



Freedom on the Net 2016 - Kenya

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Country:	Kenya
Year:	2016
Status:	Free
Total Score:	29 (0 = Best, 100 = Worst)
Obstacles to Access:	8 (0 = Best, 25 = Worst)
Limits on Content:	7 (0 = Best, 35 = Worst)
Violations of User Rights:	14 (0 = Best, 40 = Worst)
Population:	46 million
Internet Penetration:	46 percent
Social Media/ICT Apps Blocked:	No
Political/Social Content Blocked:	No
Bloggers/ICT Users Arrested:	Yes
Press Freedom Status:	Partly Free

Key Developments, June 2015-May 2016

- Average broadband connection speeds surpassed the global average in 2016, enabling greater and higher quality access to the internet for Kenyans (see **Availability and Ease of Access**).
- A music video promoting gay relationships was unsuccessfully targeted for removal, and netizens suspected government interference with a website satirizing the president (see **Content Removal**).
- The Kenyan Film and Classification Board expressed intent to regulate online video content, sparking concerns of potential censorship (see **Content Removal**).
- Arrests and prosecutions under KICA Section 29 for criticizing government officials or their associates during the coverage period numbered in the dozens, continuing a problematic trend of silencing ordinary netizens that began in 2014 (see **Prosecutions and Detentions for Online Activities**).
- In a positive step, Section 29 was declared unconstitutional in April 2016 (see **Legal Environment**).
- Research revealed that Kenya's National Intelligence Service was a registered customer of FinFisher's sophisticated surveillance technology (see **Surveillance, Privacy, and Anonymity**).

Introduction:

Internet freedom in Kenya declined slightly in the past year due to increasing arrests and prosecutions for "misusing" online tools to criticize the authorities.

Kenya is one of the most wired countries in sub-Saharan Africa, boasting a number of undersea fiber optic cable landings in the coastal city of Mombasa and serving as a gateway for several others countries in the region. [\[1\]](#)

Continued investments in information and communication technology (ICT) infrastructure has paid off, with Kenya's average broadband connection speeds reaching 7.2 Mbps, surpassing the global average of 6.3 Mbps in 2016. As a result, user growth has been profound; government data touted an 80 percent internet penetration rate in mid-2016, a figure that incorporates the expanding mobile phone user population.

While the internet is still relatively free, the government has increased attempts to restrict it in the past couple of years, driven by sensitivities around hate speech since the tumultuous 2008 elections, growing terrorist threats, and the upcoming general election in 2017. During the coverage period, an unprecedented number of Kenyan bloggers and social media users were arrested or summoned for questioning, mainly for their online commentary criticizing government officials. This continued a trend of silencing ordinary netizens – in addition to journalists – that began in 2014. Most arrests were made under Section 29(a) of the 2013 Kenya Information and Communications Act (KICA), which penalized the "misuse of licensed telecommunications equipment" before it was ruled unconstitutional by the Supreme Court in April 2016. Arrests and prosecutions dropped significantly following the ruling.

No websites, social media platforms, or communication apps are blocked in Kenya, though unsuccessful efforts to take down ostensibly objectionable content was reported in the past year. In one incident, the Kenyan Film and Classification Board (KFCB) ordered Google's Kenya office to pull down a YouTube music video that the agency deemed inappropriate for promoting homosexual relationships. Google declined, pointing to its lack of jurisdictional authority over flagged YouTube content.

In keeping with the KFCB's growing interest in policing Kenya's internet for "morally corrupt" content, the body signaled intentions to restrict online videos in January, particularly on the newly launched streaming service, Netflix, out of concerns that some content may be unsuitable for minors. In October, the KFCB followed up with the draft Film, Stage Plays and Publication Act 2016, which if enacted, would require ISPs to police their networks for illegal content such as pornography and hate speech, and potentially facilitate censorship.

Meanwhile, Kenyans grew increasingly concerned about government surveillance efforts in the past year, especially following October 2015 revelations that the National Intelligence Service was a registered customer of FinFisher surveillance technology.

Obstacles to Access:

Steadily increasing access to the internet was fueled in large part by relatively low-priced mobile services and expanding mobile broadband networks. Average broadband connection speeds surpassed the global average in 2016. The telecommunication regulator's independence was questioned after irregularities in the members' appointment process led to it being disbanded in February 2016.

