

REPUBLIC OF KENYA THE MEDIA ACT, 2007

THE MEDIA COMPLAINTS COMMISSION

COMPLAINT NO. 075 OF 2010

KENYA REVENUE AUTHORITY.....COMPLAINANT

KENYA TELEVISION NETWORK.....RESPONDENT

JUDGEMENT

Facts, Evidence and Issues for Determination

The complainant herein, Kenya Revenue Authority (KRA), is a duly registered state corporation in Kenya tasked with the administration and enforcement of all the laws relating to revenue in Kenya which include but not limited to collection of taxes. The respondent is a television station, Kenya Television Network (KTN), based in Kenya with wide viewership in the region and Kenya in particular and a subsidiary of the Standard Group Limited.

The Complaint

The complainant avers that on diverse dates between 23rd and 28th November 2009 and on 22nd December 2009, the Respondent broadcast a news item (entitled "**Port of Impunity**") wherein the station alleged that members of KRA staff were engaged in acts of corruption, fraud and complicity in tax evasion, which information was inaccurate and unfair contrary to Section 35 (2) of the Media Act (thereafter called the "**Act**") as read together with Article 1 of the Second Schedule to the Act (accuracy and fairness) of the Code of Conduct and Practice of Journalism in Kenya. The Standard Group denied this position and stood by their broadcast.

Complainant's Case

The complainant submitted a copy of the video clip of the said broadcast which the Commission had the benefit of watching extensively. KRA called witnesses who gave *viva voce* evidence on its behalf and these were Mr. Kennedy Onyonyi (PW1), who is the Senior Deputy Commissioner in-charge of the Marketing and Communications Department and Elizabeth Muthoni (PW2), a Customs Officer whose duties include verification of imports entering Kenya.

In his examination in chief, Mr. Kennedy Onyonyi testified that: The news item alleged that KRA's officers were engaged in acts of corruption and had been found complicit in acts which led to tax evasion and further that KRA did not follow procedures in discharging its mandate.

He added that KTN had alleged Entry No. 2009MSA1964871 was irregularly passed, full duties having not been paid, which was not the position.

He asserted that no comments were sought from KRA before the story was aired. The Commissioner General was invited to comment but he declined because KTN refused to show him the report and he could not comment on what he had not seen. It was his contention that had the report been shown to KRA, the complainant would have clarified the issues about the entry, particularly the date it was passed and whether duties were collected prior to the news item being aired. He stated that the report was inaccurate, unfair and not balanced at all.

On cross examination by Mr Echesa Welime, Mr. Onyonyi testified that KTN never aired the statement made by KRA yet KTN journalists were present during the presentation of the statement. However, upon playing the DVD clip submitted to the commission, it emerged that indeed KTN had covered the press statement made by KRA and broadcast it as well.

On further cross-examination, he stated that he was the Senior Deputy Commissioner in-charge of the Marketing and Communications Department but was not well versed with custom regulations as such he was not competent to answer questions on custom procedures.

Elizabeth Muthoni (PW2), a Proper Officer, within the meaning provided for under Section 2 of the East African Customs Management Act, 2005, testified that her duties involve the discharge of goods from the Port. She is based at the Mitchell Cotts Inland Container Freight Station.

Ms. Muthoni gave chronology of events in respect to importation of goods and in particular the container in question. She informed the Commission that goods imported into the country can be discharged at Kilindini Port in Mombasa or at Inland Container Freight station. She added that entry of the imported goods was lodged by the Clearing Agent, IFRA Services Limited in the Simba System on 29th October 2009. The Simba System, she added, was a self declaration in which KRA allows the importer to make the declaration himself.

The importer, Kilimanjaro Food Court, had declared two items, namely 200 cartons of drinking water packed in 1.5 litre bottles and 160 cartons of hair cut kits. The goods were being imported from Dubai in a 140 Container No. FSCU 6694823. It was a consolidated shipment where several importers come together to import goods in one consignment. The supporting documents were lodged on 30/10/09. The agent lodged an invoice for USD 4,120 as the total value of the goods. The agent had assessed the total taxes payable to be **KShs. 196,977.00**. The Declaration Officer No. 00585 at Document Processing Centre sent a message for pre-verification to the clearing agent in the Simba System because he was not satisfied with the declaration. He was suspicious of the self-assessment declaration because of the importation of water into Kenya from Dubai. He sent a request for 100% verification meaning the contents of the entire container were removed and examined. The request was sent on 6/11/2009.

