IN THE COURT OF APPEAL AT NAIROBI

(CORAM: W. KARANJA, TUIYOTT & ACHODE, JJ.A.) CIVIL APPEAL NO. E378 OF 2020

BETWEEN

WANURI KAHIU..APPELLANT

AND

CREATIVE ECONOMY WORKING GROUP..............1ST RESPONDENT
CEO, KENYA FILM CLASSIFICATION BOARD
EZEKIEL MUTUA..2ND RESPONDENT
KENYA FILM CLASSIFICATION BOARD....................3RD RESPONDENT
ATTORNEY GENERAL..............4TH RESPONDENT
ARTICLE 19 EAST AFRICA...................................5TH RESPONDENT
KENYA CHRISTIAN PROFESSIONALS FORUM.......................................6TH RESPONDENT
KENYA NATIONAL COMMISSION ON HUMAN RIGHTS......................7TH RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi Constitutional and Human Rights Division (**J.A. Makau, J**.) delivered on 29th April, 2020*

in

Petition No. 313 of 2018)

****

JUDGMENT OF THE COURT

[1] The appellant is an internationally acclaimed Kenyan-born film maker and the producer and director of the film ***"Rafiki***", the subject of the appeal. While the 1st respondent is a consortium of civil society organizations and institutions whose objective is to campaign for legislative and policy reform in the creative sector for the advancement of culture, arts and media in Kenya.

[2] The appellant submitted the original script of the film **"Rafiki"** to the 2nd Respondent, applied for and was granted a film licence in line with **sections 4** and **5** of the Film and Stage Plays Act (**the Act**). The appellant also obtained an endorsement on the filming licence upon revision of the script of the film **"Rafiki"** in line with **section 7** of **the Act.**

[3] On 10th April 2018 the appellant submitted the film **"Rafiki"** for examination and rating by the 3rd respondent. On 16th April, 2018 the appellant met with the 3rd respondent, wherein the 3rd respondent directed the appellant to edit the film by 18th April, 2018 and remove what the 3rd respondent termed to be *"offensive classifiable elements"* before resubmission for classification.

[4] The appellant upon consulting her lawyers, declined the request to edit parts of the film; and asked the 2nd respondent to proceed with the classification of the film as it was. Through a letter dated 26th April 2018, the 3rd respondent informed the appellant that the film had been classified as **RESTRICTED**, outlining that the film contained classifiable elements such as homosexuality which run afoul of Kenyan laws as well as the culture of the Kenyan people.

[5] The letter also warned against the exhibition or distribution of the film **"Rafiki"** anywhere within the Republic of Kenya; indicating that the 3rd respondent was exercising its mandate to promote the culture of the Kenyan people as well as protection of children from exposure

to harmful content. The 2nd respondent subsequently made a public statement rehashing the 3rd respondent's decision.

[6] The appellant, together with the 1st respondent, filed a constitutional petition contending that the manner in which the 2nd and 3rd respondents had conducted themselves in classifying the film, occasioned violation of her constitutional rights. Her petition was grounded on reasons that the explanations for restricting the film, being the depiction and legitimization of homosexual and lesbianism in Kenya, had no proximate relation to the grounds of limitation of the freedom of expression including the freedom of artistic creativity under **Article 33(2)** of **the Constitution**. Further, that the decision was arbitrary in violation of **Article 47** of **the Constitution**.

[7] She also contested the constitutionality of **sections 4,6,7,8,9,12,13,16,30** and **35** of **the Act**; **sections 5(i),(ii),(iii),(iv)** and **(v)** of the Kenya Film Classification Board Classification Guidelines, 2012 ("**the Guidelines**"), which the Board relied upon to make the decision to ban the film. For this reason, she contended that the provisions should be declared unconstitutional for infringing on the freedom of expression including the freedom of artistic creativity under **Article 33** of **the Constitution**.

[8] The two petitioners sought the following reliefs:

a. A declaration that sections 4,6,7,8,9,12,13,16,30 and 35 of the Film Plays Act, Cap 22 and sections 5(i), (ii), (iii), (iv) and

(v) and 6, 3,5 of the Kenya Film Classification Guidelines, 2012 violate the freedom of expression including the freedom of artistic

creativity under Article 33 and are therefore unconstitutional and invalid;

b. *A declaration that the Kenya Film Classification Guidelines, 2012 do not have the force of law, and are illegal, unconstitutional and therefore null and void for all purposes;*

c. *A declaration that the decision dated 26th April, 2018 by the Respondents to restrict the film* ***"Rafiki"*** *violated the appellant's right to freedom of expression including the freedom of artistic creativity under Article 33 of the Constitution of Kenya and is therefore unconstitutional and invalid;*

d. *Special damages under Article 23(3)(e) of the Constitution of Ksh. 8,500,000/- being compensation in respect of:*

   i. *Projected sales from theatrical distribution of Ksh.7,500,000/-*

   ii. *Loss of sponsorship of Ksh.1,000,000/-.*

e. *General damages under Article 23(3)(e) of the Constitution of Kenya in favour of the appellant as against the Kenya Film Classification Board being compensation for the Board's violation of her rights under Article 33 of the Constitution.*

f. *Interest on all monetary awards at Court rates from the date of Judgment until payment in full.*

g. *An order that the respondents bear the appellant's and 1st respondent's costs of the petition.*

[9] On 29th April, 2020, the court delivered its judgment dated 26th March, 2020. The court delineated the following issues for determination:

a. *Whether the court had jurisdiction to hear and determine the matter?*

b. *Whether the Films and Stage Plays Act, Cap 22 Laws of Kenya and Kenya Films Classification Guidelines 2012 and the restriction of film Rafiki amounted to violation of the 1st petitioner's right to freedom of expression guaranteed under* ***Article 33*** *of* ***the Constitution of Kenya*** *and whether the same were illegal, invalid and null and void?*

c. *Whether the restriction of the Rafiki by the Kenya Film and classification Board was made irrationally, arbitrary and un procedurally and contrary to the law particularly* ***Article 47*** *of the constitution and relevant provisions of the* ***Fair Administrative Actions Act****?*

d. *Whether the petitioners were deserving of the orders and remedies sought?*

[10] At this stage, we are contented with setting out the answers reached by the trial court to the issues it framed. It found that its jurisdiction had been prematurely invoked due to **section 29** of **the Act** having provided a statute-based appeal mechanism under which the dispute to licensing and classification of films could have been addressed.

[11] On the second issue, the court appreciated that freedom of expression under **Article 33** of **the Constitution** is not absolute and limitation is internally provided under **Article 33(2**) and also to the extent and in the circumstances provided under **Article 24** of **the Constitution**. The court found that the limitations under **Article 33(2)** of **the Constitution** are not exhaustive and other

limitations

can be imposed as long as they are in accordance with **the Constitution**. The court therefore elected to take a holistic interpretation of **the Constitution** and guided by **Article 159(1)**, the court read **Article 33(2)** alongside **Articles 53** and **55** of **the Constitution** on the protection of the rights of children and the youth from harmful cultural practices.

[12] The court stated that **Article 24** embodies three tests that determine the constitutionality of legislation imposing limitations on fundamental rights and freedoms. Whether the limitation was prescribed by law; whether the limitation pursues a legitimate aim; and whether the limitation was necessary in a democratic society. Applying these tests to **the Act** and **Guidelines**, the trial court returned a view that they were constitutional, legal, valid and the limitations imposed therein were reasonable and justified in a democratic society.

[13] Regarding the specific allegations of the unconstitutionality of certain provisions of **the Act**, the court below held that **sections 7(1),9,12,13** and **16** meet the test for constitutionality under **Article**

24. As regards the challenge against **section 9** of **the Act**, the court noted that some of the applications received by the Board for filming licenses may necessitate the presence of security agencies at the shooting of the film, in particular in the national parks in Kenya where shooting of films in these settings not only endangers the lives of the cast and production team but also the

lives of the wild animals

in their natural habitat. To the contention against **sections 4** and **8** of **the Act** for lacking the element of *mens rea,* the court noted the 1st respondent's argument that the sections impose criminal offences in the nature of strict liability offences. The court however did not render its own determination here. As regards the criticism to **sections 6, 30** and **35** of **the Act** for being vague and overbroad, the court held that the same were to be read alongside **section 15(2)(b)** of **the Act** where the Board is mandated to prescribe Guidelines to be applied in the classification of films.