Availability and Ease of Access

The Kenyan government's commitment to developing the country's information and communication technologies (ICT) sector as a tool for economic growth has led to a tremendous increase in the number of users, notably on mobile devices. Much of this growth has been driven by growing recognition of the necessity of internet services and the decreasing costs of internet enabled devices.

Internet users numbered 37.7 million, according to government data from June 2016, a 27 percent increase over the previous year,^[2] representing 80 percent penetration of the country's estimated 47 million population.^[3] Data from the International Telecommunications Union (ITU) from 2015, which may not account for mobile internet access, estimated a lower penetration rate of 46 percent, a modest increase from 43 percent in 2014.^[4] Fixed-line broadband penetration remained very low, however, at less than one percent in 2015.^[5]

The government reported nearly 40 million mobile phone subscriptions in June 2016,^[6] a penetration rate of 90 percent, up from 80 percent the previous year. The ITU reported 81 percent penetration in 2015.^[7] However, many people have more than one subscription to take advantage of incentives offered by different providers or to expand their geographic coverage, putting the actual number of users much lower. The mobile sector is the predominant provider of data and internet services to Kenyan users, mostly through 3G and Long-term Evolution (LTE) networks, which account for 99 percent of total internet subscriptions.^[8] Broadband

connection speeds are fast, documented at 7.2 Mbps by Akamai's *State of the Internet* report, above the global average of 6.3 Mbps.^[9]

Kenya has comparatively low-priced mobile services for Africa, with calling rates around KES 4 (US\$ 0.04) per minute.^[10] Data bundles are available for prepaid mobile customers, while mobile broadband subscriptions on GPRS/EDGE and 3G/4G networks continue to increase. This growth can be attributed to competitive mobile internet tariffs, promotions, competition between providers, and the rise in social media use, particularly among young people. In 2015, the Alliance for Affordable Internet ranked Kenya 25 out of 52 countries assessed that met the UN Broadband Commission's target for affordable mobile broadband, set at a maximum of 5 percent of a country's gross national income (GNI) per capita.^[11] But while internet penetration continues to increase across the country, there is still a large urban-rural divide in access, with internet use mainly concentrated in Nairobi.^[12]

Large rural areas of the country 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 in rural areas. This prompted the government to establish the Universal Service Fund (USF) in 2013 to raise KES 1 billion from the industry each year in order to expand mobile and internet services.^[13] The *National Optic Fibre Backbone Infrastructure* (NOFBI) also aims to expand rural access; to date, it has been implemented in 27 rural towns. The NOFBI project aims to improve communication 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]

Restrictions on Connectivity

During the year under review, there were no reports of the government controlling the internet infrastructure to limit connectivity. Kenya connects to the international internet via four undersea cables – Seacom, the East Africa Marine System (TEAMS), EASSY, and Lower Indian Ocean Network (LION2) – which increased the broadband availability and improved internet speeds over the past several years. License provision for access to the international gateway was liberalized in 2004.^[15]

ICT Market

Kenya's ICT sector is competitive, comprised of over ten internet service providers (ISPs) and three mobile phone providers. As of June 2016, Safaricom continued to dominate the market for mobile phone services with a market share of 64 percent for internet and mobile data subscriptions, 78 percent for voice services, and 94 percent for SMS.^[16] This high market share prompted the ICT cabinet secretary and regulator to propose regulations in July 2015 to reign in Safaricom's monopoly of the sector.^[17] The Attorney General subsequently asked Parliament to withdraw the proposed regulations, accusing the ICT ministry of overstepping its mandate.

Meanwhile, two other mobile operators – Airtel Networks and Telkom Kenya (Orange) – served the remaining share of the mobile market. There are no limitations on the number of operators permitted to launch and operate telecommunications infrastructure, with both data carriers and cellular licenses allowed to run domestic fiber networks.^[18]

Regulatory Bodies

Kenya's telecommunications sector is regulated under the Kenya Information and Communication Amendment Act (KICA) 2013, which established the Communications Authority of Kenya (CA) as the regulator for both broadcast and online media.^[19] While KICA explicitly enshrines the independence of the CA, the act was widely criticized for the power it granted to the cabinet secretary of the ICT ministry to appoint the now authority's board without stakeholder input as well as the presidential appointment of the board's chairperson.

