



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL NO. 513 OF 2011**

**DR. CHRISTOPHER NDARATHI MURUNGARU.....PLAINTIFF**

**VERSUS**

**THE STANDARD LIMITED.....1<sup>ST</sup> DEFENDANT**

**BEN AGINA.....2<sup>ND</sup> DEFENDANT**

**DAVID OHITO.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. By a plaint dated 10<sup>th</sup> October 2011 and filed in Court on 24<sup>th</sup> November 2011, the plaintiff herein seeks the following orders:
  - a. **An injunction to restrain the Defendants, their servants and/or agents from further publishing defamatory words or articles relating to the Plaintiff and in particular linking the plaintiff into corruption, corrupt activities and Anglo Leasing affair.**
  - b. **General damages for libel.**
  - c. **Aggravated, punitive and exemplary damages for libel.**
  - d. **Costs of the Suit.**
  - e. **Interest on (b), (c) and (d) above.**
  - f. **Any other or further relief or order that this Hon. Court may deem fit to grant.**

2. The cause of action herein arose from publications attributed to the defendants on 5<sup>th</sup> June 2011 and 11<sup>th</sup> July 2011, publications which, in the plaintiff's view were defamatory of the plaintiff. Confronted with the plaint the defendant filed a defence dated 10<sup>th</sup> April 2012 on 12<sup>th</sup> April 2012 in which while admitting publishing the alleged articles denied that the same were defamatory of the plaintiff. Of relevance to the present ruling however, is paragraph 2 of the said defence in which the defendant contended that this Honourable Court has no jurisdiction to hear this suit by virtue of Article 34(2) of the Constitution of Kenya and put the plaintiff on notice that they would be raising a preliminary objection to

that effect. In the meantime vide a Notice of Preliminary Objection dated 21<sup>st</sup> December 2011 and filed in Court on 23<sup>rd</sup> December 2011 the three defendants contended that this Honourable Court has no jurisdiction to hear this suit by virtue of Article 34(2) of the Constitution of Kenya (2010). It is this preliminary objection that is the subject of this ruling.

## **The Submissions**

### **Defendants' Submissions in Support of the Preliminary Objection**

3. The Defendants filed written submissions and authorities. Through their learned counsel **Mr. Gitonga**, they also made oral submissions.
4. In his submissions, **Mr. Gitonga**, contended that if this Honourable Court upholds the objection a precedent that gives true meaning to the letter and spirit of Article 34 of the Constitution of Kenya be set in line with the hopes and conscious decision of the Kenyan people in enacting that Article. While setting out the provisions of Article 34(2) and 260 of the Constitution, it is submitted that this Court is an office and the judiciary is an organ comprising the Government of the Republic under the Constitution. Article 34(2), it is submitted, gives specific rights of freedom to the media barring any control of state over or interference with any person engaged in broadcasting, production or circulation of any publication or the dissemination of information by any medium. It also bars the state from penalising any person for any opinion or view or the contents of any broadcast, publication or dissemination. Since the said clause is couched in mandatory terms, it is submitted, this Court cannot exercise control over, interfere with or penalise any person engaged in the media save in so far as the matter relates to the exclusion under Article 33(2) of the Constitution. In the defendants' view, the Kenyan judiciary has historically performed dismally in its duty to evolve a rational jurisprudence that harmonises constitutional command for freedom of expression with the legitimate interest underlying the law of defamation without clogging the freedom of expression and cites as examples the judgements and awards of the High Court against the media. Citing Article 33 of the Constitution it is submitted that whereas there are limitations contained in clause (2) with respect to prevention of destabilisation of social order and/or commission of crime or discrimination and clause (3) requiring that in the exercise, persons shall have regard to the rights and reputation of others, breach of qualification under clause (2) amounts to crime while breach of clause (3) amounts to tort. By including Article 34(2) in the Constitution, it is submitted, the people of Kenya hoped to bring an end to state and political pressure and interference with the media that reigned during the yester years when the Executive arm curtailed the freedom through licensing procedures and harassment and detention of journalists while the Judiciary did so through award of excessive awards. The Legislature on the other hand contributed by the enactments and amendments to the relevant statutes. This, it is submitted, was the historical basis that informed the enactment of the present Article 34 as shown by the history of the Constitutional Review process. It is submitted that the attempt to introduce limitations to the provisions of Article 50 of the **Bomas Draft** in the **Wako Draft** was rejected when the people of Kenya voted against the latter draft during the 2005 referendum which rejection, it is the defendants' view, was a reflection that the people of Kenya did not want the State to control or interfere with the workings of the media or the media penalised for their opinions and publications.
5. Based on the foregoing, this Court is urged to diligently and honestly craft a precedent that will put an end to interference of the state with media freedom by applying its mind to the letter and spirit of Article 34(2) as intensioned by the people of Kenya when they passed the Constitution. The defendants while justifying the unique inclusion of Article 34 in our Constitution cited **Ramesh Thapar vs. State of Madras [1959] SCR 12** which was relied upon by **Rawal, J** (as she then was) in **Kwacha Group of Companies vs. The Standard Limited & Others Civil Suit No. 319 of 2005**, in which it was held:  
  
