**Alcoholic Beverages Association of Kenya v Kenya Film Classification Board & 2 others (Civil Appeal 232 of 2017) [2022] KECA 1051 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KECA 1051 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 232 OF 2017**

**DK MUSINGA, F SICHALE & HA OMONDI, JJA**

**SEPTEMBER 23, 2022**

**BETWEEN**

**ALCOHOLIC BEVERAGES ASSOCIATION OF KENYA ..... APPELLANT**

**AND**

**KENYA FILM CLASSIFICATION BOARD ..... 1ST RESPONDENT**

**ATTORNEY GENERAL ..... 2ND RESPONDENT**

**SAFARICOM LIMITED ..... 3RD RESPONDENT**

***(An Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi ( Mativo, J.) dated 13th May, 2017inHC. Petition No.10 of 2017)***

## JUDGMENT

1. Alcoholic Beverages Association of Kenya, the appellant herein, is an umbrella body of alcoholic beverage manufacturers in Kenya registered under the *Societies Act*, advocating for the rights of alcoholic beverages manufacturers. Kenya Film Classification Board (KFCB), the 1st respondent, a State Corporation operating under the Government of Kenya, and its mandate is to "regulate the creation, broadcasting, possession, distribution and exhibition of films." The 2nd respondent is the Attorney General of the Republic of Kenya whose constitutional duty includes, *inter alia*, defending public interest as well as advising State Corporations on legislative and other legal matters; and Safaricom Limited, the 3rd respondent, is a telecommunications service provider who joined the petition as an Interested Party.

2. The appellant is aggrieved by the judgment and order of Mativo, J. dated May 13, 2017, which dismissed the appellant's petition challenging the mandate of the 1st respondent, the Kenya Film Classification Board, to regulate audio visual advertisements including the advertisements for Alcoholic beverages. The learned Judge upon considering the functions of the Board under the *Film*

*and Stage Plays Act*, Chapter 222, Laws of Kenya (FSPA) as read alongside the Kenya Information and Communications Amendmen Act No. 2 of 1998 (KICA), held that the Board's mandate extended to audio visual advertisements broadcast on television, such as the advertisements submitted for exhibition by members of the appellant; and that the Board had not exercised its mandate in any manner that was discriminatory, unreasonable or procedurally unfair.

3. The appellant seeks that:

   a) The Judgement and Orders made by the Nairobi Constitutional & Human Rights Court in Constitutional Petition No. 10 of 2017 be set aside.

   b) This Court substitutes its decision with the decision of the trial Court.

   c) Costs of and incidental to the Petition be awarded to the appellant, together with interest at Court rates from the date of the award.

4. The events leading to the petition before the High Court were triggered by two letters dated 3rd and 7th January, 2017 referenced as "Unclassified Alcohol Advertisements," from the 1st respondent to some officials of the appellant's members, comprising East African Breweries Ltd, Kenya Breweries Ltd, Africa Spirits Limited, complaining that they were airing advertisements during the watershed period contrary to the Kenya Information and Communication Act (KICA), and the Programming Code for Free to Air Radio and Television Services in Kenya. The 1st respondent demanded that the appellant's members stop the advertisements in question and submit them to the 1st respondent for examination and classification.

5. The 3rd respondent joined the petition as an Interested Party in view of the fact that the 1st respondent had served it with a letter whose contents were similar to that which had been sent to some of the appellant's members, on account of some television commercials it was running entitled: 'Shinda na Mamili' and 'My Bonga Points' without submitting the same to KFCB for examination and classification.

6. Upon being notified of the letters, the appellant responded that there was no breach by its members, and that the 1st respondent's demands were in excess of its statutory mandate under Sections 15 of FSPA and 46 (I) of the *Kenya Information and Communications Act*. In turn, the 1st respondent cautioned on the consequences of non-compliance, which included imminent prosecution and other unspecified action.

