



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 10 OF 2017

IN THE MATTER OF ARTICLES 8, 10, 22, 23, 27, 47 AND 260 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF FILM AND STAGE PLAYS ACT, CHAPTER 222 OF THE LAWS OF KENYA

IN THE MATTER OF KENYA INFORMATION AND COMMUNICATION ACT, CHAPTER 411A OF THE LAWS OF KENYA

IN THE MATTER OF FAIR ADMINISTRATIVE ACT, ACT NO. 4 OF 2015

IN THE MATTER OF THE PROGRAMMING CODE FOR FREE TO AIR RADIO AND TELEVISION SERVICES IN KENYA

BETWEEN

ALCOHOLIC BEVERAGES ASSOCIATION OF KENYA.....PETITIONER

VERSUS

KENYA FILM AND CLASSIFICATION BOARD.....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

AND

SAFARICOM LIMITED.....INTERESTED PARTY

JUDGEMENT

Introduction

This petition calls for the determination of the statutory mandate of Kenya Film and Classification Board as stipulated under section 15 of the Films and Stage Plays Act^[1](hereinafter referred to as the Act) and the meaning of the words "film" and "film making" as defined in section 2 of the Act. The core dispute is whether or not Kenya Film and Classification Board (hereinafter referred to as the Board) legal mandate extends to regulating or in any manner controlling television alcohol advertisements made by members of the petitioner promoting alcoholic beverages.

The petitioner

The petitioner is an association of alcoholic beverages manufacturers in Kenya registered under the Societies Act[2] advocating for the rights of alcoholic beverages manufacturers. Aggrieved by two letters dated 3rd January 2017 and 9th January 2017 from the Board, the petitioner avers that officials of its members comprising of East African Breweries Ltd, Kenya Breweries Ltd, Africa Spirits Limited and other alcohol beverage manufacturers and traders face imminent prosecution and other unspecified action.

The letters complained of accused some members of the petitioner of airing advertisements on TV during the watershed period contrary to the Act, the Kenya Information and Communication Act[3] and the Programming Code for Free to Air Radio and Television Services in Kenya[4] (hereinafter referred to as the code).

The complaint is that the Board demanded that their members stop the advertisements in question and submit advertisements to the Board for examination and classification in excess of its statutory mandate under sections 15 of the act and 46 (1) of the Kenya Information and Communication Act[5]. It is averred that the said actions infringe the petitioners rights under articles 47 and 27 of the constitution and section 4 (3) of the Fair Administration Act.[6]

The petitioners case is that it is the responsibility of media houses as per section 46 (I) (i) and section 46 (H) of the Kenya Information and Communication Act[7] in conformity with a determination made by the Communications Authority of Kenya to ensure that they broadcast content suitable for watershed hours and that section 3.2.1 of the Code provides that only programmes or movies classified or rated by the Board as general exhibition, parental guidance or 16 shall be aired during the watershed period and that the mandate of the Board is limited only to the classification and imposition of age restriction on viewership on any film that is exhibited in Kenya and to give consumer advise on information relating to the protection of women and children against sexual exploitation or degradation in films or on the internet, hence the Board lacks the jurisdiction to regulate advertisements aired during watershed period.

First Respondents Response

Ezekiel Mutua, in a Replying affidavit filed on 10th February 2017 avers that section 2 of the Act defines *making of a film* and that an advertisement is a film within the meaning of the definition in the act and that under section 15 of the act the Board is tasked with the responsibility of regulating the creation, broadcasting, possession, distribution and exhibition of films by examining every film and every poster submitted for purposes of classification and imposing age restriction on viewership and also the responsibility of giving consumer advise, having due regard to the protection of women and children against sexual exploitation or degradation in cinematograph film and on the internet. Specifically section 17 of the act places an obligation on the Board with regard to films and or advertisements that are unsuitable for children to ensure that content that is unsuitable for children is not exhibited or broadcast in the presence of children or during times when children are likely to be viewing television or other broadcasts.

He avers that following complaints from the public and investigations by the Board, the Board discovered that some alcoholic beverages companies have been broadcasting advertisements on alcohol promotion in various televisions that have never been submitted to the Board for the purpose of classification nor have they been examined by the board for the purpose of issuance of a certificate of approval or to ensure compliance with section 17 of the Act[8]nor has a license been obtained under section 4 of the act.

