



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 218 OF 2017

IN THE MATTER OF ARTICLE 2, 3, 20, 22 (10 & 23 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER ALLEGED CONTRAVENTION OF RIGHTS OF FUNDAMENTAL FREEDOMS UNDER ARTICLES 31 (C)
(F) AND 46 OF THE CONSTITUTION**

BETWEEN

LEONARD OTIENO.....PETITIONER

VERSUS

AIRTEL KENYA LIMITED.....RESPONDENT

JUDGMENT

The Petitioners case

1. The Petitioner, **Leonard Otieno**, a male adult of sound mind brings this Petition against **Airtel Kenya Limited**, a public company which provides telecommunication services among them voice, data and financial services to its subscribers via a variety of information and communication technology platforms. He cites alleged violation of his constitutionally and Statutory protected Consumer Rights.
2. The Petitioner, a Respondent's mobile phone subscriber, line number **073336465**, avers that during the month of March 2017, he experienced repeated network disruptions, effectively barring him from communicating with friends, family and professional colleagues, and in ability to access Airtel Money, the Respondents financial services platform. He the net work failure to the SIM cards supplied by the Respondent. He also avers that the Respondent advised him to re-start his phone but this did not work. Also, he avers, he was directed to swap his card, but it only worked for one week, and a second SIM swap equally failed.
3. The Petitioner avers that he subsequently received in succession text messages stating "*Your SIM is successfully updated 21/03/2017, 23.02*". He avers he was prompted by a text message follow instructions to set up his new PIN which he did, but his phone could not access the network. He avers that his line was restored on 25th March 2017, but on 27th March 2017 he discovered that **Ksh. 10,000/=** was missing from his Airtel Money Account.He avers that even after the reconnection, the line went off again on 14th April 2017 and was off as at the date of filing this Petition. Further, he avers that he has been receiving notices informing him that he borrowed **Ksh.1,170/=** from "KOPACASH" a Platform operated by the Respondent.
4. As a consequence of the foregoing, the Petitioner invites this Court to find and hold that his rights under Articles **46** and **31** of the Constitution were violated and an award of general damages for the alleged infringement.

Respondents' Replying Affidavit

5. Victor Otieno, the Respondents' Contact Experience Operations Manager swore the Replying Affidavit dated 9th October 2017. He avers that the efficacy, efficiency and quality of telecommunication services depends on the quality of services offered and other industry support sector players such as mobile phone manufacturers and the behaviour of the end user customer operating the communication device.

6. He denied that the Respondent violated the Petitioners' rights as alleged. While admitting that a complaint of loss of network was received in March 2017, he states that the same was promptly addressed and no further or other complaint was received from the Petitioner. He averred that the Respondent only learnt about the allegation that the Petitioners' line went off on 14th April 2017 in this Petition. Further, he avers that the Respondent in good faith refunded the Petitioner a sum of **Ksh. 10,000/=** in full settlement notwithstanding the obscurity of the circumstances leading to the loss and the Petitioners' own negligence or collusion in the loss.

7. He also averred that the IT Department has reliably informed him that the Respondent's server shows that the Petitioner's line **0733364265** is functioning well and it appears that the same is deliberately switched off from the customer's end and that the Petitioner has failed to visit the Respondent's customer care for diagnosis of the problem, if any, but opted to resort to blackmail. He also averred that the data captured in the Respondent's servers indicate that there has been multiple SIM replacements by the Petitioner which activities are known to cause malfunction in SIM cards.

8. He also averred that the Petitioner has a duty to cooperate and assist the Respondent to carry a comprehensive diagnosis of the Petitioner's mobile phone to determine the source of disruption of network on his aforesaid line if any and that the Respondent's refund of the **Ksh.10,000/=** without compulsion demonstrates the Respondent's commitment to provide high quality services to its customers and sought to have the Petitioner ordered to avail his mobile phone and SIM card to the Respondent's customer care for diagnosis.

Petitioner's Supplementary Affidavit

9. The Petitioner filed a supplementary Affidavit on 10th January 2018 in which he reiterated that he reported the said problem to the Respondent. He acknowledged receipt of the **Ksh. 10,000/=** but insisted that the matter is not settled. He also alleged loss of air time which is not pleaded in the Petition.

