

Understanding Hate Speech in Kenya

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Introduction

This paper focuses on hate speech in Kenya. We interrogate the prevalence and development of hate speech over time, investigate the perpetrators of hate speech and the targeted groups, critically analyze the consequences of hate speech, dissect the freedom of speech vs. the protection from hate speech, highlight various challenges in curbing hate speech and reflect on strategies and methods of curbing hate speech being used by various agencies.

The prevalence of hate speech and developments over time

Hate speech is the use of threatening, abusive or insulting words or behavior, or display of any written or published material which intends to stir up hatred against a group of persons by reference to color, race, nationality or ethnic background as provided for in the constitution. Nadim and Fladmoe (2016) identified key aspect of hate speech as the target of specific and (presumed) at-risk, group identities or minority statuses. They further stated that “hate speech is one form of hate crime, but the term comprises a range of other types of incidents such as physical harassment and violence.”

Kenya comprises of people from different ethnic groups with different cultural traditions that they affiliate themselves to. These social groups have common culture and dialect and they are linked by economic, religious or family ties. Politics in Kenya is to a great extent based on tribe which has caused division and animosity among Kenyans due to its ethnically motivated competitive nature.

Extensiveness of tribal politics was largely experienced in 2007 elections where over 1,100 people lost their lives and over 600,000 people were forced from their homes. According to political analysis “the dilemma arises when politicians use ethnicity for their personal gain and create a divide which breeds tribalism”(DW 2017). The violence in 2007-2008 brought about the realization of the impact of hate speech to the nation and due to this, measure were put in place to curb the hate speech vice.

The effort to stop hate speech is mainly focused on mainstream media hence the formation of National Cohesion and Integration Commission (NCIC). The hate speech offence is punishable by three year in prison or a fine of up to one million Kenyan shillings, or both. The NCIC was formed to tame hate speech and promote national cohesion and integration. According to NCIC, it has discharged its mandate to fight hate speech with no favor to any political affiliation. In 2011-2016, NCIC stated to have recorded several court cases that proved impartiality (NCIC 2016).

On the other hand, Onyoyo (2012) questions the legal interpretation of hate speech in his paper on *Criminality in “Hate Speech”: Provision in the Laws of Kenya- Jurisprudential Challenges*. He pointed out that the courts have not managed to prosecute hate speech charges brought before them with success. This is a challenge to courts especially when politicians and their supporters quickly mastered what constitutes hate speech under the NCIC Act, and instead use words and utterances that do not fall within that threshold (NCIC 2016). Such words are classified as incitement to violence, which is a crime under the Penal Code.

The Commission went further and stated that politicians have learnt about incitement to violence by use of foul language constituting to insults not covered in any penal statute. Due to such challenges, the NCIC proposed amendments to the Act to help seal the existing loopholes. Mainstream media has become more careful on content they disseminate to avoid finding themselves on the wrong. However, hate speech on social media has been on the rise thus the biggest challenge to the Commission.

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There was a shift of hate speech from mainstream media to the social media platforms. In 2013 general elections, large numbers of threats and incitements to violence were reported on social media networks. The growth of social media users in Kenya keeps on increasing yearly. For instance report by Soko directory revealed that 4.3 to 5.1 million face book users visit the platform every month. 85% are based in Nairobi, 3% in Mombasa, 0.9% in Eldoret and 0.6% in Kisumu. Twitter on the other hand posts 728,074 tags of which 85% are based in Nairobi, 6.1% Mombasa, 3.8% Nakuru and 2.5% in Eldoret and Kisumu.

Social media Stats Counter Kenya revealed 71.04% facebook users, 10.39% pinterest, 8.84% twitter, 4.34% youtube, 2.66% reddit, and 1.08% instagram (Statcounter, 2017). The growth of social media use in Kenya has increased the sharing of information among people located in different parts of the country. Facebook and Twitter have been actively used; however use of Whatsapp platform is also in the increase. Social media platforms have not only been used to share information but people use them for different purposes. Politicians have used social platforms to publicize their political ideologies.

On the other hand, tribal divide in the country has been expressed through social media. Supporters affiliated to different parties have attacked one another by creating suspicion through inflammatory statement posted on social media. The offensive information incites hatred, creating tension in the country. Although there is institution to tame hate speech, people still receive messages containing hate speech through peer-to-peer SMS and on social media (Stair and Reynolds 2016).

