



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.313 OF 2018

WANURI KAHIU.....1ST PETITIONER

CREATIVE ECONOMY WORKING GROUP.....2ND PETITIONER

VERSUS

CEO KENYA FILM CLASSIFICATION BOARD

EZEKIEL MUTUA.....1ST RESPONDENT

KENYA FILM CLASSIFICATION BOARD.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

ARTICLE 19 EAST AFRICA.....1ST INTERESTED PARTY

KENYA CHRISTIAN

PROFESSIONALS FORM.....PROPOSED 2ND INTERESTED PARTY

JUDGMENT

BACKGROUND

1. The 1st petitioner submitted the original script of the film “**Rafiki**” to the 2nd Respondent, applied for and was granted a film licence in line with section 4 and 5 of the Film and Stage Plays Act. The petitioner also obtained an endorsement on the filming licence upon revision of the script of the film “**Rafiki**” in line with section 7 of the Act.

2. On 10th April 2018 the 1st petitioner submitted the film “**Rafiki**” for examination and rating and was thereafter invited for a meeting at which the 2nd Respondents’ officials directed her to edit the film by April 2018 and remove offensive classifiable elements before resubmission for classification.

3. The 1st petitioner upon consulting her lawyers, she declined to edit the parts of the film they were requested to edit; and requested the 2nd Respondent to proceed with the classification of the film as it was. Through a letter dated 26th April 2019 the 2nd Respondent informed the 1st petitioner that the film had been classified as **RESTRICTED**, outlining that the film contained classifiable elements such as homosexuality which run a foul Kenyan laws as well as the culture of the Kenyan people.

4. The letter also warned against the exhibition or distribution of the film “**Rafiki**” anywhere within the Republic of Kenya; indicating that the 2nd Respondent was exercising its mandate to promote the culture of the Kenyan people as well as protection of children from exposure to harmful content. The 1st Respondent subsequently made public statement rehashing the 2nd Respondent’s decision.

Petitioner’s Case

5. The petitioner contest the constitutionality of sections 4,6,7,8,9,12,13,16,30 and 35 of the Films and Stage Plays Act, Cap 32 (“**the Act**”); section 5(i),(ii),(iii),(iv) and (v) of the Kenya Film classification Board’ classification Guidelines, 2012 (“*the Guideline*”); and ultimately, the decision to ban the film “**Rafiki**” under the aforesaid sections.

6. The challenge is specifically merited on the basis that the sections of the Act, the Guidelines and the decision itself offend the freedom of expression including the freedom of artistic creativity under Articles 33(i); the freedom of the media under Article 34, the right of access to information under Article 35; and the principle of legality under Article 50(2) (n) of the constitution. The petitioners therefore request the court to allow the petition and issue orders sought.

The 1st and 2nd Respondent’s Case

7. The 1st and 2nd Respondents filed a Replying affidavit to the petition sworn by Mr. Ezekiel Mutua, the Chief Executive Officer of Kenya Film Classification Board, affirming the 2nd respondent is mandated under section 15 of the Films Act to regulate the creation, broadcasting, possession, distribution and exhibition of films. Further under section 15(2) the Board(s) responsibility for prescribing guidelines to be applied in the classification of films. It is Respondents position that the film was considered by the Board for purposes of classification and upon review of the film and due to presence of strong impact classifiable elements in the film it was that it be altered so that it may be classified as (“*Adults only 18*”) which was with the mandate of the Board as set out under section 16 of the Films Act. It is Respondents case that upon the 1st petitioner’s failure to make the recommended alteration, the Board classified the film as “*Restricted*” and communicated the same to the petitioners, and later the general public pursuant to **Section 12(2) and (3) of the Films Act**.

8. The Respondents argue that they acted strictly within the mandate under the Films Act and classification Guidelines. It is contended the right pursued by the petitioners can be limited according to Article 24 of the constitution. It is Respondents submissions that the Boards, action were constitutional and the harm to the public is irreparable contrary to the petitioners’ allegation that the harm is material and not irreparable.

The 3rd Respondent’s Case

9. The 3rd Respondent is opposed to the petition and filed submissions in support of their opposition of the petition.

The 2nd Interested party’s Case

10. The 2nd interested party filed a Replying affidavit to the petition sworn by Mr. Peter Gachuhi opposing the petition. It is 2nd interested party’s contention that though the constitution guarantees the right to freedom of expression the same is not absolute and can be limited through reasonable restrictions.

11. It is contended that the decision of the Respondents to restrict the film *Rafiki* was not arbitrary and did not violate the 1st Petitioner’s rights under Article 47. On the issue of the freedom of expression, the 2nd Interested Party depones that the right is a qualified right and therefore can be interfered with by the State, and that the limitation set out in the Films and Stage Plays Act, Cap 22 are reasonable and justifiable.

12. It is further contended that the allegations by the Petitioners that Section 4 and 16 (6) of the Act create offences without *mens rea* are unfounded as the same fall within the category of strict liability offences on which a person can be convicted only on proof of *actus reus*.

13. On the claims against the legitimacy of the Film Classification Guidelines, the Deponent avers that they have statutory basis by virtue of Section 15 (2) (b) of the Films Act which mandates the Board to prescribe the procedure for the application for licensing.

14. In response to the allegations against the specific thematic areas and elements in Section 3 of the Films Guidelines the same exist in order to maintain the moral standards of the viewers and discourage the audience to sympathise with criminals, and prevent disrespect to the rule law.

The 3rd Interested party Case

15. The 3rd Interested party, the Kenya National Commission on Human Rights, is an independent Commission established under Article 59(4) of the Constitution and an independent commission within the meaning of Chapter 15 of the Constitution of Kenya (2010). The 3rd Interested Party is mandated under Article 59(2) of the Constitution of Kenya to, inter alia, promote the respect for and develop a culture of human rights in the Republic of Kenya, to promote the protection, and observance of human rights in public and private institutions and to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice. The 3rd Interested party is further mandated under Article 249(1) of the Constitution to protect the sovereignty of the people, to secure the observance by all state organs of democratic values and principles and to promote constitutionalism.

Petitioner's Submission

16. The petitioners set out the issues for determination and argue that the right to freedom of expression the 1st Petitioner avers that the Respondents as state organs are bound by the national values and principles of governance which includes the observance, protection, respect, promotion and fulfilment of the rights and freedoms in the Bill of Rights.

17. It is submitted by the petitioners that on limitation of the Petitioner's right to freedom of expression, the Petitioner relies on a number of cases notably that of **Print Media South Africa & Another v Minister of Home Affairs (Print Media South Africa)** where the Court decided that *"any regulation of the right to freedom of expression amounts to a limitation."* The Petitioner submits that the Films Act creates a system of 'administrative prior classification' which according to the above case transfers control from the right-bearer to the administrative body and therefore the freedom of expression of the right bearer is curtailed. The dangers of administrative prior classification is further set out in the cases of **Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape [2007] (5) SA 450 (SCA), The Sunday Times v The United Kingdom, and The Observer and Guardian v The United Kingdom.**

18. The petitioner further urge that on the constitutionality of the decision to ban the film, the Petitioner submits that the same was unconstitutional as the grounds on which it was banned have no proximate relation to the grounds for limitation under Article 33 (2). They further argue that decision was not necessary or proportionate. The case of **Wilson Olal & 5 others v AG & 2 others [2017] eKLR** is referred to as it sets out the circumstances under which the freedom of speech, expression or assembly may be curtailed. It is submitted by the Petitioner that the decision by the 1st and 2nd Respondents did not meet this criterion.

19. It is further averred that under Article 24 Respondents must prove 3 elements: that the limitation is (i) provided by law; (ii) serves a legitimate aim; and is (iii) proportionate and strictly necessary in an open and democratic society.

20. The petitioners further assert that on proportionality and necessity test the 1st Petitioner contends that the ban is not necessary in order to protect children from harmful content as the same can be done in other ways that do not restrict the freedom of expression. The 1st Petitioner relies on the case of **R v Oakes** where the Supreme Court of Canada held inter alia that the measures adopted must *"not be arbitrary, unfair or based on irrational considerations."* It is submitted that a decision to place an age restriction of '18' rather than ban the film would have met the proportionality test. Therefore the decision of the Respondents does not meet the proportionality test set out in Article 21.

21. It is further submitted that on issue of remedies the 1st Petitioner relies on Article 23 (2) (e) of the Constitution and the cases of **Dick Joel Omondi v Hon. Attorney General [2013] eKLR** and **Kenneth Stanley Njindo Matiba v AG [2017] eKLR** where the courts held that the award of damages is appropriate where there is a constitutional violation. Furthermore, special damages may be awarded where there is a **"nexus between the constitutional violation and loss of financial business income."**

22. The 2nd Petitioner in its submission dated 20th December 2018, avers that the impugned provisions of the Films Act are unconstitutional.

