

REPUBLIC OF KENYA
IN THE MATTER OF THE MEDIA ACT CAP 411B
BEFORE THE MEDIA COMPLAINTS COMMISSION
COMPLAINT NO. 090 OF 2010

MIGUNA MIGUNA.....COMPLAINANT

VERSUS

THE STANDARD NEWSPAPER.....1ST RESPONDENT

RUNJI WA MBEU..... 2ND RESPONDENT

DECISION OF THE COMMISSION

The Complaint

1. This Complaint was filed on 24th September 2010, in relation to an article published in the Standard Newspaper of July 29, 2010 titled **“Why Won’t Miguna Let Sleeping Volcanoes Lie”** authored by Runji wa Mbeu. In his complaint, he stated that article was misleading, inaccurate, promotes ethnic animosity, and is derogatory. Attached to the complaint was a letter addressed to the Chairman of the National Cohesion and Integration Commission, and an article penned by the Complainant titled **“Threats By Moi And His Surrogates Will Not Deter Me”**. The Complaint prayed for an apology and correction.
2. The Commission issued a Notification of the Complaint to the Respondents dated 8 October 2010, giving the respondents 14 days to respond to the Complaint and notification. The Respondents did not file a response. The Complaint was then listed for mention on 14th February 2011 for purposes of fixing a hearing date. On that date, the complainant did not appear and the

hearing was set for 13th May, 2011. On this date the Respondents also made an application to file their response out of time.

The Response

3. On 21st April 2011, the respondents filed a response in which they denied that the Article in question was inaccurate or misleading, and that the respondents never attempted to inspire hatred against the Complainant. They argued that the article in question was a fair comment on a matter of great public interest. They asked the Commission to dismiss the Complaint.

Background to the main hearing of the dispute

4. Although the Complaint was lodged at the Media Council on 24th September 2010, it was never heard until 13th November 2012. This was largely due to the Respondents' delay in filing their response; it was filed seven (7) months out of the stipulated fourteen (14) days.
5. Despite vehement opposition from the Complainant, the Commission admitted the Respondents' pleadings and further allowed them to participate in the hearing of the Complaint. This decision was delivered vide the Commission's ruling dated 2nd June 2011.
6. Thereafter, the proceedings herein were characterized by absence of both parties during scheduled mention or hearing dates, culminating in an application by the Respondents to dismiss the Complaint due to non-attendance. On 4th April 2012, the Respondents filed their Notice of Motion seeking dismissal of the complaint, and duly served the same upon the Complainant to appear for hearing of the said application on 10th May 2012.

The Complainant did not file a Replying Affidavit or any other form of Response to the Notice of Motion.

7. While determining the application for dismissal of the Complaint, the Commission was constrained to look at the entire history of this matter, and in particular, the conduct of both parties. The Commission noted that the Respondents had previously failed to adhere to the Commission's Rules of Procedure by failing to file their response within the 14 days and instead filed them almost seven (7) months out of time.
8. The Commission also noted that the Complainant, on the other hand, had also failed to appear for several mentions or hearings when required to do so. The Commission regretted the inordinate delay by the Respondents in filing their Response, but also noted that the Complainant did not heed the Commission's advice in its ruling dated 2nd June 2011 to file an application relating to this delay. The Complainant instead chose to stay away from the proceedings until he was served with the Respondent's Notice of Motion seeking to dismiss his Complaint. This conduct did not seem to do justice to the Complainant's interest in this matter. It is indeed the Complainant's continued absence from this Commission that gave birth to the Respondent's application to dismiss the Complaint.
9. In a nutshell, the Commission observed that the conduct of both parties made it unjust for this Commission to dismiss the Notice of Motion dated 4th April 2012 merely because the Respondents had previously failed to attend proceedings in respect of this dispute. The Complainant had likewise failed to attend hearings, and the blame therefore lay on both parties, albeit more on

the Respondents who took seven (7) months to file their response. The Commission decided to dismiss the Notice of Motion and order a full hearing of the dispute. In doing so, the Commission was guided by **Article 159(2) (d)** of the Constitution of Kenya 2010. It stipulates that in exercising judicial authority, the courts and tribunals shall be guided by certain principles, one of them being that "justice shall be administered without undue regard to procedural technicalities."