[14] Turning to **the Guidelines**, the court observed that the same were yet to be published under the Kenya Gazette. The learned trial Judge held that although having not undergone the steps stipulated under the **Statutory Instrument Act**, the **Guidelines** only intend to provide a definite guideline to classification of films as delegated by **the Act** to the Board. The trial court came to the conclusion that if the **Guidelines** were to be nullified there would be untold practical prejudice as their invalidation would result in the decisions of the Board being at limbo, and thereby exposing the nation as a whole, and more specifically the children and young adults, to audio-visual content that may be harmful to public order, decency and against public interest. Further, that a declaration of unconstitutionality would also prejudice the Board's responsibility of rating all audio- visual advertisements, inform and consider television and radio programmes before public

broadcast. In seeking to strike a balance

by ensuring that there was compliance with the law while at the same time not leaving players and stakeholders in limbo and chaos, the court granted the Board one (1) year from the date of the judgment to bring the **Guidelines** under the ambit of the law.

[15] On the third issue of whether the restriction of the film ***"Rafiki"*** was administratively fair pursuant to **Article 47** of the **Constitution**, the court held that; the appellant failed to demonstrate that 2nd respondent and the Board acted outside their powers under **the Act**, nor was it demonstrated that the Board acted with bad faith, ill will or malice or failed to give the appellant an opportunity to be heard or reasons for its decision; the Board repeatedly engaged the appellant with a view at arriving at an amicable resolution to the issue at hand; and the Board subsequently issued the appellant with written reasons for the decision it had reached.

[16] Consequently, the court found the petition to be without merit and issued the following orders:

a. *The jurisdiction of this court has been prematurely invoked.*

b. *The Right to freedom of expression under Article 33 of the constitution is not absolute, and is subject to limitation but only to the extent and in the circumstances provided under Article 24 of the constitution.*

c. *The provisions of the Films Act, and specifically sections 4,6,7,8,9,12,13,16,30 and 35 of the Films and Stages Plays Act and section 5(i) (ii)(iii) and (iv) as well as 63(5) of*

Classification Board Classification Guidelines, 2012 are constitutional and valid in terms of Article 24 of the constitution.

d. The exercise of the discretion by Board in the decision to "restrict" the 1st petitioner's film "Rafiki" is constitutional, proper and valid.

e. The petition is without merit and is dismissed with costs.

[17] In this appeal the appellant rallies her grievances around two thematic issues: that the learned Judge erred in finding that the jurisdiction of the court was prematurely invoked; and that the trial Court erred in failing to find that the 2nd respondent's decision to ban **"Rafiki"** is unconstitutional as it is in contravention of the scope of limitation of the right to freedom of expression under **Article 33(2)** of **the Constitution**. The 1st respondents join the appeal through a cross appeal dated 21st October 2020 in which they raise similar grounds as those in the main appeal but add two: that the High Court grossly misdirected itself in law by failing to assess the damages it would have awarded had the petition succeeded; and the High Court grossly abused its discretion in making the order on costs.

[18] The issue of jurisdiction was first raised when the petitioners sought conservatory orders through a notice of motion dated 11th September 2018. In a ruling dated 21st September 2018, *Okwany, J* held that;

"Having regard to the above provisions, I find

that this court has wide jurisdiction to deal with the instant petition as it raises questions of violation/threat of violation under the Constitution."

[19] The question of jurisdiction persisted to the main hearing of the petition. On this occasion, the proponents of non-jurisdiction prevailed. The trial court held;

> ***"In the view of the aforesaid I find that where the relevant statute presents alternative dispute resolution mechanisms and offered the petitioner the right of appeal, the petitioner is bound to follow that alternative dispute resolution. The alternative forms of dispute resolution are recognized under Article 159(2)***
> ***(c) of the constitution and the courts are under obligation to protect and promote the purpose and principles of the constitution as provided under Article 159 2(e) of the constitution. In view of the foregoing I find the petitioner failed to make use of the appeal mechanism provided in the Films and Stage Plays Act before filing this petition. I find that the jurisdiction of this court has been prematurely invoked."***

[20] On this issue the appellant argued that the learned Judge failed to question in detail whether the petition fell under the jurisdiction of the Court in **Article 165(3)** of the **Constitution**. She pointed out that pursuant to **Article 165(3)(d)(ii)** of the **Constitution**, the trial court had jurisdiction to determine whether anything said to be done under the authority of the **Constitution** or law is inconsistent with or in contravention of the **Constitution.** So too under **Article 23(1),** that the trial court had the jurisdiction to hear and determine applications for redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. She contended that **Article 165(6)** of the **Constitution** vests upon the High Court the supervisory jurisdiction over any body or authority exercising judicial or quasi-

judicial functions. She argued that the 2nd and 3rd

respondents exercised quasi-judicial functions in making the determination to ban films including ***"Rafiki".*** It was her contention that in her petition she sought the High Court's determination of the constitutionality of the 3rd respondent's decisions and whether those decisions abided by the principles entrenched in the **Constitution**. She also sought the determination of the constitutionality of various sections of **the Act** and the regulations used by the Board to rate films.

[21] The decision of the trial court was criticized as setting a dangerous precedent. She questioned whether she should have abandoned the claim seeking determination of the constitutionality of the impugned provisions of law and instead appealed to the Minister under **section**

29 of **the Act.** Further, at what point was she to have filed a constitutional reference, after the Minister's decision under **section 29** or filed it contemporaneously with her appeal before the Minister? She posited that the Minister, under **section 29**, lacked the jurisdiction to authoritatively interpret the Constitution.

[22] The appellant relied on the decision in **Republic v National Environmental Management Authority [2011] KECA 412 (KLR)**,

in which it was held that where there is a statutory appeal procedure, judicial review will only be granted in exceptional circumstances, and in deciding whether such an exception existed, the court must closely consider the suitability of the

statutory appeal for the particular case,

specifically, what the real issue is and whether that appeal process is capable of determining it.

[23] Adding their voice, the 1st respondents contended that the issue of jurisdiction was *res judicata,* having been heard and determined by *Okwany, J*. in her ruling dated 21st September 2018 where she found that the court had wide jurisdiction to deal with the petition as it raised questions of violation or threat of violation of rights under the **Constitution**. As the ruling was never appealed against to the Court of Appeal, the matter was *res judicata* and Makau, J. could not sit on appeal over the ruling of *Okwany, J.*

[24] The 2nd and 3rd respondents understood the trial court's finding to be that the petition was premature and therefore the doctrine of exhaustion was relevant. However, the same was not sufficient to oust the jurisdiction of the court to lead to the court downing its tools. They pointed out that the issue was raised and argued by only one party, the 6th respondent, and that the principal parties never raised it. Relying on the Supreme Court decision in **Methodist Church in Kenya v Fugicha & 3 others (Petition 16 of 2016) [2019] KESC 59 (KLR) (23 January 2019) (Judgment) (with dissent - JB Ojwang, SCJ)**, they contended that third parties admitted as interested parties should limit themselves to the main issues raised by the primary parties and consequently, the

issues to be determined by the court should remain the issues presented by the principal parties. Therefore, the court's finding that its

jurisdiction was prematurely invoked and yet the court went ahead to determine the matter is congruent with the principles established in the ***Methodist Church in Kenya Case (supra).*** In addition to the foregoing, they submitted that the petition before the court satisfied the exceptions to the doctrine of exhaustion as established in the High Court decision in **Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated)) [2020] KEHC 10266 (KLR) (6 November 2020) (Judgment)**. More specifically that the alternative dispute resolution forum established under statute may not have been sufficient to determine the grievances under the Petition, that is principally the constitutionality of **the Act**.

[25] On its part the 4th respondent, relying on the decision in **Macharia & another v Kenya Commercial Bank Ltd & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR)** submitted that jurisdiction is a serious issue that courts should never overlook once raised during the proceedings. It is contended that **section 29** of **the Act** provides for an appeal mechanism under which disputes relating to licensing and classification should be addressed. Further, that the appellant and 1st respondent never tendered evidence to

demonstrate compliance with that provision. The 4th respondent agreed with the finding of the High Court that due to the foregoing, the jurisdiction of the court was wrongly invoked. It is further argued that **Article**

159 of the **Constitution** recognizes alternative forms of dispute resolution and the High Court as well as other courts are under a constitutional obligation to protect and promote the purpose and principles of the **Constitution** as provided for under the said article.

