



The East African Court of Justice Decision on Media Services Act 2016 and its Implication

BACKGROUND

That the Media Service Act No. 12 of 2016 (hereinafter “the Act”) was enacted by the Parliament of United Republic of Tanzania on 5th November 2016, according to the preamble of the Act the object of the law is to make provisions for promotion of professionalism in the media industry for establishment of Journalists Accreditation Board, independent media council and framework for regulation of media service and for other related matters.

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

BEFORE EAST AFRICAN COURT OF JUSTICE

Sometimes on 11th January 2017 Media Council of Tanzania (MCT), Legal and Human Rights Centre (LHRC) and Tanzania Human Rights Defenders Coalition (THRDC) filed the Reference before the East African Court of Justice challenging the Act on ground that it violates fundamental principles of the EAC Treaty (Reference No. 2 of 2017).

VIOLATION

Reference concerned a violation of Articles 6(d), 7(2) and 8(1) (c) of the Treaty for Establishment of the East African Community (hereinafter “the Treaty”). Under the Treaty, Tanzania has an obligation to uphold the fundamental principles of the Community as enshrined in Article 6(d):

“good governance including the adherence to democracy, the rule of law, accountability, transparency as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.”

Tanzania has an obligation to uphold the Community’s operational principles as listed in Article 7. Article 7(2) prescribes that Partner States:

“undertake to abide by the principles of good governance, including adherence to the principles of democracy, rule of law, social justice and the maintenance of universally accepted standards of human rights.”



PROBLEMATIC PROVISIONS

The Act under Section 7 (3) (a), (b), (c), (f), (g), (h), (i) and (j) **restricts type of news or content without reasonable justification.** It provides:

A media house shall, in the execution of its obligations, ensure that information issued does not:

a. Undermine:

- i. The national security of United Republic; or*
- ii. Lawful investigations being conducted by a law enforcement agent;*
- b. Impede due process of law or endanger safety of life of any person;*
- c. Does not constitute hate speech;*
- d. n/a*
- e. n/a*
- f. Involve unwarranted invasion of the privacy of an individual;*
- g. Infringe lawful commercial interest, including intellectual property rights of that information holder or a third party from whom information was obtained;*
- h. Hinder or cause substantial harm to the Government to manage the economy;*
- i. Significantly undermines the information hold-*

er's ability to give adequate and judicious consideration to a matter of which no final decision has been taken and which remains the subject of active consideration; or

j. Damage the information holder's position in any actual or contemplated legal proceedings or infringe professional privilege.

The Act introduces the mandatory accreditation of journalists and gives powers to the Board of Accreditation to cancel the same under Section 19 which provides:

(1) A person shall not practice as a journalist unless that person is accredited in accordance with the provisions of this Act

(2) A person who intends to practice as a journalist shall apply for accreditation to the Board in the form and manner prescribed in the regulations.

(3) A journalist who is not a citizen of the United Republic or is not regarded as a permanent resident by virtue of immigration laws may be accredited for a specific purpose for a period not exceeding ninety days.

(4) Where a period of accreditation granted under subsection (3) expires, and the purpose for accreditation is not completed, the journalist who pursues that purpose may apply to the Board for extension of time for a further period not exceeding twenty one days.

(5) The Board may cancel the accreditation of a journalist if its satisfied that:

- c. the journalist has committed gross professional misconduct as prescribed in the code of ethics for journalist profession; and*

d. in case of a foreign journalist, such journalist does not pursue the purpose for which accreditation was granted.

Press card on Section 20:

- (1) A journalist accredited in terms of this Act shall be issued with a press card by the Board.
- (2) A press card shall be evidence that the holder is an accredited journalist and shall be valid for a period prescribed in the Regulations.
- (3) The holder of a press card may, upon the expiry of the press card and payment of prescribed fees, make application to the Board for renewal.

Roll of journalist Section 21:

- (1) The Board shall maintain a roll of journalists containing all names and particulars of existing accredited journalists.
- (2) A person who ceased to be an accredited journalist as a result of his name being expunged from the roll of Journalists or is suspended from practicing as an accredited journalist shall not practice, whether directly or indirectly, as a journalist.
- (3) An accredited journalist whose name is expunged from the roll of Journalists or is suspended shall not practice as journalist for a period of not less than three months.
- (4) Notwithstanding the provisions of subsections (2) and (3), where the name of any journalist has been expunged from the roll or the effect of the accreditation of any journalist has been suspended in terms of this section, the Board may, either of

its own motion or on application in the prescribed manner by the journalist concerned, and in either case after holding such inquiry as the Board may deem fit, direct that-

- (a) the deletion from the roll be confirmed;
- (b) the name of that journalist be restored to the Roll; or
- (c) the suspension of the accredited journalist be lifted.

