Elige Communications Limited v Communications Authority of Kenya; Safaricom PLC & Geonet Communications Limited (Interested Parties) (Appeal 3 of 2018) [2022] KECMAT 91 (KLR) (11 February 2022) (Judgment)

Elige Communications Limited v Communications Authority of Kenya; Safaricom PLC & another (Interested Parties)

Neutral citation: [2022] KECMAT 91 (KLR)

REPUBLIC OF KENYA

IN THE COMMUNICATION AND MULTIMEDIA APPEALS TRIBUNAL

APPEAL 3 OF 2018

ROSEMARY KURIA, CHAIR

FEBRUARY 11, 2022

BETWEEN

ELIGE COMMUNICATIONS LIMITED ..... APPELLANT

AND

COMMUNICATIONS AUTHORITY OF KENYA ..... RESPONDENT

AND

SAFARICOM PLC ..... INTERESTED PARTY

GEONET COMMUNICATIONS LIMITED ..... INTERESTED PARTY

JUDGMENT

1. The Appellant has filed this appeal because it is aggrieved by a decision made by the Respondent on 1st August 2018 in Determination 1 of 2018(hereinafter called the determination). During the hearing of the appeal, the Appellant, the Respondent and the Interested Parties called one witness each. On conclusion of the hearing, all the parties filed written submissions which they proceeded to highlight.

Background

2. The background to this appeal is that on 15th November 2016, the 1st Interested Party lodged a complaint with the Respondent against the 2nd Interested Party alleging illegal termination of international calls disguised as local calls. Similarly, on 22nd November 2016, the 2nd Interested Party lodged a complaint with the Respondent against the 1st Interested Party accusing it of interference with and interruption of its services by blocking calls especially those conveyed via Session Initiation

Protocol. At the centre of the dispute between the two interested parties was Clause 3.7 of an interconnection agreement between them stating as follows:-

> "It is hereby agreed that xxxx shall not transit, terminate or re-sell international traffic or telephone calls originating from outside Kenya into the Safaricom system. On breach of this clause by xxxx, Safaricom may exercise the option to suspend or terminate the agreement in accordance with clause 21 herein below".

3. The Appellant also lodged a complaint in February 2017 over the inclusion of a clause in interconnection agreements with mobile network operators (MNOs) prohibiting termination of international calls, and was invited by the Respondent to a meeting to discuss the disputed clause, but for some reason was not involved in the substantive submissions leading to the determination. On the 1st and 2nd Interested Parties' part, the Respondent directed them to file written submissions and to produce their Call Detail Records (CDRs) for its examination, and ultimately made the determination. The determination isolated and reached findings on six contentious issues, and directed that the findings would apply not only to the disputants before it but also to the industry in general saying in the second last paragraph of the determination under the heading "conclusion".

> "The Authority has duly considered the matters under contention and has issued various determinations and/or directives to the parties in dispute as well as general directives and reminders to the industry as a whole. It is to be noted that the observations and determinations contained herein have gone on record and may be relied upon in other future regulatory undertaking such as consideration for general compliance status as may be appropriate".

4. The Appellant has filed an appeal pursuant to section 102F (2) of the *Kenya Information and Communications Act* because it is aggrieved with the findings in respect of three of the contentious issues in the determination namely:-

    1. Participation in Traffic Re-origination (SIM Boxing): Concerning this issue, the Respondent found that the 2nd interested Party had been terminating international calls disguised as local calls by re-originating international calls using local numbers.

    2. Provision of Clause prohibiting international call termination in interconnection agreements: The Respondent found that interconnection agreements between mobile network operators and other licensed operators should be done in a manner that facilitates all forms of traffic. The Respondent pronounced that interconnection agreements facilitated the exchange or termination of local calls under local termination rates or for the transiting of international bound local calls from interconnection licensee through interconnection licensee or terminating calls of international origin through interconnect licensee to local subscribers of the interconnecting licensees through commercially agreed terms. The Respondent also found that an interconnecting licensee could bring in international Voice Over Internet Protocol(VoIP) traffic for termination to the interconnect licensee's network but under commercially agreed terms and with clear Caller Line Identification for appropriate billing under commercially agreed terms. In addition, the Respondent also said that given the technology neutral regulatory framework adopted in Kenya a voice call is a voice call irrespective of the technology used for delivery as long as the origin and destination of the calls are properly identified through presentation of appropriate Caller line Identification.

