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Tekle Fisseha Mengistu and Katiba Institute and 1 Others vs. Global Witness and Kenya Human Rights Commission and 6 Others

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# Case summary and Outcome

The High Court of Kenya ruled that it had jurisdiction to hear a petition against Meta Platforms, Inc., the parent company of Facebook, concerning its alleged failure to regulate content on its Facebook platform, specifically by not removing inciteful, hateful, and dangerous material that had been posted. The case arose from claims that Meta’s content moderation practices and algorithms facilitated the spread of violent and hateful content, leading to serious harm in Kenya and other African countries. The Court rejected Meta’s attempt to strike out the petition, finding that the allegations involved fundamental constitutional rights and could not be dismissed based on disputed facts. It also held that the petition raised novel and complex legal questions about digital human rights, corporate accountability, and cross-border impacts of social media. Accordingly, the Court certified the case for hearing by a multi-judge bench.

# Facts

petition filed before the High Court of Kenya by Tekle Fisseha Mengistu, Abrham Meareg, and the Katiba Institute (collectively, the petitioners), challenging the conduct of Meta Platforms, Inc. (the respondent), the parent company of the social media platform Facebook. The petition concerns Meta’s alleged failure to regulate harmful content on Facebook, particularly in relation to Kenya and other African countries.

The first petitioner, Tekle Fisseha Mengistu, is an Ethiopian citizen. He claims that inciteful and dangerous content posted on Facebook led to violations against his family in Ethiopia, including the murder of his father, causing his family to flee to the United States. The content in question was allegedly moderated at Meta’s content moderation centres located in Nairobi, Kenya. [para 55]

The 2nd petitioner, Abrham Meareg, is also an Ethiopian citizen and a researcher who resides and works in Kenya. He claims to have been the target of hateful, inciteful, and dangerous comments were made against him while residing in Kenya, where he continues to reside. He is the son of Professor Meareg Amare, who was killed during the Tigray War after Facebook posts targeted him. Abrham Meareg **[believes](https://www.amnesty.org/en/latest/news/2023/10/meta-failure-contributed-to-abuses-against-tigray-ethiopia/)** these hostile Facebook posts contributed to his father's death.[[1]](#footnote-1)

The 3rd petitioner, Katiba Institute, is a Kenyan civil society organization[[2]](#footnote-2) that advocates for constitutionalism, the rule of law, and human rights in Kenya pursuant to Articles 22 and 23 of the Constitution of Kenya.

The petitioners bring this action in their individual capacities, on behalf of a class of Facebook users in Kenya and across Africa, and in the public interest. They assert that the High Court of Kenya has jurisdiction to hear the matter, citing Meta’s content moderation operations in Nairobi, its business activities in Kenya (including advertising), and the direct impact of Facebook content on users within the country.

The respondent, Meta Platforms, Inc., is a corporation incorporated in the State of Delaware, United States of America, and is the parent company of Facebook. The petitioners allege that Meta exercises control over content moderation policies and algorithms on the Facebook platform, including those affecting users in Kenya and the wider African region.

The cause of action is based on the alleged failure by Meta to uphold fundamental rights under the Constitution of Kenya, 2010, particularly those related to freedom of expression and protection from hate speech and incitement to violence.

The petitioners allege that Meta’s actions and omissions violated multiple provisions of the Kenyan Constitution by allowing and amplifying harmful content on Facebook during the Tigray conflict. They cite Article 33(2) on prohibited expression such as incitement to violence and hate speech, and other rights including the right to life (Article 26), dignity (Article 28), non-discrimination (Article 27), security (Article 29), privacy (Article 31), consumer protection (Article 46), and access to justice (Articles 47, 48, and 50).

# Decision Overview

The main issue before the Court in this ruling was not the substantive determination of the alleged human rights and freedom of expression violations, but rather two preliminary applications: the respondent's application seeking to strike out the petition for lack of jurisdiction and the petitioners' application seeking certification of the petition as raising substantial questions of law for hearing by a multi-judge bench.

