REPUBLIC OF KENYA

IN THE COMPETITION TRIBUNAL AT NAIROBI

CASE NO. CT / 003 OF 2023

BETWEEN

CORRUGATED SHEETS LIMITED.....APPELLANT

AND

COMPETITION AUTHORITY OF KENYA.....RESPONDENT

(Appeal from the Decision of the Respondent dated 17th of August 2023)

JUDGEMENT

A. BACKGROUND

1. This Appeal emanates from the decision issued by the Respondent on the 17th August, 2023 against the Appellant and 13 other manufacturers and distributors of steel products in Kenya.
2. The Respondent is a State Corporation established under the Act No 12 (hereinafter referred to as ("The Act") of Kenya. It has a wide mandate on matters competition law and policy under the Act. For purposes of this appeal, we shall focus on the Respondent's mandate to regulate market conduct in relation to restrictive trade practices of price fixing and output restriction under Section 21 of the Act.3
3. The Respondent states that sometime in August 2020, it initiated investigations in the steel manufacturing and distribution sector in Kenya. This was precipitated by market intelligence that market players in the sector were engaged in coordinated conduct contrary to Section 21 of the Act.4
4. The Respondent states that on or about 15th December 2021, the Respondent in accordance with Sections 31 and 32 of the Act as read with sections 118 and 118A of the Criminal Procedure Code (CAP 75) Laws of Kenya, conducted a search and seizure exercise. The exercise was simultaneously conducted in the premises of Doshi Group, Devki Steel Mills Limited, Tarmal Wire Products Limited, Mabati Rolling Mills Limited,Tononoka Rolling Mills, Abyssinia Group Industries, Apex Steel Limited and Insteel Limited.5
5. The Respondent states that in August 2020, it initiated investigations in the steel manufacturing and distribution sector in Kenya. This was based on market intelligence that manufacturers and distributors were engaging in coordinated conduct prohibited under Section 21 of the Act.[1]
6. After analysis of the documentation seized, the Respondent established that another 8 companies, including the Appellant, were also subjects of interest in the investigation.6 Based on a preliminary review of the material before it, the Respondent issued a Notice of

[1]Replying Affidavit sworn by Benson Nyagol dated 21st March, 2024 paragraph, 4

Investigation (NOI) and summons for appearance dated 11th of March 2022 to the Appellant.7

7. The Respondent stated that in accordance with sections 31 and 32 of the Act as read with sections 118 and 118A of the Criminal Procedure Code Cap 75 Laws of Kenya simultaneously conducted a search and seizure exercise at the premises of Doshi Group (Doshi), Devki Steel Mills Limited (Devki), Tarmal Wire Products Limited (Tarmal), Mabati Rolling Mills Limited (MRM), Tononoka Rolling Mills (Tononoka), Abyssinia Group Industries (Abyssinia), Apex Steel Limited (Apex) on 15th December, 2021 and Insteel Limited (Insteel) on 21st December, 2021.[2]
8. After initial analysis of the information obtained during the search, the Respondent established that other than the eight (8) companies, an additional six (6) companies namely Blue Nile Wire Products Limited (Blue Nile), Accurate Steel Mills Limited (Accurate), Jumbo Steel Mills Limited (Jumbo), Nail and Steel Products Limited, **Corrugated Sheets Limited (Corrugated)** and Brollo Kenya Limited (Brollo) were also subjects of interest in the investigation.[3]
9. Subsequently, the Respondent pursuant to Section 31(4) of the Act, conducted interviews with the Appellant's Representative on 5th April 2022 and after analysis and upon consideration of the pieces of evidence and the explanations given during the interview, the Respondent issued a Notice of Proposed Decision (NOPD) to the Appellant on 4th May, 2022 pursuant to section 34 of the Act. Moreover, the Respondent supplied the Appellant with the bundle of evidence it relied upon to come up with the NOPD and granted the Appellant 21 days to make written representations or make oral representations.[4]
10. The Responded stated that on 16th June, 2022 the Appellant, in response to the Respondent's NOPD submitted their written representations and further requested for an oral hearing. The Respondent pursuant to section 35 of the Act convened a hearing conference with the Appellant on 18th August, 2022.[5]
11. The Respondent posits that having considered the Appellant's written representations as well as the oral submissions together with other matters raised during the hearing conference, made a finding that the Appellant together with thirteen (13) steel manufacturers and distributors had engaged in price fixing contrary to sections 21(1) of the Act as read together with section 21(3)(a) of the Act and that the Appellant together with twelve (12) steel manufacturers and distributors had engaged in output restriction contrary to sections 21(1) of the Act as read together with section 21(3)(e) of the Act.[6]

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[2] Replying Affidavit sworn by Benson Nyagol dated 21st March, 2024 paragraph, 5
[3] Replying Affidavit sworn by Benson Nyagol dated 21st March, 2024 paragraph 6
[4] Replying Affidavit sworn by Benson Nyagol dated 21st March, 2024 paragraph 7 & 8.
[5] Replying Affidavit sworn by Benson Nyagol dated 21st March, 2024 paragraph 9
[6] Replying Affidavit sworn by Benson Nyagol dated 21st March, 2024 paragraph 12

12. Consequently, the Respondent issued to the Appellant the Determination Notice and the Statement of Reasons both dated 17th August, 2023 through an email dated 21st August, 2023 and hardcopies served on 23rd August, 2023.[7]
13. The Responded stated that in the course of the investigation and before the issuance of the determination, five out of the fourteen steel manufacturing and distribution firms invoked section 38 of the Act and entered into settlement negotiations with the Respondent.
14. The Respondent found that the Appellant's conduct;
    i. The Respondent restrained the Appellant from engaging in conduct that violates section 21(1) of the Act as read together with section 21(3) (a) of the Act.
    ii. The Respondent restrained the Appellant from engaging in future violations of the Act.
    iii. The Respondent directed the Appellant to implement the approved competition compliance programme within 12 months from the date of its approval whose implementation would be subjected to a compliance check by the Respondent.
    iv. The Respondent imposed a financial penalty of 0.5% of the Appellant's 2021 gross annual turnover in Kenya amounting to KES. 86,979,378.53.[8]

B. DOCUMENTS AND EVIDENCE

15. The Appellant filed the following documents before the Tribunal: -

Record of Appeal containing: -

a) Memorandum of Appeal dated 15th September 2023
b) Affidavit dated 15th September 2023
c) Notice of Appeal dated 30th August 2023
d) The Respondent's summary Decision dated 17th August 2023
e) The Respondent's Decision dated 17th August 2023
f) The Respondent's email correspondence dated 21st August 2023.
g) The Respondent's Notice of investigation and Summons for Appearance dated 11th March 2022
h) The Appellant's witness statements dated 25th March 2021
i) The Respondent's letter dated 29th March 2022
j) The Respondent's letter dated 13th April 2022
k) Price List for Doshi Limited shared by the Respondents through their email correspondences dated 30th May 2022
l) The Respondent's Bundle of Evidence
m) The Respondent's email correspondence dated 5th May 2022
n) The Respondent's email correspondence dated 24th may 2022
o) The Respondent's letter dated 4th May 2022

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[7] Replying Affidavit sworn by Benson Nyagol dated 21st March, 2024 paragraph 11
[8] Replying Affidavit sworn by Benson Nyagol dated 21st March, 2024 paragraph, 12

p) The Respondent's letter dated 24th May 2022
q) The Appellant's witness statements dated 5th April 2022
r) The Appellants submissions dated 16th June 2022
s) The Appellants submissions dated 17th October 2024
t) The Appellants list of Authorities dated 17th October 2024
u) The Notice of Appeal dated 30th August 2023
v) The Memorandum of Appeal dated 6th May 2025.
w) Notice of Appearance dated 27th September 2023
x) Supplementary Record of Appeal dated 21st November 2023
y) The Appellant's further submissions together with list of authorities dated 25th February 2025.
z) The Appellant's supplementary list of Authorities dated 26th February 2025.
aa) The Appellant's Submissions together with List of Authorities dated 10th June 2025
bb) Notice of withdrawal of Appeal dated 23rd July 2025
cc) Further Affidavit sworn by Suraj Pate on 28th June 2024
dd) Applicant's list and digest of authorities dated 3rd March 2025
ee) Affidavit of service sworn by Luciah Mutua on 26th March 2024
ff) The Notice of Motion dated 22nd May 2024 together with supporting Affidavit dated 22nd May attached thereto.

16. The Respondent filed the following documents:
    a) Notice of Appointment of Advocate dated 4th September 2023
    b) Replying Affidavit sworn by Benson Nyagol on 21st March 2024 and the annexures thereto.
    c) Replying Affidavit sworn by Benson Nyagol on 19th June 2024
    d) Respondent's written submissions together with list and Bundle of Authorities attached thereto dated 4th February 2025.
    e) Respondent's written Submissions dated 24th June 2025 together with the list digest and bundle of authorities attached thereto.
17. The matter came up for hearing on 23rd July 2025 when the parties' advocates highlighted their respective submissions. Mr. Inamdar Advocate was the lead Counsel in prosecuting the Applicant's case together with Mr. Onyony. The Respondent was represented by Mr. Nzuki Maurice.

C. APPELLANT'S CASE

18. Dissatisfied with the Decision of the Respondent, the Appellant appealed to this Tribunal against the whole decision. The Memorandum of Appeal dated 15th September 2023, outlined ten (10) broad grounds of appeal.[9] However, the Appellant condensed the 10 grounds into four (4) main issues: -

[9] Appellant's Written submissions dated 10th June 2025, page 5

(a) Whether the Respondent erred in law and in fact by failing to appreciate, that at all material times, it is bound by the mandatory provisions of Constitution of Kenya 2010, the Fair Administrative Action Act No. 14 of 2015, and the Evidence Act Cap 80 Laws of Kenya, in the discharge of its mandated under the Act No. 12 of 2010. **(Ground 2, 3, and 6)**

(b) Whether the Respondent erred by wrongly interpreting, misapplying, and misconstruing Sections 21(1) and 21(3) (a) of the Act No. 12 of 2010 and thus reached and or arrived at an erroneous conclusion, to the effect that the Appellant's conduct infringed Section 21(1) as read together with Section 21 (3) (a) of the Act. **(Ground 4 and Ground 8)**

(c) Whether the Respondent erred by wrongly interpreting, misapplying, and misconstruing Sections 21(1) and 21(3) (e) of the Act No. 12 of 2010 and thus reached and or arrived at an erroneous conclusion, to the effect that the Appellant's conduct infringed Section 21(1) as read together with Section 21 (3) (e) of the Act. **(Ground 5 and Ground 8)**

(d) Whether the Respondent erred in law and in fact by imposing a financial penalty upon the Appellant in the absence of any evidence to support such a finding, thus arbitrarily and unjustifiably infringing upon the Appellant's rights to property under Article 40 of the Constitution of Kenya 2010. **(Ground 7, 9 and 10)**

19. **On the first issue** as to whether the manner in which the Respondent conducted its investigations violated the right to right to fair hearing and fair administrative action under Articles 47 and 50(1) of the Constitution of Kenya 2010, and the Fair Administrative Action Act. The Appellant submitted that the Respondent erred in law by failing to appreciate, that at all material times, it is bound by the mandatory provisions of Constitution of Kenya 2010, the Fair Administrative Action Act No. 14 of 2015, and the Evidence Act Cap 80 Laws of Kenya, in the discharge of its mandated under the Act No. 12 of 2010. (Ground 2, 3, and 6 of the grounds on appeal)

20. Under this issue the Appellant highlighted key sub-issues for the consideration by the Honourable Tribunal:[10]

    (i) Whether the manner in which the Respondent conducted its investigations and proceedings, upon which the Decision was based, constitutes a violation of the Appellant's rights to fair hearing and fair administrative action under Articles 47 and 50(1) of the Constitution of Kenya 2010, and the Fair Administrative Action Act.

[10] Appellant's written submissions dated 10th June 2025, page 6.

(ii) Whether the Respondent erred in law and misdirected itself in failing to appreciate that it was bound by the mandatory provisions of the Evidence Act, in the conduct of the proceedings before it.

21. The Appellant avers that Respondent failed to furnish the Appellant with all the necessary documentation used by the Authority in arriving at its final decision, contrary to Section 4(3)(g) of the Fair Administrative Action Act.[11] The section provides that:

"Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action."

22. The Appellant further stated that through its letter dated 4th August 2022, it raised an objection to the reliance on electronic evidence by the Respondent without the production of a prescribed certificate of electronic evidence pursuant to the provisions of Section 33 (1) of the Act and Section 106(B) (4) of the Evidence Act.[12] The two statutes provide as follows:

Section 33(1) of the Act

"The Authority may receive in evidence any statement, document, information or matter that may in its opinion assist to deal effectively with an investigation conducted by it, but a statement, document, information or matter shall not be received in evidence unless it meets the requirements for admissibility in a Court of law."

Section 106 B (4) of the Evidence Act

"In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

[11] Appellant's Written submissions dated 10th June 2025, page 6.
[12] Appellant's Written Submissions dated 10th June 2025, page 7

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),

shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it."

23. The Appellant argues that at the time when this objection was raised, the Respondent took no steps to address the concerns raised by the Appellant by furnishing the Appellant with the documentation requested through the objection.[13]

24. The Appellant posits that the Respondent introduced new evidence through its Replying Affidavit dated 2nd March 2024, and that the said evidence included a certificate of electronic evidence and a digital forensic examination report from the Ethics and Anti-Corruption Commission, letters appointing forensic consultants and officials from the Ethics and Anti-Corruption Commission, together with an inventory list for both the companies searched and the items returned by the Respondent from all the companies searched, during investigation. According to the Appellant, these documents were in Respondent's custody at all material times prior to, during, and after the Appellant's hearing on the 18th of August 2022.[14]

25. The Appellant further argues that the Respondent furnished no sufficient reasons for refusing to serve the Appellant with the impugned evidence, despite the Appellant having been charged jointly together with the other undertakings of engaging in restrictive trade practices.

26. **The Appellant referred to the case of <u>Joseph Mbalu Mutava vs the Attorney General & Another (2014) eKLR</u> where the court was called upon to while examine the question of whether procedural fairness was applied by an administrative body in exercise of its mandate, stated that:**

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[13] Appellant's Written submissions dated 10th June 2025, page 7.
[14] Appellant's Written submissions dated 10th June 2025, page 8.

"While it is the position that the technical rules of evidence do not strictly apply to such situations it is imperative that any evidence relied upon by the commission should have been availed to the petitioner to comment upon..."

27. The Appellants states that the onus fell upon the Respondent to ensure that the Appellant was accorded a fair hearing under Article 50(1) of Constitution of Kenya 2010, but the Respondent failed to discharge this burden yet it had multiple opportunities to furnish the Appellant with this evidence, from the period it initiated its investigations in August 2020, to the date of the Applicant's hearing on the 18th of August 2022. Which opportunities the Respondent failed to utilize.[15]
28. From the foregoing, the Appellant submits that the Respondent flouted the mandatory provisions of section 4(3) (g) of the Fair Administrative Action Act and Article 50(1) of the Constitution of Kenya 2010.
29. It is the Appellant's submission that the Respondent not only denied the Appellant its right to a fair hearing and fair administrative action by failing to provide the Appellant with all the necessary materials relied upon by the Respondent in rendering its decision, but also in producing and placing reliance on evidence that failed to satisfy the mandatory requirements of Section 106 B (4) of the Evidence Act as read together with Section 33(1) of the Act. Appellant submits that in the absence of the said certificate the evidence submitted by the Respondent in the proceedings before it, was therefore shrouded in illegality and obtained un-procedurally.[16]
30. The Appellant relied on the Court of Appeal case of **John Lokitare Londinyo vs I.E.B.C and 2 others (2018) eKLR** held as follows: -

"It is at this juncture that the provisions of Section 106 B of the Evidence Act come into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do."

