having access to the internet compared to 17% in rural areas. In its report the previous year³⁷, and in keeping with similar studies, it noted that glaring gaps in basic digital skills are an obstacle to wider usage and application of digital tools and services.

However, even while addressing the digital divide, one must be wary of the statistics as presented as many have questioned the methodology being employed to arrive at these numbers. The KNBS Census paints a different picture than what the CA quarterly reports tell us. The census results³⁸.

³⁰Available at <https://ca.go.ke/wp-content/uploads/2019/06/Sector-Statistics-Report-Q3-2018-19.pdf>

³¹Available at <https://ca.go.ke/wp-content/uploads/2020/03/Sector-Statistics-Report-Q2-2019-2020-1.pdf>

³²<https://www.jumia.co.ke/sp-mobile-report/>

³³<https://www.jumia.co.ke/sp-mobile-report/>

³⁴<https://ca.go.ke/industry/universal-access/ict-access-gap-study/>

³⁵https://www.kictanet.or.ke/kenya-much-more-is-required-to-achieve-digital-rights/?utm_source=rss&utm_medium=rss&utm_campaign=kenya-much-more-is-required-to-achieve-digital-rights

³⁶<https://www.worldbank.org/en/country/kenya/publication/kenya-economic-update-accelerating-kenyas-digital-economy>

³⁷<https://documents.worldbank.org/en/publication/documents-reports/documentdetail/968481572468094731/kenya-economic-update-securing-future-growth-policies-to-support-kenya-s-digital-transformation>

³⁸<https://www.knbs.or.ke/?wpdmpromo=2019-kenya-population-and-housing-census-volume-i-population-by-county-and-sub-county>



revealed that the number of mobile users over 3 years stood at 20.6 million when the report was released. Out of this, 10.4 million are women while 10.2 million are men. The data also showed that 22.6 per cent of individuals aged 3 years and above used the internet while 10.4 per cent used a computer. Another astounding statistic from the data released by KNBS was that mobile phone ownership is highest in rural areas (12 million) compared to urban areas (eight million) with Nairobi County leading in the number of mobile phone owners at four million³⁹.

In response to clamour by sector professionals, the CA released its Guiding Manual For The Collection Of Supply Side Data On Telecommunications/ICT 2019⁴⁰. In this Manual the regulator revised a number of indicators and their respective definitions with an intention of meeting regional and local data needs and for purposes of common understanding of ICT indicators.

For instance, the definition of mobile subscriptions in the guiding document now reads: “only active subscriptions should be included (those used at least once in the last three months for making or receiving a call or carrying out a non-voice activity such as sending or reading an SMS or accessing the Internet).” That of active mobile-broadband subscriptions now refers to “the sum of standard and dedicated mobile data subscriptions to the public Internet. It covers actual subscribers, not potential subscribers, even though the latter may have broadband enabled-handsets. It means the total number of SIM cards that have accessed the internet in the last three months regardless of data speeds”

Mobile Money Services:

Over the same time period, active mobile money transfer subscriptions and agents stood at 32.0 million and 223,084 respectively. A total of 784.4 million transactions were made valued at 2.122 trillion Kenya shillings.

During this time, consumers spent 1.84 trillion Kenya Shillings to purchase goods and services, which involved 571.5 million transactions. The person-to-person transfers were valued at 737.0 billion Kenya shillings⁴¹. By the end of the year, the number of active registered mobile money subscriptions stood at 28.9 million and the number of active mobile money agents stood at 205,328. M-Pesa recorded the highest market share of 98.8 percent, whereas T-Kash recorded the lowest market share of 0.07 percent⁴².

This rise in mobile money transactions bodes well not only for the unbanked but also has ripple effects on the socio-political economy of the country. Research⁴³ shows that increasing access to formal financial tools reduces poverty, stimulates investment, and creates growth, particularly in rural areas. More interestingly, this inclusion increases lower income populations’ ability to save securely thereby improving the resilience of the poor to income shocks and may eventually allow them to invest in business ventures.

³⁹<https://www.standardmedia.co.ke/business/article/2001361388/report-says-one-in-five-kenyans-has-internet-access>

⁴⁰<https://ca.go.ke/wp-content/uploads/2020/03/ICT-Indicators-Manual-2019-.pdf>

⁴¹Available at <https://ca.go.ke/wp-content/uploads/2019/06/Sector-Statistics-Report-Q3-2018-19.pdf>

⁴²Available at <https://ca.go.ke/wp-content/uploads/2020/03/Sector-Statistics-Report-Q2-2019-2020-1.pdf>

⁴³<https://www.mdpi.com/2071-1050/11/3/568/pdf>

Data and Broadband Services:

Smartphones are an important feature of the mobile Internet landscape around the world. Access to the Internet by Kenyans is mostly through mobile phones and especially smartphones which have become widely available and relatively affordable.

As at the end of the year under review, the total data/Internet subscriptions stood at 39.6 million, of which 22.0 million subscriptions were on broadband⁴⁴.

Below are the trends in mobile subscriptions and mobile penetration levels per the Communications Authority's Sector Statistics Report 2019⁴⁵.



Source: CA, Operators' Returns, * Mobile Pay Ltd data not available due to non-compliance by the operator

For the last three months of the year 2019, due to development and publishing of a guiding manual on the definitions and methodologies of collecting and reporting telecommunications/ICT indicators, as well as revision of the data collection template during the quarter under review, some mobile network operators revised data initially submitted especially that on mobile data subscriptions, which account for 99 percent of data/internet subscriptions. In this respect, the total data/internet subscriptions declined to stand at 39.6 million, of which 22.0 million subscriptions were on broadband⁴⁶.

⁴⁴ <https://ca.go.ke/wp-content/uploads/2020/03/Sector-Statistics-Report-Q2-2019-2020-1.pdf>

⁴⁵ <https://ca.go.ke/wp-content/uploads/2020/03/Sector-Statistics-Report-Q2-2019-2020-1.pdf>

⁴⁶ <https://ca.go.ke/wp-content/uploads/2020/03/Sector-Statistics-Report-Q2-2019-2020-1.pdf>



STATE OF DATA CONSUMPTION IN KENYA

Kenya's internet bandwidth consumption has expanded annually since The East Africa Marine System (TEAMS), the country's first undersea fibre-optic cable, went live in April 2009. Kenya now has four undersea fibre-optic cables and increased penetration of 4G and 3G mobile network connectivity across the country.

According to Nendo⁴⁷, in the year 2014, Kenya had a maximum capacity of 848 Gbps (billions of bits per second) and utilised 467 Gbps. By 2019, the maximum capacity had increased by 458% to 4,623 Gbps owing to increased investment in infrastructure. Usage grew by 109% to 977.04 Gbps which demonstrates that the available capacity is greater than the capacity utilised.

Kenyans continue to consume content, news and search for information using the internet. In 2018, Kenyans were estimated to have used over 269 million gigabytes of data across video, web browsing, music, communications, social networking, and other digital content. The growth in content creation and sharing (especially photos and videos) is excellent news for telecommunication companies as well as Kenyans who seek out local content, however, there is rising concern about the amount of time spent online from mobile phones and tablets, absorbing the sheer abundance of information at our fingertips. Deloitte's Global Mobile Consumer Survey for the country dubbed "The Kenyan Cut"⁴⁸ reported that over two-thirds of respondents confessed that they use their smartphone more than they would like to. Those surveyed also admitted to having trouble ensuring the daily amount of money spent on data bundles in their budget.

By 2022, as predicted by the Nendo publication⁴⁹, data consumption for Kenya is expected to cross 1 billion gigabytes per year. According to the same report, 2018 total internet market revenues for Kenya were estimated to be \$1.1 billion, expected to double to \$2 billion by 2022.

⁴⁶ <https://ca.go.ke/wp-content/uploads/2020/03/Sector-Statistics-Report-Q2-2019-2020-1.pdf>

⁴⁷ *The State of Mobile Data 2019 (context, consumption, control)* A Nendo Publication

⁴⁸ https://www2.deloitte.com/content/dam/Deloitte/ke/Documents/technology-media-telecommunications/Deloitte_GMCS_Report_The_Kenyan_Cut_August_2019.pdf

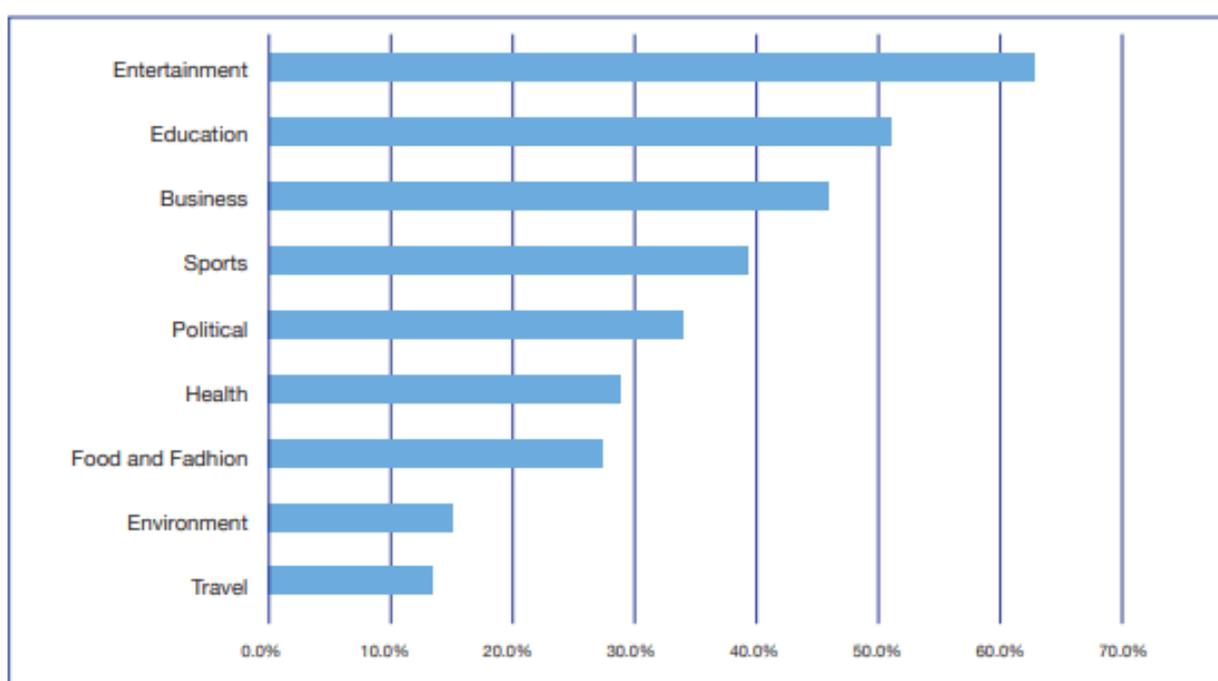
⁴⁹ *The State of Mobile Data 2019 (context, consumption, control)* A Nendo Publication

BLOGGING IN KENYA

It is impossible to ignore the increase in the popularity of blogs for consuming varied content, news and entertainment. Bloggers have found a lucrative means of earning an income online – it was reported⁵⁰ that as of 2019 the average monthly income of bloggers in Kenya is Ksh 30, 000.

However, there are individuals or companies which earn more or less based on traffic and monetization strategies. Their popularity continues to grow despite the changes in the Google Algorithm which, once updated, caused many sites that depended on AdSense to experience a reduction in their earnings⁵¹.

A survey⁵² on Kenya’s engagement with the blogosphere was conducted by United States International University (USIU)’s SIMELab between December 2018 and March 2019. The survey sampled 3,269 respondents aged between 14 and 55 from eight counties. The research revealed that a majority of Kenyans (nearly three-quarters) do read online blogs, the most popular being those whose content centered on entertainment and education.



The same research also showed that most men in Kenya read the sports online blogs, while most women read food and fashion online content.

Bloggers account for a large majority of local content produced in the country. More specifically, there were approximately 35,000 bloggers in 2019 according to BAKE.

The BAKE Awards, organized by the Bloggers Association of Kenya (BAKE) since 2012, has recognized and awarded the best in Kenyan blogging every year. The BAKE Awards 2019 winners⁵⁴ were announced at a gala event that was held at the Utalii Hotel on 22nd June 2019.

⁵⁰<https://www.fixusjobs.com/kenyan-bloggers-income-reports-2019/>

⁵¹<https://www.fixusjobs.com/kenyan-bloggers-income-reports-2019/>

⁵²https://www.usiu.ac.ke/assets/file/SIMELab_Social_Media_Consumption_in_Kenya_report.pdf

⁵³Source https://www.usiu.ac.ke/assets/file/SIMELab_Social_Media_Consumption_in_Kenya_report.pdf

⁵⁴<https://www.bakeawards.co.ke/2019/06/23/here-are-the-bake-awards-2019-winners/>

Women dominated the awards, winning in 15 out of 23 categories⁵⁵. Categories range from technology, sports and entertainment, to fashion, food and the environment, and everything in between. The competition has grown year on year and in 2019, over 15,000 blogs were entered into the competition and over 1 million votes were recorded⁵⁶.

⁵⁵<https://www.bakeawards.co.ke/2019/06/23/bake-awards-2019-total-vote-tally/>

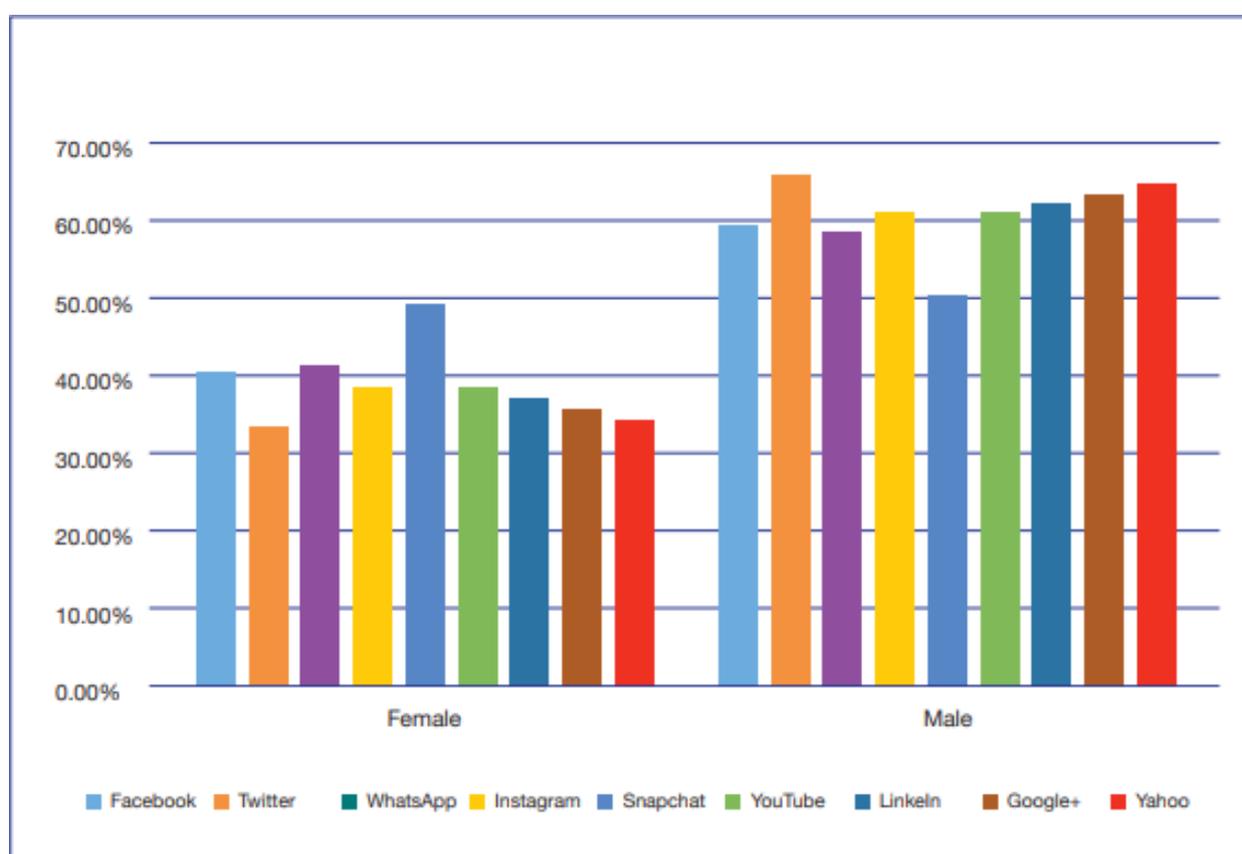
⁵⁶<https://www.bakeawards.co.ke/about/>



SOCIAL MEDIA USE

According to research⁵⁷ on social media use and consumption in Kenya, there were 8.80 million social media users in Kenya in January 2020. This represented an increase in the number of social media users by 1.0 million (+13%) between April 2019 and January 2020. Social media penetration in Kenya stood at 17% in January 2020. This could be attributed to the cost of mobile data plans as well as the high number of social media users being concentration in urban and peri-urban areas.

