REPUBLIC OF KENYA

IN THE MATTER OF THE MEDIA ACT CAP 411B

IN THE MEDIA COMPLAINTS COMMISSION OF THE MEDIA COUNCIL AT NAIROBI

COMPLAINT NO.083/2010

PETER MBUTHIA GACHUHI……COMPLAINANT

VERSUS

NATION MEDIA GROUP…….……1ST RESPONDENT

MACHARIA GAITHO…….……2NDRESPONDENT

DECISION OF THE COMPLAINTS COMMISSION

Mr. Peter Mbuthia Gachuhi, hereinafter referred to as the Complainant, lodged a formal complaint with the Media Council of Kenya on 12th May 2010 against the Nation Media Group, hereinafter referred as the 1st Respondent, and Mr. Macharia Gaitho, hereinafter referred to as the 2nd Respondent. The Complainant is an Advocate of the High Court of Kenya working with the law firm Kaplan and Stratton advocates. The Complaint is based on opinion article that was written by the 2nd Respondent, a leading and respected journalist and opinion writer working for the 1st Respondent. The article complained about was carried in the *Daily Nation* Newspaper of 20th April 2010 published by the 1st Respondent, arguably the leading media house in the East African region.

THE COMPLAINT

The Complainant complained about the article titled *Want Kenya to be landlocked? Just do away with kadhi courts*, written by the 2nd Respondent and published by the 1st Respondent on

20th April 2010. The nature of the complaint is that the said article "*is most alarming, sensational and inaccurate and meant to elicit a violent and divisive reaction on the ongoing debate*". The Complainant complained about the story because it was "*misleading, inaccurate, inflammatory, biased, promotes ethnic animosity* and *promotes a violent reaction towards those asking for a NO vote at the referendum especially the Christians*". The Complainant added that' *"the article will lead to a Muslim-Christian confrontation on the Kadhi Courts which should be avoided at all costs"*. As remedy, the Complainant sought a correction and publication of an appropriate commentary.

The Complainant resorted to lodge a formal complaint with the Media Council of Kenya after he had earlier written a letter of complaint to the 1st Respondent, for the attention Mr. James Kinyua, on 22nd April 2010 and did not receive a response. In that letter, he had urged the 1st Respondent "*to immediately issue a statement in like prominence, retracting the article with a suitable apology failing which, a complaint will be lodged with the National Cohesion and Integration Commission and with the Media Council".*

THE ARTICLE COMPLAINED ABOUT

The article complained about was produced before the complaints commission. It was indeed written by the 2nd Respondent and published by the 1st Respondent in the *Daily Nation* newspaper on 20th April 2010. The title was *Want Kenya to be land-locked? Just do away with Kadhi courts*. To get the full gist of its content, we hereby reproduce its body:

It's just as well that victory for the No campaign would not lead to the removal of the Kadhi's courts from our constitution.

For if that happened, Kenya would become a landlocked country.

We would say goodbye to the famous beaches and hotels that generate an entire tourist economy.

The ancient towns and settlements that make a coast so alluring to visitors, historians, anthropologists and other scholars would in an instant become the property of our southern neighbour.

Mombasa, Malindi and Lamu would become part of Tanzania.

The port of Mombasa would no longer be ours. Nor would Fort Jesus, the Gedi ruins, the Vasco da Gama pillar and the Kilifi and Kwale titanium sands.

We will need passports to access the fleshpots of Mtwapa and all the entertainment joints that attract visitors like insects to light.

We have enjoyed a hold on landlocked Uganda because most of its trade passes through our port. No more, for we would also be at the mercy of a neighbour that doesn't care too much for the East African Community protocols on free movement and trade.

How would all that happen? Simple. The Kadhis courts did not happen on our present constitution by accident, by mistake, or as part of some long-range Islamisation campaign as is currently being suggested by some extremist propaganda.

It was all part of the Lancaster House independence negotiations. At the time, you see, the coastal strip was technically not a part of what was known as the Kenya Colony. It was part of the dominion of the Sultan of Zanzibar, but administered as a British Protectorate.

The British could have surrendered the landlocked Kenya Colony to get independence but retained the Protectorate to eventually get its own independence along with Zanzibar the following year.

Zanzibar of course subsequently went into union with the Republic of Tanganyika, to form the country now called Tanzania.

Were it not for the agreement establishing the Kadhi's courts so as to extend Kenyan sovereignty to the coastal strip, it would have been a part of Zanzibar, and subsequently part of Tanzania!

That is the agreement the No campaigners are now suggesting we can unilaterally abrogate. They prefer to close their eyes to what would be the logical next step – going back to the post-agreement status quo.

AT THE SAME TIME, THEIR CAMPAIGN neglects to mention another small detail. A No vote does not mean that the Kadhis' courts will be expunged from our constitution; they will remain there quietly doing what they have always been doing. So, in effect, a No vote is also a Yes vote for retention of those same courts!...

The contents of the rest of the article are detailed in the copy of the said article that was produced by the parties.

Mr. Ken Nyaundi, the then Chair of the Complaints Commission, wrote to the Managing Editor, *Daily Nation*, on 12th July 2010, notifying him of the Complaint and requiring him to respond within fourteen (14) days. Having received no response, Mr. Ken Nyaundi again wrote to Mr.

Joseph Odindo, the Editorial Director of the Nation Media Group, on 30th July 2010 and required him to respond by 7th August 2010 failure to which the matter would be set down for hearing. It was only on 17th August 2010 that a response from the Respondent's lawyer was received at the Media Council of Kenya.

THE RESPONSE TO THE COMPLAINT

The Respondents' response was filed by their lawyer, Mr. Sekou Owino, on 17th August 2010. Regarding the Complaint, Mr. Owino acknowledged that the 2nd Respondent wrote the article complained about. However, he denied everything else. He stated that the article was well balanced and could not have been alarming or sensational. He went on that it was untrue that the article was meant to elicit violent or divisive reaction to the then ongoing debate on the Constitution amongst the readers as no such reaction was ever elicited. The article was fair comment and reasonable opinion on a matter of public interest by the 2nd Respondent. Mr. Owino argued that the Complaint is unfounded as the article clearly urged peace and sober debate on matters of Constitution generally and on the Kadhi Courts specifically. He denied that the 2nd respondent was biased as he was objective and fair on a matter of grave public interest of the time. He also denied that the article sought to instigate ethnic or sectarian animosity.

Regarding the Remedy sought by the Complainant, Mr. Owino stated that the article constituted the 2nd Respondent's honest opinion and did not express any error of fact that would justify the claim for a correction. There was no basis for the claim for a commentary on the matter as this would constitute censorship and abridgement of the freedom of the media generally and of the 2nd Respondent's freedom of speech in particular. Mr. Owino argued further that the Complaint had no basis in law or media ethics and sought to compel and intimidate the Respondents into self-censorship to suit the Complainant's personal views and opinions. He went on to state that there was nothing in the article which would lead to religious confrontation as alleged by the Complainant. Mr. Owino argued that the matters of the Constitution generally were at the time of the publication of the article issues which required open debate of all shades of opinion. He concluded that the claim seeking to compel

the Respondents to publish a commentary on this matter would not only constitute censorship by compelling a media house to publish a commentary but also illegal as it would constitute contempt of court since the matter relating to this is pending in the Court of Appeal.

