

REPUBLIC OF KENYA

IN THE MATTER OF THE MEDIA ACT

AND

IN THE MATTER OF THE MEDIA COMPLAINTS COMMISSION

COMPLAINT NO 5 OF 2012

JOHN KABUTU NGAHU.....1ST COMPLAINANT

ESTHER WANJIRU KABUTU.....2ND COMPLAINANT

- VERSUS -

RADIO AFRICA GROUP T/A KISS 100 FM.....1ST RESPONDENT

CAROLINE MUTOKO.....2ND RESPONDENT

DECISION OF THE COMMISSION

THE COMPLAINT

1. The Complainants herein are John Kabutu Ngahu, the Head of Finance for Tatu City under the Renaissance Group and his wife Esther Wanjiru Kabutu. The Respondents are Radio Africa Group t/a Kiss 100 FM (1st Respondent) and Caroline Mutoko (2nd Respondent) a breakfast host, Programme Controller and the Group Marketing Manager at Radio Africa.
2. The Complainants lodged a complaint with the Media Council of Kenya on 8th March 2012 against the Respondents in respect of a morning (breakfast) radio show on Kiss 100 FM that was broadcast by the 1st Respondent on 19th October 2011 at 9:15 am.
3. The Complainants alleged that Caroline Mutoko uttered the following words:

...very very sad ...that that two students of JKUAT were knocked down on Thika superhighway and now they have gone out nini nini asking for bumps. What what...if you know very well...why are you crossing a superhighway...no no even sadly enough at JKUAT don't we have the foot bridge...don't we have that foot path. No no when are we going to end

stupidity ...no the reason am saying no is because I am not having this conversation. Am not having conversation of people who get knocked by a matatu because the matatu reversed on the highway... why are you trying to cross that thing and then oh...we were killed...oh.. haki yetu...oh.. a riot oh... shut up if you are that stupid you deserve to die...

4. The Complainants were aggrieved for the reasons that the words above were spoken by Caroline Mutoko:
 - i. Recklessly and irresponsibly without caring whether the allegations in question were true or false.
 - ii. Without taking steps to verify the facts and/or ascertain the truth.
 - iii. Without caring what the consequences of such words would have on the family of a student who had been knocked down and killed by a speeding car when she was walking off the road.

5. The complaints noted that if Caroline Mutoko had bothered to check her facts she could have established that:-
 - I. No Jomo Kenyatta University of Agriculture and Technology (JKUAT) student was knocked down while crossing Thika superhighway.
 - II. There was no strike or demonstration over an accident by JKUAT campus students following an accident on the Thika superhighway.
 - III. The only demonstration held by JKUAT students was the one held by students of JKUAT Karen campus protesting the accident that had resulted in Bernice's death on Lang'ata South Road near JKUAT Karen Campus and demanding the erection of speed bumps.
 - IV. The only JKUAT student who died in a road accident was Bernice Wambua Kabutu who was knocked down while walking off Lang'ata South Road near JKUAT Karen campus.

6. The Complainants went further to state that the family felt that it was morally wrong, hurtful, inhumane, insensitive and in bad taste for Caroline Mutoko to say the words, **"she was so stupid she deserved to die!"**

7. Claiming that the broadcast was misleading, inaccurate and biased, the Complainants prayed for the following remedies:
 - I. An apology on the same show;
 - II. A correction on the same show;
 - III. A public reprimand of the journalist or media enterprise involved.

THE RESPONSE

8. In their response filed with the Media Council of Kenya on 7th May 2012, the Respondents denied that the words spoken by Caroline Mutoko were inaccurate, misleading and biased in breach of **Article 1(a) and (f) of the Code of Conduct for the Practice of Journalism (hereinafter referred to as the Code of Conduct)** for the following reasons:

- I. The demonstration being referred to by the Complainants took place at Bogani, along Lang'ata South Road whereby **one student** was killed while walking **off the road**, whereas the demonstration referred by Caroline Mutoko was one that took place along the Thika superhighway where **two students** were killed while trying to cross the superhighway.
- II. The words spoken by Caroline Mutoko did not specify the date when the **two students** were knocked down along Thika superhighway. The fact that the date of broadcast coincided with the date of the accident at Bogani along Lang'ata South Road where **one student** was killed does not mean that the words were making reference to it.
- III. There had been incidents of road accidents along Thika superhighway as a result of people not using the designated foot bridges to cross the road. Caroline Mutoko therefore sought to make a fair comment over a grave national concern as regards road accidents along Thika superhighway and the death toll arising consequently.

9. The Respondents denied that the words spoken by Caroline Mutoko were insensitive and failed to treat the subject of the broadcast with dignity and compassion in breach of **Article 1(g) of the Code of Conduct** for the following reasons:

- i. The words spoken by Caroline Mutoko referred to the striking JKUAT students along Thika superhighway and were not in any manner particular to the student who had been knocked down and killed. The words "*we were killed...haki yetu...*" made reference to a group of students and not to an individual student.
- ii. There was no particular reference by name or otherwise to the student who was knocked down and killed along Lang'ata South Road. Article 1(g) of the Code only requires journalists in their reporting to show particular compassion to victims of crime or tragedy. However, the striking JKUAT students along Thika superhighway referred to by Caroline Mutoko were not victims of any crime or tragedy.

