



**Kinyanjui v Kenya Films Classifications Board (KFCB) & another (Petition E119 of 2024) [2025] KEHC 5814 (KLR) (Constitutional and Human Rights) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5814 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E119 OF 2024**

**LN MUGAMBI, J**

**MAY 9, 2025**

**BETWEEN**

**WILLIAM GETUMBE KINYANJUI ..... PETITIONER**

**AND**

**KENYA FILMS CLASSIFICATIONS BOARD (KFCB) ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF EXECUTIVE OFFICER KENYA FILMS CLASSIFICATIONS BOARD ..... 2<sup>ND</sup> RESPONDENT**

**The requirement by Kenya Films Classification Board for the licensing and prior inspection of content uploaded to social media platforms is impractical**

*The case examined whether the Kenya Films Classification Board (KFCB) could lawfully demand licences and prior inspection of user-generated content uploaded to platforms like YouTube, TikTok, Instagram, and Facebook under the Films and Stage Plays Act (Cap 222). The petitioner, a content creator, challenged a KFCB demand for Kshs. 243,200 in filming fees for two smartphone-recorded music videos uploaded to YouTube. The Court found that while such recordings fall within the statutory definition of “film,” applying outdated licensing and inspection procedures to social media content was impractical, arbitrary, and contrary to Article 33 (freedom of expression) of the Constitution. However, the Act’s protective objective—especially for children—remained valid, and KFCB could still require takedown of harmful content. The demand for licence fees was declared null and void. The petition was partly allowed, highlighting the need for law reform to align regulation with technological realities.*

Reported by John Wainaina

**Statues** - definition of statues - Films and Stage Plays Act - sections 2, 4, 12, and 16 - whether the definitions of film and film making under Section 2 of the Films and Stage Plays Act extend to audio-visual recordings made using smartphones and uploaded on social media platforms - whether the requirement for licensing and prior inspection of audio visual content under sections 4, 12, and 16 of the Films and Stage Plays Act was applicable to user-generated content uploaded to social media platforms such as TikTok, YouTube, Instagram, and Facebook.



**Constitutional Law** - fundamental rights and freedoms - freedom of expression - equality and freedom from discrimination - Kenya Films Classification Board (KFCB) requirement the licensing and prior inspection of audio visual content uploaded to social media platforms such as TikTok, YouTube, Instagram, and Facebook - where KFCB seeks licensing fees for such content - whether the Kenya Films Classification Board in requiring the licensing and prior inspection of audio visual content uploaded to social media platforms such as TikTok, YouTube, Instagram, and Facebook was unjustifiable, impractical, and a violation of the freedom of expression - whether the Kenya Films Classification Board enforcement of licensing fees and regulatory control over social media uploads was arbitrary, discriminatory, and inconsistent with the evolving nature of technology and content creation - Constitution of Kenya article 27 and 33; Films and Stage Plays Act (cap 222) sections 2, 4, 11, 12, 15, 16, and 17.

### **Brief facts**

The petitioner, a social media content creator, uploaded two music videos titled “*Yesu Ninyandue – Imejaa*” and “*Yesu Ninyandue – Nyonga*” to YouTube in January and February 2024. On 29 February 2024, he received a demand letter and a sales invoice from the 2nd respondent, requiring payment of KShs. 243,200 for filming licence fees. The respondents also instructed him to pull down the videos, claiming they contained inappropriate content, had not been licensed, and had not been examined for classification as required under sections 4, 12, and 15 of the Films and Stage Plays Act.

The petitioner asserted that the videos were self-produced using a smartphone and meant for his social media audience. He argued that the Act did not regulate such amateur social media content and that the respondents' actions violated his rights under articles 33 (freedom of expression), 34 (freedom of the media), and 47 (fair administrative action) of the Constitution. He also claimed he was not given an opportunity to be heard before enforcement directives were issued.

The respondents, through an affidavit by Pascal Opiyo, defended their mandate under the Act to regulate all films intended for public exhibition, including those disseminated via modern platforms such as YouTube, TikTok, and OTT/VoD services. They argued that the videos in question were music videos, meant for public consumption, not mere social media posts, and thus fell under their jurisdiction. The respondents further contended that despite challenges posed by evolving technology, their duty to protect vulnerable groups from harmful content remained valid and enforceable.

The petitioner sought, among other reliefs, a declaration that the Act did not apply to social media uploads, an order declaring the demand for licence fees null and void, and an injunction restraining the respondents from interfering with his online content.

### **Issues**

- i. Whether the definitions of film and film making under Section 2 of the Films and Stage Plays Act extended to audio-visual recordings made using smartphones and uploaded on social media platforms.
- ii. Whether the requirement for licensing and prior inspection of audio visual content under sections 4, 12, and 16 of the Films and Stage Plays Act was applicable to user-generated content uploaded to social media platforms such as TikTok, YouTube, Instagram, and Facebook.
- iii. Whether the Kenya Films Classification Board in requiring the licensing and prior inspection of audio visual content uploaded to social media platforms such as TikTok, YouTube, Instagram, and Facebook was unjustifiable, impractical, and a violation of the freedom of expression.
- iv. Whether the Kenya Films Classification Board enforcement of licensing fees and regulatory control over social media uploads was arbitrary, discriminatory, and inconsistent with the evolving nature of technology and content creation.

### **Held**

1. In interpreting a statute or any written document, the court must first ascertain its scope by referring to its stated purpose.



