IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZNIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 27860 OF 2024

(CORAM: MANYANDA, J., AGATHO, J., AND RUMISHA, J.)

PAUL KISABO.....PETITIONER

VERSUS

MINISTER OF INFORMATION, COMMUNICATION AND INFORMATION TECHNOLOGY.....1ST RESPONDENT

TANZANIA COMMUNICATIONS REGULATORY AUTHORITY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Date of last order: 14.03.2024
Date of Judgement: 03.05.2024

AGATHO, J.:

This case presents several novel issues of regulation of the cyberspace in Tanzania especially the allegation of restriction of access to a popular audio social media platform called Clubhouse. The Petitioner complains that the Respondents in particular, the 2nd Respondent in her capacity as the regulator and controller of Tanzania's cyberspace, has restricted access to and availability of Clubhouse. The Respondents have categorically denied the allegations.

The Petitioner branded himself as a self-confessed regular user of Clubhouse. He claims that the denial of access to Clubhouse is an infringement of his fundamental constitutional rights enlisted in the Constitution of the United Republic of Tanzania of 1977 as amended (herein cited a CURT), and under various international treaties and conventions ratified by Tanzania.

The rights and duties which he alleges to have been infringed upon include the right

to freedom of opinion and expression of his ideas; the right to seek, receive and, or disseminate information regardless of national boundaries; the right to receive information irrespective of borders; the right to freely and peaceably associate and cooperate with other persons and to express views publicly; the right not to have his rights infringed upon by others and the right to enjoy fundamental human rights and to enjoy the benefits accruing from the fulfilment by every person of this duty to society. The Petitioner like other citizens has the duty to observe and abide by the Constitution and the laws of the United Republic of Tanzania.

The Petitioner averred in paragraph five of his affidavit that the 2nd Respondent has placed limitations on the accessibility of Clubhouse such that the only way it can be accessed in Tanzania is by using Virtual Private Networks hereinafter VPNs. We have noted that the issue of VPN though peripheral to the case at hand, has taken considerable time of the parties in their submissions. The VPN enables Internet users to access content or websites that are otherwise not available on public networks. The VPN issue is not central because the Petitioner has not alleged that the 2nd Respondent is not regulating the use of VPN. We thus decline to be bogged into the VPN discussion. Moreover, what the Respondents are disputing is the allegation that the 2nd Respondent has blocked access to the Clubhouse in Tanzania. The Petitioner has alleged that the Clubhouse can be accessed via VPN. He does not want to do so because he knows the use of VPN in Tanzania requires registration. Therefore, the Respondents' lengthy submission on the regulation of VPN in Tanzania is superfluous as there is no dispute about the said regulation and its purpose. We thus do not see any relevance in making a detailed analysis of this issue of VPN.

The Petitioner claims that Clubhouse, a popular social audio platform; is a valuable informative communication tool in his daily life. Since it permits live one on one interactions and permits reviews of recorded conversations; the Petitioner says the conversations exchanged have been helpful to him to understand matters of national and

international importance.

It was his allegation that he had been left confused with the Government's restriction on access to the Clubhouse. Having regard to the benefits derived by himself, the Respondents, and other Tanzanians on the use of such media it irked and prompted him to knock at the door of this Court seeking redress. He has decided to invoke the assistance of the Court to unravel the alleged mystery of continued control of access and use of Clubhouse. The Petitioner is asking this Court to grant several reliefs hoping to unlock his restricted fundamental human rights. These are:

1. Declaration that the ongoing restrictions on the availability of the social audio platform Clubhouse violate Article 18(1); 18(2); 20(1); 26(1)[29(1) and 29(5) of the Constitution of the United Republic of Tanzania of 1977 as amended (herein cited as CURT);
2. Declaration that the ongoing restrictions on access to Clubhouse without VPN is violative of provisions of various international treaties more particularly, the Universal Declaration of Human Rights (UDHR) Article 19; International Covenant on Civil and Political Rights (ICCPR) Article 19, and the African Charter on Human and Peoples' Rights (ACHPR) Article 9;
3. Declaration that the Petitioner and similarly situated Tanzanian citizens have constitutional rights to unrestricted access to the social audio platform Clubhouse;
4. Declaration that the Petitioner and similarly situated Tanzanian citizens have rights under international law and treaties to unrestricted access to the social audio platform Clubhouse;
5. Interim orders that the Respondents provide and facilitate unrestricted access to the social audio platform Clubhouse while the case progresses; and
6. Orders that the Respondents provide, facilitate, and continue to provide, unrestricted access to the social audio platform Clubhouse from the date of judgment.

The Respondents on their side have denied any wrongdoing. They have refuted the allegation of restricting the Clubhouse. They have also argued that they do not own the Clubhouse. They cannot therefore tell if it is restricted. In the end, they invited the court to dismiss the petition for want of evidence and merit.

Before delving into the issues for determination, it is worth stating that the parties were under legal representation. Whereas Mr John Seka, learned counsel, appeared for the Petitioner, Pauline Fridoline Mdendemi, State Attorney stood for the Respondents. We appreciate the industrious work done by the parties' learned counsel. The Petition was heard by way of written submissions.

Turning to the issues, the parties agree the following to be the issues for determination in this petition:

a) Whether the Government of Tanzania uses the social audio platform Clubhouse and for what?

b) Whether access to Clubhouse is a fundamental right of the Petitioner?

c) Whether the Second Respondent has restricted access and availability of Clubhouse in Tanzania;

d) Whether the aforementioned restrictions [if any] are justifiable

e) To what reliefs are parties entitled.