- iii. There was nothing in the words spoken by Caroline Mutoko that would make specific reference to the student who was knocked down along Lang'ata South Road.
10. The Respondents denied that they failed to offer a correction for the words spoken by Caroline Mutoko in breach of **Article 1(b) of the Code of Conduct** for the following reasons:
 - i. The demonstration being referred to by the Complainants took place at Bogani, along Lang'ata South Road whereby **one student** was killed while walking **off the road** whereas the demonstration referred by Caroline Mutoko was one that took place along the Thika superhighway where **two students** were killed while trying to cross the superhighway.
 - ii. The words spoken by Caroline Mutoko did not specify the date when the **two students** were knocked down along the Thika superhighway. The fact that the date of broadcast coincided with the date of the accident at Bogani along Lang'ata South Road where **one student** was killed does not mean that the words were making reference to it.
 - iii. The Complainants had suffered no injury by virtue of the words spoken by Caroline Mutoko and as such, the Respondents owed no duty to the Complainants to correct the same information.
11. The Respondents denied that they had generally failed to conduct themselves ethically in breach of **Article 4 of the Code of Conduct** for the following reasons:
 - i. They always adhered to the standards required of all journalists and media practitioners and they responded, on February 13, 2012, to the concerns raised by the Complainants through their Advocates.
 - ii. They were duty-bound to conduct themselves ethically and in accordance with the Code of Conduct.
12. In conclusion, the Respondents stated that the words spoken by Caroline Mutoko did not make any reference to the demonstration by JKUAT students at Bogani along Lang'ata South Road where one student had been knocked down and killed, but one that took place on the Thika superhighway where two students had been knocked down and killed while trying to cross the road.
13. The Respondents further stated that since the two incidents were different and distinct, the Complainants could not have a cause of action based on the words spoken by Caroline Mutoko referring to the demonstration by JKUAT students along the Thika superhighway.

14. In view of the foregoing and further grounds that were to be adduced at the hearing, the Respondents requested the Commission to dismiss the Complaint with costs to the Respondents.

THE HEARING

15. During the hearing, the 1st Complainant was led in his evidence-in-chief by his counsel Mr. Gathaiya and was cross-examined by Mr. Khaseke for the Respondents. The Complainants called one witness, Mr George Gatere Bari, the Chief Security Officer at JKUAT; Caroline Mutoko was led by counsel for the Respondents, Mr Khaseke, and cross-examined by Mr Gathaiya.

16. In his testimony, the 1st Complainant stated that the Complainants were the parents of the late Bernice Wambui Kabutu, the JKUAT Karen Campus student who was killed. He went on to testify that Bernice Kabutu and her friend, Ms Rosemary Mutisya, were hit by a speeding car, registration number KBA 352B on 17th October 2011, as they walked off Bogani Road from the JKUAT Karen Campus to their hostel. Ms Bernice Kabutu died on the spot while her friend was hurt. They were both rushed to Kenyatta National Hospital where Ms Mutisya was admitted while Bernice's remains were later taken to the Lee Funeral Home. At the time of her death Bernice was a first year student studying Information Technology.

17. The 1st Complainant further testified that some students of JKUAT Karen Campus who were walking home along the road reacted angrily to the accident and barricaded the road with stones blocking motorists. He said that Hardy Police Station was informed and the police from there rushed to the scene, dispersed the students and cleared the stones thereby enabling normal flow of traffic to resume. He testified that there was no other accident involving JKUAT students in any of their other campuses on that material day.

18. In his testimony, the 1st Complainant reiterated the grounds upon which their complaint was based. He said that before lodging the Complaint, they had sought an apology from the Respondents but none was given.

19. During the hearing an audio clip of the broadcast that is the subject of the Complaint was played and the following is the transcript of the same:

Co-Host: **What I want to tell you...**

Mutoko: **What...?**

Co-Host: **It is very ... very sad ...**

Mutoko: That ...

Co-Host: That two students of JKUAT were knocked down on Thika superhighway and now they have gone out asking for bumps ... what ...? What ...? If you know very well ...

Mutoko: Why are you crossing a superhighway...?

Co-Host: No ... nooh! Even sadly enough... At JKUAT, don't we have the footpath... don't we have that footpath...?

Mutoko: No ...no. When are we ever end ... this ...? No the reason I am saying no is because I am not having this conversation. I am not having a conversation of people who get knocked by a Matatu because the Matatu reversed on the highway... If... if ... when I am coming to work ... aaah... What are they called ... our friends who are fixing this side of town ... KURA ... Kenya Urban Roads Authority..., they have done some amazing work on Ngecha road ... Now if it is like early on a Saturday morning or Sunday ... I hit Ngecha ... I mean ... I am at 110 ... What would I be doing on a superhighway?

Co-Host: Probably 150 to 160 ...

Mutoko: Ok! I am not that stupid, I would never do that ... But on a regular day ... you are doing what? ... easily ... 80 ... 100 ... ok?

Co-Host: No ... no ... Let me tell you ... a car hitting you even at 50 ...

Mutoko: Yes ...?

Co-Host: 50 ...!

Mutoko: Why are you trying to cross that thing ... and then ...oh! Oh! ... a riot ... oh! ... shut up! If you are that stupid, you deserve to die!!!

