

REPUBLIC OF KENYA
THE MEDIA ACT, 2007
THE MEDIA COMPLAINTS COMMISSION
COMPLAINT NO 092 OF 2010

THE AIDS LAW PROJECT.....COMPLAINT
VS
NATION MEDIA GROUP.....1ST RESPONDENT
MUTUMA MATHIU.....2ND RESPONDENT
KWAMCHETSI MAKOKHA.....3RD RESPONDENT

DECISION OF THE COMPLAINTS COMMISSION

The Complaint

The Complainant herein, The Aids Law Project (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, Nation Media Group (NMG), based in Kenya with wide readership in Kenya and in the East African countries of Uganda, Tanzania and Rwanda as well as presence on the internet with an immense capacity to influence and shape public opinion. The second respondent, Mr Mutuma Mathiu, is the managing editor responsible for the editorial content of the publication in which the article in question was published and the third respondent, Mr Kwamchetsi Makokha, is the author of the article.

The complaint, dated 9/10/2010, was lodged with the Media Council of Kenya on 18/10/2010. ALP complained about an article, headlined "***Thou Shalt not lie with mankind as with womankind***", published in the Saturday Nation of 9th October 2010. The Complainant's said that the article was inaccurate, unfair, and biased and in breach of Article 1 (accuracy and fairness) of the Code of Conduct for the Practice of Journalism, schedule 2 of the Media Act 2007, hereinafter the 'Code'. That the said article was inflammatory and promoted hate speech against the homosexual community in Kenya in breach of Article 25 (Hate Speech) of the Code.

Response to the Complaint

The Respondents admitted that the Article was authored by the 3rd Respondent and published as such. They denied that the article breached any section of the Media Act and further averred that the complainant did not locus standi to lodge the complaint. They further averred that the complainants completely misapprehended the context of the article. They concluded by stating that the complaint was an affront to freedom of expression and should be dismissed.

Submissions by the Complainant

ALP contended that as a registered NGO, its Constitution allows it to act on behalf of people with HIV and AIDS who as a result of stigma, discrimination and stereotyping are afraid to act on their own names. They gave supporting documents to show their registered legal status. They averred that on this grounds they grounds they possessed the requisite *locus standi* to lodge this representative complaint on behalf of homosexuals.

The complainants went ahead and defined homosexuals as people who are sexually attracted by other people of the same sex. The words 'gays' and 'gay people' are also common terms used instead of 'homosexuals', whereas 'lesbians' are only used to describe female homosexuals. They felt that these fundamental definitions of homosexuals already indicate that this minority group is evenly distributed throughout the entire society. Homosexuals can be both female and male and exist in all classes, social groups, races, positions and countries, regardless of their age or origin.

The Complainant's main contention was that the opinion-editorial article published on 8th October 2010 by the 1st Respondent herein, through concurrence of the 3rd and 2nd Respondents was homophobic, promotes hate speech and is inflammatory intended to promote hate against a particular class of Kenyans who are gays or homosexuals.

Excerpts of the article penned by the 3rd Respondent under the editorship of the 2nd Respondent entitled ***"Thou shalt not lie with mankind as thou would with womankind"*** are as follows:

"...That is why the moral leadership of the country must be heard loud and clear in the chorus of condemnation against gays and sex workers..."

"For a long time, HIV has been comfortable with being secretly transmitted from sex workers to truck drivers and then into marriage, until men who have sex with men also started demanding attention by wearing tight-fitting clothes. Now, there are some people who also want to edge in sideways and suggest that sex work should be free, like selling airtime..."

"...that men who have sex with men need to be ignored more pointedly lest they become a permanent fixture of Kenyan society..."

"... Kenyans should shudder to imagine how much more men who have sex with men would contribute to new HIV infections if their lifestyle was not classified as offences against the order of nature and hidden from public view..."

“...Men who have sex with men are such an insignificant population,.....”. ALP felt this would further promote discrimination.

