

**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**HCCHRPET E014 OF 2025**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 28, 31(c) &  
(d), 33(2) & 3, 34(1), 45(1) AND 53(d) OF THE CONSTITUTION OF KENYA,  
2010**

**AND**

**IN THE MATTER OF: PROTECTION OF THE RIGHTS OF THE CHILD**

**AND**

**IN THE MATTER OF: PROTECTION OF REPUTATION, PRIVACY AND  
PRESERVATION OF THE DIGNITY OF INDIVIDUALS**

**AND**

**IN THE MATTER OF: PEACE, NATIONAL COHESION AND UNITY OF THE  
NATION**

**AND**

**IN THE MATTER OF: PROTECTION OF MORALITY IN THE PUBLIC SQUARE**

**BETWEEN**

**FELIX KIBET.....PETITIONER**

**VERSUS**

**X CORP.....1<sup>ST</sup> RESPONDENT**

THE ATTORNEY-GENERAL ..... 2<sup>ND</sup>  
RESPONDENT

THE COMMUNICATIONS AUTHORITY OF KENYA .....3<sup>RD</sup>  
RESPONDENT

THE KENYA FILM CLASSIFICATION BOARD .....4<sup>TH</sup>  
RESPONDENT

NATIONAL COHESION & INTEGRATION COMMISSION.....5<sup>TH</sup>  
RESPONDENT

OFFICE OF THE DATA PROTECTION COMMISSIONER.....6<sup>TH</sup>  
RESPONDENT

AND

PARADIGM INITIATIVE FOR INFORMATION

TECHNOLOGY DEVELOPMENT.....AMICUS CURIAE

JUDGMENT

1. This Petition invites the Court to interrogate the legal and constitutional responsibility of a global social media platform, the 1<sup>st</sup> Respondent, X Corporation (formerly Twitter), together with the relevant State regulatory bodies, in respect of content disseminated and accessible within the jurisdiction of Kenya. The Petitioner, Felix Kibet, contends that the impugned content allegedly pornographic, obscene, defamatory, and otherwise unlawful has been permitted to proliferate on the platform to the detriment of constitutionally guaranteed rights and freedoms.

2. The Petition is premised on the assertion that harmful and unlawful material is published, circulated, and remains accessible on the 1<sup>st</sup> Respondent's platform within Kenya, thereby resulting in, or posing a real and imminent threat of, violations of fundamental rights and freedoms, including the rights to dignity, equality, privacy, and the protection of children. In support of these allegations, the Petitioner relies extensively on compiled screenshots and extracts of online posts annexed to the record, which purportedly depict instances of hateful ethnic expression, explicit sexual content, and the unauthorized disclosure of personal information (doxing).
  
3. The Petitioner further anchors his claim in various statutory frameworks, including the National Cohesion and Integration Act (in relation to hate speech), the Children Act (with respect to child protection in digital spaces), the Data Protection Act (concerning the unlawful processing and dissemination of personal data), and the Computer Misuse and Cybercrimes Act (in relation to cyber harassment and child pornography). He contends that, notwithstanding these legislative safeguards, the Respondents have failed, neglected, and/or refused to discharge their respective statutory mandates, thereby necessitating the intervention of this Court through the grant of appropriate reliefs.
  
4. It is specifically alleged that the Respondents have abdicated their legal and constitutional obligations by failing to take adequate or effective measures in response to the conduct attributed to the 1<sup>st</sup> Respondent, thus permitting the continued publication and accessibility of the impugned material.

5. The gravamen of the Petition is that the 1<sup>st</sup> Respondent's platform facilitates the dissemination and access, within Kenya, of pornographic or otherwise indecent content, hate speech, abusive expressions, and related material, which the Petitioner asserts contravene constitutional provisions, including Article 10 (national values and principles of governance), Article 28 (human dignity), Article 34 (freedom of the media), Article 45 (protection of the family), and Article 53 (rights of the child). The Petitioner avers that such content undermines the rights and reputations of individuals and is injurious to the moral and social fabric of Kenyan society.
6. The Petitioner further contends that the 2<sup>nd</sup> to 6<sup>th</sup> Respondents have remained indolent, and in their inaction, have effectively acquiesced in and abetted the alleged unlawful and unconstitutional conduct of the 1<sup>st</sup> Respondent.
7. The Petitioner seeks the following orders:
  - a. ***THAT a declaratory order be and is hereby issued that the 1st respondent act of allowing, entertaining, encouraging, acquiescing in and/or promoting in its social media platform X (formerly Twitter) the publication and access on Kenya is in contravention of various Articles of the Constitution and S. 22 (1) (b) of the Children Act and therefore illegal and unconstitutional.***
  - b. ***A declaratory order be and is hereby issued that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents have failed, ignored and/or refused to discharge their Constitutional mandate in light of the 1<sup>st</sup>***

*Respondent's illegal and unconstitutional acts and are therefore in contravention of Article 156 (4) (a) and (6) of the Constitution, Section 46 (A) of the Kenya Information and Communications Act, 1998, Section 15 (1) (a) of the Film and Stage Plays Act, section 25 (1) of the National Integration and Cohesion Act and section 6 & 25 of the Data Protection Act, 2019 respectively;*