Who produces hate speech and what drives them

According to Nadimand Fladmoe (2016), perpetrators of hate speech base their actions on prejudices, stereotypes and assumptions about differences between groups. Hate speech criminals are not strange people in the society. Some are well known members of the society and highly ranked socially. On the other hand, the ordinary people are also perpetrators of hate speech when they cause discomfort to other groups through their utterances.

Hate speech is not a new phenomenon according (Basse, 2016). The increase of hate speech is as a result of availability and access to social media platforms where individuals can post information online and hide behind anonymity. There are different types of hate speech perpetrators. There are offenders by conviction and activists/instrumentalists which he described as people with clear intention of engaging in hate speech. On the other hand, incidentalists are people who may post information without thinking about the consequences, but when legal or social repercussions arise, they tend to be shocked because they didn't intend to engage in hate speech (McGonagle 2016.)

Most of hate speech cases in Kenya have been dropped for lack of evidence or offenders especially the politicians have received lenient punishments like public apology. Political class are notorious producers of hate speech, however they know how to get away with their act.

What groups are targets of hate speech?

Hate speech is the use of threatening, inciting, abusive or insulting words or behavior, or display of any written material with the intention of stirring up ethnic hatred. According to NCIC Act Section 13, ethnic hatred means hatred against a group of persons defined by reference to color, race, nationality (including citizenship) or ethnic or national origins. Ondigi (2012) defined hate speech as speech or any form of expression designed to promote hatred on the basis of race, religion, ethnicity or national origin.

Hate speech words intends to degrade, intimidate or incite violence or prejudicial action against a person or group of people based on their race, ethnicity, nationality, religion, language, ability, or appearance. According to European Court of Human Rights in *Gunduz v Turkey* as quoted in Ondigi (2012), hate speech is all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin. Hate speech is not only expressed in written words but also in movies, arts and gestures. Nadim and Fladmoe (2016), insist that in other words, individuals who identify with certain groups may be exposed to hate speech even in instances where they are not the direct recipients of the abuse

The Hate Speech Watch in May 2016 reported that the internet is full of hatred and incitement towards lesbian, gay, bisexual, transgender, queer and intersex people. In Kenya, ethnic hatred under Section 13 means hatred

against a group of persons defined by reference to color, race, nationality (including citizenship) or ethnic or national origins (NCIC Act 2008). However, according to Kenya National Commission on Human Rights KNCHR), the NCIC Act 2008 law is too narrow since it is too focused on ethnicity, yet hate speech goes beyond ethnic or political incitement. It is difficult to prosecute hate speech targeting gender since the law is not clear about it. Hate Speech Watch in 2016 insists that hate speech targeting women is often neglected, for is so much present in everyday life and it can be so subtle that people do not even recognize it.

KNCHR (2017) report revealed that the use of hate speech along ethnic lines and derogatory remarks about other tribes, races and communities has become the hallmark for Kenya's political rallies during the run-up to elections. This happened despite the experiences of the 2007 post-election violence where violence targeted individuals and communities on the basis of their ethnicity and their political leanings. The same incitements were also repeated during the election campaigns in the 2012/13 electoral cycle (KNCHR 2017).

The political and tribal groups are vulnerable to hate speech. This is attributed to colonial injustice in Kenya. The sustained confiscation of ancestral land and natural resources, lack of political representation, prolonged conflicts and discrimination are among other causes of division of the country along ethnic line thus hatred.

Nadim and Fladmoe (2016) warned that recurrent hate speech targeting selected groups can serve to legitimize harassment and discrimination, and ultimately violence towards individual members of these groups. In addition, hate speech can keep prejudices alive; deprive people of their dignity and cause fear and alarm in the groups it targets.

Majority of people have access to and use social media in Kenya. They have network as a result of different social groups they engage with. According to Nadim and Fladmoe (2016), the availability of such networks, means that hate speech can be spread rapidly and reach more people and the scope for targeting individuals and groups with hate speech has grown enormously.

The relationship between freedom of speech and the protection from hate speech

The freedom of expression and free speech is a fundamental right and freedom which is enshrined in the constitution (Mbaaro 2011). Article 33, of the Kenya's constitution permits the right to freedom of expression. This includes: freedom to seek, receive or impart information or ideas, freedom of artistic creativity, academic freedom and freedom of scientific research.

