



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



(Coram: Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J;
Fakihi Jundu, J; & Audace Ngiye, J)

REFERENCE NO. 7 OF 2016

BETWEEN

THE MANAGING EDITOR, MSETO.....1ST APPLICANT

HALI HALISI PUBLISHERS LTD.....2ND APPLICANT

AND

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

21ST JUNE, 2018

JUDGMENT OF THE COURT

A. INTRODUCTION

1. Before this Honourable Court for its determination is a Reference by the 1st and 2nd Applicants dated and filed on 7th October, 2016. The Reference is brought under Articles 6(d), 7(2), 8(1)(c), 27(1) and 30(1) of the Treaty for the Establishment of the East African Community, as well as Rule 24 of the East African Court of Justice Rules of Procedure, 2013. The 1st Applicant describes himself as the editor for a weekly local Tanzanian newspaper, *Mseto*, duly registered under Tanzanian law as evidenced in the certificate of incorporation dated 13th April, 2013.
2. The 2nd Applicant describes itself as the publisher of *Mseto* and a legal person under Tanzanian law, duly registered as such and evidenced in the certificate of incorporation issued on 3rd January, 2005.
3. For purposes of this Reference, the 1st and 2nd Applicants shall hereinafter be referred to collectively as the *Applicants* and are represented by Fulgence Thomas Massawe and Jeremiah Mtobeysa, Advocates, and their address for service is given as Legal and Human Rights Centre, Legal Aid Clinic, Kinondoni, Justice Mwalusanya Isere Street, P.O Box 79633, Dar Es Salaam, Tanzania.
4. The Respondent is the Attorney General of the United Republic of Tanzania and his address for purpose of service is given as No.20, Barabara ya Kivukoni, P.O Box 11492 Dar Es Salaam, Tanzania.

B. THE APPLICANTS' CASE

5. The Reference relates to an order issued by the Tanzanian Minister of Information, Youth, Culture & Sports (hereinafter the Minister) dated 10th August, 2016. The order, issued pursuant to the provisions of Section 25(1) of the Newspapers Act, 1979, is alleged to have had the effect of directing the Applicants to cease publication of the newspaper, *Mseto*, for a period of three (3) years. It was further alleged that no reasons were proffered for the order by the Minister but in a letter dated 11th August, 2016 in reference to the previous order issued, the Office of the Registrar of Newspapers informed the Applicants that they were prohibited from publishing or disseminating information by any means, including the internet. It is alleged that no reasons for this further directive were also given.
6. The Applicants in the above context thus contend that while the then Section 25(1) of the Newspapers, Act gave the Minister unfettered discretion to prohibit the publication of newspapers nonetheless, the order issued pursuant thereto violates the Respondent's obligations under the Treaty for the Establishment of the East African Community (hereinafter 'the Treaty').
7. The Applicants in addition claim that the order issued specifically violates the provisions of Articles 6(d), 7(2) and 8(1)(c) of the Treaty as it unreasonably restricts press freedom and violates the fundamental and operational principles codified in the aforementioned provisions of the Treaty, which include accountability, transparency, good governance, rule of law and democracy.

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8. Further, it is contended that the said order violates the Applicants' right to freedom of expression, and that the Respondent has failed in its obligations, pursuant to the provisions of Articles 6(d) and 7(2) of the Treaty, to promote, recognize and protect human and peoples' rights in accordance with the provision of the African Charter on Human and Peoples' Rights (hereinafter the African Charter'), as well as abiding by the universally accepted standards of human rights, which include the right to freedom of expression guaranteed under Article 9 of the said Charter.
9. The Applicants furthermore contend that the order issued by the Minister is a restriction of press freedom and a violation of their right to freedom of expression, and therefore the Respondent has failed in his duty and obligation to abstain from any commission, act or omission likely to jeopardize the implementation of the fundamental principles enunciated in the Treaty under Article 8(1)(c) thereof.
10. The Applicants have added that while the then Section 25 of the Newspapers Act gave the Minister unfettered discretion to issue orders directing the cessation of publication of newspapers with the sanction of and/or a ban with hefty fines imprisonment for those failing to comply with the orders; the provision violates the right to receive and impart information, which adversely impacts on press freedom and freedom of expression, which are key components of democracy and indispensable to accountability and transparency.

11. For the above reasons, the Applicants, pursuant to Articles 27(1), 30 and 35 of the Treaty and Rules 68 and 69 of the Rules of this Court, beseech this Court to *inter alia*:

- i. Declare that the order restricts press freedom and thereby constitutes a violation of the Respondent's obligations under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d) and 7(2) of the Treaty;*
- ii. Declare that the order violates the Applicants' right to freedom of expression and thereby constitutes a violation of the Respondent's obligation under the Treaty to recognize, promote and protect human and peoples' rights and to abide by the universally accepted human rights standards as specified in Articles 6(d) and 7(2) of the Treaty;*
- iii. Declare that Section 25(1) of the Newspapers Act has a chilling effect on the rights to receive and impart information as well as the freedom of the press, which violates the fundamental and operational principles codified in Articles 6(d) and 7(2) of the Treaty;*
- iv. Order the Respondent State to annul the order and allow the Applicants to resume publication of Mseto with immediate effect;*
- v. Order the Respondent State to make reparations to the Applicants consisting of, among others, compensation for lost profits;*

vi. Order the Respondent State to cease the application of Section 25(1) of the Newspaper Act and repeal or amend the Newspaper Act to bring it in conformity with the fundamental and operational principles codified in Articles 6(d) and 7(2) of the Treaty;

vii. Order that costs of the Reference be met by the Respondent State; and

viii. Any other relief that the Court deems appropriate.