A survey was conducted in 2019 to ascertain how Kenyans use the top nine social media platforms. The study done by USIU⁵⁸ in Nairobi revealed that, the vast majority of Kenyans almost equally use WhatsApp (88.6%) and Facebook (88.5%). The third most used social media is YouTube (51.2%) followed by Google+ (41.3%). Both LinkedIn and Snapchat are the least popular in Kenya at 9.3% and 9.0% respectively. Further analysis showed that the most active age group on social media is 26-35 years, while the least active are those aged above 46 years⁵⁹.



60

⁵⁷Research by Datareportal Available at <https://datareportal.com/reports/digital-2020-kenya>

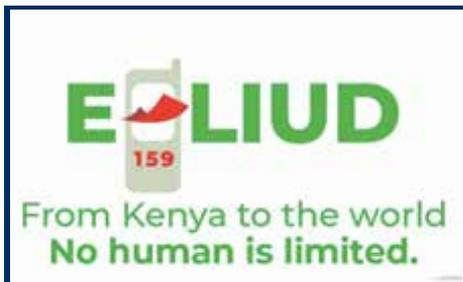
⁵⁸https://www.usiu.ac.ke/assets/file/SIMElab_Social_Media_Consumption_in_Kenya_report.pdf

⁵⁹Facebook is mostly used by 26-35 years (34.6%) and least used by 46 years and above (4.6%). Twitter is mostly used by those of 26-35 years (39.3%) and least used by 46 years and above (4.8%). When it comes to WhatsApp, it is also commonly used by Kenyans aged 26-35 years. Instagram is most used by 21-25 years at 38.7% and least used by those beyond 46 years (2.8%). Similarly, Snapchat is also mostly used by those aged 21-25 years (38.7%). YouTube is most used by 26-35 years (34.1%) and least used by 46 years and above. Source https://www.usiu.ac.ke/assets/file/SIMElab_Social_Media_Consumption_in_Kenya_report.pdf



TRENDING SOCIAL MEDIA CAMPAIGNS IN 2019

#KOT or Kenyans on Twitter is a veritable force for light entertainment, social, cultural and political commentary, rallying around causes, and for pushing for change. It is an interesting indicator of what discourse is taking place in the country and has been seen to be an agenda setting forum. Some of the most prominent Twitter hashtags and digital campaigns during the period were:



#ELIUD159:

Safaricom began a campaign hashtag in preparation for Eliud Kipchoge’s (successful) attempt to break the two hour marathon record. Twitter ⁶¹provided a custom emoji that appeared when one used the hashtag. #ELIUD159 along with the ELIUD emoji overtook the sponsor hashtag and trended in Kenya for three days reaching over 12 Billion impressions according to Twitter⁶².

Additionally, the campaign reached celebrities and global brands who joined in the conversation generated by the campaign. The Safaricom brand sentiment picked up and hit an all-time high of 85.5%. This may be partly attributed to the fact that the telco provided its subscribers with a free YouTube bundle from 8am to 4pm to enable them to stream the Vienna race live on their phones at no cost ⁶³.

#MyAlwaysExperience⁶⁴:

Kenyan women took to Twitter to express outrage over the Always brand of sanitary pads, which they alleged causes rashes, burns and discomfort.

Initially, Proctor and Gamble (P&G), the manufacturers of Always pads, denied that it distributes or sells sub-standard products in Kenya⁶⁵, and instead mounted a counter campaign #FeelTheComfortAlways using influencers⁶⁶. This failed to satisfy concerns, so P&G tried again as it realized demands for quality and accountability were increasing rather than fading.

It organized a meeting, ostensibly to listen to women’s complaints, after which it went silent again even after demands for updates by and on behalf of Kenyan women⁶⁷.



⁶¹Image source <https://kenyanwallstreet.com/safaricom-rebrands-mpesa-logo-in-celebration-of-eliud-kipchoge/>

⁶²https://marketing.twitter.com/emea/en_gb/success-stories/how-safaricom-used-twitter-to-unite-kenya-for-kipchoge-record-attempt

⁶³<https://citizentv.co.ke/business/how-to-get-free-safaricom-bundle-smss-for-kipchoge-ineos-challenge-285764/>

⁶⁴<https://twitter.com/hashtag/myalwaysexperience?lang=en>

⁶⁵On March 12th 2019 he brand tweeted from its official company Twitter account @Always_Kenya the following statement: “The Always Ultra pads we have in Kenya are similar to the Always pads in other parts of the world including Germany, UK, US, South Africa. All our pads including the ones in Kenya are designed and developed in Europe and the US. The needs of our women and girls in Kenya are our number 1 priority, and we recognize that our consumers have evolving needs which is why we introduced our new product Always Soft which has a softer and more comfortable feel on skin. All our products go through very rigorous regulatory tests and are also tested with real women to ensure that they are safe for use.”

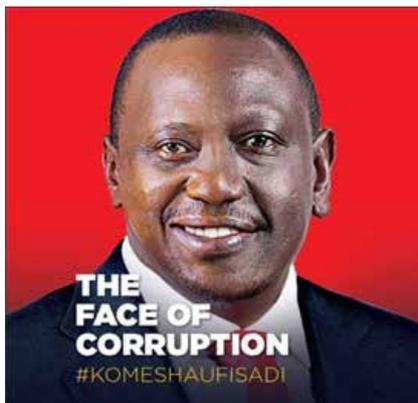
⁶⁶<https://hapakenya.com/2019/03/12/pg-responds-to-always-complaints-with-tone-deaf-influencer-campaign/>

⁶⁷<https://africanarguments.org/2020/03/31/must-always-pads-always-be-low-quality-for-kenyans/>

#SwitchOffKPLC⁶⁸:



This online protest was mounted in 2018 and continued through to 2019. Consumers deployed the hashtag to complain against the company's alleged extortion of its customers through irregular billing and the public through alleged skewed procurement practices among other corrupt practices.



#TheFaceOfCorruption⁶⁹:

Kenyans on Twitter, dissatisfied with the state of public finance management and angered by the wanton corruption, carried out a multi-faceted campaign in which they blamed the Head of State Uhuru Kenyatta and the Vice President William Ruto for condoning the vice.

The campaign included the hashtag (also accompanied by #BeyondZeroCorruption), banners which were hung prominently on highways in the capital city, and the left picture which was circulated extensively on WhatsApp and Facebook.⁷¹

#Repeal162⁷²:

This is the collective movement behind two petitions that sought to challenge sections of the Penal Code that outlaw 'carnal knowledge against the order of nature and indecent acts between males whether in public or private'. The petitions asked the court to declare Sections 162 (a) and (c) and 165 as unconstitutional due to their infringement of various constitutional rights as they discriminated against members of the LGBTQ community.

⁶⁸<https://twitter.com/hashtag/switchoffkplc?lang=en>

⁶⁹<https://twitter.com/hashtag/thefaceofcorruption?src=hash>

⁷⁰<https://twitter.com/Syombuak/status/1104280379601633280>

⁷¹Image source <https://twitter.com/WanjikuRevolt/status/1104810143764672513?s=20>

⁷²https://twitter.com/hashtag/Repeal162?src=hashtag_click

162 (a) and (c) and 165 as unconstitutional due to their infringement of various constitutional rights⁷³ as they discriminated against members of the LGBTQ community⁷⁴.

WHAT YOU NEED TO KNOW ABOUT REPEAL162

THE PETITIONS IS NOT ABOUT
 The petitions do NOT refer to rape or any form of non-consensual acts including sexual conduct with minors or sexual conduct in public. The petitioners hold the view that those should be punished as provided for in The Sexual Offences Act (2006).

The Petitions are NOT about legalizing gay marriage. Article 45 (2) of the Constitution recognizes marriage between a man and a woman.

THE PETITIONS IS ABOUT
 The Petitions seeks to promote constitutionalism, equality and the rule of law and to ask for the protection of human rights for all as enshrined in the Constitution of Kenya.

This case speaks to the right to privacy where adults should be able to engage in consensual sexual conduct in private without external intrusion; the right to dignity providing for humane treatment and personhood; the right to the highest attainable standards of health accorded to every citizen; the right to equality and non-discrimination; and freedom and security of the person.

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WHAT YOU NEED TO KNOW ABOUT REPEAL162

WHAT IS A PETITION?
 A petition is a request to an authority. A petition can be made to a government agency, parliament, or the judiciary.

PÉTITIONS 150 OF 2016 & 234 OF 2016
 In 2016, the National Gay and Lesbian Human Rights Commission (NGLHRC), the Gay and Lesbian Coalition of Kenya (GALCK), and the Nyanza, Rift Valley and Western Kenya Network (NYASWEE) together with partners filed petitions 150 & 234 of 2016 respectively, at the high court.

WHAT HAPPENS IF THE CASE IS WON?
 We look forward to a victory in the decriminalisation cases before the High Court as a major step for equality and non-discrimination for all in Kenya. Should the case be won, we will continue working to ensure full compliance with the court ruling and working with stakeholders to expand protections on grounds of sexual orientation, gender identity and expression (SOGIE).

WHAT HAPPENS IF THE CASE IS LOST?
 We strongly believe that the constitution promotes human rights and equality for all, regardless of a person's sexual orientation, gender identity or expression. We are actively involved in planning and preparing for all the outcomes of the case. If the case is lost, in collaboration with partners, we have security, advocacy, and communications systems in place to immediately address any cases of violence and discrimination against persons on grounds of sexual orientation and gender identity and/or expression.

LOVE WINS

75

⁷³Including, the right to privacy, the right to freedom of expression, the right to health, the right to human dignity and the right to freedom from non-discrimination.

⁷⁴On the 24th of May 2019, the High Court dismissed our petition. In their decision, the three judge bench -Lady Justice Roselyn Aburili, Justice Chacha Mwita and Justice J. Mativo-found that the petitioners failed to convince the court that the clauses were used to discriminate against the sexual and gender minorities. The bench insisted that the clauses did not, in fact, discriminate against sexual minorities or violate their constitutional rights to privacy and equality.

⁷⁵Image source <https://www.facebook.com/GALCK.org/photos/a.356437484700635/863023340708711/?type=3>

ICT LEGISLATIVE & POLICY DEVELOPMENTS

POLICIES

Four key policies were passed during the reporting period which may signal the government and ministries' commitment to ensuring there is a robust legislative and policy framework which will support the ICT sectors growth and expansion. Even so, the existence of numerous policy documents does not automatically equate to a comprehensive policy agenda – and may in fact be counterintuitive in the long run. It potentially creates an unnecessarily complex system which then affects the implementation and at times leads to complete or partial policy failure. For instance, most of these guiding instruments rely on strategies that straddle several thematic areas and build on other ICT related policies and laws. In the event that these edicts are not fully implemented, such as those related to access to information and data protection, the parent policies shall not be fully executed and actualized.

1. NATIONAL ICT POLICY

After 3 years, the Ministry of ICT finally confirmed the Cabinet's passing of the ICT Policy⁷⁶ which seeks to realize Kenya as a globally competitive knowledge-based economy. The journey began when the policy was first presented to ICT CS Joe Mucheru in 2016 and featured key inclusions such as the need to review the National ICT Sector Policy, as well as the review of the National Information and Communications Technology (ICT) Sector Policy Guidelines of 2006.

The policy objectives are listed as follows:

1. To create the infrastructure conditions that enable the use of always-on, high speed, wireless, internet across the country.
2. To facilitate the creation of infrastructure and frameworks that support the growth of data centres, pervasive instrumentation (Internet of Things), machine learning, and local manufacturing while fostering a secure, innovation ecosystem.
3. To grow the contribution of ICT to increase the overall size of the digital and traditional economy to 10% of GDP by 2030, by using ICT as a foundation for the creation of a more robust economy, providing secure income and livelihoods to the citizenry. To leverage regional and international cooperation and engagements to ensure that Kenya can harness global opportunities.
4. To position the country to take advantage of emerging trends such as the shared and gig economy, by enhancing our education institutions and the skills of our people and by fostering an innovation and start-up ecosystem that is able to lead in the adoption of emerging trends on a global scale.
5. To gain global recognition for innovation, efficiency, and quality in public service delivery. Government services will be delivered in a manner that ensures we have a prosperous, free, open and stable society.

In light of the policy objectives outlined, the policy focuses on 4 key areas: increased investment in mobile connectivity (mobile first); creating an enabling business environment for the digital market to thrive (market); ensuring online access to government services (public service delivery); and to develop skills and encourage innovation.

⁷⁶Available at <https://www.ict.go.ke/wp-content/uploads/2019/12/NATIONAL-ICT-POLICY-2019.pdf>

2. KENYA DIGITAL ECONOMY BLUEPRINT:

The Digital Economy Blueprint ⁷⁷ was developed to provide a conceptual framework adopted by Kenya in its quest towards the realization of a successful and sustainable digital economy. The Blueprint identifies the five pillars of the digital economy, that are described under the headings, Digital Government, Digital Business, Infrastructure, Innovation-Driven Entrepreneurship and Digital Skills and Values. The Blueprint also highlights the cross-cutting issues that need to be considered for the success of a digital economy. The document sets out the opportunities and challenges in maximizing the benefits on offer in such a way as to sustainably and effectively grow and competitively participate in the global digital economy.

Sector experts ⁷⁸ have rightly identified that this is not the first such policy document of this nature (see the ICT policy of 2006 and the national ICT Masterplan 2014-2017). The main variance is found in the proposal to establish a Digital Economy secretariat to monitor the targets identified within each of the five pillars and ensure that the goals are met ⁷⁹.

3. THE NATIONAL BROADBAND STRATEGY:

The vision of the Broadband Strategy ⁸⁰ is to transform Kenya into a knowledge-based society driven by a high capacity nationwide broadband network. The Strategy is critical to the achievement of Vision 2030 which recognizes the enabling role of ICTs and anchors some of its key aspirations upon the availability and adoption of broadband technologies. Kenya, therefore, needs a very clear roadmap towards the realization of a connected and knowledge-based economy that the strategy provides.

The Strategy focuses on five key thematic areas that have a direct impact on its implementation and success. These are:

- Infrastructure, Connectivity and Devices
- Content, Applications and Innovations
- Capacity Building and Awareness
- Policy, Legal and Regulatory Environment
- Financing and Investment.

