The image is a cover for a report. It features a central map of Kenya in a reddish-brown color. The background is a light purple-grey with a dense pattern of small, semi-transparent icons representing various digital and internet-related concepts, such as social media, technology, and communication. A large, stylized graphic on the right side consists of three overlapping curved bands in black, red, and green, which are the colors of the Kenyan flag. The title is written in large, bold, white, sans-serif capital letters, with the words 'of the' and 'IN KENYA 2016' in a smaller font size.

# STATE of the INTERNET IN KENYA 2016



Bloggers  
Association  
of Kenya



The Bloggers Association of Kenya (BAKE) is grateful to our partners and individuals working in the Internet Freedoms space who offered technical, advisory and financial support in this project. They include; Internews Network, HIVOS, Article 19 and Morris Kiruga.

This report was produced as part of BAKE's iFreedoms Kenya program. It is available for download at: [ifree.co.ke/reports](http://ifree.co.ke/reports)

State of the Internet in Kenya 2016 Report

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## Introduction

It has been an eventful period since we released our first report<sup>1</sup> in June 2015. Since then, a lot has happened that has positively shaped the nascent industry. At the policy level, a new Cabinet Secretary for Information, Communication and Technology, Joe Mucheru and two Principal Secretaries, Sammy Itemere and Victor Kyalo came into office during the period. From the courts, the law that was being used to intimidate bloggers was declared unconstitutional. In the business of blogging, the forerunner entertainment blog, Ghafla! was acquired by Ringier Africa<sup>2</sup>, showing blogging as a business venture and profession is coming of age fast. On the negative though, members of the LGBTQ community, women and children have faced cyber bullying.

The Bloggers Association of Kenya (BAKE)<sup>3</sup> continues to grow and undertake its mandate of promoting online content creation and free expression in Kenya. Apart from the continued Internet freedom trainings, it has made strategic decisions to align to various organizations and initiatives that will further promote freedom of expression in Kenya. Several legal instruments have been lined that will have an impact on the ICT sector in general.

The Access to Information Act (2016)<sup>4</sup> has paved the way for Kenyans to seek information from government agencies and private sector players in a manner not seen before. The ICT Policy<sup>5</sup> will soon be finalized and operationalized. The government is also working on a Cyber Crimes and Computer Related Crimes Bill<sup>6</sup> that will guide the sector and hopefully, promote the digital economy.

BAKE is actively engaged in the review of the ICT Practitioners Bill as the representative of bloggers and online content creators. Initially, the efforts were to either kill the Bill in totality or water down its provisions. This has changed to a focus of having legislation that will promote the growth and development of the ICT industry. The organization is also engaged in the review of the Films, Stage Plays and Publications Bill, 2016<sup>7</sup> because some parts of it touch on online content.

We hope that the changes that are taking place will continue to robustly include the participation of stakeholders and help springboard the industry to its ideal future.

1 <http://www.ifree.co.ke/2015/06/16/the-state-of-blogging-social-media-in-kenya-report-download/>

2 <http://www.dhahabu.co.ke/2016/05/26/ghafla-buy-ringier-shows-growth-blogging-kenya/>

3 [www.bake.co.ke](http://www.bake.co.ke)

4 <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2031%20of%202016>

5 <http://www.information.go.ke/wp-content/uploads/2016/06/Draft-NationalICTPolicy-20June2016.pdf>

6 <http://www.mygov.go.ke/?p=11234>

7 <http://www.ifree.co.ke/wp-content/uploads/2016/11/DRAFTBILL-KFCB-21-7-Draft-10-1.pdf>

## Growth of the Internet in Kenya

For this report, we tracked the 36 most active blogs within the BAKE server and the stats from individual blogs for the period between October 2015 and October 2016. According to our analysis of the data collected, the blogging scene has seen a huge growth in the terms of monthly readership in the last one year. Overall monthly visits (readers) increased by 46 per cent from 12.4 Million to 18.1 Million. There are many factors which have contributed to the growth of blogs readership including the high increase of the number of Kenyans who can access Internet through their phones. But more importantly, blogs are seen by many Kenyans as authentic means to get news and opinions which mainstream media would normally shy away from. This could be described as Anti-Traditional Media Sentiment and the blogs are increasingly filling the gap.

The lifestyle category has seen the highest growth, recording 69 per cent, followed by the business category with 46 Per cent and creative writing with 36 per cent. The rapid growth of business blogs was not a surprise following the trouble with the banking industry; more than once, Social Media and Kenyans online were accused of causing the collapse of Chase Bank and soft runs in several other banks. We also saw many new bloggers opting to create business blogs as opposed to other categories like creative writing which has been dominant in the last few years.

It is interesting to note that the readership of the blogs under political category decreased by 47 per cent followed by entertainment by 37 per cent. We always expected that the two categories would be the biggest gainers going with the past trends but it seems things are changing. One simple explanation as to why the two categories lost readership could be that Kenyans are getting serious with the content they interact with online. For the entertainment category in specific, the other reason could be because traffic is being diverted elsewhere, especially to the ever increasing popularity of Facebook videos and YouTube.

The growth in Kenya's Internet penetration has seen the media and entertainment economy significantly move online. The Communications Authority of Kenya (CA) quarterly sector Statistics Report Fourth Quarter for the Financial Year 2015-2016 (April-June 2016)<sup>8</sup>, indicates that the Data/Internet market reached 26.8 million during the quarter while the estimated number of Internet users grew to 37.7 million users during the period under review.

The report further records that Internet penetration declined from 87.2 per cent recorded last quarter to 85.3 per cent. This drop is attributed to the revision of the base population figure used in the computation of penetration from 43.0 million to 44.2 million in line with the Economic Survey 2016.

According to the Kenyan Entertainment and Media Outlook: 2013-2017 (Outlook)<sup>9</sup> report by audit firm PricewaterhouseCooper (PwC), Internet access is a key driver of entertainment and media advertising and content dispersion in most segments. The Internet market consists of both consumer spending on Internet access and the revenues generated from Internet advertising. PwC estimates that the total entertainment and media expenditure in Kenya will exceed US\$3 billion in 2017. Internet traffic in Kenya has increased due to the reinforcement of international bandwidth capacity. Increased capacity has benefitted both the fixed and mobile segments. The report further asserts that Kenyan Internet advertising is set to grow at a compound annual growth rate (CAGR) of 21.9 per cent over the forecast period, growing from a low base of only US\$2 million in 2008. Search and mobile advertising will be the main growth-driving segments over the forecast period.

