

Bukenya Church Ambrose v Attorney General (Miscellaneous Cause No. 13 of 2010) [2021] UGHCCD 71 (7 July 2021)
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- *2. That this honorable court by way of enforcement of the applicant's fundamental freedoms of speech, expression and media do order the lifting or the ban of the Bimeeza.*
- *3. That the cost of this application be awarded to the applicant.*

The Application was supported by an affidavit in support of the Notice of Motion but briefly the grounds are;

- 1. That since the year 2000, beginning with Radio One various radio stations including CBS and Simba has produced a programme known as *Bimeeza* which are open air ex-studio public live broadcasts.
- 2. That the *bimeeza programme* is a public participatory programme where the members of the public are invited to exchange views on various topics including politics, religion, commerce, culture, sports and the like and exchange of views is broadcast live.
- 3. That later other radio stations such as CBS radio started *Bimeeza* programme called *Mambo Bado* and Simba Radio started *Simbawo Akati*.
- 4. That the various codes of conduct strictly prohibit use of inflammatory language and use or threat of use of violence and no single incident of violence resulting from exchange of views during *bimeeza* has ever been reported to any police station.
- 5. That the people who participate in *bimeeza* are doing so in pursuit of their freedoms of speech, expression and media guaranteed in Article 29 (1) (a) of the Constitution.
- 6. That in September 2009, government ordered a ban of the said *Bimeeza*, which ban was communicated to the public by the minister of information, Princess Kabakumba Matsiko via radio and TV which was followed by a press release signed by the Chairperson of the Broadcasting Council.
- 7. That the ban is a breach of the freedoms of expression and media guaranteed in the Constitution and the breach has aggrieved the applicant and all people who participate in the *Bimeeza* and the applicant's action is in public interest.

The respondent replied to the application by filing an affidavit in reply by *Eng Godfrey Mutabazi* who was the Chairperson of Broadcasting Council

- 1. The respondent in his affidavit in reply stated that he was fully conversant with all the provision of laws of Uganda relating to the control, supervision and regulation of broadcasting activities as spelt out in the Electronic Media Act.
- 2. The Respondent confirms that the government of Uganda is a contracting member state of the International Telecommunications Union, in which all member states are required to comply with the terms of the **Geneva 1984 (GE 84)** Agreement relating to the use of the band 87.5 – 105 MH2 for FM sound broadcasting.

- 3. That the international guidelines on the use of the frequency subject to the approval of the competent authorities of the respective member states.
- 4. That Uganda enacted the Electronic Media Act in 1996 to set out the legal, technical and regulatory framework for the optimal use of the scarce public spectrum, which is a property of the government of Uganda.
- 5. That the broadcasting council issue licenses to several radio stations including; CBS, Radio One, Radio Two*(Akabozi Kubiri)* and Simba upon fulfillment of the requirements set out in Section 2(2) of the Electronic Media Act.
- 6. That the Furthermore the applicant had never applied for a license from the council to operate and broadcast *Bimeeza* programme pursuant to the provisions of the Electronic Media Act.
- 7. The nature of this programme is a live broadcast:
 - a. Using different geographical locations for the same programme,
 - b. Encourage random access to airwaves by whoever is in a position to access the microphone and no control over the crowd by the presenter/ producer.
 - c. Characterized by inability of the present/producer to make use of the technical requirements of a studio set up and installing the pre – listening device.
- 8. That the operation and management of *Bimeeza* programmes by radio stations were being carried out without the requisite license and therefore contravened the provisions of the Electronic Media Act.
- 9. That at all material times, the broadcasting council issued warnings to CBS Radio, Radio Simba, and Radio One over the illegal operation of the live broadcast programmes or *Bimeeza* to no avail.
- 10. That the Broadcasting Council used to receive several complaints from the public over the nature of messages broad cast live on *Bimeeza* which related to use of inappropriate/ abusive language and issues of noncompliance with the law.
- 11. That it had become increasingly difficult on behalf of the producers and /or presenters of *Bimeeza* programmes to control the speakers/guests/crowd on these outside live broadcasts and therefore Broadcasting Council decided to suspend the broadcast of *Bimeeza* programmes.
- 12. That the broadcasting council has never at any time, banned the broad cast of any programme and in particular the *Bimeeza* and that the suspension of *Bimeeza* programmes did not affect other talk shows which Broadcast on all radio stations.

