IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA
FIRST INSTANCE DIVISION

*(**Coram**: Yohane B. Masara, PJ; Richard Wabwire Wejuli, DPJ; Richard Muhumuza, Gacuko Leonard & Kayembe Ignace Rene Kasanda; JJ)*

REFERENCE NO. 28 OF 2020

ABDUL OMARY NONDO ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF
THE UNITED REPUBLIC OF TANZANIA ..... RESPONDENT

31st MARCH 2026

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This Reference was brought before the East African Court of Justice ("the Court") on 25th August 2020 under Articles 4, 6(d), 7(2) 8(1)(c), 27(1) and 30(1) of the Treaty for the Establishment of the East African Community ("the Treaty") and Rules 1 and 25 of the East African Court of Justice Rules of the Court, 2019 ("the Rules").

2. The Applicant, Abdul Omary Nondo, is a Tanzanian national and resident and describes himself as a concerned and patriotic citizen. He is also a media user and human right activist in Tanzania. For the purposes of this Reference, the Applicant's address of service is: c/o *Togo Tower, 2nd Floor, Manyanya Street, Kinondoni, P. O. Box 5413, Dar es Salaam.*

3. The Respondent is the Attorney General of the United Republic of Tanzania. He is sued in his capacity as the Principal Legal Advisor to the Government. For the purposes of this Reference, the Respondent's address of service is: c/o *Office of the Solicitor General, 10 Kivukoni Road, P.O. Box 71554, 11405 Dar Es Salaam.*

B. REPRESENTATION

4. At the hearing, the Applicant was represented by Mr Peter Majanjara, Advocate; while the Respondent was represented by Mr Stanley Kalokola and Ms Jacqueline Kinyasi, Senior State Attorneys and Mr Francis Wisdom, State Attorney.

C. THE APPLICANT'S CASE

5. The Applicant's case is set out in his Statement of Reference which is supported by the Affidavit deponed by the Applicant himself. The Applicant also filed, on 12th Mach 2025, a Supplementary Affidavit in Support of the Reference and an Affidavit in Reply to the Respondent's Affidavit in Reply to the Supplementary Affidavit deponed on 2nd April 2025.

6. The Applicant filed Written Submissions and the Rejoinder to the Respondent's Written Submissions dated on 2nd May 2025 and 7th November 2025 respectively. The same were highlighted in Court on 11th November 2025.

7. The substance of the Applicant's complaints in this Reference relates to the enactment and gazettement of the *Electronic and Postal Communications (Radio and Television Broadcasting Content) (Amendment) Regulations, 2020, GN No. 486 of 2020,* by the Minister for Information, Culture, Arts and Sports on 19th June 2020 and published on 26th June 2020. They amended the *Electronic and Postal Communications (Radio and Television Broadcasting Content) Regulations, 2018, GN No. 134* published on 16/03/2018.

8. It is the Applicant's case that the Regulations as amended impose an unjustified restriction on values and principles of democracy; namely, freedom of expression, the rule of law, accountability, transparency and good governance, which the Respondent has committed to abide by through the Treaty to which the Respondent is a party.

9. In the Applicant's eyes, the impugned amendments; specifically, Regulations 14, 37, 45 and 47 as amended are in violation of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

10. The Applicant therefore seeks from the Court the following reliefs, reproduced *verbatim*:

    i. **A DECLARATION that the provisions of Rules 14, 37, 45 and 47 violate freedom of expression by restricting the type of news or content thereby violating the aforementioned provisions of the Treaty in that they restrict the type of news or content thus imposing arbitrary and unjust restrictions on news and other information and content and therefore infringing the right to freedom of expression;**

    ii. **AN ORDER to the RESPONDENT State to cease the application of the Regulation and repeal or amend the Regulations to bring it in conformity with the fundamental and operational principles codified in Articles 6(d) and 7(2) of the Treaty;** and

    iii. **AN ORDER that the costs of and incidental to this Reference be met by the Respondent.**

11. He also seeks such further or other Orders as may be just, necessary or expedient in the circumstances.

D. THE RESPONDENT'S CASE

12. The Respondent's case is stated in the Reply to the Reference dated 12th October 2020, in the Affidavit in Support of the Reply to

the Statement of Reference deponed on 12th October 2020 by Andrew Johnson Kisaka, Principal Officer in Tanzania Communication Regulatory Authority (TCRA) and in the Affidavit in Reply to the Applicant's Supplementary Affidavit deponed by Andrew John Kisaka on 26th March 2025.

13. The Respondent also filed Submissions in opposition to the Applicant's Submissions, which were highlighted in Court on 11th November 2025.