7. The appellant's contention was that the mandate of the 1st respondent is limited to the classification and imposition of age restriction on viewership on any film that is exhibited in Kenya; giving "consumer advice on information relating to the protection of women and children against sexual exploitation or degradation in films or on the internet" but it lacked the jurisdiction, to regulate advertisements aired during the watershed period. The appellant described the letters by the 1st respondent as an abuse of power, written in bad faith and with the intention of harassing its members, because The Film and Stage Plays Act, Cap 222 of the Laws of Kenya, did not confer the 1st respondent with regulatory powers over television advertisements at all.

8. The appellant therefore filed a Petition in the High Court, lamenting that the 1st respondent's actions infringed its members' rights under Articles 47 and 27 of *the Constitution* and Section 4 (3) of the *Fair Administration Act*. It sought orders which we summarize broadly as a declaration that: the 1st respondent should not discriminate on its members on account of the type of business they carried out; the FSPA, the KICA, the Programming Code for Free to Air Radio and Television Services, and Kenya Film Classifications' Advertising Regulations did not confer on the 1st respondent express statutory

powers to license, examine, approve and classify alcoholic advertisements, nor authorize administrative action on account of breach of these instruments; that the decision of the 1st respondent contained in the two letters was procedurally unfair and in of breach of Article 47 of *the Constitution*; an order of *Certiorari* for purposes of quashing the two letters; a permanent injunction be issued to restrain the 1st respondent from purporting to license, approve, examine, or classify alcoholic advertisements.

9. The appellant contended that the FSPA did not confer the Board with regulatory powers over television advertisements at all; that it was the duty of the media houses to ensure broadcast content suitable for watershed hours as set out under Section 46 KICA, and that Section 3.2.1 of the Code, which provided that only programs or movies rated by the 1st respondent as general exhibition were to be aired during watershed hours; that the mandate of the board was limited only to the classification and imposition of age restriction only on films; to give advice and information hence the 1st respondent lacked jurisdiction to regulate adverts during water shed hours.

10. The appellant argued that it was denied the right to be heard; in the letters complained of, the 1st respondent came up with the decision to prosecute without giving them an opportunity to be heard; which decision was unreasonable and ultra vires; that Section 12 KICA applied to films shown in an exhibition such as a movie hall, and it did not apply to adverts which were TV broadcasts; that the intention of parliament was to control the making and exhibition of films, not adverts; that NACADA had the mandate over the promotion of alcoholic beverages; and that the CCK is vested with powers to prescribe program code to set standards.

11. The appellant had also argued that although the 1st respondent was aware of its mandate to classify and approve alcoholic adverts, there was no clarity in law as there were different players that had been given a mandate in the regulation of alcoholic beverages in Kenya, being the *Alcoholic Drinks Control Act*, the NACADA Act and the *Kenya Information and Communications Act*; that this had led to a confusing and unreasonable regulatory regime regarding alcohol promotion, thereby violating the principles of fair administrative action under Article 47 of *the Constitution*.

12. The 1st respondent drew from Section 2 of FSPA's definition on making of a film to argue that an advertisement is a film, and therefore justifies its regulation of audiovisual advertisements, and that under Section 15 of FSPA it is mandated with the responsibility of regulating the creation, broadcasting, possession, distribution and exhibition of film for purpose of classification and imposing age restriction; that Section 17 of KICA specifically placed an obligation on the board with regard to films/adverts that are unsuitable for children are not broadcast during watershed hours.

13. The 1st respondent further argued that some alcoholic beverage companies had been showing advertisement on alcohol promotion that had not been submitted to it for purposes of classification, that the advertisements were for adult consumption but broadcast during watershed hours.

14. The 1st respondent, as a result of the complaint and investigations made, wrote to the petitioner's members to submit the adverts for examination, classification and approval. The 1st respondent pointed out that one of the appellant's member admitted to the advertisements in question, but contested the jurisdiction of the board, whilst two others, Kenya Breweries Limited and Africa Spirits, continued to show the advertisements prompting the letter dated January 3, 2017, and that the response to the said letter of January 3, 2017 was an admission of the violations complained about by the board.