2. Section 2 of the Film and Stage Plays Act (the Act) had an expansive definition of the words, film and film making. The word film as used in the Act encompassed any recorded audiovisual medium while film making included the recording on a video cassette, video disc or other audiovisual medium. The definition was not pegged on the means or mode of transmission; but the recording itself, hence reference to any recorded audio-visual medium applying the *ejusdem generis* (of the same kind) rule, that meaning could also be extended to even videos on smartphones or those that are recorded by any means whatsoever. However, the role of the 1st respondent would only come in if the videos or audio-visual recordings were done with a view of public exhibition.
3. Going by the meaning of the words film and film making, the contention that the Act only applied only to filming done within a conventional film studio and not the audio-visual recordings taken using smartphones for purposes of uploading on social media was untenable.
4. The definition was not by reference to the apparatus used to take the video or the medium through which it was to be transmitted but by the attributes of the recording. Consequently, an audio-visual music video recorded using a smart phone or any recording contained in a smartphone was a film within the definition of the Act.
5. In statutory interpretation, courts must focus, not on a single statutory provision but on the overall effect of all the other provisions to ensure that the Statute yielded a single, sensible consistent meaning consistent in line with the overall purpose of the legislation in question.
6. In a day and age, where any person with access to a smartphone that could generate an audiovisual recording and upload on any social media platform at any time, the requirement that all persons desiring to record any audio-visual film for public display must obtain a licence from the 1st respondent was ludicrous. Such a condition could only be implemented more in breach than in compliance. The requirement that all audio-visual videos intended for public display must first be submitted to the 1st respondent who will examine them and approve before they are exhibited was also impractical and an unwarranted intrusion of one's privacy if all persons were required to be submitting all the videos, they want to share on social media to the 1st respondent for censorship first.
7. Such requirements for the license and prior inspection before publication had been overtaken by events unless the respondent could demonstrate that it was capable of implementing those provisions before uploading all audio-visual recordings in the social media, because failure to do so would be discriminatory, arbitrary and unlawful. Such an interpretation would thus lead to unreasonable or illogical results and was rejected. In times when any person with a smart phone could use it to take an audio-visual recording and upload it to his or her account in a social media platform where it could be accessed by the public, it was ridiculous to expect the 1st respondent to enforce the requirement of examining, approving, classifying and rating all those videos or to demand for the payment licenses prior to filming and uploading the amateur video recordings.
8. While sections 4 and 12 of the Film and Stage Plays Act could apply to traditional film production, they were outdated and inapplicable to modern platforms like TikTok, Instagram, Facebook, and Twitter. The law was ill-equipped to regulate the mass production and instant sharing enabled by new technology. Licensing and inspection procedures were irrational and could not be enforced for social media uploads. However, the Act remained relevant in addressing its original purpose, protecting vulnerable groups, especially children, from harmful or inappropriate content, and must be interpreted in line with that overarching objective.
9. The law should serve public interest where it was required to strive to avoid adopting a construction that was in any way adverse to public interest, economic, social and political or otherwise. The court had a duty to ascertain whether there was a possible construction that permitted the application of the statute without reaching a finding of unconstitutionality.
10. Although the 1st respondent had hitherto relied on scrutinizing the production and regulating broadcast and exhibition as a means of enforcing regulation; those methods were outdated and could



- not meaningfully be enforced using the processes provided for in the Act in respect of audio-visual content such as the one transmitted on the Over the Top (OTT), Video on Demand (VoD) and other means provided by social media platforms such as Facebook, Instagram, Tiktok, and Twitter as the 1st respondent had no capacity to ensure its interaction with the same before the upload was done.
11. The challenges of enforcement did not however mean that the statutory role of the 1st respondent to protect the vulnerable from inappropriate audio-visual content in any medium whatsoever has died out. The evil that was intended to be addressed by the Act persisted notwithstanding deficiencies frustrating the achievement of the objective for relying on processes that had significantly been overtaken by the new trends. That was an area for law reform rather than judicial resolution.
  12. The respondents misread the provisions of the Films and Stage Plays Act, in particular sections 4, 12 and 16 when they purported to apply them to demand license fees from the petitioner for recording his music video without a licence and uploading it in his social media youtube account; that was improper for the 1st respondent in exercise of its mandate to protect the vulnerable from harmful/ inappropriate audio-visual by demanding that the offending video be pulled down.
  13. The duty to examine, classify and rate audio-visual content on any public display in order to protect the vulnerable members of society such as children remained vested on the 1st respondent and could enforce it regardless of the means of transmission adopted. In requiring the petitioner to pull down the music video that the 1st respondent considered inappropriate, 1st respondent was within its authority under the Act.
  14. The requirement to pull down what the 1st respondent considered as offensive music videos was a matter within the scope of authority of the 1st Respondent in line with the underlying purpose of the Film and Stage Plays Act. The fast-growing technology had brought about challenges on effective regulation but that had not taken away the mandate vested on the 1st respondent which the 1st respondent had a duty to perform. The Act was thus not unconstitutional.
  15. The purpose of enacting the Films and Stage Plays Act and empowering the 1st respondent to regulate the display or exhibition audio-visual content was to ensure protection of the vulnerable persons from exposure to harmful content. That requirement was reasonable and justifiable as the vulnerable, such as children deserve to watch age-appropriate content and that limitation was within the justifiable limits permissible under article 24 of the Constitution. The petitioner had not challenged the finding of the 1st respondent on inappropriateness of the content. The petitioner did not pull down the video, as such his freedom of expression was not violated.
  16. The petitioner had not discharged the burden demonstrating that the finding that the video was offensive content was unreasonable. As such the court should not stop the respondent from discharging its mandate of ensuring the inappropriate content was removed from public circulation using every available lawful means at its disposal including partnering with the platforms the petitioner listed. By parity of reasoning, the prayer to declare the administrative processes employed by the 1st respondent unconstitutional could not therefore issue.
  17. The letter dated February 29, 2024 was to the extent that it issued the petitioner with a sales invoice of Kenya Shillings 243, 200/- demanding licence fees for uploading the video null and void as the current legal procedures, section 4, 12, and 15 manifestly envisaged fulfilment of conditions applicable to conventional film studios and audiovisual recordings via OTT, VoD or those posted on social media platforms were not covered. Any attempt to enforce those licensing requirements to the new trends without undertaking necessary changes that would bring arbitrariness. The demand for payment of the licence fees was rejected, and was null and void.

