

REPUBLIC OF KENYA

IN THE MATTER OF THE MEDIA ACT, 2007

COMPLAINTS COMMISSION

COMPLAINT NO. 094/2010

MIGUNA MIGUNA.....COMPLAINANT

VERSUS

THE NAIROBI LAW MONTHLY.....1ST RESPONDENT

AHMEDNASSIR ABDULLAHI.....2ND RESPONDENT

JUDGEMENT

On 25/11/2010, Mr Miguna Miguna(hereinafter referred to as the Complainant), made a written complaint to the Media Council of Kenya against the Nairobi Law Monthly(hereinafter referred to as the 1st Respondent) and Mr Ahmednasir Abdullahi(hereinafter referred to as the 2nd Respondent). At the material time, the Complainant was the Prime Minister’s Advisor on Coalition Affairs, and performed such duties from the Office of the Prime Minister of Kenya. The Complainant is also an Advocate of the High Court of Kenya, and a Barrister and Solicitor of the Law of Upper Canada. On the other hand, the Nairobi Law Monthly(the 1st Respondent), a publication by the Nairobi Law Monthly Limited is owned and operated by Mr Ahmednasir Abdullahi(the 2nd Respondent), who is also the Publisher and Editor – in –Chief of the publication.

THE COMPLAINT

The Complainant was specifically aggrieved by the publication in the November 2010 issue of the 1st Respondent at page 17 titled, " **Miguna Miguna loses it again**". A caption "**Grapevine**", was inscribed besides the title. The Complainant averred that the offending article relied on rumours, innuendos, and maliciously made false claims that the 2nd Respondent knew or ought to have known were false.

From the Complaint Form and supporting documents attached thereto, the following statements aggrieved the Complainant;

1. The story's title; "**Miguna Miguna loses it again**" implied that the Complainant was involved in some kind of contest, which he had lost like a previous one or previous ones. The Complainant averred that that there were no contests that he participated in and lost, both during the workshop or previously, and that this headline unfairly attacked and injured his character, reputation and ability as a lawyer and adviser to the Prime Minister
2. The assertion that "*Prime Minister Raila Odinga's Special Adviser on Coalition Affairs, Miguna Miguna , was involved in an ugly spat with Public Service Minister Dalmas Otieno, when he gate crashed an invite-only event for Permanent Secretaries*" was, according to the Complainant both false and defamatory. He averred that he was directed by the Prime Minister to attend the meeting and that he was never involved in any such alleged exchange with the Minister
3. The statement that "*The morning session was open to the public, but the Minister demanded that the mid-morning session- after the break- be exclusive to PSs and facilitators from the Committee of Experts. However, Mr Miguna showed up. The Minister reminded him the meeting was only for PSs but he declined to leave, saying he had been sent by the PM to attend the seminar*" was false and misleading. He averred that this statement portrayed him as an unreasonable person, thereby unjustly damaging his reputation and assassinating his character.
4. The assertion that; "*At this point, Mr Otieno and Head of Public Service Francis Muthaura summoned the police to throw him out. Security officers had been called in but he left before they could arrive. But it was terrible, said one of the participants*" was false and misleading. He

averred that no police or security officers were called or involved, and that this assertion is injurious to his character as a law-abiding citizen, public servant, an Advocate of the High Court of Kenya, and a Barrister and Solicitor of the Law of Upper Canada.

5. The statement that *"The session came four months after Mr. Miguna shamed the country at a conference reviewing operations of the International Criminal Court(ICC) in Kampala, Uganda. During the incident, Mr. Miguna was reportedly shouted out of a session when he attempted to object to Mr Wako's presentation in front of international delegates"* was false and scandalous, made maliciously with the intention of injuring his reputation. He averred that disagreeing with Attorney General Amos Wako at a conference where both of them officially represented the Government of Kenya did not amount to shaming the country.
6. The caption at the top of the story was **"Grapevine"**, implying that the story was made of unconfirmed and unreliable rumours and innuendos.
7. The caption on the Complainants mug shot/ photo **"Newsmaker"** implied that he did something newsworthy. He averred that if the alleged newsworthy event occurred in September 2010, then it ought to have been reported in the 1st Respondents' October 2010 issue. According to the Complainant, the publication of the news after almost two months after the alleged incident points to malice as much as it also aggravates the situation.