- c. An order of permanent injunction be and is hereby issued restraining the 1<sup>st</sup> Respondent from allowing the publication and/or access of the impugned publications in prayers a to f herein within the territory of the Republic on Kenya.*
- d. An order of Mandamus be and is hereby issued compelling the 1st respondent to within 21 days of this order delete all publications in the nature and character of the impugned publications in prayers a to f herein.*
- e. An order of mandamus be and is hereby issued compelling the 1<sup>st</sup> Respondent to within 21 days of this order suspend and/or delete all accounts/handles in Kenya using names other than their official names registered in government records.*
- f. An order of mandamus be and is hereby issued compelling the 2<sup>nd</sup> Respondents to initiate and/or take measures that would ensure social medial platforms in Kenya are Constitutionally compliant and safe for Kenyans. The 2<sup>nd</sup> Respondent does report quarterly to the National Assembly on the progress.*
- g. A declaratory order be and is hereby made that remaining passive, abetting the illegal and unconstitutional acts of the 1<sup>st</sup> Respondent violating human rights of Kenyans, the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup>*

***Respondents have abdicated their constitutional and statutory mandates.***

8. The Petition is opposed by all the Respondents. The 1<sup>st</sup> Respondent filed Grounds of Opposition dated 7<sup>th</sup> February 2025 together with a Replying Affidavit sworn by Jarrod Doherty, the Group Product Manager, Platform Safety & Integrity, dated 10<sup>th</sup> March 2025, opposing both the Application and the Petition dated 13<sup>th</sup> January 2025. The 2<sup>nd</sup> Respondent filed Grounds of Opposition dated 4<sup>th</sup> March 2025 in opposition to the Application and the Petition of even date, while the 3<sup>rd</sup> Respondent filed a Replying Affidavit sworn by David Mugonyi, the Director General and Chief Executive Officer of the Communications Authority of Kenya, dated 19<sup>th</sup> February 2025.

### **The Petitioner's submissions**

9. The Petitioner submits that the 1<sup>st</sup> Respondent's platform permits users to create pseudonymous accounts, publish written posts, images, and videos, and participate in live audio discussions through the "Spaces" feature, all without adequate regulation. It is contended that, in pursuit of profit, the 1<sup>st</sup> Respondent has allowed, facilitated, encouraged, and promoted the dissemination of content including pornography, nudity, hate speech, incitement to violence, violations of national values, invasions of privacy, and attacks on the dignity and reputation of individuals. The Petitioner argues that such conduct contravenes Articles 10, 28, 31, 33, 45, and 53 of the Constitution, as well as section 22(1)(b) of the Children Act, and accordingly urges this Court to grant declaratory and

injunctive relief restraining the continued publication of such content within Kenya.

10. On jurisdiction, the Petitioner submits that this Court is properly seized of the matter pursuant to Articles 22, 23, and 165 of the Constitution, which vest in the High Court the mandate to determine alleged violations of rights and fundamental freedoms. It is argued that the doctrine of constitutional avoidance is inapplicable where a petition directly alleges infringement of constitutional rights. In this regard, reliance is placed on ***Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others [2014] eKLR***, where the Supreme Court underscored the principle that courts should avoid determining constitutional questions where a dispute may be resolved on other legal grounds. The Petitioner contends that the present dispute squarely raises constitutional questions and thus properly falls within the jurisdiction of this Court. Further reliance is placed on ***Standard Limited & 2 Others v Christopher Ndarathi Murungaru [2006] eKLR***, where the Court of Appeal affirmed that the High Court retains jurisdiction under Articles 22 and 23 to grant appropriate remedies for violations of fundamental rights and freedoms.
  
11. On locus standi, the Petitioner submits that the Petition is properly instituted in the public interest pursuant to Articles 22 and 258 of the Constitution, which permit any person to institute proceedings claiming that the Constitution has been contravened or is threatened with contravention. In support of this proposition, reliance is placed on ***Okiya Omtatah Okiiti v James R Njenga & 19 Others [2022] eKLR***, where the

Court affirmed that public interest litigation enables individuals to approach the Court on behalf of others whose rights are affected or threatened.

12. The Petitioner further relies on ***Priscilla Nyokabi Kanyua v Attorney General & Another [2010] eKLR***, where the Court observed that procedural technicalities relating to standing ought not to hinder the adjudication of alleged violations of constitutional rights in public interest litigation. On that basis, it is submitted that the Petition is properly before this Court.
13. On the substantive issues, the Petitioner contends that social media platforms such as that operated by the 1<sup>st</sup> Respondent fall within the ambit of “all other types of media” contemplated under Article 34 of the Constitution and are therefore subject to the constitutional framework governing freedom of expression. It is submitted that the right to freedom of expression under Article 33 does not extend to hate speech, incitement to violence, or advocacy of hatred.
14. In this regard, reliance is again placed on ***Standard Limited & 2 Others v Christopher Ndarathi Murungaru [2006] eKLR***, where the Court of Appeal emphasized that freedom of the press does not confer an unfettered licence to publish without responsibility. The Court therein cited with approval the decision in ***Gitlow v New York (1924) 69 L Ed 1138***, for the proposition that freedom of speech does not confer “an unrestricted and unbridled license that gives immunity for every possible use of language.” The Petitioner submits that these authorities underscore the principle that

the exercise of freedom of expression must be balanced against the protection of dignity, reputation, and public order.