- (5) A person aggrieved by the decision under this section may appeal to the Minister.
- (6) A person aggrieved by the decision of the Minister may seek redress from the High Court.
- (7) The Board shall cause the roll of Journalists to be published in the gazette or newspaper of wide circulation or website of the Board.

Criminal defamation Section 35:

- (1) Any matter which, if published, is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation, is a defamatory matter.
- (2) The matter referred to under subsection (1) shall qualify to be a defamatory matter even when it is published against a deceased person.
- (3) The prosecution for the publication of defamatory matter concerning a person who is dead shall not be instituted without the written consent of the Director of Public Prosecutions.

Defamation in print media Section 36:

(1) A person shall be deemed to make publication of a libel if that person causes the print, writing, painting, effigy or other means by which the defamatory matter is conveyed, to be dealt with, either by exhibition, reading, recitation, description, delivery or otherwise, in a way that the defamatory meaning thereof becomes known or is likely to be known to either the person defamed or any other person.

(2) It shall not be necessary for defamation that the defamatory meaning is directly or completely expressed.

(3) For the purpose of subsection (2), it shall be sufficient that such meaning and its application to the person alleged to be defamed may be collected either from the alleged libel itself or from any extrinsic circumstances or partly from the one and partly from the other means.

Definition of unlawful publication Section 37: Publication of defamatory matter concerning a person shall be unlawful within the meaning of this Part, unless-

(a) the matter is true and it was for the public benefit that it is published; or

(b) it is privileged as one of the grounds for the reasons provided under this Act.

Cases in which publication is absolutely privileged

Section 38:

(1) The publication of defamatory matter is abso-

lutely privileged, and a person shall not be liable to punishment in that respect where-

(a) the matter is published by the President, the Government or the National Assembly in any official document or legal proceedings;

(b) the matter is published in the National Assembly, by the President, the Government or by any member of the National Assembly or the Speaker;

(c) the matter is published by order of the President or the Government;

(d) the matter is published concerning a person who is the subject to military or naval discipline for the time being, and relates to his conduct as a person who is the subject of such discipline and is published by the person having authority over him in respect of such conduct;

(e) the matter is published in the course of any judicial proceedings by a person taking part in court proceedings as a judge or magistrate or commissioners or advocate or assessor or witness or party thereto;

(f) the matter published is in fact a fair report of anything said, done or published in the National Assembly; or

(g) the person publishing the matter is legally bound to publish it.

(2) Where a publication is absolutely privileged, it is immaterial for the purposes of this Part whether the matter is true or false, and whether it is known or be not known or believed to be false, and whether or not it is

published in good faith.

(3) *Nothing in this section shall exempt any person from any liability of a civil or criminal nature under any other Part of this Act or under any other written law if the publication of a matter alleged to be absolutely privileged is prohibited or the relief to a person injured is available under the Constitution of the United Republic.*

Cases in which publication is conditionally privileged

Section 39:

A publication of defamatory matter is privileged on condition that it was published in good faith, if the relation between the parties by or to whom the publication is made is such that the person publishing the matter is under some legal, moral or social duty to publish it to the person to whom the publication is made or has a legitimate personal interest in publishing it and the publication does not exceed either in extent or matter what is reasonably sufficient for the occasion, and in any of the following cases, namely-

(a) the matter published, is in fact, a fair report of anything said, done or shown in a civil or criminal inquiry or proceedings before any court, if however the court prohibited the publication of anything said or shown before it, on the ground that it is seditious, immoral or blasphemous, the publication shall not be privileged;

(b) the matter published, is a copy or, reproduction, or is in fact, a fair abstract of any matter which was previously published, and the previous publication of

which was or would have been privileged under this Part;

(c) the matter is an expression of opinion in good faith as to the conduct of any person in a judicial, official or other public capacity, or as to his personal character so far as it appears in such conduct;

(d) the matter is an expression of opinion in good faith as to the conduct of a person in relation to a public question or matter, or as to his personal character, so far as it appears in such conducted;

(e) the matter is an expression of opinion in good faith as to the conduct of any person disclosed by evidence given in a public legal proceedings, whether civil or criminal, as to the conduct of any person as a party, witness or otherwise in any such proceedings, or as to the character of any person so far as it appears in any such conduct as in this paragraph;

(f) the matter is an expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance or act published or publicly done or made or submitted by a person to the judgment of the public, or as to the character of the person so far as it appears;

(g) the matter is a censure passed by a person in good faith on the conduct of another person in any matter in respect of which he has authority, by contract or otherwise, over the person, or on the character of the other person, so far as it appears in such conduct;

(h) the matter is a complaint or accusation made by a person in good faith against another person in respect of his conduct in any matter, or in respect of

his character so far as it appears in such conduct, to any person having authority, by contract or otherwise, over that other person in respect of such conduct or matter, or having authority by law to inquire into or receive complaints respecting such conduct or matter; or

(i) the matter is published in good faith for the protection of the rights or interests of the person who publishes or of the person to whom it is published.

