



Law Society of Kenya v Director General, Communication Authority of Kenya & 3 others; Royal Media Services Limited & 2 others (Interested Parties) (Constitutional Petition 89 of 2018) [2024] KEHC 7346 (KLR) (Constitutional and Human Rights) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7346 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 89 OF 2018**

AC MRIMA, J

JUNE 20, 2024

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

**DIRECTOR GENERAL, COMMUNICATION AUTHORITY OF
KENYA 1ST RESPONDENT**

**JOE MUCHERU, CABINET SECRETARY, INFORMATION
COMMUNICATION AND TECHNOLOGY 2ND RESPONDENT**

**DR FRED MATIANG'I, CABINET SECRETARY, INTERIOR AND NATIONAL
GOVERNMENT 3RD RESPONDENT**

ATTORNEY GENERAL 4TH RESPONDENT

AND

ROYAL MEDIA SERVICES LIMITED INTERESTED PARTY

NATION MEDIA GROUP LIMITED INTERESTED PARTY

THE STANDARD GROUP LIMITED INTERESTED PARTY

Court affirms the government's decision to shut down live television transmission by three media stations with a view to maintain security, law and order.

The case challenged the decision of the government shut down the live television transmission by three broadcast stations, of an event considered to result in the breach of national security. The court dismissed the petition by holding that the petitioners had failed to demonstrate that the respondents' impugned action contravened the Constitution and the law. Conversely, the respondents demonstrated that they acted within the limitations of the freedom of the media in line with article 24 of the Constitution and the law. Hence, the petition was unsuccessful.



Reported by Robai Nasike

Constitutional Law – *fundamental rights and freedoms – freedom of the media – freedom of expression – limitations of the freedom of media and freedom of expression – where broadcast stations were issued a directive to abstain from covering an event that would allegedly lead to a serious breach of security - whether the decision to shut down the live television transmission by three broadcast stations, of an event considered to result in breach of national security, passed the constitutional muster of being a permissible limitation in law - whether the live coverage of an event purporting to install a people’s president, by broadcasting stations, was constitutional and lawful.*

Brief facts

The main issue before the court was whether the decision to shut down the live television transmission by three broadcast stations, of an event considered to result in the breach of national security, passed the constitutional muster of being a permissible limitation in law. The interested parties, as responsible and law-abiding members of the media fraternity had the obligation, under Article 3(1) and (2) of the Constitution and the law to respect, uphold and defend the Constitution, by refraining from perpetuating an event that had its core objective of not only subverting and undermining the democratic will of the people, but also had the potential of causing widespread civil unrest at the very least. The Interested Parties were out to further an activity which was specifically restrained by the Constitution. Such actions could not be deemed as normal broadcasting services on the part of the Interested Parties.

Issues

- i. Whether the decision to shut down the live television transmission by three broadcast stations, of an event considered to result in breach of national security, passed the constitutional muster of being a permissible limitation in law.
- ii. Whether the live coverage of an event purporting to install a people’s president, by broadcasting stations, was constitutional and lawful.

Held

1. The first port of call in the legal space within which telecommunication and/or broadcasting stations ought to operate was the Constitution, article 34 on the freedom of the media and article 33 on freedom of expression. The statutory framework consists of the Kenya Information and Communications Act, Cap. 411A, Laws of Kenya (the Act) and its subsidiary regulations such as the Kenya Information and Communications (Broadcasting) Regulations (the Regulations).
2. The Kenya Information and Communications Act, Cap. 411A, Laws of Kenya (the Act) established the Kenya Communications Authority of Kenya, (the CAK), under section 5. The decision to shut down telecommunication and/or broadcasting stations was tantamount to suspension of the license to transmit signal of live broadcast. Section 5B (1) of the Act required that every action taken by the Authority conform with the dictates of Article 34 of the Constitution. Section 5B (3) and (4) of the Act limited the freedom accorded to the media. The parameters for broadcasting services in Kenya were provided for under Part IVA of the KICA. The functions of CAK in relation to broadcasting services were provided for in Section 46 of the Act.
3. There were several subsidiary legislations in place which focused on broadcasting services. For instance, the Kenya Information and Communications (Broadcasting) Regulations (the Regulations) imposed general requirements on licensees for broadcasting services. Regulation 6 called upon the Commission to ensure that broadcasting services reflect the national identity, needs and aspirations of Kenyans. Regulation 19 provided for the content of the broadcasts.
4. The statutory framework on telecommunication and/or broadcasting stations affirmed the position that the freedom of the media could be appropriately limited as long as it was within the constitutional imperatives envisaged in article 24 of the Constitution, the law and the Regulations thereunder.



