



**Nairobi Bottlers Limited v Ndung'u & another (Civil Appeal  
99 of 2018) [2023] KECA 839 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 839 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 99 OF 2018  
HM OKWENGU, KI LAIBUTA & JM MATIVO, JJA  
JULY 7, 2023**

**BETWEEN**

**NAIROBI BOTTLERS LIMITED ..... APPELLANT**

**AND**

**MARK NDUMIA NDUNG'U ..... 1<sup>ST</sup> RESPONDENT**

**COCA COLA CENTRAL, EAST & WEST AFRICA LTD ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment and decree of the High Court of Kenya  
(Constitutional and Human Rights Division) at Nairobi (Onguto,  
J.) dated January 30, 2018 in Nairobi Petition No. 325 of 2015)*

**Absence of label information on glass coca cola soda bottles while providing the same in the plastic bottles amounts to violation of consumer rights and unfair discrimination**

*The contention in the instant case was that unlike the plastic bottle, the glass bottle of coca cola soda products did not contain; nutritional information, contact information and storage directions. The court held that the Kenya Consumers Protection Advisory Committee could not determine constitutional matters touching on alleged breach consumer rights or any constitutional questions, a mandate conferred by the Constitution to the High Court. The court further noted that the omission of nutritional information, storage and contact information offended article 46 of the Constitution and the Consumer Protection Act. The court also held that the differential treatment of the consumers of coca cola product in glass bottles amounted to unfair discrimination.*

Reported by Kakai Toili

**Constitutional Law** – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – consumer rights - right to information necessary for consumers to gain full benefit from goods and services – claim that the glass coca cola soda bottles did not contain nutritional, storage and contact information - what information should be included in the label information about nutrient content of a product - whether failure to provide nutritional, storage and contact information on the glass coca cola soda bottles violated consumer rights under article 46 of the and the - of Kenya, 2010, article 46.



**Constitutional Law** - *fundamental rights and freedoms - enforcement of fundamental rights and freedoms - right to equality and freedom from discrimination - whether the failure to provide nutritional, storage and contact information on the glass coca cola soda bottles and providing the same on the plastic bottles amounted to unfair discrimination - of Kenya, 2010, article 27.*

**Jurisdiction** – *jurisdiction of the Kenya Consumers Protection Advisory Committee - jurisdiction to determine constitutional matters touching on alleged breach consumer rights or any constitutional questions - whether the Kenya Consumers Protection Advisory Committee could determine constitutional matters touching on alleged breach consumer rights or any constitutional questions - , No 46 of 2012, sections 75, 89 and 90.*

**Constitutional Law** – *constitutional petitions – institution of constitutional petitions - locus standi (right to sue) - whether a person who had stopped using a product could institute a suit claiming a violation of consumer rights with regard to the product - of Kenya, 2010, articles 22 and 258.*

**Words and Phrases** – *discrimination – definition of discrimination - differential treatment; a failure to treat all persons equally when no reasonable distinction between those favoured and those not favoured - , 10<sup>th</sup> Edition.*

**Words and Phrases** – *differential treatment – definition of differential treatment - a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured - , 10<sup>th</sup> Edition.*

### **Brief facts**

The 1<sup>st</sup> respondent sued the appellant and the 2<sup>nd</sup> respondent at the trial court claiming that he had discovered a disparity between the information printed on the label of the glass coca cola soda bottles and the plastic bottles containing the same product. He admitted that he stopped taking coco cola soda in 2014 on doctor’s advice. His contestation was that unlike the plastic bottle, the glass bottle had no information showing the nutritional content of the coca cola, krest, fanta, sprite or stoney beverages nor did it have information on customer service telephone and e-mail address or storage directions.

It was the 1<sup>st</sup> respondent’s case that the omissions violated consumer rights under article 46(1) (b) and (c) of the of Kenya, 2010 (the Constitution). He also claimed that the disparity in the information provided in the same products sold in glass and plastic bottles amounted to treating consumers unequally, which violated article 27(2), (4) and (5) of the .

The trial court found in favour of the 1<sup>st</sup> respondent and issued among other orders; a declaration that omission of nutritional information and storage directions on the glass bottles constituted a violation of consumer rights and a declaration that the selective provision of nutritional information, directions on storage, customer care mobile number and e-mail address on the plastic bottles while omitting that information from the corresponding glass bottles amounted to discrimination and unequal treatment of consumers. Aggrieved, the appellant filed the instant appeal.

### **Issues**

- i. Whether failure to provide nutritional, storage and contact information on the glass coca cola soda bottles violated consumer rights under article 46 of the and the .
- ii. Whether the failure to provide nutritional, storage and contact information on the glass coca cola soda bottles and providing the same on the plastic bottles amounted to unfair discrimination.
- iii. Whether the Kenya Consumers Protection Advisory Committee could determine constitutional matters touching on alleged breach consumer rights or any constitutional questions.
- iv. What information should be included in the label information about nutrient content of a product?
- v. Whether a person who had stopped using a product could institute a suit claiming a violation of consumer rights with regard to the product.

### **Relevant provisions of the Law of Kenya, 2010**

#### **Article 46 - Consumer rights**

*(1) Consumers have the right—*



- (a) to goods and services of reasonable quality;
- (b) to the information necessary for them to gain full benefit from goods and services;
- (c) to the protection of their health, safety, and economic interests; and
- (d) to compensation for loss or injury arising from defects in goods or services.

## Held

1. As the matter was a first appeal, the court proceeded by way of a re-hearing, at the end of which it made its own independent conclusions of law and fact. The court accorded respect to the findings of the first instance court but would not hesitate to depart from those findings if the same were not based on evidence, were arrived at by way of a misapprehension of the evidence or the trial court misdirected itself in some material respect which rendered the decision erroneous. The instant court's latitude to depart was greater where, as in the instant case, the matter in the court below proceeded not on the basis of oral evidence, which would have given the trial court the clear advantage of hearing and observing witnesses as they testified, but by way of affidavits and submissions which were on record. That was more so where the decision turned on, not so much the peculiarity of highly contested facts, but rather the interpretation of certain provisions of the Constitution.
2. From a reading of sections 75, 89 and 90 of the , none of the provisions created a forum capable of resolving the issues raised in the petition before the trial court. Sections 75, 89 and 90 or any other provision of the did not support the argument that the petition before the trial court was pre-mature. Accordingly, the suit before the trial court was not pre-mature nor did it offend the doctrine of exhaustion. The committee established under the (Kenya Consumers Protection Advisory Committee) could not, by any stretch of imagination determine constitutional matters touching on alleged breach consumer rights or any constitutional questions, a mandate conferred by the Constitution to the High Court.
3. Articles 22 and 258 of the seriously eroded the hitherto eminent common law principle of *locus standi*. Under both articles, proceedings could be instituted by the aggrieved party on its own interest, by a person acting on behalf of another person, on behalf of a class of people, in public interest or by an association acting on behalf of its member or members. The test was whether the person moving the court fell under any of the categories enumerated in the provisions. No argument was advanced to suggest otherwise.
4. Under no circumstances could the court properly directing its mind accept an invitation to agree to a judicial standard for *locus standi* that inhibited the right to bring proceedings under articles 22 and 258 of the . Such an interpretation would be a direct affront to the letter and spirit of the Constitution. It would be a clear breach of articles 48 and 50 of the , except only when the litigation was hypothetical, abstract or was an abuse of the judicial process. The standard guide for *locus standi* must remain the command in articles 22 and 258.
5. Although consumer rights affected only the parties, their impacts and consequences were substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest. Accordingly, consumer rights litigation was not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. Conversely, litigants and the courts asserted the growing power of the expanded Bill of Rights (thanks to Kenya's transformative and progressive Constitution) by establishing its meaning through contested cases in a process.
6. The entrenchment of the right to access justice, and the right to approach the court to enforce the Bill of Rights blurred the common law principle of *locus standi*. Parties, who were ordinarily denied access to courts for want of *locus standi* premised on personal interest, should access courts provided the person, body or association fell within the descriptions in articles 22 and 258 of the . The right to access courts was deeply entrenched in the Constitution. It was no longer a common law prerogative. Accordingly, the 1<sup>st</sup> respondent had the *locus standi* to file the petition.
7. In peremptory terms, the Constitution imposed an obligation on all courts to promote the spirit, purpose and the objects of the Bill of Rights, when interpreting the Constitution. Unlike other statutory enactments, the provided in mandatory terms the manner in which it ought to be construed.



8. Section 4 of the provided that the purposes of the Act were to promote and advance the social and economic welfare of consumers in Kenya. From the definition of a consumer in section 2 of the and the preamble to the Act, the whole tenor of the Act was to protect consumers. The Act must be interpreted keeping in mind that its focus was the protection of consumers.

9. The general principle governing the determination of cases was that the party who alleged or, as it was sometimes stated, the party who made the positive allegation, had to prove. Moreover, the onus on the petitioner to establish violation of alleged consumer rights was not a mere formality; it was important.

