

REPUBLIC OF KENYA
IN THE MATTER OF MEDIA COUNCIL ACT 2013
AND
IN THE MATTER OF MEDIA COMPLAINTS COMMISSION
COMPLAINT NO. 5 OF 2021

ARTICLE 48 INITIATIVE.....COMPLAINANT
VERSUS
STANDARD GROUP PLC.....1ST RESPONDENT
MANAGING EDITOR, STANDARD NEWSPAPER.....2ND RESPONDENT
JOHN KAMAU MUTHONI.....3RD RESPONDENT

DETERMINATION

A. INTRODUCTION

1. The Complainant is a company limited by guarantee. It was registered on 31st December 2019. Article 48 Initiative is also registered as a law firm and advocacy organization for persons living with disabilities and is represented in this complaint by Ms. Felicia Mburu its Director. The 1st Respondent is a media enterprise operating in Kenya and owns the Standard Newspaper which is managed by the 2nd respondent. The 3rd Respondent is an employee of the 1st Respondent
2. On the 21st of September 2021, the 1st Respondent, in its newspaper, The Standard published an article titled, *Inmates held at the president's pleasure suffer dose of injustice*. On the 22nd of September 2021, the same newspaper published another article titled: *Police still follow colonial rule book when dealing with mentally ill suspects*.
3. The Complainant in this matter, was aggrieved by the two articles, and on 7th of October 2021, they filed a complaint before the Media Complaints Commission alleging that the Respondents violated several clauses of the Code of Conduct for the Practice of Journalism in Kenya.
4. The reasons advanced for the complaint were that the stories were misleading, incomplete, inaccurate and that they perpetuated stereotypes against persons with disability in breach of

the Code of Conduct for the Practice of Journalism in Kenya as set out in the Media Council Act of 2013.

5. They further complained that the Respondents jointly and severally published and or caused to be published:
 - a. Personal information of persons with disability without consent.
 - b. Health information of persons with disabilities without consent.
 - c. Family circumstances of persons with disabilities without consent.
 - d. False information on property rights.
 - e. Court material without verification of facts and information about on-going cases which are not open to the public.

Further, they complain that the Respondent colluded with other parties and misrepresented themselves to get information and were biased in the reporting.

6. Consequently, the Complainant sought several reliefs, among them, an apology, a correction, withdrawal of the two articles from all the media's platforms and payment of damages for family members mentioned in the articles without their consent or knowledge. This is pursuant to Section 38 (1) and (2) of the Media Council Act of 2013.
7. In response the, the Respondent stood by the articles and stated that they were published in public interest and added that they were accurate reports of documents that were publicly available. They urged the Commission to dismiss the Complaint as there was no discernable violation of the Code of Conduct for the Practice of Journalism.
8. Pursuant to section 35(1) of the Act, the Commission conducted an assessment of the initial pleadings and admitted the Complaint for adjudication

B. THE COMPLAINANTS CASE

9. The complainant filed two witness statements. Felicia Mburu's statement is dated 20th of April 2022 while Abraham Musili's statement is undated. The two articles complained of were also attached as evidence of what is alleged. They also gave oral testimony.
10. In the oral evidence, the complainant Ms. Felicia Mburu, as the first witness PW1 on the 20th of April 2022 adopted her witness statement and was subjected to cross examination by the Respondent's advocate.