He also avers that the advertisements complained of are intended for adult consumption yet the same are broadcasted during the watershed period (between 5.00 am and 10pm) exposing them to young children and that in executing its mandate, the Board also considers the Code prescribed by the Communications Authority of Kenya.

Thus, the letters complained of were written pursuant to the aforesaid mandate and that on 21st December 2015, the Board wrote to members of the petitioner requesting them to submit their audiovisual

advertisements in compliance with the law for purposes of examination, classification and approval and in response, on 30th December 2015, a member of the petitioner admitted the advertisements in question but contested the jurisdiction of the Board and notwithstanding the said letters, two members of the petitioner, namely Kenya Breweries Ltd and Africa Spirits Ltd wilfully and negligently continued to broadcast their audiovisual advertisements prompting the letter dated 3rd January 2017 complained of and the response was also an admission of the violations complained of.

He insisted that members of the petitioner were given ample opportunity to be heard but they declined to appear before the Board, nor has the petitioner challenged the constitutionality of any of the provisions of the law and that the petitioners' rights are not absolute.

Petitioners further supporting affidavit

On 6th March 2017, the petitioner filed a further affidavit stating that the Board is aware that its mandate to classify and approve alcoholic advertisements is not clear in law and consequently, the Board with the assistance of the Kenya Law Reform Commission is developing a new law to cover the issue, hence, unless the framework is amended to provide express mandate, the law as it is at the moment does not confer the board with such powers.

The second Respondent

The second Respondent did not file any response to the petition nor did they participate in these proceedings.

Petitioners Advocates Submissions

Petitioners counsel submitted that the petitioner is entitled to protection under chapter 4 of the constitution, that the Boards actions violated articles 27 (4) and 47 of the constitution and that the petitioner was denied the right to be heard^[9] in that in the letters complained of, the Board came up with the decision to prosecute without according them the opportunity to be heard. Counsel also submitted that the decision in question is unreasonable^[10] and against the petitioners legitimate expectation^[11] and that the decision is *ultra vires* in that the Board acted outside its statutory powers and cited several leading decisions on this point.

Counsel also submitted that the Act does not confer the Board with regulatory powers over television advertisements at all and cited the preamble to the act and argued that the term film does not extent to cover advertisements and any recorded audio visual medium and cited section 15 as restricting the mandate of the Board. Counsel also cited the definition of film in section two of the Act and insisted that the mandate of the Board is restricted to the classification and imposition of age restriction on viewership on any film that is exhibited in Kenya.

Counsel stated that section 12 of the Act applies to films being exhibited at an exhibition such as a movie hall and cited *Nation Media Group vs The A. G.*^[12] hence it does not apply to TV broadcasts such as advertisements and that the National Campaign Against Drug Abuse Authority has the mandate over the promotion of alcoholic beverages^[13] and that, the Communications Authority of Kenya is vested with powers under section 46H of the Kenya Information and Communications Act^[14] to prescribe a programme Code and power to set standards, hence under section 46H the powers are only exercised by the Communications Authority of Kenya. It was also argued that the existence of several players regulating alcoholic beverages in Kenya makes the whole regime unreasonable^[15] and violates Article 47 of the constitution.

Counsel also submitted that the Code and the Kenya Film Classification Board Advertising Regulations have no force of law and cited sections 5(1), (2), (3) and 11 (4) of the Statutory Instruments Act^[16] which requires appropriate consultations with persons who are likely to be affected by regulations before the regulations are made. (However, the effective date for the Statutory Instruments Act^[17] is clearly

described at section 2 of the act as:- “**effective date**” means the 27th of August, 2010).

Counsel cited the preamble to the act and submitted that the intention of Parliament was to control the making and exhibition of films as defined under the act. Counsel also asked the court to consider the definition of "films" under the act.

Counsel further cited the provisions of section 15 of the act which grants powers to regulate the creation, broadcasting, possession, distribution and exhibition of films by examining every film and every poster submitted for purposes of classification and that all the advertisements in question fall within the mandate of the Board.

