Kenya Union of Journalists v Communications Authority of Kenya & another; Media Council of Kenya (Interested Party) (Petition 501 of 2019) [2024] KEHC 13677 (KLR) (Constitutional and Human Rights) (7 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13677 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 501 OF 2019

LN MUGAMBI, J

NOVEMBER 7, 2024

BETWEEN

KENYA UNION OF JOURNALISTS .... PETITIONER

AND

COMMUNICATIONS AUTHORITY OF KENYA .... 1ST RESPONDENT

ATTORNEY GENERAL .... 2ND RESPONDENT

AND

MEDIA COUNCIL OF KENYA .... INTERESTED PARTY

Constitutionality of sections 46A(i) and(j); and 46H(1) of the Kenya Information and Communication Act on the functions of the Communications Authority of Kenya in relation to broadcasting services

The petition challenged the constitutionality of various sections and regulations of the Kenya Information and Communication Act, the Kenya Information and Communication (Broadcasting) Regulations and the Programing Code for Broadcasting Services issued by the Communications Authority of Kenya (CAK). The court held that the Media Council of Kenya (MCK) was clothed with the authority to set media standards and to monitor their compliance; thus to the extent that section 46A(i) and (j) of the Kenya Information and Communications Act gave a similar role to CAK it was unconstitutional. The court further held that it ought to be responsibility of MCK to set and monitor the ethical codes for the protection of the children and/any other vulnerable group and to monitor and enforce them, not CAK. The court thus found that sections 46A(i) and(j); and 46H(1) were unconstitutional.

Reported by Kakai Toili

Constitutional Law *– constitutionality of statutory provisions – constitutionality of section 46A(i) and (j) of the Kenya Information and Communications Act – claim that the Kenya Information and Communications*

Act gave the Communications Authority of Kenya (CAK) a similar role to that given to the Media Council of Kenya (MCK) - distinction between the roles of CAK and MCK - whether section 46A(i) and (j) of the Kenya Information and Communications Act was unconstitutional for giving CAK a similar role to that given to MCK under article 34(5) of the Constitution – whether the Kenya Information and Communications Act's dispute resolution mechanism impeded the implementation of the dispute resolution procedure under the Media Council Act hence unconstitutional - Constitution of Kenya, article 34(3) and (5); Kenya Information and Communications Act (cap 411), section 46A(i) and (j).

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms – freedom of the media - whether governmental control or censorship through giving of directions on media content and as to how and when content should be aired was adversative to the independence and freedom of media - whether it was the responsibility of the Communications Authority of Kenya to set and monitor the ethical codes for the protection of the children and/any other vulnerable group and to monitor and enforce them - Constitution of Kenya, articles 21(3), 34 and 53(2).*

Constitutional Law *– interpretation of the Constitution and statutes - principles of interpretation of the Constitution and statutes - what were the principles to be applied in the interpretation of the Constitution and in determining the constitutionality of statutes – Constitution of Kenya, article 159(2)(e).*

Brief facts

The petitioner deponed that under the Constitution, one of the rights recognized under article 34 was the freedom of media pursuant to which article 34(5) which provided the manner in which it shall be realized by directing that Parliament enact legislation that provided for the establishment of a body, which shall be independent of control by Government, political interests or commercial interests; reflect the interests of all sections of the society; and set media standards and regulate compliance with those standards. It was averred that the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) affirmed that the body contemplated thereunder was the interested party, the Media Council of Kenya (MCK).

The petitioner posited that despite that clear position, the Kenya Information and Communications Act had provisions that conferred that mandate upon other bodies in contravention of article 34(5)(c) of the Constitution which anticipated the body to be the MCK created by the Media Council Act. In particular, it was noted that sections 46A(e), (i), (j) and (k), 46H; 46H, 46(J), 46K, 46L(2)(3)(4) and (5), 46M of the Kenya Information and Communications Act and regulations 37, 38, 40(d) ,42 and 46Q(2)(c) of the Kenya Information Communication (Broadcasting) Regulations,2009 (the impugned provisions) conferred the power *inter alia* to the CAK, to set standards for the time and manner of programmes to be broadcast , set up a dispute resolution procedure, gave it the power to prescribe a programme code among others.

The petitioner also deponed that the CAK through a public notice in the local dailies, notified about the implementation of the Programing Code for Broadcasting Services in Kenya which was unconstitutional. The petitioner thus sought among other orders; a declaration that the CAK did not have the power and authority to set media standards including programming standards for broadcast media; a declaration that the Broadcasting Code for broadcast media as prescribed by CAK was unconstitutional; and a declaration that the impugned provisions were unconstitutional.

Issues

i. What were the principles to be applied in the interpretation of the Constitution and in determining the constitutionality of statutes?

ii. What was the distinction between the roles of the Communications Authority of Kenya and the Media Council of Kenya?

iii. Whether section 46A(i) and (j) of the Kenya Information and Communications Act was unconstitutional for giving the Communications Authority of Kenya a similar role to that given to the Media Council of Kenya under article 34(5) of the Constitution.

iv. Whether the Kenya Information and Communications Act's dispute resolution mechanism impeded the implementation of the dispute resolution procedure under the Media Council Act hence unconstitutional.

v. Whether governmental control or censorship through giving of directions on media content and as to how and when content should be aired was adversative to the independence and freedom of media.

vi. Whether it was the responsibility of the Communications Authority of Kenya to set and monitor the ethical codes for the protection of the children and/any other vulnerable group and to monitor and enforce them.

Relevant provisions of the Law

Constitution of Kenya

Article 34 - Freedom of the media

(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.

(4) All State-owned media shall—

(a) be free to determine independently the editorial content of their broadcasts or other communications;

(b) be impartial; and

(c) afford fair opportunity for the presentation of divergent views and dissenting opinions.

(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.

Kenya Information and Communications Act (cap 411)

Section 46A - 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;

(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.

Section 46H - Commission to prescribe programme code

(1) The Commission shall have the power to set standards for the time and manner of programmes to be broadcast by licensees under this Act.

(2) Without prejudice to the generality of subsection (1), the Commission shall—

(a) prescribe a programming code;

(b) review the programming code at least once every two years;

(c) prescribe a watershed period programming when large numbers of children are likely to be watching or listening to programmes; and

(d) ensure compliance with the programming code prescribed under this section:

Provided that the programming code referred to herein shall not apply where a licensee is a member of a body which has proved to the satisfaction of the Commission that its members subscribe and adhere to a programming code enforced by that body by means of its own mechanisms and provided further that such programming code and mechanisms have been filed with and accepted by the Commission.

