



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 254 OF 2016

IN THE MATTER OF ALLEGED VIOLATION OF THE PETITIONER'S AND

SAFARICOM SUBSCRIBERS' FUNDAMENTAL RIGHTS UNDER

THE BILL OF RIGHTS IN THE CONSTITUTION OF KENYA;

AND

IN THE MATTER ALLEGED CONTRAVENTION OF THE

CONSTITUTION, CONSUMER PROTECTION ACT AND

THE KENYA COMMUNICATION AND

INFORMATION ACT;

IN THE MATTER OF ARTICLES 22,23, 35, 40, 46, 73, 74,

75 AND 258 OF THE CONSTITUTION OF KENYA

JAMES KURIA.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1STRESPONDENT

MINISTRY OF INFORMATION,

COMMUNICATION & TECHNOLOGY.....2NDRESPONDENT

COMMUNICATION AUTHORITY OF KENYA.....3RDRESPONDENT

SAFARICOM LIMITED.....4TH RESPONDENT

JUDGMENT

1. The Petitioner, a male adult of sound mind brings this Petition citing violation of his constitutionally and Statutory protected Consumer Rights by the fourth Respondent. He also sues the first to third Respondents for allegedly violating their statutory mandate of ensuring that the fourth Respondents upholds its legal mandate to protect its customers.

2. The first Respondent is the Hon. Attorney General sued as the principal legal government representative. The second Respondent is the Ministry Responsible for formulating, administering, managing and developing and developing the Information, Broadcasting and Communication Policies in the Republic of Kenya.

3. The third Respondent is a Statutory Body established by the Kenya Communication and Information Act, 1998^[1] as amended by the Kenya Communication and Information (Amendment) Act, 2013. Its duties include inter alia regulating the communication sector in Kenya.

4. The fourth Respondent is Safaricom, a public company. It provides *inter alia* voice, data and financial services to its subscribers via a variety of information and communication technology platforms.

The Petitioners case

5. The Petitioner avers that he is a pre-paid Safaricom mobile phone subscriber, and line number **0720-842521**. He further avers that Safaricom owes a duty to its subscribers to notify them in advance of all applicable levies. He further avers that on **25th** May 2016 he received an unsolicited text message from Safaricom with words to the effect "*save up to 85% on your local calls, SMS & internet by subscribing to the advantage plus prepay plans. Dial ... to choose your preferred bundle.*" He claims he construed the message to mean that he would save 85% on all calls, SMS and internet. He claims that upon reading the text message, he subscribed to the promotion and immediately Safaricom deducted **Ksh. 4,999/=** from his M-Pesa account. Shortly, he avers, Safaricom notified him that the expiry date for the subscription was **24th** June 2016.

6. The crux of the Petitioners' complaint is that the above information was not disclosed to him prior to the subscription. Further, he states that the initial message was misleading and or contained material non-disclosure, hence a violation of Article **46** of the Constitution and provisions of the Consumer Protection Act.^[2]

7. He avers that the second and third Respondents failed or neglected to protect consumer rights. Also, the first to third respondents failed to direct Safaricom to stop the practice complained of. As a consequence the Petitioner prays for:-

1. A declaration that the 4th Respondent violated the Petitioner's and Safaricom subscribers' protected consumer rights under Article 46 of the Constitution and the Consumer Protection Act.

2. A declaration that the 4th Respondent unjustly enriched itself by violating the Petitioner's and Safaricom subscribers' protected consumer rights.

3. An injunction order do issue directed to the 4th Respondent not to confiscate the Petitioner's unutilized; Voice, Data, and Short Messaging Services (SMS) pending determination of this Petition.

4. An order of prohibition do issue to permanently debar the 4th Respondent, its privies, agents, affiliated persons, nominees, associates, servants, proxies, or whomsoever, from imposing concealed, post-deduction, and non-upfront charges, fees, rates, interests, and expiries on the Petitioner and Safaricom subscribers.

5. An order directed to the 3rd Respondent to audit and/or direct an audit be conducted on the 4th Respondent to ascertain Safaricom's unjust enrichment from its violation of the Petitioners and

Safaricom subscribers' constitutionalized consumer rights.

