



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI HIGH COURT

CASE NUMBER: HCCHRPET/E541/2022

CITATION: TEKLE FISSEHA MENGISTU AND KATIBA INSTITUTE AND 1 OTHERS VS GLOBAL WITNESS AND KENYA HUMAN RIGHTS COMMISSION AND 6 OTHERS

RULING

Introduction

1. The petitioner in the Petition dated 14th December 2022 challenges the respondent's failure to regulate the Facebook Platform where it is alleged that inciteful, hateful and dangerous content was posted and the respondent failed to take them down.
2. In addition, the petitioners argue that the respondent's Facebook algorithm recommends content that amounts to propaganda for war, incitement to violence and advocacy to the Facebook users in Kenya.
3. The petitioner also accuses the respondent of granting preferential treatment to users in other countries as opposed to Facebook users in Africa thus is discriminative.
4. For these reasons and more, the petitioners' assert that the respondent has contravened Articles 19(2), 26, 27, 28, 29, 31, 33, 46, 47, 48 and 50 of the Constitution.
5. This ruling relates to two applications as directed by this Court in its Ruling dated 16th November 2023. First, the petitioner's application dated 14th December 2022 seeking empanelment of a bench to resolve the substantial questions of law raised in the petition. Second, the respondent's application dated 18th September 2023 seeking to have the petition struck out on the premise that this Court lacks jurisdiction to determine the issues raised in the petition.

Petitioners' Application

6. The petitioners in their application seek the following orders:
 - i. Spent.
 - ii. This Court be pleased to certify that the petition herein raises substantial questions of law.
 - iii. This Court be pleased to refer this petition to her Ladyship the Chief Justice for assignment of an uneven number of judges, being not less than three, to hear this petition.
 - iv. This Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders if granted.
 - v. The cost of this application be in the cause.



7. The application is supported by the 2nd petitioner's supporting affidavit of even date and grounds on the face of the application.
8. The 2nd petitioner depones that the petitioners instituted this petition against the respondent on the grounds that:
- a) The respondent has allowed and continues to allow inciteful, hateful and dangerous posts on Facebook thereby violating the spirit of Article 33(2) of the Constitution of Kenya. Further, the Respondent benefits from the prioritization of such posts which is an affront to the Constitution of Kenya.
 - b) The respondent has allowed posts that amount to doxing to be published on Facebook and availed such posts to users in Kenya thereby violating Article 31(c) of the Constitution;
 - c) The respondent's algorithm recommends content that amounts to propaganda for war, hate speech, incitement to violence and advocacy of hatred to Facebook users in Kenya thereby violating their right to dignity under Article 28 of the Constitution and their right not to be subjected to any form of violence or subjected to psychological torture under Article 29 of the Constitution;
 - d) Failure by the respondent to take down content that amounts to propaganda for war, hate speech, incitement to violence and advocacy of hatred has led to the loss of lives thereby violating the right to life as guaranteed under Article 26 of the Constitution;
 - e) Failure by the respondent to take down content that violates the Facebook Community Standards amounts to unfair administrative action and is a violation of Article 47 of the Constitution;
 - f) The respondent's preferential treatment of users in some countries as opposed to its treatment of Facebook users in Africa amounts to discrimination on grounds of race, and ethnic and social origin which is a violation of Article 27 of the Constitution;
 - g) The respondent has failed to protect the health and safety of their users by allowing content that amounts to propaganda for war, hate speech, incitement to violence and advocacy for hatred to be published on Facebook thereby violating Article 46 of the Constitution; and
 - h) The respondent's action has led to the vilification of individuals and destruction of communities thereby violating the core purpose of the Constitution as espoused under Article 19(2) of the Constitution.
9. According to the petitioners, the petition which underscores the violation of the petitioners' rights by the respondent's algorithmic design and its failure to carry out effective content moderation, raises a number of substantial questions of law that require the Court's determination. The 2nd petitioner sets out the substantial issues as follows:
- i. Protection of human rights in the age of Artificial Intelligence (AI);
 - ii. The duty of social media platforms to moderate content on their platforms;
 - iii. Algorithmic bias and discriminatory AI;
 - iv. The economics of social media platforms and their effect on human rights;
 - v. Intermediary liability for harms caused by social media platforms;
 - vi. Internet governance; and
 - vii. The jurisdiction of this Honorable Court where digital decisions are made in Kenya but have a wider effect.
10. The petitioners assert in view of this, that the matters raised in the petition present and substantial questions of law that are novel and complex. Further the petition has weighty evidence thus the call for a discussion and a variety of interpretations from a number of judges. The petitioners also claim that the instant petition is a precedent setting case that will enable this Court to determine our nation's digital future on social media platforms. For these reasons and the great public interest therein, the petitioners are certain that this application is justified and so pray that it be allowed.
11. Furthermore, the petitioners aver that this Court has the requisite jurisdiction to entertain this



matter for the reasons that: the impugned Facebook algorithm recommends inciteful, hateful and dangerous content to Facebook users in Kenya; content creation for the most part of East and Southern Africa carried out in Kenya; the respondent sells advertising space to Kenyans and the respondent uses its content moderation in Kenya as a base to export human rights violations to Eastern and Southern Africa.

Respondents' Case

12. The respondent in reaction to the application filed its grounds in support dated 31st July 2023 and submissions through Oraro and Company Advocates. This support was however retracted in a Notice of Withdrawal dated 15th November 2023 filed through the firm of Coulson Harney LLP.

Interested Parties Case

13. The 1st, 2nd, 3rd, 4th and 6th interested parties' responses with respect to the petitioner's application are not in the Court file or Court Online Platform (CTS).

5th Interested Party

14. In response to the application, the 5th interested party filed grounds in support dated 15th November 2023 on the premise that:

- i. The Petition raises substantive issues of law including, amongst others, the following:
 - a) Are proprietors of social networking websites duty-bound to moderate content posted on their respective websites by the users of those websites?
 - b) Are proprietors of social networking websites, in any event, liable for human rights violations arising from content posted on their respective websites by the users of those websites?
 - c) Are proprietors of social networking websites liable for human rights violations arising from moderation of content howsoever posted on their respective websites where the offending content-moderation is outsourced to a third party?
 - d) Are proprietors of social networking websites liable for human rights violations arising from moderation of content howsoever posted on their respective websites where the offending content moderation is executed by means of artificial intelligence?
 - e) Does the High Court of Kenya have jurisdiction to hear and determine petitions concerning alleged cross-border human rights violations arising from moderation of content posted on social networking websites where the alleged offending content-moderation is executed in Kenya?
 - f) Does the High Court of Kenya have jurisdiction to hear and determine petitions concerning human rights violations occurring in Kenya but arising from alleged offending moderation of content executed outside the territory of Kenya?
- ii. The determination of the substantive issues of law, set out above, will affect the parties to the petition, transcend the circumstances of the petition and have a bearing on public interest as demonstrated below:
 - a) The determination of the subject substantive issues, if made either way, will affect the exercise of the fundamental freedom of expression by millions of persons residing in Kenya (citizens and non-citizens who post content on Facebook and on other social networking websites.
 - b) The determination of the subject substantive issues, if made either way, will affect the exercise of amongst other rights, the right of access to information, consumer rights, and freedom from discrimination, by millions of persons residing in Kenya [citizens and non-citizens] who consume content posted on Facebook and on other social networking websites.
 - c) The determination of the subject substantive issues, if made either way, will have a bearing on the national security of Kenya as it will impact on the responsibility of proprietors of social networking websites in the prevention and mitigation of security threats posed or multiplied by content posted on respective social networking websites.
 - d) The determination of the subject substantive jurisdictional issues, if made either way, will be precedential on the jurisdiction of the High Court of Kenya with regard to petitions for redress of



transboundary and cross-border human rights violations.

