IN THE EAST AFRICAN COURT OF JUSTICE AT

ARUSHA FIRST INSTANCE DIVISION

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

REFERENCE NO.2 OF 2017

MEDIA COUNCIL OF TANZANIA ..... **1ST APPLICANT**

LEGAL AND HUMAN RIGHTS CENTRE TANZANIA HUMAN RIGHTS ..... **2ND APPLICANT**

DEFENDERS COALITION ..... **3RD APPLICANT**

VERSUS

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

28TH MARCH 2019

JUDGMENT OF THE COURT

A. INTRODUCTION

1. This is a Reference that was filed on 11th January, 2017 by the Applicants pursuant to Articles 6(d), 7(2), 8(1)(c), 27(1) and 30(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as "The Treaty) as well as Rule 24 of the East African Court of Justice Rules of Procedure,2013.

2. The Applicants are Non-Governmental Organizations registered as such under the Laws of The United Republic of Tanzania, a Partner State in the East African Community. In the present Reference, they are represented by Mr. Fulgence Masawe Advocate of P.O. Box 79633 Dar-es-Salaam, Tanzania.

3. The Respondent is the Attorney General of the United Republic of Tanzania whose address is 20 Kivukoni Front 11492 Dar-es-Salaam, Tanzania.

B. BACKGROUND

4. This Reference is a challenge to the Media Services Act, No.120 of 2016 (hereafter referred to as "The Act") enacted by the Parliament of the United Republic of Tanzania on 5th November, 2016, and assented to by the President of the United Republic of Tanzania on 16th November, 2016.

5. The Applicants allege that the Act in its current form is an unjustified restriction on the freedom of expression which is a cornerstone of the principles of democracy, rule of law, accountability, transparency and good governance which the Respondent has committed to abide by, through the Treaty, amongst other international instruments.

6. The Reference specifically challenges the alleged violation of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

C. APPLICANT'S CASE

7. The Applicant's case is contained in the Reference dated 11th January, 2017, the Affidavits of Kajubi D Mukajanga, Helen Kijo-Bisimba and Onesmo Olengulumwa all filed on 11th January, 2017; the supplementary Affidavits of Jabir Iddrissa and Geoffrey Dilinga, both filed on 14th August, 2018; the Applicants' written submissions filed on 13th April, 2018, and the Applicants Supplementary List of Authorities filed on 14th November, 2018. The Applicants also filed a Rejoinder to Respondents written Submissions, on 14th August, 2018.

8. The Applicants contend in the Reference that the Respondent State, in enacting and applying the Act, violated Articles 6(d), 7(2) and 8(1)(c) of the Treaty which provide as follows:

> **Article 6:**
>
> **"The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:**
>
> **(a)** .....
>
> **(b)** .....
>
> **(c)** .....
>
> **(d) 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 people's rights in accordance with the**

provisions of the African Charter on Human and Peoples' Rights."

Article 7

"2. The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights."

Article 8

1. The Partner States shall:

(a) .....

(b) .....

(c) abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty."

9. The Applicants state that the United Republic of Tanzania (hereafter referred to as Tanzania) is a Partner State of the East African Community (EAC) and therefore has an obligation to ensure compliance with the Treaty.

10. The Applicants' contend that Tanzania, in enacting and applying the Act, violates the said provisions of the Treaty.

11. The Applicants' cite various provisions of the Act which they contend are in violation of the specific provisions of the Treaty referred to above, particularized as follows:

(a) That Sections 7(3)(a), (b), (c), (f), (g), (h), (i) and (j) of the Act violate freedom of expression by restricting type of news or content without reasonable justification;

(b) That the Act introduces the mandatory accreditation of journalists and gives powers to the Board of Accreditation to cancel the same under Sections 13, 14, 19, 20 and 21 of the Act, in violation of Articles 6(d), 7(2), and 8(1)(c) of the Treaty;

(c) That the Act, under Sections 35, 36, 37, 38, 39 and 40 provides for criminal penalties when defamation is established thereby restricting freedom of expression and the right to access information;

(d) That the Act, in Sections 50 and 54 criminalises publication of false news and rumours thereby restricting freedom of expression, and the right to access information;

(e) That the Act, in sections 52 and 53, criminalises seditious statements thereby restricting freedom of expression and the right to access information;

(f) That the Act in sections 58 and 59 vest the Minister with absolute powers to prohibit the importation of publications, or sanction media content, which is unjust and restrictive of freedom of expression and access to information.

12. The Applicants therefore seek the following reliefs:

(a) A declaration that the provisions of Sections 7(3)(a), (b), (c) (f), (g), (h), (i), and (j) of the Act violate the said provisions of the Treaty in that they restrict the type of news or content and thus impose arbitrary and unjust restrictions on news and other information and content and therefore infringe the right to freedom of expression;

(b) A Declaration that the Provisions of Sections 13, 14, 19, 20 and 21 of the Act violate the said provisions of the Treaty in that they restrict freedom of expression;

(c) A Declaration that the provisions of Sections 35, 36, 37, 38, 39 and 40 of the Act violate the aforementioned provisions of the Treaty in that they restrict freedom of expression;

(d) A Declaration that the provisions of Sections 50 and 54 of the Act violate the said provisions of the Treaty in that they restrict freedom of expression;

(e) A Declaration that the provisions of Sections 52 and 53 of the Act violate the said provisions of the Treaty in that they restrict freedom of expression;

(f) A Declaration that the provisions of Sections 58 and 59 of the Act violate the said provisions of the Treaty in that they restrict freedom of expression;

(g) A Declaration that the Act violates the said provisions of the Treaty;

(h)An order to the Respondent state to cease the application of the Act and repeal or amend the Act to bring it in conformity with the fundamental and operational principles contained in the Treaty; and

(i) **An order that the costs of and incidental to this Reference be met by the Respondent.**

D. **RESPONDENT'S CASE**

13. The Respondent filed a Response on 28th February, 2017, as well as an Affidavit sworn by Silvia Novatus Matiku, and filed on the same day. The Respondent also filed written submissions on 29th June, 2018. These latter submissions were filed out of time, but later upon application by the Respondent, and no objection by the Applicant, the Court granted an extension of time and deemed the same to be properly filed.

14. The Respondent's Response to the Reference included a Notice of Preliminary Objection whereby the Respondent contended that the Court did not have jurisdiction to entertain the Applicant's Reference. In the event, on the direction of the Court, the Preliminary Objection was heard together with the main Reference.