10. After the Commission's ruling dated 25th September 2012 both parties agreed to proceed with the full hearing of the matter on 13 November 2013, during which time they would produce evidence and or call witnesses in support or opposition of the Complaint

11. This brief narrative of the pre-trial proceedings is imperative in order to understand why this dispute took an unusually long time before it was finally determined.

The Hearing

12. During the hearing, the Complainant represented himself while the Respondents were represented by Mr Billing. The Complainant stated that he was an Advocate of the High Court of Kenya, a Barrister and Solicitor in Ontario, Canada, where he had practised law for more than fifteen (15) years before he relocated to Kenya in 2007. He is also a published author.

13. He stated that from 6th March 2009 to 4th August 2011, he worked as a Senior Adviser to the then Prime Minister of the Republic of Kenya (Mr Raila Odinga);

on coalition, constitutional and legal affairs. He was also, at all material times, a columnist for the Star newspaper.

14. He added that on Tuesday, the 27th of July 2010, the he wrote an article that was published in the Star Newspaper titled **"Kibaki Deserves Silence from Moi."** In that article, he argued that in compliance with existing practice in modern functioning democracies around the world, President Mwai Kibaki deserved silence from former President Daniel Arap Moi. Quoting an article by Nancy Gibbs in the Time magazine, he posited that sitting and former presidents should be extremely cautious before criticizing each other publicly as such utterances might cause great anxiety and heightened passions among large sections of the population thereby causing instability in the country.
15. He stated that the article was responding to Moi's public criticisms of President Kibaki and his reported defence of detention without trial and torture during his 14-year regime. The Complainant argued further that not only was Moi's regime repressive, he [Moi] had no legal, constitutional or moral grounds to defend detention without trial and torture as these could never have been legitimate governance and leadership methods by him. "No legitimate government could argue that it had the legitimacy to govern or rule but the governed had no corresponding responsibility of questioning, challenging or calling the rulers to account," the Complainant argued. He also stated further that torture was never legally permitted, even under Moi's 24-year reign.
16. He stated that his article of 27th July 2010 did not threaten war, insurrection or violence and it never made reference to Moi's ethnicity or his personal security .
17. He added that at about 10pm on Wednesday, 28th July 2010, someone notified the Complainant that an article by Lee Njeru, Moi's spokesman, would be

appearing in The Standard newspaper of Thursday 29th July 2010, the following day, and that the article was a vicious attack on the Complainant.

18. He added that on 29th July 2010 the Complainant discovered an article purportedly written by 'Runji Wa Mbeu' titled **"Why Won't Miguna Let Sleeping Volcanoes Lie?"** at page 15 of that day's issue of the newspaper.
19. The Complainant was astounded after reading the article. He stated that he found the article chillingly threatening against himself and others like him. He testified that he also found the article inaccurate, misleading, inflammatory, derogatory, threatening ethnic animosity and violence. The Complainant stated that 'Runji Wa Mbeu's' article was blatantly false, inaccurate and a misleading assertion as the Complainant's July 27th article in the Star, which was the only article he published on that date, made no reference to Moi formenting rebellion against the Complainant.
20. On 29th July 2010 the Complainant exercised his right of reply as is the norm in the practice of journalism and wrote an article titled **"Threats By Moi And His Surrogates Will Not Deter Me"**. He sent the article to the respondents on the same day at 10:47 am, but it was never published by the Respondents. He was denied his right of reply; therefore these falsehoods are still in the public domain.
21. He testified that after carefully examining the purported name of the 'author' of the offending article, he discovered that Lee Njiru's last name had been inverted backwards as **"Runji,"** which was essentially "Njiru" read backwards. **"Wa Mbeu"** meant "Of **Embu,**" again read backwards, which confirmed his earlier tip off. He perused the article further and noted that at paragraph 8 of the article, the author stated that

"Thousands of young-bodied youth joined the armed forces to fight off Shifita menace and generally secure Kenya's borders. After the [Rift Valley] Province proved itself as a reservoir of highly disciplined and brave fighters, it was again called upon to supply personnel to the regular police, General Service Unit, Administration Police, Prisons and the Kenya Wildlife Service."

22. To the Complainant, this seemed to elevate one ethnic group, the Kalenjin, above all the other 41 ethnic groups. In his view this promotes ethnic animosity. In any event, he found this statement inaccurate as all Kenya's ethnic groups have participated and been involved in ensuring the territorial integrity of the country.