23. It is urged Section 4 limits the freedom of expression of filmmakers without any proximate relation to Article 33 (2) and the offence is imposed without *mens rea*. According to the decision in **Geoffrey Andare v AG [2016] eKLR** it was held that the lack of *mens rea* creates a section which is wide and arbitrary and therefore it cannot constitute as a limitation by law;

24. It is averred that section 6 Section 16 limits the freedom of expression on ground which are outside what is provided under Article 33 (2). Furthermore it creates an offence without *mens rea* which is contrary to the decision in **Geoffrey Andare V AG [2016] eKLR**.

Section 30 like section 6 delegates unbridled powers to the Cabinet without providing grounds for revocation of licenses which power can be abused or misused. This is supported by the case of **Dawood v Minister of Home Affairs [2000] ZACC 8** where it was held that the section was unconstitutional for excessive delegation. In regards to Section 7 and 8 (2), as well as 12, 13 the 2nd Petitioner reiterates the arguments laid down in the Petition. 16 limits the freedom of expression on ground which are outside what is provided under Article 33 (2). Furthermore it creates an offence without *mens rea* which is contrary to the decision in **Geoffrey Andare V AG [2016] eKLR**.

Section 30 like section 6 delegates unbridled powers to the Cabinet without providing grounds for revocation of licenses which power can be abused or misused. This is supported by the case of **Dawood v Minister of Home Affairs [2000] ZACC 8** where it was held that the section was unconstitutional for excessive delegation.

In regards to Section 7 and 8 (2), as well as 12, 13 the 2nd Petitioner reiterates the arguments laid down in the Petition.

25. It is urged that section 30 like section 6 delegates unbridled powers to the Cabinet without providing grounds for revocation of licenses which power can be abused or misused. This is supported by the case of **Dawood v Minister of Home Affairs [2000] ZACC 8** where it was held that the section was unconstitutional for excessive delegation.

26. It is petitioners contention that on the issue of the constitutionality of the Classification Guidelines, the 2nd Petitioner asserts that the same are not law and therefore cannot amount to a limitation of freedom of expression as per the **General Comment No. 34, Article 19, Freedoms of Opinions and Expressions**. The Petitioner repeats its allegations provided in the Petition in regards to the specific provisions of the Films Classification Guidelines. Petitioner repeats its allegations provided in the Petition in regards to the specific provisions of the Films Classification Guidelines.

27. The petitioners argue that even if the Act pursues a legitimate aim the state has used "*means which are broader than necessary to accomplish that objective,*" and this has resulted in the violation of the Petitioner's rights and fundamental freedoms. It submits that the Films Act and Classification Guidelines should be held to be unconstitutional and invalid as they are an "insidious form of censorship contrary to Article 33 (1).

The 1st and 2nd Respondents Submissions

28. The 1st and 2nd Respondents filed their submission dated 28th February 2019 in which they begin by highlighting the relevant and applicable principles that they believe would guide the court in determining the matter.

29. On the issue of whether the Films Act is unconstitutional, the Respondents first tackle whether the limitations in Article 33 are exhaustive. Reliance was placed on various cases including **Standard Limited & 2 others v Christopher Ndarathi Murungaru [2016] eKLR** where the Court held that there must be a holistic interpretation of the Constitution which means interpreting it as a whole, and looking at all provisions together as they relate to each other. In this regards, Article 33 must be read together with Articles 53 and 55.

30. The Respondents further urge the Court to take consideration of the fact that Kenya is party to various international instruments including the **Convention on the Rights of the Child** which requires the state to take all actions to ensure the best interest of children are a primary consideration. They submit that the limitations are prescribed by section 12 and 16 of the Films Act and therefore they are prescribed by the law. They further submit that the Act does indeed pursue a legitimate aim. They rely on the several cases including the case of **K.A Abbas v The Union of India and another [1971] AIR 481, 1971 SCR (2) 446** where the Court outlines the risks posed by motion pictures to:-

“...stir up emotions more deeply than another product of art. Its effect particularly on children and adolescents is very great since the immaturity makes them more willing to suspend their belief than mature men and women.”

The Respondents believe that the above quote aptly reflects their concerns and that the ban is to protect the public.

31. The Respondents also contend that limitation that the limitation has been proven to be necessary in democratic societies as evidenced by case law and statutory laws from India, South Africa, Nigeria, United Kingdom and United States; in which the freedom of expression particularly regarding films is restricted through licensing and other measures.

32. The Respondents on the impugned sections 4 and 8, they reiterate their assertions in their replying affidavit and add that even in the Environmental Management and Coordination Act, No. 8 of 1999, that statute provides for regulatory offences of which *mens rea* is not required and therefore strict liability offences are also created under the Films Act. On the constitutionality of section 6, 30 and 35, they submit that the provisions are not vague and overboard and the same should be read alongside section 15 (2) (b) of the Act. On the third issue on whether the Film Classification Guidelines are unconstitutional and therefore null and void, the Respondents aver that the guidelines are yet to be gazetted and fall within the definition of statutory instruments under the Statutory Instruments Act No. 3 of 2012.

33. It is Respondents contention on the further issue on the constitutionality of the decision to restrict the film, the Respondents submit that the decision to restrict the film was in good faith, constitutional, valid and pursuant to the provisions of the Films Act. Further, the Board at all times acted within the powers granted under the Films Act and exercised its discretion in deciding to approve the film for exhibition. It never acted outside its powers and the Petitioners have not demonstrated how the decision was made in bad faith or with ill will or malice. Additionally the 1st Petitioner was given an opportunity to be heard and written reasons for the decision via the letter dated April 26, 2018.

34. It is Respondents further submissions that the petitioners are not deserving of the orders sought and urge the court to find in their favour.

Submissions by 3rd Respondent

35. The 3rd respondent filed written submissions dated 4th March 2019 on the even date. It is 3rd respondents contention on the issue of whether the provisions of the Act are unconstitutional, the 3rd Respondent avers that Provisions of the Films Act and Regulations protect and enhance respect for the rights of other consumers and especially the most vulnerable. The film was banned as it is not in line with the culture and moral values of the Kenyan People. For those reasons the 1st Respondent's decision to ban the film was within its mandate and the law. This is supported by Article 19 of the ICCPR and the case of **Mutunga v R (1986) KLR 167** where the court held that Constitutional rights and freedoms are subject to limitations which are designed to ensure that enjoyment of the same by an individual does not prejudice the rights and freedoms of others or the public's interests.

36. The 3rd respondent argue that when it comes to damages, the Petitioners have not tendered sufficient evidence to prove their claim for damages in regards to the loss of projected sales and sponsorship. They claim that the 1st Petitioner has not submitted any evidence that she entered into a contract with any third party for sponsorship. For the above reasons the 3rd Respondent submits that the Court should dismiss the petition.

The 1st interested party's submissions

37. The 1st interested party filed submissions dated 14th December 2018 submitting that on the first issue, Section 4 and 8 (2) of the Films Act are unconstitutional on grounds that they are vague as they lack a *mens rea* and impose vicarious liability on all other persons other than the offender.

38. The 1st interested party argues that section 6 is unconstitutional as it provides the licensing officer with an avenue to act arbitrarily which threatens the freedom of expression and artistic creativity. Furthermore the Films Act is silent on the conditions for granting and refusing to grant a film license thus making the provision vague and uncertain. The Party refers to the case of **Republic v Registrar of Companies Ex Parte Independent Electoral Board of Kenya National Chamber of Commerce & Industry (KNCCI) [2016] eKLR** where it was held that public officers must not abuse their discretion, and must carry out their duties for the benefit of the people of Kenya. Furthermore, it was held that:-

“To deny a citizen his/her lawful rights donated to or her by Parliament in my view without proper reasons would amount to wrong exercise of discretion.”

39. The 1st interested party further urges that as regards to section 7 and 8 of the Films Act, the Party submits that the provisions limit the freedom of expression based on arbitrary, vague and overly broad provisions, and the same fall short of the threshold for a limitation of a Constitutional right as set out under Article 24. The 1st interested party argue that section 9 is unconstitutional as it delegates arbitrary powers to policemen to interfere with the freedom of expression and artistic creativity of film makers, and imposes an “*unnecessary legislative restriction and/ or limitation on Article 33 (1).*” As regards section 12 it is urged of the Films Act is unconstitutional as the Board can make the decision not to issue a certificate not only based on Article 33 (2) of the Constitution but the same decision can be made based on a personal opinion formed based on a private view of the film. Additionally, it is contended that the section failed the necessity and proportionality test under Article 24.