To begin with the first issue; whether the Government of the United Republic of Tanzania uses the Clubhouse, the parties have divergent views on this point. The Petitioner was **surprised that** the Respondents have denied the existence of an official government platform within Clubhouse to necessitate the formulation of this question as an issue for determination. As per paragraph 4 of the Counter Affidavit of Dr Philip Haule Filikunjombe, the Respondents have denied the Clubhouse as an official communication platform of the Government. The Petitioner

contended that the Government of Tanzania has an official presence on Clubhouse through the page of the Chief Government Spokesperson at the following link: **https://www.clubhouse.com/house/msemaji-mkuu-wa-serikali.** This has been resisted by the Respondents.

The Petitioner, as can be discerned from paragraph 4 of his Affidavit, paragraphs 5, 6 and 7 of the Rejoinder Affidavit and Annex CH 01 and CH 02, it is his view that the Government of Tanzania not only officially announced the establishment of its Clubhouse page but has actively used the said page to communicate with the public about various government initiatives. It is demonstrated through the links appended to paragraph 7 of the Rejoinder Affidavit and Annex CH 02; how various executives of the government of Tanzania have relied on Clubhouse to disseminate information to the public.

Undenied by the Respondents, the Petitioner submitted that the Office of the Chief Government Spokesperson is an instrumental office within the setup of the First Respondent tasked with the responsibility of passing on profiling the good image of the Government of Tanzania in the eyes of the Republic. The Petitioner also submitted that by establishing and using the Clubhouse page of the Chief Government Spokesperson; the Government of Tanzania through the First Respondent was undertaking the following mandates outlined in the Constitution of Tanzania, 1977:

a) Being accountable to the people under Article 8[1][c];

b) Reporting to the public because sovereignty resides in the people, and it is from the people that the Government through this Constitution shall derive all its power and authority – Article 8[1][a];

c) Updating the public of its primary objective of promoting the welfare of the people [Article 8[1][b]; and,

d) Enhancing the citizens right to be informed at all times of various important events of life and activities of the people and also of issues of importance to the society – Article 18[2]

In paragraph 4 of the affidavit in support of the petition, the Petitioner averred that the Government through the office of the Chief Government Spokesperson uses Clubhouse to engage with other Tanzanians on various programmes and projects implemented by the Government of the United Republic of Tanzania. However, the Respondents have denied that the Government of the United Republic of Tanzania maintains a Clubhouse page as one of its official communication Platforms. They underlined the official communication platform. The Petitioner rejoined by attaching additional evidence in his Rejoinder Affidavit by way of Annexure CH 01 and CH 02. What do these annextures contain? Annexture CH1 is the Press Release "*Taarifa kwa Vyombo vya Habari*" by Mr Gerson Msigwa, the then Chief Government Spokesperson dated 25th February 2023 informing the public that his Office will start using Clubhouse to engage the public through the said forum via channel "Maelezo News" and forum called "*Msemaji Mkuu wa Serikali*." Besides that, the Press Release, the Petitioner attached other photographs of Ministers with captions on what they will discuss in the Clubhouse. The latter's insignia is seen in every photo. It was the Respondents' submission that the said annexture CH01 was just information to the public that it will engage the public into various debates and discussions through the Clubhouse. The said annexture was never a notice to the public that the Clubhouse platform would be an official platform for Government Communications. The government was merely trying to reach out to wider society.

But what stunned the Petitioner was the clear rejection of the Respondents' witness Dr Philip Haule Filikunjombe in paragraph 4 of his counter affidavit that the Government of the United Republic of Tanzania has official platforms for communicating with the public for which Clubhouse is not part of them. Whether this was a blatant lie or not we looked closely at

Annexture CH 01 and noted that it clearly confirms that the Government uses Clubhouse to communicate with the public. Whether that is an official communication channel is a different story that will unfold shortly.

Nevertheless, it suffices to point out here that Section 5 of the Media Services Act, Act No.12 of 2016 establishes the Director of Information Services who shall be appointed by the President of the URT. Section 5(2)(a) of the Act states further that the said Director shall be the Chief Government Spokesperson. Section 5(2)(b) of the same Act designates him as a principal advisor to the government in all matters related to strategic communication, publication of news and the function of the media industry.

In our scrutiny, we then turned to Section 3 of the Media Services Act which defines electronic media as a "mode of communication of content to the public by television, radio, video, cinema, e-newspaper or by any other electronic means and devices including **social media**, **applications**, and any other related means". (Emphasis is ours). Neither party told the court through what media or under which law the government official communications is prescribed. In a bid to understand the government official communications to the public, we consulted the e-Government Act, Act No. 10 of 2019 regulating e-Government services. Of particular interest was Sections 27 and 28(d) of that Act. Section 27 provides for recognition of e-Government Services. It adds that without prejudice to any other written law, the Government institution may provide services in electronic form. It is our view that the government communication with the public is one of such services.

Section 28(d) of the Act states that: a government institution shall, for proper delivery of e-Government Services – (d) use appropriate channels and languages that enable citizens to access government services based on available technologies. This too cements the view that government services including the supply of information on strategic projects and others are part included in the provision of the cited statute.

From the two laws cited, the Media Services Act and the e-Government Act, it can

safely be stated that the Government can communicate with the public via electronic means including social media such as the Clubhouse. The same is lawful as per the e-Government Act and will be regarded as official communication. Considering the above law, although the issue of government using the Clubhouse has divided the parties, it is our conclusion that the government of the United Republic of Tanzania through the Office of Chief Government Spokesperson indeed uses the Clubhouse.

