

REPUBLIC OF KENYA

IN THE MEDIA COMPLAINTS COMMISSION OF THE MEDIA COUNCIL AT NAIROBI

COMPLAINT NO.084/2010

LEORNARD .G. KAMWETI.....COMPLAINANT

VERSUS

NATION MEDIA GROUP.....1ST RESPONDENT

JAINDI KISERO.....2ND RESPONDENT

DECISION OF THE COMPLAINTS COMMISSION

Mr Leonard .G. Kamweti (hereinafter referred to as the Complainant), made a written complaint to the Media Council of Kenya against the Nation Media Group (hereinafter referred to as the 1st Respondent) and Mr Jaindi Kisero (hereinafter referred to as the 2nd Respondent). At the material time, the Complainant was the Company Secretary of the National Bank of Kenya (NBK) and an Advocate of the High Court of Kenya. On the other hand, the 1st Respondent owns and publishes the Daily Nation and The East African newspapers that are widely circulated and read in Kenya and the East African region, whereas the 2nd Respondent is a journalist.

The complaint, dated 7/6/2010, was lodged with the Media Council of Kenya on 10/6/2010. Mr Kamweti complained about two articles, headlined "***Fury at NBK Management's Plot to Strip Preferential Shareholders of Equal Rights***", published in the Daily Nation on 20 April 2010, and "***Treasury foils NBK plot to Strip its Shares of Dividend Rights***", and published in The East African issue of 19-25 April 2010. He contended that they were false, adverse and defamatory to him as a professional. Both articles were written by the 2nd Respondent and published by

the 1st Respondent, and they were similar in content, save for the dates of publication and the different newspapers in which they were published.

A brief summary of the two articles complained of

In order to fully comprehend and fairly adjudicate upon this complainant, it is imperative to briefly summarise the content of the two articles to get a clear picture of the factual situation that gave rise to the story alleged to have aggrieved the Complainant.

The two articles concerned the privatization of the National Bank of Kenya (NBK), the third largest bank in Kenya at that time. The ultimate authority on the issue was the Privatisation Commission of Kenya. The articles alleged that there was an attempt by the National Bank of Kenya's Board, led by the National Social Security Fund (NSSF), to strip the Government of its rights it enjoyed as a preferential shareholder, which are equal to those of equity holders. The NBK Board had planned to achieve this objective by taking the matter before the bank's Annual General Meeting (AGM) on 18/6/2010, and stripping preference shareholders of equal rights with ordinary shareholders in the sharing of dividends and bonuses. The NBK also wanted the AGM to create bonus shares to be distributed among ordinary shareholders.

It was reported in the articles that at that point in time, the NBK had both preference and ordinary shares on its balance sheet with the Government owning 75 % preference shares and the NSSF holding 21%. The two categories of shares rank in equal rights when it comes to distribution of dividends, however holders of preference shares cannot vote at an AGM. The NSSF, with 48% of the shares, and the public with 29%, were only entitled to 15% of the profits. The 2nd Respondent opined that were the AGM to approve the NBK's management proposal, the Government, whose shareholding was restricted to preference shares, would be the biggest loser. NBK's Board was attempting to strip the government of the rights it enjoyed as a preference shareholder, which are equal to those of equity holders. The Government would eventually lose control of the NBK, a listed company that had survived on injection of taxpayer funds over the decade. As the NBK was prepared for privatization, untangling the rights owned by these two classes of shares had become the flashpoint of a heated battle between the

Privatisation Commission and NSSF. The articles further argued that by forcing a shareholders' resolution, NBK was attempting to forestall a public policy decision by the Kenya Cabinet on how this privatization should be handled.

The 2nd Respondent further wrote that, ironically, the move by NBK appeared to have been an attempt to head off a privatization formula crafted by the Privatisation Commission with the advice of professional services firm PricewaterhouseCoopers. The Commission had proposed that the two categories of shares be converted at a rate of 1:1. This would in effect nationalize the bank by making the Government the majority shareholder before the bank was sold to a majority shareholder. NSSF had opposed the conversion formula on the grounds that it would dilute the Fund's investment in the bank, and that if a dividend were declared at that time, 85% of the dividend would accrue to the preference shareholders. According to the said articles, if the resolution placed by the NBK's management in the up coming AGM had gone to a vote, the decision would have immediately ended any plans to privatize NBK.

