REPUBLIC OF KENYA

IN THE MATTER OF THE MEDIA ACT
AND
IN THE MATTER OF THE COMPLAINTS COMMISSION OF THE MEDIA COUNCIL OF KENYA

COMPLAINT NO. 001 OF 2011

FRANCIS MUTHAURA.....COMPLAINANT

VERSUS

THE EDITOR STANDARD NEWSPAPERS.....1ST RESPONDENT
BEN AGINA .....2ND RESPONDENT
BEUTTAH OMANGA .....3RD RESPONDENT

JUDGMENT

Parties

The complainant, Ambassador Francis Muthaura, is a life-long civil servant who holds the highest office in the civil service as the Permanent Secretary in the Office of the President and Head of the Civil Service and Secretary to the Cabinet. Prior to his current position, he served as permanent secretary in several key ministries, Kenya's Permanent Representative to the United Nations in New York, Kenya's Ambassador to the European Union in Brussels, and founder Secretary-General of the East African Community. As Kenya's Permanent Representative in New York, he participated in the preparatory meetings that led to the establishment of the International Criminal Court (ICC). Amb. Muthaura, who was represented by Mr. Muriuki Mugambi of the Muthaura, Mugambi, Ayugi & Njonjo Advocates, appeared before the Complaints Commission as a witness.

The first respondent is the Editor of the *Standard,* Kenya's oldest newspaper published by The Standard Group Limited. He did not appear before the Commission. The second respondent, Mr. Ben Agina, is the News Editor of the *Standard*. He appeared before the Commission as a witness. The third respondent, Mr. Beuttah Omanga, is a Reporter with the *Standard*. He did not appear before the Commission. The three respondents were represented by Mr. M. Billing of Guram & Company Advocates.

Complaint

Amb. Muthaura complains the stories by the *Standard* have impacted negatively on his standing at the ICC where he has been named as a suspect of the post-election violence of 2007/08 , thus jeopardizing his rights as person who is innocent until proven guilty. The stories, he argues, have dented his reputation at home and abroad, and affected his chances to a fair trial. He contends that the stories have breached the Code of Practice for the Conduct of Journalism in Kenya, hereafter referred to as "the Code", of the Media Act.

The complaint is pinned primarily on one news story written by Ben Agina and Beuttah Omanga. The story was published on the front page of the *Standard* of 11 January 2011, as the lead story. It was headlined "*Kenya's Secret plot against the ICC"*. It also carried a kicker headline – above the main headline – reading "Faced *with proposed prospect of six prosecutions at The Hague the country plans to topple ICC through African Union"*. The story was continued on page 4 with the headline "*Rome Statute: Kenya lobbies Africa to ditch ICC"*.

The complaint was later enlarged to cover other related stories subsequently published by the respondents.

Background

Before looking at the complaint in detail it is necessary to describe the backdrop against which it has been made. The ICC Prosecutor, Louis Moremo-Ocampo, on 15 December 2010 named Amb. Muthaura as one of the six prominent Kenyans -- popularly known as "the Ocampo Six"-- suspected to have masterminded the post-election violence in which more than 1,100 people were killed, 3,500 injured and more than 600,000 displaced from their homes. The violence, which brought Kenya to the brink of civil war, has riveted the international community. So have the cases involving the Ocampo Six in

view of a deep-rooted culture of impunity in the country and failure by authorities to prosecute those responsible for the violence. The ICC Pre-Trial Chamber II is currently carrying out confirmatory hearings to determine whether to commit the suspects to full trial.

Amb. Muthaura is accused of being criminally responsible as an "indirect co-perpetrator" for crimes against humanity including murder, forcible transfer, rape, persecution and other inhumane acts. He is only a suspect. If after the confirmatory hearings he is committed to trial, he will become an accused person but he will still retain the presumption of innocence until, if ever he is, found guilty. That is the law.

If found guilty Amb. Muthaura, who is 73 years old, is liable to imprisonment for the rest of his life. His property could also be confiscated to pay reparations to the victims.

As already stated, the ICC cases have attracted a lot of attention. They have given the country a chance to let justice be done. It is also reasonable to say that media reports about the ICC process will have the potential to influence public opinion and attitudes.

Complainant's case

It is against that background that Amb. Muthaura has made the complaint. The complaint itself is very specific and pointed. He claims the story published by the Standard on 11 January 2011 is "fabricated, malicious and reckless" and "must have been meant to prejudice my standing before the ICC, the prosecutor and judges". He accuses the *Standard* and the two authors of the story "to have begun to try me in the public domain".

Amb. Muthaura is concerned that the *Standard* may have prejudiced his case through inaccurate and biased reporting and undermined his rights to a fair trial. This theme runs throughout his complaint. He quotes the Rome Statute of the ICC to support his rights:

> *Both Articles 55 and 67 of the Rome Statute guarantee the rights of persons during an investigation and rights of an accused. By publishing the baseless and malicious story which has very serious implications on me personally, the Office of the President and our*

> *country's standing in the international community, the Standard newspaper has infringed on my rights under Article 55.*

He points out that the *Standard* story was published just over three weeks after he was named by the ICC Prosecutor one of the suspects for whom he had applied to the Pre-Trial Chamber II to be summoned.

Amb. Muthaura's lawyer, Mr. Mugambi, told the Commission that naming the suspects publicly before the summonses were confirmed by the Pre-Trial Chamber II was "contrary to custom". And while the decision on whether or not the Pre-Trial Chamber II would issue the summonses was pending, the *Standard* published the prejudicial story, Mr. Mugambi says. The story, he argues, was in total disregard of the serious nature of the allegations made against his client. The story, he says, alleges that Amb. Muthaura is involved in the subversion of the ICC process in Kenya and in the African continent.

Mr. Mugambi told the Commission that the Pre-Trial Chamber II, in its decision delivered on 11 February 2011 on the confirmation of the issuance of the summonses against the Ocampo Six, criticized the public announcement of their names and the conduct of the Prosecutor in the media. The Chamber said:

> *While it is not the Chamber's role to comment and advice the Prosecutor on his interaction with the press and media, the Chamber nevertheless is concerned if his actions have the potential to affect the administration of justice and the integrity of the present proceedings before the Chamber.*

Using the above quotation partly to support his argument, Mr. Mugambi said the *Standard*'s story resulted in prejudicial publicity for his client. He told the Commission:

> *The story was the first of a series of articles that the Standard published related to the ICC process, casting aspersions against the complainant, and which have serious implications on the complainant's standing locally, internationally and in the face of the ICC which is now seized of the proceedings against the complainant and two others.*

He said the story portrays Amb. Muthaura as a "deceitful, conniving, self-serving and vindictive", a person who, as one of the Ocampo Six, was trying to scuttle the ICC proceedings by instigating Kenya's pullout from the Rome Statute.

Mr. Mugambi asked the Commission to assess the implications of the allegations contained in the story "in the context of the circumstances and environment" in which the article was published. He says that it is a fact that "media reports have received prominence in the [ICC] proceedings" and have "influence and indeed form an integral part of the [ICC Prosecutor's] evidence." He says that judging from the reference to media reports made by the judges of Pre-Trial Chamber II, "the judges have been and shall continue to be influenced by the material which is contained in the local press."

