IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)

AT DAR ES SALAAM

(CORAM: FELESHI JK, MGONYA J., AND MASOUD J.)

CONSOLIDATED MISC. CIVIL CAUSE No. 15 OF 2019 & No. 5 OF 2020

RAYMOND PAUL KANEGENE.....1st PETITIONER

BOB CHACHA WANGWE.....2nd PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

30/09/2020 & 26/11/2020

Masoud, J.

The constitutional validity of some provisions of the Cybercrimes Act No. 14 of 2015 (the Act) is once again being challenged in this consolidated petition. Unlike in **Jebra Kambole vs A.G**, Misc. Civil Cause No. 32 of 2015, relied on by the respondent, where sections 4, 5, 6, 7, 8, 9, 10, 11, 14, 19, 21, 22, 31, 32, 33, 34, 35, 37, 38 and 50 of the Act were challenged for violating articles 16, 17(1), 18, and 21(1) of the Constitution of the United Republic of Tanzania (the Constitution) and only section 50 of the said Act was found to be unconstitutional, the petitioners in this consolidated petition challenged only sections 16, and

39(2)(a)&(b) of the Act for infringing articles 15, 16, 17 and 18 of the Constitution.

The provisions of sections 16 and 39 (2)(a) & (b) of the Act were not challenged in the **Jebra Kambole case**, in which only section 50(2)(b) of the Act was declared unconstitutional for violating article 13(6) of the Constitution, and the government was directed to correct the anomaly complained of within the period of twelve (12) months from 2/12/2016, failure of which the provision should be scrapped off the statute book.

We are very much aware that there is also the case of **Jamii Media Company Ltd vs The Attorney General and Another**, Misc. Civil Cause No. 9 of 2016, which came after **Jebra Kambole** (supra), and in which the petitioner challenged in vain the constitutionality of sections 32 and 38 of the Cybercrimes Act claiming that the provisions were violative of articles 13(6)(a), 16 and 18(1) & (2) of the Constitution. As was in **Jebra Kambole** (supra), the constitutionality of the provisions of sections 16 and 39 (2)(a) & (b) of the Cybercrimes Act was not challenged in **Jamiii Media Company Ltd** (supra).

It was on the basis of the decision of this court in **Jebra Kambole** (supra) which was relied upon by the respondent that it was argued in the respondent's replying submissions that the consolidated petition was res judicata and must for such reason be dismissed. Of significance to note is that the point had not been raised as a preliminary point of objection. Having been raised in the respondent's replying submissions, it meant that the petitioners did not have opportunity to reply on the point. Interestingly, the petitioner did not ask the court for leave to reply on the point which ought to have been properly raised as a preliminary point of objection. We will come back to this point afterwards.

To appreciate the substance of the allegation of the constitutionality of the impugned provisions in the present consolidated petition which we will set out herein below afterwards, we found it fit to reproduce the impugned provisions as an understanding of their construction is crucial in determining whether or not the petition is res judicata, and whether the impugned provisions are indeed offensive of the provisions of articles 15, 16, 17 and 18 of the Constitution. The impugned provisions therefore read as follows:

'S. 16 Any person who publishes information or data presented in a picture, text, symbol, or any other form in a computer system ***knowing that such information or data is false, deceptive, or misleading or inaccurate, and with intent to defame, threaten, abuse, insult, or otherwise deceive or mislead the public or concealing commission of an offence,*** *commits an offence, and shall on conviction be liable to a fine of not less than five million shillings or to imprisonment for a term of not less than three years or to both.'*

'S.39(2) The Minister ***may prescribe procedures*** *for service providers to-*
(a) inform the competent authority of ***alleged illegal activities*** *undertaken or information provided by recipients of their services; and*
(b) avail competent authorities, at their request, with information enabling the identification of recipients of their service.'