14. The Respondent vehemently opposed the Application. He contends that the impugned Regulations are justifiable and consistent with the values and principles of democracy, freedom of expression, rule of law, accountability and good governance.

15. That, the new Regulations were promulgated for the purposes of, *inter alia,* protecting and safeguarding public morality, security, intellectual property rights and children against unsuitable broadcasted contents.

16. In addition, the Respondent asserts that the limitations to freedom of expression introduced by the impugned Regulations are in consonance with the Constitution and other regional and international human rights instruments.

17. That, the amended Regulations are in compliance with Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

18. Thus, the Respondent prays for the dismissal of the Reference for want of merit with costs.

E. ISSUES FOR DETERMINATION

19. At the Scheduling Conference held in Kigali on 26th February 2025, the following issues for determination were agreed:

    i. **Whether the provisions of Regulations 14, 37, 45 and 47 of the Regulations are in violation of Article 6(d), 7(2) and 8(1)(c) of the Treaty;** and

    ii. **What remedies are the Parties entitled to.**

F. THE COURT'S DETERMINATION

ISSUE 1: Whether the Provisions of Regulations 14, 37, 45 and 47 of the Regulations are in violation of Article 6(d), 7(2) and 8(1)(c) of the Treaty

i. Applicant's Submissions

20. Counsel for the Applicant submitted that the gravamen of the Reference is that the impugned Regulations, specifically Regulations 14, 37, 45 and 47, are in violation of the Treaty.

21. Submitting on the amended Regulation 14, Counsel for the Applicant stated that it obliges media houses to restrict content to a "*watershed period*". That, the Amended Regulations changes the watershed period from between 22h00 and 05h30 to between 00h00 and 05h00.

22. For the Applicant, the amendment reduced the period during which "*material suitable for adults*" may be viewed, which are unclear, ambiguous and capable of subjective interpretation.

23. It is the Applicant Counsel's stance that the restrictions interfere with freedom of expression, which is the cornerstone of any democratic society, and the rule of law as provided for under Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

24. He submitted further that the impugned provision contains terms that are unclear and ambiguous and are subject to subjective interpretation in violation of the Treaty. He referred to words such as "*material suitable for adults*" and "*presentation of programs shall adhere to national value, traditions and culture.*"

25. To buttress his stance, Counsel for the Applicant relied on the cases of **Lohé Issa Konaté vs Burkina Faso, Application No. 004/2013(2014)** and **Burundi Journalists Union vs The Attorney General of the Republic of Burundi, EACJ Reference No. 7 of 2013**.

26. With regard to Regulation 37, Counsel for the Applicant informed the Court that the same was deleted through GN Number 135 of the year 2022. That, although the contested provision was deleted from the Regulations, it is his view that by amending the said Regulation, the Respondent was admitting what was claimed within the Reference. That, it is necessary for the Court to determine the validity of the said Regulation even by way of *obiter dictum.*

27. With regard to Regulation 45(1), Mr Majanjara was of the view that a penal provision creating an offence should show the elements that constitute it; namely *mens rea* and *actus reus.* In his view, the *mens rea* element is missing in the impugned regulation.

28. Concerning Regulation 47, Counsel Majanjara submitted that it is vague and unclear; especially, the terms "necessary rights clearance". That, the law should state what amounts to necessary rights clearance.

29. He argued that, as a penal provision, it should comply with principles of drafting of penal provisions, in order to enable subjects of the law to know the elements to be met for an offence.

30. Finally, Counsel Majanjara submitted that the concept "*necessary rights clearance in respect of the content being broadcasted*" within the Regulation is too broad and unclear. That, it is susceptible to multiple interpretations.

ii. <u>Respondent's Submissions</u>

31. Opposing the Applicant's submissions, Mr Kalokola did not agree with the Applicant's complaints. He contended that the words "*materials suitable for adults*" used in the impugned Regulation 14 although not defined within the law, the meaning is clear. He referred to Regulation 14 of the original Regulations of 2018 which details what materials are suitable for adults. That materials suitable for adults by implication mean that the same are not suitable for children.

32. Responding to the averment relating to Regulation 37, Counsel for the Respondent stated that the allegations against it is now moot, as the provision was deleted by GN No. 135 of 2022. That, since the impugned Regulation is no longer in existence, there is no live dispute about it and, consequently, determination of Regulation 37 is now moot before the Court.

33. Rebutting the Applicant Counsel's submissions on Regulation 47, Counsel Jacqueline averred that the issue of *'clearance of rights'* was previously provided for in the Regulation 2018. That, the only change was that in the 2018 Regulation one was supposed to bring evidence to the authority that they have obtained clearance of right.

