

Kenya

	2016	2017		
Internet Freedom Status	Free	Free	Population:	48.5 million
Obstacles to Access (0-25)	8	7	Internet Penetration 2016 (ITU):	26 percent
Limits on Content (0-35)	7	7	Social Media/ICT Apps Blocked:	No
Violations of User Rights (0-40)	14	15	Political/Social Content Blocked:	No
TOTAL* (0-100)	29	29	Bloggers/ICT Users Arrested:	Yes
			Press Freedom 2017 Status:	Partly Free

* 0=most free, 100=least free

Key Developments: June 2016 – May 2017

- Internet connection speeds surpassed the global average, while average mobile internet speeds ranked highest in the Middle East and sub-Saharan Africa (see **Availability and Ease of Access**).
- Online manipulation and disinformation proliferated on social media in advance of national elections in August 2017, though digital activism remained vibrant (see **Media, Diversity, and Manipulation and Digital Activism**).
- The High Court ruled Section 132 of the penal code unconstitutional in April 2017; the provision penalized “undermining the authority of public office s” and had been used to prosecute online and offline speech (see **Legal Environment**).
- Numerous Kenyan bloggers and social media users were arrested or questioned for critical online speech, continuing an alarming trend (see **Prosecutions and Detentions for Online Activities**).
- The High Court suspended a new system to monitor illegal mobile network usage on grounds that it could erode privacy, though new research revealed intelligence agencies have direct access to telecommunications networks, bypassing legal oversight (see **Surveillance, Privacy, and Anonymity**).

Introduction

The internet in Kenya remained relatively free in the past year, though issues of hate speech, disinformation, and surveillance in the lead-up to the contentious 2017 elections season threatened to undermine internet freedom. A proactive civil society pushed the judiciary to rollback some restrictions.

As one of the most wired countries in sub-Saharan Africa, Kenya boasts an increasingly tech savvy population and one of the fastest average connection speeds in the world. Political content is not systematically censored, though in June 2017, select children's television shows were banned from web and TV broadcasts for ostensibly promoting homosexuality in violation of "moral values."

In an effort to curb the spread of online abuse spreading before elections, the Communications Authority of Kenya issued guidelines prohibiting the dissemination of political messages that "contain offensive, abusive, insulting, misleading, confusing, obscene or profane language," among other problematic provisions that could limit legitimate online expression. Yet the guidelines failed to check the proliferation of online manipulation and disinformation on social media.

The Kenyan judiciary made several moves to protect the fundamental rights of citizens online in the past year. In April 2017, the High Court ruled unconstitutional Section 132 of the penal code that had penalized "undermining the authority of public office s," though not before several bloggers and social media users were arrested for criticising government officials online. Amid revelations of the government's growing surveillance capabilities, a high court judge suspended the implementation of a "device management system" after an activist filed a case saying it could be used to monitor communications.

In another victory for internet freedom, digital activism surrounding the growing problem of internet shutdowns in other sub-Saharan African countries achieved a commitment from the communications regulator that the internet would not be shut down during the elections period.

Obstacles to Access

Internet connection speeds in Kenya far surpassed the global average, while average mobile internet speeds ranked the highest among countries across the Middle East and sub-Saharan Africa. A June 2017 High Court ruling reinstated the independence of the Communications Authority.

Availability and Ease of Access

Kenya's Vision2030 Medium Term Plan (2013-2017), the second phase in the implementation of the country's development plan, considers information and communication technologies (ICTs) as a key foundation for national transformation.¹ Focusing on devolution (decentralization) and building equity across the country, the government has prioritized the expansion of ICT capacity, with internet connectivity being a key pillar.²

¹ GoK, 2013: Second Medium Term Plan, 2013 – 2017: Transforming Kenya: Pathway To Devolution, Socio Economic Development, Equity And National Unity. Page 21

² See for example, Ministry of ICT Strategic Plan (2013-2017) and Master Plan (2013/14 – 2017/18), <http://www.ict.go.ke/downloads-2/>

Key Access Indicators		
Internet penetration (ITU) ^a	2016	26.0%
	2015	45.6%
	2011	8.8%
Mobile penetration (ITU) ^b	2016	81%
	2015	81%
	2011	67%
Average connection speeds (Akamai) ^c	2017(Q1)	12.2 Mbps
	2016(Q1)	7.3 Mbps

^a International Telecommunication Union, "Percentage of Individuals Using the Internet, 2000-2016," <http://bit.ly/1cblxxY>.

^b International Telecommunication Union, "Mobile-Cellular Telephone Subscriptions, 2000-2016," <http://bit.ly/1cblxxY>.

^c Akamai, "State of the Internet - Connectivity Report, Q1 2017," <https://goo.gl/TQH7L7>.

According to government data by the Communications Authority, internet users numbered 39.6 million as of December 2016, a 12 percent increase over the previous year and representing a penetration rate of nearly 90 percent.³ The government also reported 38.9 million mobile phone subscriptions in December 2016 for a penetration rate of 88.2 percent, up from 87.7 percent the previous year.⁴

Official government data for internet penetration includes mobile internet subscriptions, which accounted for over 99 percent of internet subscriptions in Kenya as of December 2016, eclipsing fixed connections that made up only 0.6 percent.⁵ Nevertheless, subscription statistics may not reflect actual usage. Many Kenyans have more than one mobile subscription, and the numbers reported by the Communications Authority include corporate registrations. Actual mobile usage by private individuals is thus much lower.⁶ The data also contrasts sharply with figures from the International Telecommunications Union (ITU), which estimated Kenya's internet penetration at 26 percent in 2016, up from 21 percent the previous year.⁷

Access has grown due to the increasing affordability of internet service. As of 2017, Kenya's domestic calling rates ranged from KES 2-4 (USD \$0.02 - 0.04) per minute, even across networks.⁸ Data bundles, and recently "flexi-bundles" that combine data, calls and SMS, have become the fastest growing revenue source in the telecom sector.⁹ According to Safaricom, Kenya's leading telecom provider by market share, the average internet usage per month is 270 MB of data, a 52 percent

3 Communications Authority of Kenya, Quarterly Sector Statistics Report: Q2 FY 2016/2017 (October-December 2016), <http://www.ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q2%20FY%202016-17.pdf>

4 Communications Authority of Kenya, Quarterly Sector Statistics Report: Q4 2015/2016 (April-June 2016).

5 Communications Authority of Kenya, Quarterly Sector Statistics Report: Q2 of the Financial Year 2016/2017 (September – December 2016).

