

REPUBLIC OF KENYA
IN THE MEDIA COMPLAINTS COMMISSION OF
THE MEDIA COUNCIL AT NAIROBI
COMPLAINT NO. 91/2010

AIDS LAW

PROJECT.....COMPLAINANT

VERSUS

RADIO AFRICA T/A CLASSIC 105 FM.....1ST
RESPONDENT

CIKU MUIRURI.....2ND
RESPONDENT

DECISION OF THE COMMISSION

The complainant herein, The Aids Law Project (referred to as ALP), is a legal based non-governmental organization that deals with legal issues on HIV/AIDS in Kenya. The organization provides legal services, counselling and information that affect this group of people. The first respondent is a media house, based in Kenya with wide listenership in Kenya as well as presence on the internet with an immense capacity to influence and shape public opinion. The 2nd Respondent, Ciku Muiruri hosts a show titled “*Busted*” broadcast by the 1st Respondent.

The Complaint

The Aids Law Project lodged a complaint, dated 1/11/2010, with the Media Council of Kenya on 2/11/2010 about a broadcast aired on 21st October 2010, by the respondents through their Radio show called Busted. The 1st Respondent broadcasts the said shows daily in the evening on week days where supposedly, cheating spouses are 'busted' by their spouses. The 2nd Respondent has been the host of the show, at times impersonating a character to 'bust' the cheating spouse.

In the said broadcast, the 2nd Respondent under the direct control, knowledge and authority of 1st respondent impersonated the wife of a cheating spouse who was allegedly the boss of the lady he

was having an extra marital affair with and while role playing the part of the wife of a cheating spouse, disclosed allegedly that the cheating spouse was HIV positive. The relevant excerpts of the transcription of the broadcast were as follows:-

Ciku (Mama Pat): you are not having an affair with my husband?

Agnes (cheating lady): No. No I can't do such a thing

Ciku: Now Agnes you need to know I haven't called to fight with you and I have not called to make any accusations. I just called to give you some information which I think is going to help you. You know I am a saved woman and I let God guide me in all decisions I make and everything I do. I just called to warn you that my husband has been diagnosed with something very serious.

Agnes: What is it?

Ciku: He's HIV positive. He is positive he has also infected me. I am also positive.

It is the complainant's contention that the broadcast of the HIV/AIDS status of a person without their consent on national radio is breach of the person's right to privacy as provided for under Article 31(c) the Constitution. In light of this the 2nd Respondent disclosing the HIV/AIDS status of a person even though not disclosing their full identity but nevertheless information that friends and close associates of a person would easily speculate or even correctly identify the identity of that person like putting their voice on radio without distorting it and their names (Agnes and Nicholas) is a breach of that person's right to privacy.

The complainant added that the 1st respondent being employers of the 2nd respondent condoned and allowed the broadcast of such injurious information on radio thus are vicariously liable for the actions of the 2nd Respondent's conduct while at work. Complainant averred that radio has immense capacity to influence and shape opinions of the general public. Thus even though the person alleged to be infected with HIV/AIDS is not infected this broadcast was in total disregard to the right to privacy of the HIV and AIDS positive person and confidentiality and would portray such blatant disregard of human rights of HIV positive person as lawful and acceptable which in effect leads to stigmatization that comes with such disclosure

That therefore the casual, reckless and negligent manner the 2nd Respondent through the connivance of the 1st Respondent purported to disclose the HIV / AIDS status of a person on national radio is both a breach of constitutional human rights and a statutory offence under the HIV and AIDS Prevention and Control Act and that with such perception created that the HIV status of a person can be disclosed in a casual reckless and negligent manner, people would be apprehensive to get themselves tested and as a consequence denying them proper care and medication.

The Complainant stated that the complaint violated of articles 2(5), 3(1), 10(2), 20(1), 20(4), 27, 28, 29(d) and 31(c) of the Constitution of the Republic of Kenya the HIV and AIDS Prevention and Control Act No, 14 of 2006, the Media Act Cap 411B. They further added that the broadcast was:-

- A breach of the person's right to privacy;
- Breach of media etiquette and ethics;
- Such disregard of human rights of HIV positive person which in effect leads to stigmatization of people living with HIV.
- The clip was subsequently used as a promotional tool for Classic 105 FM station for its show 'busted' which was in extremely bad taste.

