

REPUBLIC OF KENYA  
IN THE MEDIA COMPLAINTS COMMISSION OF THE MEDIA COUNCIL AT  
NAIROBI  
COMPLAINT NO.089/2010

ESTHER PASSARIS..... 1<sup>ST</sup> COMPLAINANT  
ADOPT-A-LIGHT LIMITED..... 2<sup>ND</sup> COMPLAINANT

-VERSUS-

WEEKLY CITIZEN.....RESPONDENT

**DECISION OF THE COMPLAINTS COMMISSION**

**The Parties**

Ms Esther Passaris, a businesswoman, and Adopt-A-Light Company Limited, both based in Nairobi, complained of two articles published by the *Weekly Citizen* in August 2010. Ms Passaris is a director of Adopt-A-Light Company Limited. The *Weekly Citizen* is a newspaper published by Headlink Publishers Ltd, based in Nairobi.

Ms Esther Passaris complained of the articles to the Council in a letter dated 11 August 2010. She formalized her complaint by completing the official Complaint Form (Form 1) on 13 August 2010.

**Articles complained of**

The articles complained of include:

1. The article headlined “**Hard times for Advertising Diva Passaris**” published on page 19 of the 2-8 August 2010 issue of the *Weekly Citizen*, with a front-page picture of Ms Passaris with the headline “**Passaris unmasked**”. On the previous issue published on 26 July-1 August 2010, the newspaper had also carried a picture of Passaris with the headline, “**Coming soon Esther Passaris in South Africa**”.

2. The article headlined “**Passaris Under Siege**” published in the 9-15 August 2010 issue of the *Weekly Citizen*.

### **Brief summary of the articles**

The articles depict the 1<sup>st</sup> complainant, Ms Passaris, as a hustler and an unscrupulous person. The articles claim, among other things, Ms Passaris was having financial problems and was embroiled in a legal dispute with her landlord over a house in Kitisuru which she wanted to buy. The articles also claim that she made sexual advances to prominent personalities, and tried to use blackmail, in attempts to solve her alleged problems, and harped on her relationship with Pius Ngugi, who the newspaper described as her “erstwhile boyfriend”, who is the father of her children. The articles claim Ms Passaris lives “such an expensive life”, which she “cannot afford” and that she has “resorted to the unscrupulous vice”. The article claims she has a Congolese boy friend.

### **The Complaint**

Ms Passaris contends that the articles are unfair, inaccurate, biased, obscene, sexist and violated her privacy and that of her children in contravention of the Media Act and the Code of Conduct for the Practice of Journalism in Kenya (hereafter referred to as “the Code of Conduct”). She also claims that prior to the publication of the articles there were attempts to extort money from her by one Brian Yongo, by threatening to publish stories that would injure her reputation.

She also claims that upon telephoning the editor of the *Weekly Citizen*, Mr Tom Alwaka,

for remedial action she was “insulted and disconnected” in breach of clause 4 on Accountability, clause 5 on Right of Reply and clause 23 on Editor’s Responsibilities of the Code of Conduct.

### **Response to the Complaint**

The respondent maintained that the article “**Hard Times for advertising Diva Passaris**” was part of news dissemination and was not and does not qualify as inaccurate, obscene and sexist in breach of clause 1 of the Code of Conduct.

The respondents averred that at the hearing they would plead justification of all the matters contained in the article and will justify the same with documentary evidence.

They stated that there exists a case between Ms Passaris and her landlord and produced as evidence a Chamber Summons, Kultar Singh Hanspal v Esther Muthoni Passaris, Civil Suit No. 280 of 2009, in the High Court of Kenya at Nairobi Milimani Commercial Courts.

They claimed that the dissemination of news regarding the case cannot be false or libelous and pleaded justification.

The respondent further said:

*“It is common ground that Esther Passaris has children with Pius Ngugi and the said story cannot be false. We have evidence that Pius Ngugi sent her a text calling her an extortionist and they have since fallen out.*

*“Regarding the boyfriend, we have evidence and witnesses and shall also plead justification.*

*“In sum, we deny all the allegations and this is an attempt to gag the media and we shall place our defence at the hearing hereof and deny all the allegations in toto.”*

The respondent went on to claim that Ms Passaris called Mr. Tom Alwaka and inquired if he was associated with the *Weekly Citizen*. They said that, according to Mr Alwaka, she claimed to have been so informed by a journalist at *The Standard* newspapers, who she did not name. They stated that Mr Alwaka claims he told her that he was not able to give the source of the story as she demanded and had no control over the editorial policy.