Held

1. The court had a duty to interpret the Constitution in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights in a manner that contributed to good governance. In exercising its judicial authority, the court was also obliged under article 159(2)(e) of the Constitution to protect and promote the purposes and principles of the Constitution.
2. There were a number of well-established principles employed in interrogation of the constitutionality or lack thereof of a statute or a provision.
    1. There was a general presumption that every Act of Parliament was constitutional.
    2. The purpose and effect of the impugned provision could also be examined in determining constitutionality of a statute.
    3. The court was required to interrogate the intention articulated and intended in the statute.
    4. The burden to prove the unconstitutionality of a statute was on whoever alleged that the Act was unconstitutional.
    5. A law which violated the Constitution was void.
3. The Constitution at article 34 guaranteed the freedom of the media. The unconstitutionality of the impugned statutory provisions would arise where it was clear that the statutory provisions ran afoul the constitutional provision such as in where the particular regulation was demonstrated to unjustifiably impede a fundamental freedom guaranteed by the Constitution, as alleged in the present case, if it was violation of the freedom of the media or freedom of expression either under article 34 or 33 of the Constitution or if it was contrary to the constitutional values and principles.
4. The Supreme Court judgment in the case of *Communications Commission of Kenya v Royal Media Services & 5 others* (2014) eKLR was significant as article 163(7) of the Constitution, provided that all courts other than the Supreme Court were bound by the decisions of the Supreme Court. The Supreme Court interpreted article 34(3) of the Constitution as providing the constitutional backing for the mandate of the CAK in matters concerning licensing. The mandate of the CAK could thus be concluded to trace its constitutional validity in article 34(3), not article 34(5) which expressly related to the MCK.
5. Article 34(3) of the Constitution anticipated the establishment of a regulator to regulate the media markets through licensing which may include setting technical standards, regulation of ownership of the media, setting licensing conditions among others. Article 34(5) on the other hand contemplated the creation a body that would make possible the protection and enjoyment of the media freedom and the freedom of expression.

6. From a constitutional viewpoint, under article 34(5), MCK was the body clothed with the authority to set media standards and to monitor their compliance. That meant that to the extent that section 46A(i) and (j) of the Kenya Information and Communications Act gave a similar role to CAK, that was a misplaced duplication which only succeeded in creating jurisdictional duplicity. Section 46A(i) and (j) was thus unconstitutional.
7. The regulator (CAK) could and may develop and prescribe licensing conditions/ standards relevant to the broadcasting or electronic licences but only if that did not infringe on the Constitution or meddle with the mandate of MCK.
8. For the complaint that there were two parallel dispute resolution procedures provided for in the Kenya Information Communications Act and the Media Council Act which created confusion, one had to look at that issue from a perspective of the two bodies performing distinct roles. Conflicts were bound to occur in either regime. Providing for dispute settlement procedure to allow disputes emanating from licensing to be dealt with under the Kenya Information Communications Act was not *per se* unconstitutional if it related to specific matters falling under the scope of CAK and while those under the MCK could be dealt with under the Media Council Act.
9. The petitioner did not demonstrate that the Kenya Information and Communications Act dispute resolution mechanism had in any way impeded the implementation of the dispute resolution procedure under the Media Council Act or the Constitution. Article 159 of the Constitution embraced alternative dispute resolution procedures which the two Acts had embodied.
10. On the allegation that the issuance programming code was unconstitutional, CAK demonstrated (without a rebuttal from the petitioner), that the programming code was issued pursuant to revised Regulations of 2018, not 2009. CAK also described the broadcasting code as 'licensing standard' meant to protect children during the watershed moment and was not in any way or form a media standard. CAK further claimed that the need to issue the programming code was informed by the public interest to protect the children from harmful content during the watershed period.
11. Inappropriate content on children may possibly be classified into two classifications. There was that which was outrightly illegal such as exposing children to pornography which was a matter of criminal law implemented by the State. There was that which was not criminal but inappropriate on moral grounds such as airing content that was not suitable for children viewing. Under the Constitution article 53(1)(d), children were supposed to be protected from all forms of abuse.
12. Article 53(2) of the Constitution provided that a child's best interests were of paramount importance in any matter concerning the child. Under article 21(3) of the Constitution all State organs and all public officers had a duty to address the needs of vulnerable groups within the society including women, older members of the society, persons with disabilities, children, youth, members of minority or marginalized communities among others.
13. Governmental control or censorship through giving of directions on media content and as to how and when content should be aired was adversative to the independence and freedom of media from governmental control and was against the principles of a free and independent media that article 34 of the Constitution provided for. If it was a question of content being inappropriate, that was an ethical issue which should be dealt under the context of media standards by media workers not by the media regulator. It was an issue concerning media standards which was for MCK to oversight.
14. CAK and MCK could not work in isolation and must work collaboratively to ensure that children were protected. To the extent that the programme code by CAK veered off into MCK's mandate to develop age-appropriates programme code for broadcasting services in Kenya that was potentially intrusive and a threat to emasculate the freedom of the media by expressly undermining the provisions of article 34(5) of the Constitution. It ought to be responsibility of MCK to set and monitor the ethical codes for the protection of the children and/any other vulnerable group and to monitor and enforce them,

not CAK. The court must uphold the independence of the media as protected under article 34 which advanced the rule of law and upheld the principles and purpose of the Constitution.

Petition allowed.

Orders

i. *Section 46Ai and j and 46H(1) of the Kenya Information and Communications Act was unconstitutional.*

ii. *A declaration was issued that the Broadcasting Code for broadcast media as prescribed by CAK was unconstitutional and therefore null and void.*

iii. *Notwithstanding order no. ii, considering that the need to protect children from inappropriate media content was paramount, the court suspended the order declaring the broadcasting code by CAK unconstitutional for six months to enable MCK develop age-appropriate standards to protect children and other vulnerable persons from inappropriate media content.*

iv. *No orders as to costs.*

Citations

Cases

Kenya

1. *Andare, Geoffrey v Attorney General & 2 others* Petition 149 of 2015; [2016] KEHC 7592 (KLR) - (Explained)
2. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Followed)
3. *Council of County Governors v Attorney General & another* Constitutional Petition 56 of 2017; [2017] KEHC 6395 (KLR) - (Mentioned)
4. *County Government of Nyeri & another v Cecilia Wangechi Ndungu* Petition 1 of 2014; [2015] KEELRC 1142 (KLR) - (Explained)
5. *In the Matter of the Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) - (Mentioned)
6. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Application 29 of 2014; [2014] KESC 6 (KLR) - (Followed)
7. *Nation Media Group Limited & 6 others v Attorney General & 4 others; Consumer Federation of Kenya & 4 others (Interested Parties)* Petition 30 & 31 of 2014 (Consolidated); [2016] KEHC 7689 (KLR) - (Followed)
8. *Okoiti, Okiya Omtatah v Communication Authority of Kenya & 8 others* Constitutional Petition 53 of 2017; [2018] KEHC 7513 (KLR) - (Followed)
9. *Waititu, Ferdinand Ndung'u v Independent Electoral & Boundaries Commission (IEBC) & 8 others* [2014] KECA 615 (KLR) - (Explained)

Tanzania

Ndyanabo v Attorney General [2001] EA 495 - (Followed)

Uganda

Olum & another v Attorney General Constitutional Petition 6 of 1999 - (Explained)

United Kingdom

Pearlberg v Varty [1972] 1 WLR 534 - (Followed)

India

Hamdard Dawakhana v Union of India Air (1960) AIR 554, 1960 SCR (2)671 - (Explained)

United States

US v Butler 297 US 1 (1936) - (Explained)

Canada

R v Big M Drug Mart Ltd [1985] CR 295 - (Followed)

Statutes

Kenya

1. Constitution of Kenya articles 34, 53(1)(d); 53(2); 159 - (Interpreted)
2. Kenya Information and Communication (Broadcasting) Regulations (cap 411A Sub Leg) regulations 37, 38, 40(1)(d); 41; 42 - (Interpreted)
3. Kenya Information and Communications Act (cap 411A) sections 6,46A(e)(i)(j)(k); 46H; 46J(a); 46K(a); 46L(2)(3)(4); 46M; 46H; 46Q(c); 102A; 102E - (Interpreted)
4. Kenya Information and Communications Act (cap 411A) sections 46A(i)(j); 46H(1) - (Unconstitutional)
5. Media Council Act (cap 411B) Schedule 2; sections 6(1)(e);6(1)(j);27-44 - (Interpreted)

Advocates

Oduor Ibrahim for the petitioner

SM Kilonzo and Associates for the 1st respondent

Muma and Kanjama Advocates for the interested party

JUDGMENT

Introduction

1. The initial is petition dated December 13, 2019 but was afterward amended on March 9, 2020. It is supported by the petitioner's Secretary General, Erick Oduor's affidavit.