11. According to the witness, the complaint is centered on the launch of a report from a study titled "*An exploratory study of the Interaction between the Criminal Justice System and Persons with Intellectual and Psychosocial Disabilities*" that was meant to be "an invite only event". The witness testified that since the forum was only meant for those who had express invitation, the 3rd Respondent gained access to the online meeting by subterfuge and obtained information which he was not meant to be privy to and used the same in the two publications.
12. The Complainant's second witness PW2 was Abraham Musili who testified on the 29th of June 2022. The witness testified that he came across the article when someone told him that he had seen his name in the newspapers.
13. PW2 testified that the author of the story seemed not to have had the correct facts. He contended that the publication has negatively impacted his criminal case that was still pending in court.
14. The witness accused the 3rd Respondent of not seeking his consent before publishing the article. He stated that he had never been charged or arrested on the allegations stated in the article.
15. It was Mr. Musili's contention that the documents referred to in the article were from the Power of Mercy Advisory Committee(POMAC) which had reviewed him in 2013, 2016, 2018, 2021 and 2022 thus any records, reports or documents produced by the Respondents in their witness statement were protected under Sections 32 of the Presidential Mercies and Pardons Act 2011. He indicated that he had appeared before the Committee on several occasion but had not received any feedback.
16. Mr. Musili further testified that he had not given anyone the documents referred to in the article because he did not possess them, neither were they in any court. He stated that whoever was in possession of the documents referred to in the article either stole them or got them from someone in the POMAC.
17. PW2 testified that his case was heard and determined in 1992 and there are no medical records in this file and that currently he had only one on-going *habeas corpus* application recorded by the Court as Misc. Application E302 of 2020 to question denial of liberty on the basis of perceived disability under section 166 of the CPC, now unconstitutional. The *habeas* application equally has no medical records for Abraham Musili nor any information on his previous 1992 conviction nor POMAC report from 2008, nor allegations of

drug/alcohol abuse nor purported bribe taking, nor children, nor purported property nor prison records.

18. Mr. Musili pointed out the following allegations were not true: i). having property in Mavoko; ii). having two children; and iii). being bribed while working at a morgue.

C. THE RESPONDENT'S CASE

19. In their statement of response, the Respondents denied that they published or caused to be published, health information of persons with disability without consent; published family circumstances of persons with disability without consent; published false information on property rights; published false and purported court materials without verification of facts; published information about on-going cases which are not public information and that in collusion with other parties they misrepresented themselves and were biased.
20. They also denied that they violated the Code of Conduct for the Practice of Journalism with respect to accuracy and fairness, accountability right of reply and privacy. They argued that the complaint was premised on alleged violations of the Data Protection Act 2019 which is the exclusive mandate of the Office of the Data Commissioner and the High Court of Kenya on appeal.
21. The Respondents also questioned the justiciability of the complaint and the jurisdiction of the Commission to entertain it.
22. The Respondents called two witnesses. John Kamau Muthoni DW1 was the Respondent's first witness. He appeared before the Commission on the 29th day of June 2022. He testified that he is a Court Reporter at The Standard Group, where he had worked for 9 years.
23. DW1 stated that he got to know about the forum on '*Justice system and persons with disability*' in May 2021 and managed to get the report in September 2021. He received the published document the same day the report was launched.
24. He told the Commission that he knew about the launch through his work as a Court Reporter. He is assigned and gets information on the Chief Justice's (CJ's) engagements when they concerned the public. The CJ's Communications person told him about the launch.

25. On the launch of the Report of **Arthur's s Dream Autism Trust (ADAT)**, the witness told the Commission that the same had been advertised on their social media page as well as The African Litigation Center.
26. He insisted that he used his email address to get into the virtual launch of the report and had no control of who could access the launch and that when he logged in, he wasn't kicked out.
27. DW1 said that he received no complaint from ADAT or the South African Litigation Center on the article after he used their report as was shared during the launch.
28. On the documents of the probation officer, he said that he got them from a Sharon Ndori who was working at Article 48 at the time and who now works in a government agency.
29. The witness told the Commission that it was in public interest for the story to be published because he wanted to highlight the plight of people incarcerated at Mathare at the president's pleasure.
30. The witness said that whatever was written in the articles was obtained from the probation report sent to him by Sharon Ndori. He argued that he did not require consent to have the report and that no one from the board had complained about the publication as it was part of court documents, as public records from the Milimani case Misc. No 4 of 2020.
31. On the question of whether he sought consent from the Complainants, he said that he did not need to since the launch was a public event and anyone could access the launch. He attended the launch where the report was shared, he further stated that the wording of the Power of Mercy Act under section 32 (2) does not mandatorily prohibit sharing of information. The reasons why he wrote and presented the story for publication was because he intended to create public awareness especially regarding the freedom of the incarcerated persons so that they could get help and/or elicit reaction from the public.
32. The Respondent also called Dr. Jane Muiruri as their DW2. Dr. Muiruri testified before the Commission that she had worked with People with Mental Disability since 2016 and that ADAT as an organization deals with such people.
33. She said that she was aware that PW2 was to be part of the persons to be helped by one of the consortiums they had.
34. Dr. Muiruri said that the article was to bring light to the report and that she had no issue with how the Respondents reported it, arguing that the article was a true representation of the report they had prepared.