“Give gays an inch and they will take a mile.....they will be demanding special seats in the National Assembly, the Senate and the county assemblies...”

“...No sooner will the government start spending money on men who have sex with men in the guise of fighting HIV and AIDS, than a bolt of lightning will strike the country, bringing with it sterility and sickness.”

“...The more socially isolated men who have sex with men are, in prison and outside, the less they will affect the rest of the society...”

In support of its plaint, the Complainant gave copies of its Registration Certificate and a copy of the Article complained about. They also put the complaint in context using the constitutional and legislative frameworks including the Constitution of Kenya articles 2(5), 3(1), 10(2), 20(1), 20(4), 27 and 28. Other laws referred to were the NCIC Act No 12 of 2008, the HIV and AIDS Prevention and Control Act No 14 of 2006, the Media Act No 3 of 2007 and international conventions (International Covenant on Economic, Social and Cultural Rights – ICESCR) which Kenya has ratified and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The **Complainants prayers** are:

1. To make the necessary recommendations to the director of Public Prosecutions to institute criminal charges against the 3rd Respondent for hate speech
2. Investigate the Complaint and make necessary recommendations to the Media Council to issue the appropriate directive against the Respondents from instigating hate speech against homosexuals or gays
3. Order the Respondents to publish an apology and correction in such an equivalent prominent manner in its publication and state that the apology is with respect to the publication at issue
4. Issue a public reprimand against the Respondents.

The Complainant called upon two witnesses in support of the complaint. Paul Ogendi, a legal officer with the ALP took the stand and related the complaint with the factual situation. He testified that the tone of the article clearly demonstrated a bias towards Kenyans of a gay or lesbian orientation; that it was homophobic and promoted hate speech. He pointed out the specific paragraphs that in his view offended the law at issue. Upon cross-examination by Sekou Owino for the respondents, Mr Ogendi stated could not define what hate speech was.

The second witness was Catherine Kamunde, a human rights activist and a lesbian. She passionately dissected the article and tried to demonstrate that there was clear bias, homophobia and hate promoted by the article. She averred that the Nation newspapers were widely read, even by 'matatu people'. She testified she had been accosted by some Matatu touts after they had read an article about her person previously published by the newspaper, but they were not hostile to her. She averred that she has continued to get insults because of the story. She added that the Article promoted an attitude of stereotyping towards gays.

Upon cross-examination by counsel for the respondents, Ms. Kamunde admitted That she would not say that gay persons are denied health care but she would not attribute it to the Article; she added that it may just be because of such Articles. (b) That she was aware that only one gay person reacted to the Article by email but the Respondents did not publish it, however the email was not produced at the hearing. She further admitted that she had previously declared publicly her status as a gay person and that the article did not mention her specifically; she added that she had no direct complaint against Kwamchetsi Makokha. She agreed that the article was one of satire but a cruel one and without empathy.

They requested that the Complaints Commission investigate the complaint and make the necessary recommendations to whatever appropriate body created by law to take remedial action and correction.

The respondents did not call any witnesses.

Submissions by the Respondents

The respondents through their advocated submitted that the 2nd respondent's evidence was improbable. They further submitted that it would be unsafe to believe that Matatu touts read articles in newspapers months after a story is published and which does not mention an individual and seek to confront a person based on that article. They further submitted that in any event the touts were not hostile to her therefore the claim that it would stir violence against

gay person is unproven speculation at best. They further submitted that the 1st witnesses' evidence was irrelevant.

They also submitted that the Complainants did not have jurisdiction to file the Complaint as section 26 of the Media act does not contemplate a complaint filed by a third party but a person who is directly aggrieved by any publication or any conduct of a journalist, media enterprise or the council. They further submitted that The Complainant itself has not suffered any damage as a result of the Article therefore the Commission should dismiss it for want of Jurisdiction.