10. The fundamental principle was that such interpretation as would serve the interests of the would best carry out its object and purpose should be preferred. Where the provisions of the law were capable of two meanings the court must choose the meaning that would give effect to the Constitution and promote its purpose. Thus, constitutional interpretation should be purposive. Rights should be interpreted in accordance with the general purpose of having rights, namely the protection of individuals and minorities against an overbearing collectivity. It was not the duty of the court to construe any of the provisions of the to defeat the obvious ends the was designed to serve.

11. Article 46 of the and the imposed explicit requirements for the content of food labels, which manufacturers were not free to ignore. Those requirements included the nutritional label, which must include the name of the food, the disclosure of the quantity of contents, the name and place of business of the manufacturer or distributor, a list of their ingredients and nutrition information. Nutritional label could be defined as a description used to inform the customer about the nutritional properties of food, which also helped the customer in purchasing nutritious food and consuming nutritionally balanced meals.

12. The label information about nutrient content must as of necessity conform with article 46(1)(b) of the which guaranteed a consumer the right to the information necessary for a consumer to gain full benefit from the goods and services. In the minimum, the nutrition labelling should; -

1. provide consumers with nutrition information about the food product;
2. enable consumers to compare the nutritional quality of products from the same food group;
3. enable consumers to choose among products from different food groups based on nutritional quality;
4. prevent or reduce consumer deception by providing information about the nutrient composition of the product; and
5. provide incentives to improve food products by requiring manufacturers to describe fully the ingredients and nutrient value of their products.

13. The trial court adopted an interpretation that upheld the tenor and intention of article 46 of the and the by upholding the right for consumers to be provided with information pertaining to ingredients, nutrition claims and declaration of potential allergens as well as nutrition or health claims. Food warnings and labels informed consumption. Such information, as required by article 46, enabled consumers to make informed decisions. The should be construed liberally to give effect to the values it embodied and the purposes for which the makers framed it.

14. The trial court's finding on the obligation placed on the appellant and/or the 2<sup>nd</sup> respondent to provide nutritional information, e-mail address and storage directions was grounded on article 46(1)(a), (b), and (c) of the , which guaranteed consumers products of reasonable quality, and the right to be provided with the information necessary for them to gain full benefit from goods and services. The article also guaranteed the protection of consumers' health, safety, and economic interests.

15. The appellant and the 2<sup>nd</sup> respondent had not persuaded the court that, pursuant to article 46 of the , they did not owe the consumers of their products an obligation to provide them with nutritional information, storage and contact information. On the contrary, the 1<sup>st</sup> respondent demonstrated to the required standard that the omission offended article 46 and the .

16. Article 27 of the Constitution guaranteed the right to equality and freedom from discrimination. Discrimination could be said to have occurred where a person was treated differently from other persons who



were in similar positions on the basis of one of the prohibited grounds like race, sex disability among others or due to unfair practice and without any objective and reasonable justification. Discrimination could be either direct or indirect. The discrimination alleged by the 1<sup>st</sup> appellant was indirect in nature.

17. The 1<sup>st</sup> respondent bore the obligation to lay sufficient material before the court, so as to discharge the evidential burden. It was only after the 1<sup>st</sup> respondent had discharged the onus of proof that the obligation under article 24(3) of the shifted to the appellant and/or the 2<sup>nd</sup> respondent to justify why the differential treatment. The reasons for the limitation must surmount an article 24 of the analysis test. Article 24 required limitation to be reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual did not prejudice the rights and fundamental freedoms of others, and the relation between the limitation and its purpose and whether there were less restrictive means to achieve the purpose.

18. The coca cola soda packaged in glass bottles did not have nutritional information, storage directions, customer care mobile number, and e-mail address. The coca cola soda packaged in glass bottles provided nutritional information, storage directions, customer care mobile number, and e-mail address. There was a price disparity in the two products. The appellant had not justified why it was only the consumers of the coca cola products in plastic bottles who were entitled to be aware of the nutritional information, access to customer mobile number and even storage directions. It had not been demonstrated why consumers of the same product sold in glass bottles were deprived the same information.

19. The appellant and/or the 2<sup>nd</sup> respondent did not demonstrate that the provision of nutritional information, storage directions and customer care numbers and e-mail address to the consumers of the coca cola products packaged in glass bottles was inconsequential. The differential treatment of the consumers of coca cola product in plastic and glass bottles was not connected to a legitimate purpose or, for good reason, justifiable.

20. Commercial factors determined the price of the coca cola products in glass and plastic bottles. A customer had the freedom to opt for either of the two products. However, that was how far it went. The differential treatment of the consumers of coca cola product in glass bottles deprived them the constitutionally guaranteed right to be aware of the nutritional information of their preferred beverage. It deprived them access to customer care if needed, in case they had a complaint they wished to raise. Consumers of the coca cola product in glass bottles had been left in the dark on the issue of storage direction. The appellant/2<sup>nd</sup> respondent's actions amounted to unfair discrimination which was a blatant violation of article 27(5) of the Constitution.

21. The submission that both plastic and glass bottles were available and accessible to all consumers and, therefore, the issue of the consumers with lower purchasing power preference of the glass packaged products was not an issue of discrimination but one of choice was self-defeatist. That was because it literally meant that if a consumer had low purchasing power and could only afford the coca cola product packaged in glass bottles, then because of his financial position, he was not entitled to the information supplied in the other similar product, but in a different package. Such a reasoning flew on the face of articles 27 and 46 of the . In the premises, the appellant and the 2<sup>nd</sup> respondent had not demonstrated that the reasons for the differentiation passed an article 24(3) of the analysis test.

22. In the absence of evidence that the 2<sup>nd</sup> respondent was a subsidiary of Coca Cola Export Corporation and/or a separate legal entity from Coca Cola Export Corporation, the trial court could not be faulted for finding that the 2<sup>nd</sup> respondent was properly sued.

*Appeal dismissed; judgment and decree of the trial court delivered on January 30, 2018 upheld.*

### **Orders**

*No order as to costs.*



## Citations

### Cases

#### Kenya

1. *Dida, Mohammed Abduba v Debate Media Limited & another* Civil Appeal 238 of 2017; [2018] KECA 642 (KLR) - (Explained)
2. *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* Petition 164B of 2016; [2018] KEHC 7130 (KLR) - (Explained)
3. *Fugicha, Mohamed v Methodist Church in Kenya (suing through its registered trustees) & 3 others* Civil Appeal 22 of 2015; [2016] KECA 273 (KLR) - (Explained)
4. *Gichuru v Package Insurance Brokers Ltd* Petition 36 of 2019; [2021] KESC 12 (KLR) - (Explained)
5. *In the Matter of Gender Representatives in the National Assembly and the Senate* [2012] 3 KLR 718 - (Explained)
6. *Kuria, James v Attorney General & 3 others* Petition 254 of 2016; [2018] eKLR - (Explained)
7. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
8. *Mohammed, Twaber Abdulkarim v Mwatibethe Adamson Kadenge & 2 others* Civil Appeal 45 of 2015; [2015] KECA 153 (KLR) - (Explained)
9. *Muthinja, Geoffrey & another v Samuel Muguna Henry & 1756 others* Civil Appeal 10 of 2015; [2015] KECA 304 (KLR) - (Explained)
10. *Njoya, Timothy & 6 others v Attorney General & 4 others* Miscellaneous Civil Application 82 of 2004; [2004] KEHC 1467 (KLR) - (Explained)
11. *Sakwa, Michael Osundwa v Chief Justice and President of the Supreme Court of Kenya* Petition 167 of 2016; [2016] eKLR - (Explained)
12. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR) - (Explained)

#### South Africa

1. *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998) - (Applied)
2. *Harksen v Lane No & others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997) - (Explained)
3. *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012) ZASCA 13; 2012 (4) SA 593 (SCA) - (Explained)
4. *Pharmaceutical Manufacturers Association of South Africa and another: In re Ex Parte President of the Republic of South Africa & Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000) - (Explained)
5. *Phumelela Gaming and Leisure Ltd v Gründlingh and others* (2006) ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) - (Explained)

#### Nigeria

*Ifezue v Mbandugha* (1984) 1 SCNLR 427; 5 SC 79 - (Applied)

#### United Kingdom

1. *Essop & ors v Home Office; Naeem v Secretary of State for Justice* (2017) UKSC 27 - (Explained)
2. *Sarka Angel Walkins Singh v the Governing Body of Aberdare Girls High School & another* [2008] EWHC 1865; [2008] FCR 203 - (Explained)
3. *Watkins Singh, R (on application of) v Aberdare Girls High School & another* (2008) EWHC 1865 - (Applied)

#### Regional Court

*Lyomoki & others v Attorney General* [2005] EA 127 - (Explained)



## Texts

Garner, BA., (Ed) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn

## Statutes

### Kenya

1. Constitution of Kenya articles 21, 22, 27(2)(4)(5); 35(1)(b); 46(1)(b); 48; 50; 258- (Interpreted)
2. Consumer Protection Act, 2012 (cap 501) sections 2, 75, 87, 89, 90- (Interpreted)
3. Evidence Act (cap 80) sections 107(1)(2); 109 - (Interpreted)
4. Food, Drugs and Chemical Substances Act (cap 254) ) In general - (Cited)
5. Standards Act (cap 496) section 9- (Interpreted)