35. The witness said that even though she was part of the authors, she had no issue with not being credited by the reporter and that the fact that John Kamau is her nephew was irrelevant to the issue. She said that they got in touch with him because he was a court reporter and introduced him to the rest of team for him to continue with the research and the writing of the story.
36. The witness confirmed that the launch was open to the public and that they had sent the link via social media to as many people as they could.

D. ANALYSIS AND DETERMINATION

37. The Commission has considered the pleadings of the parties as well as their detailed submissions and authorities and have identified the following issues as rendering themselves for determination:
 - i. **Whether, personal information, of persons living with disability was published without their consent.**
 - ii. **Whether there was disclosure of false information on property rights and therefore inaccurate reporting.**
 - iii. **Whether the Respondent commented on cases pending before the court and therefore in violation of the rule of sub-judice.**
 - iv. **Whether personal information, of persons living with disability was published without their consent.**
38. In determining these issues, the Commission merges the first three grounds of complaints as set out in the complaint dated the 7th of October 2021. The grounds include disclosing personal information of persons with disability without consent, disclosing health information of persons with disability without consent and disclosing family circumstances of persons with disability without consent.
39. In their submissions, on this particular issue, the complainant dwelt on matters of the Data Protection Act of 2019. Section 8 (1) (f) of the Data Protection Act of 2019 states that one of the functions of the office of the Data Commissioner is to receive and investigate any complaint by any person on infringements of their rights under this Act.
40. In their submissions, the Complainant quoted Section 2 of the Data Protection Act which defines "**health data**" as data related to the state of physical or mental health of the data

subject and includes records regarding the past, present or future state of health, data collected in the course of registration for, or provision of health services, or data which associates the data subject to the provision of specific health services; "**identifiable natural person**" means a person who can be identified directly or indirectly, by reference to an identity such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social or social identity.

41. Clearly the matters complained of would appear to this Commission as matters for the office of the Data Commissioner and the Complaints been pursuant to Section 8 (1) (f) of the Data Protection Act of 2019 should have been filed before the Data Commissioner who has powers to investigate these issues.
42. The Respondents do not address this issue in their submissions but have mentioned it in their statement of response. Nevertheless, we agree with the Respondents that the submissions of the Complainant mutate and get convoluted as they conflate issues of constitution, copyright, and defamation.
43. As rightly submitted by the Respondents parties in any litigation are bound by their pleadings, and one party should not be allowed to steal a march on another by purporting to amend its prayers in submissions. Simply put, submissions are not pleadings, and it amounts to waste of time to introduce matters that are not expressly pleaded in submissions.
44. The Commission has opted not to throw the baby out with its birth water. Our perusal of the stories as published reveal some issues that fall within our mandate and warrant our comment and determination. We have painstakingly looked at the headlines and the content and text of the stories and conclude that the said articles were published in the best interest of the persons living with disability and in public interest.
45. The articles were, as submitted by the Respondents, published to raise public awareness- especially regarding the freedom of the incarcerated persons so that they can/could get help/ elicit a reaction from the public.
46. The Commission is unable to find bad faith, ill motive, malice, or mendacity in the publication of the articles highlighting the plight of people held for long periods without trial on account of mental health challenges. We do not find any wrongdoing on the part of the journalist and therefore the remedy of withdrawal of the articles from all platforms or an apology cannot accrue.

