REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 53 OF 2017

IN THE MATTER OF ARTICLES 22 (1) & (2) (C) AND 258 (1) & (2) (C) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE IN ARTICLES 1,2,3 (1),10 (2),232 (1) (D),(C), (E)& (F) AND 259 (1) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 24, 31,32, 33 AND 47 OF THE CONSTITUTION OF KENYA,2010

IN THE MATTER OF ALLEGED VIOLATION OF THE FAIR ADMINISTRATIVE ACTION ACT AND THE STATUTORY INSTRUMENTS ACT

IN THE MATTER OF THE LEGAL AND CONSTITUTIONAL VALIDITY OF THE GOVERNMENTS' DECISION THROUGH THE COMMUNICATIONS AUTHORITY OF KENYA TO SECRETLY ACQUIRE CAPABILITY FOR SPYING ON THE POPULATION BY TAPPING THE NETWORKS OF MOBILE PHONE PROVIDERS

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

COMMUNICATION AUTHORITY OF KENYA.....1ST RESPONDENT

BROADBAND COMMUNICATIONS

NETWORKS LTD.....2ND RESPONDENT

CABINET SECRETARY, INFORMATION,

COMMUNICATION AND TECHNOLOGY.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

ORANGE-TELKOM KENYA.....1ST INTERESTED PARTY

AIRTEL NETWORKS KENYA LIMITED..2ND INTERESTED PARTY

SAFARICOM LIMITED.....3RD INTERESTED LIMITED

COALITION FOR REFORMS

AND DEMOCRACY (CORD)..... 4TH INTERESTED PARTY

ARTICLE 19- EAST AFRICA.....5TH INTERESTED PARTY

JUDGMENT

The Parties

1. The Petitioner is the executive Director of Kenyans for Justice and Development Trust, a legal trust incorporated in Kenya whose object is promotion of democratic governance, sustainable economic development and prosperity. He filed this Petition in public interest.

2. The first Respondent is the Communications Authority of Kenya (CAK), the regulatory authority for the communication sector in Kenya established under Section **3** of the Kenya Information and Communications Act[1] (KICA).

3. The second Respondent, Broadband Communications Networks Limited is liability company contracted by CAK to implement the Device Management System (DMS) which entails to design, supply, deliver, install, test, commission and maintain the device.

4. The third Respondent is the Cabinet Secretary, Information, Communication and Technology, the parent ministry under which CAK falls.

5. The fourth Respondent is the Honourable Attorney General, the Principal government legal adviser. Pursuant to Article **156** of the Constitution, he represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings.

6. The first, second and third interested parties are Mobile Network operators (MNO's) providing mobile telephone communication services on a variety of platforms among them voice calls, messaging, data, internet, and mobile banking.

7. The fourth Interested Party is a coalition of political parties while the fifth interested party is an international Non Governmental Organization, registered in Kenya under the Non-governmental Organization Co-ordination Act.[2] Its objects include protecting and promoting the right to freedom of expression. It monitors threats to freedom of expression in different regions of the world and advocates for the implementation of the highest standard of expression, nationally and globally.

The Petitioners case

8. The Petitioners case is that contrary to the law which requires public participation in policy formulation and implementation, and the constitution which protects the rights of individuals to privacy, the Government of Kenya has secretly embarked on a plan to monitor the population by installing a communication surveillance system, dubbed Device Management System (DMS) on mobile phone networks operated by the **1st**, **2nd** and **3rd** Interested Parties. He avers that the reason cited by the government to justify the system for eavesdropping on private communications is that the DMS is required to monitor and identify stolen handsets, counterfeits phones, and devices that have not been type-approved by the regulator, yet the government is silent on; the systems' capabilities for spying on calls and texts and reviewing mobile money transactions; and how it will protect the privacy of individuals once the information is collected by the second respondent and shared with third parties.

9. He also avers that access to features such as Home Location Register raises the question why a fake phone whose identity in the register will be promptly denied access to the network should be located and that the block diagram provided to the first, second and third interested parties by CAK shows that:- the second Respondent will be hooked to call records database and Mobile Operator

Locations. He avers that CAK will have a direct link on SMS data base and that the link allows a third party full access to virtually all other data of the mobile user over and above the handset identity.

10. He further avers that experts believe that the same mission can be achieved through a direct link to the regulator without the third party so that when there is need to query a particular subscriber data then licensees have a role to play so as to stay responsible with their confidentiality, thus making it possible to trace a breach of customer confidentiality. The Petitioner states that the installation of the DMS will enable the Government to snoop on anything the unsuspecting population transacts through their mobile phones; hence Kenyans will no longer enjoy the right to privacy as far as the use of mobile phones is concerned.

11. The Petitioner also avers that through the CAK, the government has ordered the first, second and third interested parties to allow the second Respondent to tap their computers on the governments behalf by planting spying gadgets on all telephony networks operated by the first, second and third interested parties and that the devices have the capacity to gain access to all information stored by the service providers and transacted on phones owned by individuals, including the times and dates of the communication, the exact location where one is placing the calls, as well as the duration of the calls.

12. He avers that there is no need for the device because the government can obtain access subject to obtaining a court order and that there is no proper legal framework to back the gadgets. Further, he avers that the second Respondent has no legal obligation to protect customers confidentiality, yet it will have access to private information, thus exposing consumers to intrusion of their privacy. He avers that illegal gadgets can be identified using the unique **15** digit code called IMEI assigned to each device, without resulting to the DMS, as was done in year 2012 when the government switched off **1.5** million counterfeit phones without using the system.

13. The Petitioner states that pursuant to Article **226 (5)** of the Constitution, the officials of CAK who directed or approved the use of public funds on the DMS contrary to law should be held to be personally liable. He cites threat or violation of Constitutionally guaranteed Rights and invites this Court to grant the following reliefs:-

*a. **A declaration that** the impugned actions of the 1st and 2nd Respondents have threatened and violated the Constitution of Kenya, 2010.*

*b. **A declaration that** the 1st Respondent's decision (communicated through the 1st Respondent's letters dated 31st January 2017 and 6th February 2017, both referenced as CA/LCS/1600/Counterfeit Devices/Vol. II, addressed to the 1st, 2nd and 3rd Interested Parties) to contract the 2nd Respondent to secretly set up the Device Management System (DMS) which has the capacity of spying on Kenyans, is unconstitutional and, therefore, null and void.*

*c. **A declaration** that any vendor contracts between the 1st and 2nd Respondents, or between the 1st Respondent and any other party, associated in any way with the Device Management System(DMS) are unconstitutional and, therefore, null and void ab initio.*

*d. **A declaration** that pursuant to Article 226(5) of the Constitution of Kenya, 2010 officials of the 1st Respondent who directed or approved the use of public funds on the DMS contrary to law or instructions, are liable for any loss arising from that use and should make good the loss, whether the officials remain the holders of the office or not.*

*e. **An order** quashing the 1st Respondent's letters dated 31st January 2017 and 6th February 2017, both referenced as CA/LCS/1600/Counterfeit Devices/Vol. II, addressed to the 1st, 2nd and 3rd Interested Parties.*

*f. **An order** quashing any vendor contracts between the 1st and 2nd Respondents, or between the 1stRespondent and any other party, associated in any way with the Device Management System.*

*g. **An order** compelling the 2nd Respondent to refund any monies the 1st Respondent has paid to the 2nd Respondent pursuant to any vendor contracts between the 1st and 2nd Respondents, or between the 1st Respondent and any other party, associated in any way with the Device Management System (DMS).*

*h. **A permanent order** of prohibition prohibiting the Respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to implement the Device Management System (DMS) or, in any way whatsoever, to do anything, including installing on the networks of the Interested Parties, or any other telephony infrastructure or*

network, any gadget or equipment that have the capacity for spying, snooping, shadowing, investigation, scrutiny, inspection, observation, following, monitoring, reconnaissance, tailing, staking out, or in any way whatsoever or howsoever interfering with the privacy of members of the Kenyan public through communications surveillance technologies used to monitor or snoop on the population.

i. ***An order that*** *pursuant to Article 226(5) of the Constitution of Kenya, 2010, the 1st, 3rd and 4th Respondents should recover any loss arising from the DMS project from officials of the 1st Respondent who directed or approved the use of public funds on the DMS contrary to law or instructions, whether the officials remain the holders of the office or not.*

j. ***An order that*** *the costs of this suit be provided for.*

i. Any other relief the court may deem just to grant.

First Respondents' Replying Affidavit

14. **Francis Wangusi**, CAK's Director General swore the Replying Affidavit filed on **22ND** March 2017. He avers that:- CAK is a regulatory body for the communication sector envisioned under Article **34** of the Constitution and Established under Section **3** of KICA**;**[3] it is responsible for facilitating the development of the information and communication sectors in Kenya which include broadcasting, multimedia, telecommunications, electronic commerce, postal and courier services**;** under KICA and the Regulations thereto, its Responsibilities include:- *Licensing all systems and services in the communications industry including telecommunications, postal, courier and broadcasting; Managing the country's frequency spectrum and numbering resources; Facilitating the development of electronic commerce; Type approving and accepting communications equipment meant for use in the country; Protecting consumer rights within the communication industry; Managing competition within the sector to ensure a level playing ground for al industry players.*

15. Mr.Wangusi averred that at the onset of mobile communication services in Kenya in 2000, the worldwide Global System for Mobile Communications (GSM) market was:-

i. In the year 1985,the European Commission endorsed the Confederation of European Posts and Telecommunications (CEPT) GSM project. In 1989 it adopted the GSM standard proposed by the CEPT. To further the development of the GSM standard, operators in Europe entered into an agreement to form an association to lead such developments. In the year 1995 it was registered as GSM MoU Association (GSMA). It was agreed that in order to identify mobile communication devices that have been manufactured with regard to the GSM standard, the devices had to bear identification mark of quality, a unique ***15*** *digit serial number known as International Mobile Equipment Identity (IMEI) to be issued by GSMA. The GSMA therefore became the custodian of all the IMEI numbers for all GSM devices in the world and to this end the GSMA maintains a global central database containing basic information on the serial number (IMEI) ranges of millions of mobile devices eg. mobile phones, tablets, data cards, etc that are in use across the world's GSM mobile networks and the database is known as the IMEI Database. The GSMA allocates official IMEI number ranges to all manufacturers of compliant devices and records these ranges and device model information in the IMEI Database. The information recorded includes the manufacturer and model names of the device and its main network capabilities (e.g. frequency bands, radio interfaces). Further, the GSMA allocates the first 6 numbers of the IMEI and the remaining 8 digits are allocated by the manufacturer of the mobile communication device while the last digit is a security check digit which is used to verify the whole string of digits.*

16. He also averred that the first, second and third interested parties are all members of GSMA and have access to the GSM IMEI Database and that theft of mobile devices and proliferation of counterfeit devices or illegal devices became a main concern for regulators. He states that in 2011, at the East African Communications Organizations (EACO) congress, for which Kenya is a member and the interested parties participated in, it was agreed that the mobile service operators in the member countries would implement an equipment Identification Register (EIR), a database that contains a record of all the Mobile Stations served by the mobile network owners. The database is divided into a white-list (a list of mobile stations allowed to access services), a black-list (a list of mobile stations which have been reported lost or stolen),a grey-list (a list of mobile stations of questionable nature) and that the EIR was to aid in the control of stolen mobile devices.