The Complainant prayed for the following orders

- a) Investigate the Complaint herein and make the necessary recommendation to the Attorney General/ and or Director of Public Prosecutions to institute criminal charges against the 1st Respondent and 2nd Respondent for unlawful disclosure of the HIV status of a person without their written consent.
- b) Investigate the Complaint and make the necessary recommendation to the Media Council to issue the appropriate directive against the Respondents for casual, reckless and negligent manner they treated the issue of disclosure of HIV status of a person.
- c) Order the Respondents to broadcast an apology and correction in such an equivalent prominent manner in its broadcast and correct the perception created that the HIV status of a person can casually be disclosed without their prior consent as required under Section 22 (1) of the HIV Prevention and Control Act.
- d) Issue a public reprimand against the Respondents.
- e) Investigate the Complaint and make the necessary recommendation to whatever appropriate body created by law to take remedial action and correction.

- f) Costs of this action be awarded to the Applicants.

The Response to the Complaint

Upon notification by the Complaints Commission, the respondents filed their response dated 5th April 2011. The Respondents jointly and severally responded to the Complaint by admitting that the broadcast was indeed aired, but averred that the broadcast was not inaccurate or misleading at all and that the listening public was fully aware at all times that 2nd respondent was not in actual fact the wife of the cheating spouse hence the said broadcast was neither misleading nor inaccurate. Moreover, at the end of the said broadcast, it becomes evident that the 2nd Respondent is not in fact who she purports to be. They argued that the said broadcast did not reveal the HIV/AIDS status of any person because the 2nd Respondent assumed the character of a wife, whose actual HIV/AIDS status remained deliberately hidden throughout the period of the said broadcast, a fact which was within the knowledge of the listening public. In any event they stated that the only person for who the information in the said broadcast could possibly be inaccurate or misleading, and who could have the locus to bring a complaint on this basis, is the lady who was having an extra marital affair with the cheating spouse. The lady is not a party to the present complaint and neither is she a Complainant.

On the issue of Locus the Respondents contended that the Complainant has no *locus standi* to bring the same. And the fact that failure to indicate whether ALP is acting on behalf of the lady, renders it impossible to ascertain the parties in the dispute and sought to have the complaint rejected for want of jurisdiction on this basis, in accordance with Rule 11 4(d) of the Media (Complaints Commission) Rules 2009 (hereinafter referred to as "the Rules").

With regard to the breaches of the Code of conduct they argued that the 2nd Respondent was justified, within the meaning of Article 8 of the Code, to use subterfuge to obtain the information in the said broadcast since the information could not be obtained by any other means. They averred that the caller who publicly requested the 2nd Respondent to call his allegedly cheating spouse was constitutionally entitled to information concerning his family, hence the Respondents were justified, as the agent of the said caller, to obtain that information through the means they utilised and that the said information could not be obtained by any other means hence the Respondents were justified to employ misrepresentation and subterfuge to obtain the same.

On the issue of privacy they argued that the 2nd Respondent assumed the character of the wife of a cheating spouse, which fact was well known to the listening public hence the listening public was fully informed and aware during the period of the said broadcast that the 2nd Respondent was not in fact the wife of the cheating spouse, at no time was the full identity of the wife revealed to the listening public. The Respondents averred that this ground of the complaint is unsustainable because the right to privacy subsists in a private individual and by its very nature it is not a collective right. The Complainant cannot purport to bring a complaint for breach of the right to privacy of people infected with HIV/AIDS in general. Therefore, the Complainant's averment that even though the person alleged to be infected with HIV/AIDS is not infected, the broadcast was in disregard to the right to privacy of the HIV/AIDS positive person is baseless, vexatious, frivolous and an abuse of the procedures for dealing with complaints.

They concluded their response by stating that that the Respondents were within their Constitutional rights and freedoms to broadcast the item complained of by virtue of Articles 33 & 34 of the Constitution and prayed to have the complaint dismissed.

The Hearing

After the close of pleadings the matter was fixed for hearing wherein the Complainants called one witness Mrs Jacinta Nyachae whereas the 2nd Respondent appeared as witness for the Respondents.

Mrs Jacinta Nyachae testified that she is the Executive Director with the Aids Law Project and averred that Aids Law Project is a registered Non -Governmental Organization in Kenya and thus with the corporate capacity to sue and be sued and that part of ALP's mandate was to promote quality of life to People Living with HIV/AIDS through legal advice, advocacy, research and education and without limitation to: Carry out litigation and legal advocacy campaigns to counter wrongs that have occurred and where possible, to establish legal precedents that prevent them from recurring; and that ALP also acts on behalf of people with HIV/AIDS who as a result of stigma, discrimination and stereotyping are afraid to act in their own names and were doing so in this instance. She testified that the basis of the complaint arose out of an 'informal discussion she had with community of people living with HIV who felt that the clip was extremely inflammatory and did not in way help in the fight against stigma and discrimination against people living with HIV/AIDS. On cross examination by Mr Georgiadis Khaseke for the Respondents, she admitted that HIV and AIDS was matter of public interest. She further admitted that if her spouse was cheating on her she would want to find out. She further admitted that she was aware the busted show was not real but was used to catch cheating spouses. She admitted that no person living with

HIV had contacted ALP complaining about the broadcast and neither had ALP had contacted the respondents.