While the Petitioner alleges that the government is using audio social media Clubhouse to reach out to Tanzanians, the Respondents have unsuccessfully denied such allegation. That is because the evidence given shows that like other social media platforms, the government is using the Clubhouse. The Government Spokesperson as well as the Minister of Information, Communication and Information Technology and others use the Clubhouse. We again do not think that it would be illegal for the Government to use the Clubhouse or other social media considering that the e-Government Act has legalised the use of electronic means for the delivery of public service. The Respondents' denial is thus unfounded. In the end, we find that the government is indeed using the Clubhouse to communicate with the citizens. However, the government's use of the Clubhouse as a communication channel may be informal for there is no evidence given that there is a law or instrument sanctioning its use as an official communication means for the Government. Despite that, the first issue is thus answered in the affirmative because the question was whether the Government of Tanzania uses the Clubhouse. It was not the issue of the same being formal or informal communication channel.

Turning to the 2nd issue whether access to the Clubhouse is a fundamental right of the Petitioner, this too divided the Petitioner and the Respondents**.** Through his petition the Petitioner asserted that he has fundamental rights under the Constitution of the United Republic of Tanzania and at international law to access Clubhouse. The Respondents have conceded that the rights exist. But they are not absolute. It is to this

quest we now revert.

To appreciate the existence of the fundamental right; a better understanding of Clubhouse is needed. According to Paragraph 2(a) of the petition and paragraph 2 of the affidavit in support of the petition; Clubhouse is an audio-based social media app that allows people everywhere to talk, tell stories, develop ideas, deepen friendships, and meet interesting new people around the world. The Petitioner stated that he relies on it to share and receive information. He particularly states that he has immensely benefited in the past in receiving updates of various information through the page of the Chief Government Spokesperson of the government of the United Republic of Tanzania.

Since Clubhouse is used by the Petitioner to receive and disseminate information is there a fundamental right to access it? To answer the question aforementioned; one needs to revisit the Constitution of Tanzania; 1977, particularly, Article 18[1] and 18[2] of the Constitution. Under the official Swahili version of the Constitution; Article 18[1] provides thus:

> ***Bila ya kuathiri sheria za nchi, kila mtu yuko huru kuwa na maoni yoyote na kutoa nje mawazo yake, na kutafuta, kupokea na kutoa habari na dhana zozote kupitia chombo chochote bila ya kujali mipaka ya nchi, na pia ana uhuru wa mawasiliano yake kutoingiliwa kati.***

From the above quotation, it is undisputed that unless he is restricted by laws of the country, the Petitioner has 3 distinct fundamental rights under Article 18[1] that is to say, he has:

a) Freedom of opinion and expression of his ideas;

b) Right to seek, receive and, or disseminate information regardless of national boundaries;

c) Freedom to communicate without interference from his communication.

Likewise, a quick glance of Article 18[2] reveals that the Constitution of Tanzania provides for the right to receive information. The constitution says:

> ***Kila raia anayo haki ya kupewa taarifa wakati wote kuhusu matukio mbalimbali nchini na duniani kote ambayo ni muhimu kwa maisha na shughuli za wananchi, na pia juu ya masuala muhimu kwa jamii.***

From the above provision, one can easily notice that every citizen of Tanzania has the following distinct rights:

a) The right to be informed at all times of national and international events that are important to the life and activities of the people and

b) The right to be informed at all times of important issues of the community.

The rights under Article 18[1] and 18[2] of the Constitution of Tanzania, 1977 are also provided for under the Universal Declaration of Human Rights, hereinafter, the UDHR, the International Covenant on Civil and Political Rights, hereinafter, the ICCPR, and the African Charter on Human and Peoples' Rights, hereinafter, the ACPHR.

Under the UDHR, Article 9 provides thus:

> ***Everyone has the right to freedom of opinion and expression" and that "this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.***

Under the ICCPR, Article 19[2] provides thus:

> ***Everyone shall have the right of freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of***

art, or through any other media of his choice.

Similarly, under the ACHPR, Article 19 provides thus: -

> ***Every individual shall have the right to receive information and [e]very individual shall have the right to express and disseminate his opinions within the law.***

It is thus explicit that the above provisions of the CURT and those of UDHR, ICCPR and ACHPR all recognise that people [including the Petitioner] have fundamental rights to receive seek and disseminate information without restrictions subject only to the law of the relevant state.

The Petitioner's counsel submitted that, applying the law to the rights of the Petitioner and having regard to his claimed reliance on the use of Clubhouse and mindful of the fact that the Respondents have not stated anywhere in their evidence that Clubhouse operations in Tanzania are currently restricted, we are of the view that there is a distinction between access to the Clubhouse as a fundamental right and its alleged restriction. Thus, the Petitioner's claim that he has fundamental rights under the CURT and under UDHR, ICCPR and ACPHR to seek, receive and disseminate information; ideas and opinion through the use of Clubhouse is quite different from the restriction to access alleged by the Respondents. Nevertheless, the rights are subject to lawful restrictions.

This issue should not detain us much. It is evident that access to the Clubhouse as Internet based application that enable citizens including the Petitioner to access information and enabling him to exercise his freedom of expression is a fundamental right. This is based on the **functional equivalence principle** that the rights enjoyed in the real world are also enjoyed in the cyberspace. Several legal instruments have touched upon these rights such as **the African Union Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019**; and **the Council of Europe Guide to Human**

Rights and Digital Rights for the Internet Users. They state that digital rights are the fundamental rights and freedoms enjoyed on the Internet. We are saying so because Article 18 of the CURT grants such right regardless of technology environment. In other words, the provisions of the CURT are **technology neutral**.

The aforesaid right is equally recognised in international conventions (UDR; ICCPR; and ACHPR). The access to the Clubhouse is part and parcel of exercising of human rights. That means the government has an obligation to support the availability of the Internet and the Clubhouse and other applications in the country. That is why there is the TCRA Act (imposing obligation on the regulator to ensure that there is communication, interconnection, and interoperability); the Universal Communication Service Access Fund (UCSAF), the Electronic and Postal Communications Act (EPOCA) and its regulations too must support communication availability, interconnection, and interoperability. In addition, the government by virtue of Article 18 of the CURT is barred from unduly restrictions, throttling, or blocking of communication apps, platforms, networks such as Internet access, and social media including the Clubhouse.