Furthermore, the statement at paragraph 8 of the article also threatened him expressly and through innuendo, in the sense that if he persisted in criticizing Moi, he would be destroyed by "these brave warriors."

23. At paragraph 9 of the offending article, the author stated that ***"It should not be lost on Miguna and his ilk that the Rift Valley supplied most of the combatants from Kenya to the First and Second World War."*** The upshot of this, according to the Complainant, was that the province is saturated with ex-soldiers including World War veterans. These assertions, taken together with others in the same article and contextualized, were intended to mean that "these valiant combatants" were prepared to crush people like "Miguna and his ilk." This in his view was scandalous and chilling and should have had no place in a free and democratic society where individuals ought to have the right to debate and disagree peacefully.

24. The Complainant also referred to paragraph 10 of the article, that demonstrated a direct threat of physical harm to him; where it read thus; **“It would be in Miguna's interest to know that every location in the Rift Valley has not less than 100 men and women who are highly conversant with weaponry and other aspects of warfare, conventional and otherwise.”**

25. Mr Miguna further stated that he did not hate Moi but was only opposed to his past dictatorial tendencies. His article was only to caution him, through a reasoned argument, against attacking President Kibaki. In his view and in the wider context of the fact that the offending article was purportedly written on behalf of, and in defence of Moi, a former President and a man with immense financial power and the capacity to mobilize human resources to do his bidding, and given the fact that Moi had sent emissaries to the Complainant warning him to stop criticizing and attacking him in the media; and given the fact that Moi had instructed an advocate to send the Complainant a libel notice over his column in the Star newspaper; these threats and inflammatory statements in the offending article were even more ominous.

26. Having read this article and with no response from the Respondents, he wrote a letter dated 2 August, 2010, and reported the threat contained in the offending article to the Police Commissioner, the Director of the CID, the Chairman of the National and Integration Commission, the Minister of Justice, the Prime Minister and the Attorney General seeking the intervention of the relevant state authorities charged with law enforcement and protection of his constitutional rights. He provided copies of these letters to the Commission.

27. By letter a dated 24 August 2010 the National Cohesion and Integration Commission stated that: *"While the Commission recognizes that the article complained of is violent, and likely to interfere with peaceful co-existence as it makes reference to groups of ex-military men and women conversant with weaponry and warfare, banding together to "destroy the agents of anarchy and malice" as well as the future of the nation being "redefined and written in blood; such utterances pose a security threat and in that regard fall directly under the mandate of the security organs of the State."*
28. And by letter a dated 9 August 2010, the Minister of Justice acknowledged receipt of his complaint and recommended that he believed the *"issue raised is being handled by the National Cohesion and Integration Commission."*
29. Despite inaction on the part of the said state agencies, Mr Miguna urged the Commission to note that the fact that both the National Cohesion and the Minister of Justice recognized the significance of the complaint and agreed that the offending article needed to be dealt with in accordance with the law. After this he then filed this Complaint with the Media Council of Kenya.
30. He told the Commission that the Standard Newspaper, as a major national circulating newspaper in Kenya, has an onerous responsibility to be fair, balanced and objective both in its reports, comments and opinions published within its pages, as failure to do so would undermine and be inimical to a free and democratic society within which a free media can thrive. He did not call any witnesses.
31. The Complainant sought an apology from the Respondents and also wanted the respondents reprimanded.

32. Upon cross-examination by Mr Billing for the Respondents, Mr Miguna reiterated that he not only found the article defamatory, but malicious and scandalous. He said he had not filed a suit at the High Court as it was his discretion as to which forum to take his grievances; that is why he chose the Media Council as opposed to the High Court. He also pointed out that there was no legal requirement that he had to commence a civil defamation action at the High Court rather than proceeding by way of a complaint before the Media Council.

33. Mr Miguna also stated that he had not consequently encountered war-like people nor been harmed in any way. He however insisted that such kinds of threats should not be allowed in any mainstream media or media in general because they can fan violence.

The Respondents' case

34. They did not call any witnesses and opted to rely on their written submissions

Submissions by the Complainant

35. The Complainant filed his submissions on 14th November 2012 wherein he specifically pointed out various paragraphs of the article that he found misleading, inaccurate, promoting ethnic animosity, derogatory and threatening.