5. The Constitution of Kenya 2010 ushered in a new era of the country's governance. It was a departure from the retired Constitution where power was concentrated on the Presidency and the Executive generally. The Constitution of Kenya, 2010, instead gave sovereign power to the people. Under article 3(2), any attempt to establish a government otherwise than in compliance with the Constitution was unlawful.
6. The manner in which the democratic government in Kenya was formed was also well spelt out in the Constitution. Such a government was founded on a President who was democratically elected by 50% + 1 of the registered voters in Kenya under the universal suffrage system. That system was managed by the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution. Once elected and eventually sworn-in as the President, the winner, assumed that position and exercised delegated executive power under Chapter Nine of the Constitution. The President would become the Head of State and Government, exercise the executive authority of the Republic [with the assistance of the Deputy President and Cabinet Secretaries], was the Commander-in-Chief of the Kenya Defence Forces, was the Chairperson of the National Security Council and, above all, was a symbol of national unity.
7. The Constitution did not provide for any other form of a President of the Republic. Therefore, the phenomenon of a 'Peoples' President', propounded by Raila Odinga and his supporters, was not only foreign to the land, but also in direct contravention of article 3(2) of the Constitution. Further, Article 2(3) of the Constitution affirmed the supremacy of the Constitution by providing that the validity or legality of the Constitution could not be challenged before any Court or State organ. The events of January 30, 2018 as perpetrated by Raila Odinga ran afoul the Constitution. The installation of the 'Peoples' President' by way of swearing-in was, hence, an attempt to establish a government otherwise than in compliance with the Constitution.
8. The petitioner, as well as, the interested parties did not demonstrate, by way of evidence, that they acted within the Constitution and the law. There was no rebuttal to the respondents' position that the respondents had acted in defence of the Constitution under article 3 of the Constitution and that the freedom of the media was properly limited within article 24 confines and the law. There was also no rebuttal to the allegation that the 1st respondent informed all the media houses in Kenya, well before the date, of the possible security risks in covering the events of January 30, 2018, live. The request was made in the larger interests of the public and to maintain security, law and order. In addition, the instant petition did not challenge the direction issued by the 1st respondent.
9. The interested parties, as responsible and law-abiding members of the media fraternity had the obligation, under Article 3(1) and (2) of the Constitution and the law to respect, uphold and defend the Constitution, by refraining from perpetuating an event that had its core objective of not only subverting and undermining the democratic will of the people, but also had the potential of causing widespread civil unrest at the very least.
10. The Interested Parties were out to further an activity which was specifically restrained by the Constitution. Such actions could not be deemed as normal broadcasting services on the part of the Interested Parties. The 1st respondent was, hence, within its constitutional and statutory mandate to ensure that the unconstitutional actions by the interested parties were not permitted to flourish. Having chosen not to obey the Constitution and the law, the interested parties, willingly and intentionally, exposed themselves to all and any legal perils which included the impugned action by the 1st respondent.
11. The petitioner did not demonstrate that the respondents' impugned action contravened the Constitution and the law. Conversely, the respondents demonstrated that they acted within the limitations of the freedom of the media in line with article 24 of the Constitution and the law. Hence, the petition was unsuccessful on two fronts. First, that the interested parties were out to propagate an



unconstitutional venture, and, second, that no evidence or sufficient evidence was tendered in proof of the averments in the petition.

12. The impugned action was constitutional and lawful. The respondents were coordinated Government ministries that hard to work collegially, share information and collaborate to achieve the greater and lawful good anticipated by the Constitution. The respondents' collective decision, was reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom to the extent that it forestalled an unconstitutionality and an illegality.

Petition dismissed.

Orders

Parties to bear their own costs.