The 2nd Respondent also wrote that on the face of it, the disagreements were of a technical nature but underlying the technical disputes was a ferocious battle to control and decide who eventually owned the bank. He wrote that the NBK management had also come up with their own proposal, with their Managing Director Reuben Marambii suggesting that the *pari passu* arrangement be done away with and holders of preference shares be paid at the 10% rate pegged at the rate which holders of government bonds were being paid. This proposal would create two parallel markets for the preference and ordinary shares.

The two articles reported that the Treasury, through the Kenya Privatization Commission, foiled the attempt by the NBK to strip the preference shareholders of equal rights, by writing to the bank to expunge a resolution from AGM's agenda that touched on the planned sale of the bank. In his letter to NBK, the Chief Executive Officer of the Commission, Mr Solomon Kitungu, said *"What you are trying to do is fraudulent as it would be morally wrong for the shareholders of one category of shares to meet and change the rights and privileges of another category of shareholders"*. The articles reported that Mr Kitungu argued that what NBK was seeking to do

through the backdoor was a massive transfer of value from one class of shareholders to shareholders who could not vote at the AGM.

The articles also reported that *In February, NBK's Company Secretary Lee Kamweti (the Complainant herein) wrote yet another letter to Mr Kitungu proposing several other options of converting the shares. In his letter to NBK, Mr Kitungu complained about the assertion by Mr Kamweti in his letter that the NSSF would continue to fight against PWC's proposal. He said Mr Kamweti appeared to be either encouraging or precipitating resistance to the conversion bid to derail the privatization process. We do not think that Mr Kamweti needs to be the spokesman for the NSSF as NSSF can independently address the pertinent issues at the Fund," he said.*

The 2nd Respondent further wrote that *it would appear that the Privatisation Commission was beginning to feel that NBK was ganging up with the NSSF to defeat the conversion formula proposed by PWC.*

The Complaint

The Complaint dated 7/6/2010 was filed with this Commission on 10/6/2010. The Complainant was aggrieved by the reference to him, in both articles, as *"either encouraging or precipitating resistance to the conversion in a bid to derail the privatization process. "*

In the Daily Nation of 20 April 2010, the 2nd Respondent wrote and the 1st Respondent published an article captioned ***"Fury at NBK Management's Plot to Strip Preferential Shareholders of Equal Rights"***. The Complainant contends that in this article, the 2nd Respondent referred to an adverse report written by a Mr Kitungu, in which the Complainant was mentioned specifically and severally in an unfavourable light. The Complainant was specifically aggrieved by the statement that; ***"He appeared to be either encouraging or precipitating resistance to the conversion in a bid to derail the privatization process. We do not think Mr Kamweti needs to be the spokesman for the NSSF as NSSF can independently address the pertinent issues at the fund"***

In the East African issue of 19- 25 April 2010, the 2nd Respondent wrote and the 1st Respondent published yet another article headlined ***“Treasury Foils NBK Board Plot to Strip its Shares of Dividend Rights”***. The Complainant contends that in this article, the 2nd Respondent referred to an adverse report written by a Mr Kitungu, in which the Complainant was, once again, mentioned specifically and severally in an unfavourable light. The Complainant was specifically aggrieved by the statement that; ***“He appeared to be either encouraging or precipitating resistance to the conversion in a bid to derail the privatization process. We do not think Mr Kamweti needs to be the spokesman for the NSSF as NSSF can independently address the pertinent issues at the fund”***