*Petition partly allowed.*

## **Citations**

### **Cases**

#### **Kenya**



1. *AIDS Law Project v Attorney General & another; VIHDA Association (Interested Party); Center for Reproductive Rights (Amicus Curiae)* Petition 97 of 2010; [2015] KEHC 6972 (KLR) - (Mentioned)
2. *Alcoholic Beverages Association of Kenya v Kenya Film and Classification Board, Attorney General & Safaricom Limited* Petition 10 of 2017; [2017] KEHC 5996 (KLR) - (Mentioned)
3. *Alcoholic Beverages Association of Kenya v Kenya Film Classification Board & 2 others* Civil Appeal 232 of 2017; [2022] KECA 1051 (KLR) - (Mentioned)
4. *Anarita Karimi Njeru v Republic* Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR), [1979] KLR 154 - (Explained)
5. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) - (Explained)
6. *Kenya Human Rights Commission & Community Advocacy & Awareness Trust (Crawn Trust) v Non-Governmental Organizaxtions Co-ordination Board & Law Society of Kenya* Petition 404 of 2017; [2018] KEHC 8915 (KLR) - (Mentioned)
7. *Kimutai, Rotich Samuel v Ezekiel Lenyongopeta & 2 others* Election Petition 273 of 2003; [2005] KECA 96 (KLR) - (Explained)
8. *Ndungu, Cecilia Wangechi v County Governement Of Nyeri & Cecilia Wangechi Ndungu v County Governement Of Nyeri* Petition 1 of 2014; [2015] KEELRC 1142 (KLR) - (Explained)
9. *Okoit & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 5 others* Petition 42 & 27 of 2014 (Consolidated); [2021] KEELRC 2306 (KLR) - (Mentioned)
10. *Otieno, Leonard v Airtel Kenya Ltd* Petition 218 of 2017; [2018] KEHC 9063 (KLR) - (Explained)
11. *Standard Ltd & 2 others v Christopher Ndarathi Murungaru* Civil Appeal 187 of 2014; [2016] KECA 70 (KLR) - (Mentioned)
12. *Wanuri Kabiu & Creative Economy Working Group v CEO - Kenya Film Classification Board Ezekiel Mutua, Kenya Film Classification Board, Attorney General; Article 19 East Africa (Interested Party); Kenya Christian Professionals Form (Proposed Interested Party)* Petition 313 of 2018; [2020] KEHC 6500 (KLR) - (Mentioned)

#### **United States**

*Crowell v Benson* 285 US 22, 62 (1932) - (Explained)

#### **Statutes**

##### **Kenya**

1. Constitution of Kenya articles 33; 34; 40; 47; 53(2); 165(3)(b) - (Interpreted)
2. Evidence Act (cap 80) section 107(1) - (Interpreted)
3. Films And Stage Plays Act (cap 222) sections 2; 4; 11; 12; 15; 16; 17- (Interpreted)
4. Kenya Information And Communications Act (cap 411A) sections 46(k); 46(2) - (Interpreted)

#### **Instruments**

Draft Film and Stage Plays (Self Classification) Regulations, 2023

#### **Advocates**

None mentioned

## **JUDGMENT**

#### **Introduction**

1. The Petition dated 6<sup>th</sup> March 2024 is supported by the Petitioner's affidavit in support of even date and a further supplementary affidavit dated 13<sup>th</sup> May 2024.



2. The gravamen of this petition is that the *Films and Stage Plays Act*, Cap 222 is not intended for the regulation of amateur videos recorded such as those recorded on smartphones and used in social media content hence the respondents acted outside the provisions of the Act in purporting to compel the Petitioner to pay for the licence in respect of the music video uploaded in his youtube account and for demanding that he pulls it down for exhibiting inappropriate content.
3. The Petitioner alleges that the Respondent's actions of are in violation of Articles 33, 34 and 47 Constitution on freedom of expression, freedom of the media and fair administrative action. He complained that the procedure adopted by the Respondent in reviewing the videos was unilateral and was not given an opportunity to present his case before the being required to comply with those directives.
4. Consequently, the Petitioner brings this Petition against the Respondents seeking the following reliefs:
  - a. An order do issue directing that the 1<sup>st</sup> Respondent's demand dated 29<sup>th</sup> February 2024 that was issued upon the Petitioner is null and void.
  - b. An order do issue prohibiting the Respondent's from engaging YouTube, Tiktok, Twitter, Facebook to pull down the Petitioner's social media posts or banning his account.
  - c. A declaration that the *Films and Stage Plays Act* does not grant the 1<sup>st</sup> Respondent any powers on regulation of social media activities.
  - d. A declaration that the current administrative process which the 1<sup>st</sup> Respondent has been regulating social media be declared unconstitutional.
  - e. The Costs of this Petition be borne by the Respondents'.
  - f. Interest on (e) from the date of judgment until payment in full.

#### **Petitioner's Case**

5. The Petitioner states that he is a social media content creator and regularly posts his content on Facebook, Tiktok and YouTube. He deponed that back in January and February 2024, he uploaded two videos called 'Yesu Ninyandue -Imejaa' and 'Yesu Ninyandue -Nyonga' on YouTube.
6. He avers that thereafter on 29<sup>th</sup> February 2024, the 2<sup>nd</sup> Respondent issued him with a demand letter followed by a sales invoice of Kshs.243, 200- being the outstanding filming licensing fees.
7. The Respondents further stated that his content on YouTube was inappropriate for display to the public and thus demanded he ceases exhibiting the same.
8. Furthermore, he was notified that the 1<sup>st</sup> Respondent is mandated under Section 15 of the *Films and Stage Plays Act* to regulate broadcast content in Kenya. As such, Section 4 of the *Act* requires one to obtain a filming license and under Section 12, the film ought to have been examined by the 1<sup>st</sup> Respondent before being produced. The 2<sup>nd</sup> Respondent directed that the Petitioner take down the YouTube videos for non-compliance with the said provisions.
9. The Petitioner contends that the 1<sup>st</sup> Respondent's requirement that one obtains a license to produce social media content is absurd and in violation of his rights under Articles 33, 34, 40 and 47 of the *Constitution*. He contends that the 1<sup>st</sup> Respondent cannot assign itself the jurisdiction to examine all videos produced on smartphones in Kenya prior to uploading (public exhibition) on social media. That in doing so, the 1st respondent is curtailing the freedom of expression and the freedom of the media which can only be limited by law and not the 1<sup>st</sup> respondent.



