



Radio Jambo Trading as Radio Doldings International Limited v Communications Authority of Kenya (Appeal 1 of 2019) [2021] KECMAT 453 (KLR) (18 June 2021) (Judgment)

Radio Jambo Trading as Radio Doldings International Limited v Communications Authority of Kenya [2021] eKLR

Neutral citation: [2021] KECMAT 453 (KLR)

**REPUBLIC OF KENYA
IN THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL
APPEAL 1 OF 2019
ROSEMARY KURIA, CHAIR
JUNE 18, 2021**

BETWEEN

RADIO JAMBO T/A RADIO DOLDINGS INTERNATIONAL LIMITED APPELLANT

AND

COMMUNICATIONS AUTHORITY OF KENYA RESPONDENT

JUDGMENT

1. The appellant filed this appeal because it is aggrieved by the respondent's decision of 3rd June 2019 to impose a penalty of Ksh. 500,000/= (five hundred thousand) against the appellant's radio station, Radio Jambo on 3rd June 2019. The appellant also claims that the respondent failed to grant them an opportunity to be heard before imposing the penalty.

Appellant's case

2. The appellant claims that on 3rd June 2019, the respondent wrote to them indicating that on 31st May, 2019 they had aired inappropriate content on their Radio Jambo station and therefore was liable to pay a Ksh. 500,000/= penalty. On 8th June 2019 the appellant wrote to the Respondent explaining that the Station's Program Controller had immediately terminated the services of the third party whose content was inappropriate. In response the respondent wrote a letter dated 18th June 2019 indicating that their decision delivered on 3rd June, 2019 still stood.

Respondent's case

3. On its part, the respondent claims that on or about the 31st may, 2019, it had received a complaint that the appellant had violated the appropriate contents standards requirement by airing sexually



explicit content during the watershed period. According to the respondent the appellant had invited a sexologist during watershed hours between 11.05 and 11.57am to discuss the problems bedeviling sexual dysfunction in women, specifically the inability to become aroused. The guest went ahead to suggest that one of the solutions to this problem is massaging sexual organs with massage oil. She encouraged women to massage their partners as part of foreplay and gave them tips on how to carry out erotic massages in order to get their partners aroused. She added that most partners do not engage in foreplay for various reasons and promoted her own products for use in erotic massage. This was followed with a detailed description of how to use the products, using words which in the opinion of the respondent had sexual connotations. The specific words the guest is said to have uttered are:

“Msikilizaji, fikiria position ya Mombasa raha yote, maanake mi napenda kuchuna mboga, kuchuna mboga yuaweza access sehemu zako zote za mwili na sisemi tu sehemu zako za siri”

4. The respondent further claims that the appellant was a serial offender and that despite previous notices, warnings and or/caution issued to the appellant on 29th April, 2019 and a subsequent meeting between the parties held on 20th May, 2019, the appellant had refused, failed and/or neglected to heed the same and had continued airing inappropriate content.

Analysis and finding

5. The parties filed their submissions after oral hearing of their witnesses. The appellant did not cite any authorities in its submissions. The tribunal has reduced the issues for determination to two.
6. The first is whether due process was followed before the respondent made the decision to impose a penalty of Ksh. 500,000/= on the appellant. The complaint against the appellant was received by the respondent via a telephone call on 31st May, 2019. The respondent’s witness admitted during cross-examination that they went into their archives and realized that on 29th April, 2019, they had already issued a warning/caution to the appellant. The warning on 29th April, 2019 was for a violation which had occurred in March 2019. The respondent did not issue a separate notice for the violation of 31st May, 2019. They went ahead and imposed a penalty because in their own words, they had already warned the appellant. The rules of natural justice and *audi alteram partem* (the right to be heard) are sacrosanct and must be strictly adhered to when the right to property is at stake. Article 40 (2) (a) of the Constitution prohibits parliament from enacting a law that permits the State (and or its organs and agencies – emphasis mine) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description....” The right to property is protected by the Constitution and procedural fairness is implicit before the loss of such a fundamental right. Article 47 of the Constitution as read together with section 4 of the *Fair Administrative Action Act* provide that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Implied in procedural fairness is a mandatory requirement that state organs and agencies such as the respondent must accord every person against whom administrative action is taken an opportunity to be appear before them in person; to be heard and to test the veracity of any adverse evidence against them. The appellant was not granted an opportunity to be heard; make presentations or test the veracity of the complaint against them on 31st May, 2019. A decision made without hearing the person who is likely to be affected by it cannot be allowed to stand. In *Pashito Holdings Ltd. & Another vs. Paul Nderitu Ndun’gu & Others* ([1197]eKLR) the Court of Appeal expressed itself as follows:

“An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the



decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under duty to 'act judicially'.

