

The Examination of the Legal and Institutional Regulatory Framework for Broadcast Media in Kenya

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Abstract: This article is a culmination of a study examining the legal and institutional framework that Kenya has for regulating adult content in broadcast media. In that regard, the children’s rights in relation to protection from broadcast content as encapsulated in the Constitution of the republic of Kenya is considered. The relevant international conventions that Kenya has ratified and how local laws seek to protect children from potentially harmful broadcast media is of paramount interest. The researchers draw from the Kenya Information and Communication (Amendment) Act 2013, the Kenya Information and Communication (Broadcasting) Regulations 2009 which are still relevant to the new aforementioned Act, the Media Council of Kenya 2013 and the Children Act of Kenya. The objective is to examine various regulations and laws and how they protect children from potentially harmful broadcast content in Kenya. The findings establish various laws in Kenya providing for the regulation of broadcast media, which are implemented by two media regulatory bodies: Media Council and Communications Authority of Kenya. The two regulatory bodies are the two parallel public complaints systems to which Kenyans can launch complaints regarding media content. The writers conclude that as things are currently, children in Kenya face a dangerous future in terms of their morals unless measures are put in place to watchdog the fourth estate.

Keywords: Broadcast Media, Regulatory Framework, Watershed, Adult Content.

INTRODUCTION

The broadcast media regulatory framework in Kenya consists of numerous laws and administrative bodies. The three sources of broadcast media law in Kenya are the Constitution of the Republic of Kenya (herein the Constitution), statutory law and international law. Any international treaty that Kenya ratifies automatically forms part of the Constitution [1]. International treaties that Kenya has ratified that seek to protect children from harmful media content include the 1989 United Nations Convention on the Rights of the Child (herein CRC), the 1990 African Charter on the Rights and Welfare of the Child (herein ACRWC) and the 1976 International Covenant on Civil and Political Rights (herein ICCPR) [2]. The CRC, ACRWC and the Children Act of Kenya 8 of 2001 (herein Children Act) all define a child to be a person below the age of 18 years [3]. Similarly, they all provide that children’s best interests be of paramount importance in every matter affecting them [4].

Other statutory laws in Kenya relevant to this dissertation include the Kenya Information and Communication (Amendment) Act 2013 (herein KICA 2013). KICA 2013 exists to amend the Kenya Information and Communication Act 1998 (herein

KICA 1998). The regulations in place to give effect to the Act are the Kenya Information and Communication (Broadcasting) Regulations 2009. Also relevant are the Media Council of Kenya Act 2013 (herein MCA), which replaced the Media Act of 2009.

Unfortunately, none of the above laws are adhered to as Kenya’s broadcast media is airing sexually explicit content during the day. One of the most explicit conversations ever broadcast on national radio was one famously known as the ‘Nicole and Muturi’ clip. The clip is a conversation between a man and a lady in which the lady is begging the man in explicit terms to visit her for sex. The most excruciating is the language they use without euphemisms. The clip has explicit mentioning of private parts and obscene acts. Below is an excerpt transcript of part of the conversation in which the characters are talking in explicit terms. Beyond this excerpt transcript is explicit content which could not be included here, yet it was broadcast on radio; the most egalitarian media.

Kiswahili-English Translated Transcript

NICOLE: (in a low Voice)
Nilikuanatakaa...nilikuanatakakufinywa... [I need sex]

MUTURI: MbonahaukuniambiaKitambo?
[Why didn't you tell me earlier?]

NICOLE: Aiii...Muturisiukujesaahiitu-act
maramoja? [assh! Muturi, just come nowwe
act right away]

MUTURI: Mimi kamanishalala.... [What if I
am already asleep?]

NICOLE: Aaaaa...TokaMuturi,
utarudikwakosaatano [come on Muturi, you
will goback at 11 pm]

MUTURI: Maze
siweziamakasaahii...ungeniambiakitamboninge
kujatukitambolakinisanishalalamimi [I can't
wake up now...if you had told me earlier, I
could have come, but now I'm already asleep]

NICOLE: Aha aabasimienikuje? [aha, okay.
Can I come over myself]

MUTURI: Hapana,
weweutafanyanisiendekeziasubuhi [No! you
will make me unable to go for work tomorrow]

NICOLE: (begging) a aaa...nakaatu three
hours [I will only be there for three hours]

MUTURI: Saahiini Late... [It's late now]

NICOLE: Si late kwangu.... [It's not late for
me]

MUTURI: Aaaaiwewekwendahukokeshonikona
work [aaai, you just leave it, tomorrow I need
to work!]