Citations

Cases

Kenya

1. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 15 (KLR)) — (Explained)
2. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (Presidential Election Petition 1 of 2017; [2017] KESC 42 (KLR)) — (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 1, 2(3); 3(1)(2); 4(2); 10; 22; 24; 33(1); 34(1)-(5); 45; 47; 74; 88 — (Interpreted)
2. Evidence Act (cap 80) sections 107, 108, 109 — (Interpreted)
3. Fair Administrative Actions Act (cap 7L) sections 4, 5 — (Interpreted)
4. Kenya Information and Communications Act (cap 411A) sections 5A, 5B(1), (3),(4); 46; part IVA — (Interpreted)
5. Kenya Information and Communications (Broadcasting) Regulations (Legal Notice 187 of 2009) regulations 6, 19 — (Interpreted)

Advocates

Miss Soweto for the petitioner

Miss Okimaru for 1st respondent.

Mr Thande Kuria for 2nd, 3rd and 4th respondents.

JUDGMENT

Background:

1. On January 30, 2018, the Director General of Communication Authority of Kenya, 1st respondent herein, shut down the live television transmission for three broadcasting stations being the Royal Media Services Limited, Nation Media Limited and The Standard Group Limited (hereinafter 1st, 2nd and 3rd interested parties). As a result, the stations' ability to broadcast their respective information and programmes were impeded.
2. It was the petitioner's case that the 1st respondent did not communicate any reasons to the interested parties for the shutdown which persisted for more than seven days.



3. The petitioner contended that on January 31, 2018, a day after the shutdown, the Dr Fred Matiang'i, 3rd respondent herein, made a Press statement justifying the shutdown by stating among other reasons that the decision was to facilitate the full investigation into serious breach of security occasioned by the media fraternity that participated in covering the events of January 30, 2018 where Raila Odinga held a rally at Uhuru Gardens in Nairobi.
4. The petitioner further contended that it was only until February 8, 2018 when the 1st interested party's television station was reopened. It was also its case that the shutdown interfered with the viewership of the stations which according to statistics carried out by Kenya Audience Research Foundation and Geopol indicated that the 1st, 2nd and 3rd interested parties enjoyed 40.9%, 10.7% and 9.8% and 33.7%, 11.1% and 8.8% viewership in Kenya respectively.

The Petition:

5. Through the Petition dated March 8, 2018, supported by the affidavit of Mercy Wambua deposed to in a similar date, the petitioner claimed that the 1st, 2nd and 3rd respondents actions not only violated the values and principles in the Constitution, but also constituted a serious threat to the rule of law, order and administration of justice.
6. The petitioner asserted that the shutdown was a violation of article 33(1) of the Constitution that entitles every person including the members of public the freedom to seek, receive and impart information.
7. It was its case further that to the extent that the 2nd, 3rd and 4th respondents interfered with the independence of the 1st respondent, they were in breach of article 45 of the Constitution and section 5A of the Kenya Information and Communications Act which requires the 1st respondent to be free from control by Government political or commercial interests in performance of its duties.
8. The petitioner posited further that the shutdown was an infraction of the interested parties' right to fair administrative action under article 47 of the Constitution as read with section 4 of the Fair Administrative Actions Act for failing to give written reasons.
9. The petitioner claimed further that the shutdown violated the right under article 34(1) of the Constitution that guarantees freedom of electronic, print and all other types of media.
10. It was the petitioner's case that the 1st, 2nd and 3rd interested parties violated article 34(2) of the Constitution which requires State not to exercise control over or interfere with any person engaged in broadcasting or circulation of any publication or the dissemination of information by any medium or penalise any person for any opinion or view or the content of any broadcast publication or dissemination.
11. On the foregoing factual and legal backdrop, the petitioner prayed for the following reliefs;
 - a. A declaration that the decision, action and/or conduct of the 1st, 2nd and 3rd and 4th respondents whether jointly, collectively or severally to shut down the broadcasting television stations of the 1st, 2nd and 3rd interested parties on January 30, 2018 was ultra-vires, unlawful, unreasonable, unjustifiable and was in violation of article 47 of the Constitution as read together with section 4 and 5 of Fair Administrative Action Act No. 4 of 2015.
 - b. A declaration that the decision, action and or conduct of the 1st, 2nd, 3rd and 4th respondents to shut down the broadcasting television station of the 1st, 2nd and 3rd interested parties on January 30, 2018 is a violation of article 33 of the Constitution.