3. Adherence to Subscriber Registration Requirement: The Respondent found that the registration process adopted by the 2nd Interested Party did not comply with the SIM Registration Regulations and that all licensees must comply with procedures under the *Kenya Information and Communications (Registration of SIM-cards) Regulations 2015*.

Analysis and Findings

5. This tribunal needs to address a preliminary question as to the scope of this appeal given that the Appellant was not party to the proceedings leading to the determination. To our minds, the answer is fairly straightforward: the Appellant's role in the appeal must be restricted to taking issue with the reasoning behind the determination on the matters in issue in the dispute between the 1st and 2nd Interested Parties, and not to advancing a fresh case using its own evidence.

6. The memorandum of appeal here had five grounds but the Appellant withdrew the first ground because it had been dispensed with at a preliminary stage. Our task therefore is to address the remaining grounds. Needless to say, the tribunal is not seized of any other grounds of appeal that the other parties may have framed. We have thereby considered the evidence and submissions, and make the following findings:-

> On whether the Respondent erred in fact and in law by failing to take cognizance of the legality as well as the operational nature of Voice over Internet Protocol (VoIP) Services and the right of licensees to provide Internet (PC/IP Phone) to PSTN VoIP services at local rates irrespective of the location of the caller. This is despite, the Appellant pleads under this ground, coming into force of the Guidelines for Implementation and Provision of VoIP services vide Gazette Notice No. 6394 published on the 12th August 2005 in the Kenya Gazette Vol CVII-No.55 which legalized VoIP services and provides the guidelines for their provision and implementation.

7. For a start, we have perused the entire determination and see no evidence that the Respondent deemed Voice over Internet Protocol (VoIP) Services illegal. The Appellant did not also specify their basis for such a position.

8. What did the determination say in connection with VoIP and call rates? The Respondent pronounced in the determination that an interconnecting licensee could bring international VoIP traffic for termination to the interconnect licensee's network but under commercially agreed terms and with clear Caller Line Identification for appropriate billing under the commercially agreed terms. We have perused the determination and see no specific reference to PC/IP Phone to PSTN VoIP services. It would appear though that the Appellant is largely aggrieved with the Respondent's pronouncement that according to its technology neutral framework, an international call is any call that is made from Kenya to another country or from another country into Kenya irrespective of the technology for its delivery as long as the origin and destination of the calls are properly identified through presentation of appropriate caller identification. This apparently gave rise to the Appellant's extrapolation that the Respondent would consider a PC/IP Phone to PSTN VoIP call made from a local switching platform subject to commercially agreed call termination rates.

9. Clause 3.2 of the VoIP guidelines promulgated by the Respondent in 2005 gave directions as to the termination rates applicable for PC/IP Phone to PSTN calls as follows:-

> Due to the limitations associated with availability of PCs and internet connectivity and the high cost of international calls delivered over legacy TDM switched networks, telephone calls are originated from PCs or IP phones and terminated on the PSTN. The only

> significant cost for these calls (usually long distance and international calls) is the local charge applied by the terminating PSTN operator.

10. The Respondent submits that the above clause does not mean that there is no call rate difference between VoIP traffic originating and terminating locally on the one hand and VoIP traffic originating or terminating internationally on the other. The Respondent and the 1st Interested Party also cite in support of commercially agreed rates for PC/IP Phone to PSTN calls Clause 3.4 of the Guidelines which says in relation to PSTN via IP to PSTN VoIP calls:-

> "To facilitate this arrangement, fixed and mobile operators would enter into commercial bilateral and service level agreements (SLAs) for call termination to reduce call termination delivery costs with VoIP carriers".