- 13. That having listened to various talk shows on some radio stations such as Radio One's spectrum and talk back and capital radio's, capital gang I then established that the applicant had continued to freely exercise his freedom of speech and expression as guaranteed under the provisions and expression of Article 29(1)(a) of the constitution.

When this matter came up for hearing on 8 th July 2010, the respondent's counsel applied for a stay of the hearing pending the outcome of the interpretation of the

Constitutional Court on the Constitutionality of the Judicature (Fundamental Rights and Freedoms)(Enforcement Procedure) Rules SI 55 of 2008. The Court noted as follows;

"In view of the provision of Article 137(5)(b) of the Constitution the Attorney General has requested that the matter be referred to the Constitutional Court, the request is granted. The question as framed by counsel is referred to the Constitutional Court for decision in accordance with clause (1) of Article 137"

The court stayed the hearing of this application until 22nd May 2017 when the Supreme Court determined Constitutional Appeal No. 03 of 2011 between Bukenya Church Ambrose and Attorney General and ordered as follows; "That the High Court should proceed to hear Misc. Cause No. 13 of 2010: Bukenya Church Ambrose v Attorney General and dispose of it on merits"

When the matter came up for hearing 30th June 2017 the applicant's lawyer was directed to file written submissions but it seems he failed or refused to do so and it is not clear whether the respondent was informed of the court directives. The trial judge returned the file upon transfer from the division for direction and action.

The court has decided to determine the matter on the pleadings and evidence as presented.

The Applicant was represented by *Mr. Ladislaus Rwakafuzi* and the Respondent was represented by *Mr. Elisha Bafilawala.*

Analysis

The applicant contends that the banning of *Bimeeza* (open air ex-studio public live radio broadcasts) by government is a breach of the freedoms of speech, expression and media guaranteed under Article 29(1)(a) of the Constitution.

No right, including the right to freedom of expression, is absolute. Fundamental rights are limited in terms of the Constitution, and non-compliance with relevant constitutional limitation will result in the invalidity of the relevant action.

The freedom of speech and expression which shall include freedom of the press and other media is not an absolute right. This therefore means that it can be limited by law and then only to the extent that the limitation is reasonable, justifiable in an open democratic society. Any limitation must be subject to a three part test:-

- *A limitation will only be acceptable when 'prescribed by law;*

- *When it is necessary and proportionate; and*
- *When the limitation pursues a legitimate aim.*

The Government has to respect, and in fact, encourage exercise of such rights. It is the abundant duty of the State to aid the exercise of right to freedom of speech as understood in its comprehensive sense and not to throttle or frustrate exercise of such rights by exercising its executive or legislative powers or passing orders or taking action in the name of reasonable restrictions.

In the celebrated case of *Charles Onyango Obbo and Anor v. Attorney General, Constitutional Appeal No.2 of 2002, MULENGA J. S. C.,* the Supreme Court unanimously emphasized that:

- Where a law prohibits an act, which is otherwise an exercise of a protected right, that prohibition is valid only if it fits within the parameters of Article 43 of the Constitution.
- In clause (2) (c) of Article 43, the Constitution sets out an OBJECTIVE STANDARD against which every limitation on the enjoyment of rights is measured for validity. The provision in clause (2) (c) clearly presupposes the existence of universal democratic values and principles, to which every democratic society adheres. It also underscores the fact that by her Constitution, Uganda is a democratic state committed to adhere to those values and principles, and therefore, to that set standard. While there may be variations in application, the democratic values and principles remain the same.
- Legislation in Uganda that seeks to limit the enjoyment of the right to freedom of expression is not valid under the Constitution, unless it is in accord with the universal democratic values and principles that every free and democratic society adheres to. The court must construe the standard objectively.
- Under Article 43(2) democratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified.