17. Further, he averred that it was resolved by EACO that the mobile network owners and other mobile service operators will maintain a blacklist containing reported stolen or lost devices and the mobile service providers will deny service to such mobile devices. Further, the interested parties have installed and currently run their own individual EIRs and as paying members of the

GSMA they have access to the IMEI Database.

18. He averred that in 2012, **1.89** million illegal mobile handsets were denied service and that Urban IT consulting Ltd was with the approval of CAK, handset vendors and mobile service providers including the first, second and third interested parties to offer handset verification system in strict adherence to confidentiality. He averred that the switch off was unsuccessfully challenged in court,[4] after which the purveyors of counterfeit phones resulted to methods that made detection harder such as international calls reflected as local calls resulting in loss of revenue.

19. **Mr.Wangusi** averred that to address these challenges, it was necessary to create a centralized EIR which is the DMS and that its implementation is within the constitutional and statutory mandate of the CAK. He averred that CAK engaged the mobile service providers including the first, second and third interested parties in various stakeholders meetings and it was agreed that there was a need to detect all devices, isolate illegal devices and deny them service and mop-up illegal devices in Kenya. Further, he avers that the first, second and third interested parties and various providers signalled that they were in support of the DMS project. He states that CAK embarked on a search by way of open tender, of a supplier who could implement the DMS and create a DMS system that can define a white list of devices that should access GSM services, identify counterfeit devices and substandard goods, reported lost or stolen devices and instances of SIM boxing operations.

20. He also averred that to achieve the above, it was imperative that the DMS would have access to IMEI, the serial number of a mobile device which identifies the device attempting to access a network. He states that the DMS will have access to the IMEI's in the operators EIR and the IMEI Database operated by the GSMA to compare with the devices in Kenya, International Mobile Subscriber Identity (IMSI)-the number assigned to a mobile by CAK for uniquely identifying the subscribers, Mobile Station Integrated Subscriber Directory number (MSISDN), a number assigned to each subscriber by a mobile service provider on behalf of the authority, that is the subscribers mobile number. Further, he avers that access to IMEI, IMSI and MSISDN does not create automatic access to CAK to the call data records (CDR) or content of such call concerning any mobile number and that access sought by CAK to the mobile network operators EIR's and or home location register is only for the purposes of identifying the IMEI, IMSI and MSISDN for each device. He also averred that CAK is permitted by law to work with and hold consultations with the Kenya Bureau of Standards (KBS), Anti-Counterfeit Agency, the Kenya Revenue Authority (KRA) and the National Police Service.

21. He also stated that after competitive bidding, the authority contracted the second Respondent to design, supply, deliver, install and commission the DMS and that mobile service providers were invited to nominate persons from their organization to the committee on the implementation of the DMS as agreed in a meeting held on **20th** January 2016. He stated that some of the mobile service providers nominated persons from their organizations to the Committee on the implementation of the DMS while others sought more consultations. He states that CAK held further consultations with the various mobile service providers and other stakeholders, and that the design annexed to the Petitioners' supporting affidavit was not final, and that the scope of data required by DMS was to be defined and shared with operators. Also, he states, CAK would enter into discussions to align the overlapping type approval with the KBS. Further, he states, CAK formed working groups as follows, Technical, Regulatory and Consumer Affairs and that the DMS is at the design stage, hence, this Petition is premature. Further, he states, CAK did not attempt to access the mobile service providers databases. Also, he stated that CAK is yet to respond to issues raised and that it is currently in discussion with various stakeholders and no decision has been taken.

22. He averred that CAK has mandate to monitor compliance with KICA and that DMS is not a new policy but a continuation to control or stop proliferation of illegal devices. He averred that DMS can only access information on a mobile service provider network that it is authorized to access by the mobile service providers and that it is a clean-up process of illegal devices which commenced way back in 2011. He denied the allegations of snooping and stated that the Petitioners averments are premised on misinformation, are hypothetical and denied the alleged violation of constitutional rights.

Second Respondents' Replying Affidavit

23. **Chege Nganga**, the second Respondents designated Project Manager for the implementation of the **DMS** project swore the Replying Affidavit filed on **22nd** March 2017. He avers that the system hardware has been delivered to CAK's premises and that the suppliers are already demanding payment, hence there is likelihood of prejudice being occasioned to the second Respondent. He also averred that the system will benefit Kenya's economy by blocking the use of illegal mobile devices, minimizing theft of mobile devices, blocking use of counterfeit mobile devices, stop sim boxing and cut revenue leakages from mobile operators. He avers that the DMS is incapable of spying on the calls or SMS's or mobile money transactions as shown by a letter from the manufacturer of

the device stating its capabilities. He also avers that after the installation, the system will be handed over to CAK who will solely be responsible for granting the second Respondent access for maintenance purposes only and that the second Respondent will not have an independent or unsupervised access to the system or data. He averred that CAK risks losing **US$1,878,223.45** and the second Respondent risks incurring a monthly loss of **US$10,044.89** as a consequence of the interim orders granted by this court.

Third Interested Party's Replying Affidavit

24. **Mercy Ndegwa,** the third Interested Party's head of Regulatory and public policy-Corporate Affairs Division swore the Replying Affidavit filed on **13th** June 2017. She avers that:- **(i)** the third Interested Party is a leading Communication company in East and Central Africa with over **25.1** Million subscribers; **(ii)** that its services include voice calls, data and Mobile Cash Transfer (M-pesa) and from its subscribers to subscribers of the first and second interested parties; **(iii)** that the third interested party received the letters marked **0001** in the Petitioners' Affidavit; **(iv)** that on **20**th January 2016, CAK invited the third Respondent to discuss the proliferation of counterfeit handsets in the country and to her knowledge on the day of the meeting, CAK had an International Tender (No. CA/PROC/OIT/27/2015-2016) for the Design, Supply, Delivery, Installation, Testing, Commissioning and Maintenance of a DMS and that the second Respondent was awarded the tender in partnership with a third party entity, Invigo Off-Shore Sal of Lebanon.

25. She also averred that on **10th** October 2016, CAK wrote to the first, second and third Interested Parties stating that it intended to install a DMS on mobile cellular networks to combat the proliferation of illegal communications end-user terminals including sim boxes; that between January 2016 and October 2016 CAK did not convene any meeting or engage the third interested party on the design of the system but rather only opted to communicate the specifications and design through the letter dated **10th** October 2016. She also averred that the third interested party through its Chief executive Officer Mr. Bob Collymore responded vide a letter dated **17th** October 2016 raising among other issues, the privacy, confidentiality and consumer concerns arising from the fact that its consumer's personal information shall be in the custody of a third party (second Respondent). The letter also raised security concerns on the installation of the DMS, which would have to be addressed prior to the commencement of the project. In response, she avers, CAK called a pre-implementation meeting which took place on **26th** October 2016. In the said meeting, she states, CAK proposed two committees to discuss the matter, namely, technical and regulatory. Further, she avers, the interested parties proposed a consumer committee which would among others engage the public and consumer organizations on consumer related concerns such as privacy and consumer awareness.

26. She further avers that on **23rd** November 2016, the first and only technical committee meeting was held between the first Respondent, the first, second and third interested parties and the second Respondent in which the first, second and third Interested parties raised the same concerns on privacy and consumer awareness of the project and upon conclusion of the meeting it was the third interested parties understanding that the DMS design and requirements were subject to further discussions on the issues raised. She further states that on **13th** January 2017, CAK wrote a letter to the third interested party indicating they would supply the third interested party with a network block diagram showing how the DMS would interconnect with the core network.

27. She avers that on **25th** January 2017,a regulatory meeting was held between the first and second Respondents on one hand and the first, second and third interested parties whereby it was agreed that a regulatory discussion of the project cannot be done without the conclusion of the technical discussion of the project; but contrary to was agreed, on **31st** January 2017, CAK wrote a letter to the third Interested Party stating that its DMS technical team shall visit the third interested party's network facility on **21st** February 2017 to survey the integration of the DMS to the third Interested Party's network, and to discuss the same with the third interested Party' technical team.

28. She avers that before the said visit, CAK wrote a letter dated **6th** February 2017 stating that it had commenced the DMS Project installation and integration and requested the third interested party grants the second Respondent access to its site for installation of DMS. She states that the third interested Party responded to the said letter vide a letter dated **17th** February 2017 stating that a technical assessment was still required to be done prior to installation so as to pave way for the Legal, Regulatory and Consumer Affairs Committees to discuss the impact on the networks and consumers and also requested for a meeting to discuss *inter alia* an alternative design that would address the issue of counterfeit devices, but the letter did not elicit a response. She avers that the third Interested Party raised the concerns listed in paragraph **22** of her affidavit among them whether the second Respondent will have unfettered access to the consumers' call data records, location information, credit card and M-Pesa information, identification information and SMS information, which basically equates to all the records of any consumer with a registered mobile device. She deposes that CAK has failed to address the said concerns, leading to the conclusion that the third interested parties subscribers are at risk of having their personal details, telecommunications, short message services, social media messaging and data exchanges being subject to interference by installation of the said DMS device.

29. As a consequence, she avers, the third Interested party is apprehensive that their subscribers shall desist from using their devices, in effect reversing the progress made in making communication easier for subscribers. She also avers that the decision to install the device without consultation is arbitrary, and, that the law does not grant CAK power to arbitrarily interfere with communication devices by tapping, listening to, surveillance or intercepting communications related data. Hence, she avers that CAK's actions are contrary to Article **10 (2)** of the Constitution, and that CAK does not state the current measures currently in place to curtail counterfeit devices taking into account the Anti-Counterfeit Act, the KBS or stopping the items at the points of entry. She avers that the installation of DMS requires consultations in line with rights under Article **31**, **47** and **40** of the Constitution.

First Respondents' Further Affidavit

30. **Mr.Wangusi** in a further affidavit filed on **5th** October 2017 disputed the contents of the third Interested Party's affidavit and averred that at a meeting held on **20th** January 2016, CAK briefed participants on efforts undertaken to combat counterfeit devices and provided details on how DMS would interact with relevant government agencies including the Anti-counterfeit agency and the mobile network owners. Further, he avers that roaming subscribers would be exempted from DMS. He states that Mobile Network Operators suggested that the project be implemented in phases and that the mobile network owners would forward nominees to the project committees to facilitate implementation of the DMS project. He avers that the interested parties were involved in the discussions and that setting up a link is not the same as installation, and that a meeting had been planned by the time CAK was served with the interim orders issued in this Petition. He avers that all the concerns raised have been addressed and that this petition was prompted by misapprehension of the DMS by the third interested party.

The third and fourth Respondent

31. The third and fourth Respondent did not file a response or submissions, but counsel for the third Respondent adopted the submissions by the first Respondents' Counsel.

The first, second, fourth and fifth Interested Parties

32. The first Interested Party did not file any Response or submissions, but its advocate confirmed that they were not taking any position, but they would be happy with the outcome of the case whichever way the court decides. The second interested Party did not file any pleadings nor did it participate in the proceedings. The fourth Interested Party did not file a Response to the Petition, but filed submissions. The fifth Interested Party filed a brief which I will refer to later.