20. During cross-examination, the 1st Complainant accepted that their deceased daughter Bernice was not mentioned by name by Caroline Mutoko. He also agreed that having listened to the audio clip, Caroline Mutoko was not talking about anything that had happened in Karen. He also agreed that Caroline Mutoko, in her comments, was referring to a group of JKUAT students who were protesting.

21. During re-examination, the 1st Complainant stated that the JKUAT students had protested following the accident that involved their daughter Bernice. He said that the students demonstrated because they were angry that their colleagues had been hit by a car and also to demand the erection of speed bumps to prevent the occurrence of similar accidents in future. He testified that as a result of the demands of the protesting students, speed bumps were erected soon after the protest.

22. Mr George Gatere Bari, the Chief Security Officer of JKUAT was called as a witness by the Complainants, he testified that on 17th of October 2011, there was an accident along Bogani Road that involved two ladies. One died and the other was taken to Kenyatta Hospital. He added that after the accident, there was a bit of unrest, and he was informed. He called the OCS Hardy and the OCS Karen, who were later joined by the OCPD and they were able to calm the students.
23. Mr Gatere further testified that during that period of 17th of October 2011 and the entire week, there were no other incidents or accidents involving any of the JKUAT students. He also testified that there was accident that occurred at JKUAT Thika road and there was no demonstration by JKUAT students.
24. Mr wrote a letter dated 26th June 2012 addressed "To whom it may concern" in which he confirmed that a road accident occurred on 17th of October 2011 involving two students of JKUAT. These were Bernice Wambui Kabutu registration number JKC 010010041/11 and Rose Mutisya registration number JKC 00300561/11. These students were hit by motor vehicle registration number KBA 352B along Bogani road as they were walking to their hostel from Karen Campus. Bernice died on the spot while Rosemary was rushed to Kenyatta National Hospital by the campus ambulance. Bernice's body was taken to Lee Funeral home.
25. In Mr Gatere's letter he confirmed that there was no other accident involving their students on the material day in any of their campuses. Mr Gatere produced the letter as part of the Complainants' evidence and marked LKN1.
26. They stated that the above matters were confirmed by the evidence of the Complainants and by George Gatere Bari, the Chief Security Officer of JKUAT.
27. Caroline Mutoko testified that she first saw the Complaint when she received, in her email box, a copy of the same. She said that all email would come to her but the company policy did not allow her to deal with legal matters. She added that for this reason she could not and did not respond to the email.
28. She testified that she was disturbed by the Complaint because she did not understand how her reference to one incident about Thika superhighway, could have been made to suggest that she was glad that someone died. She said this was unsettling to her. She asked her director, William Pike, to respond because he handled all legal matters for the company.
29. The 2nd Respondent went on to say that on the morning she heard about this particular incident of "this young lady, two things came promptly to mind". What startled her was that something horrible happened to a young girl, yet a few months

before she had been on another campus, and when leaving that campus she saw students go through Thika Road. She testified that in the same moment as she discussed with her co-host what happened to “this girl”, she remembered the carnage she had seen. She also remembered seeing students, both from the United States International University (USIU) and Kenyatta University (KU), trying to cross Thika superhighway. And for her it was not just the pain that someone lost her life but the fact that **“we abdicate our responsibility as pedestrians when it comes to road safety”**.

30. She said that she spoke bluntly, in pain and in anger because it was such a waste to lose somebody in their twenties. She testified, however, that the one incident wasn't related to the other though she appreciated the misunderstanding. She said that when William Pike asked her to see him, she explained this scenario to him.
31. The 2nd Respondent went on to explain why she thought there was a misunderstanding. She said that she was very aware where this young lady lost her life. She said that it had nothing to do with Thika superhighway. But her mind went immediately to something else she had seen. She remembered that within the same month they had carried a story of 92 deaths in one month on Thika superhighway. These deaths had not involved collision of vehicles but they were pedestrians who were dying and most of these were students from USIU and KU. That was why she made a reference to Thika superhighway.
32. She testified that she had already understood what had happened to this young girl and she understood that she was a student. For her the link between the two incidents was “students”. She repeated that she was very aware that “this young lady” had lost her life on the other side of town but for her the issue was being able to do a link in thirty seconds and say, “Yes this has happened now. Let me go forward to another thing”. For her there was no relation between the two incidents.
33. The 2nd Respondent testified further that what motivated her to make the comments that she made was that, knowing that a student had lost her life, she remembered seeing KU students trying to cross the Thika Highway. She also remembered one time when she was leaving KU she tried to use what seemed to be a shortcut for crossing the Thika superhighway. This involved traversing six lanes. The danger involved in doing this prompted her to make the comment that she made on the morning show as angrily and as bluntly as she could because people should not attempt to cross the superhighway. She said that the subject of the Complaint should be looked at in that context and it was therefore very important to separate the two.