The respondent further said:

*“The second call by the complainant to Alwaka was at night and she claimed to have received information from COTU secretary-general Francis Atwoli. Since it was at night, he politely asked the respondent to address the issue the following day.”*

Regarding the said Brian Yongo, the respondent said that “he is neither a reporter, director, or shareholder of our publication and we cannot comment on allegations of extortion or threats”.

The respondent said the articles published in the *Weekly Citizen* were “part of our core business of information and dissemination and there is nothing scandalous or obscene in the said publications and we put the complainant to strict proof and seek particulars of such claims.”

### **Complainants reply to the Response**

Ms Passaris submitted a list of 24 documents with supporting notes to demonstrate what she described as the inaccuracies and unfairness in the statements by the respondent.

She reiterated that the stories complained of were inaccurate, obscene and sexist in breach of clauses 1 and 15 of the Code of Conduct. She said she will further prove that

the respondent breached other clauses of the Code of Conduct including:

Clause 1 on Accuracy and Fairness: The respondent failed in his fundamental objective of writing a fair, accurate and unbiased story and did not seek and/or obtain views of the complainant who has been mentioned unfavourably in the story.

Clause 2 on Independence: The respondent gathered news from outside forces and special interest groups, in this case being the said Brian Yongo.

Clause 3 on Integrity: The respondent failed to identify the sources and was sensational for obvious reasons of protecting the said Brian Yongo and the making of money from members of the public.

Clause 4 on Accountability: The respondent failed to adhere to the laid down standards in the Code of Conduct.

The complainant said she did not dispute the existence of the case between her and her landlord but stated that the *Weekly Citizen* did not give a “full, fair and candid disclosure of the facts surrounding the matter”. She provided documents in support of this contention, which include the ruling in the case cited by the respondent, Kultar Singh Hanspal v Esther Muthoni Passaris, HCCC No. 280 of 2009, and the lease signed by Alka Sharma as manager of the estate of Kultar Singh Hanspal and Esther Passaris for the lease of the contested house in Kitusuru, Land Reference Number 774/75. The lease contains an option to purchase which reads:

*If the Tenant wishes to purchase the Property and at any time before the expiry of the said term (or extended term, if any) gives the Landlord not less than three (3) months notice of that wish (“the Tenant’s Notice”), then the Landlord must, on the expiration of the Tenant’s notice, sell the Property to the Tenant at the agreed purchase price of Kenya*

*shillings thirty five million (KShs 35,000,000.00) ....”*

In the ruling delivered on 16 October 2009, Justice Joyce N. Khaminwa noted that the plaintiff denied the agreement and contended that the lease was neither valid nor capable to be registered and therefore the defendant had no interest in the property. However, Justice Khaminwa went on to say that the landlord undertook to register the lease but it appeared that he did not. She said:

*“A party cannot benefit from his failure to perform his obligations.... I am of the view that in this suit the defendant has a good case with chances of success. She is in possession and it is proper that she should continue in possession until the suit is determined, but she continues to pay rent as in the agreement. The balance of convenience tilts in her favour.”*

### **Hearing of the Complaint**

The hearing of the complaint started on 29 July 2011 when the complainants’ witness, Ms Passaris, testified in examination-in-chief and was briefly cross-examined by the respondent’s advocate.

During the hearing, Ms Passaris pointed out a number of statements published by the *Weekly Citizen* as being inaccurate and unfair. The respondent did provide evidence to rebut the claims, despite claiming justification in his pleadings. The statements, which constitute about 90 percent of the articles, include the following inaccurate or misleading assertions and expressions, which she also highlighted in her written submissions:

1. *“Hard times for advertising diva Passaris”*
2. *“Passaris unmasked”*
3. *“Passaris under siege”*
4. *“Embattled businesswoman Esther Muthoni Passaris has now moved out and is now seriously trying to re-invent her life after her various litigation matters proved that she is*

a vexatious litigant.”

5. “erstwhile boyfriend’ Pius Ngugi.

6. *The landlord, whose house she claims she has an option to buy, “is currently living in the servant quarters of the same premises on Forward Close as Passaris brags.”*

7. *“The said house is charged to Oriental Bank who are now advertising the sale by public auction.*

8. For the house “which is valued at Sh100 million”, Passaris “had offered a paltry Sh33 million an offer the bank and not only deem derogatory but sarcastic.”

9. “Passaris allegedly made several sexual advances to a senior City Council officer to woo him in the settling claims Passaris lodged with the council but the officer who had been briefed of her blackmail and seduction antics did not yield and to the contrary removed all her billboards along Uhuru Highway.”