10. The Petitioner avers that, the 2<sup>nd</sup> Respondent in issuing the said demand clothed itself jurisdiction to purportedly examine all videos in smartphones and uploaded as content on social media insisting that this is not covered by the provisions of the *Films and Stage Plays Act*.
11. He asserts that the Respondents have thus adopted an absurd interpretation of the law as it would mean that all videos that are recorded on smartphone or other devices require the Respondent licence and also examination and approval otherwise it would amount to violation of the *Act*.
12. Accordingly, the Petitioner asserts that the Respondents actions are beyond the scope of the *Films and Stage Plays Act* which was never intended to deal with audio-visual relating to social media content.
13. He also emphasizes that the 2<sup>nd</sup> Respondent in a press release made known that the 1<sup>st</sup> Respondent does not regulate user generated content such as his which he creates on his smart phone.

### **Respondents' Case**

14. In opposition to the Petition, the Respondents filed a Replying affidavit sworn by the 2<sup>nd</sup> Respondent, Pascal Opiyo, on 26<sup>th</sup> April 2024.
15. He asserted that the 1<sup>st</sup> Respondent is mandated under Section 15 of the *Film and Stage Plays Act* to regulate the creation, broadcasting, possession, distribution and exhibition of films. This is by examining every film submitted for classification and giving consumer advice.
16. He states that Section 4 of the *Act* stipulates for films made in Kenya the producer must obtain a Filming License from the 1<sup>st</sup> Respondent before producing the same. That Section 12 of the *Act* requires the 1<sup>st</sup> Respondent to examine the finished film before exhibition and distribution to the public.
17. Once vetted and content the 1<sup>st</sup> Respondent is finds that the production satisfies the requirements, the 1<sup>st</sup> Respondent will then issue a Certificate of Approval under Section 16 of the *Act*.
18. Having set out the legal requirements, the 2<sup>nd</sup> Respondent observed that although the 1<sup>st</sup> Respondent is mandated to regulate all these aspects of filming and production, the advancement of technology has posed significant challenges on regulation of film production. This because it has led to production and distribution of films in a novel and unconventional manner such as the social media platforms where one can easily record a video on the phone and circulate the video through various platforms such as: Over-The-Top platform (OTT), Video on Demand (VoD) or other social media platforms such as Facebook, Twitter or Tiktok. He explained these mediums as follows:
  - a) Over-The-Top media service (OTT) entails distribution of films directly to consumers/viewers through the internet by passing broadcast platforms. Those are well known for streaming services such as Netflix, Amazon Prime, Viusasa and Youtbe.
  - b) Video on Demand (VoD) involves the distribution and exhibition of films and audio-visual content that allows consumers/viewers to access film library through use of technology without use of traditional video playback or through broadcasting schedule. Example includes youtube, similarly, OTT Media Service Providers are considered sub-subscription based/paid VoD service.
  - c) Another mode of distribution is through social media platforms such as Facebook, Twitter, Instagram and Tiktok.



19. That these new digital platforms are the primary platforms for commercialization of films/audio-visual content that was formerly exhibited through cinema and broadcast. The films include short films, advertisements, Q & A for live broadcasts as well as feature films.
20. He asserts that despite these technological changes, it still remains the mandate of the 1<sup>st</sup> Respondent to regulate the audio-visual content especially that which is intended for public exhibition or distribution regardless of model of distribution whether it is Over Top Media Service Providers, Video on Demand Services or even social media platforms.
21. He deposed that the justification for approval, classification and rating under the Film and Stage Plays Act remains valid as there is still a need to protect the vulnerable members of the society who include, children, women and young adults from undesirable content even as methods of content dissemination continue to advance.
22. He stated that the 1<sup>st</sup> Respondent is in the process of reforming the regulatory and enforcement mechanisms and has come up with the [Draft Film and Stage Plays \(Self Classification\) Regulations, 2023](#) which has already undergone public participation and has been forwarded to the National Assembly for enactment.
23. In regard to the Petitioner's case, he deposed that the 1<sup>st</sup> Respondent received multiple complaints in relation to the Petitioner's video titled 'Yesu Ninyandue'. He stated that the video caused public uproar as the content was deemed vulgar, blasphemous, and distasteful and depicted women in a degrading manner.
24. Upon examination of the Petitioner's video and others that had been identified, the Respondents noted that the Petitioner had neither obtained a filming license nor submitted the same for approval and classification before distribution as required by the law hence the 1<sup>st</sup> Respondent wrote to the Petitioner requiring that he complies with the law. He avers that the Petitioner's refused to comply with this requirement and as such the videos are still on the Petitioner's YouTube platform and were not taken down by the 1<sup>st</sup> Respondent.
25. He contended that the impugned film is a music video and not a mere social media post as claimed by the petitioner. That music videos are distributed and/or exhibited through 'Video on Demand' services and are thus subject to assessment, classification, rating and approval by the Kenya Film Classification Board and that same cannot be categorized as 3rd Party user generated content.
26. It is asserted that the rights of the Petitioner are subject to reasonable and justifiable limitation imposed through the [Film and Stage Plays Act](#). He contends moreover that the Petitioner's video does not constitute third-party user generated content as alleged but is a music video meant for public exhibition. For that reason, the same is subject to assessment, classification, rating and approval by the 1<sup>st</sup> Respondent in line with the [Act](#). On this premise, he urges the Court to dismiss the Petition with costs to the 1<sup>st</sup> Respondent.

### **Petitioner's Submissions**

27. In the submissions dated 22<sup>nd</sup> July 2024, Otao and Associates Advocates for the Petitioner submitted on the issue of whether this court has jurisdiction to try this matter; whether the definition of "film" under the Film and Stage Plays Act is ambiguous or void and lacks certainty and whether KFCB's demand dated 29<sup>th</sup> February 2024 to the Petitioner is *ultra vires*.