47. The complainant argues in her submissions that the 3rd Respondent misrepresented himself to access the virtual launch of the report. The Code of Conduct for the Practice of Journalism in question in Clause 9, states that a journalist shall identify themselves and not use subterfuge unless information cannot be obtained by other means. This is a strong ground in any complaint, and it should have been pleaded from the outset and not introduced in the submission as has been canvassed elsewhere in this decision. To hold otherwise would be tantamount to denying the Respondent the right to be heard on that ground.

48. The Commission would however like to caution the journalist that public interest must also be pursued in adherence to the law and that the right to know shall be weighed against the privacy right of people. The express provision is in Clause 14 of the Code of Conduct for the Practice of Journalism and we wish to reiterate it here for clarity purposes.

(1) The public's right to know shall be weighed against the privacy rights of people in the news.

(2) Journalists shall stick to the issues.

(3) Intrusion and inquiries into an individual's private life without the person's consent are not generally acceptable unless public interest is involved. Public interest shall itself be legitimate and not merely prurient or morbid curiosity.

(4) Things concerning a person's home, family, religion, tribe, health, sexuality, personal life, and private affairs are covered by the concept of privacy except where these impinge upon the public.

49. The question that the Commission grappled with was whether, the 3rd Respondent remained true to the issues and facts of the story before publishing; whether his intrusion onto the private life of persons with disability was punctuated by bad faith or an attempt to raise awareness towards their wellbeing. Further, whether public interest being pursued was prurient and legitimate.

50. The Respondents submit that the publication was done in pursuit of public interest. This issue came out quite clearly from both the witnesses presented by the Respondents.
51. In the case of Public Interest: The essence of this defense is that the respondent has a duty to disseminate the information complained of and that the public have a corresponding interest in receiving the story.
52. Even though this defense is by no means limited to the publication of stories by the media, it is in this context that the idea of publication in the public interest is most pronounced.
53. The leading case on the defense remains Reynolds v Times Newspapers, (1999) UKHL 45 (1999) 4 All ER 609, (2001) 2 AC 127 where the House of Lords proposed a number of guidelines that a defendant should observe if wishing to argue that a publication was responsible and in the public interest. Those non-exhaustive guidelines, listed by Lord Nicholls, require the person publishing the story to consider: -

- 1. The seriousness of the allegation/ story/information, i.e., if it is not true what will be the level of misinformation to the public and what will be the corresponding harm to the individual.*
- 2. The nature of the information and the extent to which the subject-matter is a matter of public concern.*
- 3. The source of the information and whether it is reliable or motivated by malice and/or avarice.*
- 4. Whether suitable steps have been taken to verify the information.*
- 5. Whether the allegation in a story has already been the subject of an investigation which commands respect.*
- 6. Whether it is important that the story be published quickly.*
- 7. Whether comment was sought from the claimant, or whether that was not necessary in the context of the story.*
- 8. If the article or story includes the gist of the claimant's version of events.*
- 9. Whether the article or story is written in such a way as to amount to statements of fact, or whether it raises questions and is suggestive of the need for further investigation.*

10. The timing of the publication.

54. It is the Commission's finding that the article as published fits the bill, as the story fulfills the rigors of the Code of Conduct for the Practice of Journalism on public interest and privacy without destroying each other.