15. The 1st respondent maintained that its mandate was to regulate adverts, pointing out that in interpreting a statute, the intention of parliament must be taken into consideration. Further that Section 17 of KICA imposed a special duty on the board to protect children, and that rating by the

board is recognized by the code; that advertisements were within the regulatory mandate of the board; the impugned letters were well within its mandate, and the investigations and information relayed regarding possible sanctions on the face of breaches was not discriminatory.

16. The 2nd respondent did not file any reaction to the petition.

17. The 3rd respondent supported the petition, and argued that: the FSPA, KICA and Programming Code did not confer on the 1st respondent express statutory powers to license, examine, approve and classify alcoholic advertisements as well as television commercials; the 1st respondent's mandate was limited to controlling the making and exhibition of cinematographic films in theatres and drama; that commercial advertising in Kenya is regulated by the Advertising Standards Body of Kenya (ASBK) created by Marketing Society of Kenya (MSK) and the Association of Practitioners in Advertising (APA); that ASBK formulated Code of Advertising Practice & Direct Marketing ('the Code of Advertising') which regulated among others commercial advertising, and which was binding on the advertisers, practitioners in advertising as well as media owners.

18. The 3rd respondent maintained that the core objective of the Act is to control the making and exhibition of films in public theatres or drama, which is the board's mandate, and this mandate does not extend to adverts.

19. In considering the issues argued, the learned Judge by a judgment dated 13th May, 2017, addressed his mind to the rules of interpreting a statute, pointing out that the most important rule deals with the statute's plain language, and that in the absence of any expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive; and give it a contextual interpretation necessary to meet the ends of justice.

20. In adopting a construction that would carry out the obvious intention of the legislature, the court pointed out that it should neither enlarge the scope of the legislation or the intention of the legislature where the language of the provision is plain and unambiguous; and that it has no power to rewrite, recast or reframe the legislation, because courts decide what the law is and not what it should be.

21. Embracing the afore-going approach, the learned trial Judge was persuaded by the preamble to the Film and Stage Plays Act, and the definitions regarding the term "audio-visual" to mean both a sound (audio) and sight (visual) component, either live or pre-recorded, and may be enhanced by the use of technologies to make them easier for a large audience to hear or see, or presented "as is" to a small group; that Audiovisual commercial was a term that described various forms of promotion of goods and services, covering television advertising, sponsorship, teleshopping and product placement.

22. On the issue as to whether the 1st respondent acted within its statutory mandate, the trial court in its reading of Section 15 of the FSPA held that the intention of the legislature was very clear, in that the board was mandated to regulate the creation, broadcasting, possession, distribution and exhibition of films by imposing age restriction on viewership and that the board was mandated to protect women and children against sexual exploitation or degradation.

23. The above interpretation informed the trial court's finding that advertisements of alcoholic drinks had to comply with specific restrictions and guidelines, so as to conform to the law; and that it was in the interests of the children and the society at large to enforce regulations governing advertising of alcoholic beverages.

24. On the alleged violation of Article 27 of the *Constitution*, the trial court found no evidence that the regulations in question had been enforced in a manner that was discriminatory against the appellant or any of its members; with regard to the two letters complained of, no decision or action had been

arrived at by the time the petition was filed, as to warrant making a finding that the steps taken by the 1st respondent amounted to breach of the rules of natural justice or contrary to its statutory mandate. The trial court was of the view that the appellant moved to court prematurely.

25. In addition, the trial court found that the 1st respondent's functions were authorized by the relevant statute, and the restrictions in question were not in the least restrictive nor unreasonable to achieve the purported aim; that in regulation of commercial adverts the court was inclined to consider whether the regulation was aimed at advancing public interest and that there was significant interest in protecting the health, safety, welfare, moral value of children, specifically marketing to children products with potential long term effect on their health and morals such as alcohol.

26. In affirming the steps taken by the 1st respondent, the trial court pointed out duty to uphold rules and standards aimed at protecting minors; and that transmission of audio visual adverts should ensure respect for culture, age, difference, linguistic diversity, moral values and religious convictions. The petition was thus dismissed in its entirety.