28. On the first issue, Counsel relying on Article 165(3) (b) of the *Constitution* submitted that this Court has jurisdiction to entertain this matter as it pertains to the violation of the rights under Articles 33, 34, 40 and 47 of the *Constitution*.
29. On definition of film as provided for under Section 2 of the *Film and Stage Plays Act*, Counsel submitted that it vaguely broad. He contended that if the meaning were to be adopted, it would make all recorded film and audio-visual media in peoples' smartphones subject to review and regulation by the 1<sup>st</sup> Respondent.
30. Counsel noted that the *Act* which was enacted in 1962 where the audio-visual content that was available then was film studio and cinema not the current technology where audio visual technology is available to any person with a smart phone. Counsel thus argued if Section were to be applied as intimated by the respondents, it will be a blanket ban of modern-day media rights.
31. Further Counsel stressed that the two terms, films and audio-visual medium, do not distinguish the instruments used in a film theatre and instruments such as mobile phones and other personal handheld devices capable of being used to film and make audio-visual recordings. Counsel this makes these provisions void for vagueness.
32. Reliance was placed in *Aids Law Project v Attorney General & 3 others* [2015] eKLR where it was held that:

“ a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vagueness offends several important rules...A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application... The principle [of legal certainty enables each community to regulate itself: ‘with reference to norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible –an individual must have an indication of the legal rules applicable in a given case – and he must be able to foresee the consequences of his actions, in particular to be able to avoid incurring the sanction of the criminal law.”
33. On the third issue, Counsel submitted that the Respondents had acted *ultra vires* in purporting to have authority to regulate social media and the cyber space. Counsel further noted that the 1<sup>st</sup> Respondent had taken its mandate to mean that it regulates all videos that are watched in Kenya through the social media and cyber space. In addition to this pronouncement affecting all Kenyans, it was submitted that content creation in other countries is not regulated as purported by the Respondents.
34. Accordingly, it was argued that the regulation of social media and smartphones, fall outside the scope of the 1<sup>st</sup> Respondent's jurisdiction and so the Respondents' acted *ultra vires* in this matter. Counsel further urged that the *Act* does not even make any mention of social media and thus it was evident that the Respondents had proceeded to clothe themselves with authority on matters not envisioned within the *Film and Stage Plays Act*.
35. Reliance was placed in *Okiya Omtatah Okoiti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 6 others* [2021] eKLR where it was held that:

“ An act of ultra vires when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting



without jurisdiction or ultra vires or contrary to the provisions of law or its principles renders the decision made laced with illegality.”

36. Equal reliance was placed in [Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another](#) [2018] eKLR.

### 1<sup>st</sup> and 2<sup>nd</sup> Respondents Submissions

37. In support of their case, the respondents filed submissions dated 25<sup>th</sup> July 2024 through Sisule and Associates LLP. Counsel highlighted the issues for determination as: whether the 1<sup>st</sup> respondent possesses the statutory mandate over film content exhibited or distributed, within the Republic of Kenya, on Video on Demand platforms, including Youtube and whether the actions of the 1<sup>st</sup> respondent infringed upon the Petitioner's constitutionally guaranteed rights and fundamental freedoms, including Articles 33, 34, and 47 of the [Constitution](#).
38. On the first issue, Counsel relying on Section 11 and 15 of the [Films and Stage Plays Act](#), answered in the affirmative. Consequently, Counsel asserted that the 1<sup>st</sup> Respondent is mandated under the [Act](#) to either approve the film for exhibition to the public, approve the film for exhibition subject to excisions or decline to approve the film for exhibition to the public in line with Section 16 (1) of the [Act](#).
39. Counsel noted that the 1<sup>st</sup> Respondent's mandate is also anchored in the obligation to protect women and children against sexual exploitation or degradation in cinematograph films and on the internet, as well as to ensure age-inappropriate content is not exhibited or distributed to children as envisaged under Section 15 and 17 of the [Act](#). Counsel added further that the 1<sup>st</sup> respondent's mandate is recognized under Section 46(2) of the [Kenya Information and Communications Act](#).
40. Therefore, Counsel reasoned that the key contention herein is whether the subject matter falls within the scope of the 1<sup>st</sup> respondent's mandate under the [Films and Stage Plays Act](#). In this regard, Counsel submitted that it was evident that the 1<sup>st</sup> respondent's mandate includes regulation of films exhibited on the internet as can be gathered from the provisions of the [Act](#).
41. Reliance was placed in a similar matter where the Court in [Alcoholic Beverages Association of Kenya v. Kenya Film Classification Board](#) (2017) eKLR held as follows:
- “ Advertisements of alcoholic drinks must comply with specific restrictions and guidelines so as to conform to the law. Audio-visual commercial communications must not cause physical or moral harm to minors, must not exploit minors' inexperience or credulity, must not encourage minors to pressurize parents to make a purchase, must not be aimed at minors or encourage alcohol consumption.
- It is necessary to effectively enforce the safeguards bearing in mind that children of tender age may not have developed adequate 'cognitive defenses' to implicitly process and appreciate commercial messages. Article 53 (2) of the [Constitution](#) provides that a child's best interests are paramount importance in every matter concerning the child, and in this respect. I find that it is in the interest of the children .and the society at large to enforce regulations governing advertising of alcoholic beverages.”
42. The Court of Appeal upheld this decision in [Alcoholic Beverages Association of Kenya \(ABAK\) v Kenya Film Classification Board & 2 others](#) [2022] KECA 1051 (KLR. Comparable reliance was placed in [Wanuri Kabiu & Another v. CEO- Kenya Film Classification Board & 2 Others](#) (2020) eKLR.



43. On the second issue, Counsel submitted that these rights are subject to limitation in line with the law and thus not absolute. Moreover, Counsel submitted that contrary to the petitioner's assertion, the 1<sup>st</sup> Respondent had not violated his rights in exercising its mandate by issuing the compliance notice. Counsel stressed instead that it is the petitioner who was in breach of the law and is yet to comply by taking down the cited YouTube videos.
44. Reliance was placed in *Wanuri Kabi & another v CEO –Kenya Film Classification Board & 2 others* (2020)eKLR where it was held that the freedom of expression is not absolute. Equal dependence was placed in *Standard Limited and 2 others v Christopher Ndarathi Murungaru* (2016) eKLR.

### **Analysis and Determination**

45. It is my considered view that the key issues raised for determination in this matter is as follows:
- i. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents misread the provisions of the *Film and Stage Plays Act* in purporting to assume jurisdiction over audio-visual music videos uploaded on social media by the Petitioner (you-tube music videos).
  - ii. Whether or not the Respondents actions violated the Petitioner's rights under Articles 33, 34, 40 and 47 of the *Constitution*.
  - iii. Whether the Petitioner is entitled to the relief sought.