Although the consolidated petition employed articles 15, 16, 17 and 18 of the Constitution as the provisions which were infringed, the substance of the submissions in chief of the petitioners was only hinged on the provisions of articles 16(1) and 18 of the Constitution. We undertake not

to consider articles 15 and 17 of the Constitution as the same were not argued and hence, in our view abandoned. Accordingly, the provisions of articles 16(1) and 18 of the Constitution which were used and employed in the submission in chief of the petitioners read in full as thus:

> *Article 16(1) 'Every person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications.*
> *(2) For purpose of preserving the person's right in accordance with this Article, the state authority shall lay down legal procedures regarding the circumstances, manner and extent to which the right to privacy, security of his person, his property and residence may be encroached upon without prejudice to the provisions of this Article.'*
>
> *Article 18. 'Every person-*
> *(a) has a freedom of opinion and expression of his ideas;*
> *(b) has a right to seek, receive, and or disseminate information regardless of national boundaries;*

(c) has the freedom to communicate and a freedom with protection from interference from his communication and

(d) has a right to be informed at all times of various important events of life and activities of the people and also of issues of importance to the society. '

As is required by law, the consolidated petition was brought by way of respective petitions of the individual petitioners which were supported by affidavits of the petitioners, disclosing factual basis and grounds on which the consolidated petition rested. The respondent vigorously opposed the consolidated petition as depicted in her replies and counter affidavits to the individual petitions of the individual petitioners, now forming the consolidated petition as already pointed out.

We need not reproduce details of the pleadings and the affidavits and counter affidavits of the parties herein which are on the record save to the extent necessary for disposition of the consolidated petition. Neither do we need to reproduce the respective written submissions filed by the parties for and against the consolidated petition save also to the extent necessary in disposing of the consolidated petition.

We must, nonetheless, point out here that the petitioners did not make submissions not only on articles 15 and 17 of the Constitution which they abandoned, but also sub-article 16(2) of the Constitution which provides exception to the rights set out under sub-article 16(1) of the Constitution. With the exception of explanations as to inapplicability of article 30(2) of the Constitution which formed part and parcel of the petitioners' submissions in chief, there was nothing from the petitioners to explain why the exception under article 16(1) of the Constitution could not apply to save the impugned provisions if at all the provisions were offending the right to privacy.

The crux of the allegation, and submissions thereof, as we discerned from the record before us is that the provisions of sections 16 and 39 (2)(a) & (b) of the Act infringe the right to privacy and freedom of expression guaranteed under articles 16(1) and 18 of the Constitution. In support, the petitioners in their submissions in chief gave a detailed jurisprudential framework of the right to privacy and freedom of opinion and expression emerging from regional and international human right forums and other jurisdictions such as Kenya, Uganda and Zimbabwe. We thoroughly considered it in making our deliberations.

As to how the impugned provisions infringe the specified provisions of the Constitution, the petitioners submitted as follow. With respect to section 16 of the Act, the foundation of the submissions rested on the argument that, the provision is unduly vague and overboard, it provides limited guidance as to what will be prohibited, and the inherent complexity of determining falsity. And for such reasons, it was submitted that the provision does not conform to the three tier test, a commutative test, which requires, firstly, limitation of rights to be clear, and accessible and prescribed by law; secondly, the objective of the law must be pressing and important to the society; and thirdly, the law must be proportionate with the objectives it seeks to achieve. Authorities from African Court of Human Rights, Kenya, and Europe were cited in support to support the above argument.

In relation to section 39 (2)(a) & (b) of the Act, the submissions were based on the argument that the Minister's power to prescribe the procedures requiring service providers to divulge specified information and identify service recipients interferes with the right to privacy and private communication under article 16(1), and the right to freedom of opinion and expression, the right to seek, receive and disseminate information and ideas without restrictions as provided under article 18.

In their arguments, service providers should not be compelled to give information without the consent of a person who issued such information. For such reasons, the provision does not also conform to the three tier test. An Indian authority, namely, **K.S. Puttaswamy v Union of India** (2017) 10 SCC1 was cited in support to emphasizing the argument that a procedure established under the law depriving the right to privacy must be fair, just, and reasonable.

