



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 187 OF 2014

THE STANDARD LIMITED.....1<sup>ST</sup> APPELLANT

BEN AGINA..... 2<sup>ND</sup> APPELLANT

DAVID OHITO..... 3<sup>RD</sup> APPELLANT

AND

DR. CHRISTOPHER NDARATHI MURUNGARU.....RESPONDENT

*(Appeal from the ruling and order of the High Court of Kenya at Nairobi, (Odunga, J.) dated 29<sup>th</sup> October 2012*

in

HCCC NO. 513 OF 2011)

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JUDGMENT OF THE COURT

On 29<sup>th</sup> October 2012 the High Court at Nairobi, (*Odunga, J.*) dismissed a preliminary objection raised by the three appellants, *The Standard Ltd* (the publisher of the *Standard* and *Standard on Sunday* newspapers), and its two employees/journalists, *Ben Agina* and *David Ohito*, in which they contended that the High Court did not have jurisdiction to entertain a defamation claim against them because of the freedom of the media guaranteed by *Article 34(2)* of the Constitution.

Aggrieved by the ruling, they filed the appeal now before us, in which they continue to argue that upon the promulgation of the Constitution on 27<sup>th</sup> August 2010, only the *Complaints Commission* established by the *Media Council Act, 2013* has jurisdiction to entertain complaints and claims against the media.

The preliminary objection that the learned judge dismissed was provoked by a suit filed by *the respondent, Dr. Christopher Ndarathi Murungaru* against the appellants arising from two publications in the *Standard on Sunday* of 5<sup>th</sup> June 2011 and the *Standard* of 11<sup>th</sup> July 2011, relating to the scandal popularly known in Kenya as the “*Anglo Leasing scandal*” which is the centrepiece of the British journalist, *Michela Wrong’s* book, *Its Our Turn to Eat: The Story of A Kenyan Whistle Blower, (Fourth Estate, 2009)*. The respondent, the cabinet minister in charge of internal security at the time of the scandal, averred that the two publications were defamatory of him and prayed for an order of

injunction to restrain the appellants from publishing further defamatory material linking him to corruption or the Anglo Leasing scandal, general, aggravated, punitive and exemplary damages, interest, and costs of the suit.

On 12<sup>th</sup> April 2012, the appellants delivered their defence in which they admitted publishing the material in question but pleaded that the same was not defamatory of the respondent. In addition they pleaded the defences of justification, fair comment and in the alternative, qualified privilege. In paragraph 2 of the defence, they averred that by dint of article 34(2) of the Constitution, the High Court lacked jurisdiction to hear the suit. Earlier, on 23<sup>rd</sup> December 2011, they had filed a **Notice of Preliminary Objection** drafted in the same terms as paragraph 2 of the defence.

After hearing the parties, Odunga, J. underscored the value of freedom of expression and freedom of the media in a democratic State, but found that freedom of expression is not one of the rights that under **Article 25** of the Constitution cannot be limited; that freedom of expression can be limited under **Article 24** of the Constitution; that **Article 34(2)** prohibits the State in mandatory terms from exercising control over or interfering with broadcasting, production or circulation of any publication or dissemination of information by any medium or penalising any person for any opinion or view or the content of any broadcast, publication or dissemination; that freedom of the media did not extend to the conduct prohibited by **Article 33(1)** of the Constitution such as propaganda for war, incitement to violence and hate speech; that the role of a court in a defamation suit does not constitute control, interference with, or penalization of the media by the State; that under **Article 28** of the Constitution every person has inherent dignity and the right to have that dignity respected and protected; that under **Article 31** of the Constitution every person is guaranteed the right to privacy; that respect for the right to dignity and privacy extends to the media; and that violation of those rights entitles an aggrieved person to a remedy from the courts.

It is that ruling that has aggrieved the appellants, leading to this appeal, which was argued through written submissions and oral summation. Although the appellants' memorandum of appeal sets out 8 grounds of appeal, the real question in the appeal, as we adverted at the beginning of this judgment, is whether Article 34(2) of the Constitution bars the courts from entertaining, determining and awarding remedies in defamation claims. In other words, does hearing, determining and awarding a remedy in a defamation claim by the courts of Kenya, constitute State control, interference or penalization of the media which is prohibited by Article 34(2) of the Constitution?

**Mr. Gitonga** for the appellants thought so and argued that Article 34 was couched in mandatory terms and its effect and import was to deny the courts jurisdiction to entertain defamation suits. Drawing from previous draft Constitutions, in particular **the draft Constitution of Kenya, 2002 (The CKRC Draft)**, **the draft Constitution of Kenya, 2004 (The Bomas Draft)** and **the Proposed Constitution of Kenya, 2005 (The Wako Draft)**, the appellants argued that Article 34(2) was deliberately introduced in the Constitution to bring to an end a historical legacy of harassment, intimidation and undermining of the media in Kenya, perpetuated by the Executive, the Legislature and the Judiciary. That provision, it was urged, prohibited the State in mandatory terms from exercising control over or interfering with or penalizing the media in the discharge of its functions. Citing **Article 260** of the Constitution, the appellants submitted that State means the collectivity of offices and organs comprising the government, and therefore included the courts, so that courts were equally prohibited from controlling, interfering with or penalizing the media, by for example issuing injunctions or awarding damages against it.

