



**Classic FM trading as Radio Africa Group Ltd v Communications Authority of Kenya
(Tribunal Appeal 2 of 2019) [2021] KECMAT 663 (KLR) (Civ) (18 June 2021) (Judgment)**

Neutral citation: [2021] KECMAT 663 (KLR)

**REPUBLIC OF KENYA
IN THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL
CIVIL**

TRIBUNAL APPEAL 2 OF 2019

ROSEMARY KURIA, CHAIR

JUNE 18, 2021

BETWEEN

CLASSIC FM TRADING AS RADIO AFRICA GROUP LTD APPELLANT

AND

COMMUNICATIONS AUTHORITY OF KENYA RESPONDENT

JUDGMENT

1. The appeal before us for determination concerns two protagonists. One is a known radio station engaging in broadcasting services and the other is a known regulator in broadcasting services in Kenya.
2. The appellant, Classic FM, vide a Memorandum of Appeal dated 24th July 2019 raises the following grounds:
 - i) The Communications Authority of Kenya (hereinafter referred “CAK”) erred in law and fact by failure to afford the Appellant an opportunity to be heard before imposing a penalty in violation of the Article 47 of the *Constitution* on the right to a fair administrative action, Article 50 on the right to a fair hearing and Section 4 of the *Fair Administrative Action Act* that provide for a mandatory requirement for a fair hearing before adverse action maybe taken against a party.
 - ii) The Communication Authority erred in the fact by holding that the complained of discussion topic was inappropriate and was likely to incite listeners as the complained of discussion topic was a matter of public notoriety and of national interest as it had been featured in all leading dailies of the day and had roused national interest that necessitated its airing to advance national dialogue and discussion on topical issues:



- iii) The Communication Authority erred in the fact by failing to acknowledge and take into account that the complained of words were a verbatim playing of a recording that was in the public domain and whose contents were essential and necessary to further national debate without distorting the context within which the discussion was taking place amounting to a qualified privilege when reporting controversial subjects on the need or proper contextualization of the discourse;
- iv) The Communication Authority of Kenya erred in law and fact by failure to note that the radio presenters repeatedly pursued a neutral stance that sought to explore the issue while upholding the dignity and highest professional standards to facilitate the debate, caution callers and listeners on the need for civil dialogue and advance the national interest of freedom of expression in a respectful and professional manner; and
- v) The Communication Authority of Kenya erred in law and fact by failure to exercise its discretionary powers when levying penalties on Classic FM despite the measures put in place by the station to prevent a repeat of the same action and to eliminate future violations proactively.

3. The Appellant thus sought orders that:

- a. The appeal be allowed.
- b. The decision of CAK of 3rd June 2019 imposing a penalty of kshs 500,000/= be set aside.
- c. Costs of the appeal be borne by the Respondent.

4. The crux of the matter before us is that on or about 28th May 2019; the Appellant allegedly violated the appropriate content standards requirement by airing sexually explicit content during the watershed period. An allegation which was vehemently denied.

5. The Respondent alleged that the content aired was in regards to domestic violence, where one caller was quoted saying

“Na hii message nimeona imeingia hapa, hawa ni wale Malaya unakuwanga na hao ni mbele ya watoto.”

6. The Respondent then averred that another caller also mentioned how his wife belittles his private parts and also slaps him in front of his own children

7. A different complaint was that on 31st May 2019 at 8.13A.M the appellant allegedly aired inappropriate content during the watershed period. The content was that of Apostle Dr. James Ng’ang’a who was noted saying;

“If you are not going to respect my wife I’ll kick you out of my Ministry....this time round I’ll show you my power. Mwanamke yeyote katika huduma hii ambaye hata heshimu mke wangu, kesho badilisha kanisa yako. Kanisa yako badilisha uite yako utoke kwa hii yangu.....Wajinga hawa! Mumetajirika hapa hapa kwangu, stupid arrogant! Kama hamta heshimu mke wangu, I’m not going to serve with you! Mmekuja kwangu na matuta, useless people, takataka, rubbish! Satan wants to bring Neno down, that is why



the devil is fighting me all over in media....., alafu na mke wako mnakaa hapo mnafikiri mtanitahirisha? Fungeni hiyo kanisa ama muigeuze, Stupid!”

8. It is the above contents that provoked the Respondent to write the letter dated 3rd June 2019 to the Appellant, which we quote verbatim as the letter is of importance in these proceedings.