It is the Complainant’s contention that these articles falsely implied, to reasonable members of the public and were understood to mean, that he was a person want of skills, of ill motive, manipulative and unprofessional, and who deviously wished to derail a process. He averred that the originator of the story (Mr Kitungu), the journalist (Mr Kisero), and the media enterprise (NMG) could not prove the allegations of bad faith on his part by way of a *“bid to derail the privatization process”*. The Complainant asserted that the 2nd Respondent knew where NBK was located but never attempted to obtain his view on the story, thus breaching Rule 1(a) of Schedule 2 of the Media Act of 2007. This rule requires all sides of the story to be reported whenever possible, and that comments should be obtained from anyone who is mentioned in an unfavorable light. Without verifying the facts, the 1st Respondent proceeded to write and the 2nd Respondent proceeded to twice repeatedly publish and broadcast the story. The Complainant contended that the articles had caused him to be looked upon by his colleagues, directors, shareholders and stakeholders and staff in a public company as unreliable, unprofessional, dishonest, manipulative busy body. He contended that this reduced his status in the eyes of his peers, many of whom had called and queried him severally since the two articles were published. This, he averred, had caused him great and deep personal anguish.

The Complainant also contended that the 2nd Respondent’s wife used to be an employee of NBK but was laid off due to redundancy. The fact that she was among 40 pensioners who sued the bank, in the Complainant’s opinion, makes it unethical for the 1st Respondent to write

adverse articles about the bank in violation of Clause 2 (d) of the Second Schedule of the Media Act that requires journalists to avoid self interest that erodes journalistic duty and service to the public

The Complainant's main contention was that the story was misleading, inaccurate and biased. He sought an apology and damages from the Respondents. He attached the following documents to his complaint

1. The Complainant's letter to the two Respondents dated 26/4/2010 seeking an apology and damages arising from the two articles
2. The Response from the 1st Respondent denying any liability to the Complainant
3. The Complainant's letter to the 1st Respondent insisting that his claims were justified and that they owed him an apology
4. The Complainant's letter to the Media Council of Kenya setting out the alleged defamatory statements and outlining the remedies sought.

Response to the Complaint

The Response dated 10/8/2010 was filed with this Commission on 17/8/2010. The Respondents jointly and severally responded to the Complaint by admitting that the two articles were published, but averred that they were true in substance and fact, and were not defamatory of the Complainant as alleged or at all. The Respondents further averred that the story was on a matter of public interest, namely the privatization of a public company in which the Kenyan public had an interest. They also averred that the fact that the 2nd Respondent's wife worked with the bank was irrelevant to the story, of no consequence, and does not in itself disqualify the 2nd Respondent as a journalist and a Kenyan from writing about the bank as the issue was one of grave public interest. The response further argued that the articles did not make any adverse reference to the Complainant and were duly objective and balanced, hence did not mandatorily require the Complainant to be contacted in person. They further argued that the

articles were not intended to harm the Complainant either as a person or as a professional, and could not in any case have been perceived in that sense by the readers of the articles.

As concerns the injury alleged to have been suffered by the Complainant, the Respondents averred that the Complainant had not suffered any damage to his reputation or any injury to his professional or other standing on account of the articles.

In relation to the remedies sought by the Complainant, the Respondents contended that there was no basis for the retraction of the story because the articles were true in substance and fact. Finally, the Respondents averred that the Complainant was not entitled to any damages in law as the articles were true, and that in any event, this Commission has no powers and or jurisdiction to award damages.

The Respondents prayed that the Complaint be dismissed for lacking legal justification for the remedies sought

Complainant's Reply to the Response

The Complainant's reply to the Response dated 25/8/2010 was filed with this Commission on 6/9/2010. In his Reply, the Complainant reiterated the story was untrue and defamatory, especially by publishing the words that the Complainant encouraged resistance to conversion, attempted to derail the privatization process and attempted to be a spokesman for NSSF. He further argued that public interest is not a licence or blank cheque to publish false, defamatory statements. The Complainant insisted that the 2nd Respondent's wife issue was relevant in demonstrating motivation as she had sued the Complainant personally in HCCC 89/2008, and in the Retirement Benefits Authority Claim filed on 28/4/2010. The publication, according to the Complainant was intended to hit out at the Complainant in furtherance of the altercation seen in the two cited cases.

The Complainant also maintained that the articles were adverse, biased, unbalanced, made disparaging innuendos, and were therefore not true in substance and fact as averred by the Respondents. He also insisted that, despite having been unfavorably mentioned in the articles,

no comments were sought from him as required by Rule 1(a) of the Media Act. The Complainant maintained that he had suffered damage and injury, and was therefore entitled to the relief sought.