First Respondents' Counsels Submissions

Counsel cited the definition of film in section 2 of the Act[18] and submitted that the Board has the mandate to regulate audiovisual advertisements and that the scope of the Board's mandate includes regulation of all television and other audiovisual advertisements. Counsel submitted that in interpreting a statute the language and intention of parliament must be taken into account.[19]

Counsel also submitted that section 46 I (2) of the Kenya Information and Communications Act[20] contemplates that the provisions of the Act[21] be complied with by the creators of content and that advertisements which relate to beverages are well understood to be unsuitable content for children and that section 17 of the Act imposes a special duty on the Board to protect children and that rating by the Board is also recognized by the Code.[22] Counsel submitted audiovisual advertisements in question are within the regulatory mandate of the Board as is provided under the Act[23] and that the letters which triggered these proceedings are within the mandate of the Board and that undertaking investigations and informing the persons under investigations of the possible breaches of the law cannot be said to be discriminatory, hence no grounds have been demonstrated for reasonable apprehension of bias nor do the letters in question offend articles 27 and 47 of the constitution and that the petition has not met the threshold for grant of the orders sought.

Submissions by counsel for the Interested Party

Counsel for the interested party submitted that the core objective of the Act[24] is to control the making and exhibition of cinematograph films and that cinematograph is concerned with the exhibition or performance to the public in theatres or drama, hence the Board's mandate is limited to controlling the making and exhibition of cinematographic films in theatres and drama, hence its mandate does not extend to films in respect of advertisements for commercials such as alcoholic advertisements and further that the exhibition of commercial advertisements cannot be construed to be purposes incidental and connected to the functions of the Board. Counsel also submitted that commercial advertising in Kenya is regulated by the Advertising Standards Body of Kenya created by the Association of Practitioners in Advertising and that section 46 (1) does not apply to licensed broadcasters.

Jurisdiction

Article 165 (3) (d) (i) & (ii) of the Constitution provides that the High Court has power to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of the constitution or of any law is in consistent with, or in contravention of, the constitution. More important judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality of purported statutes or decisions exercised pursuant to statutory powers.

Guiding principles on statutory interpretation

Statutory interpretation is the process by which courts interpret and apply legislation. The court interprets how legislation should apply in a particular case as no legislation unambiguously and specifically

addresses all matters. Legislation may contain uncertainties for a variety of reasons such as:-

- a. *Words are imperfect symbols to communicate intent. They can be ambiguous and change in meaning over time.*
- b. *Unforeseen situations are inevitable, and new technologies and cultures make application of existing laws difficult.*
- c. *Uncertainties may be added to the statute in the course of enactment, such as the need to compromise or catering for certain groups.*

Therefore, a court must try to determine how a statute should be enforced, but I am alive to the fact that in constructing a statute, the court can make sweeping changes in the operation of the law so this judicial power should be exercised carefully.

There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of any expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.

The duty of the Court is neither to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate itself.

Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual.^[25] Statutory construction should be a narrow pursuit, not a broader one:-

"[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others.... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."^[26]

A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim *noscitur a sociis* (meaning of a word should be known from its accompanying or associating words) has much relevance in understanding the import of words in a statutory provision.^[27]

One key function of the court in interpreting a statute is the creation of certainty in law. Certainty in law enables planning of human affairs in reliance on the law, and the realization of expectations based on such planning. It makes for uniformity in the administration of justice, and prevents the unbridled discretion of the judiciary. It makes available the tested legal experience of the past.^[28] The other key point for the court to consider while interpreting the law is to change and adapt the law to new and unforeseen conditions. Law must change because social institutions change.^[29] And in applying generalized legal doctrine, such as statutes, to the facts of specific cases uncertainties and unforeseen problems arise. As conditions change with the passage of time, some established legal solutions become outmoded. The courts should resolve these uncertainties and assist in adapting the law to new conditions.

While interpreting the law, the court should bear in mind that they should make laws when necessary to

make the ends of justice. Legal systems world over could not grow as has been the case without a great amount of judicial law making in all fields. However, to the extent that judges make laws, they should do so with wisdom and understanding.

In my view, there are two key assumptions relied by courts to explain and justify statutory interpretation. One is the assumption that meaning in legislative texts is "plain" -- that is, clear and certain, not susceptible of doubt. This assumption is the necessary basis for the plain meaning rule. The other assumption is that legislatures have intentions when they enact legislation and these intentions are knowable by courts when called on to interpret legislation.

However, we need not forget that the touchstone of interpretation is the intention of the legislature. The legislature may reveal its intentions directly, for example by explaining them in a preamble or a purpose statement. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.^[30] To properly understand and interpret a statute, one must read the text closely, keeping in mind that the initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one.^[31] Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.^[32]

In a recent decision of this court^[33] I observed that the principles which apply to the construction of statutes include presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

Key definitions.