[26] Weighing on this issue in support of the decision, the 6th respondent emphasized that the doctrine of exhaustion is a well-recognized legal principle that prevents the circumvention of statutory dispute resolution mechanisms and is deeply rooted in the need to respect the legislative framework, promote efficiency and prevent unnecessary burdening of judicial resources. The cases of **Mutanga Tea & Coffee Company Ltd v Shikara Limited & another [2015] KECA 469 (KLR)**, **Muthinja & another v Henry & 1756 others (Civil Appeal 10 of 2015) [2015] KECA 304 (KLR)** and **Vania Investments Pool Limited v Capital Markets Authority & 8 others [2014] KECA 452 (KLR)** were cited to buttress this point. It was argued that the appellant did not and has not demonstrated exceptional circumstances to justify bypassing the statutory dispute resolution process. Further, that there was no evidence that the mechanism was ineffective, inaccessible or biased. It was also submitted that the issue was in respect of the stage at which the High Court's jurisdiction was invoked; whether the actions

complained of had crystallized for a suit to be instituted in court before exhausting the statutory remedy.

[27] The arguments raised regarding the trial court's decision on jurisdiction calls on us to determine, in the first place, two prefatory issues; whether an interested party to proceedings can properly raise an objection on jurisdiction when the main parties have not; and whether the impugned decision was *res judicata* in view of the earlier decision by *Okwany, J.* on the same matter.

[28] It is common ground that at an interlocutory stage of the proceedings the 6th respondent, an interested party to the petition, took up the objection on the basis that the petitioners had not exhausted the appeal process under **section 29** of **the Act**, a position it urged again at the hearing of the main petition. The question is whether in these circumstances, the stance by the 6th respondent run afoul the principle restated by the apex Court in ***Methodist Church in Kenya (supra)*** that an interested party may not frame its own issues or introduce new issues for determination by the court.

[29] We take the view that as the question of jurisdiction is so fundamental and goes to the heart of the authority of a court to hear and determine a dispute before it, it would not matter that the issue is raised by an interested party. Indeed, the court can raise the issue *suo moto*. When an interested party alerts a court that it may be bereft of jurisdiction, it is not framing its own issues or introducing a new cause of action, it is simply cautioning the court that it may possibly be entertaining a matter which it has no authority to hear

and determine. It is not a peripheral issue under the monopoly the main parties.

[30] Generally speaking, a trial court is permitted, when disposing of a matter finally, to arrive at findings that are different from tentative findings made in answer to the same issue or issues arising at interlocutory proceedings (see **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] KECA 102 (KLR)**). This is because the findings at the interlocutory stage will often be tentative. At this stage the court is not expected to render itself with finality on issues that will arise for final determination in the later part of the proceedings. At the later stage, the court will have benefitted from considering the evidence and hearing full argument on the issues and will invariably be the wiser. The court should be free to change its mind.

[31] The situation is somewhat different when it comes to interlocutory decisions regarding preliminary objections. Preliminary objections proceed on the basis of uncontested facts. As it is expected that the court's appreciation of the facts will remain the same even after taking of evidence then its findings on a preliminary objection cannot be expected to change. It even seems to us that an issue raised as a preliminary objection and answered in a ruling cannot be revisited again other than through an application for review or an appeal.

[32] The proceedings before the trial court show that learned counsel Mr.

Ochiel appearing for 1st respondents drew the Court's attention to the

Ruling by *Okwany J.* In the impugned decision *Makau J.* observed, erroneously, that the petitioner did not submit on the question of jurisdiction. Further, in making his decision, the learned Judge makes no mention of the earlier Ruling and does not discuss it at all. We wonder whether his decision on the matter would have been any different had the Ruling been on his radar.

[33] Anyhow, we think that given that there was no change of facts and circumstances, the Ruling of *Okwany J* had determined the issue of jurisdiction with finality in those proceedings and revisiting the matter in the same proceedings would be in contravention of the doctrine of *res judicata*.

[34] And even if we were to consider the issue on merit, against settled legal principles, we reach a decision that the Ruling of *Okwany J*. cannot be faulted. Speaking authoritatively on the exhaustion of alternative remedy in a multifaceted dispute which also involves a plea for a constitutional relief, the Supreme Court in **Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition e007 of 2023) [2023] KESC 113 (KLR)** had this to say;

"105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed

inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But

there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.

106. The restraint and effective remedy rule, which we find favor in, is what led the Supreme Court of India in <u>United Bank of India vs Satyawati Tondon & Others</u>; (2010) 8 SCC to state as follows:

> *"44. ... we are conscious that the powers conferred upon the High Court under article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under article 226 of the Constitution.*
>
> *45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance." [Emphasis ours]*

107. Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective,

then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others (Pet No 15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment)."

[35] The petition before the High Court was not only questioning the validity of the decision of the respondents to restrict the film ***"Rafiki"*** but the constitutionality of ten provisions of **the Act** and **the Guidelines** in their entirety. The mechanism under **section 29** of **the Act** was certainly ineffective as the Minister has no power to declare any law as unconstitutional. As will be apparent presently, the petition and the arguments taken up therein on the constitutional issues were not a frivolity and cannot be said to have been set up simply to evade the statutory alternative dispute resolution mechanism. There was a genuine and *bonafide* grievance that could only be heard and determined by the High Court.

[36] The next main issue is whether the impugned provisions of **the**

Act and the **Guidelines** as a whole are contra the **Constitution.** But first, we do not understand the appellant and the 1st respondent as

contending that there should be no form of regulation of the industry. To be sure, the duo did not seek to impeach **section 15** of **the Act** which explicitly sets out one function of the Board to be regulation of the creation, broadcast, possession, distribution and exhibition of films. The provision reads;

> **"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;**
>
> **(b) license and issue certificate to distributors and exhibitors of films.**
>
> **(2) The Board may from time to time prescribe—**
>
> **(a) the procedure for application for licensing as a distributor or exhibitor of films; and**
>
> **(b) guidelines to be applied in the classification of films."**

[37] To the debate of whether to regulate or not, the 2nd and 3rd respondents pointed out that administrative prior classifications have been adopted by other democratic nations which possess vibrant film industries. Examples are given: India – Sections 3, 4, 5A, 5B and 5C of Cinematograph Act, 1952 read alongside the

Cinematograph Amendment Act, 2023 and Rules 22 and 23 of the Cinematograph (certification) Rules, 2024; South Africa – Sections 3 and 18 of the Film and Publications Act and Amendment Act No. 11 of 2019, gazetted in March 2022; Nigeria – Sections 1, 2, 28, 33 and 36 of the National Film and Video Censors Board Act No. 85 of 1993; United Kingdom – Sections 2, 4, 4A, 4B, 7, 8, 9, 10 and 11 of the Video Recordings Act, 1984, read alongside the Cinemas Act, 1985 and the Licensing Act, 2003; and the United States of America where in ***Freedman vs Maryland* (1965) 380 U.S. 51** the Court advocated

for what it referred to as *"judicial prior classification"*.

[38] So, Kenya stands in good company and the objective of **the Act**, proclaimed in its preamble, "*to provide for controlling the making and exhibition of cinematograph films, for the licensing of stage plays, theatres and cinemas"* cannot be faulted. What is critical is the measures of control provided under the statute and their implementation are reasonable, necessary and a demonstrably justified within constitutional imperatives.

[47] To be gleaned from the tone of the arguments taken up before us by the appellant is a change of heart regarding a position she held before the trial court. At trial she was firm that any limitation whatsoever of the right to freedom of expression beyond the internal limits of **Sub- Article 2** of **Article 33** amounts to an impermissible limitation to the right. We understand her to have climbed down from that position to the acknowledgment that

there could be limits to the freedom of

expression outside those in **Sub-Article 2** as long they accord with **Article 24**. This contrasts with the position of 1st respondents which remains that **Article 33(2(a)** to (**d)** contains an exhaustive list of permissible grounds for limitation of that right and no limitation is constitutional unless it is one of the four.