The limitation in the circumstances of this case is prescribed by law in order to regulate activities of the broadcasters to operate in an orderly and accountable manner. The justification for broadcast regulation and licensing is generally based on the argument that airwaves are a scarce resource: technically, a limited number of frequencies are available, and it is therefore in public interest to regulate broadcasting to ensure a wide range of views.

The broadcasting licensees are subject to the code of conduct for broadcasting services. The Broadcast licensees must comply with licence requirements laid down by the appropriate regulator or authority. No body may undertake broadcasting activities without being in possession of a valid licence which in turn regulates the operations of the licence-holder.

Section 3 (1) of the Electronic Media 1996 provides that "A person shall not install or operate a television station, radio station, or any broadcasting apparatus without a license in that respect issued by the Council*."

Furthermore, *Section 3 (2) (c) of the Electronic Media 1996* states inter alia that; The council shall before issuing a licence under this section, take into account the following;

Location of station and geographical area to which broadcast is to be made.

According to the letter dated 23rd December 2002, to the Manager Obligato Club from broadcasting council, licence was not given to operate in such an area because the club did not fall under these sections of the law.

In such regard Simba radio, did not have the outside broadcasting licence, meaning whatever it was operating outside the scope of its licence was illegal as was the letter dated 21st December 2002, written to the general manager Simba FM radio and Radio One from the broadcasting council stating;

"Ebimeeza programme is therefore in direct contravention of the above section, since it is broadcast from the area for which your radio station was not licensed. The station was not licensed "outside broadcast" (OB) but to broadcast from a specific location"

According to the letter dated 17th September 2004 to the general manager of Bulange - Mengo complained about the *Mambo Bado* programme of the 28th August, 4th September and 11th September revealing a prima facie case of highly abusive, agitative, and inciteful programmes.

The Broadcaster was on many occasions given an opportunity to legalize their programme but failed to comply with the minimum broadcasting standards, however in the letter of February 6th 2008 having taken note of the corrective measures that the management of central broadcasting service has taken since January 11th 2008, the suspension of the presenter and producer of the *Mambo Bado* program was lifted, but still the applicant failed to comply.

The letter also ordered strict adherence to the minimum broadcasting standards, as spelt out in the Electronic Media Act in the Mambo Bado and all programmes so that they are positively informative; educative and/or provide good entertainment to the public.

It is on record through a letter of October 22nd 2008, that the applicant failed to comply on so many occasions when given an opportunity to air his programmes. A conclusion was drawn that should CBS fail on its obligations in accordance with the law, we shall, without further notice (in accordance with section 10(a) and 25(2) of the Act in execution of our functions) have no other alternative other than restraining 89.2 FM from further contravention of the Electronic Media Act.

I have taken time to look through both affidavits and annexures attached thereto and it is my conclusion that the Applicant failed to comply with the minimum broadcasting standards as per the Electronic Media Act. The regulation of broadcasting through licensing regime does not constitute either a breach of limitation of freedom of expression.

We should also stop using the provisions of the Constitution as is the supreme law of the land as a blanket cover for failure to adhere to the other laws. The applicant cited Article 29(1) (a) of the Constitution, yet on several occasions complaints were made to them but never attended to. Having not reported to police does not take away the fact the programmes were highly tribalistic, agitative, secretarian and inciteful.

The right of freedom of speech, expression and media is only a guarantee for one who abides with the said laws and not one who thinks they will use the Constitution as a blanket cover.

I therefore dismiss this application with no order as to costs.

I so order

SSEKAANA MUSA JUDGE 7 th July 2021

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