7. What the respondent did is that it went into its archives and fished a number of previous violations and instantly fined the appellant. The respondent may be adept at keeping a record of wrongs, but the law will frown at any attempt to use such a record to pounce on the appellant whenever the respondent considers it convenient to do so. For if such a trend were permitted, the respondent too would be required to exercise lenience and pardon the appellant, if the appellant at their last transgression repented and atoned for their sins.
8. In *Judicial Service Commission of Kenya v. Mbalu Mutava & Another* [2015] e-KLR, the Court of Appeal concluded that unlike the right to fair hearing under the common law, the right to fair administrative action is wide in scope, as it encompasses several duties: the duty to act expeditiously; duty to act fairly; duty to act lawfully; duty to act reasonably; and in specified cases, duty to give written reasons for the decision.
9. The right to be heard cannot be qualified. Thus we find that the decision of the respondent dated 3rd June, 2019 was made in total disregard of the provisions of Articles 40, 47 & 50 of the *Constitution*, section 4 of the *Fair Administrative Action Act* and principles of natural justice.
10. The second issue is whether the content broadcast by the appellants on the material day was inappropriate. The programming code is couched in words that must be construed strictly. A breach of the code is thus a transgression of strict liability. There are no exceptions or qualifications; no ifs or buts. The *Kenya Information and Communications (Broadcasting) Regulations*, 2009 as well as the Programming Code for Broadcasting Services in Kenya defines the watershed period as the "time between 5.00 a.m. and 10.00 p.m. or such other time as may be prescribed by the Authority, within which content intended for adult audience is not to be aired." Section 3 of the Programming Code provides that the scope of the Code is to ensure that unsuitable material for children and minors is not broadcast during the watershed period. The purpose for this regulation is to protect vulnerable sections of the society. Broadcast of materials that contain images or language of a sexual nature ought not to be broadcast during the watershed period. The intention of the code is to keep the minds of children free from matters which are the sole preserve of adults. It therefore does not matter whether children are in school or at home. As long there is a likelihood that children may be able to listen into such a broadcast, the code prohibits it. However the determination as to whether any content aired during watershed period is inappropriate or not is the statutory preserve of the respondent. But the respondent cannot exercise this power *nolens volens*. It can only do so within the strict confines of what is allowed by law. The respondent does not have the luxury of cherry picking situations when it will follow the law and when it will not; or even provisions of the law to follow or not. It must follow the law at all times, however inconvenient or inexpedient it is to do so. This second issue is therefore remitted to the respondent for disposal in strict compliance with the provisions of Articles 40, 47 and 50 of the *Constitution*, the *Fair Administrative Action Act* and the *Kenya Information & Communications Act*.
11. The result is that we unanimously allow the appeal on the following terms:
 1. We set aside the decision made by the Respondent on 3rd June, 2019 to impose a penalty of KShs. 500,000/= on the Appellant.
 2. Each party will bear its own costs.



It is so ordered.

DELIVERED VIRTUALLY THIS 18TH DAY OF JUNE 2021

In the presence of the honourable Members of the this Tribunal,

HON. MBESA MALOMBE,.....Member

HON. MARGARET NYAMBURA NDUNG’U,..... Member

HON. COLLINS WANDERI, Member

HON. VIVIENNE ATIENO, Member

HON. DAMARIS NYABUTI Member

HON. RAMADHAN ABUBAKAR..... Member

.....

ROSEMARY KURIA

CHAIRPERSON-COMMUNICATIONS & MULTIMEDIA APPEALS TRIBUNAL