The 100% verification was carried out on 7/11/09 and the Head of Verification Officer, Mr. Yusuf Aden, input a message directing the Verification Officer to raise an offence for under-declaration. The correct value of the goods as per the Valuation Database and Market Survey was found to be USD 57,613.40 and not USD 4,120 as declared by the importer. As a result of the above intervention, the Customs Department collected additional revenue amounting to **KShs. 1,713,981.00**. The offence was compounded and the clearing agent fined KShs. 300,000.00. The entry passed on 18th November 2009 and the goods released on 19th November 2009.

She asserted that the Officers involved in the process acted in the proper manner and did not take any bribe.

She further testified that the news item was broadcast on 23rd and 28th November 2010 and 22nd December 2010. This was after the taxes had been collected and verification carried out. The collection of the taxes and the verification was not prompted by the news article by the Respondent.

On cross-examination, Ms Muthoni testified that the entry shown by KTN and in the hands of John Allan Namu had the following discrepancies: The container number had an extra zero, it read 66904823 as opposed to 6694823, It had not been passed by the Officer in KRA as is the norm, did not have a date of clearance and that the news item aired by KTN showed a document stamped approved which was inconclusive.

In their written submission, the complainant averred that KTN breached the following provisions of the Media Act, Cap 411B as set out below:

i. Accuracy and Fairness

They stated that the news article began with the Prime Time Anchor, Njoroge Mwaura, announcing that ***"Cartels of KRA Officers business and Clearing and Forwarding Agents collude on a daily basis to defraud the country of millions of shillings on a daily basis"***.

It is the complainant's contention that this was in breach of Section 35(2) of the Media Act, 2007 hereafter the Act which reads:

"The media shall keep high professional and ethical standards and shall, at all times have due regard to the Code of Conduct set out in the second schedule to this Act".

They further averred that KTN had breached paragraph 1(d) of the second schedule (Code) of the Act, with its reference to "Cartels of KRA Officers". Paragraph 1 (d) states:

"where stories fall short of accuracy and fairness, they should not be published. Journalists, s h o u l d distinguish clearly in the reports between comment, conjecture and fact".

It was their submission that the news report did not show any KRA Officers receiving bribes and perpetuating fraud - collusion is defined as a fraudulent social understanding. No

distinction was made between comments and facts while conjecture was reported as fact. They further submitted that "PW 2" Elizabeth Muthoni give a chronology of events which clearly show that a red flag was raised on the 6th November 2009 way before KTN came up with the story. On 7th November 2009 100% verification was carried out. A tedious and time consuming process, which was done due to the conscientiousness and diligence of the complainant's officers to ensure the country did not lose any taxes. An offence of under declaration was raised and due taxes of KShs.1, 713,981.00 and a fine of KShs.300, 000.00 paid. The report was aired after the 100% verification. It is their contention that the entire report was inaccurate and unfair on the hardworking and honest officers who detected the fraud and made sure all taxes owed were paid.

They submitted that in publishing the news item, KRA was exposed to contempt, ridicule and its professional reputation greatly harmed. The Import Entry Form used in the story had not been passed by KRA's officers. Indeed there was a discrepancy in the container number. It was not stamped nor signed by KRA Officers. The Respondent did not check this and the story fell short on accuracy. They further submitted that the story should not have been published as it was riddled with inaccuracies which could have been easily checked and that within the four months it took to put the story together, such discrepancies could have been checked.

ii. Provocative and Alarming Headlines

They submitted that the headline of the news article was provocative and alarming in breach of paragraph 1(e) of the second schedule to the Act which states that:

"In general, provocative and alarming headlines should be avoided. Headings should reflect and justify the matter printed under them. Headings containing allegations made in statements should either identify the body or source making them or at least carry quotations marks".

The news article was entitled "***Port of Impunity***". It linked KRA to impunity by showing various clips of the Headquarters Times Tower creating the impression that the Authority operated without due regard to law. This headline alarmed Kenyans who look upon KRA to collect taxes fairly to support the Kenya economy.

iii. Bias

KTN also breached Article 1(a) of the second schedule to the Act which states

"The fundamental objective of a journalist is to write a fair, accurate and unbiased story on matters of public interest. All sides of the story shall be reported, whenever possible. Comments should be obtained from anyone who is mentioned in an unfavourable context".

There were no comments sought from the Commissioner General of KRA before the story was aired and the respondents excuse of it being against management policy to show a story to the persons mentioned there before being aired was not only a lame excuse but was also illegal.

iv. Impartiality, Malicious and Scandalous

In this respect they argued that the Port is operated by many different operators and these include the Kenya Police Service, Kenya Bureau of Standards (KEBS) and Kenya Plant Health Inspectorate (Kephis), Kenya Ports Authority (KPA). None of them were interviewed, nor their views sought. KTN made it look like KRA controls all the activities at the port and this was impartial and lacking in balance, in contravention of Article 1(f) of the Code which reads ***"Journalists should present news fairly and impartially, placing primary value or significance and relevance"***.