iii. The subject of the certification application falls within the terms of Articles 165(3)(b) and (d) of the Constitution as demonstrated below:

iv. The petition invites the Court to exercise its jurisdiction under Article 165(3)(b) of the Constitution of Kenya by determining whether the policies, acts or omissions of the respondent as relates to the moderation of content posted on Facebook deny, violate, infringe or threaten the rights and fundamental freedoms in the Bill of Rights including, amongst others, freedom from discrimination.

v. The petition invites the Court to exercise its jurisdiction under Article 165(3)(d)(i) of the Constitution by determining whether the exercise of jurisdiction by the High Court of Kenya over petitions for redress of alleged transboundary and cross-border human rights violations is consistent with the Constitution.

vi. There is a demonstrable state of uncertainty in the law as regards the subject substantive questions of law outlined above as they are novel and the Courts have not had an opportunity to pronounce themselves on the same.

7th Interested Party

15. The 7th interested party in support of the petitioners' application filed its Replying affidavit through its Chief Executive Officer, Florence Muturi sworn on 3rd May 2023.

16. Echoing the petitioners' sentiments, the 7th interested party avers that indeed the petition raises novel and complex issues with specific emphasis on the jurisdiction of courts on matter of internet governance and extra-territorial and trans-jurisdictional activities. In addition, it is stated that a number of novel issues crystalize from this petition:

i. Whether the respondent practices algorithmic bias and discriminatory Artificial Intelligence;

ii. Whether the respondent is liable for decisions carried out by the Respondent's Artificial intelligence;

iii. Whether the respondent has a duty to moderate the content in its social media platforms and to what extent the liability for this duty extends;

iv. Whether the respondent's content moderation and AI has led to breach of fundamental Human rights;

v. Whether the respondent is liable for the breach to human rights and harm caused by its Platform moderation or lack of and artificial intelligence;

vi. What is the liability of a foreign citizen for his/its activities or non-action;

vii. Whether the Kenyan Courts would have the jurisdiction to adjudicate issues arising from action or inaction of actors over the internet;

viii. Determination of transnational and cross-jurisdictional grievances.

17. The 7th interested party equally avers that the petition raises occurrences of an affront to fundamental rights and freedoms as guaranteed in our Constitution. In its opinion, the respondent who uses a mixture of artificial intelligence and human moderators to moderate the content allowed on its platforms, is liable to ensure that its infrastructure does not violate the constitutional rights of its users and citizens as accorded by the law and neither allow illegal conduct on its platform which violates of citizen's rights. The respondent's alleged inaction and neglect in this regard is argued to be in violation of human rights and freedoms.

18. On this premise, the 7th interested party asserts that it is necessary that this Court emphasize its authority and jurisdiction to protect and enforce the rights of every person in this regard, on the digital space.

1st and 2nd Petitioners' Submissions

19. The 1st and 2nd petitioner through Nzili and Sumbi Advocates filed submissions dated 14th November 2023 where the issues for determination were set out as: whether the petition falls within



the terms of Article 165(3)(b) of the Constitution; whether the petition is one of general public interest/ importance; the specific substantial questions of law for which the certification is sought; and whether there is a state of uncertainty in the law.

20. Relying on the averments and the alleged constitutional violations outlined in the petition, Counsel submitted that the issues therein invoke Articles 165(3) (b) and (d) of the Constitution hence qualifies as a matter for certification under Article 165(4) of the Constitution as affirmed in *Esther Awuor Adero v Cabinet Secretary (Education) & Others* [2021] eKLR.

21. Counsel relying in *Hermanus Phillipus v Giovanni Gneccchi-Ruscione* [2013] eKLR submitted that the Supreme Court guided that public interest is the general welfare of the public that warrants recognition and protection, something in which the public as a whole has a stake. Counsel reiterating the contents of the petition argued that the petition raises issues that concern the public and need for protection of its rights. It was stressed that determination of this petition would transcend the rights of the petitioners herein.

22. Counsel submitted that the Court of Appeal in *Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR emphasized that an application for empanelment must underscore the specific issues that are deemed substantial questions. Counsel noted that the substantial questions herein had been captured under Paragraph 3 of the Application.

23. Counsel contended in the fourth issue that these are novel issues as they have not been settled by the Supreme Court in Kenya nor the Privy Council of the United Kingdom. Furthermore, that there is currently no precedent set in Kenya nor in any other country concerning these issues being: the issues on the new digital concepts such as algorithms and artificial intelligence and their effects on human rights. Likewise, the issues raised stem from the borderless nature of the internet. For these reasons, Counsel argued that there is uncertainty in law concerning these matters.

3rd Petitioner's Submissions

24. Counsel, Ochiel Dudley for the 3rd petitioner filed submissions dated 27th December 2023 in support of the application.

25. Counsel submitted that the petition raises substantial questions of law which necessitate the certification of a bench. Additionally, Counsel submitted that there is uncertainty in law concerning the issues raised. This was appreciated by the Court of Appeal in *Okiya Omtatah Okoiti*(supra) as cited in support.

26. Counsel further pointed out that the respondent in its application had admitted the novel nature in this matter by asserting that the petition presents an unprecedented legal theory. According to Counsel, the issues raised herein necessitate the empanelment of a bench to address the pertinent issues including those of this Court's jurisdiction. This is more so in view of the liability of multinational corporations such as the respondent for violation of the rights of Kenyans as the 3rd petitioner, the rights of foreigners living in Kenya such as the 2nd petitioner and the rights of foreigners domiciled in other countries by multinational corporations operating in Kenya such as the 1st petitioner.

1st Interested party's Submissions

27. The 1st interested party also in support of the application filed submissions dated 15th November 2023 through the firm of Muge Law Advocates. The sole issue for determination highlighted was whether the petition raises a substantial question or questions of law.

28. Counsel submitted that the petition raises a substantial question of law which warrants empanelment of a bench in line with Article 165(4) of the Constitution. Counsel anchored this argument on the grounds that: the petition raises questions of law that fall under Article 165(3)(b) of the Constitution as is evident from the petition, determination of the questions not only affects the petitioners but also affects the general public and it is clear that the questions such as use of



algorithms by social media companies and how they contribute to offline harms and rights violations are unsettled thus a legal uncertainty.

29. Reliance was placed in *J. Harrison Kinyanjui v Attorney General & Another* [2012]eKLR where it was held that:

“The proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly or substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by the Privy Council or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is more question of applying these principles or the plea raised is palpably absurd, then the question would not be a substantial question of law.”

30. Comparable dependence was placed in *County Government of Meru vs. Ethics and Anti-Corruption County Government of Meru vs. Ethics and Anti-Corruption, Omtatah Okoiti & Another v Uhuru Muigai Kenyatta & 7 Others* [2016] eKLR, *Okiya Omtatah Okoiti & Another (supra)*, and *Hermanus Phillipus Steyn (supra)*.