34. Counsel Jacqueline explained that with the amendment brought by the 2020 Regulations, a licensee by subscription shall ensure it has obtained the 'necessary rights clearance in respect of the content being broadcasted' without necessarily submitting such evidence to the authority.

35. Additionally, Ms Kinyasi clarified that clearance of rights is a permission that one gets in order to use another person's content for the intellectual property's protection purpose.

36. That, it was not possible for the Regulations to specify all clearance of rights required; that, the word 'necessary' suffices depending on what content the licensee is going to use.

37. Regarding the Applicant's challenge that the terms 'License by subscription' was not defined in the Act, Counsel for the Respondent urged the Court to disregard it for the simple reason that the claim was not raised before his submission.

38. With respect to Regulation 45, where the Applicant faulted the said Regulation for failing both to provide for *mens rea* of the offence created and the value of the fines, Counsel for the Respondent insisted that the objective of promulgating the impugned regulation was mainly to provide for a comprehensive regulatory regime.

39. Counsel Kinyasi referred to the Code of Conduct embedded therein. It was her assertion that the principal Regulation had obligations and the Code of Conduct, and that whoever breaches it is liable.

40. Lastly, Counsel for the Respondent conferred that the Applicant, in his submissions, raised a new issue in relation to the content committee. According to her, that issue has never been pleaded in the Reference or the affidavits in support of the Reference. To that end, Counsel for the Respondent urged this Court to ignore any complaint in relation to the content committee.

iii. Determination of the Issue

41. To determine this issue, we have considered the submissions of Counsel for both parties and have taken into account the pleadings, evidence on record and the authorities cited.

42. We are aware that the matter before us relates to a quest to impugn a law alleged to curtail freedom of expression, which is a cornerstone of democracy and the rule of law.

43. In the case of **Burundi Journalists Union vs The Attorney General of the Republic of Burundi** (*supra*), this Court cited with approval the decision of the Supreme Court of Canada in **R vs Oakes (1986) ISCR 103** where it was stated as follows:

> ***"It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The***

concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over emphasized."

44. In **Plaxeda Rugumba vs Attorney General of the Republic of Rwanda, EACJ Appeal No. 1 of 2012,** the Court noted that:

"... we are of the firm view that the principles set out in Articles 6(d) and 7(2) were not inscribed in vain. The jurisdiction of this Court to interpret any breach of those Articles was also not in vain, neither was it cosmetic. The invocation of the provisions of the African Charter on Human and Peoples Rights was not merely decorative of the Treaty but was meant to bind Partner States, hence the words that Partner States must bind themselves to 'the adherence to the principles of democracy, the rule of law as well as the recognition, promotion and protection of the Human and People's Rights in accordance with the provisions of the African Charter on Human and Peoples Rights'."

45. Furthermore, in **Media Council of Tanzania & 2 Others vs The Attorney General of the United Republic of Tanzania, EACJ Reference No. 2 of 2017,** the Court formulated a three-tier test to be applied in determining whether a National Law is consistent with the Treaty. This test is set out as follows:

"(a) Is the limitation one that is prescribed by Law? It must be part of a Statute, and must be clear, and accessible to citizens so that they are clear on what is prohibited;

(b) Is the objective of the law pressing and substantial? It must be important to the society; and

(c) Has the State, in seeking to achieve its objectives chosen a proportionate way to do so? This is the test of proportionality relative to the objectives or purpose it seeks to achieve."

46. In the instant Reference, the Court has to assess if the Amended Regulations meet the above three - tier test and the failure on one of them constitutes the violation of the right of to freedom of expression and, consequently, an infraction to Articles 6(d) and 7(2) of the Treaty.

47. We now apply the said test in order to evaluate and determine the Applicant's allegations that the named provisions of the impugned Regulations violate the Treaty.

Regulation 14

48. The Applicant's claim is that the provisions of Regulation 14 offend the Treaty on the ground that it restricts content to a "watershed period", reducing the period during which "material suitable for adults" may be viewed and interferes with freedom of expression. As stated above, the allegations are disputed by the Respondent.

49. The impugned Regulation reads:

"For the purpose of this regulation, "watershed period" means the broadcasting time from 0000hrs to 0500hrs which content services licensees shall broadcast material suitable for adults."

50. Submitting on the amended Regulation 14, Counsel for the Applicant stated that it obliges media houses to restrict content to a "*watershed period*". The Amended Regulations changes the watershed period from between 22h00 and 05h30 to between 00h00 and 05h00.

51. For the Applicant, the amendment reduced the period during which "material suitable for adults" may be viewed, which are unclear, ambiguous, capable of subjective interpretation, violating Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

52. On its part, the Respondent submitted that "the material suitable for adults" used in the impugned Regulation 14 are not defined within the law and referred to Regulation 14 of the original Regulations of 2018 which speaks about what are materials suitable for adults and invited the Applicant to read it together with the impugned regulation, to the extent that the amendment did not touch on Regulation 14(b) and (c) of the original Regulation.