Before setting out in full the case for the complainant it is important to point out that the respondents, in their submissions, took the position that "the burden of proving that the *[Standard*] story was not accurate and not fair is on the complainant". The lawyer for the respondents, Mr. Billing adds:

> *The complainant has in my submissions failed to prove that the article was unfair or inflammatory. The article was not fabricated as alleged nor has any damage been shown.*

Mr. Billing maintained that the article was published as "fair comment" and "without malice". We shall return to the respondents' defence later.

The *Standard* story claims Kenya is "laying ground for a motion to be tabled at the African Union summit in Ethiopia that could trigger withdrawal of African states from the Rome Statute that founded the ICC". The story further claims that sources in Government, which are not named, told the *Standard*, that "the plot to instigate the pullout" from ICC was being driven by "a shuttle diplomacy" ahead of the 30-31 January 2011 African Union preparatory meeting in Addis Ababa, which was expected to set the agenda for the AU summit in July. The story further claims there is an informal Secretariat at the Office of the President, which plays the role of a "think tank" to scuttle the ICC process. The story states:

> *The team is working closely with the Head of the Civil Service, Mr. Francis Muthaura, who incidentally is on the ICC list of six suspected masterminds of post-election violence.*

The story names the following as members of the ""think tank"" or those "who have reportedly been tasked with the assignment of advising Government on this matter":

1. Mr. Ben Kioko who is the Legal Counsel of the AU Commission,
2. Suspended [now reinstated] Foreign Affairs Permanent Secretary Mwangi Thuita,
3. Prof Peter Kagwanja,
4. A lawyer who represents one of the Ocampo Six, and
5. Kenya's ambassador to Ethiopia Dr Monica Juma

Amb. Muthaura, by implication, is a member of the "think thank".

Mr. Agina, the lead author of the story, told the Commission that they did not interview any of the members of the "think tank". He states, however, that he tried to verify with Mr. Thuita Mwangi and Mr. Ben Kioko, alleged members of the "think tank", the existence of the "think tank". Both denied that it existed, with Mr. Kioko adding he could not talk for the Government (This information is not included in the story).

Under cross examination, Mr. Agina added that it was co-author and third respondent, Mr Beuttah Omanga, who had stated that Amb. Muthaura was part of the "think tank". Earlier, in his testimony, Mr. Agina had told the Commission that the story was based on a "tip" from the Managing Editor of the *Standard*, Mr. Kipkoech Tanui. Apart from that, it would appear that the sole authority given in the story for the existence of the "think tank" is the unnamed "sources within the Presidency", which Mr. Agina declined to name, saying it was against the policy of his newspaper.

Amb. Muthaura denies the existence of any think-thank or secret operation organized or coordinated by him to undermine the ICC process. He told the Commission:

> *The story is false. The alleged think tank does not exist. It is the creation of somebody. A fabrication.*

He claims that the respondents are actuated by malice in authoring, printing and publishing the "inaccurate, misleading, biased" story, which cast aspersions on his person and have serious implications for his standing locally, internationally and in the ICC.

He also denies there are any attempts by the Government to pull out of ICC. It is on public record, he says, that the Government has not sought for withdrawal from the ICC but had asked only for a deferral of the Ocampo Six cases.

He says the *Standard* story gives the impression that unless he is removed from his job he is going "to mess" the ICC process". ICC Prosecutor Louis Moreno-Ocampo has subsequently requested the Government to remove him from his position. Amb. Muthaura told the Commission:

> *I am sure he relied on the article [by the Standard] and which probably forms part of his evidence.*

Amb. Muthaura says he resigned as chairman of the powerful National Security Advisory Committee [that advises the National Security Council [which President Kibaki chairs on issues likely to threaten the country's security], as soon as he was mentioned by the Prosecutor as a suspect because he wanted to avoid a conflict of interest. He told the Commission:

> *I do not participate in the meetings ... as alleged in the article, I stopped sitting on them after we were mentioned due to the conflict of interest.*

He says he is particularly upset by the *Standard* story because the authors did not make a serious effort to contact him for a comment before publishing the story, as required by Article 1 (a) of the Code. After reading the story, he says, "I was hurt and I am still hurt by the story". 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.*

After the publication of the story, he prepared a statement, circulated to all the media including the *Standard,* in which he demanded an apology. "I have not received any response from the *Standard*," he says. "I sought an apology and none has been forthcoming."

In his submissions, Amb. Muthaura's lawyer, Mr. Mugambi, repeatedly argued that the content of press reports is a significant factor and source of evidence which has been referred to extensively and indeed relied upon in the context of the proceedings before the ICC. He says that further to the evidentiary value of press reports, public perception and the view of the court have been and are likely to be set and shaped by statements made in the press. He goes on to state:

> *Accordingly and on the basis of the seriousness of the ICC process in which due respect is paid to the role of the media in the presentation of evidence, the forming of evidence and the creation of impressions, it is submitted that the respondents were and are duty bound to be particularly careful in the material which is published. It is further submitted that this standard is further heightened by virtue of the fact that the matters discussed are not just important for the people of Kenya in one of the country's darkest moments, but also to the international community (in respect of which the entire African Union was mentioned) and to the international community which respects the role of ethical media reporting. The respondents, who have invoked 'public interest' as a defence to their right to disseminate the information contained in their publication are aware of this heightened duty, more so to the extent that the second respondent [Mr.. Agina] is the editor in charge of ICC matters.*

Timing

Amb. Muthaura's lawyer stresses the relevance of the timing of the publications and the contextual background. He claims that the conduct of the first respondent regarding the complaint and the Complaints Commission procedures reveals malice or recklessness characterized by delaying tactics, negligence and absence of a duty of care towards his client. We will deal with the issue of malice and recklessness shortly in greater detail. For now, let's look at the timelines of the relevant events and proceedings, as they throw some light on these claims:

Timelines

15 Dec. 2010
ICC Prosecutor announces applications have been made seeking summonses against the Ocampo Six. Amb. Muthaura issues a statement saying he is innocent.

10 Jan. 2011
Mr. Agina, *Standard* News Editor and lead author of the story, telephones Amb. Muthaura's office for a comment on the story planned for publication the following day. He leaves a "call-me-back" message without specifying the purpose of the call. Time of call: 3 p.m.

11 Jan
Standard publishes the story "*Kenya's Secret plot against the ICC"*, slightly over three weeks after the ICC Prosecutor names Amb. Muthaura as one of the suspects awaiting the application for summonses to be considered by Pre-Trial Chamber. Amb. Muthaura issues a press release describing *Standard* story as "malicious" and aimed at undermining his standing before the ICC.

12 Jan
Amb. Muthaura writes to Media Council complaining about "the continued maligning and peddling of falsehood touching on myself by the *Standard* newspaper."
13 Jan
Standard publishes a story based on Amb. Muthaura's press statement but does not retract its story. Instead, it publishes on its online version a comment from one Sifu Msafiri supporting the newspaper story against Amb. Muthaura.

18 Jan
Mr. Agina establishes on his own motion that there was no factual basis for the *Standard* story and writes a retraction. The *Standard* refuses or neglects to publish the retraction.

28 Jan
Amb. Muthaura makes a formal complaint to the Complaints Commission, terming the *Standard* story as "misleading, incomplete, inaccurate, inflammatory and biased."

1 Feb.
Commission notifies the *Standard* about the complaint, giving them 14 days to respond. The *Standard* fails to respond.

22 Feb.
Commission extends the deadline.

28 Feb.
Commission writes to the *Standard* again noting they have not responded to the notice of 1 Feb. and gives them 7 days to respond or face disciplinary action.