6. *An order to the 2nd and 3rd Respondent to discharge their statutory mandate to regulate and ensure the 4th Respondent stops violating the Petitioner's and Safaricom subscribers' constitutionalized consumer rights.*

7. *An order of restitution directed to the 4th Respondent to reimburse to the Petitioners and Safaricom subscribers all audited monies and/or resources unjustly and unconstitutionally obtained from them by Safaricom Limited.*

8. *Exemplary damages.*

9. *Costs of and incidental to this suit.*

First and Respondents' grounds of opposition

8. The first and second Respondent filed grounds of opposition stating:- **(i)** *that the Petition does not raise constitutional issues, (ii) that the second Respondent has at all material times acted within their constitutional and statutory mandate, (iii) that the Petitioner has not demonstrated how the second Respondent has failed in its duties, (iv) the Petitioner has not exhausted the available statutory remedies, and (vi) the Petitioners rights are not absolute.*

Fourth Respondents' Replying Affidavit

9. On behalf of the fourth Respondents is a Replying Affidavit by **Mr. Daniel M. Ndaba**, it's in house counsel. He avers that the Petitioner purchased a Subscriber Identity Module (SIM) card in a starter pack containing prepay terms and conditions. He also avers that Safaricom invests heavily in advertising in order to maintain its leading position in the industry and it disseminates relevant information to reach to both existing and potential customers.

10. Further, he averred that the *Safaricom Advantage Plus* plan was meant to extent the additional value and convenience enjoyed by Post pay subscribers to Prepay customers and that in advertising the product, Safaricom provided adequate information to existing and potential customers sufficient to make them fully informed to decide.

11. **Mr. Ndaba** also averred that on **11th** December 2015, Safaricom filed tariffs with the Communications Authority of Kenya (second Respondent) in conformity with the Kenya Information and Communications (Tariff) Regulations, 2010, (hereinafter referred to as the Regulations). He states that the service was subject to terms and conditions filed with the authority which were available at its website and at its outlets country wide and that the terms and conditions provided the petitioner with an easy way to access its services from the convenience of his phone.

12. Further, he averred that the Petitioner was subject to the applicable conditions of use, and that the subscription was voluntary. He also stated that the promotion was to expire after 30 days, which information was available at the website. Also, he stated, customers including the petitioner could dial Safaricom to ascertain terms and validity period. Lastly, he stated that the petitioner failed to inquire the terms and conditions prior to subscribing.

Third Respondents' Replying Affidavit

13. **Edward Rinkanya**, the third Respondents acting Principal Legal Officer in his Replying affidavit filed on **20th** July 2016 avers that the law provides mechanisms to protect consumers and to resolve complaints. Further, the Petitioner never complained to the authority, hence, the Petition is pre-mature. Also, he avers, the alleged violation of Article **46** is unfounded.

Petitioner's Supplementary Affidavit

14. The Petitioner filed a supplementary on 19th July 2016 in which :- **(i)** *he denied being issued with a starter pack, (ii) averred that the alternative dispute resolution mechanisms provided under the law and the regulations cannot determine matters relating to violation of rights, and (iii) and Article 46 (3) of the Constitution placed a burden upon Safaricom to provide the necessary information.*

Applicable legal provisions

15. Article 46 (1) of the Constitution provides that consumers have the right to goods and services of reasonable quality, to the information necessary for them to gain full benefit from goods and services, to the protection of their right, safety, and economic interests and to compensation for loss or injury arising from defects in goods and services. Sub-Article (2) provides that Parliament shall enact legislation to provide for consumer protection, fair honest and decent advertising. To give effect to the above Article, Parliament enacted the Consumer Protection Act.[3] Part Two of the Act[4] provides Consumers Rights while Part Three prohibits un fair practices.

16. Article 46 (3) provides that the Article applies to goods and services offered by the public entities or private persons.

Comparable Jurisprudence

17. Before addressing the issues raised in this Petition, and formulating the standard to assess whether the Petitioner has properly discharged his burden of prove, it is desirable to consider foreign jurisprudence dealing with comparable legislation. Foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues that confront us in this matter. At the same time, it is important to appreciate that foreign case law will not always provide a safe guide for the interpretation of our Constitution. When developing our jurisprudence in matters that involve constitutional rights, we must exercise particular caution in referring to foreign jurisprudence[5]bearing in mind the need to develop our common law based on our transformative and progressive Constitution.

18. The South African Constitution and the South African Consumer Protection Act have provisions similar to the Kenya Constitution and our statute law protecting consumer rights. Hence decisions from South Africa Courts on the subject may offer useful guidance.

