REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR. NO. E176 OF 2025

BETWEEN

REPUBLIC ……

APPLICANT

VERSUS

KATIBA INSTITUTE …… 1ST APPLICANT

KENYA HUMAN RIGHTS COMMISSION…… 2ND APPLICANT

VERSUS

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

COMMUNICATION AUTHORITY OF KENYA… 2ND RESPONDENT

ATTORNEY GENERAL……3RD RESPONDENT

AND

KENYA UNION OF JOURNALISTS……. 1ST INTERESTED PARTY

KENYA EDITOR'S GUILD……. 2ND INTERESTED PARTY

EAST AFRICA EDITORS' SOCIETY …… 3RD INTERESTED PARTY

JUDGMENT

1. The Application before this court for determination is dated 25th June, 2025 wherein The Applicants are seeking the following Orders:

a. This Application be certified urgent and heard on a priority basis in the first instance.

b. Pending the hearing and determination of this Application inter-parties, a Conservatory Order issue suspending the implementation of the Memo Ref No. CA/CE/BC/TV 90 a purporting to direct all television and radio stations to stop any live coverage of the demonstrations.

c. Pending the hearing and determination of this Application, A conservatory order issue directing the Respondents to restore the signals of the TV and Radio stations that were deplatformed following the CA's directive.

d. Pending the hearing and determination of the Application, A conservatory order issue restraining the Respondents, or any officer subordinate to the Director General of the Communication Authority from enforcing or acting on the Memo Ref No. CA/CE/BC/TV 90 a purporting to direct all television and radio stations to stop any live coverage of the demonstrations.

e. Pending the hearing and determination of the Application, the 1st and 2nd Respondents cause to be published to the public a notice suspending the Memo Ref No. CA/CE/BC/TV 90 A.

f. Grant of Judicial Review orders including:

i. An order of Prohibition restraining the Respondents from enforcing the decision of 25 June 2025 as contained in Memo Ref No. CA/CE/BC/TV 90 A.

ii. An order of Certiorari to bring to this Court and to quash the Communication Authority's decision of 25 June 2025 directing Television and Radio stations not the demonstrations.

iii. Costs of the litigation to deter CA's repeated attempts at censorship of Kenyan media.

2. The Application is supported by the Supporting Affidavit of Nora Mbagathi the Executive Director of the 1st Applicant, Katiba Institute sworn on 25th June, 2025.

3. It is the Applicants' case that on 25 June 2025 the Communications Authority of Kenya (hereinafter referred to as CA) issued an unconstitutional, unlawful, and procedurally defective directive requiring all television and radio stations to cease live coverage of ongoing public demonstrations, accompanied by threats of unspecified "regulatory" action in the event of non-compliance. It is further deposed that police officers subsequently raided transmission sites of Citizen TV, NTV, and KTN, and switched off their Free-To-Air services.

4. The Applicants challenge this action as a direct and unjustified infringement of the freedoms of expression, information, and the media guaranteed under Articles 33, 34, and 35 of the Constitution, as well as the rights to fair administrative action and a fair hearing under Articles 47 and 50 and the Fair Administrative Action Act (hereinafter referred to as the FAA). They contend that none of the affected media houses was afforded an opportunity to be heard, contrary to the dictates of procedural fairness.

5. Reliance is placed on binding precedent, foremost the judgment in **Republic v Chiloba, Director General Communications Authority of Kenya; Katiba Institute & 5 others (Exparte Applicants) (Judicial Review Application E041 of 2023) [2023] KEHC 23791 (KLR) (Judicial Review) (19 October 2023) (Judgment*),*** where this Court held that prior censure of media houses for broadcasting demonstrations was illegal, irrational and procedurally improper, having been anchored on an expired Programming Code, and amounting to unjustified interference with media freedom. The Court emphasised that such actions violate Articles 33, 34 and 47, fail the proportionality test under Article 24, and offend natural justice.

6. Further reliance is placed on ***Kenya Union of Journalists v Communications Authority of Kenya & another; Media Council of Kenya (Interested Party) (Petition 501 of 2019) [2024] KEHC 13677 (KLR) (Constitutional and Human Rights) (7 November 2024) (Judgment),*** in which this Court affirmed that the Media Council of Kenya is the constitutionally designated body to set and monitor media standards, and that sections 46A(i) and (j) and 46H(1) of the Kenya Information and Communications Act, to the extent that they conferred similar power on CA, were unconstitutional.

