



**Njenga v Communications Authority of Kenya & 3 others (Complaint 4 of 2019) [2021] KECMAT 666 (KLR) (21 May 2021) (Ruling)**

Neutral citation: [2021] KECMAT 666 (KLR)

**REPUBLIC OF KENYA  
IN THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL  
COMPLAINT 4 OF 2019  
MBESA MALOMBE, MEMBER  
MAY 21, 2021**

**BETWEEN**

**ADRIAN KAMOTHO NJENGA ..... COMPLAINANT**

**AND**

**COMMUNICATIONS AUTHORITY OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**SAFARICOM LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AIRTEL KENYA LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**TELKOM KENYA LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have filed separate preliminary objections in response to this Complaint. The objections raise the question whether this tribunal is vested with the jurisdiction to hear the complaint, and to grant the relief sought. We directed that these objections be heard together.

**Background**

2. In his complaint, the Complainant pleads that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents,
  1. Have failed to provide an option to consumers to roll over unused data thus illegally depriving consumers of their unused data
  2. Are charging consumers “out of bundle” rates for data when data has purportedly run out without obtaining specific consent
  3. Are discriminating against consumers by charging “out of bundle” rates that are different from normal bundle rates



4. Have not been sending reasonable depletion notifications to consumers to enable them track usage
3. The Complainant also pleads that the 1<sup>st</sup> Respondent has failed to exercise its statutory mandate of oversight over and regulation of the 2<sup>nd</sup> to 4<sup>th</sup> Respondents, who are its licensees, and is in any case conflicted in the exercise of such mandate because it benefits from the alleged malpractices by the 2<sup>nd</sup> to 4<sup>th</sup> Respondents through levies that are proportional to the latter's revenue.
4. The complainant prays for the following remedies:
  1. An order directing the Respondents, jointly and severally to furnish this tribunal with the current data tariffs.
  2. An order directing the Respondents, jointly and severally to prominently display the current data tariffs on their respective websites.
  3. An order directing the Respondents, jointly and severally to cease from depriving customers their unused data based on the data expiry model.
  4. An order directing the Respondents, jointly and severally to enable active subscribers to roll over unused data at all times.
  5. An order debaring the Respondents, jointly and severally from charging consumers "out of bundle" rates for data without specific content.
  6. An order debaring the Respondents, jointly and severally from discriminating against consumers by charge "out of bundle" rates that are different from normal bundle rates
  7. An order directing the Respondents, jointly and severally to enable consumers to transfer unused data to other users on the same network.
  8. An order directing the Respondents, jointly and severally to send depletion notifications at usage intervals of 75%, 50%, 25% and 0% to consumers.
  9. An order of compensation for unlawful loss/ deprivation of data bundles.
  10. The tribunal be at liberty to grant any other order, relief or direction that it deems fit and lawful in the circumstances.
5. The 2<sup>nd</sup> Respondent's preliminary objection dated 22<sup>nd</sup> February 2021 is that
  1. This tribunal lacks the jurisdiction to grant the reliefs sought by the Complainant by dint of section 102E of the *Kenya Information and Communications Act* (KICA)
  2. The prayers sought in the Complaint are not available against Safaricom PLC in view of the express provision of section 102E of KICA
  3. The Complaint as filed and the reliefs sought thereof are unmeritorious and ought to be dismissed with costs to Safaricom PLC.
6. The 3<sup>rd</sup> Respondent's preliminary objection dated 1<sup>st</sup> March 2021, which was filed together with a response to complaint of the same date, is that
  1. Under Section 102E of KICA, this tribunal lacks jurisdiction to issue the orders sought against the 3<sup>rd</sup> Respondent and or at all.



2. The tribunal is being asked to adjudicate on a civil and constitutional dispute.
7. The 4<sup>th</sup> Respondent's preliminary objection dated 19<sup>th</sup> February 2021 is that
  1. Neither the complaint nor the reliefs sought fall within the remit of the tribunal's jurisdiction
  2. The complaint dated 17<sup>th</sup> October 2019 ought to be struck out with costs to the Respondents.