8 <http://ca.go.ke/images/downloads/STATISTICS/SECTOR%20STATISTICS%20REPORT%20Q4%202015-2016.pdf>

9 <http://www.pwc.com/ke/en/publications/entertainment-and-media-outlook.html>

## Mobile Data and Smartphone Penetration

Kenya's mobile penetration has increased from 89.2 per cent to 90 per cent according to the CA report<sup>10</sup>. The report says that the continued growth in mobile subscriptions has been driven by proliferation of mobile data services such as m-commerce and m-banking services as well as handset affordability.

<sup>10</sup> Ibid

According to the Consumer Barometer survey by Google<sup>11</sup>, the percentage of people who use a smartphone to access the Internet in Kenya has increased from 27 per cent in 2014 to 44 per cent in 2016.

<sup>11</sup> <https://www.consumerbarometer.com/en/trending/?countryCode=KE&category=TRN:NOFILTER:ALL>

## Notable platforms in Kenya

### Facebook

According to Facebook, there are 6.1 million Kenyans on Facebook.

The visit by Mark Zuckerberg, Facebook's co-founder and CEO, in September 2016 was a validation of the growth of the platform in Kenya and also the ICT sector. In his visit, he announced that he wanted to learn from both the local developers and entrepreneur community. He visited the iHub, Twiga Foods and Andela on his first visit to Sub-Saharan Africa<sup>12</sup>.

### Twitter

According to a story published in the Economist<sup>13</sup> in May 2014, it is believed that Twitter's co-founder, Evan Williams, sent the first ever tweet from the lounge of the Mount Kenya Safari Club in August 2007.

According to Nendo<sup>14</sup>, a digital research company, there are 2.2 million monthly active Kenyans on Twitter. 1 million of them use Twitter every day.

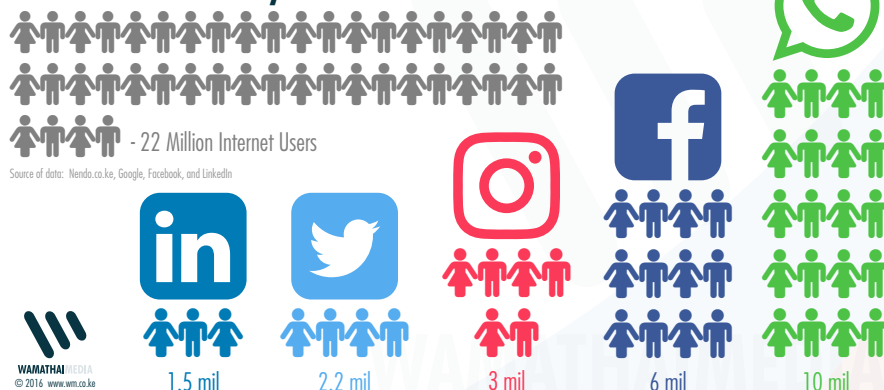
### WhatsApp

According to Nendo estimates, WhatsApp has 10 million users in Kenya. It has become an important channel for person-to-person communication and has become a driver of conversations on other social media platforms as content shared on WhatsApp finds its way on Twitter and Facebook.

### Others

Nendo also estimates that there are 3 million Instagram users in Kenya and 1.5 million LinkedIn users.

### Internet Use in Kenya



<sup>12</sup> <http://www.techweez.com/2016/09/01/zuckerberg-in-nairobi/>

<sup>13</sup> <http://www.economist.com/blogs/baobab/2014/05/twitter-kenya>

<sup>14</sup> <http://nendo.co.ke>

## The role of blogs and Social Media

Blogging platforms and Social Media have become alternative news sources for Kenyans. Time and again, even mainstream media has either used the platforms to first air their news or rely on it to gather news. The government has used it to communicate and respond to critical issues.

As alternative, reliable and dependable sources of news, Jackson Biko and Morris Kiruga have stood out in the past year for credibly showing the world society's ills and struggles.

Crowdfunding had yet to get an impetus as did when Jackson Biko through his blog<sup>15</sup> wrote about Mr. Emmanuel Otieno aka Jadudi who was fighting cancer. He told the story<sup>16</sup> of the then 22-year-old university student from a humble background who had undergone three brain surgeries, but still had a lot of fight in him and sought financial help to go under the knife for the fourth time. As a result of Biko's piercing storytelling coupled with Zawadi Nyong'o's brilliant Social Media campaign, Ksh. 6.4 million was raised in 46 hours.

Mr. Kiruga, popularly known as Owaahh, has cut a niche for himself as the best historical and research-focused blogger of our time. While he has been blogging for over six years, it is his serialized story on the corruption at Imperial Bank<sup>17</sup> in February 2016 that put him on the national radar. He continues to consistently write features that are well developed for online readers.

The industry has also grown to be an environment with legitimate career paths<sup>18</sup> which employ full-time writers. Platforms like HapaKenya<sup>19</sup>, Techweez<sup>20</sup>, Tuko<sup>21</sup>, Ghafla!<sup>22</sup> and Soko Directory<sup>23</sup> among others continue to have full-time staff on their payroll. Most of these are in the media industry, but a few of them are secondary offline careers built around an online presence.

Social Media has also claimed its stake as a force to reckon with its never ending fierce critiquing, highlighting and pushing policy makers to take actions on issues. Mark Kaigwa, in an academic article titled; From Cyber Café to Smartphone: Kenya's Social Media Lens Zooms In on the Country and Out to the World<sup>24</sup> asserts that journalists now consider Twitter a part of their beat, using it as a core part of their job.

Kaigwa says it has become common to see news broken on Twitter by a blogger - whether a hobbyist, informed industry insider, or cyber-roving reporter pouncing on a story—legitimizing it (at times, plagiarizing it outright!). Kenyan media outlets routinely source and quote tweets and other comments from Social Media for their news stories.

Nanjira Sambuli argues<sup>25</sup> that going by the last decade of growth and contribution to public policy directly and indirectly, Social Media cannot be taken for granted. What is casually referred to as “hashtag activism” has considerable successes in bringing duty bearers to shame and account.