7. The Applicants set out their legal foundation by emphasising the supremacy of the Constitution under Articles 2(1) and (4), the binding effect of the national values and principles in Article 10 on all State action, and the broad protections secured within the Bill of Rights under Articles 19 to 21. They further underscore that Article 23 empowers this Court to grant appropriate relief for any threatened violation of fundamental rights, and that Article 24 permits the limitation of such rights only by law and only where the limitation is reasonable and justifiable in a democratic society. It is asserted that the CA's directive cannot meet the constitutional threshold for lawful limitation, lacks statutory basis, and constitutes an impermissible exercise of control over the media contrary to Article 34(2).

8. It is also deposed that the directive undermines the exercise of the Article 37 right to peaceful assembly, since the media's role in ensuring transparency, accountability, and dissemination of information is integral to the safe and democratic exercise of that right.

9. The Applicants further contend that the impugned directive is ultra vires the Kenya Information and Communications Act. Sections 46A(c) and (d) require CA to promote diversity, plurality, and the public interest in broadcasting, while section 46I obligates broadcasters to gather and present news accurately, impartially, and in a manner that reflects

alternative views. The directive, it is argued, negates rather than advances these statutory duties.

10. They assert that the CA acted irrationally, unreasonably, and in a manner inconsistent with Article 47 and sections 4 and 7 of the Fair Administrative Action Act (FAA). No reasons were furnished for the abrupt censorship, contrary to the constitutional "culture of justification". The Applicants also warn that suppressing media visibility during demonstrations exposes citizens to danger, especially given the history said to be of judicial notice of excessive force by the National Police Service.

11. The Applicants maintain that unless this Court intervenes urgently, the Respondents will continue to perpetrate unconstitutional limitations on fundamental rights, with grave implications for constitutional democracy, media independence, and public accountability. It is urged that conservatory relief is necessary to forestall irreversible harm and to prevent the Application from being rendered nugatory.

12. The Application was canvassed by way of written submissions dated 6th July, 2025 and supplementary written submissions date 14th October, 2025.

13. The Applicants submit that the Respondents have persisted in conduct that this Court has previously censured. They rely on **Republic v Chiloba, Director General Communications**

Authority of Kenya; Katiba Institute & 5 others (Exparte Applicants) (Judicial Review Application E041 of 2023) [2023] KEHC 23791 (KLR) (Judicial Review) (19 October 2023), in which the Court reproached the Communications Authority (CA) for censoring media coverage of demonstrations, and on **Kenya Union of Journalists v Communications Authority of Kenya & another; Media Council of Kenya (Interested Party) (Petition 501 of 2019) [2024] KEHC 13677 (KLR) (Constitutional and Human Rights) (7 November 2024) (Judgment),** where the Court affirmed that only the Media Council of Kenya is constitutionally empowered to set and monitor media standards. They argue that the impugned directive of 25 June 2025 which ordered all broadcasters to stop live coverage of demonstrations and was followed by police raids and shutdowns of Citizen, NTV and KTN reflects a disregard of binding judicial pronouncements and an attempt to revive unconstitutional state control over the media.

14. The Applicants contend that the directive is unconstitutional, unlawful and procedurally improper. They argue that it violates Articles 33, 34 and 37, as well as Articles 47 and 50 and sections 4 and 7 of the Fair Administrative Action Act. They reiterate that Article 34(2) expressly prohibits State control over the media, and that none of the media houses was accorded a hearing or furnished with reasons. They

submit that the Respondents relied on inapplicable provisions namely Articles 33(2) and 34(1), which address hate speech, propaganda for war and incitement to violence and even cited a non-existent section 461 of the Kenya Information and Communications Act. They argue that covering peaceful protests under Article 37 cannot fall within the Article 33(2) exceptions.

15. It is submitted that the directive is ultra vires Article 34(5) and the Media Council Act. Relying on *Kenya Union of Journalists (supra)*, the Applicants maintain that CA has no mandate to set or monitor media standards. They further submit that the directive offends sections 46A(c)–(d) and 46I of the Kenya Information and Communications Act, which require promoters of broadcasting services to advance plurality, accuracy, impartiality and the presentation of alternative viewpoints.