3rd Interested party’s submissions

31. Chimei and Company Advocates on behalf of the 3rd interested party filed submissions dated 20th November 2023. Counsel similarly identified the issue for determination as whether the petition raises a substantial question of law warranting certification for empanelment of a bench under Article 165(4) of the Constitution.

32. Counsel equally relying in *Okiya Omtatah Okoiti & another(supra)* submitted that the Court of Appeal established the principles in such applications as follows:

- i. The issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
- ii. The applicant must show that there is a state of uncertainty in the law;
- iii. The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution; and
- iv. The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”

33. Counsel submitted that the issues raised in the petition go beyond the petitioners’ case as the same bears a great significance on public interest. Particularly, it was stressed that the petitioners represent a number of classes. First the Facebook users in Kenya who have suffered human rights violations as a result of the respondent’s failure to remove the offensive posts, second, Second the Facebook users within Kenya whose rights have been violated from its algorithm serving them with inciteful, hateful and dangerous content and third, Facebook users who use Facebook while in Kenya. Undoubtedly the issues affecting Facebook users in Kenya is a matter of public interest.

34. Counsel further submitted that these issues as is seen in the petition go above the online sphere resulting in real life implications on welfare and human rights of the public at large. Reliance was placed in *Del Monte Kenya Limited v County Government of Muranga & 2 others* [2016] eKLR where it was held that:

“where the Petition raises or deals with an issue of public importance then the balance tilts in favour of empanelment especially if it is also an issue, the determination whereof would affect the rights of both the individual parties as well as the public at large or it is an issue which is yet to be determined and settled by the court or a court superior in hierarchy.”

35. Counsel further submitted that the specified issues in the petitioners’ application are novel questions as have not been addressed before. Reliance was placed in *Stanley Livondo v Attorney General* [2020] eKLR where it was held that: -



“A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it, are concerned.”

36. Lastly, Counsel stated that the issues raised fall under Article 165(3)(b) and (d) of the Constitution. Counsel further pointed out that the petition contains voluminous evidence which will benefit from scrutiny by a bench considering the seriousness of the issues raised therein. Reliance was placed in *Philomena Mbete Mwilu v Director of Public Prosecution & 4 others* [2018] eKLR where it was held that:

“I fully agree with the above views on the jurisprudential value of decisions by a bench or a single judge of this court. Although the present petition can be heard by a single judge of this court and also being fully aware that a bench would sometimes require resources both personnel and financial as well as more time to resolve a petition than if it were heard by a single Judge, the present petition is the kind of petition that this court should exercise its discretion in favour of an expanded bench due to its public importance and significance in our constitutional democracy.”

7th Interested Party’s Submissions

37. On 6th November 2023, Manasses, Mwangi and Associates filed submissions for the 7th interested party. Counsel outlined the single issue for discussion as whether the petition should be certified as one raising substantial issue of law and referred to the Hon. Lady Chief Justice for empanelment of a bench to determine it.

38. Counsel echoing the other parties sentiments submitted that the petition raises substantial issues of transnational and cross-jurisdictional grievances, whether the courts in Kenya have jurisdiction to determine issues of action or inaction of actors over the internet, whether the respondent is liable for human rights violations by its content moderation, protection of human rights in the social media space, the application of Artificial Intelligence in content moderation by social media companies, the issue of algorithmic bias of the Respondent’s systems and discrimination contrary to the provisions of the Constitution, and the economics of social media platforms and their effect on human rights among others. Counsel noted further that pertinent issues were underscored by the 7th interested party in its replying affidavit. All these issues are considered to be novel and complex.

39. For this reason, Counsel submitted that the petition raises constitutional issues which fall within this Court’s jurisdiction under Article 165(3)(d) of the Constitution and satisfies the threshold set in *Okiya Omtatah Okoiti & another (supra)*. Similar dependence was placed in *Martin Nyaga and Others V Speaker County Assembly of Embu and 4 Others and Amicus* [2014] eKLR.

40. Counsel in closing emphasized that the petition will have far-reaching consequences on the intersection between the application of human rights and the way the respondent designs and applies artificial intelligence. As well as content moderation by social media platforms. Thus, Counsel stated that the petition cuts across all the social media and digital space. Moreover, Counsel submitted that the Court will also have an opportunity to address the question whether this Court has jurisdiction to grant redress for human rights violations which occurs in the social media space and who is liable for the same.

Respondent’s Application

41. The respondent in its application seeks orders that:

- i. This Court be pleased to strike out the petition dated 13th December 2022.
- ii. In the alternative to prayer 1 above, this Court be pleased to strike out the claims of the 1st and 3rd petitioners in the petition dated 13th December 2022.
- iii. This Court be pleased to issue any other orders it deems fit to meet the ends of justice.
- iv. The costs of this Application be provided for.



42. The application is supported by the respondent's replying affidavit sworn by Emma Pagan, its Associate General Counsel on 18th September 2023.

43. She depones that the respondent's company is registered and governed by the laws of the State of Delaware in the United States of America thus this Court lacks the requisite jurisdiction to entertain this petition. This argument is based on a number of reasons.

44. First, she avers that the Kenyan Constitution does not have an extraterritorial reach hence cannot be invoked to address the petitioner's claims. In this regard, she avers that the petitioners' allegations arise from events that occurred within Ethiopia not Kenya. She points out that both the 1st and 2nd petitioners are Ethiopia citizens and the subject Facebook accounts were created by the two while residing in Ethiopia. It is stated that although the 2nd petitioner works in Kenya, his allegations entirely concern Ethiopia.

45. Additionally, she avers while the 3rd petitioner is a Kenyan organization, it fails to demonstrate the respondent's alleged discriminatory conduct regarding content moderation affecting Kenyans or persons residing in Kenya.

46. Moreover, it is deponed that the respondent does not have any employees located in Kenya nor any infrastructure in the Country. She adds that the respondent does not employ content moderators in Kenya.

47. She however depones that the third-party contractor in Kenya who had been engaged ceased its content moderation services with the respondent in March 2023. As such it is argued that there is no sufficient nexus between the respondent and Kenya for this Court to assume jurisdiction over the issues raised.

48. She further posits that the relief sought by the petitioners cannot be effected in Kenya. This is with specific focus on the Facebook algorithm and respondent's content moderation practices.

49. The respondent further argues that this Court's jurisdiction is also challenged on the basis of the doctrine of constitutional avoidance. She states that the respondent sets out a pre-condition to all its users on Facebook and are required to consent to the Terms of Service.

50. For this reason, she states that the matters raised herein can be determined on another basis being contractual. This was however not utilized by the petitioners. What is more, such a dispute is supposed to be brought before the United States Court. Section 4(4) of the Terms of Service provides that any dispute will be resolved by the U.S. District Court for the Northern District of California or a State Court located in San Mateo County. She argues therefore that the petitioners cannot circumvent this dispute resolution clause.

51. On this ground, the respondent argues that the petition is bad in law and an abuse of the Court process since the petitioners' seek to invoke an extraterritorial application of the Kenyan Constitution which is improper. Moreover, the petition overlooks the foreign choice of law provision in the respondent's Terms of Service for Facebook users.

