



Speaker of the County Assembly of Siaya County v Nation Media Group Limited (Petition E245 of 2021) [2025] KEHC 8315 (KLR) (Constitutional and Human Rights) (12 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E245 OF 2021
LN MUGAMBI, J
JUNE 12, 2025**

**BETWEEN
SPEAKER OF THE COUNTY ASSEMBLY OF SIAYA COUNTY PETITIONER
AND
NATION MEDIA GROUP LIMITED RESPONDENT**

JUDGMENT

Introduction

1. The Petition dated 28th May 2021 was amended on 18th July 2024 and is supported by the Petitioner's affidavit in support of the even date.
2. The Petitioner alleges that the Respondent has failed to correct and delete false and misleading information published in a Newspaper Article dated 5th March 2020 that violates its right under Article 35(2) of *the Constitution*. For this reason, the Petitioner seeks the following reliefs:
 - i. A declaration that the Respondent has violated the Petitioner's right under Article 35(2) of *the Constitution*.
 - ii. A declaration that any allegation that the County Assembly of Siaya paid its members per diems for a trip that never materialized are unfounded, baseless, misleading and untrue.
 - iii. A declaration that the Respondent violated the Petitioner's right of reply despite having notice of the misleading publication made on 5th March 2020.



- iv. An order do issue pursuant to Article 35(2) of *the Constitution* compelling the Respondent to correct or delete the untrue and misleading information published about the Petitioner on 5th March 2020.
- v. Permanent injunction barring the Respondents and their agents from continuing publishing misleading publications in print, online or any other medium linking the County Assembly of Siaya or its members to corruption originating from paid per diems for an inexistent visit to Uganda.
- vi. In the alternative to the foregoing, an order compelling the Respondents to offer the Petitioner an apology in the same print and electronic media with the same print and prominence as the impugned publication and or the right to reply in their respective print and digital platforms and be published with similar prominence as the untrue and misleading allegations.
- vii. An order do issue pursuant to Article 23(3)(c) of *the Constitution* compelling the Respondent to compensate the Petitioner for the violation of rights.
- viii. Costs of the Petition.

Petitioner's case

3. The Petitioner states that the Respondent on 5th March 2020 published a story captioned 'Kisumu residents' protest over the slow pace in graft cases' in the Daily Nation and its online platform. In the publication it is alleged that the Respondent reported that:

'Leading the protesters who camped outside the offices within the CBD was Kondele Social Justice Centre Team leader Boniface Akach, who urged the commission's Western Regional Manager George Oira to come out and address them and issue a status report on the cases the commission is investigating in the region...

In response to the complaints, the commission's Deputy Regional Manager Aura Chibole asked the activists to write a petition to the agency highlighting issues of concern and the cases they want expedited.

He also revealed that investigations into the case where Siaya MCAs pocketed allowances and per diem for a non-existent Uganda trip had borne positive results.

He said investigations into the matter are still active and are almost complete.'

4. The Petitioner asserts that these claims are false, malicious, misleading and unfounded with the sole aim of painting the Petitioner as a corrupt organ. It is noted that the Respondent did not even bother to contact the Petitioner or the MCAs to ascertain the veracity of the allegations and to grant them their right of reply which is a standard practice in journalism.
5. The Petitioner is grieved that despite informing the Respondent that the published information is misleading and requesting the information to be deleted, the Respondent has maintained the offensive publication in its online platforms. The Petitioner thus brings this Petition against the Respondent as its malicious, false and misleading information that continues to paint the Petitioner as a corrupt enterprise.

Respondent's Case

6. The Respondent in reply filed its Replying Affidavit through its Reporter, Rushdie Oudia sworn on 13th February 2024.



7. He states that despite Article 10 of *the Constitution* prescribing against corruption, the same remains a vice that goes to the root of governance in county governments thus damaging their reputation. It is alleged that this led to the establishment by county governments' Corruption Prevention Policies with the Ethics and Anti-Corruption Commission (EACC) opening investigations on the conduct of MCAs.
8. He asserts that a similar concern was raised concerning the governance of the County Government of Siaya. He states that this led to numerous protests by its residents and civil rights groups. Particularly the concerns revolved around: misappropriation of funds by State Officers, stalled and abandoned public projects, embezzlement of Project funds and delays in EACC's investigations into the reports of corruption and embezzlement of funds. Furthermore, owing to these allegations, the governor of Siaya was even summoned to appear before the Senate for a hearing into the misappropriation of public funds.
9. In light of the foregoing, he contends that the impugned publication dated 5th March 2020 contained true assertions of corruption. He adds that the issue of the non-existent trip to Uganda was equally covered by other news outlets and the EACC in its final Report for the Financial Year 2019/2020.
10. Moreover, he asserts that the publication addressed a public interest issue and thus the Respondent had a moral and social duty to publish the information. On this premise, he avers that there was no malicious intent or any falsehoods in publishing the Article as alleged.

