

UGANDA / JUDGMENT

Human Rights Network For Journalists Ltd and Another v Attorney General (Constitutional Petition No. 25 of 2018) [2023] UGCC 97 (17 March 2023)

[2023] UGCC 97

COURT

Constitutional Court of Uganda

BEFORE

Monica K. Mugenyi, JCC, Gashirabake, JCC,
Madrama, JCC, Musoke, JCC, Egonda-Ntende, JCC

CASE / FILE NUMBER

Constitutional Petition No. 25 of 2018

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THE REPUBLIC OF UGANDA IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA CONSTITUTIONAL PETITION NO. 025 OF 2018

1. HUMAN RIGHTS NETWORK FOR JOURNALISTS LTD

2. EASTERN AFRICA MEDIA INSTITUTE (U) LTD:.....PETITIONERS

VERSUS

ATTORNEY GENERAL:.....

HON. MR. JUSTICE FREDRICK EGONDA-NTENDE, JCC CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JCC HON. MR. JUSTICE CHRISTOPHER MADRAMA, JCC HON. LADY JUSTICE MONICA K. MUGENYI, JCC HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JCC

JUDGMENT OF ELIZABETH MUSOKE, JCC

The petitioners filed this Petition under Article 137 (1) and (3) of the 1995 Constitution and Rule 2 of the Constitution Court (Petitions and References) Rules, 2005, challenging the constitutionality of several provisions of the Uganda Communications Act, 2013.

Background

In 2013, Parliament passed the Uganda Communications Act, 2013 ("UCA"). The UCA, which commenced on 18th January, 2013, provides for regulation of the communications sector which encompasses telecommunications, radio communications, postal communications, broadcasting, data communication and infrastructure

The two petitioners are registered non-governmental organizations engaged in advocating for the promotion, protection and respect of the rights of members of the media sector. The petitioners contend that several provisions of the UCA are inconsistent with and/or in contravention of the 1995 Constitution, and in particular contend that Sections 7 (1) and (2), 9, 11 (2), (3) and (4), 13, 14 (5), 16 (4) (d) (iii), 29 (a), 31 and para (a) (i), (ii) and (iv) of Schedule 4, 60 (5), 61 (b), 63 (2), 67 (1) (f) and (2) Section 72 (1) and (2) (c) violate the right of freedom of the media and other press

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guaranteed under Article 29 (1) (a) of the 1995 Constitution. The petitioners further contend that Section 21 (b) of the UCA violates the right to property guaranteed under Article 26 of the 1995 Constitution. The petitioners further aver that Section 23 of the UCA violates the right to equality and freedom from discrimination guaranteed under Article 21 of the 1995 Constitution. Lastly, the petitioners contend that Sections 31 and para (a), (i), (ii) and (iv) of Schedule 4 and 41 (4) of the UCA violate the right to just and fair treatment before administrative bodies which is guaranteed by Article 42 of the 1995 Constitution. The petitioners therefore seek this Court to make declarations of unconstitutionality in the terms highlighted above and any other remedies that the Court deems fit.

The evidence in support of the Petition is contained in the respective affidavits of Mr. Robert Sempala, a journalist and National Coordinator of the 1st petitioner and Mr. Wakabi Michael Andrew, also a journalist and the President of the 2nd petitioner.

The respondent filed an Answer to oppose the Petition. He contended that the Petition does not disclose any questions for constitutional interpretation and for that reason ought to be dismissed. On the merits, the respondent contended that all the impugned provisions are necessary to promote efficiency and accountability of the Uganda Communications Commission ("UCC"), the body responsible for regulating the communications sector. The respondent further contended that the impugned provisions that relate to the exercise of the supervisory powers of the Minister responsible for Information and Communication Technology ("the Minister") over the UCC are necessary to ensure that the UCC performs its mandate in accordance with the law and are justified. The respondent also makes several contentions, to the effect that the allegations set out in the Petition are lacking in merit. These will be considered, in detail, later in the judgment. He asks this Court to dismiss the Petition with costs.

The respondent relied on an affidavit sworn by Mr. Richard Adrole, a Senior State Attorney in the respondent's Chambers in support of his Answer to the Petition.

Representation

At the hearing, Mr. Lastone Gulume, learned counsel appeared for the petitioners. Mr. Jeffrey Atwine, learned Principal State Attorney represented the respondent.

The parties, with leave of the Court, relied on written submissions.

Resolution of the Petition

I have carefully studied the pleadings and also considered the submissions of counsel for both sides and the law and authorities cited.

The parties, in their submissions, considered the following issues as arising from the Petition:

- Whether Sections 7 (1) and (2), 9 (3), 11 (2), (3) and (4), 13, 14 (1) (5), 16 (4) (d) (iii), 29 (a), 60 (5), 61 (b), 63 (2), 67 (1) (f) and (2), 72 (1) and (2) of the UCA are inconsistent with Article 29 (1) (a) of the 1995 Constitution.
- Whether Section 21 (b) of the UCA is inconsistent with Articles 26 (2) (1) and 29 (1) (a) of the 1995 Constitution.
- Whether Section 23 (b) of the UCA is inconsistent with Article 21 (3) (1) of the 1995 Constitution.
- Whether Sections 31, 41 (4) and Paragraph (a), (i), (ii) and (iv) of (4) Schedule 4 of the UCA are inconsistent with Articles 42 and 29 (1) (a) of the 1995 Constitution.
- Whether the impugned limitations under Sections 7 (1) and (2), 9 (3), 11 (2), (3) and (4), 13, 14 (5), 16 (4) (d) (iii), 29 (a), 31, 41 (4), 60 (5), 61 (b), 63 (2), 67 (1) (f) and (2), 72 (1) and (2) and Paragraph (a), (i), (ii) and (iv) of Schedule 4 of the UCA are acceptable and demonstrably justifiable in a free and democratic society.

Whether the petitioners are entitled to the reliefs prayed for." 6)

I will proceed to resolve the above issues as framed by the parties. However, before doing so, I wish to reiterate that the jurisdiction of this Court, as far as material to this Petition is provided for under Article 137 (3) (a) of the 1995 Constitution which provides that

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"A person who alleges that—

- (a) an Act of Parliament or any other law or anything in or done

under the authority of any law is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate."

The issues as framed by the parties clearly indicate that the petitioners are alleging that certain provisions of the UCA, an Act of Parliament are inconsistent with and/or in contravention of named provisions of the 1995 Constitution. I am therefore satisfied that the Petition raises questions for constitutional interpretation and will proceed to determine the issues.

Issue 1: Whether Sections 7 (1) and (2), 9 (3), 11 (2), (3) and (4), 13, 14 (5), 16 (4) (d) (iii), 29 (a), 60 (5), 61 (b), 63 (2), 67 (1) (f) and (2), 72 (1) and (2) of the UCA are inconsistent with Article 29 (1) (a) of the 1995 Constitution

Counsel for the petitioners made several points in his submissions on issue 1. Firstly, he submitted that the impugned provisions are inconsistent with the purpose of the right to freedom of the press and other media as enshrined in the 1995 Constitution, in so far as they grant to the UCC wide and unfettered powers in management of the communications sector. For a description of the purpose of the right to freedom of the media, counsel referred to the case of *Onyango Obbo and Another vs. Attorney General*, Constitutional Appeal No. 2 of 2002 (unreported) where Mulenga, JSC stated that the essence of the media's existence is to impart knowledge to the public; and to the India Supreme Court case of *Indian Express Newspapers (Bombay) Private Ltd and Others vs. Union of India and Other* (1985) for the proposition that freedom of the press meant freedom [of the press] from interference from authority which would have the effect of interference with the content and circulation of newspapers. Counsel submitted that the impugned provisions by granting wide powers to the UCC facilitate it to carry out arbitrary interference with the media which results in violation of the purpose of the right of freedom of the press as guaranteed under Article 29 (1) (a).

