

PROMOTING BEST PRACTICE AMONG ACTIVISTS FOR MORE EFFECTIVE COLLABORATION IN DIGITAL RIGHTS LITIGATION IN TANZANIA

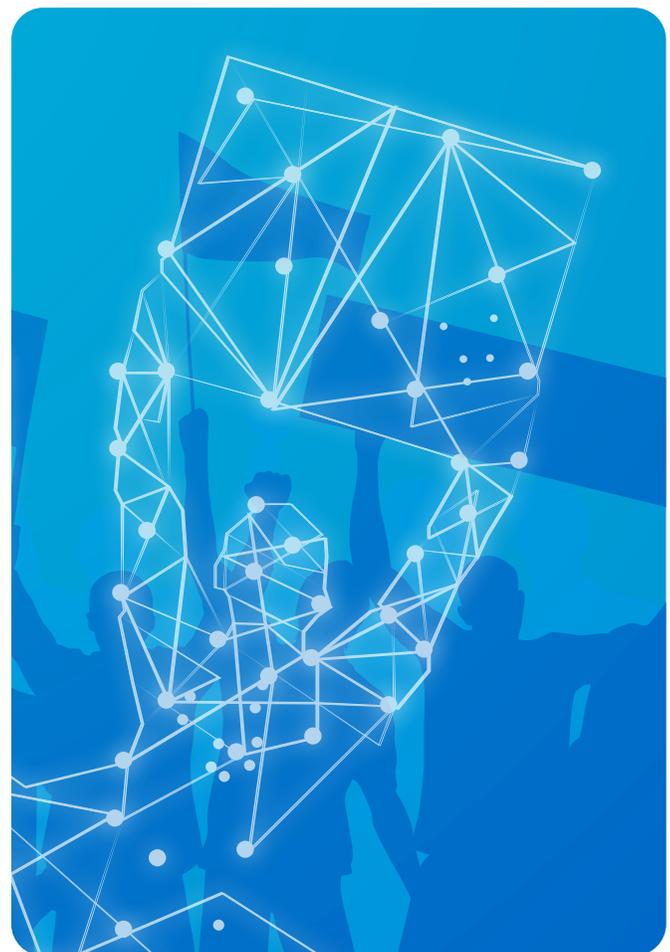
A Case Study of Legal and Human Rights Center and Two Others v. The Minister for Information, Culture, Arts and Sports, the Tanzania Communications Regulatory Authority and the Attorney General

High Court Misc. Civil application no. 12 of 2018

Background

The Electronic and Postal Communications Act (EPOCA) (2010) came into force in Tanzania on May 7, 2010, thereby repealing the Broadcasting Services Act and the Tanzania Communications Act of 1993. Among others, the Act regulates electronic communications, including internet communication and social media engagements, and provides that issues of content be governed by the Ministry of Information, Youth, Culture and Sports.

On March 13, 2018, the Minister for Communications adopted the Electronic and Postal Communications Act (EPOCA) (Online Content Regulations) of 2018, which among other things, oblige bloggers and owners of discussion forums, as well as radio and television streaming services, to register with the communications regulator and to pay hefty licensing and annual fees. The regulations were criticised for threatening citizens' right to privacy and freedom of expression.¹



¹ CIPESA, *Analysis of Tanzania's Electronic and Postal Communications (Online Content) Regulations 2017*, https://cipesa.org/?wpfb_dl=259; and, Ashnah Kalemera, *Tanzania Issues Regressive Online Content Regulations, Collaboration on International ICT Policy in East and Southern Africa*, April 12, 2018, <https://cipesa.org/2018/04/tanzania-enacts-regressive-online-content-regulations/>



Filing and Objectives of the Case

On April 20, 2018,² the Legal and Human Rights Centre, Media Council of Tanzania, Tanzania Media Women Association (TMWA), Jamii Media, Tanzania Human Rights Defenders Coalition (THRDC), and the Tanzania Editors Forum (TEF) filed a case in the High Court of Tanzania against the Minister for Information, Culture, Arts and Sports, the Tanzania Communications Regulatory Authority (TCRA) and the Attorney General challenging the enforcement of EPOCA regulations.³ The applicants argued that the regulations were promulgated in excess of power, illegally, against the principles of natural justice, and were unreasonable, arbitrary and ambiguous. Further, the applicants argued that the regulations violate fundamental rights and freedoms, specifically:

- a) The right to freedom of expression and opinion as provided for under Article 18(1)(d) of the Constitution of Tanzania; Article 19 of the Universal Declaration of Human Rights (UDHR) and the International Convention on Civil and Political Rights (ICCPR); Article 9 of the African Charter on Human and Peoples Rights and Article I(1) of the Declaration of Principles of Freedom of Expression in Africa (2002).
- b) The right to privacy and freedom from communication surveillance contrary to Article 16 & 18(c) of the Constitution of Tanzania, Article 12 & 19 of the UDHR, Article 17(1) of the ICCPR and Article II (1) and (2) of the Declaration of Principles of Freedom of Expression in Africa.
- c) Principles and Rules of natural justice, mainly the right to be heard and seek redress from a court of competent jurisdiction, including appeals, contrary to Article 107B of the Constitution of Tanzania and Article 11 of the UDHR.

The case was filed under the Judicial Review of Administrative Decisions with the objective to seek a court order to quash the Minister's decision promulgating the regulations. In addition, the petition asked the court to ensure that all provisions of the Regulations that restrict freedom of expression are repealed and amended in line with Article 18 of the Constitution and other regional and international standards.

Collaboration

There were a series of initial meetings by the petitioners. The meetings explored alternatives to litigation but a decision was made to file the case.⁴ The choice of the Court was based on the perceived independence of the judiciary in Mtwara district in southeastern Tanzania which had previously dealt with a number of cases against government in a transparent manner.⁵ During the meetings, roles and responsibilities were assigned on tasks such as fundraising and logistics.

A litigation surgery was held, involving seven lawyers representing applicants in the case, to devise the case approach, draft pleadings, and plan for any objections and review relevant laws and precedents. The surgery created a platform for developing a communication strategy for the applicants and was instrumental in identifying skills and competencies of each of the organisations involved in the case. Initially, there were six parties to the case. However, three applicants (Jamii Media, TAMWA and TEF) later withdrew from the case. TAMWA and TEF's withdrawal from the case was attributed to waning interest, while that of Jamii Media was due to separate criminal proceedings against its Executive Director⁶ which had already put a strain on the organisation's operations.⁷ The withdrawals were a huge setback to the strength and progress of the case. Nevertheless, the remaining applicants stayed committed to taking the case forward.

² Louis Kolumbia, *Brief Reprieve for Tanzania's Bloggers as Court Halts Restrictive New Rules*, *The East African*, May 4, 2018, <https://www.thecitizen.co.tz/News/1840340-4544618-26v9y7z/index.html>

³ *Legal and Human Rights Center and 2 Others v. The Minister for Information, Culture, Arts and Sports, the Tanzania Communications Regulatory Authority and the Attorney General*, <http://sol.udsm.ac.tz/images/MyPDF/Contentsdecision.pdf>

⁴ See for example, *Catalysts for Collaboration*, "Plan as a Group", <https://catalystsforcollaboration.org/catalysts.html#planasagroup>; see also the strength of coordination in *Authors Guild, Inc. v. Google Inc* where a team from the Electronic Frontier Foundation (EFF) and the Authors Guild—a society of published authors and leading writers filed a lawsuit to challenge copyright infringement by Google.

⁵ *Daily News*, "Government Wins Online Content Case," *Daily News* January 10, 2019, available at <https://dailynews.co.tz/news/2019-01-105c36e550dc8a9.aspx>

⁶ *Voice of America*, "Tanzanian Reporter Fights for Free Press After Arrests, Threats," December 22, 2019, <https://learningenglish.voanews.com/a/after-arrests-and-threats-tanzanian-journalist-continues-to-fight-for-free-press/5189534.html>.