36. The Complainant asserted that it was the responsibility of The Standard newspaper Managing Editor and other editors to ensure either that those false statements were not published unchallenged, or that once published, the person to whom they were directed against had a fundamental right of reply, which the Complainant attempted to exercise by submitting an article titled

"Threats By Moi And His Surrogates Will Not Deter Me" on July 29, 2010 at 10:47am; but was denied publication by the 1st Respondent.

37. He stated that the following sentence was inaccurate and misleading

"Thousands of young-bodied youth joined the armed forces to fight off Shifita menace and generally secure Kenya's borders. After the [Rift Valley] Province proved itself as a reservoir of highly disciplined and brave fighters, it was again called upon to supply personnel to the regular police, General Service Unit, Administration Police, Prisons and the Kenya Wildlife Service." He further added that the statement was inaccurate because all of Kenya's ethnic groups have participated and been involved in ensuring the territorial integrity of the country.

38. He testified that the statement at paragraph 8 of the impugned article also threatened him, expressly and through innuendo, that if he persisted in criticizing Moi, he would be destroyed by "these brave warriors."

39. At paragraph 9 of the offending article, the author stated that ***"It should not be lost on Miguna and his ilk that the Rift Valley supplied most of the combatants from Kenya to the First and Second World War"***. The upshot of this is, according to the Complainant, the province is saturated with ex-soldiers including World War veterans."

40. The Complaint submitted that the article was more ominous because it was written on behalf of and in defence of former President Moi, a man with immense financial muscle to mobilize people to do his bidding. He also stated that Moi had sent emissaries to the Complainant to stop criticizing him in the media, and gone further to instruct an advocate to send the Complainant a libel notice over his column in the Star newspaper.

41. In conclusion he stated that all these allegations in his complaint had not been challenged by any evidence or rebuttal from the Respondents. He prayed for the following orders;

- An apology
- An order restraining the respondents from publishing further articles about him

42. He specifically submitted that by failing to publish his right of reply, the Respondents breached the Media Act.

43. Since they filed a general denial or bald defence as he called it, and further failed to call any witnesses, his complaint and evidence stood uncontroverted. He was therefore entitled to the reliefs sought

Submissions by the Respondents

44. The Respondents filed their brief one page (1) submissions on 18 November 2012 in which they denied that their article promoted ethnic hatred or violence as alleged. They further submitted that the article was a fair comment on a matter of public interest and importance, concerning the Complainant who at the material time was a public officer attached to the Prime Minister's office. The Respondents did not elaborate on this line of defence. They opted, instead, to attach two (2) High Court decisions, namely, **Hon Martha Karua-vs-The Standard Limited & Kwendo Opanga (2007) HCCC NO 294 of 2004, and Dr Joseph N.K. Arap Ng'ok -vs-The East African Standard Limited and Dominic Odipo (2011). HCCC NO 1463 of 2002.** The Respondents then requested the Commission to dismiss the Complaint.

45. This casual presentation of legal precedents by the Respondents, without analyzing the factual or legal relevance to the present complaint, is in the least disappointing, and at most a manifestation of the casual and seemingly carefree attitude in which the Respondents have approached this matter since the Complaint was filed before the Commission in September 2010.
46. It is the professional duty of every Counsel appearing before any court or tribunal, and who chooses to rely on any law or case law, to dissect and convince the presiding arbitrators or adjudicators on their application to the dispute at hand. It is not the duty of the court or tribunal to sieve through the case law to ascertain their relevance or applicability in the first instance. The arbitrator or adjudicator needs to be convinced before they retire to make a final decision, through a wholesome appraisal of the facts, evidence and submissions.
47. On this aspect alone, the Respondents' defence is thoroughly weakened and unable to withstand the thorough submissions tendered by the Complainant on issues of fact and issues of law.
48. The Respondents' lawyers' laxity notwithstanding, the Commission was legally obligated to read the two cases referred to in their submissions to determine their *ratio decidendi*, and relevance to the current dispute.
49. In the case of **Martha Karua-vs-the Standard Newspaper and Kwendo Opanga**, she was complaining about an article titled "**Bedroom Spells Danger For Kibaki State House**", published in the Sunday Standard. The said article was on page 6 and was authored by the Second Defendant. It was closely related to the headline of the paper which was titled "**As First Lady Clashes with Ministers**". The headline story ran throughout pages 1,2,3,4, and 5 and

culminated in the offending article on page 6. Ms Karua complained that the Defendants falsely and maliciously authored, printed and published the words she considered defamatory under the banner headline “ Bedroom Spells Danger for Kibaki State House” as follows:-