The overall objective of this Strategy is to provide quality broadband services to all citizens. Quality broadband refers to connectivity that is always-on and that delivers a minimum of 5mbps to individuals, homes, and businesses for high-speed access to voice, data, video and applications for development. Access to broadband in Kenya for all citizens has the potential to generate enormous social and economic benefits.

⁷⁷Document available at <https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf>

⁷⁸<https://nation.africa/kenya/blogs-opinion/blogs/dot9/walubengo/digital-economy-blueprint-can-we-walk-the-talk--173930>

⁷⁹<https://nation.africa/kenya/blogs-opinion/blogs/dot9/walubengo/digital-economy-blueprint-can-we-walk-the-talk--173930>

⁸⁰Document available at http://icta.go.ke/pdf/The_National_Broadband_Strategy.pdf

4. BLOCKCHAIN TASKFORCE REPORT:

This report⁸¹ assesses how the emerging technological revolution could be leveraged to enhance and support various agenda items, ranging from improving health coverage by employing the Internet of Things (IoT) and Artificial Intelligence (AI) to improve food sustainability using Blockchain technology to eradicate counterfeit seeds. The report argues that of all the emerging technologies, none exhibits the potential to be as disruptive and transformative as distributed ledgers with a focus on Blockchain and AI technologies. The use of Blockchain and AI technologies could be transformative across several key sectors in Kenya, including healthcare, agriculture, education, and government services. The improved efficiency, transparency, and accountability of Blockchain can considerably benefit government services in which several emerging markets struggle with inefficient legacy infrastructures and an inability to provide citizens with fast, accountable, and transparent service delivery.

The report was compiled by the Distributed Ledgers Technology (DTL) and Artificial Intelligence (AI) Taskforce, which was led by Prof Bitange Ndemo and a team of 14. The team of experts came up with 12 recommendations on how Blockchain and AI can be utilised to fight corruption, counterfeits and cybercrime. It also details how the technologies can be tapped to curtail misdiagnosis of diseases, attain food security and strengthen democratic processes^{82, 83}. Further, the 123-page report covers policy and regulatory framework touching on Big Data, 5G and Internet of Things (IoT).

The recommendations were comprehensive and covered a sweeping array of multi-sectoral changes such as the elimination of corruption⁸⁴, minimization of the national debt through a digital asset framework, improvement of cybersecurity protocols and a call to reduce transaction costs. More specifically, the task force made other suggestions such as the introduction of a digital fiat currency and investing in the development of solutions like blockchain-powered land registries.

Among several other recommendations, the task team called for the government to⁸⁵:

- Draft a digital asset framework that will enable Kenyan citizens to raise funds through initial coin offerings (ICOs).
- Create a digital locker (complementing a digital ID) for every citizen to securely store official documents like credit reports and birth certificates⁸⁶.
- Use blockchain to track agricultural produce from end-to-end (from seeds to marketplace) and to use AI and analytics to detect fraud, trace unsafe products
- Distribute farming subsidies through a blockchain controlled agri-token
- Introduce blockchain technology to enable customers to trace the supply chain of medication
- Develop a health token incentive to reward citizens who maintain a healthy lifestyle.
- Use blockchain supply-chain networks to flag and report counterfeit goods.

⁸¹Document is available at <https://www.ict.go.ke/blockchain.pdf>

⁸²There have been suggestions made about using blockchain to reduce election anomalies by reducing voter fraud and manipulation of results through its secure, peer-to-peer, encrypted technology.

⁸³<https://www.businessdailyafrica.com/corporate/tech/Charting-the-way-forward-in-Kenya-s-Blockchain-adoption/4258474-5218320-uc538n/index.html>

⁸⁴Blockchain has been recommended as an anti-corruption tool due to its open public registries which can be monitored. Further, blockchain promises “tamper-proof records that corrupt clerks or bureaucrats cannot modify”. See <https://www.u4.no/publications/are-blockchain-technologies-efficient-in-combatting-corruption>

⁸⁵<https://ventureburn.com/2019/08/kenya-report-blockchain-ai/>

⁸⁶This would necessitate an amendment of the Huduma Act and a provision included to require all Huduma Namba data is captured on a government blockchain as proof of digital identity.



The launch of the report received widespread media attention and has been hailed as a progressive policy document. However, some experts are not entirely convinced. One digital rights expert Mugambi Laibuta is of the opinion ⁸⁷ that the document suffers from “fundamental, conceptual errors”, specifically surrounding the definitions of the key concepts in the report. He noted that it failed to distinguish between distributed ledgers and blockchain and seemingly uses the two terminologies interchangeably ⁸⁸. He added that the document did not recognize that the two are deployed in different sectors and for diverse purposes, from banking to digital identification. This is an ironic observation given that the report itself states that “Blockchain, as with any new and emerging technology, is little understood and has many definitions. Fundamental to any definition, however, is the concept of chain of transactions linked by cryptographical signatures that are unchangeable across networks and that are decentralized in terms of ownership and control”⁸⁹.

⁸⁷Feedback received on 8th October 2020 via phone interview.

⁸⁸Blockchains are one form of distributed ledger technology. Not all distributed ledgers employ a chain of blocks to provide a secure and valid distributed consensus. A blockchain is distributed across and managed by peer-to-peer networks. See <https://towardsdatascience.com/the-difference-between-blockchains-distributed-ledger-technology-42715a0fa92>

⁸⁹<https://www.ict.go.ke/blockchain.pdf>

LAWS, BILLS AND LEGISLATIVE PROPOSALS

5. DATA PROTECTION ACT

November 2019 marked a great milestone in the history of Kenyan legislation with the enactment of the much anticipated Data Protection Act, 2019 (the Act)⁹⁰. It was the culmination of months of work done by the multi-stakeholder taskforce⁹¹ for the development of the privacy and data protection policy and bill. The taskforce worked towards ensuring that the final documents represented a robust and progressive framework to discharge the growth potential of the national digital ecosystem while providing a high level of protection to citizen and consumers for their personal data⁹².

The purpose of the Act is to, inter alia, regulate the collection and processing of data in Kenya. The Act introduced comprehensive obligations to persons who collect and process data. Any infringement of said obligations would result in a fine of up to KES 5 million or in case of an undertaking, up to 1% of its annual turnover of the preceding year, whichever is lower.

Section 3 enshrines key principles for data protection and privacy. However, s. 3 (b) fails to incorporate all of the internationally recognized data protection principles within this section of the Act even if they are provided for elsewhere in the law, including fairness and transparency, storage limitation, and accountability⁹³. Section 25 is not complete and fails to outline all of the international recognized data protection principles. This section does not include principles provided elsewhere in the law, and this inconsistency is confusing. It fails to include integrity and confidentiality as well as accountability⁹⁴.

The Act establishes the office of the Data Protection Commissioner which is to be headed by a Data Commissioner. The role of the office of the Data Protection Commissioner includes overseeing the implementation of the Act, establishing and maintaining a register of data controllers and data processors, exercising oversight on data processing operations, receiving and investigating any complaint by any person on infringement of the rights under the Act⁹⁵. However, it should be noted that many stakeholders are of the opinion that the establishment of the office of the data commissioner as a body corporate does not grant this office with the necessary institutional and financial independence to execute its mandate effectively under the new law. In order to ensure the necessary independence and effectiveness of the Office, a Statutory Commission which would be preferable to a State Office⁹⁶.

On a positive note, the Act has extraterritorial application as it applies to data controllers and processors established or resident in or outside Kenya in so far as they process personal data while in Kenya or of data subjects located in Kenya⁹⁷.

⁹⁰http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2019/TheDataProtectionAct__No24of2019.pdf

⁹¹The Taskforce was established through Gazette Notice Number 4367 of 11th May 2018 available at http://kenyalaw.org/kenya_gazette/gazette/volume/MTcwNg--/Vol.CXX-No.56/

⁹²<https://ca.go.ke/wp-content/uploads/2018/10/GSMA.pdf>

⁹³Analysis of Kenya's Data Protection Act, 2019 by Privacy International, available at https://privacyinternational.org/sites/default/files/2020-02/Analysis%20of%20Kenya%20Data%20Protection%20Act%2C%202019_Jan2020.pdf

⁹⁴Analysis of Kenya's Data Protection Act, 2019 by Privacy International, available at https://privacyinternational.org/sites/default/files/2020-02/Analysis%20of%20Kenya%20Data%20Protection%20Act%2C%202019_Jan2020.pdf

⁹⁵<https://www.oraro.co.ke/2019/11/13/what-the-data-protection-act-2019-means-for-you/>

⁹⁶Analysis of Kenya's Data Protection Act, 2019 by Privacy International, available at https://privacyinternational.org/sites/default/files/2020-02/Analysis%20of%20Kenya%20Data%20Protection%20Act%2C%202019_Jan2020.pdf

⁹⁷<https://www.oraro.co.ke/2019/11/13/what-the-data-protection-act-2019-means-for-you/>



Section 24 of the Act allows data controllers and data processors to appoint a data protection officer (DPO) who may be a staff member whose role includes advising on compliance with the Act. A group of entities is allowed to appoint a single data protection officer provided that the officer is accessible by each entity. However, it should be noted that the law fails to define what constitutes “regular and systematic monitoring of data subjects on a large scale” as provided for in Section 24(1) (b). The Data Commissioner, once appointed, should clarify this term to ensure that data controllers and data processors know when they are obliged to designate a DPO. Further, his section fails to outline details on the mandate and functions for the DPO.

The impact of this Act is that persons who collect, control, manage and store data will need to review their terms and conditions and operations to avoid the penalties of non-compliance. It is expected that the finer, more practical details will be set out in the regulations after sector consultations and public participation processes.

6. THE COPYRIGHT (AMENDMENT) ACT, NO 20 OF 2019

In September, Kenya’s President signed the Copyright (Amendment) Act 2019⁹⁸. The Copyright (Amendment) Act 2019 amends Kenya’s Copyright Act of 2001 (the Principal Act) and is aimed at addressing inter alia, concerns about illegal content handling, the role of ISPs, as well as the collection and disbursement of royalties to authors and copyright owners.

One of the notable changes is the wider range of protected subject matter: for instance, under section 2 (k), the definition of “work” is expanded to include translations, adaptations, new versions, or arrangements of pre-existing works, and anthologies or collections of works (provided they are original by reason of the selection and arrangement of their content). Section 2 (m) defines “artwork” as an original work of visual art created by an artist or artists, or produced under their authority. Similarly with section 2 (g), “musical work” is stated to mean a work consisting of music, irrespective of musical quality, and includes a graphical notation of such work and works composed for musical accompaniment. This clarification is notable particularly with respect to the question of whether musical arrangements are protectable in the same manner as primary works⁹⁹. Additionally, it deletes the definition of “folklore” from the Main Act.

Another key change is that it clarifies the role of Internet Service Providers and introduces certain protections¹⁰⁰. The Act provides that “an Internet Service Provider shall not be liable for infringement for providing access to or transmitting content, routing or storage of content in the ordinary course of business. The import of this is that ISPs are granted safe harbour and are exempted from liability for copyright infringement provided in any way to promote the content or material being transmitted”. This raises the question of whether ISPs like YouTube that create automatic playlists may be considered as “promoting” the contents of such playlists¹⁰¹. Further, the Act includes a clause that would task ISPs to restrict or delete copyright-infringing content in a 48-hour window after reporting from a copyright holder. Failure to take down such material is an offense and punishable under the law (under subsection (c) (iii)). In any event, the amendment enables an aggrieved person to apply for an injunction with the High Court in Kenya against a person facilitating the infringement of copyright.

⁹⁸http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2019/TheDataProtectionAct__No24of2019.pdf

⁹⁹[http://ipkitten.blogspot.com/2019/10/kenya-amends-its-copyright-act-to.html#:~:text=The%20Copyright%20\(Amendment\)%20Act%202019%20amends%20Kenya's%20Copyright%20Act%20of,to%20authors%20and%20copyright%20owners.&text=The%20Amendment%20Act%20does%20not%20repeal%20the%20entirety%20of%20the%20Principal%20Act](http://ipkitten.blogspot.com/2019/10/kenya-amends-its-copyright-act-to.html#:~:text=The%20Copyright%20(Amendment)%20Act%202019%20amends%20Kenya's%20Copyright%20Act%20of,to%20authors%20and%20copyright%20owners.&text=The%20Amendment%20Act%20does%20not%20repeal%20the%20entirety%20of%20the%20Principal%20Act)

¹⁰⁰[http://ipkitten.blogspot.com/2019/10/kenya-amends-its-copyright-act-to.html#:~:text=The%20Copyright%20\(Amendment\)%20Act%202019%20amends%20Kenya's%20Copyright%20Act%20of,to%20authors%20and%20copyright%20owners.&text=The%20Amendment%20Act%20does%20not%20repeal%20the%20entirety%20of%20the%20Principal%20Act](http://ipkitten.blogspot.com/2019/10/kenya-amends-its-copyright-act-to.html#:~:text=The%20Copyright%20(Amendment)%20Act%202019%20amends%20Kenya's%20Copyright%20Act%20of,to%20authors%20and%20copyright%20owners.&text=The%20Amendment%20Act%20does%20not%20repeal%20the%20entirety%20of%20the%20Principal%20Act)

¹⁰¹ [http://ipkitten.blogspot.com/2019/10/kenya-amends-its-copyright-act-to.html#:~:text=The%20Copyright%20\(Amendment\)%20Act%202019%20amends%20Kenya's%20Copyright%20Act%20of,to%20authors%20and%20copyright%20owners.&text=The%20Amendment%20Act%20does%20not%20repeal%20the%20entirety%20of%20the%20Principal%20Act](http://ipkitten.blogspot.com/2019/10/kenya-amends-its-copyright-act-to.html#:~:text=The%20Copyright%20(Amendment)%20Act%202019%20amends%20Kenya's%20Copyright%20Act%20of,to%20authors%20and%20copyright%20owners.&text=The%20Amendment%20Act%20does%20not%20repeal%20the%20entirety%20of%20the%20Principal%20Act)

Section 10 of the Amendment Act provides for a register of copyright works by its author or owner; and charges the Copyright Board with the task of keeping and maintaining a register of all works, which acts as prima facie proof of copyright.

The Amendment Act additionally introduces an artist's resale royalty right (section 26D of the Main Act), which will apply for as long as the copyright remains effective or subsists in the work in question. It also prescribes the value of royalties payable, as well as the various circumstances in which the right falls away. For instance, it does not apply in situations where the work is sold for charity purposes¹⁰².

A noteworthy development following the amendment of the parent act was the suit brought by Multichoice Kenya against Safaricom and Jamii Telecom over copyright infringement¹⁰³. The digital satellite television provider moved the court to compel Safaricom and Jamii to block access to websites that offer pirated streams of sports matches from its SuperSport channels. It based this suit on Section 35B of the Copyright Act which obligates an Internet service provider to take down any infringing content within 48 hours of being served with a takedown notice. In fact, MultiChoice had sent a takedown notice to the two firms which they allege was ignored. It maintained that "the rebroadcasting, retransmitting or replicating the exclusive content of the applicant without their authorization is a breach of their rights, is unlawful and causes irreparable economic loss to the applicant, not to mention other losses and evils that piracy perpetrates."

7. ICT PRACTITIONERS BILL

The ICT Practitioners Legislative Proposal was reported ¹⁰⁴ to make a return in 2019. The Proposal made recommendations for: the establishment of the ICT practitioners institute, registration of ICT practitioners, licensing of ICT practitioners, enforcement of ICT policies, financial provision, as well as miscellaneous provisions" such as regulations and transition clauses.

