



LEGAL OPINION ON THE ARREST OF ERICK KABENDERA AND PRESS FREEDOM IN TANZANIA

Introduction

Freedom of expression plays a very instrumental role in democratic governments as it encourages debates, creative solutions, effective communication and researches that shapes the society in all aspects. A free press plays an essential function in making information available to the public about every aspect of public, political, social and economic activity.¹ It holds the powerful to account,² and enables everyone to participate in free political debate.³

Many undesirable consequences can flow from there is a press that is not truly free. For instance, it may lead to the wrong government being elected, the wrong policies being adopted, the wrong people being appointed, and corruption, dishonesty and incompetence not being exposed.⁴ It is, therefore, imperative that limitations on press freedom only be imposed in very limited and exceptional circumstances

Freedom of expression and limitations

The Constitution of the United Republic of Tanzania under Article 18 provides for the absolute freedom of expression and right to information. Legal and Human Rights Centre (LHRC) understands under the International Convention on Civil and Political Rights (ICCPR) Article 19, freedom of expression and right to information is not absolute. But any limitation to the freedom of expression must be decided according to the following tests:

- **Step 1:** *Any restriction on a right must be prescribed by law.*
- **Step 2:** *The restriction must serve one of the prescribed purposes listed in the text of the human rights instrument.*
- **Step 3:** *The restriction must be necessary to achieve the prescribed purpose.*

¹ South African Supreme Court of Appeal, *National Media Ltd and Others v. Bogoshi*, [1999] LRC 616.

² See, for example, East African Court of Justice, *Burundi Journalists Union v. The Attorney General of the Republic of Burundi*, Reference No. 7 of 2013 (2015), par. 8

³ ECtHR, *Castells v. Spain*, App. No. 11798/85 (1992), par. 43.

⁴ South African Supreme Court of Appeal, *Hoho v. The State*, Case No. 493/05 (2008), par. 29.

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Prior to applying the three steps of the test, any interference(s) with the right to freedom of expression should be identified. Some of the interferences which have always failed the test are for example arrest/imprisonment, failure to investigate death, fines, damages, closure, exile, search and seizure, accreditation and licensing regimes, regulation, banning of media, surveillance, “Trumped-up” charges, risk of being prosecuted, physical restrictions on press access, harassment just to mention few.

Testing the limitations

Legal and Human Rights Centre has been trying to test and counter limits that vividly seem to infringe media and people’s right to free expression. Good examples include the test applied by the East African Court of Justice in two cases filed by Legal and Human Rights Centre (LHRC), Media Council of Tanzania (MCT) and Tanzania Human Rights Defenders Coalition (THRDC) vs. the Attorney General⁵ as well as the case filed by Hali Halisi Publishers vs. Attorney General⁶ in which Tanzania was held in violation of the freedom of expression.

Mseto Newspaper Case

The Kiswahili tabloid owned by Hali Halisi Publishers Limited was banned on August 11, 2016, for a period of 36 months following the notice from the then Minister for Information, Youth, Culture and Sports, Nape Nnauye on alleged illegalities. The Court, in its ruling following the case filed by LHRC on behalf of Hali Halisi Publisher challenging the ban, noted that the government had failed to establish how the publication violated the public interest and ordered the government of Tanzania to immediately lift the ban on Mseto newspaper and to let it resume publication.

The government of Tanzania to date has failed to implement the court order. There was a notice of appeal which was filed but to date there is no appeal. Despite the court ruling 36 months of the ban has elapsed, still, the government has refused to issue the license for the newspaper to resume its publications.

Media Services Act Case

On March 28, 2019, the East African Court of Justice in the case filed by LHRC, MCT and THRDC ruled that some provisions of the Media Services Act, 2016 (MSA) suppressed the freedom of expression and access to information. The court directed the government of Tanzania to take necessary measures to bring Media Services Act into compliance with the East African Community Treaty.

⁵ East African Court of Justice (Media Services Act Case) Reference Case No. 2/2017

⁶ East African Court of Justice Appellate Division Application No. 3/2019

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The government was aggrieved by the decision and on April 11, 2019 they filed the notice of appeal. Despite the facts that the rules require the appeal to be instituted within 30 days from the date of notice of appeal, to date, there is no appeal.

Continued threats and limitations to press freedom and freedom of expression

Despite the fightback by LHRC and other activists, still, there have been numerable incidents and conducts that deter the freedom of expression and media freedom in Tanzania. Some of the current events include;

Disappearance of Azory Gwanda

Azory Gwanda a freelance journalist has been missing since November 21, 2017. The government has failed to launch a credible investigation to find out what happened to him. The Minister of Foreign Affairs was quoted by BBC Focus on Africa saying Azory had disappeared and died. This statement was later clarified that he was misquoted. The misery of Azory Gwanda has to date remained unknown despite the pressure from both local and international organizations.

Arrest and detention of Eric Kabendera

The law confines the manner and conduct of arrest, such that a person in charge of the process should declare his/her identity, disclose reasons for arrest and inform the arrested person of his/her rights including right to legal representation. [Section 11 of the Criminal Procedure Code, CAP 20].

“In making an arrest the police officer or other person making the arrest shall actually touch or confine the body of the person being arrested unless there be a submission to the custody by word or action. If the person to be arrested forcibly resists the endeavour to arrest him, or attempts to evade the arrest, the police officer or any other arresting person may use all means necessary to effect the arrest”.

Erick Kabendera’s arrest and detention process did not appreciate these fundamental processes. Arresting personnel did not introduce themselves, did not disclose the offence they wanted to arrest him for. It is reported that, arresting personnel who were later on identified as policemen did unconditionally use force and extra power to surrender Kabendera into their car. This is contrary to the laws and codes of conducts guiding the arresting agencies. Force should be involved when it is due.

It is evident that Kabendera was unlawfully detained and denied bail while under Police custody for about seven (7) days. The law guarantees to a person for all bailable offences. Kabendera was at first interrogated with citizenship accusations, later on, cybercrimes and sedition, but, in all respect, he was not

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bailed out. Ultimately he was charged for unbailable offense – including money laundering. Nevertheless, Kabendera was detained and his whereabouts hidden without justifiable cause.

United Convention on the Protection and Safety of Journalist as well as International Declaration and Best Practices for Journalist Safety and other international instruments guarantee rights and freedom of journalists.

“All journalists, media professionals and associated personnel have the right to protection from all human rights violations and abuses, including through killing, torture, enforced disappearance, arbitrary arrest and detention, expulsion, intimidation, harassment, threats and acts of other forms of violence, de facto or de jure adverse discrimination against themselves and their family members, or any other arbitrary action that results from the exercise of the rights referred to in this Declaration, including unlawful or arbitrary surveillance or interception of communications in violation of their rights to privacy and freedom of expression”.

LHRC’s position

LHRC is concerned about the situation of the media and freedom of expression in Tanzania. Tanzania has been assuring the world that she is doing well in terms of media freedom and freedom of expression but practices suggest the opposite. LHRC condemns anomalies on these basic rights especially the recent one of arresting and detaining a journalist Erick Kabendera which is a continuation of violation of basic human rights, infringement of civic space and attack to journalist and press freedom. Legal and Human Rights Centre calls upon the Government of the United Republic of Tanzania to review her endeavours on civil and political rights to promote enjoyment and protection of human right in Tanzania.

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