

REPUBLIC OF KENYA

IN THE MATTER OF THE MEDIA COUNCIL ACT [2013]

AND

IN THE MATTER OF THE COMPLAINTS COMMISSION

MEDIA COMPLAINT NO. 5 OF 2013

HON. JAMLECK KAMAU.....COMPLAINANT

VERSUS

ROYAL MEDIA SERVICES LTD.....RESPONDENT

THE COMMISSION'S DECISION

HEARINGS HELD AT: NAIROBI ON: 3rd and 24th July, 2014.

PANEL CHAIR: Prof. Murej Mak'Ochieng

MEMBERS: Mr. Peter Mwaura and Hon. (Mr.) William Oketch, RM

Appearances

For the Complainant: Ms Kamunya, of Miller & Company Advocates.

For the Respondent: Mr. Gacheru, of Kamau Kuria & Company Advocates.

1. The Parties.

[1] The Complainant is a Member of Parliament representing Kigumo Constituency in the National Assembly while the Respondent is one of the leading media enterprises in Kenya that owns a number of broadcast radio stations and a television station with a commanding presence in the country.

2. The Complaint.

[2] By a complaint filed on 8/8/13 the Complainant alleged that on various dates in July 2013, the Respondent through its television station called Citizen TV aired a program commonly

known as "Road Hog" without ascertaining the true position thereby resulting in the publication of a video clip that was malicious and spiteful against the Complainant. He further contended that the said publication portrayed him as a reckless driver with no regard for traffic laws thereby exposing him to embarrassment and public ridicule especially in light of his status in society as a legislator.

3. The Response.

[3] In its response dated 26/8/14 the Respondent conceded that Citizen TV published a program titled "Road Hog" showing a motor vehicle registration KBM 555 V, a Range Rover, being driven on the wrong side of the road . Although a search at the Registrar of Motor Vehicles indicated that the motor vehicle belongs to one Jamleck Kamau, a finding highlighted in the program, the Respondent however categorically denied mentioning anywhere in the story that the driver of the motor vehicle was one Jamleck Kamau since the story merely mentioned him as a registered owner.

4. The Hearing .

[4] The Commission at first instance attempted to facilitate an early voluntary settlement of the dispute through mediation as mandated by Section 36 of the Media Council Act [2013] but the initiative collapsed resulting into the dispute being escalated to a full hearing[s] held on 3/7/14 and 24/7/14 before a panel of three (3) Commissioners comprising of **Prof. Murej Mak'Ochieng** (Chair), **Mr. Peter Mwaura** and **Hon. (Mr.) William Oketch, RM.**

5. The Complainant's case.

[5] The Complainant contended that the Respondent had not bothered to ascertain the true position in the matter before airing the story repeatedly within a week which in itself pointed to malice against the Complainant especially because the clip was misleading, inaccurate and inflammatory. Further, the Complainant pointed out that the clip was understood to mean that he is a reckless driver without regard or respect for traffic laws particularly in view of his

societal standing as a legislator and as a result the publication vilified and exposed the Complainant to embarrassment and public ridicule.

[6] The Complainant testified on 3/7/14 alleging that the Respondent violated his right to privacy under Article 31 of the Constitution by unnecessarily publishing his name as the registered owner of motor vehicle registration KBM 555 V in the video clip yet he was not driving the same at the material time. The Complainant also alleged that the Respondent's clip inferred an air of malice and contemptuous references to his dignity when at a point in the clip the presenter states: "*But he is not alone*" – which words according to the Complainant meant that he was driving the said motor vehicle at the material time.

7. The Respondent's case.

[7] The Respondent emphasized that ' Road Hog' was a collaborative initiative between the government and itself as an effort to encourage road safety and observance of the traffic rules which had become a matter of immense public interest. The video production procedure involved filming the offending motor vehicle, obtaining its registration particulars from the Registrar of Motor Vehicles and eventually airing the video on national television through its Citizen TV. The Respondent reiterated that the program had hugely impacted on road safety compliance and was recently awarded the Association of Kenya Insurer's (AKI) Road Safety Award (2013). In effect the Respondent relied on the defence[s] of freedom of expression and of the media on a matter of public interest such as road safety.