Pundits and ICT professionals noted ¹⁰⁵that the definition of ICT practitioner was too broad and left the scope too vague to be reasonably implemented. The proposal defined practitioners as those who "employ technologies to collect, process, store or transfer information for a fee". Furthermore, it appeared to introduce onerous requirements which would have the effect of hindering the practice and trade of ICT. The Proposal provided for both Registration (under section 19) and Licensing (under 24), and it was feared that compliance with both steps would pose unnecessary barriers to practice of the profession.

Additional obstacles were discovered in the educational prerequisites for registration which were: "A person shall be eligible for registration under this Act as an ICT practitioner if the person is: a holder of at least bachelor's

¹⁰²https://www.adams.africa/intellectual-property/kenya-overview-of-the-copyright-amendment-act-20-of-2019/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration

¹⁰³<https://www.standardmedia.co.ke/business/article/2001350354/multichoice-sues-safaricom-jamii>

¹⁰⁴<https://techweez.com/2019/02/05/ict-practitioners-legislative-proposal-2018/>

¹⁰⁵<https://www.linkedin.com/feed/update/urn:li:activity:6498383527476756480/>



degree in ICT related field including computer science, information technology, telecoms, computer engineering from a recognized university; a holder of at least a bachelor's degree in electrical and electronics engineering, mathematics or physics and has at least 2 years post qualification experience in ICT field; holder of a diploma in ICT related in computer science, IT, telecoms of computer engineering with 5 years' experience in the ICT field; any other bachelor's degree with more than 5 years post qualification experience in ICT; and lastly, has demonstrated expertise, innovation or competence in ICT as may be determined by the Council.¹⁰⁶ These would prove too burdensome on IT practitioners and professionals.

Fortunately, no further developments were made with this Proposal and it was not tabled.

8. KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) BILLS

In 2019, two bills were circulated which proposed to amend the KICA on different issues.

8.1. The new amendments to KICA proposed by Hon. Elisha Odhiambo, MP, published on March 15th, 2019, sought to add a new section 34A on the compensation of telecommunications consumers for call drops; a new section 25A on splitting telecommunications businesses, and section 84J prescribing how the Universal Service Fund (USF) should be used.

Clause 25 A 1 (b) proposed to “legally split or separate the telecommunication business from such other business”. This proposal was ill-conceived and potentially redundant, considering that if a telecommunications company was to establish a separate company that is fully owned, controlled and managed by itself, that would defeat the purpose of splitting it. Furthermore, it may be construed as overreach where the government would then be able to prescribe how a company is run and would result in administrative bottlenecks, increase operational cost, and stifle innovation .

Clause 34 1 A sought to introduce a penalty in the event that a call gets cut out or dropped after connecting. The proposed provision stated that a licensee would be liable to credit a consumer who initiates a call that gets cut out after a connection by Kenya Shillings ten worth of airtime for each call drop within its network for a maximum of three call drops per day. As it stands currently, there is a subsidiary clause by the regulator where telecommunications companies are penalized a percentage of their profit for the poor quality of service. “The CA levies a fine equal to 0.1 percent of the gross annual revenue of a firm for failing to meet standards.” It is worth noting that the monies that are collected as penalties go directly to CA, and not the affected end-users. As such, members of the sector proposed in their memorandum submitted that this new provision be retained as the refund goes to the consumers, rather than the regulator .

Finally, with regard to the (USF), it was suggested that the section requiring “increased nationwide access to advanced telecommunications service” be amended to reflect proportionate allocation to underserved regions, and ensure that there is equitable distribution of resources across the country¹¹⁰ .

¹⁰⁶<https://techweez.com/2019/02/05/ict-practitioners-legislative-proposal-2018/>

¹⁰⁷<https://www.kictanet.or.ke/?mdocs-posts=kica-amendment-bill-2019-national-assembly-bill-number-20>

¹⁰⁸<https://ca.go.ke/authority-fines-telcos-over-ksh-300m-for-poor-quality-services/>

¹⁰⁹<https://www.kictanet.or.ke/?mdocs-posts=kica-amendment-bill-2019-national-assembly-bill-number-20>

¹¹⁰<https://www.kictanet.or.ke/?mdocs-posts=kica-amendment-bill-2019-national-assembly-bill-number-20>

8.2. The second Bill published on July 24, 2019 proposed to amend KICA Section 2, which was tantamount to the regulation of social media, including bloggers and WhatsApp administrators.

The Kenya Information and Communication (Amendment) Bill, 2019 was tabled in parliament on 2 October 2019 for its first reading. The Bill, which is a Private Member's Bill, aimed to amend the provisions of the Kenya Information and Communications Act (KICA) by introducing stringent regulations on the use of social media in Kenya.

The Bill was not well received by sector players and stakeholders as it was widely agreed that its very premise is unconstitutional. Seeking to regulate bloggers in the manner proposed in the Bill would amount to regulating the news, stifling free speech, and invading their privacy. As such it would infringe the constitutional provisions governing these rights, namely article 31, which guarantees the right to privacy, article 32 which guarantees the freedom of belief and opinion, article 33 that guarantees the freedom of expression, article 34 that gives the people freedom of the media, and lastly article 35 that guarantees citizens access to information. Also, the regulation of bloggers and social media, in general, creates a chilling effect on free speech and freedom of the media in the country¹¹¹.

With regard to the regulation of bloggers, the Bill proposed a mandatory requirement for bloggers to obtain licences from the Communications Authority of Kenya (CA). The definition of blogging given under the Bill is wide and ambiguous and appears to be similar to that of journalism under the Media Council Act, 2013. Under the Bill, blogging includes “collecting, writing, editing, and presenting of news or news articles” on social media platforms. This definition is wide enough to capture ordinary users of social media platforms such as YouTube, Facebook and Twitter. More importantly, it is not constitutionally sound to insist that for one to share news online they require to be registered first. Further, in any event, this definition leaves out an entire group of persons who run blogs that are informative, or opinion based, but not news or newsworthy by any definition¹¹².

Another example of a vague provision was that of Section 841C (2) which proposed “Where a social media platform is created for a group of persons, it shall be the responsibility of the group administrator to— (c) approve the content to be published in the platform; and (d) control undesirable content and discussion.” Not only is it unclear who would qualify as an administrator (and how that would be reasonably enforced in the event that there are more than one moderators of a group), the definition of “undesirable content and discussion” is not provided which leads to unchecked discretion in deciding what constitutes acceptable discourse and may lead down a slippery slope of threatening freedom of speech and expression.

Similarly, with the regulation of social media platforms, the Bill introduced the requirement for a social media licence to be obtained in respect of a social media platform that is accessible in Kenya by the social media platform operator in question. It is unclear whether this requirement is mandatory or discretionary as no penalty has been prescribed for failure to obtain the licence.

Social media platform operators whose platforms are available in Kenya will also be required to have a physical office in Kenya. The definition of a social media platform given in the Bill is very wide and captures any online medium that allows for social networking and media sharing. As such, this provision would be too ambiguous as to be reasonably enforced.

¹¹¹KICTANET Memorandum on the “Social Media Bill 2019”

¹¹²KICTANET Memorandum on the “Social Media Bill 2019”



Some of the provisions of the Bill may have adverse data privacy concerns. For example, a social media platform operator would be required to keep all data relating to users of its platform and submit this data to the CA on request¹¹³ . Many vehemently opposed the Bill, such as BAKE and KICTANet, referring to the proposed law as “unconstitutional” and warned that the amendments would have “devastating ramifications on the Sovereignty of the People, the Supremacy of the Constitution and democracy”¹¹⁴.

¹¹³<https://www.bowmanslaw.com/insights/intellectual-property/highlights-on-proposed-law-introducing-strict-regulation-of-social-media/>

¹¹⁴<https://www.blog.bake.co.ke/2019/11/14/bake-submits-memorandum-to-have-bloggers-and-social-media-registration-bill-shelved/>

COURT CASES & JURISPRUDENTIAL DEVELOPMENTS

CYBERCRIMES LAW PETITION

(Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties) [2019] Eklr)

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

There were welcome provisions which were hailed as progressive, including those criminalizing child pornography and cyber harassment. Even others whose intent could be said to curb revenge porn and distribution of photo images without the owner's consent, the use of vague terms in the Act such as 'obscene' and 'intimate' are too ambiguous to be reasonably legally enforced. Further, many digital rights advocates and organizations had raised worry over several other provisions therein that they feared met the threshold of unconstitutional – such provisions concerned the criminalization of fake news, and the normalization of government surveillance.

One such organization which decried these provisions was the Bloggers Association of Kenya (BAKE) (along with other interested parties) which filed the Constitutional Petition No. 206 of 2018¹¹⁵ challenging the constitutionality of the Act, stating that it violated, infringed and threatened fundamental freedoms protected in the Bill of Rights in the Constitution of Kenya ¹¹⁶.

It was the Association's contention that 26 sections of the law threaten the freedom of opinion, freedom of expression, freedom of the media, freedom and security of the person, right to privacy, right to property and the right to a fair hearing. The sections in contention are 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52 & 53¹¹⁷.

BAKE submitted that section 5 of the Act (composition of the National Computer and Cybercrimes Committee), as well as sections 16 (unauthorized interference), 17 (unauthorized interception), 22 (false publications), 23 (publication of false information), 24 (child pornography), 27 (cyber harassment), 28 (cybersquatting), 29 (identity theft and impersonation), 31 (interception of electronic messages or money transfers), 32 (willful misdirection of electronic message), 33 (cyber terrorism), 34 (inducement to deliver electronic message), 35 (intentionally withholding message delivered erroneously), 36 (unlawful destruction of electronic messages), 37 (wrongful distribution of obscene or intimate images), 38 (fraudulent use of electronic data), 39 (issuance of false e-instructions), 40 (reporting of cyber threat), 41 (employee responsibility to relinquish access codes), 48 (search and seizure of stored computer data), 49 (record of and access to seized data), 50 (production order),

¹¹⁵<http://kenyalaw.org/caselaw/cases/view/159286>

¹¹⁶https://cipesa.org/?wpfb_dl=319

¹¹⁷<https://www.blog.bake.co.ke/2018/05/29/justice-chacha-mwita-suspends-26-sections-of-the-computer-misuse-and-cybercrimes-act/>



51 (expedited preservation and partial disclosure of traffic data), 52 (real-time collection of traffic data), and 53 (interception of content data) were inconsistent with the Constitution as they threatened to infringe on the stated rights as outlined in Chapter 4 of the Constitution. The petitioners asked the court to determine whether the 26 sections of the provisions within the disputed law, which had been previously suspended pending hearing and determination of the petition, were indeed unconstitutional and denied, infringe and threaten freedom of expression, media, and persons besides the right to privacy, property and a fair hearing, as enshrined in the constitution of Kenya.

The legal team made the argument that some of the Act's provisions had led to the arrest of bloggers and content creators in the online space and in these instances "the government has presumed it owned the truth and any other opinion was false". Moreover, a section criminalizing fake news was unconstitutional and had the effect of muzzling opinions and quiet discordance to the government, as the legislators themselves were the biggest beneficiaries of fake news¹¹⁸. The case was slated to be heard in January 2020¹¹⁹.

Further, the petition challenged the procedure of enactment of the Bill, stating that it was not in accordance with the National Assembly's Standing Orders¹³ and went on to state that the requirement for public participation under Articles 10 and 118 of the Constitution was not satisfactorily met¹²⁰.

HUDUMA NAMBA COURT CASE

(Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR)

The Government initiated the National Integrated Identity Management System (NIIMS) program. The purpose of this initiative is to create and manage a central master population database which will be the 'single source of truth' on a person's identity. The database will contain information of all Kenyan citizens and foreign nationals residing in Kenya and will serve as a reference point for ease of service delivery.



¹¹⁸<https://www.ifree.co.ke/2019/10/the-ruling-on-the-bake-cybercrimes-to-be-delivered-on-january-30-2020/>

¹¹⁹The Hon. Justice Makau found that the Act is valid and does not violate, infringe or threaten fundamental rights and freedoms and is justified under Article 24 of the constitution. The Judge further ruled that the sections the subject of the petition are constitutional and do not violate, infringe and/or threaten fundamental rights and freedoms. He dismissed the petition on 20th February 2020. Ruling available here <http://kenyalaw.org/caselaw/cases/view/191276/>

¹²⁰See https://cipesa.org/?wpfb_dl=319

¹²¹However, the manner in which the exercise was carried out was decried by many. In fact, a court case was brought by human rights organizations and other interested parties, challenging the constitutionality of enabling laws and seeking a halt to the operationalization of the NIIMS system, pending determination of the case. Among others, one of the points of contention of the Petition¹²² was “no adequate and/ or proper safeguards for protection of the data and/ or personal information intended for collection under the NIIMS system, hence there is a violation and/ or threat of violation of the right to privacy guaranteed under Article 31 of the Constitution.”

The Nubian Rights Forum (the first petitioner) had multiple points it wanted the court to consider. One was that “the technical specifications and planned practical implementation of NIIMS was opaque, with inadequate and conflicting information provided to the public. Its position was that the process by which the NIIMS system has been established and the information revealed to date concerning its design, implementation and administration strongly suggests that the lessons from international experiences with digital identity systems have not been sufficiently reviewed and applied by the Respondents. The experiences and challenges of the Aadhaar system in India were cited as an illustration of the problems likely to be encountered with NIIMS.” A further grievance was related to “its linkage to the delivery of an undefined sphere of government services, including access to identification documents, universal healthcare, fertilizer subsidies, cash transfers, affordable housing and education..... members of the Nubian community have challenges acquiring identity documents under the existing system under section 8 of the Act.... therefore [...] it will aggravate the discriminatory practices against the Nubian community, as it will be linked to the provision of essential government services”¹²³ .

The High Court delivered its judgment in December, wherein it suspended core aspects of the NIIMS/ Huduma Namba, pending hearings and the resolution of legal suits filed against the program.

The ruling revises the design of NIIMS in key ways in significant ways as is indeed a step in the right direction. The ruling provides for the following:

- registration in the digital identity program should not be mandatory;
- access to government services should not be tied to registration status;
- there should be no deadline to the registration;
- DNA and GPS information should not be collected; and
- the Kenyan government should not share the data collected with third parties until the legal cases are determined¹²⁴

¹²¹Image source <https://techweez.com/2019/02/19/huduma-number-controversy/>

¹²²<http://kenyalaw.org/caselaw/cases/view/172447/>

¹²³<http://kenyalaw.org/caselaw/cases/view/189189/>

¹²⁴<https://www.omidyar.com/blog/reflections-niims-judgement>



CYPRIAN ANDAMA V DIRECTOR OF PUBLIC PROSECUTION & ANOTHER [2018] EKLK 125

The petition raised the questions as to whether Section 84D of the Kenya Information and Communications Act (KICA) violates the right and freedom of expression under Article 33 of the Constitution. Section 84D of KICA Act made the publishing of obscene information in electronic form an offence. The offensive section reads: Any person who publishes or transmits or causes to be published in electronic form, any material which is lascivious or appeals to the prurient interest and its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied therein, shall on conviction be liable to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years, or both.

In a historic win for freedom of expression, the High Court sitting in Nairobi declared that section 84D of Kenya Information and Communication Act (KICA), which criminalized sharing vulgar information in electronic form, is unconstitutional¹²⁶. The Judge found that “a provision such as Section 84D of KICA is too retrogressive to fit into the modern, open and democratic society envisaged under the current Constitution. The impugned section is too wide in scope, punitive in intent, and suppressive in effect to be tolerated by our transformative Constitution. It is clear [...] that the impugned section is inconsistent with Articles 33, 50 (2) (b) and 25 (c) of the Constitution, in so far as it suppresses freedom of expression and denies the accused the right to fair trial through vagueness and ambiguity”¹²⁷.