6 For more on this, see Chapter 5 of Measuring the Information Society, 2016, by ITU, <http://www.itu.int/en/ITU-D/Statistics/Pages/publications/mis2016.aspx>

7 International Telecommunication Union, "Percentage of Individuals Using the Internet, 2000-2016," <http://bit.ly/1cblxxY>
NB: ITU data published in 2016 retroactively revised its timeseries data for Kenya's internet penetration. In its 2015 dataset, internet penetration was estimated at 45.6 percent. The 2016 dataset revised the 2015 figure to 21 percent. No explanations were provided for the revisions.

8 Safaricom Plans, accessed 16 June, 2017, <https://www.safaricom.co.ke/personal/plans/prepay/uwezo-tariff>

9 "Safaricom FY service revenues rise 14.8% driven by mobile data growth," TeleGeography, May 11, 2017, <https://www.telegeography.com/products/commsupdate/articles/2017/05/11/safaricom-fy-service-revenues-rise-14-8-driven-by-mobile-data-growth/>

increase from 2016.¹⁰ This growth in data usage can be attributed to uptake of over-the-top (OTT) services such as messaging apps and increased social media activity.¹¹

Internet speeds in Kenya have also improved remarkably. According to Akamai's *State of the Internet* report, Kenya's internet connection speed in the first quarter of 2017 averaged 12.2 Mbps, surpassing the global average of 7.2Mbps, while mobile internet speeds averaged 13.7 Mbps, the fastest in the Middle East and sub-Saharan Africa.¹²

Nonetheless, internet access and affordability varies between urban and rural areas, and there is a digital divide based on gender, with more male mobile and internet users than women.¹³ Large rural areas have not been able to benefit from Kenya's high-capacity bandwidth in part due to market disparities and weaknesses in last mile connectivity, which is expensive and requires basic infrastructure such as electricity and roads that are often poorly developed. The National Optic Fibre Backbone Infrastructure (NOFBI) aims to improve telecommunications across the country's newly devolved governance structures and increase delivery of e-government services, such as applications for national identity cards or passports and registration of births and deaths.¹⁴

The Universal Service Fund (USF) established in 2013 also aims to expand mobile and internet services to close the digital divide.¹⁵ In January 2017, the government contracted three private companies to connect 894 secondary schools with 5 Mbps internet service under the USF as part of an effort to bridge the digital divide.¹⁶ This was informed by the 2016 "ICT Access Gaps Report" commissioned by the regulator, which revealed that over 94 percent of the country was covered by 2G networks, while 3G networks covered 78 percent of the population.¹⁷

Restrictions on Connectivity

During the year under review, there were no reports of the government controlling the internet infrastructure to limit connectivity, though in April 2017, Safaricom networks were offline between 9am and 5pm, which the company attributed to technical failures.¹⁸ The outage affected over 30 million subscribers who rely on the operator's voice, SMS, data, web-hosting, and mobile money services.¹⁹

10 Safaricom 2017 Financial results, May 2017, pg 23, accessed 16 June 2017, https://www.safaricom.co.ke/images/Downloads/Resources_Downloads/FY16-17Presentation.pdf

11 "We are Social: Digital in 2017," accessed 2 June 2017, <https://wearesocial.com/special-reports/digital-in-2017-global-overview>

12 Akamai, *The State of the Internet*, Q1 FY 2017, Accessed 02 June 2017, <https://www.akamai.com/us/en/multimedia/documents/state-of-the-internet/q1-2017-state-of-the-internet-connectivity-report.pdf>

13 Based on Kenya National Bureau of Statistics Economic Survey, 2017. For gender disparity, see page 249, accessed on 4 June 2017, <http://www.devolutionplanning.go.ke/images/hb/Economic%20Survey%202017.pdf>

14 ICT Authority, "National Fibre Optic to cover all 47 counties by December 2015" <http://www.icta.go.ke/nofbi-update/>

15 Muthoki Mumo, "Sh74 billion needed to bridge Kenya's yawning digital divide," Daily Nation, May 28, 2013. <http://bit.ly/1IPvXUo>

16 Treasury, Tender CA/PROC/OT/05/2016-2017, accessed 3 June 2017, http://supplier.treasury.go.ke/site/tenders.go/index.php/public/contract_view/3214

17 Communication Authority, 2016, accessed 4 June 2017, <http://www.ca.go.ke/images/downloads/RESEARCH/ICT%20Access%20Gaps%20Report-April%202016%20.pdf>

18 Mumo, Muthoki, "Safaricom outage leaves millions off network for hours," Daily Nation, April 24, 2017, <http://www.nation.co.ke/news/Safaricom-network-breakdown-affects-millions/1056-3901410-ixo1sqz/index.html>

19 Mwita, Weitere, "CA to punish Safaricom over Monday's network downtime," The Star, April 24, 2017, https://www.the-star.co.ke/news/2017/04/24/ca-to-punish-safaricom-over-mondays-network-downtime_c1548904

Kenya connects to the international internet via four undersea cables—SEACOM, the East Africa Marine System (TEAMS), EASSY, and Lower Indian Ocean Network (LION2), with three others (Africa1, Djibouti Africa Regional Express (DARE) and Liquid Sea) landing in Mombasa.²⁰ License provision for access to the international gateway was liberalized in 2004.²¹