11. The tribunal has considered Clause 3.2 of the guidelines and is unable to see any distinction made therein between a local or international call made via PC/IP Phone to PSTN. In our understanding, such a call can be made from any location from a software application with a local switching platform without any carrier, and therefore attracts a local termination rate, which is our plain reading of the term "local charge applied by the terminating PSTN operator". We take the view that it had been intended that this phrase was referring to commercially agreed rates, nothing could have been easier than to do so. The *Kenya Communications Regulations*, 2001 define an international telephone call as "an effective or completed telephone call exchanged with a telecommunications station outside the country in which the calling telecommunications station is situated." The Respondent's pronouncement that it is the geographical location of the caller that determines the origin or destination of a call as it relates to PC/IP Phone to PSTN call contradicts these provisions. Kenya Communications Regulations and offends Clause 3.2 of the Respondent's 2005 VoIP guidelines.

12. The call rate for via PC/IP Phone to PSTN calls is distinct from the situation contemplated in Clause 3.4 of the guidelines where a call is originated from a landline or mobile network, then transmitted through Internet Protocol and finally terminated to a landline or mobile network. It is the tribunal's view that it is such transmission of traffic which ordinarily is done through an international gateway that would be subject to commercially agreed rates, and not an IP/PC to PSTN call. The upshot is that we find that the Respondent ignored its own guidelines by appearing to base termination rates for IP/PC to PSTN on the location of the caller, and not on the location of the switching platform and therefore misdirected itself.

13. Whether the Respondent made an error in holding the 2nd Interested Party guilty of SimBoxing of the basis of lack of evidence of international numbers in its Call Detail Records(CDRs) presented to it notwithstanding the operational mode of internet(PC /IP Phone) to PSTN VoIP services.

14. The 1st Interested Party's complaint to the Respondent had been that the 2nd Interested Party was terminating international calls into the 1st Interested Party's network disguised as local calls which amounts to SIM Boxing. The Appellant faults the Respondent's finding that the 2nd Interested Party was indeed guilty of SIM Boxing based on the absence of international numbers in its CDRs despite said interested party confirming that it originated calls from USA and terminated them into Mobile Network Operators in Kenya. The Respondent's witness agreed during cross-examination by the 2nd Interested Party that no SIM boxes were recovered at the 2nd Interested Party's premises, that no physical inspection of the latter's hardware was carried out, and that the local numbers said to have been used in the SIM Boxing were not captured in the determination.

15. Still, the 2nd Interested Party was under an obligation to explain why there were absolutely no international numbers in its CDRs. To begin with, in its complaint to the Respondent that the 1st

Interested Party was interfering with and interrupting its calls, the 2nd Interested Party vide its letter to the Respondent dated November 22, 2016 had complained that most of the calls in question had been made using its GeoNet calling cards. In its technical description of its services, the 2nd Interested Party had clearly indicated that the calling cards were operated from its switching platform in the USA and their use regulated by the American Federal Communication Commission. Consequently, the Respondent was right in expecting that calls made through those cards would bear American numbers, and in the absence thereof to find, on a balance of probabilities, that the 2nd Interested Party had manipulated the numbers to appear as local. We would therefore agree with the Respondent that the calls that the 2nd interested party was accusing the 1st Interested Party of interrupting or interfering with were never said to have been made through the GeoSafari application whose call which it says all originate in the country. The upshot is that we dismiss this ground of appeal.

3. Whether the Respondent made a fundamental error by failing to clearly distinguish between SIM boxing and provision of PC/IP Phone to PSTN VoIP services by licensees, and purported to equate the two services notwithstanding that one of the services is legal and the other is illegal.

16. This ground is similar to the one above which faults the Respondent for finding the 2nd Interested Party guilty of SIM Boxing. We have already noted that the Respondent based its decision on SIM Boxing on the absence of international numbers in the 2nd Interested Party's CDRs. At the same time, we are unable to find any part of the determination in which the Respondent equates SIM Boxing with provision of PC/IP to PSTN VoIP services by licensees. The 2nd Interested Party itself denies that the two were equated, while paragraph 6 of its report dated 19th October 2017 which is part of the record, the Respondent acknowledged that the 2nd Interested Party had an application which enabled voice calls to be made over the internet from any part of the world. The claim that the Respondent equated provision of PC/IP to PSTN VoIP services with SIM Boxing therefore has no merit and accordingly, this ground of appeal fails.