15 <http://www.bikozulu.co.ke/that-thing-in-jadudis-head/>

16 <http://www.businessdailyafrica.com/Opinion-and-Analysis/How-my-Jadudi-blog-helped-raise-Sh6-4-million-in-under-48-hours/-/539548/2830136/-/mghnlcz/-/index.html>

17 <http://owaahh.com/the-sack-of-imperial-bank/>

18 <http://www.mwendengao.com/2016/10/07/blogging-influencing-legitimate-career-paths-supported/>

19 <http://www.hapakenya.com>

20 <http://www.techweez.com>

21 <http://www.tuko.co.ke>

22 <http://www.ghafla.co.ke>

23 <http://www.sokodirectory.com>

24 <http://www.mark.co.ke/about/>

25 <http://www.nation.co.ke/oped/blogs/dot9/nanjira/3225972-3442840-97nvpz/index.html>



## Freedom of expression and the media in Kenya

The last year and a half has been difficult for media freedoms in Kenya. Journalists and bloggers have felt the wrath of power and influence when doing their job in a manner that is striking similar to the old, dark days of Kenya. When Kenya promulgated the Constitution on August 27th 2010, with robust provisions for journalism practitioners, it was never imagined that these provisions will remain just on paper.

Article 19 East Africa, last year<sup>26</sup> documented that that each month from January to September 2015 had cases of intimidation. Over 60 journalists and bloggers were silenced, intimidated, harassed and some even killed in a spate of violence against freedom of expression, freedom of the media and access to information. The cases of threats against journalists and bloggers have been all over the country, with the fewest incidences being in the northern part of Kenya. Isiolo, Meru, Embu, Kiambu, Kitui, Mombasa, Kwale, Kajiado, Nairobi, Narok, Bomet, Kisii, Kisumu, Bungoma, Uasin Gishu and TransNzoia counties all recorded threats to freedom of expression. The Police, state officials, politicians and other individuals have contributed to the silencing and intimidation of journalists. In the period this report covers, at least two journalists or bloggers were threatened every month.

Kenyan online have also not been spared the wrath of excessive force and impunity. The use of ‘improper use of licensed telecommunication gadget’ under Section 29 of the Information and Communications Act was rampant. It criminalized publishing information online which is deemed unlawful by the authorities. The section has since been declared unconstitutional.

Others were charged with “undermining authority of a public officer,” for criticizing government officials on Social Media, a charge

under section 132 of the penal code (Chapter 63 Laws of Kenya) which was enacted in 1948 during the colonial rule. Robert Alai, when charged under this section, filed a counter suit challenging its constitutionality. The case is ongoing.

In April 2016, the police Inspector General Joseph Boinnet cautioned the public against making unsubstantiated claims touching on the banking sector, some of which have caused panic. At least one seemed, at best, to be fake or incomplete. In the press release, the IG’s office said that it had arrested “David Mukunzi Zawadi to face the relevant charges related to misuse of Social Media to disseminate falsehoods about the banking sector.” The release explained the reason for his arrest as “It’s one thing to alert acquaintances about matters that are truthful and factual but we shall not allow persons driven by malicious considerations to peddle falsehoods to mislead members of the public.” Despite this, however, BAKE cannot find any record of a blogger by that name in the Kenyan blogosphere, or even anywhere in the Kenyan police or court system.

In most of these cases, bloggers and Kenyans online were arrested and held for some days for questioning. They would then be released without being charged. The arrests are made on Fridays and successful online engagements lead them to be released on Monday. In retrospect, journalists and activists who were active in Kenya in the 1980s would feel nostalgic about this process albeit negatively so.

In 2016, Ezer Kipkirui<sup>27</sup> was arrested and held for taking a photo of a long queue in a Huduma Center in Nakuru. Journalist Yassin Juma<sup>28</sup> was arrested for sharing a Facebook comment showing a photo of a dead member of the Kenya Defence Forces (KDF).

26 <https://www.article19.org/resources.php/resource/38322/en/launching-article-19s-annual-report-2015>

27 <http://www.ifree.co.ke/2016/03/ezerkipkirui-arrestforcreating-disturbance-by-taking-a-photo-of-huduma-center-in-nakuru/>

28 <http://www.ifree.co.ke/2016/01/freelance-journalist-yassin-juma-arrested-for/>

Mbuvi Kasina<sup>29</sup> faced six counts for misuse of licensed telecommunications system for questioning the expenditure of Kitui South Constituency Development Funds (CDF). In October 2016, blogger Dennis Owino<sup>30</sup>, popularly known as @kinyanboy was arrested and held for six hours without being questioned, allowed to write a statement or told reasons for his arrest<sup>31</sup>. He was released later in the evening.

Many other Kenyans online were arrested, some charged for expressing their opinions online. They include Martha Miano, Elijah Kinyajui, Patrick Safari, Judith Akolo, Martha Miano, Antony Njoroge alias Waime Mburu, Eddy Reuben Illah, Kalinga Mgandi, David Mukunzi Zawadi, Brian Otieno, Elkana Jacob and Harun Kongo. Wanjeri Nderu was physically harmed for calling for accountability online. Godfrey Wamalwa, Reuben Ogada and Nehemiah Okwemba are among journalists who were attacked for their coverage of stories in the counties.

Journalists Alphonse Shiundu and John Ngirachu were summoned to the Department of Criminal Investigations (DCI) for allegedly publishing classified information. They had reported on the loss of funds from the Interior Ministry; the information had been made available to the National Assembly's committee by Interior Cabinet Secretary Joseph Nkaissery.

This trend follows last year's one when Macharia Gaithe, Purity Mwambia, Bernard Namunane, Frankline Wambugu and Alex Kiprotich had also been summoned by the DCI and asked to reveal the sources of their security related stories. It is a cardinal rule in journalism that sources are sacred.

Some journalists and media houses have also been sued for defamation by various state officers for publishing some stories. Kurgat Marindany of Radio Africa was sued for defaming the Kajiado District Commissioner for writing that he cried in public.

The governor of Nairobi County, Evans Kidero, sued Nation Media Group and Standard Media Group for publishing stories that linked him to the financial mismanagement of Mumias Sugar Company.

Furthermore, all Judges of the Supreme Court sued the Star newspaper owned by Radio Africa Group claiming one of its articles had portrayed them as corrupt judicial officers. The article is alleged to have said that they received bribes to make certain key decisions. National Bank of Kenya filed a defamation case against Nation Media Group over newspaper articles it termed 'malicious'.