The Complainant's general averment is that the foregoing defamatory statements, taken together and in context, is deliberate and intended to cause serious damage to his good name, character and reputation.

The Complainant is further aggrieved by the fact that no one from the 1st Respondent exercised due diligence and fairness by contacting him to verify the authenticity of the stories. He wrote to the 2nd Respondent demanding retraction and an apology but the 2nd Respondent, in a terse rejoinder, stated that there was nothing defamatory, and that they would neither apologise nor retract the story. It is at this point that the Complainant decided to lodge this complaint with the Media Council of Kenya in accordance with section 26(1) of the Media Council of Kenya Act, Chapter 411B of the Laws of Kenya,

as read together with Rule No. 3 and 4 of the Media (Complaints Commission) Rules, of 2009. The Complaint sought an apology and correction of the story by the two Respondents. The complaint was thereafter forwarded to the Complaints Commission as provided in section 26(2) of the said Act as read together with Rule No. 5(1)

THE RESPONSE

Pursuant to section 27(1) of the Media Council of Kenya Act as read together with Rule No.5 (2), the Commission duly notified the respondents, in writing, of the receipt and registration of the complaint, the breach, act or omission in question, and requested their response in writing. According to Rule No. 5(3), the Respondents were to respond to the issues raised in the complaint within fourteen days. Rule No. 5(2) provides;

“The respondent shall, within fourteen days from the date of receipt of notification under section 27(1) of the Act, respond in writing to the issues raised in the complaint”

It is not in dispute that the Respondents were duly served with the Notice of the Complaint but failed to file their response within 14 days as required by the law. The complaint was set down for mention on 14/2/2011 for purposes of fixing hearing dates. On this date, the Respondents made an appearance through their Counsel, and the matter was fixed for hearing on 8/3/2011. At the hearing, the Complainant raised a preliminary objection to the presence and participation of the Respondents' advocates in the hearing, because they had not responded to the complaint as required by the Rules, and that they should be deemed to have admitted the contents of the complaint. The Complainant further argued that having failed to file a response to his complaint, the respondents had not submitted to the jurisdiction of the Commission and should therefore be barred from participating in the proceedings.

In reply, the Respondents' advocates submitted that they were not aware that it was mandatory for them to make a written response to a complaint as a mode of response. They argued that in any event, their subsequent appearances on the date of mention and at the hearing was sufficient submission to the jurisdiction of the Commission and their willingness to participate in the proceedings. They urged

the Commission to invoke Article 159(2)(d) of the Constitution that provides; “ **Justice shall be administered without undue regard to procedural technicalities**” and Rule No.29(2) of the Media (Complaints Commission) Rules, of 2009 that provides; “ **Non-compliance with these rules shall not render void any action taken unless the Commission directs so**”

The Commission delivered its ruling on this preliminary objection on 22/3/2011, in which it observed that invoking Rule No. 29 meant ignoring the mandatory procedural requirement under section 27 of the Media Act. In its ruling, the Commission stated thus; *“The advocates for the Respondents are lawyers who ought to have understood the mandatory nature of section 27 of the rules of procedure in respect of filing a response after due service of notice. Although the Commission has discretionary powers under Rule 29(2) as stated above, this discretion should be exercised judiciously. Indeed the framers of the Constitution could not have had the intention of ridding courts and quasi-judicial bodies of procedure, only that procedure should not impede substantive justice. We do not believe that there will be an impediment of substantive justice if the Commission does not invoke its discretionary powers under Rule 29(2) in their favour.”*