### **The Respondents' Submissions**

8. The 1<sup>st</sup> Respondent filed submissions supporting the preliminary objections. It relied on the classic case of *The Owners of Vessel "Lillian S" vs Caltex Oil Kenya Ltd (1989) KLR 1* for the proposition that a court cannot handle a case any further once it finds that it has no jurisdiction. The 1<sup>st</sup> Respondent also invoked section 102A (1) and 102E of KICA, to say that this tribunal does not have jurisdiction. Further, the 1<sup>st</sup> Respondent also cited authorities to the effect that that being a creation of statute, this tribunal could only exercise the jurisdiction specifically and expressly conferred, and not implied, by statute and that the wording of the statute regarding jurisdiction had to be strictly construed. In addition, the 1<sup>st</sup> Respondent urged that the Complainant could not base his prayer for relief on section 102E (1) (i) of KICA because the orders sought were substantive, and not ancillary or supplementary.
9. The 2<sup>nd</sup> Respondent submits that the complaint is based on alleged irregular and unlawful data tariffs, and expiring data tariffs, which it urges to be, under section 102A of KICA, outside the tribunal's jurisdiction. In addition, the 2<sup>nd</sup> Respondent submits that the reliefs sought by the Complainant are not available against it in view of the express provisions of section 102E of KICA. This respondent relied on *R v. BPRT & Another ex parte Albert Kigera Karume (2015) eKLR* for the proposition that a tribunal's jurisdiction is limited to the express provisions of the statute creating it, and anything not expressly spelt out to be done by a tribunal is outside its jurisdiction. The 2<sup>nd</sup> Respondent also cited case law to the effect that a tribunal has no inherent powers, and that each party to a case must present the relief that it seeks and not leave to the court to speculate on such relief. The 2<sup>nd</sup> Respondent also relied on *N.K. Brothers Limited v. David Mulei (2021) eKLR* which enunciated that jurisdiction may be determined at two levels, namely whether a tribunal has jurisdiction to entertain the dispute in the first place, and whether it has the jurisdiction to grant the relief sought.
10. The 3<sup>rd</sup> Respondent submits that this tribunal has no jurisdiction to direct a private entity to furnish it with data tariffs, to issue prohibitory or mandatory injunctions or to award compensation. In addition, this respondent urges that the tribunal has no jurisdiction to grant relief that has not been prayed for by a party.
11. The 4<sup>th</sup> Respondent urges that this tribunal has no jurisdiction to entertain this complaint because it falls outside the express provisions of section 102A (1) of KICA. Further, this respondent submits that the alleged violations of KICA consumer protection and tariff regulations also fall outside section 102A (1) of KICA. It is also the 4<sup>th</sup> Respondent's position that the tribunal has no jurisdiction to grant the relief prayed for because they fall outside the provisions of section 102E of KICA.

### **The Complainant's submissions**

12. The Complainant opposes the objections. He argues that section 102A allows any person to bring a complaint against the Respondents whom he describes as creatures of KICA. The Complainant also submits that section 102D of KICA empowers the tribunal to summon witnesses, conduct discovery and to order investigation of any contravention of the act. Concerning jurisdiction to grant the relief



sought, the Complainant urges that the tribunal is not captive to the remedies prescribed under section 102E (1), but in fact, enjoys a wide latitude to grant different reliefs or a combination thereof.

### **Analysis and finding**

13. The following are the issues for the determination of the preliminary objections: -

1. Whether this tribunal has jurisdiction to entertain this complaint.
2. Whether this tribunal has jurisdiction to grant the relief sought.

#### **1. Whether this tribunal has jurisdiction to entertain this complaint.**

14. This tribunal's jurisdiction to entertain a complaint is prescribed by section 102A (1) and (8) of the *Kenya Information and Communications Act* (KICA). The jurisdiction of this tribunal to hear this complaint can only be considered under subsection 1 because subsection 8 relates strictly to the right of the 1<sup>st</sup> Respondent and the Media Council of Kenya to file complaints in matters they consider to have public interest implications. The said section 102A (1) of KICA reads as follows: -

A person aggrieved by-

- a. any publication by or conduct of a journalist or media enterprise
- b. anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise; or
- c. any action taken, any omission or any decision made by any person under this Act, may make a written complaint to the Tribunal setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought.

15. Subsection (1) (a) allows complaints against journalists or media enterprises while subsection (1) (b) allows complaints by or on behalf of journalists and media houses to assert the media freedom and therefore both expressly exclude the instant complaint. What about subsection (1) (c)? Only the Complainant addressed us on its interpretation. The subsection expressly allows any person aggrieved by "any action taken, any omission made or any decision made by any person under this Act". The *Interpretation and General Provisions Act* defines "person" to include "a company or association or body of persons, corporate or incorporate". Who is "any person under this Act"? A plain meaning of this phrase is any legal person whose activities are regulated by the *Kenya Information and Communications Act*. In Republic vs. Council of Legal Education & Another ex parte Sabiha Kassamia & Another (2018) eKLR, the High Court restated the cardinal principle of statutory construction as follows: -

In construing a statutory provision, the first and foremost rule of construction is that of literal construction. All the Court has to see at the very outset, what does the provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, the other rules of construction of statutes need not be called into aid.