40. On the constitutionality of section 13 it is submitted that the grounds for limitation of the freedom of expression have no proximity with the grounds provided under Article 33 (2) of the Constitution. This has resulted in a limitation which is unreasonable and unjustifiable in an open and democratic society. On the constitutionality of section 16 the Party asserts that the provision is vague and ambiguous and therefore cannot be applied in a reasonable manner. Furthermore, Section 16 (7) creates an offence without *mens rea*. Therefore the section offends the principle of legality in Article 50 (2).

41. The 1st interested party argue section 30 and 35 of the Film Act is unconstitutional Films Act the same is unconstitutional as it grants unbridled power to the Cabinet to revoke licences, certificates of approval and permissions which have been issued under the Act. The same may be used arbitrarily as no grounds of revocation have been provided. Additionally, Section 35 does not clearly set out the limits of the authority granted to the Cabinet and the standards applicable to the law made under the authority. Therefore it does not meet the requirements under Article 94 (6).

The 2nd Interested party submissions

42. The 2nd Interested party filed submissions dated 3rd December 2019, arguing that the court has no jurisdiction to hear and determine the matter as the Petitioners have not pursued the appeals mechanism provided for under Section 29 of the Films Act. This sentiment is supported by cases of **Mutunga Tea & Coffee Company Ltd v Shikara Limited & another [2015] eKLR** and **Vania Investments Pool Limited v Capital Markets Authority & 8 others [2014] eKLR** where the Courts held that where statute provides for alternative dispute resolution, the same should be pursued first before the parties go before a court of law. The 2nd interested party argue that it is not proper to hear and determine the matter as the Petitioners have not pursued the appeals mechanism provided for under Section 29 of the Films Act. This sentiment is supported by cases of **Mutunga Tea & Coffee Company Ltd v Shikara Limited & another [2015] eKLR** and **Vania Investments Pool Limited v Capital Markets Authority & 8 others [2014] eKLR** where the Courts held that where statute provides for alternative dispute resolution, the same should be pursued first before the parties go before a court of law. It is further submitted for the 2nd interested party that the restrictions provided for under Article 33 of the Constitution are not limited and the same can be restricted subject to the provision of the laws of Kenya including the Penal Code.

43. It is urged by the 2nd interested party that the decision by the 1st and 2nd Respondents to ban the film *Rafiki*; the Respondents complied with Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act. The 1st Petitioner was involved and given an opportunity to comply with the Films Act by editing the movie but refused to do so. As a result the film was classified as Restricted. Additionally, the decision to restrict the film was done in writing which is required under the provisions above.

44. On the issue of the constitutionality of various provisions of the law, the 2nd Interested Party has referred to the case of **Jack Mukhongo Munialo & 12 others v Attorney General & 2 others [2017] eKLR** where the validity of various provisions of the Elections Offences Act were challenged. The Court held that where there is such a challenge, the court must ascertain the true nature and character of the provisions by taking into account all factors including the history, purpose and surrounding circumstances of the statute as well as the “*...mischief which it intends to suppress...*” Furthermore the case established that there is a presumption of constitutionality of a statute or statutory provision although the same is rebuttable. The 2nd interested party further submit that the purpose of the Films Act inter alia is to ensure that the “*media content being released for public consumption is suitable and compliant with the laws of the country.*” The same provides for classifiable elements which are legitimate and which the state must ensure are properly applied to films for public consumption

The 3rd interested party's submissions

45. The 3rd interested party filed submissions on 8th February 2019, urging that the freedom of expression can indeed be limited, the said limitation must fall within the provisions of Article 33 (2) of the Constitution as read with Article 24. On the issue of the Constitutionality of the provisions of the Films Act, it is submitted that Section 4 is vague and overboard and does not base the offence of the element of *mens rea*. This is supported by the cases of **Elonis vs United States [2015] 13 183** and **R. Ballakrishna Pillai v State of Kerala Criminal Appeal No. 372 of 2001** where the importance of establishing the *mens rea* in criminal offences was fortified.

46. As regards section 6, 7 and 8 it is contended that the same is urged that the licensing officer has unfettered discretion. The 3rd respondent relies on the case **Republic v Kenya Power & Lighting Company Ltd & another [2013] eKLR** where the Court held that discretion must be exercised in a reasonable manner. The Party further asserts that the provision is vague for lacking any guidelines or standards on how the licencing officer is to exercise their power. This is against the judgement of the Court in **Geoffrey Andare v Attorney General [2015] eKLR** in which it was held that the law must be precise and clear.

47. On the unconstitutionality of Section 9, the Party submits that police officers have been given wide discretionary powers with no standards or guidelines on how to exercise them. This means that the same are being exercised base on personal beliefs. Furthermore, the offence in section 9 lacks the element of *mens rea*. Therefore, police may interfere with film makers' freedom of expression. It is further submitted that Section 12, 13, and 16 limit the freedom to seek, receive and impart information in a manner that does not comply with Article 24 and 33 (2) of the Constitution. They further claim that Section 30 and 35 go against the spirit of Article 47 of the Constitution on Fair Administrative Action. The 3rd respondent submit that Section 12, 13, and 16 limit the freedom to seek, receive and impart information in a manner that does not comply with Article 24 and 33 (2) of the Constitution. They further claim that Section 30 and 35 go against the spirit of Article 47 of the Constitution on Fair Administrative Action.

Analysis and Determination

48. I have very carefully considered the pleadings; rival submissions by counsel both written and oral submissions as well as the authorities relied upon; and from the above the following issues arises for consideration:-

a) **Whether the court has jurisdiction to hear and determine this matter"**

b) **Whether the Films and Stage Plays Act, Cap 22 Laws of Kenya and Kenya Films Classification Guidelines 2012 and the restriction of film Rafiki amounts to violation of the 1st petitioner's right to freedom of expression guaranteed under Article 33 of the Constitution of Kenya and whether the same is illegal, invalid and null and void"**

c) **Whether the restriction of the Rafiki by the Kenya Film and classification Board was made irrationally, arbitrary and un procedurally and contrary to the law particularly Article 47 of the constitution and relevant provisions of the Fair Administrative Actions Act"**

d) **Whether the petitioners are deserving of the orders and remedies sought"**

A) **Whether the court has jurisdiction to hear and determine this matter"**

49. The 2nd interested party submit that it is trite law that jurisdiction is everything; it is *sine qua non* the court's authority to adjudicate a legal principle. That it is a principle that was elucidated on in a masterly fashion in a celebrated Supreme Court decision of **Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others (2012) eKLR** where the court pronounced itself on the question of jurisdiction in the following terms;

“(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain in a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, in the Matter of the Interim Independent Electoral Commission (Applicant) Constitutional Application Number 2 of 2011.

Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

50. The petitioner and other parties in this petition did not submit on this issue and as such I will consider the 2nd interested party submission on this point and the law.

51. In the instant petition, through Article 165 of the constitution grants unlimited jurisdiction on the court over civil and criminal matters, it has always been the accepted practice that where there exists a statute-built dispute resolution mechanism the same should be exhausted before the court's jurisdiction is involved. The Court of Appeal in **Mutanga Tea & Coffee Company Ltd vs Shikara Limited & another [2015] eKLR** considered an appeal in which the Appellant was faulting the High Court for dismissing its claim on account of failing to follow dispute resolution mechanism prescribed under Physical Planning Act and the Environmental and Management Coordination Act. In dismissing the Appeal, the Court made the following:-

“We are therefore satisfied that the learned Judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2) (c) and the very raison d'être of the mechanisms provided under two Act.”

52. In the instant petition section 29 of the Films and Stage Plays Act provides for a statute-based appeal mechanism under which dispute relating to licensing and classification of films can be addressed. The sections provides as follows:-

"29. Any person who is aggrieved by a decision of a licensing officer, licensing authority, or the Board may appeal to the Minister, and the Minister may, subject to this Act, confirm, vary or reverse that decision, and in so doing the Minister may give such directions in the matter as may be necessary to give effect to his decision and any decision of the Minister under this section shall be final."

53. In the instant petition the petitioners did not submit on this issue. From the record it is clear the petitioners did not make any effect to use the appeal mechanism provided for under the Films and Stage Plays Act before preferring the instant petition.

54. In the instant petition, there is no dispute that the Films and Stage Plays Act prescribes alternative mechanism and afforded the petitioner the right to appeal to the minister who is mandated subject to the relevant Act, to confirm, vary or reveal the decision and in doing so may give such directions in the matter as may be necessary to give effect to his decision and whose decision under the section 29 of the Act shall be final.