15. The Respondents case is that:

a) Freedom of expression is not absolute and that the Act is reflective of the intent and purport of Article 18 of the Constitution of Tanzania and pays special regard to the promotion of public awareness in issues of national interest and national importance by protecting the rights

and interests of individuals and that of the public and is therefore justifiable;

b) The act does not violate the provisions of Articles 6(d), 7(2) and 8(1)(c) of the Treaty, but rather the alleged impugned Sections of the Act are in line with the spirit and purport of the said Articles of the Treaty;

c) Sections 7(3)(a), (b), (c), (f), (g), (h), (i) and (j) of the Act do not violate freedom of expression but rather provide the rights and obligations of a media house and the manner in which they should conduct themselves in exercising the rights under the provisions of the Act. Further, the said provisions of the Act are in line with the Constitution of Tanzania and with the Treaty;

d) The functions of the Board under Section 13 of the Act, the powers of the Board under Section 14 thereof, the accreditation of Journalists under Section 19, the release of press cards under Section 20 and the roll of journalists under Section 21 do not violate the said provisions of the Treaty. The said provisions provide an oversight and control mechanism over the journalism profession for scrutiny, statistics and growth;

e) The Provisions of Section 35 which define defamation, Section 36 which deals with defamation in print media, Section 37 which provides for the definition of unlawful publication, Section 38 which provides for cases in which publication is absolutely privileged, Section 39 which provides for cases in which publication is

conditionally privileged, and Section 40 which provides for offers of amends do not restrict the freedom of expression and right to access information but rather ensure the rights, freedoms, privacy and reputation of other people or interest of public are not prejudiced by wrongful exercise of the rights and freedoms of individuals;

f) The provisions of Section 50 which provide for offences relating to media services and Section 54 which provide for an offence of publication which is likely to cause fear or alarm do not restrict the freedom of expression and right to access of information as provided under the Constitution of Tanzania, or the Treaty;

g) The provisions of Section 52 which define *"Seditious intention"* and Section 53 which provides for seditious offences do not restrict the freedom of expression and right to access of information, as provided under the Constitution of Tanzania, or the Treaty; and

h) The provisions of Section 58 which gives powers to the Minister to prohibit publications and Section 59 which provides for powers of the Minister, are just and do not restrict the freedom of expression and right to access of information.

16. The Respondent therefore prays that the Reference be dismissed with Costs to the Respondent.

SCHEDULING CONFERENCE

On 13th March, 2018, the Parties attended a Scheduling Conference at this Court, where it was agreed *inter alia,* that the following are the issues for determination:

a) **Whether the Court has Jurisdiction to hear and determine the Reference;**
b) **Whether the cited provisions of the Act , are a violation of the cited Articles of the Treaty; and**
c) **Whether the Parties are entitled to the remedies sought.**

E. DETERMINATION

ISSUE NO.1: Whether the Court has Jurisdiction to hear and determine the Reference:

17. The Respondent challenges the jurisdiction of the Court to hear and determine this Reference, essentially on three grounds:

i **That the Reference before this Court which is an International Court, was filed without the Applicants first exhausting all available remedies in the National Courts;**

ii **That the matter is *res judicata*; and**

iii **That in any event, the Reference was filed out of time and in violation of Article 30(2) of the Treaty;**

Exhaustion of Local Remedies

18. The thrust of the Respondent's argument on this issue is *that* **"Although the Treaty and the Rules do not specifically state that**

Applicants should exhaust local remedies before approaching this Court, it is a practice of International Law that litigants should first attempt to exhaust available remedies." The Respondent further submits that "**the Court is not precluded by the Treaty or the Rules of this Court from applying this International principle on a case to case basis as it sees fit to prevent the abuse of Court process or in the interest of Justice."**

19. Further, the Respondent cites Article 30(3) of the Treaty which provides as follows:

> **"The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State."**

20. The Respondent proceeds to argue that the fact of the Respondent having domesticated the Treaty by enactment of the Treaty for the Establishment of the East African Community Act, Cap 411, brings Article 30(3) above into play and thus limits the jurisdiction of the Court in this instance. The Respondent contends that this position is further supported by Article 34 of the Treaty which provides as follows:

> **"When a question is raised before any court or tribunal of a Partner State Concerning the interpretation or application of The provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question."**

21. The Respondent concludes therefore that in the instant case, jurisdiction to hear and determine the Applicants' grievances lay with the National Courts, which could have referred to this Court, any question of interpretation or application of the Treaty or any provision thereof. The Respondent draws the attention of the Court to the case of **Union of Tanzania Press Clubs and Hali Halisi Publishers Ltd vs. The Attorney General of the United Republic of Tanzania, MISC Civil Cause No.02 of 2017**, before the High Court of Tanzania at Mwanza. In that case, the Petitioners therein challenged various provisions of the Act as being unconstitutional and violating Article 13(6)(a) of the Constitution of the Republic of Tanzania. Stating that the said case was dismissed by the High Court of Tanzania, the Respondent contends that the same is therefore *Res Judicata*, although there in an appeal in respect thereof, pending before the Court of Appeal of Tanzania.

22. The issue of its *res judicata* shall be addressed separately and substantively in this Judgment.

23. In urging that this Court should not entertain the matter as the Applicants have not exhausted available remedies in the National Courts, the Respondent further relied on the case of **Urban Mkandawire vs. The Republic of Malawi, Application No.003 of 2011**, where the African Court on Human and Peoples Rights dismissed the subject application for failure to first exhaust local remedies. The Respondent cited the similar position taken by the African Commission on Human and Peoples Rights, in Article 19 Vs. Eritrea (2007) AHRLR 73 (ACHPR 2007) as well as the **Communication No.263/02 Kenya Section of the International Commission of Jurists, Law Society, Kituo cha Sheria, Kenya**.

24. On their part, the Applicants contended that the Respondent's objection was without basis, and that the Court has jurisdiction to consider and adjudicate upon the Reference. In the Applicants' submission, there is no requirement to exhaust domestic remedies before filing a reference in this Court. The Jurisdiction of the Court is expressly set out in Article 27(1): **"The Court shall initially have jurisdiction over the interpretation and application of this Treaty."** Nor in this case, is jurisdiction compromised by the *proviso* to the said Article 27 (1) which states: "**Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States."** The Applicants' Submission is that, contrary to the Respondent's argument, the proviso to Article 27(1) does not limit the Court's jurisdiction to interpret or apply the Treaty on the basis of domestication of the Treaty. Rather, the court's Jurisdiction to interpret or apply the Treaty will be limited where the Court's Interpretation is to be applied to jurisdiction that has been conferred by the Treaty on Organs of the Partner States. No such jurisdiction, argues the Applicant, to interpret and apply the Treaty, has been conferred on organs of a Partner State, by any provision of the Treaty. In the event therefore, this Court has exclusive jurisdiction in the interpretation and application of the Treaty. The Applicants cite the statement of the Court in its decision in the **Anyang' Nyongo and Others vs. The Attorney General of Kenya and Others, EACJ Reference No.1 of 2006** that, *"there is no doubt about the primacy, if not supremacy of this Court's jurisdiction over the interpretation of provisions of the Treaty."*

25. The Applicant submitted that the African Court on Human and Peoples Rights and the African Commission on Human and People's Rights referred to by the Respondent were unhelpful and indeed irrelevant to the instant case, as they were decided in specific application of provisions in the African Charter on Human and Peoples Rights and the relevant rule of the Rules of the African Court. In contrast, the Applicant drew the Courts attention to the decisions on the matter, by the Court of Justice of the Economic Community of West Africans States (ECOWAS), applying the ECOWAS Protocol and Supplementary Protocol which, like the Treaty for the Establishment of the East African Community, do not have any provision requiring exhaustion of local remedies before approaching the Regional/International Court.