1st and 2nd Petitioners' Response

52. In reaction to the respondent's application, these petitioners filed grounds of opposition dated 23rd November 2023 on the basis that:

- i. The question of jurisdiction as challenged by the respondent is not a preliminary issue but rather a substantive issue that requires this Court to consider all the evidence in the petition before making a just determination.
- ii. The question of jurisdiction as challenged by the respondent is in itself a substantial question of law that needs to be referred to a bench of an uneven number judges constituted in accordance with Article 165(4) of the Constitution.
- iii. The prayers sought in the application cannot be granted given the provisions of Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.



- iv. The actions described by the 1st petitioner took place in Kenya and so within the jurisdiction of this Court as the respondent's content moderation centre has been and is based in Kenya and its moderation centre is also in Kenya.
- v. The actions described by the 2nd petitioner also took place and continue to take place in Kenya within the jurisdiction of this Court.
- vi. The jurisdiction of this Court specifically pleaded under paragraphs 155 to 168 of the petition and is invoked on the basis that the respondent's algorithm recommends inciteful, hateful and dangerous content to Facebook users in Kenya; the respondent undertakes content moderation for the posts impugned in the petition in Kenya; the respondent's advertising business in Kenya, which is in question in this petition, takes place in Kenya. The respondent also pays tax for this advertising business; the petition pursues implementation of Article 19(2) of the Constitution to preserve the dignity of individuals and communities.
- vii. The violations addressed in the Petition took place in Kenya.
- viii. Article 22(1) of the Constitution allows any person to bring a Constitutional Petition alleging that rights and fundamental freedoms have been violated, limited, or threatened. A person need not be a Kenyan citizen to bring a constitutional petition in Kenya.
- ix. Article 22(2) of the Constitution allows any person (which is defined to include any entity whether incorporated or not) to bring a petition on behalf of another person and in public interest. The 3rd petitioner is therefore a property party in this case.
- x. The respondent is properly before this Court having been served with the petition pursuant to leave granted by the Court under Order 5 Rule 21 of the Civil Procedure Rules.
- xi. The respondent has employees in Kenya who conduct Facebook content moderation as has been conclusively held by the Court in ELRC Petition E052 of 2023: Kiana Monique and 184 Others v Meta & 3 Others (2023) eKLR.
- xii. The doctrine of constitutional avoidance does not apply in this petition as the petition does not claim a breach of the Terms of Service and neither address the issues raised in the petition such as use of the algorithm. Moreover, the remedies sought not available under contract law.
- xiii. As the dispute before this Court is not a contractual dispute arising out of the Terms of Service, the clauses in the Terms of Service on choice of forum do not apply.
- xiv. Under Article 165 (3)(b) of the Constitution, only the High Court in Kenya has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened.
- xv. The petition is brought by the petitioners on their own behalf, on behalf of the class they represent and in public interest. It concerns the welfare of Kenyans and corporate actions taken in Kenya which this Court has jurisdiction to determine in the public interest.
- xvi. This Court has jurisdiction to hear this petition as it arises out of the respondent's unconstitutional conduct and decisions made in Kenya.
- xvii. This Court ought to dismiss the respondent's application with costs.
53. These averments were equally reiterated in the 1st petitioner's Replying Affidavit sworn on 29th November 2023. Equally, the 2nd petitioner's replying affidavit sworn on 24th November 2023.
54. In addition to these grounds, the 1st petitioner affirms that the alleged violations against him and his family were as a result of the respondent's decision and failure to take down the impugned posts while at its content moderation centres in Nairobi. In the end, this led to the murder of his father causing his family to flee to the United States.
55. The 2nd petitioner affirms that the hateful, inciteful and dangerous comments were made against him while residing in Kenya and where he still resides to date.

1st Interested Party's Case

56. The 1st interested party through its Deputy Programme Director, Mandivavarira Mudarikwa



filed its Replying Affidavit sworn on 28th November 2023.

57. Opposing the respondent's claim of lack of an identifiable nexus between the 1st and 2nd petitioners' claims and Kenya, the 1st interested party submitted that the 2nd petitioner resides and works in Kenya. Moreover, the petition details that the inciteful comments were directed at the 2nd petitioner while he was residing in Kenya. It is further noted that the 3rd petitioner is a Kenyan NGO which in addition has a Facebook account. In view of all the petitioners, it is averred that the nexus is the content moderation of Facebook which takes place in Kenya. This is done on behalf of most sub-Saharan countries. In addition, it is stated that the offensive material complained of remains available in Kenya.

58. It is as well averred that while the respondent argues that it is a foreign Company, it operates and does business within Kenya which falls within the jurisdiction of this Court. The 1st interested party notes also that the allowance of the publishing of inappropriate content in regard to propaganda of war, incitement to violence, hate speech and advocacy of hatred is prohibited under Article 33(2) of the Constitution.

59. Furthermore, the 1st interested party argues that the blatant violation of the fundamental rights and freedoms envisaged under the Constitution makes it certain that this Court has the necessary jurisdiction to entertain the petition.

60. In like manner, the 1st interested party argues that Article 2(5) of the Constitution places an international obligation on this Court to ensure that human rights are respected, protected and fulfilled. It is averred that the UN Guiding Principle 11 places a corporate responsibility on all corporations including international corporations to respect human rights and freedoms. As such, it is asserted that this Court cannot turn a blind eye to the violation of rights and abuses by entities operating in Kenya.

61. The 1st interested party also challenges the respondent's assertion that the petition invokes the doctrine of constitutional avoidance. This is owing to the flagrant constitutional violations that are cited in the petition.

2nd Interested Party's Case

62. The 2nd interested party in opposition to the application filed grounds of opposition dated 7th February 2024 on the grounds that:

In opposition to the respondent's statement that the Constitution of Kenya does not apply extraterritorially to this action because the alleged acts occurred and have effects outside Kenya.

i. As of the date of the petition, content moderation of content posted on the respondent's Facebook Platform by users in most Sub-Saharan countries, Kenya and Ethiopia included, was moderated by the respondent in Kenya

ii. The 1st petitioner was gravely affected by the respondent's content moderation activities in Kenya and the 2nd petitioner lives in Kenya.

iii. The respondent's failures in algorithmic design and effective content moderation have an effect in Kenya as they violate and threaten fundamental rights and freedoms under the Bill of Rights of Facebook users in Kenya and the welfare and rights of the people of Kenya

iv. The petitioners bring the instant petition not only on their own behalf or for their own interests but also in the interest of the following classes:

a) Facebook users within Facebook's content moderation ambit of Kenya who have suffered human rights violations as a result of the respondent failing to take down Facebook posts that violated the Bill of Rights even after making reports to the Respondent,

b) Facebook users within Kenya whose rights have been violated from the Facebook algorithm serving them with inciteful, hateful and dangerous content while they were in Kenya, or who reported inciteful, hateful and dangerous content which was not taken down and led to further violation of their rights, and



c) Facebook users who use Facebook while in Kenya.

v. The petition establishes human rights violations by the respondent afflicting Facebook users in Kenya in violation of the Bill of Rights under the Constitution of Kenya and manifests the manner in which these classes of Kenyans have been violated and are threatened.