31. In addition, the Appellant also relied on the case of **Idris Abdi Abdullahi v Ahmed Bashane & 2 others (2018) eKLR** where the appellant states that it affirmed that the requirement to produce a certificate of electronic evidence was mandatory. The court held that the importance of the certificate is to **"confirm source, process, custody and delivery of the said electronic record before admission so as to pre – empt the manipulation of the record."**[17]

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[15] Appellant's Written submissions dated 10th June 2025, page 9.
[16] Appellant's Written submissions dated 10th June 2025, page 9
[17] Appellant's Written submissions dated 10th June 2025, page 41.

32. The Appellant posits that since a certificate of electronic evidence was never furnished with respect to the evidence submitted by the Respondent in the proceedings before it, it thus follows that the entire process leading to the delivery of the Respondent's decision was shrouded in illegality and the same should thus be set aside.
33. On the issue of delay of Respondent's Decision, the Appellant further avers that there was inordinate delay in the delivery of the Respondent's decision. According to the appellant, the impugned decision was belatedly delivered on the 21st of August 2023, just over one year after the conclusion of the hearing convened by the Respondent on the 18th of August 2022.
34. The Appellant states that no reasons were provided by the Respondent for the inordinate delay in the delivery of the decision. The Appellant made reference to the case of ***Republic v Attorney General & Another Ex Parte Ngeny (Ngeny Case)*** cited with approval in the case of **Republic v Disciplinary Tribunal of the Law Society of Kenya & another Ex-parte Bernard Muriuki Kanyiri [2018] eKLR,**[18] the High Court while faced with a similar situation held that: -

"it was important to determine the cause of delay and where no explanation is given, the delay will be deemed inordinate and an abuse of the constitutional rights of a Petitioner."

35. Furthermore, the Appellant submitted that even the justification provided by the Respondent that it was seeking the relevant approvals prior to the delivery of its decision is bereft of any form of evidentiary backing. Therefore, The Appellant argued that the prolonged delay was in contravention of Article 47 which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

36. **On the second issue,** as to whether the Respondent erred in law and misdirected itself in failing to appreciate that it was bound by the mandatory provisions of the Evidence Act, in the conduct of the proceedings before it. The Appellant highlighted the Respondent's contention that as an administrative body the proceedings before it, is governed by Article 47 of the Constitution and not Article 50 which governs judicial proceedings.[19]
37. The Appellant posits that the Respondent produced a certificate of electronic evidence and a report from the Ethics and Anti-Corruption Commission together with another report and certificate of electronic evidence from another forensic consultant. The Appellants posits that this was an attempt to overcome the objection raised by the Appellant through its letter dated 4th May 2022, concerning the absence of a certificate of electronic evidence contrary to section 106(B) (4) of the Evidence Act, Articles 3, 47 and 50(1) of the Constitution and section 33 of the Act. According to the Appellant, the Respondent decided to shift goal posts in order to overcome the objection previously raised by the Appellant and therefore filling the gaps in the appellate stage.

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[18] Appellant's Written submissions dated 10th June 2025, page 10.
[19] Appellant's Written submissions dated 10th June 2025, page 11.

38. The Appellant stated that Section 4(3)(g) FAA Act makes it mandatory for the administrator to provide a party with all the information, materials and evidence to be relied upon in making the decision or taking the administrative action whereas Article 47 provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. [20]
39. The Appellant relied on Article 50(1) which provides that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing or, if appropriate, another independent and impartial tribunal or body. Therefore, it was apparent that the duty to act fairly by an administrative entity as enshrined in the above provisions generally include the obligation to provide a party with all the evidence it intends to rely on, which duty, the Applicant avers is grounded in the principles of natural justice, particularly the right to be heard *(audi alteram partem)* and the right to a fair administrative action.[21]
40. According to the Appellant, the duty applies, without distinction, to any other body, even though they are not judicial, but are only administrative. To buttress this point, the Appellant's made reference to the courts decisions that emphasized that fair administrative action requires the disclosure of material evidence. In the case of **Re Pergamon Press Ltd [1971] Ch. 388 quoted with approval in the case of Republic v Truth, Justice and Reconciliation Commission & another Ex-Parte Beth Wambui Mugo [2016] eKLR**,[22] the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. The Court stated:
"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr. Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr. Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimize the significance of their task. They have to make a report which may have wide repercussions. They may, if they think

[20] Appellant's Written submissions dated 10th June 2025, page 12.
[21] Appellant's Written submissions dated 10th June 2025, page 12.
[22] Appellant's Written submissions dated 10th June 2025, page 12.

fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative."

41. The Appellant also relied on the case of **Republic vs. The Honourable Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004, cited with approval in the case of The Accounting Officer of the Kenya Ports Authority vs the Public Procurement Administrative Review Board and 2 others (2019) eKLR,[23] that court held that:**

> *"The term natural justice, the duty to act fairly and legitimate expectation have no such difference but are generally flexible and interchangeable depending on the circumstances and the context in which they are used. The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons, or bodies that are under a duty to act judicially. They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure."*

42. The Appellants stated that Section 33(1) of the Act in this respect makes it mandatory for the Respondent to receive in evidence any statement, document, information or matter that may in its opinion assist it to deal with an investigation conducted by it, only if it meets the requirements for admissibility in a court of law. Therefore, the fact that the Respondent sought the assistance of both the EACC and forensic consultants in the extraction and in the review of the electronic evidence obtained from various electronic gadgets seized from the undertakings that were subject of the Respondent's investigation must meet the admissibility test.
43. The Appellants stated that all the evidence produced by the Respondent in its own proceedings could only be acquired through the involvement of third parties whose assistance was sought by the Respondent, to not only extract the electronic evidence but also provide the Respondent with a report together with a certificate of electronic evidence showcasing the manner in which the said evidence was retrieved. The absence of a certificate it would not have been possible for the Respondent to confirm the source, process, custody and the delivery of the said electronic record. According to the appellant, the certificate is

[23] Appellant's Written submissions dated 10th June 2025, page 13.

therefore vital in the production of electronic evidence and the impugned evidence could not have been received by the Respondent in the absence of the said certificate.[24]

44. The Appellant submitted that the Respondent herein should be equally estopped from approbating and reprobating at the same time, on the essence of the production of a certificate of electronic evidence. In the Court of Appeal case of **Behan & Okero Advocates v National Bank of Kenya (2007) eKLR cited with approval in the case of Republic v Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteria [2010] eKLR,**[25] that a party should not be permitted to blow hot and cold at the same time.

45. Moreover, in the case of **Joseph Ngii v Republic (2020) eKLR**[26] the court while faced with a similar circumstance stated that:

> ***"As a matter of principle the appellant cannot be allowed to approbate and reprobate or change positions by turning around and saying the exact opposite of what he told the lower court and in the process use the appeal process as machinery to help him do so."***

46. The Appellant argued that it is ironical and misleading for the Respondent to shift goal posts at this juncture and urged the Tribunal to bar the Respondent from using it as a conduit to change its case on appeal after discovering the gaps present in its case.[27]

47. The Appellant submitted that all the certificates of electronic evidence and all **the new evidence referred to under paragraph 21 of this submissions,** marked as **BN 19(a – h), BN 20(a), BN 20(b), BN 21(a), BN 21(b), BN 23, BN 24(a – g), and BN 25,** in the Respondent's Replying Affidavit sworn on 21st March 2024, have only been introduced in the instant appeal in order to assist the Respondent to bridge the gaps of its case on appeal. [28] Moreover, the Appellant further submitted that paragraphs 27 – 35 of the Respondent's affidavit sworn on the 2nd March 2024, have equally been inserted by the Respondent in support of the additional evidence.[29]

48. The Appellant therefore urged the Tribunal that all the additional evidence and paragraphs introduced through the back door by the Respondent ought to be struck off from the record. Furthermore, the Appellant stated that the Tribunal misdirected itself in law and in fact by referencing and analyzing non-existent evidence namely **(BN 25(b))** while ignoring the actual certificates produced in the documents marked as **BN 19(b), BN 19(h), BN 21(b), and BN 23, in** the Respondent's Replying Affidavit sworn on the 2nd of March 2024, thus rendering its decision dated 3rd April 2025, legally untenable to that extent.[30]

49. **On the third issues,** as to whether the Respondent erred by wrongly interpreting, misapplying, and misconstruing Sections 21(1) and 21(3) (a) of the Act No. 12 of 2010 and thus reached and or arrived at an erroneous conclusion, to the effect that the Appellant's

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[24] Appellant's Written submissions dated 10th June 2025, page 14.
[25] Appellant's Written submissions dated 10th June 2025, page 14.
[26] Appellant's Written submissions dated 10th June 2025, page 14
[27] Appellant's Written submissions dated 10th June 2025, page 15
[28] Appellant's Written submissions dated 10th June 2025, page 15
[29] Appellant's Written submissions dated 10th June 2025, page 15
[30] Appellant's Written submissions dated 10th June 2025, page 16

conduct infringed Section 21(1) as read together with Section 21 (3) (a) of the Act. (Ground 4 and 8)

50. On this issue on price fixing, the Respondent's found the Appellant culpable of engaging in discussions with thirteen (13) other other manufacturers and distributors of steel, on the revision of sizes with the aim of increasing their gross profit margins in relation to the price of tubes as duly captured under Evidence 1.[31]
51. With respect to **Evidence 2**, the Respondent opined in its Decision, that the steel manufacturers and distributors were discussing the minimum tolerance to be adhered to by all even when the standard for water pipes allowed for a range within which the companies could operate in.[32]
52. The Appellant states that based on the assessment of the discussions held under Evidence 1 and 2, the Respondent held that the Appellant had participated in various meetings and or discussions on prices, margins, profits and or product specification such as weight and thickness outside the confines of set regulatory standards with the objective of directly and or indirectly fixing prices, profit margins and other terms of trade. On Evidence 2, the Appellant maintains the position that these were in fact discussions on standards as opposed to discussions directly or indirectly geared towards price fixing. [33]
53. The Appellant argued that the Respondent erred in concluding that this was a discussion on price fixing, since the Respondent failed to appreciate both the economic and the legal context within which the discussions under Evidence 2 were being held.
54. The Appellant posits that these discussions were held at a time when there existed no standards on plates and tubes, and that the said issue was still before the KEBS committee. It is also crucial to note that it was commonplace for parties to have discussions and to make proposals on standards which would later on be forwarded to the Kenya Association of Manufacturers (KAM) and subsequently to the Kenya Bureau of Standards (KEBS). As such it was only logical for parties to enter into discussions in an attempt to resolve the gap that was currently in the market.[34]
55. On Evidence 2, in relation to the minimum thickness for coils, it is the Appellant's submission that the need for this discussion was prompted by the influx of the substandard 0.9mm tubes, plates and coils within the market, prompting parties to come up with a strategy to curb the said influx by ensuring that each party complied with the proposed standard. Furthermore, the Appellant's contends that it was also vital based on the discussions captured under Evidence 2, for parties to reach an agreement on the proposed

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[31] Record of Appeal dated 15th, September, 2023 page 67-78
[32] Record of appeal dated 15th, September, 2023 page 69-73
[33] Appellant's Written submissions dated 10th June 2025, page 16.
[34] Record of Appeal 15th, September, 2023, Evidence 3 at page 75 – 76 and the Appellant's Statement dated 5th April 2022 at page 343 and 344 of the Record of Appeal)

thicknesses / tolerances that would be applicable to the coils, given that this was going to be the same standard that would be adopted for the plates and tubes.[35]

56. It is also the Appellant's submission that the Respondent erred by concluding that there already existed a standard which provided a range within which the parties could operate in, when in essence what is captured under Evidence 2 is a proposed standard on water pipes. The Appellant further argued that the mislabeling of the 0.9mm plates, was also another issue which the members of the tubes sub sector hoped to address by initiating the process for the development of standards for both the plates and tubes so as to create a level playing field for all parties within the market.[36]
57. According to the Appellant's, it was mendacious for the Respondent to conclude that members were indirectly engaging in price fixing when this was actually a discussion on the development of standards. It is the Appellant's view the discussions held under Evidence 2 were only necessitated by the prevailing commercial circumstances and the same was just a normal commercial response to the conditions prevailing within the market.[37]
58. Furthermore, the Appellant submitted that the Respondent erred by failing to consider both the economic and legal context for the discussions held under Evidence 2 by reaching the conclusion that parties were either directly or indirectly involved in discussions relating to price fixing. The Appellant posits further that the Respondent equally erred in failing to consider the Appellant's submissions in reference to the jurisprudence established by the European Commission touching on the assessment of conduct that is classified as a hardcore restriction or a per se prohibition. The European Commission held that in cases where an agreement is presumed to restrict competition by object, regard must be had to, the content of the provisions of the agreement, its objectives and the economic or legal context of the agreement.[38]
59. The Appellant relied on the joint cases of **CRAM & Reinzikh v Commission (1984) ECR 1679, Paragraph 26 and case 96 / 82 IAZ v Commission (1983) ECR 3369, paragraph 22, stated:**

    "that in order to determine whether an agreement has as its object the restriction of competition, it is not necessary to inquire whether the two contracting parties took the initiative in inserting any particular clause or to verify that the parties had a common interest at the time when the agreement was being concluded. It is rather a question of examining the aims pursued by the agreement as such, in light of the economic context in which the agreement is to be applied."

[35] Appellant's Written submissions dated 10th June 2025, page 17.
[36] Appellant's Written submissions dated 10th June 2025, page 17.
[37] Appellant's Written submissions dated 10th June 2025, page 17
[38] Appellant's Written submissions dated 10th June 2025, page 18

60. The Appellant also referred to the **European Court of Justice (ECJ) in case C – 211 / 22 – Super Bock Bebidas vs Autoridade da Concorrencia, the ECJ while faced with a similar circumstance held that:**

"The essential legal criterion for ascertaining whether an agreement, whether it is horizontal or vertical, involves a restriction of competition by object is a finding that the agreement in itself presents a sufficient degree of harm to competition.

In order to determine whether that criterion is met, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the actual conditions of the functioning and structure of the market or markets in question.

In addition, where the parties to the agreement rely on its procompetitive benefits, those effects must, as elements of the context of that agreement, be taken into account. Provided that they are demonstrated, relevant, intrinsic to the agreement concerned and sufficiently significant, those effects may give rise to reasonable doubts as to whether the agreement concerned caused a sufficient degree of harm to competition."