The respondents called the 2nd respondent, Ms Ciku Muiruri as a witness, she testified that she is the host of the busted show; she testified that she first records a conversation before airing it live, and takes all measures to ensure that the identities of persons concerned are not disclosed. She added that, if ranked amongst her many shows; the particular show at issue would rank top five in terms of dramatic effect.

She stated that it was the woman's spouse who called her and asked her to bust the cheating couple. She further testified that the show is meant to expose cheating spouses in order to curb the vice. She added that this particular clip had great impact on the public and was widely circulated and in fact, she managed to get sponsorship from Population Services International (PSI) based on it. She stated that she had a Face book following of about 44,000 people from the last time she checked and wide audience and she had not received any complaint regarding that show. She stated that she had not met nor spoken to anyone from the ALP before, and she got information from the legal department that a complaint had been filed against her regarding the show.

On cross-examination by Mr Omwanza Ombati, She admitted that she had a large following and as a media personality, she would shape public opinion, she further admitted that Agnes, Nicholas and Mama Pat were actual people whose consent was never sought before she published their names and particulars on radio. She also admitted that sometimes she could fabricate a story and does not rely on a real story to 'bust' a spouse, and therefore creates an entire fictional account of 'busted'. She also admitted that she used HIV / AIDS as a prank in this particular busted and has never used it before. She stated that she understood that the tenets of journalism were to entertain, educate and inform. She stated that she was not familiar with the Code of Conduct for the practise of journalism however she stated the 2nd respondent has an in- house policy on broadcasts.

Complainants Submissions

In their submissions filed on 22/9/2011 with the Commission, the Complainant reiterated that ALP being a juridical person has capacity to sue and be sued and therefore has capacity to institute a complaint against the Respondents. They submitted ALP also acts on behalf of people with HIV/AIDS who as a result of stigma, discrimination and stereotyping are afraid to act in their own names and therefore had jurisdiction to lodge the complaint. They further submitted that the complaint had been motivated by an informal discussion between the Executive Director of ALP, and community of people living with HIV who felt that the clip was extremely inflammatory and

did not in way help in the fight against stigma and discrimination against people living with HIV and AIDS for this reasons they submitted that they had *locus standi* to lodge the complaint. In addition they submitted that Section 26(1) of the Media Act, provides that any person aggrieved by

- (a) any publication, or any conduct of a journalist or media enterprise or the Council;
- (b) anything done against a journalist or media enterprise that limits or interferes with the Constitutional freedom of expression of such journalist or media enterprise, make a written complaint to the Council setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought

Relying on this they submitted that being a juridical person they had *locus standi* to lodge a complaint.

They further submitted that the broadcast violated the Constitution specifically articles 2(5), 3(1), 10(2), 20(1), 20(4), 27, 28, 29(d) and 31(c) of the Constitution of the Republic of Kenya. Other written laws which apply with regard to the complaint are HIV and AIDS Prevention and Control Act No. 14 of 2006 and the Media Act. Act No. 3 of 2007 and the Journalists Code of Conduct. They further submitted that the broadcast violated Section 22 as read with section 3 of the HIV/AIDS Prevention and Control Act No. 14 of 2006, section 3 provides that the object and purpose of the Act are inter *alia to*

...(b) Extend to every person suspected or known to be infected with HIV and AIDS full protection of his human rights and civil liberties by-

- (ii) Guaranteeing the right to privacy of the individual... whereas section 22(1) of the Act provides that:No person shall disclose any information concerning the result of a HIV test and any related assessments to any other person except with the written consent of that person.

The Complainants further submitted that 2nd Respondent was in grave breach of all the know tenets of journalism. Though not disclosing their full identity, she used names of the parties concerned in her broadcast, of which friends and close associates of a person can easily speculate or even correctly identify the person. By putting their voice on radio without distorting it and their names (Agnes and Nicholas, Mama Pat) is a breach of that person's right to privacy.

The Complainant submitted that the broadcast violated the following clauses of the Code of Conduct: Clause 8, 12, 13(c) and 20. Clause 8 of the Code of Conduct provides that, Journalists should generally identify themselves and not obtain or seek to obtain information or pictures through misrepresentation or subterfuge. Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means.