¹²⁵<http://kenyalaw.org/caselaw/cases/view/159278>

¹²⁶<https://www.ifree.co.ke/2019/07/justice-winfreda-okwany-rules-that-section-84d-of-the-kica-act-is-unconstitutional/>

¹²⁷<https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2019/11/Andama-v-DPP.pdf>

DIGITAL RIGHTS IN KENYA IN 2019

The most common rights and freedoms associated with the internet are the freedom of opinion, expression, assembly and association, the media, the right to information, data protection and privacy. Internet principles govern openness, access and affordability and even security, stability and resilience of the internet. One feature of human rights is that they are interrelated, interdependent and indivisible. Therefore, when they interact, and are subsequently translated to the internet, we extrapolate provisions such as freedom from surveillance, content controls and takedowns, censorship, shutdowns, blocking and/or filtering, and user information requests.

Rights and freedoms come with corresponding responsibilities and duties. One such responsibility is that the enjoyment of one's rights must not prejudice those of another; in which case States may enact laws which limit certain rights where it is reasonable and justifiable to do so, or in the public interest¹²⁸. The need to combat terrorism, hate speech and incitement to cause violence, alarming or obscene material and fake news have oft been cited as justifications for State limitations of digital access and content¹²⁹. There is currently an ongoing debate regarding how best to balance the public interest in countering false and harmful speech; while maintaining the free flow and access of potentially valuable speech.

¹²⁸*Cyprian Andama v Director of Public Prosecution & another; Article 19 East Africa (Interested Party) [2019] eKLR*

¹²⁹*State of the Internet in Kenya, 2018 Report by BAKE Available at <https://www.ifree.co.ke/wp-content/uploads/2018/02/State-of-the-Internet-in-Kenya-report-2017.pdf>*



DATA PROTECTION & THE RIGHT TO PRIVACY

The Constitution of Kenya 2010, under Article 31 recognizes the right to privacy and the country recently further guaranteed the same by enacting the Data Protection law (discussed above) which forms the foundational legal framework for enforcing the right to privacy and in particular protection of Personal Data. It also then introduces international standards as espoused by the UN Principles on Personal Data Protection and Privacy 2018, the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1976 the latter two of which Kenya has signed and ratified. In addition, Kenya is a party to other conventions that have recognized the right to freedom of expression, including The African Charter on Human and Peoples Rights (ACHPR) and African Union Convention on Cyber Security and Personal Data Protection (2014).

DIGITAL IDENTIFICATION:

National identity schemes can be defined as “government-initiated programs that assign a unique identification number to each targeted participant, which is used for identification verification”¹³⁰. When well-designed, digital ID not only enables civic and social empowerment, facilitates the government to provide adequate and efficient socioeconomic services to citizens, but also makes possible real and inclusive economic gains.

Huduma Namba Registration (April - May 2019)

The NIIMS allows the government to collect a huge range of biometric data of all Kenyan citizens and foreign nationals on an unprecedented scale, thus posing a huge risk to the right to privacy of citizens and foreign nationals living in the country and as well as Kenyan nationals around the world.

To facilitate this process, the government sought to harmonize and consolidate laws that govern registration of persons and other related aspects such as the Registration of Persons Act (Cap.107); Births and Deaths Registration Act (Cap 149); Kenya Citizenship and Immigration Act (No. 12 of 2011); Refugees Act (No. 13 of 2006); and Kenya Citizens and Foreign Nationals Management Service Act (No. 31 of 2011). After this review and streamlining exercise, the Ministry of Interior and Coordination of National Government developed a draft law that was referred to as the ‘Huduma Bill’¹³¹¹³². The ministry invited views and proposals for its consideration in July 2019 from concerned stakeholders and the general public¹³³. This may well have been an instance of putting the cart before the horse, as by May 2019, and before the Bill was made public, the exercise had already yielded 39 million registrations under the scheme¹³⁴.

The stated concerns included those regarding the data protection and privacy, penalties, the effect on marginalized communities who have been historically excluded from accessing services and identification documents.

¹³⁰Review of National Identity Programs (ITU-T, 2016)

¹³¹<https://www.ict.go.ke/wp-content/uploads/2019/07/12-07-2019-The-Huduma-Bill-2019-2.pdf>

¹³²Prior to the publication of the Huduma Bill, NIIMS itself had been established vide an omnibus bill - Statute Law (Miscellaneous Amendments) Act No. 18 of 2018 – which was plagued by numerous issues such as not being debated or passed by the Senate, failure to submit the same for public participation as well as the fact that its contents “obfuscated and combined many issues, making it extremely difficult for citizens to engage effectively with the process.” See more at <https://www.khrc.or.ke/publications/214-judgement-on-niims-huduma-namba/file.html>

¹³³<https://www.ifree.co.ke/wp-content/uploads/2019/07/Call-for-Public-Participation.docx>

¹³⁴<https://www.standardmedia.co.ke/kenya/article/2001326858/38-million-listed-says-mucheru>

Specifically, stakeholders demanded ¹³⁵ that the Bill (and the exercise as a whole) be put on hold until a strong, stand-alone data protection law was enacted and operationalized owing to the large volume and sensitivity of data that being collected. In addition, the Bill contained vague provisions leaving room for misinterpretation. For instance, the proposed law failed to give a definition of “authorized persons” when it comes to the disclosure of user data. Secondly, it was suggested that the rollout of NIIMS be conducted in such a way that ensured all persons were guaranteed access to services and did not interfere with citizens’ and residents’ access to fundamental rights and freedoms. Third, it was stated that the punitive penalties in Part 5 and the Second Schedule of the Bill be revised to ensure they are proportional to the gravity of the offence and the degree of responsibility of the offender, and also consider mitigating factors. Fourth, that the systemic/official discrimination meted members of marginalized groups and ethnic minorities such as Kenyan Somalis and Nubians be put to an end ¹³⁶.

Kenya’s Decennial Census (August 2019)

The 2019 Kenya Population and Housing Census was the 8th to be conducted in Kenya and the first paperless, where mobile technology was used during mapping and enumeration, in adherence to the UN recommendations for the 2020 round of censuses on the adoption of the use of technology ¹³⁷.

The 2019 Census was conducted under the provisions of the Constitution of Kenya, 2010 (Fourth Schedule Part 1 Item 11), the Statistics (Amendment) Act, 2019, and the Statistics (Census of Population) Order, 2018 – Legal Notice No. 205. The theme of the census was “Counting Our People for Sustainable Development and Devolution of Services”. This was in response to the demand for statistical information for implementation of Kenya’s development agenda such as the Big Four and Vision 2030 and other global initiatives including the Sustainable Development Goals (SDGs)¹³⁸.

The human rights underpinning of such an exercise is not to be underestimated: “When we are counted, we begin to count, and the fundamental contribution of human rights is that we all have the right to be counted. That’s the beginning of accountability” according to Nicolas Fasel, chief statistician at the Office of the High Commissioner for Human Rights¹³⁹. However, human rights groups and advocates raised concerns ¹⁴⁰ about the inclusion of questions in the census that would require citizens and residents to disclose personal identifiers such as ID, Passport Number as well as the location of their home. Global standards on censuses emphasize data protection, privacy and anonymity, and do not require one to give any information that could personally identify them. Kenyans deemed the requirement to provide ID and passport numbers as, at least unnecessary and at worst gross overreach. In response, the government spokesman stated that this was “to establish the number of those who have actually acquired these documents”. One pundit observed ¹⁴¹ that this explanation was “highly suspect given that it is the state itself that issues these documents and could easily check its own databases. More importantly, finding out how many people have been issued passports does not require that enumerators write down passport numbers.”

¹³⁵<https://twitter.com/AmnestyKenya/status/1156473322407911424?s=20>

¹³⁶<https://twitter.com/AmnestyKenya/status/1156473322407911424?s=20>

¹³⁷https://www.unece.org/fileadmin/DAM/stats/publications/2015/ECECES41_EN.pdf

¹³⁸<https://www.knbs.or.ke/?p=5621>

¹³⁹<https://www.ohchr.org/EN/NewsEvents/Pages/CensushumanrightsinclusionKenya.aspx>

¹⁴⁰<https://businesstoday.co.ke/why-the-2019-census-should-worry-you-over-privacy/#:~:text=According%20to%20Amnesty%20Kenya's%20Irungu,no%20law%20to%20safeguard%20data.&text=KNBS%20says%20that%20apart%20from,private%20sector%20at%20various%20levels>

¹⁴¹<https://www.aljazeera.com/opinions/2019/8/27/kenyas-census-and-government-mass-surveillance-agenda/>



In the absence of a comprehensive legal framework to safeguard this sensitive personal data at the time, save for draft Bills and the broad constitutional guarantee of the right to privacy under article 31, there were valid fears that there were insufficient protections for Kenyans' information. The provision states that "every person shall have the right of every person not to have - (c) ...information relating to their family or private affairs unnecessarily required or revealed" - (d) ...the privacy of their communications infringed."

Even The UN Fundamental Principles of Official Statistics ¹⁴² outlines the principles to be followed when carrying out such enumeration processes, one of which underscores the data minimization concept¹⁴³ : that personal data collected in the context of government obtaining official statistics be strictly confidential and used exclusively for statistical purposes¹⁴⁴ .

Amnesty International Kenya issued a guiding statement ¹⁴⁵ which indicated the civic responsibility one has to participate in the census process and outlined what one's rights were. In doing so they stated that enumerators may ask for Huduma Namba, National ID, and Passport registration status, and emphasized that it is not mandatory to disclose the same. "Should you answer these questions you will have given away your personal identity, and given the GPS location attached to your information, your location as well. The inclusion of individual indicators could ... be used to victimize marginalized groups For your data to be secure, the tablets must be free from interception, interference, or use for any purpose apart from establishing national data trends.

Without a comprehensive Data Protection Law, your personal data and location is not yet safe."

In addition to the amount and type of personal (and in some instances highly sensitive) information that was collected in respect of all persons, a further cause for alarm lay in the fact that a failure to disclose carried penal risk (imprisonment for up to one year or to a fine of up to Ksh 500,000, or both)¹⁴⁶ .

¹⁴²https://unstats.un.org/unsd/dnss/gp/Implementation_Guidelines_FINAL_without_edit.pdf

¹⁴³<https://www.forbes.com/sites/bernardmarr/2016/03/16/why-data-minimization-is-an-important-concept-in-the-age-of-big-data/#5b94903c1da4>

¹⁴⁴<https://www.roedl.com/insights/kenya-2019-national-census-inadequate-protection-personal-information>

¹⁴⁵<https://www.amnestykenya.org/ten-things-you-should-know-about-the-national-population-census-2019/>

¹⁴⁶<https://www.nation.co.ke/kenya/news/you-face-sh500-000-fine-for-false-census-answers-196882>

GOVERNMENT REQUESTS FOR USER DATA

The government demanded that social networking service company Facebook reveal private information about Kenyan users in 2019. According to the transparency report for the first half of 2019¹⁴⁷, there were 5 total requests were made with respect to 6 Facebook accounts: one pertaining to a legal process and 4 emergency requests, one of the emergency requests were honoured. As for the second half of the year ¹⁴⁸, 6 total requests for user data made by the Kenyan state regarding 19 accounts: 4 were related to a legal process and 2 were emergency requests (of which 1 was complied with for the latter).

The government did not make any information requests, removal requests for Kenyan Twitter ¹⁴⁹ users during the reporting period. Similarly, Google ¹⁵⁰ and Yahoo ¹⁵¹ did not report any requests for user information, or to take down content for its citizen users.

DATA PROTECTION, TRUST & USER CONTROL

Countries around the world must adapt and enforce robust data protection laws to ensure users' personal data are safeguarded at all times. Legislators should develop policy, legal and regulatory frameworks that put individuals and their rights at the fore. Data Protection laws are designed to keep consumers' information safe and offer individuals meaningful and actionable control over their personal data whenever they are asked to disclose it. These frameworks should also require that connected products and online services protect privacy and data protection of personal data by design and by default. Personal data is "any information relating to you, whether it relates to your private, professional, or public life"¹⁵².

Kenyans have had many complaints, especially those who use Safaricom, concerning fraud, spam messages from businesses, SIM swaps, unauthorized subscription, and the like. Due to the increase in complaints from Safaricom subscribers on matters of unsolicited messages and deceptive marketing activities, in May 2019, Safaricom introduced new regulations to govern the sending of promotional SMS or SMS marketing messages. The company stated that the guidelines are "intended to guide our operations within the legal and ethical requirements to protect Safaricom subscribers from unsolicited messages"¹⁵³.

In the digital sphere where we share great amounts of personal data which are in turn transferred extraterritorially instantaneously, it would be virtually impossible for one to maintain control of their personal information without implementing data protection measures i.e. those practices, safeguards, and binding rules put in place to protect your personal information and ensure that you remain in control of it. The world over, Kenya included, control entails deciding whether or not you want to share some information, who has access to it, for how long, for what reason, and be able to modify some of this information, and more¹⁵⁴.

¹⁴⁷<https://transparency.facebook.com/government-data-requests/country/KE/jan-jun-2019>

¹⁴⁸<https://transparency.facebook.com/government-data-requests/country/KE/jul-dec-2019>

¹⁴⁹<https://transparency.twitter.com/en/reports/information-requests.html>

¹⁵⁰https://transparencyreport.google.com/government-removals/overview?hl=en&request_country=period:Y2019H2;authority:KE&lu=request_country

¹⁵¹<https://www.verizonmedia.com/transparency/index.html?guccounter=1>

¹⁵²<https://www.accessnow.org/data-protection-matters-protect/>

¹⁵³<https://support.uwaziimobile.com/portal/en/kb/articles/promotional-messages>

¹⁵⁴<https://www.accessnow.org/data-protection-matters-protect/>

In the absence of these measures and controls, a breach may occur, and it could have a rather damaging impact.

This was the unfortunate case that occurred in 2019 when Safaricom was sued for alleged violation of the privacy of over 11.5M customers by exposing their biodata and betting history¹⁵⁵. The leaked dataset apparently contained specific identifying details of subscribers, including full names, their mobile phone numbers, gender, age, identity numbers, passport numbers as well as the total amounts gambled. The man at the centre of the suit, a Mr. Kabugi, averred that the data had the make and type of devices used by the subscribers as well as their location¹⁵⁶.

¹⁵⁵<https://www.standardmedia.co.ke/nairobi/article/2001331280/man-sues-safaricom-for-breach-of-rights-seeks-damages-worth-sh100m>

¹⁵⁶<https://kenyainsights.com/safaricom-breached-the-privacy-of-11-5m-customers-by-exposing-their-sports-betting-history-biodata-and-now-sued-for-sh115-trillion/>

FREEDOM OF EXPRESSION & OPINION

Every individual has the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. In Kenya, the Constitution, at Article 33 provides that every person has the right to freedom of expression, which includes—(a) freedom to seek, receive or impart information or ideas; (b) freedom of artistic creativity; and (c) academic freedom and freedom of scientific research. The Constitution also states that the right to freedom of expression does not extend to— propaganda for war; incitement to violence; hate speech; or advocacy of hatred that— constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination specified or contemplated in Article 27 (4). In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others. Article 32 (1) on the other hand states that every person has the right to freedom of conscience, religion, thought, belief and opinion.

Around the globe, we have witnessed the ways in which the internet and social media have aided – at other times, abated – the exercise of civil and political liberties. From animating rights and amplifying marginalized experiences on one extreme; to the proliferation of ‘alternative facts’ and inflammatory speech on the other; and everything in between. It has impacted how individuals and groups participate in governance by enabling them (as members of digital publics) to interrogate processes and practices, speak truth to power, and call for action in public fora. All this with remarkable results.¹⁵⁷ Digital activism and advocacy has been incredibly successful and had the effect of drawing attention to, garnering support for, and generating discourse around issues, and even prompting a response from decision makers due to public outcry on social media. In response governments (Kenya’s included) have sought to police and regulate online conduct by weaponizing the law. It has also led to the rise of digital authoritarianism. Repressive regimes, elected incumbents with authoritarian ambitions, and unscrupulous partisan operatives have exploited the unregulated spaces of social media platforms, converting them into instruments for political distortion and societal control¹⁵⁸.