15. The Petitioner further submits that the impugned publications amount to violations of the rights to privacy and human dignity as guaranteed under Articles 31 and 28 of the Constitution. In support of the right to privacy, reliance is placed on ***Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 Others [2015] eKLR***, where the High Court elaborated on the centrality of privacy as a fundamental value underpinning individual autonomy and dignity.
  
16. Additional reliance is placed on ***Jessicar Clarise Wanjiru v Davinci Aesthetics and Reconstruction Centre & 2 Others [2017] eKLR***, where the Court defined the right to privacy as the right of an individual to be protected from intrusion into their personal life or affairs through the publication of personal information. The Petitioner also places reliance on ***Tatu Kamau v Attorney General & 2 Others [2021] eKLR***, where the Court emphasized that human dignity is the foundation upon which other constitutional rights are anchored. On the basis of the foregoing, the Petitioner submits that the impugned publications on the 1<sup>st</sup> Respondent's platform violate the privacy and dignity of persons within Kenya and urges this Court to grant the declaratory, mandatory, and injunctive reliefs sought in the Petition.

### **The 1<sup>st</sup> Respondent's submission**

17. It is contended, at the outset, that the Petition discloses no reasonable cause of action and that no violation of constitutional rights has been

demonstrated as against the platform provider. The 1<sup>st</sup> Respondent submits that the Petitioner merely annexed screenshots of posts allegedly published by certain users and improperly attributed the conduct of those independent users to the platform. In those circumstances, it is argued that any conceivable cause of action would properly lie against the individual authors of the impugned content, rather than against the entity that merely operates the platform.

18. It is further submitted that the relationship between the platform and its users is purely contractual, arising upon registration and governed by the applicable Terms of Service, Privacy Policy, and rules regulating user conduct. These instruments are said to address, inter alia, privacy violations, abuse and harassment, hateful conduct, and child safety. Provision is made for enforcement through reporting mechanisms, removal of content, restriction of visibility, suspension of accounts, and other graduated measures depending on the nature and gravity of the violation.
19. The 1<sup>st</sup> Respondent underscores the global scale at which the platform operates, with approximately 500 million posts published daily, and submits that the most efficacious means of addressing objectionable content lies in the internal reporting systems available to users. It is contended that users who encounter such content may invoke the reporting tools, whereupon the complaint is reviewed and appropriate enforcement action taken. The Petitioner, it is argued, failed to utilise these mechanisms and instead prematurely invoked the constitutional jurisdiction of the Court.

20. It is further contended that liability cannot attach to the platform in respect of content generated by independent third parties. The submission is that the platform merely provides the technological infrastructure through which users communicate, and does not author or create the impugned content. Reliance is placed on ***Dyroff v The Ultimate Software Group, No. 18-15175***, where the United States Court of Appeals for the Ninth Circuit held that recommendation algorithms and similar features do not constitute the creation or development of unlawful content by a platform provider. It is submitted that this authority affirms the principle that digital platforms cannot be treated as the authors of user-generated content.
21. Further reliance is placed on ***Twitter Inc v Taamneh, 598 U.S. (2023)***, in which the United States Supreme Court declined to impose liability on a social media platform for content posted by users, holding that the mere provision of a communication platform does not amount to aiding or abetting unlawful conduct. It is submitted that this decision reflects the broader principle that platform providers are not responsible for the independent acts of their users.
22. Further reliance is placed on ***Google Inc v Australian Competition and Consumer Commission (2013) 249 CLR 435***, where the High Court of Australia held that Google was not the publisher of advertisements appearing in its search results, having neither authored nor adopted the content. It is argued that this decision reinforces the jurisprudential position that intermediary platforms which facilitate communication

cannot, without more, be deemed responsible for user-generated content.

23. On whether the Petition discloses a constitutional cause of action, reliance is placed on ***Sanitam Services (E.A.) Limited v Tamia Limited & 16 Others [2012] eKLR***, where the High Court held that a petition which fails to disclose any infringement of a constitutional right is liable to be struck out. It is submitted that the present Petition similarly fails to identify any specific act or omission attributable to the platform that would amount to a violation of constitutional rights, and instead impermissibly seeks to elevate grievances against third-party users into constitutional claims.
24. The doctrine of exhaustion of alternative remedies is also invoked. It is submitted that the complaints raised fall within statutory dispute resolution mechanisms established under Kenyan law, including the mandate of the National Cohesion and Integration Commission in relation to hate speech, and the Office of the Data Protection Commissioner in respect of privacy-related complaints. Reliance is placed on ***Dickson Mukweluine v Attorney General & 4 Others [2012] eKLR***, where the Court held that where a statutory mechanism exists, it ought, as a general rule, to be exhausted prior to invoking the constitutional jurisdiction of the Court.
25. Further reliance is placed on ***Jawara v The Gambia (1996)***, where the African Commission on Human and Peoples' Rights affirmed that domestic remedies must be exhausted unless shown to be unavailable, ineffective, or insufficient. It is submitted that no such demonstration has been made in the present case.