- c. A declaration that the respondents violated article 34(1), (2), (3)(4) and (5) of the Constitution by shutting down the 1st, 2nd, and 3rd interested parties' television broadcasting stations.
- d. A declaration that all the respondents are in violation of Article 10 of the Constitution and section 5(A) of the Kenya Information and Communications Act.
- e. A declaration that the individual State Officers being the Director General of CAK and or the person who was in charge of the CAK at all material times, Mr Joe Mucheru, the Cabinet Secretary for Information, Communication and Technology and Dr Fred Matiang'i the Cabinet Secretary for Interior and Coordination of National Government are jointly, severally and personally liable and accountable for the respondents' actions and conduct.
- f. A declaration that the 1st, 2nd and 3rd respondents have each violated the oath and/or affirmation of office that each took pursuant to article 74 of the Constitution.
- g. A declaration that the 1st, 2nd and 3rd respondents having been found in breach of the Constitution and Laws of Kenya and oath of office are each unfit to hold state or public office.
- h. Any such Orders as this Honourable Court shall deem fit and just to grant.

The Responses:

- 12. It was only the 1st respondent which filed its response to the Petition. The rest of the respondents adopted the 1st respondent's response and filed their written submissions thereto.
- 13. None of the interested parties participated in the matter.
- 14. Responding to the Petition, the Director General, Communication Authority of Kenya responded to the Petition through the Replying Affidavit of one Christopher Kemei, the then Director in-charge of Licensing, Compliance and Standards, deposed to on November 19, 2018.
- 15. It was its case that the 1st respondent conducted itself in strict conformity with the Constitution, The Kenya Information and Communications Act and the Regulations thereunder.
- 16. It averred that the 1st respondent was informed by the Ministry of Interior and Coordination of National Government of security concerns relating to the then planned 'swearing-in ceremony' of the People's President by the National Super Alliance (NASA) Coalition, which Coalition had lost a hotly-contested Presidential election. The 1st respondent was advised of the pending unrest especially orchestrated by live television broadcasting of the event.
- 17. He deposed that the 1st respondent was further informed that the National Security Advisory Council had assessed and determined that the unrest could be alleviated by ensuring that live broadcast of the event was not undertaken and it was advised, therefore, that live broadcasts would possibly, be stopped.
- 18. Based on the foregoing information, the 1st respondent advised its licensees against live broadcast to which most broadcast intimated their intention not to broadcast live the 'swearing-in event'.
- 19. He deposed further that on or about January 30, 2018, contrary to the 1st respondent's advice or directive, the 1st, 2nd and 3rd interested parties attempted to broadcast the event necessitating immediate shutdown in order to avert a security crisis.
- 20. It was his deposition that on February 2, 2018, the 1st respondent became aware of the orders of this court dated February 1, 2018 in Petition No 38 of 2018, Okiya Okiya v Communications



Authority and Others directing it to restore live television transmission by the 1st, 2nd and 3rd interested parties.

21. He deposed that it complied with the court orders by having its technical team put in place the required parameters and procedures needed to switch on signal on February 4, 2018 including sending teams to transmission stations to restore the transmission.
22. The 1st respondent deposed that the constitutional rights alluded to in articles 33, 34 and 47 are not absolute and do not extend to propaganda for war, incitement to violence or advocacy for ethnic incitement or to cause harm.
23. It was its case that the Petition is unmerited and the reliefs sought ought not be granted.

The Parties' Submissions:

24. The petitioner filed written submissions dated November 19, 2018 whereas the 1st respondent urged its case further through its written submissions dated February 15, 2019. The 2nd, 3rd and 4th respondents filed joint written submissions dated February 11, 2019.
25. The arguments and decisions referred to and relied upon by the parties in their respective submissions are hereby highly appreciated and shall be synthesized in the analysis section of this Judgment.

Analysis:

26. Having carefully appreciated the tenor of the petitioner's case as well as the respondents' rebuttal, the issues that arise for determination are as follows: -
 - i. Whether the decision to shut down the 1st, 2nd and 3rd interested parties' live broadcast and transmission services was unconstitutional and unlawful.
 - ii. Depending on (i) above, whether the 1st, 2nd and 3rd respondents are unfit to hold any public office.
 - iii. Whether the 2nd, 3rd and 4th respondents interfered with the independence of the 1st respondent contrary to section 5 of Kenya Information and communication Act.
27. A look at the issues in seriatim follows.

a. Whether the decision to shut down the 1st, 2nd and 3rd interested parties' live broadcast and transmission services was unconstitutional and unlawful:

28. The resolution of the lawfulness of the decision to shut down the interested parties' live broadcast resides in an interrogation of the context in which it occurred and how such decision squares out with the constitutional and statutory entitlement that guarantees media freedom and the independence of telecommunications in Kenya.
29. This court has thoroughly sifted through the Petition. The Petitioner averred to the circumstances that led to the shutdown. It complained of constitutional infractions as a result of the shutdown and referred to the Press Statement of the 3rd respondent, the Cabinet Secretary Ministry of Interior and Coordination of National Government, dated January 31, 2018.