The allegation that the impugned provisions violate the specified provisions of Constitution were disputed by the respondent. It was alleged that the petitioners failed to sufficiently demonstrate how the impugned provisions infringe the specified provisions of the Constitution. Regard was had to the objects of the Act which were according to the respondent, to ensure that cybercrimes are effectively controlled and prosecuted.

Attention was drawn to the **Jebra Kambole's case** decided earlier whose details were set out above, and a subtle argument was seemingly advanced that the present consolidated petition was res judicata as shown earlier. The point was raised in the respondent's replying

submissions and not by way of filing a notice of preliminary objection. The petitioner did not therefore have an opportunity to reply to the arguments advanced in connection with the point. There were no clear details provided to cement the arguments advanced.

It seems to us that the respondent was, impliedly, thinking that since the provisions which were challenged in the earlier decision of this court in **Jebra Kambole**, and those which are now being challenged in the present petition, are all falling under the Cybercrimes Act; then the constitutionality of the impugned provisions of sections 16 and 39 (2)(a) & (b) of the Cybercrimes Act which is a subject matter of the present petition is res judicata by virtue of the decision of this court in **Jebra Kambole**.

In the light of the above considerations, we were unable to see any link shown by the respondent as to how the impugned provisions of section 16 and 39 (2)(a) & (b) of the Cybercrimes Act were interlinked with the provisions of the same Act which were specifically challenged and whose constitutionality was determined in the earlier decision(s). We recalled that in **Jebra Kambole** the petition was partly allowed in that only the provision of section 50 of the Cybercrimes Act was declared

unconstitutional, while the other provisions mentioned herein above were found not to be offensive of the Constitution.

In so far as the argument that this consolidated petition was res judicata was concerned, we are satisfied that it was not shown by the respondent how the constitutionality of the impugned provisions of sections 16 and 39(2)(a)&(b) of the Cybercrimes Act (supra) would fit into those provisions i.e sections 4, 5, 6, 7, 8, 9, 10, 11, 14, 19, 21, 22, 31, 32, 33, 34, 35, 37, and 38 of the Cybercrimes Act, which were not declared offensive to the Constitution in **Jebra Kambole**, and not into the provision of section 50 of the Cybercrimes Act (supra) which was declared unconstitutional in that decision.

In other words, it was not shown by the respondent how the provisions interlink with one another so that challenging the provisions of sections 4, 5, 6, 7, 8, 9, 10, 11, 14, 19, 21, 22, 31, 32, 33, 34, 35, 37, and 38 of the Cybercrimes Act meant also challenging the provision of section 16 and 39(2)(a)&(b) of the same Act. We cannot therefore find and hold that the impugned provisions in this petition were necessarily and substantially in issue in the previous cases.

Having given due consideration to the point of res judicata, we are unable to agree with the respondent that the present consolidated petition is res judicata based on the submissions which were made in that respect. We would as such overrule the point of objection that the petition is res judicata.

Disputing the entire allegation on which the consolidated petition was based, the respondent maintained that the impugned provisions were not violative of any provision of the Constitution and they were, in any case, saved by article 30 and 31 of the Constitution. The context of the submissions in reply has had regard to the cyberspace environment whose crimes are, arguably, different from the ordinary ones. With regard to section 16 of the Act, the substantive argument in reply was that the provision is so plain and clear that it does not violate the relevant provision of the Constitution as alleged by the petitioners. Rather, section 16 of the said Act complements the protection of the right to privacy and personal security against false information, the right to freedom of expression and rights, duties and interests of an individual vis-a-vis rights of the community. It was also submitted that under section 16 of the Act, it is only information which is false, deceptive, and misleading which is restricted and upon which an offence is created.

The other argument was that while articles 16, 17(1) and 18 of the Constitution provide for a general rule in respective rights, the said articles read with article 30(2) of the same Constitution subject the general rule in the respective rights to an exception that a person may be deprived of his personal right to privacy, security, freedom of movement and freedom of opinion or expression under certain circumstances and in accordance with procedures prescribed by law.