26. The Applicant therefore invited the Court to take up jurisdiction, and determine the Reference before it.

27. Having considered the respective pleadings and submissions of the parties on this first issue of exhaustion of local remedies (forming part of the question regarding the Courts jurisdiction), we now turn to the Courts determination on the same.

28. It is common ground that the Court's jurisdiction is drawn from the Treaty and in particular Articles 23(1) and 27 (1) thereof. These provide as follows:

> **ARTICLE 23:**
>
> *1. The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.*

ARTICLE 27:

*1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty: "**Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.**"*

29. As stated above, the Respondent sought to argue that the fact of domestication of the Treaty, in this case the Respondent State's enactment of the East African Community Act, Cap.411, confers jurisdiction on the National Courts of Tanzania, thus, bringing into operation the proviso to Article 27(1) of the Treaty, and limiting the jurisdiction of this Court. In so arguing however, the Respondent did not demonstrate to the Court how such domestication limited the Court's jurisdiction in terms of the said provision. In enacting the East African Community Act, the Respondent State was fulfilling a specific obligation under Article 8(2) of the Treaty, which provides as follows:

> **"Each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular:-**
>
> > **(a) to confer upon the Community the legal capacity and personality required for the performance of its functions; and**

(b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory."

30. Beyond that, there is nothing in the clear wording of Article 8(2) to suggest that, the Article confers jurisdiction to interpret and apply the Treaty on any state organ.

31. In an attempt to shore up its argument on this issue, the Respondent makes reference to Article 34 of the Treaty which provides as follows:

> **"Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question."**

32. It is our view that far from supporting the Respondent's position, Article 34 buttresses the position that this Court has exclusive jurisdiction to interpret and apply the Treaty. This is consistent with Article 33(2) of the Treaty that provides:

> **"Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter."**

33. Analysing Articles 34 and 33(2) of the Treaty in **Anyang' Nyongo and Others vs. Attorney General of Kenya and Others (Supra)**, this Court observed that *"The purpose of these provisions is obviously to ensure uniform interpretation and avoid possible conflicting decisions and uncertainty in the interpretation of the same provision of the Treaty."*

34. The Court went further:

> **"Article 33(2) appears to envisage that in the course of determining a case before it, a national court may interpret and apply a Treaty provision. Such envisaged interpretation, however, can only be incidental. The Article neither provides for nor envisages a litigant directly referring a question as to the interpretation of a Treaty provision to a national court. Nor in is there any other provision directly conferring on the National Courts' jurisdiction to interpret the Treaty."**

35. We turn to consider the question of whether there was an obligation on the Applicants in this matter, to pursue and exhaust available local remedies in the National Courts of the Respondent State, before filing the instant Reference before this Court. In bringing the instant Reference, the Applicants were exercising the right granted to them as residents of a Partner State of the Community, by Article 30(1) of the Treaty which provides that:

> **"Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner**

State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."

36. In the **Anyang' Nyongo** case referred to above this Court stated:

"Article 30 no doubt confers on a litigant Resident in any Partner State the right of direct access to the Court for determination of the issues set out therein. We therefore, do not agree with the notion that before bringing a reference under Article 30, a litigant has to exhaust the local *remedy.* In our view, there is no local remedy to exhaust."

37. The **"exhaustion of local remedy"** argument has been canvassed before this Court in a number of cases. The rule and its application, or otherwise, in the context of the Treaty, was considered by this Court at some length, in **Malcom Lukwiya vs. The Attorney General of the Republic of Uganda and the Attorney General of the Republic of Kenya, Reference No.6 of 2015. "The Court observed that "The exhaustion of domestic remedies rule is widely upheld by International Courts having direct jurisdiction over individuals as a treaty requirement and as a rule of Customary International Law. In that regard, the exhaustion of local remedies rule is considered as condition precedent for the assumption of jurisdiction over suits brought in an International Court against a state by an individual from a member state"**; However, this Court went further to state: **"The EAC Treaty recognizes the capacity of individuals to seek redress for a**

breach of their rights enshrined therein against any Partner State or an institution of the Community. Article 30(1) of the Treaty --- gives *locus standi* to any person to have direct access to the Court and the Treaty has not provided the exhaustion of domestic remedies as a condition for the admissibility of petitions brought by individual before the Court."

38. In the **Lukwiya Case**, the Court made reference to the earlier case of **Plaxeda Rugumba vs. The Attorney General of the Republic of Rwanda, Reference No.8 of 2010** where the Court held that **"It is not in doubt that there is no express provision barring this Court from determining any matter that is otherwise properly before it, merely because the Applicant has not exhausted local remedies."** In dismissing the Respondent's contention, the Court held, **"The EACJ is the only court mandated to determine whether the EAC Treaty has been breached or violated .... Whether the Applicants complaints can be addressed elsewhere is immaterial to the exercise of jurisdiction under the Treaty...."**

39. With respect, the authorities cited by the Respondent herein, from the African Court of Human and Peoples' Rights and the African Commission on Human and Peoples' Rights, cannot, in our view, assist the Respondent. This is because, both the African Charter on Human and Peoples' Rights, as well as the Rules of the African Court on Human and Peoples' Rights, specifically require exhaustion of local remedies in the subject Respondent States as a pre-condition to admission of complaints or applications. In a somewhat disingenuous approach, the Respondent sought to rely on the reference to the African Charter on Human and Peoples' Rights, in Article 6(d) and the reference therein to **"the maintenance of universally accepted**

standards of Human Rights" in Article 7(2). The Court however is persuaded by the Applicants Submission that **"it is clear from reading these previsions that Articles 6(d) and 7(2) of the Treaty are referring to the substantive rights and duties that form the basis of International Human Rights Law, and do not refer to the procedural laws that are applicable to certain regional or international human rights mechanisms."** And further, **"Articles 6(d) and 7(2) establish the obligations that are placed on Partner States of the Community and do not set out procedural rules governing the jurisdiction of this Court."**

40. In the **Lukwiya** case, the Court made reference to the consideration of the local remedies rule by the ECOWAS Court of Justice. That Court has constantly held that to the extent that the Court's Protocols do not contain the rule, it is not applicable before the Court. This position is similar to that adopted by this Court. Indeed in the Appeal in the **Rugumba case Appeal No.12 of 2010** the Appellate Division of this Court, whilst acknowledging that **"the obligation to exhaust domestic remedies forms part of customary international law, recognised as such in the case law of the International Court of Justice"** and **"it is also to be found in other International Human Rights Treaties"** ---- nevertheless, the Court concluded:

> **"However, the EAC Treaty does not have any provision requiring exhaustion of local remedies. In our view, though the Court could be flexible and purposeful in the interpretation of the principle of the local remedies rule, it must be careful not to distort the express intent of the EAC Treaty."**

41. In the instant case, the Applicants, who are Residents of a Partner State of the EAC, seek to exercise their rights under Article 30 of the Treaty, to approach this Court directly, for determination of the legality of an Act of the Partner State on the grounds that such Act is unlawful or an infringement of the provisions of the Treaty. On its part, the Court is bound to take up jurisdiction under Articles 23 and 27 of the Treaty.