The regulator's murky independence was highlighted in May 2015 when the High Court disbanded the CA's board after what it determined were irregularities in the appointment process,^[20] such as the appointment of board members outside statutory timelines. The ICT ministry appealed the decision.^[21] However, the new ICT cabinet secretary who assumed office in December 2015,^[22] withdrew the appeal at the advice of the Attorney

General in 2016, on the basis that it would not be successful,^[23] effectively declaring the board null and void. A new board was inaugurated in May 2016.^[24]

Limits on Content:

No websites were blocked during the coverage period, though a YouTube music video promoting gay relationships was unsuccessfully flagged for removal, while the owner of a website satirizing the president accused the government of interfering to briefly take it offline. The Kenyan Film and Classification Board expressed intent to regulate online video content, sparking concerns of potential censorship.

Blocking and Filtering

Internet content is not blocked or filtered in Kenya, and internet users have unrestricted access to social networking platforms and communication applications such as Facebook, Twitter, YouTube, and LinkedIn, all of which rank among the 20 most popular websites in the country.^[25]

Online censorship may be on the horizon. In January 2016, the Kenya Film Classification Board (KFCB) stated it would seek to regulate the newly launched streaming service, Netflix, out of concerns that the site hosts video content that may be unsuitable for minors.^[26] The KFCB followed up by proposing draft legislation in October. The Film, Stage Plays and Publication Act 2016,^[27] if enacted, would require ISPs to ensure that content hosted on their networks is classified by the board, as well as "take reasonable steps to prevent the use of their services for hosting or distributing pornography, radicalisation materials, glamorisation of use of drugs and alcohol, hate speech and demeaning any religion and community and report all persons maintaining or hosting or distributing all content reasonably suspected to be in violation of this Act."^[28] Failure to comply would be considered a criminal offense and subject to a fine, imprisonment of up to two years, or both. Such intermediary liability for online content may lead ISPs to block content preemptively.

Content Removal

The government has at times sought to remove controversial content from the internet, without much success thus far. In March 2016, the KFCB ordered Google's Kenya office to pull down a YouTube music video that the agency deemed inappropriate for promoting homosexual relationships. The office declined on grounds that it lacks jurisdiction over content flagged on YouTube.^[29]

In a murky case, the satirical website isuhuruinkenya.co.ke went offline for several hours on December 7, 2015 just a few days after it was registered,^[30] prompting suspicions of government interference.^[31] The site reports whether President Uhuru Kenyatta is in the country at the given time, adding weight to the popular perception of him as an absentee president. The site's creator said on Twitter that the national registrar, KENIC, had removed his site after receiving a complaint from the government.^[32] KENIC published an official statement saying that it had not deleted the website's domain and that technical issues were responsible for its temporary inaccessibility. It explicitly denied being subject to government pressure to remove the website.^[33]

Intermediaries 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.^[34] 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.^[35] This provision can be invoked to block or take down online content, according to the Association of Progressive Communications.^[36] Issues of intermediary liability are further complicated by the fact that the Kenyan judicial system and media are not fully conversant with legal norms involving the internet.

Media, Diversity, and Content Manipulation

Kenya's online information landscape is diverse and vibrant, representing a wide range of issues and viewpoints. However, in Kenya's increasingly partisan environment, observers note hired bloggers and Twitter bots on both sides of the political divide are increasingly crowding out diverse and independent viewpoints with partisan commentary on social media.

There are no state-run online news outlets, and the most popular news websites include the BBC, CNN, and Kenya's *Standard Online* and *Daily Nation*. While print outlets, television, and radio continue to be the main sources of news and information for most Kenyans, all major television stations have live-stream features, use YouTube to rebroadcast news clips, and actively engage audiences on Facebook and Twitter.

Bloggers and social media personalities have become highly influential over the past few years, as the increase in 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 – there were an estimated 15,000 registered blogs in 2015,^[37] covering a diverse range of topics such as fashion, the environment, food, politics, health, and human rights. 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.^[38]

The government does not impose any economic constraints on online media in Kenya, which has helped online outlets thrive. In recent years, print newspaper distribution has been undercut by online news sources, a trend which led the president to announce in March 2015 that government advertising would shift to digital platforms to reduce spending, calling them cheaper and more effective given their broad reach.^[39]

Individual internet users are generally comfortable expressing themselves openly online, though the use of digital technologies to spread ethnic, racist, and xenophobic commentary continues to pose a serious challenge to freedom of expression in Kenya, particularly during politically contentious periods such as national elections. In the absence of a suitable framework to regulate online hate speech, many feel that the emphasis should be on self-regulation by internet users, with the government stepping in when needed to address hate crimes involving the internet.^[40] Nonetheless, observers worry that self-censorship may rise following the growing number of bloggers and ordinary users arrested for criticizing the government.