Furthermore, the court while assessing Article 101 (1) of the TFEU (Treaty for the Functioning of the European Union) which is similar to section 21(3) of the Act held that:

"...a restriction of competition by object may only be made after having determined that that agreement presents a sufficient degree of harm to competition, taking into account the nature of its terms, the objectives that it seeks to attain and the factors that characterize the economic and legal context of which it forms part"

61. The Appellant's submission that in order to determine whether an agreement presents a sufficient degree of harm to competition, a competition authority cannot simply look at the bottle's label. A formalistic approach should be supplanted by a substantive analysis, under which: (i) the content of the agreement's provisions, (ii) its objectives and (iii) the economic and legal context of which it forms a part are properly considered. According to the Appellant's submission, that the Respondent blatantly disregarded the Appellant's submissions in relation to the substantive analysis of hardcore restrictive trade practices by other jurisdictions such as the European Union and South Africa, despite this type of prohibitions having not been expounded upon under our jurisdiction.[39]
62. The Appellant posits that it neither engaged in the discussions captured under Evidence 2, nor was it privy or aware of the discussions held therein. As for the discussions captured under Evidence 1 the Appellant maintains the position that even though it was copied as a

[39] Appellant's Written submissions dated 10th June 2025, page 19

recipient of the said email, the fact still remains that the Appellant was neither privy nor did the Appellant understand the content of the discussions captured and it did not also reply or engage in the discussion captured under Evidence 1.The Appellant submitted that it was mendacious for the Respondent to assign the Appellant liability based upon the simple fact that the Appellant was copied in an email.

63. The Appellant maintains that it was not aware of the contents of the impugned email even though the same was received by the Appellant. Furthermore, it would be contrary to the doctrine of the presumption of innocence for the Respondent to infer awareness on the sole basis of the email having been sent to the Appellant.[40]
64. The Appellant relied on the case of **Court of Justice of the European Union in case C- 74 / 14 – Eturas UAB and others vs Lietuvos Respublikos Konkurencijos Taryba,** the court shed light on the level of evidence required to presume the existence of a concerted practice in a case involving technological collision. In this case the court had to establish whether in the circumstances of the case before it, the mere sending a message concerning a restriction of the discounts rate could constitute sufficient evidence to confirm or to raise a presumption that the economic operators participating in the E - TURAS booking system knew or ought to have known about that restriction, even though some of them claim not to have had any knowledge of the restriction, some did not change the actual discount rates applied and others did not sell any travel packages at all via the E – TURAS system during the relevant period.

    The court in this respect held that: ***"It is for the referring court to examine on the basis of the national rules governing the assessment of evidence and the standard of proof whether, in view of all the circumstances before it, the dispatch of a message, such as that at issue in the main proceedings, may constitute sufficient evidence to establish that the addressees of that message were aware of its content. The presumption of innocence precludes the referring court from considering that the mere dispatch of that message constitutes sufficient evidence to establish that its addressees ought to have been aware of its content."***

65. According to the Appellant, the Respondent imposed liability upon the Respondent only upon the basis that the Appellant was copied as a recipient of both the messages in Evidence 1 and Evidence 2. The Appellant argued that other than being copied to those emails (Under Evidence 1 and 2), there was no other evidence produced by the Respondent to further buttress the position that the Appellant tacitly assented to an anticompetitive action.[41]

The Appellant maintains that it was not privy to any of the discussions captured under Evidence 1 and 2. As such in the absence of additional evidence pointing to the Appellant's involvement

[40] Appellant's Written submissions dated 10th June 2025, page 20.
[41] Appellant's Written submissions dated 10th June 2025, page 20.

in the anticompetitive conduct, it was erroneous for the Respondent to impose liability upon the Appellant.

66. On this issue, the Appellant concluded by submitting that the onus fell upon the Respondent to establish that the Appellant through its conduct contravened the provisions of Sections 21(1) and Section 21 (3) (a) of the Act, which burden the Appellant avers the Respondent failed to discharge.
67. **On output restriction**, as to whether the Respondent erred by wrongly interpreting, misapplying, and misconstruing Sections 21(1) and 21(3) (e) of the Act No. 12 of 2010 and thus reached and or arrived at an erroneous conclusion, to the effect that the Appellant's conduct infringed Section 21(1) as read together with Section 21 (3) (e) of the Act. (Ground 5 and 8)
68. It is the Respondent's contention that the Appellant's conduct together with twelve (12) other players within the steel manufacturing and distribution sector constitutes an infringement of Section 21(1) as read together with Section 21(3) (e) of the Act.
69. According to the Respondent's the parties agreed to limit the importation of the less than 1mm finished plates and coils with the intention of creating an artificial shortage of the same within the market and ultimately increasing its price. The Respondent relied on Evidence 3 and corroborated by Evidence 45E which is an email of a Zen Gardens meeting, in which the Respondent observed that the subsequent decision by those present in the said meeting was to go slow on the importation of raw materials which demonstrates output restriction. Further, in Evidence 31, there was a Tononoka meeting which was meant for manufacturers to discuss price and how to reduce stock to ensure price stability as well as Evidence 39 on the discussion that there was excess material in the country and there was need to control price, material and stabilize the market. These pieces of evidence are corroborated by Evidence 28 and Evidence 50.[42]
70. The Appellant posits that with the exception of the discussions captured under Evidence 3, the Appellant was never mentioned as a participant in any of the discussions captured in the pieces of evidence alluded to. It is the Appellant's submission with respect to the discussions captured under Evidence 3, that the sole aim of the said discussions was to curb the influx of the 09mm plates and tubes in the market at significantly low price, which according to the members of the Kenya Association of Manufacturers (KAM) was hurting the businesses of the local manufacturers.[43]
71. According to the Appellant, the thinner plates and tubes were known to contribute highly to the collapse of buildings, and the association was therefore under the obligation to protect the final consumers from any harm. The Appellant thus avers that an assessment of the discussions captured under Evidence 3 clearly depicts that the aim or the objective of the said discussion was in truth not geared towards impeding competition. Therefore, the

[42] Record of Appeal dated 15th, September, 2023 page 75-76 and the Respondents Decision at paragraph 151.
[43] Appellant's Written submissions dated 10th June 2025, page 22

Respondent herein had the obligation to conduct an examination of the aims of the said discussions, in light of both the economic and legal context of the discussions held under Evidence 3.[44]

72. The Appellant argued that the Respondent only adopted a formalistic approach in making the determination the Appellant had engaged in conduct that was restrictive of competition by object. Appellant referred to the case **CRAM & Reizinkh (Supra) and the case of Super Bock Bebidas (Supra)** the European Court of Justice both stated: that in order to determine whether an agreement presents a sufficient degree of harm to competition, a competition authority cannot simply look at the bottle's label. A formalistic approach should be supplanted by a substantive analysis, under which: (i) the content of the agreement's provisions, (ii) its objectives and (iii) the economic and legal context of which it forms a part are properly considered.[45]
73. In addition, the Appellants stated that in the **Barry Brothers case (Supra),** the European Court of Justice while conducting an assessment of the BIDS agreement first took into consideration whether the agreement was by its object restrictive of competition. The court stated that: ***"To determine whether an agreement comes within the prohibition laid down in Article 81(1) EC, close regard must be paid to the wording of its provisions and to the objectives which it is intended to attain."***[46]
74. The Appellant maintains that it was erroneous for the Respondent to simply allege that the Appellant relied on the defense of legitimate objectives, without first establishing the fact that the nature of the discussions held under Evidence 3 was by its object restrictive of competition. The Appellant submitted that considering the aims and in light of the economic context within which the discussions captured under Evidence 3 were held, it is mendacious for the Respondent to conclude that the Appellant in collusion with the other members of the tubes sub sector participated in these discussions with the aim of distorting, preventing or lessening competition within the Kenyan market.
75. According to the Appellant, the Respondent failed to demonstrate that the Appellant colluded with other members of the tubes sub sector with the common intent to distort competition and that the nature of the agreement in Evidence 3 was such that it could only be plausibly be interpreted to this end. Therefore, the Respondent blatantly disregarded the Appellant's submissions in relation to the substantive analysis of hardcore restrictive trade practices by other jurisdictions such as the European Union and South Africa, despite this type of prohibitions having not been expounded upon under our jurisdiction.
76. The Appellant concluded by stating that the onus fell upon the Respondent to establish that the Appellant through its conduct contravened the provisions of Sections 21(1) and Section 21 (3) (e) of the Act, which burden the Appellant avers the Respondent failed to discharge.

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[44] Appellant's Written submissions dated 10th June 2025, page 22
[45] Appellant's Written submissions dated 10th June 2025, page 22
[46] Appellant's Written submissions dated 10th June 2025, page 23

D. Whether the Respondent erred in law and in fact by imposing a financial penalty upon the Appellant in the absence of any evidence to support such a finding, thus arbitrarily and unjustifiably infringing upon the Appellant's rights to property under Article 40 of the Constitution of Kenya 2010. (Ground 7, 9 and 10).

77. On the above issue, it is the Appellant's submitted that the Respondent erroneously imposed a financial penalty upon the Appellant in the absence of any evidence to support such a finding. It is the Appellant's submission that the Respondent herein had the obligation to assess the aims of the discussions captured under Evidence 2 and Evidence 3, in light of both the economic and the legal context of the said discussions.[47]
78. According to the Appellant, the Respondent only adopted a formalistic approach in making the determination that the Appellant had engaged in conduct that was restrictive of competition by object. Therefore, there was no substantive analysis conducted by the Respondent of the Appellant's conduct, to lead to the logical conclusion that the Appellant had colluded with other members of the tubes sub sector with the intent of distorting or preventing competition within the market.
79. The Appellant submitted that it was never privy to the discussions captured therein, and it was further erroneous for the Respondent to impose liability upon the Respondent on the basis of the mere receipt of an email and in the absence of any other evidence pointing to the Appellant's involvement in anti-competitive conduct. The Appellant thus submitted that the Respondent failed to discharge the burden that the Appellant had engaged in anti-competitive conduct, in the absence of any evidence pointing to the Appellant's involvement.
80. In addition, the Appellant avers that even the computation of the financial penalty imposed upon the Appellant is wholly unreasonable and unfair. To this end, the Appellant avers that the Respondent in computing the financial penalty erroneously considered the Appellant's gross annual turnover for the year 2021, which is Kshs. 17, 397, 029, 924/=[48]
81. The Appellant submitted that the said turnover comprised of revenue wholly unrelated to the products that were subject of the contravention, as prescribed under Clause 11 of the Competition Administrative Penalties and Settlement Guidelines. Clause 11 of the above Guidelines *states that the relevant turnover of an undertaking(s) is the preceding gross annual turnover of the products that are subject of the contravention. Furthermore, it provides that the preceding year for the restrictive trade practice shall be the year before the Authority reaches a decision.*
82. Furthermore, Clause 35 of the same Guidelines prescribes *that in determining the affected turnover, the Authority will have regard to the firm's audited financial statements.* It is the Appellant's submission that the Respondent ought to have considered the turnover of only the products that were subject of the contravention, in computing the penalty applicable.

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[47] Appellant's Written submissions dated 10th June 2025, page 24
[48] Appellant's Written submissions dated 10th June 2025, page 24

According to the Appellants, the product that was subject of the contravention in the Appellant's case was the tubes, as this was the product that the Appellant produced.

83. According to the Appellant, the penalty imposed upon the Appellant ought to have been calculated on the basis of the Appellant's turnover for the tubes mill division, which amounted to Kshs. 164, 953, 355/= and not the Appellant's gross annual turnover for the year 2021 which according to the Respondent's decision was Kshs. 17, 397, 029, 924/=
In conclusion, the Appellant invited the Tribunal to find that the Respondent erred in both fact and in law in making a finding and thus implored the Tribunal to set aside the Respondent's decision and to uphold the appeal.

84. The Appellant prayed for orders:
    a) The Appeal be allowed.
    b) That the Decision and orders of the Respondent delivered in 17th August 2023 be set aside.
    c) That in the alternative, thee decision and orders of the Respondent be varied in such manner this Tribunal deems appropriate.

C. RESPONDENT'S CASE.

85. In Response, the Respondent opposed the Appeal and submitted the following issues for determination by the Tribunal;
    I. Whether the manner in which the Respondent conducted its investigations and proceedings, upon which the Decision was based, constitutes a violation of the Appellant`s rights to fair hearing and fair administrative action under article 47 and 50(1) of the Constitution of Kenya, 2010 and the Fair Administrative Action Act.
    II. Whether the Respondent erred in law and misdirected itself in failing to appreciate that it was bound by the mandatory provisions of the Evidence Act in the conduct of the proceedings before it.
    III. Whether the Respondent erred by wrongly interpreting, misapplying and misconstruing sections 21(1) and 21(3) of the Act Cap 504 Laws of Kenya and thus erroneously found the Appellant in contravention of the sections.
    IV. Whether the Respondent lacked evidence to impose a financial penalty against the Appellant.

I. Whether the manner in which the Respondent conducted its investigations and proceedings, upon which the Decision was based, constitutes a violation of the Appellant`s rights to fair hearing and fair administrative action under article 47 and 50(1) of the Constitution of Kenya, 2010 and the Fair Administrative Action Act.

86. On this issue, the Respondent submitted that the Respondent is an administrative body established under section 7 of the Act. In carrying out its mandate, the Respondent is bound by not only its establishing statute but also the tenets of fair administrative action under Article 47 of the Constitution of Kenya, 2010 as well as the Fair Administrative Action Act. Accordingly, the Investigations by the Respondent is administrative in nature and the procedure to be applied is provided for under the Act. In carrying out investigations the Respondent is guided by the procedure set out in sections 31 to 36 of the Act.[49]
87. According to the Respondent, an investigation as described in sections 31 to 36 of the Act involves a thorough examination or inquiry into a matter to uncover facts, gather evidence and determine if there has been a violation of the Act. This process included the collection of analysis and the interpretation of information to ensure accountability. Therefore, in exercise of the investigative Authority the Respondent is obligated to ensure that its decision is arrived at in a lawful and procedural manner and in accordance with the provisions of the Constitution of Kenya and the Fair Administrative Actions Act.[50]
88. The Respondent opposed the assertion by the Appellant that the Respondent violated the right to fair hearing and fair administrative action. The Respondent maintained that it accorded the Appellant a fair hearing. The Respondent posits that it provided the Appellant with the evidence it had relied on and accorded it an opportunity to make written and oral submissions before making its Decision.
89. The Respondent cited examples where it accorded the Appellant a fair hearing. For instance, on 4th May 2022, the Respondent served the Appellant with an NOPD together with all evidence that has been relied on.[51] Subsequently, the Appellant responded through their written representations dated 16th June, 2022. Pursuant to section 35 of the Act, the Appellant made oral representations on 18th August. 2022.[52]
90. The Respondent submitted that it is an administrative body and not a judicial body. Under the Act and the Fair Administrative Action Act, parliament was mindful of the fact that where administrative action is likely to adversely affect the rights or fundamental freedoms of parties, adequate safeguards were required within the administrative system. The safeguards provided under the Act are sufficient to ensure a fair administrative action.[53]
91. The Respondent's relied on the case of ***Majid Al Futtaim Hypermarkets Limited v Competition Authority of Kenya & another [2021] eKLR*** where the Tribunal held:
"131. The said Notice duly notified the Appellant of the findings of the 1st Respondent and the orders it intended to make against the Appellant. The Notice called for evidence in rebuttal through written representations pursuant to section 34 (2) of the Act. The Appellant was also notified of its right to a hearing conference pursuant to section 35 of the Act.