In the appellants' view, freedom of expression under Article 33 of the Constitution and freedom of the media under Article 34 must be read separately and that the only limitation that freedom of the media is subject to is propaganda for war, incitement to violence, hate speech or advocacy of hatred of the nature specified in Article 33(2) (d), which are all crimes. The other limitation to which freedom of expression is subject under Article 33(3), namely respect for the rights and reputations of others, it was claimed, is in the nature of a tort, and is not applicable to freedom of the media. It was therefore contended that the Constitution has ousted the jurisdiction of the courts to entertain tortious claims against the media, including defamation claims. For good measure it was contended that under the Constitution the media is a special person with rights and freedoms that are superior to the rights and freedoms of other persons under Article 33. To quote the appellant's counsel verbatim:

***“This Article (34) is unique to our Constitution. Nowhere else in the world has media freedom been separated from the general freedom of expression available to all other citizens and persons in a jurisdiction.”***

It is not at all clear to us whether such an extravagant claim is the product of a eureka moment, adept research, extraordinary perception and inspiration, or sheer blissful ignorance.

Citing the judgment of this Court in ***Lillian “S” v. Caltex Oil Kenya Ltd [1989] KLR 1*** and the ruling of the High Court in ***Boniface Waweru Mbiyu v. Mary Njeri & Another, Misc. App. No 639 of 2005***, the appellant contended that the jurisdiction of a court may be restricted or limited and that is what the Article 34(2) was intended to do. It was also argued that consistent with the limitation, Article 34(5) requires Parliament to enact legislation to provide for an independent body responsible for regulating the media, setting media standards and monitoring compliance. That body, it was contended, is the Complaints Commission established by the Media Council Act, 2013 which is also a tribunal within the meaning of ***Article 159(2)*** of the Constitution and is responsible for hearing and determining defamation cases. The High Court, we were told, had only supervisory jurisdiction over the Commission and could not venture to hear, determine and award damages in defamation claims.

Not surprising the respondent took a diametrically opposed position. ***Mr. Sankoh***, learned counsel for the respondent was of the view that the media did not have a *carte blanche* under Article 34 of Constitution to write and publish whatever it wished concerning any person. It was his view that freedom of the media guaranteed by the Constitution is circumscribed by the Article 33 (3), which requires that in the exercise of freedom of expression every person shall respect the rights and reputations of others. The phrase ***“every person”***, it was urged, included the media by virtue of Article 260 of the Constitution.

According to the respondent, requiring a person to respect the rights and reputations of others cannot amount to State control of the media. It was also submitted that Article 28 recognised the inherent dignity of every person and the right to have that dignity respected and protected. In the respondent’s view therefore, a person’s reputation was an integral part of human dignity, which is protected by the Constitution. The decision of the Supreme Court of the USA in ***Rosenblatt v. Baer, 382 US 75, 92 (1966)*** was relied upon to underline the link between reputation and dignity.

As regards the powers of the High Court, it was submitted that ***Article 165 (3)*** of the Constitution vests in the High Court jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and that ***Article 23*** empowered the court, in upholding and enforcing the Bill of Rights, to declare rights, issue injunctions and conservatory orders and award compensation. Exercise of such jurisdiction, in the respondent’s opinion, cannot be described as State control, interference or penalization of the media.

Responding to the appellant’s assertion that freedom of the media is unlimited save as provided in Article 34 (1) read with Article 33(2), the respondent submitted that freedom of expression and freedom of the media were not among the fundamental rights and freedoms which, by dint of Article 25, cannot be limited. Drawing from ***Articles 17 and 19*** of the ***International Covenant on Civil and Political Rights*** it was urged that the former protects every person from unlawful attacks on their honour and reputation while the latter expressly recognized that the guaranteed freedom of expression may be restricted by law to ensure respect of the rights and reputations of other persons. The respondent relied on the ruling in ***Kwacha Group of Companies & Another v. Tom Mshindi & 2 Others, HCCC No. 319 of 2005*** where arguments similar to those now raised by the appellants here were considered and rejected by the High Court.

Lastly the respondent submitted that there was nothing in the Constitution ousting or limiting the jurisdiction of the High Court to hear and determine defamation claims and that to the contrary, the mandate of the Commission was very limited and did not include the power to award damages in the event of defamation.