12. The Reference is supported by the Affidavits of Saed Kubenea sworn on 7th October, 2016 and 4th August, 2017, respectively. The Applicants also filed their submissions dated 28th August, 2017 in furtherance of their stated position as regards the issue in context.

C. THE RESPONDENT'S CASE

13. On its part, the Respondent refuted the allegations made by the Applicants in the Reference through his Response to the Reference dated and filed on 24th November, 2016. Further, in a Notice of Preliminary Objection filed on the same day, the Respondent stated that the Reference as filed was misconceived, incompetent and bad in law, and frivolous, vexatious and an abuse of the process of this Court. It was further alleged that the Reference contravened the settled principles of international law to the effect that local remedies available to the Applicants were not exhausted before invoking the jurisdiction of or seeking redress from this Court.

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14. The Respondent further contends that the Minister's order to cease publication of *Mseto* under Gazette Notice No.242 of 10th August, 2016 and purportedly made under the then Section 25(1) of the Newspapers Act, was lawful and that reasons for the said order are provided in that Section contrary to the allegations made by the Applicants that no reasons for the orders were given.
15. It is also the Respondent's case that the order by the Minister pursuant to Section 25(1) of the Newspapers Act aforesaid, was an order issued under a provision of law that was in accordance with international human rights instruments. Further, that the order was lawful and in compliance with the provisions of the Treaty, and that the Newspapers Act is also a valid Act passed by the National Assembly of the United Republic of Tanzania in compliance with Articles 6(d) and 7(2) of the Treaty.
16. The Respondent argued further that while the order issued by the Minister was in accordance with the provisions of the Treaty, freedom of expression is in any event limited as provided under Article 19(3) of the International Covenant on Cultural and Political Rights (ICCPR), as well as Article 9 of the African Charter and the penalties imposed under Section 25 of the Newspapers Act are reasonable and proportionate contrary to the Applicants' contentions.
17. For the above reasons, the Respondent seeks orders that:
- i. The Court be pleased to order that there are adequate, satisfactory and effective legal remedies in Tanzania which the Applicants are required to pursue;***

ii. The Court be pleased to dismiss the Reference in its entirety; and

iii. The costs of the Reference be borne by the Applicants.

18. The Response to the Reference was supported by the Affidavit of Nape Moses Nnauye, the Minister aforesaid deposed on 23rd November, 2016 and filed on 24th November, 2016. The Respondent on 5th May, 2018 also lodged its submissions dated the same day in support of its case as summarized above.

D. SCHEDULING CONFERENCE

19. At the Scheduling Conference held on 22nd June, 2017, it was agreed by the Parties that the issues for determination by this Court were the following:

i. Whether the Court has the jurisdiction to hear and determine the Reference;

ii. Whether the order of the Minister of Information, Culture, Arts and Sports dated 10th August, 2016 violates Articles 6(d), 7(2) and 8(1)(c) of the Treaty;

iii. Whether the order by the Minister directing Mseto to cease publication restricts press freedom, the right to freedom of expression and the right to receive and impart information. If so, whether press freedom, the right to freedom of expression and the right to receive and impart information is absolute; and

iv. What reliefs the parties are entitled to.

E. DETERMINATION

20. At the hearing on 23rd March, 2018, several of the prayers set out in the Reference were abandoned by the parties. The first was a challenge on the jurisdiction of this Court to hear and determine the instant Reference. In that regard, the Respondent conceded that this Court has the jurisdiction to hear and determine the matter and there was no need for the exhaustion of local remedies as had been urged in his Notice of Preliminary Objection and submissions, and further that the Reference was not frivolous or vexatious as he had earlier contended.

21. The issue raised in prayer No.(v) of the Reference on reparations, which included a prayer for *inter alia* compensation for lost profits was also abandoned as the Applicants conceded that they had not supplied or furnished the Court with any material to prove such a claim or the specific damages also claimed. The Applicant conceded in that regard that the submissions made to the Court on these issues were based on presuppositions and assumptions which the Court could not rely upon to make a determination of the same, and therefore, decided to abandon the whole prayer.

22. With regard to the prayers seeking a declaration that Section 25(1) of the then Newspapers Act violates the fundamental and operational principles of Articles 6(d) and 7(2) of the Treaty, and further, that the impugned Section should cease being applied and be repealed and/or amended, the parties conceded that the said provision had been repealed by new statutory provisions, namely, the Media Service Act No. 12 of 2016, and that therefore the

prayer had been overtaken by events and was consequently abandoned.