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[49] The Respondent's written submissions dated 24th June, 2025 at page 5.
[50] The Respondent's written submissions dated 24th June, 2025 at page 5.
[51] Annexure BN-1 attached to the Replying affidavit dated 2nd March 2024.
[52] Replying Affidavit sworn by Benson Nyagol dated 21st March, 2024 paragraph 9.
[53] The Respondent's written submissions dated 24th June 2025 page 6.

133. We have reviewed the procedure laid down at paragraph 34 and 35 of the Act, and we are of the opinion that the 1st Respondent acted according to the laid down procedure. The Appellant is only invited to bring evidence in rebuttal through written representations and conference hearing only upon issuance of a proposed decision.

143. We have, hereinabove, determined that the Appellant was supplied with all the documents that the 1st Respondent relied upon. We have also determined that the 1st Respondent followed the correct procedure as laid down in part E of the Act. We find that process does not require formal rules for it to achieve the threshold of natural justice. The Appellant was given adequate notice to rebut the evidence against it. The Appellant was also given an opportunity to be heard."

92. The Respondent posits that the Appellant was at all material times accorded an opportunity to challenge the evidence relied on before the Respondent in accordance with the procedures set out in sections 31 to 36 of the Act and in accordance to the right to fair hearing under Article 50 (1) of the Constitution of Kenya.
93. The Respondent also relied on the case of ***Republic v Commission on Administrative Justice Ex parte Stephen Gathuita Mwangi [2017] eKLR*** where the Court noted that:-

"The fair hearing must be meaningful for it to meet the constitutional threshold. The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. ***This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice... Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case..."***

94. In response to the Appellant's assertions that the Respondent delayed in delivering its decision over one year after the in-person hearing, the Respondent submitted that at all times it was expeditious in delivering its decision. The Respondent further submitted that it started its investigations in 2020 and finalized the same in August 2022. The Respondent stated that months adding up to August 2023 when the Decision was delivered were spent in seeking relevant approvals.[54]
95. The Respondent added that, it was mindful of its obligations under Article 47 of the Constitution and accorded all companies including the Appellant administrative action which was expeditious, efficient, lawful, reasonable and procedurally fair. Furthermore, the

[54] The Respondent's written submissions dated 24th June 2025 page 7

Respondent stated that an appeal under section 40 of the Act is an opportunity for the Tribunal to examine the entire process leading to the decision that is the subject of the appeal with a view to ensure that the Appellant was accorded fair administrative action.[55]

ii. Whether the Respondent erred in law and misdirected itself in failing to appreciate that it was bound by the mandatory provisions of the Evidence Act in the conduct of the proceedings before it

96. On this issue, the Respondent submitted that it is an administrative body and that its investigations are administrative in nature and therefore the strict rules of evidence DO NOT apply. To substantiate this, the Respondent relies on the case of ***Joseph Mbalu Mutuva Vs Attorney General & another [2014] Eklr.*** where the court while examining the question of whether procedural fairness was applied by an administrative body in the exercise of its mandate, stated that:

"Judicial opinion is divided on the requirement for cross-examination of witnesses as forming part of procedural fairness. ***It is also not necessary that strict rules of evidence be applied in such inquiry."*** *It is generally agreed that a hearing can be in any form, whether by way of written representations or an oral hearing. However, when it comes to cross-examination of witnesses, a distinction is made between oral hearing and other forms of hearings in this regard. While it is the position that the technical rules of evidence do not strictly apply to such situations it is imperative that any evidence relied upon by the Commission should have been availed to the Petitioner to comment upon..."*

97. The Respondent also relied on ***Civil Appeal 52 of 2014 Judicial Service Commission Vs Mbalu Mutuva & another [2015] eKLR*** where the court held:

"All these cases including **Nancy Makhoha Baraza v Judicial Service Commission & 9 Others [2012] eKLR** *show that an investigation is not a trial and that cross-examination of witnesses, if called, is a rare occurrence. Unless the empowering law provides otherwise, the decision whether or not to summon witnesses and the decision to allow the cross-examination of witnesses, is at the sole discretion of the investigating body. Indeed, the technical rules of evidence with the attendant right to cross-examination do not form part of the natural justice rule or in this case, part of fair administrative action."*

98. The Respondent further submitted that its investigation process is guided by Article 47 of the Constitution of Kenya, 2010, sections 31 through 36 of the Act as read together with section 4 of the Fair Administrative Action Act, 2015 which prescribes the approach to be followed in an administrative process. According to the Respondent, the Appellant's

[55] The Respondent's written submissions dated 24th June 2025 page 7-8.

assertion that the certificate of electronic record is required under section 106B (4) of the Evidence Act in an administrative process lacks basis in law.

99. The Respondent further made reference of ***David Macharia & 2 others V Teachers Service Commission & another [2018] Eklr*** where *the court in arriving in its decision relied on the case of* ***Constantine Simati v Teachers Service Commission and another [2011] eKLR Azangalala J*** which stated that,

> *"An internal disciplinary tribunal is not held to the same standards as a court of law. This becomes even more critical where an employee seeks to enforce an acquittal in a criminal trial as evidence of innocence in internal disciplinary proceedings"*

100. According to the Respondent's the Act, segregates the administrative and adjudicative roles in the enforcement of the Act. Therefore, in discharging its functions, the Respondent is not required to act like a court, the adjudicative role is vested in the Tribunal, where a party if dissatisfied with a decision of the Respondent has an opportunity for an independent review of the decision to ensure that the decision was arrived at in a lawful and procedural manner.[56]

101. The Respondent's submitted that due to the *sui generis* nature of competition law and hence the legal framework governing the investigations and decision of the Respondent, strict adherence to the technical rules of the law of evidence is not applicable.[57]

102. The Respondent posits that the certificates of electronic evidence were annexed to its affidavit solely to confirm before the Tribunal that the certificates were issued by the Ethics and Anti-Corruption Commission Forensic Laboratory when evidence was processed but they were not a requirement in the administrative process. Therefore, the judicial procedure had no application in the investigation by the Respondent and providing the certificate at the Notice of Proposed Decision stage would have amounted to importing a judicial procedure in place of an administrative process which is clearly stipulated by statute.[58]

103. The Respondent further submitted that the Appellant insisting that the Respondent was bound by the judicial practice of admission of evidence the Appellant is inviting the Tribunal to import a judicial procedure in place of an administrative process which is clearly stipulated by statute. According to the Respondent's the Courts of law have previously pronounced themselves on the procedure and the obligation of administrative decision-making bodies in taking administrative action. For instance, the Respondent cited the case of ***Kenya Revenue Authority vs Menginya Salim Murgani, Civil Appeal No. 108 of 2009*** where the court stated that:

> *"There is ample authority that decision-making bodies other courts and bodies whose procedures are laid by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed." (Emphasis Ours)*

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[56] The Respondent's written submissions dated 24th June 2025 at page 9.
[57] The Respondent's written submissions dated 24th June 2025 at page 9-10.
[58] The Respondent's written submissions dated 24th June 2025 at page 10.

104. The Respondent's insists that it had laid out the proper interpretation of section 33(1) of the Act and submitted that based on that interpretation there was no obligation on the Respondent, a public administrative authority, to conduct its investigations like a court of law. The Respondent maintains that it has powers and procedures stipulated in statute, which it is obliged to objectively apply to determine facts and draw conclusions from them to provide the basis for its administrative action. According to the Respondent's, Parliament did not intend to import judicial procedures into an administrative process through section 33(1) of the Act.[59]

105. The Respondent concluded by submitting that the said section of the statute does not explicitly prescribe the stage of proceedings at which a certificate of electronic record must be produced or filed. Consequently, it would be unjust and contrary to the interests of justice to import a judicial procedure in an administrative process.

iii. Whether the Respondent erred by wrongly interpreting, misapplying and misconstruing sections 21(1) and 21(3) of the Act Cap 504 Laws of Kenya and thus erroneously found the Appellant in contravention of the sections

106. On this issue, the Respondent's submitted that the Appellant engaged in conduct that constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act. The Act prohibits any agreement, decision or concerted practices by undertakings whose object or effect is to prevent, distort or lessen competition of goods or services in Kenya unless it is exempt as provided under the Act. The Act also provides a non-exhaustive list of the prohibited agreements, decisions or concerted practices and in this matter, it was price fixing.

107. Price fixing is defined under clause 30 of the Consolidated Guidelines on Restrictive Trade Practices under the Act ("Consolidated Guidelines ") to include: fixing the price itself; or fixing an element of the price such as fixing a discount, setting percentage price increase; setting the permitted range of prices between competitors; setting the price of transport charges (such as fuel charges), credit interest rate terms and an agreement or arrangement to indirectly restrict price competition in some way such as recommended pricing.

108. The Respondent also highlighted the definition of concerted practice contained under section 2 of the Act as a co-operative or coordinated conduct between firms, achieved through direct or indirect contact, that replaced their independent action, but which did not amount to an agreement

109. Furthermore, Clause 12 of the Consolidated Guidelines further provides that a concerted practice can include any type of coordinated activity between undertakings which substitute practical co-operation between them for the risks presented by effective competition, and includes any practice which involves direct or indirect contact or communication between undertakings, the object or effect of which is either to influence the conduct of undertakings

[59] The Respondent's written submissions dated 24th June 2025 at page 10-11

on a market or to disclose the course of conduct which an undertaking has decided to adopt or is contemplating to adopt in circumstances where the disclosure would not have been made under normal conditions of competition.

110. Clause 27 of the Consolidated Guidelines, states that horizontal collusive agreements are subject to "object" assessment, that is, strict or per se scrutiny for which no defences can be asserted and that the Respondent will only consider the content and nature of the agreement and not the effect of the agreement.

111. The Respondent referred to the case of ***Case C-105/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission [2006] ECR I-8725***, where at paragraph 125 of the Judgement, the Court held that:

> *"That paragraph of the judgment under appeal reveals no error of law on the part of the Court of First Instance, since, for the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to prevent, restrict or distort competition within the common market...."*

112. The Respondent maintains that the price fixing conduct engaged in by the Appellant was a concerted practice as it was coordinated activity between the steel manufacturing and distribution companies which substituted practical co-operation between them for the risks presented by effective competition. Further, the Respondent submitted that there was direct contact and communication between the steel manufacturing and distribution companies, the object of which was either to influence the conduct of the companies on the market or to disclose the course of conduct which a company had decided to adopt or was contemplating to adopt in circumstances where the disclosure would not have been made under normal conditions of competition.[60]

113. The Respondent's posits that the companies were in competition and therefore in a horizontal relationship and thus their conduct amounted to a hard-core restriction that is by its very nature injurious to the proper functioning of competition and has no redeeming value whatsoever and that there was no need to prove the effect of the conduct.

114. The Respondent highlighted key evidence that it considers crucial in proving its case;

    a. Evidence 1: An email of 15th May 2018, sent by Mr. Neelkamal Shah of Nail & Steel Limited to Mr. Niral Savla of Tononoka and copied Brollo Kenya, Mr. Nilesh Doshi of Doshi, Prakash of MRM/Safal group, Mr. Murtaza of Tarmal, **Mr. Suraj of Corrugated (Appellant's Representative),** Mr. Kunal Gupta of Athi Steel, Mr. Devang of Devki Steel, Mr. Neil Nathwani of Apex and Prabu of MRM and Mr. Amarjit Singh of Accurate. The subject of the email was pricing. In the said email, Mr. Neelkamal Shah indicated that they had spoken the previous week and many sizes on the tube pricelist needed to be

[60] The Respondent's written submissions dated 24th June at page 12-13.

revised as their gross profit margin was low and, in some cases, negative for the 20*20*1, 25*25*1, 40*40*1.2 and 30*30*1.2. The email further indicated that for the 20*20*1 they were all left with KES 12 to KES 13 gross profit and on 25*25*1 about KES 15 per length of 6 meters. Mr. Niral Salva was tasked to look into it as they were all pushing huge tonnages but with no margin.[61]

b. An email sent on 24th September, 2018 by Nilesh Doshi of Doshi, to Niral Savla, of Tononoka and also Chairman of the Pipes and Tubes sub-sector in KAM. In copy were Neil Nathwani of Apex Group and also Chair of Hot Rolling sub-sector, Kishore Gangadharam of Insteel, Prakash Chauhan of Safal Group, Neelkamal Shah of Nail & Steel Limited, Suraj of Corrugated, Kunal Gupta of Athi Steel, Ketan Doshi of Brollo, Jateen Patel of Abyssinia, Kaushik Pandit of Devki, Murtaza Tarmal of Tarmal Wire Products Limited, Davinda Bhachu of Accurate, Devang of Devki and Bobby Johnson of Steel Makers Limited.[62]

c. An email sent on 24th September, 2018 by Nilesh Doshi of Doshi, to Niral Savla, of Tononoka and also Chairman of the Pipes and Tubes sub-sector in KAM. In copy were Neil Nathwani of Apex Group and also Chair of Hot Rolling sub-sector, Kishore Gangadharam of Insteel, Prakash Chauhan of Safal Group, Neelkamal Shah of Nail & Steel Limited, Suraj of Corrugated, Kunal Gupta of Athi Steel, Ketan Doshi of Brollo, Jateen Patel of Abyssinia, Kaushik Pandit of Devki, Murtaza Tarmal of Tarmal Wire Products Limited, Davinda Bhachu of Accurate, Devang of Devki and Bobby Johnson of Steel Makers Limited.[63]

115. The Respondent posits that it had established that the deliberations were for the purpose of seeking consensus on the thickness of coils to be imported by all. The Respondent further asserts that Evidence 2 demonstrated the existence of a standard on water pipes and that the steel manufacturers were discussing the minimum tolerance to be adhered to by all even when the existing standard allowed for a range.[64]
116. The Respondent argued that thickness/size and weight of coils and products have a direct correlation to the prices and/or margin of steel products and that the email was an invitation to the said companies to agree on importing similar sizes/thickness in order to have similar pricing strategies with the view of limiting competition. Further, the Respondent stated that where there is prescribed standard, it is incumbent on the regulated entities to comply with the standard and make unilateral and independent decisions on their tolerance levels as long

[61] Replying Affidavit sworn by Benson Nyagol dated 21st March, 2024 paragraph 13.1
[62] Replying Affidavit sworn by Benson Nyagol dated 21st March, 2024 paragraph 13.5
[63] Annexed to the Replying affidavit dated 19th June, 2024 and marked as BN-5 (Evidence 2) is a copy of the email dated 24th September, 2018
[64] Supra

as the same is within the standards. According to the Respondent, this has been established not to be the case in Evidence 2.[65]

117. The Respondent relied on the case of ***C-699/19 P Quanta Storage Inc vs European Commission,*** the Court (Fourth Chamber) found that the General Court was correct in upholding the Commission's reliance on emails in which the Appellant was copied to characterize its passive contribution to the conduct in question and that its participation was not dependent on the Appellant having had direct discussions with its competitors. The court held:

> *123. By the second part of its fourth ground of appeal, the appellant criticises the General Court for holding that the Commission had rightly considered, in the decision at issue, that the appellant's contribution, through its own conduct, to the infringement at issue was established by the fact that it had not publicly distanced itself from the unlawful conduct, whereas its participation consisted solely in being copied in internal Sony Optiarc emails referring to unlawful exchanges of information between competitors.*
>
> *124. In that regard, it should be borne in mind that, according to settled case-law, in order to establish that an undertaking has participated in a single and continuous infringement, the Commission must prove that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the substantive conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk (see, to that effect, judgment of 24 September 2020, Prysmian and Prysmian Cavi e Sistemi v Commission, C-601/18 P, EU:C:2020:751, paragraph 130 and the case-law cited).*
>
> *125. From that perspective, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery.* ***That complicity constitutes a passive mode of participation in the infringement which is capable of rendering the undertaking concerned liable.***[66]
>
> *128. Therefore, in the light of the case-law referred to in paragraphs 124 and 125 above,* ***the General Court correctly held that the Commission was entitled to rely on emails in which the appellant was copied in order to characterise its contribution to that infringement, since the characterisation of the appellant's passive participation in that***

[65] Annexed to the Replying affidavit dated 19th June, 2024 and marked as BN-5 is a copy of the email dated 24th September, 2018

[66] Judgment of 6 December 2012, Commission v Verhuizingen Coppens, C-441/11 P, EU:C:2012:778, paragraph 73.

infringement is not subject to the condition that it participated in direct discussions with its competitors.