The Kenya Internet Exchange Point (KIXP) is run and operated by the Telecommunication Service Providers Association of Kenya (TESPOK), a non-profit organization representing the interests of internet service providers (ISPs). The IXP keeps Kenyan internet traffic in the country, lowering the cost of connectivity. A second IXP was established in Mombasa, but its failure to attract enough users led to its closure.²² With support from the African Union, a backup IXP was established in 2016 to further lower costs of internet connectivity among ISPs.²³

ICT Market

Kenya's ICT sector is competitive. As of March 2017, there were 51 network facilities providers, 3 of which are national providers (Tier 1) while the rest are regional (Tiers 2 and 3).²⁴ These licensees provide facilities for internet, voice, and mobile virtual network operators, among others. The Kenyan communications regulator is mandated to license all communication systems and services. Due to the hybrid nature of communication systems, the regulator set up a Unified Licensing Framework (ULF), which is technology and service neutral.²⁵ A network facilities licensee may also be an application and content provider.

There are five mobile service providers—Safaricom, Airtel, Equitel, Telkom, and Sema. The Kenyan government has partial ownership of Safaricom Limited (35 percent) and Telkom Kenya (40 percent).²⁶ Safaricom dominates the mobile market with 71 percent of all mobile subscriptions and 68 percent of internet subscriptions. As such, there have been calls to declare Safaricom a dominant player and in effect trigger dominance abuse safeguards.²⁷ This has been met with stiff opposition from the company, the competition authority, the ICT cabinet secretary, and some legislators who claim Safaricom's market share does not amount to abuse under the Competition Act 2011.²⁸ The sector regulator, despite commissioning a report on the issue, was clear that it did not favor splitting

20 TeleGeography, accessed on 14 June 2017, <http://www.submarinecablemap.com/#/country/kenya>

21 David Souter and Monica Kerretts-Makau, "Internet Governance in Kenya – An Assessment for the Internet Society," Internet Society, September 2012, <http://bit.ly/1M0d9xv>

22 "Mombasa Internet traffic e-routed to Nairobi hub," Business Daily, June 8, 2015, <http://www.businessdailyafrica.com/corporate/Mombasa-Internet-traffic-e-routed-to-Nairobi-hub/539550-2744864-ff86de/index.html>

23 "Mombasa tipped to be region's internet hub after IXP launch," The Standard, June 23, 2016, <https://www.standardmedia.co.ke/business/article/2000206339/mombasa-tipped-to-be-region-s-internet-hub-after-ixp-launch>

24 CA, accessed 13 June 2017, <http://ca.go.ke/images/downloads/TELECOMMUNICATION/LicenseeRegister/Register%20of%20ULF%20Licensees-%20March%202017.pdf>

25 CA, Accessed on 18 May 2017, <http://www.ca.go.ke/index.php/telecommunication>

26 Safaricom, https://www.safaricom.co.ke/images/Downloads/Resources_Downloads/sustainabilityreport_2016.pdf and "Kenya gets 10pc Telkom stake for free as part of Helios' deal," Business Daily, March 6, 2016, <http://www.businessdailyafrica.com/Corporate-News/French-give-Kenya-10pc-of-Telkom-to-seal-Helios-takeover-/-/539550/3104956/-/et8qgrz/-/index.html>

27 "Safaricom faces M-Pesa break up in market dominance war," Business Daily, February 23, 2017, <http://www.businessdailyafrica.com/corporate/Safaricom-faces-M-Pesa-break-up-in-market-dominance-war-/539550-3824418-rhmfndz/index.html>

28 Competition Act 2011, [https://www.cak.go.ke/images/docs/competition_act-2011\(1\).pdf](https://www.cak.go.ke/images/docs/competition_act-2011(1).pdf)

Safaricom, one of the report's recommendations, and is currently engaging with stakeholders for input.²⁹

Regulatory Bodies

Kenya's telecommunications sector is regulated by the Kenya Information and Communications Act (KICA).³⁰ The Act established the Communications Authority of Kenya (CA) as an independent regulatory authority for the communication sector. This independence has been undermined through amendments to the Act that enable the executive branch of government (the president and cabinet secretary) to appoint the chairperson and board members to the CA.

In a June 2017 ruling, the High Court quashed amendments made in December 2015 to the KICA by the Statute Law (Miscellaneous Amendments) Act 2015.³¹ The amendments sought to align the law with antimonopoly procedures under the Kenya Competitions Act; and transfer regulatory authority to the cabinet secretary. This meant that the CA would be obliged to consult both the cabinet secretary and the competition authority before exercising its mandate, infringing on its independence. The June 2017 ruling brought a semblance of independence back to the CA.

Limits on Content

Content is periodically restricted for violating Kenyan social mores, though censorship is not widespread. The 2017 elections season saw the proliferation of online manipulation and disinformation tactics on social media, despite guidelines implemented in June that banned certain types of language in online communications.

Blocking and Filtering

Political and social content is not generally subject to blocking in Kenya. In a December 2016 report, research conducted by the Centre for Intellectual Property and Information Technology Law (CIPIT) in partnership with Open Observatory of Network Interference (OONI) tested 1,357 websites on four of the country's leading networks and observed no signs of censorship. Social networking platforms and communication applications such as Facebook, Twitter, YouTube, and LinkedIn were also fully accessible.³²

Nonetheless, the government periodically seek to police the internet for content that is perceived to be morally objectionable (see Content Removal).