Clause 12 of the Code of Conduct provides that,

(a) Except in justifiable cases, journalists should not tape or record anyone without the personal knowledge. An exception may be made only if the recording is necessary to protect the journalist in a legal action or for some other compelling reason.

(b) Before recording a telephone conversation for broadcast, or broadcasting a telephone conversation live, a station should inform any party to the call of its intention to broadcast the conversation. This, however, does not apply to conversation whose broadcast can reasonably be presumed, for example, telephone calls to programmes where the station customarily broadcasts calls.

Clause 13(c) of the Code provides that (c) Intrusion and inquiries into an individual's private life without the person's consent are not generally acceptable unless public interest is involved. Public interest should itself be legitimate and not merely prurient or morbid curiosity. Things concerning a person's home, family, religion, tribe, health, sexuality, personal life and private affairs are covered by the concept of privacy except where these impinge upon the public.

Clause 20 provides that as a general rule, the media should apply caution in the use of pictures and names and should avoid publication when there is a possibility of harming the persons concerned.

They further submitted that the casual, reckless and negligent manner the 2nd Respondent through the connivance of the 1st Respondent purported to disclose the HIV/AIDS status of a person on national radio is both a breach of their constitutional human rights and a statutory offence under the HIV and AIDS Prevention and Control Act and also flouts the Journalist Code of Conduct. In addition they submitted that that the broadcast was in total disregard to a person's privacy and portrays such blatant disregard of human rights of HIV positive people to wit they cited the case of *Liberal Democrat Party of UK Vs. The Daily Telegraph*, (Complainant's List of authorities No. 2) in the Press Complaints Commission of the United Kingdom where the Commission observed that;

recording individuals using clandestine listening devices without their knowledge was particularly serious and intrusive, requiring a strong public interest defence. Secretly recording a public servant pursuing legitimate public business was without question a serious matter.

The Complainant also cited the following cases to buttress their submissions **South Africa Telecommunications and Electrical Supply Authority Vs. Campus Bay FM Stereo, Case No. 40/99**, where the Respondent broadcast on radio that top five storeys of well-known building in Port Elizabeth had been blown away in a storm. The matter was considered in most serious light

by Commission. The broadcaster was fined R10 000.00, R7 000.00 of which is suspended for five years and R3 000.00 of which must be paid before the end of February 2000. They also cited the case *Perulam vs. East Coast Radio, Case No. 34/2007* a complaint by driver of car that her privacy had been intruded upon. During a traffic programme, her alleged errant driving was described on-air and she was identified by describing her as the "lady driving a red car with registration plate *** ZN". The complainant was identified by friends and colleagues through her personalised number plate. She did not have opportunity to explain or defend her alleged errant driving. The Tribunal found that the broadcaster went one step too far in identifying the driver. Description of a person (or woman) driving a red car" would have been sufficient information for motoring public to take necessary steps in the interest of road safety. The Tribunal found that legitimate public interest in road safety did not override the Complainant's right to privacy. The broadcaster was found to have contravened clause 38 of Code of Conduct and reprimanded. The complaint was upheld.

Relying on the above authorities the complainants submitted that in the instant case, there have been no extenuating circumstances that should lead the Commission to take this particular show lightly. They added that, the 2nd Respondent during cross-examination admitted that this particular show was subsequently used in advertisement. While drawing comparisons with another advertisement, 'wacha mpango wa kando' which the 2nd Respondent alluded to as being sponsored by the same PSI company, they submitted that , whilst the 'wacha mpango wa kando' is an ongoing educative advertisement that discourages cheating by married couples; 'busted' is flouted for its entertainment value. The extreme example being that the busted show which is in issue in this case demonstrates the shock and awe effect that its presenter, would wish it to be associated with.

They also submitted that owing to the 2nd Respondents own admission that she sometimes does run out of material, in which case she fabricates the show, demonstrated the length at which the 2nd Respondent can go to '*entertain*' her listeners. In conclusion they made the following prayers

- Order the Respondents to broadcast an apology and correction to the public and in particular people living with HIV/AIDS in such an equivalent prominent manner as the clip complained of and correct the perception created by it that the HIV status of a person can casually be disclosed without their prior consent as required under Section 22 (1) of the HIV Prevention and Control Act,