26. Counsel for the 1<sup>st</sup> Respondent also cites ***Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR***, in which the Court of Appeal reiterated that where legislation provides a clear dispute resolution framework, that procedure must be followed before resort is had to constitutional litigation. It is contended that the Petitioner disregarded these established mechanisms.
27. Additionally, reliance is placed on ***Mbugua & 10 Others v Attorney General & 54 Others; Communications Commission of Kenya (Interested Party) [2023] KEHC 1917 (KLR)***, where the High Court struck out a petition that improperly combined multiple grievances against numerous respondents without clearly delineating the role of each. It is submitted that the present Petition suffers from a similar defect, in that it advances a multiplicity of complaints without demonstrating, with precision, the manner in which the platform is alleged to have violated constitutional rights.
28. It is the 1<sup>st</sup> Respondent's submission that the Petition is incompetent, frivolous, and an abuse of the process of the Court. It is maintained that no violation of constitutional rights has been established as against the platform, and that the grievances raised are amenable to resolution through statutory mechanisms and internal processes. Accordingly, the Court is urged to strike out or dismiss the Petition with costs.

### **The 2<sup>nd</sup> Respondent's Submission**

29. Submissions were advanced in opposition to the Petition on the basis that it is misconceived, it being contended that Kenya already possesses an extensive and comprehensive legal and regulatory framework governing online communications and digital content. Counsel for the 2<sup>nd</sup> Respondent submitted that regulation in this sphere is addressed through a constellation of statutes and constitutional provisions, including the Constitution of Kenya, the Kenya Information and Communications Act, the Computer Misuse and Cybercrimes Act, the National Cohesion and Integration Act, the Prevention of Terrorism Act, the Data Protection Act, the Mutual Legal Assistance Act, and the National Intelligence Service Act, among others. It was argued that these instruments collectively establish mechanisms for addressing offences committed through digital platforms, including cyber harassment, publication of false information, child pornography, identity theft, cyber terrorism, and hate speech.
30. It was further submitted that the Constitution itself provides a normative framework for the regulation of communications and media practice. In particular, reliance was placed on Articles 31, 33, 34, and 35, which respectively protect the rights to privacy, freedom of expression, freedom and independence of the media, and access to information. Counsel contended that these provisions underscore the necessity of balancing regulation of digital communications with the protection of fundamental rights and freedoms, and cautioned that any attempt by the State to directly regulate content published by individuals on social media platforms must be approached with circumspection so as to avoid unjustified encroachment upon constitutionally guaranteed freedoms.

31. Reliance was also placed on existing institutional mechanisms regulating the digital environment. It was submitted that the Data Protection Act governs the processing of personal data and establishes the Office of the Data Protection Commissioner to enforce the right to privacy under Article 31, while the Computer Misuse and Cybercrimes Act creates offences relating to online misconduct, including publication of false information, cyber harassment, identity theft, and the distribution of obscene material.
32. The 2<sup>nd</sup> Respondent further submitted that the National Cohesion and Integration Act addresses offences relating to hate speech and ethnic incitement, while the Prevention of Terrorism Act criminalizes the dissemination of information intended to incite acts of terrorism. It was contended that these statutory frameworks demonstrate the existence of a robust and comprehensive regulatory regime addressing the very concerns raised in the Petition.
33. It was additionally submitted that media practice in Kenya is regulated under the Media Council of Kenya Act, which gives effect to Article 34 of the Constitution and establishes the Media Council of Kenya as the body mandated to promote professional standards in journalism. Reference was made to the Guide on the Use of Social Media and the Internet for Media Practice in Kenya, which sets out ethical standards relating to accuracy, privacy, verification of information, and the responsible use of user-generated content. Counsel argued that these measures demonstrate that the State has taken deliberate steps to regulate online communications while safeguarding constitutional freedoms.

34. Notwithstanding the foregoing, it was emphasized that the regulation of social media platforms presents unique challenges, the internet operating both as a global commons and as privately owned digital infrastructure. It was therefore submitted that the State cannot realistically monitor or regulate every piece of content published by individuals on global platforms, and that primary responsibility for content moderation lies with the platform providers through their internal policies and enforcement mechanisms. It was further contended that measures have been undertaken to require social media companies accessible within Kenya to establish local presence so as to enhance accountability and address concerns such as disinformation, harassment, and incitement to violence.
35. On the constitutional dimension, counsel underscored that freedom of expression is a foundational democratic value protected under Article 33. In support of this proposition, reliance was placed on *Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR*, where the High Court affirmed that:
- “There can be no doubt that the freedom of expression, coupled with the right to receive and impart information, is a core value of any democratic society deserving of the utmost legal protection.”***
36. It is the 2<sup>nd</sup> Respondent’s submission that this authority illustrates the centrality of freedom of expression and the need for any regulatory intervention to be carefully calibrated.