Content Removal

29 Communication Authority, accessed 1 June 2017, <http://ca.go.ke/images/downloads/speeches/latest/Press%20statement%20by%20CA%20Chairman%20Mr.%20Ngene%20Gituku%20on%20the%20Competiton%20study.pdf>

30 The Kenya Information and Communications Act No. 2 of 1998, as amended by the Kenya Information and Communications (Amendment) Act 2009, and the Kenya Information and Communications (Amendment) Act 2013. See, Republic of Kenya, "The Kenya Information and Communication (Amendment) Bill, 2013," Kenya Gazette Supplement No. 105 (National Assembly Bills No. 19), July 22, 2013, <http://bit.ly/1vyJiY>

31 Kenya Law, *Okiya Omtatah Okoti v Communications Authority of Kenya & 21 others* [2017], Accessed 7 June 2017, <http://kenyalaw.org/caselaw/cases/view/136754/>

32 Xynou, M., "Kenya: Free Censorship Internet?" OONI, accessed 21 May 2017, <https://ooni.torproject.org/post/kenya-study/>

The government has at times sought to remove content from the internet. In June 2017, the Kenya Film Classification Board (KFCB) banned six children's television programs for ostensibly promoting homosexuality "against our Kenya's moral values and culture."³³ The programs aired on broadcast and online channels. The Kenyan penal code criminalizes same sex relationships, and the KFCB routinely discriminates against LGBTI (lesbian, gay, bisexual, transgender, or intersex) projects.³⁴

In October 2016, the KFCB proposed to review and replace the Films and Stage Plays Act, Cap 222 with the Films, Stage Plays and Publications Bill, which would have empowered the KFCB to monitor, classify, and approve any content published online in Kenya.³⁵ After publishers and content creators pushed back, the bill was withdrawn for review.³⁶

Some reports indicate that the authorities may force users to remove certain content from their social media profiles. In one example, blogger Robert Alai removed content from his Facebook page in August 2017 in relation to a report that got him arrested (see Prosecutions and Detentions for Online Activities).³⁷

Internet intermediaries in Kenya can be held liable for illegal content, such as copyright and hate speech, though they are not required to actively monitor traffic passing through their networks unless they are made aware of illegal content.³⁸ Under the National Cohesion and Integration Act of 2008, which outlaws hate speech, a media enterprise can be fined up to KES 1 million (US\$11,000) for publishing "utterances" that can be characterized as hate speech under the law's broad definition.³⁹ This provision can be invoked to block or take down online content, according to the Association of Progressive Communications.⁴⁰

Media, Diversity, and Content Manipulation

Kenya's online information landscape is diverse and vibrant, representing a wide range of issues and viewpoints. Social media has become an influential platform for journalists to source and share news. Traditional broadcast news programs increasingly interact with viewers in real time on Twitter or Facebook.

During the 2017 elections season, social media enabled opinion influencers to proliferate, unfortunately leading to online manipulation and overt disinformation. A number of fake news

33 KFCB, "Statement on Children Television Programs..." accessed 15 June 2017, <http://kfc.co.ke/wp-content/uploads/2017/06/STATEMENT-ON-CHILDREN-TELEVISION-PROGRAMMES-PROMOTING-HOMOSEXUALITY-IN-KENYA-ISSUED-ON-15TH-JUNE-2017.pdf>

34 Sections 162, 163 and 165 punishes gay relationships with jail terms ranging from 5 to 21 years dependent upon whether relations were consensual. Attorney General, *Penal Code Chapter 63*. Nairobi: National Council for Law Reporting, 2014.

35 Article 7, Jadili, accessed 21 May 2017, <http://jadili.ictpolicy.org/docs/kfcb2016>

36 KFCB, accessed 2 June 2017, <http://kfc.co.ke/wp-content/uploads/2017/02/REQUEST-FOR-PROPOSAL-FOR-THE-PROVISION-OF-LEGAL-CONSULTANCY.pdf>

37 "Blogger Robert Alai arrested after leaking photos of Kenyattas in hospital," Nairobi News, August 19, 2017, <http://nairobinews.nation.co.ke/news/robert-alai-arrested-photos-kenyattas/>

38 Alice Munyua, Grace Githaiga and Victor Kapiyo, "Intermediary Liability in Kenya," (research paper, commissioned by Association for Progressive Communication) <http://bit.ly/1GOXHDA>

39 Section 62 (1) defines hate speech as "words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race." Section 62 (2) holds: "A newspaper, radio station or media enterprise that publishes the utterances referred to in subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding one million shillings." See: National Cohesion and Integration Act, 2008, section 62, accessed September 12, 2014, <http://bit.ly/1ZR1dbX>

40 Munyua, Githaiga and Kapiyo, "Intermediary Liability in Kenya."

websites were reportedly registered with legitimate-sounding names to disseminate false news, such as CNN Channel 1 (cnnchannel1.com),⁴¹ undermining the quality of information available online.

Different political camps set up teams of paid bloggers, social media influencers, and bots to shape public opinion online.⁴² Propaganda, hate speech, and social media campaigns targeting individuals or organizations affiliated with the opposing side became common, including via paid Google Ads and Facebook sponsored posts.⁴³ Local media also reported that President Kenyatta Uhuru, the incumbent candidate, had hired the data mining company Cambridge Analytica to help his campaign. The company is linked to two websites that were used extensively during the general elections campaigns—therealraila.com and uhuruforus.com. The former spread hate speech and negative ads against the main opposition candidate, Raila Odinga, while the latter site spread positive narratives favouring the incumbent. Donald Trump's campaign had also hired Cambridge Analytica in advance of his successful U.S. presidential campaign in 2016.⁴⁴

The Communications Authority of Kenya in June 2017 gazetted new guidelines to curb online abuse in partnership with the National Cohesion and Integrated Commission (NCIC), a statutory body which seeks to reduce inter-ethnic conflict.⁴⁵ However, the guidelines included broad wording as the basis for penalties, prohibiting political messages that “contain offensive, abusive, insulting, misleading, confusing, obscene or profane language,” which could be used to limit legitimate online expression. The guidelines also required administrators of social media pages to “moderate and control the content and discussions generated on their platform,” and gave mobile network operators the power to refuse at their discretion the transmission of political messages that do not comply with the guidelines.⁴⁶ In addition, bulk political messages require prior approval from the NCIC under the guidelines.