The respondent, Meta, challenged the jurisdiction of the Kenyan High Court, arguing that the Kenyan Constitution does not apply extraterritorially and that the alleged harms occurred outside Kenya and involved non-Kenyan citizens.

Meta contended it had no employees or infrastructure in Kenya and that its third-party content moderation contract in the country ended in March 2023. They asserted the dispute was contractual, governed by Terms of Service with a US forum selection clause, and invoked the doctrine of constitutional avoidance, arguing the matter should be resolved contractually rather than as a constitutional case. They sought to strike out the petition entirely or, in the alternative, the claims of the non-Kenyan petitioners.

On the other part, the petitioners and interested parties argued that the case centred on violations of fundamental rights under the Kenyan Constitution, not merely a contractual dispute, and thus properly fell within the High Court’s jurisdiction under Article 165(3)(b). They asserted a sufficient nexus to Kenya, citing Meta’s algorithmic promotion of harmful content to Kenyan users, regional content moderation potentially conducted within Kenya, and the company’s advertising operations targeting the Kenyan market.

They opposed the application to strike out the petition, contending it relied on contested factual issues—particularly regarding Meta’s presence and operational links to Kenya—that should be resolved at trial. They maintained that the doctrine of constitutional avoidance was inapplicable where clear allegations of constitutional rights violations were raised, especially where the claims extended beyond the scope of Meta’s Terms of Service.

Furthermore, the petitioners argued the matter raised novel and complex legal questions involving digital human rights, algorithmic accountability, content moderation obligations, corporate responsibility for cross-border harms, and internet governance, warranting consideration by a multi-judge bench.

Consequently, the High Court of Kenya addressed two key applications in the matter: an application by Meta Platforms, Inc. to strike out the petition and an application by the petitioners seeking certification of substantial constitutional questions for referral to the Chief Justice under Article 165(4) of the Constitution.

On Meta's application to strike out the petition, the Court found that striking out is a draconian measure to be exercised sparingly and is distinct from a preliminary objection, which must be based on undisputed facts. The Court found that Meta's application involved strongly contested factual positions, particularly concerning the nexus between Meta's actions/omissions and Kenya, which could only be determined at trial.

The Court rejected Meta's argument that it lacked jurisdiction. It held that the alleged human rights violations, stemming from acts or omissions regarding content moderation potentially linked to Kenya and impacting fundamental rights, fell squarely within its jurisdiction under Article 165(3)(b).

The Court stated, "This in my view perfectly falls within the purview of this Court’s jurisdiction to consider under Article 165 (3) (b) of the Constitution". The Court noted that the Constitution binds every person within the Republic. [para 135]

The Court further found that the doctrine of constitutional avoidance did not oust its jurisdiction, as the petition raised fundamental human rights concerns requiring constitutional interpretation that went beyond a simple contractual dispute. It noted that constitutional avoidance does not apply when the constitutional violation is clear, there's no apparent alternative relief, or seeking non-constitutional resolution would be futile.

The Court concluded that the petition raised pertinent issues deserving of serious consideration and "warrants to be given a chance and be heard on merits as opposed to terminating it summarily at a preliminary level”. The Court thus dismissed Meta's application to strike out. [para 136 & 137]

On the petitioners' application for certification, the Court analysed the meaning of a "substantial question of law" based on precedent. Relying on guiding precedent, including the Indian case of *Sir Chunilal Mehta & Sons Ltd v. Century Spinning and Manufacturing Co. Ltd,* the Court emphasized that a “substantial question” is one of “general public importance” or one that “directly and substantially affects the rights of the parties” and is “not finally settled” or is “not free from difficulty”. Such a question affects the parties but transcends the case's circumstances, has a significant bearing on public interest, and involves a state of uncertainty in the law.