Res Judicata

42. Although in its Notice of Preliminary Objection the Respondent did not specifically raise the issue of *res judicata*, in submissions, the same was urged under the general cover of jurisdiction. The Applicants in turn made submissions on the same in the Applicants' Rejoinder to Respondent's written submissions, filed on 14th August, 2018. The Respondents submission is that **"similar"** cases have been filed in the National Courts challenging the Act. Specifically, the Respondent cites **Union of Tanzania Press Clubs and Hali Halisi Publishers Ltd. vs. The Attorney General of the United Republic of Tanzania**, (supra). In its submissions, the Respondent states that in that matter, the Petitioners challenged certain provisions of the Act as being unconstitutional and offending provisions of the Constitution of the United Republic of Tanzania. Stating that the High Court of Tanzania dismissed the Petition, the Respondent herein therefore urges that the matter is *res judicata.*

43. It is trite law that, for a matter to be res judicata, the matter must be between the same parties in respect of the same subject matter, and determined on merits by another court of competent jurisdiction. In **James Katabazi and 21 Others vs. Secretary General of the East**

African Community, and the Attorney General of Uganda, EACJ Reference No.1 of 2007, this Court stated:

> **"Three situations appear to us to be essential for the doctrine to apply: One, the matter must be 'directly and substantially' in issue in the two suits. Two, Parties must be the same or parties under whom any of them claim litigating under the same title. Lastly, the matter was finally decided in the previous suit. All the three situations must be available for the doctrine of res judicata to operate."**

44. From the Respondent's own Submissions, the litigant in the Tanzania High Court matter was different from the Applicants in the instant case. Further, in the Tanzania High Court, the matter at issue was whether the provision of the Act, offended the Constitution of the United Republic of Tanzania. In the instant case, the question is whether the provisions impugned by the Reference, violate specific Articles of the Treaty.

45. No evidence was tendered before this Court, on the question of whether or not the **Union of Tanzania Press Clubs Case** was actually concluded on merit.

46. It is our view that, without even delving into what actually transpired in the Tanzania High Court proceedings, it is clear that the principle of *res judicata* has no application to the instant case.

Filing the Reference out of Time

47. Again, the question of whether the Reference was filed out of time, was not specifically raise by the Respondent in the Notice of

Preliminary Objection, but was urged in the Submissions. The Applicants responded thereto. Article 30(2) of the Treaty provides as follows:

> **"The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be."**

48. With undue emphasis on the word *"enactment"* in Article 30(2), the Respondent argued that the *"enactment"* of the Act is the date that the Parliament of the United Republic of Tanzania passed the Act, namely 5th November, 2016 and that the two month period referred to in Article 30(2) should be reckoned from that date, and that therefore the Reference having been filed on 11th January, 2017, the same was out of time, and should be dismissed on that basis.

49. On their part, the Applicants submitted that prior to the President assenting to the law, the law making process is not complete, and that such process was completed on the date of assent, 16th November, 2016. That being the reckon date, in filing the Reference on 11th January, 2017, the Applicants were within time, and in compliance with Article 30(2) for the Treaty.

50. As stated above, the Respondent appears to have placed undue emphasis on the word "*enactment*" in Article 30(2). Indeed the Respondent, in its submissions has proceeded on the basis that in the legislative process, *"enactment"* is equated to passing of a Bill in Parliament. Reading Article 30(2), what is *"the action complained of"* in the instant Reference? It is clearly the Law known as the Media

Services Act, which became law after firstly, being passed by the Parliament of the United Republic of Tanzania on 5th November, 2016 and secondly, being assented to by the President of the said Respondent State on 16th November, 2016. The passage of the Bill by the Parliament was only one step towards the making of the law. Prior to the Act being assented to by the President, there was no law in respect of which there could be a complaint. Indeed as regards Article 30(2) the focus is on "*the action complained of.*" The action complained of against the Respondent State, is the enactment of the Media Services Act, which became law on 16th November, 2016 upon assent by the President.

51. In this regard, the Applicants were well within time, in terms of Article 30(2), in filing the Reference on 11th January, 2017.

52. On the question of the jurisdiction therefore, we find that this Court has jurisdiction under Articles 23 and 27 of the EAC Treaty; the Applicant is well within his right to approach this Court under Article 30; the issue of *res judicata* does not arise in the instant case; and in terms of Article 30(2) the Reference was filed within time.

53. In answer to the First Issue therefore, whether the Court has jurisdiction to hear and determine the Reference, we answer in the affirmative.

ISSUE NO.2: Whether the cited provisions of the Act, are a violation of the cited Articles of the Treaty:

54. The gravamen of the Applicants case in the Reference is that they challenge the Sections of the Act set out in paragraph 12 above, as violating Articles 6(d), 7(2) and 8(1)(c).

55. It is not disputed that Tanzania as a Partner State , has obligations *inter alia,* under Articles 6(d), 7(2) and 8(1)(c) of the Treaty. These Articles are reproduced earlier in this Judgment. At the heart of this Reference however, is the question of whether by enacting the Media Services Act, the Respondent State violated the said Treaty provisions or any of them. Both in the Reference and in the Applicants' submissions, the Applicants set out specific provisions of the Act which in their contention, fall foul of the said Treaty provisions. Indeed, of the nine orders prayed for by the Applicants in the Reference, seven are for declarations that various provisions of the Act violate the Treaty.

56. This Court has on several occasions in the past been invited to consider alleged violations of the said Articles of the Treaty. In **Samuel Mukira Muhochi vs. The Attorney General of Uganda, Reference No.5 of 2011,** this Court stated, with reference to Article 6(d) of the Treaty:

> **"... these principles are foundational, core and indispensable to the success of the integration agenda, and were intended to be strictly observed. Partner States are not to merely aspire to achieve their observance; they are to observe these as a matter of Treaty obligation."**

57. In **Rugumba vs. Attorney General of Rwanda, (supra)**, the Court stated:

> **"... we are of the firm view that the principles set out in Articles 6(d) and 7(2) were not inscribed in vain. The jurisdiction of this Court to interpret any breach of those**

Articles was also not in vain, neither was it cosmetic. The invocation of the provisions of the African Charter on Human and Peoples Rights was not merely decorative of the Treaty but was meant to bind Partner States hence the words that Partner Stats must bind themselves to "the adherence to the principles of democracy, the rule of law ..... as well as the recognition, promotion and protection of the human and people's Rights in accordance with the provisions of the African Charter on Human and Peoples Rights."