Petitioners' Submissions

11. Carrey Joseph Advocates for the Petitioner filed submissions dated 20th December 2024 and highlighted the issues for discussion as: whether the Petitioner's right under Article 35 (2) of *the Constitution* has been violated, whether an order for permanent injunction ought to be granted against the Respondent and whether the Petitioner is entitled to compensation.
12. Counsel submitted that the Respondent published the offensive information without giving it the right of reply, even after disputing the accuracy and authenticity of the same. Counsel stressed that the Respondent had not discharged its burden of proof on the accuracy of the information.
13. Counsel thus submitted that the Petitioner had established the constitutional violation as set out in *Anarita Karimi Njeru v Republic* [1979] eKLR and affirmed by *Mumo Matemo v Trusted Society of Human Rights Alliance* (2013)eKLR by the Respondent in breach of its right under Article 35(2) of *the Constitution*.
14. On the second issue, Counsel relied in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR (Civil Appeal No. 77 of 2012) where it was held that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

- a. establish his case only at a prima facie level,
- b. Demonstrate irreparable injury if a temporary injunction is not granted, and
- c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages



are to be applied as separate, distinct and logical hurdles which the applicant as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

15. Counsel submitted that the Petitioner had established that it deserves a permanent injunction as demonstrated that the Respondent had refused and ignored to delete the inaccurate and offending publication hence satisfied the three elements. Counsel stressed that this Order was crucial as failure to issue, would mean that the Respondent will continue to mislead the public with false information regarding the cited allegation.
16. In like manner, Counsel in the third issue, submitted that the Petitioner was entitled to payment of compensation owing to the Respondent’s violation of its right under Article 35(2) of *the Constitution*. Counsel’s argument was anchored in Article 23(3) (e) of *the Constitution* and the case of *Gitobu Immanyara & 2 others v Attorney General [2016]eKLR* where the Court of Appeal affirmed that compensation is payable in constitutional petitions.

Respondent’s Submissions

17. On 13th February 2025, Hamilton Harrison and Matthews Advocates filed submissions for the Respondent.
18. On the onset, Counsel submitted that the Petition does not meet the threshold for a constitutional petition as outlined in the *Anarita Karimi* case (*supra*). This is because the Petitioner failed to demonstrate with precision how the Respondent violated its constitutional right and being that constitutional rights are subject to limitation under Article 24 of *the Constitution*.
19. Counsel stressed that the right of deletion of the publication was only available to the Petitioner if the information published was false. In this case, counsel reiterating the averments in the Respondent’s replying affidavit asserted that it had been shown that the impugned information was true.
20. Counsel added that although Petitioner maintained that the information was false, it failed to rebut the contents of the EACC’s Report which also contains this allegation. As such, Counsel submitted that the Petitioner had failed to prove its assertions. Reliance was placed in *Kasina v Attorney General & another [2024] KEHC 7573 (KLR)* where the Court held that:

“Violation of fundamental rights and freedoms is a question of fact that a petitioner has to prove before the court to the required standard on a balance of probabilities. A party has the duty to prove that the action complained of was violative of his fundamental rights and freedoms.”

21. Furthermore, Counsel submitted that the Petition is an attempt to interfere with the Respondent’s freedom of media as envisaged under Article 34 of *the Constitution*. It was stressed that the publication addressed a grave public interest issue which the Respondent had a duty to inform the public. On this premise Counsel stressed that the public interest in the matter is sufficient ground of limiting fundamental rights as advanced.
22. Reliance was placed in *Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5others [2014] KESC 53 (KLR)* where the Supreme Court held that:

“Close to home, Franceschi and Mwita (Quoted in PLO Lumumba, *The Constitution of Kenya*, 2010, Strathmore University Press, 2014) argue that [at page 172]:

The media is like a giant beast: Its teeth are persuasion, its eyes information, and its hands formation of public opinion. The media wins and loses elections. The media impeaches



politicians and, on its own, the media watchdogs Government decisions and uncovers corrupt malpractices. The media is power we cannot and do not want to control; it is the neo-doctor of our current sick society. When the media watches, stake-holders tremble, suffer anxiety and run away if they can. But it is precisely that power that can save democracy.”