Reading the above clip, which is now available for download on internet, it is clear that Kenya risks harming its more than 19 million children by exposing them to such content [5]. The above clip was repeatedly aired between 8 am and 7pm on 25th October 2011 on radio stations. It caused such a stir among Kenyans that the Media Council of Kenya called for a press conference and issued a statement concerning the clip, yet four years down the line, such sexually explicit material is still rampant in Kenya broadcast media [6]. As recently as 17th of April 2015, the chairperson of Communications Authority of Kenya (hereafter CAK) was still issuing threats to revoke licenses of the numerous media stations that air adult content during the day, but such ultimatums fell on deaf ears [7].

Understanding 'Sexually Explicit Content'

The United States Supreme Court has defined sexually explicit content or otherwise obscene content as 'material judged by contemporary community standards, must appeal to the prurient interest in sex, must depict sexual conduct in a patently offensive manner, and must lack serious literary, artistic, political, and scientific value' [8]. The court recognised that there are developmental differences between children and adults. It therefore found it constitutional for the government to regulate the exposure of sexually explicit content to minors, even if contemporary community standards would not find the material obscene for an adult [9].

Sex on television and radio is much more than depictions of sexual intimacy or sexual intercourse [10]. Children and adolescents can learn a lot about sex, such as what it means to be a man or a woman, what makes someone attractive or 'cool', how one should behave around someone of the opposite gender and so on [11]. More than that, sexually explicit broadcasts are not appropriate for adolescents whose bodies are still maturing and identities still being discovered [12]. In Kenya, radio and television comedians may engage in cat calling, ogling, leering or staring at human features that are a certain shape or size. Similarly, there have been numerous broadcasts where presenters or actors make sexual remarks concerning body parts, nudity and sexual activities like petting including sexual intercourse, frequently accompanied by laugh tracks.

Children's Rights, Broadcast media and the Constitution of Kenya

The Constitution is the supreme law in Kenya. It constitutes the fundamental principles of the State and binds all persons and State organs [13]. The Constitution of Kenya recognizes the vulnerability of children by calling upon state organs and all public officers to address the needs of vulnerable populations such as that of children [14]. Article 27 of the Constitution provides that every person is equal before the law and is entitled to equal protection and equal benefit of the law.

Chapter 4 of the Constitution contains the Bill of Rights. This chapter embodies numerous freedoms and their limitations. The freedom of expression is amongst the rights guaranteed to the peoples of Kenya. However, like most other fundamental rights, it can be limited when it is infringing on the rights of others [15]. For example, article 33(3) goes on to provide that in exercise of the right of freedom of expression, every person shall respect the rights of others. Also, Article 29 (d) provides that every person has the right to freedom from torture including psychological torture.

The Constitution provides that broadcast media in Kenya is subject to licensing procedures that regulate the airwaves [16] Article 34(5) provides:

"Parliament shall enact legislation that provides for the establishment of a body, which shall—

- (a) Be independent of control by government, political interests or commercial interests;
- (b) Reflect the interests of all sections of the society; and
- (c) Set media standards and regulate and monitor compliance with those standards."

International Conventions and Regulation of Broadcast Media in Kenya

As earlier mentioned, international conventions ratified by Kenya form part of the

Constitution of Kenya [17]. International treaties that Kenya has ratified relevant to this paper include the ICCPR, CRC and ACRWC. As mentioned in the previous chapter, the above instruments provide for the right to freedom of expression but also provide that the freedom of expression is not absolute and call for regulation of the media [18]. ICCPR provides that everyone shall have the right to freedom of expression through any media of their choice [19]. It, however, goes on to provide that this freedom carries with it special duties and responsibilities and may therefore be subject to certain restrictions for the protection of public health and morals [20].

Article 13 of the CRC, provides that the child shall have the right to freedom of expression, which includes the right to seek and receive information regardless of frontiers. Similarly, to Article 19 of the ICCPR, article 13 of the CRC provides for restrictions on the media for the protection of public health and morals ideals. Article 17 of the CRC focuses on limiting media content for the protection of children. The relevant part of Article 17 provides that State Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of sources, especially those aimed at the promotion of his or her social, spiritual and moral wellbeing and physical and mental health. To this end, the article provides that State Parties shall encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her wellbeing, bearing in mind the provisions of Article 13 and 18.

Article 18 recognizes that parents have primary responsibility for children. Article 12 of the CRC calls for child participation in matters affecting them and provides that, State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. The provisions of Article 12 of the CRC are repeated almost verbatim by Article 7 of the ACRWC, as well as section 4(4) of the Children Act of Kenya.

The Kenya Information and Communication (Amendment) Act 2013 (KICA 2013)

KICA 2013 was assented to on 11 December 2013 and took effect on 2 January 2014. It exists to amend some provisions of the Kenya Information and Communication Act 1998 (herein KICA 1998). Section 3 of KICA 1998 provides for the establishment of the Communications Commission of Kenya (herein CCK), responsible for the licensing and regulation of communication services in the country. Section 3 of KICA 2013 changes the name of the regulatory body from CCK to Communications Authority of Kenya (herein CAK).