Issues for determination

33. From the facts enumerated above, I find that the following issues distil themselves for determination, namely:-

a. Whether this Petition is hypothetical;

*b. Whether the DMS system threatens or violates the Right to privacy of the subscribers of the first, second and third Interested Parties. If yes, whether the limitation meets the Article **24** analysis test;*

c. Whether the process leading to the decision to the acquisition and installation of the DMS system was subjected to adequate public participation;

d. Whether it was a requirement for the first Respondent to comply with the requirements of the Statutory Instruments Act;

e. Whether the installation of the DMS falls within the statutory mandate of CAK;

f. Whether CAK violated the Petitioners Right to a fair Administrative Action;

g. Whether the impugned decision violates consumer rights of the subscribers of the third, fourth and fifth Respondents;

h. Whether there are grounds to hold officers of CAK personally liable;

i. Whether the Petitioner made a case for the court to cancel the tender to the second Respondent;

j. What is the appropriate order regarding costs;

k. What the appropriate reliefs (if any).

Whether this Petition is hypothetical;

34. **Mr. Kilonzo** for CAK submitted that the architecture of the proposed DMS is still a matter under discussion, and that this Petition is premised on misinformation, hence the Petition is pre-mature and hypothetical.[5]

35. Supporting the Petition, counsel for the third Interested Party submitted that Article **22** of the Constitution provides for the right to approach the court if a right is threatened with contravention. He cited *Bernard Murage vs Fineserve Africa Ltd & 3 Others***[6]** in support of the proposition that a party does not have to wait until a fundamental right has been violated, or for violation of the constitution to occur before approaching the court.

36. The Petitioner submitted that CAK's decision to install the DMS, a device with the capability to spy or snoop on the general population violated the Constitution and statute. He submitted that the DMS can collect and store subscribers personal data which will enable the government to access, collect and retain subscribers communication data, hence a gross violation of the right to privacy.

37. The fourth and fifth interested party's counsels' supported the Petition. The fifth Interested Party's' counsel in his brief stated that this Petition raises critical issues which fundamentally affect the extent to which the Constitution of Kenya, KICA and other laws provide meaningful protection to individuals in the exercise of their freedom of expression and privacy rights.

38. Differently put, counsel for the CAK is advancing common law principles in relation to what were called abstract, academic or hypothetical questions. The principle is called ripeness, it prevents a party from approaching a court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct alleged to be unconstitutional. This principle was aptly captured by **Kriegler J**[7] in the following words:-*"The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness"... Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. ...The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."*

39. Lord Bridge of Harwich put it more succinctly when he stated:- *"It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."****[8]***It is perfectly true that usually the court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed.[9] The requirement of a dispute between the parties is a general limitation to the jurisdiction of the Court. The existence of a dispute is the primary condition for the Court to exercise its judicial function.[10] On the other hand, *mootness* involves the situation where a dispute no longer exists. Ripeness asks whether a dispute exists, that is, whether it has come into being.

40. But can this common law jurisprudence hold sway on the face of our transformative and progressive Constitution with an expanded Bill of Rights and enhanced standing to approach the court" A *stereotyped recourse* to the interpretive rules of the common law, statutes or foreign cases, can subvert requisite approaches to the interpretation of the Constitution. Kwasi Prempeh in *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa****[11]*** observes that the common law, in its method, substance, and philosophical underpinnings, carries with it elements and tendencies that do not accord with the *transformative* vision reflected in modern Bills of Rights.[12] Much of the problem, he notes, stems from the basic constitutional and jurisprudential paradigm upon which English common law is built, namely Austinian positivism and Diceyian parliamentary sovereignty, notions which are incompatible with the *transformative* ideals of the Constitution of Kenya, 2010.[13]

41. Thus, Judges cannot afford to routinely cite common-law cases to deny or grant *locus standi* or determine *ripeness.* The issue

before me raises a fundamental issue of the incompatibility of the common law with *transformative constitutionalism.* Davis and Klare in *Transformative Constitutionalism and the Common and Customary Law*[14] expressed the apprehension that, the inbred formalism of the legal culture and the absence of a well-developed tradition of critical jurisprudence may stultify efforts to renovate the legal infrastructure in the way envisaged by the Constitution.

42. The Constitution of Kenya, 2010 recognises a fairly broad catalogue of human rights. These constitutional commitments to human rights are, however, nothing but 'printed futility' unless enforced through institutions established for that purpose, particularly those empowered to interpret the Constitution. A strategy to ensure the enforcement of human rights is litigation. The first aspect that determines the enforcement of constitutionally-entrenched human rights through courts and other judicial bodies, however, is the *locus standi* (standing) of the applicant and ripeness. Standing and ripeness determines whether an individual or group of individuals or an entity has the right to claim redress on a justiciable matter before a tribunal authorised to grant the redress sought. Standing and ripeness are preliminary issues, the lack of which precludes any form of determination over the merits of the case. Issues of standing and ripeness are inextricably intertwined with the right of access to justice. Effective access to justice is considered as the most basic requirement of a system which purports to guarantee legal rights. Access to justice is indeed the conscience of any human rights instrument.

43. Obviously, issues of standing and ripeness significantly determines the reach of constitutional justice. Perhaps, conscious of this fact, the drafters of our constitution deliberately expanded the right to approach the court in cases involving violation of constitutional rights. Thus, Article **22 (1)** of the Constitution provides that every person has a right to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article **258** of the constitution provides that every person has a right to institute court proceedings, claiming that the constitution has been contravened, or is threatened with contravention. Such a person can be acting either in his own interest or on behalf of another person who cannot act on their behalf, or as a member of a group or class of persons or in public interest on behalf of an association or it members.

44. Article **50 (1)** of the Constitution confers the right to everyone to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

45. Consistent with the above provisions, it follows that any legislation, or common law principles that prevent or inhibits judicial resolution of a dispute, or which constitutes an impediment to a persons' constitutional right to have a dispute resolved, may be challenged in terms of the access to court clauses.

46. The guarantee of access to the courts or other fora embodies the requirement that there be "a dispute that can be resolved by the application of law."[15] I must point out that the choice of the words *"a dispute that can be resolved by the application of the law"* in Article **50 (1)** of the Constitution was a clear intention by the drafters of the constitution to exclude the requirement of common law doctrine of ripeness in cases involving violation of constitutional rights. The drafters are clear that a mere threat of violation of a constitutional right is sufficient. It reflects a conscious decision to move away from the restrictive effect of the use of the word "ripeness." This is because the concept of ripeness may present a procedural barrier to access to the courts, particularly with regard to the litigation of constitutional issues where a party is citing threat to violation of constitutional rights.

47. A determination of ripeness in cases involving violation of constitutional rights involves an inquiry into whether it is appropriate for a particular issue to be resolved by the courts. The features which may be subject to inquiry are whether the Petitioner has standing to claim the relief; whether there is a threat; whether the issue is moot in that the dispute has been resolved; whether the subject matter is appropriate for judicial action.

48. To elaborate this point further, although the *Lancaster House Constitution* contained a Declaration of Rights, its enforcement mechanisms, particularly those relating to *locus standi* (legal standing) and ripeness, posed a great challenge to human rights litigation. This is so because the *Lancaster House Constitution* adopted the traditional common law approach to standing and ripeness. Under this approach it was required that an individual must have a "personal, direct or substantial interest" in a matter in order to have standing and that the dispute must be ripe. The Lancaster House Constitution failed to recognize the importance of broader rules of standing and ripeness, which would accommodate public interest litigation, and cases specifically for protecting human rights or threat to breach of rights or breach of the constitution. Contrary to this, the Constitution of Kenya 2010 broadens the rules of both standing and ripeness in order to enhance access to the courts. Under the 2010 constitution any person can approach the high court claiming violation or threat to violation of rights.

49. A clear reading of the above constitutional provisions leads to the irresistible conclusion that a party does not have to wait until a right or fundamental freedom has been violated, or for a violation of the Constitution to occur, before approaching the Court. This position was appreciated in *Coalition for Reforms and Democracy vs Attorney General***[16]** thus :-

"We take this view because it cannot have been in vain that the drafters of the Constitution added "threat" to a right or fundamental freedom and "threatened … contravention" as one of the conditions entitling a person to approach the High Court for relief under Article 165(3) (b) and (d) (i). A "threat" has been defined in Black's Dictionary, 9th Edition as "an indication of an approaching menace e.g. threat of bankruptcy; a Person or a thing that might cause harm" (emphasis added). The same dictionary defines "threat" as "a communicated intent to inflict harm or loss to another…" The use of the words "indication", "approaching", "might" and "communicated intent" all go to show, in the context of Articles 22, 165(3) (d) and 258, that for relief to be granted, there must not be actual violation of either a fundamental right or of the Constitution but that indications of such violations are apparent."

50. It is sufficient that the Petitioner has alleged that a right in the Bill of Rights, namely the right to privacy has been infringed or threatened with violation or a threat to breach of the Constitution. The word 'threatened', in my view, was included in **Article 22** of the **Constitution** to make it clear that an applicant may also approach a Court to obtain an interdict to prevent a future violation of a right. Whether or not such an applicant will be successful depends on other considerations, but **Article 22** makes it clear that such an applicant will have standing to seek relief in such circumstances although no actual violation exists. In my view, the issue of threats to the violation of the fundamental rights and freedoms does not require a real and live case for the Court to intervene. The irresistible conclusion is that the argument that this dispute is hypothetical fails.

Whether the DMS system threatens the Right to privacy of the subscribers of the first, second and third Interested Parties. If yes, does the limitation meet the Article 24 analysis test"

51. The Petitioner argued that the DMS device has the capability to spy or snoop on the general population and collect and store subscribers personal data which will enable the government to access, collect and retain communication data belonging to subscribers, hence a gross violation of the right to privacy.

52. Counsel for third Interested Party supporting the Petition argued that the third Interested Party is obligated to protect its customers' rights and argued that consumer related issues and issues raised by the third interested party have not been addressed. He submitted that DMS would permit access to an individual's mobile number and their call records. He asserted that access to the said information is subject to consent of the Mobile Network Operators, hence the information which will also include financial statements will be accessed by third parties yet there exists a contract between the mobile service provider and the subscriber. Further, he submitted that the National Police Service, the Anti-Counterfeit Agency and KBS will also have access to the DMS system.

53. He argued that Article **31** entitles every one the right to privacy[17]and that intercepting communication infringes on privacy.[18]He submitted that Section **27A (3)** of KICA obligates the third Interested Party to keep in a secure and confidential manner and not to disclose the subscribers registration details without the written consent of the subscriber except for the reasons stated under Section **27A (2) (a), (b) & (c)** while subsection **(4)** makes failure to comply with the above provisions an offence. He argued that Regulation **15** of the Kenya Information and Communications (Consumer Protection) Regulations,2010 protect consumer privacy by requiring that an operator should not monitor, disclose or allow any person to monitor or disclose, the content of any information of any subscriber transmitted through licensed system by listening, tapping, storage or other kinds of interception or surveillance of communications and related data.

54. Counsel for the fifth Interested Party submitted that any system that generates and collects data on individuals without attempting to limit the data set to well-defined targeted individuals is a form of, mass surveillance and argued that threat to privacy is also a threat to freedom and that it can only be limited in a manner prescribed by the law.

55. Counsel for the first Respondent submitted that the Petitioner has failed to state in clear terms the alleged violations[19] of constitutional rights. On the assertion that the second Respondent will access the subscribers details, counsel submitted that the second Respondent its under a contract that binds it on confidentiality. He argued that no evidence was tendered to prove that DMS is meant to eavesdrop. He submitted that the right to privacy is not absolute but it is limited by every other right accruing to another citizen.[20] He argued that the purpose of the DMS is to curb proliferation of illicit and illegal devices in the telecommunications market, hence a valid reason for the limitation, and that a court should not be used to perpetuate an illegality.