58. In **Burundian Journalists Union vs. The Attorney General of the Republic of Burundi, Reference No.7 of 2013,** the substantive issue was the freedom of the press and freedom of expression in the context of Articles 6(d) and 7(2) of the Treaty. This Court observed that **"there is no doubt that freedom of the press and freedom of expression are essential components of democracy."** In that case, reviewing a number of decisions from various jurisdictions the court quoted with approval, the Supreme Court of Canada in Edmond Journal:

> **"It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over emphasized."**

59. Upon review of the said several earlier decisions in the **Burundian Journalists** case, the Court concluded as follows with regard to interpretation of Articles 6(d) and 7(2):

> **".... Under Articles 6(d) and 7(2), the principles of democracy must of necessity include adherence to press freedom."**
>
> **".... A free press goes hand in hand with the principles of accountability and transparency which are also enshrined in Articles 6(d) and 7(2)."**
>
> **"... by acceding to the Treaty and based on ... finding that Articles 6(d) and 7(2) are justifiable, Partner States .... are obligated to abide and adhere by each of the fundamental and operational principles contained in Articles 6 and 7 of the Treaty and their National laws must be enacted with that fact in mind. In stating so, we have previously held that whereas this Court cannot superintend the Organs of Partner States in the ways they enact their laws, it is an obligation on their part not to enact or sustain laws that completely negate the purpose for which the Treaty was itself enacted."**

60. In answering its own question **"..... What is the test to be applied by this Court in determining whether a National Law.....meets the expectations of the Treaty,"** and finding no answer in the Treaty itself, the Court adopted the three part test set out by the Supreme Court of Canada in **R. vs. OAKES, (1986) ISCR 103**. This test, which was adopted by the High Court of Kenya in **CORD vs. The**

Republic of Kenya and Others HC Petition No.628 of 2014, may be paraphrased and broken down into these questions as follows:

> **(a) Is the limitation one that is prescribed by Law? It must be part of a Statute, and must be clear, and accessible to citizens so that they are clear on what is prohibited;**
>
> **(b) Is the objective of the law pressing and substantial? It must be important to the society; and**
>
> **(c) Has the State, in seeking to achieve its objectives chosen a proportionate way to do so? This is the test of proportionality relative to the objectives or purpose it seeks to achieve.**

61. It is common ground between Parties hereto, that freedom of opinion and freedom of the media are at the core of the fundamental and operational principles set out in Articles 6 and 7 of the Treaty. Indeed this is no more than the law as enunciated in the **Burundian Journalists** case, as well as the other authorities cited above. That said, it is trite law, and again common ground herein, that these rights are by no means absolute. Various courts in different jurisdictions have endeavored to set the parameters of when and how these rights may be restricted or limited. In **Julius Ndyanabo vs. Attorney General, (2004) TLR14,** applying the constitution of Tanzania, the High Court of Tanzania stated:

> **"What the Constitution ..... attempts to do; in declaring the rights of the people is to strike a balance between individuals liberty and social control."**

62. Referring to the **Burundian** Journalists case and the three tier test adopted therein, the Applicants submitted that if any provision of the impugned Act fails to pass any one of the three tests, that failure will constitute a violation of the right to freedom of expression and press freedom. Further, such provision of the Act will consequently breach the fundamental and operational principles set out in Articles 6 and 7 of the Treaty. We respectfully agree with Applicants.

63. Accordingly, to answer Issue No.2 in the instance Reference, we proceed to subject the impugned provisions of the Act to the said three tier test.

Section 7 of the Act:

64. The Applicants contend that "The Act under Section7 (3) (a), (b), (c), (f), (g), (h), (i), and (j) violate freedom of expression by restricting type of news content without justification. The said section 7(3) provides as below:

> **"A media House shall, in the execution of its obligations, ensure that information issued does not:**
>
> **(a) undermine:-**
>
> **i) The national security of the United Republic of Tanzania; or**
>
> **ii) Lawful investigations being conducted by a law enforcement agent;**
>
> **(b) impede due process of law or endanger safety of life of any person;**
>
> **(c) does not constitute hate speech;**

(d)disclose the proceedings of the Cabinet;

(e)facilitate or encourage the commission of an offence;

(f) Involve unwarranted invasion of the privacy of an individual;

(g)infringe lawful commercial interests, including intellectual property rights of that information holder or a third party from whom information was obtained;

(h)hinder or cause substantial harm to the Government to manage the economy;

(i) significantly undermines the information holder's ability to give adequate and judicious consideration to a matter of which no final decision has been taken and which remains the subject of active consideration; or

(j) damage the information holder's position in any actual or contemplated legal proceedings, or infringe professional privilege."

65. In response, the Respondent, while conceding that the Treaty clearly states the fundamental and operational principles .... under Article 6 and 7 of which freedom of opinion and expression are core, submitted that, like all other rights, freedom of expression and opinion is not absolute but subject to reasonable limitation, therefore the limitation should be subject to reasonableness. After interrogating the constitution of the United Republic of Tanzania, on the limitation of

rights, the Respondent urged that the restrictions in Section 7 of the Act are reasonable and are limited to specific instances.

66. Applying the three tier test:

i) Whilst it is manifestly clear that by definition, the Section is set out in the law, does that in and of itself meet the first test as set out and contemplated in the cases referred to above? In the **CORD Case (supra)**, the Court stated that: **"It must be part of a statute and must be clear and accessible to citizens so that they are clear on what is prohibited."** In **Konate vs. Burkina Faso, App No.004/2013/(2014)**, the African Court on Human and Peoples Rights, quoted with approval, the UN Human Rights Committee as follows:

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

Against this requirement, in our view the several impugned provisions in Section7 (3) of the Act must fail the first test, as being vauge, unclear and imprecise. Unlike in the **Burundian Journalists Case,** in the instant Reference, the Applicants were very specific as to which content-based provisions of the Act, they impugn as falling foul of Articles 6 and 7 of the Treaty.

Section 7(3)(a) – the word **"undermine"** which forms the basis of the offence, is too vague to be of assistance to a journalist or other person, who seeks to regulate his or her conduct, within the law.

ii) Again, the word **"impede"** is vague and would not meet the UN Human Rights Committee's guidance that **"laws must contain rules which are sufficiently precise, to allow persons in charge of their application to know what forms of expression are legitimately restricted and what forms of expression are unduly restricted."**

iii) The Act does not define hate speech, and therefore, in the context, the term is vague and potentially too broad.

iv) "Unwarranted invasion" also in our view fails the test of clarity and precision.

The phrase **"infringe lawful commercial interests"**, in subsection (g), **"hinder or cause substantial harm"** in subsection (h), **"significantly undermines"** in (i) and **"damage the information holders position",** all, similarly fall short of clearly defining the scope and extent of the respective content restrictions, to enable journalists and other persons to properly appreciate the limitation to the right to freedom of expression or to be clear on what is prohibited.