In opposition to the respondent's statement that, the Court does not have jurisdiction to hear the Petition under the constitutional avoidance doctrine

vi. While there is a contractual relationship between Facebook users and the respondent, the petition raises substantial issues going beyond the scope of a contractual dispute demanding the interpretation of this Court. These include issues as to the protection of human rights in the age of Artificial Intelligence (AI), and the liability of social media platforms as intermediaries for harm inflicted on their watch

vii. It would be futile to seek a non-constitutional resolution of the dispute when the essence of the matter revolves around safeguarding fundamental human rights, requiring an interpretation of the Constitution, that would otherwise not be addressed by contractual remedies

In opposition to the respondent's claim that the Court does not have jurisdiction over the claims filed by the 1st and 3rd petitioners' due to the foreign choice of law in the Terms of Service.

viii. Despite the foreign choice of law in Terms of Service, this Court has jurisdiction to entertain the petition by virtue of the nature of the claims brought forth by the 1st and 3rd petitioners which transcend contractual issues.

ix. The 1st petitioner rightfully invokes this Court's jurisdiction to address the respondent's activities which were in Kenya. The respondent's hub based in Kenya moderated posts in Amharic and failed to take down posts reported by the 1st petitioner.

x. The 3rd petitioner, though a non-consuming entity, is an entitled party to this suit as a person acting in the public interest and representative of Facebook users in Kenya, who may pursuant to Articles 22 and 23 of the Constitution, institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been violated or threatened.

xi. Based on the foregoing, the 2nd interested party urges this Court to dismiss the respondent's application in accordance with the above.

3rd Interested Party's Case

63. The 3rd interested party in response filed a replying affidavit which was sworn by its Executive Director, Davis Malombe on 5th December 2023.

64. Opposing the respondent's allegations, he avers that the actions complained of by the petitioners in the petition were handled by the external firms which had been outsourced by the respondent to operate within Kenya. These firms were tasked with the function of analyzing the content posted on Facebook and to remove content found to be in breach of the Facebook Community standards. He notes that this was even admitted by the respondent under Paragraphs 10 in its replying affidavit.

65. He adds that with the respondent's admission that the content moderators no longer operate, means that the respondent has left an open door for the continued posting of hateful content on the Facebook platform which will infringe on the rights of millions of Kenyans who use the platform.

This is despite the already hateful and incitement videos that had been posted on the platform even during the moderation period. He highlights examples of Bett Kiptoo, Member of Parliament of Tiaty in 2021 and Benson Njuki in 2022 who had posted inciteful and hateful content.

66. On this premise, he emphasizes that the petition had been brought on behalf of a class of persons in this case all Facebook users in Kenya, those who use the platform while in Kenya, those whose content is moderated in Kenya and those in Africa as the content moderation function of Facebook is based in Kenya.

67. He further depones that constitutional avoidance does not apply in this petition, as the petition specifically deals with the infringements set out under Articles 19(2), 26, 27, 28, 29, 31, 33, 46, 47,



48 and 50 of the Constitution. He argues that the respondent's Terms of Service does not deal with violation of rights under the Bill of rights.

5th Interested Party's Case

68. Mugambi Kiai, the 5th interested party's Regional Director on its behalf filed a Replying Affidavit sworn on 24th November 2023.

69. He depones in opposition that the respondent's jurisdictional averments have no basis in fact and law. He notes that the respondent's impugned actions arose as a result of content moderation that was being conducted in Kenya although complaints arose from Ethiopia. Furthermore, that the respondent's content moderation for the East Africa region is based in Kenya. He in addition underscores that it was apparent that the respondent's operation has a global reach including Kenya and thus not in doubt that they operate in Kenya.

70. He argues that every person despite their nationality has a right to institute proceedings in Court claiming violation of a right or a fundamental freedom under the Bill of rights. In this case he avers that it was, the infringement occasioned by the content moderation.

71. He also challenges the assertion of constitutional avoidance since the petition raises constitutional issues on the respondent's business model in addition to the other averments raised in the petition. Therefore, he states that the petition raises issues of public interest that can only be addressed by constitutional resolution. He on this premise avers that there are circumstances under which an exemption is made to the doctrine of constitutional avoidance such as this petition.

72. He further posits that the 2nd and 3rd petitioners reside in Kenya therefore have the requisite locus standi to institute the instant suit. Moreover, it is noted that the petition is brought on behalf of a class of persons who use Facebook in various capacities within Kenya thus unfeasible to propose that the suit be instituted in the State of California. He states that the petition transcends the individual relationship between the respondent and its users as affects millions of people including those who do not even use the Platform.

The Other Interested Parties responses

73. The other interested parties' responses and submissions are not in the Court file or Court Online Platform (CTS).

Respondent's Submissions

74. The respondent through Coulson Harney LLP Advocates filed two sets of submissions dated 12th February 2024 and 19th April 2024. These submissions were made in reply to the parties' responses not the respondent's application.

75. Counsel on a preliminary note opposed the responses for being filed late. That is long after the deadlines were issued and that they did not seek leave of the Court to file the responses. In this regard, Counsel urged that the late responses be disregarded by the Court and petition be dismissed.

76. Reliance was placed in Benard Maina Kamau v Sunripe (1976) Limited (2014) eKLR where it was held that:

"Parties should not be allowed to disobey orders and directions issued by the courts and orders and directions issued by the court must be adhered to without fail."

77. Counsel in addition noted that the 3rd interested party's reply lacks merit as raises unfounded and irrelevant allegations that fail to address the respondent's averments on this Court's lack of jurisdiction.

78. Like arguments were made with reference to the petitioners' responses and submissions, 2nd, 3rd and 7th interested parties' responses. Reliance was placed in Francis Kariuki Muruatetu & another v Republic & 5 others (2016) eKLR where the Supreme Court prohibited the interested party from introducing new issues for determination by the Court.



1st and 2nd Petitioner's submissions

79. Nzili and Sumbi Advocates filed submissions dated 14th February 2024 for these petitioners and identified the issues for discussions as: whether the question of jurisdiction as raised by the respondent is a preliminary question of law or a substantive question of law; whether the respondent's application has been argued as a preliminary objection, and if so, whether it has met the test for a valid preliminary objection; whether the question of jurisdiction as raised by the Respondent is one of the substantial questions of law for which certification was sought under the 1st and 2nd petitioners application dated 14th December 2022, whether this Court has jurisdiction to hear the petition and grant the prayers sought; and whether the petition offends the doctrine of constitutional avoidance.

80. Counsel in the first issue argued that the respondent's application as raised constitutes a preliminary objection. It was argued that the respondent in filing the application had misrepresented what the petition is about. Furthermore, that the application raises disputed facts thus a substantive question which can only be determined at the hearing of the petition.

81. For this reason, Counsel submitted that the respondent's application having been disguised as a preliminary objection had failed to meet the test for preliminary objections so as to be sustainable. Reliance was placed in *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR where the Supreme Court guided that it was instructive that for a court to hear a preliminary objection, it must be satisfied that there is no proper contest as to the facts; the facts are deemed agreed as they are presented in the pleadings on record.

82. Like dependence was placed in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA 696.

83. According to Counsel the issue of jurisdiction as raised by the respondent is one of the substantial questions for which the petitioners seek certification in their application dated 14th December 2022. Counsel stressed that the parties must be informed of the Court's decision regarding the issue of certification first, so that any party seeking to appeal is able to exercise their right to appeal or approach the Court of Appeal for any necessary orders on stay of proceedings. Reliance was placed in *Bia Tosha Distributors Limited v Kenya Breweries Ltd & 6 Others* [2023] KESC14 (KLR) where the Supreme Court held that:

"Every litigant before court is entitled to a decision".