Offer of amend Section 40:

(1) A person who publishes words alleged to be defamatory of another person may, if he claims that the words were published by him innocently in relation to that other person, make an offer of amends and in that case where-

(a) the offer is accepted by the party aggrieved and is duly performed, no proceedings for libel or slander shall be taken or continued by that party against the person making the offer in respect of the publication in question, but without prejudice to any cause of action against any other person jointly responsible for that publication;

(b) the offer of amends is not accepted by the party aggrieved, then, except as otherwise provided for by this section, it shall be a defence for the person making the offer, in any proceedings by the party aggrieved for libel, slander against the person making the offer in respect of the publication in question, to prove that:

(i) the words complained of were published by the defendant innocently in relation to the plaintiff; and

(ii) the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff and has not been withdrawn.

(2) An offer of amends made pursuant to this section, shall be accompanied by an affidavit specifying the facts relied upon by the person making it to show that the words in question were published innocently in relation to the party aggrieved.

(3) For the purpose of a defence under paragraph (b) of subsection (1), no evidence, other than evidence of facts specified in the affidavit, shall be admissible on behalf of the person making the offer of amends to prove that the words were so published.

(4) An offer of amends referred shall be construed and understood to mean an offer-

(a) in any case, to publish or join in the publication of a suitable correction of the words complained of, and a sufficient apology to the party aggrieved in respect of those words; and

(b) where copies of a document or record containing the written words have been distributed by or with the knowledge of the person making the offer, to take such steps as are reasonably practicable on for notifying persons to whom copies have been so distributed that the words are alleged to be defamatory of the party aggrieved.

(5) Where an offer of amends is accepted by the party aggrieved:

(a) any question as to the step to be taken in fulfillment of the offer as so accepted shall, in default of agreement between the parties, be referred to and determined by the court; and

(b) power of the court to make orders as to costs in proceedings by the party aggrieved against the person making the offer in respect of the publication in question or in proceedings in respect of the offer referred to under paragraph (a) shall include power to order the payment by the person making the offer to the party aggrieved of the costs of an indemnity basis, and expenses reasonably incurred or to be incurred by that party in consequence of the publication in question.

(6) Where no proceedings have been commenced in pursuance to subsection (1), the court may, upon application made by the party aggrieved, make an order for the payment of the costs and expenses as court finds just and appropriate.

(7) For the purpose of this section, words shall be treated as published by one person, in this subsection referred to as the publisher, innocently in relation to another person if the following conditions are satisfied:

(a) the publisher did not intend to publish the words and concerning that other person and did not know of circumstances by virtue of which they might be understood to refer to that other person; or

(b) the words were not defamatory on the face of it and the publisher did not know circumstances by virtue of which they might be understood to be defamatory of that other person, and in either case, that the publisher exercised all reasonable care in relation to the publication.

(8) Any reference in subsection (7) to the publisher shall be construed as including a reference to a servant or agent of the publisher in relation to the contents of the publication in question.

(9) The provisions of subsection (1)(b) shall not apply in relation to the publication of words by a person who is not the author unless he proves that the words were written by the author without malice.

Offences relating to media services Section 50 provides:

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

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

(i) threatens the interests of defense, public safety, public order, the economic interests of the United Republic, public morality or public health; or

(ii) is injurious to the reputation, rights and freedom of other persons;

(b) information which is maliciously or fraudulently fabricated;

(c) any statement the content of which is-

(i) threatening the interests of defence, public safety, public order, the economic interests of

the United Republic, public morality or public health; or

(ii)injurious to the reputation, rights and freedom of other persons;

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

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

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

(2) Any person who-

(a) operates media outlet without licence;

(b) practices journalism without accreditation; or

(c) disseminates false information without justification, commits an offence and upon conviction, shall be liable to a fine of not less than five million shillings and not exceeding twenty million shillings or to imprisonment for a period not less than three years but not exceeding five years or to both.

Seditious intention Section 52:

(1) A "seditious intention" is an intention to-

(a) bring into hatred or contempt or to excite disaffection against the lawful authority of the Govern-

ment of the United Republic;

(b) excite any of the inhabitants of the United Republic to attempt to procure the alteration, otherwise than by lawful means, of any other matter in the United Republic as by law established;

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

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

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

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

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

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

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

Seditious offences Section 53:

(1) Any person who-

(a) does or attempts to do or makes any preparation to do, or conspires with any person to do, any act or omission with a seditious intention;

(b) utters any words with a seditious intention;

(c) publishes, sells, offers for sale, distributes or reproduces any seditious publication; or

(d) imports any seditious publication, unless that person has no reason to believe that it is seditious, commits an offence and shall be liable upon conviction, in the case of the first offender to a fine not less than five million shillings and not exceeding ten million shillings or to imprisonment for a term of not less than three years but not exceeding five years or to both, and for a subsequent offence, to a fine of not less than seven million shillings and not exceeding twenty million shillings or to imprisonment for a term of not less than five years but not exceeding ten years or to both.