- Order the Respondents to issue a public statement on its radio that HIV / AIDS is a serious national issue, which ought to be treated in an emphatic and sensitive way so as bring down the levels of stigma and discrimination that is associated with it.
- Issue a public reprimand against the Respondents,
- Fine the Respondents Kshs, 500,000/= as a corrective lesson to their indifferent and casual manner of treating the issue of HIV/AIDS, that it can be used as a prank for its entertaining shows,

Respondents Submissions

In their written submissions filed with Commission on 6 /10 /2011, the respondents raised four issues for determination, specifically

- a) Whether the complainant has the capacity or *locus standi* to file the complaint
- b) Whether the Commission has jurisdiction to hear the complaint
- c) Whether the respondents did breach any provisions of the Act and the Code
- d) Whether the complaint is entitled to the reliefs sought

On the first issue they submitted that although cognizant of Section 26 (1) of the Media Act that allows anyone to lodge a complaint with Council, the nature of the present complaint was such that a complainant cannot be instituted by a third party. They submitted that the complaint alleges infringement of a person's privacy and confidentiality and neither persons in question, that is, Agnes, Nicholas and Mama Pat came forth to complain or testify, in fact the whole broadcast was at the instigation of Nicholas "a would be complainant". In support of this submission they cited the South African case of **J Wiblin Vs SABC Case No. 10/99**, where the South African Complaints Commission held:

"When, however, the complaint deals with privacy, it would seem unreasonable to allow a third party to access this commission on that basis. The matter of public interest does not usually come into play in this kind of case and accordingly we have come to the conclusion that the complainant does not have locus standi in the present matter."

In addition they submitted that since the complainant had admitted that they had not been instructed by any person to bring forth the complaint, they had no capacity to institute these proceedings.

On the second issue, they submitted the Commission had no jurisdiction to determine the matter. They averred that the crux of the complainants case was that the broadcast breached the Constitution of Kenya particularly articles 20(4) 27, 28, 29 and 31 thereof. They submitted that redress of alleged denial, violation or infringement of a right or a fundamental freedom is a preserve of the High Court and other Courts contemplated by the Constitution, not the Media Complaints Commission. Secondly they submitted that the complaint related to the alleged disclosure of the HIV / AIDS status of a person contrary to the HIV/AIDS Prevention and Control Act, particularly, section 3 and 22 thereof. They further submitted that Part VII of the HIV/AIDS Prevention and Control Act of 2006 establishes the Equity Tribunal and in terms of Section 26 thereof, the Tribunal is vested with the jurisdiction to hear and determine complaints arising out of any breach of the provisions of the Act, including breach of article 3 and 22 thereof. Therefore the Commission had no jurisdiction to determine matters vested in a different tribunal to wit they cited the Court of Appeal Case of the *Owners of the Motor Vessel "Lillian S" Vs. Caltex Oil (Kenya) [1989] KLR1*, where the Court observed that jurisdiction is everything and that a court of law should down its tools in respect of the matter before it, immediately it holds the opinion that it does not have the jurisdiction to hear the mater.

In concluding their submission on this issue they stated that the Commission can only make a determination on an alleged breach of **the Media Act and Code of Conduct for the Practise of Journalism in Kenya**. They submitted that complainants have not shown any breach of the said Act. On the third issue they submitted that in the reasonable circumstances of the broadcast there was no breach of the Media Act or Code of Conduct for the Practice of Journalism. The public, who the Act and the Code seeks to protect, and who listen to the programme "busted" are at all times fully aware that the broadcast is a merely a prank, ludicrous and grotesque act intended to "catch" a "cheating spouse". That since the public is fully aware that the 2nd Respondent is not in actual fact the wife of the cheating spouse, the question of accuracy of the information to the public does not therefore arise and the listeners of the program cannot at any stage be shocked or traumatized at the broadcast they believe to be so, in support of this submission they cited the South African Broadcasting Complaints Commission case of **J Brink Vs. 5FM, Case No: 22/2005**, where the Commission stated that:

"Of course, the listeners knew that the call was a prank call. In the end, this is one of those cases where there is doubt as to whether the code was contravened. The tribunal believes that the contents of the call, was in practically questionable taste. However, since the Tribunal could not unequivocally come to the conclusion that privacy had been invaded upon unreasonably, given the fact that the person called was soon told that it was a fake call and he did not complain to the BCCSA himself, the complaint is not upheld."

They further submitted that the person who was called knew at the end, that the call was a prank meant to "catch" her. Also, all the listeners of the programme know that the call is a prank call. That was not the first broadcast of the programme "busted", in any event, they submitted, she was not the complainant herein. On that basis, the Respondents prayed that the claim on alleged breach of the code should not be upheld.

