

REPUBLIC OF KENYA
IN THE MEDIA COMPLAINTS COMMISSION
COMPLAINTS NO. 15 OF 2024

NIC OTIENO NISSEN MAGATHER COMPLAINANT
VS
NATION MEDIA GROUP LIMITED 1ST RESPONDENT
EDITOR, DAILY NATION 2ND RESPONDENT

RULING ON PRELIMINARY OBJECTION

A: BACKGROUND

1. The Complainant is a Kenyan Resident Named **NICK OTIENO NISSEN MAGATHER**.
2. The 1st Respondent is a media enterprise operating in the Republic of Kenya and owns several publications, including the Nation Newspaper.
3. The 2nd Respondent is an employee of the 1st Respondent and is designated as the Editor.

B: THE COMPLAINT

4. The Complainant alleges, in a complaint filed on 23rd October 2024, that the Respondent published his image without consent in the Daily Nation newspaper edition dated 18th January 2024.
5. The Complaint claims that the image, which was captioned ***"KENYAN CONTINUE FEELING THE PINCH OF HIGH FUEL COSTS"***, yet he was walking, was disparaging because it implied that he had to walk to town.
6. The Complainant alleges that the 1st and 2nd Respondents unlawfully exploited his image for commercial benefit, thereby violating his right to control the use of his likeness.
7. Additionally, the Complainant contends that the publication of an image depicting him walking in worn-out shoes, purportedly to suggest financial hardship due to rising fuel costs, constituted an intrusion into his privacy and dignity as a public servant.

C: THE PRELIMINARY OBJECTION

8. Before filing any response thereto, the Respondents issued a notice of Preliminary Objection dated 30 November 2024 on the grounds that: -

- I. The Complaint does not allege a breach of the Code of Conduct for the Practice of Journalism in Kenya.*
 - II. The Complaint is fundamentally anchored on the provision of the Data Protection Act Cap 411C of the laws of Kenya, to which the Complaints Commission lacks the requisite jurisdiction to hear and determine.*
9. The Commission, having noted the P.O. may, in effect, impeach the jurisdiction of the Commission to hear and determine the complaint, invited the parties to file and serve written submissions on the same to enable it to deal substantively with the issue.

D: RESPONDENTS' SUBMISSIONS

10. The Respondents filed submissions supporting the Preliminary Objection accompanied by a bundle of authorities and case law, reiterating their earlier position challenging the Commission's jurisdiction to handle the matter because the complaint is purely based on provisions governed under the Data Protection Act and not violations of the Code of Conduct on the Practice of Journalism.
11. The Respondents further submitted that it was not enough for a party to file a complaint simply because the Respondents are regulated under the Media Council Act. That they must prove a violation based on the Code of Conduct.
12. To support their position that the Commission lacks jurisdiction to hear and determine a complaint that emanates from a complaint not based under the Media Council Act and the Code of Conduct specifically, the Respondents cited the case of **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR.**
13. The Respondents also relied on the exemptions under Section 52 of the Data Protection Act, which exempts "Journalism, Literature and Art" from data protection principles and submitted that images fell within this category. The Respondents further submitted that the caption under the picture suggested that the publication was done in the public interest, thus buttressing that it fell squarely under the exemptions under the Data Protection Act.

E: COMPLAINANT'S SUBMISSIONS

14. The Complainant asserted that the Commission possesses jurisdiction to adjudicate complaints against journalists and media enterprises, contending that the Respondents

are a media house and journalists which fall within the regulatory ambit of the Media Council Act.

15. The Complainant further submitted that the core issue, “use of pictures and names”, is expressly governed by Clause 20 of the Media Council Act Code of Conduct for the Practice of Journalism under Section 45 of the Media Council Act.
16. The Complainant further submitted that the use of pictures and names when there is a possibility of harming the person, and those that can embarrass, is also within the ambit of the grounds of complaints made against media enterprises and journalists.
17. Lastly, the Complainant invoked Article 31 of the Constitution, which enshrines the fundamental right to privacy.

F: ANALYSIS AND DETERMINATION

18. Based on the pleadings, parties’ submissions, and applicable law, the following issues arise for determination:

- ***Whether the Complaint pertains exclusively to the Data Protection Act or also involves a breach of the Code of Conduct for the Practice of Journalism.***

Upon careful consideration of the law and submissions, the Commission examined the following key questions:

- I. Whether the complaint has been lodged against a media house and journalist in Kenya.***
- II. Whether the complaint falls within the material jurisdiction of the Media Council Act (2013).***
- III. Whether ethical violations under the Code of Conduct have been sufficiently pleaded.***

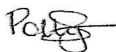
19. There is no doubt that the answers to the questions above are affirmative.
20. The Commission acknowledges that the Data Protection Act, 2019, is the principal legislation governing data privacy in Kenya. It regulates the processing of personal data to safeguard individual rights.

21. However, the Commission's mandate under the Media Council Act extends to adjudicating disputes involving media ethics and professional conduct, including those arising under the Code of Conduct for Journalism.
22. Although some aspects fall within the Data Protection Act, the Commission finds that the Complaint also falls within the Commission's statutory functions to mediate and adjudicate public and media disputes, particularly concerning ethical breaches in journalism regarding how photographs are used.
23. Accordingly, the Commission determines that the Complaint engages Clause 20 of the Code of Conduct, which governs the ethical use of images, and thus lies within its jurisdiction—but only to that extent.
24. The Commission shall not adjudicate on: Data Protection Act violations (reserved for the Office of the Data Protection Commissioner), and Constitutional privacy claims under Article 31 (within the purview of the High Court)
25. Considering all submissions and authorities, we determine that the complaint does not solely fall within the province of the Data Protection Act but also falls within the mandate of the Complaints Commission under the Media Council Act, under Sections 31 and 34.
26. Consequently, the Commission finds and holds that the complaint should be heard and facts ascertained to arrive at a just determination.
27. The upshot of the foregoing is that the 1st Respondent's **Preliminary Objection dated 30th November 2024** is not merited and the same is dismissed entirely, and the complaint is admitted.
28. No orders as to costs.
29. It is so ordered.

DATED and DELIVERED at NAIROBI on this27th Day of May 2025.

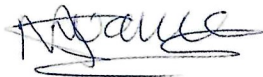


MR. DEMAS KIPRONO
CHAIRPERSON, MEDIA COMPLAINTS COMMISSION



MS. POLLY GATHONI
VICE- CHAIR, MEDIA COMPLAINTS COMMISSION

I Certify this to be a True copy
of the Original
Signed: *[Signature]* Date: *28 May 2025*
REGISTRAR
COMPLAINTS COMMISSION
www.complaintscommission.or.ke
P.O. BOX 43132 - 00200, NRB



MR. KANTIM MWANIK

COMMISSIONER, MEDIA COMPLAINTS COMMISSION

I Certify this to be a True copy
of the Original
Sign: *Kanda* Date: *27 May 2025*
REGISTRAR
COMPLAINTS COMMISSION
www.complaintscommission.or.ke
P.O. BOX 43132 - 00200, NRB



MS. NASRA HUSSEIN OMAR

COMMISSIONER, MEDIA COMPLAINTS COMMISSION



MR. MASEME MACHUKA

COMMISSIONER, MEDIA COMPLAINTS COMMISSION