17. Whether the Respondent erred by applying the provisions of Regulation 7(2)(b) of the *Kenya Information and Communications (Registration of SIM cards) Regulations* , 2015 to OTT telecommunications services providers notwithstanding the nature of these services. The Appellant faults the Respondent's finding that the process adopted for the registration of subscribers to the 2nd Interested Party VoIP app does not comply with the *Kenya Information and Communications (Registration of SIM-cards) Regulations, 2015*. The Respondent found as a fact and the 2nd Interested Party conceded that it registered its subscribers to its app through an online self-registration mechanism and used third party information obtained from sources such as Mpesa to verify the identity of the subscriber.

18. The Appellant submits that given that OTT services do not require a SIM card, the Respondent's licensees should not be required to abide with the *Kenya Information and Communications (Registration of SIM-cards) Regulations, 2015*.

19. The tribunal takes the following view of this ground of appeal. To begin with, a distinction must be made between general OTT telecommunications services providers and VoIP telecommunications services providers licensed by the Respondent. The former, such as Skype and WhatsApp are not regulated by the Respondent and cannot therefore be subject of this appeal. VoIP telecommunications services providers licensed by the Respondent such as the 2nd Interested Party, on the other hand, are under the regulatory authority of the Respondent. There is no dispute that they do not require a SIM card because they are internet-based. Nevertheless, under Regulation 7(2) (b) of the *Kenya Information and Communications (Registration of SIM-cards) Regulations, 2015*, the law remains that

subscribers to telecommunication services licensed by the Respondent must register with the provider, or its agent, in person. As a result, the Respondent cannot be in error to require, which we find as a fact that it did, that its licensees obey the law. The SIM Card regulations were promulgated pursuant to section 27D of the *Kenya Information and Communications Act* which empowers the relevant Cabinet Secretary to make them in consultation with the Respondent. The said regulations, whether they appear to have been overtaken by advances in technology or not, remain in force until they are amended by the Cabinet Secretary, repealed by Parliament or nullified by a superior or higher court (See *Samuel Muchiri W. Njuguna & 6 Others v the Minister of Agriculture* (2000) eKLR, & *George Ndemo Sagini v The AG & 3 Others* (2017) eKLR). This fourth ground of appeal accordingly fails.

20. In the upshot, this tribunal makes the following orders:-

    1. The Respondent's finding in Determination 1 of 2018 that the geographical location of a caller or callee determines whether a call is local or international, and the terminating rates thereof, offends the definition of an international call in the Kenya Communications Regulations (2001) and is thereby set aside in so far as it contradicts Clause 3.2 of the Respondent's 2005 VoIP guidelines.

    2. The Respondent's finding that the 2nd interested party was guilty of SIM Boxing by reason of the absence of international numbers in its Call Detail Records is upheld

    3. The tribunal has no jurisdiction to interfere with the Respondent's implementation of regulation 7(2) (b) of the *Kenya Information and Communications (Registration of SIM Cards) Regulations, 2015*.

    4. Each party shall bear its own costs.

DELIVERED VIRTUALLY IN THE PRESENCE OF THE HONOURABLE MEMBERS OF THIS TRIBUNAL, COLLINS WANDERI, VIVIENNE ATIENO, DAMARIS NYABUTI AND RAMADHANI ABUBAKAR MUKIRA

In the presence of:-

Miss Asasha for the Appellant

Malonza for the Respondent

Maina Kimaru With Leyla Ahmed for the 1st Interested Party

Muhalia For Simiyu for the 2nd Interested Party

DATED THIS 11TH DAY OF FEBRUARY, 2022

Rosemary Kuria

Chairperson-communications & Multimedia Appeals Tribunal