Major media companies also occasionally removed stories without clarification, leaving internet users unclear whether information had been subject to self-censorship or misreported in the first place. In one example, *The Standard* daily newspaper removed a story that said the Communication Authority planned to spy on social media users during the election period from their website in January 2017 without publishing a correction.⁴⁷ Other reports said the Authority intended to monitor and analyse social media posts, and separately ordered mobile service providers to allow a third party contractor access to network infrastructure as part of a “device management system” (see Surveillance, Privacy, and Anonymity). Analysts believe *Standard* editors may have removed the

41 Abdi Latif Dahir, “Fake news is already disrupting Kenya’s high-stakes election campaign,” Quartz Africa, June 25, 2017, <https://qz.com/1011989/fake-news-and-misinformation-are-upstaging-kenyas-upcoming-high-stakes-election/>

42 Mayoyo, Patrick, “Fake news by bloggers could mess Kenya’s 2017 elections,” Standard, April 21, 2017, <https://www.standardmedia.co.ke/business/article/2001237115/fake-news-by-bloggers-could-mess-2017-elections>

43 #DavidNdiExposed, “Walter Menya,” #MaizePriceScandal, and #GoKDelivers were a few examples of social media campaigns started or promoted by pro-government or opposition social media users. See, for example, the news cycle on Walter Menya arrest: “Blogger who leaked exclusive DCI photos of Walter Menya,” The Nation, June 20, 2017, <http://www.nation.co.ke/news/Pauline-Njoroge-Walter-Menya-photos-DCI/1056-3978466-ldvrkhz/index.html>

44 “Uhuru hires data firm behind Trump, Brexit victories,” The Star, May 10, 2017, https://www.the-star.co.ke/news/2017/05/10/uhuru-hires-data-firm-behind-trump-brexit-victories_c1557720

45 “Guidelines on Prevention of Dissemination of Undesirable Bulk and Premium Rate Political Messages and Political Social Media Content via Electronic Communications Networks in Kenya,” GOK, Kenya Gazette Vol.CXIX-No.95

46 See for example Article19 submissions to the regulator, <https://www.article19.org/resources.php/resource/38838/en/kenya:-new-draft-guidelines-on-dissemination-via-electronic-communications-networks-should-be-scrapped> ; <https://rsf.org/en/news/kenyan-election-campaign-hits-journalists-and-media-freedom>

47 The article initially appeared on The Standard, 13 January 2017, accessed on 14 January 2017 at: <https://www.standardmedia.co.ke/article/2000229727/communications-authority-to-monitor-private-talk-and-texts-during-poll>

story to avoid repercussions, though the regulator's steps to undermine user privacy were reported on other websites.⁴⁸ The news may have also triggered greater self-censorship among internet users.

There are no economic constraints on online media in Kenya, which has helped online outlets thrive, though the government has been known to use its advertisement spending to influence the media's editorial choices, resulting in financially-induced self-censorship.⁴⁹ Media outlets also determine the tone of their content out of fear of upsetting other primary advertisers. For example, after publishing a critical report about Safaricom, Kenya's leading telecommunication provider, in early 2017, one journalist later said that his editor had not authorised the story in a move that effectively distanced the outlet from the article's findings.⁵⁰

Bloggers and social media personalities have become highly influential over the past few years. Fast and affordable internet in major cities and towns has enabled Kenya's growing class of digitally skilled citizens to become content creators and alternative sources of news and information. According to the Bloggers Association of Kenya (BAKE)—formed in 2011 to support Kenya's blogging community—the 36 most active blogs hosted on their servers experienced a 46 percent increase in monthly readership between October 2015 and September 2016.⁵¹ The exponential growth in blogs has created an economically viable industry for bloggers who are increasingly sought by Kenyan businesses as a platform for advertising.⁵²

Digital Activism

Social media continued to grow as an important platform for political debate and mobilization around critical issues in Kenya:

- In June 2016, the hashtag #TearGasMonday dominated social media, mobilizing protests against the elections management body (IEBC) for alleged corruption.⁵³ The protests slowed down Nairobi's business district for three consecutive Mondays, though they were marred when some participants resorted to violence. The IEBC commissioners agreed to leave office in August 2016, paving the way for a new team to manage the August 2017 elections.⁵⁴
- The vocal civil society advocacy campaign, #KeepItOn, raised awareness about the growing incidence of internet shutdowns during elections and protests in several countries across sub-Saharan Africa. Kenyan officials publicly committed to keeping the internet online during the August elections as a result of the campaign.⁵⁵
- In July 2016, Koffi Olomide, a popular Congolese musician, was captured on video at

48 <http://mobile.nation.co.ke/news/Government-likely-to-start-phone-tapping/1950946-3816372-d7wr9z/index.html>

49 Alan Rusbridger, "Kenya: The Devious Art of Censorship," New York Review of Books, December 8, 2016 issue, <http://www.nybooks.com/articles/2016/12/08/kenya-devious-art-of-censorship/>

50 Author's Phone Interview in Nairobi, March 2017 in reference to CIPIT's surveillance findings on Safaricom Internet networks, blog.cipit.org/2017/03/23/cipit-research-reveals-evidence-of-internet-traffic-tampering-in-kenya-the-case-of-safaricom-network/

51 BAKE, "State of Internet Freedom in Kenya 2016," <http://www.ifree.co.ke/wp-content/uploads/2016/11/State-of-Internet-Report-Kenya-2016.pdf>

52 Bloggers Association of Kenya (BAKE), "The State of Blogging & Social Media in Kenya 2015 Report," page 3.

53 Twitter search #TearGasMonday: <https://twitter.com/search?q=%23TearGasMonday&src=typed>

54 "Issack Hassan, other IEBC officials agree to leave office" The Nation, August 3, 2016, <http://www.nation.co.ke/news/politics/IEBC-officials-agree-to-leave-office/1064-3328830-6v41ep/index.htm>

55 "Communications Authority of Kenya Promises Not to Shut Down Internet During the Election," techweez, August 2, 2017, <http://www.techweez.com/2017/08/02/communications-authority-kenya-wont-shut-down-internet/>

the airport assaulting a female member of his crew. Social media users created the #DeportKoffiOlomide campaign to call for his deportation,⁵⁶ which the Inspector General of Police heeded. The musician later apologized for the incident.⁵⁷

Violations of User Rights

The High Court ruled that Section 132 of the penal code that penalized “undermining the authority of public officers” was unconstitutional in April 2017, but not before several bloggers and ICT users were arrested for criticizing government officials on social media. The government’s unlawful and disproportionate surveillance capabilities became more evident in the past year, particularly as the country prepared for national elections in August 2017.