Hearing of the Complaint

After close of pleadings, the complaint was heard on 14/5/2011 during which the Complainant gave his evidence in chief and was thereafter cross-examined by Mr Sekoue Owino Advocate for the Respondents. Both the Complainant and the Respondents did not call any witnesses.

In his evidence in chief, the Complainant testified that he is an Advocate of the High Court of Kenya, a Certified Public Secretary, a Company secretary of the National Bank of Kenya (NBK) and a trustee of the bank's pension fund. He testified on 20/4/2010, while he was in his office, he read two articles, headlined "***Fury at NBK Management's Plot to Strip Preferential Shareholders of Equal Rights***", published in the Daily Nation on 20 April 2010, and "***Treasury foils NBK plot to Strip its Shares of Dividend Rights***", published in The East African issue of 19-25 April 2010. He further stated that the 1st Respondent had been publishing a lot of negative reports about the bank's pension fund, and he saw these articles as a continuation of this trend. He was especially pained by the use of the phrase "**Treasury foils NBK's Board plot**" as it implied that there was an attempt by the Board, in which he sat as a Company Secretary, to engage in robbery and fraud. He averred that this title portrayed the Board as mischievous, unreliable and untrustworthy. The Complainant also testified that by stating that NBK had survived over the past decade on massive investment of tax payers funds, the article ruined both his image and that of NBK as the government had never lost any money in NBK.

The Complainant also testified that as a Secretary to the NBK Board, he served all stakeholders including NSSF, and that it was therefore wrong for the Respondent to cite a letter in which the Complainant was accused of acting as the spokesman for NSSF. The Complainant also testified that the wife of the 2nd Respondent used to work for NBK from 1987 to 2001 when she was retrenched, thus giving rise to what the Complainant referred to as "matrimonial conflict of interest" on the part of the 2nd Respondent. The Complainant insisted that by writing this story,

the 2nd Respondent violated Rule 2(d) of the Media Act that requires journalists to avoid self interest.

The Complainant wound up his testimony by telling the Commission that the 2nd Respondent never sought his comments on the story, thus violating Rule 1(a) of the Code of Conduct for the Practice of Journalism. After failing to secure an apology and clarification from the Respondents, he filed this complaint with the Commission. He informed the Commission that he had abandoned his claim for damages upon advice that this remedy was outside the Commission's jurisdiction. He therefore prayed for an apology, correction and clarification from the Respondents.

During cross examination by Owino for the Respondents, the Complainant admitted that NBK was an institution in which the public had an interest, considering that it had over 65,000 shareholders. He also admitted that between 2006 and 2007, the Government injected some money into NBK, but this was later converted into equity when the Banking Act was amended. The Complainant however maintained that no money was lost and the portfolio remained the same.

At the end of the hearing, and there being no witnesses for either party, the Commission directed the parties to file written submissions, after which a final decision would be rendered in the matter.

Submissions by the complainant

In his submissions filed at the Commission on 21/4/2011, the Complainant maintained that the articles published by the Respondents were defamatory, inflammatory, biased, inaccurate, unfair and untrue. To support his assertion, he relied on Black's Law Dictionary, 8th Edition that defines defamatory as *"tending to harm a person's reputation usually by subjecting the person to public contempt, disgrace or ridicule"*, and inflammatory as *"tending to cause strong feelings of anger , indignation, or other type of upset, tending to stir the passion"*. The Complainant submitted that the articles defamed him as an Advocate, Certified Public Secretary who sits on

both the NBK Board and NBK Pension Fund by portraying him as a forced spokesperson of NSSF and a saboteur of Cabinet decisions. He also submitted that the 2nd Respondent was biased because his wife, who used to work at the Bank, was laid off. The Complainant insisted that the 2nd Respondent was therefore biased. He submitted that the Respondents breached section 35 of the Media Act, and Clause 1(a), 2(e) and (d) of the Code of Conduct for Journalism

The Complainant also submitted that freedom of the media as set out in Article 34 of the Constitution of Kenya is constitutionally limited under Article 33(3) that provides that those who exercise freedom of expression to respect the rights and reputation of others. As concerns public interest, the Complainant relied on the case of **Reynolds Vs Times Newspapers Limited and others (2001) AC 127**