56. Counsel for the fourth Interested Party submitted surveillance and intercepting of communication violates the right to privacy.[21]

57. Article **2 (4)** of the Constitution provides that any law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. Article **259** of the Constitution provides that the Constitution shall be interpreted in a manner that promotes it's purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights and permits the development of the law; and contributes to good governance. Consistent with this, when the constitutionality of legislation or any act or omission is in issue, the court is under a duty to examine the objects and purport of the legislation, the act or omission and to read the provisions of the legislation, the conduct or omission so far as is possible, in conformity with the Constitution.[22]

58. It is also necessary to restate the well-known general principles relating to constitutional interpretation, which are, in any event, incontrovertible. The *first* principle is that the Constitution of a nation is not to be interpreted like an ordinary statute. In his characteristic eloquence, the late Mahomed AJ described the Constitution as 'a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government'. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.[23]In keeping with the requirement to allow the constitutional spirit and tenor to permeate, the Constitution must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner.[24]Instead, constitutional provisions are to be 'broadly, liberally and purposively' interpreted so as to avoid what has been described as the 'austerity of tabulated legalism.'[25]It is also true to say that situations may arise where the generous and purposive interpretations do not coincide.[26] In such instances, it was held that it may be necessary for the generous to yield to the purposive.[27] *Secondly,* in interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question.[28]

59. It is undisputed that two letters annexed to the Petitioners supporting Affidavit dated **6th** January 2017 and **31st** January 2017 triggered these proceedings. CAK did not dispute writing the said letters. The third Interested Party was emphatic that it received the letter(s) from CAK, thus settling the question of the origin of the letters. The letter dated **6th** February 2017 states in part:-

".....We are in the advanced stages of setting up the connectivity links between DMS and your network.

In this regard, kindly facilitate our principal contractor, M/S Broadband Communication Networks Limited, to access your site and install the link at the data-centre or Mobile Switching Room. The link should terminate close to the core network element that shall integrate to the DMS solution. The DMS Bock Diagram and Integrated Requirements for this setup was shared with your technical team..."

60. The letter dated **31st** January 2017 reads in part:-

"The purpose of the visit is to survey and discuss with your technical team the integration of the DMS and your network. The key highlights of the visit will be on the following matters:

i. technical architecture of connectivity between the DMS and your system to access information on the IMEI, IMSI,MSISDN and CDRs of the subscribers on your network;

ii. the point(s) of connection for the dedicated link between your system and the central DMS servers located as CA Centre Waiyaki Wy;

iii. rack space to install the DMS node at your premises and clean power supply; and

iv. any other technical matters that may arise."

61. The words to note in the letter dated **31st** January 2017 are:- *"...to access information on the IMEI, IMSI,MSISDN and CDRs of the subscribers on your network."* These words warrant no explanation. Section **2** of KICA defines "access:- as follows:- "access" in relation to any computer system", means instruct, communicate with, store data in, retrieve data from, or otherwise make use of any of the resources of the computer system." The Act defines data as follows:- "data" means information recorded in a format in which it can be processed by equipment operating automatically in response to instructions given for that purpose, and includes

representations of facts, information and concepts held in any removable storage medium."

62. The Act defines electronic record to mean a record generated in digital form by an information system, which can be transmitted within an information system or from one information system to another and stored in an information system or other medium. It defines telecommunication system as a system for the conveyance, through the agency of electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy, of— (i) speech, music and other sounds; (ii) visual images; (iii) data; (iv) signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sound, visual images or data; or (v) signals serving for the activation or control of machinery or apparatus and includes any cable for the distribution of anything falling within (i) to (iv) above.

63. Privacy is a fundamental human right, enshrined in numerous international human rights instruments.[29] It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information, and association. The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction, and liberty, a "private sphere" with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals.[30] Activities that restrict the right to privacy, such as surveillance and censorship, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.[31]

64. A person's right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her personal affairs relatively free from unwanted intrusions.[32] Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable. Yet the autonomy of the individual is conditioned by her relationships with the rest of society. Equally, new challenges have to be dealt with. The emergence of new challenges is exemplified by this case, where the debate on privacy is being analyzed in the context of a global information based society. In an age where information technology governs virtually every aspect of our lives, the task before the Court is to impart constitutional meaning to individual liberty in an interconnected world. Our constitution protects privacy as an elemental principle, but the Court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.

65. Data protection is an aspect of safeguarding a person's right to privacy. It provides for the legal protection of a person in instances where such a person's personal particulars (information) is being processed by another person or institution (the data user). Processing of information generally refers to the collecting, storing, using and communicating of information. The processing of information by the data user/responsible party threatens the personality in two ways:[33] *a) First, the compilation and distribution of personal information creates a direct threat to the individual's privacy; and (b) second, the acquisition and disclosure of false or misleading information may lead to an infringement of his identity.*

66. The modern privacy benchmark at an international level can be found in the 1948 Universal Declaration of Human Rights[34]which was aptly described by Professor Richard Lillich as the *"Magna Carta of contemporary international human rights law*." It is expressly premised on *"the inherent dignity and ... the equal and inalienable rights of all members of the human family*."[35]

67. The right to privacy is also dealt with in various other international instruments. The African Charter on Human and Peoples' Rights[36] provides that *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind...."*

68. Article **19** of the Constitution stipulates that the Bill of Rights is the cornerstone of democracy in Kenya. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. Article **31** provides the Right to Privacy of the person, home or property searched. It recognizes the right of every person to privacy, which includes the right not to have their person searched; their possessions seized; information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed. The recognition and protection of the right to privacy as a fundamental human right in the Constitution provides an indication of its importance.

69. The European Court of Human Rights Court has long recognized the intrusiveness inherent in government interception of the content of communications. It held that *"telephone conversations"* are *"covered by the notions of 'private life' and 'correspondence'*[37] referred to in Article **8** of the European Convention on Human Rights. Since, then the advent of the internet and advancements in modern technologies have revolutionized the way we communicate. The ECHR has acknowledged these developments, expanding the scope of Article **8** protection to include "*e-mail communications.*"

70. Today many citizens live major portions of their lives online. Citizens use the computers and cell phones to conduct businesses, to communicate, impart ideas, conduct research, explore their sexuality, seek medical advice and treatment, correspond with lawyers, communicate with loved ones and express political and personal views. Citizens also use the internet to conduct many of their daily activities, such as keeping records, arranging travel and conducting financial transactions. Much of this activity is conducted on mobile digital devices, which are seamlessly integrated into the citizens personal and professional lives. They have replaced and consolidated fixed-line telephones, filing cabinets, wallets, private diaries, photo albums and address books.

71. As innovations in information technology have enabled previously unimagined forms of collecting, storing, and sharing personal data, the right to privacy has evolved to encapsulate state obligations related to the protection of personal data.[38] A number of international instruments enshrine data protection principles, and many domestic legislatures have incorporated such principles into national law.[39]The internet has also enabled the creation of greater quantities of personal data. Communication(s) data is information about a communication, which may include the sender and recipient, the date and location from where it was sent, and the type of device used to send it.

72. The following excerpt from a decision of the European Court of Human Rights is relevant:-[40]

"59. Communications data is the digital equivalent of having a private investigator trailing a targeted individual at all times, recording where they go and with whom they speak. Communications data will reveal web browsing activities, which might reveal medical conditions, religious viewpoints or political affiliations. Items purchased, new sites visited, forums joined, books read, movies watched and games played – each of these pieces of communications data gives an insight into a person. Mobile phones continuously generate communications data as they stay in contact with the mobile network, producing a constant record of the location of the phone (and therefore its user). Communications data produces an intrusive, deep and comprehensive view into a person's private life, revealing his or her identity, relationships, interests, location and activities.

60. Moreover, the costs of storing data have decreased drastically, and continue to do so every year. Most importantly, the technical means of analysing data have advanced rapidly so that what were previously considered meaningless or incoherent types and amounts of data can now produce revelatory analyses. Communications data is structured in such a way that computers can search through it for patterns faster and more effectively than similar searches through content.

61. The intrusiveness of communications data is further reflected by … "[a]aggregating data sets can create an extremely accurate picture of an individual's life, without having to know the content of their communications, online browsing history or detailed shopping habits. Given enough raw data, today's algorithms and powerful computers can reveal new insights that would previously have remained hidden."(foot notes omitted)

73. Threats to individual privacy are greater now than ever envisaged. Global technologies and convergence facilitate the dissemination of information but, at the same time, pose enormous threats to individual (and corporate) confidentiality. A comprehensive personal dossier can now take minutes to compile electronically and a digital camera or mobile phone can record images in an infinite variety of ways and circumstances.

74. A persons' right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her own personal affairs relatively free from unwanted intrusions. Information protection is an aspect of safeguarding a person's right to privacy. It provides for the legal protection of a person in instances where such a person's personal particulars are being processed by another person or institution. Processing of information generally refers to the collecting, storing, using and communicating of information.

75. 'Privacy,' 'dignity,' 'identity' and 'reputation' are facets of personality. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Personal choices governing a way of life are intrinsic to privacy. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

76. Technological change has given rise to concerns which were not present several decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible bearing in mind its basic or essential features. Like other rights which form part of the fundamental freedoms protected by the Bill of Rights, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights.

77. Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual. The right of privacy is a fundamental right. It protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.

78. The letter dated **31st** January 2017 referred to earlier clearly states the purpose of the DMS system, that is to "to access information." Accessing such information can only be lawful if it falls within the permitted parameters of Section **27A** of KICA. Accessing mobile telephone subscribers information in a manner other that as provided under the law inherently infringes the right to privacy, a fundamental right guaranteed under the constitution. It follows that for the DMS system to lawful, the reason given must not only be lawful, but it must meet the Article **24** analysis test in that it must be reasonable and justifiable in a open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

79. The reason cited by CAK is that the device will help in combating illegal devices. The question is whether the said reason is a limitation that is reasonably justifiable in a democratic society. Human rights enjoy a *prima facie*, presumptive inviolability, and will often 'trump' other public goods,' Louis Henkin wrote in *The Age of Rights*:-[41]

"Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary."

80. In this regard, the above question should be answered with reference to the standards of review laid down by courts when the validity of a statute is challenged which include two main standards:-

a. The first is the "rationality" test. This is the standard that applies to all legislation under the rule of law;

b. The second, and more exacting standard, is that of "reasonableness" or "proportionality", which applies when legislation limits a fundamental right in the Bill of Rights. Article 24 (1) of the Constitution provides that such a limitation is valid only if it is "reasonable and justifiable in an open and democratic society."

81. It is important for the court to determine whether the reason offered is "reasonably related" to a legitimate purpose, that is to enable CAK fulfill its statutory mandate. I will examine this later while determining whether combating illegal devices falls within the statutory mandate of CAK. In determining reasonableness, relevant factors include:-**(a)** whether there is a "valid, rational connection" between the limitation and a legitimate public interest to justify it, which connection cannot be so remote as to render the decision arbitrary or irrational. **(b)** the second consideration is whether there are alternative means of exercising the asserted right that remain open to the first Respondent.

82. A common way of determining whether a law or a regulation or decision that limits rights is justified is by asking whether the law is proportionate. Established jurisprudence on proportionality has settled on the following tests:- **(i)** *Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right"(ii) Are the means in service of the objective rationally connected (suitable) to the objective"(iii)Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective" (iv) Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right"*[42]

83. Limitation of a constitutional right will be constitutionally permissible if **(i)** it is designated for a proper purpose; **(ii)** the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; **(iii)** the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally **(iv)** there needs to be a proper relation ("proportionality *stricto sensu*" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.'