*“freedom of speech and expression includes freedom of propagation of ideas and that this freedom is ensured by the freedom of circulation. The freedom of speech and expression are the foundations of all democratic organisations and essential for the proper functioning of the process of democracy”*
6. The defendants submit relying on **Reyes vs. The Queen [2002] 2 AC 235a** that the Court ought to uphold the principles of Constitutional interpretation and protect the right given to the media by Article

34 and carefully consider the language and mandatory wording of Article 34 and give it a generous and purposeful interpretation. In that case it was stated:

*“when called upon to interpret the Constitution the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The Court has no license to read its own predilections and moral values into the Constitution but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency and mark the progress of a maturing society”.*

7. This Court is urged to depart from the decision reached by **Rawal, J** in the **Kwacha Case** (supra) on the ground that the said decision did not give life to the principles and spirit of democratic values of a nation as expressed in Article 34. By referring to other provisions in the Constitution, it is submitted that the learned Judge was fishing for an excuse to decline to enforce the right given to the media by Article 34(2). By comparing the media to regular persons, the court, it is contended, failed to recognise the fact that by virtue of inclusion of Article 34, the Constitution considers and treats the media as special persons just like in Articles 45, 46, 53, 54 and 55. Referring to **Lillians vs. Caltex Oil Kenya Limited [1989] KLR 1** it is submitted that what Article 34 has done is to impose a limit on the courts authority in terms of the kind and nature of the action and matter of which the Court can take cognisance and the area to which its jurisdiction extends and this is in the realm of Article 33(2) and not Article 33(3) in regard to the tort of defamation. Referring to **Boniface Waweru Mbiyu vs. Mary Njeri & Another Nairobi HCCC No. 639 of 2005** it is the defendants’ contention that Article 34(2) of the Constitution is very clear that the state shall not interfere nor punish any person for any opinion or view or the content of any broadcast, publication or dissemination and the judiciary being a state organ, has no right in involving itself in matters concerning the media. By not excluding Article 33(3) from the immunity in Article 34(2) it is submitted the people of Kenya intended that any publication in the media could not be challenged before a Court of law on grounds that it is defamatory because what is published or broadcast is beyond the control of the state. This does not, in the defendants’ view, amount to non-regulation of the media since Article 34(5) provides for the establishing a body tasked with setting standards, regulation monitoring compliance with the set standards. Pursuant to that and the Sixth Schedule to the Constitution, the Media Act, 2007 has established The Media Council of Kenya which is the body tasked with the said role. There is also the Complaints Commission composed of a chairman and five members and the fact that the qualifications of the chairman and other members are set highly is an indication, according to the defendants, that the Commission is competent enough to handle matters of Defamation as its composition makes it preferable than courts as it is representative of different ideas. On hearing a complaint the Commission is empowered to dismiss the complaint, order offending party to publish an apology or correction in such a manner as the Council may direct or issue a public reprimand of journalist or media enterprises involved or a combination of the orders. The decision, however, is subject to appeal even to the High Court on matters of law and in absence of an appeal the decision is enforceable as an order of the Court. Just like in Arbitration proceedings it is submitted on the strength of **University of Nairobi vs. N K Brothers Limited [2009] eKLR** persons aggrieved by acts of the media do not have the option of having their complaints addressed by different forums and in particular, the Courts since by promulgating Article 34(2) of the Constitution, the people of Kenya did not want any state interference with the freedom of the media.

8. In conclusion it is submitted that the Court lacks jurisdiction to hear this suit and as such, the suit stands abated and invalid in law.