34. The 2nd Respondent repeated several times that she was very aware that the deceased was not on Thika Road. She said that what concerned her was the carnage on Thika Road.
35. Asked to comment on the indication that the words **“Haki yetu, a riot, shut up! If you are that stupid you deserve to die”** were insensitive, Caroline Mutoko said that those words referred not to the young lady but to a pattern where people, especially university students, complain after the fact without taking cognisance of the role they played. She wanted to emphasise that people have to take responsibility. She had spoken therefore out of exasperation and was not motivated by malice. She said that she did not mention the name of the deceased and that she did not even know who the deceased was.
36. Explaining why she did not issue a correction or an apology when she learnt of the Complaint, Caroline Mutoko said that any legal matters were handled by William Pike. As a matter of company policy, she could not reply to anything of a legal nature. She said that it would have been different if the email was of a personal nature as opposed to the one she received which asked for a public apology and spoke of quantum of damages.
37. The 2nd Respondent finished by saying that she was sorry that the Complainants took her traffic update out of context and felt that she **“besmirched the name of this incredible woman, their daughter”**. In hindsight, she wondered whether there was a way to separate the two narratives within one traffic update.
38. She went on to say: **“If the brutality, the exasperation of my words hurt, I can apologize for that, but I know I never mentioned this young woman. ... So, the fact that my words were taken out of context is all I can possibly apologize for and explain.”**
39. During cross-examination, she was asked whether they had received a traffic update regarding riots by JKUAT students prior to that clip being aired. She said that they had received an update but that it was about KU and not JKUAT. When she was probed further, she said that they had received reports specifically on the Thika superhighway and the deaths there.
40. However, when the first part of the audio clip was played back, she said that the report was wrong since those involved were not knocked down on Thika superhighway. When she was asked again whether she had received any report about the accident involving the JKUAT students, Caroline Mutoko said that she heard it from Jalang’o, her co-host, and also in their news on the same day.

41. Asked whether she was therefore aware that a student of JKUAT was knocked down by a vehicle, she answered that there were two JKUAT students knocked down but she did not know where. She now said that she was told about the accident involving the JKUAT Karen students after the radio show.
42. The 2nd Respondent went on to testify that in her estimation any pedestrian who crossed a superhighway and was knocked down by a speeding car was stupid and deserved to die because they had abdicated their responsibility and were therefore asking for it.
43. She then said, however, that a person who gets knocked down while not crossing the road has not done anything wrong; and she would not have been callous enough to say that they deserved to die.
44. Asked whether she knew that **all** that the family of the deceased wanted from her was an apology, she said that she was not aware because what she had received was a demand notice. She said that if the request for an apology did not involve legal issues, she would have been willing to offer it. She said that in that case what she would have apologised for was the hurt that was caused by the misunderstanding of what she had said.
45. Caroline Mutoko said that in the circumstances of this case, however, seeing that she did not abuse the deceased or refer to her, she could only offer a clarification.
46. Asked about what the clarification would entail, Caroline Mutoko said that she would have explained that she understood that the deceased was the only JKUAT student who died as a result of a road accident in Karen. She would have then clarified that her rant was about Thika superhighway and her pain and exasperation about what was happening there. She said that this was the same clarification that she was now making before the Commission.
47. During re-examination, Caroline Mutoko said that she did not want to appear high-handed. She said that considering the pain it must have caused, she could apologize for the pain that the misunderstanding created. She went on to say the following to the Complainants:

By the way, you don't have to look at me, but I need you to understand I never meant to hurt you. I did not know your daughter, I'm sorry she lost her life, I'm sorry it has taken us this long to just clarify this misunderstanding. I'm really, really sorry. I'm really sorry. I'm really sorry. I can totally understand why you wrote, and understand hearing the two in the same day. But I'd also like to believe by and large I'm a better person

than that and my reputation speaks for me. I wouldn't hurt somebody who's lost someone. It's pointless, utterly pointless. You lost your daughter and I'm sorry.

48. Asked by the Commission why she got the facts wrong in the first place despite having several sources of information and updates, Caroline Mutoko said that it was not her mistake since it was Jalang'o who initiated the conversation by stating the wrong facts and they had carried the conversation from there. She had therefore gone by the fact that two students had been knocked down on the Thika superhighway.
49. Asked by the Commission whether she thought there was anything wrong with Jalang'o having got his facts wrong, she said that she thought it was wrong and that if that had not happened "this woman wouldn't be in tears". She said that based on this incident, if such a thing happened in the future, she would be more diligent to get the facts right.
50. Asked again by the Commission whether she would be willing to clarify and apologise on the show, Caroline Mutoko said that she would, but that William Pike would get involved with regard to how that apology and clarification would be worded or phrased.
51. At this juncture and with the intervention of the Commission, the Complainants and the Respondents agreed to explore a suitable apology by the Respondents to the Complainants. The Commission adjourned the proceedings to facilitate this settlement but parties were unable to agree. The Commission therefore directed that parties to file their submissions to enable the Commission to determine the matter based on the pleadings and evidence.

SUBMISSIONS BY THE COMPLAINANTS

52. In the Complainants' submissions filed on 5th December 2012, they submitted that when the audio clip was played to the Complaints' Commission, there was no denial that the following words were an accurate rendition of what was stated by Caroline Mutoko who was an employee of the 1st Respondent:

...very very sad ...that that two students of JKUAT were knocked down on Thika superhighway and now they have gone out nini nini asking for bumps..what what...if you know very well... why are you crossing a superhighway...no no even sadly enough at JKUAT don't we have the foot bridge...don't we have that foot path. no no when are we going to end stupidity ...no the reason am saying no is because I am not having this conversation. Am not having conversation of people

who get knocked by a matatu because the matatu reversed on the highway... why are you trying to cross that thing and then oh...we were killed...oh.. haki yetu...oh.. a riot oh... shut up if you are that stupid you deserve to die...