2. This petition challenges the constitutionality of sections 46A(e), (i), (j) and (k); 46 H; 46J(a); 46K(a); 46L(2), (3) & (4), 46M, 46H as read with 46Q(c) and section 102A as read together with section 102E of *Kenya Information and Communication Act*, 1998 and regulations 37, 38, 40(1)(d), 41 and 42 of the *Kenya Information and Communication (Broadcasting) Regulations*. In addition, it also assails the Programing Code for Broadcasting Services issued by Communications Authority of Kenya.

3. The petitioner seeks the following relief against the respondents:

    i. A declaration that the Communications Authority of Kenya does not have the power and authority to set media standards including for programming standards for broadcast media.

    ii. A declaration that the Broadcasting Code for broadcast media as prescribed by Communications Authority of Kenya is unconstitutional and therefore null and void.

    iii. A declaration that sections 46A(e),(i), (j) and (k); 46H; 46J(a); 46K(a); 46L(2),(3) & (4), 46M, 46H as read with 46Q(c) and section 102A as read together with section 102E of *Kenya Information and Communication Act*, 1998 and regulations 37, 38, 40(1)(d), 41 and 42 of the *Kenya Information and Communication (Broadcasting) regulation*s are unconstitutional.

    iv Costs of this petition.

    v Any other order this court may deem fit and just in the circumstances.

Petitioners' Case

4. The petitioner depones under the current *Constitution*, one of the rights recognized under article 34 is the freedom of media pursuant to which sub - article (5) which provides the manner in shall be realized by directing that 'Parliament shall enact legislation that provides for the establishment of a body, which

shall- be independent of control by government, political interests or commercial interests; reflect the interests of all sections of the society; and set media standards and regulate compliance with those standards'. It is averred that the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] KESC 53 (KLR) affirmed that the body contemplated thereunder is in fact the Media Council of Kenya, (the interested party herein).

5. The petitioner posits that despite this clear position, the Kenya Information and Communications Act (KICA) has provisions that confer that mandate upon other bodies in contravention of article 34(5)(c) of the *Constitution* which anticipates the body to be the Media Council created by the *Media Council Act* as this was the Act enacted to give effect to article 34 (5) of the *Constitution* .

6. In particular, it is noted that sections 46A(e)(i)(j) and (k), 46H; 46H, 46(J), 46K, 46L(2)(3)(4) and (5), 46M of the *KICA* and regulations 37, 38, 40(d) ,42 and 46Q(2)(c) of the *Kenya Information Communication (Broadcasting) Regulations*,2009 confers the power *inter alia* to the Communications Authority of Kenya, to set standards for the time and manner of programmes to be broadcast , set up a dispute resolution procedure, gives it the power to prescribe a programme code among others.

7. Furthermore, that section 102A(a) and (b) as read with section 102E of the *KICA* confers the Multimedia Appeals Tribunal, jurisdiction over broadcast media disputes.

8. Consequently, it is argued that these provisions and regulations are unconstitutional in light of article 34(5) of the *Constitution* . The petitioner thus stated that the 1st respondent has usurped the mandate of the interested party to the detriment of the media practitioners in Kenya.

9. In addition, he depones that the 1st respondent on December 8, 2019 through a public notice in the local dailies, notified about the implementation of the Programing Code for Broadcasting Services in Kenya which the petitioner contends was in blatant disregard of article 34(5) of the *Constitution* and the Supreme Court's pronouncement hence unconstitutional.

10. The petitioner opposed the code pointing out that it is based on the retired provisions of the *Kenya Information and Communication Broadcasting Regulations*, (2009). Moreover, the areas it purports to cover are already addressed in the Code of Conduct for Practice of Journalism under Schedule 2 of the *Media Council Act* hence is an unnecessary duplication.

11. Moreover, it is contended that the Code's language is vague, generalized and uncertain. It is alleged that this has restricted the general conduct of journalism and exposed the petitioner's members to a myriad of complaints. Likewise, he points out that the Code limits the freedom of media in violation of article 34 of the *Constitution* .

12. It is asserted that this is made more apparent by section 6 of the *KICA* which establishes that the composition of the Board. The Board comprises of a chairperson appointed by the President, principal secretaries and seven persons appointed by the Cabinet Secretary. Essentially, it is argued that the Body is under the control of the Government which is in sharp contrast to the heart of article 34(5) of the *Constitution* .

13. The petitioner is accordingly aggrieved by the 1st respondent's actions as prescribed by the impugned provisions of the *KICA*, its regulations and the Programming Code. This is because it amounts to establishment of a system in disregard of article 34(5) of the *Constitution* . On this premise, the petitioner urges this court to allow the petition.

1st Respondent's Case

14. In reply, the 1st respondent filed its replying affidavit by its Acting Director, Peter Martin Ikumilu, sworn on March 2, 2020.

15. Similarly, relying on the Supreme Court's pronouncement in the Communications Commission of Kenya (*supra*), the 1st respondent avers that it is the body mandated to license broadcasting and other electronic media. This authority is provided for under article 34(3) of the *Constitution* . Likewise, this mandate also extends to regulation of standards of these spheres. Accordingly, it is stated that the 1st respondent's function is to prescribe broadcasting licensing standards as empowered under the *KICA*.

16. He further contends that the Programming Code for Broadcasting Services in Kenya contrary to the petitioner's allegation is not a media standard but a licensing standard in line with its mandate under section 5 and 46H of the *KICA* as read with article 34(3) of the *Constitution* . Nevertheless, he states that although this Code is mandatory to all broadcasting licensees, it does not apply to a licensee who is a member of a body that subscribes and adheres to a Programming Code enforced by that body.

17. He further alleges that the implementation of the Programming Code was done in accordance with its mandate in the *Constitution* . He notes that the process of preparation commenced in 2011. The Code was subjected to stakeholder consultations between 8th April and May 7, 2015. The participants included the petitioner as represented by Erick Oduor. Additionally a stakeholder's workshop was held on July 9, 2015.

18. He states that thereafter the first version of the Programming Code was gazetted on December 31, 2015. Owing to the stakeholders concerns, the Code was revised to incorporate their input. The second version of the Code was published in March 2016 and came in force on July 1, 2016. He informs that this Code by virtue of section 46H (2) (b) of *KICA* is to be reviewed once every 2 years. Consequently the Code was due for review in 2018.

19. Before the review, the 1st respondent invited the stakeholders for consultation between December 18, 2018 and January 18, 2019.Equally, a stakeholder's workshop was held on 2February 8, 2019. The revised Code was then gazetted on April 12, 2019. The effective date was 6 months from the date of gazettement. In light of this, it is stated that contrary to the petitioner's assertion the Code was not published in September 2019.

20. The 1st respondent states that the provisions of the Code that are allegedly vague and general are not particularized by the petitioner. Moreover that the impugned provisions are constitutional. Further that they are not premised on the function stipulated under article 34(5) of the *Constitution* but the 1st respondent's licensing function in setting the licensing standards in accordance with article 34(3) of the *Constitution* .