27. The appellant has urged us to set aside the judgment on 14 grounds, several of which are repetitive of the same issues, so we have reframed and condensed them so as to achieve precision, that the learned Judge erred in law and in fact: in giving a broad definition of the term "film" without appreciating the nature and context of the term, and holding that the 1st respondent's functions were authorised by the relevant statute; in failing to find that the definition of "film" under Section 2 of film in the FSPA was not clear, thus leaving a wide margin of interpretation of the term, creating room for abuse and misuse; incorrectly categorizing advertisements as audio visual in nature thus falling within the definition and meaning of film; failed to appreciate that the 1st respondent's mandate was limited to all feature films, short films and trailers which are shown theatrically; misdirected himself in finding that the 1st respondent had reason to protect the moral values of children through regulating product placement in films, promotion of alcohol imagery through films, celebrity endorsements on alcohol in film, song promotions and events shown on television/commercial advertisements; that the Petition was prematurely filed and there was nothing to show that there was any violation of Article 47 of the *Constitution*, or any provisions of the law; failing to address the issue of the Programming Code for Free to Air Radio and Television Services despite the issue being put before him for determination.

28. We have carefully considered the record of appeal, the written and oral submissions, the authorities cited and the law. Our mandate on a first appeal as set out in Rule 29(1) of the *Court of Appeal Rules* (2022) requires us to reappraise the evidence and to draw our own conclusions. In *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

29. We are guided by the above threshold in light of the record.

30. It is common ground even from the condensed grounds, the appeal revolves around the two main issues identified by both parties, and which we propose to address under the following thematic sub-heads:

    a) Whether the Board has under the provisions of FSPA the powers to regulate the making and display of advertisements in the electronic media;

b) Whether the notification by the 1st respondent through its first letter warning that it would enforce sanctions for breach already committed; and the alleged continuation of corrupting morals was a violation of the right to fair administrative action and fair hearing.

31. As regards the 1st respondent's powers to regulate the making and display of advertisements in the electronic media, the appellant argues that this Act limits the scope and content of the board to carrying out its specified functions for the purpose of licensing stage plays, cinema and theatre, and faults the trial Judge's finding that the definition of a film extends to audio visual adverts. The appellant further contends that FSPA is inconsistent with KICA which establishes a framework for licensing, regulating and broadcasting services.

32. It is the appellant's contention that under Section 46 KICA, the idea is to as far as possible use terms and conditions of the license to enforce standards to be adopted, and refers to Section 46 (1) which requires all broadcasters to observe standards of good taste and integrity, respect privacy of individuals, to ensure the adverts are not deceptive or repugnant to good taste. The appellant's argument is that under Section 46 (2) of KICA, it is only where a cinematograph film (as defined under FSPA) is broadcast, that such film becomes subject to the latter legislation.

33. Drawing from the case of *Ndyanabo v. Attorney General* (2001) 2 EA 485, which addressed the general principles in interpreting the *Constitution*, the appellant faults the learned Judge for giving the term 'film' and 'advertisement' the same meaning, arguing that just because a film can be carried out through other audio visual medium, does not transform an advertisement recorded by similar medium to a film to warrant classification or censorship under FSPA. The appellant argues that in applying the principles, the interpretation has to be predicated on its text and the context within which the provisions are made. That with this in mind, the text of the preamble was to control the making and exhibition of cinematograph films, and the context within which the control is carried out is for licensing of stage plays, theatres and cinemas.

34. The appellant laments that the interpretation given by the learned Judge results in giving the 1st respondent a nod to violate the provisions of Article 34 (2) of the *Constitution* which provides the State shall not:

> " a) exercise control over or interfere with any person engaged in broadcasting the production or circulation of any publication or the dissemination of information by any medium: or
>
> b) penalize any person for any opinion or view or the content of any broadcast, publication or dissemination."

The appellant is categorical that the learned Judge's finding was predicated on the fact that television advertisement comprised both audio and visual features which fitted within the definition of cinematograph film as defined by the FSPA, but maintains that the broadcasting of advertisements through electronic media is regulated by the Communictions Authority of Kenya and not the 1st respondent board.