19. In interpreting the Consumer Protection Act[6] it is instructive to refer to the principles enunciated by the South African Court in *Natal Joint Municipal Pension Fund vs Endumeni Municipality*,[7] that is to consider the words used in the light of all relevant and admissible context, including the circumstances in which the legislation came into being. Furthermore, '...a sensible meaning is to be preferred to one that leads to insensible or un-businesslike results. . .' [8] and that that the interpretative process involves ascertaining the intention of the legislature.[9]

20. To ascertain the intention of Parliament, it is important to consider the preamble to the Act. The long title of the Act provides that it is "*An Act of Parliament to provide for the protection of the consumer prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto.*"

21. The Act must be interpreted in a manner that gives effect to the purpose of the Act as set out in Section 3 which provides for the Interpretation and purposes of Act. It reads:-

(1) *This Act must be interpreted in a manner that gives effect to the purposes set out in subsection (4).*

(2) *When interpreting or applying this Act, a person, court or the Advisory Committee may consider—*

a) appropriate foreign and international law; and

b) appropriate international conventions, declarations or protocols relating to consumer protection

22. Section 4 provides that the the purposes of the Act are to promote and advance the social and economic welfare of consumers in Kenya by—

a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;

b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers;

c) promoting fair and ethical business practices;

d) protecting consumers from all forms and means of unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices including deceptive, misleading, unfair or fraudulent conduct;

e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior;

f) promoting consumer confidence, empowerment and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;

g) providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and

h) providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers.

23. Section 2 of the Act defines a consumer as a person to whom goods or services are marketed in the ordinary course of a supplier's business, or who has entered into a transaction with a supplier in the ordinary course of a supplier's business, unless the transaction is exempt from the application of the act. The definition includes a user of the goods or a recipient or beneficiary of the particular service irrespective of whether that person was a party to a transaction concerning the supply of the goods or services. This has the effect that the recipient of a gift from a consumer would also be considered a consumer in terms of the Act.^[10] The important features to note are that there must be a transaction to which a consumer is party, or the goods are used by another person consequent on that transaction.

24. From the definitions, the Preamble and purpose of the Act, it is clear that the whole tenor of the Act is to protect consumers. A consumer is a person who buys goods and services, as well as persons who act on their behalf or use products that have been bought by consumers. The Act must therefore be interpreted keeping in mind that its focus is the protection of consumers.

Issues for determination

25. Having considered the pleadings and having heard the parties respective submissions, I have identified the following issues for determination.

a) Whether the Petitioner ought to have exhausted the Statutory Dispute Resolution Mechanism before invoking this courts' jurisdiction.

b) Whether the fourth Respondent breached its constitutional and statutory obligations to the Petitioner or its Customers.

c) *Whether the Petition discloses a case against the first, second and third Respondents.*

Whether the Petitioner should have exhausted the Statutory Dispute Resolution Mechanism before invoking this courts' jurisdiction.

26. The first and second Respondents counsel submitted that this dispute ought to have been determined by the Appeals Tribunal established under the Kenya Information and Communication (Amendment) Act, 2013 and the dispute Resolution mechanism established under the Consumer Protection Act.^[11] Citing *Speaker of the National Assembly vs Njenga Karume*^[12] counsel submitted that where a statute has established a dispute resolution mechanism, the court must exercise restraint in entertaining the dispute. He added that not every violation of the law ought to be raised in the high court as a constitutional Petition.^[13]

27. To buttress his argument, counsel cited *Bernard Murage vs Firestone Africa Ltd & 3 Others*^[14] where it was held that the mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court, but, all that the Court need to do is to examine whether the alternative remedy is efficacious.

28. A similar argument was advanced by counsel for the third Respondent who submitted that the Act provides an elaborate consumer protection framework through the Kenya Information and Communications (Consumer Protection) Regulations which provide a mechanism for resolving complaints which culminate in an appeal at the Multimedia Appeals Tribunal established under Section 102 of the Act, hence this court ought to decline jurisdiction.

29. The Petitioners counsel was of a different opinion. He argued that the Appeals Tribunal does not have jurisdiction to determine alleged violations of the Constitution.^[15]

30. Regulation 2 of the Kenya Information and Communications (Dispute Resolution) Regulations, 2010 defines a “consumer” to mean any person who uses communication services or products offered by a licensee; It defines a “dispute” to mean any matter that is in contention between a licensee and another, a consumer and a licensee, where one or both parties is aggrieved by the conduct of the other and the parties have failed to reach an amicable resolution after due effort has been made.

31. Regulation 3 grants the Commission power to resolve disputes between— (a) a consumer and a service provider; (b) a service provider and another service provider; or (c) any other persons as may be prescribed under the Act. Regulation 4 provides for the procedure of initiating disputes. Regulation 8 (6) provides that any party dissatisfied by the decision of the Commission may Appeal to the Appeals Tribunal established under Section 102F of the Act within fifteen days of the decision. Appeals against decisions rendered by the Appeals Tribunal lie at the High Court as provided under Section 102G of the Act.