53. They submitted that the above words spoken by Caroline Mutoko were inaccurate, misleading and in breach of Article 1(a) and (f) of the Code of Conduct for the following reasons:

- i. No JKUAT student was knocked down while crossing Thika superhighway.
- ii. There was no strike or demonstration over an accident by JKUAT campus students following an accident on Thika Road.
- iii. The only demonstration was one held by students of JKUAT Karen campus protesting the accident that had resulted in Bernice's death on Lang'ata South Road near JKUAT Karen Campus and they were demanding the erection of speed bumps.
- iv. The only student who died in a road accident was Bernice Wambua Kabutu who was knocked down while walking off Lang'ata South Road near JKUAT campus.
- v. There had been no incident involving a JKUAT student having been knocked down while crossing the Thika superhighway the whole of the year 2011.

54. They stated that the above matters were confirmed by the evidence of the Complainants and by George Gatere Bari, the Chief Security Officer of JKUAT.

55. They submitted further that the words spoken by Caroline Mutoko "**...shut up if you are that stupid you deserve to die...**" were insensitive and failed to treat the subject of the broadcast with dignity and compassion in breach of Article 1(g) of the Code of Conduct on accuracy and fairness.

56. The complainants also submitted further that the said words were not only insensitive but treated the subject of discussion with utmost indignity and lack of compassion. They said that they had in their evidence clearly demonstrated how the said words caused them immense pain, anguish, distress and emotional hurt during the immediate period when they had lost their 18 year old daughter.

57. It was the Complainants contention that the words were especially insensitive due to the fact that the words implied that their daughter was not only stupid but that she deserved to die. According to the Complainants, the reality was that their daughter had been knocked down from behind while walking off the road, and that she and her friend were not crossing the road and were not in any way negligent nor did they contribute to the occurrence of the accident.

58. The Complainants submitted that the Respondents, upon being informed of the inaccuracies of the broadcast, failed to correct the same in breach of Article 1(b) of the Code of Conduct, on Accuracy and Fairness. They noted, however, that during the hearing, Caroline Mutoko apologized to the Complainants for the hurt they underwent following the broadcast.
59. It was the Complainants' case that the Respondents generally failed to conduct themselves ethically in breach of Article 4 of the Code, on Accountability, for the following reasons:-
- i. The allegations contained in the said broadcast were false and lacked basis in fact or at all as there was no demonstration by students of JKUAT Juja Campus protesting the knocking down and killing of a student on Thika superhighway.
 - ii. The Respondents broadcast the said words recklessly and irresponsibly without caring whether the allegations in question were true or false and without taking steps to verify the facts or ascertain the truth
 - iii. The Respondents failed and or did not care to verify the substance of the allegations contained in the said broadcast with either the Complainants or the JKUAT authorities or the Traffic Police Department so as to publish balanced articles
 - iv. The Respondents came to the conclusion that the Complainants' daughter was so stupid in trying to cross the road that she deserved to die yet the fact was that she was knocked **off the road** from behind and was blameless for the accident that killed her.

SUBMISSIONS BY THE RESPONDENTS

47. In the Respondents' written submissions filed on 18th December 2012, the Respondents submitted that during the radio show in question, Caroline Mutoko's co-host gave a traffic update that students from Jomo Kenyatta University of Agriculture and Technology (JKUAT) were demonstrating against an alleged rise in the number of accidents near their campus. They stated that Caroline Mutoko, having experienced some accident along Thika superhighway, considered it as an issue of great public and national importance since many lives were being lost on the roads and especially on the Thika superhighway.
48. The Respondents submitted that during the hearing, it became apparent that there was a misunderstanding as to the context in which Caroline Mutoko had made her comments.

49. According to the Respondents, Caroline Mutoko was referring to the Thika superhighway and the fact that students and pedestrians in general chose to demonstrate on the roads instead of taking the initiative upon themselves to prevent accidents by using the facilities available to them. They stated that Caroline Mutoko did not have in mind the accident involving the Complainants daughter and that her comments were never directed at the deceased nor to the incident that caused her death.
50. The Respondents submitted further that according to Caroline Mutoko's testimony, an informal tally had been conducted on the number of road carnages per the month in Kenya and the number for Thika superhighway alone reached 92. They stated that this was a very disturbing reality particularly to Caroline Mutoko who had experienced the said highway en route to her home. She was accustomed to seeing pedestrians cross the highway lanes, at the risk of matatus reversing. She found it appalling and irresponsible for these students to willingly endanger their lives while crossing the highway, yet there was a footbridge available.
51. It was the Respondents' submission that when Caroline Mutoko's co-host mentioned students hit on the superhighway, Caroline instinctively and naturally thought of the Thika superhighway and made a comment based on what she had seen. Her comments during the show were directed at the persons who cross that specific highway carelessly. She could not understand why students would riot and cause havoc over inevitable accidents which could be avoided if only the footbridge was utilized. In fact, in her assessment, such acts amounted to recklessness because the students were willingly putting their lives at risk on a daily basis.
52. The Respondents argued further that at the time the show was on air, the Caroline Mutoko had no knowledge of a protest at the JKUAT, Karen Campus, and that it was her co-host who brought up the university and not her. They argued that throughout the entire show, her only reference was the Thika superhighway. She was not aware of the death of the Complainants' daughter along Lang'ata South Road and no reference whatsoever was made to the late Bernice Wambui Kabutu. In addition, she was not making reference to students of JKUAT, rather her focus was on pedestrians who cross the Thika superhighway recklessly. No reference whatsoever was made to any individual by name.
53. It was the Respondents argument that there was no breach of any of Article 1 (a) of the Code of Conduct for the Practice of Journalism ("the Code") which provides:

"The fundamental objective of a journalist is to write a fair, accurate and an unbiased story on matters of public interest. All sides of the story shall be reported,

wherever possible. Comments should be obtained from anyone who is mentioned in an unfavourable context.”