[39] The freedom of expression safeguarded by **Article 33** has a content- based restriction. The self-calibration is under **Sub-article 2** which provides that the right does not extend to;

> **"(2) The right to freedom of expression does not extend to—**
>
> **(a) propaganda for war;**
> **(b) incitement to violence;**
> **(c) hate speech; or**
> **(d) advocacy of hatred that—**
>
> **(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or**
>
> **(ii) is based on any ground of discrimination specified or contemplated in Article 27(4)."**

[40] Although the freedom of expression enjoys broad constitutional protection, it is not without bounds and is one of those which, under **Article 24**, can be limited by law. When expressly excluded from the list of those rights under **Article 25** which are non-derogable, the intendment of the **Constitution** must be that, in addition to the content-based restrictions expressly imposed by **Sub-Article 2** of **Article 33**, other limitations to the freedom of expression can be imposed but only within the strict scope and ambit of **Article 24**. This is not to open up the right to unbridled derogation but to

interpret the right holistically as explained by this Court in the decision of **Standard Limited & 2 others v Christopher Ndarathi Murungaru [2016] KECA 70 (KLR)**.

[41] We, therefore, uphold the following holding of the trial court;

> ***"It is clear from Article 33 of the constitution that the right to freedom of expression is not absolute as it is evidently that it is not included in the illimitable rights and fundamental freedoms provided under Article 25 of the constitution. It is further clear that the right to freedom of expression, as provided under Article 33(2) of the constitution is internally limiting and therefore constitutionally protected expression does not extend to those areas highlighted by the constitution. I therefore find the limitations as provided under Article 33(2) of the constitution are not exhaustive, therefore other limitations could be imposed on the right to freedom of expression, but only in as far this will be in accordance with the provisions of the constitution."***

[42] So that the power to limit is not exercised capriciously or abused to claw back on derogable rights, **Article 24(1**) provides the following safeguard;

> **"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."

[43] The clause itself expressly speaks to the criteria for testing whether or not a limitation is reasonable and justifiable. How this plays out practically with a court tasked with applying the test was discussed in the South African decision of **S v Manamela and Another (Director-General of Justice Intervening) (CCT25/99)** **[2000] ZACC 5** in which the Constitutional Court had this to say about section 36(1) of the South African Constitution, whose provisions are similar to **Article 24(1**);

"It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.

Although section 36(1) differs in various respects from section 33 of the interim Constitution, its application continues to involve the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality. Each particular infringement of a right has different

implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute

standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of its legislative and social setting. Accordingly, the factors mentioned in section 36(1) are not exhaustive. They are key considerations, to be used in conjunction with any other relevant factors, in the overall determination whether or not the limitation of a right is justifiable.

These themes are eloquently dealt with in the judgment of O'Regan J and Cameron AJ (the minority judgment). We agree with their approach and also agree that there is a pressing social need for legislation to address the evil they identify. Section 36, however, does not permit a sledgehammer to be used to crack a nut. Nor does it allow for means that are legitimate for one purpose to be used for another purpose where their employment would not be legitimate. The duty of a court is to decide whether or not the legislature has overreached itself in responding, as it must, to matters of great social concern. As the minority judgment points out, when giving appropriate effect to the factor of "less restrictive means", the court must not limit the range of legitimate legislative choice in a specific area. The minority judgment also states that such legislative choice is influenced by considerations of cost, implementation, priorities of social demands, and the need to reconcile conflicting interests. These are manifestly sensible considerations that do not provoke disagreement. Our difference with the minority judgment is not over how the principles should be articulated, but rather as to how they should be applied in the circumstances of this case."

[44] This follows the test in the Canadian Supreme Court decision of **R v Oakes** **[1986] 1 S.C.R 103** where the court famously stated;

"To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures

responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M

Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test":
R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the

degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two

elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

[48] With these parameters and principles in mind, we turn to consider the arguments on the provisions of **the Act** sought to be impeached as unconstitutional. As we do so, we observe that it is only counsel for the 1st respondent who went into some length in submitting on each of the impugned provisions. Without elaborating, the 4th respondent took the position that the provisions ensure that the media content and any other player in the industry complies with the statutory requirements in **the Act** and that those provisions and the impugned **Guidelines** address classified elements such as sex, crime, obscenity, nudity, occult, horror and drugs. The High Court itself did not go into any detailed analysis of the criticism that had been specifically pleaded in the petition and argued in respect to each of the sections and it falls on us to do so.

[49] It is submitted by the 1st respondent that **section 4** of **the Act** criminalizes expression through filmmaking on grounds that have no proximate relation to **Article 33(2).** Further, the offence is imposed without *mens rea* and imposes vicarious liability on persons other than the offender. As a result of the absence of *mens rea,* the section is wide and arbitrary; and it does not

constitute a limitation by law.

[50] The impugned **section 4** reads;

> **"4. No film to be made without filming licence**
>
> **(1) Subject to the provisions of section 10 of this Act, no film shall be made within Kenya for public exhibition or sale either within or outside Kenya except under and in accordance with the terms and conditions of a filming licence issued by the licensing officer under this Part.**
>
> **(2) Where any film is made in contravention of the provisions of subsection (1) of this section, the producer, proprietor, promoter and photographer thereof, and every other person engaged in the making of the film, shall each be guilty of an offence.**

[51] The first argument faulting **section 4** as having no proximate relation to **Article 33(2)** must necessarily fail because of our holding that the limitations of the freedom for expression are not only those specifically expressed in **Article 33(2)** but also those permissible within the scope and ambit of **Article 24**. To the extent that the appellant fails to address the issue through the prism of **Article 24**, the argument falters.

[52] Regarding the contention that **section 4** is an offence which is imposed without *mens rea*, we do not understand the provision as creating a strict liability offence and the crucial element of *mens rea* has to be established to prove criminal liability. The general rule is that at "*common law mens rea is a necessary element in a crime*" (Lord Pearce in **<u>Sweet v Parsley</u> [1969] AC 132**). The mere exclusion of

such words as "intentionally", "willfully", or "knowingly" from a

provision creating the offence does not mean that the section creates

an absolute offence. *Mens rea* is at the heart of criminal liability and any provision creating an offence that purports to exclude it must say so unequivocally. Even then, it is problematic whether an absolute offence is constitutional, a matter beyond the scope of this decision. Important for the question raised here is that **section 4** of **the Act** is one amongst the hundreds of penal provisions in our statutes that do not explicitly include words that traditionally connote *mens rea* but which must be read as including it because the provision does not expressly exclude *mens rea* as necessary to impute criminal guilt. This finding applies to the similar challenge to **section 17 (b)**.

[53] Does the provision impose vicarious liability on persons other than the offender? In **subsection (2**), a person who would be liable for the offence is one who contravenes **section 4**, be that person a producer, proprietor, promoter, photographer or any other person engaged in the making of the film. That would be the offender and we do not discern the intention of the statute to be to limit the offence to just the production or ownership of an unlicensed film. A person who promotes or who is involved in photography or in any other way in making of the film would be as liable as the producer or owner. This direct liability is not unconstitutional.

[54] **Section 6** of **the Act** on filming licences provides:

"6. Filming licences

(1) The licensing officer may, in his discretion, issue or refuse to issue a filming licence for which application has been made to him under this Act, or may issue it subject to the condition that a police officer of or above the rank of Inspector, or other person appointed for the purpose by the licensing officer, shall be present at the making of the film, and to such other conditions as he may think fit.

(2) Before granting a filming licence, the licensing officer may require the applicant to enter into a bond, with or without sureties in such sum (not exceeding such amount as is prescribed) as the licensing officer may require, to secure that the film, so far as it is made, is made in accordance with—

(a) the conditions (if any) contained in the licence; and

(b) the description, text and other information supplied to the licensing officer, with any alterations and additions for which permission has been granted under section 7 of this Act."

[55] This provision is sought to be impeached as impermissibly delegating basic policy matters to the licensing officer for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. It is contended that the 3rd respondent's failure to give legislative guidance in **section 6** confers unfettered, absolute and unbridled discretionary powers to the licensing officer, leaving the power open to arbitrariness, whim and caprice in the issuance, refusal or conditional issuance of licences. As a result, it would be near impossible to review the exercise of discretion to issue, refuse or impose conditions on a license. Further, that **section 6** is vague

and arbitrary in a manner that threatens the right to fair administrative action under **Article 47** as well as the rule of law,

transparency, accountability and good governance in the issuance of filming licenses under **Article 10**, hence invalid. Lastly on this provision, that there is no objective criterion for the issuance of licences, the process is subjective and shrouded in mystery. Petitioners and members of the public are not told in advance whether or not their applications qualify for licenses.