## Advocates

None mentioned

## JUDGMENT

1. This is an appeal from the judgment and decree of the High Court (Constitutional and Human Rights Division) at Nairobi (Onguto, J), delivered on January 30, 2018, in Nairobi High Court Constitutional Petition No 325 of 2018. The appellant, Nairobi Bottlers Limited, was the 1<sup>st</sup> respondent in the said case. Aggrieved by the impugned judgment, the appellant seeks to overturn it citing a whopping 24 grounds, abridged later in this judgment. The 1<sup>st</sup> respondent, Mark Ndumia Ndung'u, was the petitioner in the said case. M/s Coca Cola Central, East & West Africa Ltd, the 2<sup>nd</sup> respondent, was also the 2<sup>nd</sup> respondent before the trial court.
2. By a constitutional petition dated July 31, 2015, the 1<sup>st</sup> respondent sued the appellant and the 2<sup>nd</sup> respondent at the High Court, Constitutional and Human Rights Division, claiming that he had discovered a disparity between the information printed on the label of the glass Coca Cola soda bottles and the plastic bottles containing the same product. He claimed that his preference was the Coca Cola sold in glass bottles. By his own admission, he stopped taking Coco Cola Soda in 2014 on doctor's advice after he was diagnosed with ulcers. His contestation was that unlike the plastic bottle, the glass bottle had no information showing the nutritional content of the Coca Cola, Krest, Fanta, Sprite or Stoney beverages nor did it have information on customer service telephone and e-mail address or storage directions. He claimed that the missing nutritional information was essential to enable consumers to know the benefits derivable from the consumption of the beverages. Further, he claimed that the e-mail address and phone numbers were essential to enable consumers give feedback, to make enquiries and complaints, and to obtain optimum benefit from the said products. In addition, he claimed that the storage directions that the glass bottle should be stored in a cool dry place were also missing. It was his case that the said omissions violated consumer rights under article 46(1)(b) and (c) of the *Constitution*. Further, that the omission to provide contact details offended article 35(1)(b) of the *Constitution*. He also claimed that the disparity in the information provided in the same products sold in glass and plastic bottles amounts to treating consumers unequally, which violates article 27(2), (4) and (5) of the *Constitution*.
3. In his petition, the 1<sup>st</sup> respondent sought the following orders:
  - a. a declaratory order that the respondent's omission of the nutritional value on the Coca Cola, Fanta, Krest, Stoney and Sprite glass bottle prejudices the health of consumers as safeguarded in article 46(1)(c) of the ;



- b. a declaratory order that the respondents' omission of the nutritional information, directions on storage, customer care mobile number and e-mail address on the Coca Cola, Fanta, Krest, Stoney and Sprite glass bottle is contrary to article 46(1)(b) of the Constitution as it denies the respondents' consumers the right to information necessary to gain full benefit of the products;
  - c. a mandatory order compelling the respondents to display the nutritional value, storage directions, customer care e-mail address and phone number on the Coca Cola, Fanta, Krest, Stoney and Sprite glass bottles;
  - d. a declaratory order that the respondents' omission of the nutritional information, directions on storage, customer care mobile number and e-mail address on the Coca Cola, Fanta, Krest, Stoney and Sprite glass bottle while availing the information on the corresponding plastic bottles amounts to discrimination and the unequal treatment of the glass bottle consumers, and is contrary to article 27(2), (4) and (5) of the Constitution; and
  - e. an order for compensation of the petitioner for discrimination.
4. The appellant opposed the petition through an affidavit sworn by one Cyrus Gitau on April 4, 2016. The appellant's case was that it was a franchise bottling and marketing the impugned beverages under the license of the Coca Cola Company. Nevertheless, it was of the view that the petition was fanciful and the 1<sup>st</sup> respondent did not justify inclusion of its name in the petition. It was also the appellant's case that the 1<sup>st</sup> respondent was not a consumer of Coca Cola products and was therefore a stranger to the petition.
5. In response to the 1<sup>st</sup> respondent's claims, the appellant stated that the Coca Cola crown glass bottle caps indeed bore the physical and postal address of the manufacturer, brand of trade name, as well as optional ingredients such as carbonated water, sugar, colour, caramel, acidulate, phosphoric acid, flavoring and caffeine. It was the appellant's case that the information necessary for consumers to gain full benefit from goods and services provided under section 87 of the Consumer Protection Act regulates any disclosure of information by suppliers to consumers.
6. Concerning the difference in price between the beverages packed in glass bottles on one hand and plastic bottles, the appellant submitted that the difference in pricing was because the glass bottles are re-usable while plastic bottles are not re- usable.
7. The 2<sup>nd</sup> respondent opposed the petition vide affidavits sworn by Antoinette Absalom on October 14, 2015, and March 24, 2016. It was the 2<sup>nd</sup> respondent's case that the Petition did not disclose a valid cause of action against it since it is a service company mandated to market and promote Coca-Cola Company brands, and was not involved in the production, manufacture or packaging of any beverage.
8. In response to the issue of labelling, the 2<sup>nd</sup> respondent maintained that the 1<sup>st</sup> respondent had no cause of action against it since the 1<sup>st</sup> respondent had not set out with a reasonable degree of precision his complaints, the provisions said to have been infringed, and the manner in which they are alleged to have been infringed. The 2<sup>nd</sup> respondent further contended that the food labels on all the 2<sup>nd</sup> respondent's beverage brands in Kenya complied with the food labelling requirements under the Food, Drugs and Chemical Substances Act. It maintained that the existing labels provide the brand, trade name, common name of the food, correct declaration of the net contents in weight, volume or number and as well as the name and address of the manufacturer, packer or distributor of the food. Further, it stated that it had complied with the Kenya Standard KS EAS 29:200: Carbonated (Beverages) Soft Drinks–Specification



requirements on the date of manufacture as well as the expiry date. In addition, it stated that it had provided the brand, trade name, common name of the food, correct declaration of the net contents in weight, volume or number and as well as the name and address of the manufacturer, and packer or distributor of the food. It was also the 2<sup>nd</sup> respondent's case that the global commitment by the Coca Cola Company to provide nutritional information is not binding on it because it is a separate entity and that, therefore, it was wrongly sued. Furthermore, the 1<sup>st</sup> respondent did not demonstrate that he requested for the information, and that the request was declined.

9. In the impugned judgment, the trial court identified and determined the following issues:
  - i. whether the petitioner had standing to bring the petition;
  - ii. whether the petitioner failed to set out his complaint with a reasonable degree of precision;
  - iii. whether the petitioner's failure to exhaust alternative remedies, if at all, is fatal to the petition;
  - iv. whether the petitioner has a right to the nutritional and contact information sought in the petition;
  - v. whether the difference in nutritional information contained on the packaging of the plastic and glass bottle beverages is discriminatory;
  - vi. is the petitioner entitled to any costs (sic); and
  - vii. who should bear the costs of this petition?
10. The learned judge found in favour of the 1<sup>st</sup> respondent and issued the following orders:
  - a. a declaration that omission of nutritional information and storage directions on Coca Cola, Fanta, Krest, Stoney and Sprite brands glass bottles constitutes a violation of consumer rights under article 46(1) (a), (b) and (c) of the Constitution;
  - b. a declaration that the respondents' selective provision of nutritional information, directions on storage, customer care mobile number and e-mail address on the Coca Cola, Fanta, Krest, Stoney and Sprite brands plastic bottles while omitting that information from the corresponding glass bottles amounts to discrimination and unequal treatment of consumers contrary to article 27(2), (4) and (5) of the Constitution;
  - c. a mandatory injunction directing the respondents to provide nutritional information, storage directions and customer care mobile number and e-mail address on all of their Coca Cola, Fanta, Krest, Stoney and Sprite brands glass bottles within six (6) months of the date of delivery of this judgment; and
  - d. that each party shall bear its own costs of the petition.
11. The appellant cites the following grounds in this appeal, contending that the learned judge erred in: (a) finding that the 1<sup>st</sup> respondent demonstrated breach of fundamental rights; (b) elevating the appellant's gratuitous exercise of providing nutritional information and contact addresses on its plastic bottles to the status of a constitutional violation under article 46(1) of the Constitution; (c) finding that the different details in information provided to a consumer on separate containers in which a product is sold constituted discrimination under article 27 of the Constitution; (d) failing to appreciate that not every differentiation amounts to discrimination; (e) misinterpreting the provisions of article 46 of the Constitution and expanding the appellant's obligations beyond the requirements set out in the *Consumer Protection Act*, the *Food, Drugs and Chemical Substances Act*, and the *Standards Act*; (f)



wrongly interpreting the definition of a supplier under the [Consumer Protection Act](#) and arriving at a wrong decision;

- (g) taking judicial notice of the fact that there was prevalence of non-communicable and nutritional related diseases in the absence of actual evidence;
- (h) improperly introducing new material in the course of writing the judgment and deciding on the same without giving the parties an opportunity to comment on the same, thereby breaching the appellant's right to a fair hearing under article 50 of the [Constitution](#) ;
- (i) disregarding the parties' evidence and submissions;
- (j) finding that the 1<sup>st</sup> respondent had the *locus standi* to institute the proceedings;
- (k) finding that the alternative remedies contemplated by the statutes were not effective;
- (l) delaying the judgment for more than one year, thereby compromising the legitimacy and quality of the judgment;and
- (m) in delivering an internally inconsistent judgment.