10. “Being on the verge of bankruptcy, Passaris owes Kenya Revenue Authority Sh24 million... City Council of Nairobi Sh100 million amongst other creditors and even caused a manager of Diamond Trust Bank Westgate to be sacked.”

11. “Early this year she allegedly was trying to blackmail a prominent businessman and a cabinet minister.”

12. “Back to Sudi, the old Congolese now in love with Passaris has been jetting in and out of South Africa as if driving to her Kitisuru house and she is desperately looking for Sh20 million to pay a prominent law firm she owes money.”

13. At one time, she went out with a CEO of a prominent bank who bought her a house dog for USD1000 but the guy used her and dumped her after her demand for handouts became too much and the guy has since threatened to bring her down financially having lent her Sh28 million.”

14. “The woman lives such an expensive life and her monthly expenses and drawings are in the region of Sh1 million which she cannot afford and has resorted to the unscrupulous vice. The question is where did the City Hall hundreds of millions go?”

15. The once flamboyant Esther Passaris is licking her economic wounds after her failure to offset bank loans and debts to individuals which total to millions.

16. Last week, Diamond Trust wanted to repossess her 4x4 KBE 70V having fallen in arrears.

17. Her fate at her Kitisuru house hangs in balance. Sources close to her claim *she is shopping for a house in Westlands.*

18. Other sources say *Esther has been in arrears of school fees at Peponi School, the school belongs to the Kenyatta family.*

19. She is also being investigated for having threatened a prominent Nairobi businessman and has been trying to name-drop the name of a senior cabinet minister to intimidate the police and *compromise the investigations.*

20. “It is instructive to note that in March 2002 Passaris entered a contract with City Council of Nairobi wherein the council purported to grant Passaris an indefinite and sole exclusive right and/or monopoly to use street light poles in the city of Nairobi which *contract was declared null and void by the High Court in a constitutional application* and she has appealed against the said order.”

21. Her company *Adopt-A-Light is also facing a winding-up petition for a paltry sum of Sh500,000* and it will be interesting to see how this saga unfolds.

Ms Passaris also pointed out that her relationship with Pius Ngugi is not in issue. She has children with him. But the *Weekly Citizen* story contained distorted and false facts, she said. She further stated:

*“The falling out (if any) can only be a consequence of the said publication and hence the complaint.*

*“They [Weekly Citizen] say I am separated from my boyfriend, which is not true. I take offence to the term ‘boyfriend’. To all intents and purposes [Pius Ngugi] is my husband and father of my children and we are not separated.”*

On the complaint on privacy, she reiterated that the newspaper violated her privacy and that of her children by disclosing the registration number of her car and the name of the school of her children, contrary to the Code of Conduct, the Constitution and the Children’s Act.



She also maintained that the *Weekly Citizen* did not give her an opportunity to correct the articles. She said that when she called the editor “he was very rude, even abusive, and then he banged the phone.”

Ms Passaris was cross-examined by Osundwa Sakwa, advocate for the respondent. But he did not complete his cross-examination as the matter was adjourned to 2 August 2011 for further hearing when Mr Sakwa would continue the cross-examination. But that was never to be. Neither Mr Sakwa nor his representative turned up for the hearing, nor did he give any explanation for not showing up.

Although the complainants were ready to proceed, the Commission adjourned the matter to 29 August 2011 to give the respondent another chance, despite objections from the complainants.

On 29 August a representative of the respondent appeared at the hearing venue and was informed that the hearing would start at 10 a.m. then he disappeared and did not come back for the hearing, without any explanation or communication. The Commission, after waiting for about an hour, decided to proceed with the hearing as scheduled following a request by the complainants. After redirect examination, the complainants closed their case.

The Commission then directed that written submissions should be filed by 5 September 2011 and set the date of 13 September 2011 for highlighting the submissions. A notice was sent to both parties, but the respondent did not file any submissions or attend the 13 September meeting for highlighting the submissions.

On 5 September 2011, however, the advocates for the *Weekly Citizen*, Osundwa & Co Advocates wrote back to his counterpart, copy to the Commission: “You have now taken a date ex-parte for highlighting of submissions, my client has not given evidence, the complainant has not been cross-examined. How did you get this date and the supposed orders or directions ex-parte? How did the Commission direct filing of submission

without confining to the due process? We are afraid that we may not get justice before the Commission if at all that was done with knowledge. We shall not attend on the 13<sup>th</sup> September, 2011 for the reasons contained in hearing notice herewith attached. Meanwhile, we invite you on the 16th September, 2011 to meet before the Commission take a hearing date for us to complete our cross examination and the due process shall follow suit.”