23. Comparable reliance was placed in *Karen Njeri Kandie v Alassane Ba & another* [2017]eKLR and *Shadrack B.O. Gutto & 4 others v Hillary Ng’weno & 3 others* (Civil case No.888 of 1981).

24. Counsel in light of this, submitted that allowing the sought orders would be akin to deterring constructive criticism of public or state officers and thus failing to keep them accountable. To buttress this point reliance was placed in *Nairobi City County Government v John Kamau & another* [2017]eKLR where it was held that:

“The Plaintiff herein is a County Government which can be defined as government for the people and by the people and not just any other body of persons. It is run using public resources and it is a mini government so to speak. It is different from the former local authorities. I am persuaded by the arguments by Counsel for the defendants that a county government should be open to public criticisms as this is the only way that it can be held to account. The circumstances of this case were even more peculiar as the alleged defamatory statement arose from the contents of the Auditor General’s report which is an official report and which contents are substantially true.”

25. Like dependence was placed in *Paul Ongili v Nation Media Group Limited & another; Director of Public Prosecutions (Interested Party) 12024* KEHC 11391 (KLR), *Robert Alai v The Hon Attorney General & another* [2017] eKLR and *Communications Commission of Kenya (supra)*.

26. In view of the foregoing, Counsel submitted that the Respondent had not acted out of malice in publishing the Article and that the Petitioner had not adduced any evidence to support the claim of malice. Considering this, Counsel submitted that the remedy for compensation was not available to the Petitioner. Reliance was placed in *Wamwere & 5 others v Attorney General* [2023]KESC 3(KLR) where it was held that:

“In awarding damages, courts exercise a very broad, open-ended remedial discretion taking into account what is just, fair and reasonable in the circumstances of the case.”

27. Counsel in closing, stressed that the Petitioner had failed to prove that the Respondent had violated its constitutional right.

Analysis and Determination

28. Key issues for determination in this Petition are:

- i. Whether the Respondent violated the Petitioner’s right under Article 35(2) of *the Constitution*.
- ii. Whether the Petitioner is entitled to the reliefs sought.

29. Under Article 35 of *the Constitution* the right of access to information is guaranteed as follows:

- (1) Every citizen has the right of access to--
 - a. information held by the State; and



- b. information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
- (3) The State shall publish and publicise any important information affecting the nation.
30. The essence of Article 35(2) of *the Constitution* was elaborated by the Court Linus Simiyu Wamalwa v University of Nairobi & another [2015] KEHC 7896 (KLR) as follows:

“In the above context, Article 35(2) (b) of *the Constitution* states that;

“Every person has the right to the correction or deletion of untrue or misleading information that affects the person.”

The normative content of the above right is clear and it requires no more than a literal interpretation. It comprises two elements; firstly, for one to enforce the above right, there must be untrue or misleading information. Secondly, the untrue or misleading information affects that person and I dare add that it affects him in a prejudicial manner.

In addition to the above, as I understand the jurisprudence on the subject, for a person to enforce the provisions of Article 35(2) of *the Constitution*, he must have requested for the deletion of the untrue and misleading information and the same had been denied. Further where the request has been denied, the Court will further have to interrogate the reasons and evaluate whether the reasons accord with *the Constitution* - See Andrew Omtatah Okoiti vs Attorney General & 2 others (2012) e KLR and Kenya Society for the Mentally Handicapped (KSMH) vs Attorney General and Others Nairobi Petition No. 155A of 2011.

Having said so, I will start by examining the record to ascertain whether the Petitioner has proved that there exists untrue and misleading information in regard to his degree certificate and academic transcripts. Thereafter, I will determine whether his rights under Article 35(2) of *the Constitution* has thereby been violated.”

31. In *Reiya & another v Kiok* [2024] KEHC 14399 (KLR) the Court held:

- “20. In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.’ Art. 33(3) of *the Constitution*.
21. The right to freedom of speech and expression must be exercised in a manner that does not injure the rights of others especially to dignity and reputation.
22. And where defamation occurs: ‘Every person has the right to the correction or deletion of untrue or misleading information that affects the person’. Art. 35(2) of *the Constitution*...
26. As a result of the posts and statements, the Plaintiffs claims that, they have been injured in their credit and reputation and the 2nd Plaintiff’s activities have been brought into hatred, ridicule, contempt, disdain, scorn, public scandal, and disparagement in consequence of which the Plaintiffs have and continues to suffer loss and damage.