Digital Activism

The internet continued to grow as an important platform for political debate and mobilization around critical issues in Kenya. With the fourth largest Twitter activity in Africa (following Egypt, Nigeria, and South Africa),^[41] Kenya's Twitter users regularly engage in political conversations online. In July 2015, when the news network CNN referred to Kenya as a "hotbed of terror" during a report about President Obama's visit to the country, Kenyans took to social media to dispel the mischaracterization of their country using the hashtag #SomeoneTellCNN that trended worldwide.^[42]

In another example of hashtag activism, Kenyans created the #WhatWouldMagufuliDo campaign in November 2015 to praise newly elected Tanzanian President John Magufuli for his immediate efforts to curb corruption by placing limits on foreign travel by public servants and lavish state celebrations.^[43] Through fun memes and tweets, the campaign sought to contrast the leadership priorities of the Kenyan president with his Tanzanian counterpart with the hopes of encouraging greater accountability.^[44]

Violations of User Rights:

Dozens of charges were filed under KICA Section 29 for criticizing government officials or their associates during the coverage period, continuing a problematic trend of abusing the law to silence ordinary netizens that began in 2014. In a positive step, Section 29 was declared unconstitutional in April 2016. Research revealed the use of FinFisher surveillance technology by Kenya's National Intelligence Service.

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, passed in response to widespread ethnic violence that ensued after the 2007 general elections.^[45] 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.

Section 132 of the penal code, which penalizes "undermining the authority of public officers," also constrains freedom of expression, both online and off.^[46] Meanwhile, criminal defamation laws remain on the books, pending repeal or amendment to conform with the 2010 constitution.

Prior to April 2016, online expression was specifically targeted under Section 29 of the Kenya Information and Communications Act (KICA) 2013, which penalized the use of ICTs to disseminate messages deemed to be "grossly offensive" or that cause "annoyance, inconvenience or needless anxiety to another person" with a fine of up to KSH 50,000, three years in prison, or both.^[47] Section 29 of KICA was used to arrest and, in some cases, charge an unprecedented number of bloggers and social media users for their online activities in 2015 (see Prosecutions and Detentions for Online Activities). In a positive April court decision, the provision was declared unconstitutional for infringing on fundamental rights,^[48] leading to a significant drop in arrests and prosecutions since.^[49]

Recently proposed laws threaten to further restrict online freedom of expression. In July 2016, the Ministry of ICT called for stakeholder input into the Computer and Cyber Crimes Bill 2016.^[50] The bill reportedly followed international standards such as the Budapest Convention on Cybercrime in its efforts to address cybercrime such as computer fraud and child pornography.^[51] 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.^[52] If passed, the provision could be used in the same way as the unconstitutional KICA Section 29.

A number of positive laws have been proposed in recent years to protect the rights of Kenyan internet users. The Data Protection Bill 2013, though still in draft form as of mid-2016, aims to regulate the collection, processing, storing, use, and disclosure of information relating to individuals processed through automated or manual means.^[53] 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

An unprecedented number of Kenyan bloggers and social media users were arrested or summoned for questioning in 2015-2016, mainly for online commentary criticizing government officials, under Section 29(a) of the 2013 Kenya Information and Communications Act (KICA), which penalized the "misuse of licensed telecommunications equipment" before it was ruled unconstitutional by the Supreme Court in April 2016.^[54] The trend of using the law as a tool to silence critical speech began in 2014.