Applicable legal provisions

10. Before addressing the issues presented in this Petition, I find it appropriate to re-state the relevant legal provisions. A convenient starting point in this conversation is Article **46 (1)** of the Constitution which provides that consumers have the right to goods and services of reasonable quality, to the information necessary for them to gain full benefit from goods and services, to the protection of their right, safety, and economic interests and to compensation for loss or injury arising from defects in goods and services. To give effect to the above Article, Parliament enacted the Consumer Protection Act.^[1] Part Two of the Act^[2] provides Consumers Rights while Part Three prohibits unfair practices.

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

Comparable Jurisprudence

12. Before addressing the issues raised in this Petition, and formulating the standard to assess whether the Petitioner has properly discharged his burden of proof, I find it necessary to consider foreign jurisprudence dealing with comparable legislation. This is because foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with similar issues. However, I am alive to the fact that, it is important to appreciate that foreign case law will not always provide a safe guide for the interpretation of our Constitution. Thus, when developing our jurisprudence in matters that involve constitutional rights, we must exercise particular caution in referring to foreign jurisprudence.^[3] It is important to bear in mind the need to develop our common law based on our transformative and progressive Constitution.

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

14. While interpreting the Consumer Protection Act,^[4] guidance can be obtained from the principles enunciated by the South African Court^[5] whereby it stated that it is useful to consider the words used in the light of all relevant and admissible context, including the circumstances in which the legislation came into being. The Court went on to state that '*...a sensible meaning is to be preferred to one that leads to insensible or un-businesslike results. . .*'^[6] Further, the Court stated that the interpretative process involves ascertaining the intention of the legislature.^[7] The intention of Parliament can be gathered from the preamble to the Act. The long title of the Act provides that it is "*An Act of Parliament to provide for the protection of the consumer prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto.*"

15. The Act has its own uniqueness. It has its own interpretation clause, which provides that it must be interpreted in a manner that gives effect to the purposes that are set out in Section 3 of the Act. The section provides that when interpreting the Act, applicable foreign law, international law, conventions, declarations or protocols may be considered.

16. Also relevant is Section 4 of the Act which provides that the purposes of the Act are to promote and advance the social and economic welfare of consumers in Kenya.^[8]

17. Section 2 of the Act defines a consumer as a person to whom goods or services are marketed in the ordinary course of a supplier's business, or who has entered into a transaction with a supplier in the ordinary course of a supplier's business, unless the transaction is exempt from the application of the act. The definition includes a user of the goods or a recipient or beneficiary of the particular service irrespective of whether that person was a party to a transaction concerning the supply of the goods or services. This has the effect that the recipient of a gift from a consumer would also be considered a consumer in terms of the Act.^[9] The important features to note are that there must be a transaction to which a consumer is party, or the goods are used by another person consequent on that transaction.

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

Issues for determination

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

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

b. Whether the Petitioner has proved his case to the required standard.

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

20. Even though this issue is fairly dispositive, the Petitioner's counsel did not address it at all, even after it was raised by the Respondents counsel in their submissions.

21. Counsel for the Respondent cited Regulation 3 of *Kenya Information and Communication (Dispute Resolution) Regulations, 2010* and the definition of a dispute under Regulation 2 and submitted that the dispute herein can be resolved by the Communications Authority of Kenya. He argued that the Act has established a Committee known as Kenya Consumer Protection Advisory Committee which is responsible for *inter alia* facilitating a mechanism of conflict resolution regarding consumer issues and where appropriate referring the complaint to the appropriate authority and ensuring that action has been taken by the competent authority. He also argued that this is a dispute between the consumer and a service provider, and that not every dispute should be addressed through a constitutional Petition, hence this dispute is wrongfully before this court. To buttress his argument, counsel cited *Robert Amos Oketch vs Andrew Hamilton & 8 Others*^[10] and *Roshanara Ebrahim vs Ashleys Kenya Limited & 3 Others*.^[11]

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

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

24. In my view, in principle, it appears that a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, there is merit in the argument that a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. It is also correct to state that jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. This position was ably captured by the *South African Constitutional Court*^[12] in the following words:-

"Jurisdiction is determined on the basis of the pleadings,^[13]... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."