55. In the view of the aforesaid I find that where the relevant statute presents alternative dispute resolution mechanisms and offered the petitioner the right of appeal, the petitioner is bound to follow that alternative dispute resolution. The alternative forms of dispute resolution are recognized under Article 159(2) (c) of the constitution and the courts are under obligation to protect and promote the purpose and principles of the constitution as provided under Article 159 2(e) of the constitution. In view of therefore foregoing I find the petitioner failed to make use of the appeal mechanism provided in the Films and Stage Plays Act before filing this petition. I find that the jurisdiction of this court has been prematurely invoked.

B) Whether the Films and Stage Plays Act, Cap 22 Laws of Kenya and Kenya Films Classification Guidelines 2012 and the restriction of film Rafiki amounts to violation of the 1st petitioner's right to freedom of expression guaranteed under Article 33 of the Constitution of Kenya and whether the same is illegal, invalid and null and void"

56. The petitioners submit that freedom of expression is of considerable constitutional significance and lies at the heart of democracy. Indeed, freedom of expression is not the sole preserve of those who would express lofty, noble or merely in offence sentiments, but should enable individuals to convey and receive views on a wide range of matters. **Article 33(1) of the constitution** guarantees the right to freedom of expression and provides that, every person has the right of freedom of expression which includes:-

"(1) Every person has the right to freedom of expression, which includes—

- (a) Freedom to seek, receive or impart information or ideas;**
- (b) Freedom of artistic creativity; and**
- (c) Academic freedom and freedom of scientific research."**

57. The petitioner urge that the right to freedom of expression, including freedom of artistic creativity is a derogate right only to the extent of the limitations placed within the constitutional prescription. **Article 33(2) of the constitution** provides that the right to freedom of expression does not extend to:-

"(2) The right to freedom of expression does not extend to—

- (a) Propaganda for war;**
- (b) Incitement to violence;**
- (c) Hate speech; or**
- (d) Advocacy of hatred that—**
 - (i) Constitutes ethnic incitement, vilification of others or incitement to cause harm; or**
 - (ii) Is based on any ground of discrimination specified or contemplated in Article 27(4)."**

58. The petitioners contend that in addition to the constitutional protection, the right to freedom of expression is also guaranteed in a number of international and regional human rights instrument that Kenya is a signatory to and is bound to enforce. The petitioners urge that under **Article 2(6) of the constitution**, Kenya has ratified international treaties which now form part of Kenya law. The Article provides:-

"2(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

59. The petitioners also rely on **Article 20(1) of the constitution** which provides that the Bill of Rights applies to all and binds all state organs and all persons. They also rely on **Article 10(1) of the constitution** which provides the National values and principles of governance bind all state organs, state officer, public officers and all persons whenever any of them:-

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) Applies or interprets this Constitution;**
- (b) Enacts, applies or interprets any law; or**
- (c) Makes or implements public policy decisions."**

60. The petitioners aver that the Respondents are state organs bound by the national values of governance under Article 10 of the constitution. That they are also bound by **Article 21(1) of the constitution** to observe, protect, respect, promote and fulfil the right of freedom of expression and freedom of artistic creativity.

61. It is further urged by the petitioners that **Article 19(1) and (2) of ICCPR** that everyone shall have the right to hold opinions without interference and right to freedom of expression which shall include freedom to seek, receive and import information and

ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice. Article 3 of the African Charter on Human and Peoples' Rights provides that every individual shall be equal before the law and be entitled to equal protection of the law. Article 9(2) of the African Charter on Human and Peoples' Rights provides that every individual shall have the right to express and disseminate his opinions within the law.

62. The petitioners further contend that the United Nation Human Rights Committee adopted its General commission No. 34 which provides interpretative guideline on the normative content of the right to freedom of expression as provided for under **Article 19(1) and (2) of ICCPR**.

63. The petitioners submit limitation of the Right to freedom of expression within the context of censorship of films amounts to a limitation on the right and referred to case in print media **South Africa & another in Minister of Home Affairs (print media South Africa)**.

64. The petitioners aver that the deposition, import and nature of the effect of the films and stage Play Act, and the Kenya Film classification Board Guidelines, 2012 is to impose a system of administrative of films, which limit the right to freedom of expression. The petitioners further contend that a system that required prior classification (*of films*) is a prima facie form of censorship and a violation of the right of expression.

65. In South African on Supreme Court of Appeal in **Midi Television (pty) Ltd t/a E-TV vs Director of Public Prosecutions (Western Cape) 2007 (5) SA 540 (SCA)** in reflecting on the decision of the Court of Appeal of England and Wales in **Attorney General vs British Broadcasting Corporation [1981] AC 303 (CA)** noted that prior restraint of a publication, though occasionally necessary in serious cases, is a drastic interference with freedom of speech and should only be ordered where there is substantial risk of grave injustice. The case law recognises that an effective ban or restriction on a publication by a court order even before it has 'seen the light of day' is something to be approached with circumspection and should be permitted in narrow circumstances only.

66. The petitioners aver that the decision of the Board of 26th April 2018 to bar the film "**Rafiki**" is tantamount to placing a legal restriction on the film maker's right to freedom of expression, as the 1st petitioner was specifically prohibited from distributing, broadcasting or exhibiting of the film anywhere in the Republic of Kenya. Consequently the petitioners challenge the constitutionality of the decision of 26th April 2018 to restrict "**Rafiki**" as arbitrary and contrary to the freedom of expression under Article 33 of the constitution.

67. The petitioners contend that the film was restricted for allegedly depicting and legitimizing homosexual practices and lesbianism, both of which have no proximate relation to the grounds for limitation of freedom of expression under Article 33(2) of the constitution. The petitioners argue the decision to restrict the film on the aforesaid grounds is discriminatory, also not necessary or proportionate in an open and democratic society with respect for the rights of the individuals.

68. The petitioners contend that the decision to restrict the film for allegedly depicting homosexual practises and lesbianism is arbitrary and violates the right to reasonable administrative action under Article 49 and section 4(1) and 5(1) of the Fair Administrative Action Act No. 4 of 2015.

69. The petitioners argue courts had determined on prescription of Article 33 of the constitution on the right to freedom of expression and permissible constitutional restriction and referred to the case of Robert Alai **vs The Hon. Attorney General & Another [2017] eKLR** at paragraph 29, the Court opined that:-

"It is therefore correct to say, that freedom of expression is not absolute but again, it is only subject to limitations in the Constitution."

70. The petitioner contended further that the limitation on the right to freedom of expression is provided under Article 33(3) of the constitution in which it is provided "*in the exercise of the right to freedom of expression every person shall respect the rights and reputation of others.*"

71. It is argued by the petitioners that the decision to bar the film "**Rafiki**" by the 1st and 2nd Respondents does not meet the criteria of permissible restrictions of the right to freedom of expression as provided for under Article 33(2) and (3). That the film "**Rafiki**" it is argued does not contain, promote or encourage any propaganda for war, incitement to violence, hate speech or

advocacy of hatred and as such the petitioner should benefit from the constitutional protection of right to freedom of expression wherein there is no prohibition of the exhibition, distribution and broadcast of the film "**Rafiki**".

72. It is argued by the petitioners that any other limitation or justifiable derogation of right to freedom of expression, including freedom of artistic creativity, that falls outside the exceptions contained under Article 33(2) and (3) must meet the criteria set out under Article 24 of the constitution. In the case of **Jacqueline Okuta & another vs Attorney General & 2 others (2017) eKLR**, Hon. Justice Mativo, stated:-

"Freedom of expression is secured under Article 33 of the constitution and for it to be limited; limitation must be within the scope and ambit of the provisions of Article 24 of the constitution."

73. Article 24(1) of the constitution provides:-

"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) The nature of the right or fundamental freedom;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitation;

(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

74. Any restriction must be provided by law which must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. Further the state is obligated to demonstrate the legal basis for any restriction. The new restricting freedom of expression should not grant executive or administrative authorities excessively broad discretionary power to limit expression.

75. The petitioners urge that the Kenya Film Classification Board Guidelines, 2012 relied upon by the Respondents to bar the film "**Rafiki**" were never gazetted therefore do not have the force of law and therefore the decision to restrict the film "**Rafiki**" fails to meet the first test of constitutional limitation under Article 24.

76. The petitioners assert that when a state invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature and the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

77. The petitioners refer to a letter dated 26th April 2018 in which the 1st Respondent notified the 1st petitioner as follows, concerning the decision to censor the film "**Rafiki**":-

"This is to convey the decision of the Kenya Film Classification Board that the film Rafiki submitted to the Board for examination and classification on 10th April 2018 has been RESTRICTED. The film should not be distributed, broadcast or exhibited anywhere within the Republic of Kenya. Anyone found in possession of the said film will also be in breach of the law.