16. On procedural fairness, the Applicants rely on **Kenya Human Rights Commission & Community Advocacy & Awareness Trust (Crawn Trust) v Non-Governmental Organization Co-ordination Board & Law Society of Kenya [2018] KEHC 8915 (KLR), Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti [2018] eKLR, Kuto v Kenya Magistrates and Judges Association; Independent Electoral and Boundaries**

Commission & another (Interested Parties) (Petition E422 of 2023) [2023] KEHC 26157 (KLR), and on this Court's own findings in *Republic v Chiloba (supra)*, to submit that failure to accord the media houses a hearing renders the directive unlawful and void.

17. They argue that the impugned action is unreasonable and disproportionate, contrary to Article 47 and the proportionality principles stated in **Jacqueline Okuta v Attorney General [2017] eKLR.** The Applicants submit that silencing the media during public protests enables police abuses to go unrecorded, thereby endangering life and undermining the rights protected in Article 37. They further assert that the Respondents provided no reasons for their action, contrary to the "culture of justification" affirmed in **Republic v Fazul Mahamed (supra).**

18. On the freedom of expression and the media, the Applicants emphasise its foundational role in a democratic society, citing General Comment No. 34 of the UN Human Rights Committee. They ask the Court to consider Kenya's historical context, including past clampdowns on the press. They argue that the Respondents' claim to be acting under licence conditions is untenable, since rights may only be limited by law under Article 24, not by licence templates.

19. The Applicants submit that the Respondents' reliance on undefined notions of public interest, national security and urgency must be rejected. They cite **Republic v Muneer Harron Ismail & 4 others [2010] eKLR, Sudi Oscar Kipchumba v Republic (Through National Cohesion & Integration Commission) [2020] eKLR, and Republic v Nairobi City County Police Commander & 3 others Ex Parte Coalition for Reforms and Democracy [2016] eKLR** to argue that vague invocations of national security cannot justify constitutional violations.

20. They maintain that the threat of suspension or regulatory action was real, and that Articles 22 and 258 entitle litigants to challenge threatened rights violations. They rely on **Aperera v Officer Commanding Langata Police Station & 2 others; Maina (Interested Party) [2025] KEHC 4472 (KLR) and Kelvin Roy Omondi and Bonface Mwangi v National Assembly & Chief of Staff & Head of Public Service & 8 Others (HCCHRPET/E269/2025)** to illustrate that threatened violations are actionable.

21. The Applicants further contend that the Respondents' conduct violates Article 10's normative value-based framework particularly the rule of law, accountability and good governance. They cite **Republic v Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008]**

3 KLR (EP) 478 and argue that the Respondents acted without legal authority and contrary to binding court decisions in **Republic v Chiloba (supra) and Kenya Union of Journalists (supra).** They submit that the use of state power to silence the media is an abuse of office within the meaning of **Republic v Attorney-General, Anti-Counterfeit Agency, CS Industrialization & Enterprise Development & Polycarp Igathe Ex-Parte Tom Odoyo Oloo [2015] KEHC 677 (KLR),** and that it also offends Article 73(1) (a), as elaborated in **Keroche Breweries Limited & others v Attorney-General & others [2016] KEHC 7254 (KLR).**

22. On remedies, the Applicants urge the Court to invoke its full power under Article 23 and to craft reliefs that "strike at the source", citing the Supreme Court's endorsement of structural interdicts in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others; Petition No 14, 14A, 14B and 14C of 2014; Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR)** and this Court's approach in **Law Society of Kenya v Attorney General & another; Warsame & another (Interested Parties) (Petition 307 of 2018) [2019] KEHC 10881 (KLR).** They ask that costs be borne personally by the

Director-General of the CA as a deterrent against future violations.

23. The Applicants submit that the Respondents' actions lacked constitutional or legal foundation, posed a grave threat to democratic accountability, and echoed a past in which media suppression facilitated abuse of power. They ask the Court to reject the Respondents' justifications, uphold the supremacy of the Constitution, and grant the reliefs sought.

1st and 2nd Respondents' Case

24. The 1st and 2nd Respondents oppose the Application through the replying affidavit of David Mugonyi, the Director-General of the Communications Authority of Kenya, who deposes that he is duly authorised to speak on their behalf.

25. It is averred that that the 2nd Respondent is the statutory regulator of the ICT sector, including broadcasting, and is mandated to licence broadcasters, enforce licence conditions, manage spectrum resources, and safeguard consumer interests. Broadcasters, he notes, are required by law and by their licence terms to maintain valid annual licences and to adhere strictly to their licensing conditions.