25. In *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya*^[14] after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the Court held:-

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

[47]. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*^[15]

28. The question that begs for an answer is whether the dispute resolution mechanism established under the Act and the Regulations cited above is competent to resolve the issues raised in this Petition. The core issue is the allegation that the Respondent violated the Petitioners

rights under Article 46 of the Constitution and the Consumer Protection Act.^[16] He cites inability to access network in his mobile phone, alleged theft of Ksh. 10,000/=, and an alleged borrowing from his account and dissatisfaction in the services rendered.

27. It is common grounds that the facts as presented in this Petition disclose an alleged breach of Article 46 rights and consumer rights under the Act. It is also common ground that the Petitioner invites this court to hold that his aforesaid rights have been violated. Differently put, the facts as presented in this Petition disclose a dispute relating to the quality of services rendered to a consumer by a service provider. Can such a dispute be resolved within the confines of the Act under the dispute resolution mechanism established under the Act and the Regulations?

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

29. I am conscious of the truth that the right of access to court is entrenched in our Constitution^[17] and it is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes. Construed in this context of the rule of law, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable. This is the test the court should bear in mind when invited to decline jurisdiction.

30. It is equally true that the need for an effective remedy in a case may justify this court to take the exceptional course of entertaining a dispute where the court is satisfied that the laid down statutory mechanism may not provide an effective remedy to the aggrieved party or if it is clear the dispute disclosed by the facts substantially or wholly lies outside the scope of the laid down statutory mechanism. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred or will occur or there is a clear violation of the Constitution and that there is no alternative effective remedy within the statutory established mechanism.

31. Further, it is also equally true that our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute.^[18] It is also settled that the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]....a remedy is considered available only if the applicant can make use of it in the circumstances of his case.^[19]

32. It is important to note that the Act seeks to ensure that consumers have access to fast, effective and economical redress for disputes.^[20] This is because litigation is generally costly, complex and time-consuming.^[21] In most cases parties to the dispute end up becoming frustrated by the whole litigation process. The Act, therefore, provides consumers with other less costly and cumbersome avenues of redress. By so doing, the Act empowers consumers to be able to enforce their rights. Writing on the Consumer protection Act of South Africa which has identical provisions to ours, Christie and Bradfield correctly argue that "...the real value in the legislation rather lies in the mechanisms it has introduced for the relatively more accessible and informal resolution of consumer disputes".^[22]

33. Choosing the most appropriate dispute resolution mechanism often depends on the circumstances of the particular complaint, namely: the value of the claim; the level of complexity; the number of consumers involved; the incentive for the parties to find a mutually agreeable solution; whether there was fraud, negligence or just misunderstanding; the time, money and effort the consumer or business is willing to spend in resolving the dispute; if any policy elements are involved; and if there are any cross-border elements involved.^[23]

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

35. The Petitioner has not demonstrated that he cannot get an effective remedy under the dispute resolution mechanism established under the statute. The attempt to clothe the alleged breaches with Article 46 rights is not good enough. There must be a clear demonstration that the alternative remedy is not available, not effective, and not sufficient to address the grievances in question. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law. The "deepest norms" of the Constitution should determine whether the dispute involves explicit constitutional adjudication, or whether it could safely be left to the statutory provisions. In this regard, I am persuaded beyond doubt that the adjudication of the issues complained herein can safely be left to the statutory provisions.

36. Courts abhor the practice of parties converting every issue in to a constitutional question where such issues can safely be left to the dispute resolution mechanism established under the statute. The Court of Appeal in *Gabriel Mutava & 2 Ors. vs. Managing Director Kenya Ports Authority & Another*^[24] underlined the conventional judicial policy as established by the courts over time and now settled that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law as follows:-

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

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

37. A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case

without reaching a constitutional issue that should be done.^[25] A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.^[26] When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.^[27]

38. The question of what constitutes a constitutional question was also discussed in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*^[28] in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak*^[29] notes that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”^[30]

39. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.^[31] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights.

40. It is also important to point out that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution, the Court is obligated to promote these modes of alternative dispute resolution. A Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy.^[32] I am also clear in my mind that the place of alternative dispute resolution is respected by the courts and this court is no exception.