23. Flowing from the above, only three (3) issues remain to be considered by the Court to wit:

i. Whether the order of the Minister of Information, Culture, Arts and Sports dated 10th August, 2016 violates Articles 6(d), 7(2) and 8(1)(c) of the Treaty;

ii. Whether the order of the Minister directing Mseto to cease publication restricts press freedom, the right to freedom of expression and the right to receive and impart information. If so, whether press freedom, the right of freedom of expression and the right to receive and impart information is absolute;

iii. [An] Order [directing] the Respondent State to annul the order and allow the Applicants to resume publication of Mseto with immediate effect.

24. We shall in their context now turn to the submissions made by Parties on these issues which as can be seen are connected and the submissions were indeed made jointly on all the issues.

(a) The Applicants' Submissions

25. The Applicants have urged that the order issued by the Minister not only restricted press freedom, but also unjustifiably infringed upon the right to freedom of expression, which in turn violated the fundamental and operational principles under Articles 6(d), 7(2) and 8(1)(c) of the Treaty. It was further submitted that the United Republic of Tanzania has failed in its obligations to abide by and

uphold the principles of good governance, democracy, the rule of law, accountability, transparency, social justice and the recognition, promotion and protection of peoples' and human rights as is its obligation under the Treaty.

26. Further, the Applicants submitted that international law, and in particular Article 19 of the International Covenant on Civil and Political Rights (ICCPR), guarantees and protects the rights to press freedom and freedom of expression. It was also argued that Article 9 of African Charter also guarantees freedom of expression, and that every individual should have the right to receive information. Although they agreed that these rights were not absolute, they added that the impugned order amounted to an unjustifiable restriction of these rights and freedoms contrary to Article 19 of the ICCPR and Article 9 of the African Charter.

27. The Applicants furthermore submitted that the order by the Minister failed to meet the threshold for restriction of the freedom of expression and press freedom as was set out by this Court in **Reference No. 7 of 2013 Burundi Journalists Union vs The Attorney General of the Republic of Burundi** where the Court established that any action restricting freedom of expression must be provided by law; that the objective or purpose of the law or action was pressing and substantial and that the law was proportionate relative to the aim that it sought to achieve. They thus argued that although the impugned order purportedly had legal basis under Section 25(1) of the Newspapers Act, it failed to meet the requisite quality of law as demanded by Article 19 of the ICCPR and Article 9 of the African Charter.

28. It was also argued by the Applicants that the law did not give “*sufficient precision*” to allow a person to foresee with any degree of certainty what publications would be prohibited by the Minister, and that concepts such as good order, peace and public interest were not defined under the Act and were therefore left to the unfettered discretion of the Minister to impose a ban of a publication based on a subjective opinion and his sole unrestricted judgment. Further, they contended that any restriction on freedom of expression should not be made unless there was a real risk of harm to a legitimate interest, and that there ought to be a close causal link between the risk of harm and the right of expression sought to be limited.

29. The Applicants have in addition alluded to the fact that the order was unnecessary and disproportionate in a democratic society because it was a severe and unjustifiable form of prior restraint and that due consideration and regard on the nature of the expression to be restrained was not given. Reference in that regard was made to **Application No. 13585/88 Observer & Guardian v United Kingdom (1991)** where the European Court of Human Rights stated that there was a need for a most careful scrutiny on the inherent dangers of prior restraint in so far as the press is concerned.

30. In conclusion, the Applicants submitted that the order issued by the Minister was not founded in law as provided in Article 19 of the ICCPR and Article 9 of the African Charter, and that it did not pursue any of the legitimate aims under Article 19(3) of the ICCPR as well as Article 27(2) of the African Charter, and that it therefore amounted to an unnecessary and disproportionate restriction on

the freedom of expression and press freedom. That in the circumstances Articles 6(d), 7(2) and 8(2) of the Treaty were also violated hence the prayers in the Reference.

(b) The Respondent's Submissions

31. The Respondent submitted that the order issued by the Minister under the repealed Section 25(1) of the Newspapers Act through Notice No. 242 of 10th August, 2016 did not violate the fundamental and operational principles under Articles 6(d) and 7(2) of the Treaty as alleged, and further, that the order was lawful and complied with the tenets and freedoms enshrined in the Constitution of the United Republic of Tanzania.
32. The Respondent also argued that the Applicants had been afforded the right of response and the right to be heard through a letter dated 9th October, 2016 that had been sent to them from the Registrar of Newspapers before the order was issued by the Minister banning and ordering cessation of the publication of *Mseto*. Further, it was argued that the restriction was in line with the provisions of Article 19(3) of the ICCPR, in that, the restriction was provided by law and was necessary.
33. It was also submitted on behalf of the Respondent that the right to freedom of expression and information is provided under Article 18 of the Constitution of the Republic of Tanzania and that the repealed Sections 25(1) of the Newspapers Act, which provided for the restriction of the right to freedom of expression, was anchored in Article 30(2) of the said Constitution and that the order was valid so long as it satisfied the proportionality test as enunciated in **Director of Public Prosecutions vs. Daudi Pete (1993) TLR 22.**

In that case, the Court held that because of the collective rights of the society, it was common to find limitations to the basic rights of the individual in practically every society. Reference was also made to, **Julius Ndyanabo vs. Attorney General (2004) TLR 14** in that regard.

