

**IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA
AT DAR ES SALAAM**

TRIBUNAL APPEAL NO 13 OF 2019



**WATETEZI ONLINE TV.....APPELLANT
VERSUS
TANZANIA COMMUNICATIONS
REGULATORY AUTHORITYRESPONDENT**

JUDGMENT

The appellant, **WATETEZI ONLINE TV** being aggrieved by the decision of the above named respondent lodged an appeal to this Honourable Tribunal against the whole decision on three grounds, namely:-

1. That the Respondent erred in law by relying on the wrong provisions of the law to reach its decision.
2. The Respondent erred in law by acting beyond its power.
3. The Respondent erred in law by convicting an entity which does not exist.

On the above grounds, the appellant prayed the Honourable Tribunal to be pleased to make the following orders, namely:-

- (a) That an order that the decision of the respondent compelling the appellant to pay fine be set aside.
- (b) An order for payment of general damages incurred by the appellant for loss of business.
- (c) An order for costs of this appeal.

Upon being served with the memorandum of appeal, the respondent file a reply to the memorandum disputing the grounds raised and called this Tribunal to find them unmerited and consequently dismiss the appeal with costs and confirm the decision of the respondent.

The facts of this appeal were simple and straight forward. The appellant was accused of operating without Online Policy or Guidelines in contravention of Regulation 5 (1) (C) the Electronic and Postal Communication (Online Content) Regulations, 2018.

The Content Committee upon hearing the appellant, found that the appellant was indeed in breach of the said Regulation and ordered the appellant to pay fine of Tshs.5,000,000.00 and to be warned to abide with the law. The appellant aggrieved by the decision of the Committee appealed to this Tribunal, hence this judgement in appeal.

When this matter came for hearing, the appellant was enjoying the legal services of Ms. Bertha Nanyaro, learned advocate. On the other hand, the respondent had the legal services of Ms. Gloria Rwakibalira and Ms. Happiness Flavian, learned advocates.

Ms. Nanyaro started by praying to the Tribunal to adopt their grounds of appeal and written skeleton arguments in support of this appeal. The learned counsel immediately proceeded to argue ground number one and when probed by the Tribunal as to whether the provisions of the law she cited in her written skeleton arguments are proper, Ms. Nanyaro readily conceded that the whole of ground number one and the written skeleton arguments put forward and the provisions cited there are based on dead law and prayed to abandon that ground.

In the foregoing, the learned counsel jumped into ground number two and submitted that the Content Committee of the respondent in her decision went overboard to exercise conviction powers and imposition of fine, which powers, according to the learned counsel for appellant, were vested with the court of law and not regulatory organs. The learned counsel cited the provisions of Regulation 19 to support her argument. The said regulation states:

“Any person, who contravenes the provisions of these Regulations, commits an offence and shall upon conviction be liable to a fine of less than five million Tanzania shillings or to imprisonment for a term of less than twelve months or to both.” (emphasis theirs)

On that same vein the learned counsel cited the case of **HAMIS MASISI AND 6 OTHERS V. REPUBLIC**, [1995] TLR 24, in which it was held that the action of the Regional Commissioner was illegal for being made without authority and therefore ultra vires and prayed that this Tribunal be guided by the above holding and position of the law find and hold that the Content Committee acted

without authority and consequently proceed to set aside and quash the decision of the Content Committee.

On the other hand, Ms. Rwakibalira starting with ground two argued that the Content Committee did not act beyond its powers because under section 28 (1) (b) and (d) of Tanzania Communications Regulatory Act, CAP. 172 R.E. 2017 the respondent has powers to regulate online content, summon, hear and give decision in the course of its regulation process. When probed by the Tribunal if the Committee has powers of conviction, Ms. Rwakibalira conceded that the Committee has no powers of conviction but pointed out that its powers are as stated in section 44(2) (b) of the TRCA Act, 2017. Further when probed by the Tribunal the effect of the Committee using Regulation 18 instead of section 44 of TCRA Act, 2017 the learned counsel replied that she leave that point for the Tribunal to decide.

The learned counsel for respondent, however, pointed out and argued that section 32 (6) of TCRA Act, 2017 gives powers to the Committee to regulate its own transactions and section 44(2) (g) of the same Act, give the Committee powers to impose warning.

Ms. Rwakibalila went on to point out that there is no dispute that the offence was committed or that the appellant was operating against the Regulation and as such urged this Tribunal to rectify the anomaly committed by the Committee by imposing a proper fine under proper law as pointed above.

In rejoinder, Ms. Nanyaro reiterated her earlier submissions and went on to submit that Regulation 18 is very specific and what was done by the Committee was against the law. According to her, the call to rectify the anomaly admitted will be equal to blessing the errors committed by the Committee. As to the warning, the learned counsel submitted that they do not contest the warning given. On that note, the learned counsel reiterated her prayer to uphold this ground and set aside the decision of the Committee.

The Tribunal has carefully pondered on the rival arguments advanced by both sides on this point that the Committee erred in law by acting beyond its powers and used a wrong provision in imposing a conviction. The Tribunal has visited the cited provisions of TCRA Act, 2017 and its regulations and reading between them there is no doubt that Regulation 18 of the Electronic and Postal

Communications (Online Contents) Regulations, 2018 do not give powers to Committee to impose fine. The powers under that Regulation, we have no flicker of doubt, are vested to the courts of law with criminal jurisdiction but not to regulatory organs as correctly argued by the learned counsel for the appellant. Indeed, the Content Committee was wrong to impose fine based on that Regulation.