Moreover, Nairobi Aviation College was granted an order by the High Court to begin contempt of court proceedings against Nation Media Group, over an article alleging that the institution issues fake certificates to students.

This year, blogger Cyprian Nyakundi has four defamation cases from Bidco, Bob Collymore, Michael Joseph, Safaricom and Nahashon Nyagah for publishing stories related to them. Nyakundi himself also sued journalist Larry Madowo for defamation for casting aspersions on his character in an article on his blog.

Another online personality, Allan Wadi has been an exception in the last two years. He was arrested, arraigned in court and jailed for two years in 2015. He was charged with hate speech and undermining the authority of a public officer. A lawyer, Edward Oonge, appealed the sentence after eight months and he was released. He was however, arrested again in March 2016 and charged with incitement to violence. The case is still ongoing.

Another critical event in the last year is that Kenya Network Information Center (KENIC) pulled down a domain, isuhuruinkenyana.co.ke<sup>32</sup>, which stated at any one time whether the Kenyan President was in the country or not. President Uhuru Kenyatta has made more foreign trips than any other President and Kenyans were questioning the value of these trips.

29 <http://www.ifree.co.ke/2016/02/mbuvi-kasina-faces-six-counts-improper-use-licensed-telecommunication-system/>

30 <http://www.ifree.co.ke/2016/10/blogger-dennis-owino-held-by-police-for-six-hours-without-a-reason/>

31 <http://www.ifree.co.ke/2016/10/18/dennis-owino-held-police-six-hours-without-reason/>

32 <http://isuhuruinkenyana.co.ke>



The site monitored the President's travel log, replying with a NO or YES depending with the location of the president. At the time of its launch in December 2015, the President was away attending a summit in South Africa. He had just come from the Commonwealth Summit in Malta and Climate Change Summit in

Paris. The trending hashtag #IsUhuruinKenya accompanied the online conversations, making it a discussion on whether the head of state was giving the country enough attention.

Pressure from Kenyans online saw the domain reinstated later that evening after being off the whole day.

## Internet Freedoms in Kenya

The period saw the online publication of the alleged rot at National Bank of Kenya, followed by accusations from the bank that bloggers are unprofessional. In a statement<sup>33</sup>, the National Bank of Kenya (NBK) said it was aggrieved by increased number of Social Media users, including a blogger, who published malicious and untrue information about reputation-sensitive institutions like banks.

BAKE was quick<sup>34</sup> to distance all bloggers from the blanket condemnation, urging the bank to take all necessary measures to seek redress in courts and any other measures.

During the same year, the Central Bank of Kenya (CBK) said<sup>35</sup> that Social Media is to blame for the then collapse of Chase Bank. The apex bank said, "Chase Bank Limited experienced liquidity difficulties, following inaccurate Social Media reports and the stepping aside of two of its Directors."

Equally, BAKE also distanced Social Media users<sup>36</sup> from blame for the Chase Bank crisis by putting forward that the bank was put under receivership on 7th April 2016 for liquidity challenges due to lack of integrity by the management. None of the top Directors; the Chairman and the Chief Executive are bloggers. In addition, no blogger or Social

Media user was the recipient of the huge loans the Directors and staff of the bank gave themselves, against banking regulations.

Another notable issue on Internet freedoms was when two Kenyans were charged and convicted for contempt of court<sup>37</sup>. Jackson Njeru and Jacqueline Okuta aka Nyako Ber were jailed for three months for contempt of court by a High Court Judge, Msagha Mbogholi. They were jailed because they were Facebook administrators of the group, "Buyer Beware." Their crime was that being group administrators, they did not bring down a post from a member of the group that mentioned prominent lawyer Cecil Miller, who has sued them for defamation. The lawyer had earlier gotten injunction against the two for mentioning his name anywhere online pending the determination of the cases he has against them. This was precedence for Kenyans online because the crime of omission was coming into play. While it is not them who posted the comments, their crime was not deleting the comments or advising against those posting of the existing court injunction.

In November 2016, the Banking Fraud Investigation Unit announced that they had arrested<sup>38</sup> Christine Gachiko Njeri for spreading a malicious report claiming that Family Bank was about to be put under receivership on Facebook.

33 <http://www.blog.bake.co.ke/2016/04/09/bloggers-and-social-media-are-not-to-blame-for-the-chase-bank-crisis/nbk-statement-on-irresponsible-blogging-final/>

34 <http://www.blog.bake.co.ke/2016/03/01/we-are-strongly-against-the-blanket-condemnation-of-bloggers/>

35 [https://www.centralbank.go.ke/images/docs/MPC%20Press%20Releases/Press\\_Release\\_Chase\\_Bank\\_Limited\\_April\\_7\\_2016.pdf](https://www.centralbank.go.ke/images/docs/MPC%20Press%20Releases/Press_Release_Chase_Bank_Limited_April_7_2016.pdf)

36 <http://www.blog.bake.co.ke/2016/04/09/bloggers-and-social-media-are-not-to-blame-for-the-chase-bank-crisis/>

37 <http://www.ifree.co.ke/2016/06/16/jackson-njeru-jailed-three-months-contempt-court/>

38 <http://www.ifree.co.ke/2016/11/banking-fraud-officers-arrest-christine-gachiko-njeri-malicious-message-family-bank-social-media/>

## Human Rights online in perspective

On June 30th, 2016, the United Nations Human Rights Council declared online freedom to be a human right that must be protected. In the resolution<sup>39</sup>, UNHRC called for the “promotion, protection, and enjoyment of human rights on the Internet.” The resolution stresses that the same rights that people enjoy offline must also be protected online and governments should particularly ensure they are guaranteed. It also underlines that intentionally disrupting Internet access to citizens should be condemned as it infringes on people’s freedom of expression.

Concerned by the increase in threats and lack of adequate protection against children online, the Communications Authority of Kenya (CA) published and circulated the National Kenya Computer Incident Response Team Coordination Center (National KE-CIRT/CC)<sup>40</sup>. Its mandate is to coordinate response and manage cyber security incidents nationally and to collaborate with relevant actors locally, regionally and internationally.

The guide to child online protection<sup>41</sup> formed a core part of the National KE-CIRT/CC because children can unknowingly get into dangerous situations online. The guide defines online crimes to include solicitation of a minor, cyber bullying, identity theft and online fraud and child pornography.