35. In this regard the appellant submits that in further discharge of provisions of the KICA, the 1st respondent has published "The Programming Code for Free to Air Radio and Television Services in Kenya," which at Clause 13 expressly provides guidelines to advertisers and forms carrying out any advertisements in broadcasts.

36. On the issue as to whether the two letters complained of breached the appellant's right to fair administrative action by dint of Article 47, the appellant argues that the 1st respondent had already

prejudged guilt and all that remained was the enforcement of penalties. The appellant alleges bias on the part of the 1st respondent, pointing out that it already claimed that the appellant was looking for opportunity to continue corrupting morals of the young people. In this regard, the appellant cited *Ridge v Baldwin* (1964)AC 40 which encapsulated what constitutes the rules of natural justice, and contends that the 1st respondent did not follow the rules of natural justice.

37. The 1st respondent in its submissions argues that the appellant is introducing new arguments to limit the board's mandate, which arguments were not before the trial court, that the board can achieve its mandate without purporting to regulate television adverts.

38. The 1st respondent submits that the petition in the High Court challenged its mandate to regulate audio visual advertisements, including advertisements for alcoholic beverages, which it addressed before the superior court.

39. The respondent agrees with the trial court's finding on its mandate, that the rule when dealing with the interpretation of statute is the language used and in the absence of express legislation to the contrary, ordinary language must be taken as conclusive.

40. In the trial court, the bone of contention was the 1st appellant's mandate in regulation of adverts vis a vis the different statutory instruments with respect to the audio visual advertisements broadcast on television. The trial court held that a statutory body is bound to adhere to the mandate stipulated in the statute creating it, and its actions must conform to the statutory and constitutional prescriptions. In considering the mandate of the 1st respondent, the learned Judge considered the functions as set out under Section 15 of the FSPA, and held that the provisions were clear in intent that the board was mandated to regulate the creation, broadcasting, possession, distribution and exhibition of films by, inter alia, imposing age restrictions on viewership and is also mandated to protect women and children against sexual exploitation or degradation in cinematograph films and on the internet.

41. In reconsidering and evaluating the evidence, it is clear to us that the learned Judge properly identified the main issue in contention as being the extent of mandate of the Board in the regulation of television advertisements including alcoholic advertisements, in relation to the various statutes namely: The *Films and Stage Plays Act*; The *Kenya Information and Communications Act*, No. 2 of 1998; The Kenya Information and Communications (Broadcasting) Regulations, 2009; and The Programming Code for Free to Air Radio and Television Services in Kenya [2" Edition- March 2016 and 3" Edition- March 2019].;

42. The question we pose is whether the Judge properly applied the recognized and relevant principles of statutory interpretation, or took into account irrelevant considerations in arriving at his decision? The appellant urges us to consider the preamble to the FSPA as the starting point to aid in the construction and interpretation of the statute, with regard to addressing the issue relating to the Board's powers to regulate commercial advertisements. The preamble indicates that the legislation is;

> "...to provide for controlling the making and exhibition of cinematograph films, for the licensing of Stage Plays, theatres and cinemas; and for purposes incidental thereto and connected thereto."

The argument presented is that the preamble demonstrates that the intention of Parliament was to control the making and exhibition of films as defined under the FSPA for 'controlling the making and exhibition of cinematograph films', and that Section 12 of the Act applies to films being exhibited at an exhibition such as a movie hall. On the other hand, the Board's assertion regarding its regulatory mandate over audiovisual advertisements, is drawn from Section 2 of the FSPA, and its functions under Section 15 of the Act. We are called upon to give meaning to these provisions as well as the key words.

43. Certainly an approach to statutory interpretation which results in the textual interpretation matching the contextual, is most desirable yet at the same time, the canons of construction are simply rules to aid courts in determining the meaning of legislation; and in interpreting a statute a court must presume that the legislature says in a statute what it means and means in a statute what it says there. This means that where the words of a statute are unambiguous, then, this first canon would give the result that "judicial inquiry is complete."