84. On the next issue, Counsel submitted that this Court based on the petitioners' averments has subject matter jurisdiction, territorial jurisdiction, jurisdiction to grant the remedies sought and in personam jurisdiction. Reliance was placed in *Republic v Magistrates Court, Mombasa; Absin Synergy Limited* [2022] KEHC 10 (KLR) where it was held that:

"26. Back to the three factors which affect court's jurisdiction discussed above, First, pecuniary literally means 'related to money.' Pecuniary jurisdiction sets the pecuniary limits on the jurisdiction of a court. Every court is deemed to have a certain monetary limit of which it can entertain cases and decide. Second, Territorial jurisdiction is the territorial limit in which the law is applicable or the court has power to decide upon. Third, Subject Matter Jurisdiction refers to the nature of the claim or controversy. This means that certain courts are precluded from entertaining suits of particular nature. When the court has no jurisdiction over the subject matter of the suit it cannot decide any question on merits. It can simply decide the question of jurisdiction and if it concludes that it has no jurisdiction over the matter it downs its tools.

27. Strictly, a suit is only effective if the court has jurisdiction to adjudicate the issues raised in the suit. The jurisdiction of the court to adjudicate those issues depends on a number of elements including: - whether the suit discloses a cause of action which that court has jurisdiction to determine (eg breach of contract, negligence etc; whether the court has jurisdiction over the defendant; whether the court has jurisdiction to grant the remedy sought. Importantly, and highly



relevant to this case, jurisdiction of the court does not extend into a foreign country. It refers to the local area upon which its jurisdiction extends within the Republic of Kenya.”

85. On the last issue, Counsel submitted that it is only the High Court which has jurisdiction to determine whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened as affirmed in *Dennis Mogambi Mong'are v Attorney General & 3 Others* [2011] eKLR.

86. Counsel further submitted that the Court in *KB v SCM & 5 others* [2022] KEHC 289 observed that the doctrine of constitutional does not apply in situations where:

“(a) The constitutional violation is so clear and of direct relevance to the matter;

(b) There is no apparent alternative form of ordinary relief; or

(c) It would be a waste of effort to seek a non-constitutional resolution of the dispute.”

87. Like dependence was placed in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR.

3rd Petitioner’s submissions

88. Counsel, Ochiel Dudley for the 3rd petitioner filed submissions dated 27th December 2023 in opposition to the respondent’s application.

89. Counsel begun by stressing that this Court has jurisdiction to entertain this petition as the cause of action arose in Kenya since the content moderation was done in Kenya. Counsel also pointed out that the National Cohesion and Integration Commission has raised concerns about Meta’s failure to moderate harmful content on Facebook. Counsel as such submitted that the issues in the petition are subject to this Court’s jurisdiction.

90. Be that as it may, Counsel stated that no Court in Kenya has so far concluded one’s case prematurely based on the respondent’s similar arguments. To buttress this issue reliance was placed in *Motaung v Samasource Kenya EPZ Limited t/a Sama & 2 others* [2023] KEELRC 320 (KLR) where the Court in response to the respondent’s jurisdiction claims held as follows:

“Meta’s liability was a “question of evidence” and that the “court [was] persuaded that it would be pre-mature to strike off [Meta] from the Petition. There [were] weighty outstanding issues yet to be determined.”

91. Similarly, Counsel asserted that the petition herein raises weighty issues. Counsel added that a Court’s power to strike out pleadings is not mandatory but a discretionary power and so should be exercised sparingly as held by the Court of Appeal in *Safepak Limited v Henry Wambega & 11 others* [2019] eKLR.

1st Interested Party’s Submissions

92. Muge Law Advocates for the 1st interested party filed submissions dated 28th February 2024 where Counsel outlined the issues for discussion as: whether this Court has jurisdiction to hear the matter and relief sought by the petitioners in the petition was filed on 14th December 2022, whether this Court is prohibited by the doctrine of constitutional avoidance to hear the matter and Whether the 1st and 3rd petitioner’s claims should be struck off as sought by Meta.

93. Counsel in support of the petitioners’ application for empanelment submitted that the petition raises substantial questions of law within the context of Article 165(4) of the Constitution and in terms of the standard confirmed by the Court of Appeal in *Okiya Omtatah Okoiti & another* (supra).

94. Counsel further submitted that the issue of jurisdiction is a substantive issue which ought not to be determined at an interlocutory stage but as a substantive issue after the merit of the petition has been considered. Reliance was placed in *Mukisa Biscuits Co. Ltd*(supra) where it was held that:

“A preliminary objection ... raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

95. That said, Counsel reiterated the 1st interested party’s averments in its replying affidavit on the



demonstrable nexus between the petition and this Court's jurisdiction. To support this point, reliance was placed in *Li Wen Jie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others* [2017] eKLR where it was held that:

"[t]he Bill of Rights applies to all persons including foreign national and any decision that is bound to affect their rights must be arrived at in conformity with the constitutionally guaranteed rights to fair process."

96. Like dependence was placed in *Republic v Director of Immigration Services Ex-Parte Planet Motors Company Limited & another* [2016] eKLR and *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] KESC 34.

97. On whether the doctrine of avoidance is applicable, Counsel submitted that the petitioners bring the petition on behalf of a class of persons owing to numerous alleged violations. Reliance was placed in *Bia Tosha Distributors Limited* (supra) where the Supreme Court held that:

"[a] court of law cannot turn a blind eye to alleged constitutional breaches in order to invoke the principle of party autonomy that binds parties to their agreements. This in itself does not mean that any person who sets out to petition the court alleging violation of fundamental rights and freedoms under the Bill of Rights must succeed, as cases are determined on their merits."

98. Like dependence was placed in *Mohamed Feisal & 19 others v Henry Kandie Chief Inspector of Police (OCS) Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)* [2018] eKLR, *CNM v WMG* [2018] eKLR, *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR, *Communications Commission of Kenya*(supra) among others.

3rd Interested Party's submissions

99. The 3rd interested party opposing the respondent's application filed submissions dated 20th February 2024 through Chimei and Company Advocates. The issues for discussion were identified as: whether the Constitution of Kenya applies to the instant petition; whether the doctrine of constitutional avoidance is applicable to this petition and whether the respondent's Terms of Service prevent the 1st and 3rd petitioners from seeking redress for the violation of rights and fundamental freedoms in the Kenyan Courts.

100. On the first issue, Counsel submitted that the instant petition revolves around the petitioners' pursuit to seek redress for the violation of human rights and freedoms for a class of persons. It is stated that this falls under this Court's jurisdiction under Article 165 and 22 of the Constitution. Counsel submitted that the respondents' impugned conduct is linked to Kenya as detailed in the 3rd interested party's affidavit.