The independence of CAK is provided for in section 5A (1) of KICA 2013. This section provides that CAK shall be free of control by government, commercial or political interests in the exercise of its powers and in the performance of its duties. However, section 6 of KICA 2013 provides that the management of CAK shall vest in a board, which shall constitute a chairperson appointed by the President and seven persons appointed by the Cabinet Secretary of the relevant government ministry.

Section 46I provides that all licensed broadcasters shall observe standards of good taste and decency. 'Good taste and decency' have not been defined by the Act. Section 46H(1) of KICA 2009, which is still in force, gives CCK (now CAK) power to set standards for the time and manner of programs to be broadcast by licensees under the Act. Section 46H (2) provides:

'Without prejudice to the generality of sub-section (1), the Commission shall-

- (a) Prescribe a programming code
- (b) Review the Code every two years
- (c) Prescribe a watershed period programming when large numbers of children are likely to be watching
- (d) Ensure compliance'

Section 102 A of KICA 2013 provides for a complaints mechanism. This section establishes the Communication and Multimedia Tribunal and provides that any person aggrieved by a journalist or media body may lodge a complaint to the Tribunal. Section 102A (8) goes on to provide, "Without prejudice to the functions of the Authority or the Media Council, the Authority or the Council may take up a complaint on its own initiative and forward the same to the Tribunal for determination where in its opinion the complaint has public interest implications." In regards to sanctions, section 46J of KICA 2009, provides that the Commission, now Authority, may revoke a license where the licensee is in breach of broadcast regulations.

The Kenya Information and Communication (Broadcasting) Regulations, 2009

The Kenya Information and Communication (Broadcasting) Regulations (herein KIC Regulations) exist to implement KICA 2009 and KICA 2013. It defines a child as a person under the age of 18 years. Section 19 of the regulations deals with program content and provides that a licensee shall ensure that no broadcasts by its station present sexual matters in an explicit or offensive manner. Section 20 specifically provides for the protection of children. It reads:

'A licensee shall-

- a) Ensure that due care is exercised in order to avoid content that may disturb or be harmful to children, that has offensive

language, explicit sexual or violent material, music with sexually explicit lyrics...

- b) Not broadcast programs with the content specified in paragraph (a) during the watershed period.'

Part 1 of the regulations defines the watershed period as a time between 5am and 10pm or such time as the Authority may prescribe. Section 34 of KIC Regulations relates to the watershed period. It provides:

(1) A licensee shall ensure that-

- a) content which depicts or contains scenes that are rated by the Kenya Film Classification Board as adult or are of the language intended for adult audiences are not aired during watershed period
- b) all programs broadcast during the watershed period are suitable for family audiences and the transition from family oriented to a more adult programming after the watershed period is gradual
- c) consumer advice such as warnings, labeling, classification details and other announcements are given prior to the telecast of a program or its trailers
- d) all trailers and promotional material shown before the watershed time comply with paragraph (b) and (c)

(2) All licensees shall exercise responsibility in scheduling of programs to reduce the risk of causing offence'

Other than the watershed or daytime content approach that exists to protect children from adult content, there also exist the information and ratings approach as well as the censorship approach. Section 3.1.1 of the Kenya Broadcasting Code of Practice for Free-to-Air Radio and Television, which is a Code established by section 37 of KIC Regulations, provides that programs rated as General Exhibition (GE) or rated 10 by the Kenya Film Censorship Board are suitable for family viewing. On the other hand, programs with an adult theme shall be rated as Parental Guidance (PG) and aired after 10 pm. Section 39 of KIC Regulations provides for a complaints handling procedure. It provides that every broadcaster shall develop a procedure for handling complaints from persons aggrieved by its broadcasts. Section 42 (1) provides:

'Where any person alleges that he has exhausted the broadcasters complaints handling procedure and is not satisfied with the remedy offered or action taken, he may appeal to the Authority, and such appeal shall be dealt with in accordance with the Dispute Resolutions Regulations or such procedures as may be prescribed by the Authority from time to time: Provided that the Authority may, on its own motion, investigate a matter where in its view a broadcaster has

breached the provisions of the Act, Regulations or Program Code.'