21. He points out that in relation to section 102A of the *KICA*, the Communications and Media Appeals Tribunal is not a party in this suit and hence a determination in that effect in their absence would be inappropriate.

22. The 1st respondent as well argues that the petition does not meet the threshold for a constitutional petition as the petitioner does not identify the extent to which the impugned provisions violate the Constitution. Consequently, the 1st respondent urges the court to dismiss the petition.

2nd Respondent's Case

23. This respondent's reply and submissions to the petition are not in the court file or court online platform (CTS).

Interested Party's Case

24. The interested party in response through its Chief Executive Officer, David Omwoyo filed its replying affidavit sworn on March 9, 2020.

25. He informs that supervisory control of the media industry is divided into two spheres to wit regulation and administration. With reference to regulation and supervision of media content, article 34(5) of the *Constitution* envisages the establishment of an independent body with the distinct mandate of setting media standards, regulation and monitoring of compliance of the set standards.

26. In this regard, the interested party was established under the *Media Council Act*, 2013 and set these standards as seen under the Second Schedule of the Act. Additionally, it regularly issues guidelines and continues to develop regulations for the sector including the Media Practitioners Code of Conduct and the Advertisers Code of Conduct.

27. On the other hand, he avers that the 1st respondent is the body established with the function of generally administering the communication infrastructure in broadcasting, cyber security, multimedia, telecommunications, electronic commerce, postal and courier services. Accordingly this body has the exclusive licensing power of these operators.

28. The interested party however alleges that there are overlapping mandates between the statutory bodies created in the respective statutes and that of the 1st respondent. With regard to the matter at hand, he notes that this issue has been canvassed by the courts in *Nation Media Group Limited and others v Attorney General and Others*(2016)eKLR and Communications Commission of Kenya (*supra*).

29. In view of the foregoing the interested party urges this court to make a definitive pronouncement over this issue and also grant orders for the effective realization of article 34(5) of the *Constitution* .

Parties' Submissions

Petitioner's Submissions

30. In the submissions dated April 18, 2022, the petitioner's counsel, Oduor Ibrahim sought to discuss:

> "whether the 1st respondent has jurisdiction to prescribe media standards including broadcasting standards; whether the Programming Code is equivalent to Media Standards; whether the impugned provisions are unconstitutional; whether Section 102A, to the extent that it concerns itself with publications, conduct of journalists or media enterprises is unconstitutional and thus what remedies should issue."

31. On the first issue, counsel argued that the 1st respondent lacks jurisdiction to set media standards and so its implementation of the Programming Code is *ultra vires*. Counsel contended that upon enactment of the *Constitution* in 2010 this role particular role was vested on the interested party by virtue of article 34(5) of the *Constitution* which was effectuated by the enactment of the *Media Council Act*. It was submitted that this position was also affirmed by the Supreme Court in Communications Commission of Kenya (*supra*) and the High Court in *Nation Media Group Limited & 6 others v Attorney General & 9 others* [2016] eKLR.

32. Counsel further stressed that section 7 of the sixth schedule of the *Constitution* provides that where a law enacted before the promulgation of the *Constitution* confers a function on a body, and a provision of the *Constitution* confers that function to a different body, then the provision of the *Constitution* prevails.

33. On whether the programming code is equivalent to media standards, the petitionerstated that this issue was settled by the Supreme Court in Communications Commission of Kenya (*supra*) as follows:

> "(172) Sub-article (c) of article 34(5) of the *Constitution* provides for the functions of the body to be established. It is to set media standards, and regulate and monitor compliance with those standards. What do the words "media standards" mean, in the context of the media sector and its operations" It is apparent from the wording of this article that the *Constitution* requires Parliament to establish a standards-compliance watchdog, some kind of media -oversight authority. This same watchdog is expected to set those standards, and regulate them.
>
> (173) In conventional parlance, the phrase "media standards" is used to convey the sense of the professional qualifications, and codes of conduct and ethics, for media practitioners. The standards denote not only who qualifies to practice, for example, as a journalist or correspondent, but also how media practitioners and media houses should conduct themselves in the course of their functions."

34. Counsel submitted that the impugned provisions are indeed unconstitutional to the extent outlined in the petitioner's affidavit. Further counsel argued that these provisions provide for a parallel regulatory regime contrary to the Constitution's prescription and comparable provisions in the *Media Council Act*. It was argued that this creates duplication and an overlap of functions between the two bodies which in turn creates ambiguity and uncertainty.

35. On the 3rd issue, whether the impugned provisions are unconstitutional; counsel submitted that section 102A(a) and (b) as read together with section 102E confers the Multimedia Appeals Tribunal, jurisdiction over broadcast media contrary to article 34 (5) of the *Constitution* and section 27 of the *Media Council Act.* Consequently, these provisions run parallel to the elaborate framework for dispute resolution set out under Part V of the *Media Council Act*.

36. From the foregoing, counsel summed up by submitting that the 1st respondent by dint of article 34(5) of the *Constitution* does not have the mandate to set media standards. That this mandate belongs to the interested party. On this premise the impugned provisions in the *KICA* and the Programming Code are unconstitutional.

1st Respondent's Submissions

37. In support of its case, the 1st respondent filed submissions dated March 4, 2020 through SM Kilonzo and Associates. Counsel sought to highlight:

> "whether the 1st respondent has jurisdiction to prescribe media standards; whether the Programming Code is equivalent to media standards; whether the impugned sections are unconstitutional; whether section 102A of the *KICA* is unconstitutional and whether the reliefs should issue."

38. In the first issue, counsel submitted that the 1st respondent under section 5 of the *KICA* is mandated to license and regulate the broadcasting industry. That, section 46H of the *Act* empowers the 1st respondent to prescribe and review a Programming Code to be adhered to by all broadcasting licensees. Accordingly, the 1st respondent established the impugned Programming Code as detailed in the 1st respondent's affidavit.

39. On whether this function usurps the interested party's role, Counsel answered in the negative. He relied on the Supreme Court pronouncement in Communication Commission of Kenya (*supra*) which he noted separated the functions of the two bodies. The 1st respondent's function was affirmed as licensing and regulation of the information and communications sector as derived from article 34(3) of the *Constitution* , while that of the interested party is to set and regulate media standards as derived from article 34(5) of the *Constitution* . In nutshell the court held as follows:

> "
>
> "(178) It is clear from the two statutes that the body contemplated by article 34(5) of the *Constitution* is the Media Council of Kenya, and not the successor to the CCK. The legislation passed by Parliament leaves no doubt as to what CCK's successor understood its remit to be, under the *Constitution*
>
> ....
>
> (369) Sub-article 3 of article 34 provides for the licensing of broadcasting and other electronic media, subject to licensing procedures that are necessary to regulate airwaves and other forms of signal distribution; and are independent of control of government, political interests or commercial interests. This sub-article refers to the licensing procedures that are to be carried out by CAK.
>
> .....
>
> [371]Sub-article 5 of article 34 mandates Parliament to enact legislation that provides for the establishment of a body which shall be independent of control by Government, political interests or commercial interests; reflect the interests of all sections of all sections of the society; and set media standards and regulate and monitor compliance with those standards. This sub-article refers to the Media Council."

40. Accordingly counsel stressed that it is apparent that the 1st respondent does not set media standards as advanced by the petitioner. That the Programming Code only concerns itself with the licensing conditions to wit among others, consumer protection, copyright protection, enhancement of consumption of local content and accessibility of broadcasting services by persons with disabilities. Nonetheless counsel recapped that compliance with this Code is not mandatory to members of a body such as the petitioner.