26. It is the Respondents' case that the events leading to the impugned directive arose from routine compliance monitoring on 25 June 2025, during which the 2nd Respondent observed

that several broadcasters were airing live coverage of demonstrations without deploying the mandatory seven-second profanity-delay mechanism required under Condition 7 of the Broadcast Licence Terms. The Respondents state that this mechanism is essential for editorial review to prevent the airing of graphic, inflammatory, or otherwise harmful material, particularly during the watershed period when children may be watching. They assert that the broadcasts in question contained such content and therefore contravened Condition 7 of the licence and provisions of the Constitution, including Articles 33(2) and 34(1), as well as the Media Council Act and the Kenya Information and Communications Act.

27. Against this background, the Respondents state that the directive issued on 25 June 2025, vide Memo Ref. No. CA/CE/BC/TV 90 A, was a temporary compliance measure instructing broadcasters to cease live transmission of the ongoing demonstrations and to activate the seven-second delay. They emphasise that the directive did not prohibit coverage of the demonstrations altogether; broadcasters remained free to report through delayed broadcasts, digital platforms, or post-event analysis. The decision, they say, was confined to the demonstrations of that day and was meant to avert potential public harm, including escalation of violence,

trauma to viewers, and exposure to material that could fall within the restrictions recognised under Article 33(2).

28. The Respondents further state that immediately upon learning of a court order on 26 June 2025, they suspended the directive in its entirety through a further memo, restoring the status quo and allowing broadcasters to continue coverage subject to compliance with their licence conditions. They therefore contend that the impugned decision presently has no legal force and is not being implemented.

29. They oppose the orders of certiorari and prohibition sought. They maintain that the directive was grounded in lawful licensing requirements and in the public interest, and that it did not amount to a ban on coverage but merely required adherence to the seven-second delay. They argue that removing the delay requirement would undermine licence conditions and expose the public to unfiltered harmful content, potentially causing irreparable harm by way of heightened violence, trauma, obscenity, and other material restricted under Article 33(2). The Respondents also note that none of the affected broadcasters has ever contested the legality of the relevant licence conditions and that all licensees are aware of the implications of non-compliance.

30. The 1st and 2nd Respondents filed written submissions dated 9th October, 2025.

31. They contend that the Applicants fundamentally mischaracterize a regulatory compliance measure as censorship. They submit that the impugned directive of 25 June 2025 was a lawful, proportionate and urgent compliance instruction issued in response to ongoing violations of broadcast licence conditions, specifically the mandatory 7-second profanity delay under Condition 7. They assert that the directive neither banned media coverage nor interfered with editorial content but merely required broadcasters to desist from airing live demonstrations without the delay mechanism.

32. The 2nd Respondent avers that it is the statutory regulator under the Kenya Information and Communications Act (KICA), mandated to license and supervise broadcasters. During routine monitoring on 25 June 2025, it observed several broadcasters airing live demonstrations without the obligatory 7-second delay, resulting in the unfiltered dissemination of graphic violence, inflammatory statements and profane language during the watershed period. This, it maintains, violated multiple licence conditions and Articles 33(2) and 34(1) of the Constitution. The directive was therefore issued to forestall further harm and remained limited to the events of that day.

33. The Respondents emphasise that the directive did not proscribe coverage of demonstrations; broadcasters could continue covering the events through delayed feeds, digital

platforms or post-event analysis. Moreover, upon receiving notice of court proceedings on 26 June 2025, the Authority immediately suspended the directive in its entirety, thereby restoring the status quo.

34. The Respondents deny that the directive breached the right to fair administrative action. Citing **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300** as adopted in *Republic v National Assembly & 2 others; Okoiti (Ex parte) [2022] KEHC 15587*, they argue that the directive was neither illegal nor ultra vires. They rely on the Supreme Court's holding in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR)** at paragraph 369 to affirm that Article 34(3) constitutionally vests licensing and related technical regulation in the Authority.

35. They maintain that broadcasters were in open breach of Conditions 7, 10.3.2, 10.4.1 and 10.8 of their licences. That the directive merely required immediate compliance with obligations broadcasters had voluntarily accepted; it imposed no sanctions and made no final finding of wrongdoing. The Respondents dispute the Applicants' factual assertions regarding alleged police raids, arguing that such claims lack the precision required under **Anarita Karimi Njeru v Republic [1979] KECA 12 (KLR)**.