According to the Article 27, every person is equal before the law and has the right to equal protection and equal benefit of the law. Due to this, state or individual shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth (KNHCR 2017 report).

Onyoyo (2012) insist that freedom of speech is one of the prerequisites for a democratic society. Democracy becomes meaningless if there is no freedom to give and receive information and this is granted by the constitution. To what extent can an authority insist on hate speech without betraying the constitutional rights of individuals or groups? Onyoyo (2012) admits that there is dilemma on the hate speech and freedom of expression in Kenya.

Section 13 of the National Cohesion and Integration Act 2008, finds liable any person who uses threatening, abusive or insulting words or behavior, or displays any written material, which is threatening, abusive or insulting and that is intended or likely to stir up ethnic hatred. It further defines "ethnic hatred" as hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins. However, the definition of hate speech in this Act falls short of the definition required to protect one from being a victim of hate speech (KNCHR 2017). This is because hate speech is only recognized as such only if it occurs on the basis of ethnicity or race.

According to Elliot et al. (2016), negotiating hate speech is a delicate matter due to human rights protection. From a human rights perspective, the right to life and the prohibition of discrimination are to be balanced against the freedom of expression. Freedom of speech principles should be balanced by considering whether or not these speech acts are offensive or incite violence. To achieve this, then the legislation should play its role.

McGonagle (2016) argues that it is not possible to talk about a bright shining line dividing freedom of expression and hate speech. This is because hate speech covers a range of different types of expressions. Due to this, it's

very important to look at the context in which the expression is made: What was the nature of the expression? What was the intention of the speaker? What was the broader political or socio-cultural context in which the expression was made? Who made the expression?

He further cited example of a politician or a member of government utters hate speech, that's a particularly relevant circumstance. At this point you are dealing either with an elected representative, and therefore someone with a certain democratic mandate, or with the government. He adds that it is widely recognized that governments have a monopoly on power so any hate speech emanating from governmental circles could be perceived as having government approval, which makes the consequences for the victims very far-reaching indeed.

Similar sentiments were expressed by Milly Odongo as quoted in Odingi (2012), when she acknowledged that there is a thin line between freedom of expression and hate speech and henceforth, care must be taken to ensure that the charges facing hate speech suspects actually meet the threshold of hate speech, to avoid compromising the exercise of freedom of expression.

Allan Wadi who was sentenced for two years felt that his arrest and prosecution were unfair. He accused government security agencies for fighting freedom of expression. *"They have been targeting pro-opposition loyalists who criticize the looting and tribal leaning regime. They only fake arrest to pro-government loyalist when there is a public outcry. The cases for those supporting government never proceed as such"* (iFreek 2017).

It is difficult to determine whether the words uttered brought hatred against an individual or community. This is because most of the offences the individuals are charged with are largely based on opinions they hold against government rather than what the law defines as hate speech. Nadim and Fladmoe (2016) revealed that hate speech can inhibit others in their freedom of speech in public debate thus weakening democracy.

Ways and methods of curbing hate speech in Kenya

Different authors have different suggestions that can help curb hate speech. Gomes, Keen and Georgescu (2014) insist that it is important to look at the underlying cause of hate speech and address them. In Kenya tribal politics is the major cause of hate speech and this is as a result of ignorance by leaders to address fundamental issues like historical injustice that comprises of land, inequality and regional imbalances, economic equality and opportunities for all among others. It is important to address instances of hate speech; and in this context, the instances of hate speech in Kenya is during electioneering period.

The consequences resulting from hate speech should be addressed to help perpetrators understand the effect they may cause to the victim or to themselves. This should involve good explanation about the danger or destruction hate speech has caused or will cause when some words are used (Gomes et al., 2014). The authors further suggested that the reasons why hate speech occur should be known. Issues related to tribalism, historical injustices, ethnicity and stereotypes are some of the things leading to hate speech.

It is important to look at the context in which the expression is made: What was the nature of the expression? What was the intention of the speaker? What was the broader political or socio-cultural context in which the expression was made? Who made the expression? In developed world, victims of online hate speech are given opportunity to counter the speech against them based on idea of empowerment. The victim is given the opportunity to reclaim the narrative by countering it (McGonagle, 2016).