12. The appellant beseeches this court to allow the appeal and set aside the judgment dated January 30, 2018, in its entirety. It also prays that this court dismisses the 1<sup>st</sup> respondent's petition in the High Court and award it costs of this appeal and of the petition in the High Court.

13. The appellant and the 2<sup>nd</sup> respondent filed written submissions, which they highlighted orally when the appeal came up for hearing on February 14, 2023. The 1<sup>st</sup> respondent did not file any submissions, and neither did he attend court despite having been duly served with the hearing notice. Mr George Oraro, SC led the appellant's legal team comprising of Mr Omoga and Mr Wathuta, while learned counsel Ms Weru held brief for Mr Karori for the 2<sup>nd</sup> respondent.

14. Mr Oraro, SC advanced 5 grounds, namely: (i) whether the respondent proved breach of fundamental rights; (ii) whether the respondent had an alternative remedy; (iii) whether nutritional information and storage directions is a fundamental right under article 46(1)(a), (b) and (c) of the Constitution; (iv) whether the difference in the information provided on the packaging of the plastic and glass bottles amounts to discrimination; and (v) which party is liable for costs.

15. Senior counsel argued that the 1<sup>st</sup> respondent admitted that he ceased consuming the appellant's brands and, considering that there was no complaint by any consumer on the appellant's brands, the 1<sup>st</sup> respondent lacked sufficient interest to initiate the petition, nor did he satisfy the requirements of articles 21 or 258 of the the [Constitution](#). To buttress his argument, senior counsel relied on [Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya](#) (2016) eKLR where the High Court held:

“it is clear that the petitioner has completely no business in bringing the matter to court to permit such proceedings to be litigated would amount to the court itself abetting abuse of its process.”

16. He also cited [James Kuria v Attorney General & 3 others](#) (2018) eKLR in which the High Court stated that the [Consumer Protection Act](#) must be interpreted keeping in mind the definition of a consumer. The court in that case also defined a consumer as a person who buys goods and services, as well as persons acting on their behalf, or uses products bought by consumers. The appellant submitted that the 1<sup>st</sup> respondent had no basis bringing the petition, having stopped taking the appellant's beverages four years before the petition.



17. On the question as to whether the 1<sup>st</sup> respondent had a fundamental right as a customer to nutritional storage and contact information as sought, Mr Oraro, SC contended that article 46(2) places the responsibility of formulating appropriate policy framework and legislation on Parliament. It was his position that, in exercise of the said mandate, Parliament enacted the Consumer Protection Act to complement other existing legislation. Counsel relied on the Supreme Court holding in Advisory Opinion No 2 of 2013: In the Matter of Gender Representatives in the National Assembly and Senate (2012) eKLR that Parliament must be allowed to discharge its functions. He also cited this court's dictum in Mumo Matemu v Trusted Society of Human Rights Alliance & others (2013) eKLR that the court must show deference to the independence of the legislature, and that courts must exercise restraint and only intervene in appropriate instances bearing in mind the circumstances of each case.
18. Further, Mr Oraro, SC submitted that the scope of information a supplier is required to provide as set out under section 87(1) of the Consumer Protection Act, is that the disclosure should be clear, comprehensible and in conformity with the Standard Act. He argued that it is not the right of a consumer or the court to extend the scope of the said obligation, and underscored that the 1<sup>st</sup> respondent was obligated to demonstrate how the appellant failed to comply with those statutory provisions.
19. On the question as to whether the difference in information on the packaging of the plastic and glass bottles was discriminatory, senior counsel submitted that the right to equality and non-discrimination guaranteed under article 27 of the Constitution is the right of persons and not products. Further, whether to buy beverages in a glass or plastic bottle is a consumer's discretion, and, therefore, it does not in any way amount to discrimination. He contended that the 1<sup>st</sup> respondent neither alleged nor proved that any category of persons were denied access to products packaged in either plastic or glass bottles. Additionally, counsel cited the South African Constitutional Court decision in Harksen v Lane No & others (1997) ZACC 12, which set out a three-stage enquiry for ascertaining whether discrimination had been proved as follows:
- “(a) Does the provision differentiate between people or categories of people? If so, does the provision bear a rational connection to a legitimate purpose? If it does not, then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
- 
- i. Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend on whether, objectively, the ground is based on attributes and characteristics, which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
- ii. If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it is found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the



complainant. The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...

- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (...of the ...Constitution)”

20. It was counsel’s submission that whenever a person alleges any violation or breach of a fundamental right, he must adduce evidence in support of the allegation. He argued that the appellant was not obligated to do anything until a case was made out which required to be met.
21. Regarding the existence of an alternative remedy, Mr Oraro, SC argued that not every dispute is constitutional and, therefore, the drafters of the Constitution left the right and obligation to protect consumer rights to Parliament which, under article 46(2) of the Constitution, enacted the Consumer Protection Act. He argued that the said statute is comprehensive and not only addresses the rights and protection of the consumers, but also provides an efficacious dispute resolution procedure under section 4 of the Act.

Counsel maintained that the doctrine of constitutional avoidance arises in this case and urged that the 1<sup>st</sup> respondent’s claim ought to have been resolved within the provisions of the statute, and not as a constitutional petition. To buttress his submission, he cited this court’s decision in Speaker of The National Assembly v James Njenga Karume (1992) eKLR where the court held that:

“... where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should strictly be followed.”

22. Finally, senior counsel concluded by arguing that the 1<sup>st</sup> respondent failed to prove any of the allegations made in the petition. He maintained that the court erred in placing a burden on the appellant, which is not the case for manufacturers of other beverages. He urged this court to allow the appeal with costs.
23. The 2<sup>nd</sup> respondent’s counsel Ms Weru consolidated the grounds of appeal numbers 2, 3, 4, 8, 9, 10, 11, 12 & 24 relating to the order by the trial judge requiring the appellant and the 2<sup>nd</sup> respondent to provide nutritional information and storage directions on the Coca Cola, Fanta, Krest, Stoney and Sprite glass bottles. Counsel submitted that in making the said order, the learned judge either misunderstood or misconstrued the provisions of the various statutes, since a plain reading of article 46 of the Constitution demonstrates that there is no specific reference to the type of information to be provided to consumers. Counsel argued that the learned judge proceeded on an erroneous premise or understanding of the law, which resulted in an error meriting this Court to interference.
24. With regard to section 87 of the Consumer Protection Act, Ms Weru submitted that the learned judge wrongfully found that the Consumer Protection Act “does not require the disclosure of any specific kind of information.” Counsel described the said finding as a serious misdirection because the statute makes specific reference to and adopts the standards set out under section 9 of the Standards Act and regulation 6.2 of Kenya Standard KS EAS 29:2000. She urged that the learned judge failed to appreciate that the beverages the subject of these proceedings have no mandatory nutritional labelling



requirement under the *Standards Act*. To buttress this submission, counsel cited *Twaber Abdulkarim Mohammed v Mwachethe Adamson Kadonge & 2 Others* (2015) eKLR where this court stated:

“... it is generally accepted that the Constitution only lays down, in broad terms, a set of guiding fundamental principles according to which the State is governed. It provides the framework or skeletal structure without the details. It is from these broad guiding frameworks that laws are made to give life and meaning to the Constitution. It is in those laws and not in the Constitution that the details reside.” (Emphasis added).

25. On the *Food, Drugs and Chemical Substances Act*, counsel submitted that the learned judge fell into error when he failed to consider or take into account Regulation 4 of the Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations, 1978. The said regulation requires manufacturers to only provide: brand or trade name; common name of the food; correct declaration of the net contents in weight, volume and number; and name and address of the manufacturer, packer or distributor of the food.” Counsel argued that the learned judge applied different standards when dealing with the requirement to provide nutritional information. She submitted that, had the learned judge considered and analyzed the relevant provisions of the two statutes, he would have concluded that there is no statutory obligation requiring mandatory nutritional labelling.