Secondly, counsel submitted that the impugned provisions have an unconstitutional effect. Counsel reiterated the statement of Dickson, J. in the

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Canada Supreme Court Case of *R vs. Big M Drug Mart Ltd and 3 Others* [1985] 1 R. C. S that, "both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation." Counsel also cited Dickson J's statement that the object is realized through the impact produced by the operation and application of the legislation. Counsel further referred to the statement of Wilson, J in the same case that, "once the plaintiff can point to an actual or potential impingement on a protected right, it will not matter that the underlying legislative purpose is subject to conjecture." Counsel then submitted that as demonstrated in the affidavits in support of the petitioners, the UCA has an unconstitutional effect, notwithstanding, its seemingly legitimate purpose as set out in its long title and the objectives listed under Section 3 thereof. The unconstitutional effect according to counsel is that the UCC has in the past arbitrarily suspended the broadcasting licences of several

media houses, and in other cases unjustifiably closed media houses. In other instances, the unconstitutional effect has manifested in the issuance by the UCC of vague broadcasting guidelines.

The third point made by counsel is that Sections 7 (1) and (2), 9 (3), 11 (2), (3) and (4), 13, 14 (5), 16 (4) (d) (iii), 67 (1) (f) and (2) and 72 (1) and (2) (c) empower the Minister to unduly interfere with the workings of the UCC, its board and tribunal, which has the effect of subjecting the UCC to political and economic interference which in turn results in the violation of the right to freedom of the press and other media. He pointed out that the UCA empowers the Minister to interfere in several ways, such as; 1) by issuing policy directives to the UCC; 2) appointing and removing members of the UCC board; 3) removal of the Executive Director on vague grounds of misbehaviour; 4) determining remuneration for members of the board; 5) appointing technical advisers to the UCC; and 6) requiring the Minister to receive the surplus funds of the UCC. Counsel contended that international best practice as reflected in the Declaration of Principles on Freedom of Expression and Access to Information in Africa adopted by the African Commission on Human and Peoples' Rights in 2019 calls for an independent communications sector regulator as opposed to one which is subject to

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internal interference as the case is with the UCC under the Minister. He cited Principle 17 Paragraph 1 of the said Declaration which provides that:

"A public regulatory authority that exercises powers in the areas of broadcast, telecommunications or internet infrastructure shall be independent and adequately protected against interference of a political, commercial or other nature."

and Principle 17 Paragraph 2 which provides:

"All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by among other things, an appointments process for members which is open, transparent, and involves the participation of civil society and is not controlled by any particular political party."

Counsel contended that by creating a framework where the Minister interferes with the running of the UCC, the UCA falls short of the standard required under Principle 17, Paragraphs 1 and 2 above, especially considering that the UCA does not put in place any measures to safeguard the UCC from political and commercial interference by the Minister. Counsel submitted that allowing interference by the Minister in the workings of the UCC is inconsistent with the right to freedom of the press and other media.

The next point made by counsel is that the UCA, by proscribing the broadcasting of content that is contrary to public morality under Section 29 (a), has the effect of placing vague and subjective constraints on freedom of the media. Counsel submitted that the test of morality is subjective and does not constitute a valid limitation. Counsel cited the East Africa Court of Justice case of

Media Council of Tanzania and 2 Others vs. Attorney General of Tanzania, Reference No. 2 of 2017 where it was held that a provision fails the test of a valid limitation and is therefore void if it is vague, unclear and imprecise.

In view of the above submissions, counsel for the petitioners submitted that issue 1 ought to be answered in the affirmative.

In response, counsel for the respondent submitted that the UCA was enacted to provide a regulatory framework for the communications sector and also

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to facilitate its development and is in no way unconstitutional. It was further submitted that the involvement of the Minister in the workings of the UCC is for purposes of promoting efficiency and accountability of the UCC to the Government and the people by ensuring that the UCC adheres with the overall Government's policy objectives.

It was further submitted that it is not unconstitutional that the Minister appoints members of the UCC board because appointment of members of Boards and Statutory Enterprises is an executive function performed by the Minister as a delegate of the President. Further, that the UCA lays down the composition of the members of the UCC which is comprised of professionals from various fields such as engineers, lawyers and members, among others. Accordingly, the Minister does not run the UCC as a one man show as the petitioners want this Court to believe.

Counsel also submitted that it was not unconstitutional that the Minister is involved in the process of removal of members of the UCC from office since under Section 24 of the Interpretation Act, Cap. 3 the appointing authority has the power to remove an appointee from office.

It was further submitted that the Minister's supervision of the financial activities of the UCC by determining the remuneration payable to the members of the board or managing of the surplus requirements of the funds of the UCC does not violate the right to the freedom of the press, because as the supervisor of the UCC, the Minister can rightly determine such matters. Further still, that there are inbuilt safeguards to ensure that the Minister does not abuse his supervisory powers.

With regard to the submission that the UCA contravenes the right to freedom of the press insofar as gives powers to the Minister to remove the UCC Executive Director, counsel submitted that this submission was misleading and vexatious since the petitioners do not demonstrate the connection between removal of the Executive Director and violation of the right to freedom of the press.

In relation to the contention that the UCA is unconstitutional because under sections 29 (a), 31 and Paragraph (a), (i), (ii) and (iv) of schedule 4, it prohibits broadcasting of content on vague grounds of being contrary to

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public morality, counsel submitted that the provisions are clear and stipulate what the prohibited conduct and the minimum broadcasting standards are. Counsel submitted that the literal meaning of morality connotes principles concerning what is right and wrong or what is good or bad behaviour according to a certain group of people.

For the above submissions, counsel submitted that issue 1 be answered in the negative.

I have carefully considered the submissions of counsel on either side on issue 1 which relates to the effect of the impugned provisions of the UCA on the right of the freedom of the press and other media as guaranteed by the 1995 Constitution. Article 29 (1) (a) provides that:

"Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media"

The UN Human Rights Committee has stated that the right to freedom of speech and expression includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. (See: Para 11 of General Comment No. 34 on Article 19: Freedoms of opinion and expression). In my view, the right to freedom of the press and other media as envisaged under Article 29 (1) (a) encompasses the right of the press to transmit all manner of ideas, opinions and content without unlawful interference from state or non-state actors. As was stated in the India Supreme Court case of *Indian Express Newspapers vs. Union of India and Others*, 1986 AIR 515 (per Venkataramiah, J.):

"The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments."