COMPLAINANT'S REPLY TO THE RESPONSE

The Complainant's reply to Mr. Owino's response was received by the Media Council on 2nd September 2010. The Complainant still held that the article complained about was not well balanced as a matter of fact or law. He maintained that the article was extremely alarming and warned Kenyans of the dire consequences should the Kadhi courts be removed. The Complainant argued that with the passing of the new constitution at the referendum, the Respondents cannot claim that such a reaction could not have ensued if the referendum had a different result. The Complainant asserted that the article complained about was not fair comment because it sought to give a grossly distorted history of the Coastal strip. He went on that the said article was not a reasonable opinion, was extremely irresponsible and was not based on any sufficient historical information. The article failed the public interest demand that the Respondents publish articles that are objective.

The Complainant went further to state that the Respondents are jointly and severally in breach of the Media's Code of Conduct set out in the Media Act, No. 3 of 2007. Specifically, the Respondents failed to exercise due responsibility and objectivity expected on such serious matter and in particular the respondents had failed to show any justification of the article, the following:-

I. That Kenya's boundaries were the subject of any negotiations and conditional agreement reached with the Sultan of Zanzibar
II. That Kenya's sovereignty is conditional upon the inclusion and retention of Kadhi's Courts in the Constitution
III. That any agreement on the Coastal strip exists that requires Kenya to surrender the strip to the Sultan of Zanzibar in the event of exclusion of the Kadhi Courts in the Constitution.

IV. That if at all such an agreement existed (which is denied) it remains in perpetuity.

The complainant argued that the effect of the article and the respondents' position was that the Kenyan people are beholden to the Sultan (not withstanding that Zanzibar received its full independence in December 1963 without laying any claim to the Coastal strip) on the matter of religion or the Kadhi courts. For him, this is highly irresponsible journalism.

Regarding the remedies sought, the Complainant asserted that the Media Council must of necessity look into the inaccuracies of the article and grant the appropriate remedies sought. For him, to wish away the matter is to give credence to deliberate manipulation and undue influence of the public that trusts and takes seriously the views and commentary carried by the Respondents. He concluded that it is on that basis that the respondents must be held to account for the irresponsible article and that they cannot hide under the cloak of censorship to write and publish grossly distorted historical facts and warn the public of dire consequences. This was a breach of trust.

THE HEARING

The Complainant, Mr. Peter Mbuthia, began by speaking to case law. He started with the ***Chirau Ali Mwakwere v Nation Media Group Ltd & Another*** **Nairobi Civil Suit 1329 of 2003 (Unreported)** case to address the issue of privilege which the Respondents were relying on, on both aspects of privilege. The first aspect of privilege he addressed was what the Respondents' lawyer referred to as fair comment on a matter of general public interest. The second privilege on the issue of censorship and freedom of expression is what is commonly referred to as constitutional privilege. In the UK they call it the Reynold's privilege and in the US they call it the Sullivan privilege after the case laws that they have referred to.

The Complainant read Judge J M Khamoni's reference to 28 Halisbury's Law of England, 4th edition, where it said that in the Reynold's case, the privilege was stated thus: *"An occasion is privileged where the person who makes a communication has interest or a duty, legal, social or moral to make it to the person it was made and the person to whom it is so made had a corresponding interest to receive it."*

The Complainant stressed that in the *Reynolds's* case, Lord Nicholas had said that:

"The epithet 'fair' as applied to the defence of comment on a matter of public interest, is now meaningless and misleading. The true test is whether the opinion, however exaggerated, obstinate or prejudiced was honestly held by the person expressing it".

The Complainant further said:

"So, again, fair comment is an issue also of a true opinion not one of inaccurate facts. That is how fair comment works. So, in our case presently, fair comment cannot be a defence both as a fact even as an opinion."

Asked by the Commission to comment on the phrase 'was honestly held', the Complainant said that if the 2nd Respondent had laid a basis of his research saying that when he wrote the article he was referring to a particular agreement and he honestly believed having read that agreement that this was the effect of it, then that would have been honest. The Complainant argued however, that one cannot write an article and go to a court of law or a tribunal such as this and merely say it is their opinion. Firstly, there is no documentary evidence from the 2nd Respondent and secondly, he was not even coming to give oral evidence. So, he did not give the Commission the opportunity to interrogate whether it was an opinion honestly held. He relied solely on a reply which is a pleading, but a pleading in itself without evidence is nothing. The Complainant concluded that since no documentary evidence was adduced and the 2nd Respondent did not appear before the Commission to give oral evidence, the Commission cannot find that he held an honest opinion. Therefore qualified privilege does not apply.

The Complainant said:

"So, suppose even you wanted to agree that probably it was an honest opinion, where is the evidence? Do you have documentary evidence that yes; this looks like it was an honest opinion? No! Has the second respondent Mr. Macharia Gaitho come before you to tell you on oral evidence that I honestly held this opinion? You don't have it and it would be wrong in my respectful view that in a tribunal which is administering justice equally to the parties to express

that he held an opinion without him or any evidence laid before you. That is qualified privilege that does not apply.

The next one is the constitutional privilege which they say that we are trying to gag or we are trying to censor their freedom of expression. Again if you go through the Chirau Mwakwere's case you will find there is a lot that has been said about constitutional priviledge"

The Complainant then turned to the issue of constitutional privilege. He again referred to Chirau Mwakwere's case. He highlighted especially the section which states:

"If the press in the course of practicing investigative journalism publishes a statement of public interest after verifying the facts, it will not be held liable if it subsequently turns out that it made a mistake and damaged the reputation of the plaintiff. In the U.S, this defence is known as 'constitutional privilege' associated with Sullivan versus New York Times".

The Complainant then argued that following the above, one can only invoke constitutional privilege if a journalist had verified or established the facts but it subsequently turns out that a mistake was made. He went on that, that is the hallmark of a constitutional safeguard so that when one is balancing their freedom of expression it does not outweigh falsehood. He submitted that that in this case the court held that constitutional privilege would not apply if the facts are inaccurate.

Asked by the Commission to clarify whether it meant that the facts have to be 100% falsified or it would be okay if say 25% were falsified and 75% were correct, the Complainant answered that

One would apply the totality of the facts to the issue that is being addressed and look at it in whole. He argued that if this was done, the whole article complained about was inaccurate in the sense that if there was an agreement, and none was produced, did that agreement specify that Kadhis' Courts cannot be removed from the Constitution and if Kadhis' Courts are removed from the Constitution, we would lose our sovereignty over the Coastal strip? He argued therefore that if one looked at the totality of the facts, the whole article including the title is

false. The 2nd Respondent makes reference in the article to an agreement but does not give the date for the same. He also refers to negotiations but does not state where they were held.

The Complainant then submitted that the article was actually a distortion of historical facts. This is because one expects that the media or the journalist has done his research and it is accurate. In this case the Respondents hold themselves as having researched and known that there is an agreement and they put it out there and we all come to believe it. It is a fact that people believe almost everything that the media tells them especially when it comes to the issue of facts. They are in this case led to believe that if we remove Kadhis' Courts, that agreement will catch up with us and we will give up all those nice things we find at the Coast. The article says:

"We would say goodbye to the famous beaches and hotels that generate the entire tourist economy, the ancient towns and settlements that made our Coast so alluring to visitors, historians, anthropologists…We shall lose the Port of Mombasa. It will no longer be ours". If the 2nd Respondent holds himself as having done research, almost 80% or 90% of us will not bother to research because we have believed him. Little do we know that in fact this is not accurate."