They further submitted that the Complainants did not have locus standi to lodge the complaint because Section 26(1) of the Media Act 2007 which expressly requires that the person aggrieved and who has suffered damage must be the one to institute a Complaint. They avered that the Complainant admitted in evidence that the Article does not refer to or aggrieve it but that it may have aggrieved persons with whom it is in association with. The Second witness who was supposedly aggrieved by the Article was not a party but merely a witness.

The Respondents submitted that the design of the Complainants procedure from the structure of the Complainants Commission and the Text of the establishing legislation as read together with the Rules governing the Complainants procedures do not contemplate a situation of a complaint being filed on a representative basis.

For the above reasons the complainants submitted that the Complainants had no **locus standi** to institute the Complaint and the Commission has no jurisdictional authority to consider it.

They also submitted that the complaint should be rejected because the parties cannot be ascertained pursuant to Rule 11 (4) (d) of the Rules which permits rejection of a Complaint if the parties cannot be ascertained.

They submitted that article was not homophobic and neither was it established that it was, save for the assertion that the penal consequences of homosexuality are in parity with bestiality, even so, the Penal Code at section 162(a) and 162(b) does indeed attribute penalty of 14 years to both categories of offences, for this reason they argued that the Statement was true in substance, in law and in fact, and further submitted that there was nothing in the said Article that would have invited such a reader to consider that the Article was meant to stir hatred and no evidence was adduced at the trial to support this allegation.

They also submitted that the claim that the Article's apparent condemnation of gay persons constitutes hate Speech is unfounded as the only legal definition of Hate Speech in Kenya is from the National Cohesion and Integration Act (2008) section 13(1) which defines hate speech as conduct or a combination of speech and conduct which is:

"Threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence..... if such person intends to stir ethnic hatred....

They submitted that this definition going by that definition of the offence of Hate Speech, it is clear that ethnic hatred is at the core of hate Speech in Kenya under the law of Kenya, nothing else. Not even, Homophobia, therefore, as a matter of law, the claim that an attack on gay persons would constitute hate Speech is misconceived.

They also submitted that the Complaint is misconceived and seeks to abridge freedom of Speech and of the Media and that it seeks to abridge the 3rd Respondents right to expression of his opinions, and the right to artistic creativity in expression of those opinions and views contrary to Article 33(1) of the Constitution, granted, Article 33(2) truncates such right so as to avoid Hate Speech and incitement to violence, they submitted that those do not apply for the reason in law that hate Speech in Kenya is restricted to ethnicity.

They submitted that the complaint failed to appreciate the essence of the Article because it was on a matter on which the Public had a legitimate interest in debating and the respondents and Journalists and a Media organization respectively had a legitimate duty and obligation to permit exchange of views and opinions. The Views were published in a newspaper column with the intention of reaching a broad public audience.

They also submitted that the Article took the form of a satirical piece of the author's views on such a Public issue. It involved therefore the 3rd Respondents' exercise of his artistic creativity in commenting on an issue of Public interest. In addition they submitted that the context of the Article in was in the sense of commenting on an issue of Public importance

They cited the case of **Snyder Vs Phelps**, where the US Supreme Court held that the freedom of speech as reflected in the first amendment is at the core of democracy. Where it was also stated that speech concerning public affairs is more than self-expression: it is the essence of self-government..... Accordingly, speech on public issues occupies the highest rung of the hierarchy of first amendment values, and is entitled to special protection in addition they submitted that the Complaint therefore sought to prevent the coverage of Public issues and abridge freedom of the

Media by contrary to Article 34(2)(b) of the Constitution which specifically states that the State or any Authority may not: *penalize any person for any opinion or view or the content of any broadcast, publication or dissemination.* "

With regard to the complainants prayers they stated submitted as follows

That prayer number 1 is unconstitutional and contrary to Article 159(10) of the Constitution which states as follows:

"The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or (sanctions. shall not be under the direction or control of any person or authority ... ' "

Secondly, the prayer is contrary to the Media Act: Section 29 of the Media Act is clear as to the orders and actions that the Complaints Commission may make subsequent to hearing of a Complaint before it. A recommendation of the kind sought here is not one of them and should be dismissed because

- a) The Complainant has not approved any grievance or breach that could entitle it to any remedy;
- (b) The remedy sought here is unconstitutional;
- c) The remedy seeks to enjoin the Commission to act ultra-vires the establishing legislation- by issuing an order that it is not empowered to issue.