30. The Press Statement provides context in which the shutdown occurred. Due to its centrality, a reproduction of its contents verbatim will be proper. The 3rd respondent stated as follows: -

Following the events of January 30, 2018 at Uhuru park by National Super Alliance (NASA), led by Raila Odinga and other leaders, the Government wishes to state as follows:

1. What was witnessed at Uhuru Park was a well-choreographed attempt to subvert or overthrow the legally constituted Government of Kenya.
2. The Government was aware and is aware of the role of some elements on the media fraternity who participated in furtherance of this illegality. Their complicity would have led to thousands of deaths of innocent Kenyans due to the build-up of incitement that was witnessed in early hours of the morning of January 30, 2018.
3. Media owners and all relevant actors had been given a full security situation brief well ahead of the illegal activities of NASA. Unfortunately, some media houses chose to disregard this advice, their own code of ethics, self-regulation and the moral responsibility of every Kenyan to safeguard the security of their fellow citizens.
4. Accordingly, the Government took a decision to shut down the concerned media houses, until further notice, as it launches a full investigation into the serious breach of security.
5. Further, the Government has commenced full investigation around purported swearing in of Raila Odinga. The investigations will extend to co-conspirators and facilitators. Upon completion of these investigations, appropriate legal action will be taken in accordance with the laws of Kenya. Additionally, the Government will prefer appropriate administrative measures on a need by need basis.
6. The Government of the Republic of Kenya restates that it will continue to perform its cardinal responsibility of protecting lives and properties of all Kenyans regardless of their political affiliations. Further, the Government will continue to guarantee a conducive and enabling environment for businesses to thrive. The Government remains committed to the rolling out of development programmes in every part of the country.
7. In conclusion, the Government takes this opportunity to thank Kenyans especially the residents of Nairobi for their resilience and peaceful conduct despite spirited efforts by NASA and specifically the proscribed armed militia hitherto operating under the banner of NRM, to incite them into tribal divisions, violence and possible massacre.

Dr Fred Matiang'i

Cabinet Secretary, Ministry of Interior and Coordination of National Government.

31. Still on the background of the matter, and as can be appreciated from the 1st respondent's Replying Affidavit, a position not controverted by the Petitioner, the Rt. Hon. Raila Odinga, the then Leader of the Political outfit by the name National Super Alliance (NASA) had on January 30, 2018 convened a rally at Uhuru Gardens in Nairobi for purposes of 'swearing himself in' as the Peoples' President. Still



uncontroverted, the interested parties had earlier on been briefed by the 1st respondent of the possible break down of peace and tranquillity in the country as a result of any live broadcasting of the event. The entities were, therefore, advised and directed not to undertake such broadcasts for the larger good of the country.

32. To the contrary, the interested parties, who were part of the larger media fraternity, ignored the 1st respondent's advisory and direction and intended to carry out the live coverage of the event. As a result, the foregoing precipitated the shutdown of the interested parties' broadcasting services.
33. Having rendered as much, the Court now turns to the legal space within which telecommunication and/or broadcasting stations ought to operate.
34. The first port of call is the Constitution. For that purpose, article 34 comes to the fore. Sub-articles (1), (2), (3) and (5) thereof are relevant in this discourse. They are tailored as under: -

Freedom of the media.

34.

- (1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in article 33(2).
- (2) The State shall not—
 - (a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or
 - (b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.
- (3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—
 - (a) are necessary to regulate the airwaves and other forms of signal distribution; and
 - (b) are independent of control by government, political interests or commercial interests.
- (5) Parliament shall enact legislation that provides for the establishment of a body, which shall—
 - (a) be independent of control by government, political interests or commercial interests;
 - (b) reflect the interests of all sections of the society; and
 - (c) set media standards and regulate and monitor compliance with those standards.