The Commission found that the Respondents had not responded to the issues raised in the complaint as required by section 27(1) of the Media Act, and were therefore deemed to have forfeited their right to do so in these proceedings. Having so found, the Commission made the following orders; *“We consequently order that the Respondents be allowed to be present during the proceedings but exercise no right to cross examine the complainant. We on the other hand decline to the Complainant’s prayer to have summary disposal of his prayers as contained in the complaint. Doing so would lead to impediment of substantive justice. We consequently order that the complainant proceeds to prove his claims substantively”*

The Respondents did not appeal against this ruling and indeed participated in the hearing of the complaint on 22/3/2011, through their advocate Mr Ben Mosota

THE COMPLAINANT’S TESTIMONY

In his evidence in chief, the Complainant reiterated that the publication by the Respondents was false and malicious. He denied having gate crashed at the meeting of Permanent Secretaries in Mombasa.

He produced a copy an Internal Memo dated 15/9/2010 addressed to him by the Chief of Staff in the Prime Minister's Office, inviting him to attend the Permanent Secretaries/ Accounting Officers' workshop on Implementation of the New Constitution scheduled for Friday 17, 2010 from 8.30 a.m. at Serena Beach Hotel, Mombasa. The Complainant testified that he was not aware of and did not see or hear any police summoned. He further testified that he never had an ugly spat with Honourable Dalmas Otieno, that he was not thrown out of the meeting and there was no threat to throw him out as alleged in the article. The complainant also testified that the phrase, **"It was terrible, said one of the participants"** was misleading as it did not name the person who made the comment.

It is the Complainant's view that publishing a story two months after the alleged event further illustrates the malice on the part of the Respondents. The incident in Mombasa, according to the article, took place towards late September 2010 but was published in November 2010.

As concerns the international conference in Kampala, the Complaint stated that he was not shouted out of the session as alleged in the story. He also testified that by putting the title **"Grapevine"** at the top the Respondents knew they were relying on rumours, but in the body of the story, they asserted them as facts.

The complainant testified that when he read the article in November 2010, he was surprised as no one had called him to inquire about the stories reported therein. His efforts to secure an apology or retraction from the Respondents were rebuffed, especially by the 2nd Respondent. To prove this, the Complainant produced copies of the following correspondence between himself and the 2nd Respondent;

1. The Complainant's letter to the 2nd Respondent dated 9/11/2010 addressed to the 2nd Respondent stating the correct facts and demanding an apology and retraction of the story.
2. The email response dated 12/11/2010 from the 2nd Respondent tersely stating that there was nothing defamatory and that they would neither apologise nor retract the story.
3. The email dated 12/11/2010 from the Complainant to the 2nd Respondent notifying the 2nd Respondent that if he did not retract the defamatory article by 2/12/2010, the Complainant

would commence legal action against the 2nd Respondent personally and against 1st Respondent media enterprise.

4. The email dated 18/11/2011 from the 2nd Respondent to the Complainant stating that the story was factual, but at the same time stating that the Respondents wished to publish the Complainant's letter dated 9/11/2010 as a way of clarifying the matter
5. The email dated 18/11/2010 from the Complainant expressing his displeasure at the manner in which his complaint had been handled.

In summary, the Complainant's avers that the said publication relied on rumours, innuendos and maliciously made false claims that the 2nd Respondent knew or ought to have known to be false. The 2nd Respondent did not verify the information and did not contact the Complainant to give his side of the story. The complaint wants the Commission to order the Respondents to publish an apology and correction/ retraction of the story

THE RULING OF THE COMMISSION DATED 14/7/2011

After hearing the Complainant's evidence and submission's, the Commission delivered a ruling on 14/7/2011 wherein it expressed its opinion that it was not convinced that the Complainant had proved his claim substantively. The Commission had doubts as to whether or not the alleged altercations occurred, and opined that it could not, in good conscience, make a finding without further investigation into the complaint. The Commission therefore invoked the provisions of section 28 of the Media Act that grant it powers to require any person to give the Commission reasonable assistance in the investigation of a complaint. The Commission, having found that it needed reasonable assistance from someone who was present and party to the incident at the meeting of Permanent Secretaries, issued a notice to Honorable Dalmas Otieno to appear before the Commission.