3 March
The *Standard* responds, denying Amb. Muthaura had sought a correction or been denied an opportunity to reply.

19 March
The *Standard* publishes story "*Why Kibaki won't let Muthaura go",* and cartoon titled "*Kenya Government's Pecking Order*".

13 May
Hearing of the complaint before the Commission. Mr. Agina admits the story was false. Mr. Billing says they are amenable to a formal apology. Commission directs the parties to agree on the wording of an appropriate apology and return on 4 June to record consent.

18 May
Amb. Muthaura's lawyer, Mr. Mugambi, sends a draft copy of the apology to Mr. Billing as agreed.

30 May
Mr. Mugambi writes to Mr. Billing again urgently asking for a reply. No response.

The timelines reveal a picture of lethargy and reluctance on the part of the respondents to act on the complaint that is of vital interest to the "victim" of the story, while at the same time showing an eagerness or rush to publish new material that further harms the "victim". It is not surprising that the complainant is claiming malicious intent. We will return to this important question of malice later.

Enlarged Complaint

During the course of his testimony, Amb. Muthaura widened the scope of his complaint. He stated:

> *The Standard has been targeting me for a long time. Even the pictures they use, they pick the ugliest. When the ICC makes a ruling against Muthaura, it is the headline, but when it rules in my favour it is hidden in the middle pages.*

Amb. Muthaura says there has been "a series of articles" published by the respondents, which have been "intended to injure my reputation or my interest". His lawyer, Mr. Mugambi, drew the Commission's attention to four other stories published by the *Standard*. These includes another page-one story lead story published on 19 March 2011 headlined "*Why Kibaki won't let Muthaura go"*, which was continued on page 4 under the headline "*Why Kibaki won't fire Muthaura as demanded by ICC prosecutor"*, a cartoon published on page 19 of the same issue titled "*Kenya Government's Pecking Order"* and a description of Amb. Muthaura as "*GUIDE AND SUPREME LEADER"*, an online version of "*Kenya's Secret plot against the ICC*" published on 10 January, and another online version of the same story, internationalized for an Africa-wide and global audience, headlined "*African Dictators Secret Plot against ICC"* posted on the ECADF Ethiopian News website on 10 January with the by-line credits of Ben Agina, Beuttah Omanga and the *Standard*, the second, third and first respondents respectively.

Amb. Muthaura says that it is beyond dispute that the respondents' subsequent publication of stories concerning him are calculated to injure his reputation and standing at the ICC. We shall have more to say about the harm caused to Amb. Muthaura by the publication of the *Standard* story.

His lawyer, Mr. Mugambi, also draws the Commissioners' attention to the following eleven actions or omissions, which he says shows the first respondent, whether in concert with the second and third respondents or with others, "has been inconsiderate of the significant prejudice suffered by the complainant":

1. The first respondent ignored the facts and published the story without any reasonable investigation having been done or indeed taking any

reasonable steps to consult the complainant or the official Government Spokesman.

2. The respondents, despite becoming aware within a week of the publication that the story and in particular the allegations against the complainant had been false and unfounded, failed to retract the story and have not done so to date.

3. The first respondent, despite being fully aware of the seriousness of the complaint and the comprehensive response by the complainant, has failed to publish an apology.

4. The first respondent, despite the seriousness of the matter and having independently established on or before 18 January 2011 that the allegations against the complainant were false, ignored the Complaints Commission's notification dated 1 February 2011 by failing to respond or even acknowledge receipt of the notification within 14 days as stipulated on the notification, thus necessitating an extension of time which was granted by the Commission in its meeting of 22 February 2011.

5. In its late response dated 3 March 2011, the respondent "callously" claimed that "the complainant has at no time sought a correction from us neither have we refused and or neglected to correct any such error" and that "we have not denied the complainant an opportunity to reply as alleged". The respondent made the claim despite knowing the falsity of the story as well as the widely available public records and a specific statement issued by the complainant on 12 January 2011 and notified specifically to the respondent.

6. Despite attending a meeting organized by the Complaints Commission on 8 April 2011 and taking a date for hearing by consent on 11 May 2011, the respondent failed to make arrangements to secure attendance at the hearing citing, at the last minute, a letter dated 9 May 2011 that said the respondent's counsel would be in the Court of Appeal on that date, whereas knowledge of the Court of Appeal hearing was available as early as 18 April 2011.

7. After the hearing on 13 May 2011 where it emerged that the allegations against the complainant were completely unfounded and the

respondent indicated that he was amenable to an apology, the respondent ignored no less than two letters seeking the consummation of the apology offered. The letters were not even acknowledged.

8. Having taken a date for mention of the matter for the purposes of "recording a consent order on settlement", the respondent failed to appear before the Commission and no explanation was offered for the failure to appear.

9. Having had an opportunity to assess the seriousness and implications of the false story by attending the oral testimony of the complainant on 13 May 2011, the respondent has taken absolutely no steps to inject any urgency into the matter despite the impending African Union meeting held in July, the ongoing ICC proceedings and the public perceptions "which continue to be influenced by the allegations made against the complainant".

10. The above events and observations show that the respondent has been "casual, negligent and indeed malicious" toward the complainant and his professional and personal interests.

11. In addition, the complainant submitted, "the conduct of the [first] respondent was inimical to the proper conduct of proceedings before the Commission" and "discloses an attitude of lack of seriousness in its approach to the Commission's proceedings, disregard of the complainant's grievances and in the circumstances discloses malice." The respondent's conduct is "blatantly" disrespectful of the Commission's jurisdiction to regulate responsible journalism" and "can only be reasonably attributed to malice against the complainant".

Respondents Case

Cross-examining Amb. Muthaura, the counsel for the respondents, Mr. Billing, sought to prove that as a public servant what he did or did not do was of public interest. We need not go into the details of this line of questioning for it was never disputed that Amb. Muthaura was a public figure. Mr. Billing also sought to show that there was indeed shuttle diplomacy to pull out of the ICC.

Again we need not go into details of this line of questioning as it was never disputed that there was a shuttle diplomacy. What was in dispute was the purpose of the shuttle diplomacy. Amb. Muthaura had maintained that there was never a time that the Government had sought to pull out of the ICC. What the Government had set to do was to have the first hearing of the Ocampo six cases deferred. Again, what was in dispute was whether there was a think tank to advice the government on pulling out of the ICC. It was also in dispute whether Amb. Muthaura had demanded an apology. The following is an extract of the relevant cross-examination:

Mr. Billing: "Is it not true that the shuttle diplomacy led by the Vice President [Kalonzo Musyoka] was meant to both defer and withdraw from the ICC? "

Amb. Muthaura: There is no time when Government has applied to get out of ICC. The shuttle diplomacy was meant to defer the date of the first hearing. It was not for getting out of the Rome Statute. So the heading on page 2 of the story, Rome Statute: Kenya lobbies Africa to ditch ICC, is not correct."

Mr. Billing: "What about the persons mentioned in the story aren't they part of a "think tank"?

Amb. Muthaura: "The persons mentioned in the story are not part of any think tank."

Mr. Billing: "May I draw your attention to the comment made by the Vice President on the second page of the story in which he mentions withdrawing from the ICC?"

Amb. Muthaura: "I cannot talk on behalf of Kalonzo or Karua on issues of deferring or withdrawal from the ICC; those are their own opinions."

Mr. Billing: 'Did you call the *Standard* to complain?"