67. As regards the impugned provisions of Section 7 of the Act therefore, we find ourselves unable to accept the Respondent's Submission that "the restrictions are ..... not too wide and do not act as a fishing net, sweeping across and catching wanted and unwanted fish." With respect, that is precisely what the impugned provisions do.

68. On the second limb of the three-tier test, the High Court of Kenya in the CORD case stated that "the objective of the law must be pressing and substantial, that it must be important to society." The aim of the

content restrictions in Section 7 is not self-evident, nor did the Respondent make specific submissions on the same.

69. On their part, the Applicants referred the Court to the respective provisions to be found in The African Charter on Human and Peoples rights and the International Covenant on Civil and Political Rights, (ICCPR). Article 27(2) of the African Charter provides that: **"rights shall be exercise in respect of the rights of others, collective security, morality and common interests."**

70. Article 19(3) of the ICCPR provides that free expression may be limited for respect of the rights or reputation others; or for the protection of national security or of public order ("ordre public), or of public health or morals. The Applicants further referred the Court to the position stated in the UN Human Rights Committee's General comments to the effect that a State Party relying on legitimate aim to justify a provision restricting free expression, can only do so by demonstrating **"in specific and individualized fashion the precise nature of that threat, and the necessity (and proportionality) of the specific action taken, establishing a direct and immediate connection between the expression and the threat."**

71. Whereas as stated the Respondent made no specific submissions on the issue of legitimate aim as regards the impugned sections the Applicant urged that the impugned Section **"in imposing a system of prior censorship, does not pursue a legitimate aim consistent with Article 19 of the ICCPR and Article 9 of the African Charter."**

72. Nor did the Respondent submit or otherwise seek to demonstrate to the Court that the impugned Sections of the Act contain restrictions

which are necessary or appropriate to the legitimate aim sought to be achieved.

73. For the reasons set out above, we are of the view that the impugned provisions of Section 7 of the Act, fail the first test of the three tier test set out in the CORD Case and the other authorities cited above. This failure is by reason of the broad and imprecise wording used in the sections, with the result that the provisions do not make it clear to citizens what exactly is prohibited, such that they may regulate their actions. That failure alone constitutes a violation of the right to press freedom and freedom of expression which in turn translates into a breach of the fundamental and operational principles set out in Articles 6 and 7 of the Treaty.

74. In this we are guided by what was stated by the Court in the **Burundian Journalists Case** that **"....under Article 6(d) and 7(2), the principles of democracy must of necessity include adherence to press freedom"** and, **"free press goes hand in hand with the principles of accountability and transparency which are also entrenched in Articles 6(d) and 7(2)."** The Court thus concluded that **"Partner States ... are obligated to abide and adhere by each of the fundamental and operational principles contained in Articles 6 and 7 of the Treaty and their National Laws must be enacted with that fact in mind."**

75. Over and beyond the first test, the Respondent also failed to establish either that there was a legitimate aim being pursued by the Respondent State in enacting the limitation in the impugned section of the Act, or indeed that the said limitations are proportionate to any such aim. As regards the cited provisions of Section 7 of the Act

therefore, we find that they are in violation of Articles 6(d) and 7(2) of the Treaty.

Sections 13, 14, 19, 20 and 21

76. The Applicants impugn these provisions, which establish and deal with a system of accreditation, as being in violation of the said Articles of the Treaty. On its part, the Respondent denied the violation and submitted that the purpose of the provisions is to provide oversight and put in place, a control mechanism on the journalism profession for scrutiny, statistics and growth.

77. In the **Burundian Journalists Case**, it was acknowledged that accreditation *per se* is not objectionable. In the instant reference also, we see nothing objectionable to either section 13 which deals with functions of the Board or section 14 which deals with powers of the Board. In this regard, we read section 14 together with section 21(4)(5) and (6).

78. Sections 19 on the other hand is problematic, when we apply the three tier test referred to above. This is so in relation to the meaning and definition of the term **"journalist"** used in section 19 and defined in section 3. In the latter Section, journalist is defined as **"a person accredited as a journalist under this Act, who gathers, collects, edits, prepares or presents news, stories, materials and information for a mass media service, whether an employee of media house, or a freelancer"** In turn, **"mass media"** is defined as **"includes any service, medium or media consisting in the transmission of voice, visual data, or textual message to the general public."**

79. We agree with the Applicants' submission that the definition of **"journalist"** in section 19 is too broad, **"to provide sufficient provision to allow an individual to foresee what activities they are forbidden from performing without accreditation."** Indeed, the term **"journalist"** is difficult to define with precision. This was recognized by the UN Human Rights Committee in its General Comment 34: **"journalism"** is a function shared by a wide range of actors, including professional full time reporters and analysts, as well as others, who engage in forms of self-publication in print, on the internet or elsewhere.

80. In the context of section 19 of the Act, it is also not clear, what legitimate aim the accreditation requirement therein (as a limitation on the right to freedom of expression), pursues. In **Scanlen vs. Zimbabwe, Case No.297/05(2009)** the African Commission on Human and Peoples Rights took the view that a system of compulsory accreditation of journalists did not pursue the legitimate aims of public order, safety and protection of the rights and reputation of others. In the same case, the Commission concluded that: **"the Respondent State's arguments that the accreditation of journalists, ... are on grounds of public order, safety and for the protection of the rights and reputation of others, to be unsustainable and an unnecessary restriction of the individual practice of journalists."**

81. In our view, sections 20 and 21 of the act flow from section 19, and therefore they stand or fall together. We have already found that, section 19 does not pass the three tier test.

82. In answer therefore to the question, are sections, 13, 14, 19, 20 and 21 of the Act a violation of Articles 6(d) and 7(2) of the Treaty, we find that read together as they must be, sections, 19, 20 and 21 do violate the said provisions of the Treaty.

Sections 35, 36, 37, 38, 39 and 40 of the Act

83. These sections that comprise Part V of the Act deal with the offence, established in sections 35, of Criminal Defamation. Section 35 provides as follows:

Section 35:

(1) Any matter which, if published, is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation, is a defamatory matter;

(2) The matter referred to under subsection (1) shall qualify to be a defamatory matter even when it is published against a deceased person; and

(3) The prosecution for the publication of defamatory matter concerning a person who is dead shall not be instituted without the written consent of the Director of Public Prosecutions.