54. The Respondents noted that during the Caroline Mutoko’s cross-examination, it was revealed that fatalities had been previously recorded informally by the Respondents relating to the Thika superhighway and that the show was focused on matters of public interest; meaning traffic updates and general road safety. They submitted that it was in the interest of the public to know the situation of the traffic in the city in order to plan one’s movement accordingly.

55. They submitted that comments made by Caroline Mutoko were based on her experience on the Thika superhighway which at the time had registered a high death toll. No person was singled out during the show and no reference to any person was made or alluded to therefore the requirement to seek a comment was not applicable.

56. The Respondents referred to the decision by the Press Council of South Africa in **Ziyad Motala versus Sunday Times** in dismissing the Complaint on a commentary that had been considered racist by the Complainant. The Appeal Panel was of the opinion that regardless of the motive behind the said publication, the author raised an issue of crucial and legitimate public interest that should be aired, not concealed. It further stated that:

“... society is a very broad, complex construct – and what is offensive to one section of society today, may not be offensive tomorrow – or may not ever have been offensive to another section of society”

57. Regarding Article 1(f) and 1(g) of the Code which jointly provide that: **“journalists should present news fairly and impartially and should treat all subjects of news coverage with respect and dignity, showing particular compassion to victims of crime or tragedy”**, the Respondents submitted that the words spoken by Caroline Mutoko were neither offensive nor were they in reference to the Complainants’ daughter. They argued that Caroline Mutoko had no knowledge of the fatal accident that occurred off Lang’ata South Road involving the Complainants’ daughter. According to them, she was concerned about the accidents that had occurred along the Thika superhighway in general.

58. The Respondents submitted further that there was no correlation between the two incidents save for the fact that students may have been involved. They said that it was an unfortunate fact that the date of the broadcast coincided with the date of the fatal accident, but it was clear that Caroline Mutoko was not discussing the incident involving the Complainants’ daughter.

59. The Respondents reiterated the fact that the Caroline Mutoko found it irresponsible for students to openly disrupt the activities of the general public through demonstrations instead of taking up the initiative to prevent some of these accidents by not willingly endangering their lives while crossing the highway. They argued that any pedestrian who chose not to use the facilities provided for crossing the road were blatantly ignoring the sure risk of death yet safety measures were in place. In the opinion of Caroline Mutoko, this was tantamount to senseless behaviour; it was merely an accident-waiting-to-happen scenario.
60. The Respondents argued that making comments on the reckless behaviour of the public was not a failure to treat the subject with dignity and compassion as alleged by the Complainants. They argued that it was a fair comment made against reckless behaviour.
61. The Respondents contended that it was an undisputed fact that the persons referred to by Caroline Mutoko were not victims as prescribed in the Code of Conduct at all. In their opinion, she was referring to anyone making the conscious choice not to use the footbridge. The comments were not directed at anyone specific and on the whole not about the Complainants' daughter.
62. In reference to the aforementioned South African case, the Respondents stated that the Appeal Panel relied on the previous decision of **Team Media Israel versus The Sunday Times** which developed the concept that the Panel should somehow be the arbiter of "the line" which defines "the acceptable norm" in comment. This is the notion that the Press Council, the Press Ombudsman and/or the Press Appeals Panel should be the arbiter of society's social *mores* and express itself against a comment which crosses this "line".
63. The Respondents therefore submitted that in this particular case, the Respondents had not breached this line and were well within the confines acceptable as per the provisions of the Code of Conduct, and that the Commission had the jurisdiction to make declarations to that effect.
64. The Respondents then made reference to Article 1(b) of the Code which contains the proviso:

"Whenever it is recognized that an inaccurate, misleading or distorted story has been published or broadcast, it should be corrected promptly. Corrections should present the correct information and should not restate the error except when clarity demands"