84. The Canadian Supreme Court[43](Dickson CJ) stated that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

*a) The first criterion concerned the importance of the objective of the law. First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.***[44]**

*b) Secondly, the means chosen for the law must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'***[45]**

85. When employing the language of proportionality the High Court would ask whether the end could be pursued by less drastic means, and it has been particularly sensitive to laws that impose adverse consequences unrelated to their object, such as the infringement of basic common law rights.Talking of a less restrictive means, the alleged illegal devices are not manufactured in Kenya. There are laws governing importation of goods. There are laws governing counterfeit goods. The Kenya Bureau of Standards monitors standards. We have the Kenya Revenue Authority. We have the National Police Service. All the points of entry are manned. These laws and the institutions they create have not been shown to be insufficient. It is also admitted that in the past **1.89** Million illegal devices were switched off. The Mobile Network Owners are able to identity and block black listed devices. This can be used to effectively combat the illegal devices by denying them access as was successfully done in the past. All these are lawful and less restrictive means which are available to achieve the same purpose.

86. Subscribers data held by the first to the third Interested Parties can only be released under the circumstances permitted by the law, and in particular Section **27A** of KICA. There is no argument before me to demonstrate that the DMS fits any of the circumstances contemplated under the said section. Nor is there a strong argument by CAK rebutting the position taken by the Petitioner and Safaricom on the capabilities of the DMS. In any event the letter dated **31st** January 2017 which triggered this Petition stated in clear terms that the DMS was meant to *"...to access information on the IMEI, IMSI,MSISDN and CDRs of the subscribers on your network*. Such informationn can only be accessed inconformity with Section **27A** of the Act. There is nothing to demonstrate that DMS falls within the said provision.

87. Further, for the DMS system to pass the Article **24** analysis test, the decision introducing it must be lawful. In the next issue I will discuss whether decision was adopted in a manner consistent with the law. For now, it will suffice to say that it can only pass the Article **24** analysis test if it was adopted legally.

88. For the decision to be legal, the object cited, namely, combating illegal devices must be within the statutory mandate of CAK. I will address this issue later. For now, it suffices to state that the mandate of combating illegal devices does not fall within the statutory mandate of CAK.

89. The conclusion becomes irresistible that there are other less restrictive means, hence the DMS system does to satisfy Article **24** analysis test.

Whether the process leading to the decision to the acquisition and installation of the DMS system in the first, second and third Interested Parties Mobile Net works was subjected to adequate public participation;

90. The Petitioner argued that the impugned decision was made and effected without effective public participation, in that whereas there was an attempt to reach out to the first, second and third interested parties, there was no attempt to reach the public.

91. Counsel for the third Interested Party supporting the Petition cited *Law Society of Kenya vs A.G. & 2 Others*,[46] and submitted that three meetings were held and all concluded with the need for further meetings to discuss privacy, security and consumer related

issues, hence there was no public participation. He also argued that Section **5A(2)** of KICA requires CAK to be guided by national values and principles of national governance stipulated in Article **232** of the Constitution. He also submitted that public participation is an indispensable ingredient and that Section **23 (2) (e)** requires CAK to have regard to the values and principles of the constitution. He submitted that there was no proper consultation[47]between the first respondent, the interested parties and members of the public and in any event consumer education was referred to in the correspondence in future tense.

92. Counsel for the CAK submitted that CAK held meetings with stakeholders as enumerated at page **29** of the submissions, hence, there was adequate public participation. He submitted that consultations are ongoing.

93. The Replying Affidavit of **Mercy Ndegwa** paints a picture of in adequate consultations. She avers that CAK made the decision to implement the DMS system before the negotiations were concluded and that the public were not engaged and that the issues they raised were never addressed.

94. There are numerous foreign and local decisions holding that an analysis of the Constitutional provisions yields a clear finding that public participation plays a central role in legislative, policy as well as executive functions of the Government."[48] Both local and foreign jurisprudence are in agreement that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is also an established jurisprudence that any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful.[49]

95. The question that follows is, is whether in the circumstances of this case, the CAK undertook public participation that in any meaningful sense meets the threshold appropriate for public participation. Differently put, what was the threshold for public participation which would have been appropriate for this exercise" As Justice Sachs observed *"... What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."**[50]*** (Emphasis added)

96. I emphasise the words "all interested parties" because even though the information sought to be accessed involves the subscribers, there was no attempt to engage the them or the public. In the ***Mui Basin Case*****[51]** a three-judge bench of the High Court considered relevant case law, international law and comparative jurisprudence on public participation and culled the following practical elements or principles which both the Court and public agencies can utilize to gauge whether the obligation to facilitate public participation has been reached in a given case:-

a) ***First,*** *it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.*

b) ***Second****, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.*

c) ***Third,*** *whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See* ***Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya*** *(JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:*

"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."

d) ***Fourth****, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the*

subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e) ***Fifth**, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.*

f) ***Sixthly,** the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.*

97. In *Okiya Omtata Okoiti vs Commissioner General, KRA & Others***[52]** this court observed that there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.[53]In *Doctors for Life International vs Speaker of the National Assembly and Others*,[54] the SA court held that in determining whether there was public participation in any particular case, the Court will consider what has been done in that case. The question will be whether what has been done is reasonable in all the circumstances. When a decision, a policy or legislation is challenged on the grounds that it was not adopted in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question or adopting the policy or decision, the State agency exercising it gave effect to their constitutional obligations.

98. The primary duty of the courts is to uphold the Constitution and the law "which they must apply impartially and without fear, favour or prejudice."[55] What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation of a State agency in exercising powers is required to fulfil. Article **10 (1)** of the constitution provides that "The national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them— *(a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions*.

99. Sub-article **(2) (a)** and **(c)** provides that "The national values and principles of governance include— **(*a*)** patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; **(*c*)** good governance, integrity, transparency and accountability. Article **10** expressly provides that public participation is one of the national values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

100. Section **5A (2)** of KICA provides that in fulfilling its mandate, the Authority shall be guided by the national values and principles of governance in Article **10** and the values and principles of public service in Article **232 (1)** of the Constitution. Article **232** provides for Values and principles of public service which include involvement of the people in the process of policy making and accountability for administrative acts

101. In *Okiya Omtata Okoiti vs Commissioner General, KRA & Others***[56]**this court observed that *"Kenyans were very clear in their intentions when they entrenched Article **10** in the Constitution.***[57]** *They were singularly desirous of insisting on certain minimum values and principles to be met in constitutional, legal and policy framework and therefore intended that Article **10** be enforced in the spirit in which they included it in the Constitution. It follows, therefore, that all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions must adhere to Article **10** of the Constitution. In order to justify their exclusion in matters falling under Article **10**, the burden is indeed heavy on the person desiring to do so considering that Article **10** is one of the provisions protected under Article **255** of the Constitution whose amendment can only be achieved by way of a referendum."*

102. The essence of public participation was also captured in the South African case of *Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others*,[58] in the following terms:-

"…engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision."

103. Considering the above Constitutional and statutory dictates, and guided by the above jurisprudence, I find that public participation must apply to policy decisions affecting the public though the degree and form of such participation will depend on the peculiar circumstances of the case. As stated above, millions of subscribers and the general public whose records are held by the Mobile Network Owners were not involved in the consultations at all. Pertinent issues were raised by the first, second and third Interested Parties. Evidence tendered shows that as at the time the letters which triggered this Petition were written, the issues had not been addressed. CAK admits that consultations were still ongoing and states that this Petition was filed pre-maturely. To me, this a clear admission that what had been done so far in terms of engagement with stakeholders was insufficient. It was also averred and even submitted on behalf of CAK that no decision had been made, hence this Petition is pre-mature, yet the letters that triggered this Petition suggest otherwise. They were seeking access to *inter alia integrate the DMS and the networks.* Clearly, there were negotiations going on with the Mobile Network Operators and the subscribers were never involved at all. This leads to the conclusion that the decision to install the DMS system and the purported implementation was done before undertaking any meaningful stakeholder engagement. It follows that the decision to install the DMS system and the purported implementation is incapable of being read in a manner that is constitutionally compliant.

104. The key consideration here is whether CAK acted reasonably in the manner it facilitated the interested parties and excluded the public and the subscribers in the particular circumstances of this case. The nature and the degree of public participation that is reasonable in a given case depends on a number of factors. These include the nature and the importance of the policy or decision, and the intensity of its impact on the public. The public whose data is held by the first, second and third Interested Parties and whose constitutional right to privacy is at risk in the event of breach must as of necessity be involved in the engagements. Thus, the process must be subjected to adequate public participation wide enough to cover a reasonably high percentage of the affected population in the country. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect CAK to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.[59]CAK admits that negotiations were still ongoing as at the time it commenced the project. As pointed out the subscribers and the public in general were never involved at all. Applying the above considerations, the conclusion becomes irresistible that there was absolutely in adequate public participation prior to the process leading the acquisition and the attempt to install the DMS system.

Whether it was a requirement for CAK to comply with the Statutory Instruments Act;

105. The Petitioner argued that if the decision to implement the DMS system is a regulatory process as averred by **Mr. Wangusi** in paragraph **112** of his Replying affidavit, then it is was subject to the Statutory Instruments Act[60] as defined in section **2** of the Act. Consequently, the Petitioner argues that, the purported implementation violates the said Act. This submission is a direct invitation to this court to determine whether a regulation or policy decision made by a State agency is subject to the provisions of the Statutory Instruments Act.[61] Counsel for CAK did not address this submission.

106. Article **165** of the Constitution grants this Court the jurisdiction to determine *inter alia* the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. A proper construction of Article **165** which gives this Court exclusive jurisdiction to decide whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution is therefore consistent with the principles underlying the exclusive jurisdiction of this Court.

107. Article **94 (5)** of the Constitution precludes all other persons or bodies, other than Parliament from making provisions having the force of law in Kenya except under authority conferred by the Constitution or delegated by the legislature through a statute. The National Assembly may, therefore delegate to any person or body the power to make subsidiary legislation, which require approval of the House before having the force of law. Subsidiary legislation made by persons or bodies other than Parliament are commonly known as Statutory Instruments.[62]

108. Section **2** of the Statutory Instruments Act[63] and the Standing Orders of the respective Houses define Statutory Instrument as **"** *any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."*

109. Regulation is defined as a Principle or Rule (with or without the coercive power of law) employed controlling, directing, or managing an activity, organization, or system. It also means Rule based on and meant to carry out a specific piece of legislation. Regulations are enforced usually by a regulatory agency formed or mandated to carry out the purpose or provisions of a

legislation.[64] It is also defined as the act of regulating; a rule or order prescribed for management or government; a regulating principle; a precept.[65]

110. If in the words of **Mr. Wangusi**, the introduction of the DMS is a regulation, then, the above statutory and dictionary definition applies. The Regulation is a Statutory Instrument within the said definition. Statutory Instruments are prepared by the Cabinet Secretary or a body with powers to make them, e.g. a Commission, authority or a Board. Statutory Instruments must conform to the Constitution, Interpretation and General Provisions Act,[66] The Parent Act, The Statutory Instruments Act.[67]

111. If the introduction of the DMS system is a policy or a guideline, then the provisions of Section **5C** of the Act come into play, and as per the above definition, it is a statutory instrument. Section **5C** of the Act provides:- *5C. (1) The Cabinet Secretary may issue to the Authority, policy guidelines of a general nature relating to the provisions of this Act. (2) The guidelines referred to under subsection (1) shall be in writing and shall be published in the Gazette.*

112. The Statutory Instruments Act[68] requires:- **(a)** Consultation with stakeholders, **(b)** preparation of regulatory Impact Statement,[69] preparation of explanation memorandum, tabling of statutory instrument in the House,[70] consideration of the statutory instrument by the National Assembly,[71] Committee on Delegated Legislation.