37. Further reliance was placed on ***Geoffrey Andare v Attorney General & 2 others [2016] eKLR***, where the High Court cautioned against overly broad criminalisation of online speech, observing that while misuse of telecommunications platforms must be addressed, regulation must remain proportionate given the central role of social media as a medium for the exercise of freedom of expression. Counsel submitted that this reasoning reinforces the principle that regulation of digital speech must be consistent with constitutional safeguards.
38. On the burden of proof, it was submitted that no violation of constitutional rights had been established as against the 2<sup>nd</sup> Respondent. Reliance was placed on ***Rashid Odhiambo Allogoh & 245 others v Haco Industries Limited [2015] eKLR***, where the Court held that a party alleging infringement of constitutional rights must do more than merely assert such violations, and must demonstrate, by cogent evidence, the manner in which those rights have been infringed. It was contended that no such demonstration had been made.
39. The 2<sup>nd</sup> Respondent places reliance on the well-established principle in ***Anarita Karimi Njeru v Republic (1976-1980) 1 KLR 1272***, as reaffirmed in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR***, that a constitutional petition must plead alleged violations with reasonable precision and particularity. According to the 2<sup>nd</sup> Respondent, the Petition merely enumerates various constitutional provisions without setting out, with the requisite specificity, the manner of their alleged violation or the role attributable to the 2<sup>nd</sup> Respondent. On that basis, the Court was urged to dismiss the Petition with costs.

### **The 3<sup>rd</sup> Respondent's Submission**

40. The 3<sup>rd</sup> Respondent, the Communications Authority of Kenya, filed written submissions in opposition to the Petition and urged the Court to decline the reliefs sought as against it. It is contended that the Petition is predicated upon an erroneous assumption that the Authority exercises regulatory control over social media platforms such as the 1<sup>st</sup> Respondent. It was submitted that the Authority's mandate is strictly derived from the Kenya Information and Communications Act, 1998 (KICA), which establishes it as the sector regulator for telecommunications, broadcasting, postal and courier services, cybersecurity, and electronic commerce within Kenya.
  
41. It is contended that the statutory functions of the Authority include the licensing of communications service providers, management of the national frequency spectrum and numbering resources, regulation of communications services, protection of consumer interests within the sector, and the facilitation of the development of information and communications technologies.
  
42. It is further contended that this mandate does not extend to the licensing or regulation of social media platforms such as the 1<sup>st</sup> Respondent. It was argued that such platforms operate as global, internet-based services, typically hosted outside the jurisdiction, and accessible to users irrespective of geographic location. In those circumstances, it was submitted that no statutory power exists enabling the Authority to regulate the operations of such platforms or to assume responsibility for

content generated by their users. It was further noted that although legislative proposals have been made to expand regulatory oversight to social media platforms, no such amendments have been enacted into law.

43. In particular, reference was made to the Kenya Information and Communications (Amendment) Bill, 2019, commonly referred to as the Social Media Bill, which sought to introduce licensing requirements for social media platform operators and to mandate the establishment of local offices within Kenya. It was submitted that, the Bill not having been enacted, no legal basis exists upon which the Authority may assert regulatory control over such platforms.
44. On that footing, it was submitted that responsibility has been improperly attributed to the Authority in respect of matters falling outside its statutory remit. Counsel submitted that to compel the Authority to regulate social media platforms would be to require it to act ultra vires its enabling statute. Emphasis was placed on the principle of legality, it being argued that, as a statutory body, the Authority may only exercise powers expressly conferred upon it by law, and no more.
45. In support of this position, reliance was placed on ***Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR***, where the High Court affirmed that a statutory body can only exercise powers conferred by its enabling statute, observing that: ***“Public bodies, no matter how well intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation... Public power can be validly exercised only if it is clearly sourced in law.”***

46. It was the 3<sup>rd</sup> Respondent's submission that the foregoing authority affirms the doctrine of legality and underscores the imperative that regulatory bodies must operate strictly within the confines of their statutory mandate. Counsel argued that the Court in that decision found that the Authority had acted ultra vires where it purported to exercise functions vested in other bodies, and that the same reasoning applies herein. Accordingly, it was contended that the Authority cannot be compelled to regulate social media platforms or control online content in the absence of an express statutory mandate.

47. The 3<sup>rd</sup> Respondent placed further reliance was placed on ***Daniel Ingida Aluvaala & another v Council of Legal Education & another [2018] eKLR***, where the Court emphasized that public bodies may only act within powers conferred by law, stating that:

***“Public bodies... may only do what the law empowers them to do... the doctrine of legality which requires that power should have a source in law is applicable whenever public power is exercised.”***

48. According to the 3<sup>rd</sup> Respondent, this principle reflects the broader constitutional requirement that all public authorities must act within the limits of their lawful mandate, and that to require the Authority to regulate social media platforms would be to compel it to act without legal authority, thereby undermining the rule of law.

49. It is the 3<sup>rd</sup> Respondent's submission that no neglect or failure of constitutional or statutory duty has been demonstrated. On the contrary, it was contended that the Authority has acted strictly within the scope of

its mandate under KICA, and that, in the absence of legislative expansion of that mandate, no liability can attach in respect of the matters complained of. The Court was therefore urged to find that the 3<sup>rd</sup> Respondent has acted intra vires its statutory powers and to decline the reliefs sought against it.