Amb. Muthaura: "I did not call the *Standard* to complain. You do not call someone who has knifed you on the back. I wrote a press release and circulated to all media houses included the *Standard* where I discounted the existence of such a "think tank" and demanded for an apology and retraction."

Mr. Billing's line of defence up to this point was to impose the burden of proof on the complainant and to deny that the respondents had refused or

neglected to correct the error in the story in breach of Article 4 on accountability of the Code, or had denied the complainant opportunity to reply in breach of Article 5 (Right of Reply) of the Code. Later he turns to a defence of "fair comment on a matter of public interest" and the sanctity of journalistic sources. We shall return to these defences shortly. For now let's focus on the testimony of Mr. Ben Agina.

Ben Agina

In his testimony, Mr. Ben Agina gives the Commission an opportunity to understand the process that led to the writing of the offending story and how the *Standard* handled the story. He also gives the Commission an opportunity to observe his demeanour, ethical behaviour, professional training and attitude.

He told the Commission that he has been a journalist with the *Standard* for the last 15 years, and that he was well "aware" of his duties as a reporter. He confirmed that he is the News editor of the *Standard*. A word about News Editors News is pertinent. In general, News Editors are responsible for initiating, planning and directing news coverage and deploying reporters; they select the events and issues to be covered and how to cover them. A News Editor is an important gatekeeper in a news organization. He decides which stories to keep out and which stories to let in and in what form. The "who-what-when-where-how-and-why" of covering news stories depends a great deal on the initiative, resourcefulness, insight, knowledge and imagination of the News Editor.

Mr. Agina is also the *Standard*'s specialist on the ICC. According to a story published by the *Standard* on 9 September 2010 headlined *Hague court to host Kenyan editors,* he was one of three editors from Kenya invited by the ICC "for training on its activities and mandate". While on training at The Hague, a picture of him with ICC Prosecutor Luis Moreno-Ocampo and two other Kenyan journalists was published in the *Standard* of 14 October 2010. Despite this training and specialization, he told the Commission that he did not understand the import of the story that he co-authored with Beuttah Omanga. He said that he did not know what would be the effect of the article. Asked by Mr. Mugambi whether he was aware that if he is convicted of contravening the provisions of the Media Act he could be jailed for up to six months, and if Amb. Muthaura is convicted under the Rome he could be jailed for life, Mr.

Agina replied: "I did not know that." Asked whether he knew how the ICC operates, and that his story is being used as evidence by the court against the Amb. Muthaura, he replied: "We do not know the ICC operates. We are not lawyers."

As we were informed earlier, Mr. Agina got "a tip" about the "think tank" from his Managing Editor Kipkoech Tanui. In journalistic language, a tip or "tip-off" is information that journalists can use as a starting point in the investigation of a story. A tip is never the story itself. It is an idea for a story, a lead on what is happening or about to happen, a rumour, or a brief on what has happened or is about to happen but needs to be investigated so as to run as an authentic story. But Mr. Agina and Mr. Omanga do not seem to gone beyond the "tip". However, Mr Agina told the Commission:

> *We did our own research on the names of the [people in the] think tank. We got the names from our own sources which we cannot disclose.*

Neither Mr. Agina nor Mr. Omanga spoke to Amb. Muthaura. "We did not get him… we have never spoken to him," he told the Commission. As stated in the **Timelines**, Mr. Agina said he telephoned Amb. Muthaura's office at about 3.00pm on 10 January 2011 looking for a comment, moments before the editorial meeting to approve the story and other stories to be published in the following day's paper, and left a message with a woman requesting Amb. Muthaura to call him back. The message did not give a reason for the call. It did not make any reference to any "think tank" or alleged plot by the Government to undermine the ICC.

In putting his story together – he was the lead author -- Mr. Agina also said he called an official at the African Union. "I tried to verify with Ben Kioko [a Kenyan lawyer who works with the AU Commission], but he said he could not talk for the government." He went on: "I spoke to Mr. Thuita Mwangi. He denied the there was such a think tank. I spoke to Dr. Ben Kioko who denied there was a think tank.

In other words, not a single person interviewed by Mr. Agina and reported in the story confirmed that there was a think tank.

And Mr. Agina, following lead from the first respondent, also told the Commission that he did not receive any demand from Amb. Muthaura to

correct the story and, in equal measure, added: "We have not denied the complainant the opportunity to respond." However, he acknowledged that the *Standard* received the press statement of 12 January 2011 in which Amb. Muthaura said: "[I] shall seek for publication of a substantiation of the story failing which I demand an appropriate apology from the *Standard* newspaper and the two journalists for writing and publishing a fabricated story concerning me".

He said he saw the letter of the Amb. Muthaura asking for an apology "for the first time when Media Council wrote to us". He denied that "we meant to tarnish the name of the complainant", saying there was no hidden agenda. "It is a matter of fair comment in public interest," he said. He concluded his evidence by saying: "We stand by the story."

But on cross-examination, Mr. Agina said he included the name of Amb. Muthaura in the story because the reporter with whom he co-authored the story, Beuttah Omanga, said he was a member of the think tank, a part of the secret plot to subvert the ICC process.

Mr. Mugambi**:** "But was it true?"

Mr. Agina: "I found later out that there was no think tank."

Mr. Mugambi: "When was this?"

Mr. Agina**:** "I found out a week after the story was run.

Mr. Mugambi**:** "Did you make any effort to correct the position after you made this discovery?

Mr. Agina: "I did a 400-word story clarifying the position but the *Standard* did not publish my story."

Mr. Mugambi**:** "Why not?"

Mr. Agina: "I don't know, I don't make those kinds of decisions."
Commission: "Mr.. Agina, if you had the authority to do so would you publish an apology?"

Mr. Agina: "I would publish an apology. I did not know the impact it would have on the ambassador, and I am sorry."

Thereupon the counsel for the *Standard*, Mr. M. Billing said: "In light of the circumstances I will need to seek further instructions from my client on how to proceed, as I had different instructions on the matter."

Commission: Mr.. Billing your client has admitted to the falsity of the story, are they willing to do an apology?

Mr. Billing: "I will confer with my client and advise them on the same...

Mr. Mugambi: "In the mean time, I can draft an apology for publication by the *Standard*, and have the matter mentioned for purposes of recording a settlement."

Commission: "We will have the matter mentioned on 3 June 2011 for purposes of recording a settlement."

That did not happen. Mr. Billing ignored letters written by Mr.. Mugambi to reach agreement on a draft apology. Apparently, the respondents had gone back to the stand stated in their reply of 3 March 2011, which had stated that they stood by their story which is "fair comment on matters of public interest".

As we have seen, the dramatic admission of culpability by Mr. Agina led to the end of the hearing, with Mr. Billing undertaking to consult with the first respondent to arrange for an apology to be published in the newspaper. It was agreed that the parties would agree on an appropriate draft apology and then return on 3 June for mention and to record assent order on settlement. However, having taken this date mutually, the respondents failed to appear before the Commission without any apologies or explanation. Mr. Mugambi told the Commission that the respondents had ignored two letters from the complainant regarding the drafting of an apology. The complainant, clearly vexed by this strange turn of events, then sought orders to prepare written submissions. The orders were granted, and both parties filed written submissions for the Commission to rule on the case.

In their submissions, the respondents reduced the complainant's grievances to three complaints:

1. The story published on 11 January 2011 was unfair, inaccurate, misleading and inflammatory in breach of Article 1 of the Code.