[56] While it is true that **section 6** grants the licensing officer discretion to issue or refuse to issue a filming licence or to issue it subject to a condition or conditions, the expectation of the law is that the discretion will be exercised judiciously and in conformity with the statute and the **Constitution**. In addition, **section 29** is the avenue for challenging a decision of the licensing officer to Cabinet Secretary and can be invoked to check on abuse of discretion.

[57] The further criticism that the provision does not contain express constraints and is, therefore, a legislative omission is without merit in the face of **section 35** which gives power to the Cabinet Secretary to make regulations for the better carrying into effect of the provisions and purposes of **the Act**. Using this power, the Cabinet Secretary can issue guidelines of what is to be taken into account in exercising the licensing discretion. It is needless for the statutory provision to prescribe a retail list. Indeed, there is much to be gained by leaving policy matters to regulations which are more malleable to changing and evolving circumstances. That said, the true north must always be that the conditions for grant

or refusal of a licence must be aligned

with the statute and the **Constitution**. In closing on this provision, the way of dealing with the failure of the Cabinet Secretary to make regulations is not to strike down the licensing provision but to require him/her to carry out the duty through an order of mandamus.

[58] The challenge to **section 7(1)** and **(2),** and **section 8 (2)** can be taken together. The former outlaws the making of any material alteration or addition to the text, synopsis or scenes of a licensed film without prior permission, in writing, of the licensing officer. It is asserted that this limits the freedom of artistic creativity under **Article 33(1)(b)** of the **Constitution** and is, therefore, unconstitutional. A similar argument is made regarding **section 8(2)** which criminalizes the making of a film otherwise than in accordance with the particulars furnished to the licensing officer, except or in so far as permission to make alterations or additions has been granted.

[59] Once it is accepted that some form of licensing of films is not unconstitutional, then it does not seem unreasonable for the law to require that any material alteration or addition to the film be sanctioned by the licensing officer. Not to require this additional permission could lead to the abuse of licence granted as film makers can use an already granted licence to materially or fundamentally alter or add to a film in a manner that it could not have passed the test for a licence in the first instance. The provisions of **section 7** and **8** do not, in our view, curtail the

freedom of expression of film makers.

They are simply a check against abuse of a film licence that has already been granted.

[60] **Section 9** reads; -

9. Power of police officer or appointed person at making of a film

"(1) Where a filming licence is issued subject to the condition that a police officer or other person appointed for the purpose shall be present at the making of the film, such police officer or other person may in his discretion, having regard to any special or general directions given to him by the licensing officer, intervene, if need be by force, to stop the making of any scene which in his opinion endangers the safety of any person or property (other than property in the possession or disposition of the producer, the promoter or any other person engaged in the making of that film) or which is cruel or causes unnecessary suffering to an animal, or which he has reason to believe is being made in contravention of any of the provisions of this Act or of any regulations made thereunder, or of any of the conditions contained in the licence or attached to any permission granted under section 7 of this Act.

(2) Where a police officer or other person intervenes as aforesaid, he shall forthwith notify the licensing officer of such intervention and of the reasons therefor, and the licensing officer may either permit the making of the film to be resumed or, having first given the holder of the filming licence an opportunity of being heard, permit the making of the film to be resumed on such conditions as he may think fit or refuse to permit the making of the film to be resumed.

(3) Any person who obstructs or hinders any police officer or other person in the exercise of his duties under this section shall be guilty of an offence.

(4) Where, after such intervention as aforesaid, the making of a film is resumed without the permission of the licensing officer or in

contravention of any condition imposed under subsection (2) of this section, the producer, the proprietor, the promoter

and the photographer of the film and every other person engaged in the making of the film, and, where the holder of the filming licence is not one of the aforesaid persons, such holder also, shall each be guilty of an offence."

[61] The 1st respondent takes the view that the provision limits the freedom of expression by allowing policemen wide latitude to intervene in the making of films, if need be, by force. Moreover, that it fails the necessity test as there are less restrictive measures in the Penal Code and in the Prevention of Cruelty to Animals Act. Lastly that the use of force is broader than necessary to ensure compliance with the terms of a license. Consequently, the provision fails the proportionality test set out in **Okuta & another v Attorney General & 2 others (Petition 397 of 2016) [2017] KEHC 8382 (KLR)**.

[62] The authority to use force granted to a police office under **section 9** is undoubtedly wide. However, it is easily justified where the safety of a person or property is endangered or in circumstances where there is cruelty or unnecessary suffering to an animal. These are circumstances, which, because of the exigencies of the moment, call for immediate action. However, the power extends to the use of force to stop the making of a scene where a police officer has reason to believe that it is being made "*in any contravention of the Act of any of the provisions of this Act or of any regulations made thereunder, or of any of the conditions contained in the licence or attached to any permission granted under section 7 of this Act*". It is not clear to us why the

use of force would be necessary in these additional

circumstances. As **Article 24(3)** of the **Constitution** places an obligation on the 2nd and 3rd respondent to demonstrate that there is a less restrictive means of achieving the purpose of this limitation, and none has been forthcoming, we must reach a conclusion that the use of force is constitutional only in circumstances where the safety of any person or property is endangered or where there is cruelty or unnecessary suffering to an animal and only then when the film maker has refused to heed a stop order.

[63] It is contended that **section 12** limits freedom of expression including freedom of artistic creativity on grounds that have no proximate relation to the grounds for limitation contained under **Article 33(2),** namely propaganda for war, incitement to violence, hate speech and advocacy of hatred. Second, the requirement of approval as opposed to rating before distribution, exhibition or broadcast, publicly or privately, of any kind of film does not serve any legitimate aim in an open and democratic society. Third, the censorship imposed by **section 12** fails the proportionality and necessity test under **Article 24** because it is not the least restrictive measure for rating films and is broader than necessary. **Section 12**, it is asserted, destroys the essence of the right to freedom of expression guaranteed by **Article 33**.

[64] **Section 12** on restriction on exhibitions reads:

> **“Restriction on exhibitions**

(1) No person shall exhibit any film at an exhibition to which the public are admitted or distribute such film unless he is registered as an exhibitor or distributor by the Board and issued with a certificate.

(2) No film or class of film shall be distributed, exhibited or broadcast, either publicly or privately, unless the Board has examined it and issued a certificate of approval in respect thereof:

Provided that this subsection shall not apply in respect of—

(a) educational documentaries which are approved by the Kenya Institute of Education; or

(b) films restricted for use in the medical profession.

(3) Any person who exhibits any film in contravention of the provisions of subsection (1) or subsection (2) shall be guilty of an offence."

[65] The starting point in considering the 1st respondent's criticism of this provision is to observe, again, that neither they nor the appellant fault the constitutionality of **section 15** of **the Act** which sets out the functions of the Board. For its importance to the discussion at hand we reproduce it:

"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;

(b) license and issue certificate to distributors and exhibitors of films.

(2) The Board may from time to time prescribe—

(a) the procedure for application for licensing as a distributor or exhibitor of films; and

(b) guidelines to be applied in the classification of films."

[66] One of the functions, not faulted by the 1st respondent, is the regulation of exhibition of films. Under **section 2** of the Act, "*exhibition*" is expressed to be the projection of a film or other optical affect by means of a cinematograph or similar apparatus. To be observed is that classification referred to in **subsection 1(a)(i)** is distinct and additional to the function of imposing age restrictions in **subsection 1(a)(ii)**. This distinction is not without importance because classification extends to the power to outrightly censor a film by refusing to approve it for exhibition to the public under **section 16(1)(c)**. Needless to say, since the argument does not fault the broad functions set out in **section 15** as a legitimate role of the Board, the appellant and 1st respondent would be speaking from both sides of their mouth to contend that the Board can only rate films for exhibitions and not ban them.

[67] **Section 13** of **the Act** reads:

"Restriction on display of posters

(1) No person shall display, or cause or permit to be displayed, in a public place, or so as to be visible from

a public place, any poster, unless the Board has first approved the poster for public display.

(2) Where, under paragraph (b) of subsection (1) of section 14 of this Act, the Board has directed that a description only of a poster need be furnished, and a poster advertising the film or exhibition is displayed in a public place or so as to be visible in a public place, an authorized person may, if he considers that the poster is objectionable or does not conform to the description furnished under that paragraph (and on production of his authority if so requested), require any person displaying the poster, or causing or permitting it to be displayed, to remove it or to obliterate a specified part thereof.

(3) Any person who contravenes the provisions of subsection (1) of this section, or who fails to comply with any requirement of an authorized person under subsection (2) of this section, shall be guilty of an offence.