35. The body contemplated under sub-article 5 is the Communication Authority of Kenya, sued through its Director General as the 1st respondent in this matter.



36. There is also article 33 of the *Constitution* which comes to play in this case. The provision has been reproduced under with emphasis on sub-article 2: -

Freedom of expression.

- (1) Every person has the right to freedom of expression, which includes—
 - (a) freedom to seek, receive or impart information or ideas;
 - (b) freedom of artistic creativity; and
 - (c) academic freedom and freedom of scientific research.
- (2) The right to freedom of expression does not extend to—
 - (a) propaganda for war;
 - (b) incitement to violence;
 - (c) hate speech; or
 - (d) advocacy of hatred that—
 - (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
 - (ii) is based on any ground of discrimination specified or contemplated in article 27(4).
- (3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

37. Having outlined the constitutional fundamentals of freedom of the media, the focus now turns to the statutory framework in place.

38. The *Kenya Information and Communications Act*, cap 411A of the Laws of Kenya (hereinafter referred to as ‘the KICA’ or ‘the Act’) establishes the Kenya Communications Authority of Kenya, (hereinafter referred to as ‘the CAK’ or ‘the Authority’).

39. The object and purpose of the Authority, for purposes of this dispute, is provided for in section 5 of KICA as follows;

5. Object and purpose of the Commission

- (1) The object and purpose for which the Commission is established shall be to licence and regulate postal, information and communication services in accordance with the provisions of this Act.
- (2) The Commission shall have all powers necessary for the performance of its functions under this Act.
- (3) The Commission may enter into association with such other bodies or organisations within or outside Kenya as the Commission may consider desirable or appropriate and in furtherance of the purpose for which the Commission is established.
- (4) The Commission shall, in the performance of its functions under this Act have regard to—



- (a) any policy guidelines of a general nature relating to the provisions of this Act notified to it by the Cabinet Secretary and published in the Gazette;
 - (b) Kenya’s obligations under any international treaty or agreement relating to the provisions of telecommunication, radio and postal services.
- 40. At the heart of this dispute is the shutdown, which is tantamount to suspension of the license to transmit signal of live broadcast.
- 41. The impugned action, therefore, shines the spot light on section 5B(1) of the Act. The provision requires every action taken by the Authority to be in conformity with the dictates of article 34 of the Constitution. It provides as follows;
 - 5B.
 - (1) The Authority shall, in undertaking its functions under this Act comply with the provisions of article 34 (1) and (2) of the Constitution.
 - (2) Subject to article 24 of the *Constitution*, the right to freedom of the media and freedom of expression may be limited for the purposes, in the manner and to the extent set out in this Act and any other written law.
- 42. Further to the foregoing, section 5B(3) and (4) of the Act limits the freedom accorded to the media. They are, indeed, direct derivatives of the Constitution and provides as follows;
 - (3) A limitation of a freedom under subsection (2) shall be limited only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
 - (4) The right to freedom of expression shall not extend to—
 - (a) the spread of propaganda for war;
 - (b) incitement to violence;
 - (c) the spread of hate speech; or
 - (d) advocacy of hatred that
 - (i) constitutes ethnic incitement, vilification of others persons or community or incitement to cause harm; or
 - (ii) is based on any ground of discrimination specified or contemplated in article 27(4).
- 43. The parameters for broadcasting services in Kenya is provided for under partIVA of the *KICA*.
- 44. The functions of the Authority in relation to broadcasting services are provided for in section 46 of the Act in the following manner;
 - A. Functions of the Commission in relation to broadcasting services:
 - The functions of the Commission in relation to broadcasting services shall be to—
 - (a) promote and facilitate the development, in keeping with the public interest, of a diverse range of broadcasting services in Kenya;
 - (b) facilitate and encourage the development of Kenyan programmes;



- (c) promote the observance at all times, of public interest obligations in all broadcasting categories;
- (d) promote diversity and plurality of views for a competitive marketplace of ideas;
- (e) ensure the provision by broadcasters of appropriate internal mechanisms for disposing of complaints in relation to broadcasting services;
- (f) protect the right to privacy of all persons; and
- (g) carry out such other functions as are necessary or expedient for the discharge of all or any of the functions conferred upon it under this Act.
- (h) administering the broadcasting content aspect of this Act;
- (i) developing media standards; and
- (j) regulating and monitoring compliance with those standards.