2. That the respondents have refused and or neglected to correct the error in breach of Article 4 (Accountability) of the Code of Conduct.

3. That the respondents have denied the complaint opportunity to reply in breach of Article 5 (Right of Reply) of the Code of Conduct.

This reduction leaves out important elements contained in the complaint which includes malice, lack of professionalism and due diligence and duty of care in handling the story.

In their defence, Mr. Billing told the Commission that the first, second, and third respondents "deny that the article published on 11 January 2011 was unfair, inaccurate, misleading or inflammatory" and "will put the complainant to strict proof thereof". He went further to say that the burden of proving that the story was not accurate and not fair was on the complainant. "The complainant has in my submissions failed to prove that the article was unfair or inflammatory. The article was not fabricated as alleged nor has any damage been shown," he says. Mr. Billing also states the story complained of was "a fair comment on matters of public interest", and that "the media is free and independent in carrying out its duties as such it cannot be compelled to identify its sources". He goes on to say: "The second respondent Mr. Ben Agina was candid enough to admit in proceedings that the article may have been untrue, but was published without malice and in public interest as the complainant is a public servant, hence the public would be interested in his actions or inactions. Although untrue, it does afford the respondents with defence of fair comment. It was published without malice." We shall take up the issues of inaccuracy, fair comment on matters of public interest, unnamed sources, and malice in separate sections that follow shortly.

Harm

That leaves us with the issue of whether "any damage has been shown". The respondents, have argued that the complainant has not provided any evidence to support claims of damage. But we must find for the complainant. His submissions are a veritable catalogue of the harm he has suffered because of the *Standard* story. In summary**,** he has contended that his defence at the ICC has been or would be compromised by the *Standard* story; the judges or the

prosecution at The Hague have or will rely on the story. His lawyer, Mr. Mugambi, further testified that in addition to compromising his standing at the ICC, the purpose of the article was to destroy his personal and professional life and to seek his sacking by suggesting that he is using his position for sinister purposes. Mr. Mugambi submitted that the story would have the following effects:

1. In the context of the ICC proceedings, the respondents have continued to fuel the perceptions on the complainant including suggesting, in the wake of the applications made in the ICC, that Amb. Muthaura is the highest ranking Kenyan who directs the President as is demonstrable from the caricature published in the *Standard* of 19 March 29011.

2. The generation of the story which used the term "shuttle diplomacy", suggesting that the complainant was the architect or is the key player, must have been intended or in any event has the effect of forming a part of a series whose outcome is to generate an atmosphere under which Amb. Muthaura is perceived to be the focal point of the problems that rocked the country and thus generate a reaction that he is undeserving of his position and ought to be punished.

3. In addition to generating a very hostile working environment and seriously prejudicing his position before a court in which serious sentences can be handed out, the media reports have also a historical, current and prospective impact on the complainant.

4. The complainant is a professional diplomat having spent 38 years of his 39 years in the public service in roles that relate to diplomacy and international relations . The publication of a story which suggests that he is using his skills and experience to subvert a judicial process creates an environment in which his former colleagues nationally and internationally will question his values and ethos.

5. Apart from the harm to his standing before the ICC against whom the respondents have alleged he is involved in a secret plot, it is unlikely that he shall be viewed as a leading diplomat and for the purposes of his future engagements is unlikely to be considered favourably.

6. The implications gravely injure and are likely to destroy the complainant.

Burden of proof

Mr. Billing claims that the burden of proving that the story was inaccurate and unfair is on the complainant. He is right in the sense that courts give the benefit of the doubt to the defendant and in criminal law, he or she is presumed innocent until the prosecution can prove guilt beyond a reasonable doubt and in civil law, he or she is presumed innocent until the plaintiff can show liability on a balance of probabilities. However in libel, and this complaint is essentially about libel, the common law of libel reverses the traditional positions. A libellous statement is presumed to be false, unless the defendant can prove its truth. Common sense also suggests that the one who publishes a libel should have a factual basis for the charge. The person making the libellous statement can therefore logically be required to prove the truth of his libellous statement. In any case, the law frequently places the burden of proof on the party who has superior access to the facts, especially where the other party would be placed in the position of proving a negative, such "I am not corrupt" or "There was no think tank".

Mr. Billing submitted a list of authorities, with specified paragraphs, to support his arguments. We have carefully read the specified paragraphs and we are of the view that none is relevant or applicable to the present case and the Commission could not see how the references add value to the case for the respondent. But we shall have more to say about those authorities when we examine the respondents' defence of fair comment.

From the hearing and the submissions, it is clear to us that the respondents did not have reasonable grounds for believing it was true that there was a "think tank", much less that the complainant was coordinating it. It is also clear that the respondents did not take proper steps to check the accuracy of the story and they did not genuinely or realistically seek a response from the complainant.

If the respondents did not know that they were harming the complainant or did not intend to do so, a defence of innocent dissemination on a matter of public interest is arguable. But in this case, the publication of the story, taking into account the steps taken or not taken to research the story, is not a case of innocent dissemination as suggested by Mr.. Billing. This view is confirmed by

the fact that the first respondent did not correct the story after finding out that it was false. Ethically, and according to Article 1 (on Accuracy and fairness) of the Code, the respondent should have promptly corrected the mistakes and apologized.

The claims in the story have serious implications for the complainant in view of his position with the ICC and the political and social implications of bringing to justice those who masterminded the post-election violence of 2007/8. There is no question that the circumstances surrounding the publication of the story were such that the complainant was likely to be harmed. Hence the need for the respondents to exercise social responsibility and a duty of care in publishing the story and ensuring that it was factual and fair.

Mr. Mugambi submits that the respondents deliberately calculated to cause the most damage possible by intentionally creating the widest possible circulation of the article. In this regard, he says, the article was given the greatest prominence possible, appearing on the first page as a sensational headline article "Kenya's secret plot against ICC" coupled with pictures of celebrity Moreno-Ocampo and the President [Mwai Kibaki] to attract intrigue about the 'secret plot'. He further submitted that the *Standard* posted online the stories it published against him in a move again "calculated to cause the greatest damage possible." He supplied to the Commission statistics from the "Internet World Stats" showing that the Internet is accessed by an estimated 2 billion people globally, while the figure in Africa is over 118 million. He states:

> *The article [Kenya's secret plot against ICC published on 11 January] remains on the first respondent's website to date, allowing it to be accessible to billions of people.*

The article was also published online and remains on the first respondent's website to date, "allowing it to become accessible to billions of people". The article was still on the website at the time of writing this judgment and can be found at: http://www.standardmedia.co.ke/archives/InsidePage.php?id=2000026471&cid=4.

Further, Mr. Mugambi says the article was reproduced by the respondents "in even more sensational form" in the website ECADF Ethiopian News.

Unnamed sources

The complainant made a great deal of the fact that the respondents used anonymous sources for a story which he claims was "misleading" and "false". He argues that sources gave misleading or fabricated information and therefore should not enjoy the privilege of journalistic confidentiality. Citing Article 6 (Unnamed sources) of the Code, he contended that "confidential sources should be used only when it is clearly in public interest to gather or convey important information or when a person providing information might be harmed." In this case, the complainant contends, there was no public interest to be served as the information was false and misleading. In other words, sources that give misleading information should not be protected.

However, the respondents refused to disclose their sources, arguing that the story was of public interest and it was against their policy to divulge confidential sources. We will return to the issue of public interest shortly.