Media Council Act 2013

The Media Council Act 2013 (herein MCA) is an Act of Parliament that establishes the Media Council of Kenya. The Act was assented to on 24 December 2013 and commenced on 10th of January 2014. Section 5 of the MCA establishes the Media Council. This is a body whose functions include:

- 'i Conduct an annual review of the performance and general public opinion of the media and publish the results in at least two daily newspapers of nationwide circulation
- k Establish media standards and regulate and monitor compliance with the media standards'

The term 'media' has been defined by the MCA as production of electronic or print media for circulation to the public confirming that broadcast media falls under this Act. As was shown above, audio has been specifically included in the definition. Section 27 of the MCA provides for the establishment of a Complaints Commission whose functions include adjudicating on disputes between the government and media, the public and the media and intra-media. Section 34 of the Act provides that any member of the public who has a complaint against a journalist or media enterprise can report to the Complaints Commission about the nature of the injury or damage suffered and the remedy sought. The report can be made either orally or in writing [21]. The second schedule of MCA provides for a code of conduct for journalists. Section 10 of the Journalists' Code of Conduct blocks them from publishing obscene or vulgar material unless such material has news value.

Children Act 8 of 2001

The Children Act 8 of 2001 exists to give effect to the CRC and the ACRWC in Kenya. Section 3 of the Act provides that the government shall take steps to the maximum of its financial ability to achieve the full realization of the rights of the child. Section 4(4) provides for child participation in matters affecting him or her and views of the child taken into account according to the age of the child. Section 9 of the Act provides that every child shall have the right to health care, which shall be the responsibility of the parents and the government. Section 10 of the Act establishes the National Council for Children's Services (herein NCCS) whose functions include the full implementation of Kenya's international obligations pertaining children's rights as well as planning and supervision of public aware programs on the welfare of children.

The Implications of Adult Content Exposure to Children

With a national Acquired Immune-Deficiency Syndrome (AIDs) prevalence of 7.8% in members of

the population aged between fifteen and forty nine years [22] a low level of condom use in persons aged between fifteen and sixty four year olds who are sexually active [23] and the rise of teenage pregnancy in the country [24] one might think that the government of Kenya would implement all available mechanisms to promote public health. However, an increasing number of studies show that media broadcasting of sexually explicit programs in Kenya warrants considerable concern.

Several theories are proposed to explain how and why sexually explicit media may adversely affect children's behavior. Strasburger argues that frequent exposure to sexually explicit media may affect children's self-perceptions [25]. In one study, two thirds of sexually experienced adolescents in a three year study of more than two thousand (12-17 year olds) said that they wished they had waited longer before engaging in sexual intercourse for the first time and revealed that exposure to sexual media was positively associated with regret among adolescents.

In another study, teenage girls said they wanted to be 'in love' before they had sex, yet broadcast media portrays confusing messages of what 'being in love' is. Iannotta also found that 12-14 year olds exposed to high levels of sexual media were more likely to engage in sexual activity within the next two years than were young people of the same age who were not exposed to the same content [26]. In short, the media act as a kind of super-peer that exerts pressure on children to begin engaging in sexual behavior prematurely and makes this behavior seem normative.

Signorelli explains the 'cultivation hypothesis' which argues that children's views are altered by the media content they consume gradually [27]. He argues that children who are exposed to sexually explicit content often think that everyone is 'doing it' except them, leading them to engage in such behavior. He says such children often overestimate the number of their peers who are engaging in sexual intercourse.

Many other researchers confirm the negative effects sexually explicit media has on children. Brown and L'Engle carried out a study on nine hundred and sixty seven 7th-8th graders for a two year period [28]. The study found that early exposure to television disseminating sexual content increased the likelihood of the children engaging in sexual intercourse or oral sex [29]. Delgado, Austin, Rich and Bikhani carried out a study of seven hundred and fifty four 7-18 year olds for five years [30]. They found that children who watch and listen to adult-targeted television and radio increased the risk of intercourse prior to maturity by 33% for every hour viewed at a young age [31]. Hennessy, Bleakey, Fishbein and Jordan carried out a study of five hundred and six 14-19 year olds for 2 years and

discovered similarly that exposure of children to sexual television and music predicted sexual intercourse initiation [32].

CONCLUSIONS

As examined above, Kenya's laws define a child as a person below the age of 18 years, whose best interests are paramount. Although the media has the freedom of expression and dissemination of information, the right is not absolute. As seen in this article, there are numerous laws providing for the regulation of broadcast media in Kenya with two bodies being responsible for that. There also exist parallel-public-complaints systems where one can complain: the Media Council or the Communications Authority of Kenya. There is also evidence of various regulatory laws that protect a child from adult content regardless of the state in Kenya by the time of this study. The findings prove that younger children may be frightened and psychologically harmed by sexually explicit images and sounds, whereas older children often imitate what they see on television or hear on radio. This could expose them to risks such as teenage pregnancy, teenage abortions, sexually transmitted diseases and low self-esteem. It is therefore needful that the Kenyan government and members of the community work hand in hand to protect children from harmful broadcast content.

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