Is it true, for example, that Mrs. Kibaki ordered Cabinet Ministers Martha Karua and Charity Ngilu out of State House Mombasa, because she was incensed by the Vice-President’s reference to her as Second Lady”

50. She submitted that although framed as a question, in their natural and ordinary meaning, the offending phrase implied that the First Lady, Mrs. Lucy Kibaki, had unceremoniously ejected Ministers Martha Karua and Charity Ngilu from State House Mombasa as they were unwanted and unwelcome within the premises of State House. During the hearing, Ms Martha Karua testified that she was not in Mombasa at the material time, the Standard never bothered to cross check the facts with her before publishing the story, and that they refused to apologize even after receiving her notice of libel. The Respondents did not attend the hearing nor offer any evidence in rebuttal, but filed written submissions in which, like the current dispute, they contended that the article was a fair comment on a matter of public interest.

51. Justice Khamoni, while dismissing the claim, held that the phrase complained of, when read together with the whole article plus several other related articles published in the same paper on the same day, was not defamatory. The articles, the judge stated, were intended to expose the impact of the First Lady’s activities on state operations, and especially the right of access by various senior officers to state premises without hindrance from the First Lady. The

judge concluded that the Ms Karua had not succeeded in proving that the words complained of, in their natural and ordinary sense, tended to lower her reputation in the eyes of right-thinking members of society. Although the judge did not specifically mention it, his final decision implied that discussions about the First Lady and Cabinet Ministers were fair comments on matters of public interest.

52. The Karua case is distinguishable from the current dispute in the sense that there were no other related articles appearing in the Respondents' newspaper the same day; a fact that seems to have greatly influenced Justice Khamoni's final decision to dismiss the complaint. Secondly, Mr Miguna complains about the offending article as being misleading, inaccurate, derogatory, threatening and promoting ethnic animosity; whereas Ms Karua's complaint was about the defamatory allegations that injured her reputation. Finally, Justice Khamoni's final decision, although implied, was not based on "fair comment on a matter of public interest" as submitted by the Respondents in the current case; but rather on the entire meaning and context of the offending article and several related articles published on the same day in the same newspaper. Even if Justice Khamoni had expressly interrogated the fair comment principle, it would have been impossible for this Commission to find that the threatening and misleading article against Miguna would constitute a fair comment, as known in common legal parlance.

53. The Commission therefore, finds no factual or legal relevance in the Martha Karua case to this current dispute, and declines to make any findings based on that decision.

54. In the other case of **Dr Joseph Arap Ngok**, the article complained about was titled **“Centre Cannot Function Without A Clean Mandate”**, published in the East African Standard Limited on 14th September 2001. The Centre referred to in the article was the Investment Promotion Centre (IPC). By the time it was published, Dr Ng’ok, had retired from the IPC two (2) months earlier. The offending phrase in the article were;-

“Dr Joseph Arap Ngok, the immediate former Chief Executive Officer, often sounded so uninformed and inarticulate in public that one often wondered how such a person ever got appointed to such a post”

55. Dr Ngok, a highly learned man who held a PhD in Economics, found these words defamatory as they lowered his reputation among his professional colleagues and friends. In their defence, the Respondents submitted that it was a fair comment on a matter of great public interest. While dismissing the complaint, Justice George Dulu found that the article was indeed a fair comment on a matter of public interest since the IPC was a public institution being run using tax payers money. He further observed that the Plaintiff had failed to prove, on a balance of probabilities, that the words complained of were not a fair comment on the way the institution was structured, managed or his effectiveness in achieving the objectives of the Centre.

56. The only similarity between Dr Ngok and Miguna is that both were highly learned men who held senior positions in government. However, Mr Miguna complains about the offending article as being misleading, inaccurate, derogatory, threatening and promoting ethnic animosity; whereas Dr Ngok’s complaint was about the defamatory allegations that injured his reputation.

57. Whereas the article about Dr Ngok was questioning his competence for the job, the article about Mr Miguna was warning him of dire consequences should he persist in writing negative articles about retired President Moi.