118. The Respondent submitted that the Appellant contravened section 21(1) as read together with section 21(3)(a) of the Act and that there was no error with the decision of the Authority dated 17th August, 2023.

iv. Whether the Respondent lacked evidence to impose a financial penalty against the Appellant

119. On this issue, the Respondent avers that the determination of the financial penalty is provided for under the Act. Further, the Act supersedes the Consolidated Guidelines which the Appellant is relying on. Section 36 (d) of the Act provides that the Respondent may impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question. Therefore, according to the Respondent, the assertion by the Appellant that the calculation of the financial penalty should be based on the specific infringing product is misleading and therefore has no legal basis.[67]

120. In conclusion, the Respondent's submitted that it had illustrated that the Appellant engaged in conduct that constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act (price fixing) and that the Appellant was accorded fair hearing and fair administrative action and therefore invited the Tribunal to dismiss this appeal with cost and uphold its Decision dated 17th August, 2023.

D. ISSUES FOR DETERMINATION.

121. Having carefully examined the pleadings of the parties, the evidence presented before the Tribunal as well as the parties' written submissions, the following issues emerge for determination by the Tribunal;

i. Whether the Appellant was accorded a fair hearing pursuant to Article 47 and 50(1) of the Constitution of Kenya, 2010 and the Fair Administrative Action Act.

ii. Whether technical rules of evidence apply to the investigations carried out by the Respondent.

iii. Whether the Appellant engaged in conduct that constituted an infringement of section 21(1) of the Act as read together with section 21(3) (a) & (e) of the Act.

iv. Whether the Respondent complied with the law by imposing a financial penalty against the Appellant

v. Who bears the cost of this Appeal.

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[67] The Respondent's written submissions dated 24th June 2025 page 16

E. ANALYSIS AND DETERMINATION

i. Whether the Appellant was accorded a fair hearing pursuant to Article 47 and 50(1) of the Constitution of Kenya, 2010 and the Fair Administrative Action Act.

122. **First,** the Appellant submitted that the Respondent erred in law by failing to appreciate that at all material times, it is bound by the mandatory provisions of Constitution of Kenya 2010, the Fair Administrative Action Act No. 14 of 2015, and the Evidence Act Cap 80 Laws of Kenya, in the discharge of its mandated under the Act No. 12 of 2010.[68]

123. The Appellant avers that Respondent failed to furnish the Appellant with all the necessary documentation used by the Authority in arriving at its final decision, contrary to Section 4(3)(g) of the Fair Administrative Action Act, [69] which provides that:

> ***"Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–***
>
> ***(h) information, materials and evidence to be relied upon in making the decision or taking the administrative action."***

124. The Appellant further argues that the Respondent furnished no sufficient reasons for refusing to serve the Appellant with the impugned evidence, despite the Appellant having been charged jointly together with the other undertakings of engaging in restrictive trade practices.

125. **The Appellant referred to the case of <u>Joseph Mbalu Mutava vs the Attorney General & Another (2014) eKLR</u> where the court was called upon to while examine the question of whether procedural fairness was applied by an administrative body in exercise of its mandate, stated that:**

> ***"While it is the position that the technical rules of evidence do not strictly apply to such situations it is imperative that any evidence relied upon by the commission should have been availed to the petitioner to comment upon…"***

126. The appellants stated that the onus fell upon the Respondent to ensure that the Appellant was accorded a fair hearing under Article 50(1) of Constitution of Kenya 2010, but the Respondent failed to discharge this burden yet it had multiple opportunities to furnish the Appellant with this evidence, from the period it initiated its investigations in August 2020, to the date of the Applicant's hearing on the 18th of August 2022. Which opportunities the Respondent failed to utilize.

127. On the issue of delay of Respondent's Decision, the Appellant further avers that there was inordinate delay in the delivery of the Respondent's decision. According to the appellant, the impugned decision was belatedly delivered on the 21st of August 2023, just over one

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[68] Ground 2, 3, and 6 of the grounds on Appeal

[69] Appellant's Written Submissions dated 10th June 2025, page 6

year after the conclusion of the hearing convened by the Respondent on the 18th of August 2022.

128. The Appellant states that no reasons were provided by the Respondent for the inordinate delay in the delivery of the decision. The Appellant made reference to the case of ***Republic v Attorney General & Another Ex Parte Ngeny (Ngeny Case)*** cited with approval in the case of **Republic v Disciplinary Tribunal of the Law Society of Kenya & another Ex-parte Bernard Muriuki Kanyiri [2018] eKLR,** the High Court while faced with a similar situation held that: -

> ***"it was important to determine the cause of delay and where no explanation is given, the delay will be deemed inordinate and an abuse of the constitutional rights of a Petitioner."***

129. Furthermore, the Appellant submitted that even the justification provided by the Respondent that it was seeking the relevant approvals prior to the delivery of its decision is bereft of any form of evidentiary backing. Therefore, The Appellant argued that the prolonged delay was in contravention of Article 47 which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

130. From the foregoing, the Appellant submitted that the Respondent flouted the mandatory provisions of section 4(3) (g) of the Fair Administrative Action Act and Article 50(1) of the Constitution of Kenya 2010.

131. In response, the Respondent submitted that the Respondent is an administrative body established under section 7 of the Act. In carrying out its mandate, the Respondent is bound by not only its establishing statute but also the tenets of fair administrative action under Article 47 of the Constitution of Kenya, 2010 as well as the Fair Administrative Action Act. Accordingly, the Investigations by the Respondent is administrative in nature and the procedure to be applied is provided for under the Act. In addition, the Respondent stated that in carrying out investigations the Respondent is guided by the procedure set out in sections 31 to 36 of the Act.[70]

132. According to the Respondent, the investigation as described in sections 31 to 36 of the Act involves a thorough examination or inquiry into a matter to uncover facts, gather evidence and determine if there has been a violation of the Act. The process included the collection of analysis and the interpretation of information to ensure accountability. Therefore, in exercise of the investigative Authority the Respondent is obligated to ensure that its decision is arrived at in a lawful and procedural manner and in accordance with the provisions of the Constitution of Kenya and the Fair Administrative Actions Act.[71]

133. The Respondent opposed the assertion by the Appellant that the Respondent violated the right to fair hearing and fair administrative action. The Respondent maintained that it

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[70] The Respondent's written submissions dated 24th June 2025 page 5.
Replying Affidavit sworn by Benson Nyagol dated 21st March, 2024 paragraph, 4

[71] The Respondent's written submissions dated 24th June 2025 at page 5.

accorded the Appellant a fair hearing. The Respondent posits that it provided the Appellant with the evidence it had relied on and accorded it an opportunity to make written and oral submissions before making its decision.

134. The Respondent cited examples where it accorded the Appellant a fair hearing. For instance, on 4th May 2022, the Respondent served the Appellant with an NOPD together with all evidence that has been relied on. Subsequently, the Appellant responded through their written representations dated 16th June, 2022 and made oral representations on 18th August. 2022 pursuant to section 35 of the Act.[72]

135. The Respondent submitted that it is an administrative body and not a judicial body. Under the Act and the Fair Administrative Action Act, parliament was mindful of the fact that where administrative action is likely to adversely affect the rights or fundamental freedoms of parties. Thus, adequate safeguards were required within the administrative system. According to the Respondent's the safeguards provided under the Act are sufficient to ensure a fair administrative action.[73]

136. The Respondent's relied on the case of ***Majid Al Futtaim Hypermarkets Limited v Competition Authority of Kenya & another [2021] eKLR*** where the Tribunal held:

"131. The said Notice duly notified the Appellant of the findings of the 1st Respondent and the orders it intended to make against the Appellant. The Notice called for evidence in rebuttal through written representations pursuant to section 34 (2) of the Act. The Appellant was also notified of its right to a hearing conference pursuant to section 35 of the Act.

133. We have reviewed the procedure laid down at paragraph 34 and 35 of the Act, and we are of the opinion that the 1st Respondent acted according to the laid down procedure. The Appellant is only invited to bring evidence in rebuttal through written representations and conference hearing only upon issuance of a proposed decision.

143. We have, hereinabove, determined that the Appellant was supplied with all the documents that the 1st Respondent relied upon. We have also determined that the 1st Respondent followed the correct procedure as laid down in part E of the Act. We find that process does not require formal rules for it to achieve the threshold of natural justice. The Appellant was given adequate notice to rebut the evidence against it. The Appellant was also given an opportunity to be heard."

137. The Respondent posits that the Appellant was at all material times accorded an opportunity to challenge the evidence relied on before the Respondent in accordance with the procedures set out in sections 31 to 36 of the Act and in accordance to the right to fair hearing under article 50 (1) of the Constitution of Kenya.

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[72] The Respondent's written submissions dated 24th June 2025 at page3.

[73] The Respondent's written submissions dated 24th June 2025 at page 6.

138. The Respondent relied on the case of ***Republic v Commission on Administrative Justice Ex parte Stephen Gathuita Mwangi [2017] eKLR*** where the Court noted that:-

"The fair hearing must be meaningful for it to meet the constitutional threshold. The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. ***This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice... Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case...***"

139. In response to the Appellant's assertions that the Respondent delayed in delivering its decision over one year after the in-person hearing, the Respondent submitted that at all times it was expeditious in delivering its decision. The Respondent further submitted that it started its investigations in 2020 and finalized the same in August 2022. The Respondent stated that months adding up to August 2023 when the decision was delivered were spent in seeking relevant approvals.[74]

140. The Respondent added that, it was mindful of its obligations under Article 47 of the Constitution and accorded all companies including the Appellant administrative action which was expeditious, efficient, lawful, reasonable and procedurally fair. Furthermore, the Respondent stated that an appeal under section 40 of the Act is an opportunity for the Tribunal to examine the entire process leading to the decision that is the subject of the appeal with a view to ensure that the Appellant was accorded fair administrative action.[75]

141. The Appellant argues that at the time when this objection was raised, the Respondent took no steps to address the concerns raised by the Appellant by furnishing the Appellant with the documentation requested through the objection.[76]

142. It is our considered opinion that the Appellant was furnished with all the evidence prior to the hearing of the matter. Further, the NOPD is not a final decision but a preliminary finding which the Appellant is invited to rebut. In view of the foregoing, we are satisfied that the Appellant was provided with all the evidence before the hearing and was given an opportunity to interrogate the same before a final decision was made.

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[74] The Respondent's written submissions dated 24th June 2025 at page 7
[75] The Respondent's written submissions dated 24th June 2025 at page 7-8
[76] Appellant's Written Submissions dated 10th June 2025 page 7

II. Whether technical rules of evidence apply to the investigations carried out by the Respondent.

143. The Appellant further stated that through its letter dated 4th August 2022, it raised an objection to the reliance on electronic evidence by the Respondent without the production of a prescribed certificate of electronic evidence pursuant to the provisions of Section 33 (1) of the Act and Section 106(B) (4) of the Evidence Act.[77] which both provide as follows:
Section 33(1) of the Act

"The Authority may receive in evidence any statement, document, information or matter that may in its opinion assist to deal effectively with an investigation conducted by it, but a statement, document, information or matter shall not be received in evidence unless it meets the requirements for admissibility in a Court of law."

Section 106 B (4) of the Evidence Act

"In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;
(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d)purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),

shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it."

144. The Appellant posits that the Respondent introduced new evidence through its Replying Affidavit dated 21st March 2024, and that the said evidence included a certificate of electronic evidence and a digital forensic examination report from the Ethics and Anti-Corruption Commission, letters appointing forensic consultants and officials from the Ethics and Anti-Corruption Commission, together with an inventory list for both the companies searched and the items returned by the Respondent from all the companies searched, during investigation. According to the Appellant, these documents were in Respondent's custody

[77] Appellant's Written Submissions dated 10th June 2025, page 7

at all material times prior to, during, and after the Appellant's hearing on the 18th of August 2022.[78]

145. Secondly, the Appellant submitted that the Respondent relied on evidence that failed to satisfy the mandatory requirements of Section 106 B (4) of the Evidence Act as read together with Section 33(1) of the Act. Appellant submitted that in the absence of the said certificate the evidence provided by the Respondent in the proceedings before it, was therefore shrouded in illegality and obtained un-procedurally.[79]

146. The Appellant relied on the Court of Appeal case of **John Lokitare Londinyo vs I.E.B.C and 2 others (2018) eKLR** held as follows: -

"It is at this juncture that the provisions of Section 106 B of the Evidence Act come into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do."

147. In addition, the Appellant also relied on the case of **Idris Abdi Abdullahi v Ahmed Bashane & 2 others (2018) eKLR** where the appellant states that it affirmed that the requirement to produce a certificate of electronic evidence was mandatory. The court held that the importance of the certificate is to **"confirm source, process, custody and delivery of the said electronic record before admission so as to pre – empt the manipulation of the record."**

148. The Appellant posits that since a certificate of electronic evidence was never furnished with respect to the evidence submitted by the Respondent in the proceedings before it, it thus follows that the entire process leading to the delivery of the Respondent's decision was shrouded in illegality and the same should thus be set aside.

149. As to whether the Respondent erred in law and misdirected itself in failing to appreciate that it was bound by the mandatory provisions of the Evidence Act, in the conduct of the proceedings before it. The Appellant highlighted the Respondent's contention that as an administrative body the proceedings before it is governed by Article 47 of the Constitution and not Article 50 which governs judicial proceedings.

150. The Appellant posits that the Respondent produced a certificate of electronic evidence and a report from the Ethics and Anti-Corruption Commission together with another report and certificate of electronic evidence from another forensic consultant, in its efforts to overcome the objection raised by the Appellant through its letter dated 4th May 2022, concerning the absence of a certificate of electronic evidence contrary to section 106(B) (4) of the Evidence Act, Articles 3, 47 and 50(1) of the Constitution and section 33 of the Act.