65. On the issues of apology the Respondents submitted that Caroline Mutoko did not make any apology because the incident that was the subject matter herein was not the focus of the breakfast show. They argued that the demand for an apology was therefore misplaced due to the misunderstanding as alluded to earlier in their submissions. Furthermore, it was the Respondents' case any apology by the Respondent would have to be dealt with formally by the Respondents legal department.
66. The Respondents also submitted that although they sympathised with the Complainants' plight of losing their child, the incident that was the subject of the breakfast show did not involve the Complainants' daughter. The Respondents could be held liable for the mistaken notion that Caroline Mutoko was talking about the accident on Lang'ata South Road. It was their contention that there was no disclosed breach of the Code of Conduct from the circumstances of this particular case.
67. In conclusion, the Respondents argued that it is a generally accepted notion in media law that the fact that a publication gives offence, even widespread offence, is not of itself evidence of a breach of the Code of Practice. They argued that if there was any offence caused, it was not intentional, and not in the way in which the Complainants alleged. They said that they are fully aware of their obligations as enshrined in Article 4 of the Code of Conduct in that they recognized their accountability for their actions to the public, the profession and themselves. They submitted that at all material times, they conducted themselves ethically and responsibly.
68. Further the Respondents averred that the Commission has no jurisdiction to award costs as prayed by the Claimant since **Section 29 of the Media Act Cap 411B** provides that the Commission or any of its panels may, after hearing the parties to a complaint-
- a) And being of the opinion that the complaint is devoid of merit or substance, dismiss such complaint;
 - b) Order an offending party to publish an apology and correction in such manner as the Council may specify;
 - c) Issue a public reprimand of the journalist or media enterprise involved.
69. It was the Respondents contention that in view of the foregoing, the prayers sought by the Complainants could stand and should not be granted in this particular case. In their opinion, there was an apparent misunderstanding by the Complainants, which Caroline Mutoko had clarified to them on her comments and offered a personal apology for any wrong perception that her comment may have created.
70. For these reasons the Respondents prayed that the Complain be dismissed the Claim.

THE COMPLAINANTS REPLY TO THE RESPONDENTS' WRITTEN SUBMISSIONS

71. In their Reply to the Respondents' submissions, the Complainants reiterated what they already stated in their submissions.

ISSUES FOR DETERMINATION

72. Having perused the pleadings filed by both parties, and taken into consideration their testimonies as well as their submissions, the Commission finds that the following are the issues for determination:

- i. Whether the Complainants' deceased daughter was the subject of the broadcast by the Respondents
- ii. Whether the broadcast by the Respondents violated the Constitution and the Media Act
- iii. Whether the Complainants are entitled to the reliefs sought

Whether the Complainants' deceased daughter was the subject of the broadcast by the Respondents

73. After carefully listening to, and reading the transcript of, the audio-clip of the broadcast complained about, the Commission finds it partly incorrect that the assertion by both parties that the words in the broadcast were uttered by Caroline Mutoko. The correct position is that the broadcast involved a conversation between the Caroline Mutoko and her co-host, Jalang'o. The Caroline did not, therefore utter all the words in the broadcast complained of as alleged. Some of the words were uttered by her co-host Jalang'o.

74. It is clear from the audio-clip and the transcript of the same that during the conversation between Caroline Mutoko and Jalang'o, it was Jalang'o that spoke first and gave the traffic update which he termed as very sad.

75. It is also evident from the audio-clip and the transcript above that during the conversation between Caroline Mutoko and Jalang'o, no person was named. Jalang'o stated that two (2) students of JKUAT were knocked down and that as a result JKUAT students had demonstrated asking that bumps be erected on that road.

76. The audio-clip and the transcript also reveal that Jalang'o reported that the two JKUAT students were knocked down on Thika superhighway. Caroline Mutoko then took her cue from that and proceeded to make her comments on the basis that the report was a true fact.

77. The Commission finds that on the basis of the audio-clip of the broadcast complained of, the Complainants' deceased daughter was not named directly. This finding is supported by Mr John Kabutu who agreed during cross-examination that their deceased daughter Bernice was not mentioned by name by Caroline Mutoko. Mr John Kabutu agreed further that in the audio-clip, Caroline Mutoko was not talking about anything that had happened in Karen.
78. From the foregoing, the Commission finds that Caroline Mutoko did not utter the words **"she was so stupid she deserved to die!"** as alleged by the Complainants in their Complaint form, in reference to their deceased daughter. As a matter of fact, Caroline Mutoko uttered these words **"shut up if you are that stupid you deserve to die"** during the conversation with Jalang'o after Jalang'o had reported that two JKUAT students had been knocked down on the Thika superhighway.
79. From the testimonies and submissions by both parties, it is evident that only one accident involving JKUAT students occurred on the 17th of October 2011, and that the said accident involved JKUAT Karen campus students. The gist of the Complainants' case is that because of this fact, the broadcast complained of could only have been about this accident and that, by extension, Caroline Mutoko's comments must have been directed at their deceased daughter.
80. It is evident therefore that the report by Jalang'o was clearly incorrect; it was a false fact. The Commission finds, however, that because Caroline Mutoko proceeded to make her comments on the basis that the report by Jalang'o was a true fact, she couldn't possibly have been talking about the Complainants' deceased daughter.
81. The finding above is buttressed by the fact that Caroline Mutoko repeatedly and only made reference to the Thika superhighway while the Complainants' daughter was killed off a road in Karen.

Whether the broadcast by the Respondents violated the Constitution and the Media Act

82. The Complainants submitted that the words spoken by Caroline Mutoko breached Article 1(a) and (f) of the Code of Conduct. Article 1(a) states:

"The fundamental objective of a journalist is to write a fair, accurate and an unbiased story on matters of public interest. All sides of the story shall be reported, wherever possible. Comments should be obtained from anyone who is mentioned in an unfavourable context."

Article 1(f) states:

“Journalists should present news fairly and impartially, placing primary value on significance and relevance.”