That prayer number 2 must also be dismissed for the following reasons:

- (a) There is no offence or legal transgression in Kenya or under the Media Act ,2007 known as "hate Speech against gays or homosexuals".
- (b) The Commissions does not have the power under the Media Act, 2007 to make a recommendation or order to the Council to undertake any kind of action. The order therefore seeks to enjoin the Commission to act ultra-vires in issuing such a recommendation or directive to the Council.
- c) Section 29 of the Media Act limits the nature of reliefs and or orders that the Complaints Commission may issue subsequent to hearing a Complaint

That prayer no 3 on the issuing of an Order of Publication of an Apology is misconceived and should not be issued for the following reasons;

- (a) The Complainant has not proved that it is aggrieved and or otherwise entitled to any relief under the Media Act,2007.
- (b) There is no party to whom an Apology would be issued;

(c) The Article is true in substance and in fact and was on a matter of Public interest.

(d) The issuing of an order of apology would be tantamount to an act of censorship on the part of the Commission because it would be contrary to freedom of the Media, of Speech and the inherent right to creative expression as well as an abridgment of freedom of speech under the Articles 33 and 34 of the Constitution.

That prayer 4 for a Public Reprimand has no basis because:

(a) The Complaint has not laid a foundation for the claim under the Act or at all; (b) The Complainant was not the subject of the Article that is the basis for the Claim, whether directly or indirectly;

Cc) The Complainant has not shown that it is aggrieved by the Article that is the subject of this Complainant;

(d) The Complainant has not justified or laid a foundation for any loss or damage suffered as a result of that Article.

The respondents prayed for a dismissal of the complaint on the following grounds

- a. The Complaint completely misapprehends the content, context and form of the Article
- b. The Complainant has not demonstrated that it has any cause of action to justify this Complaint
- c. The Complainant has no legal or other factual standing to institute this Complaint
- d. The Prayers sought by the Complainant are illegal and unconstitutional
- e. The Article was a fair comment on a matter of public interest
- f. The Complaint seeks to censor the Respondents from expression of their opinions and would constitute abridgment of freedom of speech and of the media
- g. The Complaint is an abuse of the process of this Commission

In conclusion the respondents further prayed that the Complaint be dismissed as the Complainant has no legal justification for the remedies sought:

Issues for Determination

From the foregoing, the clear issues for determination are the following;

1. Do the complainants have locus standi to lodge the complaint?

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. Sub article 2 goes further to state the classes of persons who can institute court proceedings which for purposes of the Media Act will in this context also include a complainant:

Article 22 (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 ALP averred that as a registered NGO, its Constitution allows it to act on behalf of people with HIV and AIDS who as a result of stigma, discrimination and stereotyping are afraid to act in their own names. Therefore it follows that the ALP has Constitutional locus standi to file complaint, this 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 a registered NGO is a juridical person and 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.

2. Is the article satirical?

According to Wikipedia, *“Satire is primarily a literary genre or form although in practice it can also be found in the graphic and performing arts. In satire, vices, follies, abuses, and shortcomings are held up to ridicule, ideally with the intent of shaming individuals, and society itself, into improvement. Although satire is usually meant to be funny, its greater purpose is often constructive social criticism, using wit as a weapon.”*

In addition, *“Satire is also the use of irony, sarcasm, ridicule, or the like in exposing, denouncing or deriding vice, folly etc.*

Drawing from the above definition and considering that at the material time, there was raging public debate on the issue of homosexuality in contemporary Kenya, and the fact that the complainants 2nd witness, Ms Kamunde admitted that she knew that 3rd respondents articles are usually satirical in nature and the respondents strenuous argument that indeed the article was of a satirical nature. The Commission is finds that indeed that the article was of a satirical nature.