41. It is clear that the Act provides for various mechanisms for the enforcement of consumer rights. Consumers may seek redress by referring the matter to the as provided under the Regulations. Where all the remedies in terms of the legislation have been exhausted, a court of law with jurisdiction may be approached. This implies that a court of law may not be approached, unless a consumer has first approached exhausted the laid down dispute resolution mechanism.

Whether the Petitioner has proved his case to the required standard.

42. The Petitioners counsel submitted that the Respondent breached the Petitioner's rights under Article 46 of the Constitution by failing to ensure that the Petitioner obtained the full benefit of the services rendered by the Respondent. He also cited violation of the Petitioners rights under Articles 33 and 31^[33] of the Constitution. Counsel attributed the alleged loss of network, the alleged KOPACASH loan, the loss of Ksh. 10,000/= and the alleged Ksh. 8,000/= worth air time to the Respondent's failure to ensure security for his line and breach of its obligations. He submitted that violation of a constitutional right carries with it a right to a remedy.^[34] He urged the court to award Ksh.3,000,000/=.

43. The Respondent's counsel submitted that for the Petitioner to succeed, he must prove that the Petitioner breached his rights to privacy, that it stole his Ksh.10,000/= or that the Respondent occasioned the said loss, that the manner in which his rights were violated and affected his rights under Article 46. He argued that the Petitioner failed to substantiate his claim to the required standard.^[35]

44. Counsel further argued that no evidence was tendered to prove the Respondents' culpability in the alleged violations. In particular, counsel submitted that there are several factors that may affect a customer's use of its services among them the mobile phone manufacturers and the behaviour of the customer operating the device. Further, it was argued that the integrity of the customers PIN can be compromised from the customers end if the customer fails to protect it from third parties and that the Petitioner did not account for his own use of his handset. On the alleged refund of Ksh. 10,000/=, he submitted that it was done in good faith, and on a without prejudice basis in order to maintain the customer relationship, but was not an admission of liability.

45. The Respondents counsel also submitted that the events leading to the alleged loss of network are disputed, and that the Petitioner failed to present his handset for diagnosis to ascertain the problem (if any). He also submitted that the Respondents IT experts stated that the Respondents server shows that the Petitioner's line is working but had been deliberately switched off. He also submitted that this court lacks the capacity to diagnose the Petitioner's SIM card to ascertain the allegations in question, and there is need for expert evidence which the Petitioner did not provide. Also, he stated that the effect of the quality of the service might have emanated from the Petitioner's device. He argued that the Petitioner is a subscriber to the same network on a different number, e.i. 0731670172, yet he has not reported problems with it. He argued that the Petitioner did not discharge the burden of prove^[36] and that this Petition does not raise constitutional issues.

46. I have severally stated that although issues of consumer rights affect only the parties, ‘their impacts and consequences are substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest, hence the need for the parties to submit the necessary evidence to enable the court to analyse the issues and arrive at a formidable determination that transcends the case at hand. Consumer rights litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the expanded Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases.^[37]

47. The general principle governing the determination of cases is that the party who alleges or, as it is sometimes stated, the party who makes the positive allegation, must prove.^[38] Moreover, the onus on the Petitioner to establish violation of alleged consumer rights is not a mere formality; it is important. Differently put, the *onus* lies on the Petitioner to prove every element constituting his cause of action. This includes sufficient facts to justify a finding that his consumer rights were violated.

48. If, in contested proceedings, the consumer asserts that his rights have been violated, the court must make a finding whether, the consumer's allegations are true. On the other hand, it is settled law that in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.^[39]

49. It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and someone belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie*, and, if be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty.^[40]

50. Indeed the words of Kitto J in the High Court of Australia decision of *Sovar vs Henry Lane Pty Ltd* seem appropriate:-^[41]

"[T]he question whether a contravention of a statutory requirement of the kind in question here is actionable at the suit of a person injured thereby is one of statutory interpretation... The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation."^[42]

51. Breach of statutory duty arises, where a person or a body is under a statutory duty to perform an act or, more rarely, to refrain from doing an act; does not perform the act, either in accordance with the terms of the statute, or at all or does the act when it should not be done; and a party suffers damage as a result of the statutory breach; and that statutory breach gives rise to 'a right of action. To succeed, the person suing must establish ^[43](a) that the statute imposes a statutory duty, or obligation upon the Respondent, (b) that the Respondent acted contrary to its statutory duty or failed to act or perform his or its statutory duties, that the respondents action violates the statutory duty, and as a result of the breach the Petitioner suffered damage.