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[78] Appellant's Written Submissions dated 10th June 2025, page 8

[79] Appellant's Written Submissions dated 10th June 2025, page 8

151. According to the Appellant, Respondent only decided to shift goal posts in order to overcome the objection previously raised by the Appellant and therefore filling the gaps present in its case on appeal.
152. The Appellant stated that Section 4(3)(g) FAA Act makes it mandatory for the administrator to provide a party with all the information, materials and evidence to be relied upon in making the decision or taking the administrative action whereas Article 47 provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
153. The Appellant relied on Article 50(1) which provides that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing or, if appropriate, another independent and impartial tribunal or body. Therefore, it was apparent that the duty to act fairly by an administrative entity as enshrined in the above provisions generally includes the obligation to provide a party with all the evidence it intends to rely on, which duty, the Applicant avers is grounded in the principles of natural justice, particularly the right to be heard *(audi alteram partem)* and the right to a fair administrative action.
154. According to the Appellant, the duty applies, without distinction, to any other body, even though they are not judicial, but are only administrative. To buttress this point, the Appellant's made reference to the courts decisions that emphasized that fair administrative action requires the disclosure of material evidence. In the case of **Re Pergamon Press Ltd [1971] Ch. 388 quoted with approval in the case of Republic v Truth, Justice and Reconciliation Commission & another Ex-Parte Beth Wambui Mugo [2016] eKLR**,[80] the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. The Court stated:

> ***"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr. Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other.He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr. Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimize the***

[80] Appellant's Written Submissions dated 10th June 2025, page 12

significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative."

155. The Appellant also relied on the case of **Republic vs. The Honourable Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004, cited with approval in the case of The Accounting Officer of the Kenya Ports Authority vs the Public Procurement Administrative Review Board and 2 others (2019) eKLR,[81] that court held that:**

"The term natural justice, the duty to act fairly and legitimate expectation have no such difference but are generally flexible and interchangeable depending on the circumstances and the context in which they are used. The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons, or bodies that are under a duty to act judicially. They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure."

156. The Appellants stated that Section 33(1) of the Act in this respect makes it mandatory for the Respondent to receive in evidence any statement, document, information or matter that may in its opinion assist it to deal with an investigation conducted by it, only if it meets the requirements for admissibility in a court of law. Therefore, the fact that the Respondent sought the assistance of both the EACC and forensic consultants in the extraction and in the review of the electronic evidence obtained from various electronic gadgets seized from the undertakings that were subject of the Respondent's investigation must meet the admissibility test.

157. The Appellants stated that all the evidence produced by the Respondent in its own proceedings could only be acquired through the involvement of third parties whose assistance was sought by the Respondent, to not only extract the electronic evidence but also provide the Respondent with a report together with a certificate of electronic evidence showcasing the manner in which the said evidence was retrieved. The absence of a certificate it would not have been possible for the Respondent to confirm the source, process, custody

[81] Appellant's Written Submissions dated 10th June 2025, page 13

and the delivery of the said electronic record. According to the appellant, the certificate is therefore vital in the production of electronic evidence and the impugned evidence could not have been received by the Respondent in the absence of the said certificate. [82]

158. The Appellant submitted that the Respondent herein should be equally estopped from approbating and reprobating at the same time, on the essence of the production of a certificate of electronic evidence. In the Court of Appeal case of **Behan & Okero Advocates v National Bank of Kenya (2007) eKLR cited with approval in the case of Republic v Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteria [2010] eKLR,**[83] that a party should not be permitted to blow hot and cold at the same time.

159. Moreover, in the case of **Joseph Ngii v Republic (2020) eKLR**[84] the court while faced with a similar circumstance stated that:

> ***"As a matter of principle the appellant cannot be allowed to approbate and reprobate or change positions by turning around and saying the exact opposite of what he told the lower court and in the process use the appeal process as machinery to help him do so."***

160. The Appellant argued that it is ironical and misleading for the Respondent to shift goal posts at this juncture and urged the Tribunal to bar the Respondent from using it as a conduit to change its case on appeal after discovering the gaps present in its case.

161. The Appellant submitted that all the certificates of electronic evidence and all **the new evidence referred to under paragraph 21 of this submissions,** marked as **BN 19(a – h), BN 20(a), BN 20(b), BN 21(a), BN 21(b), BN 23, BN 24(a – g), and BN 25, in the Respondent's Replying** Affidavit sworn on 21st March 2024, have only been introduced in the instant appeal in order to assist the Respondent to bridge the gaps of its case on appeal. [85] Moreover, the Appellant further submitted that paragraphs 27 – 35 of the Respondent's affidavit sworn on the 2nd March 2024, have equally been inserted by the Respondent in support of the additional evidence.

162. The Appellant therefore urged the Tribunal that all the additional evidence and paragraphs introduced through the back door by the Respondent ought to be struck off from the record. Furthermore, the Appellant stated that the Tribunal misdirected itself in law and in fact by referencing and analyzing non-existent evidence namely **(BN 25(b))** while ignoring the actual certificates produced in the documents marked as **BN 19(b), BN 19(h), BN 21(b), and BN 23, in** the Respondent's Replying Affidavit sworn on the 2nd of March 2024, thus rendering its decision dated 3rd April 2025, legally untenable to that extent.[86]

163. On this issue, the Respondent submitted that it is an administrative body and that its investigations are administrative in nature and therefore the strict rules of evidence DO NOT apply. To substantiate this, the Respondent relies on the case of *Joseph Mbalu Mutuva Vs Attorney General & another [2014] Eklr,* where the court while examining the question of

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[82] Appellant's Written Submissions dated 10th June 2025, page 14.
[83] Appellant's Written Submissions dated 10th June 2025, page 14.
[84] Appellant's Written Submissions dated 10th June 2025, page 14.
[85] Appellant's Written Submissions dated 10th June 2025, page 15.
[86] Appellant's Written Submissions dated 10th June 2025, page 15.

whether procedural fairness was applied by an administrative body in the exercise of its mandate, stated that:[87]

> *"Judicial opinion is divided on the requirement for cross-examination of witnesses as forming part of procedural fairness.* ***It is also not necessary that strict rules of evidence be applied in such inquiry."*** *It is generally agreed that a hearing can be in any form, whether by way of written representations or an oral hearing. However, when it comes to cross-examination of witnesses, a distinction is made between oral hearing and other forms of hearings in this regard. While it is the position that the technical rules of evidence do not strictly apply to such situations it is imperative that any evidence relied upon by the Commission should have been availed to the Petitioner to comment upon..."*

164. The Respondent also relied on ***Civil Appeal 52 of 2014 Judicial Service Commission Vs Mbalu Mutuva & another [2015] eKLR*** where the court held:

> *"All these cases including* **Nancy Makhoha Baraza v Judicial Service Commission & 9 Others [2012] eKLR** *show that an investigation is not a trial and that cross-examination of witnesses, if called, is a rare occurrence. Unless the empowering law provides otherwise, the decision whether or not to summon witnesses and the decision to allow the cross-examination of witnesses, is at the sole discretion of the investigating body. Indeed, the technical rules of evidence with the attendant right to cross-examination do not form part of the natural justice rule or in this case, part of fair administrative action."*

165. The Respondent further submitted that its investigation process is guided by Article 47 of the Constitution of Kenya, 2010, sections 31 through 36 of the Act as read together with section 4 of the Fair Administrative Action Act, 2015 which prescribes the approach to be followed in an administrative process. According to the Respondent, the Appellant's assertion that the certificate of electronic record is required under section 106B (4) of the Evidence Act in an administrative process lacks basis in law.[88]

166. The Respondent further made reference of ***David Macharia & 2 others V Teachers Service Commission & another [2018] Eklr*** where *the court in arriving in its decision relied on the case of* ***Constantine Simati v Teachers Service Commission and another [2011] eKLR Azangalala J*** which stated that,

> *"An internal disciplinary tribunal is not held to the same standards as a court of law. This becomes even more critical where an employee seeks to enforce an acquittal in a criminal trial as evidence of innocence in internal disciplinary proceedings"*

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[87] The Respondent's written submissions dated 24th June 2025 at page 8

[88] The Respondent's written submissions dated 24th June 2025 at page 9

167. According to the Respondent's the Act, segregates the administrative and adjudicative roles in the enforcement of the Act. Therefore, in discharging its functions, the Respondent is not required to act like a court, the adjudicative role is vested in the Tribunal, where a party if dissatisfied with a decision of the Respondent has an opportunity for an independent review of the decision to ensure that the decision was arrived at in a lawful and procedural manner.[89]

168. The Respondent's submitted that due to the *sui generis* nature of competition law and hence the legal framework governing the investigations and decision of the Respondent, strict adherence to the technical rules of the law of evidence is not applicable.[90]

169. The Respondent posits that the certificates of electronic evidence were annexed to its affidavit solely to confirm before the Tribunal that the certificates were issued by the Ethics and Anti-Corruption Commission Forensic Laboratory when evidence was processed but they were not a requirement in the administrative process. Therefore, the judicial procedure had no application in the investigation by the Respondent and providing the certificate at the Notice of Proposed Decision stage would have amounted to importing a judicial procedure in place of an administrative process which is clearly stipulated by statute.[91]

170. The Respondent further submitted that the Appellant insisting that the Respondent was bound by the judicial practice of admission of evidence the Appellant is inviting the Tribunal to import a judicial procedure in place of an administrative process which is clearly stipulated by statute. According to the Respondent's the Courts of law have previously pronounced themselves on the procedure and the obligation of administrative decision-making bodies in taking administrative action. For instance, the Respondent cited the case of ***Kenya Revenue Authority vs Menginya Salim Murgani, Civil Appeal No. 108 of 2009*** where the court stated that:

> *"There is ample authority that decision-making bodies other courts and bodies whose procedures are laid by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed." (Emphasis Ours)*

171. The Respondent maintains that it had laid out the proper interpretation of section 33(1) of the Act and submitted that based on that interpretation there was no obligation on the Respondent, a public administrative authority, to conduct its investigations like a court of law. The Respondent maintains that it has powers and procedures stipulated in statute, which it is obliged to objectively apply to determine facts and draw conclusions from them to provide the basis for its administrative action. According to the Respondent's, Parliament

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[89] The Respondent's written submissions dated 24th June 2025 at page 9
[90] The Respondent's written submissions dated 24th June 2025 at page 9-10
[91] The Respondent's written submissions dated 24th June 2025 at page 10

did not intend to import judicial procedures into an administrative process through section 33(1) of the Act.[92]

172. The Respondent concluded by submitting that the said section of the statute does not explicitly prescribe the stage of proceedings at which a certificate of electronic record must be produced or filed. Consequently, it would be unjust and contrary to the interests of justice to import a judicial procedure in an administrative process.

173. The Appellant at the interlocutory stage filed an application before the Tribunal seeking to expunge certain additional Evidence introduced by the Respondent at the Appeal stage. The Tribunal heard and determined the application in favor of the Appellant partially and struck out the Evidence introduced by the Respondent during this Appeal.

174. On this issue, we agree with the Respondent's that strict rules of evidence do not apply, however as aptly held in the ***Joseph Mbalu Mutava v Attorney General & another [2014] eKLR,*** (cited above), the aggrieved party should be accorded an opportunity to comment on the evidence relied upon by the administrative body.

i. From the Record, the Respondent served the Appellant with a Notice of Investigation sometime in March 2022 to appear before it and conducted interviews with the appellant's representative. Upon review of the evidence, and clarifications issued during the interview, the respondent issued a notice of proposed decision dated 4th May 2022. Additionally, the respondent provided the appellant with the bundle of evidence it relied up to come up with the NOPD and provided the Appellant 21 days to make written representations and or indicate with it required an opportunity to make oral representation. Subsequently the Appellant made their written representations dated 16th June 2022 and further requested for an oral hearing. This oral hearing, was convened on 18th August 2022 and upon considering the appellants written representations and Submissions, the Respondent arrived at its decision dated 17th August 2023.

ii. From the evidence on record, we are satisfied that due process was followed by the Respondent and the Appellant was accorded a fair hearing.

III. Whether the Appellant engaged in conduct that constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) &(e) of the Act.

175. The Respondent's in its Decision found the Appellant culpable of engaging in discussions with thirteen (13) other other manufacturers and distributors of steel, on the revision of sizes with the aim of increasing their gross profit margins in relation to the price of tubes as duly captured under Evidence 1.[93]

176. With respect to Evidence 2, the Respondent opined in its decision, that the steel manufacturers and distributors were discussing the minimum tolerance to be adhered to by

[92] The Respondent's written submissions dated 24th June 2025 at page 10-11

[93] Record of Appeal dated 15th, September, 2023 page 67-78

all even when the standard for water pipes allowed for a range within which the companies could operate in.[94]

177. Based on Evidence 1 and 2, the Respondent held that the Appellant had participated in various meetings and or discussions on prices, margins, profits and or product specification such as weight and thickness outside the confines of set regulatory standards with the objective of directly and or indirectly fixing prices, profit margins and other terms of trade. On Evidence 2, the Appellant maintains the position that these were in fact discussions on standards as opposed to discussions directly or indirectly geared towards price fixing. [95]

178. The Appellant argued that the Respondent erred in concluding that this was a discussion on price fixing, since the Respondent failed to appreciate both the economic and the legal context within which the discussions under Evidence 2 were being held.

179. The Appellant posits that these discussions were held at a time when there existed no standards on plates and tubes, and that the said issue was still before the KEBS committee. It is also crucial to note that it was common place for parties to have discussions and to make proposals on standards which would later on be forwarded to the Kenya Association of Manufacturers (KAM) and subsequently to the Kenya Bureau of Standards (KEBS). As such it was only logical for parties to enter into discussions in an attempt to resolve the gap that was currently in the market.[96]

180. On Evidence 2, in relation to the minimum thickness for coils, it is the Appellant's submission that the need for this discussion was prompted by the influx of the substandard 0.9mm tubes, plates and coils within the market, prompting parties to come up with a strategy to curb the said influx by ensuring that each party complied with the proposed standard. Furthermore, the Appellant's contends that it was also vital based on the discussions captured under Evidence 2, for parties to reach an agreement on the proposed thicknesses / tolerances that would be applicable to the coils, given that this was going to be the same standard that would be adopted for the plates and tubes.[97]

181. It is also the Appellant's submission that the Respondent erred by concluding that there already existed a standard which provided a range within which the parties could operate in, when in essence what is captured under Evidence 2 is a proposed standard on water pipes. The Appellant further argued that the mislabeling of the 0.9mm plates, was also another issue which the members of the tubes sub sector hoped to address by initiating the process for the development of standards for both the plates and tubes so as to create a level playing field for all parties within the market.[98]

182. According to the Appellant's, it was mendacious for the Respondent to conclude that members were indirectly engaging in price fixing when this was actually a discussion on the

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[94] Record of appeal dated 15th, September, 2023 page 69-73

[95] Appellant's Written Submissions dated 10th June 2025, page x

[96] Record of Appeal dated 15th, September, 2023, Evidence 3 at page 75 – 76 and the Appellant's Statement dated 5th April 2022 at page 343 and 344 of the Record of Appeal)

[97] Appellant's Written Submissions dated 10th June 2025, page 17

[98] Appellant's Written Submissions dated 10th June 2025, page 17

development of standards. It is the Appellant's view the discussions held under Evidence 2 were only necessitated by the prevailing commercial circumstances and the same was just a normal commercial response to the conditions prevailing within the market.[99]

183. Furthermore, the Appellant submitted that the Respondent erred by failing to consider both the economic and legal context for the discussions held under Evidence 2 by reaching the conclusion that parties were either directly or indirectly involved in discussions relating to price fixing. The Appellant posits further that the Respondent equally erred in failing to consider the Appellant's submissions in reference to the jurisprudence established by the European Commission touching on the assessment of conduct that is classified as a hardcore restriction or a per se prohibition. The European Commission held that in cases where an agreement is presumed to restrict competition by object, regard must be had to, the content of the provisions of the agreement, its objectives and the economic or legal context of the agreement.[100]

184. The Appellant relied on the joint cases of **CRAM & Reinzikh v Commission (1984) ECR 1679, Paragraph 26 and case 96 / 82 IAZ v Commission (1983) ECR 3369, paragraph 22, stated:**

> **"that in order to determine whether an agreement has as its object the restriction of competition, it is not necessary to inquire whether the two contracting parties took the initiative in inserting any particular clause or to verify that the parties had a common interest at the time when the agreement was being concluded. It is rather a question of examining the aims pursued by the agreement as such, in light of the economic context in which the agreement is to be applied."**

185. The Appellant also referred to the **European Court of Justice (ECJ) in case C – 211 / 22 – Super Bock Bebidas vs Autoridade da Concorrencia, the ECJ while faced with a similar circumstance held that:**

> ***"The essential legal criterion for ascertaining whether an agreement, whether it is horizontal or vertical, involves a restriction of competition by object is a finding that the agreement in itself presents a sufficient degree of harm to competition.***
>
> ***In order to determine whether that criterion is met, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the actual conditions of the functioning and structure of the market or markets in question.***

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[99] Appellant's Written Submissions dated 10th June 2025, page 18.
[100] Appellant's Written Submissions dated 10th June 2025, page 18.