A common feature of satire is a common feature of satire is strong irony or sarcasm —“in satire, irony is militant”— This "militant" irony or sarcasm often professes to approve of (or at least accept as natural) the very things the satirist wishes to attack.” The author in his piece appears to be vehemently supporting the segregation of homosexuals in society, when in actual sense, it can be safely construed that the authors actual point is to vilify society for holding this position.

Secondly, Article 33 of the Constitution of Kenya protects freedom of expression including artistic creativity, it provides as follows 33. (1) Every person has the right to freedom of expression, which includes—

- (a) freedom to seek, receive or impart information or ideas;
- (b) freedom of artistic creativity; and
- (c) academic freedom and freedom of scientific research.

It goes further in article 34(2)(b) and provides that

The State shall not— penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

The article is clearly labeled opinion and is thus protected under article 34(2)(b)

However, the Article is clearly labelled opinion. The question therefore is whether satire is an opinion. To do justice to the proceedings, the Complaints Commission would have benefitted from the appearance of the 3rd respondent, author of the said article, who unfortunately did not present himself for cross-examination to clarify his intent in writing the article.

3. Does the article amount to hate speech?

The Media Act does not define hates speech. However, according to Section 13 (1) the National Cohesion and Integration Commission, it is **“using threatening, abusive or insulting words or behaviourto stir up ethnic hatred...”**

Hate speech. 13. (1) A person who-

(a) uses threatening, abusive or insulting words or behaviour, or displays any written material;

(b) publishes or distributes written material;

(c) presents or directs the performance the public performance of a play;

*(d) distributes, shows or plays, a recording of
visual images; or*

(e) provides, produces or directs a programme; which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up.

It is evident from the above definition, it is clear that hate speech in Kenya is limited to ethnic, not homophobia. To that extent the article does not amount to hate speech for purposes of Kenyan law.

4. Is the Complainant entitled to the reliefs sought?

From the foregoing, the Complaints Commission does not find any reason to award any reliefs for the complainant as requested in their complaint testimony and submissions.

However, the Commission notes that it would be prudent for the respondents in this case to use appropriate labelling for their articles that are to be published so that there is no ambiguity or misunderstanding as to the type of writing that is being used. The label 'Opinion' is very wide and styles vary. This advice is also given to the wider media fraternity in general.

Orders of the Complaints Commission

The Complaints Commission feels that freedom of expression is the right to express one's own ideas and opinions freely through speech, writing, and other forms of communication but without deliberately causing harm to others' character and/or reputation by false or misleading statements. Freedom of press is part of freedom of expression.

The Commission hereby finds that the article was a satire and that the respondents did not aim to harm any person or persons with their opinion piece, infact it was the complete opposite.

Nevertheless we reiterate our advice that they should clearly label their articles so that all persons who read it in understand it in a clear manner.

On the Complainant's prayer to make recommendations to the director of Public Prosecutions to institute criminal charges against the 3rd Respondent for hate speech, the Complaints Commission advises that the respondents can lodge a complaint with the NCIC directly if they so wish .

On their request to give appropriate directive against the Respondents from instigating hate speech against homosexuals or gays, once again this is a matter to be presented to NCIC to deal with.

Having found that the article was a satirical piece and there was no malice neither intended nor proved, the Commission declines to order the Respondents to publish an apology and correction in such an equivalent prominent manner in its publication.

Delivered on this 22th Day of May 2012:

Commissioner Grace Katasi.....

Commissioner Priscilla Nyokabi.....

Commissioner Fatuma Hirsi Mohamed.....

Commissioner Peter Mwaura.....

Commissioner Murej Mak'Ochieng.....