53. We must from the onset note that Article 19(2) of the *International Covenant on Civil and Political Rights* (ICCPR December 16,1966), recognizes to everyone:

> **"...the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."**

54. Similarly, *the Constitution of the United Republic of Tanzania* guarantees the freedom of expression under Article 18(a). It provides that:

> **"Every person –**
>
> **(a) has a freedom of opinion and expression of his ideas;**
>
> **(b) has a right to seek, receive and, or disseminate information regardless of national boundaries;**
>
> **(c) has the freedom to communicate and a freedom with protection from interference from his communication;**
>
> **(d) ..."**

55. It is common ground that although freedom of expression is a basic right enshrined both in international and national laws, the exercise of this right is subject to justified derogations or limitations.

56. Article 19(3) of ICCPR provides that:

> **"The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:**
>
> **a) For respect of the rights or reputations of others;**
>
> **b) For the protection of national security or of public order (*ordre public*), or of public health or morals."**

57. Similarly, *the Constitution of the United Republic of Tanzania* prescribes some limitation to the freedom of expression's exercise. The restrictions to the right to freedom of expression are provided for under Article 30(2) of the said Constitution of Tanzania in the following terms:

> **"It is hereby declared that the provisions contained in this Part of this Constitution which set out the principles of rights, freedom and duties, does not render unlawful any existing law or prohibit the enactment of any law or the doing of any lawful act in accordance with such law for the purposes of:**
>
> **(a) ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals;**
>
> **(b) ensuring the defence, public safety, public peace, public morality, public health, rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property of any other interests for the purposes of enhancing the public benefit;**
>
> **(c) ensuring the execution of a judgment or order of a court given or made in any civil or criminal matter;**
>
> **(d) protecting the reputation, rights and freedoms of others or the privacy of persons involved in any court proceedings, prohibiting disclosure of confidential**

information, or safeguarding the dignity, authority and independence of the courts;

(e) imposing restrictions, supervising and controlling the formation, management and activities of private societies and organizations in the country; or

(f) enabling any other thing to be done which promotes, or preserves the national interest in general."

58. For comparison purposes, the *European Convention on Human Rights* provides as follows, regarding the freedom of expression:

> **"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."**

59. Further, Article 10(2) of the same Convention, provides for the limitation of the right to freedom of expression. It states:

> **"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or**

crime, for the protection of health or morals, for the protection of the reputation or rights of others, (...)"

60. Coming back to the issue under discussion, Counsel for the Applicant faults impugned Regulation for constraining media houses to restrict the "watershed period" reducing the broadcasting time for "material suitable for adults".

61. Applying the three-tier test, the Court has to verify if the Regulations as amended meet the necessary requirements.

62. It is not in contention that the content restrictions which constitute the subject of the Reference are set down in a law namely Regulation 14 of the impugned Regulations. The question is*: is the provision of the impugned Regulation sufficiently clear and accessible to Parties to enable an individual to regulate conduct accordingly?*

63. Counsel for the Applicant submitted that Regulation 14 fails the test of clarity, to the extent that it is drafted in vague language and is too broad; that it provides limited guidance as to what would be prohibited under the law. To buttress his stance, he relied on **Konaté vs Burkina Faso** (*supra*) where the ACHPR observed that:

"[...] to be considered as "law", norms have to be drafted with sufficient clarity to enable an individual to adapt his behaviour to the rules and made accessible to the public."

64. Counsel for the Respondent on his part clarified that a material suitable for adults is the opposite of a material suitable for children, which is already in the law under the Regulation unamended.

65. Applying the test of clarity and accessibility to "**Material suitable for Adults**", the Court is of the view that Regulation 14 meets the test of precision.

66. It is incontestably established that adults and children are different on many points of view: physically, psychologically, mentally, cognitively and emotionally.

67. Whereas an adult is characterized by maturity and responsibility, children are defined by their immaturity both emotionally and psychologically.

68. To that extent, adults and minors do not have the same needs in terms of radio and television broadcasting programs and their content.

69. It is difficult even impossible to draw up a list of what can be considered as "material suitable for adults." Every attempt to establish a list of 'material suitable for adults' should stumble certainly over the inevitable non-exhaustivity and will undoubtably fail to cover all possible scenarios or details and this apprehension applies *mutatis mutandis* to the material suitable for children.

70. Thus, the definition of the concept of "Material suitable for adults" by opposite to "Material suitable for children", takes into consideration their mental and psychological immaturity.