The Board notes with great concern that the said film objectionable classifiable elements such as homosexual practices that run counter to the laws and culture of Kenyan people. It is our considered view that the moral of the story in this film is to legitimize lesbianism in Kenya contrary to the law and the Board's content classification guidelines. In light of the above, the film Rafiki should not be exhibited or distributed in any form or platform anywhere the Republic of Kenya. Any

exhibition of the said film for public consumption in Kenya will be in violation of the section 16 of the Films and Stage Plays Act, Cap 222 of the Laws of Kenya and will attract severe penalties.

Please note that the mandate of the Board is premised on the need to promote Kenya's culture, national aspirations and values and to protect children from exposure to harmful content. Films made in Kenya for public consumption must therefore reflect and respect the dominant values of the Kenyan society."

78. The decision was followed by public statement issued by the 1st Respondent on 27th April 2018 in which the contents of the letter was released to the public.

79. The petitioners submit that there is no legitimate aim between the restrictions to bar the film "Rafiki" and the premise of the restriction by the 1st and 2nd Respondents on the depiction of 'homosexual practices that run contrary to the law and culture of Kenyan people.

80. It is further contended that many fictional motion pictures, many of which are filmed, exhibited, distributed and broadcasted in Kenya and have been issued restrictive licences by the 1st and 2nd Respondents to do so, depict story lines and events that are unlawful. That the Respondents, it is urged, have allowed the exhibition of movies that depict murder, drug, trafficking, theft, robbery with violence etcetera, all of which are illegal in Kenya. It is therefore averred that there was no legitimate aim in the Respondents decision to restrict "Rafiki".

81. The petitioners in support of the above proposition rely on the case of **Print Media South Africa & another vs Minister of Home Affairs** where the Constitutional Court of South Africa reflected on the question of moral agency in the context of freedom of expression, particularly artistic freedom and the freedom to seek or impart ideas, at paragraph 55:-

"Embraced by the right [to freedom of expression] is the liberty to express and to receive information or ideas freely. The right also encompasses the freedom to form one's own opinion about expression received, and in this way, both promotes and protects the moral agency of individuals. Whether expression lies at the right's core or margins, be it of renown or notoriety, however essential or inconsequential it may be to democracy, the right cognizes an elemental truth that it is human to communicate, and to that fact the law's support is owed." [Emphasis added].

82. The petitioners aver that the protection of "vulnerable adults" as eluded by the Respondents in the Replying affidavit of Ezekiel Mutua dated 15th October 2018 at paragraph 32(h) as a legitimate objective of the impugned Act is erroneous, mischievous and meant to mislead this court. That the impugned Act makes provision for the protection of children under section 17 and makes no reference to vulnerable adults.

83. It is further submitted by the petitioners that any restrictions placed on right to freedom must be "necessary" for a legitimate propose. It is urged that a prohibition on a blanket ban on the film "Rafiki" violates the test of "necessity" if the protection of children from harmful content as espoused by the Respondents being the reason of the ban could be achieved in other ways that do not restrict freedom of expression. It is further contended that measures to protect the rights must be rationally connected to the objective of protecting the interest, in the sense that they are carefully, designed so as to be the least intrusive measures which would effectively protect it. That when restricting rights one must not "use a sledge-hammer to crack a nut".

84. In Supreme Court of Mexico [Suprema Corte de Justicia de la Nacion de Mexico] opined as follows;

"It is not enough for the legislature to demonstrate that the aim pursued is legitimate; rather, it must ensure that the measure employed is carefully designed to accomplish that compelling aim." Along these lines, the Court specified that "necessary" is not the same as "useful" or "opportune." Accordingly, "In order for the restriction to be legitimate, the certain and compelling need to impose the limitation must be clearly established. In other words, it must be demonstrated that the objective in question cannot reasonably be accomplished by another measure less restrictive of freedom of expression. This means that it must not be limited beyond what is strictly necessary in order to guarantee the full exercise and scope of this human right," held the Court. In its decision, the Supreme Court found that "A restriction to freedom of expression must be proportionate to the legitimate aim that justifies it, and strictly tailored to the accomplishment of that objective without interfering in the legitimate exercise of said freedom."

85. It is further urged by the petitioners that any restriction placed on freedom must not be overloaded. It is further contended that the proportionality test therefore in the strict sense leads to an examination of the reasonableness of the legally provided measure considered in its totality by weighing the limitation or restriction of the right, on one hand, and the aim it seeks to accomplish, on the other. If the curtailment of the potential enjoyment or exercise of the right is excessive in relation to the proposed objective, the measure is disproportionate and therefore unlawful. It therefore follows the assessment of proportionality in the strict sense focuses on the means/ends relationship, which must be balanced or proportionate.

86. It is argued by the petitioners that the report by 2nd Respondent marked as Exhibit “**FM-3**” in the Replying affidavit of the Respondent of Ezekiel Mutua dated 15th October 2018, titled “Report on classification of the film “**Rafiki**” examined on 10th and 11th April 2018 at Kenya Film classification Board Preview Theatre at Uchumi House Nairobi, on page 3, it is clear there was an opportunity available for 2nd Respondent not to completely extinguish the rights of the 1st petitioner by preferring to place an age restriction of “18th” whenever the film could be viewed by adults, rather than to completely restrict the film. The petitioners therefore contend that the decision to restrict the “**Rafiki**” does not meet the proportionality test set out in Article 24 of the constitution. It is urged that the decision to limit the 1st petitioner’s right to freedom of expression does not meet the threshold provided for under **Article 24 of the limitation of rights.**

87. The 1st interested party and 3rd interested party support the petition and the petitioner’s submissions herein.

88. The 1st and 2nd Respondents and interested party oppose the petition.

89. The Respondents and the 2nd interested party pray that the petition be dismissed urging the Film and Stage Plays Act, Cap 222 Laws of Kenya is constitutional, legal and valid.

90. The crux of the petition is that the Films and Stage Play Act violates, or threatens to violate, the petitioner’s right to freedom of expression guarantee under Article 33 of the Constitution of Kenya 2010. **Article 33(2) of the constitution** limits the freedom of expression as it is provided; that the right to freedom of expression does not extend to:-

"33(2) The right to freedom of expression does not extend to—

(a) propaganda for war;

(b) incitement to violence;

(c) hate speech; or

(d) advocacy of hatred that—

(i) Constitutes ethnic incitement, vilification of others or incitement to cause harm; or

(ii) Is based on any ground of discrimination specified or contemplated in Article 27(4)."

91. It is clear from Article 33 of the constitution that the right to freedom of expression is not absolute as it is evidently that it is not included in the illimitable rights and fundamental freedoms provided under Article 25 of the constitution. It is further clear that the right to freedom of expression, as provided under **Article 33(2) of the constitution** is internally limiting and therefore constitutionally protected expression does not extend to those areas highlighted by the constitution. I therefore find the limitations as provided under **Article 33(2) of the constitution** are not exhaustive, therefore other limitations could be imposed on the right to freedom of expression, but only in as far this will be in accordance with the provisions of the constitution.

92. In support of the above proposition the Respondents and 2nd interested party sought to rely on the decision of Court of Appeal in **Standard Limited & 2 others vs Christopher Ndarathi Murungaru (2016) eKLR (Makhandia, Ouko, & M’Inoti; JJ.A)**, where the Court opined on the restricted interpretation of the Constitution as hereunder:

“... The appellants contend that the only limitation to freedom of the media allowed by the Constitution is engaging in

propaganda for war, incitement to violence, and hate speech or advocacy of hatred of the nature specified in Article 33(2) (d). In arriving at that conclusion, we are afraid that the appellants have chosen to look at Article 34 in isolation, without due regard to other provisions of the Constitution. A tool of interpretation that confines each provision of the constitution or guaranteed right and fundamental freedom into airtight silos, without due regard to how they relate to each other and to the whole, is to be completely eschewed.”

93. In the above-mentioned decision the Appellate court adopted the definition of “*holistic interpretation*” as provided by the Supreme Court in the matter of **Kenya National Human Rights Commission, S.C Advisory opinion Ref No. 1 of 2012**, as hereunder:-

“...It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances.”

94. The Appellate court in the **Standard Limited vs Christopher Murungaru (supra)** concluded that:-

“... An interpretation of the Constitution that destroys one or some of its provisions or render them otiose, or results in anomalous or illogical conclusions cannot be countenance.”

95. Article 259(1) of the constitution provides:-

“(1) This Constitution shall be interpreted in a manner that—

- (a) Promotes its purposes, values and principles;
- (b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- (c) Permits the development of the law; and
- (d) Contributes to good governance.”