Submissions by the respondents

In their submissions filed at the Commission on 27/5/2011 by their Counsel Mr Sekoue Owino, the Respondents explained that the articles merely reported a dispute with regard to the shareholding structure of NBK, and the correspondence between the management of the NBK and the Privatisation Commission on how the shareholding would be structured. The articles reported some opinions of the Chief Executive Officer of the Commission (Mr Kitungu) on the proposals made by the management of the NBK. The Respondents submitted that there was no direct reference to the Complainant except with regard to the fact that the Complainant wrote a letter in February 2010 making proposals on how the issue could be dealt with. The Respondents submitted that in response to that letter, Mr Kitungu responded as follows, ***“We do not think that Mr Kamweti needs to be the spokesman for the NSSF as NSSF can independently address the pertinent issues at the fund”***. They submitted that in effect, this was Mr Kitungu’s opinion on the effect of the Complainant’s letter on the issue of privatization of the NBK generally and the issue of shareholding specifically. It was the Respondent’s submission that the articles were a reporting on a matter that was essentially a difference of opinion between the management of NBK (represented by the Complainant) and the Commission (represented by Mr Kitungu). According to the Respondents, the exchange of

correspondence was between two officials representing their respective organizations, and that the Respondents merely relayed differences by public officials over a public institution.

Secondly, the Respondents submitted that the Complainant had alleged that the 2nd Respondent had a vendetta against him and NBK after the 2nd Respondent's wife was laid off by NBK, but failed to discharge the burden of proving that the said woman was the 2nd Respondent's wife. Mr Owino cited the case of **Njoki Vs Muthuru (1985) KLR 874 at 895** in which the Court of Appeal held that a party asserting a marriage must prove that there had actually been a marriage that fell within the different categories of marriages recognized under the laws of Kenya. The Respondents insisted that the purported marriage was irrelevant to this case.

Thirdly, the Respondents submitted that the Complainant had failed to adduce independent evidence to prove that the articles had injured his personal and professional reputation. They alluded to a "well known law that a person's reputation cannot be injured in his own eyes" but did not cite the relevant statute or case law in support of this law. Nevertheless, the Respondents submitted that no evidence of a third party who construed those words to be injurious of the Complainant was adduced.

Fourthly, Mr Owino submitted that the fact that the Government of Kenya and the NSSF were shareholders in NBK alongside 65,000 other shareholders of different kinds rendered NBK a public institution that holds public money. The affairs of NBK were therefore matters of general public interest, and the Complainant and other officers of the NBK were loosely public officials because they were custodians of public assets. Mr Owino submitted that these officials must therefore be subjected to public scrutiny that will include opinions of praise, protest, criticism, and even complaints of their management of public assets. In context, the Respondents were reporting to the public an issue in which the public had a legitimate and justifiable interest in knowing, and therefore one in which the Respondent, as media, had a corresponding duty to disclose.

It was also Mr Owino's contention that the Complainant's claim on the essence and tenor of the articles could not have been drawn by a reasonable and objective reader.

Mr Owino also submitted that the subject of the articles was the NBK, and not the Complainant in his personal capacity. He cited the old case of Salmon Vs. A. Salmon & Co Ltd (1897) AC 22, in which the court held that a company is a different legal entity from the shareholders, directors and even workers. Going by this legal principle, the Complainant cannot make claims based on a story that was about NBK.

Mr Owino further submitted that the content of the stories were honest and justifiable statements on public issues, and that even if they were critical of the Complainant, they were fair comments on a matter of public interest. He cited the case of New York Times Vs Sullivan 376 US 254, in which the US Supreme Court said *"...we consider this case against the background of the national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks on government and public officials.."*

The Respondent submitted that these were not matters of purely private concern to the Complainant as to justify an abridgement of the Respondent's freedom of speech, freedom of the media and the public right of access to information, as provided for in Articles 33, 34 and 35 of the Constitution of Kenya. To buttress this argument, Mr Owino cited the American case of Snyder Vs Phelps 562 US 2011, particularly the words of Roberts CJ on freedom of speech in the American Constitution, wherein he said, **"as a nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate...."**

In conclusion, Mr Owino submitted that the Respondents simply rendered Mr Kitungu's opinion on NBK, and the Complainant as an officer of NBK. The Complainant therefore seeks to prevent the coverage of public issues and to abridge the constitutional freedom of the media, especially Article 34(2) (b) which states that the State or any Authority may not **"penalize any person for any opinion or view or the content of any broadcast, publication or dissemination"**. The

Respondents prayed that the Complaint, seeking to enjoin this Commission in censorship of opinions and discussion of matters of public interest, was unconstitutional and should be dismissed.