45. There are as well several subsidiary legislations in place which focus on the broadcasting services. For instance, the *Kenya Information and Communications (Broadcasting) Regulations* (hereinafter referred to as ‘the Regulations’) which imposes the following general requirements on licensees for broadcasting services.

46. Regulation 6 thereof calls upon the Commission to ensure that broadcasting services reflect the national identity, needs and aspirations of Kenyans. Further, Regulation 19 provides for content of the broadcasts as follows: -

A licensee shall ensure that no broadcasts by its station—

- a. contains the use of offensive language, including profanity and blasphemy;
- b. presents sexual matters in an explicit and offensive manner;
- c. glorifies violence or depicts violence in an offensive manner;
- d. is likely to incite, perpetuate hatred, vilify any person or section of the community, on account of the race, ethnicity, nationality, gender, sexual preference, age, disability, religion or culture of that person or section of the community; or
- e. has no program rating from Kenya Films Classification Board indicated prior to the commencement of such programs.

47. The above discussion affirms the position that the freedom of the media can be appropriately limited as long as it is within the constitutional imperatives envisaged in article 24 of the *Constitution*, the law and the Regulations thereunder.

48. It is, therefore, for this court to determine whether the impugned decision and/or action of the 1st respondent passed the constitutional muster of being a permissible limitation in law.

49. In doing so, the genesis of this matter remains at the forefront. The expected determination can only be made by considering the totality of the facts and circumstances of this case. That, hence, calls for the interrogation of the evidence on record.

50. Whereas it is settled that the standard of proof in the ordinary Constitutional Petitions is on the balance of probabilities, the evidential burden of proof calls for parties to render evidence of rebuttal in proper instances. [See the Supreme Court of Kenya in *Odinga & another v Independent Electoral and*



Boundaries Commission & 2 others; Aukot & another (interested parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ).

51. Throwing its weight, once again, on the proof of Constitutional Petitions, the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2015] eKLR tied the concept of burden of proof to the person claiming violation of a right under article 22 of the *Constitution*. It observed as follows;

... Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

52. Sections 107, 108 and 109 of the *Evidence Act* cap 80 Laws of Kenya also clearly captures the foregoing as follows respectively: -

107. Burden of proof

- (1) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person

53. As stated, the Petition has been thoroughly looked into. The petitioner, properly so, set out the constitutional foundation of the dispute. The Petition was opposed. The respondents mounted a combined front that the circumstances that led to the impugned decision were of serious threat to public security and that the interested parties had been foretold of such further to being asked to exercise restraint by not rendering live broadcasts of the event.

54. On their part, the interested parties did not participate in this matter. As such, the averments by the respondents remained uncontroverted. Likewise, the Petitioner did not tender any evidence contrary to the respondents' position.

55. But, what actually happened at the Uhuru Park on the January 30, 2018? It is on record that the Rt Hon Raila Odinga, having lost in a Presidential election, and having not properly so, conceded to the defeat planned to be sworn-in as another President of Kenya. That was to be the Peoples' President.



56. The Constitution of Kenya 2010 ushered in a new era on the country's governance. It was a departure from the retired Constitution where power was concentrated on the Presidency and the Executive generally.
57. The now Constitution instead gave the sovereign power to the people, hence, the following words in the Preamble: -
 We, the people of Kenya.....

 Exercising our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution:
 Adopt, Enact and give this Constitution to ourselves and to our future generations.
58. Article 1 of the Constitution is on the sovereignty of the people, article 2 reinforces the supremacy of the Constitution, article 3 is on the defence of the Constitution whereas Article 4 is on the Republic of Kenya.
59. Under article 3(1), every person is under an unreserved duty to respect, uphold and defend the Constitution.
60. Article 4(2) defines the Republic of Kenya as a multi-party democratic State founded on the national values and principles of governance in article 10.
61. It is article 3(2) which directly illuminates the events of the January 30, 2018. It states as follows: -
 Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful.
62. The manner in which the democratic government in Kenya is formed is also well spelt out in the Constitution. Such a government is founded on a President who is democratically elected by 50% + 1 of the registered voters in Kenya under the universal suffrage system. That system is managed by the Independent Electoral and Boundaries Commission established under article 88 of the Constitution.
63. Once elected and eventually sworn-in as the President, the winner, assumes that position and exercises delegated executive power under Chapter Nine of the Constitution.
64. The President becomes the Head of State and Government, exercises the executive authority of the Republic [with the assistance of the Deputy President and Cabinet Secretaries], is the Commander-in-Chief of the Kenya Defence Forces, is the Chairperson of the National Security Council and, above all, is a symbol of national unity.
65. The Constitution does not provide for any other form of a President of the Republic. Therefore, the phenomenon of a 'Peoples' President', propounded by the Rt. Hon. Raila Odinga and his supporters, was not only foreign to the land, but also in direct contravention of article 3(2) of the Constitution.
66. Further, article 2(3) of the Constitution affirms the supremacy of the Constitution by providing that the validity or legality of the Constitution cannot be challenged before any Court or State organ.
67. In light of the foregoing, it is the position that the events of January 30, 2018 as perpetrated by the Rt Hon Raila Odinga ran afoul the Constitution. The installation of the 'Peoples' President' by way