Similar reasoning was advanced with reference to sub-articles 16(2) and 17(2) of the Constitution which, in relation to the right to privacy and the right to freedom of movement, subject such rights to legal procedure regarding circumstances under which the rights may be encroached. In so far as the provision provides for the circumstances under which the right to privacy and the right to freedom of expression may be restricted, it is reasonable, not arbitrary, not too wide as it covers unlawful activities and it is intended to serve a legitimate purpose.

As to section 39(2)(a)&(b) of the Cybercrimes Act, similar test was applied as was in relation to section 16 of the Act, in urging the court to find that the provision is constitutionally valid as it strikes a balance

between rights and duties of individuals and the interests of society. The demands for fighting terrorism were raised in a bid to justify the impugned provision which according to the respondent imposes an obligation to the responsible Minister to be informed of the alleged illegal activities or information. It was in this respect argued that requesting of such information is crucial in preventing commission of crimes and is not by itself an infringement of the right to privacy.

It was also brought to the attention of the court that the Cybercrimes (General) Regulations, 2016 GN No. 224 of 2016 had since been promulgated detailing how such information may be requested depending on situations and offences involved. The resulting regime therefore provides, it was argued, adequate safeguard to ensure the rights of an individual are balanced against those of the public. In any event, it was argued, that an aggrieved service provider has a right of recourse to the court to challenge the decision of the Minister which he believes that it is contrary to the law and it interferes with his rights.

Inference was in the above respect drawn from Jebra **Kambole's case** and **Attorney General vs Dickson Paulo Sanga**, Civil Appeal No. 175 of 2020. It was the respondent's submission that section 39(2)(a)&(b) of

the Act is, as is the other impugned provision, saved not only by article 16(2) of the Constitution, but also article 30(1)&(2) of the Constitution.

Substantive issues emerging from the consolidated petition and the ensued rival submissions were very well captured and addressed by the parties. The first issue was whether section 16 of the Cybercrimes Act (supra) is unconstitutional for being violative of articles 16, 17 and 18 of the Constitution. The second issue was whether section 39(2)(a)&(b) of the Act is unconstitutional for offending the provisions of articles 16(1) and article 18 of the Constitution. The third issue was whether any of the impugned provisions are saved by the provisions of the Constitution. And lastly, what remedies are the parties entitled. We were very much aware of, and associated ourselves with, the principles governing interpretation of Constitution and standard and burden of proof referred to us, as we endeavoured to resolve the issues.

We were, in particular, guided by the following principles amongst others, namely, that fundamental rights should not be treated as absolute as they are subject to limitations, which should not be unreasonable, arbitrary, and disproportionate; that the constitutionality of a statutory provision is not found in what could happen in its

operation but in what it actually provides for, as the mere possibility of the provision being abused in actual operation, does not make it invalid; and that until the contrary is proved, a piece of legislation or a provision in a statute shall be presumed to be constitutional.

In view of the foregoing we are aware of the cases of, for example, **Rev. Christopher Mtikila vs Attorney General** [1993]TLR 31; **Julius Ishengoma Francis Ndyanabo vs Attorney General** [2004]TLR 14; **LHRC and Two Others vs Attorney General** [2006]TLR 240; and **Zakaria Kimwela and 126 Others vs The Minister of Education and Vocational Training and Another** Civil Appeal No. 3 of 2012 (CAT); and **Attorney General vs Dickson Paulo Sanga** Civil Appeal No. 175 of 2020(CAT), amongst others, which were also cited by the parties in this consolidated petition in support of their respective submissions.

We are clear that the first issue concerned section 16 of the Cybercrimes Act (supra). We considered the very provision which we reproduced herein above in its entirety. We did so against the backdrop of the rival submissions of the parties on the record whose salient features we summarized herein above, and the guiding principles which we referred

to herein above. We hastened to recall that the basis of attacking the provision of section 16 of the Cybercrimes Act (supra) was that the provision is unduly vague and overboard, it provides limited guidance as to what will be prohibited, and its inherent complexity in determining falsity in relation to information.