“Dear Patrick

RE:Penalty for airing inappropriate content during the watershed period

Reference is made to our letters dated 29th April 2019 and meeting held on 20th May 2019 reminding you to comply with the watershed guidelines. The Authority has received a complaint and noted that Classic FM has again violated the appropriate content standards requirement by airing inappropriate content and discussing a topic that is likely to incite listeners on 28th May during our breakfast show at 8.39 am to 10.00 am. Profanity and inappropriate language was also noted on 31st May 2019 during your breakfast show at 8.13am.

The Authority draws to your attention to the existing legal requirements that a broadcaster is obligated to observe in accordance to the broadcasting content standards, during the watershed period (05.00am -10.00pm) , including the following:

- a) Pursuant to section 46I of the [Kenya Information and Communication Act](#), 1998 (as amended) all licensed broadcasters are obligated to among other things, provide responsible and responsive programming that caters for the varied needs and susceptibilities of different sections of the Kenyan community as well as observe standards of good taste and decency.
- b) Part IV (I) of the [Kenya Information and communications \(Broadcasting\) Regulations](#) 2009 (20) (a) exercise care in order to avoid content that may disturb or be harmful to children, that has offensive language, explicit sexual content or violent material, music with sexually explicit lyrics or lyrics which depict violence; (b) not broadcast programmes with the content specified in paragraph (a) during the watershed period.
- c) Section 3.3.4 of the programming code states that, Save for educational programmes, which may require graphic details, no broadcasting station shall air programmes including interactive calls-ins or discussion sessions whose content is suitable for adult only audience during the watershed period.

In this regard, the Authority requires you to pay a penalty of five hundred thousand shillings (KES. 500,000/=) within ten (10) days from the date of this letter as provided for in Clause 83A of the [Kenya Information and communications Act](#) 1998 (as amended), failure to which additional regulatory action will be taken against your station.”

9. The Appellant having received the letter of 3rd June 2019 responded with a letter dated 8th June 2019. Indicating that the presenters were discussing a domestic violence incident that was reported in a local daily, The Standard. They also averred that the presenters never glorified the incident neither did they incite or encourage domestic violence. To the best of their knowledge no violent material was aired. It was also their averment that the discussion was on a matter of public interest and concern.



10. On the issue of 31st May 2019 concerning Pastor Ng'ang'a they indicated that they never came across any profanity or inappropriate language. They maintained that they were equally discussing a matter of public interest and concern.
11. The Appellant closed its letter by requesting the Respondent to reconsider the fine. On 18th June 2019 the Respondent responded to the Appellant's letter giving further details on what was said in the airings and maintaining that the fine of Kshs 500,00/= (Five Hundred Thousand Kenyan Shillings Only) should be paid within 7 days failure to which additional regulatory action will be taken.
12. It was also the evidence of the Respondent that despite warnings and/or caution issued to the Appellant vide the Respondent's letter dated 29th April 2019 and the subsequent meeting held between the parties on 20th May 2019 the appellant refused, failed and/or neglected to heed the same and has continued with the said unlawful actions.

Analysis and Determination

13. Having applied our minds to the pleadings, evidence and the submissions filed thereto we do unanimously find that the issue of utmost importance is Ground 1 in the Memorandum of Appeal, whether the Appellant was accorded a fair hearing.
14. The Respondent when it wrote the letter dated 3rd June 2019, for the avoidance of doubt it was not on its own motion, but on a complaint. Observing, that the appellant had violated:
 - a. section 46I of the *Kenya Information and Communication Act*, 1998 (as amended) all licensed broadcasters are obligated to among other things, provide responsible and responsive programming that caters for the varied needs and susceptibilities of different sections of the Kenyan community as well as observe standards of good taste and decency.
 - b. Part IV (I) of the *Kenya Information and communications (Broadcasting) Regulations* 2009 (20) (a) exercise care in order to avoid content that may disturb or be harmful to children, that has offensive language, explicit sexual content or violent material, music with sexually explicit lyrics or lyrics which depict violence; (b) not broadcast programmes with the content specified in paragraph (a) during the watershed period.
 - c. Section 3.3.4 of the programming code states that, Save for educational programmes, which may require graphic details, no broadcasting station shall air programmes including interactive calls-ins or discussion sessions whose content is suitable for adult only audience during the watershed period
15. Pursuant to the above alleged violations, the Respondent invoked Section 83A of *KICA* which provides:

“Where, on its own motion or consequent upon a complaint made by any person, the Commission-