A statutory body is bound to adhere to the mandate stipulated in the statute creating it and its actions must conform to the statutory and constitutional prescriptions. The preamble to the Films and Stage Plays Act^[34] states that "An Act of Parliament to provide for controlling the making and exhibition of cinematograph films, for the licensing of stage plays, theatres and cinemas; and for purposes incidental thereto and connected therewith."

Cinematography is defined as the science or art of motion-picture photography by recording light or other electromagnetic radiation, either electronically by means of an image sensor, or chemically by means of a light-sensitive material such as **film** stock.^[35] It is the art or technique of movie photography, including both the shooting and the processing of the image.^[36]

Cinematograph film can be defined as any work of visual recording on any medium produce through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and 'cinematograph shall be construed as including any work produced by any process analogous to cinematograph including video films.^[37] Section 2 of the act defines film as follows:-

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

The Major Law Lexicon^[38] defines *film* as:- means motion picture or sound recording film having a nitrocellulose base whether in the form of exposed or unexposed film, positives, negatives, scraped or used film. The act defines **making a film** as:-

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

Audiovisual is defined as "Using both sight and sound, typically in the form of images and recorded speech or music"^[39]It means possessing both a sound and a visual component, such as slide-tape presentations,^[40] films, television programs, church services, live theater productions and commercial audiovisual. It also includes image or artwork, motion picture or video recording, television shows and television broadcasts.

The term “audio-visual” simply means that an item has both a sound (audio) and sight (visual) component. The audio, the visual, or both may be either live or pre-recorded. They may be enhanced by the use of technologies to make them easier for a large audience to hear or see, or they may simply be presented “as is” to a small group.

The Major Law Lexicon defines^[41] Audio-visual as "production with both sound and images which may or may not be moving."

Audiovisual commercial communication refers to the promotion of goods and services in the **audiovisual** world, particularly television **advertising** and shopping, sponsorship and product placement.^[42] Audiovisual commercial communication is a term that describes various forms of promotion of goods and services. Broadly, the term covers television advertising, sponsorship, teleshopping and product placement.

From the above definitions, I am persuaded that the advertisements in question being audiovisual in nature falls within the definitions and meaning of *film* and *making film* under section 2 of the act and also within the scope prescribed at the preamble to the act.

Whether the Board acted within its statutory mandate.

The **Kenya Film Classification Board** is a state corporation that operates under the Government of Kenya whose mandate is to "regulate the creation, broadcasting, possession, distribution and exhibition of films by rating them." The Board was founded in 1963 with the commencement of the laws outlined in the Films and Stage Plays Act of 1962 (Section 11) and has since involved itself in the rating and classification of films and television programmes. More recently, it has caused controversy by banning several films, such as the American box office success The Wolf of Wall Street, the Kenyan film Stories of Our Lives and the 2015 film Fifty Shades of Grey based on the novel of the same name. The Board has also regulated television content, including advertisements.

The Kenya Film Classification Board was established by the Films and Stage Plays act of 1962 which came into force in 1963, mainly to regulate the creation, broadcasting, possession, distribution and exhibition of films by examining them for content, imposing age restrictions and giving consumer advice about various films. The Act gives the Board the power to approve or refuse to approve films and posters. The Act also states that approval is not to be granted to films that, in the Board's opinion, "prejudice the maintenance of public order or offend decency, or... [are] undesirable in the public interest. In addition, the Kenya Information and Communications Amendment Act of 2013 gives the Board the mandate to monitor television stations in order to "ensure content meant for adult audiences is not aired during watershed period (5am – 10pm)."

The Board primarily classifies and rates films by examining them and giving them a 'certificate of approval' along with its rating of 0 to 4. This scale indicates the 'impact' of the film: "low", "mild", "moderate" or "strong". This then corresponds to the general rating of the film: GE (general exhibition),

PG (parental guidance recommended), 16 (not suitable for persons under the age of 16) and 18 (not suitable for persons under the age of 18). After the certificate of approval is issued, the classification officer records the name of the film, its country of origin, rating and the date of rating and publishes the information in the KFCB classification catalogue. The Board's other activities include licensing film distributors in the country by granting film regulatory licenses to the distributors, and checking for violation of the terms of the license, including "license expiry, sale of unrated movies, sale/showing of restricted movies and misuse of classification labels."