It is apposite to set out in full the provisions of Articles 33 and 34 of the Constitution whose interpretation

and application is contested in this appeal.

***“Freedom of Expression***

**33. (1) Every person has the right to freedom of expression, which includes—**

**(a) freedom to seek, receive or impart information or ideas;**

**(b) freedom of artistic creativity; and**

**(c) academic freedom and freedom of scientific research.**

**(2) The right to freedom of expression does not extend to—**

**(a) propaganda for war;**

**(b) incitement to violence;**

**(c) hate speech; or**

**(d) 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).**

**(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.**

***Freedom of the media***

**34. (1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).**

**(2) The State shall not—**

**(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or**

**(b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.**

**(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—**

**(a) are necessary to regulate the airwaves and other forms of signal distribution; and**

**(b) are independent of control by government, political interests or commercial interests.**

**(4) All State-owned media shall—**

**(a) be free to determine independently the editorial content of their broadcasts or other communications;**

**(b) be impartial; and**

**(c) afford fair opportunity for the presentation of divergent views and dissenting opinions.**

**(5) Parliament shall enact legislation that provides for the establishment of a body, which shall—**

**(a) be independent of control by government, political interests or commercial interests;**

**(b) reflect the interests of all sections of the society; and**

**set media standards and regulate and monitor compliance with those standards.”**

The submission by the appellants that the deliberate inclusion of Article 34 as a stand-alone provision on the freedom of the media was a response to a long history of censorship and abuse of the freedom of expression and independence of the press is difficult to quarrel with. Indeed in **Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others, SC Petition No. 14 of 2014**, the Supreme Court considered at length the history of media freedom and independence in Kenya right from the colonial period to the promulgation of the Constitution in 2010, and concluded that enjoyment of the freedom was more apparent than real. The Court stated:

**“Media independence and freedom was not explicitly provided for in Kenya’s independence Constitution. It was subsumed under the generic provision of freedom of expression. Beyond the law, the State had made several muscular attempts to control the media through direct State participation. It established and tightly controlled sound and vision (radio and television) broadcasting through its monopoly in the Kenya Broadcasting Corporation (which later became the Voice of Kenya before reverting back to its earlier name). Hand in glove with this control was the establishment of regional newspapers in each of the country’s eight provinces, and later active participation in the media market by the ruling political party, Kenya Africa National Union (KANU), in Kenya Times...Private and community interests in the media were restricted to newspapers, magazines, and book publishing, perhaps because of their periodic, rather than continuous nature. Still, these media were circumscribed by at least fifteen prohibitive laws focused on controlling, restraining, and punishing the media practice rather than facilitating it...An example of this era was the proscription of publications... Numerous journalists and publishers were arrested, detained and jailed because of their work.”**

It was that *status quo* that the people of Kenya wanted to change when they voted for the new Constitution, incorporating in particular Article 34 on freedom of the media. That is the conclusion that the Supreme Court reached when it stated:

**“There is no doubt that this history of egregious favouritism, official interference and arbitrary licensing regimes, coupled with low State tolerance for dissent, informed the constitutional guarantee for freedom and independence of the media. The blatant violation of the right to the private property of the owners of media printing works and newspapers is a path the Constitution did not want to continue.”**

What we seriously doubt is the rather outlandish claim that our Constitution is the only one in the world to provide expressly for freedom of the media. Many other constitutions have provided expressly for freedom of press, while others have recognized freedom of press as a specific incidence of freedom of expression. We will mention only two examples of the former. **Article 17** of the **Constitution of the Swiss Confederation**, expressly provides for freedom of the media in the following terms:

**“Article 17 Freedom of the media**

**1 The freedom of the press, radio and television and of other forms of dissemination of features and information by means of public telecommunications is guaranteed.**

**2 Censorship is prohibited.**

**3 The protection of sources is guaranteed.”**

Perhaps the best-known Constitution in this regard is that of the USA, whose First Amendment provides:

***“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”***

As the US case shows, just like in Kenya, a background of censorship and intolerance and repression of the media necessitated the First Amendment’s broad guarantee of freedom of speech and freedom of the press. (See **Robert J. Wagman, *The First Amendment Book*, Pharos Books, 1991**).

Be that as it may, that is not in anyway to de-emphasize the importance of freedom of expression and of the media in a democratic state. The matter has been litigated, considered and reconsidered in many jurisdictions resulting in some profound and insightful opinions. Thus for example, in ***Indian Express Newspapers (Bombay) Pvt Ltd & Others v. Union of India & Others (1985) (1) SCC 641***, the Supreme

Court of India expressed itself thus on freedom of expression:

***“Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (i) it helps an individual to attain self fulfilment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.”***

Granted that centrality of expression in a democratic polity, where the Constitution has expressly recognized freedom of expression and the media, as in our case, courts must be loathe to uphold invasions of those freedoms and give the freedom of expression the greatest leeway possible.