113. Section **13** of the Act provides for guidelines for the relevant Parliamentary committee while examining the instrument. These guidelines focus on the principles of good governance and the Rule of Law. The Committee considers whether the Statutory Instrument conforms with the Constitution; the parent Act or other written laws; whether it infringes the Bill of Rights or contains a matter that ought to be dealt with by an act of Parliament, and whether it contains taxation; directly or indirectly bars the jurisdiction of the Courts; gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power; involves expenditure from the Consolidated Fund or other public revenues; is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation; appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made; appears to have had unjustifiable delay in its publication or laying before Parliament; makes rights liberties or obligations unduly dependent upon non-reviewable decisions; makes rights liberties or obligations unduly dependent insufficiently defined administrative powers; inappropriately delegates legislative powers; imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation; appears for any reason to infringe on the rule of law; inadequately subjects the exercise of legislative power to parliamentary scrutiny; and accords to any other reason that the Committee considers fit to examine. The criteria set out in Section **13** is replicated in standing Order number **210 (3)** on the procedure for considering statutory instruments.

114. If the decision was a Regulation to use the words of **Mr. Wangusi** in the paragraph of his affidavit referred to above, it was a constitutional and statutory imperative that sufficient public participation be undertaken prior to implementation and secondly it was a legal imperative that it be presented to Parliament as the law demands. I have already held that there was inadequate consultations with the stakeholders and that the public were not engaged at all.

115. It is trite that Regulations or policy guidelines must conform to the Constitution and the statute in terms of both their content and the manner in which they are adopted. Failure to comply with manner and form requirements in enacting Regulations or policy guidelines renders the same invalid. Courts have the power to declare such Regulations or policy guidelines invalid. This Court not only has a right but also has a duty to ensure that the Regulation or guideline making processes prescribed by the Constitution and the Statute(s) is observed. And if the conditions for Regulation-making processes have not been complied with, it has the duty to say so and declare the resulting statute, regulation, policy or guideline invalid.[72]

116. I find and hold that the Regulation or policy guidelines introducing the DMS system were adopted in a manner inconsistent with the constitutional and statutory requirements. The provisions of the Statutory instruments act were not complied with, hence, the regulation, or policy guideline lack legal basis to stand on. Courts are enjoined by the Constitution to uphold the rights of all and to ensure compliance with constitutional values and principles, a duty this court cannot shy away from.

Whether the installation of the DMS system falls within the statutory mandate of the CAK

117. The Petitioner argues that the capabilities of DMS duplicate the functions of the Anti -Counterfeit Agency and the KBS which are charged with the responsibilities of fighting counterfeits. Supporting the same argument, counsel for the third Interested Party cited Section **3** of KICA and submitted that CAK has no mandate under the act to implement the DMS, a function of the Anti-counterfeit agency and KBS. The section establishes CAK, a body corporate and vests it with powers to do or perform such other

things or acts for the proper performance of its functions under the Act which may be *lawfully done*. The operative words here are *lawfully done*. This section is to be read together with Section **5** cited earlier which provides the object and purposes of CAK.

118. The reason cited by CAK is that it is enforcing DMS system to combat counterfeit and illegal devices. The Anti-Counterfeit Act[73] is an Act of Parliament to prohibit trade in counterfeit goods, to establish the Anti-Counterfeit Agency, and for connected purposes. Section **3** of the Act establishes the Anti-Counterfeit Agency whose functions are stipulated under section **5** thereof being to enlighten and inform the public on matters relating to counterfeiting; combat counterfeiting, trade and other dealings in counterfeit goods in Kenya in accordance with the Act; devise and promote training programmes on combating counterfeiting; co-ordinate with national, regional or international organizations involved in combating counterfeiting; carry out any other functions prescribed for it under any of the provisions of the Act or under any other written law; and perform any other duty that may directly or indirectly contribute to the attainment of the foregoing.

119. The Kenya Bureau of Standards is established under the Standards Act.[74]Its main functions are stipulated under Section **4** of the Act. These include Promoting standardization in industry and commerce, Providing facilities for examination and testing commodities manufactured in Kenya, Test goods destined for exports for purposes of certification, Prepare, frame or amend specification and codes of practice.

120. A statutory body can only perform functions vested in it by the law. In *Daniel Ingida Aluvaala and another vs Council of Legal Education & Another*,[75]this court observed that:-

"Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decisions to be allowed to stand, it must be demonstrated that the decision is grounded on law.

As such, the Respondents actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the rule of law. Guidance can be obtained from the South African case of AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another where the court held as follows:-

*"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law"**[76]***

*Courts are similarly constrained by the doctrine of legality, i.e to exercise only those powers bestowed upon them by the law.***[77]** *The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the Respondent is constrained by that doctrine... by ensuring that its decisions conform to the relevant provisions of the law...*

The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with the law and Regulations.... "

121. CAK argued that under the Regulations, it has the mandate of *"Type approving and accepting communications equipment meant for use in the country."* A reading of the Anti-Counterfeit Act, the Standards Act and KICA leaves no doubt that the functions of combating counterfeit falls within the mandate of the Anti-Counterfeit Agency, while enforcing standards is the mandate of the Kenya Bureau of Standards. The role of the Kenya Revenue authority, the Ministry Responsible for Trade and the National Police Service in ensuring illegal goods do not enter the country is clearly pronounced under the law. Thus, for the CAK to purport to perform the functions clearly vested by the law in other statutory bodies which actions are not expressly provided under its enabling statute is *ultra vires* its functions.

Whether CAK violated the Petitioners Right to a fair Administrative Action;

122. The Petitioner argued that the impugned decision affects the rights provided under Article **47** of the Constitution in that the decision was arbitrary and that the subscribers were not heard before the decision was made.

123. Counsel for the third Respondent supporting the Petition submitted that CAK's action is an administrative action as defined under Section **2** of the Fair Administrative Action Act.[78] He submitted that administrative action includes the powers, functions

and duties exercised by authorities or quasi judicial tribunals or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

124. He further submitted that Section **4(3)** of the Fair Administrative Action Act[79] provides that every person has the right to be given written reasons for any administrative action that is taken against him or her where the administrative action is likely to adversely affect the rights of any person. He cited Section **5** of the Act which provides that where a proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator is to issue a public notice of the proposed administrative action inviting public views in that regard, consider all views submitted in relation to the matter before taking the administrative action, consider all relevant and material facts and where the administrator proceeds to take the administrative action proposed in the notice give reasons for the decision of administrative action taken, issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal and specify the manner and period within which such appeal shall be lodged. He submitted that failure to comply with the above provisions is a violation of Article **47** of the Constitution and the act.[80]

125. Counsel for the first Respondent submitted that in order to found a claim for unfair administrative action or lack of a hearing, the Petitioner must demonstrate with sufficient facts and evidence that he has the right to and has actually sought the administrative action from the Respondent, that the Respondent failed and or rendered the impugned decision, that the impugned decision was rendered without giving reasons, that he is prejudiced, and as a result of the prejudice he has suffered loss.[81] He submitted that the reasons informing the DMS are lawful, that is to curb illegal devices, hence not to the detriment of the consumers.

126. Article 47 of the Constitution provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The ***Fair Administrative Action Act***[82] was enacted to illuminate and expand the values espoused under Article **47** of the Constitution. Section **4(3)** of the Act provides the broad parameters which bodies undertaking administrative action have to adhere.

127. In ***Judicial Service Commission vs. Mbalu Mutava & Another***[83] **cited by Mr. Kilonzo,** the Court of Appeal held that:-

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

128. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others***[84] where it was held as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"

129. Section **7 (2)** of the Fair Administrative Action Act[85]provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.

130. When the constitutionality or legality of a decision made by a public body in the exercise of its statutory mandate is questioned, the duty of the court is to determine whether the impugned decision is capable of being read in a manner that is constitutionally compliant or as in the present case whether it can be read in a manner that conforms to the relevant statute. Every

act of the state or public bodies must pass the constitutional test. Put differently, it must conform to the principal of legality.

131. A contextual or purposive interpretation of the challenged decision must of course remain faithful to the actual wording of the statutes, namely the Fair Administrative Action Act,[86]the Constitution, KICA and the Regulations made there under and the Consumer Protection Act.[87] The challenged decision must be capable of sustaining an interpretation that would render it compliant with the constitution and the statutes, otherwise the courts are required to declare it unconstitutional and invalid.

132. Section **6** of the Fair Administrative Action[88] provides that *"Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with* section 5*."* Sub-section **2** of Section **6** of the Act***[89]*** provides that the information referred to in subsection **(1),** may include- the reasons for which the action was taken, and any relevant documents relating to the matter.

133. Though the short title to Section **6** is entitled *"Request for reasons for administrative action"*, the subject of the section is really access to information on administrative action. To this end, the section entitles persons affected by any administrative action to be supplied with information necessary to facilitate their application for appeal or review.[90] The information, which must be supplied in writing within three months, may include reasons for the administrative action and any relevant documents relating to the matter.[91] Where an administrator does not give an applicant reasons for an administrative decision, there is a rebuttable presumption that the action was taken without good reason.[92]

134. From the facts of this case, it is clear that the impugned decision falls within the definition of an administrative action as contemplated under the act, that the decision affects the subscribers and the public generally. It is also clear that the subscribers and the general public were never involved at all in the discussions nor were they supplied with reasons for the decision. In light of the principle of legality which requires the CAK's actions to conform with the law, I find that failure to engage the public and the subscribers, and failure to give them a hearing offends the provisions of the Fair Administrative Action Act.[93]

Whether the impugned decision violates consumer rights of the subscribers of the third, fourth and fifth Respondents;

135. Counsel for the third interested party supporting the Petition argued that the third Interested Party has an obligation to its consumers and that implementation of the system would lead to limitation of consumer rights under Article **46** of the Constitution. He also submitted that consumer rights are also protected under Regulation **3 (1)** of the Kenya Information and Communications (Consumer Protection) Regulations, 2010 which guarantees privacy to customers. He argued that consumer issues enumerated in his submissions have never been addressed.

136. **Mr.Kilonzo** in response argued that the Petitioner only made a general claim of infringement of the Consumer Protection Act.[94] Citing Article **46** of the Constitution, Regulations **3 (2)** and **6 (1)** of the Kenya Information and Communications (Consumer Protection) Regulations, 2010, he submitted that the consumer is expected to make informed choices, and to use an appropriate device. He argued that the DMS protects the consumer from the menace of illegal devices.

137. Article **46(1)** of the Constitution provides that consumers have the right to the protection of their right, safety, and economic interests. To give effect to the Article, Parliament enacted the Consumer Protection Act.[95] Part Two of the Act[96] provides for Consumers Rights. Article **46 (3)** provides that the Article applies to goods and services offered by the public entities or private persons.