27. That the continued existence of the aforesaid posts and statements gravely impact the 1st Plaintiff and the business/activities of the 2nd Defendant which relies heavily on donations and funding of the well-wishers, and that the loss being incurred thereof cannot be adequately remedied by an award of damages....
32. The posts and statements are in online platforms- the Defendant’s Facebook page- and are still accessible to the general public both in Kenya and the world over; and therefore, susceptible to being republished and further injuring the reputation of the Plaintiffs. These constitute special or exceptional circumstances which justify a mandatory injunction to delete defamatory information or publication that affects the plaintiffs and their reputation. Art. 35(2) of *the Constitution...*”
32. Furthermore, the Court in Humphrey Kariuki Ndegwa & 2 others v Standard Group Limited & 8 others [2018] KEHC 9457 (KLR) stated as follows:
- “44. Article 35 (2) (b) of *the Constitution* under which the petition was brought stipulates as follows:
- “Every person has the right to the correction or deletion of untrue or misleading information that affects that person.”
- The above Article speaks for itself and requires no more than a literal interpretation. In order to enforce the right under the above Article, the petitioner needs to show that there exists untrue or misleading information and further, that the untrue or misleading information affects him in a prejudicial manner.
45. A party seeking to enforce the provisions of Article 35(2) of *the Constitution* must however first establish that he requested for the deletion of the untrue and misleading information which request was denied, in which case, the court will also interrogate the reasons for the refusal to delete and determine if the said reasons accord with *the Constitution*. (See Okiya Omtatah Okoiti vs. Attorney General & 2 others [2012] eKLR.”
33. The authorities thus confirm to succeed in an action that invokes Article 35 (2), the first there is a threshold that must be met, firstly; the fact that the information is false has to be established and the second important aspect is a demonstration that the request for deletion of information was also made and rejected, and where it is rejected, then the Court will have the opportunity to delve into the reasons for such refusal and make a determination on the issue.
34. I have carefully read the affidavit of George Okode, the Speaker of Siaya County that he swore in support of this Petition. While he complains that the publication made by the Respondent was false; he made no effort in the first instance to assert his right under Article 35 (2) confronting the Respondent directly to retract or delete the information complained of.
35. Moreover, while the Petitioner accuses the Respondent of publishing false and malicious information against it; it is completely silent on what appears in the Ethics and Anti-Corruption Commission (EACC) Report of Activities and Financial Statement for the year 2019/2020, where EACC, a body established pursuant to Article 79 of *the Constitution* under the Ethics and Anti-Corruption Act Cap 7H, and which at Section 11 thereof has powers among others, to investigate and to recommend



prosecution of any acts of corruption and economic crimes or other matters relating to Chapter six of *the Constitution* documents an inquiry reference number EACC/KSM/EL/INQ/08/2019 being an ‘inquiry into allegations of abuse of office and fraudulent acquisition of public funds through irregular imprest claims by members of the County Assembly.’

36. In my view the Article was based on the inquiry or investigation by EACC relating to irregular imprests allegedly paid to Members of County Assembly. Legally, it was qualified to be taken as a fair comment made in public interest since the Article was thus based on an official report of EACC. It was not malicious or unfounded as suggested by the Petitioner.
37. The Supreme Court of India in the case of *Jawaharlal Darda v Manohar Ganpatrao Kapiskar Anr* on 26 March, 1998 AIR 1998 Supreme Court 2117 Bench G.T. Nanavati, V.N Khare dealt with the case with a case where the complainant, Manoharrao Ganpatrao laid a complaint against the Chief Editor of a Newspaper known as ‘Daily Lokmath,’ one Mr. J.L Darda for the publication of news of Maharashtra legislative proceedings on 4.2.84. The news were to the effect that when a question regarding misappropriation of government funds was asked, the minister admitted it by saying that an inquiry concluded there was misappropriation, and even went ahead to reveal five names that were involved, among them the complainant.

The Supreme Court found that what was reported was what true, accurate and was in good faith. The Supreme Court, exonerating the Chief Editor reasoned:

“it is quite apparent that what the accused had published in its newspaper an accurate and true report of the proceedings of the Assembly. Involvement of the respondent was disclosed by the preliminary inquiry made by the Government. If the accused bonafide believing the version of the Minister to be true published the report in good faith it cannot be said that they intended to harm the reputation of the complainant. It was a report in respect of public conduct of public servants who were entrusted with public funds intended to be used for public good. Thus, the facts and circumstances of the case disclose that the news item were published for public good. All these aspects have been overlooked by the High Court...”

38. In the light of the above, this Court finds no merit in the instant Petition.
39. It is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF JUNE, 2025.

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L N MUGAMBI

JUDGE