[8] The Respondent's Program Producer, Mr. Alex Murungi testified on 19/7/14 and strongly emphasized that the facts in the video clip were true and undisputed. He explained that the program aims at encouraging observance of traffic rules by naming and shaming law breakers as well as airing the offending motor vehicles and mentioning the registered owners of those motor vehicles according to an official search supplied by the Registrar of Motor Vehicles. He admitted that the program did not mention any name[s] of the specific driver[s] of an offending

motor vehicle due to the practical difficulty of acquiring their details preferring the option of obtaining the particulars of the registered owner[s] of the motor vehicles.

9. Framing of Issues .

[9] After consideration of the foregoing submissions by both parties, the Commission isolates four (4) critical issues that it considers falls for determination in this complaint as listed below:-

i. Whether the Respondent's story was fair, accurate and unbiased as regards road safety and observance of traffic laws.

ii. Whether the Complainant's and/or his family's right to privacy under Article 31 of the Constitution was infringed by airing of the video clip.

iii. Whether the publication as aired vilified the Complainant by exposing him to humiliation, embarrassment and public ridicule.

iv. Whether public interest in a matter of general importance overrides the rights of people who are subjects of media coverage.

10. Resolution of Issues.

[10] In considering these issues, the Commission gives due regard to both Article 33 of the Constitution of Kenya 2010 which provide for the right to freedom of expression. The Commission also considers the objective standard of practice expected of journalists and media enterprises whenever any of them exercise this freedom as provided in Section 3(2) of the Media Council Act 2013 which states as follows:

' In exercise of the right to freedom of expression, the persons subject to the Act shall-

(a) reflect the interests of all sections of society;

(b) be accurate and fair;

(c) be accountable and transparent;

(d) respect the personal dignity and privacy of others; and

(e) be guided by the national values and principles of governance set out under Article 10 of the Constitution.

i. Whether the Complainant's and/or his family's right to privacy was infringed.

[11] The Complainant alleges that his [and the family's] right to privacy under Article 31 of the Constitution was infringed when the Respondent published his name as the registered owner of the offending motor vehicle. However, a person's privacy is infringed only when the incident[s] in question fall within **Clause 14** of the **Code of Conduct for the Practice of Journalism** [hereinafter the Code] which recognizes privacy as the right to be free from undeserved and undesired publicity on matters concerning a person's home, family, religion, tribe, health, sexuality, personal life and private affairs. A claim of privacy only suffices where the infringement occurs during private time[s] at a private place or if at a public place then where one holds an apparent and reasonable expectation of privacy. None of these applies with regard to the Complainant's scenario since the incidents occurred at a public road commonly used by other motorists at such a time that could not realistically be inferred as private time. Accordingly, the Commission finds and holds that the Complainant's right to privacy was not infringed.

ii. Whether the Respondent's story was Accurate, Fair and unbiased.

[12] Accurate, fair and unbiased reporting is a basic requirement of professional journalistic ethics as provided in Clause 2 of the Code the relevant part of which states:-

2.(1) A person subject to this Act shall write a fair, accurate and unbiased story on matters of public interest.

(2) All sides of the story shall be reported, wherever possible.

(3) Comments shall be sought from anyone who is mentioned in an unfavorable context and the evidence of such attempts to seek the comments shall be kept.

[13] Firstly, with regard to **Accuracy** the Commission notes that the Respondent's witness admitted the practical difficulty they could have faced had they opted for the specific particulars of the actual drivers perpetrating the traffic offenses. He was candid enough to confess that on account of convenience they opted to obtain the particulars of the registered owners of offending motor vehicle's rather than the arduous task of searching for the actual drivers' particulars. The result of this was that the Respondent aired video clips publishing the names of motor vehicle owners irrespective of whether or not they were the ones in control of or driving the offending motor vehicles.

[14] The Commission takes judicial notice of the fact that not all motor vehicles on Kenyan public roads are driven by actual registered owners due to several reasons including authorized drivers of public service vehicles, car hire vehicles or vehicles sold but transfer of ownership not yet effected. As such there is a very real chance of person's not in actual control of motor vehicles being maligned through unfair publication especially since penalty for traffic offenses are criminal in nature and liability attaches to the perpetrator individually and is not transferable to agents. We hold that the Respondent's program is inaccurate and in breach of **Clause 2(1) of the Code** to the extent that it does not state the actual identity of the driver[s] responsible for the alleged traffic offenses.