138. The South African Constitution and the South African Consumer Protection Act have provisions similar to the Kenya Constitution and our statute law protecting consumer rights. Hence decisions from South Africa Courts on the subject may offer useful guidance. The South African Court,**[97]** interpreting their Consumer Protection Act laid down the applicable principles. It stated that the Court is to consider the words used in the light of all relevant and admissible context, including the circumstances in which the legislation came into being,'...a sensible meaning is to be preferred to one that leads to insensible or un-businesslike results...'[98] and that that the interpretative process involves ascertaining the intention of the legislature.[99]

139. The long title of the Act provides that it is *"An Act of Parliament to provide for the protection of the consumer prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto.*" The Act must be interpreted in a manner that gives effect to the purpose of the Act as set out in Section **3** which provides for the Interpretation and purposes of Act. It reads:- *(1) This Act must be interpreted in a manner that gives effect to the purposes set out in subsection (4); (2)*

When interpreting or applying this Act, a person, court or the Advisory Committee may consider— (a) appropriate foreign and international law; and (b) appropriate international conventions, declarations or protocols relating to consumer protection.

140. Section **4** provides that the the purposes of the Act are to promote and advance the social and economic welfare of consumers in Kenya. From the definition in Section **2** of the Act and the Preamble and purpose of the Act, it is clear that the whole tenor of the Act is to protect consumers. The Act must therefore be interpreted keeping in mind that its focus is the protection of consumers. The purpose of the Act is to promote and advance the social and economic welfare of consumers in Kenya.[100] Consumer rights litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the expanded Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases.[101]

141. In peremptory terms, the constitution imposes an obligation on all courts to promote "the spirit, purport and the objects of the Bill of Rights, when interpreting legislation. In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others***[102]**the S.A. constitutional court observed: "

"A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law'. In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law."

142. In line with the dictates of the constitution, this court will reject the narrow, literal reading of the above provisions and opt for a construction that promotes wider access to protection of consumer rights. Article **46 (3)** provides that the Article applies to goods and services offered by the public entities or private persons. *First*, the consumers were never involved in the discussions, hence, they were never provided with information on the device. This is a breach of their constitutional and statutory rights. *Second*, as held above, their constitutionally guaranteed right to privacy is under threat. *Third*, the act and the regulations recognize the need to protect consumer rights. On the whole, I find and hold that the DMS was introduced in a manner that was inconsistent with the constitutionally and statutory guaranteed rights of the consumers and or subscribers of the third, fourth and fifth Respondents, hence the same violates Article 46 Rights and the provisions of the Consumer Protection Act.[103]

Whether there are grounds to hold the public officers personally liable.

143. The Petitioner invites this court to hold the officers of CAK involved in the acquisition and implementation of the DMS system personally liable. Article **226 (5)** of the Constitution provides that *"If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not."*

144. **Mr. Kilonzo** for CAK did not address this submission.

145. Whereas this Court hoists high this constitutional provision as the basis for holding each individual Accounting Officer and other Public Officers directly and personally liable for any loss of public funds under their watch, it is my view that for such orders to issue, the individual persons must be parties to the case. The Petitioner has not sued any of the alleged officers. In my view, such an order can only issue against specified individual(s).The actions, omission or commissions of the individual(s) giving raise to the claim must be pleaded and particulars thereof stated with sufficient clarity. The court has not been told who the public officers involved are, the role each person played, the nature and extent of persons blame, and the particulars of breach of the constitutional provisions and the provisions they violated. The orders sought, much as they may have a constitutional underpinning warrant that the individuals be named and the case against each one of them be disclosed with sufficient clarity.

146. A court of law cannot issue orders against undisclosed persons. A court cannot issue orders, which will affect persons who are not parties to the case. Such a scenario poses a danger of granting orders affecting other persons without giving them the benefit of a hearing. It is an established principle that a person becomes a necessary party if he is entitled in law to defend the orders sought. The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice. The principle of *audi alteram partem* has its own sanctity. That apart, a person or an authority must have a legal right or right in law to defend or assail.

147. I may first clarify that as a proposition of law it is not in dispute that natural justice is not an unruly horse. Its applicability has to be adjudged regard being had to the effect and impact of the order and the person who claims to be affected; and that is where the concept of necessary party becomes significant. I find it appropriate to refer to the principle of natural justice as enunciated by the Supreme Court of India.[104] I may profitably reproduce the same here below:-

"Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

And again:-

"Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance...."

148. The right to a fair hearing under Article **50(1)** of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body.

149. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[105]

150. Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.[106] The Supreme Court of India put it succinctly:-[107]

"No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles … provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail..."

151. The invitation by the Petitioner to this the court to try and condemn undisclosed persons who are not parties to this Petition is an open invitation to this court to violate the above constitutional and common law principles which are ingrained in our jurisprudence and legal system. I decline the said invitation.

Whether the Petitioner made a case for the court to cancel the tender to the second Respondent;

152. The Petitioner invited the court to cancel the tender to the second Respondent. However, he tendered no evidence on the tendering process, how it was procured, the breaches if any nor is there evidence to enable the court to make a finding on the issue.

What are the appropriate orders regarding costs"

153. The Petitioner invites the Court to grant the reliefs enumerated in the Petition. On his part, counsel for CAK urged the Court to dismiss the Petition with costs against the Petitioner and the third Interested Party.[108] The basis of his argument is that the orders sought in the Petition cannot issue, hence, the reason why the Petitioner should bear costs while the third Interested Party should be condemned for aiding the Petitioner by furnishing him with the correspondence that enabled him to institute these proceedings.

154. I have in numerous decisions addressed the subject of costs in public interest litigation,[109] and I can do no better than repeat myself here. What is significant is that this is a constitutional Petition seeking to enforce constitutional Rights and obligations and brought in public interest. It is common knowledge that courts are reluctant to award costs in constitutional Petitions seeking to enforce constitutional rights brought in public interest.

155. Discussing costs as a barrier to Public Interest Litigation, I am reminded of the phrase *"Justice is open to all, like the Ritz Hotel"*[110]attributed to a 19th Century jurist. Costs have been identified as the single biggest barrier to public interest litigation in many countries.[111] Not only does the applicant incur their own legal fees; they run the risk of incurring the other side's. For all potential litigants, the risk of exposure to an adverse costs order is a critical consideration in deciding whether to proceed with litigation. Should the fear of costs prevent an issue of public importance and interest from being heard" **Lord Diplock's** dictum comes to mind:-

*"... it would, in my view, be a grave lacuna in our system of public law if a pressure group... or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the lawful conduct stopped...".**[112]***

156. There is little point opening the doors of the Courts if litigants cannot afford to come in, in the fear, if unsuccessful, they will be compelled to pay the costs of the other side, with devastating consequences to the individual or group bringing the action, which will inhibit the taking of cases to court.[113]The rationale for refusing to award costs against litigants in constitutional litigation was appreciated by the South African constitutional court which observed that "an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights."[114] The court was quick to add that this is not an inflexible rule[115] and that in accordance with its wide remedial powers, the Court has repeatedly deviated from the conventional principle that costs follow the result.[116]

157. The rationale for the deviation was articulated by the South African constitutional Court in *Affordable Medicines Trust vs Minister of Health* where **Ngcobo J** remarked:-

*"There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."**[117]***

158. **Sachs J**, set out **three reasons** for the departure from the traditional principle:-

"In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse.

Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy.

*Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."***[118]**

159. Discussing the same point, the supreme court of Kenya in the case of *Jasbir Singh Rai & Others vs Tarlochan Rai & Others*[119] cited by Mr. Kilonzo addressed the subject as follows:-

"in the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs…"

160. The reason for the above reasoning is that in public litigation, a litigant is usually advancing public interest as opposed to personal gain.The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.[120]The "nature of the issues" rather than the "characterization of the parties" is the starting point.[121]Costs should not be determined on whether the parties are financially well-endowed or indigent.[122] One exception which can justify a departure from the general rule, is where the litigation is frivolous or vexatious.[123] This has not been demonstrated in this case nor was it alleged.

161. This Petition is brought in public interest. According to Black's Law Dictionary[124] Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice.[125] Public interest litigation is a highly effective weapon in the armoury of law for reaching social justice to the common man. It is a unique phenomenon in the Constitutional Jurisprudence that has no parallel in the world and has acquired a big significance in the modern legal concerns. There was no suggestion that this Petition is frivolous or vexatious. I find no reason to depart from the generally accepted jurisprudence discussed above.

What are the appropriate reliefs to grant in this case

162. In view of my conclusions herein above, I find that this Petition succeeds. I have however considered the reliefs the Petitioner has invited this court to grant. However, I think this is a proper case for this court to fashion appropriate reliefs as the justice and circumstances of the case demand. This Court is empowered by Article **23 (3)** of the Constitution to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. Perhaps the most precise definition of "appropriate relief" is the one given by the South African Constitutional Court in *Minister of Health & Others vs Treatment Action Campaign & Others*[126]thus:-

"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

163. I fully adopt this definition of "appropriate reliefs" and shall deploy it in my disposition of this suit. Arising from the findings of evidence, conclusions of facts and law, constitutional and statutory interpretations and various pronouncements of law, I have reached above, I make the following orders:-

*a. **A declaration** be and is hereby issued that policy decisions or Regulations affecting the Public must conform to the Constitution and the relevant statute in terms of both its content and the manner in which it is adopted and failure to comply renders the policy decision, Regulation or guideline invalid.*

*b. **A declaration** be and is hereby issued decreeing that the decision, policy or regulation seeking to implement the DMS System was adopted in a manner inconsistent with the provisions of the Constitution, Section **5 (2)** of KICA and the Statutory Instruments Act, hence the said decision, policy and or regulation is null and void for all purposes.*

*c. **Further and or in the alternative a declaration** be and is hereby issued decreeing that the decision, policy and or regulation seeking to implement the DMS System was adopted in a manner inconsistent with the Constitution, Section **5A (2)** of KICA and the Statutory Instruments Act in that there was no adequate public participation prior to its adoption and implementation with the first,*

second and third interested parties and further the subscribers of the first, second and third Interested Parties were not engaged at all in the public consultations, hence the same is null and void for all purposes.

d. ***A declaration*** *be and is hereby issued decreeing that the first Respondent was obligated to craft and implement a meaningful programme of public participation and stakeholder engagement in the process leading to the decision, policy and or regulation or implementation of the DMS System.*

e. ***A declaration*** *be and is hereby issued declaring that the first Respondents request and or purported intention and or decision and or plan contained in its letter dated* ***31st*** *January 2017 addressed to the first, second and third interested parties seeking to integrate the DMS to the first, second and third interested parties networks to inter alia create connectivity between the DMS and the first, second and third Interested Parties system to access information on the IMEI, IMSI, MSISDN and CDRs of their subscribers on their network is a threat to the subscribers privacy, hence a breach of the subscribers constitutionally guaranteed rights to privacy, therefore unconstitutional null and void.*

f. ***A declaration*** *be and is hereby issued declaring that the first Respondents decision to set up connectivity links between the DMS and the first, second and third Interested Parties networks communicated in its letter dated* ***6th*** *February 2017 is unconstitutional, null and void to the extent that it was arrived at unilaterally, without adequate public participation and that it a threat to the right to privacy of the first, second and third interested parties subscribers and a gross violation of their constitutionally and statutory protected consumer rights.*

g. ***An order of prohibition*** *be and is hereby issued prohibiting the first Respondent, its servant or agents from implementing its decision to implement the DMS system to establish connectivity between the DMS and the first, second and third Interested Parties system to access information on the IMEI, IMSI, MSISDN and CDRs of their subscribers on their network.*

h. No orders as to costs.