They also submitted that show enjoys wide audience and the 2nd respondent has over 44,000 friends and none of the members of the public, or a person living with HIV/AIDS has neither made a complaint nor testified in this proceeding to confirm the allegations of the Complainant. In fact as a result of the broadcast "busted" has attracted sponsorship from PSI. This they submitted, is a clear indication that the broadcast was not in bad faith or reckless and the message resonated well with the audience. They concluded by submitting that the broadcast of a cheating spouse was in fact in the interest of the public since the fight against HIV/AIDS is not a private affair in Kenya.

On the fourth issue the respondents submitted that the Commission should find that the Complaint relating to the alleged breach of the Media Act and the Code of Ethics is of no substance and that the whole claim is frivolous and of no basis and should be dismissed.

They further submitted the complainant had sneaked in the last prayer in its submissions whereas the Court of Appeal had held in a several cases that a party is not entitled to a prayer that has not been pleaded. To which they cited the case of **Great Lakes Transport Co. (U) Ltd v. Kenya Revenue Authority, Civil Appeal No.2006 of 2005** submitting that on this basis, that prayer must fail. The Respondents also prayed for costs.

Issues for Determination

Having carefully perused the pleadings herein, keenly listened to the evidence and considered the submissions of both parties, the Commission framed the following issues for determination:-

1. Whether Aids Law Project has *locus standi* to lodge the complaint
2. Whether the Commission has jurisdiction to hear and determine the complaint; twinned with the issue of whether the Media Act and Code of Ethics applies to radio shows like busted.
3. Whether the busted show broadcast subject of the Complaint breached the Media Act and the Code of Conduct for the Practice of Journalism
4. Whether the Complainant is entitled to the reliefs sought.

1. Whether Aids Law Project has *locus standi* to lodge the complaint

An issue was raised by the Respondents whether the complainant, the Aids Law Project had locus to complain to the Commission especially on matters related to privacy which assumes an individual right dichotomy. The question of *locus standi* has been discussed at length in Kenya's jurisprudence. The rules on *locus standi* have been relaxed by the 2010 Constitution of Kenya.

Article 22 (1) (The Bill of Rights) of the Constitution of Kenya, provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 22 (2) goes further to state the classes of persons who can institute court proceedings which for purposes of the Media act will include a complaint, to wit

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members

In their testimony and submissions, the Complainant ALP averred that as a registered NGO, its Constitution allows it to act on behalf of people with HIV/AIDS who as a result of stigma, discrimination and stereotyping are afraid to act on their own names. Therefore it follows that the ALP has Constitutional *locus standi* to file complaint specifically under clause 2(a) and (b) of Article 22(2) of the Constitution.

Furthermore Section 26(1) of the media Act reads in part...

.....Any person aggrieved any publication, or any conduct of a journalist, media enterprise or the Council.....May make a written complaint to the Council setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought.....

The ALP being registered NGO is a juridical person as such it is a person capable of filing a complaint within the meaning of Section 26 of the Media Act, to that extent the ALP has *locus standi* to file a complaint with the Media Council. The Commission finds that the Complainant had constitutional and statutory *locus standi* to file the complaint on behalf of people living with HIV/AIDS.

2. Whether the Commission has jurisdiction to hear and determine the complaint; twinned with the issue of whether the Media Act and Code of Ethics applies to radio shows like busted.

The Respondents submitted that the Complainants had selected the wrong forum for processing of their complaint. They submitted that the Complainant ought to have approached the High Court for enforcement and protection of the right to privacy or should alternatively have approached the Tribunal Created by the HIV/AIDS Prevention and Control Act. The Complainants submitted that though the Respondents infringed constitutional rights and the HIV/AIDS Prevention and Control Act, they also infringed the Media Act and Code of Ethics in the busted show.

The Media Act defines media as follows:

“Media” includes both electronic and print media engaged in any production for circulation to the public, but does not include book publishing.

The Respondents through the production of busted show are captured by the definition of media and therefore brought under the ambit of application of the Media Act and the Code of Ethics for the Practise of Journalism. In this aspect the enforcement of the Media Act and the Code of Ethics for the practise of journalism is the main task of the Complaints Commission. The Commission does not agree with the Respondents submission that it has no jurisdiction to hear and determine the complaint. The Commission finds it has jurisdiction to hear and determine the complaint. The Commission finds it has jurisdiction and mandate to apply the Media Act and Code of ethics to shows like busted even though they are more entertainment in nature guided by Section 26 of the Media Act on complaints that provides:-

26 (1) Any person aggrieved by

- (a) Any publication, or any conduct of a journalist media enterprise or the Council; or
 - (b) Anything done against a journalist or media enterprise that limits or interferes with the Constitutional freedom of expression of such journalist or media enterprise,
- May make a written complaint to the Council setting out the grounds for the complaint, nature of injury or damage suffered and the remedy sought.