36. On procedural fairness, they submit that the directive was an urgent compliance instruction issued during ongoing violations creating immediate risks to minors and public order. They rely on **Judicial Service Commission v Mbalu Mutava & another [2015] KECA 741 (KLR)** and **Republic v Chiloba, Director General Communications Authority of Kenya; Katiba Institute & 5 others (Ex parte Applicants) [2023] KEHC 23791** to argue that procedural requirements are context-dependent and that retrospective punitive action, not urgent prospective compliance, is what ordinarily triggers the *audi alteram partem* rule. The directive, they say, concerned clear, objective, technical obligations and was not a content-based sanction of the type addressed in *Chiloba*.

37. The Respondents further contend that the directive met the constitutional and statutory tests of reasonableness and proportionality as outlined in **Jacqueline Okuta v Attorney General [2017] eKLR** and **Pastoli v Kabale (supra)**. They argue that retrospective complaint processes, such as those under the Media Council Act, cannot prevent real-time harm to minors or the risk of incitement. Since the directive neither prohibited coverage nor imposed penalties, and was immediately suspended upon judicial notice, they contend it was the least restrictive measure available.

38. The Respondents maintain that the directive did not violate Articles 33 or 34. Article 34(3), they submit, permits licensing procedures necessary for airwave regulation, including technical standards such as the delay mechanism. They again rely on the Supreme Court's reasoning in **Royal Media Services (supra)** distinguishing technical licensing regulation under Article 34(3) from content regulation under Article 34(5).

39. They argue that the directive did not control or penalise content, viewpoints or editorial judgment, as prohibited by Article 34(2). Instead, it enforced a purely technical condition governing the mode not substance of live broadcasting. The Respondents add that the broadcasts in question risked contravening Article 33(2) by airing inflammatory material capable of inciting violence. They assert that the Programming Code's status is irrelevant since the directive relied solely on licence conditions, which remain valid.

40. The Respondents submit that the 1st Respondent acted within his statutory authority under section 11(1) of KICA as the chief executive responsible for the Authority's day-to-day management. They argue that requiring Board approval for urgent compliance instructions during live events would undermine regulatory oversight. They distinguish **Kenya Union of Journalists v Communications Authority of Kenya [2024] KEHC 13677**, noting that the decision in that

case concerned content regulation under Article 34(5), not technical licensing conditions under Article 34(3).

41. The Respondents submit that the directive was a lawful and proportionate compliance measure issued under urgent circumstances to prevent ongoing violations of broadcast licence conditions and to protect minors and the public from harm. They argue that it neither restricted media freedom nor violated fair administrative action and that the 1st Respondent acted within statutory bounds.

42. On this basis, the Respondents urge the Court to dismiss the Application with costs, asserting that their actions were lawful, proportionate, temporary, and taken strictly within their statutory mandate.

Analysis and determination:

Upon perusing the Application, the response thereto and the rival submissions, the court finds the following to be the issues for determination:

1) Whether the Application has merit.

2) Who shall bear the costs?

43. In order to succeed in the Application, the Applicants have to demonstrate that the 2nd Respondent acted illegally, irregularly and with procedural impropriety. In determining whether the Applicants have proven their case, I am guided

by the Supreme Court in **Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) KLR** where it was held as follows:

> *"(49) Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."*

44. Being a Judicial Review case, the Applicants are under a duty to prove that their case falls within the legal framework and the principles that were enunciated in the case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300**, where it was held that;

> *"In order to succeed in an Application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also, Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).*

Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re an Application by BukobaGymkhana Club [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

45. Further in determining this suit, this court has been guided by the findings in **Republic v Public Procurement Administrative Review Board Exparte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** where the Court held thus:

> *"The role of the court in Judicial Review proceedings was well stated in Republic vs National Water Conservation & Pipeline Corporation & 11 Others [9] where it was held that once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was prima facie performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament, then a court will not interfere with the decision."*

46. The court has the task of ascertaining whether the 2nd Respondent acted with *illegality, irrationality or procedural impropriety* in order to satisfy itself as to whether or not the Application is meritorious.

47. It is not in dispute that the 2nd Respondent issued a directive on June 25, 2025, vide Memo Ref. No. CA/CE/BC/TV 90 A

which instructed all television and radio stations to cease live coverage of the demonstrations and to activate the 7 - second profanity delay mechanism. The directive was thereafter suspended after the court intervened.