71. It is in that context that the *UN Declaration on the Rights of the Child (1959)* states in its preamble that ***"the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, (...)."***

72. Further, Article 3(1) of *the Convention on the Rights of the Child (CRC)* to which the Respondent is a party, states:

> **"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."**

73. In the case of **Media Council of Tanzania, and 2 Others vs The Attorney General of the United Republic of Tanzania** (*supra*), the Court noted instructively that:

> ***"(...) it is trite law, and again common ground herein, that these rights are by no means absolute. Various courts in different jurisdictions have endeavoured to set the parameters of when and how these rights may be restricted or limited."***

74. Outside the EAC especially in European Union, the jurisprudence of the Court in the area of protection of morals demonstrates an ongoing willingness to accord quite a large margin of appreciation to national authorities in this area. See **Toby Mendel,** *"Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights."*

75. Therefore, by amending the broadcasting time in order to adapt it to the legitimate need of protecting the children from inappropriate content, the Respondent complied with the Treaty. The restrictions imposed by the Regulation are rational, proportionate and reasonable.

76. Consequently, the provision of Regulation 14 meets the first and second test, as being clear and precise.

77. Having succeeded the first and second test, it behooves the Court to evaluate if the Respondent in seeking to achieve the above objectives chosen a proportionate way to do so. In other words, is the means adopted by the Respondent proportionate?

78. Children protection from harmful use of new technology including Electronic and Postal Communication is a must for any society.

79. It is our considered view that reducing "*watershed period*" is a proportionate measure that the Respondent took without prejudice to the media houses' right and other users of media services. In any case it is vital for each society to uphold the highest standards of child protection considering that the interest of the children "shall be a primary consideration."

80. In consequence, the Regulation succeeds the test of proportionality.

81. Lastly, the Respondent faults the Regulation for not defining the concepts of "national value, traditions and culture."

82. It essential to mention here that the words "national value, traditions and culture" were introduced by *GN No. 13 of 2024* which amended the impugned Regulation after the Reference was already filed in the year 2020.

83. The Applicant was at liberty to amend his Reference but he opted not to do so.

84. It is a well-established rule of procedure that parties to a dispute are bound by their pleadings.

85. Consequently, the Court cannot determine an issue that was pleaded.

Regulation 37

86. With regard to Regulation 37, both Counsel agree that the provision of the impugned Regulation was deleted through the amendment made to the Regulations by GN No. 135 of 2022. Counsel for the Applicant, however, stated that it is necessary for the Court to determine this the mater even by way of obiter dictum.

87. Conversely, Counsel for the Respondent contended that since the Regulation was deleted, it is no longer in the law, there is no live dispute and consequently determination on Regulation 37 is now moot before the Court.

88. The question is whether the test of mootness has been met.

89. As defined by *Black's Law Dictionary, 10th Edition, p .1161,* a '*moot case' is "a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights.*"

90. Applied to the impugned Regulation 37, it is our view that it is no longer in existence as it was deleted. Thus, there is no live dispute for resolution before the Court. The issue is moot.

91. This Court has at many occasions pronounced itself on the question of mootness. In **Attorney General of United Republic of**

Tanzania vs African Network for Animal Welfare, EACJ Appel No. 3 of 2014. This Court held that:

> ***"In the above cases, the message is strong, comprehensive, and clear:***
>
> *i.* ***The function of courts is to contribute to justice in concrete disputes, not to give opinions on general hypothetical questions;***
>
> *ii.* ***Jurisdiction is conferred on courts not to deal with hypothetical, academic or political questions;***
>
> *iii.* ***The court must not deal in matters that are clearly lifeless, spent, academic, speculative or hypothetical;*** and
>
> *iv.* ***Judicial power is the right to determine actual controversies arising between adverse litigants."***

92. In the same vein, in the case of **Alcon International Ltd vs The Standard Chartered Bank of Uganda and others, EACJ Appeal No. 3 of 2013**, this Court stated:

> ***"...it must be said by this Court that the doctrine of mootness or academic adventure by the Courts of Justice is well known... If there is no live dispute for resolution ...or the Court is not exercising any advisory opinion jurisdiction it may have, a Court of Justice would be wasting the public resources of time, personnel and money by engaging in a futile and vain exposition of the law."***

93. In our view, since the impugned Regulation has been deleted, it is patently obvious that the prayer is now moot and hypothetical. We decline to do what the Applicant's Counsel urged us to do even by way of *obiter dicta*.

Regulation 45

94. As regards the impugned Regulation 45, the Applicant faults the Respondent for having created offences without *mens rea*. The Respondent referenced the Regulation to the Electronic and Postal Communications Act which provides for a Code of Conduct and penalties.