58. Threats of violence and promotion of ethnic prowess in warfare cannot, by any stretch of imagination, be construed as fair comments on a matter of public interest. Indeed, public interest would be better served by promoting peace and cohesion among different ethnic communities and individuals in Kenya. Unlike the Ng'ok case, the article about Miguna was not about his duties as a public servant, but rather about his journalistic ventures as a columnist for the Star Newspaper. The Ngok case is therefore clearly distinguishable from the current case, and is neither of persuasive nor binding value.

59. The Commission therefore, finds no factual or legal relevance in the Joseph Ngok case to this current dispute, and declines to make any findings based on that decision.

Issues for determination

60. Having carefully analyzed the Complaint, the Response, the testimony of the Complainant and submissions by both parties, the Commission distilled four (4) key issues for determination

- Whether the article complained of was misleading, inaccurate, promoted ethnic animosity, derogatory and threatening
- Whether it was a fair comment on a matter of public interest
- Whether the article violated the Media Act and Code of Conduct for the Practice of Journalism

- Whether the Complainant is entitled to the reliefs sought

1. Whether the article complained of was misleading, inaccurate, promoted ethnic animosity and threatening?

61. It is not in doubt that the article was a clearly misleading and inaccurate in so far as it purported to single out the Kalenjin community in Kenya as being the only ones who have served in the First and Second World War, the regular police, General Service Unit, Administration Police, Prisons and the Kenya Wildlife Service. The article also promoted ethnic bias and warfare by singling out the Kalenjin community in Rift Valley province as brave, ex- service men, highly conversant with weaponry and could fiercely defend their own, like the former President Moi who is a Kalenjin. While threatening Miguna, the article stated thus; ***"If Miguna were to start a rebellion based on his hatred for Moi, the future of this nation, its political, social economic standing and inter ethnic relations will be redefined and written in blood"***

62. To this extent, the Commission agrees with the Complainant on the inaccuracy of the article, the threats and promotion of ethnic bias and animosity. The Commission hastens to point out, at this preliminary stage, that the entire article violates Section 35(1) of the Media Act that stipulates;

The media shall, in a free and independent manner and style, inform the public on issues of public interest and importance in a fair, accurate and unbiased manner whilst distinctly isolating opinion from fact and avoiding offensive coverage of nudity, violence and ethnic bias

63. To this extent, therefore, the Respondents must be held liable for violating the Media Act, which governs their conduct as media enterprises and journalists.

2. Whether it was a fair comment on a matter of public interest

64. In their brief defence and written submissions, the Respondents argued that the article was a fair comment on a matter of public interest and importance, concerning the Complainant who at the material time was a public officer attached to the Prime Minister's office. The Respondents did not elaborate on this line of defence. They opted, instead, to attach two (2) High Court decisions, namely, **Hon Martha Karua-vs-The Standard Limited & Kwendo Opanga (2007) HCCC NO 294 of 2004**, and **Dr Joseph N.K. Arap Ng'ok -vs- The East African Standard Limited and Dominic Odipo (2011), HCCC NO 1463 of 2002**. The Respondents then requested the Commission to dismiss the Complaint.

65. The Commission has already, in evaluating the Respondents' submissions in great detail, distinguished these two legal precedents as not being of any persuasive or binding value to the current dispute.

66. Most critical, however is the fact that threats of violence and promotion of ethnic prowess in warfare cannot, by any stretch of imagination, be construed as fair comments on a matter of public interest. Indeed, public interest would be better served by promoting peace and cohesion among different ethnic communities and individuals in Kenya. Furthermore, unlike the Karua and Ngok cases, the article about Miguna was not about his duties as a public servant, but rather about his journalistic ventures as a columnist for the Star Newspaper.

67. Although the media and journalist are legally empowered to write and inform the public on matters of public interest and importance, the same law also requires them to do so in a fair, accurate and unbiased manner, as stipulated in Section 35(1) of the Media Act, and Clause 1(a) of the Code of Conduct For the Practice of Journalism.

3. Whether the article violated the Media Act and Code of Conduct for the Practice of Journalism

68. It is clearly evident that the article complained about violated both the Media Act and the Code of Conduct for the Practice of Journalism as follows;

69. Firstly, Clause 1(a) of the Code requires journalists to obtain comments from anyone who is mentioned in an unfavorable context. The Respondents not only failed to obtain Miguna's comments but also declined to publish his Right of Reply as stipulated in Clause 5 of the Code, which provides that a fair opportunity to reply to inaccuracies should be given to individuals or organizations when reasonably called for. The request to correct must be published, either in full or abridged version. The Respondents therefore violated Clause 1(a) and Clause 5 of the Code.