Therefore, the right of freedom of the press is aimed at preventing the state from doing any act which may interfere with the transmission of ideas and opinions by the press. The state is therefore prevented from carrying out acts such as censorship and any other act that may directly prevent the press

from publishing particular content. The Petition goes further and alleges that the state may also interfere with the right of the freedom of the press by doing acts that indirectly interfere with the right, as for example, where the state enacts a law providing for a regulatory body which is not sufficiently independent. The petitioners contend that the UCC, the body charged with regulating the communications sector is tightly controlled by the Minister and is not sufficiently independent, and that this is due to the legal framework under the UCA which fails to ensure this independence. In this regard, the petitioners challenge several provisions of the UCA that concern the workings of the UCC and the exercise of the Minister's supervisory powers over the UCC. The impugned provisions are as follows:

Section 7 (1) and (2) which provide:

"7. Powers of the Minister.

- (1) The Minister may, in writing, give policy guidelines to the Commission regarding the performance of its functions.
- (2) The Commission shall comply with the policy guidelines given by the Minister under this section."

Section 9 (3) which provides:

"(3) All members of the Board shall be appointed by the Minister with approval of Cabinet, one of whom shall be a person with disability and at least three of whom shall be women."

Section 11 (2), (3) and 4 which provide:

"11. Vacating office of member of the Board.

- (1) A member of the Board shall vacate office, if the member—
 - (a) is declared insolvent;
 - (b) is convicted of a criminal offence in respect of which a penalty of imprisonment of six months or more is imposed without the option of a fine;
 - (c) is continuously and persistently unable to discharge the functions of the office of a member of the Board;
 - (d) subsequently becomes disqualified from being a member under section 10.

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- (e) fails to disclose to the Commission any interest that the member has in a contract or proposed contract connected with the Commission or any other matter;
 - (f) misbehaves or abuses the office of a member of the Board.
- (2) The Minister shall determine that a member vacates office under subsection (1).
- (3) A member of the Board may resign from office in writing to the Minister.
- (4) Where a member resigns, dies or is removed from office under this section, the Minister shall within three months and in accordance with section 9, appoint another person to replace the member, and to hold office for the remainder of the term of that member."

Section 13 which provides:

"13. Remuneration of members of the Board.

The members of the Board may be paid remuneration or allowances approved by the Minister in consultation with the Ministers responsible for public service and finance."

Section 14 (5) which provides:

"14. Committees of the Board.

- (1) The Board may appoint committees—
 - (a) to inquire into and advise the Board on any matter concerning the functions of the Commission;
 - (b) to exercise the powers or perform a function of the Commission.

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- (5) Members of a committee appointed under this section may be paid allowances as the Board may, with the written approval of the Minister, determine."

Section 16 (4) (d) (iii) which provides:

"16. Executive Director."

- (1) The Executive Director shall be appointed by the Minister on the recommendation of the Board.
- (4) A person shall cease to hold the office of Executive Director if that person-

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- (a) resigns;
- (b) is declared insolvent;
- (c) is convicted of a criminal offence in respect of which a penalty of imprisonment of six months or more is imposed without the option of a fine;
- (d) is removed from office by the Minister on the recommendation of the Board for—
 - (i) continuously and persistently being unable to discharge the functions of the office Executive Director"

Section 60 (5) which states:

*60. Establishment of Uganda Communications Tribunal.

- (1) There is established a tribunal known as the Uganda Communications Tribunal.

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- (5) The tribunal may, in the discharge of its functions, be assisted by not more than four technical advisers appointed by the tribunal from technical persons identified by the Minister."

Section 61 (b) which stipulates that:

"Funds of the tribunal.

61. The funds of the tribunal shall consist of—

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- (b) grants, gifts or donations from the Government or other sources acceptable to the Minister and the Minister responsible for finance"

Section 63 (2) which provides:

63. **Vacating office of member of the tribunal.**

(1) The office of a member of the tribunal shall fall vacant if—

- (a) the member is continuously and persistently unable to perform the functions of the office;
- (b) the member engages in misbehaviour or abuse of office;
- (c) the member is subsequently disqualified from membership in accordance with section 62;

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- (d) the member fails to disclose to the tribunal any interest in a contract or proposed contract or any other matter before the tribunal.

(2) A vacancy under subsection (fXa) shall be determined by the President on the recommendation of the Minister.

(3) A member of the tribunal may resign office by notification in writing to the President."

Section 67 (L) (f) and (2) which provide:

"67. Funds of the Commission.

(1) The funds of the Commission shall consist of-

- (f) loans, grants, gifts or donations from Government and other sources made with the approval of the Minister, the Minister responsible for finance and Parliament.

(2) The Minister shall by statutory instrument determine the percentage of revenue received by operators from international incoming telecommunications traffic to be collected by the Commission."

Section 72 (L) and (2) (c) which provide:

"72. Investment of surplus funds

(1) The Board shall declare to the Minister any surplus funds that the Commission may have at the end of the financial year.

(2) Any funds of the Commission not immediately required for any purpose under this Act, may be invested-

- (c) in any other manner determined by the Board with the approval of the Minister, other than in the business licensed under this Act."

In my view, the above provisions give the Minister an oversight role over the UCC, its board and the Uganda Communications Tribunal (UCT), a dispute resolution body created under the UCA. In his role, the Minister has the powers to appoint or remove persons from the employment of the respective bodies. He/she also has the power of oversight over the financial affairs of the respective bodies under the Act.

However, the petitioners contend that the oversight role of the Minister, ^a politician, increases the likelihood of the making of political decisions, perhaps because the Minister will exert direct and indirect pressure to achieve those political decisions. This is a cynical view, that is not supported

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by evidence. I have considered the submission of counsel for the respondent that the UCC, its board and the UCT being public bodies must be accountable to the people through the Government, which may best be achieved through the oversight role played by the Minister. Therefore, I accept the contention for the respondent that the Minister plays an oversight role over the UCC, its board and the UCT, which is aimed at ensuring accountability, effectiveness and efficiency of those bodies.

I have also considered the contention by the petitioners that the concept of the right of freedom of the press envisages an independent regulatory body for the communications sector, and that this not being the case with the UCC, its board and the UCT which are under the control of the Minister, it follows that there is a violation of the right of freedom of the press. As I noted earlier, the concept of an independent regulator for the communications sector is not explicitly defined in any binding international instruments. The concept is similarly not defined under Article 29 (1) (a) which provides for the right of freedom of the press and other media. However, several standards on the subject have been expressed in several non-binding instruments. For example, Declaration of Principles on **Freedom of Expression and Access to Information in Africa (2019)** adopted by the African Commission on Human and People's Rights provides in Principle 17 as follows:

"Principle 17. Regulatory bodies for broadcast, telecommunications and the internet

1. A public regulatory authority that exercises powers in the areas of broadcast, telecommunications or internet infrastructure shall be independent and adequately protected against interference of a political, commercial or other nature.

2. The appointment process for members of a public regulatory body overseeing broadcast, telecommunications or internet infrastructure shall be independent and adequately protected against interference. The process shall be open, transparent and involve the participation of relevant stakeholders.
3. Any public regulatory authority that exercises powers in broadcast, telecommunications or internet infrastructure shall be accountable to the public.
4. A multi-stakeholder model of regulation shall be encouraged to develop shared principles, rules, decision-making procedures and programmes to shape the use and evolution of the internet.
5. The powers of regulatory bodies shall be administrative in nature and shall not seek to usurp the role of the courts."