### **Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents misread the provisions of the Film and Stage Plays Act in purporting to assume jurisdiction over audio-visual music videos uploaded on social media by the Petitioner (you-tube music videos).**

46. It is manifest that both the Petitioner and the Respondents hold opposing views on whether the *Films and Stage Plays Act* in its current status permits the 1<sup>st</sup> Respondent to regulate audio-visual videos especially those uploaded on social platforms such as youtube, twitter, face book and Instagram particularly because it requires regulation of all aspects starting from scrutiny of the process of production and exhibition and payment of licenses for purposes of filming.
47. The Petitioner argued that the *Act*, which was enacted in 1962 was meant to apply to studio film production and public exhibition of cinemas as opposed present day circumstances where the filming/recording can be done by any person who has access to a smartphone and uploading done instantaneously in the social media platforms such as facebook, twitter, tiktok or youtube.
48. The Petitioner further contended that the definition contained in the *Film and Stage Plays Act* on what constitutes a 'film' is broadly vague, and lacks legal certainty and thus taken as it is, it would mean that the 1<sup>st</sup> respondent has authority to review and approve all audio-visual media including all those that are posted on social media for approval before they are uploaded which is an impractical, illogical and absurd requirement.
49. On their part, the Respondents explained that the definition of 'film' in the *Act* covers audio-visual recording of all kinds through any medium hence the Respondent has the requisite authority to undertake approval, classification and rating of audio-visual recording for public exhibition transmitted through any medium in performing its duty to protect the vulnerable in the society such as children, women and young adults from any inappropriate audio-visual content.



50. In interpreting a Statute or any written document, the Court must first ascertain its scope by referring to its stated purpose. This was the holding of Court of Appeal in County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR where it stated as follows:

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore, the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...”

51. A reading of the preamble to the Films and Stage Plays Act Cap 222 states as follows:

“An Act of Parliament to provide for controlling the making and exhibition of cinematograph films, for the licensing of stage plays, theatres and cinemas; and for purposes incidental thereto and connected therewith”

52. The Act in Section 2 then proceeds to define what a film means. It defines ‘film’ as follows:

“film” means a cinematographic film, recorded video cassette film, recorded video discs, any recorded audiovisual medium, and includes any commentary (wherever spoken and whether the person speaking appears in the film or not), and any music or other sound effect, associated with the film, and any part of a film;

The definition of ‘making a film’ is also provided as follows:

“Making of a film” means the acts of photographing, performing or otherwise taking part in or arranging any scenes or episodes for the purpose of the production of a film and includes the recording of a film on a video cassette, video disc or other audiovisual medium;

53. From the definition of the word ‘film’ and ‘film making’ it clear that the definition is quite expansive, the word ‘film’ as used in the Act encompasses ‘any recorded audiovisual medium’ while ‘film making’ include ‘the recording on a video cassette, video disc or ‘other audiovisual medium.’ The definition is not pegged on the means or mode of transmission; but the recording itself, hence reference to ‘any recorded audio-visual medium’ applying the *ejusdem generis* rule, that meaning can also be extended to even videos on smartphones or those that are recorded by any means whatsoever. However, the role of the 1<sup>st</sup> Respondent would only come in if the videos or audio-visual recordings are done with a view of public exhibition.

54. The submission by the petitioner therefore that the Act only applies only to filming done within a conventional film studio and not the audio-visual recordings taken using smartphones for purposes of uploading on social media is untenable going by the meaning of the words ‘film’ and ‘film making’ as ascribed by Section 2 of the Act as from the meaning adopted, the word ‘film’ is used as a generic term that encompasses ‘any recorded audiovisual medium’ and ‘film making’ as the act of ‘recording on any other audio-visual medium.’ The definition is not by reference to the apparatus used to take the video or the medium through which it is to be transmitted but by the attributes of the recording.

55. Consequently, an audio-visual music video recorded using a smart phone or any recording contained in smartphone is a ‘film’ within the definition of the Act.

56. It is this meaning that the Petitioner says is absurd, since the meaning is too broad and vague and implies that the 1<sup>st</sup> Respondent by dint of Section 4 of the Act has to issue licences before producing any audio-visual recording including those produced on smartphones before uploading (public exhibition) them



on social media platforms. The Petitioner argues in that case, the 1<sup>st</sup> Respondent licensing procedures are unrealistic and absurd.

57. In statutory interpretation, Court must focus, not a single statutory provision but on the overall effect of all the other provisions to ensure that the Statute yields a single, sensible consistent meaning consistent in line with the overall purpose of the legislation in question.
58. In the present case, the Respondents insisted that the Petitioner needed a licence under Section 4 of the Act to enable him produce or record the music videos he posted on youtube. Further, that under Section 12 he was required to submit them for inspection, approval, classification and rating if they were intended for distribution or display to the public.
59. In this day and age, where any person that has access to a smartphone that can generate an audiovisual recording and upload on any social media platform at any time, the requirement that all persons desiring to record any audio-visual film for public display must obtain a licence from the 1<sup>st</sup> Respondent is ludicrous. Such a condition can only be implemented more in breach than in compliance. The requirement that all audio-visual videos intended for public display must first be submitted to the 1<sup>st</sup> Respondent who will examine them and approve before they are exhibited is also impractical and an unwarranted intrusion of one's privacy if all persons are required to be submitting all the videos, they want to share on social media to the 1<sup>st</sup> Respondent for censorship first.
60. Such requirements for the license and prior inspection before publication have been overtaken by events unless the Respondent can demonstrate that it is capable of implementing those provisions before uploading all audio-visual recordings in the social media, because failure to do so will be discriminatory, arbitrary and unlawful. Such an interpretation would thus lead to unreasonable or illogical results and is rejected.

#### Section 4. No film to be made without filming licence

- (1) Subject to the provisions of Section 10 of this Act, no film shall be made within Kenya for public exhibition or sale either within or outside Kenya except under and in accordance with the terms and conditions of a filming licence issued by the licensing officer under this Part.
- (2) Where any film is made in contravention of the provisions of subsection (1) of this section, the producer, proprietor, promoter and photographer thereof, and every other person engaged in the making of the film, shall each be guilty of an offence.