96. The principle of harmonization provides that all provision of the constitution bearing upon a specific issue should be considered together thus constitutional provisions must be construed as a whole in harmony with each other without in subordinating any one provision to the other. In discerning the purpose of freedom of expression, the court must consider the broader values embraced by the constitution.

97. I am therefore of the view that a restrictive interpretation of **Article 33(2) of the constitution** cannot be countenanced and will result in anomalies or illogical conclusions. The restrictive interpretation that **Article 33(2) of the constitution** is exhaustive would result in legitimizing and allowing films with themes that depict child pornography, paedophilia, glamourize success in drug abuse, amongst other themes which are explicitly adverse against national soul, ideas and aspirations as a nation.

98. The provision of **Article 33 of the constitution** is supposed to be read holistically and in the current matter at alongside **Article 53 and 55 of the constitution**. **Article 53(d)** advances the nation’s desire to protect the rights of children from *inter-alia*, abuse and harmful cultural practices. It provides:-

“(1) Every child has the right—

- (d) To be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour.”

99. It is noted that Article 55 of the constitution places a positive obligation on the state, as opposed to negative obligation. It is clear that this is of particular importance as the state is required to put in place positive measures to ensure the protection of the youth, and principally the vulnerable youth adults, from harmful cultural practices and exploitation. This court is further entitled to

consider international instruments which under **Article 2(6) of the constitution** this country has ratified.

100. The Republic of Kenya ratified the **international covenant on civil and political rights (ICCPR)** on 1st May 1972. **Article 19 of ICCPR** provides for the freedom of expression as hereunder:-

"1 Everyone shall have the right to hold opinions without interference.

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

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals."

101. Further to the above, it is noted that the Republic of Kenya also ratified the **convention on the Rights on the children** on 2nd September 1980. It is clear that from the reading of Article 33 alongside the provisions of the constitution, and the international instruments it cannot countenance a restrictive interpretation of Article 33(2) of the constitution as submitted by the petitioners.

102. The petitioners, and the 1st interested party are seeking determination as to constitutionality of the impugned sections in the Act, and in doing so the court is required to examine its purpose and effect. The purpose of enacting a legislation or the effect of implementing the legislation so enacted may lead to a nullification of the statute or certain provisions of the statute if found that it is inconsistent with the constitution. It is contended by the petitioners that the impugned sections are unconstitutional to the extent that they limit the freedom of expression and artistic creativity as provided for under **Article 33(i) of the constitution**. It urged by the petitioners that the freedom of expression and artistic creativity cannot be suppressed unless to the extent provided for under Article 33(2) and where such freedom is to be limited by a legislation or statutory provision thus such limitation should have proximate and direct nexus to **Article 33(2) of the constitution**.

103. In the instant petition, it is of great significant to note that the 2nd Respondent was created under the Films and Stage Play Act to regulate film industry and to ensure professionalism in the industry. The Regulation is meant to ensure that the media content being released for public consumption is suitable and compliant with the laws of the country. The statute and the regulations made thereunder legitimately addresses classifiable elements such as violence and crime, sex, obscenity and nudity, occult and horror, drugs, alcohol and other harmful substances are within the mandate of the 2nd Respondent. It is therefore the obligation of the state to ensure that the publicity of the classifiable elements is checked in all films including the film "**Rafiki**".

104. It is the duty of the petitioners to discharge the burden of establishing the unconstitutionality of the impugned sections of the Films and Stage Plays Act in this petition. The petitioners seek to enforce their right of expression notwithstanding the rights are not absolute.

105. Article 33 of the constitution relied upon by the petitioners is not absolute and the Right to Freedom of expression is subject to limitation, but only to the extent and in the circumstances provided under **Article 24 of the constitution**. **Article 24(1) of the constitution** provides:-

"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) The nature of the right or fundamental freedom;

(b) The importance of the purpose of the limitation;

c) **The nature and extent of the limitation;**

(d) **The need to ensure that the of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

e) **the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—**

(a) **The nature of the right or fundamental freedom;**

(b) **The importance of the purpose of the limitation;**

(c) **The nature and extent of the limitation;**

(d) **The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

(e) **The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."**

106. Article 24 of the embodies three (3) test that has been developed for determining the constitutionality of legislation imposing limitation on fundamental rights and freedoms being the following:-

a) **Whether the limitation was "prescribed by law"**

b) **Whether the limitation pursues a legitimate aim"**

c) **Whether the limitation was necessary in a democratic society"**

107. On whether the limitation was "*prescribed by law*", this test requires that any limitation to a fundamental right be 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. This test of constitutionality is satisfied where the limitation on the freedom of expression, particularly through cinema to graph films, is provided under the Films Act. The Board is mandated, under section 12 as read with 16, of the Act to undertake classification before the issuance of certificate of Approval. Section 12 of the Act is on restrictions on exhibitors whereas section 16 of the Act provides for certificate of approval. I therefore find that in view of section 12(2) and section 16 (1) (4) and (6) of the Films Act the first test of constitutionality is met as the limitation was duly prescribed by law.

108. The second test of constitutionality is whether the limitation pursues a legitimate aim" In the case of **Canada in Republic vs Oaks (1986) I.S.C.R 103** the court held thus:-

"Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important." [Emphasis added]

109. The overall objective of the Films Act, as provided in the preamble or long title thereon, is to control the making and exhibition of cinematograph films, for the licensing of Stage Plays, theatres, and cinemas, and purpose incidental thereto. It is evident that parliament's concern, resulting to the legislation of the Films Act, was principally the prestation of the public from content that is prejudicial to maintain of public order, offensive to decency, or undesirable acts in the public interest. This no doubt is clearly captured under section 16(4) of the Act. **Section 16(4) of the Act** provides:-

"(4) The Board shall not approve any film or poster which in its opinion tends to prejudice the maintenance of public order or offend decency, or the public exhibition or display of which would in its opinion for any other reason be undesirable in the public interest."

110. It should be noted that the parliament inserted specific provisions in the Films Act, in the instance the content that is undesirable in the public interest and offensive to decency. The parliament further deemed it fit to directly address the protection of children from harmful, indecent, age in appropriate content or material as expressly captured in section 17 of the Films Act.

111. Further, the objective of the protection of the public from content that is offensive to decency is pursued under **section 15(i) (a) (iii) of the Films Act**; where the legislative must have been concerned about lewd portrayal of women and children in a manner that is distasteful. The section provides:-

"(1) The functions of the Board shall be to—

(a) Regulate the creation, broadcasting, possession, distribution and exhibition of films by—

(i) Examining every film and every poster submitted under this Act for purposes of classification;

(ii) Imposing age restriction on viewership;

(iii) Giving consumer advice, having due regard to the protection of women and children against sexual exploitation or degradation in cinematograph films and on the internet."

112. From the above my understanding of the inclusion of "*women*" in the provision is clear manifestation that the Parliament had the objective of protecting not only children but also the adults. I find therefore that the Films Act cannot be viewed as an Act with the sole objective of protecting only children from harmful context. This interpretation is further supported by Article 55 of the constitution, where the constitution mandates the state to put in place positive measures to protect the youth from exploitation. It is therefore the recognition of the expansive scope of the objective of the Films Act and the changing needs and values of society, that the Board has been granted the discretion to prescribe guidelines to be applied in the classification of films, under **section 15(2) (b) of the Act**.

113. In the instant petition, it cannot be gainsaid that audio/visual medium, as a means of expression and communication, is distinctively different from plain text or even exclusively audio medium. The influence held by audio-visual medium cannot be disputed with the unrivalled capability of influencing the views and perceptions of, not only an individual, but of a whole generation. It is therefore of paramount importance to note that where grant rests, so does grant responsibility, and failure to regulate great power exposes every member of the society to great risk of abuse and exploitation.

114. From the above-mentioned no doubt the court aptly captured the pressing societal concern posed by cinema as an audio visual medium of expression. From the above it is clear that a mural picture is significantly different from other avenues of expression. It is for that reason that the risk of abuse of such an influence is a pressing and substantial societal concern and is a boom awaiting to explode and cause untold damages.

115. I find that the effect of release, accessibility and public exhibition of content that is offensive or adverse to public interest cannot be overlooked. The danger and/or risk posed is almost of irreversible nature in our short terms and if not controlled it can sweep both young and old. I find that the protection of the public from audio-visual content that is prejudicial to the maintenance of public order, offensive to decency, and undesirable acts in the public interest is indeed a pressing and substantial societal concern.

116. The third test of constitutionality is whether the limitation was necessary in a democratic society" To answer the question, it is necessary to assess the measures put into place by the Films Act. It is appropriate to consider measures put in place by some of the democratic countries, including the largest democracy. In India, the cinema and Film industry is regulated by cinematograph Act 1952 alongside the cinematography (*certificate*) Rules 1983. Additionally the Central Government of India issued Guidelines that would guide the regulating authority in the process of certification.