26. Ms Weru also submitted that, despite the learned judge acknowledging (para 73 of the judgment) that there was no legal obligation to provide an e-mail or phone address to consumers under the *Standards Act* and the *Food, Drugs and Chemical Substances Act*, he nevertheless directed that the same be provided. She argued that the said finding was an impermissible misdirection because it amounted to enlarging the scope of a statute. To buttress her submissions, counsel cited *Federation of Women Lawyers Kenya (FIDA) v Attorney General & Another* (2018) eKLR where it was held:

“It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate itself.” (Emphasis added)

27. Further, Ms Weru submitted that the 1<sup>st</sup> respondent failed to identify the specific provisions of article 46 of the Constitution, the *Consumer Protection Act*, the *Standards Act* and the *Food, Drugs and Chemical Substances Act*, requiring disclosure of nutritional information, storage directions, customer care mobile number and e-mail address. She submitted that the 1<sup>st</sup> respondent failed to discharge its burden of proof to the required standard or at all, and so the impugned decision was in the circumstances wrong. She further maintained that, other than making bare allegations, the 1<sup>st</sup> respondent did not provide any or any sufficient evidence of unlawful or unfair differential treatment. Accordingly, the learned judge erred in law by purporting to shift the burden of proof to the appellant and the 2<sup>nd</sup> respondent to show why the alleged discrimination was reasonable and justifiable in an open and democratic society.

28. Regarding the finding that failure to provide customer service mobile numbers, e-mail address, nutritional information and storage directions on the glass bottles amounted to discrimination



(paragraph 84 of the judgment), she argued that the learned judge failed to inquire whether the action complained of

- (i) differentiated between different classes of persons;
- (ii) whether the differentiation amounted to discrimination; and
- (iii) whether the discrimination was unfair. She argued that not all differential treatment amounts to discrimination. She underscored the fact that the Constitution only prohibits unfair discrimination and not mere discrimination as was stated by the High Court in *Mohammed Abduba Dida v Debate Media Ltd & another* (2017) eKLR that “the right to equality does not prohibit discrimination but it prohibits unfair discrimination.”

29. Counsel also submitted that, by focusing on the price differentiation, the learned judge failed to appreciate that the determination of prices is based on many commercial factors, and that the differentiation cannot by itself constitute unfair discrimination. She argued that the learned judge took into account the wrong principles and failed to take into account relevant considerations, which would have entailed the three- step enquiry set out above and thus arrived at the wrong decision.
30. Ms Weru maintained that the 2<sup>nd</sup> respondent was wrongly sued because it was not involved in the production, manufacture or packaging of the Coca Cola Company products, but only had a licence to market the Coca Cola brands. She argued that the learned judge wrongly held that, as marketer of the Coca Cola Brand, the 2<sup>nd</sup> respondent fell within the definition of a supplier under section 2 of the *Consumer Protection Act* and, therefore, article 46 bound it. Accordingly, the finding that the 2<sup>nd</sup> respondent was a supplier of the Coca Cola brand within the meaning of Section 2 of the *Consumer Protection Act* is wrong and ought to be set aside.
31. On whether the 1<sup>st</sup> respondent had locus standi to institute the proceedings, and whether he was not required to exhaust statutory remedies, Ms Weru submitted that the learned judge failed to take into account that no notice was issued under section 75 of the *Consumer Protection Act*. She argued that sections 89 and 90 of the said Act establishes the Consumer Protection Advisory Committee, whose role includes, *inter alia*, creating or facilitating the establishment of conflict resolution mechanisms on consumer issues, investigation of any complaints received regarding consumer issues and, where appropriate, referring the complaint to the competent authority, and ensuring that action is taken by the competition authority to whom the complaint has been referred. Consequently, counsel argued that the petition in the High Court was premature and it ought to be dismissed. She relied on this court’s decision in *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & Others* (2015) eKLR where the court held that where a dispute resolution mechanism exists outside courts, the same ought to be exhausted before invoking the court’s jurisdiction. Further, courts ought to be fora of last resort and not the first port of call.
32. In conclusion, Ms Weru, referring to paragraph 66 of the judgement where the learned judge relied on an article by Nelene Keen on Food and Nutrition Labelling, argued that the said article was not provided by any of the parties, nor were the parties given an opportunity to comment or distinguish the same. Consequently, she argued that the 2<sup>nd</sup> respondent’s right to a fair hearing was compromised because it was denied the opportunity to comment on the said article. Nevertheless, she argued that the said article could not override the clear statutory requirements on labelling (as contained in the Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations, 1978 and the *Standards Act*) which do not require provision of nutritional information.



33. In determining this appeal, we bear in mind our duty as an appellate court as was neatly stated by this court in *Mohamed Fugicha v Methodist Church in Kenya (suing through its registered trustees)* ¶ 3 Others (2016) eKLR that:

“As this is a first appeal... we proceed by way of a re-hearing, at the end of which we make our own independent conclusions of law and fact. We accord respect to the findings of the first instance judge but will not hesitate to depart from those findings if the same are based on no evidence, are arrived at by way of a misapprehension of the evidence or the Judge misdirected himself in some material respect which renders the decision erroneous. Our latitude to depart is greater where, as here, the matter in the court below proceeded not on the basis of oral evidence, which would have given the learned judge the clear advantage of hearing and observing witnesses as they testified, but by way of affidavits and submissions which are on record. This is more so where the decision turns on, not so much the peculiarity of highly contested facts, but rather the interpretation of certain provisions of the Constitution.” (Emphasis added).

34. First, we address the appellant’s argument that the petition before the High Court was premature because the 1<sup>st</sup> respondent failed to exhaust the dispute resolution mechanism under the *Consumer Protection Act* before approaching the High Court. Addressing this issue, the learned judge stated as follows:

“ 44. If the availability of a remedy is not evident, it cannot be invoked to the detriment of a petitioner. Thus, where a party argues that a petition is inadmissible before this court because alternative remedies have not been exhausted, that party bears the burden of demonstrating the existence of such remedies and that they have not been exhausted. The onus was on the 2<sup>nd</sup> respondent to demonstrate that the petitioner did not exhaust alternative remedies.

45. In the case at bar, a close examination of the proposed alternative remedies indicates that the 2<sup>nd</sup> respondent’s assertions about the existence of efficacious or alternative remedies are misleading. How would prosecution by the Director of Public Prosecutions or withdrawal of a license under the *Standards Act* be an answer to the constitutional questions raised by the petitioner about the interpretation of articles 27 and 46 of the Constitution in relation to consumer rights?

46. Equally, under the section 90 of the *Consumer Protection Act*, 2012, the closest the Kenya Consumers Protection Advisory Committee can get to an alternative remedy is in the following ways:

...

- e. providing advice to consumers on their rights and responsibilities under appropriate laws, and making available to consumers general information affecting the interest of consumers;
- f. creating or facilitating the establishment of conflict resolution mechanisms on consumer



issues, investigation of any complaints received regarding consumer issues, and where appropriate, referring the complaint to the appropriate competent authority and ensuring that action has been taken by the competent authority to whom the complaint has been referred;

- g. working in consultation with the Chief Justice, County governors and other relevant institutions on the establishment of dispute resolution mechanisms;  
(emphasis ours)

47. There is no condition precedent in the Act making reference to the committee a condition precedent to invoking the jurisdiction of this court. I hold that this court is competent to hear and determine the issues raised in the petition.”

35. We have carefully considered the provisions of sections 75, 89 and 90 of the Consumer Protection Act. A reading of these sections reveals that none of the said provisions creates a forum capable of resolving the issues raised in the petition before the High Court. For example, section 75 provides that Part IX of the Act does not apply to remedies claimed in respect of unfair practices under Part III. Clearly, the said section is irrelevant in that it does not create a forum capable of resolving the issues raised in the Petition.

36. True, section 89 establishes a committee known as the Kenya Consumers Protection Advisory Committee. Its functions are enumerated in section 90(a) to (n) of the Act. As the learned judge correctly stated in the above excerpt, none of the functions under the foregoing section confers the said Committee the mandate to adjudicate matters relating to breach of constitutional rights provided under article 46 of the Constitution. Even if there was any doubt as to the applicability of the doctrine of exhaustion under the act, section 84 of the Act clearly settles the position beyond question. It provides as follows:

84. Action in court

- (1) If a consumer has a right to commence an action under this Act, the consumer may commence the action in the appropriate court.
- (2) If a consumer is successful in an action, unless in the circumstances it would be inequitable to do so, the court shall order that the consumer recover—
  - a. the full payment to which he or she is entitled under this Act; and
  - b. all goods delivered under a trade-in arrangement or an amount equal to the trade-in allowance.
- (3) In addition to an order under sub section (2), the court may order exemplary or punitive damages or such other relief as the court considers proper.

37. Therefore, we find that the above-cited sections of the Act or any other provision of the Act does not support the argument that the petition before the High Court was pre-mature. Accordingly, we find



and hold that the suit before the High Court was not pre-mature nor did it offend the doctrine of exhaustion. The committee established under the Act cannot, by any stretch of imagination determine constitutional matters touching on alleged breach consumer rights or any constitutional questions, a mandate conferred by the Constitution to the High Court.

38. We now turn to the issue as to whether the 1<sup>st</sup> respondent had the *locus standi* to institute the petition in light of his admission that he was not a consumer of the Coca Cola brand products. In determining the said issue, the learned Judge stated as follows:

“ 34. In the case at bar, the petitioner avers that he brings the Petition as a law abiding citizen, public spirited individual and a strong believer in the rule of law and constitutionalism (public interest); on his own behalf (personal interest) and on behalf of the consumers of the glass bottled beverages produced by the Respondents (class interest).