16. We find that there is no ambiguity in the term "any person" under section 102A (1) (c), and construe it literally to include the 1<sup>st</sup> Respondent which is established by the Act or the 2<sup>nd</sup> to 4<sup>th</sup> Respondents which are licensed under the same. We also find that section 102A (1) (c) therefore expressly expands the scope of complaints beyond those provided for in section 102(1) (a) and (b) which relate to infractions by or against media enterprises, media houses and journalists.



17. Concerning the subject matter of the complaint, the Complainant has in paragraphs 27 to 31 of the Complaint set out the grounds for the complaint, nature of the damage, and the remedy sought. We therefore, unanimously, find the complaint justiciable and properly before us because it is based on the Respondents' alleged violation of Regulation 3 of the Kenya Information and Communications (Consumer Protection) Regulations, 2010, and Regulation 4 of the Kenya Information and Communications (Tariff) Regulations, 2010. These regulations are subsidiary to, and operationalize KICA, and cannot therefore be said to be outside the scope of section 102A. Further, the fact that the Complainant invokes constitutional provisions does not oust this tribunal's jurisdiction. Indeed, the Complainant does not pray for the interpretation of *the Constitution* or any declarations as to constitutional rights in his complaint so as to make this a case for the High Court. In *Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others* [2020] eKLR, the Court of Appeal, in addressing a similar question had this to say:

It was never the intention of *the Constitution* makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court.

## **2. Whether this tribunal has jurisdiction to grant the relief sought**

18. There is ample authority, including what the Respondents have submitted, for the proposition that a tribunal has no inherent jurisdiction, and that it can grant only such relief as its parent statute expressly allows to grant. Our jurisdiction to grant relief in complaints is contained in section 102E of KICA. None of the reliefs that the complainant has asked for is provided for in section 102E (1) (a) to (i) of the Act. It is true, like the Complainant submits, that the subsection uses the phrase "the Tribunal may", in respect of the orders that the tribunal can make, and that the word "may" is permissive, and not mandatory. However, we take this to mean that the tribunal is not obligated to make these orders, but rather that it could, or is allowed to, make any of them if it deemed it just to do so. Discussing the word "may", the High Court in *Jimmy Kaulu & 14 Others vs. Stanbic Bank Kenya Limited & 6 Others* (2008) eKLR cited *Re Johannisbers Land and Gold Trust Company* (1892) Ch. 583 where the court was called upon to interpret the phrase "the court may" and said:

...it would be absurd to suggest that 'may' in the section means "must". I think therefore that the word "may" here confers a discretion on the court to be exercised according to the judicial rule....

19. Similarly, 'the tribunal may' in section 102E is a strict prescription of the orders that this tribunal can exercise its judicial discretion to give, and no latitude to expand it is provided for.
20. We therefore find that we have no jurisdiction to grant the mandatory injunctions sought in prayers (a) to (d), (g) and (h), the prohibitory injunctions sought in prayers (e) and (f), or the damages sought in prayer (i) of the Complaint.
21. And having found that we cannot grant the primary orders allowed under section 102E(1) (a) to (h), we also find that we have no jurisdiction to grant any supplementary or ancillary orders under section 102E (1) (i) of KICA. This is notwithstanding our finding that we have jurisdiction to hear the complaint. It is evident that the drafters of the *Kenya Information and Communications Act* omitted to expand the scope of the orders that this tribunal can give so as to conform with section 102A (1) (c) but it is not the province of the tribunal to cure this omission. Indeed, in *Republic Vs Business Premises Rent Tribunal & another & Exparte Davies Motor Corporation Limited* [2013] eKLR, the High Court



cited with approval the following words in *Italframe Ltd vs. Mediterranean Shipping Co.* [1986] KLR 54; [1986-1989] EA 174:

“.... If blunders are found in legislation, they must be corrected by legislature, and it is not the function of the Court to repair them. ....”

22. The High Court went on to say: -

“Therefore, whereas it is my view that not expressly granting the Tribunal the power to grant orders of injunction Parliament made a blunder since it rendered the intention and objective of the whole Act a mirage, based on the authorities from the Court of Appeal, I am unable to find that the Tribunal is empowered by section 12 of the Act to grant orders of injunction”.

23. Striking out of pleadings is a draconian discretion that should be used sparingly, and a tribunal should not exercise it if such pleadings can be salvaged by amendment. We have considered this option in respect of the Complaint but find that no useful purpose would be served by giving the Complainant leave to amend his prayers for relief. All the reliefs allowed by section 102E relate to media enterprises and journalists, and cannot therefore benefit him. As such, we find that the Complaint dated 17th October 2019 cannot possibly succeed.