117. The Guidelines issued by the Central Government of India in exercise of the mandate under Section 5B (2) above, broadly

define the approach towards the issue of violence, sex, discrimination, smoking, drinking and consumption of drugs. The guidelines also permit the **CBFC** to execute excisions in a film, while examining a film for certification.

118. In the jurisdiction of South Africa, the Film and Publication Act No. 65 of 1996 is relevant. The Films and Publications Board (**FPB**) is established under Section 3 of the Act.

119. The mandate on the regulation and classification of films is provided under Section 18 of the Film and Publication Act.

120. Classification Guidelines for the Classification of Films, Interactive Computer Games, and Certain Publications (*South Africa*) provides further guidance on the classification of films. The Guidelines defines the category denoted as “**XX**” as:-

“...Means the material may not be distributed or exhibited in public by anyone and also not in the premises referred to in the previous sub-paragraph ... (... a holder of a license to conduct business of adult premises). In the case of child pornography it may also not be possessed anywhere.” [Emphasis added].

121. In Nigeria, the body mandated to regulate the Film industry is the National Film and Video Censors Board (**NFVCB**), established under Section 1 of the National Film and Video Censors Board Act No. 85 of 1993, with the mission to contribute to the positive transformation of Nigeria society through the censorship and classification of film and video works, while balancing the need to preserve freedom of expression within the law, and limit social harm caused by film.

122. At the same time, Act No.85 of 1993 mandates all films within the Republic of Nigeria to be submitted for Approval prior to distribution and exhibition. Section 33 stipulates:

“33. Censorship Certificate

(1) As from the commencement of this Act, no person shall exhibit, cause, or allow to be exhibited a film without a censorship certificate issued by the Board for such exhibition.

(2) A person in breach of the provisions of sub-section 1 of section is guilty of an offence and liable upon conviction to a fine of N5, 000 or to imprisonment for a term of one year.”

123. It is clear that not every film submitted for Approval receives a Censorship Certificate, but is tested against standards set by the Nigerian society in view of their culture and values. Subsequently thereafter, and only upon approval, will the film then receive a classification which will be indicated in the Censorship Certificate. This is stipulated under Section 41 of Act No. 85 of 1993.

124. It is also noteworthy that the mandate of the **NFVCB** extends to posters for the advertisement of the films, under Section 46 of the Act, which empowers the Board with the same powers and duties with regard to film, over each poster submitted for Approval.

125. In the united Kingdom, the Cinema and Film industry is regulated by various agencies with a view to protecting the public, and especially children, from content which raise harm and therefore adverse to public interest. The 2003 Licensing Act empowers the Local Councils [Borough and County Councils] to regulate the exhibition issued by the British Board of Film Classification (**BBFC**) but are not mandated to abide by the classification.

126. Despite being an independent content regulator, the **BBFC** will not accept every content presented for classification and rating. Under the **BBFC** Classification Guidelines, 2014, guidance is provided to producers, exhibitors, and distributors that the following themes may be directed for excisions, or refusal of certificate of classification.

127. In the United States, the Supreme Court of the United States in *Times Films Corporation vs Chicago* 365 U.S 43 (1961) expressly prohibited the exercise of Administrative prior classification of films on the basis of the First and Fourteen Amendments. Chief Justice Warren thought that there ought to be first an exhibition of an allegedly ‘obscene’ film as the Government could not forbid the exhibition of the film in advance. Thereafter, criminal proceedings would follow if the content was found to be offensive to statute.

128. Nonetheless, the Courts in the American jurisdiction have in various instances found the “*reasonableness*” of imposing some limitations on the freedom of expression. In **Times Films Corporation vs Chicago** (*supra*) Warren, CJ acknowledged that the protection afforded by the First Amendment liberties from prior restraint is not absolute. In **Near vs Minnesota 283 U.S. 697** immunity of press from pre-censorship was denied but pre-censorship was not to be unlimited. The protection was not unlimited but put on the state the burden of showing that the limitation challenged in the case was exceptional.

129. It is therefore apparent that even though the right to freedom of expression is protected under the First Amendment, some form of prior restraint is recommended although with the procedural input of the Court. This may be viewed as judicial prior classification, but nonetheless it is still a form of prior classification.

130. From the above it is clear that even the most liberal jurisdiction, such as that of United States of America, still advocates for some form of prior restraint to the production, distribution and exhibit of cinematograph film.

131. In view of the numerous jurisdiction making use of Administrative prior classification, I find the measure taken by 2nd Respondent to be reasonable and justifiable in a democratic society based on human dignity, equality and freedom. The measures designed clearly target at meeting the objectives of the Films Act. In view of such measures there is a rational nexus between the refusal of the certificate of Approval to a film and the pressing and substantial societal need to protect the public from content that is prejudicial to the maintenance of public order, would offend decency, or would be undesirable in the public interest, in the current case being the issue of homosexuality and lesbianism. It should be appreciated that the more important an objective is to society; that it is possible in return, to result in strongest measure, so as to achieve the objective sought; needless to say that the measures put in place by the Films Act are proportional to the objective legislated upon by parliament.

132. On the question of necessity, it is clear that where a state has sought to limit a constitutionally guaranteed right on freedom, on grounds of protection of morals in a democratic society, the legislature, and authorities charged with such a discretion have a margin of appreciation to make the initial assessment of the reality of the pressing societal need implied by the notion of “*necessity*”. In support of this proportion the Respondents referred to holding of the European Court of Human Rights (**ECHR**) in case of **Handyside vs. The United Kingdom (Application No. 5493/72)** where the Court held as hereunder at Paragraph 48:

“... In particular, it is not possible to find in the domestic law of various contracting states a uniform European conception of morals. The view taken by the respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international Judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them... Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing societal need implied by the nation of “necessity” in this context.

Consequently, Article 10 paragraph 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (“prescribed by law”) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.”

133. From the above valid exercise of the margin of appreciation differ from county to country, dependent on the values and principles close to the hearts of the society in respective countries. Therefore following the line of argument, the content exhibited in the film “**Rafiki**” may receive varied classifications depending on the society it is submitted to. Consequently, the fact the film received a different rating in South Africa, for example, cannot be a basis for this court to overturn the decision of the Board.

134. From the aforesaid; I find that the Board validly exercised its margin of appreciation, by considering the values, principles and culture of our country, as provided by the constitution and different legislations and therefore correctly exercising its mandate by declining to grant a certification of approval.

135. From the above and considering all rival submissions I find that the Film and Stage Plays Act and Kenya Films classifications Guidelines 2012 are constitutional, legal, valid and the limitations implied therein are reasonable and justified in a democratic society.

136. I have turn to consider the impugned sections 4,6,7,8,9,12,13,16,30 and 35 of the Films and Stage Plays Act and sections 5(i)

(ii) (iii) and (iv) as well as 63(5) of the Kenya Film Classification Board classification Guidelines, 2012 which the petitioners contend are unconstitutional and invalid .

137. The petitioners challenge sections 7(1), 9, 12, 13 and 16 for allegedly infringing the right of freedom of expression as granted under Article 33 of the constitution. The right to freedom of expression is not absolute and further it should be noted the limitations provided under Article 33(2) of the constitution and which the petitioners rely on are not exhaustive as already found in this judgment. The right to freedom of expression is limited by law under the Films Act, in pursuant of pressing and substantial concern and the means adopted for limitation, being Administrative prior classification is necessary, reasonable and justifiable in an open and democratic society.

138. In this regard, I find that the Films Act, and specifically sections 7(1), 9, 12, 13 and 16 are constitutional as they meet the test for constitutionality under Article 24 of the constitution. Further as regards challenge against section 9 of the Act it is noted that some of the applications received by the Board for filming licenses may necessitate the presence of security agencies at the shooting of the film, in particular in the natural parks in Kenya where shooting of films in these settings not only endangers the lives of the cast and production team but also the lives of the wild animals in their natural habitat.

139. The petitioners further challenge section 4 and 8 of the Films Act for imposing criminal offence which allegedly lacks the element of *mens rea*. The Respondents contend the offences prescribed by Film Act, take the nature of the strict liability offences.

140. The petitioners further challenge sections 6, 30 and 35 of the Films Act for being vague and over broad. The said sections are to be read alongside **section 15(2) (b) of the Films Act** where the Board is mandated to prescribe Guidelines to be applied in the classification films.