48. It is clear to the court that the 2nd Respondent's act of suspending the impugned directive after the court order is a demonstration that the 2nd Respondent was not going to lift the directive had it not been compelled by the court.

49. This court wonders why the 2nd Respondent did not issue a notice to the media houses asking them to stop airing the content that it refers to as offensive and against public interest before issuing the directive of June 25, 2025 given that it confirms that the coverage was ongoing.

50. The court is the view that the 2nd Respondent's directive of June 25, 2025, vide Memo Ref. No. CA/CE/BC/TV 90 had the effect of limiting the media houses rights and freedom as guaranteed under Article 33 and 34 of the Constitution.

51. The court asks itself the question whether in issuing the impugned directive, the 2nd Respondent complied with Article 24 (1) of The Constitution which provides ,that ''a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic

society based on human dignity, equality and freedom, taking into account all relevant factors, including--

a) the nature of the right or fundamental freedom;
b) the importance of the purpose of the limitation;
c) the nature and extent of the limitation;
d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

52. The 2nd Respondent was and remains under a duty to demonstrate to the satisfaction of the court that in limiting these freedoms under Article 33 and 34 of the Constitution it complied with Article 24 of The Constitution.

53. In order to establish whether or not the 2nd Respondent discharged its duties in compliance with the Constitution the court took time to consider what the 2nd Respondent advanced as the reasons or the justification for the limitation of the rights.

54. It was the 2nd Respondent's case that acting within its mandate to ensure compliance with license conditions and

safeguard public interest, it issued a directive on June 25, 2025, vide Memo Ref. No. CA/CE/BC/TV 90 A.

55. According to the 2nd Respondent further argued that the directive instructed all television and radio stations to cease live coverage of the demonstrations and to activate the 7 - second profanity delay mechanism. It further argued that this decision did not intend to prohibit all coverage of the demonstrations but to ensure that Broadcasters complied with their license obligations to introduce a brief delay to enable responsible editorial review before airing.

56. The 2nd Respondent's argued that this action was temporary and targeted to only demonstrations of the 25th day of June 2025 and that this aligned with Articles 33(2) and 34(1) of the Constitution of Kenya 2010 as read alongside Section 46 of the Kenya Information and Communications Act, Cap 411A.

57. It is this court’s finding that the 2nd Respondent’s arguments that the directive was to prevent irreparable harm, including escalation of violence and public trauma, as live broadcasts without the 7-second delay aired content violated the Broadcasters rights as guaranteed under Article 33 and 34 of the Constitution. The court is of the view that the objective that the 2nd Respondent was seeking to achieve could have been achieved differently or through another means.

58. The court finds that there is no relation between the limitation and its purpose since there are less restrictive means to achieve the purpose.

59. Section 4(1) The Fair Administration Action Act provides that “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.

60. The 2nd Respondent did not bother to invite the media houses to show why their licences should not be suspended within the due process and fair administrative dictates. This would have accorded with Article 47 of The Constitution and Section 4(1) of The Fair Administration Action Act. In essence the media houses were condemned unheard offending the national values and principles of governance under Article 10 of The Constitution.

61. Due process wasn't followed in arriving at the impugned decision. Had the 2nd Respondent given the media houses an opportunity to be heard, then the 2nd Respondent would have acted within Article 24 of the Constitution and Section 4(1) The Fair Administration Action Act. The 2nd Respondent failed to promote and protect Articles 33(2), 34(1) and 47 of the Constitution of Kenya 2010.

62. The 2nd Respondent's case that the impugned decision has no legal force, is not being enforced and will not be enforced while under suspension does not offer redress to the media houses. The media houses remain vulnerable and exposed to further acts of violation of their rights in the same way in the future given that the 2nd Respondent has demonstrated a clear pattern of unprocedurally suspending licences. The axe must not hang over their heads indefinitely.

63. These patterns can be gleaned from the past conduct of the 2nd Respondent in **Republic v Chiloba, Director General Communications Authority of Kenya; Katiba Institute & 5 others (Exparte Applicants) (Judicial Review Application E041 of 2023) [2023] KEHC 23791 (KLR) (Judicial Review) (19 October 2023) (Judgment).**

64. The 2nd Respondents argument that the prohibition against the live broadcast is contrary to licensing requirements for good and valid public policy reasons, which protect the public

interest is misplaced. The duty to comply with the Fair Administrative Action Act, due process and Article 24 of the Constitution must at all times carry the day.