### **Plaintiff’s Submissions in Opposition to the Preliminary Objection**

9. The plaintiff similarly filed written submissions which were highlighted by his learned counsel **Mr. Esmail**. According to the plaintiff, the bedrock of a democratic society is the ability of its members to publicly express themselves and engage in free speech without fear of any inhibition from the State or any other authority. Article 33, it is submitted is the foundation upon which the right to freedom of speech for all Kenyans is anchored. However, it must be borne in mind that the right to freedom of speech is susceptible to abuse and can have serious adverse repercussions for both the nation and individuals alike

and it is for this reason that the right to freedom of speech enshrined in Article 33 has the limitations imposed upon it by virtue of Article 33(2) and 33(3). Under the latter it is provided that “in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others”. Article 260 on the other hand describes a “person” as including a company, association or other body of persons whether incorporated or unincorporated. The media is, according to the plaintiff, therefore covered in the constitutional definition of a person and is therefore by virtue of Article 33(3) of the Constitution to respect the rights and reputation of others. Since Article 33(3) enjoins a person to not only respect the reputation of others but also the rights of others, the exception envisaged by Article 33(3) of the Constitution with respect to the freedom of speech extends to the rest of the rights under the bill of rights including the right to human dignity under Article 28 and the right to equality and freedom from discrimination under Article 27. Whereas Article 34 of the Constitution provides freedom of the media, such right is restricted by limitations in Article 33(2) and one of the limitation is advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm. Vilification, according to the plaintiff is described by *Oxford Online Dictionary* and *Dictionary.com* as “abusively disparaging speech or writing” as well as “to speak ill of; slander”. Writing or publication by the media that disparages a person’s reputation and which essentially amounts to advocacy of hatred towards that individual by the public is, it is submitted, covered by the limitations imposed on the said freedom of the media. Whether a publication or article constitutes the vilification of another can only be determined by evidence. Since the freedom of speech or the Freedom of the Media in Article is not one of the unlimited rights under Article 25 of the Constitution, the only reasonable conclusion is that the people of Kenya did not intend that the said freedoms be unlimited. Taking cue from the preamble to the Constitution, it is submitted that a society which “acknowledges the supremacy of the Almighty God of all creation; and recognises the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law” cannot be one which encourages falsehoods and adverse maligning of the very dignity and the reputation the Kenyan people held sacrosanct under Articles 28 and 33(3) of the Constitution. The plaintiff relies on **Rosenblatt vs. Baer 383 US 75, 92 (1966)**. In this case it was held that “the right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects hurt no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty”. The common thread running through the Constitution and the provisions of Articles 17 and 19 of the International Covenant on Civil and Political Rights (ICPR), it is submitted, is that the protection of the right to human dignity is a fundamental human right in any democratic society which must be protected and an infringement on the reputation of a human being has the effect of attacking his dignity. In this modern technological era, it is submitted, the word “media” extends to new forms of communication and publication such as internet blogs and social websites and therefore it would amount to a grave travesty of justice and failure to uphold the rule of law and equality as well as equity if the media were to be allowed to claim immunity from defamation suits or from being accountable for the consequences of their publication.

**10.** Judicial authority, it is submitted, is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under the Constitution. Since the High Court is bestowed with the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been violated, infringed or threatened, the people of Kenya did not enact the freedom of the media with the intention that the courts should not have jurisdiction to entertain cases in which their own dignity, reputation and honour were being infringed upon. It is contended on behalf of the plaintiff that far from Article 34 depriving the Court of the jurisdiction to deal with a case involving the infringement upon the dignity, reputation and honour were being infringed upon, Articles 28 and 33(3) enjoin the Court to ensure that the dignity of every person in the Republic is zealously protected. Since the freedom of the media emanates from the freedom of speech enshrined in Article 33 of the Constitution, the media must, of necessity be subject to Article 33(3) which enjoins it to respect the rights and reputations of “all persons”. The defendants, it is submitted, do not fall under the category of “special persons” under the Constitution a phrase which, in the defendants’ opinion, cannot exist in a society based on equality, democracy and the rule of law.

**11.** With respect to the role of the Media Council of Kenya, it is submitted that the jurisdiction of the Complaints Commission of the Media Council of Kenya is quite limited and apart from reprimanding the

media houses, journalists or directing the publication of an apology or correction, the Commission has no other powers under the Media Act thus leaving the question as to damages resulting from injury to reputation unanswered. Since the Constitution enjoins the Court to grant appropriate relief including a declaration of rights, an injunction, a conservatory order and an order for compensation, human dignity, being a fundamental right in the Bill of Rights under the Constitution is therefore capable of being protected and compensated by the Court.