(4) In this section, "an authorized person" means a person who is in writing authorised by the Board for the purposes of this Part."

[68] The provisions of this section must be read in tandem with those of **section 14(b)** which requires that every application for approval to be accompanied by a copy of every poster intended be publicly displayed is annexed with the film or its exhibition and in some cases the Board may require a full description of the poster and its visual and verbal contents. The 1st respondent does not find this requirement objectionable and does not impugn **section 14** at all. If then it serves a legitimate purpose to approve a poster which is intended to be publicly displayed in connection with the film or in exhibition, then it would be to turn logic on its head to criticize the requirement under **section 13**

that restricts display of posters so as

to ensure that no such poster is displayed in public or for public consumption unless first approved under **section 14** or that the poster displayed is in conformity with that as approved.

[69] There has been a raft of criticism around **section 16** which provides:

"16. Certificate of approval

(1) Subject to the provisions of section 17 of this Act, on completion of the examination of a film, the Board may—
- **a) approve it for exhibition to the public; or**
- **b) approve it for exhibition to the public subject to such excisions as it thinks proper; or**
- **c) refuse to approve it for exhibition to the public; or**
- **d) deleted by Act No. 6 of 2009, Sch.**

(2) On completion of the examination of a poster, the Board may—
- **(a) approve it for public display; or**
- **(b) approve it for public display subject to such deletions or alterations as it thinks proper; or**
- **(c) refuse to approve it for public display.**

(3) If the Board approves a film subject to excisions therefrom, the Board may itself make the excisions and retain in its possession the excised parts.

(4) The Board shall not approve any film or poster which in its opinion tends to prejudice the maintenance of public order or offend decency, or the public exhibition or display of which would in its opinion for any other reason be undesirable in the public interest.

(5) Where the Board approves a film or poster it shall give to the applicant a certificate of approval thereof in the prescribed form.

(6) Where the Board approves a film or poster as approved subject to excisions, deletions or alterations, any person who—

- **a) exhibits the film, from which the parts which the Board directed to be excised, deleted or altered**

have

not been excised, deleted or altered in accordance with the Board's direction; or

b) displays or causes or permits to be displayed in a public place, or so as to be visible from a public place, the poster, from or on which the parts which the Board directed to be excised, deleted or altered have not been excised, deleted or altered in accordance with the Board's direction, shall be guilty of an offence."

[70] The first is that to require approval rather than rating of films fails to serve any legitimate aim and limits freedom of expression more than is necessary. In considering the provisions of **section 12**, we observed that explicit from the provisions of the statute is that approval and rating of films serve two distinct purposes. The first entails examination of the film with the end result being that the film may be approved or disapproved for public display. Under the provisions of **sub-section 4** of **section 16**, a film will not be approved if it tends to prejudice the maintenance of public order or offend decency or which in the opinion of the Board would be undesirable in public interest. Rating, on the other hand is the process which, under **section 17** of the Act, the Board categorizes a film that has been approved as either suitable for general exhibition or for adults only or unsuitable for children under the age of sixteen years or unsuitable for children under the age of ten years.

[71] Once there is a concession that the objective of the statute to regulate the making and exhibition of cinematograph films is not an illegitimate objective then it may be to stretch logic to argue

that the

only instrument of regulation should be rating of films. It may turn out that a film may be unsuitable for even the most mature category of viewers and should not be approved in the first place. In any event, as alluded to earlier, it is an oxymoron for the appellant and the 1st respondent to acknowledge that **section 15** which gives the Board power to classify films, a power which includes to censor, is constitutional and then posit that in all circumstances, to ban a film from exhibition to the public, is a disproportionate use of that power.

[72] So, to the criteria for refusal, are the words "*maintenance of public order or offends decency, or undesirable in public interest*" rogue and incapable of definition and hence subject to abuse and misuse as suggested by the 1st respondent? Although the terms are wide, the function of regulating the film industry has been given by the people of Kenya to the Board and the law has given the Board some latitude in carrying out this mandate. The words though wide cannot be said to be imprecise because they must be construed in line with the Constitution. In addition, the scheme of the statute grants any person aggrieved by the decision of the Board to seek redress by way of an appeal to the relevant cabinet secretary whose decision, in turn, is open to judicial scrutiny. This is a check against possible abuse of discretion by the Board.

[73] Regarding the complaint that **sub-section (3**), which empowers the Board to retain in its possession any excised parts of a film, interferes with a film makers right to property over the film, this

power is only

limited to where the approval for public display has been granted subject to the retained excisions. In other words, where the excised portions have been adjudged to be unsuitable for public exhibition. Unclear to us, and not explained by the Board, is why it is not enough to simply restrict the public exhibition of the excised parts. We say so because no similar power is given to the Board to retain a film which it has outrightly refused to approve.

[74] **Section 30** of the Act is criticized as arbitrary for allegedly delegating unbridled power to the Cabinet Secretary to revoke licenses, certificate of approvals, approvals or permissions issued or given under the Act without just cause. As the grounds for revocation are not stated, the section is subject to whim, abuse and misuse in cancelling licenses issued to those deemed as critics.

[75] We agree that at a blush the provision amounts to excessive delegation. However, there is an express requirement that the person affected be served by notice. This suggests that the decision cannot be made before the person affected is heard. In any event, it is a constitutional imperative under Article 47 that such a person would be accorded fair administrative action. This would check against a whimsical use of that power which, further, is susceptible to scrutiny by way of judicial review.

[76] Next is **section 35** of the Act which reads;

"35. Regulations

(1) The Cabinet Secretary may make regulations prescribing anything which under this Act may be prescribed, and generally for the better carrying into effect of the provisions and purposes of this Act.

(2) Without prejudice to the generality of subsection (1) of this section, regulations under this section may provide for—

(a) prescribing fees for anything to be done under this Act, generally or in respect of specified areas, and, for the purpose of prescribing fees, licences may be divided into different classes and a different fee prescribed for each such class;

(b) prescribing charges for, or for matters incidental to, the attendance of police officers and other persons at the making of films under section 7;

(c) prescribing the procedure for appeals to the Cabinet Secretary under this Act;

(d) deleted by Act No. 5 of 2007, s. 14;

(e) prescribing the conditions to be observed in regard to the erection, alteration and equipment of any theatre or cinema in the Nairobi Area;

(f) prescribing the conditions to be observed in regard to securing the safety of theatres and cinemas from fire or other danger, or the safety and control of persons attending at theatres and cinemas in the Nairobi Area;

(g) deleted by Act No. 6 of 2009, Sch."

[77] The 1st respondent contends that while delegating to the Cabinet Secretary, the power to make Regulations does not specify the limits of the authority and the principles and standards applicable to the law made under the authority. Due to the absence of legislative guidance, the section not only offends Article 94(6), but also amounts to an impermissible delegation of Parliament's

power and a threat to

the freedom of expression including freedom of artistic creativity due to arbitrary regulations made under the section.

[78] The attack on **section 35** is attractive yet based on faulty premises.

Sub-section 1 permits the Cabinet Secretary to make regulations prescribing anything which under that Act may be prescribed and generally for the better carrying into effect of the provisions and objectives of the Act, while **subsection 2** sets out specific areas which require regulation without hamstringing the hand of the Cabinet Secretary. In our view, however wide the provision may appear to be, it expressly confines the cabinet secretary to making regulations for purposes of carrying into effect the provisions and objectives of the statute. Regarding the criticisms that the provision is not in tandem with Article 94 (6) for failing to specify the principles and standards applicable to the law made under the authority, the provisions of the empowering statute must be read together with the provisions of the **Statutory Instruments Act** which provides a comprehensive regime in the making, scrutiny, publication and operation of statutory instruments.

[79] Regarding the Guidelines, the appellant and 1st respondent had pleaded that they were ungazetted, not contained in any regulations, and did not have any statutory underpinning and were not law. In agreeing with this position, the learned trial Judge held:

"I therefore find and hold that the Guideline 2012, although having not undergone the steps stipulated under the Statutory Instrument Act, only intend to

provide a definite guideline to classification of films as delegated by the Films Act. It is clear from the guidelines that they do not grant the Board any new powers, but only seek to define the powers under the Films Act. I do appreciate and recognize that if the guidelines were to be nullified there would be untold practical prejudice as the invalidation of the Guidelines will definitely result in the decisions of the Board being at limbo, and thereby exposing the nation as a whole, and more specifically the children and young adults, to audio-visual content that may be harmful to public order, decency and against public interest."