32. On principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case, a position ably captured by the *South African Constitutional Court*^[16] in the following words:-

"Jurisdiction is determined on the basis of the pleadings,^[17]... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."

33. In the case of *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya* [18] after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the Court held:-

*[46]What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the **Shikara Limited Case (supra)**, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.*

*[47]. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.* [19]*

34. The question that begs for an answer is whether the dispute resolution mechanism established under the Act and the Regulations is competent to resolve the issues raised in this Petition. The core issue is the allegation that the fourth Respondent failed to furnish the Petitioner with sufficient information to enable him to make the right choice. He contends that the advertisement complained of was misleading. He thus accuses the fourth Respondent of violating his constitutionally and statutory protected consumer rights while the first to fourth Respondents are accused of allegedly being in breach of their statutory and constitutional obligations.

35. From the above, it is evident that the Petitioner has alleged breach of Article 46 rights and has invited this court to determine the constitutionality or otherwise of the impugned advertisement. He alleges that the advertisement in question is misleading and that material facts were not disclosed. Can the said issues be resolved within the confines of the Act under the dispute resolution mechanism established under the Act and the Regulations?

36. It is my view that the dispute disclosed in this Petition falls within the definition of a dispute as defined in Regulation 2 cited above which defines a dispute to mean any matter that is in contention between a licensee and another, a consumer and a licensee, where one or both parties is aggrieved by the conduct of the other and the parties have failed to reach an amicable resolution after due effort has been made.

37. I am conscious of the fact that the right of access to court is entrenched in our Constitution [20] and it is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes. Construed in this context of the rule of law, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable. This is the test the court should bear in mind when invited to decline jurisdiction.

38. The need for an effective remedy in a case may justify this court to take the exceptional course of entertaining a dispute where the court is satisfied that the laid down statutory mechanism may not provide an effective remedy to the aggrieved party or if it is clear the dispute disclosed by the facts substantially or wholly lie outside the scope of the laid down statutory mechanism.

39. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred or will occur or there is a clear violation of the Constitution and that there is no alternative effective remedy within the statutory established mechanism.

40. Our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute. [21] It is also settled that the exhaustion doctrine is only

applicable where the alternative forum is accessible, affordable, timely and effective. A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality].....a remedy is considered available only if the applicant can make use of it in the circumstances of his case.
[\[22\]](#)

41. Having fully considering the dispute disclosed in this Petition, the powers of the Authority as conferred under the law, I am clear in my mind that the mechanism established under the Act and the Regulations can afford the Petitioner an effective remedy if this dispute is to be subjected to the said mechanism. Further, the remedy is not only readily available, but would be effective and would be sufficient to address the complaint.

42. The Petitioner has not demonstrated that he cannot get an effective remedy under the dispute resolution mechanism established under the statute. The attempt to clothe the alleged failure to supply information with Article 46 rights is not good enough. There must be a clear demonstration that the remedy not available, not effective, and not sufficient to address the grievances in question.

43. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law. The “deepest norms” of the Constitution should determine whether the dispute involves explicit constitutional adjudication, or whether it could safely be left to the statutory provisions. In this regard, I am persuaded beyond doubt that the adjudication of the issues complained herein can safely be left to the statutory provisions.

44. Courts abhor the practice of parties converting every issue in to a constitutional question where such issues can safely be left to the dispute resolution mechanism established under the statute. The Court of Appeal in *Gabriel Mutava & 2 Ors. vs. Managing Director Kenya Ports Authority & Another* [\[23\]](#) underlined the conventional judicial policy as established by the courts over time and now settled that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law as follows:-

“Then there is the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where this Court again emphasized:-

“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed...”

45. A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done. [\[24\]](#) A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. [\[25\]](#)

46. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values. [\[26\]](#)

47. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others* [\[27\]](#) in which Justice O’Regan recalling the Constitutional Court’s observations in *S vs. Boesak* [\[28\]](#) notes that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the

interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”[29]

48. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. [30] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. This leads to the second issue, namely, whether or not the Petitioner proved to the required standard that Safaricom breached the provisions of Article 46 of the Constitution and the statutory provisions guaranteeing consumer rights.

49. It is also important to point out that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution, the Court is obligated to promote these modes of alternative dispute resolution. A Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy.[31] I am also clear in my mind that the place of alternative dispute resolution is respected by the courts and this court is no exception.