44. The Australian case of Amalgamated Society of *Engineers v Adelaide Steamship Company Ltd & others* (1920) 28 CLR 129, as quoted in *County Government of Nyeri & Another v Cecilia Wangechi Ndungu* [2015] eKLR set out the fundamental rule of interpretation, as being that a "...statute is to be expounded according to the intent of Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole...what does the language mean...in its ordinary and natural sense, it is our duty to obey that meaning..."

45. It is a truth universally acknowledged that the English language, both legal and general, has words which may have more than one meaning, and on account of this, many common law jurisdictions have applied three approaches to statutory interpretation. These are the Literal Rule (having the ordinary plain meaning), the Golden Rule (which looks at the intention of the legislature and avoid absurdity) and the Mischief Rule (what remedy did the legislation intend to cure). We concur with the 1st respondent that the first port of call is to examine the preamble to the parent statute, the FSPA Section 2, which principally gives the interpretation of Film and making of a film; restrictions on exhibitions particularly under Section 12 (2) of the Act; and the Functions of the Board under Section 15 of the Act.

46. It then follows, that the first consideration is to look at words in their plain language, and we note that in order to understand the extent of the Board's mandate, the learned Judge considered the definition of key terms in their ordinary plain meaning, dictionary meaning, in the context of the text in the respective legislation, as well as the intention of the legislature. We have considered the definitions given to the contested words such as: FILM, to determine whether the term did not extend to cover advertisements and any recorded audio visual medium, "CINEMATOGRAPHY defined as the science or art of motion-picture photography by recording light or other electromagnetic radiation, either electronically by means of an image sensor,or chemically by means of a light-sensitive material such as film stock - the art or technique of movie photography, including both the shooting and the processing of the image.

    Cinematography Film is defined [ as any work of visual recording on any medium produce through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual, Audio Visual as "possessing both a sound and a visual component, such as slide-tape presentations," films, television programs, church services, live theater productions and commercial audiovisual., Audio Visual Communicationas the promotion of goods and services in the audiovisual world, particularly television advertising and shopping, sponsorship and product placement".

    These words were considered in their ordinary sense, the Major Law Lexicon definition as well as in the context of the respective legislation to find that the mandate broadly covered television advertising, sponsorship, teleshopping and product placement.

47. We note that the preamble to the FSPA stipulates that the statute is for 'controlling the making and exhibition of cinematograph films', yet this term is not expressly defined under the Act, and we have considered the definition embraced by the Encyclopedia Britannica (Online edition)as well as the written submissions, particularly the suggestion by the appellant and the 3rd respondent to

extraposition these words, by giving a restricted meaning to the words, courtesy of the provisions of KICA. We have considered Section 46 (h) of KICA which establishes a framework for licensing, regulating and broadcasting services; the definition given to the term "broadcast" under Section 2 of KICA to mean "...any unidirectional conveyance of sounds or television programs whether encrypted or not by radio or other means of telecommunications for reception by the public," and *Black's Law Dictionary* 8th Edition at page 59, but we are unable to reconcile the argument that production of a film carried out through other audio visual medium does NOT make an advertisement recorded through a similar medium a film for classification or censorship for the purposes of FSPA. This is because television advertisement comprises both audio and visual features, which as a matter of fact, fits within the definition of cinematograph film as defined by the FSPA. Consequently, we find, with the greatest of respect to both counsel, to adopt the suggested approach would lead to a mutilation of the English language, and the basic rules of interpretation, and lead to an absurdity, as appropriately pointed out by the learned Judge, that the principles which apply to the construction of statues include presumption against absurdity or impracticable result.

48. An examination of the Preamble to FSPA and the definition of key terms within the statute, persuades us that the intention of the Legislature when enacting the legislation included regulating the creation and exhibition of electronic media produced through motion picture technology or electronic video camera photography, otherwise known as films, and stored/exhibited in various forms, including audio visual media such as television broadcast, and slideshows. We are of the view that the trial court was correctly aided by the preamble of the Film Stage and Plays Act, and the definitions thereto in coming to the conclusion that advertisements, being audio visual in nature, fell within the definition of film and filmmaking.