We are mindful of the fact that these fundamental rights and freedoms are not without limits. This Court held so in **Raymond Paul Kanegene and Another v. The Attorney General,** Consolidated Misc. Civil Cause No. 15 of 2019 and No. 5 of 2020 [2020] TZHC 4032 (26 November 2020) at page 15; **Julius Francis Ndyanabo v. Attorney General** [2004] TLR 14. The fundamental rights and freedom can legitimately and under the three-step test be restricted. That is the limitations are lawful, with legitimate purpose, and necessary and proportionate to the purpose sought to be achieved in democratic society . The fundamental rights are thus subject to limitations as stated in Articles 29(5) and 30(a) of the CURT, that the limitation must be provided for by the law, necessary, and proportionate. They should aim at protecting the freedom and rights of others, security, morality, public interest and common interest of the society.

To illustrate further, if the Clubhouse is used for sharing prohibited content as prescribed under the Cybercrimes Act, Act No. 14 of 2015, Electronic and Postal Communications (Online Content) Regulations 2020 as amended in 2022 or if the Clubhouse platform is used to facilitate infringement of intellectual property rights such as copyright it can be restricted through the law itself by making it an offence to violate intellectual property such as Section 24 of the Cybercrimes Act, or restriction through legally sanctioned technical means, that is code. For instance, Section 44 of the Copyright and Neighbouring Rights Act, Cap 218. This provision of the law allows the use of technical measures of protection known as digital right management system (DRM) to secure copyright in the digital environment.

Having so explained, we are inclined to answer the second issue that access to Clubhouse is a fundamental right of the Petitioner in the affirmative. However, such a right may be subject to limitations as stated above.

Advancing to the third issue, whether the restrictions on access and availability of Clubhouse in Tanzania by the 2nd Respondent are justifiable, it is ideal and logical that before answering this question, we inquire whether there is any restriction on access to the Clubhouse in Tanzania. The Petitioner herein complains through paragraphs 4, 5 and 6 of the affidavit in support of the petition and paragraphs 12 and 13 of the rejoinder affidavit that he is being restricted to access Clubhouse. Additionally, the Petitioner complained that the Second Respondent as the controller and the regulator of Tanzania cyberspace is responsible for restricting ordinary access and availability of Clubhouse. The Petitioner laments that the only possible way to access the Clubhouse is using a VPN.

In addition to his own personal experience and averments about the restrictions on access; the Petitioner has additionally relied on the report of a leading organisation that monitors internet shutdowns and restrictions, entitled, **Open Observatory of Network**

Interference [OONI] found at **https://explorer.ooni.org/findings/185407756401.**

The Petitioner claims that in this report attached as Annex CH 03 to the rejoinder Affidavit, it is stated categorically, that Tanzania, through the superintendence of the Second Respondent, has blocked Clubhouse as of 13.08.2023 and that restriction on access and availability is ongoing. The Court took trouble of examining the so called OONI report. Truly, the report is not conclusive as it suggests or suspects that in Tanzania Clubhouse is being blocked. The report is dated 13th August 2023, and it states that the **unconfirmed** blocking is still ongoing. The blocking is done at transport layer security (TLS). According to OONI which is a non-profit software project based in Rome, Italy, its report is based on a Web Connectivity test they conducted on www.clubhouse.com in Tanzania between 1st May 2023 to 23rd November 2023. It is important to note that the OONI graph has connectivity index indicators, whereas green shows that there is no blocking or Clubhouse is accessible, yellow shows that there are anomalies (presupposing possible blocking), and red shows that there is blocking. According to the OONI report itself the blocking was not confirmed. Moreover, the report did not tell who was blocking the Clubhouse. But the report used the words "Tanzania is blocking." That presupposes that the Government was blocking the Clubhouse access. A key point that should be underlined here is that the blocking is merely suspicion, and it has not been confirmed. This alone is enough to dismiss the allegations of blocking the Clubhouse in Tanzania.

Let us now turn to the credibility of the OONI report. The OONI report is questionable for several reasons. The Petitioner did not bring evidence from the maker of the report as there was no affidavit that was filed from that maker. Mr Kisabo (the Petitioner and sole witness) was neither the maker of the OONI nor did he explain how the report reached him. While we understand that the OONI report is an electronic document hence electronic evidence. We are also mindful of the fact that Section 18(2) of the Electronic Transactions Act [Cap. 442 R.E. 2022] (herein cited as ETA) was amended by

Section 29(2) of the Legal Sector Laws (Misc. Amendments), Act No. 8A of 2023 to allow admission of electronic evidence without testing its reliability at admission stage. However, that does not remove the requirement of its creditability to be tested at the stage of evaluating the evidence.

Moreover, the maker of the report ought to have tendered the report, or the witness tendering it should tell the court how he came across the document. Doing so could assist the Court in evaluating such evidence. Furthermore, it is unclear how reliable the OONI report is. We thus agree with the Respondents that the OONI report is not credible evidence and the blocking, if any, is a mere suspicion or speculation.