The use of unnamed sources has provoked a never-ending debate on its pros and cons. While it is not necessary to enter into the lengthy debate, it is important to note that the use of unnamed sources is pertinent to the determination of this complaint. The first point to note is that the *Standard's* policy of not divulging sources is in keeping with Article 7 of the Code, which states:

> *In general, journalists have a professional obligation to protect confidential sources of information.*

However, Article 7 is not such a hard-and-fast rule as the *Standard* policy. Article 7 foresees the need for exceptions, i.e. where disclosure would be justified. We must also point out that the reason for the existence of the rule of journalistic confidentiality is to ensure the free flow of information. Revealing confidential sources of information would have a chilling effect on the freedom of expression and of the press. Without the protection of anonymous sources, journalistic sources would dry up and many potential whistleblowers would not come forward and reveal information of public interests. As a result, the flow of information would be stifled and problems such as corruption might not be reported, to the detriment of society. That is why confidentiality of journalistic sources of information is protected not only in Kenya (to a degree) but widely around the world.

The protection of sources is a right recognized under other laws of Kenya as well as under international law. The right to protection of journalistic sources has been specifically recognized, for example, by the United Nations and the African Union, and nearly 100 countries have specific laws protecting journalistic confidentiality and in at least 20 countries those protections are absolute. Experts in international law also hold that the right to protect sources of information is implicit in the right to freedom of expression and that it is one of the basic conditions of press freedom. In the 1996 case *Goodwin v. United Kingdom* (22 EHRR 123), the European Court of Human Rights stated that protection of journalistic sources is one of the basic conditions for press freedom. The court further stated:

> *Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.*

The court ruled that the protection can only be removed if there is "an overriding requirement in the public interest". In *Goodwin* the legitimate reasons for wishing disclosure were outweighed by the interest of a free press in a democratic society. If journalists are forced to reveal their sources the role of the press as public watchdog could be seriously undermined because of the chilling effect that such disclosure would have on the free flow of information, the court concluded. This is a significant case on the protection of journalists' sources as it seeks to balance press freedom and individual interests.

The Declaration of Principles on Freedom of Expression in Africa also provides guidelines on balancing the journalistic privilege and other rights. Article XV of the Declaration states that media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

1. The identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
2. The information or similar information leading to the same result cannot be obtained elsewhere;
3. The public interest in disclosure outweighs the harm to freedom of expression; and
4. Disclosure has been ordered by a court, after a full hearing.

And Article XVI of the Declaration requires state parties to the African Charter on Human and Peoples' Rights to "make every effort to give practical effect to these principles". Kenya ratified the Charter on 10 February 1992, and therefore the Declaration is part of the law of Kenya following Article 2 (6) of the Constitution, which states that any treaty or convention ratified by Kenya shall form part of the law of Kenya. Article 2 (5) also states that the general rules of international law shall form part of the law of Kenya.

The protection of sources of information is of course subject to Article 35 (1) (b) of the Constitution which provides that every citizen has the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom.

During the hearing, Mr. Agina, the lead author of the story and *Standard* News Editor, admitted that he found out about one week after the publication of the story that there was no "think tank" and therefore the story was false. Should the sources of the misleading story be exposed? Does The Standard or the authors of the story owe the sources a duty of care and protection? Did Mr. Agina infringe Article 6 of the Code, which states that unnamed sources should not be used unless the pursuit of the truth will best be served, by not naming the source? Is there a public interest in disclosure and does the public interest outweigh the harm to freedom of expression? Should the veil of journalistic confidentiality be lifted in this case? It was not possible for the Commission to answer these questions with certainty; we did not have the benefit of hearing from the sources..

In any case, it is the view of this Commission that the complainant can only compel the respondents to reveal their sources in order to exercise his constitutional right to protect any right or fundamental freedom. There is no evidence presented to this Commission to show that the anonymity of the sources in and of itself has harmed the complainant or violated any of his rights or fundamental freedoms under the Code; it is the story as presented by the respondents that has apparently harmed the complainant.

Having said that, this Commission finds it necessary to state that the manner and attitude of the respondents in investigating the story falls below expected professionalism and standards. Investigation into such an important and sensitive subject should not have been conducted in such a casual and cavalier manner. In saying that we are fully aware that in investigative

journalism, looking for facts is not easy especially in situations where information is liable to be concealed, suppressed or distorted. But we must also warn that the use of anonymous sources, without proper safeguards, can provide opportunities to those who want to use the cloak of anonymity to bash political opponents or to drive a personal agenda.

We are also fully aware that journalists operate within limited preparation time. But journalists are expected to be as accurate as possible given the time allotted to story preparation and, more importantly, are expected to seek reliable sources. The source must be in a position to have accurate information, and, to the best of the reporter's ability to determine, must be understood to be reliable and the reporter should ask why the source is requesting anonymity.

In addition – and this is implicit in the Code --the media should limit harm to the subjects of their news reports; they should show compassion for those who may be affected adversely by their news coverage; they should recognize that gathering and reporting information may cause harm to people who may be innocent and that pursuit of the news is not a license for arrogance or utter disregard of other people's rights. When errors are discovered they should be corrected immediately.

Finally, it is also worth noting that neither the Constitution of Kenya nor the common law recognizes the reporters' privilege. Kenya does not have a shield law –a statute enacted which declare that communications between news reporters and informants are confidential and privileged and thus cannot be testified to in court similar to the doctor-patient, advocate-client privilege. Outside international law, Article 7 is all we have, and it is limited. The media does not have a Constitutional right of protection from revealing confidential information in court.

And the privilege afforded by Article 7 must be balanced against a variety of competing interests such as the right of the individual to a fair trial or to protect other individual rights. In the United States in the 1972 case of *Branzburg v. Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626, the U.S. Supreme Court held that news reporters do not have a right under the First Amendment to refuse to appear or testify before a grand jury. The Court stated that the burden on news-gathering in not allowing reporters' privilege was not sufficient to override the compelling public interest in law enforcement and effective grand jury proceedings.

Though there are clear dangers on the use of anonymous sources, as evidenced in the present case, it's also important that we acknowledge the value of such sources to our society. When the media uses unnamed sources with the right safeguards and for the right reasons, they play the important role of the watchdog in society.

Sanctions

In his submissions, the complainant asked the Commission to use its powers to issue a reprimand under Article 29 (1) (b) of the Code, which provides that the Commission may, after hearing the parties to a complaint, issue a public reprimand of the journalist or media enterprise involved. The Article does not specify whether the reprimand is in additional, or in lieu of, other disciplinary actions.

The complainant also asked the Commission to use its powers under Article 37 of the Code which provides for a fine, or imprisonment, or both, for refusing or failing to comply with the requirements of the Commission, obstructing or hindering the Commission, furnishing false or misleading information. The lawyer for the respondents, Mr. Billing, objected arguing that "the threat or imposition of a prison term is penal, draconian and in conflict with the Constitution of Kenya". He said Articles 46,49, 50 and 51 of the Constitution protects freedom of expression and freedom of liberty. "Otherwise, yes, the Commission has power to reprimand, fine, ask for an apology or amends or dismiss complaint," he added.