I have also considered Directive (EU) 2018/1808 of the European Parliament and European Council which was issued on 14th November, 2018, which states:

"Member States should ensure that their national regulatory authorities or bodies [for the communications sector] are legally distinct from the government. However, this should not preclude Member States from exercising supervision in accordance with their national constitutional law. National regulatory authorities or bodies should be considered to have achieved the requisite degree of independence if those authorities or bodies, including those that are constituted as public authorities or bodies, are functionally and effectively independent of their respective governments and of any other public or private body. That is considered essential to ensure the impartiality of decisions taken by a national regulatory authority or body. The requirement of independence should be without prejudice to the possibility for Member States to establish regulatory authorities that have oversight over different sectors, such as the audiovisual and telecommunications sectors. National regulatory authorities or bodies should have the enforcement powers and resources necessary for the fulfilment of their tasks, in terms of staffing, expertise and financial means."

The UCA under Section 4 establishes the UCC as a body corporate which may sue or be sued. Section 8 of the UCA provides that the UCC shall, subject to the oversight role of the Minister, exercise its functions independently of any person or body. This in my view qualifies the UCC as the kind of independent regulatory body for the communications sector envisaged in the standards set out in the non-binding instruments referred to earlier.

It is true that the involvement of the Minister could lead to exertion of illegal pressure on the UCC Board or Executive Director to do arbitrary acts that may violate the right of freedom of the press, such as arbitrarily suspending broadcast licences or issuing unreasonable broadcast guidelines, but in my view, such indiscretions when committed are not sanctioned by the UCA and

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are liable to be challenged in the courts of law. The mere fact of the possibility that the Minister or the UCC Board or its Executive Director may act arbitrarily is insufficient to ascribe an unconstitutional effect on the UCA, as the petitioners would like this Court to do.

The other contention for the petitioners was that Section 29 (a) of the UCA is unconstitutional as it imposes an unjustifiable restriction on the right of the freedom of the press. **Section 29 (a)** provides as follows:

"29. Duties of a licensee and producer.

The holder of a licence or a producer of a broadcasting station or disseminating apparatus shall—

(a) ensure that what is broadcast is not contrary to public morality"

It will be noted that the right of freedom of the press and other media under Article 29 (1) (a) is subject to the limitations set out in Article 43 of the **1995 Constitution** which provides:

"43. General limitation on fundamental and other human rights and freedoms

1. In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.
2. Public interest under this article shall not permit
 - a. political persecution;
 - b. detention without trial;
 - c. any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution."

I note that the right to freedom of expression including the freedom of the media may be justifiably limited for the purpose of protecting morals. (See: European Court of Human Rights case of Handyside vs. UK, Application No. 5982 of 1972). As to what constitutes morals or public morals, I accept the submission of counsel for the respondent that a literal interpretation of morals can suffice. Morals relate to a conception of right or wrong behaviour. An acceptable example of a broadcast that is centrally to

public morality is child pornography. It may as well be the case that the UCC may wrongly consider that certain broadcast is contrary to public morality, but again, in my view, dr aggrieved person may challenge that wrong decision in a Court, as and when it is made.

For the above reasons, I would answer issue 1 in the negative. In my view, none of the impugned provisions of the UCA violates the right to freedom of the press and other media as enshrined under Article 29 (L) (a) of the ¹⁹⁹⁵ Constitution.

Issue 2: Whether Section 21 (b) of the UCA is inconsistent with Articles 26 (1) and 29 (r) (a) of the 1995 constitution.

In support of issue 2, counsel for the petitioners submitted that Section ²¹ (b) of the UCA violates the right to property under Article 26 of the ¹⁹⁹⁵ Constitution because it places an unconstitutional requirement that an owner of a radio communications apparatus obtains a licence from the UCC before selling, letting or otherwise disposing of that property. Counsel contended that the impugned provision is unconstitutional as it fails to set out the justification for the licence requirement it imposes. He also submitted that the unjustified requirement also violates the right to freedom of the press.

In reply, counsel for the respondent submitted that Section 21 (b) serves ^a legitimate purpose of ensuring orderly dealings in communications infrastructure to avoid disrupting the sector which may lead to violation of rights of other persons. Counsel contended that the provision is necessary for the regulation of the communications sector and is not unconstitutional.

I have considered the submissions of counsel for either side on issue 2.

Article 26 (1) of the 1995 Constitution provides:

"26. Protection from deprivation of property,

(1) Every person has a right to own property either individually or in association with others."

Section 21 (b) of the UCA provides:

"21. Licence for radio communications

A person shall not, without a licence issued by the Commission-

(a) ...

(b) sell, let, hire or otherwise dispose of any radio communications apparatus"

The petitioners contended in their Petition that the above provision imposes a limitation on the proprietary rights of licence holders under Article 26 (1). This is true, since the impugned provision imposes limitations on owners of radio communications apparatus, who may only sell their communications apparatus property after obtaining permission from the UCC.

However, I noted the respondent's averment that:

"... the respondent contends that Section 21 (b) of the UCA does not in any way whatsoever offend any provision of the Constitution, but is only meant to ensure orderly dealings in communications infrastructure, since uncontrolled disposal of such equipment could disrupt the provision of communication of other people's freedoms and rights under the 1995 Constitution."

The above explanation given by the respondent is reasonable and I accept it. I consider that it may be useful in the interest of ensuring order in the communications sector to require a licence before a person can sell off his or her property.

I further note that the right to property enshrined in Article 26 (1) of the 1995 Constitution guarantees a person the right to enjoy his or her property and to dispose it of as he/she wishes. In the case of *Tre Traktorer Aktiebolag vs. Sweden*, Application No. 10873/84, the European Court of Human Rights observed that the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property. However, the right to dispose of one's property as one wishes is not absolute. and may be subject to such limitations as are permissible in a free, fair and democratic society. Acceptable limitations may include measures imposed by the government that control the use of property, such as the requirement for a licence before one uses or disposes of property. In the case of *Capital Radio (Private) Ltd vs. The Broadcasting Authority of Zimbabwe and 2 Others*, Civil Application No. 162 of 2001, the Zimbabwe Supreme Court held that:

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"States have the right and duty to ensure the orderly regulation of communications, and this can only be achieved by a licensing system."

In the present case, the measures put in place under Section 21 (b) of the UCA which impose a requirement to acquire a licence before a person can sell, let, hire or otherwise dispose of his property constitute a reasonable limitation on the right to property which is acceptable in a free, fair and democratic society.

I also wish to note that whether or not the licensing system imposed by Section 21 (b) is in fact onerous on some people or not so as to call for ^a proportionality analysis does not arise for determination in this Petition. In my view, in the absence of specific facts, it would be speculative to conduct a proportionality analysis.

I would accordingly answer issue 2 in the negative.

Issue 3: Whether Section 23 (b) of the UCA is inconsistent with Article 21 (1) of the 1995 Constitution

On issue 3, counsel for the petitioners submitted that Section 23 (b) of the UCA promotes discrimination by exempting the police, the armed forces and other services directly used by the state from licensing provisions and requirements that are applied to private persons which contravenes Article 21 (1) of the 1995 Constitution which guarantees the equal protection of all persons before and under the law in all spheres of political, economic, social and cultural life, and in every other respect. He further submitted that the highlighted exemption is also contrary to international best practice under Principle 13 Paragraph 6 of the Declaration of Principles on Freedom of Expression and Access to Information in Africa which provides that:

"the public service ambit of public broadcasters shall be clearly defined and include an obligation to ensure that the public receives adequate and politically balanced information, particularly during elections."