Reply to Respondent's submissions

In his response to the Respondent's submission filed with the Commission on 2/6/2011, the Complainant reiterated that;

The Respondents deliberately failed to refer to the Media Act that has its basis in Article 34(5) of the Constitution, thus displaying their lack of intent to keep the spirit and letter of the Act or the Constitution.

The articles were not a report on difference in views but a scurrilous and biased report and personal attack on the Complainant, and that the words were untrue, inaccurate and highly adverse.

The 2nd Respondent had a special relationship with Ms Okwara and was therefore biased and self interested in violation of Clause 2(d) of the Code of Conduct, and it did not matter whether the relationship between the 2nd Respondent and Ms Okwara was acquaintance, cohabitation or formal marriage. He urged this Commission to use the administrative test of natural justice and fairness in determining bias as set by Cross L.J. in **Hanna Vs Bradford City Council (1970) 2 ALL ER 690,** in which he stated the test is "*...given the facts whether a reasonable man with no inside knowledge might well think that there was bias*"

The **Salmon Vs Salmon** case does not apply since the Respondents specifically mentioned the Complainant by name as a meddling saboteur.

The US Supreme Court cases of **New York Times Vs Sullivan** and **Snyder Vs Phelps,** that give the press unbridled freedom, are distinguishable from Kenyan cases as the two Constitutions are different. Unlike in the United States, the Kenyan Constitution provides an abridgement of the

right to freedom (Article 33) by providing that, ***“In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”***. The Complainant therefore maintained that the Respondents have breached his rights under Article 33(3) of the Constitution. The Complainant cited the Kenyan case of **Chirau Ali Makwere Vs Royal Media Services Limited HCCC No. 57 of 2004** in which the court rejected the defendant’s attempt to rely on the **Sullivan case**. Justice Khamoni found that it did not bind the courts in Kenya, and held that press freedom did not extend to *“making untrue statements about a public figure which impute some grave wrongdoing to him or her of which they are innocent”*. Article 33(3) of the Constitution of Kenya 2010 vindicated this case, according to the Complainant, 6 years later.

The Respondents mentioned the Complainant personally and adversely but never sought his views as required by Clause 1(a) of the Code of Conduct that provides ***“Comments should be sought from anyone who is mentioned in an unfavorable context “***

The Complainant has a right to maintain his reputation under Article 33(3) and the right to have incorrect and misleading information corrected or deleted under Article 35(2)

There was no duplicity of suits as the case of **L.G. Kamweti Vs Solomon Kitungu & 2 others HCCC** was seeking other remedies that the Commission could not award, and that Mr Kitungu was not a journalist, hence claims against him could only be filed in an ordinary court

Issues for determination

Having carefully perused the pleadings herein, keenly listened to the evidence and meticulously analysed the submissions by both parties, the Commission framed the following issues for determination, while guided by the Constitution of Kenya 2010, the Media Act and Code of Conduct for Practice of Journalism in Kenya.

1. Whether the articles breached the Constitution and or the Media Act
2. Whether the articles were a fair comment on a matter of public interest

3. Whether the Complainant is entitled to the relief sought

Whether the articles breached the Constitution and or the Media Act

Both the Complainant and the Respondent relied on the Constitution and the Media Act to support their cases. While they both converged on the need to protect the freedom of the media, freedom of speech, the Complainant argued that these rights were not absolute, and those exercising them must respect the rights and reputations of others.