The immediate question now is what is the effect of such order? The learned counsel for respondent implored this Tribunal to have regards that there is no dispute that the appellant was acting in abrogation of Regulation as accused before the Content Committee and there is ample evidence that the appellant does not even dispute that as she is not contesting the warning. On that note, the learned counsel urged this Tribunal to rectify the anomaly and impose a proper fine in the circumstances guided by the proper law. The learned counsel for respondent pointed out that the proper section to impose fine was section 44 (2) (b) of the TCRA Act, 2017.

On the other hand, Ms. Nanyaro was of the diametrical different view and submissions that this Tribunal cannot do that because that will tantamount to blessing the wrong and errors committed by the Content Committee.

Having considered this hotly rival arguments and having read the proceedings and evidence tendered we are of the considered opinion that the error, if any, was partially occasioned in the final order by citing the wrong provisions. This does not absolve the fact that indeed the appellant was acting in abrogation of the law. Much as we agree with the learned counsel for the appellant that applying wrong provision in giving the punishment was wrong and irregular but on the same note we equally agree with the learned counsel for the respondent that there is no dispute that the Regulation in dispute was violated by the appellant as the record and his defence are loud and clear on the point. Failure to dispute a warning issued against himself is another indication to this effect. Guided by the above position, we are, therefore, of the considered opinion that the order of fine was a consequential order that can be dealt under Rule 35 (1) (a) read together with Rule 38 (d) of

the FCT Rules, 2012 which in their totality gives this Tribunal powers in dealing with any appeal to appraise evidence and make any necessary, incidental or consequential order to meet the end of justice. On that note, this Tribunal hereby set aside the consequential order of fine of Tshs. 5,000,000.00 as wrongly premised under Regulation 18 of the Electronic and Postal Communications (Online Content) Regulations, 2018 and instead substitute the same with a fine of Tshs. 3,000,000/= under the provisions of section 44(2) (b) and (g) of the TCRA Act, 2017. The order of warning is hereby confirmed as same was not contested.

That said and done, ground number two is partially allowed and partially disallowed for the reasons explained above.

Ms. Nanyaro addressing the 3rd ground which was to the effect that the respondent erred in law by convicting the entity which does not exist. The learned counsel pointed out this issue was not raised before the Content Committee, however, she was quick to point out that this is a point of law that can be raised at any stage, even before this appeal. According to Ms. Nanyaro, the proper party was Tanzania Human Rights Defenders Coalition. Bringing allegations

to a wrong party WATETEZI Online TV which legally does not exist as it has not been registered anywhere, the Content Committee was wrong because the licenced holder is Tanzania Human Rights Defenders Coalition. To buttress her point the learned counsel cited the case of **Christina Mrimi v. Coca Cola Kwanza Bottlers (DSM) CAT (Unreported)** in which it was held that the appellant has the obligation to identify the correct name, failure to identify the appropriate part renders the appeal incompetent.

On that note, the learned counsel prayed that this ground be found merited and allow the appeal by quashing and setting aside the decision of the Content Committee and grant the orders as prayed in the memorandum of appeal.

On the other hand, Ms. Rwakibalira, learned advocate for the respondent submitted that it is true that a license was given to Human Rights Defenders Coalition (Watetezi Tv Online). The appellant have been recognized so on understanding that the words in brackets may be used for the same purposes. She further submitted that even when the allegation were leveled against Watetezi Online TV and were summoned, they did not raise that

issue during the Content Committee during hearing hence this ground is an afterthought on the part of the appellant. Ms. Rwakibalira was quick to point out that if they deny the name then the respondent will take the appellant to court of law for criminally conducting Watetezi Online Tv illegally. On that note, the learned counsel for respondent invited this Tribunal to find no merits in this ground and dismiss this appeal with costs.

In rejoinder, the learned counsel for the appellant was candid to say the misnaming of the appellant can be cured.

Having seriously considered this ground of appeal, this Tribunal is of the considered opinion that this ground is akin to fail. We will try to explain. **One**, Watetezi Online TV is not a new name from the Tanzania Human Rights Defenders Coalition. **Two**, the learned counsel for the appellant's arguments that this is a point of law that can be raised at any time is misconceived and rejected on its face value. The issue of names need evidence and as such without citing any case law falls short of being a point of law. **Three**, much as this point was not raised before the Content Committee same is misplaced before the Tribunal because this Tribunal exercising

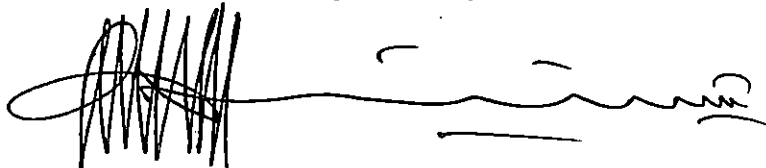
appellate jurisdiction cannot entertain a matter or issue not canvassed before the Content Committee. **Four**, as correctly submitted by the learned counsel for respondent this ground was raised as an afterthought on the part of the appellant. This can be termed as employing technicalities at the expenses of justice. It is not acceptable at all. **Five**, even the holding in the case cited cannot save this ground and the holding in that case is no longer a good law in the wake of Tribunal striving to do justice.

In the totality of the above reasons, this ground is devoid of any useful merits and is hereby dismissed.

In the upshot this appeal is partially allowed to the extent explained above and equally disallowed to the extent explained above with no order as to costs on the parity of the above holding.

Order accordingly.

Dated at Dar es Salaam this 4th this day of May 2020.



Hon. Judge Stephen M. Magoiga - Chairman



Hon. Mustapher Siyani – Member



Hon. Dr. Theodora Mwenegoha – Member

04/05/2020

Judgment delivered this 4th day of May, 2020 in the presence of Ms. Bertha Nanyaro, Advocate for the Appellant and Ms. Gloria Rwakibalira, Advocate for the Respondent.



Hon. Judge Stephen M. Magoiga - Chairman



Hon. Dr. Theodora Mwenegoha – Member

04/05/2020