41. Tying to this, counsel in the second issue also answered in the negative. This is because the Programming Code as stressed is not a set of media standards but a licensing standard for regulation of the broadcasting industry.

42. Moving to the third issue, counsel submitted thus that the impugned provisions are constitutional as they relate to the 1st respondent's authority under article 34(3) of the *Constitution* not article 34(5).

43. On the fourth issue, counsel stressed that it has been held time and again that the principles of natural justice demand that a person set to be adversely affected by the decision of a court ought to be heard. In this matter the body challenged in view of section 102A of *KICA*, the Communications and Media

Appeals Tribunal is not a party in the instant suit. For this reason counsel submitted that the court ought not to make a finding on the constitutionality of this provision in the Tribunal's absence.

44. Reliance was placed in *Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others* [2018] eKLR where it was held that:

> "150. Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.[106] The Supreme Court of India put it succinctly:-[107]
>
> "No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles ... provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail..."
>
> 151. The invitation by the petitioner to this the court to try and condemn undisclosed persons who are not parties to this Petition is an open invitation to this court to violate the above constitutional and common law principles which are ingrained in our jurisprudence and legal system. I decline the said invitation."

45. In light of these submissions counsel argued that the petitioner was not entitled to the reliefs sought and that the costs should be awarded to the 1st respondent.

46. In addition it was stressed that the petition is incompetent for failure to meet the threshold set for a constitutional petition. Reliance was placed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where the Court of Appeal held that:

> "(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims..."

Interested Parties Submissions

47. Muma and Kanjama Advocates filed submissions dated September 4, 2023 for the interested party herein. The issue for determination was identified as whether the 1st respondent has a role to play in setting media standards and regulating and monitoring compliance in light of those standards.

48. Counsel submitted that a reading of article 34(5) of the *Constitution* makes it plain that the *Constitution* contemplated the establishment of an independent body free from the control of government and commercial interests. This, counsel stated was acknowledged by the Supreme Court in Communications Commission of Kenya (*supra*) where it was held that:

> "Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards

in place, in order to attain "independence" in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body."

49. On the flipside, counsel acknowledged that the interested party in performing its functions is not called to operate in isolation but in collaboration with other bodies such as the 1st respondent as appreciated by the Supreme Court in the *Matter of the Interim Independent Electoral Commission* [2011] eKLR.

50. That said, counsel reiterating and relying on the averments in the interested party's affidavit submitted that the contention of the overlapping roles of these two bodies is not novel. Counsel stated that the two bodies worked interdependently as the 1st respondent is the licensing authority.

51. Counsel noted however that the issue stems from the fact that prescription of media standards cannot be divorced from licensing procedures. As such the full realization of article 34(5) of the *Constitution* requires the two bodies to work hand in hand.

52. Counsel on this premise submitted that the Programming Code is a fundamental legal instrument that ensures harmony and order in the media industry. For this reason, it was argued that this Code must reflect the prerequisites of the two bodies and represent the values of the Kenyan people as is also evident in other comparative jurisdictions such the United Kingdom and the United States of America.

53. On this premise, counsel submitted that the gist of the argument was that the 1st respondent and the interested party should collaborate in developing codes and guidelines in this industry.

Analysis and Determination

54. Arising from the pleadings and the submissions, it is manifest that the issues that arise for determination in this matter are as follows:

    i. Whether or not sections 46A(e), (i), (j) and (k); 46H; 46J(a); 46K(a); 46L(2),(3) & (4), 46M, 46H as read with 46Q(c) and section 102A as read together with section 102E of *Kenya Information and Communication Act*, 1998; regulations 37, 38, 40(1) (d), 41 and 42 of the *Kenya Information and Communication (Broadcasting) Regulations* and the Programing Code for Broadcasting Services are constitutional.

    ii. Whether the petitioner is entitled to the relief sought.

55. The petitioner's main contention is the constitutionality of the impugned provisions in relation to the 1st respondent's and interested party's mandate in regulating the media industry.

56. To determine this question will require delving into the said provisions and examining them closely as against each other and ultimately the *Constitution* and decide on their constitutionality or otherwise hence need to apply both statutory and principles of constitutional interpretation.

57. Article 259 of the *Constitution* is thus germane. This court has a duty to interpret the *Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights in a manner that contributes to good governance. In exercising its judicial authority, this court is also obliged under article 159(2) (e) of the *Constitution* to protect and promote the purposes and principles of the *Constitution* .

58. The Court of Appeal in *Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others* [2014] eKLR elucidating on the principles of constitutional interpretation held:

> "I accept the proposition that the appellant has put forward, that the *Constitution* must be interpreted in a liberal, purposive and progressive manner, in order to give effect to the principles and values contained therein. This is found at article 259(1) of the *Constitution* which is framed as follows:
>
> Article 259. (1) This *Constitution* shall be interpreted in a manner that—
>
> a. promotes its purposes, values and principles;
>
> b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
>
> c. permits the development of the law; and
>
> d. contributes to good governance.
>
> These principles have been reiterated time and again by our courts. In *Njoya & 6 others v Attorney General & 3 others No 2* [2008] 2 KLR (EP), this court held that:
>
> The *Constitution* is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it."

59. Correspondingly, the Supreme Court in the *Matter of the Interim Independent Electoral* [2011] KESC 1 (KLR) guided as follows:

> "(86) .....The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). The *Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The *Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the preamble, in article 10, in chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.
>
> (87) In article 259(1) the *Constitution* lays down the rule of interpretation as follows: "This *Constitution* shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

(88) These constitutional imperatives must be implemented in interpreting the provisions of article 163(6) and (7), on Advisory Opinions. Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

(89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the *Constitution* compels a broad and flexible approach to interpretation."

60. Equally, in Communications Commission of Kenya (*supra*) the Supreme Court stated as follows:

"(137) This, in our perception, is an interpretive conundrum, that is best resolved by the application of principle. This court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the *Constitution* should be interpreted in a holistic manner, within its context, and in its spirit. *In the Matter of the Kenya National Human Rights Commission*, Sup Ct Advisory Opinion Reference No 1 of 2012;[2014] eKLR, this court [paragraph 26] had thus remarked:

"...<u>But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context.It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result</u>" [emphasis supplied].

(138) In *Speaker of the Senate & Another v Attorney-General & 4 Others*, Sup Ct Advisory Opinion No 2 of 2013; [2013] eKLR, [paragraph 156], this court further explicated the relevant principle:

"The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize

> vagueness in phraseology and draftsmanship. It is to the courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, *Constitution* making does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitutions borne out of long drawn compromises, such as ours, tend to create. The constitutional text and letter may not properly [capture] express the minds of the framers, and the minds and hands of the framers may also fail to properly mind the aspirations of the people. It is in this context that the spirit of the *Constitution* has to be invoked by the court as the searchlight for the illumination and elimination of these legal penumbras."

61. On the other hand, there are a number of well-established principles employed in interrogation of the constitutionality or lack thereof of a Statute or a provision. The first is that there is a general presumption that every Act of Parliament is constitutional. This principle was captured by the Court of Appeal of Tanzania in *Ndyanabo v Attorney General* [2001] EA 495 being a restatement of the law in the English case of *Pearlberg v Varty* [1972] 1 WLR 534 that:

> "Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative"

62. Addressing the principle of presumption of constitutionality of a statute, the Supreme Court of India in *Hamdard Dawakhana v Union of India AIR* (1960) AIR 554, 1960 SCR (2)671 stated as follows:

> "In examining the constitutionality of a statute it must be assumed that the legislature understand and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment."