### **Submissions of the Complainant**

The complainant produced 22 pages of submissions, reiterating points made during the pleadings and hearing. The main point made in the submissions is that the respondent has breached the Code of Conduct by:

1. Publishing inaccurate, obscene and sexist material
2. Intruding into the privacy of the complainant by mentioning the registration numbers of the vehicle and the school her children attend.
3. Attempting, prior to publication, to extort money with threats of publishing injurious stories.
4. Insulting the complainant when she sought remedial action

### **Submissions by the Respondent**

There were no submissions by the respondent.

### **Issues for Determination**

Before identifying the issues for determination there is one issue that both parties dwelled on that this Commission feels, though it is not a matter for determination, it should be mentioned for clarity. The issue is the whether the respondent was afforded due process in the hearing. We touched upon this matter in the section on hearing. The respondent’s lawyer, in his exchange with counterpart made a great deal of his contention that his client “should not be judged unheard”, i.e. without completing his cross-examining of the 1<sup>st</sup> complainant who appeared before the commission as a witness.

However the respondent, after partially cross-examining the witness, failed to turn up for subsequent hearings on dates that were mutually agreed on, without prior notifications or excuse. While this Commission appreciates the need for all parties to be wholly heard, we deprecate the failure of the respondent to show up for scheduled hearings, not once, but three times. The respondent's lawyer even tried to set up a hearing date unilaterally. This is unacceptable. We would also like to point out to the respondent that equity aids the vigilant, not those who slumber on their rights.

That said, the Commission would like to state that after carefully examining the pleadings made by both parties and listening to the evidence presented and analysing the submissions by the complainant (the respondent did not file any submissions), and guided by the Constitution, the Media Act and the Code of Conduct, the Commission has identified the following issues for determination:

1. Whether the stories published by the *Weekly Citizen* are inaccurate, unfair, and biased.
2. Whether the *Weekly Citizen* failed to offer the right of reply to the complainant.
3. Whether the *Weekly Citizen* violated the privacy of the complainant and her children.
4. Whether the *Weekly Citizen* violated the principle of journalistic accountability.
5. Whether the statements made by the *Weekly Citizen* are obscene and sexist.
6. Whether the *Weekly Citizen* tried to extort money from the complainant.
7. Whether the complainant is entitled to the relief sought

**Whether the stories published by the *Weekly Citizen* are inaccurate, unfair, and biased**

The complainant claimed the articles published by the *Weekly Citizen* were, among other things, inaccurate, unfair and biased, and provided both documentary evidence and oral testimony to show their inaccuracies. The respondent did not counter those claims with any evidence to speak of and this Commission accepts the version of the story told by the complainant. We also hold that the respondent cannot rely on a fair comment defense as the statements were not opinions on a matter of public interest, or if they were they were not based on true facts. We, therefore, find that the respondent breached clause 1 (a) of the Code of Conduct, which clearly states in part:

*The fundamental objective of a journalist is to write a fair, accurate and an unbiased story on matters of public interest.*

**Whether the *Weekly Citizen* failed to offer the right of reply to the Complainant**

Although the respondent denies that they failed to contact the complainant for comment or to offer her the right of reply, this Commission agrees with the complainant that the respondent breached clause 1(a) of the Code of Conduct by failing to get her comments on the two stories that had mentioned her in an unfavourable light. This is a mandatory requirement. The Commission therefore finds the respondents in breach of clause 1 (a) of the Code of Conduct, which clearly states in part:

*All sides of the story shall be reported, wherever possible. Comments should be obtained from anyone who is mentioned in an unfavourable context.*

**Whether the *Weekly Citizen* violated the privacy of the Complainant and her children**

And Article 31 (c) of the Constitution states:

*“Every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed”.*

Article 13 of the Code of Conduct provides as follows:

*The public's right to know should be weighed against the privacy rights of people in the news.*

*Journalists should stick to the issues.*

*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 private affairs are covered by the concept of privacy except where these impinge upon the public.*

Section 4 of The Children Act provides that “the best interests of the child shall be a primary consideration” in all matters touching on children.

Taking into account these provisions of the law and the matters published in the *Weekly Citizen* articles, this Commission finds that the public had no right to know about her personal affairs and therefore the newspaper should have left her alone.

## **Whether the Weekly Citizen violated the principle of journalistic accountability**

Clause 4 of the Code states:

*Journalists and all media practitioners should recognize that they are accountable for their actions to the public, the profession and themselves. They should –*

*(a) actively encourage adherence to these standards by all journalists and media practitioners;*

*(b) respond to public concerns, investigate complaints and correct errors promptly;*

*(c) recognize that they are duty-bound to conduct themselves ethically*

Taking into account the inaccuracies, the unfairness and biases of the articles published in the *Weekly Citizen*, and the failure to offer an opportunity to reply, this Commission finds that the respondent violated the clause 4 of the Code of Conduct.