34. The Respondent in addition contended that the repealed Section 25(1) of the Newspapers Act meets the requirements of Article 19(3) of the ICCPR and Article 9 of the African Charter in that the restrictions had a legal basis in statute and that the statute itself meets the requirement for quality of law. It was also submitted that the “*sufficient precision*” criteria was met by Section 25(1) of the Newspapers Act aforesaid in that it provided sufficient guidance to enable the public ascertain what sorts of expressions were properly restricted, and those that were not.
35. Further, it was argued that the provision granted a control over the scope of the ban and that the same was clear on what every newspaper should publish that is, it should not prejudice public interest and/or breach of peace and good order. The Respondent thus contended that this was in tandem with the provisions of Article 19(3) of the ICCPR and Article 9 of the African Charter.
36. The Respondent also submitted that the impugned order was issued pursuant to a legitimate objective which was to maintain peace and tranquility in society, as well as to protect the Constitutional rights of the individual in conformity with Article 19(3) of the ICCPR and Article 27(2) of the African Charter. It was thus argued that the order was made by the Minister due to the inciting and false news published by *Mseto* in its Issue No. 480 of

4th -10th August, 2016 which seemingly was intended to defame the President of the United Republic of Tanzania. That despite the Editor of the newspaper being requested through several correspondences to provide credible evidence of the news in the publication, he failed to produce such evidence and therefore the publication was deemed as inciting and aimed at causing discontent amongst the people of the United Republic of Tanzania. The Respondent thus submitted that the Reference was not merited and ought to be dismissed with costs.

(c) Findings on issue No.(ii): Whether the right to press freedom, the right of freedom of expression and to receive and impart information were absolute and on issue No.(i); Whether the Minister's order violated Articles 6(d), 7(2) and 8(1) of the Treaty:

37. From the submissions above, both issues as set out may be surmised into one issue as they both have a point of convergence on the violation of press freedom and the right to freedom of expression and freedom to receive and disseminate information within the context of the Treaty. It has in that regard been argued that the order issued by the Minister dated 10th August, 2016 violates the provisions of Articles 6(d), 7(2) and 8(1)(c) of the Treaty. We shall in the circumstances and as earlier stated address both issues as one.
38. We note that the impugned order made under Government Notice No.242 published on 10th August,2016 purportedly pursuant to Section 25(1) of the Newspaper Act read as follows:

“The newspaper title “MSETO” shall cease publication including any electronic communication as per the Electronic and Postal Communications Act for the duration of thirty-six months with effect from 10th August, 2016.”

39. Section 25(1) of the Newspapers Act (now repealed) read thus:

“Where the Minister is of the opinion that it is in the public interest, or in the interest of peace and good order so to do, he may, by order in the Gazette, direct that the newspaper named in the order shall cease publication as from the date (hereinafter referred to as “the effective date”) specified in the order.” (Emphasis added).

40. Under the provisions of Section 25(1) therefore, while the Minister had the power and authority to issue an order to cease the publication of any newspaper, the parameters upon which such an order may be issued are clearly spelt out and are; (a) public interest, (b) public peace and (c) good order. It is this order that the Applicants have contended was *inter alia* in violation of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

41. While Section 25(1) was later repealed by the Media Service Act No.12 of 2016, the order banning the publication of *Mseto* is still in force and that order having been gazetted and made under that Section, it is to it that we must advert to determine whether that action was in violation of the Treaty.

42. For avoidance of doubt, Article 6(d) of the Treaty reads as follows:

“The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:-

(a) ...

(b) ...

(c) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.”

43. Furthermore, Article 7(2) of the Treaty states:

“The Partner States undertake to abide by the principles of good governance, including the adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.” (Emphasis added).

44. Under Article 6(d) of the Treaty, reference is made to the African Charter on Human and Peoples’ Rights which in Article 9(1) & (2) thereof, provides that:

i. Every individual shall have the right to receive information;

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ii. Every individual shall have the right to express and disseminate his opinions within the law. (Emphasis added).

45. The argument for the alleged violation of rights also hinges upon Article 8(1)(c) of the Treaty which reads:

“The Partner State shall-

(a) Abstain from any measures likely to prejudice the achievement of those objectives or the implementation of the provisions of this treaty.