12. In conclusion, it is submitted that a civil suit instituted by a private person seeking to vindicate his lost dignity and reputation against the media does not amount to State control of the media. State control in the plaintiff's view can only be present when the state takes actions that would amount to pre-censorship curtailing publications, circulations and other activities involved in the operation of the media fraternity and once published, the media fraternity must be able to justify, stand by and defend the veracity of the content of their publications when called on to challenge by private persons subject of and aggrieved by such publications and this can only be done by the Court. It would therefore be a travesty of justice if the Court were to down its tools based on flawed hypothesis advanced by the Defendant on the Court's want of jurisdiction and concepts such as human dignity and reputation would be relegated to the archives and history books. Accordingly, the Court is urged to hold that it has jurisdiction to entertain this matter.

### **Rejoinder by the Defendants to the Plaintiffs' Submissions.**

13. In response to the plaintiff's submissions the defendants contended that Article 34 of the Constitution was consciously crafted and included in the Constitution by the people of Kenya to safeguard the media and hence the issue of the same being unconstitutional is wrong interpretation. The defendants reiterate that the historical context of Article 34 shows that the qualification under Article 33(2) of the Constitution in the exercise of the right of expression amounts to crime and hence vilification as used in Article 33(2) amounts to crime and creates a criminal liability. Since the Complaints Commission provided for by Section 23 of the Media Act No. 3 of 2007 is a creation in the same manner as the High Court under Article 162 of the Constitution of Kenya, the complaints against the media should be taken to the Complaints Commission which provides a safeguard against the media going out of control hence it is not correct that the media enjoy unlimited freedom. In the defendant's view, the Commission falls under tribunals contemplated under Article 162(4) of the Constitution. In the

defendants' view Article 34(5) provides a forum for redress and control of professional standards, conduct and regulation of the media by the Media Council and hence the Court ought to enforce the spirit of Article 34 of the Constitution.

### **The Principles**

14. The Constitution is to be interpreted both contextually and purposefully since it is an ambulatory living instrument designed for the good governance, liberties, welfare and protection of all persons. The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A Constitution by contrast is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and when joined by a bill or charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The well known principles of constitutional interpretation, though not exhaustive, are as follows:

- (i) That the principles, which govern the construction of statutes, also apply to the interpretation of constitutional provisions. The widest construction possible, in its context, should be given according to the ordinary meaning of the words used and each general word should be held to extend to all ancillary and subsidiary matters. In certain contexts, a liberal interpretation of the constitutional provisions may be called for.**

- (ii) A constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such provision, the approach of the Court should be dynamic, progressive and liberal or flexible keeping in view ideals of the people socio-economic and political-cultural values so as to extend the benefit of the same to the maximum possible.
- (iii) The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. In interpreting the Constitution, the Court will accord due the weight to the particular circumstances in the country, including the widely-held societal norms, values and aspirations. Although public opinion may have some relevance, it is in itself, no substitute for the duty vested in the Court to interpret the Constitution and to uphold its provisions without fear or favour. The Court will give due regard to international jurisprudence and seek guidance from decisions in other common law jurisdictions. The Court must promote the spirit, purpose and objects of the Constitution. The language of the provisions construed must not be strained by the judge so as to accord with her/his own subjective moral values, otherwise the spirit of the Constitution will be lost. All provisions bearing upon a particular subject are to be considered together and construed as a whole. This is the rule of harmony, rule of completeness and the exhaustiveness and the rule of paramountcy of the written Constitution.
- (iv) The words of the written Constitution prevail over all written conventions, precedents and practices.
- (v) No one provision of the Constitution is to be segregated from the others and be considered alone, but all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.
- (vi) The Constitution is the supreme law of the land and forms the standard upon which all other laws are judged. Any law, which is inconsistent with or in contravention of the Constitution, is null and void to the extent of the inconsistency.
- (vii) Fundamental rights and freedoms guaranteed under the Constitution are to be interpreted having general regard to evolving standards of human dignity.
- (viii) Decisions from foreign jurisdictions with similar Constitutions are useful in helping in the interpretation of the Constitution.
- (ix) Both purpose and the effect are relevant to the determination of the constitutional validity of a legislative or constitutional provision.