### **The 5<sup>th</sup> Respondent's Submission**

50. The 5<sup>th</sup> Respondent submitted that the Petition alleges that the 1<sup>st</sup> Respondent has permitted the publication and circulation, on its social media platform, of content amounting to hate speech, incitement to violence, advocacy of hatred, and the vilification of individuals, and that, on that basis, the Petitioner seeks declaratory relief to the effect that the State respondents, including the 5<sup>th</sup> Respondent, have failed or neglected to discharge their constitutional and statutory mandates. It was, however, contended that the Petition fails to demonstrate, with any degree of particularity, the manner in which the 5<sup>th</sup> Respondent has violated any constitutional provision or neglected its statutory obligations under the National Cohesion and Integration Act.
  
51. It was further submitted that the Petition does not disclose any specific act or omission attributable to the 5<sup>th</sup> Respondent. Counsel argued that the relevant pleadings merely advance generalized allegations to the effect that certain State agencies failed to discharge their mandates and remained passive in the face of the alleged unlawful conduct of the 1<sup>st</sup> Respondent, without delineating the precise role or responsibility of the 5<sup>th</sup> Respondent.

52. According to the 5<sup>th</sup> Respondent the National Cohesion and Integration Act establishes a comprehensive statutory framework for addressing offences relating to hate speech and ethnic incitement. In particular, reliance was placed on section 13, which criminalizes hate speech, and section 43(1), which provides that any person alleging contravention of the Act may lodge a complaint with the Commission for investigation. It was contended that these provisions create a clear administrative mechanism for the resolution of complaints relating to hate speech and ethnic discrimination, which mechanism the Petitioner failed to invoke prior to approaching the Court.
53. In that regard, the 5<sup>th</sup> Respondent invokes the doctrine of exhaustion of statutory remedies, and places reliance in *Maya Duty Free Limited v Attorney General & 3 Others, Petition No. 45 of 2017*, where the Court held that parties ought not to invoke constitutional jurisdiction where adequate statutory remedies exist. It was submitted that the present Petition is premature, the Petitioner having failed to lodge any complaint with the Commission, and therefore cannot properly allege that the Commission has failed to discharge its statutory mandate.
54. It is the 5<sup>th</sup> Respondent's submission that it has in place mechanisms for monitoring social media platforms and addressing harmful online content, including hate speech, misinformation, and incitement to violence. Counsel for the 5<sup>th</sup> Respondent stated that the Commission routinely monitors such platforms, including that operated by the 1<sup>st</sup> Respondent, and undertakes appropriate action where violations of the Act are

detected. It was therefore contended that no failure on the part of the Commission has been demonstrated. On that basis, the Court was urged to find that the allegations against the 5th Respondent are unsubstantiated and to dismiss the Petition with costs.

### **The 6<sup>th</sup> Respondent's Submission**

55. The 6<sup>th</sup> Respondent submitted that it is a statutory body established under the Data Protection Act, 2019, with the mandate of implementing and safeguarding the right to privacy under Article 31(c) and (d) of the Constitution. Counsel referred to section 8 of the Act, which delineates its functions, including oversight of data processing operations and the receipt and investigation of complaints relating to alleged infringements of rights under the Act. It was contended that the Petition is predicated on an erroneous assumption that the 6<sup>th</sup> Respondent has neglected its statutory mandate, notwithstanding that no complaint has been lodged before it by the Petitioner in accordance with the prescribed statutory framework.

56. It was further submitted that the Data Protection Act establishes a clear procedure for redress, requiring an aggrieved data subject to first lodge a complaint with the Data Commissioner. In this regard, reliance was placed on section 56 of the Act, which provides that “a data subject who is aggrieved by a decision of any person under this Act may lodge a complaint with the Data Commissioner,” and section 57, which empowers the Commissioner to investigate such complaints. Counsel argued that these provisions establish a comprehensive statutory mechanism through

which alleged violations of privacy rights may be investigated and remedied, including the issuance of enforcement notices under section 58. It was contended that, having failed to invoke these procedures, the Petitioner cannot properly assert that the 6<sup>th</sup> Respondent neglected its statutory duties.

57. It is the 6<sup>th</sup> Respondent's submission that, although the 1<sup>st</sup> Respondent may fall within the definition of a data controller or data processor under the Act, the enforcement powers of the 6<sup>th</sup> Respondent can only be exercised within the confines of the statutory framework and cannot be triggered in the absence of a complaint or a duly initiated investigation. Counsel further stated that the 1<sup>st</sup> Respondent has not registered as a data controller or data processor within Kenya, despite efforts to require such registration.
58. It was contended that several of the complaints raised in the Petition disclose offences created under the Computer Misuse and Cybercrimes Act, including cyber harassment under section 27, which fall within the investigative mandate of law enforcement agencies and the Office of the Director of Public Prosecutions, rather than that of the 6<sup>th</sup> Respondent.
59. The 6<sup>th</sup> Respondent invokes the doctrine of exhaustion of alternative remedies. Reliance is placed ***Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR***, where the Court of Appeal held that where a dispute resolution mechanism exists outside the courts, it ought to be exhausted before recourse is had to the judicial process, observing that:

***“Courts ought to be the fora of last resort and not the first port of call the moment a storm brews.”***

60. It is the 6<sup>th</sup> Respondent’s case that the Petitioner’s failure to utilise the statutory complaint mechanism under the Data Protection Act renders the Petition premature, and the Court was accordingly urged to dismiss the claims as against it.