(b)

***(c)*”**

46. The provisions of Articles 6(d), 7(2) and 8(1)(c) of the Treaty, considered alongside Article 9(1) & (2) of the African Charter thus, clearly indicate that the rights of freedom of expression, and indeed press freedom cumulating from the freedom of expression (provided under the provisions of Article 9(1) & (2) of the ACHPR), are guaranteed, but only within the strictures and/or confines of the law. It is also the obligation and the duty of the Partner States to ensure that any laws promulgated by them are not prejudicial to the achievement of good governance, which includes the promotion, protection and recognition of the fundamental human rights and freedoms.

47. In the above context, in **Burundi Journalists Union v The Attorney General of the Republic of Burundi** (supra), this Court, in determining the issue of the right to freedom of expression and press freedom stated thus:

“We reiterate the above holdings and further, in the present Reference, the substantive issue to be addressed is the freedom of the press and freedom of expression in the context of Articles 6(d) and 7(2) as read with the Press Law. In that regard, there is no doubt that freedom of the press and freedom of expression is an essential component of democracy.” (Emphasis added).

48. The Court further held;

“We are particularly persuaded that the holding in Print Media South Africa (supra) is pertinent to this Reference. In that case, Van der Westhuizen J. held that “freedom of expression lies at the heart of democracy” and went on to state as follows:-

“.....It is closely linked to the right to human dignity and helps to realize several other rights and freedoms. Being able to speak out, to educate, to sing and to protest, be it through waving posters or dancing, is an important tool to challenge discrimination, poverty and oppression. This Court has emphasized the importance of freedom of expression as the lifeblood of an open and democratic society.”

49. Reference was also made to the Supreme Court of India decision in Ramesh Thappar v State of Madras 1950 SCR 594, where that Court stated thus:

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“Freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion, no public education, so essential for proper functioning of the processes of popular government, is possible.”

50. It is thus, not in doubt that the rights to freedom of expression and free press run in tandem, and as rights guaranteed and also limited under law, may nonetheless also be described as human and democratic rights and freedoms which Partner States should aspire to protect and promote through the enactment of national laws that achieve the objectives of good governance, more so the adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities and gender equality.

51. The Applicants and the Respondents, with that background in mind, both agree that the rights to freedom of expression and press freedom while important are not absolute, and that restrictions are sometimes made to the exercise of these freedoms especially with regards to the press. What then is the law in Tanzania on these rights? Freedom of expression is specifically guaranteed and provided for under Article 18 of the Constitution of the United Republic of Tanzania. At Article 18(1), it is thus, provided that:

“Every person-

(1) has a freedom of opinion and expression of his ideas; has the right to seek; receive and or disseminate information in any form regardless of national

boundaries; and has the freedom to communicate and freedom with protection from interference from his communications.

(2)” (Emphasis added);

52. The limitation to these rights are provided for under Article 30(2) of the said Constitution of Tanzania, and the delimitation of the freedom of expression and the right to seek, receive and disseminate information are specifically made in these 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 purpose of:-

(a) ensuring that the rights and freedom 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 defense, 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 in 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 other or the privacy of persons involved in any Court proceedings, prohibiting the 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 the private societies and organizations in the country; or enabling any other thing to be done which promotes or preserves the national interest in general.”

53. In that context, the repealed Section 25(1) of the Newspapers Act provided that an order issued by the Minister under that Section could be made in attaining and/or in accordance with the public interest, or public peace and good order. This provision would *prima facie*, be in tandem and in accordance with the provisions of Article 18(1), as read with Article 30(2) of the Constitution of Tanzania. And it is the Respondent's position therefore that in the protection of public interest and good order, the Minister issued an order of cessation of publication of *Mseto* in accordance with and in exercise of his mandate and obligations under the Act. The underlying principle in determining whether that defence is acceptable and lawful however is that any decisions made should not unjustifiably restrict the right to freedom of expression, or press freedom, and any restraint or restriction should be made on the basis of existing law and with the intention to attain a legitimate objective or aim.

54. In stating so, we are alive to the persuasive approach taken by the African Commission on Human and Peoples' Rights in Communications 140/94 & 145/95, Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria, Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights where it was stated:

“Freedom of expression is a basic human right, vital to an individual’s personal development and political consciousness, and to his participation in the conduct of public affairs in his country. Under the African Charter, this right comprises the right to receive information and to express one’s opinion. The proscription of specific newspapers by name and the sealing of their premises, without a hearing at which they could defend themselves, or any accusation of wrongdoing, legal or otherwise, amount to harassment of the press. Such actions not only have the effect of hindering the directly affected persons in disseminating their opinions, but also possesses the immediate risk that journalists and newspapers not yet affected by any of the decree will subject themselves to self-censorship in order to be allowed to carry on their work.” (Emphasis added)

55. We agree with the above statement and would only add that the principles in Article 6(d), 7(2) and 8(1) of the Treaty including those on human rights certainly demand that proscription of newspapers should be done lawfully and not whimsically or flippantly. In that context, we note that the Respondent, through the Registrar of Newspapers, had written to the Applicants on 14th September,

2012 and 27th August, 2012 and informed them that their publication of *Mseto* was against their license and stated that the Applicants were only supposed to publish sports news and no other kind of news. The Registrar had also informed the Applicants that failure to comply and conform with the terms of their license would lead to legal action being taken against them. The Applicants however continued publishing more than sports news and it seems that between 2012 and 2016, no adverse action was taken against them.