On the face of it, it appears that the reduction in arrests and detentions of vocal government critics points to more tolerance or enjoyment of free speech, and where legal reforms are adopted, they are apparently done to curb hate speech, terrorism and violent extremism, misinformation and cybercrime. However, some developments demonstrate that this right to online freedom of expression and opinion is far from unfettered by the authorities. Indeed, when one examines the incidents where these laws have been invoked in the recent past, one notices a pattern of enforcement against activists, bloggers and others who engage in digital publishing and have large followings; and is reminiscent of previous laws which outlawed critique of prominent personalities and politicians. This may well suggest that often the state’s chief interest lies much closer to criminalizing dissent or criticism - thus stifling legitimate expression - than fighting terrorism, or misinformation and hate speech¹⁵⁹.

¹⁵⁷Digital Audit of the Democracy, Rights and Governance Civil Society Sector in Kenya: An analysis of the digital civic space – CRECO, 2019 available at <http://crecokenya.org/new/index.php/resource-center/research-reports/237-digital-audit-of-the-democracy-rights-and-governance-civil-society-sector-in-kenya>

¹⁵⁸Freedom of the Net, 109 – Freedom House available at https://freedomhouse.org/sites/default/files/2019-11/11042019_Report_FH_FOTN_2019_final_Public_Download.pdf

¹⁵⁹Digital Audit of the Democracy, Rights and Governance Civil Society Sector in Kenya: An analysis of the digital civic space – CRECO, 2019 available at <http://crecokenya.org/new/index.php/resource-center/research-reports/237-digital-audit-of-the-democracy-rights-and-governance-civil-society-sector-in-kenya>

Fake news, misinformation and disinformation

United Nations Human Rights Council Special Rapporteur David Kaye once stated that “all too many leaders see journalism as the enemy, reporters as rogue actors, tweeps as terrorists, and bloggers as blasphemers.¹⁶⁰” Even so, fake news and sophisticated mis/disinformation masquerading as news is a genuine problem in the country.



In Kenya, the infamous WhatsApp ‘forwarded as received’ is a popular phrase that raises one’s suspicions that the information may be less than accurate. Apart from that, “the use of edited photos, videos or audio to either discredit the individual or the company; get monetary or political gains; for satire/parody or direct traffic to one’s website or blog”¹⁶¹ is also very common. It is published with the intent to mislead...often with sensationalist, exaggerated or patently false headlines that grab attention”¹⁶².

¹⁶³ In 2019, one such blog post was that by Afrikan-Daily.com, a website known for publishing fake news, in which it claimed that President Uhuru Kenyatta had been admitted to Nairobi Hospital for an eye ailment. The site alleged that on 2 January 2019 President Kenyatta’s hospitalization had been “revealed by statehouse operatives today at 9.01 am”. It said he was “with immediate family members who included his wife and mother”, citing “a statement by the Statehouse Spokesman”¹⁶⁴.

Another example included the scandal surrounding the Kibra by-election party list. On August 26th, the IEBC had confirmed its receipt of a letter from the Jubilee party with names of nominees for the parliamentary seat. However, Party Secretary General Rafael Tuju swiftly disowned the letter through the party’s official Twitter handle claiming that the letter was a fake document¹⁶⁵.

A rather amusing example of such sensationalist ‘news’ was the ‘Jesus hoax’¹⁶⁶. Evangelist and actor Michael Job was first seen walking and dancing in Kiserian in July. Thereafter his photos immediately started trending on Twitter, with Kenyans saying they have spotted ‘Jesus Christ’¹⁶⁷.

Child protection in the age of social media

A furore raged around a viral video on Instagram of a young boy from Consolata School who filmed himself hurling obscenities at his classmate who had allegedly spread rumours that he is gay¹⁶⁸. The unfortunate uploaded video ends with the schoolboy making a menacing warning about burning his classmate’s schoolbooks and threatening her life.

¹⁶⁰<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21557&LangID=E>

¹⁶¹<https://citizentv.co.ke/lifestyle/theres-nothing-like-fake-news-its-propaganda-gender-forum-told-248113/>

¹⁶²<http://amwik.org/misinformation-catalyst-to-silence-womens-voices/>

¹⁶³<https://africacheck.org/fbcheck/hoax-alert-kenyas-president-kenyatta-not-in-hospital-as-fake-news-site-claims/>

¹⁶⁴<https://africacheck.org/fbcheck/hoax-alert-kenyas-president-kenyatta-not-in-hospital-as-fake-news-site-claims/>

¹⁶⁵<https://www.the-star.co.ke/news/2019-08-27-iebc-confirms-receiving-jubilee-aspirants-list-for-kibra-by-election/>

¹⁶⁶https://www.youtube.com/watch?v=qjVgNVf_kKY

<https://allafrica.com/stories/201908010023.html>

https://www.youtube.com/watch?v=spBV_YSVijk

The video uploaded by the upset boy trended on social media for days prompting the Kenya Film and Classification (KFCB) CEO Ezekiel Mutua to speak on the matter. Mutua wondered why Kenyans expressed shock at the student's vile rant yet politicians, preachers and media houses use vulgar language¹⁶⁹.

The boy's video raised worry about child welfare and drew sharp attention to the much-needed discourse surrounding youth and children and their use of social media as well as cyber-bullying and parenting in the internet age¹⁷⁰.

Shortly after the incident detectives from the Directorate Criminal Investigation (DCI) Children's Department held a closed-door meeting with the management of Consolata School in Westlands, Nairobi. The boy later published another video apologizing to the public¹⁷¹.



Various initiatives have been created to ensure the protection of children and young person's online, as they are a vulnerable demographic of ICT and internet users. This includes the Communications Authority's Child Online Protection Guide 2019 (pictured) which covers offences such as identity theft, cyberbullying, child pornography, solicitation of minors¹⁷³.

It also contains information on how to prevent addiction, safely meet friends on and offline and accept invitations. This booklet complemented the Authority's other child online protection initiatives which seek to "increase awareness on the vulnerabilities of children in the cyber space as well as equipping parents, guardians and teachers with skills to enable them protect children from harmful effects of the Internet"¹⁷⁵.

Government's veiled attacks on online freedoms¹⁷⁶

The intolerance towards citizen dissent was made glaringly evident in January 2019.

"Bwana CJ.... I found it very interesting.... [that] you were very angry today, especially with one group in our society called bloggers. And I remember there was a time [...] we wanted to pass a law to stop these people from insulting all of us left, right and centre but then [...] it was taken to court and the court decided it was unconstitutional. So just like the rest of us, get used to it.... just move on" – President Uhuru Kenyatta speaking at the Anti-Graft Summit 2019¹⁷⁷

¹⁶⁹<https://www.standardmedia.co.ke/entertainment/local-news/2001342382/ezekiel-mutua-responds-to-viral-video-of-primary-school-student-s-vile-rant>

¹⁷⁰<https://www.pd.co.ke/news/national/cyberbullying-at-consolata-school-under-dci-probe-5571/>

¹⁷¹<https://businesstoday.co.ke/dci-detectives-at-consolata-school-after-student-post-threatening-video/>

¹⁷²<https://ca.go.ke/wp-content/uploads/2019/06/COP-Booklet.pdf>

¹⁷³Image source <https://ca.go.ke/wp-content/uploads/2019/06/COP-Booklet.pdf>

¹⁷⁴<https://ca.go.ke/wp-content/uploads/2018/02/Children-And-The-Use-Of-Internet.pdf>

¹⁷⁵<https://ca.go.ke/authority-supports-new-child-online-safety-initiative/>

¹⁷⁶Digital Audit of the Democracy, Rights and Governance Civil Society Sector in Kenya: An analysis of the digital civic space – CRECO, 2019 available at <http://crecokenya.org/new/index.php/resource-center/research-reports/237-digital-audit-of-the-democracy-rights-and-governance-civil-society-sector-in-kenya>

¹⁷⁷President Kenyatta's full speech at the Anti-Graft Summit (KTN News) available at https://www.youtube.com/watch?v=_fEBUw5Qweo&t=599s

This was in response to David Maraga J's comments¹⁷⁸ at the same event, where the Chief Justice stated "The war against corruption is not going to be won by people who are involved here, and some are here, hiring professional bloggers to demonize anybody, or to demonize the Judiciary.... I am now almost being sidetracked.... like today.... you must have seen in the media: I am shown there naked, massaging people who are supposed to be corrupt. We are not going to win the war against corruption by those kinds of gimmicks." – David Maraga, Chief Justice speaking at the Anti-Graft Summit 2019.

The CJ was referencing a satirical cartoon that went viral on Twitter and other platforms under the hashtag #JudiciaryMassageParlour¹⁷⁹. The images featured caricatures of himself and other judicial officers in compromising positions, which could be interpreted to mean that members of the Judiciary choose to 'massage' graft suspects instead of enforcing the law.

These public statements reveal a lot about the government's perception of criticism aimed in its direction. Firstly, President Kenyatta's jocular rejoinder indicated that one of the dominant motivations for certain laws (such as the Computer Misuse and Cybercrimes Act (2018) which contained retrogressive provisions) are indeed meant to shield the government against "insults.... left, right and centre".

Second, CJ Maraga's remarks could be construed as an express acknowledgment of the existence of hired bloggers and propagandists who leverage digital platforms for political aims, thereby giving credence to the suspicions that had long been held¹⁸⁰. Government bots have been a feature of the online space since the self-proclaimed 'digital Jubilee government' took office in 2013. These accounts are linked to the current government are said to be operated by the '527 militia' or the 36 bloggers'. By making use of actual people to post government sponsored campaigns (and counter-campaigns), as opposed to bot and automated postings, these accounts, often with large followings are able to circumvent traditional monitoring mechanisms which are installed to detect inauthentic social media behavior.

And lastly, both spoke to an intent to cast the 'anti-dissent' net wide enough to capture a diverse range of targets up to and including bloggers, vloggers, podcasters, photo/videographers, cartoonists and artists who publish using digital media; social and political commentators; and even regular social media and smart messaging users who speak against government¹⁸¹.

Other developments indicate that activists' digital campaigns are targeted in other ways. For instance, vocal activist and social entrepreneur Edwin Kiama (@WanjikuRevolution) in 2019 discovered that his active use of Facebook and Twitter accounts were limited following the suspension of Twitter and removal of content by Facebook during the same period. Kiama considered the suspension as a result of DCMA violation reports unfair and malicious by faceless individuals. "The surrogate individuals are using surrogate Gmail accounts most probably by the same individual" he noted¹⁸². He further explained that the two individuals Dennis Mwita and Donald Mbuta who claim to be photographers or videographers and who filed the DCMA takedown notices against his tweets do not actually exist. A check online does not bring up any record of them in Kenya in the addresses they provide or any digital footprint online¹⁸³.

¹⁷⁸David Maraga's speech at the Anti-Graft Summit (KTN News) available at <https://youtu.be/mFN17joPdMY>

¹⁷⁹<https://twitter.com/hashtag/judiciarymassageparlour?lang=en>

¹⁸⁰The Jubilee government is said to have recruited 36 bloggers and social media bots to drive government propaganda and influence conversations online. (State of the Internet in Africa: Mapping Trends in Government Internet Controls 1999-2009 – CIPESA available at https://cipesa.org/?wpfb_dl=307

¹⁸¹Digital Audit of the Democracy, Rights and Governance Civil Society Sector in Kenya: An analysis of the digital civic space – CRECO, 2019 available at <http://crecokenya.org/new/index.php/resource-center/research-reports/237-digital-audit-of-the-democracy-rights-and-governance-civil-society-sector-in-kenya>

¹⁸²<http://www.shitemi.com/freedom-of-expression/online-activist-wanjiku-revolt-struggles-keep-facebook-twitter-accounts-alive/>

¹⁸³<http://www.shitemi.com/freedom-of-expression/online-activist-wanjiku-revolt-struggles-keep-facebook-twitter-accounts-alive/>

Beyond individuals, organizations suffer too. Maskani Conversations (under Inuka Kenya) has noticed that “over the past one year, the majority of suspicious activities on our accounts include attempted logins and shadow blocking. For a number of months, our key online platforms had been hit by shadow blocking where they are invisible on followers’ timelines and unavailable in trends and hashtags. We raised this issue with Twitter twice and the problem seemed to have gone away after the third report. This raises the risk of platforms censoring voices without giving reasons for the said actions.”¹⁸⁴

Many more activists and human rights organizations continue to report shadowblocking or hacking attempts as a result of their political work.

Mass surveillance

In 2019, the Kenyan government prepared a draft National CCTV Policy¹⁸⁵ that would require public institutions and owners of private businesses to install CCTV equipment. In its preamble, the policy provided as its rationale that the country has been faced with grave security threats over the years. Due to terrorist attacks as well as violent robberies, there has been a steady rise in CCTV installations, and that this took place in an ‘ad hoc’ and ‘disjointed’ manner – hence the need for a standardized, uniform approach to the development that is installation of the tools.

The stated objective of the proposed policy is to “guide installation, operation and management of all CCTV systems in public and private premises while promoting their use as a mechanism to deter, detect and prevent crime for a safe and secure nation”¹⁸⁶. Crime prevention is commonly used as a justification for mass surveillance protocols and Kenyans have become accustomed to complying with them: from signing in one’s details when entering a building, to being captured on closed circuit systems.

National security is another oft invoked reason for installing surveillance software or technology. For instance, Kenya installed facial recognition systems at one of its international airports. According to the International Organization for Immigration in Kenya (IOM), it “officially handed over [a] facial recognition system at Moi International Airport, Mombasa to the Government of Kenya through the Department of Immigration Services (DIS). The system was installed with support from the Japan-funded project on Comprehensive Community Stabilization in the Kenya Coast and Key Border Points”¹⁸⁷. The challenge comes in when these protocols are being foisted on business and building owners and are ubiquitous in nature – not only in public areas or institutions.

The new policy requires owners of such buildings to maintain records of regarding make of the CCTV, model, system components including, but not limited to recorders, cameras, lenses, and multiplexers. Additionally, all CCTV footage should be disclosed in the event it is required for formal investigations where disclosure may help investigations or the prosecution of a criminal offence¹⁸⁸.

¹⁸⁴Statement given by Kimani Nyoike in the Digital Audit of the Democracy, Rights and Governance Civil Society Sector in Kenya: An analysis of the digital civic space – CRECO, 2019 available at <http://crecokenya.org/new/index.php/resource-center/research-reports/237-digital-audit-of-the-democracy-rights-and-governance-civil-society-sector-in-kenya>

¹⁸⁵<https://www.interior.go.ke/national-cctv-policy-draft/>

¹⁸⁶<https://www.interior.go.ke/national-cctv-policy-draft/>

¹⁸⁷This is in addition to previous initiatives such as the National Police Service (NPS) facial recognition system for CCTV cameras installed along major roads and highways as part of an upgrade of its Integrated Command and Control System (ICCS) in 2018. See <https://www.biometricupdate.com/201809/kenyan-police-launch-facial-recognition-on-urban-cctv-network>

¹⁸⁸ <https://www.standardmedia.co.ke/business/article/2001336536/cctv-cameras-to-be-mandatory-in-new-law>



Clause 5.5 provides for liaison between the system owners/operators of all CCTV systems and law enforcement agencies. These same agencies are then to be granted reasonable access, connection, linkage and integration mechanisms on CCTV systems according to Clause 8.5. Curiously, the draft document at 8.3 also directs that all CCTV owners maintain documentation detailing their cite plans showing CCTV placement. These measures give law enforcement unfettered access to CCTVs and the content they record which raises questions as to when such access may or may not be granted. The requirement that cite plans be maintained and shared is also unnecessarily intrusive, especially for private owners ¹⁸⁹.