95. While referring to the Code of Conduct, Counsel for the Respondent was of the view that the whole principal Regulation had obligations and a Code of Conduct; thus, whoever breaches it will be liable.

96. Counsel Majanjara tenaciously opposed the said justification on the grounds that whereas Counsel for the Respondent referred to the Code of Conduct, the same was not mentioned in the impugned provision and, consequently, cannot be relied upon when dealing with a penal provision. More specifically, Counsel argued that the Regulation fails to provide a clear indication of the value of the fines that the Regulatory Authority can impose. He is of the view that a penal provision creating an offence, must have elements constituting it; namely, *mens rea* and the *actus reus*.

97. The amended Regulations reads:

> **"45. Any content services licensee who contravenes any provisions of these Regulations commits an offence and**

where no penalty is expressly provided shall, upon conviction pay a fine not exceeding Tanzania shillings five million only."

98. On the other hand, the impugned Regulation is written as follows:

> **"(1) Any person who contravenes the provisions of these Regulations commits an offence;**
>
> **(2) A licensee who breaches any provision of these Regulations may be subjected to the Content Committee;**
>
> **(3) Upon determination and pursuant to sub regulation (2), the Content Committee may take one or more of the following actions:**
>
> **a) issue a written warning to the licensee;**
>
> **b) require the licensee to issue an apology to the public and the victim of the challenged content;**
>
> **c) order removal of the confronted content; or**
>
> **d) impose a fine in accordance with the Act."** (*Emphasis added*).

99. As regard to the *mens rea*, it is essential to refer to the above Act which obviously provides for all elements of the offence created by the said Act. For each offence, the Act highlights the mental element by words such as: "**without obtaining ...", "shall be liable upon conviction...."**

100. It is therefore upon conviction by the Court that an individual will be liable and subjected to the penalties.

101. In concluding on this sub-issue, we uphold that the reference to another national legislation especially a parent Act is common in legislative drafting.

102. Regarding Regulation 45(2) and (3), the Applicant contended that the Regulations do not provide a clear indication of the instances in which a breach of Regulations could result and, without providing a clear indication of value of the fines that the Regulatory Authority can impose on one hand and that the Content Committee has too much power capable of being abused on the other hand.

103. The Applicant raised an issue of the actus reus. With regard to this issue, it is essential to mention that the impugned Regulations refer again to the Electronic and Postal Communications Act (Principal Legislation) which, in Section 104, provides for a "Code of Conduct for content service licensees". The same also provides for offences and penalties in case of infraction thereof.

104. This Court, in **Henry Kyarimpa vs The Attorney General of the Republic of Uganda, EACJ Reference No. 4 of 2013,** noted that:

> ***"... it is not the role of this Court to superintend the Republic of Uganda in its executive or other functions. Whereas of course where there is obvious and blatant violation or breach of the principles of good governance and rule of law, this Court will, without hesitation, so declare, we are unable to do so in the present case."***

105. Subjected to the test of clarity and accessibility, does Regulation 45 meet the standards applied in such a field?

106. We are persuaded that the provision is clear and precise, and in particular, to the extent that it refers to the parent Act which is *the Electronic and Postal Communications Act, Revised Edition 2022*, specifically, Part VI which provides *inter alia* for the "Offences Relating to Electronic Communications." Thus, the impugned Regulation meets the test of clarity.

107. Having met the test of clarity, the second question is whether the amendment is important to the society?

108. The Regulations on *Electronic and Postal Communications (Radio and Television Broadcasting Content*) regulate an important activity which is critical for the society. The important role of the press in a democracy notwithstanding, lawmakers cannot close eyes on the fact that the media professionals may breach the law that govern the Press Sector.

109. To protect the society from harmful misuse of Radio and Television Broadcasting, it is necessary for the policy maker and the legislator in each society to regulate such a profession. Amongst the way to protect people from the misuse of those tools, is to provide penal sanctions against media professionals who breaches the law relating to the profession.

110. Consequently, the impugned Regulation meets the second tier-test in that the Respondent, in the impugned Regulation, discharged its duty of providing protection to the society.

111. Subjecting the impugned Regulation to the test of proportionality, the Court has to evaluate if the Respondent in seeking to achieve its objectives chose a proportionate mean.