## **Whether the statements made by the Weekly Citizen are obscene and sexist**

Clause 9 (a) of the Code provides:

*In general, journalists should avoid publishing obscene, vulgar or offensive material unless such material contains a news value which is necessary in the public interest.*

Article 15 provides:

*Women and men should be treated equally as news subjects and news sources.*

Putting aside the question of whether the statements published by the *Weekly Citizen* are true or not, this Commission does not find any obscenity or sexism in the said articles, and therefore cannot find for the complainant.

### **Whether the *Weekly Citizen* tried to extort money from the Complainant**

This Commission is unable to investigate the claim by the complainant that one Brian Yongo, who she claimed was associated with the *Weekly Citizen*, tried to extort money from her under the threat of harmful publicity. Brian Yongo was not a party to the case and the respondent claimed that he was neither an employee nor shareholder of the *Weekly Citizen*. We recommend that the respondent pursues this matter with other authorities that deal with corruption and extortion.

### **Whether the complainant is entitled to the reliefs sought**

The complainant showed through documentary evidence and oral testimony that the stories complained of were inaccurate, unfair, biased and violated her privacy and that of her children. Moreover, the respondent failed to observe journalistic accountability. This Commission, therefore, finds that the complainant is entitled to the relief sought.

### **Remedies sought**

The Complainants pray for the following remedies:

1. An apology
2. A correction
3. Other punishment to deter such publications in future

### **Orders of the Commission**

Taking into account the evidence on record, the relief sought by the complainant, the submissions made by both parties, and the relevant provisions of the Media Act, the Code of Conduct and the Constitution, the Commission makes the following orders:

1. We order and direct that the respondent publishes an apology and a correction of the story. The apology and correction should be given similar prominence as the offending stories. The complainant's advocate and the respondent should agree

within the next 21 days from today's date on the wording of the apology. The apology should be published in the *Weekly Citizen* within 14 days following the date of the agreement. In the event the parties are unable to disagree on the wording of the apology and correction, or fail to comply with this order, we further direct that this matter be mentioned before this Commission for further orders. Either party is at liberty to make the necessary applications.

2. We order and direct that the respondent pays a fine of two hundred thousand shillings for failing to report accurately, fairly and without bias as required by clause 1(a) 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. We order and direct that the respondent pays a fine of two hundred thousand shillings for failing to contact the complainant, who he mentioned in an unfavourable context, for a comment in contravention of clause 1(a) 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. We order and direct that the respondent pays a fine of two hundred thousand shillings for breaching the privacy of the complainant contrary to clause 13 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.
5. We order and direct that the respondent pays a fine of two hundred thousand shillings for violating the principle of journalistic accountability in contravention of clause 4 of the Code of Conduct.
6. We order and direct that the respondent pays a fine of two hundred thousand shillings for failing to keep and maintain high professional and ethical standards, and failing to have due regard to the Code of Conduct set out in the Second Schedule of the Act in contravention of section 35(2) of the Media Act. The fine,



imposed pursuant to section 38 of the Media Act, shall be paid to the Media Council of Kenya within 14 days.

7. This Commission is so appalled by the reckless and total disregard of the provisions of the Code of Conduct and section 39 of the Media Act by the the Weekly Citizen that we would like to issue a public reprimand against the newspaper as provided for in section 29 (1) (c) of the Media Act. We are particularly concerned by the newspaper's insistence, without providing any shred of evidence, either in its pleadings or during the hearing, that the articles it published were fair and objective and written in the normal course of journalism. In particular, we would also like to condemn the flagrant disregard of the privacy of Esther Passaris and her children, which is contrary to the provisions of the Constitution, the Childrens Act, the Media Act, and the Code of Conduct. The mandate of this Commission is to balance freedom of the Press and the rights of private citizens and we believe that public reprimands against the media should be rare and should be issued only when no other legal orders of the Commission are sufficient to address a glaring and unmitigated contravention and desecration of the Code of Conduct and the Media Act. Public reprimands are, by their very nature, a severe form of censure and reproof. This is the first public reprimand to be issued by this Commission, and we hope it will be the last.

Any party aggrieved by these orders may, as stipulated in section 32(1) of the Media Act, appeal to the Media Council of Kenya, in the prescribed manner, within 14 days from today.

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Murej MakOchieng  
(Acting Chairperson)

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Priscilla Nyokabi  
(Member)

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Peter Mwaura  
(Member)

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Fatuma Hirsi Mohamed  
(Member)