15. Article 159(1) of the Constitution provides that Judicial authority is derived from the people and vests in, and shall be exercised by, the Courts and tribunals established by or under the Constitution. As this Court, composed of a bench of three judges (**Warsame, Omondi & Odunga, JJ**) stated in **High Court Constitutional Petition No. 23 of 2012 - Hon. Lady Justice Nancy Makokha Baraza vs. The Judicial Service Commission and Others**,

“the Constitution of Kenya which was promulgated on 27<sup>th</sup> August 2010 is arguably one of the most robust in the African continent. Not only does it expressly provide that all sovereign power belongs to the people of Kenya but also states that such power shall be exercised only in accordance with the Constitution. It provides for a robust Bill of Rights which deals with all aspects of human needs including the protection of the environment and consumer rights. Article 23(3) empowers this Court, in any proceedings brought under Article 22, to grant appropriate reliefs, including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation and an order of judicial review”.

16. In interpreting Article 34 of the Constitution I shall be guided by the provisions of Article 259 of the Constitution which provides as follows:

**(1). This Constitution shall be interpreted in a manner that—**

- (a) promotes its purposes, values and principles;**
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
- (c) permits the development of the law; and**
- (d) contributes to good governance.**

17. I further wish to refer to the words of Rawal, J (as she then was) in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006:**

**“Our Constitution is not a cloud that hovers over the beautiful land of Kenya – it is linked to our history, customs, tradition, ideals, values and on political, cultural, social and economic situations. Its dynamics and relevance is rooted in these values. Cut off from these factors it would become redundant and irrelevant. The Constitution is not a skeleton of dry bones without life and spirit. The least it is expected to have and which cannot be denied is the spirit of its framers. The Court should not limit the ambit of public interest or agree to confine it only to past definitions or categories, since our Constitution inspires us to give public interest the widest leverage and to uphold it”.**

18. Again in interpreting the Constitution, the Court must remind itself of the provisions of Article 2(3) of the Constitution which provides that “the validity or legality of this Constitution is not subject to challenge by or before any court or other State organ”. The Court is therefore barred from declaring any part of the Constitution unconstitutional. This was the position taken by Mohammed Ibrahim, J (as he then was) in **Re: Harmonised Draft Constitution of Kenya: Bishop Kimani and 2 others v The Attorney General Mombasa HCCP No. 669 of 2009 (Unreported)** where the learned Judge stated:

**“Courts must be wary to undermine the presumption of Constitutionality of legislation and it must reject any invitation to question or interpret the Constitutionality of the Constitution itself.”**

19. The Preamble to our Constitution recognises our aspiration as people of Kenya for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The preamble, though not part of the Constitution, plays a very important role and ought not to be considered as a superfluity. It mirrors the values and aspirations of the People of Kenya in enacting the Constitution. In **Olum & Another vs. Attorney General (2) [1995-1998] 1 EA 258**, it was held that although the national objectives and directive principles of State policy are not on their own justiciable, they and the preamble of the Constitution should be given effect wherever it is fairly possible to do so without violating the meaning of the words used.

20. The national values which the Court is enjoined under Article 10 of the Constitution to give effect to while applying or interpreting the Constitution; enacting, applying or interpreting any law; or making or implementing public policy decisions are provided in Article 10(2) thereof which outlines the said values as:

***(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***

***(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***

**(c) good governance, integrity, transparency and accountability; and**

**(d) sustainable development.**

21. Freedom of expression is one of the fundamental freedoms pertaining to the citizens as a human being. Freedom of the press is a special freedom within the scope of freedom of expression. The freedom of press is considered as the right to investigate and publish freely. It covers not only the right of the press to impart information of general interest or concern but also the right of the public to receive it. Freedom of expression and freedom to impart and disseminate opinions and ideas is a right recognised internationally and is protected not only by all democratic states but by International instruments as well. What constitutes freedom of expression, it is generally accepted, entails the freedom to hold opinions and to seek, receive and impart information and ideas of all kinds, either orally, in writing, in print, in the form of art, or through other chosen media, without interference by public authority and regardless of frontiers. This recognition underpins the important role played by the media in the development of a society. It is difficult to imagine a right more important to a democratic society than freedom of expression. Indeed a democratic society cannot exist without that freedom to express new ideas and put forward opinions about the functioning of public institutions. The vital importance of the concept cannot be over-emphasised. Democracy is based essentially on a free debate and open discussion for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential. When men govern themselves it is they and no one else who must pass judgement upon unwisdom and unfairness and danger, and that means that unwise ideas must have a hearing as well as wise ones, fair as well as unfair, dangerous as well as safe. These conflicting views must be expressed, not because they are valid, because they are relevant. To be afraid of ideas, any idea, is to be unfit for self-government. Freedom of expression is recognised and protected by many international conventions and declarations as well as national Constitutions. The importance of freedom of expression including freedom of the press to a democratic society cannot be over-emphasised. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in government or authority to be brought to public scrutiny and thereby hold them accountable. Democracy is a fundamental constitutional value and principle in this Country. Kenya like many other countries in the world have chosen the path of democratic governance and hence the importance of the freedom of expression as being the cornerstone of every society that is democratically governed. Having chosen the path of democratic governance we have a duty to protect the rights regarding the free flow of information, free debate and open discussion of issues that concern the citizens of this country. In order to exercise these rights there must be an enabling regime for people to freely express their ideas and opinions as long as in enjoying these rights such people do not prejudice the rights and freedoms of others or public interest. As long as in expressing one's opinion even if it is false, the person doing so does not prejudice the rights and freedoms of others there would be no harm done. Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that they are in line with *Rousseau's* version of the Social Contract theory. In brief the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the *raison d'être* of the State is to facilitate and enhance the individual's self-fulfilment and advancement, recognising the individual's rights and freedoms as inherent in humanity. Protection of the fundamental human rights therefore is a primary objective of every democratic Constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression. This is as true in the new democracies as it is in the old ones.

22. The Preamble to the Constitution, as already stated declares that the people of Kenya aspire for a government based on democracy and in fact the entire Constitution reflects a commitment by the people of Kenya to establish a free and democratic society. The breadth and importance of the right of free

speech is inherent in the concept of a democratic and plurist society. Our 2010 Constitution has ushered into this country a new constitutional order whose one of the objectives is to build democracy. No society can build democracy and strong institutions to defend that democracy if there is no free flow of information even if some of that information is false. Democracy by its very nature comes at a price. These principles were enunciated by the decision of the Supreme Court of Uganda in the case of **Obbo and Another vs. Attorney General [2004] 1 EA 265 (Scu)**.

### **The Findings**

**70.** Chapter 4 of the Constitution entrenches the Bill of Rights. Under this Chapter are a raft of rights and freedoms which the people of the Republic of Kenya decided to specifically spell out in the Constitution. These fundamental freedoms and rights comprise rights which are incapable of being limited and the Constitution expressly sets out the fundamental freedoms and rights which cannot be limited in Article 25 as freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*. Since the freedom of expression is not expressly mentioned under Article 25, the first impression one gets is that freedom of expression is not absolute or boundless and that limitations may be imposed on the freedom of expression, which strike a balance between freedom of expression and of the press and other basic rights and social rights, protected by law. Under Article 24(1)(d) of the Constitution no restriction of the freedom is permissible unless it is intended to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.

**71.** However, under Article 34(2) of the Constitution which provides for the freedom of the media, the State is prohibited in mandatory terms from exercising control over or interfering with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium or penalising any person for any opinion or view or the content of any broadcast, publication or dissemination. Under Article 34(1), however, the freedom and independence of electronic, print and all other types of media, though guaranteed, does not extend to propaganda for war; incitement to violence; hate speech; or advocacy of hatred that (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or (ii) is based on any ground of discrimination specified or contemplated in Article 27 (4). Although the defendant's position is that the entrenchment of Article 34 of the Constitution places Kenya on a different plane from where it was before the promulgation of the Constitution, 2010, in my view the provisions of Article 34 is a reflection of the international standards expected of a democratic society as enunciated in **Ramesh Thapar vs. State of Madras [1959] SCR 578 and Express Newspaper & Others vs. Union of India [1958] SC 578**. The trend world over is that the State ought to desist from taking actions whose effects amount to controlling or interfering with the freedom of the media. I agree with **Mr. Gitonga** that the necessity for the enactment of Article 34 of the Constitution was informed by certain actions taken against the Media in this country prior to the promulgation of the Constitution. This is not to say that such actions were even then warranted or justified in a free and democratic State. The enactment of Article 34 was meant to ensure that the State does not feign ignorance of its obligations to the media by resorting to outmoded tactics in its attempt to silence the media. Therefore Article 34 cannot be considered in isolation but must be looked at in the light of the historical perspective and misdemeanours on the part of the State agencies, the Legislature, the Executive and the Judiciary all included.