Whether there was disclosure of false information on property rights and therefore inaccurate

55. Accuracy and fairness are one of the most important Clauses of Conduct for the Practice of Journalism. As the first Clause it is divided into a compendium of 15 other sub-clauses.
56. Sub-Clauses 2 states that a person subject to this Act shall write a fair, accurate and an unbiased story on matters of public interest.
57. The Commission has considered the rival submissions on this. The Complainant in their submission extensively quotes Clause 1 that outlines the standards on accuracy and fairness.
58. Specifically, headings shall reflect and justify the matters printed under them, journalists shall give an unbiased story and comments shall be sought from those shown in an unfavorable light. Headings containing allegations shall identify the source making them and seek to understand the diversity of the community without stereotype or bias
59. The Respondents submitted that the documents relied upon to write the article were well known and even the complainant had access to them. It cannot be said that the same was obtained illegally from their possession as evidence tendered reflects that the same was shared by Sharon Ndori who was advocate for Abraham Musili.
60. On the issue of intrusion into a private meeting, the Respondents submit, and we concur that witnesses from both sides agreed that the launch of the report relied on to generate the story was a virtual launch. The 3rd Respondent wholly and fully relied on the report titled an *"Exploratory study of the interaction between Criminal Justice System and Persons with Intellectual and Psychological Disabilities"* that was launched by the Chief Justice Martha Koome.
61. The Respondents further submit that in as much as Felicia Mburu insisted that the launch was a private affair, this cannot be further from the truth. The Respondent in its further list of documents dated 25th April 2022 has exhibited printouts from the internet to show that there was a public invitation through respective organizations inviting the public to

participate on both days. Ms. Felicia Mburu was at pains to explain at what point the public invitation turned into a private meeting.

62. The Commission finds and holds that the 3rd Respondents did not veer off from the report. His story cannot be faulted as inaccurate and therefore a complaint towards that direction is of no merit.

i. Whether the Respondent commented on cases pending before the court and therefore in violation of the rule of sub- Judice

63. The Commission merges grounds 5 and 6 of the complaint because both refer to commenting on matters pending before the court. The Commission is guided by Article 50. (1) of the Constitution on open justice system. The Article states:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

64. Sub-Article (e) states that every person has a right fair trial that includes a public trial before a court established under this Constitution. The general principle is that all cases must be heard in public. Judicial proceedings are normally conducted in a transparent manner and with the oversight of the people so as to safeguard the rights of those subjects to the power of the court and to allow the scrutiny of the public in general.
65. The Complainant was aggrieved that the Respondents published information about cases which are not open to the public. They also contended that the court materials were published without verification of facts. This Commission detects an argument of lack of accuracy on the part of the 3rd Respondent, although particulars thereof are not provided. All what was presented was a miscellaneous application between Abraham Ngalyuka Musili versus the Attorney General, a case that has no known number. The News Manual, a professional resource for journalist and media chapter 64 on the rules of court reporting outlines three main reasons why journalist must report on court cases. According to the manual, journalist report on court matters to encourage public confidence in the law, help the law to deter future crimes and to get strong news stories.

66. The High Court in Petition 56 of 2013 Charles Muturi-vs- Standard Group Limited and 4 others canvassed the issue of open justice system and interrogated the scope of Article 50 of the constitution the courts held

Article 50 (d) of the constitution provides for the right to a trial to be held in public subject to the limitation under sub article (8). The general rule is that the administration of justice must be done in public, the public and the media have a right to attend all court hearings and the media is able to report those proceedings fully and contemporaneously. The public has the right to know what takes place in the criminal courts and the media in court acts as the eyes and ears of the public, enabling it to follow court proceedings and to be better informed about criminal justice issues. The open justice principle is central to the rule of law. Open justice helps to ensure that trials are properly conducted. It puts pressure on witnesses to tell the truth. It can result in new witnesses coming forward. It provides public scrutiny of the trial process maintains the public's confidence in the administration of justice and makes inaccurate and uninformed comment about proceedings less likely. Open court proceedings and the publicity given to criminal trials are vital to the deterrent purpose behind criminal justice. Any departure from the open justice principle must be necessary in order to be justified. To use the provisions of article 50 (8) if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.