We note the Petitioner's lamentations on the Respondents' evasive denials and Dr Philip Haule Filikunjombe's averments in his counter affidavit prompting the Petitioner to brand them as lies. On the submission that the Respondents have evasively avoided directly admitting that Clubhouse is being restricted by them, the Petitioner claims that they avoided this important question by refusing to directly and affirmatively respond to specific averments in paragraphs 5 and 6 of the affidavit in support of the Petition. In response to these specific averments, the Respondents stated thus:

> ***That, the contents of paragraphs 1, 2, 3, 5, 6, 14 and 15 of the Petitioner's Affidavit are neither noted nor denied as they are facts best known by the deponent.***

Additionally, the Petitioner submitted that the Respondents through paragraph 7 of the counter affidavit are specifically denying restricting accessibility and availability of Clubhouse by transferring the blame to the Clubhouse Developer. The denial by the Respondents is couched in the following terms:

> ***That the contents of paragraph 7 of the Petitioner's Affidavit are denied. The Respondents state, the 2nd Respondent has not restricted the availability and***

accessibility of the Clubhouse social audio platform. It is further stated that it is Clubhouse Developer who can clarify the state of availability and accessibility of the Clubhouse in Tanzania.

Noticing the general denial by the 2nd Respondent, the Petitioner submitted that it is dawn upon the Court to disentangle the factual question as to whether the Second Respondent is responsible or not for the complained restrictions. It was his view that it will be resolved based on the following:

a) Credibility of the evidence and testimony of the parties' witnesses, that is Paul Kisabo for the Petitioner, Dr. Philip Haule Filikunjombe, for Respondents and;

b) The burden of proof and evidence of existing restrictions.

Regrettably, we differ with the Petitioner's view that his allegations can be said to have been proved on the balance of probability (as required by **Paulo Dickson Sanga's** case (supra) merely because the Respondents' responses were evasive or on the basis that Dr Philip Haule Filikunjombe has lied in his affidavit that the Government does not use the Clubhouse for official communications to the public. The latter issue is false because we held that the government is using the Clubhouse, but it is not conclusive that the same is an Official Communication platform. Therefore, there is no lie in the averment. Even if it would have been a lie that would have been perjury, an offence under the Penal Code [Cap. 16 R.E. 2022] but it would not have operated as proof of the Petitioner's claims. The issue of lies in testimony and credibility of a witness is elaborated herein below.

The credibility of the testimony of Dr Philip Haule Filikunjombe, the Respondents' sole witness is another point that attracted the attention of the Court. Mr Seka for the Petitioner submitted that this case was not tried orally and as such the court lacks the advantage of looking at the demeanour of the witnesses. Ms. Mdendemi, State Attorney rejected this submission arguing that it is an afterthought. However, notwithstanding the absence of evaluating the

demeanour, the Petitioner claims that one can easily look at the evidence of Dr Philip Haule Filikunjombe and notice that he had the propensity of not telling the truth. He went on attacking the testimony of the witness that he had deliberately lied through paragraph 4 of the counter affidavit that the government of Tanzania does not have a specific page in Clubhouse. Here we think the learned advocate is drawing the issue out of proportion. What Dr Filikunjombe averred in paragraph 4 of his counter affidavit is that the Government of the United Republic of Tanzania **has official communication platforms with the public for which the Clubhouse is not one of them**. We have discussed at length herein above the issue of whether Clubhouse is an official Government Communication platform or not. We will not repeat it here. We are compelled to reiterate that the government of Tanzania indeed uses the Clubhouse to communicate with the public. But it is inconclusive that the same is an official communication channel. Thus, we cannot conclude that Dr Philip Haule Filikunjombe lied on oath.

Following his attack on paragraph 4 of Dr Filikunjombe's counter affidavit that he has lied to the court the Petitioner prayed that the testimony of such witness be either disregarded or accorded less weight. The Respondents have contested such an allegation calling it an afterthought. This court found that the Government of Tanzania uses the Clubhouse. Moreover, such use is, arguably, not an official communication as it has not been formally sanctioned by the law. But as to the allegation of perjury that otherwise makes the affidavit defective, this was not raised before the court, it is a statement from the bar. However, it is appreciated that the Petitioner's counsel referred to several cases to persuade the Court to disregard Dr Filikunjombe's testimony.

It is imperative though to emphasise here that the Petitioner never sought leave of the court to summon Dr Filikunjombe to appear for cross examination. The regrets registered by the Petitioner cannot now be acted upon as they constitute an afterthought. Moreover, the demeanour of the witness is the monopoly of the trial court as held in **Ami Tanzania**

Limited v. Prosper Joseph Masele, Civil Appeal No. 159 of 2020 [2021] TZCA 668 (11 November 2021) on page 10. It is not for the parties but for the court do so, to access and draw conclusions on such a demeanour.

At this juncture we should state that the authorities cited by the Petitioner's counsel on the consequences of an affidavit containing lies are appreciated. These cases are Court of Appeal of Tanzania decisions such as **Damas Assesy & Another v. Raymond Mgonda Paula & Others** [2019] TZCA 648, **Jaliya Felix Rutaihwa v. Kalokora Bwesha & Another [**2021] TZCA 62 and **Bashir Ally v. Anyegile Andendekisye Mwamaluka & Others** [2024] TZCA 47. But they are hardly a consolation because we have been unable to conclude that Dr Filikunjombe lied in his counter affidavit.

Regarding the question of burden of proof on the alleged existing restriction of access to Clubhouse, this too is worth scrutiny. It is the law under Section 110 of the Evidence Act [Cap 6 R.E. 2019] that the burden of proof lies on a party fronting the allegation. For that matter the Petitioner in this case had a duty to prove the allegations contained in the petition. On standard of proof, it is now a crystallized legal position that in constitutional petitions like the present, the standard of proof is on a balance of probability as held by the Court of Appeal of Tanzania in **Attorney General v. Dickson Paulo Sanga** [2020] 1 TLR 61. The same was recently reiterated by this court in its decision in the case of **Joran Lwehabura Bashange v. Minister for Constitutional & Legal Affairs & Another** [2024] TZHC 774. From that settled position of the law, it is crystal that the burden of proof that there are restrictions introduced by the 2nd Respondent in accessing Clubhouse rested on the Petitioner.The Petitioner contended in vain that he has been able to discharge this burden, first, by demonstrating that he personally suffers these restrictions, and secondly by pinpointing that there exists no other explanation for lacking access of Clubhouse since once VPNs are deployed and used, Clubhouse immediately becomes available. This was never demonstrated to court rather it was the averment of the Petitioner.