The functions of the Board are clearly stipulated under section 15 of the act which provides as follows:-

15. Functions of the Board

(1) *The functions of the Board shall be to—*

(a) *regulate the creation, broadcasting, possession, distribution and exhibition of films by—*

(i) *examining every film and every poster submitted under this Act for purposes of classification;*

(ii) *imposing age restriction on viewership;*

(iii) *giving consumer advice, having due regard to the protection of women and children against sexual exploitation or degradation in cinematograph films and on the internet;*

My reading of the above provisions is that the intention of the legislature is very clear and discernible from the plain meaning of the words. The Board is mandated to regulate the creation, broadcasting, possession, distribution and exhibition of films by *inter alia* imposing age restriction on viewership. It is also mandated to protect women and children against sexual exploitation or degradation in cinematograph films and on the internet.

Advertisements of alcoholic drinks must comply with specific restrictions and guidelines so as to conform to the law. Audiovisual commercial communications must not cause physical or moral harm to minors, must not directly exploit minors' inexperience or credulity, must not encourage minors to pressurise parents to make a purchase, must not be aimed at minors or encourage alcohol consumption.

It is necessary to effectively enforce the safeguards bearing in mind that children of tender age may not have developed adequate "cognitive defences" to implicitly process and appreciate commercial messages. Article 53 (2) of the constitution provides that a child's best interests are of paramount importance in every matter concerning the child, and in this respect, I find that it is in the interests of the children and the society at large to enforce regulations governing advertising of alcoholic beverages.

Alleged violation of chapter 4 of the constitution, articles 27 and 47 of the constitution.

On the alleged violation of article 27 of the constitution, I find no evidence that regulations in question have been enforced in a manner that is discriminatory against the petitioner or any of its members.

Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[43] Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[44] The issue that inevitably follows is whether or not the letters complained of amounted to breach of the rules of natural justice. No decision or action had been arrived at by the time the petitioner filed these proceedings.

I find that the petitioner moved to court 'too early' to stop the process and as at the time of filing this petition, there was nothing to show that the steps hitherto taken by the Board were contrary to the statutory mandate of the Board nor has the petitioner proved infringement of any fundamental rights or threat to the infringement to warrant this court's intervention.

I also find that that the Boards functions were authorized by the relevant statute. The petitioner has not proved any basis for reasonable apprehension of bias to convince the court that the decision contemplated of any would be tainted with bias. Reasonable apprehension of bias is a legal standard for disqualifying decision-makers for bias. Bias of the decision-maker can be real or merely perceived. The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. [The] test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude." [45]

A reasonable apprehension of bias may be raised where an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the decision maker would unconsciously or consciously decide the issue unfairly. In my opinion the simple question which requires an answer in each case is this: Is there a real possibility that a reasonable person, properly informed and viewing the circumstances realistically and practically, could conclude that the decision-maker might well be prone to bias? I find no material before me in this case to demonstrate that had the Board proceeded, its decision would have been tainted by bias.

The letters complained of are clear. The petitioner responded to the letters and rushed to court before any decision was made. To me, this petition was filed prematurely. There is nothing to show that the letters in question in any manner violated article 47 or violated any provisions of the law or threatened the petitioners rights.

Determination

Commercial advertising and marketing practices are generally considered to fall to some extent under provisions protecting freedom of expression, such as article 33 of the constitution of Kenya 2010, Article 19 of the Universal Declaration of Human Rights and article 19 (2) of the International Covenant on Civil and Political Rights, which states that the right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers. In general comment 34, the Human Rights Committee of the U.N. stressed that the right to freedom of expression "may also include commercial advertising." [46]

Hence, the regulation of commercial advertising and marketing practices should follow the principles enunciated in national, international and regional instruments regarding possible limitations to freedom of expression. In accordance with article 24 of the constitution and Article 19 (3) of the International Covenant on Civil and Political Rights, restrictions shall only be such as are provided for by law and are necessary for respect of the rights or reputations of others. No evidence has been tendered to demonstrate that the provisions of the law discussed above or the regulations in question do not meet the constitutional muster prescribed under article 24 of the constitution permitting restriction of rights.

Article 19 (3) of the International Covenant on Civil and Political Rights also provides that restrictions may be necessary for protecting national security, public order, public health or morals. The Human Rights Committee, in general comment No. 22, stressed that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. [47]

It has not been shown that the restrictions in question are not the least restrictive nor has it been shown that it is not proportionate to achieving the purported aim. Commercial advertising and marketing may be granted less protection than other forms of speech. [48]

Further, in considering the regulation of commercial advertisements, the court is inclined to consider whether the regulation in question is aimed at advancing public interest. There is significant interest in protecting the health, safety, welfare, moral values of children bearing in mind the responsibility of the state to ensure that commercial advertisements, activities and operations do not have an adverse impact on children's rights, specifically marketing to children products with a potential long-term impact on their health and morals such as alcohol.