When the matter came up for hearing of Honorable Dalmas Otieno's evidence, he did not turn up. The Commissioners present deliberated upon this development, especially in view of the fact that this matter had been pending for too long. It was resolved that the attendance of this witness and any

other witnesses be dispensed with, and that a final decision be made, based on the complaint, supporting documents and the Complainant's testimony and submissions.

ISSUES FOR DETERMINATION

In the absence of any response or other evidence from the Respondents, the Commission finds that the evidence of the Complainant was not challenged. The Commission will therefore make a final decision on this matter based on the complaint lodged by the Complainant, his testimony on 23/3/2011, the supporting documents he attached to his complaint, and produced in court.

The issues for determination must therefore be derived from the pleadings and record of proceedings available on the Commission file. The following are the key issues for determination;

1. Whether the article is false, malicious and based on rumours and innuendos
2. Whether the headline was provocative and alarming
3. Whether the use of the complainant's picture and name harmed the Complainant
4. Whether the 2nd Respondent, as the editor-in-chief contravened the Code of Conduct for Journalism in Kenya
5. Whether the article is in breach of the Media Act and the Code of Conduct for the Practice of Journalism in Kenya
6. Whether the Complainant is entitled to the relief sought?

1. Whether the article is false, malicious and based on rumours and innuendos

The story complained of is titled "**Grapevine**". The Oxford Dictionary defines grapevine as an informal means of communication used to circulate rumours and unofficial communication. This title alone, without any further prove, illustrates that the Respondents relied on rumours to publish the stories about the Complainant. The Respondent's story therefore falls short on accuracy and fairness as

defined in section 35(1) of the Media Act and Article 1 of the Code of Conduct for Journalism. Section 35(1) stipulates;

“The media shall , in a free and independent manner and style, inform the public on issues of public interest and importance in a fair, accurate and unbiased manner, while distinctly isolating fact from opinion and avoiding offensive coverage of nudity, violence or ethnic bias”

Article 1(a) of the Code of Conduct elaborates on section 35 of the Act by providing;

“The fundamental objective of a journalist is to write a fair, accurate and unbiased story on matters of public interest”

Article 1(a) further requires all sides of the story to be reported, wherever possible, and that comments should be obtained from anyone who is mentioned in an unfavourable context. In this matter, there is no proof of the accuracy and fairness of the story, and the Complainant's comments were never sought.

The Respondents, knowing very well that they were relying on rumours, should not have published the story. By so doing, they breached Article 1(d) that stipulates;

“When stories fall short on accuracy and fairness, they should not be published. Journalists, while free to partisan, should distinguish clearly between comment, conjecture and fact”

After the Complainant wrote to the 2nd Respondent seeking an apology and correction, his efforts were rebuffed by the 2nd Respondent who replied that there was nothing defamatory, and that they would neither apologise nor retract the story. This was in clear breach of Article 1(b) that provides;

“Whenever it is recognized that an inaccurate, misleading or distorted story has been published or broadcast, it should be corrected promptly.”

Article 4 requires journalists to be accountable for their actions to the public, the profession and themselves. In particular, Article 4(a) and (b) provides that they should respond to public concerns,

investigate complaints and correct errors promptly. They are also duty bound to conduct themselves ethically.

It is obvious to the Commission that the Respondents relied on rumours to publish false and malicious stories about the Complainant. The Respondents further exacerbated the situation by refusing to apologise, declining to correct the publication, and failing to respond to the complaint within the required fourteen days. They failed to conduct themselves ethically. By so doing, the Respondents caused injury to the Complainant's character and reputation as a law-abiding citizen, public servant, an Advocate of the High Court of Kenya, and a Barrister and Solicitor of the Law of Upper Canada. The Respondents must, therefore be held responsible for their actions.