Legal Environment

Freedom of expression is enshrined in Article 33 of Kenya’s 2010 constitution and includes the right to seek, receive, or impart information and ideas, while Article 31 provides for the right to privacy. These rights, however, do not extend to propaganda, hate speech, or incitement to violence. Hate speech is penalized under the 2008 National Cohesion and Integration Act, a law that was passed in response to widespread ethnic violence following the 2007 general elections.⁵⁸ Individuals found guilty of spreading hate speech, broadly defined, can be fined up to KES 1 million (US\$11,000), sentenced to up to three years in prison, or both.

In a positive development, the High Court ruled Section 132 of the penal code unconstitutional in April 2017.⁵⁹ The section had penalized “undermining the authority of public officers,” and was used to prosecute online and offline speech.⁶⁰ Section 29 of the Kenya Information and Communications Act (KICA) was separately ruled unconstitutional in April 2016.⁶¹ Section 29 had penalized bloggers and social media users for using ICTs to disseminate messages deemed to be “grossly offensive” or to cause “annoyance, inconvenience or needless anxiety to another person,” with a fine of up to KSH 50,000, three years in prison, or both.⁶²

Recently proposed laws threaten to further restrict online freedom of expression. In July 2016, the ICT Ministry called for stakeholder input into the Computer and Cyber Crimes Bill 2016,⁶³ which was reportedly developed according to international standards such as the Budapest Convention

56 Twitter search, <https://twitter.com/search?q=%23DeportKoffiOlomide%20&src=typed>

57 “VIDEO: Koffi Olomide Apologizes to Kenyans After JKIA Fiasco,” Radio Jambo, October 24, 2016, <https://radiojambo.co.ke/video-koffi-olomide-apologizes-to-kenyans-after-jkia-fiasco>

58 Milly Lwanga, “Freedom of expression and harmful speech: The Kenyan situation,” Article 19, September 27, 2012, <http://bit.ly/1M0qSEJ>

59 Kenya Law, accessed 1 June 2017, <http://kenyalaw.org/caselaw/cases/view/135467/>

60 “Kenya: Win for freedom of expression as penal provision declared unconstitutional,” Article 19, press release, April 26, 2017, <https://www.article19.org/resources.php/resource/38727/en/kenya-win-for-freedom-of-expression-as-penal-provision-declared-unconstitutional>

61 “Kenya: Win for freedom of expression as repressive law declared unconstitutional,” Article 19, press release, April 19, 2016, <https://www.article19.org/resources.php/resource/38343/en/kenya-win-for-freedom-of-expression-as-repressive-law-declared-unconstitutional>

62 Republic of Kenya, The Kenya Information and Communications Act, chapter 411A, 2009, <http://bit.ly/1LyMfxo>; amended in 2013: The Kenya Information and Communications (Amendment) Act, 2013, <http://bit.ly/1M1zTDB>

63 Computer and Cyber Crimes Bill 2016, <http://www.mygov.go.ke/?p=11226>

on Cybercrime to address cybercrime issues like computer fraud and child pornography.⁶⁴ However, Article 14 of the bill punishes “cyberstalking” and “cyberbullying,” defined as communication that “detrimentally affects” a person, with penalties of up to KES 20 million, imprisonment of up to ten years, or both.⁶⁵ If passed, the provision could be used in the same way as KICA Section 29 that was ruled unconstitutional in April 2016.

On the other hand, other proposed laws seek to protect the rights of Kenyan internet users. The Data Protection Bill 2013, though still in draft form and in need of critical revisions as of mid-2017, aims to regulate the collection, processing, storing, use, and disclosure of information relating to individuals processed through automated or manual means.⁶⁶ The current absence of a strong data protection law threatens citizens’ privacy rights amid rising concerns over unchecked government surveillance (see Surveillance, Privacy, and Anonymity).

Prosecutions and Detentions for Online Activities

Numerous Kenyan bloggers and social media users were arrested or summoned for questioning during this report’s coverage period, continuing an alarming trend that has grown in recent years. Many individuals were targeted for their criticisms of government officials online, which was penalized under Section 132 of the Kenyan penal code before it was declared unconstitutional in April 2017.⁶⁷

Arrests, prosecutions, or legal repercussions for online activities reported since June 2016 include the following:

- Jackson Njeru, an administrator for the Facebook page, “Buyer Beware,” was arrested and jailed for three months in November 2016. He was charged with contempt of court for posting on Facebook about a case in progress against court orders. The post had requested page subscribers to contribute funds to provide bail for a defendant in the case.⁶⁸
- In October 2016, Deputy President William Ruto sued activist Boniface Mwangi for defamation on Twitter.⁶⁹ Ruto withdrew the case in November.⁷⁰
- Authorities detained blogger Dennis Owino on October 17, 2016. Known for blogging on corruption issues, Owino was held for six hours before being released without charge.⁷¹
- In October 2016, Kenya deported a South Sudanese rebel spokesperson, James Gatdet Dak, allegedly for comments he posted on his Facebook page that were seen as celebrating

64 Lilian Mutegi, “Kenya govt calls for public participation on Computer and Cyber Crimes Bill 2016,” CI East Africa, July 14, 2016, <http://allafrica.com/stories/201607140740.html>