63. The purpose and effect of the impugned provision can also be examined in determining constitutionality of a statute. This principle was applied in the case of *R v Big M Drug* 1985 SCR 295 as cited with approval in Geoffrey Andare v Attorney General & 2 others [2016] eKLR as follows:

> "Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of legislation, object and its ultimate impact are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

64. This principle also cited in *Olum and another v Attorney General* [2002] 2 EA, where the Constitutional Court of Uganda held:

> "To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further

and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the constitution, the impugned statute or section thereof shall be declared unconstitutional…"

65. Furthermore, the court is required to interrogate the intention articulated and intended in the Statute. This was confirmed by the 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…"

66. The burden to prove the unconstitutionality of a statute is on whoever alleges that the Act is unconstitutional. The case of *US v Butler* 297 US 1 (1936), a persuasive authority held thus:

> "When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the *Constitution* which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."

67. Furthermore, in *Council of County Governors v Attorney General & another* [2017] eKLR the Ccourt highlighted another critical principle in the interpretation of Statute by stating as follows:

> "A law which violates the constitution is void. In such cases, the court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on grounds that it infringes the constitution, what the court has to consider is the "direct and inevitable effect" of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.
>
> Thus, the history behind the enactment in question should be borne in mind. Thus any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom the *Constitution* vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with the Constitution."

68. These principles that must guide this court in answering the question whether the impugned provisions cited by the Petitioner are unconstitutional or not. In that regard, it is imperative that I set out the relevant constitutional provisions and the contested provisions of the two statutes for a thorough judicial scrutiny.

69. The *Constitution* at article 34 guarantees the 'Freedom of the media' and sets it out as follows:

> 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 dissemination of information by any medium; or

b) penalize any person for any opinion or view or 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

4) All State-owned media shall-

a) be free to determine independently the editorial content of their broadcasts or other communications;

b) be impartial; and

c. afford fair opportunity for the presentation of divergent views and dissenting opinions

5) Parliament shall enact legislation that provides for the establishment of a body, which shall-

a. be independent of control by government, political

70. The unconstitutionality of the impugned statutory provisions would arise where it is clear that the statutory provisions run afoul the constitutional provision such as in where the particular regulation is demonstrated to unjustifiably impede a fundamental freedom guaranteed by the Constitution, the present case, if it is violation of the freedom of the Media or freedom of expression either under article 34 or 33 of the *Constitution* or if it is contrary to the constitutional values and principles.

71. According to the petitioner, setting of media standards and monitoring the standards is the exclusively the preserve of the Media Council of Kenya which is established under the *Media Council Act* cap 411 B and anchored on article 34(5) of the *Constitution* which states that the setting media standards, monitoring and regulating them is responsibility of a body established pursuant to provisions of article 34(5) of the *Constitution* .

72. The petitioner submitted that there is 'jurisdictional duplicity' between the functions of Media Council under the *Media Council Act* as provided for in section 6(1) of the *Act* and the provisions of the *Kenya Information and Communications Act*. He cited section 46A which grants Communication Authority the Communications Authority of Kenya the power to set media standards and monitor compliance with those standards, 46H which grants the Communications Authority the power to set standards for time and manner of programmes to be broadcast by licensees and to prescribe a programming code, to review it every two years and to provide the watershed period when large numbers of children are likely to be watching or listening to the programme, to ensure compliance with programming code as a replicating section 6(1) b, d, g, and k of the *Media Council Act* thereby

violating article 34(5) of the *Constitution* . According to the Petitioner this amounts to usurpation of a mandate that is constitutionally designated a domain of the Media Council. The Petitioner assails the provisions of section 46A(e), (j), (k) of the *Kenya Communications Act* for conferring the 1st Respondent the role of setting and administering media standards including providing broadcasters with appropriate internal mechanisms for disposing complaints in relation to broadcasting disputes, administering broadcasting content as well as section 46(J)(a) which gives Communication authority the power to revoke broadcasters licences if they fail to comply with the code as an affront to the powers conferred on the Media Council of Kenya. Likewise, Section 46K which mandates the Cabinet Secretary to make regulations for broadcasting services as obscures section 6(1) e and j of the *Media Council Act*.

73. The petitioner further singled out section 46l(2), 3, 4, & 5 on dispute resolution procedure as being in conflict with what is envisaged by article 34(5). The petitioner contended that section 46L read with 46M give the Communication Authority the power to resolve disputes yet media disputes are supposed to be resolved under the *Media Council Act* which at section 27 establishes the Media Complaints Commission with powers to resolve media disputes. According to the petitioner, setting up a parallel dispute resolution mechanism under the *Kenya Information and Communication Act* is unconstitutional.

74. The petitioner further faulted regulations 37, 38, 40(1)(d), 42, of the *Kenya Information and Communication (Broadcasting) Regulations* 2009 for giving the 1st respondent the power to prescribe a programme code and set the standards, time and manner of programmes to be broadcast by licensees, to receive and approve a code that is prepared by a registered body of broadcasters wishing to operate their own code, having a supervisory mandate over complaints received and handled by broadcasters operating under their own code, the power to hear appeals from broadcasters complaint handling procedures and to investigate matters where a broadcaster is suspected to be in breach of the code as being in conflict with section 6(1) a, b, d, g & k of the *Media Council Act* and also in violation of the *Constitution* in particular, article 34(5).

75. Equally challenged was section 102A(a) and (b) together with 102E for providing for a Multi-Media Appeals Tribunal which it was argued is contrary to article 34(5) and it was an overlap given the provisions of *Media Council Act*- section 27 to 44 which has provided for an elaborate dispute resolution framework.

76. While acknowledging that the provisions cited by the petitioner under the Kenya Information and Communications Act relate to its mandate; the 1st respondent stated that it was exercising its mandate under section 46H, when it drafted the Programming Code for Broadcasting Services in Kenya 3rd Edition- September, 2019 which revised the one that had been in place since July 1, 2016 and did not in any way usurp the mandate of the interested party (the Media Council). It insisted that its mandate is distinct and was issued in relation to licensing function. It cited the Supreme Court decision of *Communications Commission of Kenya v Royal Media Services & 5 others* (2014) eKLR which explained that the roles of the two bodies are distinct as 1st respondent does licensing and regulation of the information and communications sector (including broadcasting, multimedia, telecommunication and postal services) under the Constitutional anchor of article 34(3) while the Media Council's role (the interested party) is setting media standards regulating and monitoring compliance anchored on article 34(5) of the *Constitution* .

77. At this juncture I will set out the impugned statutory provisions beginning with section 6(1) and section 27 of the *Media Council Ac*t which provides for the various function of the Media Council

Functions of the council

6.