Although the witness is entitled to credence as per **Goodluck Kyando v. Republic [2006] TLR 363** unless there is reason to doubt his credibility. We think it is unsafe to assume that the Clubhouse is accessible via VPN in the absence of a demonstration to assist the court to visualise and confirm the same. In lieu of our observation hereinabove the Petitioner has failed to discharge his burdens of proof. There is no proof that the Clubhouse is being blocked or restricted in Tanzania. The OONI report has failed to convince us that it is a conclusive proof of alleged restriction of Clubhouse in the country.

The Petitioner's view that Clubhouse is available upon using VPNs in Tanzania has neither been disputed nor contradicted by the Respondents, however, that does not prove the allegation in the absence of credible evidence. We have held that the restriction and access through VPN were not demonstrated. It is not clear whether that was left to the court on its own to test the accessibility of Clubhouse through VPN. This was a fit case for the Petitioner to demonstrate before the court how this technology works. What is more, is that even if it would have been demonstrated that does not prove that there are restrictions done by the 2nd Respondent. The Respondents have commented that VPNs used must be registered to address illegal content in cyberspace. We do not think that the fact that the Respondents have failed to properly respond to this allegation means that the same has been proved. The Petitioner has not demonstrated that Clubhouse is accessible only via VPN. Further to that, the court has declared the OONI report to be incredible as it is loaded with suspicion of restriction of Clubhouse. A case cannot be decided based on suspicion.

Having regard to the fact that the evidence of the Petitioner regarding ongoing restrictions has not been contradicted in any material respect is not a clear indicator that the Petitioner has discharged his burden of proof. Even in absence of contradictory evidence from the opponent (in this case the Respondents) this Court cannot abdicate its duty to subject evidence to analysis and consider its credibility. We have held that the

claimed restrictions have not been proved on the balance of probability. Therefore, the contention of failure of the Respondents to contradict the Petitioner's testimony on restrictions is without merit.

According to Mr Seka, Advocate for the Petitioner, the 2nd Respondent, being the regulator and controller of the cyberspace in Tanzania, has denied through paragraph 7 of the Counter affidavit without more; that they are not responsible for the ongoing restriction; raises a lot of eyebrows. He went on submitting that from the response in paragraph 7 of the counter affidavit, the Respondents are saying; we do not know who within Tanzania is restricting access to Clubhouse. In the views of the learned counsel, the Respondents are suggesting that the Petitioner and the court should ask the Clubhouse Developers why their platform is only available in Tanzania via VPNs. We think it crucial to pause a bit and explore this point in detail.

The Respondents' argument that they are not the developers of the Clubhouse social media app hence they are unable to restrict its accessibility and availability can only be given by a person who is not technologically savvy. The regulator (TCRA) with the resources it has including the IT experts with technical know-how as well as the technologies at their disposal, can throttle, degrade or block content, app, or network traffic from being accessible to anyone in Tanzanian's cyberspace. This is what is called regulation of technology through technology. Also known as code, it is the law as coined by Professor Lawrence Lessig in his groundbreaking book **Code and Other Laws of Cyberspace, 1999**. Code here means computer programs or software architecture that controls human behaviour. It is an architecture of technology that can disable certain human behaviours in cyberspace. The code that can block or disable the Internet user to access certain content or website, app, or traffic. That extends to the Clubhouse audio platform. There could be good and lawful intentions for blocking certain content, traffic, or Internet Protocol addresses. It may be part of traffic management for network security reasons or for disabling access to prohibited

content or for managing congestion in the network. These are legitimate reasons to block access to certain content, network, or website.

But for such traffic management practices or codes to operate legitimately, they must be authorised by the law. That is because it is the lawmaker through a law enacted that sanctions how the citizens' behaviours should be controlled in cyberspace like other spaces. The Respondents have submitted that the 2nd Respondent besides being not the developer of the Clubhouse audio platform, the latter platform is not registered, incorporated, or licensed to operate in Tanzania so the regulator could have a mandate to regulate it. The Respondents' State Attorney went on submitting that the 2nd Respondent has no power to either register it or issue licence to apps such as the Clubhouse. Hence it cannot be condemned to restrict its access. We are of the view that such an argument was unnecessary as it exposes the 2nd Respondent. That is because the TCRA regulates electronic communications in Tanzania. Its powers are not predicated on licensing or registration only. Besides the Tanzania Communications Regulatory Authority (TCRA) has power under EPOCA, Act No. 3 of 2010 to prosecute any provider of electronic communications service as well as those providing apps in Tanzania without a licence. From this it means if the app's service provider is unregistered or unlicenced then the TCRA can legitimately block its accessibility in Tanzania's cyberspace. But that will depend on the TCRA's motives to do so. For instance, the apps that enable people to commit crimes may legitimately be blocked by the TCRA.

It means that the TCRA and other law enforcement agencies may block or restrict access to certain websites, or apps that are used to facilitate the commission of crimes. For instance, under the Cybercrimes Act, the Copyright and Neighbouring Rights Act, Electronic and Postal Communications (Online Content) Regulations, 2020, GN 538 of 2020 as amended by GN No. 136 published on 18/03/2022, and the Computer Emergency Response Team (CERT) Regulations, 2023, GN No. 570 published on 18/03/2023 the TCRA and other law enforcement agencies and in some instances even Internet Service Providers may block or

restrict a website or app used for accessing content that violates intellectual property rights or enable access to prohibited content. Here we wanted to demonstrate that the TCRA is capable of blocking or restricting access to apps including Clubhouse. Despite this fact, the Petitioner has failed to prove that the 2nd Respondent indeed restricted access to the Clubhouse.