The Complainant then proceeded to look at the Media Act, Section 35 (1) which says:

"The media shall in a free and independent manner and style, inform the public on issue of public interest and importance in a fair, accurate and unbiased manner whilst distinctly isolating opinion from fact and avoiding offensive coverage of nudity violence ethnic biases".

He submitted that the Respondents had breached the above statutory provision which clearly said that in matters on public interest, the media should be fair and accurate and distinctly isolate opinion from fact. Considering the article, it was very clear that the 2nd Respondent was not separating opinion from fact and the facts that he was relying on are inaccurate. It is an objective test of a journalist to write a fair, accurate and unbiased story on matters of public interest.

The Complainant then moved to the case of ***Pedersen and Baadsgaard v. Denmark*** which considered Article 10 of the *European Convention on Human Rights.* Paragraph 72 of this judgment states:

"The court notes that the allegation emanated from the applicants themselves. It must therefore be examined whether they acted in good faith and complied with ordinary obligation to verify a factual statement".

Based on the above, the Complainant argued that there was an obligation internationally recognized that when a journalist writes articles, they have to verify the factual statements that they make. So, freedom of expression is not a blank freedom. Paragraph 72 above goes on to state:

In this respect the Court recalls that Article 10 of the Convention protects journalists' rights to divulge information on issues of general interest provided that they are acting in good faith and on accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism … accordingly Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern.

The Complainant then went back to the Media Act 2007. He had referred to Section 35(1) above. He said he was also relying on Section 35 (2) which states that:

The media shall keep and maintain 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.

The Complainant said:

"So, I am also relying on 35(2) to see whether applying that objectivity test did the respondents maintain the high professional ethical standard expected of them."

Rule 1(a) of that Schedule, under 'Accuracy and Fairness' provides that:

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.

Then Rule 1(d) says:

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

The Complainant argued that the 2nd Respondent, having failed to demonstrate the accuracy of the article complained of had breached this rule and the Act because it was not based on any evidence at all. He had also failed to distinguish clearly his own comments and conjectures and facts. The Complainant wondered on what one would base the issue that 47 years after independence they had the right to tell Kenyans that they would lose their 10-mile Coastal strip. There was no Constitutional evidence for it and there was no Agreement evidence for it.

The Complainant said that he was not concerned with the cartoon or the editorial that appeared in the same page with the article complained about. He said that he had not distorted the article in any way by cutting it in such a manner as not to include the cartoon and the editorial because his complaint was not about these two.

Regarding the heading of the article complained about, the Complainant stated that paragraph 1(e) of Code of Conduct says that:

In general, provocative and alarming headlines should be avoided.

He submitted that the article's heading is provocative and alarming and that the Respondents had fallen short of the Schedule again.

The Complainant said that the reason he had complained was because he thought that people must be accountable. If people were going to hold themselves out as journalists, they must be accountable and they must be ready to be held to account for what they did. On this, he mentioned Rule 4 (on Accountability) of the Code of Conduct which provides that:

Journalists and all media practitioners should recognize that they are accountable for their actions to the public, 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) recognise that they are duty-bound to conduct themselves ethically.*

The Complainant stated that he wrote to the Nation Media Group on 22nd of April 2010 for the attention of Mr. James Kinyua and drew his attention to the article complained about and the sensitivity of it and the inaccuracy of it. This was in exercise of his public duty under Rule 4(b) of the Code of Conduct. The Respondents could not therefore say they were not given an opportunity by the Complainant to respond even before the Complaint was filed. They were given that opportunity and they chose not to take it.

The Complainant submitted that the Respondents also breached the requirements of the Code of Conduct as set out in paragraphs 11(a), (b) and (c) which provide that:

> (a) *News, views or comments on ethnic, religious or sectarian dispute should be published or broadcast after proper verification of facts and presented with due caution and restraint in a manner which is conducive to the creation of an atmosphere congenial to national harmony, amity and peace.*
>
> *(b) Provocative and alarming headlines should be avoided.*
>
> *(c) News reports or commentaries should not be written in a manner likely to inflame the passions, aggravate the tension or accentuate the strained relations between the communities concerned. Equally so, articles or broadcasts with the potential to exacerbate communal trouble should be avoided.*

The Complainant went on to refer to the *Status of Journalists and Journalism Ethics: IFJ Principles.* This document by the International Federation of Journalists (IFJ) says under "IFJ

Declaration of Principles on the Conduct of Journalists" that *this international Declaration is proclaimed as a standard of professional conduct for journalists engaged in gathering, transmitting, disseminating and commenting on news and information in describing events.* The Complainant highlighted sections 1, 2, 3 and 5 of the Declaration:

1. *Respect for truth and for the right of the public to truth is the first duty of the journalist.*
2. *In pursuance of this duty, the journalist shall at all times defend the principles of freedom in the honest collection and production of news, and the right of fair comment and criticism.*
3. *The journalist shall report only in accordance with facts of which he/she knows the origin. The journalist shall not suppress essential information or falsify documents*.
5. *The journalist shall do the utmost to rectify any published information which is found to be harmfully inaccurate.*

The Complainant said that the origin of the facts that led to the publication of that article have not been provided by the Respondents. He clarified that he was not suggesting that the Respondents had suppressed essential information or falsified documents. He was only relying on the first sentence of 3 above. He submitted that because of this article, people have now come to hold the wrong belief that there is an agreement that has bound us and everybody including politicians who make our laws. This, according to him is extremely harmful.

The Complainant then made reference to the *ASNE (American Society of Newspaper Editors) Statement of Principles.* Article IV on "Truth and Accuracy" states that:

Good faith with the reader is the foundation of good journalism. Every effort must be made to ensure that the news content is accurate, free from bias and in context, and that all sides are presented fairly. Editorials, analytical articles and commentary should be held to the same standards of accuracy with respect to facts as news reports. Significant errors of fact, as well as errors of omission, should be corrected promptly and prominently.

The Complainant submitted that the Respondents had fallen short of maintaining accuracy and integrity with regard to the above.

Lastly, the Complainant referred to the "Statement of Ethical Principles" drawn by the *Associated Press Media Editors (APME)*. On Accuracy, the Statement provides that: *The newspaper should guard against inaccuracies, carelessness, bias or distortion through emphasis, omission or technological manipulation. It should acknowledge substantive errors and correct them promptly and prominently.*

The Complainant applied the above to the heading of the article complained about saying that the heading is written in such a way as to draw the readers' attention and capture their imagination regardless of whether they were for or against Kadhis' Courts. The reader is manipulated to immediately tie Kadhis' Courts to Kenya being landlocked. The Complainant argued that this was manipulation through emphasis.