Again, and like many other government edicts this draft policy suffers from vague terminology. For instance, the policy instructs that “public areas” and “restricted areas” be surveilled but does not elaborate on what these terms mean in this context. These may lead to instances where surveillance is occurring in areas that should not be under close watch, or spaces that should be under observation are not at all. The policy adds that the operation of such systems should be done in such a way that civil rights are upheld but does not go into the specifics of which rights are guaranteed and under what limitations. These vague provisions are too imprecise, and they leave too much room for arbitrary application and abuse of discretion ¹⁹⁰.

Amnesty International succinctly stated the overall problematic nature of the policy in its statement where is averred that “with sufficient safeguards and oversight, the use of CCTV to detect, deter and disrupt crime is legitimate.... The draft policy [in its current state] fails the test of necessity and proportionality prescribed by Article 24 of the Constitution. State surveillance ought to be targeted, informed by sufficient evidence of wrongdoing and authorized by an independent authority. It must protect against unlawful and discriminatory integration of any CCTV system or data with facial recognition and other biometric systems including Huduma Namba/NIIMS. ¹⁹¹” Left unrevised and unanchored in a Data Protection Act, they will allow for invasive breaches of our personal, commercial and social privacy and render our constitutional rights, analogue” ¹⁹².

¹⁸⁹<https://cipit.strathmore.edu/a-commentary-on-kenyas-draft-national-cctv-policy/>

¹⁹⁰<https://cipit.strathmore.edu/a-commentary-on-kenyas-draft-national-cctv-policy/>

¹⁹¹<https://www.amnestykenya.org/kenya-desist-from-indiscriminate-and-invasive-mass-surveillance/>

¹⁹²<https://www.amnestykenya.org/big-brother-is-watching-over-us-but-getting-too-personal/>

Digitization of Extrajudicial Killings and Executions¹⁹³

In 2017, human rights groups including the Kenya Human Rights Commission reported that a number of Facebook accounts and pages had been created that were said to be run by police officers. These pages featured posts profiling ‘gangsters’ after which pictures of their dead and mutilated bodies were posted on these pages, to warn other criminals to change their ways and surrender to the police, failure to which they will be killed. The content of these pages were gruesome, and when police authorities and Facebook itself were alerted to the activities of these Facebook accounts, they were taken down.

The first unofficial police Facebook account appeared under the name Hessa wa Kayole. “Hessa became the shadowy crime-hunter, the mystical lone ranger.”¹⁹⁴ But these accounts did not completely disappear, as Hessa had already become infamous as a vigilante ‘gang hunter’ and had inspired other Facebook accounts¹⁹⁵ to sprout up and continue his legacy in crime-ridden residential estates. In 2019 there were numerous such pages and accounts, signifying the revival of this digitized extra-judicial executions.

The profiling of people that the administrators behind the group do proves planned and premeditated intent to kill, outside the confines of the criminal justice system. In fact, this digitized profiling was confirmed when a police informer from Dandora informed Human Rights Watch¹⁹⁶ that the said officers compile a list of suspects targeted to be extra judicially executed, and that most of the killings are carried out by specific officers who have a joint WhatsApp group and other social media platforms in which they share information about future targets or those already killed.

Robert Alai detained for disclosure of information relating to terrorist activities

In June of 2019, Blogger Robert Alai was detained after he highlighted the improper handling of dead police officers¹⁹⁷ whose vehicle run over an Improvised Explosive Device, on his social media platforms. This came after The National Cohesion and Integration Commission (NCIC) and the National Police Service had earlier warned Kenyans against posting on social media gruesome photos from Saturday’s Wajir terror attack that killed a few Administration Police officers; ordering those who had to pull them down¹⁹⁸

The police claimed that Mr. Alai’s offence was the disclosure of information in relation to terrorist activities. This is one of the most high profile charges brought under the controversial anti-terrorism law that targets publishers of information¹⁹⁹, including journalists, media houses, publications, and bloggers. In court with him was a prison warder, Mr. Patrick Safari, who allegedly also posted the photos on his Twitter account²⁰⁰.

¹⁹³State of the Internet in Kenya, 2017 (BAKE 2018) available at <https://www.ifree.co.ke/wp-content/uploads/2018/02/State-of-the-Internet-in-Kenya-report-2017.pdf>

¹⁹⁴<https://www.bbc.com/news/world-africa-47805113>

¹⁹⁵Such as Nairobi Crime Free (Crime Free Society) available at <https://www.facebook.com/groups/2099527296954534/>. The header of the group bears the slogan: “Forgiving a terrorist is left to God, but fixing their appointment with God is our responsibility”.

¹⁹⁶<https://www.hrw.org/news/2019/07/02/kenya-nairobi-police-executing-suspects>

¹⁹⁷<https://www.ifree.co.ke/2019/06/robert-alai-arrested-for-highlighting-the-handling-of-bodies-of-dead-police-officers/>

¹⁹⁸<https://www.ifree.co.ke/2019/06/robert-alai-arrested-for-highlighting-the-handling-of-bodies-of-dead-police-officers/>

¹⁹⁹<https://nation.africa/news/Blogger-Robert-Alai-may-face-terrorism-charges/1056-5162962-3kogl7z/index.html>

²⁰⁰<https://www.ifree.co.ke/2019/06/robert-alai-detained-for-14-days-for-disclosure-of-information-in-relation-to-terrorist-activities/>



Section 27 of the Prevention of Terrorism Act, 2012²⁰¹ provides that, “a person who publishes, distributes or otherwise avails information intending to directly or indirectly incite another person or a group of persons to carry out a terrorist act commits an offence and is liable, on conviction, to imprisonment for a term not exceeding thirty years.”

Weeks later in July, Alai was charged with two counts: the intent of helping the terrorist group Al Shabaab and disclosing information of a deceased police officer to the public via his Twitter account. He was later released on Sh300, 000 bail ²⁰².

Doctor in Machakos suspended by County Government of Machakos for criticizing county officials

The county government of Machakos interdicted Dr. Alice Kasyoka Isike, an obstetrics Gynecologist in the Machakos level 5 hospital for allegedly publishing a derogatory post on social media, on 25th February regarding county government seniors ²⁰³. She faced disciplinary measures after she asked the Governor, Alfred Mutua, to visit the hospitals and ‘witness the sufferings’ of patients²⁰⁴.

KFCB bans public performance of songs with ‘dirty’ lyrics

Ezekiel Mutua banned two hit songs Wamlambezi and Tetema from being played in public, except in clubs and bars. In a Twitter post ²⁰⁵, he said the two songs were “pure pornography” and “dirty and unsuitable for mixed company”. He tweeted “Tetema and Wamlambezi songs are strictly forbidden outside of clubs and bars. It’s embarrassing to see even national leaders singing and dancing to the obscenity in public. The lyrics are dirty and not suitable for public consumption, especially children”²⁰⁶. This move received mixed reactions, some lauded his moral cop edit, while others criticized it for infringing on free speech.

²⁰¹http://www.vertic.org/media/National%20Legislation/Kenya/KE_Prevention_Terrorism_Act.pdf

²⁰²<https://www.ifree.co.ke/2019/07/robert-alai-released-on-sh300000-cash-bail/>

²⁰³<https://www.ifree.co.ke/2019/03/machakos-county-government-interdicts-dr-alice-kasyoki-for-allegedly-publishing-derogatory-post-on-facebook/>

²⁰⁴<https://www.kahawatungu.com/governor-alfred-mutua-wants-machakos-doctor-dismissed-for-criticising-him-through-social-media/>

²⁰⁵<https://twitter.com/EzekielMutua/status/1166251240650694656>

²⁰⁶<https://twitter.com/EzekielMutua/status/1166251238108909568>

FREEDOM OF THE PRESS

Kenya ostensibly has robust laws and regulations to protect and guarantee media independence and press freedoms. The country has come a long way from the previous era which saw raids on newsrooms, shutdowns of media houses, and assaults, threats of physical harm or harassment to journalists who published stories that were embarrassing or which painted the government, businessmen and politicians in a negative light. There is a high concentration of political power in media ownership which is leveraged for personal gain. With this, the media has pressure exerted on them from the market (GoK as advertiser), state (as regulator), and (political) ownership. To effectively play its role as watchdog and purveyor of information, the media in the country must see that the state as the driving market force as well as regulator, divests from the sector's control and ownership.

Even though we have made some gains in this regard, we are now seeing more subtle yet equally dangerous attacks on the fourth estate in the country.

Some of the challenges facing the sector at large and journalists specifically are:

- Harassment, intimidation and physical attacks on journalists by security forces have continued to be a challenge. This is especially so when investigating land and environmental matters and crime and corruption in the private or public sector. There is also the emerging threat of digital security to journalists with a number being stalked or threatened online²⁰⁷. In 2019 the sector reported fifty-five (55) violations²⁰⁸
- Media independence is compromised by ownership by a network of political elites and prominent private sector players²⁰⁹.
- Soft censorship/media repression: the government being the biggest advertiser via the Government Advertising Agency, applies indirect financial pressure on media houses by awarding or denying ad revenue depending on whether they are loyal and publish favourable coverage to the State and public affairs²¹⁰.
- Loss of public trust and confidence in the institution due to its soft line on critical political issues, as opposed to holding leaders accountable or investigating and interrogating policies and practices²¹¹.
- The rise of alternative news sources via social media platforms means that the mainstream media is no longer the exclusive authority on important issues or the sole reference point for truth. In fact, trends indicate that newsrooms mine Facebook and Twitter for content as opposed to audiences discussing what has been aired.
- Mediatisation of politics: this refers to the phenomenon whereby media becomes the platform for airing political barbs and pushing certain partisan rhetoric²¹². Political divisions would be visible on either side of media stations, carrying or interpreting headline stories differently, depending on who is being favoured²¹³.

²⁰⁷<https://www.nation.co.ke/kenya/news/world-press-freedom-day-kca-raises-alarm-over-attacks-on-journalists--164146>

²⁰⁸<https://www.mediacouncil.or.ke/en/mck/index.php/all-news/307-press-freedom-violations-current-status>

²⁰⁹<https://www.theelephant.info/data-stories/2018/11/01/the-politics-of-media-ownership-in-kenya/>

²¹⁰<https://www.pd.co.ke/opinion/commentaries/press-freedom-the-new-threat-to-media-in-kenya-35474/>

²¹¹<https://www.theelephant.info/op-eds/2020/03/13/manufacturing-non-dissent-is-the-media-in-kenya-really-free/>

²¹²<https://www.the-star.co.ke/news/big-read/2019-05-03-press-freedom-reels-under-new-forms-of-censorship/>

²¹³<https://www.pd.co.ke/opinion/commentaries/press-freedom-the-new-threat-to-media-in-kenya-35474/>



- Inadequate number of skilled journalists: it is estimated that the mainstream media has shrunk by an estimated 75 percent in five years with fewer experienced journalists available to do the public duty²¹⁴. Related to this, there is also a lack of quality journalism²¹⁵ and a decline in journalistic ethics²¹⁶.

²¹⁴<https://khusoko.com/2020/05/03/world-press-freedom-day-press-freedom-violation-on-the-rise-in-kenya/>

²¹⁵<https://www.theelephant.info/features/2017/08/03/i-accuse-the-press-why-the-kenyan-media-must-get-with-the-programme/>

²¹⁶<https://www.tandfonline.com/doi/abs/10.1080/23736992.2016.1220252>

THE DIGITAL ECONOMY

The digital economy refers to a broad range of economic activities that use digitized information and knowledge as key factors of production. In this space, the internet, cloud computing, big data, fintech, and other new digital technologies are used to collect, store, analyze, and share information digitally and transform social interactions²¹⁷. These are utilized in such a way as to facilitate online connections among people, businesses, devices, data, and processes to stimulate economic activity.

Kenya is one of the world leaders in the use of digital finance solutions such as M-PESA²¹⁸, Mula, PesaLink and Pesapal which facilitate transactions and drive the economy²¹⁹. In particular, the fintech landscape in Kenya has experienced fast and robust growth, which can be attributed to a concerted push towards ensuring financial inclusion, the penetration of mobile telephony, a positive regulatory environment, as well as the country's embrace of, and receptiveness to, technological innovations.

Fintech

Financial technology (Fintech) is used to describe new tech that seeks to improve and automate the delivery and use of financial services. At its core, fintech is "utilized to help companies, business owners and consumers better manage their financial operations, processes, and lives by utilizing specialized software and algorithms that are used on computers and, increasingly, smartphones"²²⁰.

According to the 2019 FinAccess Household Survey²²¹, 82.9% of the adult population has access to at least one financial product. The FinTech marketplace has approximately 150 such companies in operation, with services ranging from digital credit entities to remittances and transfer platforms, which serve to bring the 'unbanked' into formal finance and spur economic growth²²²²²³.

The Central Bank of Kenya has had its eye on mobile money and digital lending regulation and alignment with the 'brick and mortar' financial industry. Currently, there are overlapping layers of regulation that may put a fintech company under the supervision of multiple regulators, leading to confusion on relevant regulations. At present, there is no single regulatory source that fintech innovators can contact for clarity on regulations, raising the risk of regulatory uncertainty that discourages investment into the local fintech market²²⁴.

In 2018 the government of Kenya announced plans to set up a fintech regulatory sandbox. This will provide a testing environment for new business models that are not protected by current regulation or supervised by regulatory institutions. These testing grounds are especially relevant in the fintech world, where there is a growing need to develop regulatory frameworks for emerging business models. The purpose of the sandbox is to adopt compliance with strict financial regulations to the growth and pace of the most innovative companies, in a way that does not smother the fintech sector with rules but also does not diminish consumer protection²²⁵.

²¹⁷<https://www.adb.org/news/events/understanding-digital-economy-what-it-and-how-can-it-transform-asia>

²¹⁸Besides MPESA, other players in the mobile money space include Airtel Kenya, Telkom Kenya Ltd, and Equity Bank, which offers Equitel.

²¹⁹<https://www.ict.go.ke/wp-content/uploads/2019/05/Kenya-Digital-Economy-2019.pdf>

²²⁰<https://www.investopedia.com/terms/f/fintech.asp>

²²¹Document available at <https://fsdkenya.org/publication/finaccess2019/>

²²²<https://africanbusinessmagazine.com/african-banker/is-fintech-in-kenya-too-successful/>

²²³Examples of fintech include mobile lending, mobile banking, fundraising applications, mobile payment, insure-tech, peer-to-peer lending applications, business-to-business lending, digital payment, online trade, international money transfer, online foreign exchange, online procurement, online betting, and other blockchain applications.

²²⁴<http://www.nairobibusinessmonthly.com/impact-of-fintech-on-kenyas-financial-services-industry/>

²²⁵<https://www.fintechfutures.com/2019/02/kenya-keen-on-regulatory-fintech-sandbox/>



Digital lending

Digital lending, in particular, has been as much of a hotspot as payments, perhaps even overcrowded. There are up to 49 digital lenders in Kenya, no other African country has more. The industry is largely unregulated but includes major financial players. Banks such as Kenya Commercial Bank, Commercial Bank of Africa, Equity Bank, and Coop Bank offer instant mobile loans.