141. I now turn to consider whether the Kenya Films classification Guidelines, 2012 is unconstitutional and therefore null and void. The definition of “*statutory instrument*” under the statutory Instrument Act No. 23 of 2012, which introduces Guidelines issued by the Regulating body under powers conferred by the Act of Parliament, Kenya Films Classification Guidelines 2012 is yet to be published in the Kenya Gazette. However the decision of whether there has been non-compliance, and the effect thereof is not pegged to a mere textual reading of the provision of the statutory Instrument Act. In the decision of the (late Mr. Justice J.L.O Onguto) in **Anthony Otiende vs Public Service Commission & 2 others (2016) eKLR** the court held under paragraph 47:-

“Where non-compliance with statutory provisions and requirements is alleged, the question to be answered is not whether there has been ‘substantial’ or ‘exact’ compliance. It is ‘Was there compliance’” The decision whether there has been compliance is not pegged to a mere textual reading of the statute, in my view, but rather what is the object sought to be achieved by the statutory provision and whether that object has been achieved. It is about the statute’s objective and purpose and this test, in my view, will countenance any deviation from statutory prescriptions provided the purpose of the statute has been achieved. In that regard, the purpose of the statute as a whole as well as the specific provision is to be gathered and identified.

Secondly, the Court is to identify the steps, if any, taken to comply with the statutory provisions.

Thirdly, the Court will then ponder on whether the subsidiary legislation has achieved the purpose of the statute.

Finally, the question as to whether there is any practical prejudice as a result of non-compliance is to be answered prior to the making of any orders.”

142. I therefore find and hold that the Guideline 2012, although having not undergone the steps stipulated under the Statutory Instrument Act, only intend to provide a definite guideline to classification of films as delegated by the Films Act. It is clear from the guidelines that they do not grant the Board any new powers, but only seek to define the powers under the Films Act. I do appreciate and recognize that if the guidelines were to be nullified there would be untold practical prejudice as the invalidation of the Guidelines will definitely result in the decisions of the Board being at limbo, and thereby exposing the nation as a whole, and more specifically the children and young adults, to audio-visual content that may be harmful to public order, decency and against public interest.

143. I further recognize the mandate held by the Board in the related television industry. The Kenya Information and

Communication (*Broadcasting*) Regulations task. The Board has the responsibility of rating all audio-visual advertisements, inform and consider television and radio programmes before public broadcast. The mandate in my view is constitutional as provided under the Films Act. If what is sought by petitioners is granted this mandate would also be placed in limbo.

144. The Respondent in urging the court to adopt a “*measured and proportionate approach*” referred to the case of **Antony Otiende vs Public Service Commission & 2 others (supra)** where the court realized the effect of an invalid order to the laid Regulation system, and held at paragraph 79 as hereunder:-

“In my view, the non-compliance especially with regard to non-consultation with the NLC and failure to obtain Parliament’s approval were grave, given that the people of Kenya under Article 67(2) (c) of Constitution yearned for and mandated the NLC to advice on the development of a comprehensive land registration programme. It would be appropriate to invalidate the impugned forms but at the same time and in the public interest suspend such invalidation to avoid throwing the entire system of registration of title into disarray and chaos. That is the measured and proportionate approach that ought to be taken, as I will shortly will, to ensure that there is compliance with the law while at the same time not leaving all players and stakeholders in limbo chaos.

80. I am satisfied that the Court has such residual powers to suspend any orders or declarations of invalidation.” [Emphasis added]

145. In exercising the mandate and discretion to apply the measure and proportionate approach, to ensure that there is compliance with the law while at the same time not leaving all players and stake holders in limbo and chaos, I grant the Board one (1) year from the date of this judgment to bring the Guidelines under the ambit of the law.

c) Whether the restriction of the Rafiki by the Kenya Film and classification Board was made irrationally, arbitrary and un procedurally and contrary to the law particularly Article 47 of the constitution and relevant provisions of the Fair Administrative Actions Act"

146. The petitioners urge the court to find that the restriction of film “**Rafiki**” by Kenya Film Classification Board amounts to violation of the 1st petitioner’s right to freedom of expression guaranteed under Article 33 of the Constitution of Kenya; whereas the Board has urged this court to find that the Film’s Act is constitutional in terms of Article 24 of the Constitution. The Board further is of the view that at all material times, it has acted within the four corners of the law as provided under the constitution, relevant international treaties that has been ratified by Kenya and principally by the Films Act.

147. It is worthwhile to note that the Guidelines, 2012, though not yet published in the gazette as provided under the Statutory Instrument Act, has been formulated pursuant has the powers donated by the Films Act, with a view to meet the objectives as provided therein. I am satisfied that this court has residual powers to adopt the measured and proportionate approach in favour of public order and public interest in the face of the current pressing and substantial societal needs. I have accordingly found the decision to “**Restrict**” the film “**Rafiki**” is in good faith, constitutional, valid and pursuant to the provision of the Film Act.

148. In assessing whether a decision is illegal under Article 47 of the constitution it is trite law that the court shall examine:-

- a) If the decision contravenes or exceeds the terms of the power which authorizes the making of the decision.**
- b) Pursues an objective other than that which the powers to make decision was conferred.**
- c) Is not authorized by any power.**
- d) Contravenes or fails to implement a public duty.**

In **Republic vs PPARB Exparte Rongo University (2018) eKLR** Hon. Justice Mativo held that:-

“The task of the court in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty and power upon the decision maker. The instrument will normally be statute or regulation.

The courts when exercising their power of construction are enforcing the Rule of Law by requiring administrative bodies to act within the four corners of the powers or duties.”

149. The Respondents submitted at all material times; it acted within the provisions of the law; and more specifically the Fair Administrative Actions Act No. 4 of 2015 which amplifies Article 47 of the constitution. It is submitted the Board granted film licence, upon application, as provided under section 4 of the Film Act; the Board viewed the film in order to assess the suitability of the content for exhibition, distribution and broadcast as mandated under section 5 of the Film Act and upon detecting offensive classifiable material in the film **“Rafiki”** the Board engaged the 1st petitioner and recommended alteration to the offensive classifiable material, as stipulated under **section 16(1) and (3) of the Film Act.**

150. That ultimately the Board exercised its discretion, by declining to approve the film for exhibition to the public as provided under section 16(1) as read with section 12 of the Films Act when the 1st petitioner refused to excise the offensive material.

151. That the petitioners have failed to demonstrate that the Respondents at any one given point, and the Board acted outside their powers under the Act nor has it been demonstrated that the Board acted with bad faith, ill will or malice or failed to give the petitioners an opportunity to be heard or reasons for its decision. The Board acted in accordance with and complied with **section 3(a) and (b) of the Fair Administrative Action Act** for upon noting of offensive classifiable content in the film **“Rafiki”** the Board repeatedly engaged the 1st petitioner with a view at arriving at an amicable resolution to the issue at hand. It is noted that the Board subsequently issued the 1st petitioner with written reasons for the decision arrived at by the Board, vide the letter dated 26th April 2018 and in accordance with **section 3(d) and section 6 of the Fair Administrative Action Act.**

152. I therefore find that the decision to restrict the 1st petitioner’s film **“Rafiki”** is constitutional, and in accordance with the provisions of **Article 47 of the constitution.**

D) Whether the petitioners are deserving of the orders and remedies sought"

153. The petitioners in seeking remedies urge that the court may award damages as provided in **Article 23(2) of the constitution.** In the case of **Dick Joel Omondi vs Hon. Attorney General (2013) eKLR** Justice Lenaola (as he then was) opined as follows:-

“It is now settled law that a party whose constitutional rights are found to have been violated by the State is entitled to damages.”

154. The Respondents on the other hand argue that the award of damages sought is against the principle that the primary purpose of a constitutional remedy is not compensative or punitive, but is in public interest to vindicate the rights allegedly violated.

155. I have considered the petitioners petition, submissions in support, those of the Respondents and interested parties in opposition and I find that the petitioners have failed to prove their case. The petition is without merit.

156. I find as follows:-

a) The jurisdiction of this court has been prematurely invoked.

b) The Right to freedom of expression under Article 33 of the constitution is not absolute, and is subject to limitation but only to the extent and in the circumstances provided under Article 24 of the constitution.

c) The provisions of the Films Act, and specifically sections 4,6,7,8,9,12,13,16,30 and 35 of the Films and Stages Plays Act and section 5(i) (ii)(iii) and (iv) as well as 63(5) of Kenya Films Classification Board classification Guidelines, 2012 are constitutional and valid in terms of Article 24 of the constitution.

d) The exercise of the discretion by Board in the decision to “restrict” the 1st petitioner’s film “Rafiki” is constitutional, proper and valid.

e) The petition is without merit and is dismissed with costs.

Dated at Nairobi this 26th day of March, 2020

Delivered on 29th day of April 2020.

J.A. MAKAU

JUDGE



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