Applying Section 26 as set out to the circumstances of the cases leads the Commission to the conclusion that it has jurisdiction. What is in issue in this complaint is the conduct of the 2nd Respondent and the airing of the show by the 1st Respondent. Clearly both aspects of the definition are captured. Any publication covers the busted show that was broadcast and is subject of the complaint while the conduct of a journalist or media enterprise is what is in issue in the manner in which the busted show was pursued and aired including the HIV/AIDS part.

In the Commission's view it is wrong to argue that because there exist other avenues that the Complainant can approach on the matters in question the jurisdiction of the Media Council Complaints Commission is ousted. The Commission finds it has jurisdiction to admit, hear and determine the complaint.

3. Whether the busted show broadcast subject of the Complaint breached the Media Act and the Code of Conduct for the Practice of Journalism

The Complaints submitted that by their conduct and broadcast the Respondents had breached clauses of the Media Act and Code of Ethics. The Media Act under Section 35 anchors the Code of Ethics for the Practice of Journalism. The clauses breached according to the Complainants are Clause 8, 12, 13(c) and 20.

Clause 8 relates to misrepresentation and requires journalists to generally identify themselves and not to obtain information through misrepresentation and subterfuge which can only be justified in public interest and the material cannot be obtained by any other means.

The Commission finds that Respondents are in breach of this clause. The 2nd Respondent does not identify herself when seeking to obtain information. The Respondents argued, which was admitted by the Complainants, that HIV/AIDS is a matter of public interest. The Commission notes that HIV/AIDS has been declared a national disaster. The Commission finds that HIV/AIDS is a matter of public interest. However the show in issue was not about HIV/AIDS but rather about disclosure of cheating spouses. The Commission finds it worrying that the Respondents chose to use HIV/AIDS as a prank to bust a cheating spouse.

Within clause 8 of the Code of Ethics the Commission does not find the public interest angle that necessitated failure by the 2nd Respondent to identify herself when seeking information. The Commission finds that HIV/AIDS was not used in the public interest sense required by the clause but came in as a by the way in the 'busted' show. The Commission finds that clause 8 was breached.

Clause 12 relates to recording of interviews and telephone conversations. Except in justifiable cases, journalists should not tape or record anyone without the person's knowledge. The 2nd Respondent admitted that she tapes and records people without their knowledge. She did the same for the busted show under complaint. The Respondents did not avail information to the Commission on the justifiable reason for taping and recording calls without a person's consent. The Respondents did not give information to the Commission on why they recorded the call between Mama Pat and Agnes without seeking their consent. The Commission finds the Respondents in breach of Clause 12 for refusing to follow the guidelines on recording of calls.

Clause 13 (c) relates to intrusion into privacy without a person's consent unless public interest is involved. Things concerning a person's home, family, religion, tribe, health, sexuality, personal life and private affairs are covered by the concept of privacy except where these impinge upon the public.

The Commission from the foregoing finds that the Respondents breached this clause by intruding into personal life of persons without consent including on health and sexuality matters without justifiable public interest reason. We have already noted that the manner in which HIV/AIDS came out in this case was not with a view to furthering the fight against the disease which would be in public interest. HIV/AIDS in this complaint came out as a prank. This is no public interest. The consent part for the intrusion into one's privacy is important. There was no evidence that the Respondents sought consent from persons before airing matters concerning them. The Commission finds the Respondents in breach of clause 13 (c).

Clause 20 relates to the use of pictures and names. As a general rule the Media is required to apply caution in the use of pictures and names and should avoid publication where there is a possibility of harming the persons concerned. In the complaint in question, the names Nicholas, Agnes and Mama Pat were used without any attempt to distort their voices to avoid identification. Given the stigmatization that comes with HIV/AIDS disclosure the Respondents ought to have complied with clause 20 on use of names. The 2nd Respondent admitted during her testimony that the names she used in this particular broadcast Nicholas, Agnes and Mama Pat were real. The Commission finds that the Respondents breached clause 20 in use of real names without any regard to harm that could be caused by the HIV/AIDS disclosure. The Commission finds the Respondents in breach because of the fact that the shows are pre-recorded so there is some time to check the harm that disclosure may cause as required by clause 20. The Respondents are in breach of clause 20 guidelines.