Whether the fourth Respondent breached its constitutional and statutory obligations to the Petitioner or its Customers.

50. Counsel for the Petitioner submitted that consumer protection laws are intended to ensure that consumers can select effectively from among the available options, and added that the Constitution guarantees consumer rights.[32] To buttress his argument, counsel cited Regulation 3 of the Kenya Information and Communication (Consumer Protection) Regulations, 2010 which provides that

3. Rights and obligations of customers.

(1) A customer shall have the right to—

(a) receive clear and complete information about rates, terms and conditions for available and proposed products and services;

(b) be charged only for the products and services they subscribe to;

(c) where possible, select a service provider and service of the customer’s choice;

(d) personal privacy and protection against unauthorized use of personal information;

(e) accurate and understandable bills for products and services authorised by the customer, and to fair prompt redress in the event of a dispute in the provision of the products and services;

(f) protection from unfair trade practices, including false and misleading advertising and anti-competitive behaviour by licensees; and

(g) equal opportunity for access to the same type and quality of service as other customers in the same area at substantially the same tariff limiting variations to available or appropriate technologies required to serve specific customers.

51. Counsel submitted that Regulation 3 (1) (a) above imposes a mandatory duty upon the fourth Respondent to provide the Petitioner with clear and complete information about the rates, terms and conditions of the advantage plus plan tariff. Counsel submitted that the SMS complained of violated Section 12 (k) (n), (o), (q) & (r) of the Consumer Protection Act.[33] He also submitted that section 77

of the Consumer Protection Act^[34] annuls a consumer agreement unless it conforms to the consumer protection act and the regulations.

52. Counsel for the fourth Respondent submitted that prior to the introduction of the impugned tariff, it filed the rates with the third Respondent, and also argued that the terms were available to the public for review and inspection as per Regulation 5 (3). He also submitted that the terms were available on request. He argued that the fourth Respondent filed rates disclosing all the details including the expiry date. In any event, he argued, the Petitioner was obliged to conduct due diligence and seek any information. Also, he submitted that the petitioner did not demonstrate that he attempted to obtain the information and it was not supplied.

53. He further argued that the initial invitation through SMS was a mere invitation to treat and not an offer, hence, the Petitioner had the opportunity to consider the invitation to treat and thereafter make a decision upon satisfying himself on the terms and conditions.

54. Further, he submitted that in conformity with Sections 31, and 87 of the Act, the petitioner made available all the necessary information and that as per the initial SMS, the petitioner was to save up to 85% on local calls, SMS and internet usage and not 85% on calls, hence the alleged breach of the provisions of the act has not been proved nor did the Petitioner prove that for the one month he never received any benefits and in any event, the Petitioner is bound by the terms of the agreement.

55. Although issues of consumer rights affect only the parties, 'their impacts and consequences are substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest, hence the need for the parties to submit the necessary evidence to enable the court to analyse the issues and arrive at a formidable determination that transcends the case at hand.

56. Consumer rights litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the expanded Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases.^[35]

57. The general principle governing the determination of cases is that the party who alleges or, as it is sometimes stated, the party who makes the positive allegation, must prove.^[36] Moreover, the onus on the Petitioner to establish violation of alleged consumer rights is not a mere formality; it is important.

58. The Petitioner claims that the advertisement was misleading and relevant information such as applicable rates and the expiry date of the promotion were not supplied affront. The fourth Respondent avers that it filed the rates with the Authority as required under the Regulations and that all the applicable terms and conditions were available at its website, and on request or by dialling from the handset. Further, it was argued that the Petitioner did not exercise due diligence.

59. The question that calls for an answer is whether the advertisement was misleading and or omitted relevant material or particulars which were pertinent in influencing the Petitioner to make an informed choice. The test for determining a misleading advertisement was ably laid down by the Canadian Court in *Maritime Travel Inc. vs. Go Travel Direct.com Inc.*^[37] Madam Justice Hood undertook a fairly detailed review of the comparative advertising jurisprudence in Canada, from which she distilled eight principles, as follows:-

a) The general impression of the advertisement must be determined, and to do so, one has to consider the portion of the public to whom the advertisement is directed.

b) The literal meaning of the advertisement is to be considered as well as the general impression.

c) To try to determine whether the advertisement is false or misleading in a material respect, outside evidence may be considered, but not for the purpose of altering the general impression created by the advertisements.