As stated above, it is a trite law under Section 110 of the Evidence Act [Cap 6 R.E. 2019] that he who alleges must prove. The OONI report (annexture CH 01 to the counter affidavit) has failed to convince this Court that the 2nd Respondent restricted the access to the Clubhouse in Tanzania. The Petitioner has failed to discharge his burden of proof. The OONI report is a manifestation of suspicion that cannot be used to find the 2nd Respondent liable for restriction of the Clubhouse. We expected that the Petitioner should lead evidence of some sort showing how the Clubhouse blocking is done. It is unfortunate that even the affidavit of the OONI experts detailing how the Clubhouse restriction is done by the 2nd Respondent was not tendered. The OONI report attached to the counter affidavit of the Petitioner is clear that it suggests that Tanzania has started blocking the access to Clubhouse. We have explained the index used. The OONI report has not confirmed the alleged restrictions. In the absence of evidence to prove restrictions of the Clubhouse in Tanzania, the allegations remain speculations if not suspicions that cannot be acted upon by this court.

The counsel for the Petitioner boasts that the Petitioner has discharged his burden of demonstrating that there exists some unexplainable restrictions within the Tanzania cyberspace on accessing Clubhouse, which suggests that the burden has now shifted to the Respondents; and more particularly, the 2nd Respondent as it has a moral and statutory duty as the regulator and controller of the cyberspace to explain to the Petitioner and the Court why there exists restrictions which impair fundamental rights of the Petitioners. We have disposed this issue that the petitioner has failed to prove the restrictions of the Clubhouse in Tanzania. It is thus unsubstantiated allegation.

While we concur with the submission that access to Clubhouse is a fundamental right of the Petitioner, we reiterate the position of the law that the access is not limitless. As above demonstrated the fundamental rights may lawfully and legitimately be curtailed in certain instances. It is also correct that the 2nd Respondent as the regulator and controller of the cyberspace has a constitutional duty to elaborately explain why Clubhouse is restricted in Tanzania. That constitutional duty is imposed to the 2nd Respondent by virtue of Article 13[3]; 29[1] and 29[5] of the Constitution of Tanzania.

Truly, under Article 13[3] the Respondents and more particularly, the 2nd Respondent as the state agency responsible for the regulation and control of cyberspace are under constitutional obligation to protect the civic rights, duties and interests of every person including protecting the fundamental rights of the Petitioner to access Clubhouse without restriction. The imposed duty under Article 13[3] is couched thus:

> ***The civic rights, duties and interests of every person and community shall be protected and determined by the courts of law or other state agencies established by or under the law.***

From the above quoted provision, it is uncontroversial that the 2nd Respondent, as a state agency established under the Tanzania Communications Regulatory Authority Act has a constitutional duty to protect amongst other things the civic rights, duties, and interests of the Petitioner to have unrestricted access to Clubhouse.

The Petitioner's counsel submitted that having regard to the provisions of article 13[3] of the Constitution; the Second Respondent should not have abdicated [as they appear to do through paragraph 7 of their counter affidavit] their constitutional duty to protect the fundamental rights of the Petitioner to access Clubhouse. It is submitted that since the 2nd Respondent was made aware through this Petition; that there exist restrictions on access to Clubhouse; they could have asked the Clubhouse developer as to this challenge

of access instead of directing the Petitioner to contact the developer of Clubhouse. In our view this is a strange submission. In the cases of this nature, the burden of proof can shift when the prima facie case is established. We have concluded that the Petitioner has failed to discharge is duty to prove his allegations.

The counsel for the Petitioner has without any evidence submitted that the conduct of the 1st Respondent leaves a lot to be desired in terms of their constitutional duty under article 29[5] of the CURT imposing a duty on every person to so conduct himself and his affairs in the manner that does not infringe upon the rights and freedoms of others or the public interest. It is our firm view that this submission is wanting and unfounded. It is also incompatible with the pleadings. The petition and the affidavit in support have cited the 1st Respondent as an example of institutions that use the Clubhouse.

The petitioner's counsel went on submitting that under the above constitutional duty, it is submitted that the Respondents' omission and inaction to establish who is behind Clubhouse's inaccessibility **amounts to conduct that infringes the rights and freedom of others including the Petitioner and the public interest that is protected under Article 29[5] of the CURT.** It is to be noticed that it is in the public interest that the Clubhouse Page of the Chief Government Spokesperson be accessible without restriction and or reliance on VPN with a view to ensuring ongoing government activities are known to the public. The Respondents through learned State Attorney, Ms. Mdendemi responded by submitting that the Respondents are not the owners of the Clubhouse. Hence, they cannot tell who is blocking or restricting access to Clubhouse. Much as the submission of counsel for Petitioner sounds as good advice, we are of the view that his submission is amiss. There is no evidence that the Petitioner engaged the TCRA to inquire into the alleged restrictions. There is not any letter tendered in Court from the Petitioner to TCRA seeking clarification or inquiry on the Clubhouse restriction. Consequently, these seem to be bare allegations devoid of any evidence that Clubhouse is

restricted in Tanzania.

The petitioner has spent quite a while on this issue trying to demonstrate that the 1st Respondent has a statutory and constitutional duty to ensure that Clubhouse is available and accessible without restriction. We insist that the right of access to any application is not without limitation. It is not absolute. There are instances where lawful restriction is allowed. The key issue in this case is whether the 2nd respondent has restricted access to the Clubhouse. It is our finding that the issue of restriction of Clubhouse has not been proved. Hence, this issue has been answered in the negative.