2. Whether the headline was provocative and alarming

The story's title; **"Miguna Miguna loses it again"** implied that the Complainant was involved in some kind of contest, which he had lost like a previous one or previous ones. The Complainant averred that that there were no contests that he participated in and lost, both during the workshop or previously, and that this headline unfairly attacked and injured his character, reputation and ability as a lawyer and adviser to the Prime Minister.

In order to make a finding on this title, reference is made to Article 1(e) of the Code of Conduct that provides;

"In general, provocative and alarming headlines should be avoided. Headlines should reflect and justify the matter printed under them. "

It is the Commission's finding that the headline of the article in issue was provocative and alarming, as it did not state what contest the Complainant was involved in the past and at that point in time, and in what manner he had lost it again. The headline did not justify and reflect the matter printed in the article. The Commission therefore finds that this headline injured the Complainant's character, and the Respondents must, therefore, be held responsible for their actions.

3. Whether the use of the complainant's picture and name harmed the Complainant

The article complained of bore the Complainant's name and mug shot/ photo, with the caption "Newsmaker". According to the Complainant, this implied that he did something newsworthy. He averred that if the alleged newsworthy event occurred in September 2010, then it ought to have been reported in the 1st Respondents' October 2010 issue. According to the Complainant, the publication of the news after almost two months after the alleged incident points to malice as much as it also aggravates the situation.

As to whether or not the use of the Complainant's picture and name caused him harm, Article 20 of the Code of Conduct guided the Commission. It provides thus;

"As a general rule, the media should apply caution in the use of pictures and names and should avoid publication when there is a possibility of harming the persons concerned. Manipulation of pictures in a manner that distorts reality should be avoided."

The Respondents' use of the words "grapevine", "Miguna loses it again" and "newsmaker" besides the Complainant's photo, had the total effect of causing harm to his character and reputation. The Respondents relied on rumours but still went ahead to publish the Complainant's photo, together with their own opinions of what they thought of him. This was in clear breach of Article 20 of the Code of Conduct, and the Commission holds the Respondents responsible for their actions.

4. Whether the 2nd Respondent, as the editor-in -chief contravened the Code of Conduct for Journalism in Kenya

The Complainant's averment that the 2nd Respondent, Mr Ahmednassir Abdullahi, was the editor in chief of the Nairobi Law Monthly was not controverted. The 2nd respondent flatly refused to apologise when the Complainant requested him to do so, before the matter was lodged with the Commission. In response to the Complainant's demand for an apology and retraction of the said article, the 2nd Respondent replied through an email dated 12/11/2010, saying ***"Thanks for your letter. There are nothing defamatory in the letter. We are neither retracting nor apologizing"*** It is therefore safe to conclude that, being the editor in chief, he knew the contents of and sanctioned the publication of the

said article. This was in contravention of Article 23 of the Code of conduct for the Practice of Journalism that provides for the editor's responsibilities. It stipulates thus;

"The editor shall assume the responsibility for all content, including advertisements, published in a newspaper. If responsibility is disclaimed, this shall be explicitly stated before hand. "

By expressly declaring that there is nothing defamatory in the article, the 2nd Respondent was admitting that he was fully aware of the contents of the article and therefore responsible for the content. To this extent, the Commission finds that the 2nd Respondent breached Article 23 of the Code of Conduct, and must therefore be held responsible for this action.

5. Whether the article is in breach of the Media Act and the Code of Conduct for the Practice of Journalism in Kenya

From the foregoing analysis, the Respondents are in contravention of section 35(1) and 35(2) of the Media Act, and Articles 1(a), (b), (d), (e), Article 4, 20 and 23 of the Code of Conduct for Journalism.