65 Computer and Cyber Crimes Bill 2016, Article 14, <http://www.mygov.go.ke/wp-content/uploads/2016/07/MOICT-PUBLICATION-READY-COMPUTER-AND-CYBERCRIMES-BILL-2016-1-1-1.pdf>

66 Commission for the Implementation of the Constitution, “The Data Protection Bill, 2012,” <http://bit.ly/1hNGLGB>

67 Kenya Law, accessed 10 June 2017, <http://kenyalaw.org/caselaw/cases/view/135467/>

68 Shitemi, H, “Jackson Njeru jailed for contempt of court again,” #iFreeKe, November 14, 2016, <http://www.ifree.co.ke/2016/11/jackson-njeru-jailed-contempt-court/>

69 “Deputy President William Ruto sues activist Boniface Mwangi for defamation,” The Nation, October 7, 2016, <http://www.nation.co.ke/news/Ruto-sues-activist-Boniface-Mwangi-for-defamation/1056-3408304-ujh256/index.html>

70 “BREAKING: DP Ruto “WITHDRAWS” Defamation CASE Against Boniface Mwangi at High Court,” Kenya Today, November 1, 2016, <https://www.kenya-today.com/facing-justice/breaking-dp-ruto-defamation-case-boniface-mwangi-dismissed-high-court>

71 “Not Worth the Risk,” Human Rights Watch, May 30, 2017, <https://www.hrw.org/report/2017/05/30/not-worth-risk/threats-free-expression-ahead-kenyas-2017-elections>

the firing of a Kenyan general by the UN Secretary General attached to the South Sudan peacekeeping mission.⁷²

- In July 2017, blogger Paul Odhiambo was arrested for spreading alleged hate speech on Facebook and WhatsApp.⁷³
- In August 2017, Robert Alai, a popular blogger and social media influence, was arrested in connection with information he published about the health of a family member of President Kenyatta.⁷⁴ Content posted on his Facebook page in relation to the story was removed without explanation (see Content Removal). Alai has been arrested numerous times for online speech.
- Shortly after the August 2017 elections, Japeth Mulewa was arrested for being an administrator of a WhatsApp group that was allegedly spreading hate.⁷⁵
- In September 2017, Oliver Nyabwazi Moraira was arrested for allegedly posting hate speech on her Facebook page.⁷⁶

Surveillance, Privacy, and Anonymity

The government's unlawful and disproportionate surveillance capabilities became more evident in the past year, particularly as the country prepared for national elections in August 2017.

The Kenya Information and Communications Act (KICA) prohibits unlawful monitoring and interception of communications,⁷⁷ though the Prevention of Terrorism Act 2012 allows the authorities to limit constitutional freedoms, such as the right to privacy, during terrorist investigations.⁷⁸ Amendments to the Prevention of Terrorism Act in 2014 explicitly enable national security bodies to intercept communications "for the purposes of detecting, deterring and disrupting terrorism,"⁷⁹ which must be authorized by an interception order granted by the High Court.⁸⁰ The UK-based nonprofit Privacy International reported that Safaricom, Kenya's leading mobile internet provider, routinely provides data to authorities without a warrant for intelligence purposes; Safaricom said it only cooperates based on court orders.⁸¹

In early 2017, the Communication Authority (CA) announced an election-preparedness project aimed at curbing hate speech to avoid election-related violence through several new initiatives

72 "Fears after Kenya deports South Sudan rebel spokesman," Aljazeera, November 4, 2016, <http://www.aljazeera.com/news/2016/11/fears-kenya-deports-south-sudan-rebel-spokesman-161104164614835.html>

73 "Kenyan blogger behind bars over his social media post," Tuko, July 2017, <https://www.tuko.co.ke/245609-kenyan-blogger-bars-social-media-post.html>

74 "Blogger Robert Alai arrested after leaking photos of Kenyattas in hospital," Nairobi News, August 19, 2017, <http://nairobinews.nation.co.ke/news/robert-alai-arrested-photos-kenyattas/>

75 "[VIDEO] WhatsApp group administrator held for allegedly spreading hate messages," The Star, August 17, 2017, https://www.the-star.co.ke/news/2017/08/17/video-whatsapp-group-administrator-held-for-allegedly-spreading-hate_c1618039

76 "Blogger arrested for posting hate messages on social media," Standard, September 10, 2017, <https://www.standardmedia.co.ke/article/2001254081/blogger-arrested-for-posting-hate-messages-on-social-media>

77 Kenya Information and Communications Act, Article 31, <http://admin.theiguides.org/Media/Documents/Kenya%20Information%20Communications%20Act.pdf>

78 Prevention of Terrorism Act 2012, Article 35, <http://www.frc.go.ke/legislation/2013/03/prevention-of-terrorism-act-2012>

79 Security Laws Amendment Act 2014, Article 69, http://kenyalaw.org/kl/fileadmin/pdfdownload/AmendmentActs/2014/SecurityLaws_Amendment_Act_2014.pdf

80 Prevention of Terrorism Act 2012, Article 36, <http://www.frc.go.ke/legislation/2013/03/prevention-of-terrorism-act-2012>

81 Privacy International, "Trace, Capture, Kill: Inside Communication Surveillance and Counterterrorism in Kenya," March 15, 2017, <https://www.privacyinternational.org/node/1366>

that threatened to violate citizens' fundamental rights. According to Privacy International, one project aimed to monitor social media using the services of Israeli "web intelligence" firm webintPro, which reportedly specializes in social media monitoring and analysis.⁸² Another project involved a "device management system" apparently designed to deny communication services to counterfeit, substandard, or stolen devices. The system required mobile providers to allow a third party company to access their networks and share data with the regulator. Observers worried that the system would be used to access communications data.⁸³ In a positive development, a high court judge suspended the implementation of the system in February after an activist filed a case raising privacy concerns.⁸⁴

A March 2017 report published research by the Centre for Intellectual Property and Information Technology Law (CIPIT) that had detected the presence of a "middle-box" on a cellular network operated by Safaricom.⁸⁵ While middle-boxes have legitimate functions such as network optimization, they can also be used to manipulate traffic and assist in surveillance, raising alarms about possible privacy violations, particularly in the context of the CA's other announcements. Safaricom denied the existence of the box, and subsequent tests returned negative results, leading the researchers to conclude that it was withdrawn.