Counsel also submitted that the exemption under Section 23 (b) of the UCA is vague in so far as it applies to "other services" which are not defined, and is therefore an impermissible contravention of the rights guaranteed under

In response, counsel for the respondent submitted that the exemption in Section 23 (b) of the UCA does not amount to discrimination within the meaning of Article 21. He cited the case of *Turyatamba and 4 Others vs. Attorney General and Another*, Constitutional Petition No. 15 of 2006 (unreported) where it was held that:

"Discriminate for purposes of Article 21 and indeed for the whole constitution is to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, or religion, social or economic standing, political opinion or disability.

\$\cdots\$

The term "discrimination" has come to imply a distinction, exclusion, restriction or preference based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."

Counsel submitted that the exemption under Section 23 (b) of UCA is not based on any of the grounds prohibited under Article 21 namely sex, race, colour, ethnic origin, tribe, birth, religion, social or economic standing, political opinion or disability and cannot therefore be said to contravene the provision.

Further, it was submitted by counsel that the exemption under Section 23 (b) is justified in the interest of national security considering the sensitive work that the police and armed forces undertake. Counsel submitted that where a distinction or differential treatment has a valid objective and a rational justification and is necessary and proportional as is the case for the relevant exemption, it does not qualify as discrimination. For this submission, counsel cited the case of *African Commission on Human and Peoples' Rights vs. Kenya*, Application No. 006 of 2012 (2017).

I have considered the submissions of both counsel on issue 3 which alleges that the exemption under Section 23(b) of the UCA contravenes Article 21 of the 1995 Constitution. Section 23 (b) provides:

"23. Exemption from requirement for licence.

Notwithstanding sections 21 and 22, a licence is not required for communications apparatus—

- (a) exempted by regulations made under this Act;
- (b) for use by the police, the armed forces or any other services directly used by the State in the performance of official functions, which comply with technical requirements specified by the Commission."

Article 21 of the 1995 Constitution provides:

"21. Equality and freedom from discrimination.

- (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
- (2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.
- (3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.
- (4) Nothing in this article shall prevent Parliament from enacting laws that are necessary for—
 - (a) implementing policies and programmes aimed at redressing social, economic, educational or other imbalance in society; or
 - (b) making such provision as is required or authorised to be made under this Constitution; or
 - (c) providing for any matter acceptable and demonstrably justified in a free and democratic society.
- (5) Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Constitution."

I note that Section 23 (b) exempts the police, armed forces and other services directly used by the State in the performance of official functions from the licensing requirements under the UCA. I accept the submission of counsel for the respondent that this exemption can be justified on national

security grounds considering the work that the police and army do in maintaining law and order and defending the country. I also observe that Article 21 (4) empowers Parliament, where necessary, to make laws that give preferential treatment that is acceptable and demonstrably justifiable in a free and democratic society. In my view, the exemption under Section 23 of the UCA is acceptable and demonstrably justifiable on national security grounds.

In relation to the petitioners' submission that the exemption under Section 23 (b) is vague insofar as it also exempts "other services directly used by the state in performance of official functions" without defining those other services. My view is that Parliament, by enacting that provision,

considered that there may be other services that may require an exemption from the licensing requirements under the UCA. Such services may be assessed on a case by case basis and the ejusdem generis rule may be applied to determine which other services having similar characteristics as the police and the armed forces may be exempted under Section 23 (b).

All in all, I would answer issue 3 in the negative and find that Section 23 (b) does not contravene Article 21 of the Constitution.

Issue 4: Whether Sections 31, 41 (4) and Paragraph (a), (i), (ii) and (iv) of Schedule 4 of the UCA are inconsistent with Articles 42 and 29 (1) (a) of the 1995 Constitution.

Counsel for the petitioners submitted that Sections 31 and 41 (4) and Paragraph a (i), (ii) and (iv) of Schedule 4 of the UCA contain vague and speculative standards with which broadcasters are required to comply which undermines their right to fair and just treatment before administrative bodies under Article 42 of the 1995 Constitution. In counsel's view, broadcasters who are accused of non-compliance with the vague and speculative standards will most likely be treated unfairly and unjustly because they cannot comply with such standards.

It was further submitted that the vague and speculative standards have led to political interference in the regulation of the press and other media more so because the UCC is compromised and not independent and this has led

to arbitrary suspension or closure of media houses or issuance of vague broadcasting guidelines.

In reply, counsel for the respondent submitted that the impugned provisions are compliant with Article 42 and protect the rights of communications operators to be accorded fair and just treatment by administrative bodies. In counsel's view, the impugned provisions provide for clear due process to be followed before a decision to suspend or revoke a licence can be made. The operator is given an opportunity to make representations, a chance to remedy the offending conduct, failing which, notice is given to make further representations as to why the UCC cannot revoke the licence.

I have considered the submissions of both sides on issue 4. The petitioners contended in their Petition that Sections 31, 41 and Paragraph (a), (ii) and iv of Schedule 4 contravene Article 42 of the 1995 Constitution. Article 42 provides:

"42. Right to just and fair treatment in administrative decisions.

Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.

In the context of the communications sector, the UCA empowers the UCC to make administrative decisions by suspending or revoking the licence of a communications operator who fails to adhere with the regulatory standards set out under the Act. In this regard, Section 31 of the UCA provides:

"31. Minimum broadcasting standards.

A person shall not broadcast any programme unless the broadcast or programme complies with Schedule 4."

Schedule 4 provides as follows:

"Minimum broadcasting standards.

A broadcaster or video operator shall ensure that—

- (a) any programme which is broadcast—
 - (i) is not contrary to public morality;
 - (ii) does not promote the culture of violence or ethnical prejudice among the public, especially the children and the youth;
 - (iii) in the case of a news broadcast, is free from distortion of facts;
 - (iv) is not likely to create public insecurity or violence;
 - (v) is in compliance with the existing law;
- (b) programmes that are broadcast are balanced to ensure harmony in such programmes;
- (c) adult-oriented programmes are appropriately scheduled;
- (d) where a programme that is broadcast is in respect to a contender for a public office, that each contender is given equal opportunity on such a programme;
- (e) where a broadcast relates to national security, the contents of the broadcast are verified before broadcasting."

The minimum broadcasting standards set out above are reasonable in my view and are intended to prevent broadcasting harmful, unlawful content or content that may be prejudicial to national security. In other respects, they are intended to ensure fair and balanced broadcasting. I do not find them vague as asserted by counsel for the petitioners.

I only add that a broadcaster who fails to adhere with the above minimum broadcasting standards may have their license suspended or revoked under the provisions of Section 41 of the UCA, which provides:

"41. Suspension and revocation of licence.