**72.** In the defendants' views a suit for defamation like the present suit does not fall under the foregoing exceptions but rather falls under Article 33(3) which deals with respect of the rights and reputation of others. In the defendants' view this Court has no jurisdiction to entertain a suit for defamation since the Court is a State organ and entertaining this suit amounts to what is prohibited in the aforesaid Article 34(2). The plaintiff's view, however, is that since Article 260 applies to all persons, it applies to the media and therefore Article 33(3) similarly applies. I with due respect disagree with the plaintiff's interpretation. If the plaintiff's view was correct then the provisions of Article 34(1) with respect to reference to Article 33(2) would be superfluous yet in Constitutional interpretation, none of the provisions ought to be considered as superfluous.

**73.** My difficulty with the defendants' position arises from the role of the Court in a defamation suit.

Does the Court seek to control or interfere with the media or does it seek to penalise the media? In my view in a suit for defamation and in civil suits for that matter the Court's role is that of an independent arbiter between two disputants. In doing so the Court is empowered under Article 23(3) of the Constitution to grant appropriate relief including a declaration of rights, an injunction, a conservatory order and an order for compensation. The primary aim of the Court is that of an arbiter and in doing so is empowered by the Constitution to grant the aforesaid remedies. To say that in doing so the Court is controlling or interfering with or punishing one of the parties is to miss the point. In my view therefore such remedies as an award of exemplary and aggravated damages may have to be looked at afresh in light of the current Constitutional provisions. In Esso Standard Ltd vs. Semu Amanu Opio SCCA No. 343 of 1987 it was held:

**“As is very well known, the function of civil law is to compensate, while the function of criminal law is to inflict deterrent and punitive penalties. Damages for breach of contract and tort are, or ought to be, fixed at a sum, which will compensate the plaintiff. In the case of tort, the damages should be fixed at a sum, so far as money can do, to compensate the victim for all the injury, which has been suffered. This compensation sum may be enhanced to cover the loss suffered as well as the injury to the plaintiff's feelings and reputation. On the other hand, there is the loss of the plaintiff, and on the other there is the conduct of the defendant. The latter may have acted in a high-handed, insulting, malicious or oppressive manner. The defendant's action may cause the damages of a purely compensatory kind to be increased; and such increase, still compensatory, would be called aggravated damages. But then as a tort is a wrong done to the plaintiff how can the court prevent a wrong done repeatedly in disregard of the plaintiff's rights? The notion arose that a further sum of damages could be meted out by way of punishment or by making an example of the defendant's conduct. Hence this extra sum may be called punitive or exemplary damages. Other names have been used such as vindictive damages but vindictiveness can hardly be a trait properly pursued by a court of justice”.**

That issue will, however, await a determination on another day.

74. In interpreting the Constitution, the Court must under the rule of harmony recognize that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. The Court must promote the spirit, purpose and objects of the Constitution. The language of the provisions construed must not be strained by the judge so as to accord with her/his own subjective moral values, otherwise the spirit of the Constitution will be lost. All provisions bearing upon a particular subject are to be considered together and construed as a whole. Under Article 28 of the Constitution every person has inherent dignity and the right to have that dignity respected and protected while Article 31 deals with the right to privacy. Oxford Advance Learner's Dictionary describes “dignity” as “the quality that earns or deserves respect”. Articles 28 and 31 therefore recognize the right of a person to be respected. Where such respect is not accorded when due a person is entitled to ask the Court for an appropriate remedy under Article 23 aforesaid.

75. Is it therefore right to say that under Article 34 of the Constitution a person's right to be respected does not apply to the media in so far as the Court's jurisdiction to grant the remedies stipulated in Article 23 are concerned? In my view Articles, 23, 28, 31, 33 and 34 of the Constitution must be read together so as to gather the spirit of the Constitution without dismembering the Constitution. For this Court to decide that the remedies stipulated under Article 23 of the Constitution do not apply to the media when the Court enforces the rights of a person under Article 28 would amount to an amendment of the Constitution or at worst rendering Article 28 partly inoperative and this Court has no jurisdiction to do that. As already stated Article 34 cannot be divorced from its historical foundation. It was the need to grant the media more freedom and independence that called for the same. It was the unnecessary interference with the media houses in form of censorship and night-raids that led to the need to have in place this provision. It was the need to tame the runaway awards emanating from the Courts that gave birth to article 34. It was the passing of undemocratic legislation aimed at silencing the media that necessitated Article 34. However, it was not the desire by the people of the Republic of Kenya to give the media a free hand in publishing offending materials that conceived Article 34. Accordingly I do not accede to the argument