One notable development in the reporting period was the advent of Fuliza, which was introduced by Safaricom in January 2019. It is a service, which offers users an overdraft to complete transactions when they run out of funds in their M-Pesa accounts. The first month after its launch, the telco advanced Sh6 billion to users²²⁶. This number demonstrates the potential that exists in digital lending in Kenya.

While it has its positives, digital lending has become a cause for worry in the country over the last few years, owing to shylock-type practices and wanton blacklisting on credit-rating bureaus (CRBs). Specifically, the speed and ease of access to credit through the multitude of mobile apps have caused many borrowers to become heavily indebted. In Kenya, it is reported that at least one out of every five borrowers struggles to repay their loan. In the last three years, 2.7 million people out of a population of around 45 million have been negatively listed with CRBs, according to a study by Microsave²²⁷. This is double the rate of non-performing commercial loans in conventional banking. This is due to the fact that even though the loans are relatively small, the associated fees are quite expensive owing to the risks associated with unsecured digital lending. Interest rates are high, and borrowers are charged for late payments²²⁸.

Beyond this, it has been reported that these applications' representatives repeatedly contact defaulters about unpaid loans and use "abusive and threatening" language in addition to increasing interest rates and/or reducing the loan amount one is eligible for. Some platforms even contact borrowers' family and friends when seeking repayment. This kind of social shaming is apparently the secret to safeguarding the fintech companies' financial investment and covering the risk of providing loans digitally by leveraging their social connections over defaulters. When users download the app, they permit it to access their contacts, bringing its consumer data protection and privacy practices under scrutiny²²⁹.

The legal and policy questions that arose included: are customers fully aware of intrusive "phone-scraping" of messages and transactions? Where does this data go? How is it protected? Companies must make customers aware of what data is being collected, why and peoples' rights over their data²³⁰. In the wake of our newly enacted data protection law, it is hoped that these worries will no longer be the bane of loan seekers.

However, consumer rights advocates argued that the legislative framework should go beyond that. Currently, many digital lenders are not regulated by the Central Bank of Kenya as they do not fall within the definition of financial institutions under the current Banking Act, the Micro Finance Act or the Central Bank of Kenya Act. As such platforms fall within prudential and non-prudential entities, cooperatives and informal groups such as saving circles, the regulation should be updated to ensure that all players are covered by the regulatory measures - Banks, Fintechs, MFIs, SACCOs and telecom companies all have important roles to play^{231,232}.

²²⁶<https://fintechnews.ae/5330/fintech/fintech-in-kenya-an-overview/>

²²⁷http://www.microsave.net/wp-content/uploads/2018/10/Where_Credit_Is_Due_Customer_Experience_of_Digital_Credit_In_Kenya.pdf

²²⁸<https://theconversation.com/mobile-based-lending-is-huge-in-kenya-but-theres-a-downside-too-124195>

²²⁹<https://restofworld.org/2020/okash-microlending-public-shaming/>

²³⁰<https://talentinthecloud.io/kenyas-emerging-fintech-regulation-data/#:~:text=The%20Central%20Bank%20of%20Kenya,changes%20to%20financial%20services%20regulations.&text=Banks%2C%20Fintechs%2C%20MFIs%2C%20SACCOs,have%20important%20roles%20to%20play.>

²³¹<https://theconversation.com/mobile-based-lending-is-huge-in-kenya-but-theres-a-downside-too-124195>

²³²It is worth noting that this has since been updated. See <https://gadgets-africa.com/2020/05/18/mobile-loan-apps-no-longer-allowed-to-blacklist-defaulters-on-crbs/>

Kenya digital services tax proposal

In November of 2019, the Kenya government announced plans to start levying a new tax on digital markets under a new law²³³ signed by the president early in the month. The Finance Act seeks to broaden the Income Tax Act net to include income accruing through a digital marketplace. The law defines the digital marketplace as “a platform that enables direct interactions between buyers and sellers of goods and services through electronic means”. Also, a similar change has been made to the VAT Act²³⁴ making digital market services subject to value-added tax²³⁵. Section 4 of the Finance Act amends the Income Tax Act to include ‘income accruing through a digital marketplace’ as taxable income. Likewise, section 18 of the Act expands the VAT Act to be ‘applicable to supplies made through a digital marketplace’.

The taxes did not come as a shock since the Kenya Revenue Authority (KRA) had issued a prior declaration in the 2018 KRA Annual Summit of its intention to broaden its tax base by introducing taxes on the emerging digital economy. Even before then, there were signals of future tax changes, with the VAT Act, 2013 envisaging VAT on downloaded electronic services²³⁶.

The Act’s broad definition of “a digital marketplace” aims to capture those entities generating income through a digital platform, such as e-hailing platforms and online selling marketplaces such as Uber and Jumia. These legal modifications will essentially introduce a digital services tax payable at the time of the transfer of the payment for the service to the service provider at the rate of 1.5% of the gross transaction value. The tax will be chargeable on income from digital services accrued in or derived from Kenya through a digital marketplace according to the law.

Article 19 issued a statement²³⁷ on these developments, arguing that these “vague and ill-defined provisions are affecting Kenya’s dynamic digital sphere and have introduced legal uncertainty. This is because Kenyan authorities have so far failed to regulate who is captured by the ‘digital market-place’ provisions (i.e. start-ups, corporations, cloud platforms, etc.) and how they will be taxed (including the existence of a digital tax infrastructure). In their submissions, they noted that these amendments do not conform to a Human Rights-Based Approach to digital rights, and are not underpinned by principles of “fairness, trust, plurality, and innovation”.

Without clear guidelines, there is fear that these new rules will result in double taxation for digital platform operators as it is yet unclear who will bear the cost. It is also worrisome that it will become unduly burdensome to consumers, who may be forced to cover the increased costs, particularly where VAT on supplies is concerned²³⁸.

While the Act indicates that the measure to tax income from digital transactions entered into force on 7 November 2019, it also states that the Cabinet Secretary of National Treasury and Planning shall make regulations to provide for the mechanisms of implementation. As yet, there is no clear timeline as to when these regulations shall be published, posing a practical challenge to the implementation of the provisions. This means that enforcement of this tax will be delayed²³⁹.

²³³<http://www.kpda.or.ke/documents/Policies/Finance%20Bill%202019.pdf>

²³⁴http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2019/FinanceAct_No23of2019.PDF

²³⁵<https://theconversation.com/kenyas-tax-on-digital-trade-and-services-whats-known-and-not-known-127366>

²³⁶<https://www.bowmanslaw.com/insights/tax/what-new-digital-taxes-contemplated-in-the-finance-act-mean-for-digital-trade-and-services-in-kenya/>

²³⁷<https://www.article19.org/resources/kenya-proposed-digital-service-tax-in-finance-bill-should-guarantee-digital-rights/>

²³⁸<https://www.mondaq.com/tax-authorities/896852/what-new-digital-taxes-contemplated-in-the-finance-act-mean-for-digital-trade-and-services-in-kenya>

²³⁹<https://www.bowmanslaw.com/insights/tax/what-new-digital-taxes-contemplated-in-the-finance-act-mean-for-digital-trade-and-services-in-kenya/>



Over-the-top services tax proposal

Furthermore, The ICT ministry is in the final stages of developing a framework that will be used to tax over-the-top services (OTT). OTT media refers to a streaming media service offered directly to viewers via the Internet, bypassing cable, broadcast, and satellite television platforms. Shall Kenya's ministry proceed with this, foreign online streaming media services that offer voice and messaging services over the internet such as YouTube and Netflix will soon be required to declare the incomes they derive from Kenyan consumers²⁴⁰. The proposed policy framework will also ensure that foreign advertisements that air in the Kenyan market are subjected to taxation²⁴²

Bus & taxi hailing apps

The taxi-hailing business continued to grow in the country, with mobile apps such as Uber, Bolt and Little Cab being popular choices in connecting drivers and riders in major towns. Investment in online taxi services is on the increase, with official data showing a surge in the number of public service vehicle (PSV) licences issued last year



(the number of licences issued in 2019 rose by 10.3 per cent to 63,938 from 57,949 the previous year, according to KNBS)²⁴².

In September Transport ministry officials announced that the government blocked two bus-hailing apps (Safaricom's Little and Cairo-headquartered Swvl) from operating. The director-general of the National Transport and Safety Authority stated that the two firms failed to adhere to regulations and were operating under a tours license instead of a commuter service authorization^{243, 244}.

<https://www.capitalfm.co.ke/thesauce/government-to-tax-foreign-online-streaming-platforms-like-netflix-and-youtube/>

<https://www.nation.co.ke/kenya/business/plan-to-tax-youtube-netflix-in-final-stage-195148>

<https://www.standardmedia.co.ke/business/article/2001369862/ride-hailing-apps-rev-up-investment-in-taxi-cabs>

<https://qz.com/africa/1719491/swvl-little-buses-stopped-from-operating-in-kenya/>

Image source <https://techweez.com/2020/01/22/swvl-long-distance-trips/>

Betting

Kenya's betting industry has experienced remarkable growth, owing in part to the advent of new technologies and innovations such as smartphones, which facilitate access. According to statistics that were inadvertently released by the regulator - Betting Control and Licensing Board (BCLB) - it was revealed that punters spent a whopping Kshs 30 billion in May 2019²⁴⁵.

However, betting firms in mid to late 2019 were facing challenges relating to tax compliance. In A 20 per cent tax on betting stakes in the country was introduced, resulting in two prominent players, SportPesa and Betin halting business operations in the country. The former stated that it would cease its Kenya operations until a "non-hostile regulatory environment was returned"²⁴⁶.

Many have named the accessibility of smartphones, unemployment, the prevalence of mobile money, youth bulge which the existing industry is failing to accommodate as some of the factors that drive Kenyans to online betting.

²⁴⁵<https://nation.africa/kenya/news/shocking-details-of-sh30bn-a-month-bets-309350>

²⁴⁶<https://www.standardmedia.co.ke/sports/sports/2001351989/life-after-departure-of-top-betting-sites>



EMERGING TECHNOLOGIES

CRYPTOCURRENCY:

The Central Bank of Kenya has in the past issued a public caution against virtual currency, and in its notice ²⁴⁷ staged categorically that they are “not legal tender”, and are instead “a form of un-regulated digital currency that is not issued or guaranteed by any government or central bank”. Banks therefore do not open accounts for people who are known to deal in virtual currency, which means that the population cannot easily convert cryptocurrency payments into cash or mobile money. There has been a lot of apprehension around cryptocurrency such as Bitcoin, as many have fallen prey to crypto-related scams and lost millions of dollars. For instance, a local cryptocurrency startup Nurucoin closed shop, with the founder allegedly fleeing to California. Nurucoin, had touted itself as the ultimate pan-African cryptocurrency, and is said to have swindled ²⁴⁸ Kenyans of Kshs. 2.7 billion (\$27 million)²⁴⁹. Other scams have included Velox 10 Global²⁵⁰, a company that launched in Kenya in 2017. Founded by a Brazilian national, the company promised up to 50% monthly returns — but ended up making off with millions of dollars’ worth of investors’ money²⁵¹.

Despite this fact, and the marked absence of regulation of the technology, and the warning from the Central Bank regarding the volatility of cryptocurrencies, the trade of the same was booming in 2019. It was reported ²⁵² that the total number of Bitcoin transactions in Kenya is estimated to be worth over \$1.5m, according to the Blockchain Association of Kenya. The Blockchain and Artificial Intelligence Taskforce officially presented its report to the Information Cabinet Secretary Joe Mucheru in July 2019, with recommendations on how to go about safely implementing the technology and disrupt processes which ordinarily suffer from a trust deficit such as education, health, law, journalism, film, construction, tourism, lands, mining, banking, insurance, transport, and communication. It has even been hailed as the potential new frontier in electoral justice as it would “prevent election” and “achieve free and fair elections, blockchain must be used to create a tamper-proof system that eliminates voter fraud and provides an authentic record of votes cast”²⁵³.

DRONES:

2019 saw an increased focus on drones and their operation by the Kenya Civil Aviation Authority (KCAA). Earlier in the year, the Authority put a halt to the flying of drones, declaring their operation illegal with a risk of a hefty fine. Not soon after this announcement, it was reported ²⁵⁴ that KCAA would indeed lift the ban on drones once fresh regulations which were under development in line with international standards and ICAO rules (International Civil Aviation Organization) were approved by parliament ²⁵⁵. It is expected that these rules will address the concerns around safety, security, personal privacy and the discretion in the application of fines ²⁵⁶. At the time of compiling this report, parliament was yet to develop the relevant regulations for the commercialization of drones in the country ²⁵⁷.

²⁴⁷https://www.centralbank.go.ke/images/docs/media/Public_Notice_on_virtual_currencies_such_as_Bitcoin.pdf

²⁴⁸<https://kenyanwallstreet.com/nurucoin-scam-mastermind-isaac-muthui-sought-by-regulator/>

²⁴⁹<https://bitcoinke.io/2019/12/nurucoin-closes-shop/>

²⁵¹<https://cointelegraph.com/magazine/2020/04/01/banking-unbanked-kenya-bitcoin>

²⁵²<https://www.bbc.com/news/business-47307575>

²⁵³<https://www.nation.co.ke/kenya/business/inside-kenya-s-blockchain-ecosystem-what-the-future-holds-248804>

²⁵⁴<https://techpoint.africa/2019/11/29/kenya-may-lift-drone-ban/>

²⁵⁵<https://techweez.com/2019/11/29/kenya-lift-ban-on-drones-if-regulations-are-approved/>

²⁵⁶<https://www.businessdailyafrica.com/corporate/shipping/KCAA-s-revised-drones-rules-set-for-Parliament/4003122-5135554-vc3c0p/index.html>

²⁵⁷<https://techweez.com/2019/11/29/kenya-lift-ban-on-drones-if-regulations-are-approved/>

CONCLUSION

In closing, and upon review of the events that took place during the year 2019 in the online space, one can observe that the digital arena is becoming more mature and enriched, as evidenced by the increase in laws, policies and legal pronouncements which are guaranteeing its protection. In addition, owing to marked reduction in arrests and detentions of bloggers and online activists and human rights crusaders, we are also witnessing a more vibrant social media and blogging sphere as not only are blogs and online users exponentially increasing in number, the content and discourse is becoming more varied, reflecting the multiplicity of interests of the different online communities.



RECOMMENDATIONS

- The Kenyan government must take the necessary steps to ensure that there is freedom of the press and freedom of expression and should refrain from the harassment of journalists and bloggers.
- The challenge of the digital divide persists. The majority of non-Internet users in Kenya are people who live in rural areas (84%) and who are mostly female (58%). This should be addressed by ensuring the Universal Service Fund (USF) is distributed where needed.
- Child safety online needs to be a priority by ensuring age appropriate digital literacy.
- As the Kenyan government expands its public service delivery offerings online, so should it ensure that these interventions are guided by policy and/or regulations that govern e-government processes.
- With the unfortunate ruling that the Cybercrimes Act is valid and constitutional, we should be wary of clawing back the gains that were won that protected bloggers and journalists from being arrested and detained for speaking up against government. Civil society and the ICT community should remain vigilant of the return of laws that criminalize defamation, particularly laws that penalize the insult of government authorities or *lèse majesté*²⁵⁸ ; enable the investigation or prosecution of those who report on terrorism; and criminalize the reporting of “false news” or the “propagation of rumours”²⁵⁹ .
- The operationalization of the Data Protection Act should be fast-tracked to ensure that Kenyans are able to enjoy the benefits of the Right to Privacy as guaranteed by the constitution.

²⁵⁸<https://www.lexico.com/en/definition/lese-majeste>

²⁵⁹<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21557&LangID=E>







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ifree.co.ke/reports

STATE OF THE
INTERNET
IN KENYA 2019



Bloggers
Association
of Kenya