In Kenya, it is a challenge to fight hate speech due to tribal connections. Perpetrators of hate speech especially politicians get support from the community they come from without looking at the impact of the words used. There is need for the community members to recognize the damages inflammatory speech made. There is need to educate the society about the dangers of hate speech. Most of the time, leaders accused of hate speech manipulate community elders who in turn come out to defend their own without thinking of the damage caused to the victim(s).

To flag hate speech on social media, there can be use of blue coat packet shaper tool. The tool is used to filter undesirable traffic content on social media. This tool was used in 2013 elections to monitor social media content. On the other hand, report by DW insist on prohibition and criminalization of hate speech where a range of civil law measures and remedies can best deal with the harms caused by hate speech.

In Kenya, there are measures put in place to curb hate speech. For instance, the formation of National Cohesion and Integration Commission (NCIC) whose mandate is to tame the use of hate speech and promote national cohesion and integration, facilitate and promote equality of opportunity, good relations, harmony and peaceful coexistence between persons of different ethnic and racial backgrounds in Kenya and to advise the government thereof (Onyoyo 2012).

There is legal recourse to laws that allow online communication to be intercepted and information collected. However, the law may breach people's privacy (The Star, 2017). Most of hate speech cases are dropped for lack of evidence or for other reasons. The policies to regulate hate speech in Kenya seem to be partial. The impact is felt if the offender is the local citizen. On the other hand, the politicians walk freely even after committing the hate speech crime.

Herz and Molnar (2012), warns that banning hate speech drives extremists underground and leaves the society with no means of knowing who they are and how much support they enjoy. When they are alienated from the society, they became more aggressive and determined to recruit those who are attracted to them. On the other hand, "ban on hate speech could be misused by the government to suppress legitimate dissent and struggle for human rights" (Herz and Molnar (2012).

There is need to raise awareness on the political, social and cultural rights of individuals and groups. The awareness should include freedom of speech, and the responsibilities and social implications that come with press freedom. Journalists are required to acquire skills that will enable them identify hate speech. On the other hand, security organs and NCIC should work together with judiciary to investigate arrest and charge offender of hate speech.

Challenges in curbing hate speech in Kenya

NCIC Act 2008 law is too focused on ethnicity leaving out other target groups for hate speech. This is affirmed by KNCHR (2017) report on to the committee on elimination of all forms of racial discrimination which states that the National Cohesion and Integration Act 2008, the law does not send a strong message that hate speech is unacceptable, harmful, and dangerous and shall not be tolerated. The report further stated that due to absence of any legal precedents there is lack of clarity on what factors would be considered before one is accused of perpetrating hate speech for example; the targets of the speech, the position of influence occupied by the perpetrator vis a vis the target group.

Legal system has a poor track record of holding powerful officials to account. The high-profile names linked to hate speech have not been prosecuted despite the offensive utterance made in public against certain group(s). The failure to prosecute means that the crimes will continue. NCIC has noted that the tendency to politicize prosecution of hate speech is a real threat. This is experienced whenever prominent individuals are linked to incidents of hate crime their, supporters claim that the cases are inspired more by political affiliation than by specific acts. Despite the National Cohesion and Integration Act providing guideline to curb hate speech on social media, people still use loopholes in the system to propagate inflammatory messages.

On the other hand, KNCHR (2017) report revealed that the National Integration and Cohesion Act have limited powers of enforcement. The commission is only empowered to investigate complaints of ethnic or racial discrimination and make recommendations to the Attorney General. The Commission has recommended the prosecution of politicians from the main political divides. However there is no successful prosecution that was made despite there being incriminating evidence on hate speech against various politicians. This is reflected in the crackdown against hate speech in June 2016 where eight members of parliament were locked up for several nights in police cells due to hate speech statements made through public statements and in social media posts. But despite all this, the lawmakers were later freed for lack of concrete evidence.

In Germany, social media companies are fined up to Sh5.9 billion (€50 million) for failing to pull down hate speech. The sites are also required to submit public reports on how many posts were flagged and how many were removed under the law. However in Kenya, there is no law on the responsibility of a site on content posted on it, only individuals are targeted.

The disturbing trend of lack of convictions of political leaders who are main perpetrators of hate speech is a big challenge in fight against hate speech. Judiciary is partly to blame for failing to prosecute offenders even when evidence is made available. A good number of the hate speech cases involve politicians. The accused are either

acquitted or in some cases, suspects have walked free due to lack of convincing evidence that words uttered actually comprised hate speech as defined by the law.