In addition, where the parties to the agreement rely on its procompetitive benefits, those effects must, as elements of the context of that agreement, be taken into account. Provided that they are demonstrated, relevant, intrinsic to the agreement concerned and sufficiently significant, those effects may give rise to reasonable doubts as to whether the agreement concerned caused a sufficient degree of harm to competition."

Furthermore, the court while assessing Article 101 (1) of the TFEU (Treaty for the Functioning of the European Union) which is similar to section 21(3) of the Act held that:

"...a restriction of competition by object may only be made after having determined that that agreement presents a sufficient degree of harm to competition, taking into account the nature of its terms, the objectives that it seeks to attain and the factors that characterize the economic and legal context of which it forms part"

186. The Appellant's submission that in order to determine whether an agreement presents a sufficient degree of harm to competition, a competition authority cannot simply look at the bottle's label. A formalistic approach should be supplanted by a substantive analysis, under which: (i) the content of the agreement's provisions, (ii) its objectives and (iii) the economic and legal context of which it forms a part are properly considered. According to the Appellant's, that the Respondent blatantly disregarded the Appellant's submissions in relation to the substantive analysis of hardcore restrictive trade practices by other jurisdictions such as the European Union and South Africa, despite this type of prohibitions having not been expounded upon under our jurisdiction.[101]
187. The Appellant posits that it neither engaged in the discussions captured under Evidence 2, nor was it privy or aware of the discussions held therein. As for the discussions captured under Evidence 1 the Appellant maintains the position that even though it was copied as a recipient of the said email, the fact still remains that the Appellant was neither privy nor did the Appellant understand the content of the discussions captured and it did not also reply or engage in the discussion captured under Evidence 1.The Appellant submitted that it was mendacious for the Respondent to assign the Appellant liability based upon the simple fact that the Appellant was copied in an email.[102]
188. The Appellant maintains that it was not aware of the contents of the impugned email even though the same was received by the Appellant. Furthermore, it would be contrary to the doctrine of the presumption of innocence for the Respondent to infer awareness on the sole basis of the email having been sent to the Appellant.[103]
189. The Appellant relied on the case of **Court of Justice of the European Union in case C-74 / 14 – Eturas UAB and others vs Lietuvos Respublikos Konkurencijos Taryba,**[104]

[101] Appellant's Written Submissions dated 10th June 2025, page 19.
[102] Appellant's Written Submissions dated 10th June 2025, page 19.
[103] Appellant's Written Submissions dated 10th June 2025, page 20.
[104] Appellant's Written Submissions dated 10th June 2025, page 20.

the court shed light on the level of evidence required to presume the existence of a concerted practice in a case involving technological collision. In this case the court had to establish whether in the circumstances of the case before it, the mere sending a message concerning a restriction of the discounts rate could constitute sufficient evidence to confirm or to raise a presumption that the economic operators participating in the E - TURAS booking system knew or ought to have known about that restriction, even though some of them claim not to have had any knowledge of the restriction, some did not change the actual discount rates applied and others did not sell any travel packages at all via the E – TURAS system during the relevant period.

The court in this respect held that: ***"It is for the referring court to examine on the basis of the national rules governing the assessment of evidence and the standard of proof whether, in view of all the circumstances before it, the dispatch of a message, such as that at issue in the main proceedings, may constitute sufficient evidence to establish that the addressees of that message were aware of its content. The presumption of innocence precludes the referring court from considering that the mere dispatch of that message constitutes sufficient evidence to establish that its addressees ought to have been aware of its content."***

190. According to the Appellant, the Respondent imposed liability upon the Respondent only upon the basis that the Appellant was copied as a recipient of both the messages in Evidence 1 and Evidence 2. The Appellant argued that other than being copied to those emails (Under Evidence 1 and 2), there was no other evidence produced by the Respondent to further buttress the position that the Appellant tacitly assented to an anticompetitive action.[105]
191. The Appellant maintains that it was not privy to any of the discussions captured under Evidence 1 and 2. As such in the absence of additional evidence pointing to the Appellant's involvement in the anticompetitive conduct, it was erroneous for the Respondent to impose liability upon the Appellant.[106]
192. On this issue, the Appellant concluded by submitting that the onus fell upon the Respondent to establish that the Appellant through its conduct contravened the provisions of Sections 21(1) and Section 21 (3) (a) of the Act, which burden the Appellant avers the Respondent failed to discharge.[107]
193. **On the issue on restrictive output agreements,** it is the Respondent's contention that the Appellant's conduct together with twelve (12) other players within the steel manufacturing and distribution sector constitutes an infringement of Section 21(1) as read together with Section 21(3) (e) of the Act.
194. According to the Respondent's the parties agreed to limit the importation of the less than 1mm finished plates and coils with the intention of creating an artificial shortage of the same within the market and ultimately increasing its price. The Respondent relied on Evidence 3

[105] Appellant's Written Submissions dated 10th June 2025, page 20.
[106] Appellant's Written Submissions dated 10th June 2025, page 20.
[107] Appellant's Written Submissions dated 10th June 2025, page 21.

and corroborated by Evidence 45E which is an email of a Zen Gardens meeting, in which the Authority observed that the subsequent decision by those present in the said meeting was to go slow on the importation of raw materials which demonstrates output restriction. Further, in Evidence 31, there was a Tononoka meeting which was meant for manufacturers to discuss price and how to reduce stock to ensure price stability as well as Evidence 39 on the discussion that there was excess material in the country and there was need to control price, material and stabilize the market. These pieces of evidence are corroborated by Evidence 28 and Evidence 50.[108]

195. The Appellant posits that with the exception of the discussions captured under Evidence 3, the Appellant was never mentioned as a participant in any of the discussions captured in the pieces of evidence alluded to. It is the Appellant's submission with respect to the discussions captured under Evidence 3, that the sole aim of the said discussions was to curb the influx of the 09mm plates and tubes in the market at significantly low price, which according to the members of the Kenya Association of Manufacturers (KAM) was hurting the businesses of the local manufacturers.[109]

196. According to the Appellant, the thinner plates and tubes were known to contribute highly to the collapse of buildings, and the association was therefore under the obligation to protect the final consumers from any harm. The Appellant thus avers that an assessment of the discussions captured under Evidence 3 clearly depicts that the aim or the objective of the said discussion was in truth not geared towards impeding competition. Therefore, the Respondent herein had the obligation to conduct an examination of the aims of the said discussions, in light of both the economic and legal context of the discussions held under Evidence 3.[110]

197. The Appellant argued that the Respondent only adopted a formalistic approach in making the determination the Appellant had engaged in conduct that was restrictive of competition by object. Appellant referred to the case **CRAM & Reizinkh (Supra) and the case of Super Bock Bebidas (Supra)** the European Court of Justice both stated: that in order to determine whether an agreement presents a sufficient degree of harm to competition, a competition authority cannot simply look at the bottle's label. A formalistic approach should be supplanted by a substantive analysis, under which: (i) the content of the agreement's provisions, (ii) its objectives and (iii) the economic and legal context of which it forms a part are properly considered.[111]

198. In addition, the Appellants stated that in the **Barry Brothers case (Supra),** the European Court of Justice while conducting an assessment of the BIDS agreement first took into consideration whether the agreement was by its object restrictive of competition. The court stated that: ***"To determine whether an agreement comes within the prohibition laid down***

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[108] Record of appeal dated 15th, September, 2023 page 75-76 and the Respondents Decision at paragraph 151.
[109] Appellant's Written Submissions dated 10th June 2025, page 129
[110] Appellant's Written Submissions dated 10th June 2025, page 22
[111] Appellant's Written Submissions dated 10th June 2025, page 22

in Article 81(1) EC, close regard must be paid to the wording of its provisions and to the objectives which it is intended to attain."[112]

199. The Appellant maintains that it was erroneous for the Respondent to simply allege that the Appellant relied on the defense of legitimate objectives, without first establishing the fact that the nature of the discussions held under Evidence 3 was by its object restrictive of competition. The Appellant submitted that considering the aims and in light of the economic context within which the discussions captured under Evidence 3 were held, it is mendacious for the Respondent to conclude that the Appellant in collusion with the other members of the tubes sub sector participated in these discussions with the aim of distorting, preventing or lessening competition within the Kenyan market.[113]

200. According to the Appellant, the Respondent failed to demonstrate that the Appellant colluded with other members of the tubes sub sector with the common intent to distort competition and that the nature of the agreement in Evidence 3 was such that it could only be plausibly be interpreted to this end. Therefore, the Respondent blatantly disregarded the Appellant's submissions in relation to the substantive analysis of hardcore restrictive trade practices by other jurisdictions such as the European Union and South Africa, despite this type of prohibitions having not been expounded upon under our jurisdiction.[114]

201. The Appellant concluded by stating that the onus fell upon the Respondent to establish that the Appellant through its conduct contravened the provisions of Sections 21(1) and Section 21 (3) (e) of the Act, which burden the Appellant avers the Respondent failed to discharge.

202. In response, the Respondent's submitted that the Appellant engaged in conduct that constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act. The Act prohibits any agreement, decision or concerted practices by undertakings whose object or effect is to prevent, distort or lessen competition of goods or services in Kenya unless it is exempt as provided under the Act. The Act also provides a non-exhaustive list of the prohibited agreements, decisions or concerted practices and in this matter, it was price fixing.

203. The Respondent highlighted the term price fixing which is defined under clause 30 of the Consolidated Guidelines on Restrictive Trade Practices under the Act ("Consolidated Guidelines ") to include: fixing the price itself; or fixing an element of the price such as fixing a discount, setting percentage price increase; setting the permitted range of prices between competitors; setting the price of transport charges (such as fuel charges), credit interest rate terms and an agreement or arrangement to indirectly restrict price competition in some way such as recommended pricing.

204. The Respondent also highlighted the definition of concerted practice contained under section 2 of the Act as a co-operative or coordinated conduct between firms, achieved

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[112] Appellant's Written Submissions dated 10th June 2025, page 23.
[113] Appellant's Written Submissions dated 10th June 2025, page 23.
[114] Appellant's Written Submissions dated10th June 2025, page 19.

through direct or indirect contact, that replaced their independent action, but which did not amount to an agreement

205. Furthermore, Clause 12 of the Consolidated Guidelines further provides that a concerted practice can include any type of coordinated activity between undertakings which substitute practical co-operation between them for the risks presented by effective competition, and includes any practice which involves direct or indirect contact or communication between undertakings, the object or effect of which is either to influence the conduct of undertakings on a market or to disclose the course of conduct which an undertaking has decided to adopt or is contemplating to adopt in circumstances where the disclosure would not have been made under normal conditions of competition.

206. Moreover, Clause 27 of the Consolidated Guidelines, states that horizontal collusive agreements are subject to "object" assessment, that is, strict or per se scrutiny for which no defenses can be asserted and that the Respondent will only consider the content and nature of the agreement and not the effect of the agreement.

207. The Respondent referred to the case of ***Case C-105/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission [2006] ECR I-8725***, where at paragraph 125 of the Judgement, the Court held that:

> *"That paragraph of the judgment under appeal reveals no error of law on the part of the Court of First Instance, since, for the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to prevent, restrict or distort competition within the common market...."*

208. The Respondent maintains that the price fixing conduct engaged in by the Appellant was a concerted practice as it was coordinated activity between the steel manufacturing and distribution companies which substituted practical co-operation between them for the risks presented by effective competition. Further, the Respondent submitted that there was direct contact and communication between the steel manufacturing and distribution companies, the object of which was either to influence the conduct of the companies on the market or to disclose the course of conduct which a company had decided to adopt or was contemplating to adopt in circumstances where the disclosure would not have been made under normal conditions of competition.[115]

209. The Respondent's posits that the companies were in competition and therefore in a horizontal relationship and thus their conduct amounted to a hard-core restriction that is by its very nature injurious to the proper functioning of competition and has no redeeming value whatsoever and that there was no need to prove the effect of the conduct.

210. The Respondent highlighted key evidence that it considers crucial in proving its case;

    a. An email of 15th May 2018, sent by Mr. Neelkamal Shah of Nail & Steel Limited to Mr. Niral Savla of Tononoka and copied Brollo Kenya, Mr. Nilesh

[115] The Respondent's written submissions dated 24th June 2025 at page 12-13

Doshi of Doshi, Prakash of MRM/Safal group, Mr. Murtaza of Tarmal, **Mr. Suraj of Corrugated (Appellant's Representative),** Mr. Kunal Gupta of Athi Steel, Mr. Devang of Devki Steel, Mr. Neil Nathwani of Apex and Prabu of MRM and Mr. Amarjit Singh of Accurate. The subject of the email was pricing. In the said email, Mr. Neelkamal Shah indicated that they had spoken the previous week and many sizes on the tube pricelist needed to be revised as their gross profit margin was low and, in some cases, negative for the 20*20*1, 25*25*1, 40*40*1.2 and 30*30*1.2. The email further indicated that for the 20*20*1 they were all left with KES 12 to KES 13 gross profit and on 25*25*1 about KES 15 per length of 6 meters. Mr. Niral Salva was tasked to look into it as they were all pushing huge tonnages but with no margin.

b. An email sent on 24th September, 2018 by Nilesh Doshi of Doshi, to Niral Savla, of Tononoka and also Chairman of the Pipes and Tubes sub-sector in KAM. In copy were Neil Nathwani of Apex Group and also Chair of Hot Rolling sub-sector, Kishore Gangadharam of Insteel, Prakash Chauhan of Safal Group, Neelkamal Shah of Nail & Steel Limited, Suraj of Corrugated, Kunal Gupta of Athi Steel, Ketan Doshi of Brollo, Jateen Patel of Abyssinia, Kaushik Pandit of Devki, Murtaza Tarmal of Tarmal Wire Products Limited, Davinda Bhachu of Accurate, Devang of Devki and Bobby Johnson of Steel Makers Limited.

c. An email sent on 24th September, 2018 by Nilesh Doshi of Doshi, to Niral Savla, of Tononoka and also Chairman of the Pipes and Tubes sub-sector in KAM. In copy were Neil Nathwani of Apex Group and also Chair of Hot Rolling sub-sector, Kishore Gangadharam of Insteel, Prakash Chauhan of Safal Group, Neelkamal Shah of Nail & Steel Limited, Suraj of Corrugated, Kunal Gupta of Athi Steel, Ketan Doshi of Brollo, Jateen Patel of Abyssinia, Kaushik Pandit of Devki, Murtaza Tarmal of Tarmal Wire Products Limited, Davinda Bhachu of Accurate, Devang of Devki and Bobby Johnson of Steel Makers Limited.