83. The first part of Article 1(a) (being the first two sentences) requires a journalist to write (and report) a fair, accurate and an unbiased story on matters of public interest and to include all sides of the story, wherever possible. In the opinion of the Commission, the broadcast complained of was not a news story but a radio talk-show whose general thrust is commentary based on factual occurrences. The only factual statement in the broadcast was made not by Caroline Mutoko but by Jalang’o. Caroline Mutoko did not therefore breach this part of Article 1(a) as alleged. These comments are also applicable to Article 1(f) which refers to presentation of news not a Radio talk show.
84. The last part of Article 1(a) requires that **“comments should be obtained from anyone who is mentioned in an unfavourable context”**. We have already established above that Caroline Mutoko did not mention or refer to the Complainants’ deceased daughter. It was therefore not necessary or possible to get the Complainants’ comments at the time of the broadcast.
85. The Complainants submitted that the words spoken by Caroline Mutoko **“...shut up if you are that stupid you deserve to die...”** were insensitive and failed to treat the subject of the broadcast, their deceased daughter, with dignity and compassion in breach of Article 1(g) of the Code of Conduct which states, **“Journalists should treat all subjects of news coverage with respect and dignity, showing particular compassion to victims of crime or tragedy”**. The Complainants explained that the words were especially insensitive due to the fact that the words implied that their daughter was not only stupid but that she deserved to die.
86. Having found that the Complainants’ deceased daughter was not the subject of Caroline Mutoko’s comments, the Commission finds that she did not breach Article 1(g) of the Code of Conduct as alleged.
87. The Complainants submitted that the Respondents, upon being informed of the inaccuracies of the broadcast, failed to correct the same in breach of Article 1(b) of the Code of Conduct which states, **“Whenever it is recognized that an inaccurate, misleading or distorted story has been published or broadcast, it should be corrected promptly.”**

88. The Complainants submitted that the Respondents generally failed to conduct themselves ethically in breach of Article 4 of the Code, on Accountability. Subsection (b) of this article especially requires journalists to **“respond to public concerns, investigate complaints and correct errors promptly”**.

89. The Commission has already found that Jalang’o’s report that two JKUAT students were killed on Thika superhighway on the day of the broadcast was incorrect. It is evident that Jalang’o was not diligent enough to cross-check his facts before he made his report. Caroline Mutoko also failed to ascertain whether her colleague’s report was factually correct before she made her comments. Furthermore the Respondents refused, failed and or neglected to promptly correct the errors in the broadcast.

90. It is the Commission’s opinion that for these reasons the Respondents violated Article 1 (b) as read together with Article 4(b) of the Code of Conduct.

Whether the Complainants are entitled to the reliefs sought

91. The Complainants prayed for the following remedies:

- i. An apology on the same show
- ii. A correction on the same show
- iii. A public reprimand of the journalist or media enterprise involved

92. With regard to the prayer for an apology the Commission finds that although at the time of the broadcast, Caroline Mutoko was not referring to the Complainants deceased daughter, it was soon thereafter brought to her attention that the only JKUAT student that died on that day was the daughter of the Complainants’. After realising the mistake, Caroline Mutoko ought to have promptly apologised. For this reason the Commission finds an apology appropriate.

93. With regard to the prayer for a correction, the Commission finds that the Respondents violated Article 1 (b) as read together with Article 4(b) of the Code of Conduct, which requires journalists to correct errors promptly. These Articles obliged the Respondents to speedily correct the false report that they broadcast, irrespective of whether or not a Complaint had been lodged. The prayer for a correction is therefore appropriate.

94. With regard to the prayer for a public reprimand of the journalist or media enterprise involved, it is the opinion of the Commission that based on the foregoing findings, Caroline Mutoko’s genuine contrition and her personal apology for the hurt that the Complainants experienced as a result of the misunderstanding caused by the broadcast, this relief would be unnecessary.

ORDERS OF THE COMMISSION

95. Guided by the prayers sought by the Complaint and the provisions of the Media Act Cap 411B, as stipulated in Section 29 of the Media Act as read with Regulation 21 of the Media (Complaints Commission) Rules of 2009, the Commission therefore makes the following orders:

1. By a majority decision the Commission orders the Respondents, under section 29 (1) (a) to publish a suitable apology, giving it similar prominence as the broadcast. Accordingly, the Commission orders that the parties should agree on the wording of the apology within 14 days from today and further to agree on a date for broadcast of the apology within 21 days from today. In the event of failure, the Commission directs that this matter be mentioned before the Commission for further orders. Either party is at liberty to make an application before the Commission in respect of compliance with this order.

With regard to the apology, Commissioner Professor Murej Mak’Ochieng was of the following opinion:

Since the Respondents did not breach Articles 1(a), (f), (g) and Section 32 (1) as alleged, and the Complainants’ deceased daughter was clearly not the subject of the broadcast by the Respondents, the prayer for an apology is denied.

Professor Murej Mak’Ochieng (Dissenting on the issue of apology)

2. The Commission orders the Respondents to publish a correction to the effect that on the day of the broadcast no JKUAT students were knocked down on Thika superhighway as reported by Jalang’o and that the only JKUAT students who were knocked down on that day were from JKUAT Karen campus as they walked along Bogani road.

Delivered on this 6th Day of June 2013

Grace N Katasi
.....
(Chairperson)

Peter Mwaura
.....
(Commissioner)

Prof. Murej Mak'Ochieng

.....

(Commissioner)

(Dissenting on the issue of apology)

Fatuma Hirsi Mohamed

.....

(Commissioner)