65. The argument by the 2nd Respondent that it suspended the directive cannot cure the illegal directive. The life of an illegality or an illegal directive cannot be suspended nor extended. The directive must be arrested and removed instantly. In any event, the 2nd Respondent will suffer no harm if the impugned notice is squashed.

66. The 2nd Respondents' case that pursuant to the issuance of the Notice of suspension, the impugned decision has no legal force and is not being enforced and will not be enforced while under suspension is not enough.

67. The notice of suspension can be reactivated or invoked by the 2nd Respondent in the future should a similar event arise.

68. In the future, the 2nd Respondent has the liberty to take appropriate legal action should the need arise so long as it acts within its mandate and in a manner that will uphold the Constitution and promote due process.

69. No harm shall be occasioned if the 2nd Respondent's directive of 25 June 2025 is quashed. It will settle all the anxiety that the media houses have.

70. The democratic gains in the media freedom front that Kenya has achieved over time must be guarded jealously.

71. On another front, the Applicants have also sought an order an order of Prohibition to restrain the Respondents from enforcing the decision of 25 June 2025 as contained in Memo Ref No. CA/CE/BC/TV 90 A.

72. In order to determine this issue, I am guided by the case of **Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [2022] eKLR**, where the Court rendered itself thus:

> ***"The Order of "Prohibition" issues where there are assumptions of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi's Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction.***
>
> ***"Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some***

***decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself.*"**

73. In the case of **Kenya National Examination Council versus Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR**, the Court stated the grounds upon which such an order of prohibition may issue as follows;

"What does an order of prohibition do and when will it issue" It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See

HALSBURY&39; S LAW OF ENGLAND, 4th Edition, and Vol.1 at pg. 37 paragraphs 128."

74. Having arrived at the finding that the directive should be quashed, this court is satisfied that the Applicants have made out a case for the grant of the order of prohibition.

75. The other reliefs that the Applicants sought were conservatory in nature pending the hearing and determination of this Application.

76. In the Canadian case of **Borowski vs. Attorney General of Canada (1989) 1 SCR 342** it was stated that an appellate court will not entertain an appeal if the state of facts to which the proceedings in the lower court related have ceased to exist and the substratum of the litigation has disappeared. The Doctrine of Mootness reflects the complimentary concern of ensuring that the passage of time or succession of events had not destroyed the previously live nature of the controversy. Mootness involves the situation where a dispute no longer exists.

77. **Black's Law Dictionary Tenth Edition** defines the term "moot" as having *"no practical significance; hypothetical or academic* "and a "moot case" as a *"matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights".*

78. In the case of **Samuel Kimani & another v Dominic Kamiri Karanja [2022] eKLR** the Judge in agreement with the sentiments of Mativo J in **Evans Kidero v Speaker of Nairobi City County Assembly & Another (2018) eKLR** held: *"In the circumstances, it is my view that the matter before me stands moot for all intents and purposes and the Court therefore dismisses the second and third motions herein with costs to the Respondent."*

79. It is this court's finding that the reliefs that were sought in the form of conservatory orders are now moot.

Costs;

80. In Halsbury's Laws of England, 4th Ed Re-Issue (2010), Vol. 10, para. 16:

> *"The court has discretion as to whether cost are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially;* ***it must not be exercised arbitrarily but in accordance with reason and justice"*** [emphasis supplied].

81. In **Joseph Oduor Anode v. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR Odunga, J**. thus observed:

> *"…whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words,* ***where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so.*** *In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion …"* [emphasis supplied].

82. Being a public interest suit, this court departs from the settled rule that costs follow the event. No orders as to costs shall be issued.

Determination:

83. The Application has merit.

Order:

1) An order of Certiorari is hereby issued bringing to this Court quashing the Communication Authority's decision of 25 June 2025.

2) An order of Prohibition restraining the Respondents from enforcing the decision of 25 June 2025 as contained in Memo Ref No. CA/CE/BC/TV 90 A is hereby issued.

3) No orders as to costs.

Dated, signed and delivered at Nairobi this 27th Day of November, 2025.

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J. M. CHIGITI (SC)

JUDGE