The complainant concluded by stating that he was not looking for monetary compensation and that his action was not motivated by personal interest. His concern was that a duty had been breached. He argued that neither the passage of time (it was going to be a year since the article was written) nor the promulgation of a new constitution which had retained the Kadhis Courts, removed the inaccuracies and the falsehood of that article. These remained and many people, especially politicians still held them to be true. The Complainant's prayer is that the article requires a suitable correction as prominently as it had been written. Asked by the Commission whether he was abandoning his second prayer for a commentary to be written, the Complainant answered that he was not. He said he had prayed for both so that the Commission would decide which of the two was more suitable for the purposes of the current proceedings. He said however that the best would be a proper correction with a published commentary on it with purposes of correcting it and not one of justifying it.

CROSS-EXAMINATION

During cross-examination by the Respondents' lawyer, Mr. Sekou Owino, the Complainant admitted that in the full page of the newspaper in which the article appeared on the top left corner was the label **'Opinion'**. Asked to point out what he found to be inaccurate, divisive and alarmist in the article, the Complainant began with the title, ***Want Kenya to be landlocked?***

Just do away with Kadhis' courts, saying that it was inaccurate. He then said that the following statement was also inaccurate because he had not seen any factual evidence to support it:

"It is just as well that victory for the 'No' campaign would not lead to the removal of the Kadhis' Courts from our constitution for if that happened, Kenya would become a landlocked country".

When it was suggested to him that it was Mr. Gaitho's opinion, the Complainant said that it is not an opinion because if one continues reading it, it is based on a fact. The article reads:

"How would all that happen? Simple! The Kadhis' Courts did not happen on our present constitution by accident, by mistake or as per some long-range Islamisation campaign as is currently being suggested by some extremist propaganda". It goes on, *"It was all part of the Lancaster House independence negotiations"*.

The Complainant said that he had not seen any fact in this article that supported the proposition that at the Lancaster House independence negotiations it was agreed that if we want Kenya to be landlocked we should do away with Kadhis' Courts. He said the same about the following portion of the article:

"At the time you see, the Coastal strip was technically part of what was known as the Kenya colony. It was part of the dominion of the Sultan of Zanzibar but administered as a British protectorate".

The Complainant was asked whether his view was that whenever something is published then the evidence of it must also be within the article – that short of producing evidence within the same article, it would be inaccurate of a journalist or anyone writing in a newspaper to assert the facts. The Complainant responded that he expected that the journalist would be factual such that when he said that an agreement was reached he would indicate the date of the agreement. He continued that his letter of 22nd April 2010 to Nation Media Group was received after the article was published and had raised precisely these concerns. He had not received any response justifying that what was said in the article is factually correct.

In connection with the referendum process on the Draft Constitution, the Complainant was asked two questions. Firstly, whether he agreed that the Kadhis' Courts was an issue of debate during this time. Secondly, whether he was aware of the court case ***Jesse Mugambi & twenty five others v the Attorney General*** that was filed in 2004 and whose judgment was pending at the time when the article was published on 20th April 2010. The judgment was then delivered on 24th May 2010, a month after the publication of the article complained about. The case considered among other things, how the Kadhis' Courts made their way into the constitution and whether they ought to be retained in the constitution in the first place. The latter issue touched on the agreement (including the question of its inaccuracies) that the 2nd Respondent made reference to in the article. The judgment in this case was the subject of an appeal.

The Respondent answered the first question by saying that he agreed that the Kadhi Courts was an issue in the referendum debate and that was why in his submissions he had said that it was an extremely sensitive and emotive issue. To the second question he answered that he was aware that the ***Jesse Mugambi*** case was taking place but he was not aware of the arguments in it because he was not a party to the suit.

The Complainant was asked and he agreed that the *Daily Nation* offers an opportunity for the public to respond to issues of public interest through 'Letters to the Editor' and that the article complained about was also available online for the public to express responses to it. He was then asked whether he wrote an article of his own views to the editor for publication pointing out the supposed inaccuracies in Mr. Gaitho's article. He said that he did not because he had given them the opportunity to correct it. He was then asked whether he had checked what the online responses were to this specific article. He said he did not.

Asked by the Commission whether his contention that *the article will lead to a Muslim-Christian confrontation on the Kadhis' Courts which should be avoided at all costs* ever turned true and whether there was a confrontation, the Complainant answered that that was just his opinion based on the article.

RESPONDENTS SUBMISSIONS

Mr. Sekou Owino, the Respondents' lawyer submitted that there are four issues at the heart of the Complaint. First, there is the issue of facts and then with regard to the article that is the subject of the complaint there is an issue of the form that it took, then an issue of its contents and lastly an issue of its context.

He began by addressing the Complainant's submission that the Respondents did not act in accordance with the standards expected of them and the reference made specifically to the Media Act about this. Mr. Owino submitted that the Act makes a very clear distinction about journalism. The principles in the Act and in the code apply to journalists and in the conduct of journalism. Both journalism and what a journalist is are clearly defined in the Act. Section (2) provides:

"journalism" means the collecting, writing, editing and presenting of news or news articles in newspapers and magazines, radio and television broadcasts, and in the internet.."

Mr. Owino argued that basically the Act is saying that journalism and therefore whatever applies in this context is with regard to news. He noted that the article that is the subject of this complaint is published on a page that is clearly labeled as **'Opinion'**. As a matter of common sense or even the law, there is a distinction between publishing an opinion and publishing news. The Code of Conduct for the practice of journalism in Schedule Two of the Media Act requires that at the moment of exercising journalism there is need to separate fact from opinion. For that very simple reason, therefore the principles of accuracy and other principles that are being talked about here will only apply with regard to facts and that means with regard to news because news is a reporting of occurrences of fact.

Mr. Owino went on to say that an opinion is just a varied judgment by a person. It can be biased. It can be probably mistaken but one cannot bring to it the quality of accuracy because it is just a perspective by a particular person. He submitted, therefore, that the principles in the Act do not apply with regard to a page labeled specifically as opinion. He referred to the News

Manual, the online version, Chapter 56 on *Facts and Opinion* where under the section on Opinions, it states:

Opinions are different from facts. An opinion is a conclusion reached by someone after looking at the facts. Opinions are based on what people believe to be facts. This can include probable facts and even probable lies, although few people will knowingly give an opinion based on a proven lie. One person's probable fact can be seen by another person as a probable lie. This is one reason why people have differences of opinions.

Based on the above, Mr. Owino submitted that an opinion and a fact are two different things and that is why facts and opinions are required to be clearly labeled and designated as such which is what Mr. Gaitho was doing here. He was simply saying that this is his view.

Under the section on Personal opinion, the *Manual* states:

Personal opinions are the conclusions someone reached based partly on facts and partly on what they already believe.

Personal opinions which are based on beliefs or values which a person already has are called value judgments.

Mr. Owino submitted that the above statements make an important distinction; meaning that even though he might be a journalist, if a person writes an opinion rather than reports news, and if he labels the opinion correctly, then generally speaking the principles and standards spelt out in the Act and the Code of Conduct ought not to apply. This is because these apply specifically to journalists in the process of exercising their profession as journalists both of which are well defined and limited to the reportage of news.

Mr. Owino continued that the Respondents' published a story in which Mr. Gaitho said that in his view there are certain agreements he presupposes exist, the basis of which he then issued the opinion article. The Complainant said that he ought to have provided proof that those agreements actually do exist. Mr. Owino submitted that the failure to provide that evidence, or the failure to simply say that he had actually seen this agreement, or that he had not, in itself

does not render that opinion improper as to justify a complaint of the nature made by the Complainant.