⁷ *Interview with Jamii Media Lawyer, Benedict Ishabakaki*



The case engaged legal experts with experience in human rights, public interest litigation, security management and risk assessment. Additionally, there were a number of media experts who gave advisory opinion on the implications of the regulations on the media sector as well as the publicity strategies to employ. According to observations by the THRDC, critical constituencies affected by the regulations, such as bloggers and broadcast media owners, commented on the detriments of the regulations but refrained from collaborating on the case as amicus or provision of airtime to lawyers conversant with the case to at least render public awareness through TV and radio programs. Perhaps this decision arose from fears of government targeted actions, such as those against Jamii Media, which would otherwise hinder or frustrate their work.⁸

Use of Media

To popularise the case, print, broadcast and online media platforms were leveraged. The main aim was to publicise the implications of the regulations while at the same time raising awareness about the case amongst the public.⁹ The media was also used for updates on the hearing of the case, ruling of the court and ultimately the judgement. However only a few media platforms and media houses covered the case proceedings due to fear of possible government actions against them.¹⁰ In the public domain, the case stirred debate on social media platforms such as Facebook, Instagram and Twitter.¹¹ However, engagement was motivated by individuals' views and opinions as to the implications of the case, and not on the merits of the case.

Outcome

On May 4, 2018, the Court issued a temporary injunction preventing the implementation of the Regulations which were to take effect the following day on May 5, 2018. However, the government of Tanzania appealed against the decision and the Court overturned the injunction and dismissed the case, with each party bearing its own costs.¹² Consequently, all online content providers were advised to comply and register with TCRA.¹³

In the ruling, the judges found that applicants did not demonstrate proof of a breach of the principles of natural justice and that the respondents had not used excess powers as contended by the applicants. The court further found that the regulations were legally promulgated and were in accordance with the Electronic and Postal Communications Act.

The ruling was received with shock. James Marenga, one of the advocates for the applicants, stated: ***"We did not expect such a decision from the court. We, however, respect the court's decision. Meanwhile we are exploring alternatives."***

Since the court's ruling on the case, the Regulations have been cited in the arrest and arraignment before court of up to six prominent media figures, including Sudi Brown, the host of the popular TV programme Shilawadu, and sports news reporter Shafih Dauda, both from Clouds Media Group, on charges of using a domain not registered in

⁸ See note 6 above.

⁹ See for instance: <https://www.mwananchi.co.tz/habari/Kitaifa/Mahakama-yaitupa-kesi-ya-kupinga-kanuni-za-maudhui/1597296-4927568-6xhby2z/index.html> and <http://mwanahalisonline.com/sheria-maudhui-ya-mtandao-kukatiwa-rufaa/>

¹⁰ Human Rights Watch, "As Long as I am Quiet, I am Safe: Threats to Independent Media and Civil Society in Tanzania," October 28, 2019, <https://www.hrw.org/report/2019/10/28/long-i-am-quiet-i-am-safe/threats-independent-media-and-civil-society-tanzania>.

¹¹ See for instance, https://web.facebook.com/THRDCOALITION/?ref=br_rs

¹² Daily News, High Court Rejects Review Demands On Online Media Act, <https://dailynews.co.tz/news/2018-05-305b0e4c49f0385.aspx>; and, Reuters, Tanzania Government Wins Court Case to Impose Online Regulations, The East African, May 30, 2018, <https://www.theeastafrican.co.ke/news/ea/Tanzania-government-wins-court-case-to-impose-online-regulations/4552908-4587076-i8espo/index.html>

¹³ Ibid.



Tanzania and providing online content illegally.¹⁴ Furthermore, on October 9, 2018, two journalists – Friday Simbaya of the Guardian Company Limited and Mohab Fulwe, a reporter with the online news site Mohab TV¹⁵ – were arrested and charged with online content dissemination without a license.¹⁶ Notably, most of these cases were dismissed, while others were never prosecuted.¹⁷

Similarly, on June 4, 2019, the Online Content Committee imposed a fine of five million Tanzanian Shillings (Tshs), equivalent to USD 2,300, on Azam Media for airing a programme contrary to Regulation 5(1)(b).¹⁸ This regulation provides that an online content provider shall have the obligations to take into account trends and cultural sensitivities of the general public. The programme, which aired on Azam TV, documented the Maasai community building houses using cow dung.