On our part, we are not in doubt that the provision of section 16 of the Cybercrimes Act (supra) creates an offence relating to publishing information which is, with knowledge, not only false, deceptive, misleading, or inaccurate, but also with intent to defame, threaten, abuse, insult, or deceive or mislead the public or concealing commission of an offence. We do not think that the provision is vague and overboard, and provides limited guidance as to what is prohibited in so far as publication of information is concerned. We are also not in agreement with the petitioners that the provision is inherently complex in so far as determination of falsity is concerned.

On the contrary, the plain meaning of the provision of section 16 of the Act is clear that the provision has inherent safeguards against violation of the right to privacy and freedom of expression and the rights of an individual vis -a-vis the rights and interests of the community. The

provision is, admittedly, operative when the interests and rights of the public is endangered by the publication of information specified in the very provision and not every piece of information.

We consider the ingredients of the offence in the provision as the inherent safeguards. They include knowledge, intent to defame, threaten, abuse, deceive or mislead, falsity, deceptive, inaccuracy, and cancelling commission offence. The said safeguards are in our considered view meant to ensure that it is not each and every piece of information that is proscribed from being published, but it is only information that falls within the prescribed elements.

Our scrutiny of the submissions of the petitioners made it apparent that the petitioner did not seem to have specifically considered the above-mentioned safeguards in relation to the complaint that the provision is vague and overboard, complex, and not clear as to what is prohibited. As a result, the petitioners did not show how despite the presence of the safeguards, the provision is still violative of the specified provisions of the Constitution on the right to privacy and freedom of expression as alleged in their petitions and submissions in chief.

The argument by the petitioners that the provision is unduly vague and overboard, provides limited guidance as to what would be prohibited under the provision lacks any support and runs counter to the plain meaning of the very provision. Apart from the flat claim that section 16 of the Act restricts the right to seek, receive, and/or disseminate information, it was not shown how such rights are fringed by the provision.

The arguments advanced ignored the plain meaning of the provision which clearly specifies the information which is proscribed from being published. The arguments also did not take into accounts the right and interests of others which may be infringed by publication of the proscribed information. Likewise, the argument only considered section 16 of the Act in relation to sub-article 16(1) of the Constitution. It chose to ignore article 16(2) of the Constitution which empowers the state to prescribe procedures regarding circumstances, manner and extent to which the right to privacy may be encroached.

We think that the nature of the arguments advanced lean heavily on what could happen in operation of the impugned provision by law actors, and not on what the provision actually stipulates. We were in this regard

mindful of what is perceived by the petitioners in their argument that the provision is vague and overboard, it provides for a limited guidance as to what is prohibited, and it is complexity in determining what amounts to false information.

We were in respect of the above, thus mindful of a settled principle that a constitutionality of a statutory provision is not in what could happen in its operation but in what it actually provides for. And further that the mere possibility of a statutory provision being abused in actual operation will not, as a matter of general rule make it invalid. On this principle, we underscored the holding of this court in **Rev. Christopher Mtikila vs AG** [1995] TLR 31. It reads thus:

> *'In order to determine whether a particulr law is repugnant or inconsistent with the fundamental right, it is the provision of the Act that must be looked at and not the manner in which the power under the provision is actually exercised. Inconsistency or repugnancy does not depend upon the exercise of the power by virtue of the provisions in the Act but on the nature of the provisions themselves.'*

Our findings led us to the warning of the Court of Appeal in **Attorney General vs W. K. Butambala** [1993] TLR 46 in which the Court stated:

> *'We need hardly say that our Constitution is a serious and solemn document. We think that invoking it and nock down laws or portions of them should be reserved for appropriate and really momentous occasions. Things which can easily be taken up by administration initiative are best pursued in that manner.'*

We are satisfied that a foundation was not shown for us to invoke the Constitution to declare the impugned provision unconstitutional and nock the very provision down. In other words, since the petitioners alleged that section 16 of the Cybercrimes Act (supra) was unconstitutional, the onus to prove the unconstitutionality of the provision lies upon them. See **Julius Ishengoma Francis Ndyanabo**(supra). In the circumstances, we would agree with the respondent's submission that based on the plain meaning of section 16 of the Act and the interpretation of articles 16 and 18 of the Constitution, it can not be said that the impugned provision is offensive of the Constitution.