Section 10; The licensing officer may in writing or by notice in the Gazette exempt from the provisions of this Part any film, or any class of films, generally or by reference to the person or class of persons making the film or films.

61. In these contemporary times when any person with a smart phone can use it to take an audio-visual recording and upload it to his or her account in a social media platform where it can be accessed by the public, it is ridiculous to expect the 1<sup>st</sup> Respondent to enforce the requirement of examining, approving, classifying and rating all those videos or to demand for the payment licenses prior to filming and uploading the amateur video recordings.
62. Fortunately, the Act may have minimal applications in regard to section 4 and Section may still be relevant in a limited number of instances that maintain the traditional mode of film production but this provision cannot be enforced in relation to OTT, VoD or social media uploads in Tiktok, Instagram, Facebook or Twitter given that legal provisions are deficient in regulating mass production that has



been orchestrated by new technology. The current licensing procedures are archaic and unable to keep pace with the new technological demands. The requirement for licensing of all manner of audio-visual recordings and demand for inspection before production is irrational and guided by the Presumption against anomalous or illogical result, I would not find in favour of the 1<sup>st</sup> Respondent in upholding such provision to gag social media uploads.

63. That said, it is the humble view of this Court that the *Film and Stage Plays Act*, and in particular the 1<sup>st</sup> Respondent still has lot of relevance given the mischief the Statute was enacted to address, namely protecting the vulnerable such as children from harmful content that is not age appropriate and the public generally from undesirable content such as those promoting abuse of women. In interpretation of this Statutes, the Court must now be guided by the overriding objective behind every legislation in question. As was held by the Supreme Court *in the Matter of Interim Independent Commission* (2011) KESC 1 KLR quoting from the Court of Appeal decision of Court of Appeal in *Kimutai v. Lenyongopeta & 2 Others*:

“.... The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the “purposive approach”. In all cases now in the interpretation of statutes such a construction as will “promote the general legislative purpose” underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, “There is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.”

32. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.”

64. The above position ties well with what has now come to be known as Constitutional-Doubt canon when an Act of Parliament is challenged on constitutional grounds. The principle that the law should serve public interest whereby is required to strive to avoid adopting a construction that is in any way adverse to public interest, economic, social and political or otherwise.

65. Courts have held that where it is contended that a Statute is unconstitutional; the Court has a duty to ascertain whether there is a possible construction that permits the application of the statute without reaching a finding of unconstitutionality. In the persuasive authority of *Crowell v Benson*, 285 US 22, 62 (1932) the Court elaborating on this principle held:

“When validity of an Act of congress is drawn in question, even if a serious doubt of constitutionality is raised, it is cardinal principle that this Court will first ascertain whether a construction of statute is fairly possible by which the question may be avoided”

66. This is by identifying the intention of Parliament and construing the Act accordingly.

67. Although the 1<sup>st</sup> Respondent has hitherto relied on scrutinizing the production and regulating broadcast and exhibition as a means of enforcing regulation; these methods are now outdated and cannot meaningfully be enforced using the processes provided for in the Act in respect of audio-visual content such as the one transmitted on the Over the Top (OTT), Video on Demand (VoD) and other



means provided by social media platforms such as Facebook, Instagram, Tiktok, and Twitter as the 1<sup>st</sup> Respondent has no capacity to ensure its interaction with the same before the upload is done.

68. These challenges of enforcement do not however mean that the statutory role of the 1<sup>st</sup> Respondent to protect the vulnerable from inappropriate audio-visual content in any medium whatsoever has died out. To buttress the fact that the role of the 1<sup>st</sup> Respondent is still critical, the [Kenya Information and Communications Act](#), Cap 411 at Section 46 (k) still recognizes the role of the 1<sup>st</sup> Respondent in regulation of films by stating thus:

Section 46 (k)(2)

- a) Where any cinematograph has been submitted under any law for classification or censorship and approved for exhibition; and
- b) where approval of the film for exhibition has been denied or has been given subject to excisions, no broadcaster will-
  - i) in the case of any film in respect of which such approval has been denied, broadcast the film or any part thereof or
  - ii) in the case of film that has been approved for exhibition subject to excisions therefrom, broadcast that film or any part thereof if the film or as the case may be, that part thereof include any parts of the film required to be excised, except with the consent of and subject to any conditions given by Kenya Film Censorship Board established under [Films and Stage Plays Act](#) (Cap 222).

69. The evil that was intended to be addressed by the [Act](#) still persists notwithstanding deficiencies frustrating the achievement of this objective for relying on processes that have significantly been overtaken by the new trends. This thus becomes an area for law reform rather than judicial resolution.

70. Consequently, although I concur with the Petitioner that the Respondents misread the provisions of the [Films and Stage Plays Act](#), in particular Section 4, 12 and 16 when they purported to apply them to demand license fees from the petitioner for recording his music video without a licence and uploading it in his social media youtube account; I do not think it that it was improper for the 1<sup>st</sup> Respondent in exercise of its mandate to protect the vulnerable from harmful/ inappropriate audio-visual by demanding that the offending video be pulled down.

71. The duty to examine, classify and rate audio-visual content on any public display in order to protect the vulnerable members of society such as children remains vested on the 1<sup>st</sup> Respondent and can enforce it regardless of the means of transmission adopted.

72. In requiring the Petitioner to to pull down the music video that the 1<sup>st</sup> Respondent considered inappropriate, 1<sup>st</sup> respondent was within its authority under the [Act](#).

73. The 2<sup>nd</sup> Respondent a deponed as what prompted the 1<sup>st</sup> Respondent to take the action as follows:

Para. 13... 'The Board through its Media Monitoring Department received multiple complaints regarding audio-visual content filmed and distributed on various media, including social media, particularly audio-visual content included:

- a. A music video entitled 'Yesu Ninyandue' created by William Getumbe, the Petitioner herein, and uploaded on the online video sharing/video on demand platform-Youtube. Link:[www.youtube.com/watch?v=bmHAARU!tw](http://www.youtube.com/watch?v=bmHAARU!tw)).