[80] With that, the learned trial Judge granted the Board one (1) year from the date of this judgment to bring the Guidelines under the ambit of the law. At plenary hearing we were told by counsel for the appellant and this was not controverted by the 2nd and 3rd respondents, that notwithstanding this one-year window, the Board has failed to take the necessary steps in line with the Statutory Instruments Act. For that reason, the declaration of invalidity of the Guidelines has come into effect and it would be needless for us to determine the constitutionality of the specific provisions of the Guidelines as they are no longer law. On this aspect, the appeal is moot. In **Dande & 3**

others v Inspector General, National Police Service & 5 others

(Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated))

[2023] KESC 40 (KLR) the Supreme Court explains the doctrine of mootness in relation to appeals as follows;

"Albeit not raised by the parties, it is imperative for this court to pronounce itself on the issue of mootness of some aspects of this appeal. The

doctrine of mootness requires that controversy must exist throughout judicial proceedings including at the appellate level. An appeal or an issue is moot when a decision will not have

> ***the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical."***

[81] That said, as the decision of the Board was premised on **sections 5(ii)** and **6.3.5** of those Guidelines, it is inevitable that we consider whether the decision was in line with constitutional and statutory expectations. In communicating the decision to ban the Film to the appellant, the 3rd respondent in a letter dated 26th April, 2018, stated;

> ***"The Board notes with great concern that the said film contains objectionable classifiable elements such as homosexual practices that run counter to the laws and the culture of Kenyan people. It is our considered view that the moral of the story in this film is to legitimize lesbianism in Kenya contrary to the law and the Board's content classification guidelines."***

[82] In the Petition, the appellant and the 1st respondent took the position that since the ungazetted Guidelines were not law, they failed to pass the ***"provided by test"*** of Article 24 and there was no need to examine them under the "***legitimate aim"*** or the ***"necessity"*** limb of the three-part test. That said the Petition invited the court to find that **sections 5 (ii**) and **6.3.5**, amongst others, violate the freedom of expression including freedom of artistic creativity under Article 33 and therefore unconstitutional

and invalid. It was contended that without subjecting the impugned provisions of the Guidelines to the

tripartite test, the court found that they only intend to provide a definite guideline to classification, and do not grant the Board any new powers but only seek to define the powers under the Films Act.

[83] The impugned sections of the Guidelines, where specifically faulted as *"being expressed in words that were overly broad, vague, incapable of definition and arbitrary"*. The grounds for restriction in those sections have nothing to do with the four limitations in Article 33 (2). Regarding **sections 5 (i)** and **section 5 (iii),** the appellant and 1st respondent contended that as they provide for limitation of freedom of expression through a complete ban of films described in those sections, they are neither reasonable nor justifiable in an open and democratic society. She contended that the trial court made a strange invention in the fabric of the Constitution that is the *'protection of vulnerable youth adults'*. She submitted that **Article 260** of **the Constitution** defines adult to be any individual who has attained the age of 18 years, while youth is all individuals in Kenya who have attained the age of 18 but are yet to attain the age of 35 years. She further submitted that once a person attains the age of 18 they are considered to be adults of sound mind with certain rights and privileges including the right to vote, run for political office, marry, own property. She contended that they also have a right to choose which film to watch and what not to watch. She juxtaposed this against **section 17(1)** of **the Act** which classifies

a film as ‘adults only’ meaning all persons above the age of 18 can choose to watch it

or not. She urged that there is no provision for *'vulnerable youth adults'*. She argued that the term is unreasonable, vague and unacceptable in an open democratic society.

[84] It was also the appellant's contention that the 3rd respondent did not have the powers to ban the film ***"Rafiki"***. She argued that according to **section 15(1)(iii**) and **16(1)(c)** of **the Act** a film can only be restricted if it is only unsuitable for children. An argument we have already dealt with. She added that there is no proximate reason in limiting the film on grounds of protecting adults, the 3rd respondent can only give consumer advice when it comes to adults but not restricting a film. She relied on the decision of the Court of Appeal in

Non-Governmental Organizations Co-ordination Board v EG & 5 others (Civil Appeal 145 of 2015) [2019] KECA 902 (KLR) where

by a majority, the Court held that members of the LGBTQ Community have the right to form an association and that everyone has equal protection of the law under **Article 27** of **the Constitution** and denying registration of grounds of lesbianism and gayism is unacceptable. Similarly, she argued that restricting a film because of the gay theme has not proximate reason under **sections 15, 16** and **17** of **the Act** and beyond the powers of the Board.

[85] Without prejudice to the foregoing, the appellant submitted that when employing the language of proportionality, the trial court

should have asked whether the end of banning the film could have been pursued by means less restrictive of the freedom of expression

and artistic creativity. From her reading of **sections 15, 16** and **17** of **the Act,** she contended that the 3rd respondent had less restrictive options it could have explored before reaching the conclusion to ban. For instance, she argued that the 3rd respondent could have approved the film but with excisions on the scenes it believed to be offensive under **section 16(1)(b).** The 3rd respondent could have approved the film but restrict it as "adults only" under **section 17(1)(a**) or the 3rd respondent could have given consumer advise under **section 15(1)(iii)**. She contended that the 3rd respondent has classified countless other movies that are being displayed and exhibit more than just a 'gay theme'. She further argued that the same film that the 3rd respondent classified as restricted was being displayed in other countries, for instance in France where any person could watch the film, Scandinavia children 9 years and older can watch the film under parental guidance, Switzerland and Germany children above the age of 12 can watch the film and South Africa the rating was at 16 years.

[86] Further on the proportionality test as a fair balance to determine unreasonableness, she relied on the case of ***NGOs Co-ordination Board v EG & 5 others (supra)*** where the Court of Appeal held that the effective use of the media by the LGBTQ to advance human rights issues relevant to the gay and lesbian communities is not unlawful provided it is within the limits of **sections 162, 163** and **165** of the Penal Code. Similarly, she

argued that if the lesbian and gay

community have the right to effectively use the media in enjoyment of the rights under **Article 36** of **the Constitution,** then they can be given the right to effectively use the media in enjoyment of the right under **Article 33** of **the Constitution**. She submitted that in any case the film did not contain any gross scenes that depicted engaging in carnal knowledge by people of the same sex.

[87] On whether the decision meets the reasonable test, the appellant submitted that even if the film contained scenes that tend to suggest gay or lesbian relationships which is contrary to the law, other films that portray crime have not been banned, like those that portray forgery which is a crime under **section 349** of the Penal Code. She contended that it would be irrational and unreasonable to restrict films portraying forgery, and by the same logic, it is equally irrational and unreasonable to restrict the appellant's film.

[88] A further postulation was that the Guidelines has added powers to the Board that were not contemplated, which is a matter that was not pleaded and will not be considered by us. It goes beyond the case that was cast by the appellant at trial.

[89] Countering these submissions, the 2nd and 3rd respondents relied on **Article 259(1**) of **the Constitution** together with Supreme Court decision in **Communications Commission of Kenya & 5 others v**

Royal Media Services Ltd & 5 others (Petition 14, 14A,

14B & 14C of 2014 (Consolidated))[2014] KESC 53 (KLR), in

submitting that the Constitution is to be interpreted holistically and

contextually and in a manner that advances the purposes, spirit, principles and values of the Constitution. They argued that the individualistic and restrictive manner of interpreting the Constitution advanced by the appellant, more specifically to **Article 33(2)** of **the Constitution**, poses a potent risk to the fabric of society. Further, that this interpretation would result in legitimizing and allowing films with content/themes that espouse religious radicalization, child pornography, pedophilia, and embrace success through illicit means such as drug abuse, amongst other dangerous themes. The Court was urged to uphold the manner of interpretation applied by the High Court and reinforce that the State has the responsibility to protect the youth, children and vulnerable adults from harmful practices and exploitation.