KNCHR (2017), report revealed the severe inadequacy of law in protecting against hate speech, ethnic intolerance and incitement to hatred. The report further cited example of Section 77(3) (e) of the Penal Code provides that: any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a subversive intention, or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a term not exceeding three year. NCIC (2017) report revealed that despite the high-profile names currently linked to hate speech, the country's legal system has a poor track record of holding powerful officials to account.

The lack of convictions is partly because the Evidence Act has not been amended to deal with electronic or digital evidence such as news clips and cell phone recordings in which such speech is captured (Onyoyo 2012). The punishment for hate speech is a fine not exceeding Sh1 million or an imprisonment for a term not exceeding three years or both.

Irinews (2012) reported that whenever prominent individuals are linked to incidents of hate crime, there is a tendency for their supporters to claim that the cases are inspired more by political affiliation than by specific acts. This tendency is a real threat.

Summary and Conclusions

Political campaigns in Kenya have become the center of tribal hatred and spread of hate speech through utterance and use of social media. Incitement targeting certain communities or individuals on the basis of ethnicity is a significant problem to the society. Politics in Kenya is based on tribe which has caused division and animosity among Kenyans. Freedom of expression is a fundamental right and every person is equal before the law and has the right to equal protection and equal benefit of the law. This means full and equal enjoyment of all rights and fundamental freedoms.

Politicians use ethnicity for their personal gain. Increase in hate speech remarks through media and social media, led to the 2007-2008 post-election violence. Recurrent hate speech targeting selected groups can serve to legitimize harassment and discrimination, and ultimately violence towards individual members of these groups.

National Cohesion and Integration Commission (NCIC) was formed to tame use of hate speech and promote national cohesion and integration in Kenya. However the Commission through National Cohesion and Integration Act 2008 has limited powers. The commission is only empowered to investigate complaints of ethnic or racial discrimination and make recommendations to the Attorney General.

Both politician and ordinary citizen have been accused of hate speech. However, the study found majority of hate speech offenders to be politicians. Some of the politicians have been accused more than twice over hate speech. The study revealed that none of the accused politician over hate speech in Kenya was convicted. On the other hand, an ordinary citizen accused of hate speech was jailed for two years.

The law governing hate speech is weak since it does not send a strong message that hate speech is unacceptable, harmful, and dangerous and shall not be tolerated. Also the law does not clarify on what factors would be considered before one is accused of perpetrating hate speech. Due to this Most of hate speech cases in Kenya have been dropped for lack of evidence. It is also clear that hate speech offenders especially the politicians have received lenient punishments like being asked to offer a public apology.

Freedom of speech principles should be balanced by considering whether or not the speech acts are offensive or incite violence. There is a thin line between freedom of expression and hate speech and care must be taken to ensure that the charges facing hate speech suspects actually meet the threshold of hate speech. This will help to avoid compromising the exercise of freedom of expression. Sometimes the individuals are charged with hate speech based on opinions they hold against government rather than what the law defines as hate speech.

It is important to look at the underlying cause of hate speech and address them. The consequences resulting from hate speech should be addressed to help perpetrators understand the effect they may cause to the victim or to themselves. It is very important to look at the context in which the expression is made, what was the nature of the expression? What was the intention of the speaker? What was the broader political or socio-cultural context

in which the expression was made? And who made the expression? Prohibition and criminalization of hate speech where a range of civil law measures and remedies can best deal with the harms caused by hate speech.

Although the majority of hate speech cases in Kenya involves politicians, some having been severally accused, none of them has ever been convicted. They are summoned and sometimes arrested but they end up being released for lack of evidence. The longest period they have been in police cells was when the eight lawmakers were held in cells for four days. This squarely confirms the weak law provided by the constitution regarding hate speech.

The hate speech case that led to conviction was for the ordinary citizen who was jailed for two years. The common charge to the leaders is reconciliation and others cases are dropped for lack of evidence despite NCIC providing the evidence. Hate speech utterances have become common among the politicians due to lack of conviction.

Hate speech is a significant problem in Kenya and through hate remarks; the nation is broadly divided along ethnic line. The tendency by politicians to incite people along tribes or political affiliation is recurring habit leading to tension among communities. There is need for solution to this problem where the law governing hate speech should be amended to strictly prohibit hate speech.

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