6. Whether the Complainant is entitled to the relief sought?

Having found the Respondents in breach of the Media Act and Code of Conduct, and in the absence of any evidence to contradict the Complainant's claim, the Commission finally decides that the Complainant be granted the prayers sought in his complaint filed with the Media Council on 25/11/2010. This Commission is committed to freedom of the media as enshrined in our Constitution, but is alert to media's corresponding duty of upholding responsible journalism, that publishes accurately and fairly.

ORDERS

Taking into account the evidence on record, the relief sought by the Complainant, the conduct of the Respondents both before and after the complaint was filed; the Commission makes the following orders;

1. We order and direct the 1st Respondent to retract the story published in the November issue at page 17 titled "Miguna loses it again", and offer an apology with similar prominence given to the offending story. Accordingly, we order the Complainant and the Respondents' advocates to agree on a draft statement retracting the offending story and offering an apology to the Complainant within 14 days from today, and further 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 this Commission for further orders. Either party is at liberty to apply
2. We order and direct that the 1st Respondent pays a fine of two hundred thousand shillings for publishing a story that fell short of accuracy and fairness, and failing to distinguish clearly in their report between comment, conjecture and fact in violation of section 35(1) of the Media Act, as read together with Article 1(d) of the Code of Conduct. The fine, imposed pursuant to section 38 of the Media Act, shall be paid to the Media Council of Kenya within 14 days.
3. We order and direct that the 1st Respondent pays a fine of two hundred thousand shillings for failing to keep and maintain high professional and ethical standards, and failing to have due regard to the Code of Conduct set out in the Second Schedule of in contravention of section 35(2) of the Media Act. The fine, imposed pursuant to section 38 of the Media Act, shall be paid to the Media Council of Kenya within 14 days.
4. We order and direct that the 1st Respondent pays a fine of two hundred thousand shillings for failing to report both sides of the story and failing to obtain comments from the Complainant who was mentioned in an unfavourable context in violation of Article 1(a) of the Code of Conduct. The fine, imposed pursuant to section 38 of the Media Act, shall be paid to the Media Council of Kenya within 14 days.

5. We order and direct that the 1st Respondent pays a fine of two hundred thousand shillings for failing to promptly correct the inaccurate, misleading and or distorted story about the Complainant in contravention of Article 1(b) and Article 4(b) of the Code of Conduct. The fine, imposed pursuant to section 38 of the Media Act, shall be paid to the Media Council of Kenya within 14 days.
6. We order and direct that the 1st Respondent pays a fine of two hundred thousand shillings for publishing a provocative and alarming headline that did not reflect and justify the matter printed under them in violation of Article 1(e) of the Code of Conduct. The fine, imposed pursuant to section 38 of the Media Act, shall be paid to the Media Council of Kenya within 14 days.
7. We order and direct that the 1st Respondent pays a fine of two hundred thousand shillings for failing to apply caution in the use of pictures and names and harming the Complainant in violation of Article 20 of the Code of Conduct. The fine, imposed pursuant to section 38 of the Media Act, shall be paid to the Media Council of Kenya within 14 days.
8. We order and direct that the 2st Respondent Mr Ahmednassir Abdullahi pays a fine of two hundred thousand shillings for failing, as the editor –in-chief, to assume responsibility for all content, including advertisements, published in a newspaper, in contravention of Article 23 of the Code of Conduct. The fine, imposed pursuant to section 38 of the Media Act, shall be paid to the Media Council of Kenya within 14 days.
9. We order that the 2nd Respondent Mr Ahmednasir Abdullahi writes a personal apology to the Complainant. Accordingly, we order the Complainant and the advocate for the Respondents to agree on a draft statement offering the apology to the Complainant within 14 days from today. In the event of failure, we further direct that this matter be mentioned before this Commission for further orders. Either party is at liberty to apply.

It is so ordered.

Any party aggrieved by these orders may, as stipulated in section 32(1) of the Media Act, appeal to the Media Council of Kenya, in the prescribed manner, within 14 days from the date hereof

Delivered at Nairobi this 15th day of March 2012

Grace N Katasi(Chairperson)



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