

**REPUBLIC OF KENYA**  
**IN THE MATTER OF THE MEDIA COUNCIL ACT (2013)**  
**AND**  
**IN THE MATTER OF MEDIA COMPLAINTS COMMISSION.**  
**COMPLAINT NO. MCC /3/2021**

HON UKUR YATANI - AMBASSADOR .....COMPLAINANT

VERSUS

NATION MEDIA GROUP .....1<sup>ST</sup> RESPONDENT

MANAGING DIRECTOR BUSINESS DAILY .....2<sup>ND</sup> RESPONDENT

OTIATO GUGUYU .....3<sup>RD</sup> RESPONDENT

**SUMMARY DETERMINATION.**

**A. EXPLANATORY.**

1. This complaint raised novel issues touching on fundamental questions of freedom of the media, access to information, journalists' professional responsibilities and public interest. As such it drew healthy and diverse debate from amongst the members of the Commission in framing up the issues.
2. For efficiency and to expedite its processes the Commission resolved to render a summary of its majority determination while the full text of the judgment inclusive of the dissenting minority opinion shall be rendered within two (2) days.

**B. BACKGROUND.**

3. On 12<sup>th</sup> April 2021 the Complainant filed a complaint before the Commission relating to an article that was published by the Respondent on 18<sup>th</sup> March 2021 in their Newspaper the Business Daily. This Article was published on the newspaper's front page and headlined; '**US reveals Kenya's Secret Sh139bn Corona Virus Loan**' in which the Respondents claimed that the Cabinet

Secretary for the National Treasury & Planning, Hon. Ambassador Ukur Yatani had secretly signed a EUR 1,068,932,543 loan to supposedly 'upgrade' Kenya's health infrastructure based on claims by a Canadian firm, Kallo Inc which had put in filings at the United States Securities Exchange.

### **C. ARGUMENTS BY PARTIES.**

4. **The Complainant** was aggrieved that they were not given a right to respond to the information that was in their custody. That in any event, the time that the Respondents claim to have given them was not sufficient. They further contended that other than being malicious and carrying with it a misleading headline, the story was inaccurate by way of erroneously attributing the story the United States.
5. Yet in actual sense they were filings at the Security Exchange Commission. It is their further contention, that the article solely relied on unverified filings made by Kallo Incorporated on the 3rd of March 2021 to SEC not considering, Section 408 of Sarbanes Oxley Act 2002 which clearly suggest that the filings were not reviewed for their veracity.
6. **The Respondents** The Respondent, a journalist, who wrote the article said that as an investigative and financial journalist he came across filings at the US Securities Exchange Commission ("US SEC") which detailed a Kshs.139.5 Billion (1.06 billion Euros) loan agreement between a Canadian firm Kallo Inc., He averred that since the information had a bearing on the general public/ Kenyan taxpayers, he had a duty to inform the Kenyan public regarding the said information.
7. He stated that upon discovery of the information, and prior to the publication of the article complained of, he reached out to both the National Treasury and the US Securities Exchange for comment. He sought comments from the Complainant's Communications Advisor

on 17th March 2021 via email, text message and a phone call to request for comment prior to the publication of the article complained of.

8. The Complainant's Communications Advisor however responded by stating that the Complainant was busy attending to the supplementary budget Committee meeting and could therefore not be reached for comment and they proceeded to publish the article complained of in the discharge of their duty to report on matters of profound public interest.

#### **D. FRAMING OF ISSUES.**

9. The Commission by a majority and after lengthy debate agreed on two issues that would be key in resolving the matter which were:

- i. Whether the Article was accurate and fair?*
- ii. Whether the Right of Reply was granted?*

10. A dissenting minority while agreeing with the above issues, put forward a third issue they deemed necessary to address the matter which was:

- i. Whether the article was protected by qualified privilege?*

#### **E. RESOLUTION OF ISSUES.**

11. On issue one the majority members of the Commission found that the headline as read with the gist of the story was inaccurate as a reasonable person would have interpreted the same to mean that the United States government as well as the United States Securities Exchange Commission had made the actual disclosures.
12. On issue two the majority of members found that the Complainant had been granted a right of reply as a person subject of significant criticism or allegations of wrongdoing. The Respondents sought to achieve clarity by fact-checking the informing on the nature of the allegations. While there is no

prescribed format which a right of reply should take it was sufficient that the parties were in actual and continuous conversation on the subject matter by way of telephone and email and the complainants were given enough information and detail about the allegations enough to understand and give an informed response which they only did after the publication.

13. On issue three the minority dissenting opinion agreed with the submissions of the Respondent that the defense of qualified privilege was available to them since the article complained of was published in the public interest. They relied on case of *Reynolds v. Times Newspapers Ltd [2001] 2 AC 127* and in effect would have dismissed the entire complaint on those grounds.
14. The majority agree that while the defense of qualified privilege is available for the respondents it is lost once the complainant supplies a reasonable explanation or contradiction. They therefore find merit in the complaint as the report was not an accurate and fair report from copies or extracts from material published by a government. They were filing from a private body that could not be verified or authenticated.

#### **F. CONCLUSION.**

15. Under *sections 38 (1) (2)* of the *Media Council Act* the Complaints Commission or any of its panels may, after hearing the parties to a complaint make any or a combination of the orders set out therein. Taking into account the findings of the Commission, that *Rule 2 (11) of the Code of Conduct for the Practice of Journalism* was breached.
16. The Commission further determines that while the story was an accurate report from the filings at the US Securities Exchange Commission, its attribution as regards the headlines was wrong and inaccurate. The media and journalists are encouraged to make such public interest stories within the rules of fairness and accuracy.
17. The Commission therefore makes the following **ORDER**:

18. THAT pursuant to *section 38(1) (a)* of the Media Council Act 2013 the 1st and 2nd Respondents are directed to effect a correction by way of clarification as pertains the headline in a subsequent story in the same newspaper.

19. THAT the full text judgment shall follow on 10<sup>th</sup> March 2022.

20. THAT costs shall be in the cause.

DATED AND SIGNED IN NAIROBI THIS 8<sup>th</sup> MARCH 2022


DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MARCH 2022.



**WILLIAM OKETCH**  
**CHAIRMAN, MEDIA COMPLAINTS COMMISSION**



**ESTHER ADUMA**  
**VICE- CHAIR, MEDIA COMPLAINTS COMMISSION**



**PROF. NANCY BOOKER**  
**COMMISSIONER, MEDIA COMPLAINTS COMMISSION**



**LEMPA SUYIACA(DISSENTING)**  
**COMMISSIONER, MEDIA COMPLAINTS COMMISSION**



**HENRY MAINA**  
**COMMISSIONER, MEDIA COMPLAINTS COMMISSION**



**DEMAS KIPRONO**  
**COMMISSION, MEDIA COMPLAINTS COMMISSION**



**POLLY GATHONI (DISSENTING)**  
**COMMISSIONER, MEDIA COMPLAINTS COMMISSION**

I Certify this to be a True copy  
of the Original  
Sign:  Date: 8<sup>th</sup> March 2022  
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