112. In **The Managing Editor, Mseto and Hali Halisi Publishers Ltd vs The Attorney General of the United Republic of Tanzania, EACJ Reference No. 7 of 2016**, this Court observed that:

> **"The Treaty gives no pointer in answer to this question but by reference to other Courts, it has generally been held that the test for reasonability and rationality as well as proportionality are some of the tests to be used to determine whether a law meets the muster of a higher law. In saying so, it is of course beyond peradventure to state that Partner States by dint of Article 8(2) of the Treaty are obligated to enact national laws to give effect to the Treaty and to that extent, the Treaty is superior law."**

113. Upon the reading of Part VI of the Act, it is plainly evident that the impugned Regulation fixes fines proportionate to the gravity of the offence. Regulation 45(3) reads:

> **"Upon determination and pursuant to subregulation (2), the Content Committee may take one or more of the following actions:**
>
> **...**
>
> **(d) impose a fine in accordance with the Act."**

114. We see nothing disproportionate in the impugned provision. Thus, it is our considered view that the test of proportionally is fully met.

Regulation 47

115. With respect to the Regulation 47, Counsel for the Applicant reproaches it to be unclear and vague as it does not clarify "what amounts to a necessary rights clearance."

116. As mentioned above, Counsel Majanjara is of the opinion that the concepts of "necessary rights clearance in respect of the content being broadcasted" within the Regulation is too broad and unclear and hence subject to subjective interpretations.

117. For the Applicant, the provision which imposes duty to media houses need to be clear on the duties, to avoid interference with freedom of expression as well as discriminatory enforcement of the law. Equally, the Applicant averred that the Regulation is vague and unclear for lack of definition of the terms "licensee by subscription."

118. Opposing the Applicant's Counsel submissions on Regulation 47, Counsel Kinyasi averred that the issue of 'clearance of right' was previously provided in the 2018 Regulations. That, the only change was the issue of providing evidence in the previous principal Regulations, where one was supposed to bring evidence to the authority that they have obtained clearance of right. She explained that with the amendment brought in 2020, the Regulation provided that a licensee by subscription shall ensure it has obtained the 'necessary rights clearance in respect of the content being broadcasted.'

119. Additionally, Ms Kinyasi clarified that 'Clearance of rights' is a permission that one gets in order to use another person's content for intellectual property's protection purpose.

120. For clarity it is worth reproducing the amended and the new Regulations.

121. The amended Regulation reads:

> **"47. A licensee by subscription shall submit to the Authority evidence that it has obtained the necessary rights clearances in respect of the channels being broadcast from the satellite, cable networks and other platform of new technology."**

122. On the other hand, the impugned Regulation provides as follows:

> **"47. A licensee by subscription shall ensure it has obtained the necessary rights clearances in respect of the content being broadcasted."**

123. Applying the first of the three tier-test, namely the test of clarity, the Court must assess if the Regulation meets the standards as set out by this Court in the cases of **Burundi Journalists Union** (*supra*) and **Media Council of Tanzania & 2 Others** (*supra*) among others.

124. Before we pronounce ourself on the instant tier-test, we deem it essential to highlight that the mandatory "**necessary rights clearance"** was provided for in the Regulations of 2018.

125. Upon reading and comparison of the two texts, the only notable change relates to the issue of providing evidence. Whereas in the original Regulations the licensee by subscription was obliged to provide to "**the Authority evidence that it has obtained the necessary rights clearances ...**", in the amended Regulations, a licensee by subscription has only to ensure it has obtained the

necessary rights clearance in respect of the content being broadcasted.

126. We are persuaded by the Respondent's submissions that the "*necessary clearance of right*" differs depending upon the content a licensee wants to broadcast.

127. Once again, we agree with the Respondent's submissions that it is logically impossible to specify all kinds of clearance of rights, which necessarily depend upon the type of permission the licensee needs to have. This meets the definition given by *Black's Law Dictionary, 10th Edition, p. 1192,* where the adjective "necessary" is defined as "That is needed for some purpose or reason."

128. We now evaluate the compliance of Regulation 47 with the three -part test.

129. In our view, the provisions of the impugned Regulation 47 meet the test of clarity as required for each law. It is provided in a law and its language is clear. Its importance to society is also unquestionable.

130. In addition, Regulation 47 fulfils the requirement of proportionality as it aims at protecting intellectual property rights.

131. Counsel for the Applicant also reproached Regulation 47 for failing to provide for a definition of the terms "*License by subscription.*"

132. Upon perusing the Reference and the Affidavits in support of the same, it appears that the question regarding the definition of the

words "*License by subscription*" was not raised at that time and the Reference was not subsequently amended.

133. Parties are allowed to amend their Pleadings. The Applicant could have applied to amend his Reference by leave of the Court or by the Consent of the Respondent in order to impugn the new amendment. Rule 48 of the Rules provides that:

> **"For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any pleading, a party may amend its pleading."**

134. Similarly, Rule 51(2)(c) of the Rules prescribes that:

> **"The Court may, in the following circumstances, grant such leave to amend notwithstanding that any relevant period of limitation current at the date of instituting the case has expired, if it thinks it is just so to do: -**
>
> **...**
>
> **(c) where the amendment adds or substitutes a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed by the party seeking leave in the same case."**

135. In addition, leave to amend can be granted in an oral or otherwise informal hearing as was held in **Paul John Mhozya vs Attorney General of the United Republic of Tanzania, EACJ Application No. 13 of 2016**.