According to Maryana Munyendo, the founder of Simba Safe Kenya<sup>42</sup>, an organization that helps teach children age-appropriate safety skills necessary to protect themselves in risky situations and one of the founders of Missing Child Kenya<sup>43</sup> which tracks missing children in Kenya, says solicitation in chat rooms, cyber bullying/stalking, radicalization, identity theft and online fraud/scams are the most rampant

forms of abuses children face online. She argues that while the law recognizes the right of a child to access information and gives a child the right to privacy, children are unable to define boundaries hence the need for better, robust protection by parents and society in general.

Women have also borne the brunt of attacks online. On numerous instances, women who are vocal on various issues have been targeted, harassed and intimidated for their online advocacy. One lady who shared her experiences in confidence said she has been harassed for over a year by individuals who stalk her both physically and online. Both the Directorate of Criminal Investigations (DCI) and the National Intelligence Service (NIS) are investigating the matter.

These cases are however, not widely reported due to threat of violence that arises when they are publicized, like in the case of Wanjeri Nderu<sup>44</sup>. As a result, many victims suffer in silence and do not want to document their cases either through writing or to the police. Sadly, there are no safe reporting structures online for women to refer to or programs that could enable them better protect themselves. In addition, while many women have reported about these abuses, the police do not take them seriously.

Mwende Ngao, founder of kiketele.com<sup>45</sup>, a platform that shares stories about African women, had this to say about violence against women online, “Violence against women is nothing new. Every society, including Kenya, has its fair share of forms of violence against women. Some forms of violence such as domestic violence and sexual violence are recognized even in law but continue to happen as various cultures that view women as inferior beings support and maintain this violence. With

39 [https://www.article19.org/data/files/Internet\\_Statement\\_Adopted.pdf](https://www.article19.org/data/files/Internet_Statement_Adopted.pdf)

40 <http://www.ke-cirt.go.ke/index.php/aboutus/>

41 <http://ca.go.ke/childonlineprotection/images/docs/COP%20Booklet.pdf>

42 <http://www.simbasafekeny.com/>

43 <https://www.facebook.com/missingchildkenya/>

44 <http://www.ifree.co.ke/2015/07/03/wanjeri-nderu-assaulted-for-tweeting-about-corruption/>

45 <http://www.kiketele.com>

violence against women frequently happening in the offline world, it comes as no surprise that it would happen online. There are those who deny the existence of cyber gender violence, claiming that it's oversensitivity and can easily be mitigated by growing a thick skin or simply not getting online. It's part of the culture of denial and victim blaming that helps keep the violence going. The online space is just another platform and Social Media is just another tool that can be used for either positive or negative interactions. Social Media has made it possible for Kenyan women to form a community and advocate for issues that affect us. This has threatened those who wish to uphold the status quo leading to increased vitriol against women and men who support them. This has gotten to the point where anonymous accounts have been created specifically to target women. Revenge porn where women's nudes are being shared online as well as on apps like WhatsApp and Telegram are becoming common and feeds into the already existing culture of the objectification of women. The added advantage of anonymity online of abusers and the laxity with which cyber violence is dealt with by authorities keeps cyber violence a fringe issue, except conveniently when it has political implications. A lot of work needs to be done on prosecution when it comes to cyber violence as it's even harder to report and see justice done when compared to other forms of gender based violence. There are laws being drafted to deal with revenge porn and other forms of violence but the progress is slow and a lot of training needs to be done for police officers, the judiciary as well as online users. Hopefully, as recognition of its far-reaching effects continue, we can begin to work towards solid interventions."

Members of the lesbian, gay, bisexual, transgender, intersex, and questioning (LGBTIQ) face human rights abuses online frequently.

Online cyber bullying, and harassment is a common trend facing LGBTIQ Kenyans. LGBTIQ persons, unlike other cases of online bullying, or shaming, do not have recourse to legal mechanisms, or reporting, because the legal structures do not recognize their rights as human rights which need to be protected.

Sadly, openly gay personalities, and activists (case in point Joji Baro), continue to be pilloried with hate, shaming, and death threats online. It is harder to identify who these persons are because they often use fake profiles.

In September 2014, Dennis Nzioka<sup>46</sup>, a gay rights activist launched WATETEZI<sup>47</sup>, an online reporting platform to document human rights injustices against LGBTIQ Kenyans. A look at the curated posts on it shows hundreds of cases of abuse, shaming, cyber bullying and intimidating online. These abuses arise from comments by Kenyans to a TV/Radio stations' online platform (Facebook, Twitter), where they discuss gay rights - they could pose a question, like should homosexuality be accepted?, then invite Kenyans to comment. A read through the comment reveals the stigma attached to homosexuality, and the vile people have against gay people. In addition, random discussions on Social Media pages, whether closed or open groups, also brings out the human rights abuses.

Too few members of the LGBTIQ community are open and no longer take the online vile on them. Nzioka explains that many lesbians and gay men have been forced to close down, or delete their profiles due to continued hate thrown at them. These abuses are also not within the ambit of 'hate speech' as defined by the National Cohesion Commission's policy, and thus are not entitled to be investigated, or persons who are guilty, liable for prosecution. He adds that due to their persistence, volume, and sheer dehumanization, most people often suffer depression.

<sup>46</sup> <http://dennisnzioka.co.ke/>

<sup>47</sup> <https://www.pinterest.com/denisnzioka/watetezi/>

## Review of the Section 29 judgment

No Kenyan has suffered the wrath of Section 29 of the Kenya Information and Communication Act (KICA) like blogger Robert Alai. He had at least five active cases with these charges in court, dating back to 2012. His most recent case this year was when the Ethics and Anti-Corruption Commission (EACC) CEO Halakhe Waqo took issue with him for questioning his undergraduate degree in a post on Facebook and Twitter.

The section reads:

A person who by means of a licensed telecommunication system—

- (a) sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
- (b) sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or to both.

People of all walks of life, especially those in positions of authority took advantage of the ambiguous section to sue bloggers and Kenyans online. They would then ensure the cases are delayed, with the accused being asked to make frequent trips to courts only to be told the case will not be heard.

When you study most of these cases, they merit a charge of defamation. Kenya's jurisprudence has many cases in which Judges have given stiff penalties to defendants, which then leads one to wonder why the plaintiffs use Section 29 of KICA instead of the defamation laws considering that their reputations are at risk. It only leads to credence that it is more about intimidation and muzzling of freedom of expression than seeking justice.