Orders accordingly.

Signed, Dated, Delivered at Nairobi this 19th day April 2018

JOHN M. MATIVO

JUDGE

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[1] Cap 411A

[2] Cap 134, Laws of Kenya

[3] Supra

[4] HCCC No. 257 of 2012; Omar Guled vs CCK & Others

[5]Counsel cited John Harun Mwau & 3 Others vs A.G & 2 Others {2012}eKLR and Commission for the Implementation of the Constitution vs National Assembly of Kenya & 2 Others {2013}eKLR

[6] Pet No 503 of 2014 {2015}eKLR

[7] In Ferreira v Levin NO & others; Vryenhoek v Powell NO & others 1996 (1) SA 984 (CC) at paragraph [199]:

[8] In the case of Ainsbury vS Millington {1987} 1 All ER 929 (HL), which concluded at 930g: 13

[9] See Transvaal Coal Owners Association vs Board o Control 1921 TPD 447 at 452

[10] Nuclear Tests (Australia vs. France), Judgment, I.C.J. Reports 1974, pp. 270-271, para. 55; Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p. 476, para. 58)

[11] Vol. 80:1 Tulane Law Review 2006 at pp 72

[12] Ibid

[13] Ibid

[14] {2010} 26 SAJHR at 405

[15] See Article 50 (1)

[16] Petition No.630 of 2014

[17] Counsel cited Kennedy vs Ireland {1987}I.R 587 and

[18] Counsel cited Coalition for Reform and Democracy (CORD) & 2 Others vs Republic of Kenya & 10 Others Pet. No. 628 of 2014 {2015} eKLR at P.290

[19]Anarita Karimi Njeru vs The Republic (1976-1980) eKLR

[20]Bernstin vs Bester No. 1996 (2) SA 75 cited

[21] Counsel cited Coalition rms and Democracy vs AG Pet. 628 OF 2014

[22]Investigating Directorate: Serious Economic Offences and Others vs Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others vs Smit NO and Others [2000] ZACC 12; 2001(1) SA 545; 2000 (10) BCLR 1079 (CC) at para 22.

[23]S v Acheson 1991 NR 1(HC) at 10A-B

[24]Government of the Republic of Namibia v Cultura 2000 1993 NR328 (SC) at 340A

[25] Id at 340B-C

[26]See the South African Constitutional Court cases of *S v Makwanyane* 1995 (3) SA 391 (CC) at Para [9] footnote 8; *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) at para 17.

[27]*Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) at 183J-184B; *S v Zemburuka* (2) 2003 NR 200 (HC) at 20E-H; *Tlhoro v Minister of Home Affairs* 2008 (1) NR 97 (HC) at116H-I; *Schroeder and Another v Solomon and 48 Others* 2009 (1) NR 1 (SC) at 6J-7A; *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 596 (SC) at 269B-C.

[28]*Minister of Defence v Mwandinghi* 1993 NR 63 (SC); *S v Heidenreich* 1998 NR 229 (HC) at 234

[29] Universal Declaration of Human Rights, art 12; United Nations Convention on Migrant Workers, art 14; Convention on the Rights of the Child, art 16; International Covenant on Civil and Political Rights, art 17; African Charter on the Rights and Welfare of the Child, art 10; American Convention on Human Rights, art 11; African Union Principles on Freedom of Expression, art 4; American Declaration of the Rights and Duties of Man, art 5; Arab Charter on Human Rights, art 21; European Convention for the Protection of Human Rights and Fundamental Freedoms, art 8; Johannesburg Principles on National Security, Free Expression and Access to Information; Camden Principles on Freedom of Expression and Equality.

[30]Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 2009, A/HRC/17/34.

[31] See Universal Declaration of Human Rights, art 29; Human Rights Committee, General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9; Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988; see also, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin 2009.

[32] Neethling J, Potgieter JM & Visser PJ ***Neethling's Law of Personality*** Butterworths Durban 2005, National Media Ltd ao v Jooste 1996 (3) SA 262 (A) 271-2.

[33]**Ibid** at 270-1. Other personality rights, especially the right to a good name or fama, which are infringed through the communication of defamatory data (cf eg ***Pickard v SA Trade Protection Society*** (1905) 22 SC 89*;* ***Morar v Casojee*** 1911 EDL 171; ***Informa Confidential Reports (Pty) Ltd v Abro*** 1975 (2) SA 760 (T)) may obviously also be relevant.

[34] Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of December 10, 1948.

[35]Richard B. Lillich, The Human Rights of Aliens in Contemporary International Law, 41 (Manchester University Press 1984); Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d. Sess., Supp. No. 13, at 71,U.N. Doc. Al810 (1948).

[36] Article 2

[37]Klass and Others v. Germany, Application no. 5029/71

[38] Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy).

[39]See the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; Organization for Economic Co-operation and Development Guidelines on the Protection of Privacy and Transborder Data Flows of Personal Data; Guidelines for the regulation of computerized personal data files (UN General Assembly Resolution 45/95 and E/CN.4/1990/72). As of December 2014, over 100 countries had enacted data protection legislation: David Banisar, National Comprehensive Data Protection/Privacy Laws and Bills 2014 Map, 8 December 2014, available at http://ssrn.com/abstract=1951416 or http://dx.doi.org/10.2139/ssrn.1951416

[40] 10 Human Rights Organizations -vs- The United Kingdom, APP. NO. 24960/15

[41] Louis Henkin, The Age of Rights (Columbia University Press, 1990) 4.

[42]G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). Cf Aharon Barak:

[43] R v Oakes [1986] 1 SCR 103 [69]–[70].

[44] R v Oakes [1986] 1 SCR 103 [69]–[70].

[45] Ibid

[46] Pet No 318 of 2012

[47] Counsel cited Laws Society of Kenya vs A G, Pet No.3 of 2016, Nairobi Metropolitan PSV Saccos Union & 25 Others vs County of Nairobi Govt & 3 Others, Robert Gakuru & Others vs Governor of Kiambu & 3 Others, Pet. No 532 of 2013 {2014} eKLR,

[48]See Pevans East Africa Limited vs Chairman Betting Control and Licensing Board & Others, Pet No. 353 of 2017 consolidated with Pet No 505 of 2017 and Okiya Omtata Okoiti vs Commissioner General, KRA & Others, Pet 532 of 2017

[49] See e.g. Daly v SSHD [2001] UKHL 57 §§24-32 and ACCC/C/2008/33

[50] In the South African case of *Minister of Health and Another vs New Clicks South Africa(Pty) Ltd and Others* 2006 (2) SA 311 (CC), at para 630.

[51] In the Matter of the Mui Coal Basin Local Community {2015} eKLR

[52] Pet 532 of 2017

[53] Ibid

[54] (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006)

[55] Section 165(2) of the Constitution.

[56] Supra

[57] Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others, Petition No. 229 of 2012

[58] CCT 86/08 [2010] ZACC 5

[59]See **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)**

[60] Act No. 23 of 2013

[61] Supra

[62]Statutory Instruments, Fact Sheet No. 21, Published by the Clerk of the National Assembly,2017

[63]Supra

[64] http://www.businessdictionary.com/definition/regulation.html

[65]See Curry v. Marvin, 2 Fla. 415; Ames v. Union Pac. Ry. Co. (C. C.) 64 Fed. 178; Hunt v. Lambertville, 45 N. J. Law, 282

[66]Cap 2, Laws of Kenya

[67] Supra

[68] Supra

[69]Sections **6,7,** & **8** of the Act

[70] Section **11**

[71] Standing Order number **210**

[72]See Doctors for life case

[73] Act No 13 of 2008

[74] Cap 496, Laws of Kenya

[75] Pet No. 254 of 2017

[76] AAA Investments (Pty) Ltd v Micro Finance Regulatory Council [2006] ZACC 9; 2007 (1) SA 343 (CC).

[77] National Director of Public Prosecutions vs Zuma, Harms DP

[78] Act No 4 of 2015

[79] Ibid

[80] Ibid

[81] Counsel referred to JSC vs Mbalu Mutava & Another {2015}eKLR

[82] Act No. 4 of 2015

[83] **{2015} eKLR,** Civil Appeal 52 of 2014

[84](CCT16/98) 2000 (1) SA 1, at paragraphs135 -136

[85] Act No. 4 of 2015

[86] Supra

[87] Act No. 46 of 2012

[88] Supra

[89] Ibid

[90] Section 6(1)

[91] Section 6(2)

[92] Section 6(4)

[93] Act No 4 of 2015

[94] Supra

[95] Ibid.

[96] Ibid

[97] See Natal Joint Municipal Pension Fund vs Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[98] Ibid

[99] Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd [2015] ZASCA 111; 2016 (1) 518 para 27.

[100] See section 4

[101] See Estate Agency Affairs Board vs Auction Alliance (Pty) Ltd 2014 (4) SA 106 (CC) para 69.

[102] {2006} ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC).

[103] Supra

[104] In Canara Bank vs. Debasis Das {2003} 4 SCC 557

[105]Kioa v West (1985), Mason J

[106] See *Onyango v. Attorney General*,[106] ***Nyarangi, JA*** asserted at *page 459 that:-"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."* At *page 460* the learned judge added:-*"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at." And in Mbaki & others v. Macharia & Another,**[106]** at page 210, the Court stated as follows:- "The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."*

[107]In J.S. Yadav vs State of U.P. & Anr {2011} 6 SCC 570, Paragraph **31**

[108] To support his argument counsel cited Jasbir Singh Rai & 3 Others vs Tarlocham Singh Rai & 4 Others {2014}eKLR

[109] See Petition NO.532 o 2017, Okiya Omtata Okoiti vs KRA & 2 Others, Ruling delivered on 22 November 2017

[110] Sir James Matthew, 19th Century jurist

[111] 2 Mel Cousins BL (2005) Public Interest Law and Litigation in Ireland, Dublin: FLAC, October 2005 and see Stein R. & Beageant J., "R (Corner House Research) v the Secretary of State for Trade and Industry" (2005) 17(3) Journal of Environmental Law 413

[112] R (ex parte National Federation of Self-Employed and Small Businesses Ltd) v Inland Revenue Commission [1981] UKHL 2.

[113]Toohey J.'s address to the International Conference on Environmental Law, 1989 quoted in Blue Mountains Conservation Society Inc v Delta Electricity [2009] NSWLEC 150 [19].

[114]Hotz and Others vs University of Cape Town [2017] ZACC 10, citing Biowatch Trust v Registrar, Genetic Resources [2012] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22 (Biowatch).

[115] Ibid

[116] See, for example, AB vs Minister of Social Development [2016] ZACC 43; 2017 (3) BCLR 267 (CC) at para

329; Minister of Home Affairs vs Rahim [2016] ZACC 3; 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC) at para 35;

Sali vs National Commissioner of the South African Police Service [2014] ZACC 19; 2014 (9) BCLR 997 (CC); (2014) 35 ILJ 2727 (CC) at para 97.

[117] {2005} ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138

[118]Biowatch Trust v Registrar, Genetic Resources [2012] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22 (Biowatch)

[119] Supra note 4

[120] Supra note 32

[121] Ibid

[122] Ibid

[123] Supra Note 32

[124] Sixth Edition

[125]Public Interest Litigation: Use and Abuse, http://lawquestinternational.com/public-interest-litigation-use-and-abuse-0

[126] (2002) 5 LRC 216 at page 249