[15] Secondly, with regard to **Fairness**, the Respondent failed to demonstrate observance to Clause 2(1) of the Code. They neither sought any comments from the Complainant nor did they give him a fair opportunity to respond to the allegations. We cite *Dr. Christopher Murungaru Vs Nation Television Case 68/ 2009*, a matter adjudicated by the Complaints Commission where the complainant alleged unfair treatment by Nation Television in not seeking comments from him yet he was mentioned adversely in a broadcast aired by the TV station -resulting in biased programme.

[16] The Commission held that programmes on controversial issues of public importance should have sufficient balance in order to afford audiences the opportunity to form their own opinions. In the case under discussion the Nation Television failed to grant the complainant a reasonable right of reply since the complainant's comments were not included in the programme. The Commission further held that the story which NTV ran would have been different if the comments of Dr. Murungaru had been sought and obtained. We therefore hold that the Respondent's program is manifestly unfair to registered motor vehicle owners whose names are publicized on national TV yet they may not be responsible for the alleged traffic offenses.

[17] Thirdly, with regard to **Bias** the Commission documented an instance of bias from the testimony of the Respondent's witness who conceded that he subsequently became aware of the Complainant's status in society upon being provided with the registration particulars of the offending motor vehicle. It is therefore very likely that the programme producer thought this particular episode would make a "juicy story" because the individual is a person who is in public life and is well-known. Lastly, apparent bias can be inferred from the narration of the story where the program transitions from a clip depicting the Complainant's motor vehicle to the next motor vehicle as the presenter states: "**But he is not alone.**" The Complainant having been previously named as the owner of the offending motor vehicle then to any reasonable mind this may be suggestive that the Complainant was himself driving at the time and therefore responsible for the alleged offenses. **The media must guard against using innuendo since this can influence public perception.**

[18] **The media must also be on guard against bias in its choice of words. The statement "but he is not alone" contextually infers improper conduct by the Complainant since it directly** alludes to an assumption that the Complainant himself was driving at the particular time and hence apparent bias complained of by the Complainant. We rely on *The Worldwide*

Foundation CC, T/A Rhino Force Vs SABC2 Case 3/2014, a matter adjudicated by the Broadcasting Complaints Commission of South Africa, where a Complainant alleged that a certain program was not balanced, and that, in spite of the SABC2's production team being provided with facts that demonstrated the Complainant's honesty, the programme nevertheless projected an image of dishonesty. The Commission held that whilst the original reason for the programme was reasonable and justified, and certainly dealt with a controversial issue of public importance, the programme was not fair to the Complainant. We similarly hold that the broadcast was manifestly biased against the Complainant.

iii. Whether public interest in a matter of general importance overrides the rights of people who are subjects of news coverage.

[19] The Respondent's defense for airing the program can aptly be summarized into one phrase: public interest in this case requires traffic law offenders to not only be named and shamed but also prosecuted. The relevant issue to consider is whether public interest considerations override the rights of people who are subjects of news coverage. The traditional view was for courts to give greater weight to public interest considerations so as to *avoid adopting positions which are in any way adverse to the public interest*. (See the Decision of Lord Denning in **Wallerstein V. Moir (1974) 1 WLR 273**) and legal text of Francois Bennion in **Statutory Interpretation 3rd Edition** at **page 606**. However, such a limiting construction is contrary to the liberal aspirations of the Constitution of Kenya 2010 and in *any event, the declaration by the Supreme Court of Kenya in Hermans Phillipus Steyn vs Giovanni Guecchi - Ruscone [2013] eKLR* to the effect that *a matter of general public importance would be a matter of law or fact whose impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and impacts upon the public interest*.

[20] For public interest to place a limitation on individual rights then it must be a matter of general concern and benefit necessitating an unobstructed right of the public to know.