Is the punishment provided for in Section 37 unconstitutional? None of the articles in the Constitution cited by Mr. Billing seems to nullify the provisions of section 37. Article 46 is about consumer rights and we find nothing in it that is relevant or in conflict with the powers of punishment conferred on the Commission by Section 37. Ditto for Article 50 and 51. Article 49 (2) provides that: "A person shall not be remanded in custody for an offence if the offence is punishable by a fine only (emphasis added) or by imprisonment for not more than six months." Section 37(2) provides for a fine, or imprisonment, or both; therefore, in our view, imprisonment under the section is not in conflict with the provisions of the Constitution.

Back to the public reprimand. This is in fact a form of disciplinary action that declares a person's professional conduct is improper. However, the

circumstances under which the Commission can issue a reprimand are not spelt out in the Media Act.

The complainant states that the respondents failed in their professional responsibility, in particular they failed to act responsibly as required by the Code, especially Article 4. We shall look at Article 4 more closely when we examine whether the story complained of was false. Suffice it to say for now that this Commission is committed to constitutional freedom of expression and the right of the public to be informed. We are also committed to responsible journalism, transparency, and accountability of journalists and publishers. We would not hesitate to issue a public reprimand against journalists and publishers who disregard the provisions of Article 4 in additional, or in lieu of, other disciplinary actions. But we must be satisfied that the reprimand, in view of other actions, is not redundant.

Issues to be determined

We have reduced the number of issues to be determined to four as follows:

1. Was the story false?

2. Was the story malicious?

3. Was the story fair comment (on a matter of public interest)?

4. Did the first respondent give false information to the Commission?

Falsity

Was the story false?

In his submissions, the counsel for the respondents, Mr. Billing, was economical with the truth when he said that the second respondent, Mr. Agina, the lead author of the story and *Standard* News Editor and expert on ICC, admitted during cross-examination that the offending story "may have been untrue". In fact, Mr. Agina was categorical that the story was false. The 'sting" of the story – that there was a "think tank" coordinated by Amb. Muthaura –was a clear fabrication. Mr. Agina even apologised to Amb. Muthaura. In view of that dramatic turn of events, the respondents can no

longer rely on a defence of justification (truth), or the traditional "We stand by our story" stance.

Malice

The complainant contended that the respondents conduct manifested malice. In particular, he raised issues with the first respondent's attitude in the proceedings and towards the complaint and the complainant. He identified the following manifestations as pointers to malicious intent:

1. The respondents did not take reasonable steps to verify the accuracy of the story.

2. The respondents did not seek a response from the complainant, the person affected negatively by the publication, as required by the Code.

3. When the second respondent found out that the story was false one week after publication the first respondent refused or neglected to publish a correction, and has not done so up to this day.

4. The respondent's dealings with the complainant and his complaint was characterized by delays and snubs, including failure to attend a scheduled hearing without excuse and to answer correspondence.

5. The respondents "research" on the story was shallow and unprofessional.

6. The respondents went out of their way to publish, or to cause to publish, the story in the Internet including on a website based in Addis Ababa, the headquarters of the African Union, so as to reach the widest possible audience locally and internationally (We shall have more to say about publication when we look at the damage on Amb. Muthaura's reputation).

7. The respondent's subsequent publication of articles concerning the complainant without regard to the significant prejudice suffered by the complainant, points to a sustained campaign of vilification.

But was the story in fact published with malice? The Black's Law Dictionary (Second Pocket Edition) defines malice as the intent, without justification or

excuse, to commit a wrongful act, or reckless disregard of the law or of a person's legal rights. Malice is therefore the intentional commission of a wrongful act, absent justification, with the intent to cause harm to others; conscious violation of the law that injures another individual. Malice can be a mental state indicating a disposition in disregard of social duty and a tendency toward wrongdoing. In its legal application, the term malice is comprehensive and applies to any illegal act that is committed intentionally without just cause or excuse. It does not necessarily imply personal hatred or ill feelings but rather it focuses on the mental state that is in reckless disregard of the law in general and of the legal rights of others.

In defamation, absence of malice is characterized by "innocent publication" following an "innocent mistake" made after "due diligence". It can also be characterized by such actions as an apology, a clarification or a retraction of the offending matter as soon as mistakes are discovered. When those circumstances do not exist, and especially when the publisher of the offending matter refuses to apologize even in light of a mistake made, and when having been made still "stands by our story", the presence of malice can be assumed. This is especially so if the story is inaccurate because it was poorly researched, showing recklessness, lack of due diligence and duty of care to those who could be hurt by the publication of such a story.

The first respondent's actions, or omissions to act, show a malicious intent. And the apology offered during the hearing by the second respondent does not in any way exonerate the first respondent from malicious intent. The failure of the first respondent to publish a retraction of the story written by its own News Editor, rescinding the agreement to publish an apology as arrived at the hearing of 13 May, as well as the inordinate delay in responding to the complaint and failure to attend a mutually agreed hearing date without explanation or apology, further points to neglect, recklessness or malicious intent.

The respondents did not offer any evidence to show absence of malice other than to say that the story was published "without malice and in the public interest as the complainant is a public servant, hence the public would be interested in his actions or inactions...it was published without malice."

We find for the complainant. Below we examine the respondents' "public interest" claim, which falls under fair comment.

Fair comment

The respondents' lawyer, Mr. Billing, contends that the publication of the offending story was in the public interest with no intended malice. It was "fair comment in the matter of public interest". That was also the initial stand of Mr. Agina before he caved in during the cross-examination. Mr. Billing argues that although the story "may have been untrue", it was published "without malice and in public interest as the complainant is a public servant, hence the public would be interested in his actions or inactions." He goes on to say: "Although untrue, [the story] does afford the respondents with defence of fair comment. It was published without malice."

It was never in dispute that Amb. Muthaura was a public figure. And Mr. Billing is right but only in as far as all the details of a story do not have to be true for a defence of fair comment. To support his contention, he cited section 15 of the Defamation Act, which states:

> *In any action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.*

Section 15 captures the common law position. Not every allegation of fact has to be proved in a defence of defamation. However, in this particular case the respondents cannot rely on a defence of fair comment for three reasons.

The first is that the story complained of, as the counsel for the complainant rightly pointed out, is not a comment or opinion. It is an account of factual statements. The story cannot be characterized as opinion as it gives an account of facts, i.e. that there is a "think tank", an attempt by Kenya to pull out of the ICC, and that Amb. Muthaura was coordinating the secret plot. Those are statements of fact, not opinion even by any stretch of the imagination.

The second reason is that under common law, a defence of fair comment – assuming this was in fact fair comment-- collapses if there is malice, and we have already established that there was malicious intent or recklessness.

The third reason is that although the story was on a matter of public interest, the respondents cannot rely on a defence of fair comment – again assuming this was in fact fair comment -- as Article 33 (2) of the Kenya Constitution provides that the right to freedom of expression and of the media does not extend, among other things, to hate speech, vilification of others or incitement to cause harm.

This takes us back to the question of public interest. Neither the Media Act, nor the Kenya Constitution, defines what public interest is. Black's Law Dictionary defines public interest as the general welfare of the public that warrants recognition or something in which the public as a whole has a stake. In *Kemsley v Foot* [1952] AC 345 the court held that public interest includes, among other things, activities of central and local government and anything in the public domain. There is no doubt, therefore, that the ICC process in which six Kenyans, including the complainant, are suspected of committing international crimes is a matter of public interest. This was not disputed by the complainant and there is no point in pursuing this line of argument, as it is no longer useful to the respondents after the finding that they cannot rely on a defence of "fair comment". In any case, fair comment is a statement based on the writer's or speaker's honest opinion about a matter of public concern. It does not matter, therefore, whether the matter was "of public interest", according to Black's Law Dictionary.