Whether Clubhouse access restriction is justifiable is the next issue for analysis. Although that is appealing, it may amount to starting with the wrong footing. Therefore, before responding to that issue, we must answer the critical question of whether in the first place, the Clubhouse is restricted in Tanzania. We already held that access to the Clubhouse is a fundamental right of the Petitioner. However, such right has limits. It can be restricted but the restriction must be justifiable under the provisions of Article 30[2] of the CURT. This article provides the following justification for derogations in the enjoyment of fundamental human rights:

> ***It is hereby declared that the provisions contained in this Part of this Constitution which set out the principles of rights, freedom and duties, does not render unlawful any existing law or prohibit the enactment of any law or the doing of any lawful act in accordance with such law for the purposes of (a) ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals; (b) ensuring the defence, public safety, public peace, public morality, public health,***

rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property of any other interests for the purposes of enhancing the public benefit; (c) ensuring the execution of a judgment or order of a court given or made in any civil or criminal matter; (d) protecting the reputation, rights and freedoms of others or the privacy of persons involved in any court proceedings, prohibiting the disclosure of confidential information or safeguarding the dignity, authority and independence of the courts; (e) imposing restrictions, supervising and controlling the formation, management and activities of private societies and organizations in the country; or (f) enabling any other thing to be done which promotes or preserves the national interest in general

As to the issue of whether the restrictions on access and availability of Clubhouse in Tanzania by the 2nd Respondent are justifiable, that too ought to be examined. However, this issue should not detain us much as we have observed and concluded based on evidence adduced by the parties that there were or there is no such restriction(s). Thus, analysing the said issue in detail is nothing but an academic exercise, which we decline to do.

The 1st Respondent has not admitted that it is responsible for the ongoing restriction of Clubhouse. It is incumbent upon the Petitioner proving his case than shifting the burden of proof to the Respondents. The latter will have a task of justifying the alleged restriction under Article 30[2] of the CURT. That the restrictions must pass a three-part test.

That is:

a) The restriction on the right must be prescribed by law.

b) The restriction on the right must pursue a legitimate aim and,

c) The restriction must be necessary and proportionate to achieve that legitimate aim [necessary in a democratic society].

Although this point is superfluous as we have concluded that there was no proof of Clubhouse restrictions in Tanzania, we briefly note that the access to Clubhouse is not absolute. It can be restricted provided the above three-step test is observed. That is also the position in the cases of **Raymond Paul Kanegene** (supra) and **Julius Ishengoma Ndyanabo** (supra).

Finally, after addressing all the issues in controversy we come to the reliefs sought. The Petitioner prays that he be granted the reliefs as contained in the petition. The Respondents on their part have asked the court to dismiss the petition for lacking merit.

For the reasons stated herein above the petition is unsuccessful despite some issues being answered in the affirmative. The key finding drawn is that the alleged restrictions of the Clubhouse in Tanzania lack evidence. For that sole reason and analysis given herein above the petition at hand fails. We thus proceed to dismiss it and order as follows:

a) For declaration that the Petitioner has the fundamental right to unrestricted access in the social audio platform Clubhouse in terms of Article 18[1]; 18[2]; 20[1]; 26[1]; 29[1] and 29[5] of the Constitution of the United Republic of Tanzania. We concluded that the petitioner has the right to access the Clubhouse with the limits set by the law. It is not a right or freedom without restrictions. But such restrictions if any must comply with Article 30(2) of the CURT. Overall, we partly declare that the petitioner has a fundamental right of access to the Clubhouse. However, that right is not absolute or unrestricted. Besides, there was no proof of restriction of access to the Clubhouse platform

in the United Republic of Tanzania.

b) As for declaration that the Petitioner has the fundamental right to unrestricted access in the social audio platform Clubhouse in terms of Article 19 of the Universal Declaration of Human Rights; Article 19 of the International Covenant on Civil and Political Rights [ICCPR] and article 9 of the African Charter on Human and Peoples' Rights [article 9]. The right available to the Petitioner is not without limits. The holding in (a) above applies here. There is no unrestricted access. There may be lawful and legitimate reasons for restriction.

c) On declaration that the ongoing restrictions on the availability of the social audio platform Clubhouse violates Article 18[1]; 18[2]; 20[1]; 26[1]; 29[1] and 29[5] of the Constitution of the United Republic of Tanzania. This relief is rejected too as there was no proof of restrictions.

d) Regarding the declaration that the ongoing restriction on access to Clubhouse violates Article 19 of the Universal Declaration of Human Rights; Article 19 of the International Covenant on Civil and Political Rights [ICCPR] and Article 9 of the African Charter on Human and Peoples' Rights [Article 9], as stated in (c) above the relief is declined as there is no proof of restriction of the Clubhouse in Tanzania. The platform can be legitimately restricted under the three-step test mentioned.

e) Another sought order is that the Respondents be ordered to provide, facilitate and continue to provide, unrestricted access to the social audio platform Clubhouse from the date of judgment. This relief is declined because the restrictions were not proved in the first place. Additionally, the access to the Clubhouse like other fundamental right is never absolute. The constitutional right to access the Clubhouse is subject to lawful and legitimate limitations. The access to the said platform may be restricted if there are legitimate reasons that

abide by the three-step test explained herein above. This Court cannot fix what is not broken.

f) Finally, on costs, this being a constitutional petition, it would be fair if each party bore its costs. We thus order each party shall bear its costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 3rd Day of May 2024.

F.K. MANYANDA

JUDGE

03/05/2024

U.J. AGATHO

JUDGE

03/05/2024

A. K. RUMISHA

JUDGE

03/05/2024