- (1) The Commission may suspend or revoke a licence issued under this Act, on the following grounds—
 - (a) serious and repeated breach of the licence conditions;
 - (2) After consideration of any representations by the operator, the Commission may—
 - (a) prescribe time during which the operator is required to remedy the offending act or conduct;
 - (b) require the operator to pay a fine not exceeding the equivalent of ten percent of its gross annual revenue.
 - (3) The Commission shall give the operator written notice of not less than sixty days specifying the reasons for the intended suspension or
- revocation, during which the operator may make representations to the Commission.
- (4) Where the Commission is of the opinion that the measures under subsection (3) are not sufficient, the Commission may-
 - (a) suspend the licence for a specified period; or
 - (b) revoke the licence."

t

I note that the UCC, while enforcing compliance with the minimum broadcasting standards, acts as an administrative body and is expected to act fairly and justly as required under Article 42. The petitioners alleged that the UCC failed to act fairly in relation to two administrative decisions it took, namely, a decision to suspend the Radio Hoima broadcasting licence dated 25th May, 20L7 and a decision to suspend the NBS Television broadcasting licence dated 11th May, 20L7. The petitioners also alleged that the UCC threatened to apply the minimum broadcasting guidelines in a selective manner in a letter dated 26th September, 2017. My view is that arbitrary, unfair or unjust acts of the UCC in enforcing the UCA can be challenged by way of judicial review. Such conduct is not proof of unconstitutionality of the impugned provisions of the UCA, which as counsel for the respondent rightly submitted puts in place measures to prevent unfair and unjust decision making by the UCC.

I would therefore answer issue 4 in the negative.

Issue 5: Whether the impugned limitations under Sections 7 (1) and (2), 9 (3), LL (2), (3) and (4), L3, 14 (s), 16 (4) (d) (iii), 29 (a), 3L,4L (4), 60 (s), 61 (b), 63 (2),67 (1) (f) and (2),72 (1) and (2) and Paragraph (a), (i), (ii) and (iv) of Schedule 4 of the UCA are acceptable and demonstrably justifiable in a free and democratic society

Issue 5 was based on the premise that the impugned provisions imposed a limitation on the right of freedom of the press and other media as guaranteed under Article 29 (1) (a) of the 1995 Constitution, and/or the right to equality and non-discrimination, the right to own property and the right to fair and just treatment before administrative bodies. My analysis of issues (1), (3) and (4) has shown that this is not the case, and that the impugned provisions

challenged under those issues impose no limitation on the respective rights. Further, whereas I found that Section 21 (b) of the UCA which is challenged under issue 2 constitutes a limitation on the right to property, my analysis under that issue gave reasons for concluding that the limitation under Section 21 (b) is reasonable and acceptable in a free, fair and democratic society. I need not repeat that analysis here.

Issue 6: Whether the petitioners are entitled to the reliefs prayed for

I have answered all previous issues in the negative. Accordingly, I would find that all the allegations in the Petition have no merit and the petitioners are not entitled to any of the declarations or orders sought. I would dismiss the Petition but make no order as to costs because the Petition was necessary in the public interest of clarifying the constitutionality of the regulatory the communications framework for sector under the Uganda Communications Act, 2013.

| Dated at Kampala this | |

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Elizabeth Musoke Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCCJ]

CONSTITUTIONAL PETITION NO. 025 OF 2018

BETWEEN

| Human Rights Network for Journalists L | | Petitioner No.1 |

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| | EaStern African Media InStitute (U) Ltd:pglililOner | NO. 2 |

AND

Attorney General Respondent

JUDGMENT OF FREDRICK EGONDA. NTENDE. JCC

- t1] I[>]have had the opportunity to read in draft the judgment of my sister, Musoke, JCC. While I am in agreement with the learned Justice of Appeal with regard to resolution of issues 1, 3, 4, I do not agree with the conclusion with regard to issue no. 2 that the limitations imposed on the fundamental right to ownership of property are reasonable and justifiable in a democratic society and will accordingly give my reasons for parting company with my sister herein below.
- 12] The crux of the petitioners' case that arises in issue no.2 is set out in paragraph 1[>](g) of the petition. I will set it out in full.

'That Section 21 (b) of the Uganda Communications Act, 2013 in so far as it limits the rights of existing licence holders to sell, let or otherwise dispose of a any radio communication apparatus without the authorisation of or licence from the Uganda Communication Commission is a violation of the proprietary rights of licence holders and in effect is a violation of the proprietary rights of licence holders and in effect an unjustified restriction to media freedoms under article 29 (1) (a) of the Constitution

Page 1 of 9

of the Republic of Uganda and in contravention of the right to property under article 26 (1) of the Constitution of Uganda.'

- t3] In response to the petition the respondent filed 2 answers to the petition. The first answer to the petition was filed on 30th July 2018 and the second answer was filed on the 1st August 2018. There is no explanation provided for this state of affairs and no permission is on record for filing the second answer. A party, including the Attorney General, cannot simply file a multiplicity of answers or pleadings without following the rules.
- 14] I will proceed to consider only the first answer filed by the respondent.
- t5] I will set out below the answer of the respondent to the petition on this point. It states,

'In specific reply to the contents of paragraph I (g) of the Petition, the Respondent contends that section 21 (b) of the Uganda Communications Act 2013, is neither inconsistent with or in contravention of articles 29 (1) (a) and 26 (1) of the Constitution and is not meant to curtail the property rights of the licence holders but rather for regulatory purposes.'

t6] This answer was accompanied by an affidavit sworn by Mr Adrole, a Senior State Attorney, at the time. In relation to this matter he swore thus, in paragraph 9 of his affidavit.

> 'That I know that the limitations imposed under the impugned sections of the Uganda Communications Act No.1 (sic. of 2013) are necessary, proportionate and justifiable in a free and democratic society.'

171 As a result of these pleadings and supporting evidence issue no.2 was framed thus, 'Whether section 21 (b) of the Uganda Communications Act, No. I of 2013 is inconsistent with and in contravention of article 26 (1) of the Constitution of Uganda?'

- [8] Counsel for the petitioner submitted that the requirement for license holders to obtain prior permission or licence before they can dispose of radio of the apparatus under section 21(b) Uganda Communications Act, is an unjustified restriction of their right to property under article 26 (1) of the Constitution.
- [9] In reply the respondent's counsel countered this submission that the legitimate objective of the impugned section was to ensure orderly dealings in communications infrastructure since uncontrolled disposal of such equipment could disrupt the provision of communications services and jeopardise the enjoyment of other people's freedoms and rights under the Constitution. Section 21 (b) of the Act was intended only to regulate the sell, let, hire or disposing of such equipment which is one of the functions of the Uganda Communications Commission under section 5 of the Act. Furthermore, counsel contended that section 42 allows the transfer of licences and the Commission approves such disposal of licences, upon the confirmation that the transaction does not affect the integrity and stability of the communications sector.
- Finally, counsel for the respondent asserted that section 21 (b) of the Act is [10] not unconstitutional but rather regulatory and did not contravene the right to property under article 26 (1) of the Constitution.
- Musoke, JCC, held and rightly in my view, that section 21 (b) of the Act [11] imposed a limitation or restriction on the licence holders fundamental right to property pursuant to article 26 (1) of the Constitution in so far as it made the right of disposal subject to licence by the Uganda Communications Commission. In light of this finding what is required is to engage in limitation analysis and determine whether such limitation or restriction is permissible under the Constitution of Uganda.
- [12] In engaging in this limitation analysis I must remind myself that the burden of proof rests with the petitioner to raise a **prima facie** case that a fundamental right or freedom has been contravened. Once this is established the burden

shifts to the state or respondent to rebut or justify the limitation. See *Charles Onvanso Obbo and Anor v A General*. 1200q UGSC 81