211. The Respondent posits that it had established that the deliberations were for the purpose of seeking consensus on the thickness of coils to be imported by all. The Respondent further asserts that **Evidence 2** demonstrated the existence of a standard on water pipes and that the steel manufacturers were discussing the minimum tolerance to be adhered to by all even when the existing standard allowed for a range.[116]

212. The Respondent argued that thickness/size and weight of coils and products have a direct correlation to the prices and/or margin of steel products and that the email was an invitation to the said companies to agree on importing similar sizes/thickness in order to have similar pricing strategies with the view of limiting competition. Further, the Respondent stated that

[116] The Respondent's written submissions dated 24th June 2025 at page 14

where there is prescribed standard, it is incumbent on the regulated entities to comply with the standard and make unilateral and independent decisions on their tolerance levels as long as the same is within the standards. According to the Respondent, this has been established not to be the case in Evidence 2.[117]

213. The Respondent relied on the case of ***C-699/19 P Quanta Storage Inc vs European Commission,*** the Court (Fourth Chamber) found that the General Court was correct in upholding the Commission's reliance on emails in which the Appellant was copied to characterize its passive contribution to the conduct in question and that its participation was not dependent on the Appellant having had direct discussions with its competitors. The court held:

123. By the second part of its fourth ground of appeal, the appellant criticises the General Court for holding that the Commission had rightly considered, in the decision at issue, that the appellant's contribution, through its own conduct, to the infringement at issue was established by the fact that it had not publicly distanced itself from the unlawful conduct, whereas its participation consisted solely in being copied in internal Sony Optiarc emails referring to unlawful exchanges of information between competitors.

124. In that regard, it should be borne in mind that, according to settled case-law, in order to establish that an undertaking has participated in a single and continuous infringement, the Commission must prove that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the substantive conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk (see, to that effect, judgment of 24 September 2020, Prysmian and Prysmian Cavi e Sistemi v Commission, C-601/18 P, EU:C:2020:751, paragraph 130 and the case-law cited).

125. From that perspective, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from the content of that initiative or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. ***That complicity constitutes a passive mode of participation in the infringement which is capable of rendering the undertaking concerned liable.***[118]

128. Therefore, in the light of the case-law referred to in paragraphs 124 and 125 above, ***the General Court correctly held that the Commission was entitled to rely on emails in which the appellant was copied in order to characterise its contribution to that infringement, since the characterisation of the appellant's passive participation in that***

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[117] Annexed to the Replying affidavit dated 19th June, 2024 and marked as BN-5 is a copy of the email dated 24th September, 2018

[118] Judgment of 6 December 2012, Commission v Verhuizingen Coppens, C-441/11 P, EU:C:2012:778, paragraph 73.

infringement is not subject to the condition that it participated in direct discussions with its competitors.

214. The Respondent submitted that the Appellant contravened section 21(1) as read together with section 21(3)(a) of the Act and that there was no error with the decision of the Authority dated 17th August, 2023.

215. This Tribunal has considered in detail the rival submissions made by the Appellant and the Respondent. The Appellant denied knowledge of the circumstances leading to the emails being copied to them; it argued that did not request, nor sanction the sending of the emails; nor did it respond to any of the emails. **Therefore, the mere fact that the Appellant was copied in an email does not by itself amount to the Appellant participating in price fixing practices** contrary to Section 21 (1) as read together with Section 21 (3) (a) of the Act.

216. The Tribunal has considered the case law and decisions on similar issues. The Tribunal is persuaded by the position taken in the case of ***Aalborg Portland v Commission, judgment of 17 January 2004, not yet reported, at paragraphs 55 to 57:***

> *55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.*
>
> *56. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.*
>
> *57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules."*

217. The Tribunal has noted with approval the decision of **Toshiba Corp. vs European Commission Case T-519/09 2014** where the court held that an undertaking will be found culpable of participating in an anti-competitive conduct even if it did not participate actively in meetings of anti- competitive nature and did not publicly distance itself from what occurred.

218. Similarly it is well settled by case law that a party's silence to the emails and/ or alleged non-action on the contents of the email does not amount to dissociating itself from the

conduct as the only acceptable dissociation to cartel conduct is by public distancing by writing to the author of the email and the other competitors to distance itself from the conduct as stated in the case of ***Case T-303/02 Westfalen GassenNederland v Commission [2006] ECR I-4567*** wherein it was held that:

103 It must be pointed out in this regard that the notion of public distancing as a means of excluding liability must be interpreted narrowly. If the applicant had in fact wanted to disassociate itself from the collusive discussions, it could easily have written to its competitors and to the secretary of the VFIG after the meeting of 14 October 1994 to say that it did not in any way want to be considered to be a member of the cartel or to participate in meetings of a professional association which served as a cover for unlawful concerted actions (see, to that effect, Case T-61/99 Adriatica di Navigazione v Commission [2003] ECR II-5349, paragraph 138).

124. Silence by an operator in a meeting during which the parties colluded unlawfully on a precise question of pricing policy is not tantamount to an expression of firm and unambiguous disapproval. On the other hand, according to case-law, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable (see, to that effect, Aalborg Portland and Others v Commission, paragraph 76 above, paragraph 84).

219. In view of the evidence placed before this Tribunal it is our considered opinion that the Respondent has demonstrated that there was an agreement, concerted practice and decision by the players in the steel manufacturing and distribution industry including the Appellant on price fixing and output restriction contrary to law.

220. We agree with the Respondent that anything said or done by any of the persons in furtherance of the agreement or concerted practice, with reference to their common intention, is a relevant fact against each of the parties to the agreement or concerted practice. The Appellant has not produced any evidence or explanation exonerating itself or proving that it had publicly distanced itself from the activities of the other players on price fixing, output restriction.

IV. Whether the Respondent complied with the law in imposing a financial penalty against the Appellant

221. On the issue of imposition of financial penalty, the Appellant's submitted that the Respondent erroneously imposed a financial penalty upon the Appellant in the absence of any evidence to support such a finding. It is the Appellant's submission that the Respondent

herein had the obligation to assess the aims of the discussions captured under Evidence 2 and Evidence 3, in light of both the economic and the legal context of the said discussions.[119]

222. According to the Appellant, the Respondent only adopted a formalistic approach in making the determination that the Appellant had engaged in conduct that was restrictive of competition by object. Therefore, there was no substantive analysis conducted by the Respondent of the Appellant's conduct, to lead to the logical conclusion that the Appellant had colluded with other members of the tubes sub sector with the intent of distorting or preventing competition within the market.[120]

223. The Appellant submitted that it was never privy to the discussions captured therein, and it was further erroneous for the Respondent to impose liability upon the Respondent on the basis of the mere receipt of an email and in the absence of any other evidence pointing to the Appellant's involvement in anti-competitive conduct. The Appellant thus submitted that the Respondent failed to discharge the burden that the Appellant had engaged in anti-competitive conduct, in the absence of any evidence pointing to the Appellant's involvement.

224. In addition, the Appellant avers that even the computation of the financial penalty imposed upon the Appellant is wholly unreasonable and unfair. To this end, the Appellant avers that the Respondent in computing the financial penalty erroneously considered the Appellant's gross annual turnover for the year 2021, which is Kshs. 17, 397, 029, 924/=[121]

225. The Appellant submitted that the said turnover comprised of revenue wholly unrelated to the products that were subject of the contravention, as prescribed under Clause 11 of the Competition Administrative Penalties and Settlement Guidelines. Clause 11 of the above Guidelines *states that the relevant turnover of an undertaking(s) is the preceding gross annual turnover of the products that are subject of the contravention. Furthermore, it provides that the preceding year for the restrictive trade practice shall be the year before the Authority reaches a decision.*[122]

226. Furthermore, Clause 35 of the same guidelines prescribes *that in determining the affected turnover, the Authority will have regard to the firm's audited financial statements.* It is the Appellant's submission that the Respondent ought to have considered the turnover of only the products that were subject of the contravention, in computing the penalty applicable. According to the Appellants, the product that was subject of the contravention in the Appellant's case was the tubes, as this was the product that the Appellant produced.[123]

227. According to the Appellant, the penalty imposed upon the Appellant ought to have been calculated on the basis of the Appellant's turnover for the tubes mill division, which

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[119] Appellant's Written Submissions dated 10th June 2025, page 23.
[120] Appellant's Written Submissions dated 10th June 2025, page 24.
[121] Appellant's Written Submissions dated 10th June 2025, page 24.
[122] Appellant's Written Submissions dated 10th June 2025, page 24.
[123] Appellant's Written Submissions dated10th June 2025, page 24.

amounted to Kshs. 164, 953, 355/= and not the Appellant's gross annual turnover for the year 2021 which according to the Respondent's decision was Kshs. 17, 397, 029, 924/=. [124]

228. In response, the Respondent avers that the determination of the financial penalty is provided for under the Act. Moreover, the Act supersedes the Consolidated Guidelines which the Appellant is relying on. Section 36 (d) of the Act provides that the Respondent may impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question. Therefore, according to the Respondent, the assertion by the Appellant that the calculation of the financial penalty should be based on the specific infringing product is misleading and therefore has no legal basis.[125]

229. Having held that the Respondent has demonstrated that there was an agreement, concerted practice and decision by the players in the steel manufacturing and distribution industry including the Appellant on price fixing and output restriction contrary to the Act, the Tribunal has considered the arguments advanced by both parties on the issue of the appropriate penalty.

230. Section 36 (d) of the Act provides that the Respondent may impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question. However, in the computation of the penalty, Respondent is guided by its Competition Administrative Penalties and Settlement Guidelines and the international best practices regarding determination of remedies.

231. The Guidelines stipulates that the base penalty is 10% of the gross turnover for the undertaking. Furthermore, Clause 26 to Clause 33 of the Guidelines provide for mitigating factors to be considered in computation of the financial penalty. This includes: first time offender, public interest and justification on efficiency, consumer benefit and ability to pay. The Guidelines gives the Respondent powers in considering the mitigating factors.

232. We have taken note of the Evidence adduced by the Respondent with respect to the case before the proceedings and the resultant Decision by the Respondent and particularly the level of participation of the appellant in activities prohibited by the Act. Other that the passive participation, unlike the case of Nail and Steel, Blue Nile, Devki and Tononoka where the tribunal has already rendered its decision, the Respondent has not provided the correlation between the passive participation and the resultant implementation. For instance, Nail and Steel, Blue Nile, Devki and Tononoka decided cases, the Respondent produced a price list schedule of tubes that reflected a simultaneous revision of prices by various undertakings.

233. The Respondent proceeded to furnish the Tribunal with a table showing the name of the undertaking and the price revision effective dates as shown below: [126]

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[124] Appellant's Written Submissions dated 10th June 2025, page 25

[125] The Respondent's written submissions dated 24th June 2025 at page 16

[126] Paragraph 68 of the Respondent's decision dated 17th August 2023, marked as Evidence 3(b) in the Replying Affidavit of Benson Nyagol dated 21st March 2024 at page 74.

i. **Tubes Price Revision Dates**

Year	Name of Company	Effective Dates
2019	Doshi Group of Companies	18th February, 2019
	Insteel Limited	20th February, 2019
	Brollo	14th February, 2019
2020	**Insteel**	**2nd September, 2020**
	Nail & Steel Limited	**1st September, 2020**
	Apex Steel Limited	**1st September, 2020**
	Brollo	**1st September, 2020**
	Devki Steel Mills	**31st August, 2020**
	Doshi Group	**28th August, 2020**
2020	Apex Steel Limited	16th December, 2020
	Insteel Limited	21st December, 2020
	Tononoka Steel Limited	17th December, 2020
	Devki Steel Limited	17th December, 2020
	Doshi Group	16th December, 2020
	Brollo	18th December, 2020
	Tarmal Steel	January, 2021
	Mabati Rolling Mills	January, 2021
2021	Doshi Group	30th April, 2021
	Apex Steel	3rd May, 2021
	Brollo	3rd May, 2021
	Devki	1st May, 2021

234. In the ***T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit (C-8/08)***[127], under paragraph 31 wherein it was held that:

> ***"...Once an agreement has been classified as a restriction by object it is presumed to have negative effects and the actual effects of the agreement are not analyzed or assessed. Whether such anti-competitive effects in fact occur is only of relevance for determining the amount of any fine and assessing any claim for damages..."***

235. We note that the ten per cent (10%) penalty of the Appellants 2021 gross annual turnover was Ksh **1,739,702,992.40**. The Respondent considered some of the mitigative factors provided under the Penalties and Settlement Guidelines and arrived at the penalty of 0.5% (after considering various mitigating factors) thereby arriving at the sum of Ksh **86,985,149.62** as the financial penalty.

236. The Act prescribes that after consideration of any written representations and of any matter raised at the conference the Authority may take various measures, including section 36(d) impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking(s) in question. Rules 42 and 45 set out the factors to be considered. We are satisfied that the Respondent in its decision date 17th August 2023 in pages 35 to 38 considered some of the mitigating factors in arriving at its decision, and there has been no evidence submitted by the Appellant before this Tribunal to enable us alter the Respondents findings on the financial penalty.

237. The argument by the Appellant Counsel in its submissions that the Respondent ought to have considered the gross annual turnover of the product line in question, as opposed to the gross annual turnover has no legal basis, and this Tribunal is not persuaded.

F. ORDERS

238. Having carefully considered the rival submissions advanced by the parties, scrutinized the evidence adduced before this Tribunal, and evaluated the same against the provisions of the Act and the prevailing jurisprudence, we accordingly arrive at the inevitable conclusion that the Appellant by its conduct was culpable of a concerted practice of price fixing contrary to section 21(1) as read together with Section 21(3) (a) of the Act and output restriction contrary to section 21(1) as read together with section 21(3)(e) of the Act. In the present circumstances we therefore order as follows:

a. This Appeal be and is hereby dismissed.
b. The Respondent's decision dated 17th August 2023 be and is hereby upheld.

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[127] The Respondent's written Submissions dated 5th February 2024, page 13

c. The Appellant shall bear the costs of this Appeal.

Orders accordingly.

DATED at NAIROBI this 11TH **day of** SEPTEMBER **2025**

DANIEL OGOLA
CHAIRPERSON

ODONGO MARK OKEYO
MEMBER

KIPROP MARRIRMOI
MEMBER

RAYMOND NYAMWEYA
MEMBER

I certify that this is a true copy of the original

COMPETITION TRIBUNAL
P. O. Box 30041-00100,
NAIROBI

.....

JOHN NDERITU MWANGI /SECRETARY/CEO
COMPETITION TRIBUNAL