49. Close on the heels of the definition of terms, are the FSPA provisions under Section 12 which prohibits broadcast of films without certificate of approval by the 1st respondent and Section 15 which defines the functions. This would unravel the contention as to whether the 1st respondent acted within its statutory mandate. The appellant's contention is that the board acted in excesss of its mandate, as the FSPA limits the scope and extent of the power of the Board to carrying out the specified functions for the purposes of licensing of stage plays theatres and cinemas. Whereas films intended for broadcast fall within the mandate of the 1st respondent, the devil in the detail is whether this would exclude advertisements broadcast on television.

50. The following key phrases under Section 15 of FSPA scream out for consideration: "Examining every film ... submitted under this Act for purpose of classification; Imposing age restriction in viewership." Applying the rules of statutory interpretation, taking into account the context and intention and proportinality, our plain reading of the afore-going provisions is that the intention of the legislature is very clear and discernible from the ordinary plain meaning of the words, that it is to regulate the creation, broadcasting, possession, distribution and exhibition of film by rating them. In considering the regulation of commercial advertisements, the trial court addressed its mind to the question whether the regulation was aimed at advancing public interest. The 1st respondent's functions are provided under Section 15 of the Film and Stage Plays Act Cap 222 (FSPA), it primarily classifies and rates films by examining them and giving them a certificate of approval by rating them as GE (general exhibition), PG (parental guidance recommended), 16 (not suitable. for persons under the age of 16), and 18 (not suitable for persons under the age of 18). The Board's other activities include licensing film distributors in the country by granting film regulatory licenses to the distributors, and checking for violation of the terms of the license, including "license expiry, sale of unrated movies, sale/showing of restricted movies and misuse of classification labels."

51. We cannot fault the trial court for what we consider as judicial notice to the effect that there is significant interest in protecting the health, safety, welfare, moral values of children. In addition, to the credit of the learned Judge, he elaborated the position of international law and instruments in our Constitution, as pronounced by Article 2 (5) and (6) and made reference to recognition of freedoms by international bodies such as the Committee of the United Nations regarding possible limitations to freedom of expression, and international instruments such as Article 19 (3) of the *International Covenant on Civil and Political Rights*, to ensure that whatever restrictions the 1st respondent purported to impose were such as are as provided for by law and were necessary for respect of the rights or reputations of others.

52. There is nothing to suggest that the interpretation given is not proportionate to achieving the purpose for which the legislation was passed. We cannot attach a different meaning to this, and agree with the trial court that the board's mandate includes regulating television content including adverts. We hold that the learned Judge considered the competing interests, and interpreted the provisions in a manner which promotes the good of society.

53. It would be inappropriate to deem the issue of the 1st respondent's mandate as resolved without considering the appellant's argument as presented, that the regime for licensing, regulation and enforcement of cinematograph films for stage plays, theatres and cinemas is separate and distinct from that of broadcasting, the first is on the Board, and the latter by the Authority.

54. Whereas this aspect was addressed before the trial court, it is true that in the judgment, the learned Judge did not make specific reference to the Code. Did this lead to a fatality in the finding of the court? Indeed, the regulatory regime under the Kenya Information and Communication Act, No. 2 of 1998 (KICA) has provisions for radio and broadcasting advertisements, and in the further discharge of its provisions, the Board has published "The Programming Code for Free to Air Radio and Television Services" in Kenya with respect to guidelines to advertisers and forms carrying out any advertisements in broadcasts.

55. The principal regulator under the KICA regime is the Communications Authority of Kenya (CA) whose function is to promote public interest, by setting standards for the time and manner of programmes to be broadcast by licensees, and prescribing a programming code for the watershed period when large numbers of children are likely to be watching or listening to programmes, and ensuring compliance with the programming Code. That is the letter and spirit of Section 46 of KICA).