[90] On whether the High Court was correct in finding the 3rd respondent's decision to ban film ***"Rafiki"*** was constitutional and that the freedom of expression under **Article 33** of **the Constitution** is not absolute and is subject to limitation but only to the extent and circumstances provided under **Article 24** of **the Constitution**, it was submitted that the High Court decision was anchored on sound legal reasoning, ensuring that the regulatory powers of the 3rd respondent as established under **section 12** of **the Act** were exercised in accordance with its statutory mandate. It is urged that the 3rd respondent's mandate is to ensure that films shown to the public comply with moral and

legal standards set by Kenyan law and

the 3rd respondent correctly exercised this mandate in banning the film ***"Rafiki"*** due to its promotion of homosexuality which contravenes **sections 20, 21, 22, 23, 162, 163** and **165** of the Penal Code. Further, that **section 162** of the Penal Code criminalizes acts of *'carnal knowledge against the order of nature'* while **sections 163** and **165** of the Penal Code penalize acts of '*gross indecency and homosexual conduct'* between individuals. By approving the public exhibition of ***"Rafiki"*** the 3rd respondent would have facilitated and endorsed unlawful conduct, setting a dangerous precedent that undermines the rule of law.

[91] The 6th respondent submitted that the film ***"Rafiki"*** contravenes Kenya's culture and moral values, which do not support the promotion of homosexuality in line with **Article 11** of **the Constitution** which recognizes culture as the foundation of the nation and obligates the State to promote and protect cultural values. Additionally, it was argued that Kenya is predominantly religious and conservative and the distribution of a film that explicitly promotes conduct deemed offensive by a majority of Kenyans would not only be legally unjustifiable but would also incite moral and religious outrage. It was further urged that the 3rd respondent's mandate to classify and regulate films under **sections 15** and **17** of the Act serves public interest by ensuring content disseminated to the public does not corrupt public morals or negatively influence vulnerable groups including children and young persons. Further, that by

restricting and banning ***"Rafiki",*** the 3rd respondent sought to prevent the erosion of social values and shield impressionable audience from exposure to content that could encourage unlawful behaviour. Reliance was placed on the Court of Appeal decisions in **Alcoholic Beverages Association of Kenya v Kenya Film Classification Board & 2 others (Civil Appeal 232 of 2017) [2022] KECA 1051 (KLR)** and **Nation Media Group Limited & 6 others v Attorney General & 4 others; Consumer Federation of Kenya & 4 others (Interested Parties) (Petition 30 & 31 of 2014 (Consolidated)) [2016] KEHC 7689 (KLR)** to buttress these points.

[92] It was contended that allowing the film ***"Rafiki"*** would have undermined national values and the protection of public morality. Several decisions were cited to buttress this contention including the decision of the Ugandan High Court in **Re Bernard Lubega [2003] UGHC 78** where the court upheld similar restrictions on content deemed offensive to public morality. Similarly, the case of **Obbo & Another vs Attorney General [2004] 1 EA 265** where the Supreme Court of Uganda upheld limitations on media freedom when necessary to protect public interest; the decision

of **De Reuck vs**

Director of Public Prosecutions **[2003] ZACC 19** where the South

African Court confirmed that limitations on expressive content can

be justified when protecting minors and vulnerable groups.

[93] As stated earlier, under the provisions of **Article 24(3)** the State

or a person seeking to justify a particular limitation bears the

onus of

demonstrating to the court that the limitation passes the tests set out in **Article 24 (1).** Where, however, a petitioner posits that the provisions providing for limitation are vague or imprecise, as argued here by the appellant and 1st respondent, the petitioner bears the initial responsibility of demonstrating that the provisions are indeed vague or imprecise. It is not enough, like here, for the appellant and 1st respondent simply to rehash the adjectives without move. The two failed to flesh out the proposition that the guidelines were expressed in words that were *"overly broad, vague, incapable of definition and arbitrary"*. We find no reason to fault these provisions on this ground.

[94] The substantial complaint we hear from the appellant and the 1st respondent is the use of an outright ban of the film which involved the classifiable elements in the thematic area spelt out in the impugned provisions.

[95] Under our current legal framework **sections 162** and **165** of the Penal Code criminalizes homosexual conduct. Notwithstanding divergent views as to the constitutional validity of these two provisions, they remain valid edicts of the law as they are yet to be declared unconstitutional. On this matter **Ouko, SCJ** in **NGOs Co-ordination Board vs. EG & 4 others** **[2023] KESC 17 (KLR)** was emphatic;

> ***"Both sections 162 and 165 criminalise male homosexual relationships. It is a matter of***

interpretation that the use of the words, “any person who has carnal knowledge of any person” “against the order of nature” in section 162 may be construed to include female same-sex

relationships as “unnatural”. In contrast section 377 of the Indian Penal Code, the equivalent of our section 162, makes explicit provision that the unnatural offence is committed by having “carnal intercourse against the order of nature with any man, woman or animal”. “Any person” in our code, by parity of reasoning would similarly extend to woman.”

[96] The restrictive provisions of **section 5 (ii)** of the Guidelines reads: -

“ii) Sex, obscenity and nudity

The classifiable elements in this thematic area include:

- **Exposure or fondling of female breasts/human/animal sexual organs.**
- **Explicit images of sexual activity**
- **Behavior/language that is sexually offensive**
- **Undressed**
- **Indecent exposure - A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person**
- **Portrayal of children being coerced and or induced to engage in sexual activity**

Restricted in this thematic area is a film, poster or program that portrays, encourages, justifies or glorifies perverted or socially unacceptable sex practices such as incest, pedophilia, homosexuality or any form of pornography; content showing women as tools of sex; content endorsing sexual violence.”

[97] We take the view that a film, poster or program that advocates a criminal activity is undesirable in the public interest within the contemplation of **section 16(4**) of **the Act**. Advocating homosexuality would include promoting, encouraging, justifying or glorifying it. These touch on conduct that is outlawed as crime in our statute books.

[98] There is a reality, however, that is acknowledged by no less the 2nd and 3rd respondents. In answer to the Petition, **Mr. Ezekiel Mutua** states as follows: -

> ***“29. That at this point it is imperative to emphasize that the Board is very much alive to the realities of the day, and recognizes the existence and plight of persons who are gay, lesbians and/or bisexual…***”

[99] The Board charged with classifying films concedes that gayism, lesbians and bisexualism are realities of current Kenya. Just like we live in a country in which use of banned narcotic substances is real. So, while the guidelines rate films that depict drugs as “adults only”, they ban those that promote or endorse drug abuse. Drawing from this illustration, we come to the conclusion that outrightly banning a film that only depicts homosexual lifestyle without promoting or glamorizing it is a disproportionate limitation to the right of freedom of expression.

[100] In respect to the matter at hand, the reason that the Board gave for banning public exhibition of **“Rafiki”** is that it contained objectionable elements of homosexual practices and legitimizes lesbianism. While the latter test would be a legitimate constitutional limitation, the former could have been a reason to rate it as an “adults only” and not to ban it.

[101] What orders should we make? We have agonized over this question.

The two provisions of the Act which we have held to be unconstitutional are not relevant in reviewing whether or

not the ban

on “**Rafiki**” by the Board was a correct decision. In so far as we have upheld the decision of the High Court that the legal framework set out in the Act for restricting (including censorship) and rating films is constitutional, then the appellant should now exhaust the appeal mechanism available under the Act. In that appellate process, the decision of the Board will be reviewed against the test that a ban is permissible if the film promotes, advocates, glorifies or glamorizes homosexuality. Further, a film that merely depicts homosexual lifestyle is approvable subject to the rating set out in **section 17** of the Act. We have restrained ourselves from making the final call on this matter so that the final decision benefits from the levels of review available under the Act.

[102] As we close, we decline to make any decision on the question of damages raised in the cross-appeal by the 1st respondent. This is because the appellant, who would have been the party entitled to that prayer, chose not to press the matter in this appeal.

[103] Ultimately, we make the following orders;

i) The appeal succeeds only to the extent that we declare;

a) The provisions of **section 9(1)** of the Film and Stage Plays Act that permit the use of force **other than** in circumstances where the safety of any person or property is endangered or where there is cruelty or unnecessary suffering to an animal to be are in contravention of the Constitution and, therefore, null and void.

b) The provision of **section16(3)** of the Film and Stage Plays Act that permits the Board to retain in its possession excised parts of a film is in contravention of the Constitution and, therefore, null and void.

ii) The appellant is at liberty to appeal against the decision of the Board of 26th April 2018 under the provisions of **section 29** of the Film and Stage Plays Act within 30 days of this judgment.

iii) Each party shall bear its own costs in respect to the Petition in the High Court and this Appeal.

Dated and delivered at Nairobi this 23rd day of January 2026.

W. KARANJA

....
JUDGE OF APPEAL

F. TUIYOTT

....
JUDGE OF APPEAL

L. ACHODE

....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.