The complainant prays for:

- (i) An Apology
- (ii) Retraction of the story

Respondents Case

The Respondent, KTN had two witnesses, Mr. John Allan Namu, then Senior Investigation Journalist at KTN (DW1) and Mr. Katua Nzile, then Managing Editor and currently Deputy Chief Editor (DW2).

Mr. John Allan Namu testified that the investigation took four months and an order was made for goods from Dubai of assorted spare parts from Al Shamali Auto Parts. The shipment was to be delivered at the Port of Mombasa and then to Nairobi by road. His contact from Al Salhiya Africa sent him a container No. 66904823. Investigations he conducted revealed that the taxes due were KShs.150, 000.00 and KShs.200, 000.00 while what the Clearing Agent asked them to pay was KShs. 51, 000.00. Eventually after bargaining a total of KShs. 41, 600.00 was paid.

His confidential sources at KRA (who he did not disclose) also gave him the Import Entry No. 1964871. He could not remember the exact date the goods were released. The Commission sought to know whether import entries were confidential. Counsel for KRA informed them that they were not.

He added that before the airing of the story, they sought Mr. Waweru, the Commissioner General's comments; he declined to comment before seeing the video. They did not show him the clip as it was against KTN's management policy.

He insisted that he stood by his story.

On cross-examination, PW1 stated that if he was doing the story on his own behalf he would have shown the video to the Commissioner General, Mr. Waweru before asking him to comment. PW1 admitted that he did not interview any KRA officer neither was any captured on video taking a bribe. He also acknowledged that the Port has other operators including Clearing and Forwarding Agents, Kenya Ports Authority, Kenya Police but he did not interview nor seek comments from the other operators. He also testified that he did not interview any KRA officer and none was seen taking a bribe in the clip.

PW2 Mr. Katua Nzile, testified that indeed KTN and Standard Group Management had declined to show the news item to Mr. Waweru before airing it, this being a management policy

In their written submissions, the respondents argued as follows

(i) Accuracy and fairness

The respondent averred that at no point in the introductory section of the feature or in its context was it asserted that a KRA official had been shown receiving bribes. The feature was not about showing persons on camera receiving bribes, and infact urged the Authority to further scrutinize the broadcast on the DVD on whether there was any statement to the effect that a KRA official was caught on camera receiving a bribe.

They further argued that in its press statement, KRA publicly admitted that - ***Over the last 18 months, the authority has taken disciplinary action against 162 members of staff for corruption, theft, fraud and complicity in tax evasion out of which 54% are tax officers.***" As such, the news item could not be deemed to be inaccurate or unfair.

(ii) Allegations of bias

On the allegation that the respondents were in breach of paragraph 1(a) of the Code, they argued that during the examination of the witness Mr. Allan Namu testified that he sought a meeting with the complainants Commissioner General, Mr. Waweru, whom he actually met at the KRA offices. This factual testimony is not denied. Mr. Namu testified that he informed Mr.

Waweru of the nature and content of the feature they had investigated and were about to run, thereby according KRA a chance to respond. They asserted there is certainly not implicit, express or any other depiction of malice on the part of the station or the concerned journalists.

(iii) Impartiality, Malice and Scandal

The respondents submitted that this allegation did not form part of the complaint before the Commission. They added that a strict reading of the complaint filed by KRA does not in any way relate to any complaint concerning inaccuracy with regard to the control of activities at the port of Mombasa. They submitted that this was an assertion made by the advocate at the bar and the same should be disregarded as it amounts to an ambush upon the respondent who is on account of this late addition unable to respond appropriately to the same. They prayed that the same ought to be disregarded as it violates the stipulate of *sections 26 and 27* of the **Media Act, 2007** as well as the **Media Complaints Commission Rules, 2009**.

They further submitted that the complainant had failed to prove any breach of the Code and the complaint should thus be dismissed.

Issues for determination

From the foregoing, the clear issues for determination are the following;

1. Was the clip aired by KTN inaccurate and unfair in breach of the Act and the Code?
2. Was the coverage and the report broadcast by KTN biased in respect to KRA?
3. Was the title of the broadcast provocative and alarming?
4. Was the broadcast actuated by impartiality and malice and was the claim procedurally added to the complaint?
5. Is the complainant entitled to the reliefs sought?

Orders

Commissioner Priscilla Nyokabi.....

Commissioner Fatuma Hirsi Mohamed.....

Commissioner Peter Mwaura.....

Commissioner Murej Mak'Ochieng.....