On the Constitutional issues raised, the Commission finds that the Complainant failed to prove how his rights or reputation had been damaged by the articles. The letter that was published by the Respondents was addressed to NBK Board where the Complainant was the Secretary. He did not deny the existence of the letter; neither did he produce it as a document to prove that the contents were defamatory. The Complainant also failed to call another witness to confirm that the articles had done harm to his reputation, by tending to bring the Complainant into ridicule, scorn, hatred or contempt. By failing to produce the letter or call any witness, the Complainant failed to prove that the articles were lies or untrue. To this extent, therefore, the Commission finds that the articles did not infringe on the Complainant's Constitutional rights or injure his reputation

As relates to the Media Act, the Complainant averred that the articles breached section 35 of the Act and Clause 1 (a) that require the media to publish accurate and fair comments on matters of public interest. The Respondents submitted that they merely reported differences of opinion between the Complainant and Mr Kitungu, and did not concern themselves with the Complainant as an individual. Once again, the burden lay on the Complainant to prove the inaccuracy or unfairness of the story, by either producing the letters referred to or by adducing evidence to prove that the story was not true. He did not do so, and therefore failed to prove that the story was inaccurate and untrue. The Commission is therefore unable to find that the articles breached either section 35 of the Act, or Clause 1(a) of the Code of Code as relates to accuracy and fairness.

However, the Commission agrees with the Complainant that the Respondents breached Clause 1(a) of the Code of Conduct by failing to get his comments on the story that had mentioned him in an unfavourable context. This is a mandatory requirement that the Respondents are aware of, and they did not in fact deny this breach. The Commission therefore finds the Respondents in breach of the Code of Conduct, and they must be held responsible for this action

On the issue of bias on the part of the 2nd Respondent due to a special relationship with a former employee of NBK, the Commission is not persuaded that this relationship influenced or compromised the content of the articles as provided for in Clause 2 of the Code of Conduct. The Complainant's assertions are at best, speculative, and cannot be proved. It would be imprudent on the part of this Commission to assume bias or malice merely because there was a special relationship, without proof of actual interference. The Commission agrees with the Respondents that this issue is irrelevant, and that any such relationship, even if it were to be established, would not bar the 2nd Respondent from writing a story that is of great public concern. The Commission regrets that both parties took up so much of the time set aside for the hearing and submissions by unnecessarily dwelling on this issue.

Whether the articles were a fair comment on a matter of public interest

Section 35 of the Media Act requires the media, "... in a free and independent manner, to inform the public on issues of public interest and importance in a fair, accurate and unbiased manner...". In the law of libel and slander, one of the strongest defences available to the Respondent is that the publication was a fair comment on a matter of public interest. Order 2 Rule 7(2) of the Civil Procedure Rules of 2010 recognizes this defence. Mr Owino expounded on this ably by pointing out that NBK is a public body in which the Kenyan public had a huge stake, hence making the comments fair comment thus availing the Respondents of this defence of fair comment of on a matter of public interest. The Complainant did not oppose the public interest aspect, but only insisted that his comments ought to have been sought before the articles were published. Taking into account all the American and Kenyan cases cited by both parties, the Commission is convinced that the comments by the Respondents were fair comments on a

matter of public interest. The only mistake the Respondents made was to fail to seek the Complainant's comments on the story before publishing it.

Whether the Complainant is entitled to the relief sought

Having found that the Complainant failed to prove that the story was inaccurate, biased or unfair, and having further found that the story was a fair comment on a matter of public interest, this Commission is unable to order the Respondents to apologise or correct the story as prayed by the Complainant. The Complainant submitted that he had filed a case in the High Court against Mr Kitungu who wrote the letter that aggrieved him. The Complainant therefore still has another chance to seek appropriate remedies based on the alleged defamatory letter authored by Mr Kitungu.

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 Commission makes the following orders;

1. We order and direct that the 1st Respondent pays a fine of two hundred thousand shillings for failing to report both sides of the story and failing to obtain comments from the Complainant who was mentioned in an unfavourable context in violation of Article 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.
2. We order and direct that the 1st 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.

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

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

Delivered at Nairobi this 22 day of March 2012

Grace N Katasi

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(Chairperson)

Murej MakOchieng

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(Member)

Priscilla Nyokabi

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(Member)