84. The Applicants submitted that criminal defamation laws are an inappropriate means of limiting the freedom of the press. They argued that the protection of the reputation of others, including public figures can be assured appropriately and proportionately by the civil laws of defamation. The Applicants referred the Court to the 2010 resolution

of the African Commission on Human and People's Rights that called on all State Parties to **"repeal criminal defamation laws or insult laws which impede freedom of speech."**

85. On its part in **Kimel vs. Argentina SERIE C No.177-2008,** the Inter-American Court of Human Rights stated:

> **"The broad definition of the crime of defamation might be contrary to the principles of minimum necessary, appropriate, and last resort or ultimo ratio intervention of criminal law. In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impart or endanger them. The opposite would result in the abuse exercise of the punitive power of the State."**

86. The Respondent did not make substantive submissions in defence or justification of the introduction of the law on criminal defamation. Their submission was that **"any reasonable government should have the protection of its society at the forefront."**

87. Applying the three tier test, it seems to us that section 35 which defines defamation is not sufficiently precise to enable a journalist or other person to plan their actions within the law. The definition makes the offence continuously elusive by reason of subjectivity. How for example, would an intending publisher, for the purposes of this section, predict that what they intend to publish concerning **X** is likely to expose **X** to hatred, contempt or ridicule and therefore injure **X's** reputation" The offence created by Section 35 falls short on clarity.

88. Turning to the second tier of the test, the legitimate aim; in its brief submission referred to above, the Respondent states that **"the intent of the legislature was to protect honour of the founders of (our) Nation..."**

89. In its Reply to the Reference, the Respondent states that sections 35 to 40 of the Act do not restrict the freedom of expression and right to access information but rather, ensure the rights, freedoms, privacy and reputation of other people or interest of public are not prejudiced by wrongful exercise of the rights and freedoms of individuals. It is our view that this fails to meet the parameters referred to above, set by the UN Human Rights Committee, in its General Comment 34, that the Respondent State demonstrates a direct and immediate connection between the specific threat, and the specific action taken. The Restriction by creation of the offence of criminal defamation also therefore fails on the second tier of the test.

90. On the third tier, we do no more than refer to the Statement of the UN Human Rights Committee General Comment 34, that to meet the criterion of proportionality, the mode of restriction adopted should **"be the least intrusive protective function."**

91. In **Federation of African Journalists vs. The Republic of The Gambia EWC/CCJ/JUD/04/18**, the ECOWAS Court of Justice had this to say:

> **"The practice of imposing criminal sanctions on sedition, defamation, libel and false news publication has a chilling effect that may unduly restrict the exercise of freedom of expression of journalists. The application**

of these laws will amount to a continued violation of internationally guaranteed rights of the Applicants."

In answer to the question: does the Act, under sections 35, 36, 37, 38, 39 and 40 violate the provisions of Articles 6(d) and 7(2) of the Treaty, we find in the affirmative.

Sections 50 and 54

92. Section 50 creates what are therein described as offences relating to media services. It provides as follows:

Section 50:

(1)**Any person who makes use by any means of a media service for the purposes of publishing:**

(a)Information which is intentionally or recklessly falsified in a manner which:

i **Threatens the interest of defence, public safety, public order, the economic interests of the United Republic, public morality or public health; or**

ii **Is injurious to the reputation, rights and freedom of other persons;**

(b)Information which is maliciously or fraudulently fabricated;

(c)Any statement the content of which is:

i **Threatening the interest of defence, public safety, public order, the economic interests of**

the United Republic, public morality or public health; or

ii Injurious to the reputation, rights and freedom of other persons.

(d)Statement knowingly to be false or without reasonable grounds for believing it to be true;

(e)A statement with maliciously or fraudulent intent representing the statement as a true statement; or

(f) Prohibited information, commits an offence and upon conviction, shall be liable to a fine of not less than five million shillings but not exceeding twenty million shillings or to imprisonment for a period not less than three years but not exceeding five years or both.

(2)Any person who:-

(a)Operates media outlet without license;

(b)Practices journalism without accreditation; or disseminates false information without justification.

Commits an offence and upon conviction, shall be liable to a fine of not less than five million shillings and not exceeding twenty million shillings or to imprisonment for a period not less than three years but not exceeding five years or both.

93. Section 54 in turn creates the offence of publication of a false statement likely to case fear and alarm.

94. Applying the above test, and in particular the first limb thereof, to section 50, it seems to us to be largely unobjectionable. However, subsection 1(c) fails the test in that "threating the interests of defence, public safety, public order, the economic interests of the United Republic, public morality or public health", is too broad and imprecise, to enable a journalist or other person to regulate their actions.

95. Similarly, we agree with the Applicants' submission that in section 54, the phrase "likely to cause fear and alarm to the public or to disturb the public peace", is too vague and does not enable individuals to regulate their conduct. The Applicants referred the Court to the case of **Chavunduka and Choto vs. Minister of Home Affairs & the Attorney General, CIV APP NO.156/99,** where the Supreme Court of Zimbabwe struck down a similar provision.

96. On the question of whether Sections 50 and 54 of the Act are in violation of Articles 6(d) an 7(2) of the Treaty, we find that Section 50(1)(c)(i) and Section 54 are indeed in such violation.

Section 52 and 53

97. Section 52 defines "***seditious intention***" and Section 53 creates what it describes as seditious offences. Section 52 provides as follows:

> **(1)A "seditious intention" is an intention to:-**
>
> > **(a)Bring into hatred or contempt or to excite disaffection against the lawful authority of the Government of the United Republic;**
> >
> > **(b)excite any of the inhabitants of the United Republic to attempt to procure the alteration,**

otherwise with than by lawful means, of any other matter in the United Republic as by law established;

(c) Bring into hatred, contempt or to excite disaffection against the administration of justice in the United Republic;

(d) raise discontent or disaffection amongst people or section of people of the United Republic; or

(e) promote feelings of ill-will and hostility beaten different categories of the population of the United Republic.

(2) An act, speech or publication shall not be deemed as seditious by reason only that it intends to:-

(a) Show that the Government has been misled or mistaken in any of its measures; or

(b) Point out errors or defects in the Government of the United Republic in legislation or in administration of justice with a view to remedying such errors or defects.

(3) In determining whether the intention for which the act was done, any work spoken or any document published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and in the circumstances in which he conducts himself.

98. The Applicants submitted that these provisions, in defining sedition, fall foul of the first limb of the test. The Respondent made no submission on these provisions, but did state in its Response, that the provisions do not restrict freedom of expression and right to access of information as provide under the Constitution of the United Republic of Tanzania.

99. We are persuaded by the Applicants' submission, with reference to section 52(1) that the same fails the test of clarity and certainty, required in the first limb of the test. The definitions of sedition in the said section are hinged on the possible and potential subjective reactions of audiences to whom the publication is made. This makes it all but impossible, for a journalist or other individual, to predict and thus, plan their actions. Section 52(3) compounds this problem in that, "**the consequences which would naturally follow"** would be entirely dependant on the subjective reaction of the person or audience to whom the publication is made.

100. With reference to similar provisions in the **Federation of African Journalists vs. the Republic of The Gambia, (supra)** the ECOWAS Court stated that:

> **"The restrictions and vagueness with which these laws have been framed and the ambiguity of the *mens rea* (seditious intention) makes it difficult to discuss with any certainty what constitutes seditious offence."**

101. In that case, the Court held that the impugned laws were "violations of the internationally guaranteed rights of the Applicants." In similar vein, the Constitutional Court of Uganda, in **Andrew Mujuni Mwenda**

and Others vs. Attorney General, UGCC 5(2010), struck down the impugned seditious laws for *inter alia* being vague and overly broad.