Mr. Owino went on to say that even as a matter of law, it is recognized in the Evidence Act at Sections 59 specifically that there are certain facts which are not required to be proved. It states: *"No fact which the court shall take judicial notice need be proved."*

Mr. Owino read Section 60 (1) (o) which says: "*The Courts shall take judicial notice of all matters of general or public notoriety***."** He submitted that the matters that Mr. Gaitho was talking about with regards to the arrangements leading to the existence of the Kadhis' Courts within Kenya, the issue of the coastal strip and all other issues mentioned in that, the land questions that were mentioned in that article are matters of general or local notoriety. They are accepted and they are known.

He then read Section 60 (2) which says:

In all cases within sub section (1,) and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.

Mr. Owino submitted that the above section means that the 2nd Respondent did not need to prove the historical questions mentioned in this article and that there was no need to have proof. Mr. Owino then considered the **Jesse Kamau** case, not for the purposes of drawing from it any principles of law, but for illustration. In the case, the court considered something called the historical question with regard to the Kadhis' Courts. They mention an exchange of letters between the then Prime Minister of Kenya and the Prime Minister of Zanzibar. They then mention the agreement between the Government of the United Kingdom, the Sultan of Zanzibar and the Government of Kenya of 1963. Mr. Owino submitted that in effect even a court accepts these historical questions. He asked the Commission to find that, those agreements on the basis of which Mr. Gaitho drew his opinion, existed without the Respondents necessarily having to produce them. Mr. Owino submitted that as a matter of history, the Commission should still find that the agreements do exist.

Mr. Owino then proceeded to consider the constitutional dimension of the matter, relying on both the previous constitution and the new one. He made reference to Section 79 of the old constitution, which specifically says except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression; that is to say the freedom to hold opinions without interference and to communicate ideas and information without interference whether the communication be to the public generally or to any person or class of persons and freedom from interference with his correspondence. He conceded that under sub-article 2, the freedom was not absolute. He argued however that the limitations under sub section (2) of that constitution do not apply with regard to an opinion. The limitation speaks to "interests of defence, public safety, public order, public morality or public health".

Mr. Owino continued by considering the Constitution of Kenya 2010 at Article 33 which says that every person has the right to freedom of expression and that that freedom includes freedom to impart information or ideas. He submitted that the limitations within it speak only to propaganda for war, incitement to violence and hate speech and that these did not apply in this case. He argued that the right to impart information and ideas, provided it has not incited violence, propaganda for war, hate speech or hatred that constitutes ethnic incitement, should be allowed to stand, whether right or wrong.

Mr. Owino continued that the only exception that is created in addition to those is where it affects the rights and reputation of others. He argued that the article complained about did not hurt any individual and certainly not the complainant who was not even mentioned. Also, it did not stand to cause any hatred because if it did, the Commission concerned with hate speech would definitely have taken the 2nd Respondent to task. Mr. Owino argued further that the drafters of the constitution and the people who approved it at the referendum appreciated that freedom of expression by itself needs to be emboldened by the freedom of the media. He went on to state that Article 35(2) (b) places a specific sanction against the State by stating that the State may not penalize any person for any opinion or view or the content of any broadcast, publication or dissemination, basically telling us that a view that is expressed ought not to be penalized or ought not to be taken issue with simply because it is found to be disagreeable with

certain sections of the society. This is because it realizes that the society is better with the expression of different views and there will be opinions that people will not like and there will be opinions that people will take issue with. That in itself is not a reason to penalize him.

Mr. Owino then went on to consider the decision in the constitutional court of South Africa in ***Fred Khumalo & Others V Bantubonke H. Holomisa*** Case *CCT 53/01 (SA Supreme Court)*made in the year 2002 in order to address the reasons why the media is given that freedom and the philosophical underpinnings of freedom of expression and freedom of the media specially. At the end of paragraph 21, it states that:

"Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of the citizens to make responsible political decisions and to participate effectively in public life would be stifled"

It then goes ahead to say at paragraph 22*,*

"The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate".

At paragraph 24 it says,

"In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with the information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility.

Mr. Owino argued that the above statements underscore the fact that the media have a function to perform in addition to simply providing us with news i.e. the facts as they occur; they also have a duty, to themselves but also to the public, to air different opinions and ideas, whatever their nature. This means that as the Commission adjudicates upon this complaint, it needs to bear that in mind in terms of context. Mr. Owino said that the context in this case involved the media debating a constitution and arguing why certain clauses ought to be or ought not to be in that constitution and then allowing Mr. Macharia Gaitho, the 2nd Respondent, to express that opinion.

The next case that Mr. Owino considered was ***New York Times Co. v. Sullivan*** *376 U.S 254 (US Supreme Court),* a decision made by the US Supreme Court in which it again asserted freedom of the media by saying that "*the general proposition that freedom of expression upon public questions is secured by the First Amendment has long been secured by our decisions*". And quoting ***Roth v. United States****,* 354 U.S. 476, 484, it said that the constitutional safeguard "*was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people*". It went on to state that "*It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions'*. Mr. Owino argued that these statements were applicable also to Kenya and that the 2nd Respondent's article may not have been acceptable to certain people but he was exercising his right of freedom of expression.

The Commission asked Mr. Owino if he was submitting that the American First Amendment was equivalent to the Kenyan Article on Freedom of Speech and he agreed. Asked to what degree, he answered that "It is the same thing". He explained that he was underscoring that fact that the constitutional principles of freedom of the media and freedom of speech are universal and widely accepted. Mr. Owino went on to cite the case where it quotes Mr. Justice Brandeis saying, in ***Whitney v. California****,* 274 U.S. 357, 375-376, that:

"Those who won our independence believed … that public discussion is a political duty, and that this should be a fundamental principle of the American Government. They recognized the risk to which all human institutions are subject. But they knew that order cannot be secured merely

through fear of punishment for its infraction. That is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed".

Mr. Owino argued that what the above quotation was basically saying, is that a person about to express himself like the 2nd Respondent did, should not be put in a situation where he begins to think that in expressing that opinion, there might be somebody somewhere who will not like it, so that he is forced to streamline his opinions to conform to what is acceptable to other people. According to Mr. Owino, the judges in ***New York Times v. Sullivan***, by quoting the above statements in ***Whitney v. California***, seems to be saying that if the 2nd Respondent's opinion was improper, better ones could have been used to extinguish it. It is for this reason, Mr. Owino submitted, that at the end of the article complained about, opinions are invited out of the realization that other people may take different views.

Mr. Owino continued to argue that the judges asserted the fact that "*erroneous statement is inevitable in free debate, and … it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need … to survive'.* Mr. Owino then submitted that the judges are here saying people should express their views irrespective of whether those views are not acceptable in their society by the majority. He said, "*They are accepting yes, in the process of expressing ourselves, some of us will get it wrong but that should not be the basis on which we say that only supposedly correct information should be published".* He went on to say that even if the 2ndRespondent understands the essence of those agreements were inaccurate, and he is not a lawyer, let him express them.