35. Under the current constitutional framework, a petitioner does not have to show that he has been affected by an alleged violation in order to have standing under article 22. Therefore, nothing in law prohibits a non-consumer of a product, with an established standing under article 22(2) (a)-(d), from alleging that any consumer right or fundamental freedom under article 46 has been denied, violated or infringed or threatened.

36. Article 19(3)(b) is to the effect that the rights and freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law. While standing under article 22 falls outside the Bill of Rights, it is nonetheless a right and can only be limited on reasonable and justifiable grounds under article 24.

37. In my judgment, the petitioner has the legal standing to bring this petition. He has demonstrated sufficient interest to seek the reliefs sought in the petition.”

39. In support of the appellant’s case, Mr Oraro, SC cited *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another (Supra)* and argued that by dint of the admission by the 1<sup>st</sup> respondent that he no longer consumed Coca Cola Sodas, he had no business bringing the petition because he lacked the *locus standi*. Two things are worth mentioning. One, the above decision cited by the appellant’s counsel is a High Court decision, and is not binding on this court. Second, and more important, the position urged by the appellant’s counsel while citing the above case does not reflect the holding in the said case. Conversely, after reviewing numerous decisions and article 258 of the Constitution, the learned Judge (Odunga, J (as he then was)) stated as follows:

“ 59. What comes from the foregoing is that the courts have moved away from the strict interpretation of the locus standi rule in public law litigation that reached its peak in *Maathai v Kenya Times Media Trust Ltd* [1989] KLR 267 where Dugdale, J held that only the Attorney General could sue on behalf of the public. It is now clear from the current constitutional dispensation that the court ought to interpret the rule relating to locus standi liberally so as not to lock out persons with genuine grievances from accessing the seat of justice.

...

61. It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case the Constitution has



opened the doors of the courts very wide to welcome any person who has bona fide grounds that the Constitution has been or is threatened with contravention to approach the court for an appropriate relief. In fact, since article 3(1) of the Constitution places an obligation on every person to respect, uphold and defend the Constitution, the invitation to approach the court for redress as long as the person hold bona fide grounds for believing that the Constitution is under threat ought to be welcome. I must however hasten to add that the liberal interpretation does not mean that the rule on locus standi is no longer relevant in constitutional petitions. Where it is clear that the petitioner has completely no business in bringing the matter to court to permit such proceedings to be litigated would amount to the court itself abetting abuse of its process.

62. In this case the petitioner not only contends that his rights and the rights of others are threatened with violation but that the national values and principles of governance have been violated. In light of such allegations I cannot fault the petitioner for instituting these proceedings and I hold that he was within his right to commence these proceedings. As to whether his case is merited is another matter. *Locus standi* is a totally different thing from the merits of the petitioner's case.”

40. Articles 22 and 258 of the [Constitution](#) seriously eroded the hitherto eminent common law principle of *locus standi*. Under both articles, proceedings may be instituted by the aggrieved party on its own interest, by a person acting on behalf of another person, on behalf of a class of people, in public interest or by an association acting on behalf of its member or members. In our view, the test is whether the person moving the court falls under any of the categories enumerated in the said provisions. No argument was advanced before us to suggest otherwise. Under no circumstances can this court properly directing its mind accept an invitation to agree to a judicial standard for locus standi that inhibits the right to bring proceedings under articles 22 and 258. Such an interpretation will be a direct affront to the letter and spirit of the Constitution. It will be a clear breach of articles 48 and 50 of the [Constitution](#), except only when the litigation is hypothetical, abstract or is an abuse of the judicial process.

The standard guide for *locus standi* must remain the command in articles 22 and 258 of the Constitution. (See this court's decision in [Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others](#) (2013) eKLR).

41. As the learned judge correctly observed, the 1<sup>st</sup> respondent pleaded in his petition that he brought the petition in public interest. Although consumer rights affect only the parties, their impacts and consequences are substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest. Accordingly, consumer rights litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. Conversely, litigants and the courts assert the growing power of the expanded Bill of Rights (thanks to our transformative and progressive Constitution) by establishing its meaning through contested cases in a process.

42. The right to access justice, the right to enforce the bill of rights, and enforcement of the Constitution}, are deeply entrenched in our Constitution. As the Constitutional Court of South Africa stated, (though in the context of addressing the traditional common law principles governing judicial review and the entrenchment of judicial review under the South African Constitution) in [Pharmaceutical](#)



“the common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.”

43. The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.
44. The entrenchment of the right to access justice, and the right to approach the court to enforce the bill of rights blurred the common law principle of *locus standi*. Parties, who were ordinarily denied access to courts for want of locus standi premised on personal interest, should now access courts provided the person, body or association falls within the descriptions in articles 22 and 258. The right to access courts is now deeply entrenched in the Constitution. It is no longer a common law prerogative. Accordingly, we find and hold that the 1<sup>st</sup> respondent had the *locus standi* to file the petition.
45. Next, we address the issue as to whether the omission to provide nutritional contents of Coca Cola soda and storage directions on the glass and plastic soda bottles constitutes a breach of consumer rights guaranteed under article 46(1)(b) and (c) of the Constitution.
46. Resolving the above issue involves interpreting the relevant constitutional and statutory provisions. In peremptory terms, the Constitution imposes an obligation on all courts to promote the spirit, purpose and the objects of the Bill of Rights, when interpreting the Constitution. In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* (2006) ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) the South African Constitutional court observed:

“A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law<sup>6</sup>. In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law.”

47. Article 46(1) of the Constitution provides that consumers have the right to goods and services of reasonable quality, to the information necessary for them to gain full benefit from goods and services, to the protection of their right, safety, and economic interests, and to compensation for loss or injury arising from defects in goods and services. Sub-article (2) provides that Parliament shall enact legislation to provide for consumer protection, fair honest and decent advertising. To give effect to the above article, Parliament enacted the Consumer Protection Act. Article 46(3) provides that the article applies to goods and services offered by the public entities or private persons.
48. The preamble to the Consumer Protection Act provides that it is "An Act of Parliament to provide for the protection of the consumer, prevent unfair trade practices in consumer transactions, and to provide



for matters connected with and incidental thereto." It is enlightening to note that the *Consumer Protection Act* is a unique piece of legislation. The rareness lies in the fact that, unlike other statutory enactments, it provides in mandatory terms the manner in which it ought to be construed. In this regard, section 3 of the Act provides as follows:

1. This Act must be interpreted in a manner that gives effect to the purposes set out in subsection (4).
  2. When interpreting or applying this Act, a person, court or the Advisory Committee may consider—
    - a. appropriate foreign and international law; and
    - b. appropriate international conventions, declarations or protocols relating to consumer protection.
49. Section 4 provides that the purposes of the Act are to promote and advance the social and economic welfare of consumers in Kenya by—
- a. establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
  - b. reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers;
  - c. promoting fair and ethical business practices;
  - d. protecting consumers from all forms and means of unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices including deceptive, misleading, unfair or fraudulent conduct;
  - e. improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior;
  - f. promoting consumer confidence, empowerment and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;
  - g. providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
  - h. providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers.
50. Section 2 defines a consumer as follows: (a) a person to whom particular goods or services are marketed in the ordinary course of the supplier's business; (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act; (c) a user of particular goods or a recipient or beneficiary of particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods and services; and (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of this Act.
51. From the above definition and the preamble to the act, it is clear that the whole tenor of the Act is to protect consumers. The act must be interpreted keeping in mind that its focus is the protection of



consumers. As the Constitutional Court of South Africa observed in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012) ZASCA 13; 2012 (4) SA 593 (SCA) para 18 while discussing a similar provision in their *Consumer Protection Act*, “... a sensible meaning is to be preferred to one that leads to insensible or un-business-like results...”

52. Regarding the applicable standard of prove, the general principle governing the determination of cases is that the party who alleges or, as it is sometimes stated, the party who makes the positive allegation, must prove. Moreover, the onus on the petitioner to establish violation of alleged consumer rights is not a mere formality; it is important. As the Constitutional Court of Uganda observed in *Lyomoki & others v Attorney General* (2005) EA 127:

1. the onus is on the petitioner to show a *prima facie* case for violation of their constitutional rights, thereafter, the burden shifts to the respondent to justify that the limitations to the rights in the statute is justified by article 43 of the Constitution;
2. the purpose and effect of an impugned legislation are relevant in the determination of its constitutionality;
3. the Constitution ought to be looked at as a whole with no one particular provision destroying another but each supporting the other. All the provisions on an issue should be considered so as to give effect to the purpose of the instrument;
4. the constitution should be given a generous and purposive construction especially the part which protects the entrenched fundamental rights and freedoms; and
5. where human rights provisions conflict with other provisions, human rights provisions take precedence and interpretation should favour enjoyment of human rights and freedoms.