d) *The question is whether the advertisement is misleading in a material respect; that is, it must be something that would have an effect on the purchase decision.*

e) *Aggressive advertising is permitted, unless it is untruthful disparagement.*

f) *The Court should not interfere with advertising unless the advertising is “clearly unfair.”*

g) *Even advertisements that “push the bounds of what is fair” may not be misleading in a material respect.*

h) *In the civil context, the burden of proof on the plaintiff is a balance of probabilities; but it is a heavier burden. In the Court’s words there must be “substantial proof of activity that is a very serious public crime.”*

60. The basic prohibition with regard to misleading advertising is the making of a representation which is false or misleading in a material respect. This requirement – that the representation be false or misleading in a material means that, not all representations will constitute legally challengeable misleading advertising – only those which are materially misleading. Further, representations found on an advertisement will be read in the context of the entire advertisement – not just the literal meaning of a specific representation taken out of context.

61. The question is whether the message received by the person reading or viewing the advertisement is likely to mislead. This turns on the nature of the representation found in the advertisement, which, if not disclaimed, might constitute a materially misleading representation. Materiality is defined as being of consequence or importance, or pertinent or essential to the matter.[\[38\]](#)

62. I was, however, unable to find a case that defined ‘misleading’ with any exactitude, although some cases seemed to use the words “misleading” and “confusing” almost interchangeably. *Black’s Law Dictionary* provides some insight into this issue, as it defines misrepresentation as ‘the act of making a false or misleading assertion about something, [usually] with the intent to deceive.’

63. What is clear from the cases is that whether or not a representation is misleading will be determined from a consideration of the representation in context and from the perspective of the average person to whom it was directed. In this respect it is not accurate to say that the target of the promotion would simply be the ignorant, unthinking and credulous. Put otherwise, the facts of each case, which includes a consideration of the intended audience, must govern and the representation is to be considered from both a literal and general impression point of view.

64. Advertising can be an effective tool in persuading the public to utilize a particular product or service. By its nature, it is one-sided and usually does not convey a full and balanced analysis. To do so, of course, might diminish its persuasive power. There must, however, be a reasonable basis for the representation that is made.

65. Additionally, the advertisement complained of must be clearly unfair. The advertisement must lack a reasonable basis. It must be shown to be *per se* false or must be proved to be misleading in a material way when the whole picture of the advertisement is considered.

66. The test as to whether something is materially misleading is generally applied in the context of an average purchaser or average reader or viewer of the advertisement.[\[39\]](#) The courts have also said that at least with respect to the purchase of some products, the courts will assume a sophisticated purchaser, particularly where the product being advertised is a relatively sophisticated product.[\[40\]](#)

67. The bottom line here is that the advertisement, taken as a whole, and read, viewed or experienced by a consumer of ordinary sophistication – or perhaps in some cases a reasonably sophisticated consumer – or, a consumer of, modest sophistication – will be found to be contrary to the Act if it conveys a general impression which is false or misleading in a material respect. In determining whether a representation is

false or misleading in a material respect, a court will consider the general impression created by the advertisement in question.[\[41\]](#)

68. Similarly, the European Court of Justice, when considering the misleading of consumers, has held that, "...in order to determine whether a particular description, trade mark or promotional description or statement is misleading, it is necessary to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect."[\[42\]](#) The Court of Appeal, California, also applies a reasonable customer test.[\[43\]](#)

69. The representation will be false or misleading in a material respect if, in the context in which it is made, it readily conveys an impression to the ordinary citizen which is, in fact, false or misleading and if that ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered.

70. Also of useful guidance is the decision by the South African court in the case of *Incorrect price advertised: price not binding (Case 1)*[\[44\]](#) where it was held:-

“When a supplier advertises goods or services to the public by some method of mass communication such as the media, circulars or catalogues, this is generally considered to be an invitation to treat or do business, or a mere puff.[\[45\]](#) It may, however, depending on the particular wording of the advertisement and the surrounding circumstances, amount to a binding offer made to all the world which will ripen into a contract with anyone who accepts it.[\[46\]](#) This is best illustrated by reference to actual cases.

*The publication of an advertisement offering goods for sale at a stated price is not an offer to all who may read the advertisement but merely an invitation to make offers: **Bird v Summerville 1960 4 SA 395(N) 401D.** This is referred to as an invitation to treat.”*

71. Whether or not the supplier is bound by the terms of an advertisement depends on the wording of the advertisement.

72. Applying the reasoning expounded above, I find that the advertisement complained has not been demonstrated to have been materially false or misleading nor was it an offer but an invitation to treat.