52. Constitutional analysis under the Bill of Rights takes place in two stages. *First*, the applicant is required to demonstrate that his or her ability to exercise a fundamental right has been infringed. If the court finds that the law, measure, conduct or omission in question infringes the exercise of the fundamental right or a right guaranteed in the Bill of Rights, the analysis may move to its second stage. In this *second* stage, the party looking to uphold the restriction or conduct will be required to demonstrate that the infringement or conduct is justifiable in a modern democratic State and satisfies the Article 24 analysis test.^[44]

53. The Petitioner cites loss of network. Ironically, the Petitioner stated that he used his alternative line number **0731670172** to communicate on the same network and he had no problem with the network. He now places blame on the Respondent. To attribute loss of network on the Respondent, it requires cogent professional evidence which the Petitioner did not avail. It requires clear evidence that the Petitioner's device did not malfunction. It requires evidence to demonstrate that his gadget was examined and found to be in good condition. The Respondent states that from their end, the line is working but the phone has been deliberately switched off. The Petitioner did prove otherwise.

54. To prove the allegation that there was network failure, and that the failure could only be blamed on the Respondent's actions or omissions and that the Petitioner's gadget did not malfunction, is to me a highly technical question. It requires expert opinion. The expert will be required to convince the Court of his expertise, training, experience and take the Court through the entire telecommunication technology involved and how he has isolated the problem and the possible cause of the problem.

55. It is not as simple as the Petitioner wants this Court to believe. He cannot wake up and allege that his mobile phone could not access the network and expect the Court to form conclusion on his mere allegations. The Petitioner ought to have adduced expert evidence to substantiate the claim and to place the blame on the Respondent's network and or on the Respondent's actions or omissions. He is not an expert in telecommunications or mobile technology. He is not competent to make a conclusion that that if at all there was network failure, it was caused by wilful failure on the part of Respondent.

56. Under section 48 of the Evidence Act^[45] opinions of science or art are admissible if made by persons specially skilled in such science or art. A person specially skilled in art or science is therefore deemed to be an expert. The Petitioner did not claim he is specially skilled in art or science. The term science or art usually means any branch of learning which requires a course of previous habit of study in order to obtain competent knowledge of its nature.^[46]

57. Further, first and foremost, it is a requirement of a party who calls an expert witness to establish the credentials of the expert, or one who is especially skilled in that branch of science, to the satisfaction of the Court. The Petitioner did not state he has any credentials in the field in question. He did not state that he falls within the definition of 'specially skilled' as laid down under section 48 of the Evidence Act.^[47]

58. Worse still, the Petitioner did not attempt to explain the reasoning behind his assertion that the alleged network failure was caused by the SIM card. In any event, as stated above, he is not competent to make such a conclusion. In scientific evidence, the reasoning may be based on the following:- inspection reports, analytical reports, evidence of other witnesses, and the evidence of the experts.^[48]

59. His conclusion that the alleged network problem was attributed to the SIM card issued by the Respondent is merely his opinion. Opinion expressed must be confined to those areas where the witness is specially skilled. I repeat he is not specially skilled in this area. Even if he was an expert in the field, (which he is not), the weight to be attached to such an opinion would depend on various factors. These include the circumstances of each case; the standing of the expert; his skill and experience; the amount and nature of materials available for comparison; the care and discrimination with which he approached the question on which he is expressing his or her opinion; and, where applicable, the

extent to which he has called in aid the advances in modern sciences to demonstrate to the Court the soundness of his opinion.^[49] The basis of his opinion was not explained.