56. On 8th August, 2016, four or so years after the 2012 communication, the Registrar then wrote to the Applicants with regard to Publication No. 480 of 4th – 10th August, 2016, seeking clarification and information relating to a particular news item published therein. For avoidance of doubt, the item was headed "*Waziri amchafua JPM*" ("Minister soils JPM"). The news item was to the effect that one Engineer Edwin Ngonyani, an Assistant Minister in President John Pombe Magufuli's (JPM's) government had taken bribes from certain persons and entities in a bid to raise funds for President Magufuli's election campaigns.

57. On 9th August, 2016, the Applicants responded to the letter by stating that the news item was published to safeguard the image of the President of the United Republic of Tanzania and that of his office and that in their view, they had committed no illegality. The order for ceasing publication was then issued by the Minister in a letter dated 11th August, 2016 (the order is dated 10th August, 2016).

58. The question that arises therefore is whether the Minister and Registrar of Newspapers had given the Applicants ample opportunity to defend their publications since 2012, and whether the Applicants had allegedly failed to comply with the directive issued on 8th August, 2016, and further, whether the Minister, in exercise of his powers under the repealed Section 25(1) of the Newspaper Act and vide Government Notice No, 242 of 10th August, 2016, acted reasonably, rationally and proportionately when he ordered that the Applicants should cease publication of the newspaper *Mseto* for a period of thirty-six (36) months.

59. As stated elsewhere above, and parties agreed on this point, like any other rights and freedoms, the right to freedom of expression and press freedom are not absolute. Indeed under Article 19(3) of the ICCPR, it is provided that restrictions on the rights to press freedom and freedom of expression can be imposed but only for the purpose of respecting the rights or reputation of others, or protecting national security, public order, public health or public morals. This is similar to the provisions of Article 27(2) of the African Charter which provides that freedom of expression and press freedom may only be restricted to ensure that the right is exercised with due regard to the rights of others, collective security, morality and common interest. In addition, for comparative purposes only, under Article 10(1) of the European Convention on Human Rights (ECHR), it is provided that;

“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 a public authority and regardless of

frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.” (Emphasis added).

60. Further, pursuant to Article 10(2) of the same Convention, the limitation of the right to freedom of expression and any other unreasonable delimitations to the exercise of this right, may be deemed undemocratic, an affront to the said freedoms and an abuse of justice and principles of good governance in a democratic society.

61. In addressing the issue at hand, we have also taken into account the decision in **Julius Ndyababo v Attorney General** (supra), where the Court held that:

“There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and moral of the community...personal freedoms and rights must necessarily have limits, for as Learned Hand also rightly remarked in his eloquent speech on the Spirit of Liberty, cited by Khanna J in his judgment on His Holiness Kesavananda Bharati Sripadanagalavaru vs. State of Kerala & Another [1973] Supp. SCR 1: ‘a society in which men recognize no check upon their freedom soon

becomes a society where freedom is the possession of only a savage few. (Emphasis added).

62. The provisions of Articles 19(3) of the ICCPR and 27(2) of the African Charter are contextually similar to the provisions of Article 30(2) of the Constitution of the United Republic of Tanzania. Under Article 30(2) of the said Constitution, any existing law is not rendered unlawful if its intent and purpose is to ensure that the rights and interests of other people or the interest of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals. In essence therefore, any law that may be deemed as derogative or restrictive of the basic rights and freedoms of individuals may be enacted or enforced if the same serves a legitimate purpose and is aimed at protecting the society.

63. The same limitation for comparative purposes only is to be found in Article 10(2) of the ECHR, and for avoidance of doubt, it provides that:

“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, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” (Emphasis added).

64. The caveat on careful and lawful actions as a rationale for the delimitation of the right to freedom of expression and press freedom was however succinctly addressed by this Court in Burundi Journalists Union v The Attorney General of the Republic of Burundi (supra) which made reference to High Court Petition No. 628 of 2014 CORD v The Republic of Kenya & Others where the High Court of Kenya stated as follows on the rights to press freedom and freedom of expression;

“It may be asked; why is it necessary to protect freedom of expression, and by extension, freedom of the media. In General Comment No. 34 (CCPR/C/GC/34) on the provision of Article 19 of the ICCPR, the United Nations Human Rights Committee emphasizes the close inter-linkage between the right of freedom of expression and the enjoyment of other rights...[The] importance of the freedom of expression and of the media has been considered in various jurisdictions, and such decisions offer some guidance on why the freedom is considered important in a free and democratic society. In Charles Onyango-Obbo & Another v Attorney General Constitutional Appeal No. 2 of 2002, the Supreme Court of Uganda (per Mulenga, SCJ) stated that;

‘Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with JJ Rousseau’s version of the Social Contract theory. In brief, the theory is to the effect that the pre-social human agreed to surrender their respective

individual freedom of action, in order to secure mutual protection, and that consequently, the raison detre of the State is to provide protection to the individual citizens. In that regard, the State has the duty to facilitate and enhance the individual's self-fulfillment and advancement, recognizing the individual's rights as inherent in humanity... [Protection] of the fundamental human rights therefore, is a primary objective of every democratic Constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance' (Emphasis added).