(2) Any person who without lawful excuse, has in his possession any seditious publication commits an offence and shall be liable upon conviction, in the case of first offender to a fine of not less than two million shillings and not exceeding five million shillings or to imprisonment for a term of not less than two years but not exceeding five years or to both, and for a subsequent offence to a fine of not less than three million but not exceeding ten million shillings or to imprisonment for a term of not less than three years but not exceeding ten years or to both.

(3) It shall be a defence to a charge under subsection (2), if the person charged did not know that the

publication was seditious when it came into his possession and that as soon as the nature of the publication became known to him, he delivered the publication to the nearest administrative officer or to the officer in charge of the nearest police station.

(4) When any person is convicted of printing or reproducing a seditious publication, the court may, in addition to any other penalty which the court may impose, order that the printing machine on which the publication was printed or reproduced be, either confiscated for a period of not less than twelve months, but not exceeding three years or forfeited to the Government of the United Republic, and may make such order whether or not the person convicted is, or was at the time when the publication was printed or reproduced, the owner of the printing machine.

(5) A printing machine forfeited to the Government of the United Republic shall be sold, and the proceeds shall be paid into the Fund.

(6) When the proprietor, publisher, printer or editor of a newspaper is convicted of printing or publishing a seditious publication in a newspaper, the court may, in addition to any other penalty it may impose, and whether or not it has made any order under subsection (4), make an order prohibiting any further publication of the newspaper for a period of not less than twelve months and not exceeding three years.

(7) A court shall, before ordering the forfeiture or confiscation of a printing machine, satisfy itself that the printing machine was the printing machine upon which the seditious publication was printed or reproduced.

(8) Any person who prints or publishes a newspaper in contravention of an order made under subsection (6) commits an offence, and shall be liable upon conviction, to a fine of not less than five million shillings but not exceeding ten million shillings or to imprisonment for a term of not less than three years and not exceeding five years or to both.

Publication likely to cause fear or alarm Section 54:

(1) Any person who publishes any false statement, rumor or report which is likely to cause fear and alarm to the public or to disturb the public peace commits an offence and shall be liable upon conviction to a fine of not less than ten million shillings but not exceeding twenty million shillings or to imprisonment for a term of not less than four years and not exceeding six years or both.

(2) It shall be a defense to a charge commenced under subsection (1), if the accused proves that, prior to publication, he took such measures to verify the accuracy of such a statement, rumor or report and that such verification lead him to reasonably believe that the publication was true.

Powers to prohibit importation of publication Section 58:

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

Powers of the Minister Section 59:

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





Implication of the Decision and the Way Forward



DECISION OF THE COURT

Upon reading and hearing the Reference on the 28th day of March 2019 the First Instance Division of the East African Court of Justice delivered the judgment in favor of the Applicants. Save for Sections 13 and 14 of the Act which were found not in violation of the Treaty the rest of the provisions were found in violation of the Treaty and the United Republic of Tanzania was directed to bring the Media Services Act into compliance with the Treaty of the Establishment of the East African Community. This means the restriction of types of news, mandatory accreditation and licensing journalists, criminal defamation, criminalization of false news and rumors, sedition and powers of the Minister to prohibit publication or sanction content is outlawed.

Aggrieved by the decision of the First Instance Division of the Honorable Court on 11th April 2019 the Attorney General of the United Republic of Tanzania filed the Notice of Appeal and the same was served to the Applicants.

The United Republic of Tanzania failed to take essential and necessary steps including failing to file an appeal which they were supposed to file within 30 days from the date of filing the Notice of Appeal in accordance with Rule 86 of the East African Court of Justice Rules of Procedure of 2013.

On 9th June 2020 the Appellate Division of the East African Court of Justice delivered the Ruling and strike out the Notice of Appeal with costs for failure of the Government of Tanzania to take necessary steps in filing an Ap-

peal.

IMPLICATION OF THE DECISION AND THE WAY FORWARD

The decision of the Court is binding to the partner states. Rule 84 allows the EACJ make a binding interim order including contempt, in accordance with the Treaty article 39. There is no procedures to sanction a party that fails to implement a judgment against it. But for any award which imposes a financial damages obligation will be enforced through civil procedure rules of the Partner State where the judgment is enforced (Article 44), which does not apply in our case.

The Government of Tanzania's excuse in implementing the decision was the pending Appeal. In absence of Appeal, the only option remaining is to implement the Court's decision. In case the Government of Tanzania refuses to implement the decision of the Court, the available remedy is to file a contempt application before the Court if they apply the impugned provision against anyone.



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