### **The Interested Party’s Submission**

61. The Interested Party submitted that the Petition seeks expansive declaratory and mandatory orders against the 1<sup>st</sup> Respondent in relation to alleged publications constituting hate speech, pornography, invasion of privacy, violations of national values, and infringements of reputation.

62. It was contended that the Petitioner has failed to establish how the specific publications cited attain the requisite threshold for the alleged constitutional violations. Consequently, the Petition does not disclose a clear factual or legal basis upon which this Court may determine that the impugned content falls within the prohibited categories contemplated under Article 33(2) of the Constitution.

63. It was further submitted that any limitation on the right to freedom of expression must satisfy the well-established three-part test of legality, necessity, and proportionality, as articulated under Articles 33(2) and (3) of the Constitution and Article 19(2) of the International Covenant on Civil and Political Rights. In support of this proposition, reliance was placed on ***Coalition for Reform and Democracy (CORD) & 2 others v Republic of***

*Kenya & 10 others [2015] eKLR and Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR*, where the Courts underscored that any restrictions on expression must adhere to stringent constitutional standards of justification.

64. Reliance was also placed on *Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR*, in which the Supreme Court observed that the regulation of media content falls within the mandate of the Media Council of Kenya rather than that of the communications regulator. Further reliance was placed on General Comment No. 34 of the United Nations Human Rights Committee, which underscores that restrictions on online platforms must be content-specific and proportionate, cautioning that generic or blanket prohibitions on information dissemination are incompatible with the protection of freedom of expression. On this basis, the Interested Party submitted that the reliefs sought by the Petitioner risk imposing disproportionate limitations on lawful expression and accordingly urged the Court to dismiss the Petition.

### **Analysis and Determination**

65. Having carefully considered the pleadings, the affidavits on record, and the respective submissions of the parties, the Court is of the considered view that the following issues arise for determination
- i. Whether the Petition is premature by reason of constitutional avoidance and the doctrine of exhaustion.*

**ii. Whether the Petitioner has discharged the legal and evidential burden of proof, on the applicable standard, for the pleaded constitutional violations and the relief sought.**

66. At the outset, the Court observes that while the Constitution of Kenya vests it with jurisdiction to adjudicate disputes concerning alleged violations, denials, or threats to fundamental rights and freedoms, this jurisdiction is not exercised in isolation or as a matter of first resort. It is tempered by the principle of constitutional avoidance, which dictates that a constitutional question should not be determined where the dispute may properly be resolved on other grounds. As the Supreme Court held in **Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] KESC 53 (KLR)**:

***“The principle of avoidance entails that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.”***

67. This doctrine embodies the foundational principle that courts are fora of last resort, and that constitutional adjudication should be invoked only where no other adequate statutory, administrative, or regulatory remedy exists.

68. The Court further notes that the Petitioner’s grievances engage detailed and specialised statutory frameworks established by Parliament to address the precise conduct alleged. Complaints concerning hate speech and ethnic incitement are criminalised under section 13 of the National Cohesion and Integration Act, with section 43(1) providing mechanisms for lodging complaints with the Commission for investigation, conciliation,

and enforcement. Allegations of cyber harassment, child pornography, and distribution of obscene material online fall within the purview of the Computer Misuse and Cybercrimes Act (section 24), the Sexual Offences Act (section 16), and the Children Act (section 22(3)), each establishing investigative and prosecutorial processes. Matters implicating the misuse of personal data and breaches of privacy are specifically addressed under the Data Protection Act, 2019, which empowers the Office of the Data Commissioner to receive, investigate, and adjudicate complaints, including the issuance of enforcement notices. Issues relating to film classification, age restrictions, and protection of women and children from sexual exploitation online are addressed under section 15 of the Films and Stage Plays Act, which expressly extends to content disseminated via the internet.

69. These statutory frameworks collectively establish first-instance administrative and regulatory mechanisms capable of addressing the Petitioner's complaints. In turn, the Court is obliged to consider whether these avenues were properly exhausted before the Petitioner invoked the extraordinary jurisdiction of this Court under Article 22 of the Constitution.

70. It is settled in Kenyan jurisprudence that a constitutional petition is premature where available statutory remedies have not been invoked, unless the petitioner demonstrates exceptional circumstances justifying immediate recourse to superior courts. As observed in ***Speaker of the National Assembly v James Njenga Karume [1992] KECA:***

***“Where there is a clear procedure for the redress of any particular grievance ... that procedure should be strictly followed.”***

71. This principle was reaffirmed in *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR)* where the court held thus;

***“Even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”***

72. In the present matter, the Petition alleges that the 1<sup>st</sup> Respondent’s platform disseminated pornographic or otherwise indecent content, hate speech, abusive expressions, and related material, purportedly infringing Articles 10 (national values and principles of governance), 28 (human dignity), 34 (freedom of the media), 45 (protection of the family), and 53 (rights of the child). While the Court recognizes the importance of these constitutional protections, it is evident that each category of alleged harm is specifically catered for by statutory mechanisms capable of investigation and remedial action. The Petitioner, however, has not lodged complaints with any of the statutory bodies empowered to act, including the National Cohesion and Integration Commission, the Data Commissioner, law enforcement authorities, or the Kenya Film Classification Board, nor has the Petitioner demonstrated any exceptional circumstances justifying the bypassing of these mechanisms.