From a penalty perspective, some defamation litigants have been awarded Ksh 30 million and the recent Facebook case Ksh 5 million. However, the maximum charge for Section 29 is three months in prison, Ksh 50, 000 or both. Are these really damages worth loss of reputation?

The case came about after Geoffrey Andare, a web developer for a public institution was sued by Titus Kuria for what he alleged was posting offensive messages about him on Facebook.

He specifically took issue with these words: "You don't have to sleep with the young vulnerable girls to award them opportunities to go to school, that is so wrong! Shame on you"

It is after he filed the case that Geoffrey filed a counter suit, challenging the constitutionality of the charge<sup>48</sup>.

### Vagueness of wording

The Judge agreed with petitioner (Andare) and interested party (Article 19) in submitting that the words in the section are vague.

The section creates a chilling effect on the guarantee to freedom of expression. It creates an offence without creating the mens rea element (guilty conscience) on the part of the accused person.

She said that failure to define words like 'grossly offensive', 'indecent' obscene' or 'menacing character' leaves them to the subjective interpretation of the court. She added that determining how a message causes 'annoyance', 'inconvenience', 'needless anxiety' is also very subjective.

She said, "It is my view, therefore, that the provisions of section 29 are so vague, broad and uncertain that individuals do not know the parameters within which their communication falls, and the provisions therefore offend against the rule requiring certainty in legislation that creates criminal offences."

### Limitation of the Right to Freedom of Expression

Both the parties to the case agreed that the section limits freedom of expression. However, the respondents, the Attorney General and the Director of Public Prosecution (DPP) said that

48 <http://kenyalaw.org/caselaw/cases/view/121033/>



the limitations in the section are in line with constitutional limitations in Article 33 of the Constitution

The right to freedom of expression does not extend to-

- (a) Propaganda for war;
- (b) Incitement to violence;
- (c) Hate speech; or
- (d) Advocacy of hatred that-
  - (i) Constitutes ethnic incitement, vilification of others or incitement to cause harm; or
  - (ii) Is based on any ground of discrimination specified or contemplated in Article 27 (4).
  - (iii) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

Justice Mumbi Ngugi however, said that the limitation fails to abide by Article 24 of the Constitution which sets general provisions for limitation of rights that they can be limited; only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

She added that the limitations do not conform to a free and democratic society as envisioned in the Constitution. She added that respondents failed to demonstrate the relationship between the limitation and its purpose, and to show that there were no less restrictive means to achieve the purpose intended.

### Operating license

The learned judge looked into the purpose of the whole law, Kenya Information and Communication Act, Cap 411A “to facilitate the development of the information and communications sector (including broadcasting, multimedia telecommunications and postal services) and electronic commerce”.

She said that section 24, which deals with the issuance of telecommunication licenses’ did not intend to apply to individual users of Social Media or mobile telephony.

The Judge added that Social Media users are not given licenses by the Communications Authority of Kenya (CAK) to operate, warranting meriting of the law.

Individuals such as the petitioner and others who post messages on Facebook and other Social Media do not have licences to “operate telecommunication systems” or to provide telecommunication “as may be specified in the licence.”

### Guilty conscience

The Judge further discussed the issue of the guilty conscience, mens rea, of the petitioner to the crime. This principle in criminal law stated that the court must establish that the accused intended to commit the crime in the mind. She addressed the use of only one sentence by Titus Kuria in suing Andare, forgetting the whole context that the message was sent.

She agreed that failure to establish this guilty conscience means that the right to a fair trial in Article 50(2)(n), a right which cannot be derogated as enshrined in the Constitution was not fulfilled. The section says that you should not be convicted for a crime which is not recognized as a crime in Kenya and a crime under international law.

She ruled that:

- (a) I declare that section 29 of the Kenya Information and Communication Act is unconstitutional;
- (b) I direct each party to bear its own costs of the petition.

The DPP had wanted the case dismissed with costs to the petitioners.

Justice Mumbi Ngugi added that the DPP has the constitutional mandate to determine whether or not to proceed with the prosecution of the petitioner on the case should they disclose an offence under any other provision of law. However, the Director of Public Prosecutions cannot continue to prosecute the petitioner under the provisions of section 29 of the Kenya Information and Communications Act.

The judgment, made on 19th April 2016 was welcome news to all Kenyans online.



## Calls to regulate bloggers

There have been calls for blogging to be regulated. The concerns have been that some Kenyans online have gone rogue. The calls for regulation have come from three prominent quarters.

Dennis Itumbi, the Director of Digital Communication in the Office of the President has consistently called for the regulation of bloggers to take the same framework as media. For media, the Media Council of Kenya (MCK) is a statutory body that self-regulates media houses and journalists. This is the same format that Dennis has called for.

The National Bank of Kenya (NBK) also called for the regulation of bloggers following articles that they termed untrue and malicious. In their statement, they said they had written to various government agencies including the Ministry of Information and Communication, MCK and Central Bank of Kenya to urge them to see to it that bloggers are regulated.

The Deputy President H. E. Hon. William Ruto also called for the regulation of bloggers the same day the Inspector General of Police Joseph Boinett said that David Mukuzi Zawadi had been arrested.

## Online defamation

In a precedence setting decision, Hon. Arthur Papa Odera, the MP for Teso North, sued Peter O. Ekisa Alias Shujaa for defamation. The MP alleged that between the months of February and March 2014, Peter published defamatory statements on Facebook. The MP said the comments, “in the natural meaning of the said publication were understood to mean that he was an unprincipled man, unprofessional, corrupt and has been misusing Uwezo Fund resources.”

Civil Suit No. 142 of 2014<sup>49</sup> delivered in April 2016 by Justice Msagha Mbogholi found Peter guilty of defamation. The Judge noted that he had refused to apologize or pull down the offending words from Facebook. He proceeded to award the MP Kshs. 2 million general damages, Kshs. 1.5 Million exemplary damages and Kshs. 1.5 Million aggravated damages making a total of Kshs. 5 million. Peter was also to cover the costs of this suit.

Blogger Cyprian Nyakundi has four defamation cases. He also been arrested severally during the year, questioned and released. Through his blog<sup>50</sup>, he has been accused of defaming Safaricom, Bob Collymore and Michael Joseph, Nashon Nyagah and Bidco.