24. The upshot is that we make the following orders: -

1. The Respondents’ preliminary objections as to the tribunal’s jurisdiction to entertain the complaint is dismissed.
2. The Respondents’ preliminary objections as to the tribunal’s jurisdiction to make the orders sought is upheld.
3. The Complaint dated 17th October 2019 is struck out.

25. On costs, we find that this complaint was in the nature of public interest litigation, and take judicial notice of the fact that some of the Respondents instituted changes in their policy on data bundles in apparent response to this complaint. Each party will therefore bear its own costs.

26. It is so ordered.

Ruling dated and delivered virtually this 21<sup>st</sup> day of May 2021

R. Kuria .....

M. N. Ndung’u .....

C. Wanderi .....

R. Mukira .....

V. Atieno .....

C. Nyabuti .....

Dissent By Hon. Malombe

The issue for determination is two pronged:

1. Whether the Tribunal has jurisdiction to hear this case
2. Whether the Tribunal can grant the reliefs sought by the complainant



27. The tribunal members are all unanimous that the Tribunal has jurisdiction to hear this complaint and that it is properly before this court. I will, therefore not dwell on this. Our point of departure is on the issue of whether the Tribunal can grant the reliefs sought by the complaint. I hold that yes, the Tribunal can indeed do so.

28. The first port of call for the redress of the matter that the complainant has brought before this Tribunal would have been the 1<sup>st</sup> Respondent, who has sweeping regulatory powers over the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent. The complainant has stated in their submissions that they raised the matter with the 1<sup>st</sup> respondent and no response was forthcoming.

KICA Section 102F provides the following:

- (1) .....
- (2) Any person who is aggrieved by an action or decision of the Media Council, the Authority or a person licensed under this Act, may within sixty days after the occurrence of the event or the making of the decision, against which he is dissatisfied, make a claim or appeal to the Tribunal.
- (3) Upon any appeal, the Tribunal may—
  - a. confirm, set aside or vary the order or decision in question;
  - b. exercise any of the powers which could have been exercised by the Media Council or the Authority in the proceedings in connection with which the appeal is brought; or
  - c. make such other order, including an order for costs, as it may consider necessary.

29. My simple reading of Section 102F (2) above is that over and above the Authority and the Media Council there are several “persons” licenced under the act inter alia: telecommunication services, radio communication, broadcasting services and postal services. Further, Section 102F (3) (b) gives this Tribunal wide jurisdiction with respect not just to decisions of the Media Council but to decisions of the Authority.

30. The reliefs that are provided under section 102E seem skewed and limited to only two of the “persons” licensed under the Act i.e., radio and broadcasting services. This would seem to leave the other actors without a redress for any violations that may come before the Tribunal. How then do we reconcile the fact that the Act gives this Tribunal such sweeping powers yet does not, seemingly, provide corresponding reliefs to address complaints and appeals that are properly brought before the Tribunal?

31. That this Tribunal has the jurisdiction to offer the reliefs sought by the complainant is, in my view, made clear by Section 102E (1) (i) that provides that this Tribunal may make any supplementary or ancillary orders or directions that it may consider necessary for carrying into effect orders or directions made when this is read together with Section 102F (3) (b). The phrasing and architecture of Section 102F may be clumsy but I am convinced that the words in this statute express the legislative will and intent of the legislators when they came up with this Act.

32. This then brings up the question: What are the reliefs that would have been exercised by the Authority had they taken up the complainant’s case? The answer is to be found in KICA (Tariff) Regulations 2010 Section 10 which states:

10. Investigation of tariffs.
  - (1) The Commission may on its own motion or pursuant to a complaint made under this regulation investigate any tariff set by a licensee where the tariff is anti-competitive.





- (2) A complaint about a tariff brought under paragraph (1) shall—
  - (a) Be in writing;
  - (b) Specify the name and address of the complainant;
  - (c) State the interest of the complainant; and
  - (d) State the reasons why the tariff should be investigated.
- (3) Where after investigation, the Commission is of the view that the tariffs should adjusted, it may adjust the tariff. Provided that where the Commission intends to adjust the tariffs after investigation, the Commission shall notify the licensee and give the licensee twenty days to respond to the intended adjustment.”

33. I am, therefore, of the persuasion that this Tribunal has jurisdiction to entertain the complaint. Further, since the Authority did not take up a complaint that was clearly in their purview necessitating the complainant to seek redress before this Tribunal, I am inclined to agree with the complainant that this Tribunal has jurisdiction to make the orders sought, as would have been exercised by the Authority had they taken up the case.

**DELIVERED VIRTUALLY THIS 21ST DAY OF MAY 2021**

M. Malombe .....