Although the 2nd Respondent alluded to their having an in house policy on privacy and the conduct of shows like *busted* and treatment of persons it was not clear what that in House Policy contained as she admitted to not having heard of the Media Act Code of Conduct for the Practice of Journalism. The Commission finds this worrying as it explains the breaches of the Code of Ethics. The Commission urges the Respondents to immediately familiarize themselves with the Media Act and Code of Conduct for the Practice of Journalism so as to avoid breaches in future.

4. Whether the Complainant is entitled to the reliefs sought

The Complainant prayed for the following orders:-

- a) Investigate the Complaint herein and make the necessary recommendation to the Attorney General/ and or Director of Public Prosecutions to institute criminal charges against the 1st Respondent and 2nd Respondent for unlawful disclosure of the HIV status of a person without their written consent.
- b) Investigate the Complaint and make the necessary recommendation to the Media Council to issue the appropriate directive against the Respondents for casual, reckless and negligent manner they treated the issue of disclosure of HIV status of a person.
- c) Order the Respondents to broadcast an apology and correction in such an equivalent prominent manner in its broadcast and correct the perception created that the HIV status of a person can casually be disclosed without their prior consent as required under Section 22 (1) of the HIV Prevention and Control Act.
- d) Issue a public reprimand against the Respondents.
- e) Investigate the Complaint and make the necessary recommendation to whatever appropriate body created by law to take remedial action and correction.
- f) Costs of this action be awarded to the Applicants.

Later in the submissions the Complainant added the following prayer:-

- Fine the Respondents Kshs, 500,000/= as a corrective lesson to their indifferent and casual manner of treating the issue of HIV/AIDS, that it can be used as a prank for its entertaining shows,

The last order was opposed by the Respondents as it was not pleaded earlier.

Given the nature of the complaint and the complainant's juridical capacity, the Commission does not find this an appropriate case for an apology or correction. The nature of this case is such that the broadcast show 'busted' does not affect the complainants personally, as such there would be nothing to clarify or correct as relates to them.

On the complainant's prayer for the Commission to make recommendations to the Attorney General/ and or Director of Public Prosecutions to institute criminal charges against the 1st Respondent and 2nd Respondent for unlawful disclosure of the HIV status of a person without their written consent, this Commission advises the complainants to lodge a complaint with the Equity Tribunal to initiate the necessary criminal proceedings in the event that an offence has been committed by the respondents .

Further, the Commission finds it inappropriate to issue a public reprimand against the 2nd respondent. The Commission observed during the hearing that she was remorseful and did not intend in any way to disparage people living with HIV/AIDS. The Commission's records also reveal that this is the first complaint to be brought against the respondents.

On the issue of costs, the Commission finds it appropriate for each party to bear their own costs.

Be that as it may, the Commission is charged with the task of enforcing the Code of Conduct for the Practise of Journalism and is permitted by the Media Act to fine journalists and media enterprises for breaches and violations of the Act and the Code. In view of this the Commission makes the orders below.

Orders of the Commission

1. The Commission orders and directs the 1st Respondent to pay a fine of two hundred thousand shillings for violation of Clause 8 of the Code of Conduct. The fine imposed pursuant to Section 38 of the Media Act shall be paid to the Media Council of Kenya within 14 days
2. The Commission orders and directs the 1st Respondent to pay a fine of two hundred thousand shillings for recording interviews and phone conversations without seeking consent in violation of Clause 12 of the Code of Conduct. The fine imposed pursuant to Section 38 of the Media Act shall be paid to the Media Council of Kenya within 14 days
3. The Commission orders and directs the 1st Respondent to pay a fine of two hundred thousand shillings for intrusion and inquiries into individuals private life without seeking consent or explaining public interest involved in violation of Clause 12 of the Code of Conduct. The fine imposed pursuant to Section 38 of the Media Act shall be paid to the Media Council of Kenya within 14 days
4. The Commission orders and directs the 1st Respondent to pay a fine of two hundred thousand shillings for failure to apply caution in use of names to avoid harming persons

concerned in violation of Clause 12 of the Code of Conduct. The fine imposed pursuant to Section 38 of the Media Act shall be paid to the Media Council of Kenya within 14 days

In the event of failure to comply we further direct that this matter be mentioned before this Commission for further orders. Either party is at liberty to make the necessary applications.

Any party aggrieved by these orders may, as stipulated in Section 32 (1) of the Media Act, appeal to the Media Council of Kenya within 14 days of the date hereof.

Delivered at Nairobi this 12th Day of April 2012

Grace N Katasi

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(Chairperson)

Priscilla Nyokabi

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(Commissioner)

Peter Mwaura

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(Commissioner)