The second issue which we were called upon to resolve involves the constitutionality of the provision of section 39(2)(a)&(b) of the Cybercrimes Act. We once again considered the rival submissions of both sides in the light of the construction of the impugned provision. We were settled that the provision only empowers the Minister responsible for information and communication technology to prescribe procedures requiring service providers to divulge specified information and identification of service recipients.

It was also clear to us that the petitioner was not challenging a procedure or a procedural regime prescribed by the Minister under the impugned provision. We were told by the respondent that the Minister responsible had already promulgated the procedure envisaged under the impugned provision. In this respect, the responsible Minister promulgated the Cybercrimes (General) Regulations, 2016, GN No. 224 of 2016 which stipulate on how information specified under the impugned provision may be sought by the Minister from a service provider. It was thus argued that an aggrieved service provider has a right of recourse to the court to challenge a specific decision of the Minister made under such regulations if he believes that the decision is

contrary to the law and it interferes with his rights as opposed to challenges the provision of section 39(2)(a)&(b) of the Cybercrimes Act.

On our part, we think that section 39(2)(a)&(b) of the Cybercrimes Act (supra) as it is, it does not offend the provisions of articles 16 and 18 of the Constitution since it only provides for the powers of the responsible Minister to promulgate a procedure under which information on alleged illegal activities or information may be divulged to a competent authority.

We ae in our finding once again inspired by the principle in the **Rev. Mtikila** (supra), that a constitutionality of a statutory provision is not in what could happen in its operation but in what it actually provides for, and that the mere possibility of a statutory provision being abused in actual operation will not, as a matter of general rule make it invalid. Accordingly, the presumption of constitutionality of a statutory provision was, in respect of the impugned provision of section 39(2)(a)&(b) of the Cubercrime Act, in this petition not rebutted by the petitioner as was the provision of section 16 of the same Act whose constitutionality we determined herein above.

We, accordingly, do not find anything offensive on the powers vested in the responsible Minister under the impugned provision of section 39(2)(a)&(b) of the Cybercrimes Act. Be it as it may, we were not sufficiently shown, neither do we see any unconstitutional purpose in the impugned provision which could have otherwise justified invalidating the impugned provision of section 39(2)(a)&(b) of the Cybercrimes Act for the alleged reasons of violating articles 16 and 18 of the Constitution.

The cummulative effect of our findings have it that we do not need to consider whether the impugned provisions are saved by article 30(2) of the Constitution as in our considered view the petitioners did not discharge their onus of proving the unconstitutionality of the impugned provisions against the above mentioned provisions of the Constitution. The petitioners did not show or prove by argument or evidence that the impugned provisions were unconstitutional. We are therefore satisfied that the impugned provisions are constitutionally valid. In this respect, and as we observed above, we are satisfied that the petitioners did not rebut the presumption of constitutionality of the impugned provisions which would have rendered the court to consider and deliberate on whether the impugned provisions are saved by the Constitution and in

particular, articles 16(2) of the Constitution, and article 30(1)&(2) of the Constitution.

In the end, we find and hold that the consolidated petition by the petitioners is not meritorious. It is, as a result, dismissed. We make no order as to costs as the petition at hand was in the public interest.

It is so ordered.

Dated at Dar es Salaam this 26th day of November 2020.

E. M. Feleshi

JAJI KIONGOZI

L. E. Mgonya

JUDGE

B. S. Masoud

JUDGE