60. The Respondent stated that the integrity of the Petitioners' PIN is relevant. The Petitioner had a duty to demonstrate that no one else had access to his device or PIN. He claims he lost Ksh. 10,000/=. The Respondent states that they refunded the said sum without prejudice and without admission of liability and in order to maintain their customer relations. The Petitioner did not demonstrate that the refund was in any manner an admission of blame on the part of the Respondent nor did it absolve him from discharging the burden of proof. The law is that he who alleges must prove. The Petitioner was duty bound to table evidence to establish that the Respondent was responsible for the alleged loss. He failed to submit his gadget for diagnosis so as to establish that it was not faulty. To me, this was a serious omission.

61. A casual examination of the Petition reveals that it does not disclose a case at all against the Respondent. In particular, no evidence has been presented to demonstrate that the Respondent violated the constitutional and statutory provisions which protect consumer rights.

62. Section 107 (1) of the Evidence Act^[50] provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

63. I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** once remarked:^[51]

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

64. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Bristone Pte Ltd vs Smith & Associates Far East Ltd*^[52] :

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

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

Disposition

66. In view of my analysis of the issues herein above, the conclusion becomes irresistible that there is nothing to show that the Respondent acted illegally or in any manner violated the Petitioners consumer rights. It is also my finding that the petitioner ought to have utilized the dispute resolution mechanism provided under the statute and only approach the high Court by way of appeal if aggrieved by the decision of the Appeals Tribunal.

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

Orders accordingly

Signed, Dated and Delivered at Nairobi this 7th day of May 2018

John M. Mativo

Judge

^[1] Ibid.

^[2] Ibid

^[3] Ibid

^[4] Act No. 46 of 2012

^[5] Natal Joint Municipal Pension Fund vs Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

^[6] Ibid

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

[8] by— (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally; (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers; (c) promoting fair and ethical business practices; (d) protecting consumers from all forms and means of unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices including deceptive, misleading, unfair or fraudulent conduct; (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior; (f) promoting consumer confidence, empowerment and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism; (g) providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and (h) providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers.

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

[10] {2017} eKLR

[11] {2016} eKLR

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

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

[14] {2017} eKLR

[15] {2016} eKLR

[16] Act No. 46 of 2012

[17] See Article 48

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

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

[20] See the preamble to the Act

[21] Paleker 2003 ADR Bulletin 48.

[22] Christie and Bradfield Law of Contract 22.

[23] Centre for European Economic Law 2007 ec.europa.eu.

[24] {2016} eKLR

[25] See Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014

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

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

[28] {2002} 23 ILJ 81 (CC)

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

[30] 2001 (1) SA 912 (CC)

[31] Supra note 5 at paragraph 23

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

[33] Counsel cited Kennedy vs Ireland and Misrty vs Interim National Medical and Dental Council of South Africa

[34] Counsel cited Meskel vs Coras Iompair Eireann {1973} IR 121, Standard Newspapers Ltd & Another {2013} eKLR & Roshanara Ebrahim vs Aisleys Kenya Limited & 3 Others {2016} eKLR

[35] Counsel cited *Stephen Nyaragi Onsomu & Another vs George Magoha & 7 Others* {2014}eKLR

[36] Counsel cited *Kiambu County Tenants Welfare Association vs A.G & Another*{2017} eKLR

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

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

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

[40] *Groves v Lord Wimborne* [1898] 2 QB 402. Also, in one of the earliest cases applying this principle, Lord Campbell CJ in *Couch vs Steel* granted a remedy to a seaman who had fallen ill on a journey and suffered damage due to the failure of the ship-owner to maintain a list of medicines required by statute.

[41] (1967) 116 CLR 397 ('Sovar') 405.

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

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

[44] Stuart Woolman in M. Chaskalson et al *Constitutional Law of South Africa* 12-2:

[45] Cap 80, Laws of Kenya.

[46] *Judges and Environmental Law, A Handbook for the Sri Lankan Judiciary*, Environmental Foundation Limited, at page 125 Available at www.sljti.org-Accessed on 20th October 2017.

[47] Section 48. (1). When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions. (2) Such persons are called experts.

[48] *Judges and Environmental Law, A Handbook for the Sri Lankan Judiciary*, Environmental Foundation Limited, Chapter four.

[49] *Ibid.*

[50] Cap 80, Laws of Kenya

[51] In *Rhesa Shipping Co SA vs Edmunds* {1955} 1 WLR 948 at 955

[52]{2007} 4 SLR (R) 855 at 59