Dozens of arrests and prosecutions were documented under KICA Section 29. In most cases, those arrested were held for some days for questioning before being released without charge. Some allegations of "misusing" telecommunications bordered on the absurd. In March 2016, university student Ezer Kipkirui was arrested for taking a photo of a long queue on a busy street in Nakuru town.^[55]

Other examples include the following cases:

- Well-known and controversial blogger Robert Alai, who had been arrested several times in previous years for his online commentary, was a continual target in the past year. In December 2015, Alai was arrested after he posted a message on Facebook criticizing the Ethics and Anti-Corruption Commission. He was released on a bond in January 2016 after pleading not guilty.^[56] While his case was dropped in June after Section 29 of the KICA Act was declared unconstitutional, his release was authorized under Section 87 (a) of the penal code which allows future re-arrest and prosecution.^[57]
- Brian Otieno was arrested and charged with "misuse" of a telecommunications gadget in January 2016 for allegedly defaming a gubernatorial aspirant on social media.^[58]
- Elijah Kinyanjui was arrested on January 12, 2016, and held for 12 hours for allegedly sharing a story that depicted the Nakuru governor's daughter Brenda Mutanu in a bad light on WhatsApp and Facebook.^[59]
- Martha Wanjiru Miano, an employee of the Nyeri County Constituency Development Fund (CDF), was arrested in February 2016 and charged with "abusing" the brother of the Nyeri county governor on

Facebook. She was later released and acquitted on procedural grounds.^[60]

The authorities also targeted users and journalists for online commentary about the military's fight against the Al-Shahbab terrorist group. In January 2016,^[61] Also in January, Eddy Reuben Illah was arrested and charged with publishing prohibited material for allegedly sharing images depicting Kenyan soldiers killed by Al Shabaab through a WhatsApp group.^[62] Prison warden Patrick Safari, popularly known as "Modern Corps," was also arrested for posting comments about the Al Shahbab attack, spending the night in prison for interrogation.^[63] He had been previously arrested in July 2015 for an "annoying tweet" about Kenyan police.^[64]

Section 132 of the penal code, which penalizes "undermining the authority of public officers," was also used to prosecute individuals for their online activities, including Anthony Njoroge Mburu, who was charged in January 2016 for posting allegedly false information on social media that was viewed as harmful to Kiambu Governor William Kabogo.^[65]

Surveillance, Privacy, and Anonymity

The Kenya Information and Communications Act (KICA) prohibits unlawful monitoring and interception of communications,^[66] though the Prevention of Terrorism Act 2012 allows the authorities to limit constitutional freedoms, such as the right to privacy, during terrorist investigations.^[67] 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,"^[68] which must be authorized by an interception order granted by the High Court.^[69] The Kenyan government has stepped up its surveillance efforts in the past couple of years to deal with the threat of terrorism, which became particularly pronounced following the September 2013 Al-Shabab terrorist attack on the Westgate mall in Nairobi.

In October 2015, a report by Citizen Lab revealed a FinFisher server with IP addresses registered under Kenya's National Intelligence Service.^[70] Known as a sophisticated and user-friendly spyware suite sold exclusively to governments for intelligence and law enforcement purposes, FinFisher has been involved in a number of high-profile surveillance abuses despite being marketed as a tool for fighting crime. Privacy International also reported in October 2015 that it had received a leaked memo listing Kenya among other countries that employ FinFisher's surveillance technology, such as Syria, Zimbabwe, Rwanda, and Uganda.^[71]

User anonymity is comprised by SIM card registration requirements under the Kenya Information and Communications (Registration of Subscribers of Telecommunications Services) Regulations, 2013, which prescribes penalties of up to KES 300,000 (US\$3,500) or imprisonment of up to three years for failure to abide by the registration requirements.^[72] The regulations also grant the communications regulator with access to service providers' offices and records without a court order, raising concerns over the lack of judicial oversight.^[73]

Anonymity and user privacy may be further restricted by government efforts to tackle cybercrime via public WiFi networks. In July 2015, the regulatory authority announced new regulations requiring users of devices with WiFi capabilities to register their devices with the Kenya Network Information Centre (KENIC).^[74] If implemented, registration would require users to provide their ID card details and telephone numbers, which could be easily tracked by the government.^[75] The regulations would require the installation of Closed Circuit Television (CCTV) cameras to record people using public WiFi.^[76]

Intimidation and Violence

Bloggers and ordinary users faced increasing intimidation and violence in recent years. In June 2015, Twitter activist Wanjeri Nderi said she was assaulted at a shopping mall by an unidentified individual who told her to "stop making noise" before attacking her. Known for her Twitter posts about corruption and injustice in Kenya, Nderi and her supporters believe she was targeted for her frequent criticisms of the government.^[77]

Law enforcement officials used the accusation of "misusing" telecommunications equipment to harass and intimidate users for their online activities, even if no charge resulted (see Prosecutions and Detentions for