Current Status

The applicants sought leave to appeal against the ruling of the court. The application was filed on January 9, 2019 and on June 12, 2019, they were granted leave to file the appeal in the Court of Appeals of Tanzania.¹⁹ The appeal features three appellants: the Tanzania Human Rights Defenders Coalitions (THRDC), the Legal and Human Rights Centre (LHRC) and Media Council of Tanzania.

Lessons Learned

- Despite being able to clearly define the case objectives and strategies, the decision by some co-applicants to withdrawal from the case was demoralising. One of the lawyers involved in the case referred to the withdrawal as the “starting point of defeat”. It is therefore important that stakeholders or parties to the case have exigencies and contingency plans to ensure continuity such as defining long term strategies and being open to welcoming new partners in a case.
- During the hearings, there were a number of developments which appeared to be delay tactics intended to frustrate the applicants. Before the merits of the case were determined, the Chief Government Spokesperson, Dr. Hassan Abbas, issued a press release stating that the case was frivolous and vexatious, and the provisions of regulations did not directly aggrieve the applicants. Dr. Abbas’ statement went on to urge all online media stakeholders to comply with the provisions of the regulations.²⁰ Meanwhile, the initial judge hearing the case was transferred. Although transfers are normal practice, in this case, it was viewed with suspicion. It is imperative that litigators stay focused and committed to the intended cause, objectives and strategies of the case in the face of setbacks.
- Limited public awareness and stakeholder engagement hindered general support for the case. The lesson therefore is that strategic digital rights litigants should appropriately frame cases outside the courtroom and tailor messages appropriately. This can garner public support for the case.
- Case funding still remains a challenge. If litigation as a tool to challenge regressive digital rights developments in Tanzania is to thrive, there is a need to provide funds to leading digital rights organisations and firms and build capacity of lawyers to proactively engage in public interest litigation.

¹⁴ *The Citizen*, Crackdown by TCRA Nets Several Suspects, *The Citizen*, November 20, 2018, <https://www.thecitizen.co.tz/News/Crackdown-by-TCRA-nets-several-suspects/1840340-4768942-mxv2d1/index.html>

¹⁵ https://www.youtube.com/channel/UCUQ2qxIUpTXHU1tuo_ZMLw

¹⁶ Media Council of Tanzania, Report of Press Freedom Violations: October 2017 – September 2018, <https://mct.or.tz/wp-content/uploads/2019/05/Press-Freedom-Violations-Report-Oct-2017-to-Sept-2018.pdf>

¹⁷ See for instance; <https://globalpublishers.co.tz/mc-pilipili-akamatwa-kwa-makosa-ya-mtandao/> and

<http://zanzibar24.co.tz/dhamana-kesi-ya-soudybrown-shaffih-dauda-maua-sama-na-watuhumiwa-wengine-kujulikana-leo/>. See also <https://habarileo.co.tz/habari/2018-09-255ba9d12d2f0db.aspx>;

<https://www.dailynews.co.tz/news/2018-09-255ba9d12d2f0db.aspx>; and, <https://tsnapps.go.tz/public/epaper/154d1cc7e2137508748e5105a18c23ea.pdf>

¹⁸ Media Watch, Newsletter of the Media Council of Tanzania: Issue No. 179 May, 2019, <https://mct.or.tz/wp-content/uploads/2019/06/Media-Watch-May-2019-1.pdf>; see also, Media Council of Tanzania, Report of Press Freedom Violations: October 2017 – September 2018, <https://mct.or.tz/wp-content/uploads/2019/05/Press-Freedom-Violations-Report-Oct-2017-to-Sept-2018.pdf>; Article 19, Tanzania: Civil Society Groups Express Concern Over Rapid Decline In Human Rights, <https://www.article19.org/resources/tanzania-civil-society-groups-express-concern-over-rapid-decline-in-human-rights/>

¹⁹ See for instance, Media Council of Tanzania (MCT), High Court Nods to MCT’s Appeal Against Online Content Regulations Judgment, <https://mct.or.tz/high-court-nods/>; see also, https://web.facebook.com/mediacounciltanzania/posts/high-court-nods-to-mcts-appeal-against-online-content-regulations-judgmentthe-ba/2269559766463851/?_rdc=1&_rd

²⁰ *Ibid.*