The next case that Mr. Owino considered was ***Texas v. Johnson*** 491 U.S. 397, also a United States Supreme Court decision. In this case Gregory Lee Johnson went to the Republican

National Convention in 1984 and openly burnt the flag of the United States of America as a means of political protest. He was convicted of desecrating a flag in violation of Texas Law. He appealed to the United States Supreme Court which went on to determine, among other things and especially, whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. One of the reasons the lower court gave for convicting him was that by the burning the United States flag, which was a revered symbol of nationality, Johnson had really upset most of the citizens of his country and because he did it at a public place, he risked offending several people resulting in a violent reaction.

Johnson defended himself by saying that the flag that he burnt was his and he was merely expressing himself on a public issue that he unhappy with and that he was covered by the First Amendment. When the case went to the Supreme Court, Mr. Johnson was acquitted. The court found that he did not burn anyone's property; the flag he burnt was his; he did it in a public place and did not trespass on private property. On the bigger issue that there was a risk that people may react violently to the burning of the flag, the court held that it could not suppress free speech and free expression simply because it thought it would anger certain people. The court observed that:

"*The State's position therefore amounts to a claim that an audience that takes serious offence at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents don't countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger*."

The judges went on to decide that:

"We have not permitted the government to assume that every expression of a provocative idea will incite a riot but have instead required careful consideration of the actual circumstances surrounding such expression asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action".

Mr. Owino submitted that the essence of what the U S Supreme Court said above is similar to Article 33 of our constitution. The court can be understood to be saying that "you can express yourself but we will have a problem with you if what you are saying is directly intended to incite violence or is directed at certain category of hate speech but we will not sit here and say that because certain people will be offended by this, don't publish it". According to Mr. Owino, that is why the court said the following:

"If there is a bedrock principle underlying the first amendment, it is that the government may not prohibit the expression of an idea simply because the society finds the idea itself offensive or disagreeable".

Mr. Owino went on to make reference to the following statement by the US Supreme Court in the ***Texas v. Johnson*** judgment:

To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion, If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence".

Mr. Owino submitted that it was because of the Respondents' recognition of the above reasoning that the article complained about invited other people to give their opinions which were then published alongside the article on the Respondents' website in the Internet. Mr. Owino understood the US Supreme Court as saying the following:

… If we disagree with someone's idea we do not tell him, don't publish it; we don't tell him, apologize for it. … That is what they are saying; that look, if you see somebody else expressing an idea that you disagree with, publish your own counter to it, don't stop him, don't tell him to apologize for that idea because it is mistaken. That is what we are saying here.

Mr. Owino then submitted that to ask the Respondents to apologise would be tantamount to censorship.

The final case that Mr. Owino considered was yet another one by the US Supreme Court, ***Albert Snyder v, Fred W. Phelps****, Sr. et al.* 562 U. S. (2011). Albert Snyder was the father of a US Marine who was killed in Iraq and while he son was being buried, Mr. Fred W. Phelps who led a church called the Westboro Baptist Church went, together with some of his church members, to picket at that soldier's funeral service. The picket signs reflected the Church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. A jury held members of the church liable for millions of dollars in damages for picketing near a soldier's funeral service. The question presented to the Supreme Court on appeal was whether the First Amendment shielded the church members from tort liability for their speech in this case. The Court proceeded to deal with the above issue in the following manner. It stated that:

*"Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns on whether that speech is of public or private concern, as determined by all the circumstances of the case. … The First Amendment reflects "a profound commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."****New York Times Co. v. Sullivan****,* 376 U. S. 254, 270 (1964). That "is because speech concerning public affairs is more than self-expression; it is the essence of self-government."***Garrison v. Louisiana****,* 379 U. S. 64, 74-75 (1964).

The court then said:

*"Speech deals with matters of public when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," … or when it "is a subject of legitimate news interest, that is, a subject of general interest and of value and concern to the public," … The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."****Rankin v. McPherson****,* 483 U. S. 378, 387 (1987).

Later on, it continued:

"Deciding whether speech is of public or private concern requires us to examine the "content, form, and context" of that speech, "as revealed by the whole record" … In considering content,

form and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, and how it was said."

The Court then went on to find that the "content" of Westboro's speech, made mainly through signs and placards, were public though the "messages may fall short of refined social or political commentary". Regarding the matter of "context", about which Snyder had argued that Westboro's speech – because it was made in connection with his son's funeral – was a matter of private rather than public concern, the Court held that this fact of context could not by itself transform the nature of their speech. The Court held that: "Westboro's signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in society … and the funeral setting does not alter that conclusion". Regarding the form of the speech, the Court held that: "Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society find the idea itself offensive or disagreeable". ***Texas v Johnson*** 491 U. S. 397, 414 (1989). Indeed, "the point of all speech protection … is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."

The court concluded its opinion by stating the following:

"Speech is powerful, It can stir people to action, move them to tears of both joy and sorrow, and - or as it did here - inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case."

Mr. Owino expended great effort in applying the ***Snyder*** case above to the instant complaint. We shall attempt to summarise this effort. He set out by saying that the ***Snyder*** case "literally imitates as any can the circumstances of this complaint; context, content and form. The form and opinion by Mr. Macharia Gaitho on what he thought about the issues governing the draft constitution; context being debate regarding a referendum; and form, publication in a

newspaper." Mr. Owino argued that "if there is a category of speech that the constitution on freedom of expression and freedom of the media ought to protect, it is those regarding public affairs wherever and in whichever way it is expressed." He argued that people like the 2nd Respondent should not be censored simply because their opinion sounds to other people like outrageous speech. He went on to say that, "Mr. Macharia's opinion may not be worth anything for people who know better about those issues. The lawyers can debate the essence of those agreements and what their meanings are but as long as it is addressing a public issue, a matter of public import on public property in a peaceful manner, in compliance with the guidance of local officials, it ought not to be deemed to offend anybody."

Mr. Owino began his conclusion by arguing that if one considers the form, the context and even the facts, there is nothing that justifies this complaint. He said that relief that seeks that the 2nd Respondent be asked to apologize or retract the opinion article supposedly because his opinion was incorrect should not to be entertained. He concluded that this complaint in their respectful opinion is unconstitutional and an avenue for censorship. He asked that it be dismissed.

THE COMPLAINANT'S REPLY TO THE RESPONDENT'S SUBMISSIONS

The Complainant clarified that though the way he had copied the opinion article that was annexed to the complaint had left out the whole top part including the label "opinion" plus the date, it was not anything intended to distort the nature of the page. He said that what he was concentrating on at the time of copying was the actual article by the Respondents and that nothing has been cut off at all from that article. He therefore stood by what he had already stated in his examination in chief and also in the submissions that he had made earlier.

The Complainant noted that Mr. Owino had argued in his submissions that the article complained about was an opinion; and that if it was an opinion then it comes within the constitutional rights of the Respondents to express those opinions. The Complainant stated that he had gone to great lengths to submit and show that as a matter of fact, the article contained distorted historical facts which cannot be an opinion. He said he had gone further to demonstrate from the authorities and from the Media Act that even where it is an opinion relying on facts, the author and the respondent must ensure that those facts are accurate and

are truthful facts and where they fail to establish that, then the respondents cannot hide under the constitutional provisions. Those constitutional provisions do not exist to perpetuate law suits in the disguise of opinions.