However, the public's right to know cannot always be in 'the public interest'. Journalists must therefore understand that 'the public interest' doesn't in any way grant an unlimited right to public curiosity. **Whenever the public interest is invoked, the burden of proof is on the party claiming to** demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view of publication, would be in public interest **and how, and with whom, that was established at the material time.** The Respondent as to the satisfaction of the Commission demonstrated this. However the principle is that Broadcasters cannot be allowed to override the rights of the individual merely because the broadcast is in the public interest.

[21]The power of the electronic media (radio and television) should not be underestimated. While they have the advantage of being able to empower and to inspire people, they can also break people. That is why the Code warns broadcasters to exercise exceptional care and consideration in matters involving the privacy, dignity and reputation of individuals. We cite the case of *J Vs Heart 104.9 FM Case 49/2012*, a matter adjudicated by the Broadcasting Complaints Commission of South Africa, where the Complaint alleged her privacy, dignity and reputation had been impaired by the Broadcaster through disclosure of personal information regarding her divorce. The Tribunal held that the fact that the topic of discussion (pre-nuptial contracts) was of public interest, did not override the rights of the Complainant. We hold and find that although the Respondent has demonstrated sufficient public interest on the matter due to national concern on road carnage statistics, the broadcast is however irredeemably tainted by the fact that it breached Clause 2 (1) of the Code by failing to seek the Complainant's comments.

iv. Whether the publication as aired vilified the Complainant by exposing him to humiliation, embarrassment and public ridicule.

[22] On this issue the Commission is persuaded by the Complainant's submissions that the consequences of the publication of the name[s] of the Registered owner of the offending motor vehicle[s] causes the public in general to despise and vilify the owner of the motor vehicle aired on the programme regardless of whether they were driving the said motor vehicles at the time the alleged traffic offenses were committed.

12.Orders.

[23] The Complainant sought for several reliefs including an apology and retraction of the publication, an award of damages commensurate to the embarrassment and humiliation suffered by the Complainant and any other remedy as the Commission deems fit to award. The powers of the Commission under Section 38 of the Media Council Act [2013] do not give it jurisdiction to award compensatory damages and therefore the same is denied. The Commission genuinely supports and is impressed by the noble intentions of the Respondent's program in so far as it aims to promote observance of traffic rules through a naming and shaming campaign. However, to the extent that the Respondent's program fails, ignores or conveniently chooses not to exercise exceptional care and consideration in matters involving the dignity and reputation of registered motor vehicle owners who may not be responsible for the aired traffic offenses, the Commission finds that the Respondent is in breach of Clause 2(1) (2) and (3) of the Code. Accordingly, the Complaint is upheld and the Commission hereby

Orders that-

The Respondent publishes within thirty (30) days of this decision, an apology and correction in a subsequent edition of the program 'Road Hog', clarifying that the Complainant was not personally driving the motor vehicle registration number KBM 555V Range Rover on the material day of that the program was broadcast. The

Commission further orders counsels for both parties to agree on a draft statement of apology prior to publication.

13. Recommendations.

[24] The Commission recognizes that the freedom of the press is very essential if the press has to play a significant and constructive role in the life of a nation, especially in a democratic society such as Kenya. But like all other freedoms, freedom of the press and of media should also not be used as a license to blatantly contravene people's rights.

[25] Therefore, howsoever free the press may be, it cannot be allowed the license to malign or bring into contempt other people's reputation. The media should respect the right of people involved in the news, observe the common standards of decency and stand accountable to the public for the fairness and accuracy of their news reports by giving persons publicly accused of any wrongs the earliest opportunity to respond. To ensure that the Respondent's program is in compliance with the Code, the Commission recommends that the program's production manager should consider either:-

- i. Seeking comments and clarifications from adversely mentioned parties prior to broadcasting of the video clips; or**
- ii. Providing for a prominently written 'Disclaimer' to simultaneously run on the TV screen clarifying that the registered motor-vehicle owners are not necessarily the one[s] driving at the time of commission of the traffic offenses.**

This would still achieve the objective of promoting observance of traffic rules through rebuke and sanctions by registered motor-vehicle owner's against their offending agents.

Dated, Delivered and Signed at Nairobi this 9th day of September, 2014

Prof. Murej MakOchieng' (Panel Chair)

Mr. Peter Mwaura (Commissioner).....

Hon. (Mr.) William Oketch, RM (Commissioner).....