 - a) is satisfied that a licensee is contravening or has contravened the Act, or any other written law or any of the conditions of that licence;



- b) notifies the licensee in writing, specifying the acts or omissions which, in its opinion, constitute or would constitute contravention of the Act or the licence;;
 - c) requires the licensee to remedy the contravention within such period as the Commission may specify in the notice, then if the licensee fails to remedy the contravention within the prescribed period without reasonable cause, such a licensee shall be liable to a penalty of five hundred thousand shillings up to a maximum of zero decimal two per centum of the annual gross turnover of the offending licensee in the preceding year for every year or part thereof in which the offence is continuing and such penalty shall be a debt owed to the Commission and recoverable summarily.”
16. It is not lost on us that KICA’s commencement date was on 15th February 1999. Since its enactment other laws have come into operation most importantly the supreme law of the land, which is the Constitution of Kenya.
17. The Constitution having been promulgated on 27th August 2010 brought forth a new dawn. A transformative era. Where all parties and state organs are to be bound by it, see Article 2 of the Constitution.
18. It is also not lost on us that section 7(1) of the Sixth Schedule to the *Constitution* provides that “all law in force immediately before the effective date continues to be in force but shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution.”
19. It would therefore mean that section 83A of *KICA* ought to be interpreted or enforced in conformity with the constitution, making the necessary alterations, adaptations, qualifications and exceptions.
20. The Respondent as a regulator exercises administrative powers whenever it applies the relevant laws on a licensee, therefore it has to be guided by Article 47 of the *constitution*, which provides:
- 1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair
 - 2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action
 - 3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration
21. It is pursuant to Article 47 of the *Constitution* that the *Fair Administrative Action Act* was enacted. Specifically, the Appellant has invoked Section 4 which provides:
- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.



- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to—
 - (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
- (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

22. We do agree with the authority relied upon by the Respondent in the case of *Judicial Service Commission V Mbalu Mutava & Another* [2015] eKLR where the court of Appeal stated:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national



values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

23. It goes beyond saying that all persons are bound by the constitution including the parties herein.
24. When the Respondent was satisfied that the Respondent had violated some of the relevant provisions as a licensee did it take steps that were in conformity with the Constitution and the Fair Administrative Action Act? Our answer is in the negative. The actions or inactions that occurred on the 28th May and 31st May 2019 are separate and distinct from the meetings that were held prior, that is on the 20th May 2019. Therefore by any stretch of imagination this tribunal cannot find the meetings to amount to hearings because they were conducted before the events.
25. A reading of Article 47 of the *Constitution* and Section 4 of the *Fair Administrative Action Act* there is a process to guide any administrative body before such body takes an administrative action that is likely to affect the rights of another.
26. Exercising our appellate jurisdiction we must interrogate the process that informed the decision, and we do find that the process is wanting. The Respondent made a decision (the fine) without granting the Appellant time to defend itself.
27. After the incidents of 28th May 2019 and 31st May 2019 occurred, the Respondent ought to have invited the Appellant for a fresh meeting/hearing to show cause why they should not be fined for airing inappropriate content. But to issue a fine without hearing the matter and granting the appellant the right to defend itself screams to the high heavens.
28. Having found that the process in reaching the decision by the Respondent was flawed, we do humbly opine that it would not be necessary do dive into the other grounds of Appeal. To make a determination on these issues would affect the process, if it is to commence a fresh.
29. The tribunal therefore finds:
 - a. That the appeal is hereby allowed.
 - b. That the fine of Kshs 500,000/= is hereby set aside.
 - c. That the decision of CAK of 18th June 2019 is hereby set aside.
 - d. That the matter is hereby referred back to the respondent to enable it determine the issues afresh and in adherence to the Constitution and the Fair administrative Action Act.
 - e. Each party to bear its own costs.

It is so ordered.

DELIVERED VIRTUALLY THIS 18TH DAY OF JUNE 2021 IN THE PRESENCE OF THE HONOURABLE MEMBERS OF THE THIS TRIBUNAL, HON. MBESA MALOMBE, HON. MARGARET NYAMBURA NDUNG’U, HON. COLLINS WANDERI, HON. VIVIENNE ATIENO, HON. DAMARIS NYABUTI AND HON. RAMADHAN ABUBAKAR

ROSEMARY KURIA

CHAIRPERSON-COMMUNICATIONS & MULTIMEDIA APPEALS TRIBUNAL