The Complainant continued by arguing that there cannot be a constitutional exclusion that if the article appears at a page marked 'opinion' then the authors are at liberty to distort historical facts. Further, in looking at this matter the Complainant urged the Commission to bear in mind that complaint was about a distortion of historical facts. The Complainant argued that the onus to prove that what they wrote was historically correct lay on the Respondents and not on him as the Complainant. He said that the Respondents had at paragraph 2(a) of their response stated, *"The article constitutes the second respondent's honest opinion… and did not express any error or fact that would justify the claim for a correction".* However, they did not produce any oral or documentary evidence in support of that assertion. The Complainant submitted therefore that neither Section 79 of the repealed constitution nor article 33 and 34 of the present constitution comes to the aid of the Respondents. He argued that constitutions cannot be invoked to distort historical facts,

The Complainant then dealt with Mr. Owino's submission that under the Media Act, the definition of journalism covers news items and not opinions. The Complainant submitted that our legislature was very clear when it defined what journalism is and did not by any stretch of imagination limit the application of the Media Act only to a news article. He argued that so long as an article is written by a journalist, it falls within the provisions of the Media Act and the Code of Conduct. The Complainant wondered whether Mr. Owino was denying that the 2nd Respondent, at the time he wrote that article, was a journalist. Since there was no such denial in the Respondent's and it was not denied that he was in the employ of the 1st Respondent, the argument that what he wrote was an opinion and that it did not therefore come under the Act, fails.

The complainant next dealt with the last document in the Respondents' bundle, the *News Manual.* Chapter 56 of the manual deals with facts and opinions and clearly says that journalists must distinguish between facts and opinions. It goes on to advice on reporting both facts and

opinion and suggests ways of dealing with rumours, speculation and lies. He read from the manual where it says that: *"A fact can be defined as something said to have happened or supposed to be true. However as a journalist, you need to know how reliable statements are before you can report them as facts."* He argued that the Respondents did not do that because if they did, they would have given some evidence, oral or factual documentary evidence of how those agreements can be said to mean that if we amend our constitution we shall lose the Coastal strip. The Complainant posed the question:

"Where is this fact that at the Lancaster House Conference; or with the agreements with the Sultan of Zanzibar; or in the constitution which has been replaced where it is stated that should we remove the article on Kadhis' Courts, then we will lose our ten-mile Coastal strip?"

The Complainant then considered the issue of *probable* facts. The *News Manual* says that probable facts "are statements which it seems reasonable to believe are true, but you are not able to prove yourself, either because you do not have access to the information or because you do not have time to dig for proof (but not because you are too lazy to check)". The Complainant stated that even if one was to suppose it as probable that in the 2nd Respondent's mind the agreements he had referred to in his article indeed existed, his complaint was filed on the 12th of May 2010. Almost a whole year the Respondents had not given even an iota of evidence to show that at the time they wrote the article they probably thought it was true but that they had since carried out their own independent research and came to the conclusion that they do indeed exist. The Complainant submitted that for this reason, they could not come under the probable facts and he was therefore entitled to the correction that he had asked for.

The complainant then submitted that he was not suggesting that the Respondents cannot express ideas as had been suggested by Mr. Owino's submission. He argued that the Complaint was not dealing with ideas but with historical facts; and historical facts are not opinions. The Complainant then considered the issue of ***verifiable opinion*** as detailed in the *News Manual*. The *Manual* says that:

"These are conclusions which can be verified (shown to be true) or shown to be false. People who predict the results of horse races draw conclusions from what they know about horses and

racing. They may say that Golden Arrow will win the coming race. It is their opinion. Once the race is over, that opinion is proved to be either correct or incorrect, depending on whether Golden Arrow wins or loses. Although people usually base their opinions on facts, there is always a danger that they can reach the wrong conclusion. They might have based their opinion on facts which are themselves untrue (such as Golden Arrow's fitness); they might have failed to consider a relevant fact (the ground was muddy and Golden Arrow runs best on firm ground) or they might have reached the wrong conclusion because of a gap in the logic they used to think it through (Golden Arrow had a strong name, so was bound to win). You must always treat verifiable opinions as if they could be wrong. You must always attribute them to the person who gave them."

The Complainant argued that the Respondents had not attributed the opinions in the article complained of to the person who made them. He went further to argue that from the *Manual* one gets the understanding that when one is presenting facts and opinions, readers or listeners will find both facts and opinions useful but they need to be shown which is which. The Complainant submitted that this is an obligation which the respondents cannot run away from; and it is not just an obligation but it is actually a legal responsibility. He then went on to consider the case law that Mr. Owino relied on starting with ***Snyder v Phelps***. He said that in this case, the matter that the court was very careful about was the falsity of statements. The Court said that: *"The Fourth Circuit reversed, concluding that Westboro's statements were entitled to First Amendment protection because those statements were on matters of public concern, were not provably false,* and *were expressed solely through hyperbolic rhetoric"*

The Complainant argued from the above that what the Supreme Court was saying was that one cannot rely on constitutional provisions if the facts that are being alleged are false. He went on, that in the case of ***Fred Khumalo*** at paragraph 25, the Court said that: *"However, although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution, In particular the values of human dignity, freedom and equality"*.

The Complainant argued that the value of human dignity should be seen to mean that people must be protected from falsehoods. He submitted that no democratic society can ever be founded on a false foundation. The Complainant then referred to paragraph 35 of ***Fred Khumalo*** *judgment* where it reads*, "There can be no doubt that constitutional protection of freedom of expression has at best an attenuated interest in the publication of false statements. As Cory J observed in the Canadian case,* ***Hill v. Church of Scientology of Toronto****, "False and injurious statements cannot enhance self development. Nor can it ever be said that it will lead to healthy participation in the affairs of the community. Indeed, they are detrimental in the advancement of these values and harmful to the interest of a free and democratic society"*. Having quoted Cory, the Judge then said, *"Similarly, no person can argue a legitimate constitutional interest in maintaining a reputation based on a false foundation".*

The Complainant then beseeched the Commission not to uphold inaccurate facts on the basis that the Respondents were exercising their constitutional right since the Judges in ***Fred Kumalo*** did not accept that argument and dismissed that application. He submitted that this society of ours should not be held at ransom on the basis of false and inaccurate facts.

The Complainant then went to consider the ***Jesse Kamau*** case. He started by addressing Mr. Owino's submission based on what appears at page 29 which implies that indeed some agreements do exist and that there was an exchange of letters. About this, the Complainant said that the issue was not that there were no agreements or that there was no exchange of letters. For him, the issue was whether what the 2nd Respondent said was the correct fact of what those agreements said. He then highlighted the last sentence at page 29 of that decision, where the counsel for the applicant submitted that nowhere in either the exchange of letters or the agreements was it stated that the provisions relating to Islamic religion be entrenched in the Constitution. The Complainant stressed that this submission was not disputed. He continued by saying that there was no evidence from the time the Respondents delivered their bundle of authorities on the 11th April 2011 to contest or aver differently from what is stated in the judgment they are relying on.

The Complainant then said that if one looks at the Respondents' response, they had not applied to amend paragraph 2(a) of the response which was filed on 17th August 2010. So, they were still asserting that there was no error of fact yet they had not given any evidence despite having read the ***Jesse Kamau*** case. The Complainant therefore submitted that even on the Respondents' own authority, their assertions at paragraph 2(a) cannot be true.