53. The gravamen of the appellant’s and the 2<sup>nd</sup> respondent’s case is that the *Consumer Protection Act*, the Standard Act, the *Food, Drugs and Chemical Substances Act* are the primary statutes setting out the labelling requirements to display the nutritional information, e-mail address and storage directions on soft drinks. They faulted the learned judge for expanding the ambit of the legislation by imposing a higher standard on the appellant.

54. The learned judge, at paragraph 63 of the judgment, noted that, indeed, the 1<sup>st</sup> respondent appreciated that the appellant and/or the 2<sup>nd</sup> respondent had provided nutritional information in the soda packaged in plastic bottles. He stated as follows:

“60. The respondents products comply with this regulation though such compliance was not a point raised in the Petition. The same goes for the Kenya Standard KS EAS 29:200 (Carbonated (Beverages) Soft Drinks – Specification, 2000) prescribed under section 9 of the *Standards Act*, cap 496.”

...

63. As submitted by the petitioner the labels on the plastic beverage bottles contain nutritional, contact and storage information. The Coca Cola brand plastic bottle, as a sample, contains the following nutritional information for each 100 (milliliters) ml of beverage: Energy (180 (kilojoules) kj/ 42



(kilocalories) (kcal); Protein 0 g; Carbohydrate 10.6 (grammes) g; Total fat 0 (grammes) g; Dietary Fibre 0 (grammes) g; Sodium (grammes) g.”

64. The Coca Cola brand plastic bottle goes as far as indicating that the 500 ml bottle contains 210 kcal forming 11% of the Guideline Daily Amount. The label also provides the customer service phone number together with email contacts as well as a storage direction – cool and dry place. All this information is omitted from the glass bottles be it for Coca Cola, Krest, Fanta, Sprite and Stoney

...

70. Indeed, the 1<sup>st</sup> respondent has, as part of its sustainability framework, voluntarily provided the nutritional information claimed in this petition on the food labels attached to their plastic beverage as well as the Dasani water bottle.”

55. The appellant also claims that the learned judge adopted a strict construction of section 87 of the *Consumer Protection Act*; section 9 of the Standard Act regulation 4 of the *Food, Drugs and Chemical Substances Act*; and section 6.2 of the Carbonated Beverages) Soft Drinks Specifications KS EAS 29:200 that do not provide for the provision of nutritional information.
56. The fundamental principle is that such interpretation as would serve the interests of the Constitution would best carry out its object and purpose should be preferred. Where the provisions of are capable of two meanings the court must choose the meaning that would give effect to the Constitution and promote its purpose. (See *Ifezu v Mbandugha* (1984) 1 SC, NLR, 5 SC 79, Bello JSC). Thus, constitutional interpretation should be purposive. Rights should be interpreted in accordance with the general purpose of having rights, namely the protection of individuals and minorities against an overbearing collectivity. We do not conceive it to be the duty of this court to construe any of the provisions of the Constitution to defeat the obvious ends the Constitution was designed to serve.
57. Undeniably, article 46 and the *Consumer Protection Act* impose explicit requirements for the content of food labels, which manufacturers are not free to ignore. These requirements include the nutritional label, which must include the name of the food, the disclosure of the quantity of contents, the name and place of business of the manufacturer or distributor, a list of their ingredients and nutrition information. Nutritional label can be defined as a description used to inform the customer about the nutritional properties of food, which also help the customer in purchasing nutritious food and consuming nutritionally balanced meals. (See WJ Koe (1997), Nutritional Labelling Legislation).
58. The label information about nutrient content must as of necessity conform with article 46(1)(b) which guarantees a consumer the right to the information necessary for a consumer to gain full benefit from the goods and services. In our view, in the minimum, the nutrition labelling should-
- (a) provide consumers with nutrition information about the food product;
  - (b) enable consumers to compare the nutritional quality of products from the same food group;
  - (c) enable consumers to choose among products from different food groups based on nutritional quality;
  - (d) prevent or reduce consumer deception by providing information about the nutrient composition of the product; and



- (e) provide incentives to improve food products by requiring manufacturers to describe fully the ingredients and nutrient value of their products.
59. In our view, the learned judge adopted an interpretation that upholds the tenor and intention of article 46 and the *Consumer Protection Act* by upholding the right for consumers to be provided with information pertaining to ingredients, nutrition claims and declaration of potential allergens as well as nutrition or health claims. Food warnings and labels inform consumption. Such information, as required by article 46, enables consumers to make informed decisions. As was held in *Njoya & 6 others v Attorney General & 3 Others* (No 2) (2004) 1 KLR 261, the Constitution should be construed liberally to give effect to the values it embodies and the purposes for which the makers framed it.
60. We have considered the finding by the learned judge on the obligation placed on the appellant and/or the 2<sup>nd</sup> respondent to provide nutritional information, e-mail address and storage directions. In our view, the learned judge's finding is grounded on article 46(1)(a), (b), and (c), which guarantees consumers products of reasonable quality, and the right to be provided with the information necessary for them to gain full benefit from goods and services. The article also guarantees the protection of consumers' health, safety, and economic interests.
61. In conclusion, we find that the appellant and the 2<sup>nd</sup> respondent have not persuaded this court that, pursuant to article 46 of the *Constitution*, they do not owe the consumers of their products an obligation to provide them with nutritional information, storage and contact information as held by the learned judge. On the contrary, we find and hold that the 1<sup>st</sup> respondent demonstrated to the required standard that the said omission offended article 46 and the *Consumer Protection Act*. Consequently, on this ground, the appeal fails.
62. We now turn to the question as to whether the difference in information on the packaging of the plastic and glass bottles is discriminatory. The appellant and the 2<sup>nd</sup> respondent's argued that both the plastic and the glass bottles were available and accessible to all consumers, so they had a choice to opt for either. Further, they argued that the price difference between the beverage in the glass and plastic bottle is informed by the cost of production. Furthermore, the 1<sup>st</sup> respondent neither alleged or proved any category of persons were denied access to products packaged either in plastic or glass bottles.
63. Determining the above issue, the learned judge stated:
- “74. Nonetheless, the respondents have supplied their mobile phone number on the plastic bottles and omitted this from the glass bottles. I find and hold that it is discriminatory to supply customer service mobile numbers and e-mail addresses to a class of consumers while denying the same to a different class of consumers of the same product. Where a supplier opts to avail its customer service mobile number and e-mail address to consumers of a product, it must do so uniformly to all consumers of that product without distinction.
- ...
84. Turning to the facts of this case, it is not disputed that there is a difference in consumer information provided on the plastic bottles from that on the glass bottle. Specifically, while the plastic bottles have information on the nutritional content of the Coca Cola, Krest, Fanta, Sprite or Stoney beverages there is no such information provided on the glass bottle. Also missing are e-mail contacts as well as storage directions. The effect of this is that whereas consumers of the beverages in the plastic bottles can readily know and tell the



nutritional content of the beverages they are consuming, consumers of the beverages in the glass bottles are denied this benefit.

85. I therefore find and hold that in so far as the Respondents confer the privilege of adequate nutritional information and consumer contact addresses to consumers of the plastic bottled beverages while denying the same privilege to the consumers of glass bottled beverage without reasonable distinction, the same is discriminatory, unconstitutional and unlawful.”

64. Article 27 of the Constitution guarantees the right to equality and freedom from discrimination. The *Black's Law Dictionary*, 10<sup>th</sup> Edition defines “discrimination” as “Differential treatment; a failure to treat all persons equally when no reasonable distinction between those favoured and those not favoured.” It also defines “differential treatment” as “..., a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”

65. From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc. or due to unfair practice and without any objective and reasonable justification.

66. It is important to mention that discrimination can be either direct or indirect. This court in *Mohammed Abduba Dida v Debate Media Limited & another* (2018) eKLR explained the two forms as follows:

“Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement, which is a smaller proportion of those with the attribute, are able to comply with, without reasonable justification. The US case of *Griggs vs. Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in a job application was found “to disqualify negroes at a substantially higher rate than white applicants”. With regard to differential or unequal treatment it was observed in the case of *Kedar Nath v State of WB* (1953) SCR 835 (843) that; “Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view.”

67. Similarly, in *Mohamed Fugicha v Methodist Church in Kenya* (2016) eKLR, this court referring to a similar provision in the South African Constitution, cited with approval (Langa DP (later CJ)) in *City Council of Pretoria v Walker* (1989) ZACC 1 who observed that:

“The inclusion of both direct and indirect discrimination, within the ambit of the prohibition imposed by section 8(2) [our article 27(4)] of the *Constitution*, evinces a concern for the consequences rather than the form of conduct. It recognizes that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of section 8(2) [our article 27(4)] of the Constitution.”

68. Applying the above definitions to the facts of this case, we find that the discrimination alleged by the 1<sup>st</sup> appellant was indirect in nature. The key issue is whether it was demonstrated that the omission



complained about was discriminatory in the circumstances of the case. In *Gichuru v Package Insurance Brokers Ltd* (2021) KESC 12 (KLR), the Supreme Court had occasion to lay emphasis on the burden of proof in cases of discrimination. It held:

“...in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (2020) eKLR where the Supreme Court applied section 108 of the *Evidence Act* requiring the claimant to prove his claim in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus:“(49) section 108 of the *Evidence Act* provides that,

“the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”[50] This court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others*, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:“...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.”