65. Contrasting the cited provisions of international treaties and expositions by courts with the fundamental principles as enunciated under Articles 6(2) and 7(d) of the Treaty, this Court in Burundi Journalists Union vs. The Attorney General of the Republic of Burundi (supra), then explicitly held as follows regarding limitations to the rights under consideration:

"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.”

66. Further, a contrast of the provisions of the Treaty and international law, as against national laws as enunciated under Article 8(2) aforesaid, more so on the undertaking to abide by and the maintenance of universally accepted standards of human rights, would lead to the question whether the order made by the Minister on 10th August, 2016 was in conformity with the universally accepted standards of human rights, good governance and rule of law as prescribed in Articles 19(2) of the ICCPR and 9(1) & (2) of the African Charter. As a corollary, the next question is whether the order was issued in contravention of Articles 6(d) and 7(2) of the Treaty and is a violation of the provisions of Article 8(1)(c) thereof.

67. In our view, a further corollary question is whether the order issued by the Minister met the test for reasonability, rationality and proportionality prescribed in **Burundi Journalists Union vs. The Attorney General of Burundi** (supra) in which it was stated that a government should not determine what ideas or information should be placed in the market place and, if it restricts that right, the restriction must be proportionate and reasonable. In answer to that question, it is our view that the Minister's order had the following obvious unreasonable, unlawful and disproportionate anomalies:

- (a) There were no reasons proffered in the order issued on 10th August, 2016 vide Gazette Notice No. 242 as to why Mseto was being shut down and its publication ceased. The order

was also ambiguous and not anchored in any provisions of law and is merely predicated upon the "opinion" of the Minister. In fact Section 25(1) of the Newspapers Act which was later relied upon was mentioned in the heading only;

- (b) The Petitioner was not accorded a reasonable opportunity to respond to the allegations made against it by the Registrar of Newspapers in his letter dated 8th August, 2016. The said letter did not articulate how the article printed by the Applicants violated the provisions of the repealed Section 25(1) of the Newspapers Act, and whether the publication or article was specifically in contravention of public interest, interest of peace and/or good order. Indeed, it is conceded that the demand for an explanation as to the offending news item was served on the Applicants at 4.00 p.m. on 8th August, 2016 for a detailed response to be made by 9.00 a.m. on 9th August 2016 and their response was thereafter purportedly received by the Registrar, transmitted to the Minister who on 10th August 2016 then issued the impugned Order. Such a drastic action less than 36 hours after the initial complaint was made was clearly unreasonable;
- (c) The order was discriminatory in that it violated the principles of freedom of expression and press freedom as enunciated under Articles 18 and 30(2) of the Constitution of the United Republic of Tanzania, by failing to give proper and cogent reasons as to why a duly registered publisher should cease publication of its newspapers;

- (d) The order was made without there being established how the publication of the newspaper specifically violated public interest, interest of the peace and or good order of the people of the United Republic of Tanzania as prescribed under the Constitution and the provisions of the repealed Section 25(1) of the Newspaper Act’;
- (e) Whereas the 2012 correspondence indicated that the Applicants were to publish sports news only, the impugned order made no reference to this issue and therefore the same is presently irrelevant;
- (f) The offending news item related to alleged corruption on the part of Engineer Edwin Ngonyani. The Registrar’s letter of 9th August, 2016 in their regard partly stated as follows: “The office of the Newspapers Registration wants you to verify the intention of publishing such a letter on the Article which mentions the President on power Dr. John Pombe Magufuli and the Deputy Minister of Works, Transportation and Communication, Eng. Edwin Ngonyani.” It is unclear to us why such an article offends Section 25(1) aforesaid and the Respondent was unable to explain this obvious lack of nexus between the mention of the President or Engineer Ngonyani relating to high level corruption.

68. The Respondent having failed to establish how the publication in the *Mseto* newspaper violated the public interest, or the interest of peace and good order of the people, can only lead to the conclusion that the impugned order was made in violation of the right of freedom of expression as elucidated in Article 18(1) of the

Constitution of Tanzania, or as provided for in Articles 19(3) of the ICCPR and 27(2) of the African Charter as a measure of universally accepted human rights standards. The order indeed derogates from the principles of democracy and adherence to the principles of good governance, the rule of law and social justice. Further, the order failed to conform with and adhere to the principles of accountability and transparency. By issuing orders whimsically and which were merely his "*opinions*" and by failing to recognize the right to freedom of expression and press freedom as a basic human right which should be protected, recognized and promoted in accordance with the provisions of the African Charter. the Minister acted unlawfully.