(1) The functions of the council are to—

a. promote and protect the freedom and independence of the media;

b. prescribe standards of journalists, media practitioners and media enterprises;

c. ensure the protection of the rights and privileges of journalists in the performance of their duties;

d. promote and enhance ethical and professional standards amongst journalists and media enterprises;

e. advise the government or the relevant regulatory authority on matters relating to professional, education and the training of journalists and other media practitioners;

f. set standards, in consultation with the relevant training institutions, for professional education and training of journalists;

g. develop and regulate ethical and disciplinary standards for journalist, media practitioners and media enterprises;

h. accredit journalists and foreign journalists by certifying their competence, authority or credibility against official standards based on the quality and training of journalists in Kenya including the maintaining a register of journalists, media enterprises and such other related registers as it may deem fit and issuance of such document evidencing accreditation with the Council as the Council shall determine; (i)

(j) conduct an annual review of the performance and the general public opinion of the media, and publish the results in at least two daily newspapers of national circulation; through the Cabinet Secretary, table before Parliament reports on its functions;

(k) establish media standards and regulate and monitor compliance with the media standards;

(l) facilitate resolution of disputes between the government and the media and between the public and the media and intra media;

(m) compile and maintain a register of accredited journalists, foreign journalists, media enterprises and such other related registers as it may consider necessary;

(n) subject to any other written law, consider and approve applications for accreditation by educational institutions that seek to offer courses in journalism; and

(o) perform such other functions as may be assigned to it under any other written law.

(2) In exercise of its powers and discharge of its function under this Act the Council and every person to whom this Act applies shall ensure—

a. that the provisions of article 33(2) of the *Constitution* are safeguarded;

b. that the freedom and independence of media is exercised in a manner that respects the rights and reputations of others;

c. that the protection of national security, public order, public health and public morals is safeguarded; and

d. the compliance with any other written law.

(3) The Cabinet Secretary shall, in consultation with the Council, make regulations to give further effect to subsection (2).

78. Section 27

Establishment of the Complaints Commission

1. There is established a Complaints Commission which shall consist of seven members appointed in accordance with this section.
2. The provisions of section 7(2), (3), (4), (5), (6), (7) and (8) shall apply *mutatis mutandis* to the appointment of members of the Commission.
3. After carrying out interviews, the selection panel shall select one person qualified to be appointed as chairperson and six persons qualified to be appointed as members of the Commission, and forward the names to the Cabinet Secretary.
4. The Cabinet Secretary shall, within seven days of receipt of the names, by notice in the Gazette, appoint a chairperson and six members of the Commission.
5. The Cabinet Secretary may, in writing, reject any nomination on reasonable grounds whereafter the Cabinet Secretary shall communicate the decision to the selection panel.
6. Upon receipt of the notice of rejection under subsection (5), the selection panel shall select another person from the list of shortlisted applicants and submit his or her name to the Cabinet Secretary for appointment. 10 *Media Council Act* (cap 411B)

79. May I now flag out the impugned provisions of the *Kenya Information and Communications Act*, cap 411

Section 46A.

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; 28 *Kenya Information and Communications Act* (cap 411A) 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;

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;

h. developing media standards; and

(j) regulating and monitoring compliance with those standards

46H. Commission to prescribe programme code

(1) The Commission shall have the power to set standards for the time and manner of programmes to be broadcast by licensees under this Act. (2) Without prejudice to the generality of subsection (1), the Commission shall—

a. prescribe a programming code;

b. review the programming code at least once every two years;

c. prescribe a watershed period programming when large numbers of children are likely to be watching or listening to programmes; and

d. ensure compliance with the programming code prescribed under this section:

Provided that the programming code referred to herein shall not apply where a licensee is a member of a body which has proved to the satisfaction of the Commission that its members subscribe and 31 *Kenya Information and Communications Act* (cap 411A) Kenya adhere to a programming code enforced by that body by means of its own mechanisms and provided further that such programming code and mechanisms have been filed with and accepted by the Commission.

46J The Commission may in accordance with this Act revoke a licence to broadcast where the licensee—

a. is in breach of the provisions of the Act or regulations made thereunder; 32 *Kenya Information and Communications Act* (cap. 411A) Kenya

b. is in breach of the conditions of a broadcasting licence; or

(c) fails to utilize the assigned broadcasting frequencies within such period as the Authority shall stipulate in the licence.

46K Regulations on broadcasting

The Cabinet Secretary may, in consultation with the Commission, make regulations generally with respect to all broadcasting services and without prejudice to the generality of the foregoing, with respect to—

a. the facilitation, promotion and maintenance of diversity and plurality of views for a competitive marketplace of ideas;

b. financing and broadcast of local content;

c. mandating the carriage of content, in keeping with public interest obligations, across licensed broadcasting services;

(d) prescribing anything that may be prescribed under this Part

46L Requirement on Complaints Procedure

1. All broadcasters shall establish and maintain a procedure, by which persons aggrieved by any broadcast or who allege that a broadcaster is not complying with this Act, may file complaints.

2. The procedure referred to in subsection (1) shall be submitted to the Commission for approval.

3. Where any person alleges that he has exhausted the procedure mentioned in subsection (1) but is not satisfied with the remedy offered or action taken, he may appeal to the Commission.

4. Complaints made under this section shall be made in writing within thirty days of the breach under subsection (1) and shall set out the grounds upon which they are based, the nature of damage or injury suffered as result of the broadcast or the violation complained of and the remedy sought.

(5) Any person who is aggrieved by a decision of the Commission made under this section may appeal to the Tribunal within thirty days after the decision

46M Access to programmes

The Commission or the Tribunal may with a view to solving any dispute brought under section 46L a licensee to—

a. provide the Commission, the Tribunal or the complainant with a transcript of the broadcast complained of; require

b. furnish the Commission, the Tribunal or the complainant with copies of any document that may assist in resolving the dispute: or

c. furnish the Commission or the Tribunal with any written or oral evidence to assist in resolving the dispute or in answer to the complaint

46Q. Offences relating to broadcasting services

1. Any person who provides a broadcasting service without a broadcasting licence commits an offence.

2. Any person who provides a broadcasting service pursuant to a licence granted under this Act commits an offence if—

   a. that person provides a broadcasting service which is not of a description specified in the licence;

   b. that person provides broadcasting services in an area for which he is not licensed to broadcast; or 34 *Kenya Information and Communications Act* (cap 411A) Kenya

c. that person broadcasts in contravention of the Act or the licence conditions.

(3) A person convicted of an offence under this section shall, on conviction, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or both.

102A. Complaints

1. A person aggrieved by—

   a. any publication by or conduct of a journalist or media enterprise;

   b. anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise; or

   c. any action taken, any omission made or any decision made by any person under this Act, may make a written complaint to the Tribunal setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought.

2. A complaint under this section may be made—

   a. orally, either in person or by any form of electronic communication; or

   (b) in writing, setting out the ground for the complaint, nature of the injury or damage suffered and the remedy sought.

3. Where complaints are oral, the Tribunal may require them to be reduced in writing within seven days, unless it is satisfied there are good reasons for not doing so.

4. A complainant shall disclose to the Tribunal—

   a. the complainant's name and address; and

   (b) other information relating to the complainant's identity that the Tribunal may reasonably require.

5. Despite subsection (4), the Tribunal may—

   a. keep information provided by a complainant confidential if there are special circumstances to do so, or the Tribunal considers it is in the complainant's interests to do so; or

   b. accept an anonymous complaint concerning an issue of public interest or where no clearly identifiable person or group is affected.

6. The Tribunal may require a complainant to provide more information about the complaint within such reasonable time as the Tribunal may determine.

7. The Tribunal may, at any time, require a complaint or information provided by a complainant to be verified by the complainant by oath or statutory declaration.