- of swearing-in was, hence, an attempt to establish a government otherwise than in compliance with the Constitution.
68. With such a finding, the inevitable question that calls for an answer is whether in covering the live event, the interested parties acted within the Constitution and the law.
 69. That now takes us back to the issue of evidence. The Petitioner, as well as, the interested parties did not demonstrate, by way of evidence, that they acted within the Constitution and the law. Apart from averring in the Petition, that was all. There was no rebuttal to the respondents' position that the respondents acted in defence of the Constitution under article 3 of the Constitution and that the freedom of the media was properly limited within the article 24 confines and the law.
 70. There was also no rebuttal to the allegation that the 1st respondent informed all the media houses in Kenya, well before the date, of the possible security risks in covering the events of January 30, 2018 live. The request was made in the larger interests of the public and with a view to maintain security, law and order. As said, that was not controverted and further, the instant Petition did not challenge the direction issued by the 1st respondent.
 71. The interested parties, as responsible and law-abiding members of the media fraternity had the obligation, pursuant to article 3(1) and (2) of the Constitution and the law to respect, uphold and defend the Constitution, by refraining from perpetuating an event that had its core objective of not only subverting and undermining the democratic will of the people, but also had the potential of causing widespread civil unrest at the very least.
 72. The interested parties were, therefore, out to further an activity which was specifically restrained by the Constitution. Such actions cannot be deemed as normal broadcasting services on the part of the interested parties. The 1st respondent was, hence, within its constitutional and statutory mandate to ensure that the unconstitutional actions by the interested parties were not permitted to flourish. Having chosen not to obey the Constitution and the law, the interested parties, willingly and intentionally, exposed themselves to all and any legal perils which included the impugned action by the 1st respondent.
 73. The petitioner did not, therefore, demonstrate that the respondents' impugned action contravened the Constitution and the law. Conversely, the respondents demonstrated that they acted within the limitations of the freedom of the media in line with article 24 of the Constitution and the law.
 74. Drawing from the foregoing, the Petition is, hence, unsuccessful on two fronts. First, that the interested parties were out to propagate an unconstitutional venture, and, second, that no evidence or sufficient evidence was tendered in proof of the averments in the Petition.
 75. Having found that the impugned action was constitutional and lawful, then the rest of the issues delineated in this Petition fall by the way side.
 76. In any event, the respondents are coordinate Government ministries that must work collegially, share information and collaborate in order to achieve the greater and lawful good anticipated by the Constitution.
 77. The respondents' collective decision, in the circumstances of this case, was reasonable and justifiable in an open democratic based on human dignity, equality and freedom to the extent that it forestalled an unconstitutionality and an illegality.



Disposition:

78. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that the court file was among those that were misplaced during the court's transfer from the Division which involved movement of so many files within quite a short time. Apologies galore.
79. In the end, the following orders hereby issue: -
- a. The petition dated March 8, 2018 is hereby dismissed.
 - b. As the matter is a public interest litigation, each party shall bear its own costs.
80. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 20TH DAY OF JUNE, 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for Miss. Soweto, Learned Counsel for the Petitioner.

No appearance for Miss. Okimaru, Learned Counsel for the 1st respondent.

No appearance for Mr. Thande Kuria, Learned Counsel for the 2nd, 3rd and 4th respondents.

No appearance for the interested parties.

Chemosop/Duke – Court Assistants.