101. Reliance was placed in *S N v Cabinet Secretary for the Ministry of Interior and Co-ordination of National Management Services, Director General, Kenya Citizens & Foreign Nationals Management Services & Attorney General* [2016]eKLR where it was held that:

"12. Since the provisions applies the phrase "every person" as opposed to "every citizen", it follows that though the applicant herein is not a citizen of Kenya, she is nevertheless entitled to the protection of her as rights enshrined in Article 47 of the Constitution. This position was the position adopted by Nyamu, J (as he then was) in *Republic vs. Minister For Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004* [2008] 2 EA 323 in which he expressed himself as follows: "Although the applicant as a foreigner may not have the same standing as the Kenyan Citizens in respect of some of the rights in the Constitution, section 74(1) is available to protect the applicant because it applies to all persons and it echoes human rights which are recognised by all modern and democratic societies and Kenya is one of such states. Further, the provisions of section 74(1) of the Constitution of Kenya are echoed in article 7 of the International Covenant on Civil and Political Rights, 1966, (ICCPR) which states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The Kenyan provision applies to all persons and not only to



citizens.”

102. On the second issue, Counsel relying in Communications Commission of Kenya (supra) stated that principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. Like sentiments were also registered in KKB (supra) which was cited in support.

103. In this matter, Counsel submitted that the actions of the respondent manifestly touch on human rights and fundamental freedoms guaranteed under Articles 19(2), 26, 27, 28, 29, 31, 33, 46, 47, 48 and 50 of the Constitution which is under the exclusive jurisdiction of this Court. As such, Counsel stressed that no other forum would suffice to address the petitioners’ claims.

104. On the last issue, Counsel submitted that Article 22 of the Constitution clearly provides that any person may institute court proceedings claiming that a right or a fundamental freedom has been violated, infringed and threatened including the 1st and 3rd petitioners herein. Accordingly, Counsel contended that contrary to the respondent’s arguments this Court has jurisdiction to entertain the matter, as the alleged violations were committed in Kenya.

105. Be that as it may, Counsel submitted that the Terms of Service relate to any claims arising out of the petitioners’ use of the platform not the constitutional issues raised herein. Counsel noted that contrary to the respondent’s assertion, the issues arising in the petition relate to the use of Facebook by other users to the detriment of the 1st petitioner and the rest of the class of persons represented in the petition. Additionally, Counsel submitted that the Terms of Service do not cover the infringement or violations of the Bill of Rights.

7th Interested party’s submissions

106. Manasses Mwangi and Associates Advocates filed submissions dated 15th January 2024, for the 7th interested party.

107. Counsel submitted that the petition raises substantial questions of law that justify empanelment of a bench. Reliance was placed in Republic v Public Service Commission & Keriako Tobiko Ex parte Nelson Havi [2017] eKLR where it was held that:

“the Constitution itself does recognise that in certain circumstances it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed of numerically superior judges...”

108. Similar dependence was placed in Philomena Mbete Mwilu(supra).

109. That said, Counsel objected to the respondent’s withdrawal of its grounds of support for the petitioner’s application for empanelment arguing that parties are bound by their pleadings. Reliance was placed in Mombasa Cement Limited v Salim Masdud Abdalla & 4 others [2018] eKLR where it was held that:

“In this Application, the Applicant has taken a lot contradictory positions in the same proceedings. In my view, a party cannot be allowed to take two contradictory positions in the same proceedings. In other words, one cannot approbate and reprobate at the same time in the same proceedings. The positions taken by the applicant have been inconsistent.”

110. Like dependence was placed in Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR.

111. Turning to the respondent’s application, Counsel submitted that it was pre-mature and unmerited. Counsel noted that the respondent had not filed any substantive response to the petition before filing the instant application. It was further argued that the facts in this case affirm that this Court has jurisdiction to entertain this matter. This is because the respondent has a registered office in Nairobi which is the headquarters of the African and Asian businesses and that the content



moderators were based in their Nairobi office.

112. Counsel submitted that the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 although allows for striking out of a petition, the same is to be done in limited circumstances where there is demonstrable abuse of the court process which the respondent did not establish. Moreover, it was underscored that the respondent had not denied the existence of a cause of action in this matter.

113. Reliance was placed in *DT. Dobie & Company Limited v Joseph Mbaria* [1982] I KLR where it was held that:

“no suit should be summarily dismissed unless it is so hopeless that it disclose no reasonable cause of action. Where a suit can be injected with a semblance of a cause of action through amendment then the court should lean towards maintaining the suit.”

114. Counsel further submitted that the respondent had admitted that it was carrying out content moderation services concerning certain language-specific content in Africa within Kenya until March 2023. It was asserted that this makes it evident that this Court has jurisdiction and is the proper forum. Reliance was placed in *Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others* [2016] eKLR where it was held that:

“We find that the applicant is entitled in law to institute proceedings whenever there is threat of violation of his fundamental rights and freedoms or threat of violation of the Constitution. Whether there is a threat of violation is a question of fact and evidence must be adduced to support the alleged threat.”

115. Counsel also submitted that the Court of Appeal in *Meta Platforms, Inc & another v Samasource Kenya EPZ Limited t/a Sama & 185 others; Central Organization of Trade Unions Kenya & 8 others* [2023] KECA 999 (KLR) denying the jurisdiction allegation held that:

“Also not arguable is the ground that the Constitution does not apply to the applicants because they are foreigners. To our mind, the Constitution binds every person within the Republic and obligates every person to observe and respect it.”

116. Additional dependence was placed in *Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others* [2023] KESC 105 (KLR).

Analysis and Determination

117. Arising from various standpoints taken by the respective parties herein, the Court identified the following issues:

- i. Whether the respondent’s application to strike out the instant petition is merited.
- ii. Whether the petition dated 14th December 2022 raises substantial questions of law to warrant certification to the Chief Justice for the empanelment of an uneven number of Judges to hear the Petition

Whether the respondent’s application to strike out the instant petition is merited.

118. Striking out of pleadings is a procedure by which the Court is moved to strike out defective pleading or to cause an amendment where an amendment can cure it. It could be for the reason that the particular pleading does not disclose a reasonable cause of action or defence in law; is scandalous, frivolous or vexatious, or is intended to embarrass or delay the fair trial or is otherwise an abuse of the court process. This procedure is available to ensure that the case is presented fairly to allow the Court determine the issues in dispute. It is a power that the Court exercises sparingly with abundance of caution as it is a procedure that may summarily sending away a party from the seat of justice without a trial on merits.

119. The locus classicus case on striking out of pleadings is the Court of Appeal decision of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1982] KLR 1 which was cited with approval in Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] KECA 221 (KLR) as follows:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said: -

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

120. Further, the Court of Appeal in Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019] KECA 851 (KLR) held as follows:

“The striking out of a pleading, has time and time again been described as draconian and an order of last resort. A court will therefore only resort to it, in its discretion, where it has properly addressed itself on the principles... and is satisfied, upon assessment of the material before it that any of the grounds enumerated exists or do not exist.”

121. This position was also emphasized in the Court of Appeal case of GBM Kariuki vs. Nation Media Group Limited and 3 others [2012] KEHC 367 (KLR) citing the case of Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999 as follows:

“...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment...”

In Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000 the same court expressed itself thus:

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is



unarguable.....No suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment”.

122. Striking out of pleadings should be distinguished from preliminary legal points, or what is in common legal phraseology is known as preliminary objection. Preliminary objections are pure legal issues argued on assumption all facts pleaded are correct and if successful will lead to termination of the entire case.

123. This is unlike an application to strike pleadings whose central concern is a pleading and may lead to striking out of the pleading or an amendment if it can cure the defect.

124. In its application to strike out, the respondent introduced the jurisdictional questions which are my humble view legal issues that ought to have come as preliminary points of law.