73. I also conclude that it has not been demonstrated that the advertisement was misleading or inaccurate. I am persuaded by the evidence tendered that the applicable rates were filed with Authority as required, a fact that has not been contested. I am persuaded by the fourth Respondents assertion that the expiry date was available had the Petitioner taken care to establish it. I am convinced that the rates and the expiry date were available in advance had the Petitioner cared to establish it. The promotion could not be expected run indefinitely. The fact that the Petitioner misconstrued the advertisement is not a basis to hold that it was misleading. The test is that of an average consumer who is reasonably well informed and reasonably observant and circumspect.

Whether the Petition discloses a case against the first, second and third Respondents.

74. The Petitioners case is that the first, second and third Respondents' breached their statutory obligations and or refused or failed to act to stop the advertisement complained of. The Petitioner now invites the court to find and hold that as a consequence of the breach, the Petitioner has suffered loss, hence the reliefs sought in the Petition.

75. Counsel for the third Respondent submitted that the Petition does not disclose a case against the third Respondent and no notice of a dispute as required was served upon the third Respondent, hence, there is no basis to accuse the third Respondent for failing to perform its duties.

76. Counsel for the first and Second Respondents argued that the Petition does not meet the test laid down by our courts to establish constitutional violations[\[47\]](#)and that it does not raise constitutional issues.

[48] Counsel for the third Respondent argued that the Petition does not disclose a case against the third Respondent.

77. It is settled law that in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.[49]

78. It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and someone belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie*, and, if be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty.[50] In one of the earliest cases applying this principle, Lord Campbell CJ in *Couch vs Steel*[51] granted a remedy to a seaman who had fallen ill on a journey and suffered damage due to the failure of the ship-owner to maintain a list of medicines required by statute.

79. Here indeed the words of Kitto J in the High Court of Australia decision of *Sovar vs Henry Lane Pty Ltd* seem appropriate:-[52]

"[T]he question whether a contravention of a statutory requirement of the kind in question here is actionable at the suit of a person injured thereby is one of statutory interpretation... The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation."[53]

80. Breach of statutory duty arises, where a person or a body is under a statutory duty to perform an act or, more rarely, to refrain from doing an act; does not perform the act, either in accordance with the terms of the statute, or at all or does the act when it should not be done; and a party suffers damage as a result of the statutory breach; and that statutory breach gives rise to 'a right of action. To succeed, the person suing must establish [54](a) that the statute imposes a statutory duty, or obligation upon the Respondent, (b) that the Respondent acted contrary to its statutory duty or failed to act or perform his or its statutory duties, that the respondents action violates the statutory duty, and as a result of the breach the Petitioner suffered damage.

81. A casual examination of the Petition reveals that it does not disclose a case at all against the first, second and third Respondents or any of the Respondents. In particular, no evidence has been presented to demonstrate that the first to third Respondents failed to exercise their statutory mandate.

Disposition

82. In view of my analysis of the issues herein above, the conclusion becomes irresistible that there is nothing to show that the fourth Respondent or any of the Respondents acted illegally or in breach of the Petitioners consumer rights.

83. It is also my finding that the petitioner ought to have utilized the dispute resolution mechanism provided under the statute and only approach the high Court by way of appeal if aggrieved by the decision of the Appeals Tribunal.

84. The upshot is that this Petition fails. I hereby dismiss it with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 28th day of February 2018

John M. Mativo

Judge

[1] Act No. 2 of 1998

[2] Act No. 46 of 2012

[3] Ibid.

[4] Ibid

[5] Ibid

[6] Act No. 46 of 2012

[7] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[8] Ibid

[9] Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd [2015] ZASCA 111; 2016 (1) 518 para 27.

[10] Eskom Holdings Limited vs Halstead-Cleak ZASCA 150

[11] Supra Note 1

[12] {2008} 1 KLR 425

[13] Counsel cited Harrikinson vs A.G. of Trinidad and Tobago {1980} AC 265

[14] {2015} eKLR

[15] Counsel cited High Court Constitutional Petition No. 504 of 2014, Nairobi, Bernard Murage vs Fineserve Africa Ltd & 3 Others

[16] In the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others Case CCT 64/08 [2009] ZACC 26

[17] Fraser v ABSA Bank Ltd [2006] ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[18] {2017} eKLR

[19] {2016} eKLR

[20] See Article 48

[21] See The Speaker of National Assembly vs James Njenga Karume {1992} KLR 21

[22] Dawda K. Jawara vs Gambia, ACmHPR 147/95-149/96-A decision of the African Commission of Human and Peoples' Rights