We would like, however, for the record, to note that the counsel for the respondents went to great lengths to refer the Commission to four authorities to show, among other things, that the offending story was a matter of public interest. The authorities include Martha Karua v The Standard & Another (HCCC No. 294 of 2004), Jameel & another v Wall Street Journal (House of Lords [2006] U.K.HL 44), and Briget O'Rawe v William Trimble Limited [2010] N.I.Q.B. 135). We find the references, though interesting, irrelevant and inapplicable in the present case. There was nothing in the authorities that excuses a publisher gathering information on a matter of public interest from taking responsible and fair steps and exercising due diligence.

False information

The complainant claimed that respondent gave false and misleading information to the Commission in the letter dated 13 March 2011. In that letter the Standard Group Assistant Director-Legal, Nelly Matheka, states as follows:

> *[W]e wish to state that the complainant has at no time sought a correction from us neither have we refused and or neglected to correct any such error. In addition we have not denied the complainant an opportunity to reply as alleged...*

The counsel for the complainant, Mr. Mugambi, told the Commission that the respondents made the claim despite knowing its falsity. However the counsel for the respondent, Mr. Billing, claimed that at the date of writing the letter there was "no direct communication" by the complainant to the respondent to correct any errors. "There was therefore no neglect or refusal by the respondents," he said. "The press release of 13 January 2011 by the complainant states that the article of 11 January 2011 was false and fabricated. [It] does not ask for correction."

The complainant did not issue a press release on 13 January as stated by Mr. Billing. He issued one on 12 January in which he clearly demanded an apology. He stated:

> *I have instructed my lawyers to draw the attention of the ICC Prosecutor to the Standard story and the falsehood contained therein, and in the meantime shall seek for publication of a substantiation of the story failing which I demand an appropriate apology from the Standard newspaper and the two journalists [Mr. Agina and Mr. Omanga] for writing and publishing a fabricated story concerning me.*

And the *Standard* did in fact publish in its online edition on 12 January 2011 a story based on the press release. The story (still available on the website at the time of writing this), by Beuttah Omanga, headlined "Muthaura: I'm not part of any ICC pullout team", among other things, stated:

> *Yesterday, Muthaura termed the story a fabrication <u>and demanded an apology</u>" (emphasis added).*

We fail to see how the communication for an apology could have been more direct.

Mr. Billing also states that there was no request by the complainant to the respondents for an opportunity to reply under Article 5 of the Code. That is technically correct. However, a request for an opportunity to reply is implicit

in Ambassador Muthaura's press release of 12 January 2011. Furthermore, Article 5 (Opportunity to Reply) states in part:

> *A fair opportunity to reply to inaccuracies should be given to individuals or organizations when reasonably called for....*

The ordinary and natural meaning of those words suggests the publisher can, of his own motion, offer the opportunity to reply. In any case, Article 5 should be read with other provisions of the Code, which taken together imposes a duty on the publisher to offer a fair opportunity to reply. The provisions include the following:

Article 1 (Accuracy and Fairness) which states:

> *(a) ... All sides of the story shall be reported, wherever possible. Comments should be obtained from anyone who is mentioned in an unfavourable context.*
> *(b) Whenever it is recognized that an inaccurate, misleading or distorted story has been published or broadcast, it should be corrected promptly....*
> *(g) Journalists should treat all subjects of news coverage <u>with respect and dignity,</u> showing particular compassion to victims of crime or tragedy (emphasis added).*

Article 4 (Accountability) which states:

> *Journalists and all media practitioners should recognize that they are accountable for their actions to the public, the profession and themselves. They should –*
> *(a) actively encourage adherence to these standards by all journalists and media practitioners;*
> *(b) respond to public concerns, investigate complaints and correct errors promptly;*
> *(c) recognize that they are duty-bound to conduct themselves ethically.*

It is the view of this Commission that the first respondent is shielding behind a technicality to avoid a finding that he did give false or misleading information to the Commission, which is an offence under section 37 of the Media Act.

Prayers

The complainant's prays for the following orders:

1. That the respondents publish an appropriate apology and retraction of the story in the same prominence and in similar fashion as the original and further clarify that the said ""think tank"", was a fabrication.

2. That the Commission imposes the penalty set out in section 37(2) of the Act against the respondents for transmission of false and misleading information to the Commission.
3. That further to the above orders, the Commission should direct the respondents to identify their source, and if none exist, then state as much.

4. That the respondents be publicly reprimanded

Orders

Taking into account all the circumstances of the case and the prayers sought by the complainant, the Commission makes the following seven orders:

1. We order and direct that the first respondent retracts the story published on 11 January 2011 and offers an apology with similar prominence given to the offending story. Accordingly we order the counsels for both parties to agree on a draft statement retracting the offending story and offering an apology to the complainant within 14 days from today and further to agree on a date for publication of the statement within 21 days hereof. In the event of failure, we further direct that this matter be mentioned before the Commission for further orders. Either party is at liberty to apply.

2. We further order that the first respondent removes within 14 days from today's date the story "*Kenya's Secret plot against the ICC*" from its website, and in addition we order that the first, second and third respondents jointly inform in writing within 14 days from today's date the publishers of ECADF Ethiopian News that the story "*African Dictators Secret Plot against ICC*" posted on their website, to which the respondents jointly bear the credit of authorship, should be removed because it has been proved to be false following the Complaints Commission process. The respondents must provide

a copy of the written message and proof that it has been delivered to ECADF Ethiopian News within 14 days from today.

3. We order and direct that the first respondent pays a fine of fifty thousand shillings, or serves imprisonment for a term of three months, for making a statement to the Complaints Commission which he knew to be false or misleading. The fine is to be paid to the Media Council within 14 days from today.

4. We order and direct that the first respondent pays a fine of two hundred thousand shillings, or serves imprisonment for a term not exceeding six months, for failing to conduct himself ethically and to correct errors promptly in violation of Article 4 of the Code. The fine is to be paid to the Media Council within 14 days from today.

5. We order and direct that the second respondent, Mr. Ben Agina, and the third respondent, Mr. Beuttah Omanga, each writes a personal apology to the complainant. Accordingly we order the counsels for both parties to agree on a draft statement offering the apologies to the complainant within 14 days from today. In the event of failure, we further direct that this matter to be mentioned before the Commission for further orders. Either party is at liberty to apply.

6. The complainant's prayer that the respondents be ordered to lift the veil of reportorial confidentiality and name their sources, or declare that they do not exist, is denied. Instead, the Commission advices the complainant that a court of law, rather than this Commission, would be the right forum to seek to compel the respondent to reveal the identity of the unnamed sources in the exercise or protection of any of his rights or fundamental freedoms that may have been violated under Article 35 (1) (b) of the Constitution of Kenya .

7. The complainant's prayer that the respondents be publicly reprimanded is denied. The orders herein are sufficient vindication for the complainant.

It is so ordered.

Any party aggrieved by these orders my appeal to the Council in the prescribed manner within 14 days from the date hereof.

Delivered at Nairobi on this 19th Day of September 2011

Priscilla Nyokabi

……..

.Ag Chairperson Complaints Commission

Commissioner Fatuma Hirsi

……..

.

Member Complaints Commission

Peter Mwaura

……

Member Complaints Commission

Murej Mak'Ochieng.

……

Member Complaints Commission