Applying these principles, the Court found that the petition raised several unsettled and weighty constitutional questions. It accepted the petitioners’ contention that there was a need to address, through judicial interpretation, the extent to which human rights protections under the Kenyan Constitution apply in the context of AI-driven decisions on social media platforms.

The Court further noted it is necessary to determine whether the deployment of AI systems by such platforms—particularly where they amplify harmful content—can lead to liability for human rights violations. It also recognized the need to examine whether such systems exhibit algorithmic bias or discrimination across different geographical regions, thereby implicating the constitutional guarantees of equality and non-discrimination.

Moreover, the Court held that it was essential to clarify the scope of its jurisdiction over digital decisions made within Kenya that may result in the violation of human rights in other jurisdictions, and conversely, whether decisions made abroad that affect rights within Kenya fall within its constitutional purview.

Accordingly, the Court found that these issues are of general public importance, transcending the parties' interests, and relate to the protection of fundamental rights and freedoms in the digital era. The Court concluded that *"The resolution of the present dispute will go a long way in chatting a clear jurisprudential path that ensures observance of human rights in a borderless digital community".* [para 149]

In furtherance thereof, the High Court of Kenya dismissed Meta's application to strike out the petition, confirming its jurisdiction to hear the case based on alleged fundamental rights violations with a sufficient nexus to Kenya, and finding that the application involved disputed facts unsuitable for summary dismissal.

 The Court granted the petitioners' application for certification, finding that the petition raised substantial questions of law concerning human rights in the digital age, social media platform accountability including regarding algorithmic harms and content moderation, which relates to the handling of expression, algorithmic bias, and the court's jurisdiction over cross-border digital harms.

The case was therefore certified for empanelment of a bench of not less than three judges by the Chief Justice to hear and determine the substantive issues.

# Decision Direction

**Mixed Outcome**

This ruling affirms the Kenyan High Court's jurisdiction to hear a major human rights case against a global social media platform concerning its alleged failures in content moderation and algorithmic amplification of harmful expression. While not directly expanding or contracting the scope of protected expression itself, the decision critically introduces and certifies novel and complex legal questions regarding the duty and liability of social media platforms for the human rights impacts of their algorithmic design and content moderation.

# Global perspective

**National standards, law or jurisprudence**

* D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another KLR 1, the High Court of Kenya.
* Philomena Mbete Mwilu v Director of Public Prosecution & 4 others [2018] eKLR, the High Court of Kenya.
* Kenya, Constitution of Kenya, 2010, art 33.

**Secondary Sources**

* Amnesty International, Ethiopia: [“Meta’s Failures Contributed to Abuses Against Tigrayan Community During Conflict in Northern Ethiopia”](https://www.amnesty.org/en/latest/news/2023/10/meta-failure-contributed-to-abuses-against-tigray-ethiopia/) (31 October 2023).
* Business & Human Rights Resource Centre, Kenya: [“Ethiopians & Kenyan Rights Groups Sue Meta for Posts Inciting Violence in Tigray War; Includes Company Comments”](https://www.business-humanrights.org/en/latest-news/kenya-ethiopians-kenyan-rights-groups-sue-meta-for-posts-inciting-violence-in-tigray-war-inc-co-comments/) (14 December 2022).
1. Amnesty International, Ethiopia: [“Meta’s Failures Contributed to Abuses Against Tigrayan Community During Conflict in Northern Ethiopia”](https://www.amnesty.org/en/latest/news/2023/10/meta-failure-contributed-to-abuses-against-tigray-ethiopia/) (31 October 2023) [↑](#footnote-ref-1)
2. Business & Human Rights Resource Centre, Kenya: [“Ethiopians & Kenyan Rights Groups Sue Meta for Posts Inciting Violence in Tigray War; Includes Company Comments”](https://www.business-humanrights.org/en/latest-news/kenya-ethiopians-kenyan-rights-groups-sue-meta-for-posts-inciting-violence-in-tigray-war-inc-co-comments/) (14 December 2022). [↑](#footnote-ref-2)