A separate issue involving Bidco, saw the blogger also sue NTV journalist Larry Madowo. An audio recording was shared online that showed blogger Arthur Mandela aka Xtian Dela in which he is a middle man in negotiations for a potential blackmail. He is heard asking the Bidco communications officer for Ksh 50 million for Nyakundi to stop writing negative articles against Bidco and also delete all the articles he had written before about the firm. Larry took to his blog<sup>51</sup> in an article titled, ‘Of broke ‘bigwigs,’ Social Media ‘influencers’ and Ksh 50M tweets’ to denounce such behavior which Nyakundi found defamatory and sued him.

Deputy President William Ruto has also sued photojournalist and activist Boniface Mwangi for defamation<sup>52</sup>. A comment that Boniface wrote on his Twitter account is the subject of the suit which the Deputy President wants damages from him in addition to an apology, retraction and injunction against him barred from ever publishing or posting on Social Media any defamatory material against him.

49 <http://kenyalaw.org/caselaw/cases/view/120593/>

50 [www.cnyakundi.com](http://www.cnyakundi.com)

51 <http://larrymadowo.co.ke/ofbroke-bigwigs-social-media-influencers-and-sh50m-tweets/>

52 <http://www.ifree.co.ke/2016/10/07/deputy-president-william-ruto-sues-boniface-mwangi-defamation-tweet/>

## Intellectual property cases online

Photographer, Mwangi ‘Mwarv’ Kirubi’s image was used by Land Rover Africa on their Facebook page without his permission. His lawyers, Kikao Law, got in touch with Land Rover’s legal team in South Africa and they agreed to settle out of court<sup>53</sup>.

Kenyan athlete Julius Yego seems to have taken a similar route because just a month after his image was wrongfully used<sup>54</sup>, various pictures of him appeared on EABL’s posters whereby he appeared to endorse the brand.

Phone brand Tecno found itself in a copyright storm online after using an image of musician Wangechi, which she claimed they did without her permission<sup>55</sup>. The case

was complicated because the image was taken by a third party who then entered it into a competition by Tecno.

TV station NTV, owned by Nation Media Group (NMG), had its YouTube channel terminated<sup>56</sup> in May 2016 due to copyright infringement. A message when accessing it read, “NTV Kenya has been terminated because we received multiple third-party claims of copyright infringement regarding material the user posted.” It was surprising because the company has strong copyright law protection mechanisms of its content, including in digital platforms. Before a channel is brought down, several attempts are made to ask the channel owners to defend themselves. It was one of the most important clashes of mainstream media with the digital economy.

53 <http://mwarv.click.co.ke/2015/10/23/the-case-against-land-rover/>

54 <http://nairobi.news.nation.co.ke/news/julius-yego-blasts-eabl-for-using-his-win-to-market-husker/>

55 <http://www.hapakenya.com/2016/09/02/who-owns-the-rights-to-a-photo-the-case-of-wangechi-vs-tecno/>

56 <http://www.hapakenya.com/2016/05/13/ntv-kenya-youtube-channel-terminated-over-copyright-infringement/>

## Kenya ushers a new regime on access to information

Kenya finally has an Access to Information law, Access to Information Act (2016)<sup>57</sup>. The industriousness of Nyeri County Women Representative Hon. Priscilla Nyokabi birthed the act after initial poor commitment from the government.

Access to information and freedom of expression are sisters. Freedom of expression includes to seek, receive or impart information or ideas. It is the cornerstone of democracy as it guarantees its practice. Accessing information from both government and non-state actors enables a population express themselves informatively since they have facts.

The Act provides the processes by which citizens, it defines who is a citizen, can request for information from public entities and relevant private institution. It also penalizes

the withholding of information by public information officers. In addition, it explains the procedures for complaints, and bestows upon the Commission on Administrative Justice (CAJ) enforcement and oversight powers.

As noted by Article 19<sup>58</sup> however, the scope with regards to national security includes cabinet deliberations which ought not to be the case. Perhaps once the Cabinet Secretary formulates regulations, the scope will be better defined and broaden disclosure areas by the Executive. Other issues that need clarity in the regulations include: formats, record keeping by public entities, and accuracy of information and complaints procedures.

57 <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2031%20of%202016>

58 <https://www.article19.org/resources.php/resource/38461/en/kenya-new-dawn-for-transparency-as-access-to-information-law-is-passed>

## Surveillance and monitoring by the state

A report by University of Toronto based Citizen Lab in October 2015<sup>59</sup> revealed that the National Intelligence Service (NIS) had acquired spy software FinFisher. A FinFisher server was found in a range of IP addresses registered to a Kenyan user named “National Security Intelligence.” FinFisher is a sophisticated computer spyware suite, written by Munich-based FinFisher GmbH, and sold exclusively to governments for intelligence and law enforcement purposes.

59 <https://citizenlab.org/2015/10/mapping-finfishers-continuing-proliferation/>

Although marketed as a tool for fighting crime, the spyware has been involved in a number of high-profile surveillance abuses. Between 2010 and 2012, Bahrain’s government used FinFisher to monitor some of the country’s top law firms, journalists, activists, and opposition political leaders. Ethiopian dissidents in exile in the United Kingdom and the United States have also been infected with FinFisher spyware.

## Bloggers and Social Media concerns for 2017

In August 2016 after President Uhuru Kenyatta met Governors, they agreed to take stern actions against media houses and Social Media users<sup>60</sup> who propagate hate. They argued that the reason for coming down heavily on incitement and hate speech was to maintain peace and a stable united country before and after the elections.

The concerns are however, that these leaders will take advantage of the agreement to arrest, intimidate and prosecute their critics without any link to hate speech. The previous actions with how Governors have been against journalists and their critiques online who call them to order and journalists who highlight maladministration and corruption worry. For instance, West Pokot Governor, Simon Kachapin<sup>61</sup> and Nakuru Governor Kinuthia Mbugua<sup>62</sup> are some examples of how they have reacted to journalists who report on corruption. Governor Mbugua was also accused of using the police<sup>63</sup> to silence critics.

Another concern bloggers have is the possibility of the Internet being shut down during the 2017 General Election. This action has been an emerging trend by various African countries during elections and has cast doubts of the Kenyan government maintaining the Internet since they have closely associated themselves with these countries including Gabon, Uganda and Ethiopia. Additionally, Kenya was one of the countries that voted against <sup>64</sup>the landmark UN resolution condemning Internet shutdowns<sup>65</sup>.