69. In making that finding, we note that the provisions of Articles 6(2) and 7(d) as well as 8(1) the Treaty, as has been reiterated in the cases of **Samuel Mukira Mohochi vs. The Attorney General of Uganda Reference No. 5 of 2011** and **Plaxeda Rugumba vs. The Secretary General of the East African Community** (supra), are binding and not merely aspirational. The provisions are justiciable and create an obligation to every Partner State to respect those sacrosanct principles of good governance, and rule of law which include accountability, transparency and the promotion and protection of democracy. We are also clear in our minds that these principles were violated in the instant case and so find. We further find that whereas the rights to press freedom, to receive and impart information are not absolute, in the present case, the restrictions were unlawful, disproportionate and did not serve any legitimate or lawful purpose.

(d) Findings on Issue No.(iii); Whether the impugned order ought to be annulled and the publication of Mseto resumed:

70. This issue is a consequential one and is dependent on our findings on the previous two issues. Having held, as we have' that the Minister acted in breach of the Treaty, it only follows that an unlawful action must be followed by an order taking the parties to the *status quo ante* as of 9th August, 2016. We therefore find no difficulty in ordering the resumption of the publication of *Mseto* as prayed.

F. CONCLUSION

71. The issues placed before us for determination are matters that required the striking of a balance between the State's obligation to adhere to principles of rule of law and acceptable standards of human rights including press freedom on the one hand and the right to receive and impart information on the part of citizens of Partner State.. Our findings above would have been different had the Minister taken time to connect the expectations of Section 25(1) of the Newspapers Act aforesaid *vis-a-vis* the offending news item in *Mseto*.

72. Section 25(1) quite properly laid down the three criterion i.e. to be used as a basis for a Minister to ban the publication of a newspaper for which public interest, interest of peace and good order. The offending article suggested, with what is called evidence, that Engineer Edwin Ngonyani solicited for and received funds corruptly to fund President Magufuli's election campaigns. By all measures, that is a serious complaint and in a time when the

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scourge of corruption is lagging issue in Africa and the World, newspapers have an obligation to highlight instances of high level corruption. While it is not our place to determine whether the information published was correct or not, a knee jerk reaction to ban a publication, hours after the story hit the news stalls, cannot, in our view, be conduct that is within the parameters of the rule of law and good governance. Worse still, it cannot be, as the Minister suggested, that the President of a Partner State cannot ever be mentioned in newspaper articles. That is the price of democracy and public watch dogs like the press must be allowed to operate freely within lawful boundaries.

73. For as long as no nexus was therefore made between the offending article and the criteria for banning of publications in Section 25(1) aforesaid, this Court can only reach the conclusion that the Minister, he acted unlawfully and in breach of Articles 6(d) 7(2) and 8(1)(c) of the Treaty and we so find.

G. FINAL ORDERS

74. In light of the above, we find that the order issued by the Minister for Information, Culture, Arts and Sports of the United Republic of Tanzania vide Government Gazette No. 242 of 10th August, 2016 violates the provisions of Articles 6(d), 7(2) and 8(1)(c) of the Treaty, and shall issue orders in favour of the Applicant and against the Respondent in the following terms:

(a) It is hereby declared that the order issued by the Minister for Information, Culture, Arts and Sports of the United Republic of Tanzania dated 10th August 2016 vide Gazette Notice No. 242 restricts press freedom and

thereby constitutes a violation of the Respondent's obligation under the Treaty to uphold and protect the principles of democracy, rule of law, accountability, transparency and good governance as specified under Articles 6(d) and 7(2) of the Treaty;

(b) It is also declared that the order issued by the Minister aforesaid violates the right to freedom of expression and constitutes a violation of the Respondent's obligations under the Treaty to promote, recognize and protect human and peoples' rights and to abide by the universally accepted human rights standards as stipulated under Articles 6(d) and 7(2) of the Treaty;

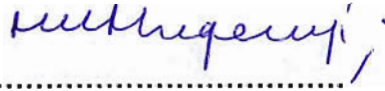
(c) The Minister is hereby ordered to annul the order forthwith and allow the Applicant to resume publication of *Mseto*.

(d) The United Republic of Tanzania shall, in accordance with Article 38(3) of the Treaty take measures, without delay, to implement this Judgment within its internal legal mechanisms and;

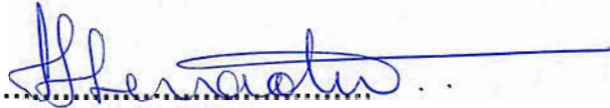
(e) The costs of this Reference shall be borne by the Respondents.

75. Orders accordingly.

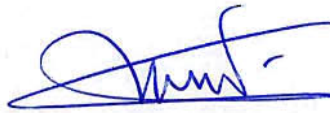
Dated, delivered and signed at Arusha this 21st day of 2018.



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MONICA K. MUGENYI,
PRINCIPAL JUDGE



.....
ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE



.....
FAUSTIN NTEZILYAYO
JUDGE



.....
FAKIHI A. JUNDU
JUDGE



.....
AUDACE NGIYE
JUDGE