136. It is our considered view that due process is a fundamental principle in the judicial process before any court. It ensures fairness and justice. It follows that any party to a judicial proceeding has a fundamental right to be informed of a proceeding against him and to consider, challenge or contradict any evidence in that proceeding in line with the principle of natural justice.

137. In **Alice Nijimbere vs The Secretary General of the East African Community, EACJ Reference No. 7 of 2015,** this Court stated as follows:

> ***"...where a matter is not pleaded and the other Party has no opportunity to respond to it, the ends of Justice would not be met if a court were to determine it."***

138. In the same line, the Appellate Division upheld that:

> ***"The claim for damages was raised for the first time by the Appellant in her final submissions, and no amendment was affected to the pleadings. It is trite law that parties are bound by their pleadings and that a Court has no jurisdiction to grant a relief not specifically pleaded. The Trial Court rightly held that the claim was unprocedural introduced and where a matter is not pleaded and the other if a court were to determine it."*** *[See* ***Alice Nijimbere vs The Secretary General of the East African Community, EACJ Appeal No. 1 of 2016****].*

139. The rationale of this position of the Court is well stated in **British American Tobacco (U) Ltd vs The Attorney General of Uganda, EACJ Reference No. 7 of 2017.**

"The object of pleadings is of course to ensure that both parties shall know what the points in issue between them are so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent."

140. The Court went on to state that **"It is a well-established rule of procedure that parties to a dispute are bound by their pleadings."**

141. Similarly, in the case of **Hon. Dr Margaret Zziwa vs The Secretary General of the East African Community, EACJ Appeal 2 of 2017,** this Court upheld that:

> **"Now, it is trite law that parties are bound by their pleadings, that no relief will be granted by a court unless it is founded on the pleadings, and that it is not open to the Court to base a decision on an un- pleaded issue unless it appears from the course followed at the trial that the un-pleaded issue had been left to the Court for decision in the matter at hand."**

142. In light of the above principle and the jurisprudence of this Court, we decline to make any determination on the issue not raised in the Reference.

ISSUE 2: What remedies are the Parties entitled to

143. The Applicant has prayed for declarations and orders as reproduced hereinabove in the Applicant's Case.

144. On the other hand, the Respondent countered the prayers and asked for the dismissal of the Reference with costs for want of merits.

145. Considering our findings on Issue 1, that the Respondent did not violate the principles enshrined in Articles 6(d), 7(2) and 8(1)(c), the declaration and orders sought in the Reference cannot be granted.

146. As to costs, Rule 127(1) of the Court's Rules provides that "**Costs in any proceedings shall follow the event unless the Court for good reasons otherwise orders**."

147. After considering the subject matter of this Reference, it appears to the Court that the same was filed for public interest.

148. Consequently, we depart from the general rule on costs and exercise our discretion to order that each Party shall bear its own costs.

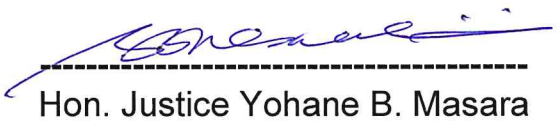
G. CONCLUSION

149. For reasons set out above, we dismiss the Reference for want of merit.

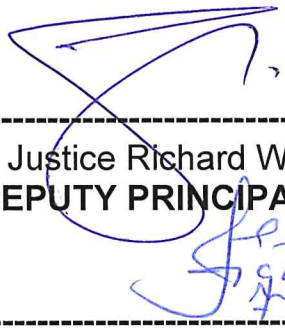
150. Each Party shall bear their own costs.

151. It is so ordered.

Dated, signed and delivered at Arusha this 31st Day of March 2026.



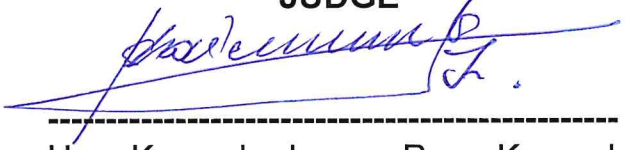
Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE



Hon. Justice Richard Wabwire Wejuli
DEPUTY PRINCIPAL JUDGE

Hon. Justice Richard Muhumuza
JUDGE

Hon. Justice Dr Leonard Gacuko
JUDGE



Hon. Kayembe Ignace Rene Kasanda
JUDGE