69. The 1<sup>st</sup> respondent bore the obligation to lay sufficient material before the court, so as to discharge the evidential burden. It is only after the 1<sup>st</sup> respondent had discharged the onus of prove that the obligation under article 24(3) shifts to the appellant and/or the 2<sup>nd</sup> respondent to justify why the differential treatment. The reasons for the limitation must surmount an article 24 analysis test. Article 24 requires limitation to be reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, 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 the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

70. The first question is whether the 1<sup>st</sup> respondent discharged the onus of prove bestowed upon him by the law for the evidential burden to shift to the other party. This court in *Mohammed Abduba Dida v Debate Media Limited & another* (supra) discussed the three stages of determining whether or not discrimination has been proved as follows:

“... unless it can be demonstrated that such selection or differentiation is unreasonable or arbitrary and created for an illegitimate or surreptitious purpose. And, the second is that, whether or not there has been a violation of the Constitution should be determined by applying a three-stage enquiry to the circumstances of each case. The three stage enquiries are: firstly, whether the differentiation created by the provision or rules has a rational or



logical connection to a legitimate purpose; if so, a violation of article 27 will not have been established. If not, a second enquiry would be undertaken to determine whether the differentiation gives rise to unfair discrimination. If it does not, there is no violation of the Constitution. But if the selection or differentiation gives rise to unfair discrimination, then the third enquiry would be necessary to determine whether it can be justified within the limitation provisions of the Constitution.”

71. In considering indirect discrimination, the Supreme Court of United Kingdom in *Essop & ors v Home Office; Naeem v Secretary of State for Justice* [2017] UKSC 27 explained six key features of indirect discrimination as follows:

- “24. the first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons why a particular pcg puts one group at a disadvantage when compared with others.
25. a second salient feature is the contrast between the definitions of direct and indirect discrimination. direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. indirect discrimination does not. instead it requires a causal link between the pcg and the particular disadvantage suffered by the group and the individual.
26. a third salient feature is that the reasons why one group may find it harder to comply with the pcg than others are many and various (mr. sean jones qc for mr. naeem called them “context factors”).
27. a fourth salient feature is that there is no requirement that the pcg in question put every member of the group sharing the particular protected characteristic at a disadvantage.
28. a fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence.
29. a final salient feature is that it is always open to the respondent to show that his pcg is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular csa test.”

72. The Supreme Court in *Gichuru v Package Insurance Brokers Ltd (supra)* also cited with approval the finding of Justice Silber in the UK High Court case of Queen, on the application of *Sarka Angel Walkins Singh v the Governing Body of Aberdare Girls High School & another* (2008) EWHC 1865, (paragraph 38) prescribing several steps to guide the proof:

- a. identify the relevant ‘provision, criterion or purpose’, which is applicable;
- b. determine the issue of disparate impacts, which entails identifying a pool for the purpose of making a comparison of the relevant disadvantage;
- c. ascertain whether the provision, criterion or practice also disadvantages the claimant personally; and



- d. consider whether the policy is objectively justified by a legitimate aim; and to consider (if the above requirements are satisfied) whether this is a proportionate means of achieving such a legitimate aim.
73. It is common ground that the Coca Cola soda packaged in glass bottles does not have nutritional information, storage directions, customer care mobile number, and e-mail address. It is also undisputed that the Coca Cola Soda packaged in glass bottles provides nutritional information, storage directions, customer care mobile number, and e-mail address. There is no dispute that there is a price disparity in the two products.
74. The appellant faulted the learned judge for failing to appreciate that the price is based on many commercial factors and the differentiation cannot, by itself constitute discrimination. The appellant also argued that the customers have an option to elect which product to buy.
75. Applying the three-stage test discussed in the above cited authorities, we find and hold that the appellant has not justified why it is only the consumers of the Coca Cola products in plastic bottles who are entitled to be aware of the nutritional information, access to customer mobile number and even storage directions. We also find and hold that it has not been demonstrated why consumers of the same product sold in glass bottles are deprived the same information. We also find that the appellant and/or the 2<sup>nd</sup> respondent did not demonstrate that the provision of nutritional information, storage directions and customer care numbers and e-mail address to the consumers of the Coca Cola products packaged in glass bottles is inconsequential. Consequently, we find that the differential treatment of the consumers of Coca Cola product in plastic and glass bottles is not connected to a legitimate purpose or, for good reason, justifiable.
76. The second enquiry determines whether the differentiation gives rise to unfair discrimination. If it does not, there is no violation of the Constitution. We find merit in the reasoning that commercial factors determine the price of the Coca Cola products in Glass and plastic bottles. We also agree that a customer has the freedom to opt for either of the two products. However, that is how far it goes. The differential treatment of the consumers of Coca Cola product in glass bottles deprives them the constitutionally guaranteed right to be aware of the nutritional information of their preferred beverage. It deprives them access to customer care if needed, in case they have a complaint they wish to raise. Also, consumers of the Coca Cola product in glass bottles have been left in the dark on the issue of storage direction. In our view, the appellant/2<sup>nd</sup> respondent's actions amount to unfair discrimination which is a blatant violation of article 27(5) of the *Constitution*.
77. The third enquiry is whether the limitation can be justified within the limitation provisions prescribed in article 24. On this third enquiry, counsel for the appellant submitted that both plastic and glass bottles were available and accessible to all consumers and, therefore, the issue of the consumers with lower purchasing power preference of the glass packaged products is not an issue of discrimination but one of choice. In our considered opinion, this reasoning is self-defeatist. We say so because it literally means that if a consumer has low purchasing power and can only afford the Coca Cola product packaged in glass bottles, then because of his financial position, he is not entitled to the information supplied in the other similar product, but in a different package. Such a reasoning flies on the face of articles 27 and 46. In the premises, we find and hold that the appellant and the 2<sup>nd</sup> respondent have not demonstrated that the reasons for the differentiation pass an article 24(3) analysis test. The upshot is that, we uphold the finding of the learned judge on the issue of discrimination.
78. Lastly, we turn to the question as to whether the 2<sup>nd</sup> respondent was wrongly impleaded. Put differently, were the proceedings against the 2<sup>nd</sup> respondent merely idle, frivolous or entirely uncalled for?



Advancing this argument, the 2<sup>nd</sup> respondent urged that its role was limited to promotion, marketing or advertising Coca Cola brands. It complained that the court’s finding that it was a supplier of the Coca Cola brand within the meaning of section 2 of the Consumer Protection Act was wrong and ought to be set aside. At paragraph 76 of the impugned judgement, the learned Judge held as follows:

“76. The 2<sup>nd</sup> respondent however admitted that it is a subsidiary of the Coca Cola Company and the one whose sole mandate is marketing and promoting the impugned beverages. In this regard, the Consumer Protection Act, 2012 defines “supplier” to mean a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds himself out to be a supplier or an agent of the supplier. I therefore find and hold that as a self-confessed promoter and marketer of the beverages in question the 2<sup>nd</sup> respondent is a supplier and owes the burden of the obligations in article 46 to consumers.”

79. We have carefully examined the record and have established that the 1<sup>st</sup> respondent, *vide* a further affidavit sworn on November 30, 2015, annexed a copy of the Sustainability Review 2013/2014 prepared by the Coca Cola Eurasia & Africa Group. He averred that the 2<sup>nd</sup> respondent is listed as a business unit of the Coca Cola Eurasia & Africa Group. In response to the further affidavit *vide* affidavit sworn on March 24, 2016, the 2<sup>nd</sup> respondent denied being one of the five business units that operate under the Coca Cola Eurasia & Africa Group. However, the 2<sup>nd</sup> respondent admitted being a subsidiary of the Coca Cola Export Corporation a separate legal entity incorporated and carrying on business in Atlanta Georgia. However, it is noteworthy that the 2<sup>nd</sup> respondent did not provide any evidence to prove that it was a separate legal entity from Coca Cola Export Corporation based in Atlanta Georgia. Under sections 107(1), (2) and 109 of the Evidence Act, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must prove that those facts exist.
80. We find and hold that, in the absence of evidence that the 2<sup>nd</sup> respondent is a subsidiary of Coca Cola Export Corporation and/or a separate legal entity from Coca Cola Export Corporation, the learned judge cannot be faulted for finding that the 2<sup>nd</sup> respondent was properly sued.
81. In conclusion, we find that this appeal lacks merit. Accordingly, it is hereby dismissed. Accordingly, we hereby uphold the judgment and decree of the High Court of Kenya (Constitutional and Human Rights Division) at Nairobi (Onguto, J) delivered on the January 30, 2018. In view of the fact that the 1<sup>st</sup> respondent did not file submissions or participate in these proceedings, we make no order as to costs. Even if the 1<sup>st</sup> respondent had participated, this being a public interest litigation, we would still be reluctant to impose costs. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**



**J. MATIVO**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