[3] Secondly where article 43 of the Constitution is called in aid to allow the limitation to the fundamental right the court must engage in a limitation analysis starting with the criteria laid down therein. Does the enjoyment of the fundamental right or freedom prejudice the fundamental rights and freedoms of other persons or the public interest? If the answer is in the affirmative, is the limitation acceptable and demonstrably justifiable in a free and democratic society, or is it provided by the Constitution? Mulenga JSC, (RIP) in *Charles Onvanso Obbo and Anor v Attorney General* (supra) formulated the limitation analysis in the following words,

> 'Similarly, 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. In determining the validity of the limitation imposed by section 50 on the freedom of expression, the court must be guided by the values and principles essential to a free and democratic society. In *Mark Gova & Another vs. Minister of Home Affairs & @9I*, [S. C. 36/2000: Civil Application No. 156/99], the Supreme Court of Zimbabwe formulated the following summary of criteria, with which I agree, for justification of law imposing limitation on guaranteed rights-

- . ^othe legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right;
- . the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations :
- . the means used to impair the right or freedom must be no more than necessary to accomplish the objective.'
- [4] As noted above, Musoke, JCC, found and I agree that section 21 (b) of the Uganda Communications Act limits the licence holders' rights to dispose of radio communication equipment by imposing a requirement for a licence from

the Uganda Communications Commission. It is now incumbent upon the respondent to justify this limitation.

- [5] In justification we only have a statement in the respondent's answer to the petition, reproduced above and the affidavit of Mr Adrole, a Senior State Attorney, at the time, in the Attorney General's Chambers in the Ministry of Justice at the time. The relevant portion is reproduced above. As a matter of evidence or proof the affidavit of Mr Adrole does not provide any facts or evidence to support the contention that section 21 (b) of the Act is a justifiable limitation upon the licence holders' right to dispose of their property as they may wish or whenever they may wish to do so.

- [16] The claim in the affidavit by Mr Adrole that 'the limitations are necessary, proportionate and justifiable in a free and democratic society' is a bare statement without any scintilla of proof of what it purports to assert. In fact it may be questionable whether Mr Adrole, who is not an expert in radio communication or broadcasting would be the right and only witness to lay down the facts upon which justification could be founded.
- [17] The only justification that we have come across is found in the submissions of the respondent. Firstly, they contended that it was intended to ensure orderly dealings in communication infrastructure as uncontrolled disposal of such equipment could disrupt the provision of communications services and jeopardise the enjoyment of other people's freedoms and rights under the Constitution.
- [18] Secondly it is contended that one of the functions of Uganda Communications Commission under section 5 (1) (b) of the Act is 'to monitor, inspect, licence, supervise, control and regulate communications services;' and that therefore the Commission has the duty to regulate the sale, let, hire or disposing of communications equipment.
- [19] Thirdly that under section 42 of the Act the Commission has power to authorize the transfer of licences to offer communications services and that

this justifies the requirement under section 21 (b) of the Act for a licence to sell, hire, let or otherwise dispose of communication apparatus or equipment.

- [20] It must be observed with regard to the first justification which is to avoid disruption of services so as not to violate other people's fundamental rights and freedoms that there is no factual basis upon which this justification is founded. It is only available in the submissions of counsel. It is neither set out in the pleadings nor in the supporting affidavit. No fundamental right or fundamental freedom that would be threatened by a disposal of communication or broadcasting apparatus of a licence holder is articulated. There is in fact no evidence available that a sale or hire of such apparatus would result in the violation of any other person's fundamental rights and freedoms. There is simply no iota of evidence laid before this court by the respondent to support this justification.
- [21] I now turn to the second justification which is that what is complained of by the petitioner is simply one of the functions of the Commission under section 5 (1) (b) of the Act to regulate communication services. This is no justification in my view to override a fundamental right. The regulatory function must be exercised in accordance with the Constitution rather than contravening it. The regulatory function of the Commission under this provision is for services and not for managing business assets or communications and broadcasting apparatus of the licence holders or the disposal of such assets.
- [22] Turning to the last justification that calls in aid section 42 of the Act I will start by setting out sections 21 and 42 of the Act in full.

- 123l Section 2l states,

'21. Licence for radio communications

A person shall not, without a licence issued by the Commission- (a) establish or use any radio station or provide radio communication services;

(b) sell, let, hire or otherwise dispose of any radio communications apparatus;

- (c) manufacture, possess, install, connect or operate any radio communications apparatus or interferencecausing apparatus.

[24] Section 42 provides,

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'42. Transfer of licence

- (1) A licence issued by the Commission shall not be transferred without the written consent of the Commission.

§(2)\$ An operator may apply to the Commission in the prescribed manner for consent to transfer a licence. §(3)\$ An application under subsection §(2)\$ shall be accompanied by an application for grant of a licence by the person to whom the operator intends to transfer the licence.

- (4) The Commission shall in considering an application for the transfer of a licence have regard to the same terms and conditions as those that apply to the grant of a new licence, but the Commission may in its discretion refuse to grant the application under this section.

- (5) For the purposes of this section—

(a)"transfer of licence" includes the acquisition of control of the licence holder; (b)"control" as used with respect to any person shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management of that person, whether through the ownership of shares, voting, securities, partnership or other ownership interests, agreement or otherwise.

- (6) The Commission shall grant its consent to transfer a licence within forty five days from the date of application.

- (7) Where consent is not granted under this section, the Commission shall within fourteen days provide a written explanation, giving reasons fbr the refusal.

- 125) As the heading of section 42 states this provision is dealing with transfer of licences for operators of communication and broadcasting services. On its face it provides no justification for licensing the sale or hire or disposal of communication and broadcasting apparatus. It is dealing with the transfer of an operator's licence to another person. However, it is instructive in so far as it gives timelines for a decision to be made for the response by the Commission to an application by an operator vide section 42 (6) of the Act.

And in section 42 (7) it provides a time line within which the Commission must provide reasons where the application is not granted.

- 1261 On the other hand, section 21 of the Act has no such safeguards. No time is provided within which the Commission has to respond to an application for a licence by an owner / operator/ licence holder desiring to sell, let, hire or dispose of his apparatus. Neither does it have a provision requiring the Commission to provide reasons for its decisions. The awesome power granted to the Commission under section 21 (b) is simply unregulated.
- 1271 On my part I am satisfied that the respondent has failed to justify this awesome power granted to the Commission under section 21 (b) of the Uganda Communications Act which is wholly unregulated by law to diminish ^a licence holder's right to dispose of its property. A prospective buyer in Uganda may have to obtain a licence to possess or own such property in accordance with section 21 (c) of the Act but that would be for the buyer to countenance. In any case the buyers need not only be within jurisdiction.
- [28] The respondent has failed to show that the enjoyment of the fundamental right under article 26 (1) of the Constitution by the licence holders threatens the fundamental rights of any other persons or the public interest. Neither has the respondent shown on the evidence or otherwise that the limitation imposed by section 21 (b) of the Uganda Communications Act is justifiable in a free and democratic society.