125. Be that as may, the respondent cited the lack of this Court’s jurisdiction in urging that the instant Petition be struck out. It was the respondent’s contention that the Petition offends the doctrine of constitutional avoidance.

126. This doctrine that assert that the Constitution should not be trivialized in resolving matters that strictly speaking are not constitutional controversies and which may be resolved on any other legal basis or grounds. In this case, the respondent contended that the present dispute is disguised as constitutional matter but it is in actual fact a contractual dispute because users of face book are required by the respondent to consent to the terms and conditions of the agreement with the respondent before being allowed to access that service and that the said terms provide the choice of forum in event of a dispute which is the US District Court of Northern Delaware or State Court in Mateo County.

127. Further, the respondent contends that the Petition is an abuse of the Court process as the Kenyan Constitution does not have extra- territorial application and that the respondent does not have any employees in Kenya. That it had only engaged a 3rd Party sometime back whose contract with the Respondent ended in the year 2023.

128. The petitioners and interested parties vigorously contested the above assertions arguing that the Petition is not about the breach of the terms and conditions of the agreement but that it is premised on violation of fundamental rights and freedoms.

129. That the application relies on disputed facts that can only be properly canvassed during the trial. They contested the fact that the Respondent has no presence in this Country stating that the matters complained of occurred when the Respondent was still maintaining its presence in this country by having content moderators who were stationed in this Country.

130. As pointed out, this application is a striking out application yet it attacks the jurisdiction and not the pleadings perse. If it is directed to the pleadings, a cardinal principle as discerned from the foregoing authorities is that striking out a pleading would only occur if it is plainly obvious that it discloses no cause of action and is incapable of being resuscitated even by an amendment.

131. The factual positions relied upon by the respondent as a ground of objecting to jurisdiction is strongly contested by the Petitioners and the interested parties who happen to present a different narrative as demonstrated above.

132. They contend that the case is not about breach of contractual terms and should not be viewed



from the narrow scope of a contractual dispute but from the broad perspective of human rights violations in the digital space provided by the Facebook Platform. That the violation complained of occurred due to the acts or omissions of content moderators based in this country but whose impact extended to another jurisdiction through the use of the Face Book platform.

133. After a conscious scrutiny of the issues raised in this Petition, I am convinced that this is a Petition that raises pertinent issues deserving of serious consideration by the Court.

134. The jurisdiction of this Court is not ousted by the doctrine of constitutional avoidance.

135. The Petition raises fundamental concerns on acts or omissions that may have been made regarding content posted on Face Book Platform by content moderators based in Kenya that may impact on observance of human rights beyond Kenya through the use of social media. This in my view perfectly falls within the purview of this Court's jurisdiction to consider under Article 165 (3) (b) of the Constitution.

136. It is thus the considered opinion of this Court that this Petition is one that warrants to be given a chance and be heard on merits as opposed to terminating it summarily at a preliminary level.

137. For reasons stated, the Respondent's application to strike out the Petition is hereby rejected and dismissed.

138. Costs shall be in the cause.

139. I now turn to the Petitioner's application for empanelment and the question is:

Whether the petition dated 14th December 2022 raises substantial questions of law to warrant certification to the Chief Justice for the empanelment of an uneven number of Judges to hear the Petition

140. The Constitution guides on the kind of case(s) that should be considered for referral to the Chief Justice for hearing by a bench comprising uneven number of Judges. This is found in Article 165 (4) of the Constitution which states:

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

Article 165 (3) and (b) (d) provide that—

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and



iv. a question relating to conflict of laws under Article 191.

141. Although the Constitution uses the phrase ‘substantial question of law’ as the test for guiding the Court in determining the nature of cases that should be recommended for empanelment of a bench to hear and determine, it does not proceed to ascribe meaning to the phrase.

142. Nonetheless, I do not think the phrase ‘substantial question of law’ should present any difficulty in discerning the meaning as it has received judicial consideration in various authorities.

143. In the celebrated Indian Supreme court Case of Sir Chunilal Mehta and Sons, Ltd vs The Century Spinning and Manufacturing (1962) SC 1314 stated:

“A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which has not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court or general principles to be applied in determining the questions are well settled and that there is a mere question of applying those principles or that the plea raised is probably absurd, the question would not be substantial....”

144. In the case of Philomena Mbeti Mwilu (Supra) the court observed as follows:

“24.a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties; there is some doubt or difference of opinion on the issues raised and that the issue is capable of generating different interpretations. If however the question has been well settled by the highest court or the general principles to be applied in determining the question before court have been well-settled, the mere application of those principles to a new set of facts presented in a case before the court would not on their own constitute a substantial question of law. There must be the possibility of the matter attracting different interpretations or opinion in its interpretation or application of the principles espoused in the matter to make it a substantial question of law. All this notwithstanding, it is up to the individual judge to decide whether the matter raises a substantial question of law for purposes of reference.”

145. The Court of Appeal in Okiya Omtatah Okoiti & Another (supra) set out the principles to be applied when considering such an application. The held thus:

“42. There are, in our view, parallels to be drawn between certification for purposes Article 163(4)(b) of the Constitution and certification for purposes of Article 165(4) notwithstanding that the drafters of the Constitution, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of “general public importance”, The word, “substantial” in its ordinary meaning, means “of considerable importance”. There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:

“(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;

(ii) The applicant must show that there is a state of uncertainty in the law;



(iii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution;

(vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”

43. It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of the Constitution is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed.”

146. Whether or not a matter will be certified as raising substantial question of law is a matter left to the discretion of the individual Judge to be exercised judiciously as guided by the authorities and the general guide under the Constitution. Matters requiring certification of empanelment of a bench must be demonstrably shown to be of great significance to the public in general as opposed to mere interest of the parties to the dispute and further, to present legal issues in which the existing legal principles have not settled with finality.

147. The question thus becomes, does the present Petition satisfy the threshold for certification of a bench? A reading of the Petition discloses that it raises weighty constitutional questions, namely:

i. Protection of human rights in the age of Artificial Intelligence (AI), particularly where the use of Artificial Intelligence in social media platform results in violation of human rights, hence to what extent, if any, social media platforms acting as intermediaries should be held accountable.

ii. Whether there is intentional algorithmic bias and discriminatory AI for different geographical regions.

iii. The Constitutional jurisdiction of this Court in relation to digital decisions made in Kenya with a wider reach on violation of human rights in other jurisdictions and the vice-versa.

148. I am persuaded that this petition raises a substantial questions of law and hence satisfies the threshold under Article 165(3) (b) and (d) of the Constitution. The issues raised are substantial and transcend the interests of the parties involved in the Petition. These are matters of general public importance relating to protection of fundamental rights and freedoms in the digital era.

149. The resolution of the present dispute will go a long way in charting a clear jurisprudential path that ensures observance of human rights in a borderless digital community.

150. The upshot is that the Petition is certified for empanelment of a bench by the Honourable the Chief Justice.

Dated, signed and delivered virtually at Nairobi this 3rd day of April, 2025.

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L N MUGAMBI
JUDGE

SIGNED BY: HON. MR. JUSTICE LAWRENCE N. MUGAMBI



THE JUDICIARY OF KENYA.
MILIMANI HIGH COURT
HIGH COURT CONSTITUTION AND HUMAN RIGHTS
DATE: 2025-04-04 14:22:37