that by enacting Article 34 the people of the Republic of Kenya divested themselves of the right to resort to Courts of law in order protect their reputation, privacy and dignity under Articles 28 and 31 of the Constitution. This thinking was espoused by Nyamu, J (as he then was) in **Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki & Another HCMA No. 7 of 2006 [2006] 2 KLR 356** as follows:

**“The Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future...Constitutional Theory has set various models of interpreting constitutional tests i.e. Historical, textual, structural, doctrinal, ethical and prudential. The Constitution formalizes the historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. Ordinarily the value content of law relates to the purpose or underlying basis of that law. Such judgment is based on the views and values of the people that make the law and those who the law regulates”.**

76. The defendants, however, argue that their interpretation of the provisions of Article 34 does not have the effect of rendering the freedom of the media unlimited since there are adequate provisions under the ***Media Act, 2007*** to deal with complaints against the media. **Mr. Gitonga**, however, admitted that under the said Act there is no provision for an award of damages. In fact it would seem that the remedies under the Act are aimed towards reprimand, apology and punishment of the media house rather than compensating the victim. I am however, not surprised that the Act does not deal with award of damages. In my view in omitting to provide for damages for compensation Parliament must have been aware of the potential conflict that would have caused and the wise decision to omit that remedy from the options available to the Complaints Commission. To contend that Article 28 of the Constitution is alive when the remedy available to a party whose rights thereunder are threatened, violated or infringed is made illusory by deprivation of the Court’s jurisdiction to adjudicate thereon while the Complaints Commission is rendered powerless to adequately deal with such matters would be contrary to the rule that both purpose and the effect are relevant to the determination of the constitutional validity of a legislative or constitutional provision. As was held in South African case of **Minister of Health and Others vs. Treatment Action Campaign and Others [2002] 5 LRC 216:**

**“Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant ‘appropriate relief’. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of s 172(1)(a) a court may also ‘make any other order that is just and equitable’ (s 172(1)(b))...Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...The courts have a particular responsibility in this regards and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal... Nor would it necessarily be out of place for there to be an appropriate order on the relevant organs of state in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the separation of state power as between the Executive and the Judiciary is to negate a foundation value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of state and it is our duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights”.**

## **Conclusion**

77. In conclusion, whereas I agree that the Court’s authority to control, interfere with or penalise the media for any opinion or view or the content of any broadcast, publication or dissemination has to be

viewed in light of the current Constitutional dispensation, the Court is not barred from investigating and adjudicating over any dispute where a person alleges that his rights or fundamental freedoms under Article 28 of the Constitution have been infringed and award appropriate remedy. To equate the powers of the Court with that of the Complaints Commission flies in the face of the express Constitutional provisions in Article 165(3)(b) which confers on the High Court the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Such reasoning will also go contrary to the powers of the High Court under Article 165(6) to supervise the subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function. In the defendants' own submission it is admitted that there is a right of appeal to the High Court from a decision arising from the process under the Media Act, a recognition that even in cases where the Complaints Commission is clothed with jurisdiction the appellate jurisdiction of the High Court is not ousted. In fact even if there was no avenue for appealing to the High Court and even if the said Act had purported that its decision was final that would not oust the High Court's supervisory jurisdiction under Article 165(6) aforesaid.

**78.** Before I conclude I must express my gratitude to counsel for thorough research and very eloquent submissions made in the prosecution and opposition of this preliminary objection. If I have not referred to all the authorities referred to me by counsel, it is not due to disrespect or out of lack of the appreciation for counsels' industry.

**79.** Having duly considered the detailed submissions and arguments by the parties, I decline to uphold the preliminary objection dated 21<sup>st</sup> December 2011. I hold that this Court has the jurisdiction to entertain this suit.

**80.** I will make no order as to costs since the issue raised herein was an issue of great national importance and Constitutional momentum.

Dated at Nairobi this 29<sup>th</sup> day of October 2012

**G V ODUNGA**

**JUDGE**

Delivered in the presence of

Mr Esmail for Plaintiff

Mr Gitonga for the Defendant