70. Secondly, the article was misleading and inaccurate in so far as it purported to single out the Kalenjin community in Kenya as being the only ones who have served in the First and Second World War, the regular police, General Service Unit, Administration Police, Prisons and the Kenya Wildlife Service. This violated Section 35(1) of the Media Act and Clause 1(a) of the Code of Conduct for the Practice of Journalism.

71. Thirdly, by singling out the Kalenjin community in Rift Valley province as brave, ex- service men, highly conversant with weaponry and who could fiercely defend their own, like the former President Moi who is a Kalenjin, the article also promoted ethnic bias and warfare. This is in violation of Clause 22 of the Code on Acts of Violence. It provides;

“The media should avoid presenting acts of violence, armed robberies, banditry and terrorist activities in a manner that glorifies such anti-social conduct. Also, newspapers should not allow their columns to be used for writings which tend to encourage or glorify social evil, warlike activities, ethnic, racial or religious hostilities”

72. The Standard newspaper, by publishing the offending article, allowed Runji Wa Mbeu to use its column to glorify the Kalenjin as skilled in warfare and ready to defend their kin against perceived threats from other ethnic communities. The article therefore violated Clause 22 of the Code.

4. Whether the Complainant is entitled to the reliefs sought

73. Having established that the article violated the Media Act and Code of Conduct for the Practice of Journalism, it naturally follows that the Complainant is entitled to the reliefs sought. In his Complaint, he sought an apology and the publishing of his Right of Reply. In his oral evidence during the hearing and written submissions, he asked further asked for an order restraining the Standard newspaper from publishing further such articles about him. The reliefs to be granted will be guided by the specific prayers in his Complaint and the provisions of the Media Act, as stipulated in Section 29 of the Media Act as read with

Regulation 21 of the Media(Complaints Commission) Rules of 2009 which provides that pursuant to section 29 that the Complaints Commission or any of its panels may, after hearing the parties to a complaint—

- and being of the opinion that the complaint is devoid of merit or substance, dismiss such complaint;
- order an offending party to publish an apology and correction in such manner as the Council may specify ;
- issue a public reprimand of the journalist or media enterprise involved.
- or make any or a combination of the orders set out above

Rule 21 further provides that in addition to the orders the Commission may make under section 29 of the Act, the Commission may make the following orders

- Recommend to the Council suspension or removal from the register of the journalist involved;
- Order return, repair, or replacement of any equipment;
- Make any directive and declaration on freedom of expression;
- Give any other order or directive as it deems necessary.

Final orders of the Commission

74. In exercise of the of the powers donated to it under section 24 of the Media Act the Commission makes the following orders;

75. *The Commission orders and directs the 1st Respondent to pay a fine of two hundred thousand shillings (Ksh 200,000) for violation of Clause 1 (a) of the Code of Conduct. The fine imposed pursuant to Section 38 of the Media Act shall be paid to the Media Council of Kenya within 14 days.*

76. *The Commission orders and directs the 1st Respondent to pay a fine of two hundred thousand shillings (Ksh 200,000) for failing to offer the Complainant the right of reply in violation of article 5 of*

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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.

77. The Commission orders and directs the 1st Respondent to pay a fine of two hundred thousand shillings (Ksh 200,000) for allowing its columns to be used for writings which tend to encourage or glorify social evil, warlike activities, ethnic, racial or religious hostilities in violation of Clause 22 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.

78. The 1st respondent is further ordered under section 29 (1) (a) to publish an apology to the Complainant. Accordingly, we order that the parties should agree on a draft statement correcting the details complained about and offering an apology within fourteen (14) days of today's date and further to agree on a date for publication of the statement within twenty one (21) days from today.

79. In exercising its powers under section 29 (1) (b) the Commission reprimands the 1st respondent for breaching articles 1(a), 5 and 22 of the Code of Conduct for the practice of journalism.

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

Delivered at Nairobi this 4th Day of April 2013

Grace N Katasi

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(Chairperson)

Prof Murej MakOchieng

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(Commissioner)

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Fatuma Hirsi Mohammed

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(Commissioner)

Peter Mwaura

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(Commissioner)