1291 I would declare that section 21 (b) of the Uganda Communications Act is inconsistent with and contravenes article 26 (1) of the Constitution of Uganda and is void to the extent of inconsistency.

Decision

[30] As Madrama, Mugenyi and Gashirabake, JJCC, agree, with Musoke, JCC, this petition is dismissed with no order as to costs.

Dated, signed and delivered at Kampala this /? Euv of fnA'r.6 ²⁰²³

ck Ntende

Justice of the Constitutional Court

⁵ THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA.

(CORAM; EGONDA NTENDE, MUSOKE, MADRAMA, MUGENYI, GASHIRABAKE, JJ CCruJ CA)

CONSTITUTIONAL PETITION NO. 025 OF 2018

¹⁰ 1. HUMAN RIGHTS NETWORK FOR JOURNALISTS LTD)

2 EASTERN AFRICA MEDIA RIGHTS (U) LTD) PETITIONERS

VERSUS

ATTORNEY GENERAL} RESPONDENT

¹⁵ JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA IZAMA, JCC

I have read in draft the Judgment of my learned sister Hon. Lady Justice Elizabeth Musoke, JCC.

I concur with the Judgment and the orders issued and would like to add my voice on a small matter in the resolution of issues numbers (1) and (4).

I agree with the decision of my Learned sister in the resolution of issue] and add to the concerns about section 29 (a) of the Uganda Communications Act which provides that: 20

29. Duties of a licensee and producer.

The holder of a Licence or a producer of the broadcasting station or disseminating apparatus shall -

(a) ensure that what is broadcast is not contrary to public morality.

Apart from what may be considered acceptable [imitation under article 43 of the Constitution as contained in the Judgment of my learned sister Hon Lady Justice Elizabeth Musoke, JCC the Constitution itself declared permissible limitations at the discretion of court with regard to public

- hearings in criminal matters by empowering courts and tribunals to exclude the press and the public from all or any proceedings for reasons of morality, public order or national security as may be necessary in a free and democratic society. Particularly, article 28 (1) and (2) of the Constitution which provides for this exception states that:
- 28. Right to a fair hearing.
- (1) In the determination of Civil Rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.
- (2) Nothing in clause (1) of this article shall prevent the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order or national security, as may be necessary in a free and democratic society.

The Constitution itself already provides for exclusion of the press on the grounds stipulated above which grounds may as well be considered under the general limitation provided for under article 43 (2) (c) which provides \$20\$ that:

> (c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

By using the disjunctive "or" where it is written "what is demonstrably \$25\$ justifiable in a free and democratic society or what is provided in this Constitution", it is made clear that there are two categories of limitations. These are, what are acceptable and demonstrably justifiable in a free and democratic society on the one hand or what is provided for in the Constitution on the other hand. By expressly allowing the exclusion of the 30

- press or the public from all or any proceedings before a court of law or tribunal for reasons of morality, public order or national security as may be necessary in a free and Democratic society, the exclusion of press or the public for reasons of the morality, public order or national security, as may
- be necessary in a free and democratic society, is an acceptable limitation 35 so long as it fall within those parameters. For that reason, it can reasonably

⁵ be argued that the freedom of press can be restricted on the grounds of morality, public order or national security as may be necessary in ^a Democratic society and section 29 (a) of the Uganda Communications Act, is therefore a reasonable saddle to control, in the public interest or to restrict what is broadcast, that which is contrary to public morality. As to how those powers are exercised is a question of enforcement and where the powers are unreasonably exercised, they can be subjected to judicial review. 10

With regard to issue 4, I further concur with the Judgment of my learned sister on the issue and wish to add that the question of whether a media entity has been treated unfairly or unjustly is not a question as to interpretation of the Constitution per se as the determination of what is unfair or unjust is a well-trodden path from the common law as well as the judicial precedents in Uganda. It is amenable to judicial review on the traditional grounds inter alia of procedural impropriety, rationality and Legality. 15 2A

In addition, the constitutional court did not assume the mandate of court of competent jurisdiction in enforcement of fundamental rights and freedoms or the Human Rights Commission which also has the mandate to enforce ^fundamental. rights and freedoms. Article 50 of the Constitution provides for

- enforcement of rights and freedoms by courts therefore in addition to the traditional powers of judicial review, there is a specific provision in article 50 that allows any person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened, to apply to a competent court for redress which may include 25
- compensation. 30

Further, article 52 (1) (d) and (h) of the Constitution as well as article 53 of the Constitution allows the human rights commission to investigate any violations of human rights and make appropriate orders. The question of whether the treatment of any person by reason of the powers granted by

the Uganda Communications Act is unfair on unjust does not require ^a decision of the constitutional court as to the interpretation of any provisions 35

- of the Constitution. The mandate of the constitutional court should be to determine any question or controversy as to interpretation. Such controversies are disputes about interpretation which may give rise to sufficient debate one way or the other as to the application, the scope, the meaning of a provision of the Constitution. In any case, in the course of
- proceedings before a competent court or before the Human Rights 10 Commission, a reference can be made to the constitutional court to elucidate on the meaning and scope or application of any provision of the Constitution that is not clear to the competent court or the Human Rights Commission under article 137 (5) of the Constitution. For emphasis, for
- purposes of its proceedings, the Human Rights Commission under article 15 53 (1) of the Constitution has the powers of a court in carrying out investigations and in my judgment can refer any question to the constitutional court under article 137 (5) of the Constitution for interpretation. In the premises, this court does not enjoy jurisdiction to resolve issue 4 as article 29 of the Constitution has already been 20 extensively considered in Onyango Obbo and Another vs the Attorney General; Constitutional Appeal Number 2 of 2002 and other precedents.

In the premises, I concur with the orders proposed by my learned sister dismissing the petition with no order as to costs.

Dated at Kampala the 17th day of May and 2023 25

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Christopher Madrama Izama Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC)

CONSTITUTIONAL PETITION NO. 25 OF 2018

BETWEEN

1. HUMAN RIGHTS NETWORK FOR JOURNALISTS LTD 2. EAST AFRICA MEDIA (U)
INSTITUTE

AND

THE ATTORNEY GENERAL

$\mathbf{1}$

JUDGMENT OF MONICA K. MUGENYI. JCC

- 1. I have had the benefit of reading in draft the judgment of my sister, Lady Justice Elizabeth Musoke, JCC in respect of this petition.
- 2. I agree with the findings and conclusions therein, as well as the orders issued

Dated and delivered at Kampala uis ..(.).f- o^, ,, .. N';.q 2023.

(I

Hon. Lady Justice Monica K. Mugenyi Justice of the Constitutional Court

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THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC*]

CONSTITUTIONAL PETITION NO.025 OF 2018

**HUMAN RIGHTS NETWORK FOR JOURNALISTS LTD. &
ANOTHER:.....: VERSUS**

THE ATTORNEY GENERAL:.....:

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA/JCC

I have had the benefit of reading in draft the judgment prepared by Hon. Lady Justice Elizabeth Musoke, JA/JCC. I concur with the judgment and have nothing useful to add.

Dated at Kampala this \$\ldots\$ Day of \$\ldots\$ Day.

.....

Christopher Gashirabake JUSTICE OF THE CONSTITUTIONAL COURT

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