- b. A music video entitled ‘*Niko uchi*’ created by Christopher Mosioma alias ‘Embarambamba,’ and uploaded on the online video sharing/ video on demand platform youtube and
- c. Depictions of religious acts [exorcism/ cleansing] by a religious leader by the name ‘Bishop Johanna’

74. The Respondent further swore that the said videos had not been assessed or rated for age restriction viewership.

75. Section 17 of the *Films and Stage Plays Act* states as follows in regard films that are not desirable for children:

Films unsuitable for children

- (1) If it considers that any cinematograph film is unsuitable for general exhibition, the Board shall record its ruling in one of the following forms—
  - (a) for adults only;
  - (b) unsuitable for children under the age of sixteen years;
  - (c) unsuitable for children under the age of ten years.
- (2) Where the Board records its ruling in the form "for adults only" it shall issue a certificate of approval subject to the condition that no child shall be admitted to the exhibition thereof.
- (3) The ruling of the Board under subsection (1) of this section shall be mentioned in all advertisements and on all posters of the film concerned, and announced on the cinema screen immediately before the film is exhibited.
- (4) Any person who exhibits any film, at an exhibition to which the public are admitted, in contravention of any condition imposed under subsection (2), or who displays or permits to be displayed in a public place or so as to be visible from a public place, any poster, or who publishes any advertisement or causes or permits to be published any advertisement, which contravenes, or who otherwise fails to comply with, the provisions of subsection (3), shall be guilty of an offence.

76. The requirement to pull down the what the 1<sup>st</sup> Respondent considered as offensive music videos was a matter within the scope of authority of the 1<sup>st</sup> Respondent in line with the underlying purpose of the *Film and Stage Plays Act*. The fast-growing technology has brought about challenges on effective regulation but that has not taken away the mandate vested on the 1<sup>st</sup> Respondent which the 1<sup>st</sup> Respondent has a duty to perform. The *Act* is thus not unconstitutional.



**Whether or not the Respondents actions violated the Petitioner's rights under Articles 33, 34, 40 and 47 of the Constitution.**

77. Constitutional Petitions are required to be pleaded with reasonable precision stating the provisions of the Constitution that have been violated and the manner of violation occurred. This was the holding in the celebrated case of Anarita Karimi Njeru v Republic [1979] eKLR where the Court held:

“... We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...”

78. Correspondingly, in Leonard Otieno v Airtel Kenya Limited [2018] eKLR the Court observed as follows:

“52. Constitutional analysis under the Bill of Rights takes place in two stages. First, the applicant is required to demonstrate that his or her ability to exercise a fundamental right has been infringed. If the court finds that the law, measure, conduct or omission in question infringes the exercise of the fundamental right or a right guaranteed in the Bill of Rights, the analysis may move to its second stage. In this second stage, the party looking to uphold the restriction or conduct will be required to demonstrate that the infringement or conduct is justifiable in a modern democratic State and satisfies the Article 24 analysis test.”

79. The Court went on to observe that:

“62. Section 107 (1) of the Evidence Act provides that

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Sub-section (2) provides that

“when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked:

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular



case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd v Smith & Associates Far East Ltd*:

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

80. The Petitioner complained that the respondent violated his right and fundamental freedom under Article 33 which relates to the freedom of expression and the freedom of the media under Article 34 for asking him to pull down his music video that was deemed inappropriate.
81. As already observed, the purpose of enacting the Films and Stage Plays Act and empowering the 1<sup>st</sup> Respondent to regulate the display or exhibition audio-visual content was to ensure protection of the vulnerable persons from exposure to harmful content. This requirement is reasonable and justifiable as the vulnerable, such as children deserve to watch age-appropriate content and that limitation is within the justifiable limits permissible Article 24 of the Constitution. The Petitioner has not challenged the finding of the 1<sup>st</sup> Respondent on inappropriateness of the content.
82. The Petitioner further alleged his right to fair administrative action was violated because the 1<sup>st</sup> Respondent took unilateral action and did not provide the petitioner with opportunity to present his case hence violated his rights under Article 47. However, it is indicated in the Petitioner’s affidavit in support that the Petitioner was given ‘seven days-notice’ before any intended action could be taken against him. I find that this was an opportunity to approach the Respondent before implementation of the decision hence notice was validly given.
83. Further, the Respondent stated the Petitioner did not pull down the video as required a fact the petitioner did not rebut, so how then were his media or freedom of expression violated?

#### **Whether the petitioner is entitled to the prayers sought**

84. In the prayers, the Petitioner wants the Court to make an order prohibiting the Respondents from engaging youtube, tiktok, twitter and facebook to pull down the petitioner’s social media posts or from banning the account. It was neither pleaded in the petition that the respondent has taken action in that regard nor was any evidence presented to this effect. That prayer is not supported by evidence or pleadings. In any event, given that the petitioner has not discharged the burden demonstrating that the finding that the video was offensive content is unreasonable, I do not see why the Court should then stop the respondent from discharging its mandate of ensuring the inappropriate content is removed from public circulation using every available lawful means at its disposal including partnering with the platforms the petitioner listed. By parity of reasoning, the prayer to declare the administrative processes employed by the 1<sup>st</sup> respondent unconstitutional cannot therefore issue.



85. As for the prayer that the *Films and Stage Plays Act* does not grant the 1<sup>st</sup> respondent any powers on regulation of social media activities, this prayer untenable because the regulation applies to audio-visual recording available for public exhibition/display the medium through which it is shared is immaterial.
86. Nevertheless, the letter dated 29<sup>th</sup> February, 2024 is to the extent that it issued the petitioner with a sales invoice of Kenya Shillings 243, 200/- demanding licence fees for uploading the video null and void as the current legal procedures, Section 4 and 12 and 15 manifestly envisage fulfilment of conditions applicable to conventional film studios and audiovisual recordings via OTT, VoD or those posted on social media platforms are not covered. Any attempt to enforce those licensing requirements to the new trends without undertaking necessary changes that will bring arbitrariness. The demand for payment of the said licence fees is thus rejected, as is null and void.
87. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY, 2025.**

**L N MUGAMBI**

**JUDGE**