56. We have in addition, examined the Kenya Information and Communications (Broadcasting) Regulations, 2009 (Broadcasting Regulations,2009) referred to by the 1st respondent in its submissions, in particular Part IV which stipulates the bare minimum standards for broadcast content in Kenya airwaves, and find that the focus on the Programming Code is prescribed to, inter alia , ensure family viewership and listening is wholesome, and material which is unsuitable for children is not broadcast at times when there is likely to be a large audience of young listeners or viewers. It then echoes what the learned Judge observed concerning restricting viewership times to achieve protection of children, and the fact that the learned Judge did not specifically mention the Code in his analysis, is in our view not fatal. In our view, even if there was an overlap of between KICA and FSPA, the respondent was within its power to regulate content of advertisements during the threshold time.

57. The second issue which the appellant challenges is the action of the 1st respondent in penning the letters dated 3rd January, 2017 and January 9, 2017, which are described as infringing or threatening to infringe upon the right to Equality under Article 27 of *the Constitution* of Kenya 2010, as well as the right to fair administrative, under Article 47. The appellant complains that it was not given a fair hearing and that the principles of natural justice were not followed; that the letter had already prejudged its members of

liability, and taken a stand on unspecified penal sanctions. The letter complained of and the wording thereto to wit:

> " that you avail yourself for the action board will enforce due to breach already committed. Details on the date and venue of the meeting will be communicated to you in course..."

58. We have already settled the 1st respondent's mandate to examine audiovisual advertisements to include broadcast on television for the purpose of classification and rating. What procedure should the 1st respondent have adopted to inform the appellant's members about what they perceived as a breach of the law or in the enforcement of the provisions of statute?

59. We have read the contents of the two letters, and note that the 1st respondent does not state that ONLY advertisements of alcoholic beverages should be submitted for classification and rating, rather, upon flagging the advertisements of alcoholic beverages during watershed period when children are likely to be viewing television, the appellant's members were informed of the breaches and required compliance with the law. We further note that the appellant's members were invited to explain why action should not be taken against them with a view to determine the regulatory action which the Board would take.

60. We consider the definition ascribed to the term 'discrimination' by the Supreme Court of Kenya in *Gicheru vs. Package Insurance Brockers Limited* [2021] KESC 12 {KLR), and find that the appellant has not demonstrated any unfair treatment or denial of normal privileges.

61. We are unable to find a point of convergence with the position taken by the appellant, as we hold the view that the same was aimed at informing the appellant's members of the alleged breach, and the meeting alluded to was a chance to explain the breach. There was no evidence presented that the meeting requested by the 1st appellant was held, and whether sanctions were actually imposed, and it is not far-fetched to conclude that the appellant did not appear before the Board, so no determination (regulatory or otherwise) was made by the Board. This invitation to a hearing resonates with the provisions of Article 47 of *the Constitution*, as well as the *Fair Administrative Action Act* (No. 4 of 2015), and we concur with the 1st respondent that the failure to be heard could only be attributed to the refusal to respond to the invite. We find that the learned Judge did not err in law in pointing out that the appellants ought to have first allowed the 1st appellant to carry out its mandate with regard to the regulation of advertisements as aforesaid, and make the regulatory decisions if any, before crying foul.

62. We have scourged through the record in a bid to identify the factual alleged infringement of Articles 10, 27 and 47 of *the Constitution* but find that no evidence was placed before the learned Judge of the High Court to warrant a determination that in fact any infringement or threatened infringement of the said Articles was likely to occur.

63. Indeed, as argued by the appellant, interpretation must depend on the text and the context, and is certainly at its best when the textual interpretation matches he contextual. We take note that the learned Judge bore in mind the fact that statutory interpretation should meet the ends of justice, taking into account two key assumptions, namely, the meaning in legislative texts is "plain", and the intention of the legislature. The reasoning of the learned Judge in our view was well thought out, and there is no issue of fact that was improperly considered or left out as to warrant a reversal of the decision. The appeal therefore lacks merit and is dismissed with costs to the 1st respondent.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.**

**D. K. MUSINGA (P)**

**.....**

**JUDGE OF APPEAL**

**F. SICHALE**

**.....**

**JUDGE OF APPEAL**

**H. A. OMONDI**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**