102. Read together, Sections 52 and 53 also fall foul of the proportionality part of the three tier test. Section 53(d) imposes custodial sentences for the offences created therein, In **Konate vs. Burkina Faso, (supra),** the African Court on Human and Peoples' Rights had this to say:

> **"Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the above provisions."**

103. For these reasons, and in the circumstance, we find that Sections 52 and 53 of the Act violate Articles 6(d) and 7(2) of the Treaty.

Section 58 and 59

104. Section 58 provides as follows:

> **"Where the Minister is of the opinion that the importation of any publication would be contrary to the public interest, he may, in his absolute discretion and by order published in the Gazette, prohibit the importation of such publication."**

105. And Section 59 provides:

"The Minister shall have powers to prohibit or otherwise sanction the publication of any content that jeopardizes national security or public safety."

106. The powers granted to the Minister in Sections 58 and 59 are far reaching, and clearly place limitations on the rights stated in both Article 19 of the International Covenant on Civil and Political Rights, as well as in Article 9 of the African Charter on Human and Peoples Rights. Is this limitation justifiable within the applicable parameters and specifically the three tier test set out above? The Applicants submitted that the provisions fail the test. As regards the first limb of the test, the provisions do not have sufficient clarity to enable a person to predict what publications would fall foul of the Minister's subjective judgment as to what is "contrary to the public interest" in Section 58 and what context would jeopardize national security or public safety, in section 59. Further, the Applicants submitted that the Respondent failed to establish what legitimate interest is being pursued in the limitation of rights in those sections. The Applicants concluded that the powers granted to the Minister in these two Sections, constitute a severe form of prior restraint and do not accord with either the said Article 19 of the ICCPR or Article 9 of the African Charter, and are therefore in violation of the Treaty.

107. On its part, the Respondent stated that the Minster has to exercise the powers judiciously, and they are not arbitrary, and that the exercise of the powers was subject to pre-conditions such as public safety and natural security. Further, the Respondent argued that a person aggrieved by the Minster's exercise of the power in this section, may challenge the same by way of judicial review.

108. With respect, the Respondent's submission does not answer the question of the subjectivity of the Minister's judgment in deciding when to exercise the powers, and more importantly, that this subjectivity denies persons the precision and certainty that would enable them to plan their actions. Further, what the Respondent calls pre-conditions are themselves subjective judgments of the Minister. Section 58 gives the Minister absolute (i.e. unfettered) discretion. Section 59 contemplates that it is the Minister who will determine that the content of a publication jeopardizes national security, or public safety, and prohibit or otherwise sanction such publication.

109. In **Media Rights Agenda and Constitutional Rights Project vs. Nigeria, COM NO.105/93–128/94-130/94-152/96.** The African Commission on Human and Peoples Rights stated with regard to a similar provision that gave the Government power to prohibit publication: **"this invites censorship and seriously endangers the rights of the public to receive information, protected by Article 9(1). There has thus been a violation of Article 9(1)."** This was with reference to the African Charter on Human and Peoples Rights.

110. Applying the said test used by this Court in the **Burundian Journalists Case** and taking into account the authorities referred to above, we are constrained to agree with the Applicants' submissions that Sections 58 and 59 of the Act contain provisions that constitute disproportionate limitations on the right to freedom of expression. The absolute nature of the discretion granted to the Minister, as well as the lack of clarity on the circumstances in which such Minister would impose a prohibition, in our view, make the provisions objectionable relative to the rights being restricted.

111. In answer therefore, to the question, are Sections 58 and 59 of the Act in violation of Articles 6(d) and 7(2) of the Treaty, we answer in the affirmative.

112. In the foregoing paragraphs, we have stated our findings that certain of the impugned provisions of the Act do indeed violate Articles 6 and 7 of the Treaty. Specifically we have found the following provisions to be in violation: Sections 7(3)(a), (b), (c), (f), (g), (h), (i), and (j); Sections 19, 20 and 21; Sections; 35, 36, 37, 38, 39 and 40; Sections 50 and 54; Sections 52 and 53; and Sections 58 and 59.

113. We find that Sections 13 and 14 of the Act are not in violation of the Treaty.

114. The Reference therefore, partially succeeds, in respect of the said provisions we have found to be in violation, and partially does not succeed, in respect of the said sections we have found not to be in violation. Below we make orders accordingly.

ISSUE NO.3: <u>Whether the Parties are entitled to the Remedies Sought</u>

115. The Applicants sought that the Court grant the remedies set out in Paragraph 12 of this Judgment.

116. On its part the Respondent prayed for the following:

i Dismissal of the Reference;

ii Costs; and

iii Any other orders that the Court may deem just and necessary.

117. Having addressed the issues before us for determination, we have found that certain provisions of the impugned Media Services Act, hereinafter set out, are in violation of the principles set out in Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.

118. As stated above, each of the Parties prayed for costs. In terms of Rule 111(1) of this Court's Rules, "Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order." The subject matter of this Reference was of public importance. Having categorized the Reference as public interest litigation we exercise our discretion accordingly, and we are inclined to find that each Party should bear their own costs.

F. FINAL ORDERS

Having found as stated above, we hereby order as follows:

(a) It is hereby DECALRED that: the provisions of Sections 7(3)(a), (b), (c), (f), (g), (h), (i), and (j); Sections 19, 20 and 21; Sections; 35, 36, 37, 38, 39 and 40; Sections 50 and 54; Sections 52 and 53; and Sections 58 and 59 of the Act, violate Articles, 6(d) and 7(2) of the Treaty for the Establishment of the East African Community.

(b) The United Republic of Tanzania is directed to take such measures as are necessary, to bring the Media Services Act, into compliance with the Treaty for the Establishment of the East African Community; and

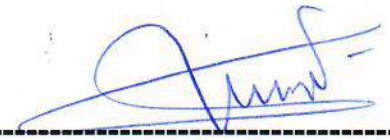
(c) Each Party shall bear their own costs.

It is so ordered.

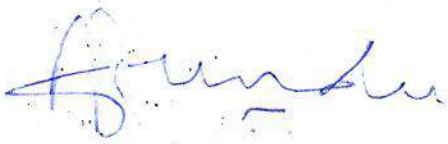
Dated, signed and delivered at Arusha this 28th Day of March 2019.

Hon. Lady Justice Monica K. Mugenyi

PRINCIPAL JUDGE



Hon. Justice Dr. Faustin Ntezilyayo
DEPUTY PRINCIPAL JUDGE



Hon. Justice Fakihi A. Jundu
JUDGE

Hon. Justice Audace Ngiye
JUDGE

Hon. Justice Justice Charles Nyachae
JUDGE