Mr. Walubengo, a lecturer at the Multimedia University of Kenya, Faculty of Computing and IT argues<sup>66</sup> that Kenya, having a more sophisticated leadership, can encroach on Internet freedoms in more subtle ways than many other African countries can. It is unlikely to orchestrate a countrywide Internet shutdown like what typically happens in Uganda or Zimbabwe. However, they can achieve the same effect by shutting down selected zones of the country as and when they deem it necessary.

60 [http://www.the-star.co.ke/news/2016/08/10/uhuru-governors-draw-plan-to-tame-hate-mongers-before-2017-poll\\_c1401728](http://www.the-star.co.ke/news/2016/08/10/uhuru-governors-draw-plan-to-tame-hate-mongers-before-2017-poll_c1401728)

61 <http://kenyanewsagency.go.ke/en/journalists-criticized-for-negative-publicity/>

62 <http://uncova.com/nakuru-blogger-arrested-for-criticizing-governor-kinuthia-mbugua-over-misuse-of-public-funds>

63 <http://www.nation.co.ke/counties/nakuru/Governor-using-police-to-harass-critics/1183314-3316388-iw09dv/index.html>

64 <http://mobile.nation.co.ke/blogs/blogs/3112606-3408884-item-1-8qucbvz/index.html>

65 <https://www.accessnow.org/un-passes-resolution-condemning-Internet-shutdowns/>

66 <http://www.nation.co.ke/oped/blogs/dot9/walubengo/2274560-3461054-view-asBlogPost-wraku8z/index.html>

He says that, “mobile-based technologies are inherently geo-location based. It is therefore easy to propagate congestion or otherwise take down GSM base-stations in one or two targeted counties without affecting the rest. This could be done to contain perceived sources of “unrest” - be they of political, social or economic nature. Citizens within those zones would be without access for as long as it is considered necessary for government authorities to get on top of a situation.”

In addition, the executive has been critical of critics of its regime, especially its policies, sending alarm to whether they will accept criticism of election mistakes and mishaps if they were to happen. It has equally resented peaceful assembly and demonstration on political issues.

The African School on Internet Governance (AfriSIG) in Durban, October 2016 made a statement<sup>67</sup> as an outcome of a multi-stakeholder practicum regarding the practice of Internet shutdowns on the continent. The statement highlighted that shutdowns violate

67 <http://afriSIG.org/afriSIG-2016/statement-on-an-intentional-Internet-shutdown/>

individual rights, companies and media organizations with content online. These institutions and individuals lose credibility, revenue, and audience when the Internet is shutdown while individuals can lose jobs. In their recommendations, they affirm that multi-stakeholder forums within countries should help determine when in extreme cases the Internet could be shutdown.

A report by the Brookings Institute published in October 2016<sup>68</sup>, affirmed that Internet shutdowns cost countries \$2.4 billion last year. The report arising from 19 countries highlights reasons for ordering these disruptions as safeguarding government authority, reducing public dissidence, fighting terrorism, maintaining national security, or protecting local businesses. While they acknowledge that the economic loss is a conservative figure, the report underlines that Internet disruptions are creating significant detrimental impacts on economic activity in a number of nations around the world.

68 <https://www.brookings.edu/research/Internet-shutdowns-cost-countries-2-4-billion-last-year/>

## Digital economy grows

The Kenya’s digital economy is growing in leaps and bounds. The Internet is transforming different sectors of the economy including agriculture, financial services, health and education. Today, the Internet access costs are less than 10 per cent of those prevailing in 2007<sup>69</sup>, before the arrival of submarine fibre optic cables. This is positively influencing the move to digitize various services including government services and going mobile.

One notable mark of growth is the acquisition of gossip blog Ghafla<sup>70</sup> by Ringier<sup>71</sup> a Switzerland based media group with an integrated and diversified value creation chain. While the value of the buyout is not public, it does illustrate the growing interest in the blogging and digital media community in Kenya. The blog has since shifted from a gossip blog to a general news site<sup>72</sup>.

70 <http://www.ghafla.co.ke/>

71 <http://www.ringier.com/en>

72 <http://www.techweez.com/2016/09/09/ghafla-kenya-change-tact-rebrand-general-news-site/>

69 <http://ihub.co.ke/blogs/22113>

## Conclusion

The growth of blogging platforms is commendable, indicating a growing demand for quality content by Kenyans online. It is a challenge to bloggers to keep up their good work. It is also instructive on which areas are experiencing more growth than others.

For the first time in the history of the republic, respondents to court cases have been served via WhatsApp. The other options used have been email and Social Media, clearly indicating the rise of online spaces for legal procedures. Boniface Mwangi and Cyprian Nyakundi were served through these three ways in their court cases.

There is a concerted effort by government to regulate the online space. Proposed laws after the other are all findings a need to tag the online space, especially online content creation. About four Bills exist as of today, some which have either already reached Parliament or still with relevant state agencies. These are the Cyber Security and Protection Bill, 2016 (from the Senate), Cybercrime and Computer related Crimes Bill (from the Ministry of ICT), Films, stage plays and publications bill, 2016 and ICT Practitioners Bill (2016). The Cyber Security and Protection Bill 2016 has already called for public participation and BAKE participated by sending a memorandum<sup>73</sup>.

On the one hand, there are some genuine reasons informing these Bills. For instance, the publication and publicizing of nude photos of children, dead persons from accidents and terrorist related incidences, cyber bullying and online threats need to be mitigated. But all these have to fulfill constitutional requirements in Article 33(2) which set limitations on freedom of expression.

The buyout of Ghafla is significant to the digital industry in Kenya. It is the first sizeable digital media outlet to be bought which reflects the growing importance of blogs in Kenya. It is changing its content from gossip to general news something that is likely to affect its consumers. But they are buoyant that with the right marketing, coupled with Ringier Africa's experience with similar moves in Nigeria and Ghana, they can retain and even grow the blog exponentially.

Threats to online freedoms will continue to emerge from different quarters, some targeted at individuals or institutions and without addressing them, they can only get worse.

As an association, BAKE will continue to call for the promotion and protection of Internet freedoms in all its forms. We hope government functionaries support us in shaping the growth of the industry and not limiting a sector that has enormous potential for individuals and the economy at large.

<sup>73</sup> <http://www.blog.bake.co.ke/2016/10/19/memorandum-presented-senate-regarding-cyber-security-protection-bill-2016/>







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