73. Given the foregoing, the Petition effectively seeks to constitutionalise matters already actionable under statute, thereby circumventing Parliament's carefully designed first-instance mechanisms. The doctrines of constitutional avoidance and exhaustion of statutory remedies are therefore directly engaged. On the evidence before the Court, the Petition is premature. This principle is expressly reinforced under section 9(2) of the Fair Administrative Action Act, which provides:

*The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms, including internal mechanisms for appeal or review, and all remedies available under any other written law are first exhausted.*

74. In this regard, the Court is guided by the decision in ***Speaker of the National Assembly v James Njenga Karume [1992] KECA***, wherein the Court of Appeal emphasized the same principle, holding that:

***“Where there is a clear procedure for the redress of any particular grievance ... that procedure should be strictly followed.”***

75. More recently, the Supreme Court has reiterated that where Parliament has established alternative dispute resolution mechanisms or specialised channels, superior courts must exercise restraint and accord such bodies the first opportunity to address disputes within their statutory remit. In ***NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR)***, the Court, in the context of exhaustion jurisprudence, cited with approval ***Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others SC Petition No. 3 of 2016; [2019] eKLR***, observing at paragraph 118:

***“Even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”***

76. The Court finds that these principles apply squarely to the present matter. The Petitioner has not invoked or exhausted the statutory and administrative mechanisms established under the National Cohesion and Integration Act, the Data Protection Act, the Children Act, the Sexual Offences Act, the Computer Misuse and Cybercrimes Act, or the Films and Stage Plays Act. There is also no evidence of exceptional circumstances that would justify bypassing these first-instance processes.
77. Consequently, the Petition is premature and cannot be entertained in its current form. The Court is obliged to respect the legislative architecture that vests these statutory bodies with first-instance responsibility for addressing the specific harms alleged.
78. Even assuming, *arguendo*, that the Petition were not barred on this ground, it further fails to meet the requisite pleading and evidential standards. As established in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR***, constitutional petitions must plead with reasonable precision the facts constituting the alleged violation and the manner in which the respondent caused or contributed to such violation.

79. Further, Sections 107-109 of the Evidence Act place the legal burden on the party asserting facts, and, as restated by the Supreme Court in **Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] KESC 66 (KLR)**, the petitioner must discharge an initial evidential burden on the balance of probabilities before any burden shifts to respondents. In the present case, the Petitioner has failed to adduce sufficient evidence that the impugned content meets the threshold of prohibited speech under Article 33(2), or that the statutory bodies or the 1<sup>st</sup> Respondent are constitutionally liable for its publication.

80. In conclusion, for the reasons set out above, the Court finds that the Petition is unsustainable. First, it is barred by the doctrines of constitutional avoidance and exhaustion of statutory remedies, as the Petitioner has not invoked or exhausted the statutory and administrative mechanisms specifically designed to address the alleged grievances. Second, and in the alternative, the Petition fails to meet the required specificity of pleading and evidential threshold, as the Petitioner has not demonstrated on the balance of probabilities that the 1<sup>st</sup> Respondent or the statutory bodies are constitutionally liable for the impugned conduct. The Court finds that the Petitioner has not demonstrated a legal or factual basis to justify the constitutional orders or declarations prayed for. No exceptional circumstances exist to warrant the grant of extraordinary relief bypassing Parliament's statutory frameworks. Consequently, all reliefs sought in the Petition are refused.

81. Applying these standards, the Court is not satisfied that the Petitioner discharged the initial evidential burden necessary for the reliefs sought. In

particular, the Petition seeks orders premised on the existence of rights-violating content, responsibility of the 1<sup>st</sup> Respondent for that content in a constitutional sense, and failures of regulators/statutory bodies to act

82. For the reasons set out above, the Court finds and holds as follows:

- a. The Petition, in its present form and on the record placed before the Court, is not properly sustainable as a first-instance constitutional claim to the extent that it bypasses available statutory complaint and enforcement mechanisms and is therefore barred by the doctrines of constitutional avoidance and exhaustion.
- b. Additionally, and also in the alternative, the Petitioner did not discharge the requisite specificity of pleading obligation and evidentiary burden to prove the alleged constitutional violations by the Respondents.

#### **Orders**

- i) The Petition is accordingly dismissed for lack of jurisdiction and also for lack of merit
- ii) In the interest of justice, each party shall bear its own costs.
- iii) Orders accordingly and file closed accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF MARCH 2026**

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**BAHATI MWAMUYE MBS**

**JUDGE**

**In the presence of:**

**Counsel for the Petitioner: Mr. Kimani h/b Mr. Obondi**

**Counsel for the 1<sup>st</sup> Respondent : Mr. Ondieki**

**Counsel for the 3<sup>rd</sup> and 6<sup>th</sup> Respondent: Mr. Mbadi**

**Court Assistant: Ms. Lwambia**