67. The Commission is persuaded and guided by the dicta of the court and finds no merit in this particular claim and the arguments advanced in the submissions of the Complainant.
68. The Commission finds and holds that the best forum to raise the issue of publishing matters pending before court would have been before the court handling the matter. What the Commission gleaned or draws from the complaint is that the Respondent violated the sub judice rule. The sub judice rule regulates the publication of matters which are under consideration by the court. Does this Commission have power under Section 38 to handle

sub judice claim in a matter pending before another court? The answer is no and therefore the remedies sought to mitigate grounds 5 and 6 cannot be granted.

69. On the issue of the Respondents colluding with parties to misrepresent and create bias, the submission that Sharon Ndori, who was an employee of Article 48, DW1 and DW2 is not convincing. The details of the alleged collusion are not outlined, and the Commission is unable, going by the evidence that was adduced during the hearing, to find collusion or conspiracy to misrepresent facts and create bias.
70. Lastly, the Commission noted that the Respondent's submitted extensively on the issue of the Complainant's lack of locus to institute this Complaint. However, it is the Commission's position that any person can file a Complaint before the Commission so long as they can demonstrate that there is discernable violation of the Code of Conduct for the Practice of Journalism.

E. CONCLUSION

71. The Commission notes that the Complainant prayed for the following reliefs:
- a) Apology
 - b) Correction.
 - c) Immediate withdrawal of all articles from all platforms.
 - d) Payment of damages for family members mentioned without their consent, or knowledge.
 - e) Impose a fine under Section 38 (1) (f) of the Media Council Act on Standard Group PLC and John Kamau Muthoni for the derogatory statements and images in the articles on disability discrimination perpetuating stigma and prejudice.
72. Having established that the stories published were in public interest and that public interest underscores the moral authority of journalism to ask hard questions and in some cases, to test the limits of ethical practice to discover truth, it is the Commission's finding that the remedy of an apology, correction, and withdrawal of all the articles from all platforms cannot accrue.
73. In addressing the issue of payment of damages for family members mentioned without their consent, or knowledge the Commission relies on the case **of Standard Limited & 2 Others**

vs Christopher Ndarathi Murungaru [2016] where the Court of Appeal held that " *The Commission has no power, under section 38 of the Media Council Act 2013 to award the kind of remedies that the Constitution contemplates for violated or infringed rights and fundamental freedoms including a person's right to a reputation and dignity.* The Commission further relies on the case of *Meditest Diagnostics Services Limited vs Nation Media Group Limited (Complainant 03. 2021)* where the Commission stated that "*the fact that the Complainant has included defamation as an injury suffered by it and prayed for an award of damages among other injuries and remedies sought does not in any way take away the Complaints Commission's jurisdiction to entertain the complaint when those other injuries claimed to have been suffered and the remedies sought are all within its mandate.*"

74. Guided by this test, the Commission has neither the jurisdiction to entertain a claim of reputational harm nor make damage awards thereof. Parties are therefore advised to familiarize themselves with the breadth and scope of the Media Council Act of 2013 and the institutions created there under.
75. Having found that there was no violation of the Code of Conduct for the Practice of Journalism, the Commission declines to impose a fine pursuant to section 38(1)(f).
76. Any party aggrieved by this decision can apply for a review pursuant to Section 42 (2) of the Act.

It is so ORDERED

DATED and DELIVERED at NAIROBI this 1ST Day SEPTEMBER 2022



ESTHER ADUMA

VICE- CHAIR, MEDIA COMPLAINTS COMMISSION

I Certify this to be a True copy
of the Original
Sign: *[Signature]* Date: *1st September 2022*
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PROF. NANCY BOOKER

COMMISSIONER, MEDIA COMPLAINTS COMMISSION



LEMPAA SUYIANKA

COMMISSIONER, MEDIA COMPLAINTS COMMISSION

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