The Complaint then considered Mr. Owino's submission relating to Section 59 of the Evidence Act asking the Commission to take judicial notice of matters of public notoriety. He said that Mr. Owino did not specify exactly what the Commission was to take judicial notice of. Secondly, he said that judicial notice does not apply on distorted facts. He invited the Commission to consider Section 60 (3) of the Evidence Act which says, *'If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it considers necessary to enable it to do so"*. He argued that the Commission could not just be asked to take judicial notice without any evidence being placed before it. He therefore submitted that Section 60 (3) could not assist the Respondents since they had not placed any documents before the Commission to substantiate the fact it was being asked to take a judicial notice of.

In conclusion, the Complainant submitted that the Media Act and the Code of Conduct correctly applies to the Respondents and that the relief sought was warranted. He argued that "if we cannot learn to correct our mistakes and be honourable enough as an institution … to correct our mistakes … this Commission is not failing the Complainant but it would be failing the very society that it seeks to protect." He ended by praying that the Commission orders a correction to be done in a manner approved by the Council and for this correction to be published.

ISSUES FOR DETERMINATION

Having carefully perused the pleadings, listened keenly to both parties during the hearing and taking into account their lengthy submissions, the Commission identifies the following as the issues for determination:-

1. Whether the opinion of the 2nd Respondent was based on accurate facts.
2. Whether the Media Act and the Code of Conduct for the Practice of Journalism applies to opinions.
3. Whether the article was published on a matter of public interest.
4. Whether the Respondents breached the Media Act and Code of Conduct for the Practice of Journalism.
5. Whether the Complainant is entitled to the reliefs sought.

THE FINDING OF THE COMMISSION

1. **Whether the opinion of the 2nd Respondent was based on accurate facts.**

The Commission acknowledges the fact that the 2nd Respondent was entitled to give his opinion as per the article published by the 1st Respondent subject of the present Complaint. The article was titled **"Want Kenya to be land-locked? Just do away with Kadhi Courts"** However the Commission regrets that the facts he relied upon on the question of Kadhi Courts were inaccurate. The Commission while noting that none of the parties availed the Agreement on the historical dimension of the Kadhi Courts nevertheless opted to rely on the decided case of ***Jesse Kamau*** in which this issue was extensively canvassed. In the ***Jesse Kamau*** Case the Court observed that nowhere was it stated in the agreements that the Islamic religion must be entrenched in the Constitution of Kenya. Interestingly this case was also relied on by Mr. Owino, counsel for the Respondents in support of their case. Relying on ***Jesse Kamau*** case the Commission finds that the 2nd Respondent based his opinion on in accurate facts. From the submissions, it is clear that an opinion must be based on true and accurate facts. By basing his opinion on inaccurate facts the Respondents breached Section 35 of the Media Act and Clause 1 (a) of the Code of Conduct for the Practice of Journalism.

2. **Whether the Media Act and the Code of Conduct for the Practice of Journalism applies to Opinions.**

The Commission notes that the Media Act and the Code of Conduct do not define what an opinion is. However, Section 35 of the Media Act requires journalists to isolate opinion from

fact. This reference means that the Media Act clearly envisages that journalists will deal with both facts and opinions and the Code of Conduct provided for in Section 35 (2) applies to both. From the case law cited by both parties, it is obvious to all and sundry that opinions are covered in the conduct of journalism. The Commission does not agree with Counsel for the Respondents that the Media Act and Code of Conduct only apply to news. He offered the Commission neither statutory nor case law to support this misleading position. The Commission therefore finds that the Media Act and the Code of Conduct applies to both news and opinions.

3. **Whether the article was published on a matter of public interest.**

Both parties agreed that the discourse on Kadhis courts was a matter in public interest, which at that point in time was subject of intense public discussions in view of the Constitutional review process. The Commission will not belabor this point as it was not in contention.

4. **Whether the Respondents breached the Media Act and Code of Conduct for the Practice of Journalism.**

The Commission finds that the Respondents breached Section 35 of Media Act and the Code of Conduct for the Practice of Journalism in the following instances:-

a. Section 35 (1) of the Media Act that requires the media to inform the public on issues of public interest and importance in a fair, accurate and unbiased manner while distinctly isolating opinion from fact. The Respondents in the article published contravened this section by failing to distinctly isolate opinion from fact.
b. Clause 1 (a) of the Code of Conduct on accuracy and fairness that requires journalists to write a fair, accurate and unbiased story on matters of public interest. In this regard the Respondents failed the accuracy test.
c. Clause 11 (b) of the Code of Conduct on covering ethnic, religious and sectarian conflict, that requires journalists to avoid provocative and alarming headlines. The Commission finds that the title of the article **"Want Kenya to be land-locked? Just do away with Kadhi Courts"** was alarming and provocative as it was

not supported by accurate facts. Relying on the ***Jesse Kamau*** Case the Commission does not find any evidence that Kenya would be landlocked as a consequence of deletion of the Kadhi Courts from the Constitution. The obligation to avoid provocative and alarming headlines is couched in mandatory terms in Clause 11.

d. Clause 11 (a) of the Code of Conduct on covering ethnic, religious and sectarian conflict requires that news, views or comments on ethnic, religious or sectarian disputes should be published or broadcast after proper verification of facts and presented with due caution and restraint in a manner which is conducive to the creation of an atmosphere congenial to national harmony, amity and peace.

The Commission guided by Clause 11 (a) as set out finds that the Respondents failed to exercise due caution and restraint in a potentially divisive and religious matter of the Kadhi Courts in publishing the article.

5. Whether the Complainant is entitled to the reliefs sought.

The Complainant sought a correction of the story and that a commentary be published to correct the article complained of. In his submissions and final prayers during the hearing the Complainant seems to have abandoned the prayer for a commentary. The Commission therefore only considers whether he is entitled to a correction as prayed. Considering that this is a matter of public interest, the complexity and sensitivity of the issues, the Commission finds it inappropriate to order a correction of the article.

ORDERS OF THE COMMISSION

Taking into account the evidence on record, the relief sought by the Complainant, the submissions made by both parties, and the relevant provisions of the Media Act, the Commission makes the following orders;

1. We order and direct that the 1st Respondent pays a fine of two hundred thousand shillings for failing to distinctly isolate opinions from facts in violation of Section 35 (1) of 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.

2. We order and direct that the 1st Respondent pays a fine of two hundred thousand shillings for failing to publish an accurate story on a matter of public interest in violation of Clause 1 (a) of the Code of Conduct for the Practice of Journalism. 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 publishing an alarming and provocative headline in contravention of Clause 11 (b) of the Code of Conduct for the Practice of Journalism. 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 contravention of Clause 11 (a) of the Code of Conduct for the Practice of Journalism in failing to exercise due caution and restraint in publishing and covering ethnic, sectarian and religious conflict. The fine, imposed pursuant to Section 38 of the Media Act, shall be paid to the Media Council of Kenya within 14 days.

In the event of failure to comply, we further direct that this matter be mentioned before this Commission for further orders. Either party is at liberty to make the necessary applications.

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 29th day of March 2012

Grace N Katasi (Chairperson) ……

Murej MakOchieng (Commissioner) ……

Priscilla Nyokabi (Commissioner) ……

Peter Mwaura (Commissioner) ……