Privacy International separately revealed that national security agencies in Kenya, especially the National Intelligence Service (NIS), have unlawful direct access to communication systems in Kenya that allows for the interception of both data and content.⁸⁶ Based on interviews, Privacy International found that law enforcement and national security agents have a physical presence in the telecoms' facilities. The report also indicated that intercepted information could be freely shared with other government agencies.

In a follow-up report published in July, Privacy International assessed two of the NIS's new cybersecurity projects—the Network Early Warning System, and the National Intrusion Detection and Prevention System—which aim to monitor telecommunications traffic for cybersecurity threats. PI raised concerns that the two systems could monitor content as well as internet traffic, based on internal documents it received.⁸⁷ Given the national security framework in which the systems are being implemented, transparency and oversight will be limited.

Anonymity is compromised by mandatory SIM card registration requirements. In 2017, Safaricom began visually documenting anyone registering for or renewing a SIM card.⁸⁸ This is an extension of the existing SIM card registration requirements under the Kenya Information and Communications (Registration of SIM-Cards) Regulations, 2015, which prescribes penalties of up to KES 300,000 (US\$3,500) or imprisonment of up to six months, or both, for failure to abide by the registration requirements.⁸⁹ The regulations also grant the communications regulator with access to service

82 Privacy International, "Trace, Capture, Kill: Inside Communication Surveillance and Counterterrorism in Kenya," page 34

83 Tender for The Design, Supply, Delivery, Installation, Testing, Commissioning And Maintenance of A Device Management System (DMS) <http://bit.ly/2r1QZJQ>; Big Brother could start tapping your calls, texts from next week; <http://bit.ly/2kEHjjU>

84 "High court stops installation of communication monitoring Device Management System," KBC English Service, February 21, 2017, <http://bit.ly/2r3dX5u>

85 Safaricom and internet Traffic tampering; <http://bit.ly/2r1xppt>

86 Privacy International, "Trace, Capture, Kill: Inside Communication Surveillance and Counterterrorism in Kenya."

87 Privacy International, "Trace, Capture, Kill: Inside Communication Surveillance and Counterterrorism in Kenya." According to the report, Traffic monitoring projects (Network Early Warning System and National intrusion Detection and Prevention Systems) have been detailed as enabling not just monitoring but deep inspection of all Internet traffic coming through the country.

88 Interview with Safaricom agents in Nairobi, May 2017

89 Kenya Information And Communications (Registration Of SIM-Cards) Regulations, 2015, <http://bit.ly/2r2vqLh>

providers' offices and records without a court order, raising concerns over the lack of judicial oversight.⁹⁰

In April 2017, the Kenya Film Classification Board (KFCB) proposed a real-name registration policy on social media to curb the spread of fake news in advance of the August 2017 elections, though the proposal was never made it to the floor of parliament.⁹¹

Intimidation and Violence

Bloggers and internet users have faced increasing intimidation and violence in recent years. Article 19 and Human Rights Watch documented 17 separate incidents in which 23 journalists and bloggers were physically assaulted by government officials or people suspected of being their affiliates between 2013 and 2017. At least two have died in circumstances that remain unclear.⁹² The groups documented 16 direct death threats against journalists and bloggers across the country during the same period.

In one case during this report's coverage period, a member of parliament allegedly threatened a blogger in central Kenya in February 2017, in response to critical comments posted on social media.⁹³ Many similar threats likely go unreported.

Technical Attacks

There were no reported cases of politically motivated technical violence against civil society, independent news, or opposition websites during the coverage period.

However, a technical attack against opposition politicians may have been attempted in the past. In an August 2016 report, The Citizen Lab reported that surveillance malware created by the company NSO Group had been hidden in a June 2015 tweet apparently designed to encourage opposition supporters to click on and share.⁹⁴ The same malware had been used against a human rights defender from the United Arab Emirates and worked by exploiting a zero-day vulnerability affecting the Apple iPhone that was previously unknown to the company. No Kenyan users were reported to have been infected by the malware, and Apple updated its security settings following The Citizen Lab report.⁹⁵

90 Section 13. "A licensee shall grant the Commission's offices access to its systems, premises, facilities, files, records and other data to enable the Commission inspect such systems, premises, facilities, files, records and other data for compliance with the Act and these Regulations." The Kenya Information and Communications (Amendment) Act, 2013, <http://bit.ly/1M1zTDB>

91 "Ezekiel Mutua proposes a ban to fake names on social media to curb fake news," The Standard, April 24, 2017, <https://www.standardmedia.co.ke/ktnnews/video/2000127082/-ezekiel-mutua-proposes-a-ban-to-fake-names-on-social-media-to-curb-fake-news>

92 "Not Worth the Risk," Human Rights Watch, May 30, 2017.

93 "Blogger: MP said he will chop off my manhood," The Standard, February 22, 2017, <https://www.standardmedia.co.ke/article/2001230286/blogger-mp-said-he-will-chop-off-my-manhood>

94 "The Million Dollar Dissident: NSO Group's iPhone Zero-Days used against a UAE Human Rights Defender," The Citizen Lab, August 24, 2016, <https://citizenlab.ca/2016/08/million-dollar-dissident-iphone-zero-day-nso-group-uae/>

95 "iPhone Users Urged to Update Software After Security Flaws Are Found," NY Times, August 25, 2016, <https://www.nytimes.com/2016/08/26/technology/apple-software-vulnerability-ios-patch.html>