The court will be inclined to uphold rules and standards aimed at protecting minors, human dignity and inculcating moral values in children. Transmission of audiovisual media advertisements should ensure respect for cultural, age difference, linguistic diversity, moral values and religious convictions.

In view of my reasoning enumerated above, I am not persuaded that the petitioner has proved its case to the required standard. The language in the provisions is clear. The mandate of the Board is also clearly spelt out in the Act. There is nothing to show that the Board acted outside its statutory mandate. Consequently, this petition fails. Accordingly, I dismiss this petition with costs to the first Respondent.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this **12th** day of **May** 2017

John M. Mativo

Judge

[1] Cap 222, Laws of Kenya

[2] Cap 108, Laws of Kenya

[3] Act No. 2 of 1998

[4] A Publication of the Communications Authority of Kenya

[5] Supra

[6] Act No. 4 of 2015

[7] Supra

[8] Supra

[9] Counsel cited Ridge vs Baldwin {1964}AC 40, Hypolito C. De Souza {1961} E.A. 377 & Oloo vs A.G {1987}K.L.R 711

[10] Counsel cited Associated Provincial Picture House vs Wednesbury Corp. {1948} 1KB 233

[11] Counsel cited Council of Civil Service Union vs Minister for the Civil Service {1983} UKHL 6

[12] {2007}eKLR

[13] Counsel cited section 43 (1) of Alcoholic Drinks Control Act

[14] Supra

[15] Counsel cited Nation Media Group-Supra

[16] Act No. 23 of 2013

[17] Ibid

[18] Supra

[19] Counsel cited *Amalgamated Society of Engineers vs Adelaide Steamship Co. Ltd & Others* {1920} 28 CLR 129, Cited in *County Government of Nyeri & Another vs Cecilia Wangechi Ndungu* {2015}eKLR

[20] *Supra*

[21] *Supra*

[22] Counsel referred to paragraph 33.3 of the Programming Code for Free-to-Air

[23] *Supra*

[24] *Ibid*

[25] The Supreme court of India in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others*{1987} 1 SCC 424

[26] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The Court takes much the same approach when it chooses congressional intent rather than statutory text as its touchstone: a canon of construction

should not be followed “when application would be tantamount to a formalistic disregard of congressional intent.” *Rice v. Rehner*, 463 U.S. 713, 732 (1983).

[27] *K. Bhagirathi G. Shenoy and others v. K.P. Ballakuraya and another* {1999} 4 SCC 135

[28] Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, *Kansas Law Review*, {1954} Vol 3 at page8-9

[29] *Ibid* page 9

[30] Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, "A guide to reading, interpreting and applying statutes"<https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf>

[31] Christopher G. Wren and Jill Robinson Wren, *The Legal Research Manual: A game Plan for Legal Research and Analysis*(2d. ed. 1986)

[32] Plain meaning should not be confused with the “literal meaning” of a statute or the “strict construction” of a statute both of which imply a “narrow” understanding of the words used as opposed to their common, everyday meaning. *Supra* note 1

[33] *The Law Society of Kenya vs The Kenya Revenue Authority & Another*, Pet No. 39 of 2017

[34] Cap 222, Laws of Kenya

[35]<https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=meaning+of+cinematograph+films>

[36] <http://www.yourdictionary.com/cinematography>

[37] www.legalserviceindia.com/copyright/Cinematograph-Films.htm

[38] P. Ramanatha Aiyah, 4th Edition, 2010

[39] <https://en.oxforddictionaries.com/definition/audiovisual>

[40] Barman, Charles R. "Slide-Tape Presentations on a Classroom Budget". University of California Press. [JSTOR 4447864](#)

[41] Supra

[42] <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=meaning+of+audio+visual+commercial+advertisements>

[43] Article 47(1) of the Constitution of Kenya, 2010

[44] Article 47(2) of the Constitution of Kenya, 2010

[45] The test was first stated in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at page 394

[46] ([CCPR/C/GC/34](#), para. 11).

[47] ([CCPR/C/21/Rev.1/Add.4](#), para. 8).

[48] See Markt Intern Verlag GmbH and Klaus Beermann, 1989, para. 26 and Casado Coca v. Spain, 1994.