(8) Without prejudice to the functions of the Authority or the Media Council, the Authority or the Council may take up a complaint on its own initiative, and forward the same to the Tribunal for determination where in its opinion the complaint has public interest implications

102E. Decisions of the Tribunal

1. The Tribunal may, after hearing the parties to a complaint—

a. order the offending party to publish an apology and correction in such manner as the Tribunal may specify;

b. order the return, repair, or replacement of any equipment or material confiscated or destroyed;

(c) make any directive and declaration on freedom of expression;

d. issue a public reprimand of the journalist or media enterprise involved;

e. order the offending editor of the broadcast, print or on-line material to publish the Tribunal's decision, in such manner as the Tribunal may specify;

f. impose a fine of not more than twenty million shillings on any respondent media enterprise and a fine of not more than five hundred thousand shillings on any journalist adjudged to have violated this Act;

g. in its reasons for its findings, record a criticism of the conduct of the complainant in relation of the complaint, where such criticism, is in its view, warranted;

h. recommend the suspension or removal from the register of the journalist involved;

i. make any supplementary or ancillary orders or directions that it may consider necessary for carrying into effect orders or directives made.

2) The Tribunal may make any or a combination of the orders set out in subsection (1)

80. I have carefully read these statutory provisions, the relevant constitutional articles and also the Supreme Court judgment in the case of *Communications Commission of Kenya v Royal Media Services* (*supra*) that all the parties made reference to.

81. The Supreme Court judgment is significant as article 163(7) of the *Constitution* , provides that All Courts other than the Supreme Court are bound by the decisions of the Supreme Court.

82. The Supreme Court at paragraph 369 found that sub-article 3 of article 34 of the *Constitution* envisions licensing of broadcasting and other electronic media. Accordingly, this validates the licensing role performed by the Communications Authority of Kenya. It also observed that following the promulgation of the *Constitution*, the licensing procedures by CCK drew their legitimacy from article 34 (3) of the Constitution.

83. The Supreme Court thus interpreted sub-article 3 of article 34 as providing the constitutional backing for the mandate of the Communications Authority of Kenya in matters concerning licensing. The

mandate of the 1st respondent can thus be concluded to trace its constitutional validity to article 34(3), not article 34(5) which expressly relates to the Media Council of Kenya. This article 34 (3) thus anticipates the establishment of a regulator to regulate the media markets through licensing which may include setting technical standards, regulation of ownership of the media, setting licensing conditions among others.

84. Article 34(5) of the *Constitution* on the other hand contemplates the creation a body that would make possible the protection and enjoyment of the media freedom and the freedom of expression.

85. The petitioner perceives that the regulator should thus not venture into an area that involves the setting media standards as this is an invasive way to dilute the protection given by article 34(5) by way statutory provisions that usurps the role of the Media Council which also ends up causing confusion.

86. The role of setting media standards, regulating and monitoring compliance with those standards is specified under article 34(5)(c) of *Constitution* to be a role that the *Constitution* anticipates will be performed by the body created to give effect to that provision. In the instant case it is obviously the Media Council under the *Media Council Act* which the Act states was enacted to give effect to article 34(5) of the *Constitution* .

87. From a constitutional viewpoint therefore, under article 34 (5), the Media Council is the body clothed with the authority to set media standards and to monitor their compliance. This means that to the extent that article 46A(i) and (j) of the *Kenya Information and Communications Act* gives a similar role to the 1st respondent, that is a misplaced duplication which only succeeds in creating jurisdictional duplicity. Section 46A(i) and (j) of the *Kenya Information and Communications Act* is thus unconstitutional.

88. That said, the regulator (1st respondent) can and may develop and prescribe licensing conditions/ standards relevant to the broadcasting or electronic licences but only if this does not infringe on the *Constitution* or meddle with the mandate of the Media Council.

89. As for the complaint that there are two parallel dispute resolution procedures provided for in the two Statutes which also creates confusion, one has to look at this issue from a perspective of the two bodies performing distinct roles. Conflicts are bound to occur in either regime. Providing for dispute settlement procedure to allow disputes emanating from licensing to be dealt with under the Kenya Information Communications Act is not perse unconstitutional if it relates to specific matters falling under the scope of Communication Authority of Kenya and while those under the *Media Council Act* can be dealt with under the *Media Council Act*.

90. The petitioner did not demonstrate that the Kenya Information and Communications Act dispute resolution mechanism has in any way impeded the implementation of the Dispute resolution procedure under the *Media Council Act* or the *Constitution*. Article 159 of the *Constitution* embraces alternative dispute resolution procedures which the two Acts have embodied.

91. On the allegation that the issuance programming code is unconstitutional, the petitioner alleged that it was issued under *Kenya Information and Broadcasting Regulations* 2009 which was redundant and which was also rendered in vague and general language which exposes journalists to myriads of complaints unnecessarily. The 1st respondent was however categorical and did demonstrate, (without a rebuttal from the petitioner), that the programming code was issued pursuant to revised regulations of 2018, not 2009 as claimed by the petitioner. The 1st respondent also described the broadcasting code as 'licensing standard' meant to protect children during the watershed moment and was not in any way or form a 'media standard'.

92. The 1st respondent further claimed that the need to issue the programming code was informed by the public interest to protect the children from harmful content during the watershed period.

93. Turning to whether the programming code issued by the 1st respondent is unconstitutional; it is necessary to say inappropriate content on children may possibly be classified into two classifications. There is that which is outrightly illegal such as exposing children to pornography which is a matter of criminal law implemented by the State. There is that which is not criminal but inappropriate on moral grounds such as airing content that is suitable for children viewing.

94. Under the *Constitution* article 53 (1)(d), children are supposed to be protected from all forms of abuse. Further, article 53(2) provides that a child's best interest are of paramount importance in any matter concerning the child. Under article 21(3) all state organs and all public officers have a duty to address the needs of vulnerable groups within the society including women, older members of the society, persons with disabilities, children, youth, members of minority or marginalized communities among others.

95. The regulator (1st respondent) stated that its programming code is meant to protect children from inappropriate or harmful content. The fact that an act is done with a good intention is not sufficient to validate such act unless it can be shown it the decision was done validly.

96. Governmental control or 'censorship' through giving of directions to media content and as to how and when content should be aired is adversative to the independence and freedom of media from governmental control and is against the principles of a free and independent media that article 34. If it is a question of content being inappropriate, that is an ethical issue which should be dealt under the context of media standards by media workers not by the media regulator. It an issue concerning media standards which is for the Media Council to oversight.

97. Nevertheless, the two cannot work in isolation and must work collaboratively to ensure that children are protected.

98. To the extent however that the programme code by the 1st respondent veered off into the Interested party's mandate to develop age-appropriates programme code for broadcasting services in Kenya that is potentially intrusive and a threat to emasculate the freedom of the media by expressly undermining the provisions of article 34 (5) of the *Constitution* . It ought to be responsibility of the Media Council to set and monitor the ethical codes for the protection of the children and/any other vulnerable group and to monitor and enforce them, not the 1st Respondent. This court must uphold the independence of the media as protected under article 34 which advances the rule of law and upholds the principles and purpose of the constitution.

99. For reasons aforesaid, this petition succeeds. The orders that commend themselves to this court are thus as follows:

    1. Section 46A i & j and 46H(1) of the *Kenya Information and Communications Act* is unconstitutional.

    2. A declaration that the Broadcasting Code for broadcast media as prescribed by Communications Authority of Kenya is unconstitutional and therefore null and void.

    3. Notwithstanding order no. 2, considering that the need to protect children from inappropriate media content is paramount, the court suspends the order declaring the broadcasting code by the 1st respondent unconstitutional for six months to enable the Media Council of Kenya develop age-appropriate standards to protect children and other vulnerable persons from inappropriate media content.

4. There shall be no orders as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2024.

L N MUGAMBI

JUDGE