[23] {2016} eKLR

[24] See Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition

No. 14, 14A, B & C of 2014

[25]<http://www.yourdictionary.com/constitutional-question>

[26]Justice Langa in *Minister of Safety & Security v Luiters*, {2007} 28 ILJ 133 (CC)

[27] {2002} 23 ILJ 81 (CC)

[28] {2001} (1) SA 912 (CC)

[29] 2001 (1) SA 912 (CC)

[30] *Supra* note 5 at paragraph 23

[31] Majanja J in *Dickson Mukweluine v Attorney General & 4 Others* Nrb HCC Petition No.390 of 2012

[32] Counsel cited *CFC Stanbic Bank Ltd vs Consumer Federation of Kenya (COFEK)* {2014}eKLR

[33] Act No. 46 of the Constitution

[34] *Ibid*

[35] *Estate Agency Affairs Board vs Auction Alliance (Pty) Ltd* 2014 (4) SA 106 (CC) para 69.

[36] *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 711.

[37] 2008 NSSC 163 (CanLII)

[38]See David M.W. Young & Brian R. Fraser, *Canadian Advertising and Marketing Law*, loose-leaf (Toronto: Carswell, 1990 -). See also *R. v. Kenitex Canada Ltd. et al* (1980), 51 CPR (2d) 103, [1980] OJ No 2758 (Ont Co Ct); *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163, 265 NSR (2d) 369, *aff'd* 2009 NSCA 42, 276 NSR (2d) 327 [Maritime Travel].

[39]*R. v. Viceroy Construction Co* (1975), 11 OR (2d) 485, 1975 CarswellOnt 582 (Ont CA) [Viceroy]; *R. v. Bussin* (1977), 36 CPR (2d) 111, 1977 CarswellOnt 1242 (Ont Co Ct); *R. v. RM Lowe & Pastoria Holdings Ltd* (1978), 39 CPR (2d) 266, 40 CCC (2d) 529 (Ont CA) [RM Lowe]; *R. v. Park Realty Ltd.* (1978), 43 CPR (2d) 29, 1978 CarswellMan 2 (Man Prov Ct); *Telus Communications Co v. Rogers Communications Inc.*, 2009 BCSC 1610, 2009 CarswellBC 3168 *aff'd* 2009 BCCA 581, 2009 CarswellBC 3424.

[40] *R. v. International Vacations Ltd.* (1980), 33 OR (2d) 327, 56 CPR (2d) 251 (Ont CA).

[41] See *R. v Imperial Tobacco Products Ltd.*, [1971] 5 WWR 409, 3 CPR (2d) 178 (Alta SC AD), quoting *Federal Trade Commission v. Sterling Drug Inc.*, 317 F (2d) 669 (2nd Cir 1963) at 674: "It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately. The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied."

[42] (Case C-210/96 *Gut Springenheide and Tusky* [1998] EUECJ C-210/96; [1998] ECR I-4657, para 31.)

[43] *Zion Lavie V Procter & Gamble Co.* A093393 available on <http://caselaw.findlaw.com/ca-court-of-appeal/1040791.html>)

[44] (20145261021) [2014] ZACGSO 1 (2 July 2014)

[45] R.H. Christie and G.B. Bradfield Christie's Law of Contract in South Africa 6th ed (2011) at 35 and 41

[46] Carlill v Carbolic Smokeball Co Ltd [1893] 1 QB 256 at 268.

[47] Counsel cited Muiruri vs Credit Bank Ltd & Another, NBI HCMISC No.138f 2003 {2006}1 KLR 385

[48] Counsel cited Anarita Karimi Njeri vs R [1976-1980}1 KLR 1272 7 Trusted Society of Human Rights vs Mumo Matemu & Another, Pet. No. 279 of 2012

[49] Sir John Comyns, A Digest of the Law of England (5th ed, 1822) 442. The Digest was first published in 1762.

[50] Groves v Lord Wimborne [1898] 2 QB 402,

[51] (1854) 3 E & B 402; 118 ER 1193 ('Couch').

[52] (1967) 116 CLR 397 ('Sovar') 405.

[53] Citing Martin v Western District of the Australasian Coal and Shale Employees' Federation Workers' Industrial Union of Australia (Mining Department) (1934) 34 SR (NSW) 593, 596.

[54] From the judgment of Lord Browne-Wilkinson in *X (Minors) vs Bedfordshire CC* [1995] 2 AC 633 (HL) 731–32. 1