(See for example, ***New York Times Co. v. Sullivan 376 U.S. 254 (1964)***). However, even in the USA where the First Amendment to the Constitution expressly recognises freedom of the press and prohibits

Congress from making laws abridging that freedom, an interpretation of freedom of the press similar to that which the appellants are urging is unknown. In ***Gitlow v. New York (1924) 69 L Ed 1138***, the Supreme Court of the USA stated:

***“It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the***

***Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.”***

Later in ***Pennkamp v. Florida 328 US 331 (1946)*** Justice Frankfurter of the same Court, while emphasizing the centrality of a free press in a democracy nevertheless appreciated, in his concurring opinion, that it also has limits:

***“Without a free press there can be no free society. Freedom of the press however, is not an end, in itself, but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in light and in that light applied.”***

Turning back to Article 34, the appellants contend that the only limitation to freedom of the media allowed by the Constitution is engaging in propaganda for war, incitement to violence, and hate speech or advocacy of hatred of the nature specified in Article 33(2) (d). In arriving at that conclusion, we are afraid

that the appellants have chosen to look at Article 34 in isolation, without due regards to other provisions of the Constitutions. A tool of interpretation of the Constitution that confines each provision of the Constitution or guaranteed right and fundamental freedom into airtight silos, without due regard to how they relate to each other and to the whole, is to be completely eschewed. As regards interpretation of the Constitution, the Supreme Court, in **Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others** (*supra*), stated that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit. On what constitutes holistic interpretation, the same Court in **In the Matter of the Kenya National Human Rights Commission, S.C, Advisory Opinion Ref. No. 1 of 2012** stated that holistic interpretation means:

***“interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances.”***

Adopting a holistic interpretation of Article 34 of the Constitution entails considering and interpreting it against other provisions of the Constitution, in particular Article 28, which guarantees every person inherent dignity and the right to have that dignity respected and protected. The inexorable link between dignity and reputation was well articulated by **Justice Porter Stewart** of the US Supreme Court in **Rosenblatt v. Baer** (1966) 382(US) 75 at 92, as follows:

***“The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects 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 protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.”***

**Lord Nicholls** of the House Lords was of the same mind in **Reynolds v. Times Newspapers Ltd** [1999] 4 All ER 609 when he stated thus:

***“Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society, which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one’s reputation.”***

(See also **Hill v. Church of Scientology** [1991] 126 DLR 129).

To adopt the interpretation of Article 34 of the Constitution advocated by the appellants would amount to stripping bare the right to dignity guaranteed by Article 28 of the Constitution. An interpretation of the Constitution that destroys one or some of its provisions or renders them otiose, or results in anomalous or illogical conclusions cannot be countenanced. (See **Centre for Human Rights & Awareness & 2 Others v John Harun Mwau & 6 Others**, CA. Nos. 24 & 82 of 2012).

The assertion that Article 34 has ousted or otherwise limited the jurisdiction of the High Court under Article 165 of the Constitution has, in our view, absolutely no substance. In **Judges & Magistrates Vetting Board & 2 Others v The Centre for Human Rights & Democracy & 11 Others**, SC. Petition Nos. 13A, 14 and 15 of 2013, the Supreme

Court said the following on ouster clauses:

***“Ouster clauses are provisions in the Constitution or a statute that take away, or purport to take away the jurisdiction of a competent Court of law. They deny the litigant any judicial assistance in the relevant matter, and at the same time deny the Courts the scope for making any arbitral contribution with respect to the relevant matter. In short, ouster clauses curtail***

***the jurisdiction of the Court, as the relevant matter is rendered non-justiciable before the Courts.”***

While, as the Supreme Court held in that case, an ouster clause in clear, firm and unequivocal language will be given effect subject to satisfying a number of relevant considerations, in this case we do not see anything in Article 34(5) of the Constitution that even remotely approximates an ouster clause. Article 165 (3) (b) of the Constitution, in very express terms, confers a special jurisdiction on the High Court to enforce rights and fundamental freedoms, as follows:

***“Subject to clause (5) the High Court shall have-***

***(a)...***

***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”***

Clause (5) to which the provision is subject is not relevant to the issue in this appeal. Article 22 of the Constitution further confers on every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened, and by dint of Article 23(2) the court is empowered to grant appropriate relief, including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any offensive law, an order of compensation and an order of judicial review.

In our view, such express jurisdiction cannot be ousted or limited by implication, as the appellants assume. In our reading of Article 34(5) of the Constitution, which provides for the establishment of a media regulatory body, there’s absolutely nothing that constrains, limits or otherwise affects the jurisdiction conferred on the High Court by Articles, 22, 23 and 165(3)(b), to enforce rights and fundamental freedoms. The Media Complaints Commission, whose membership is largely drawn from media and related practitioners, is first and foremost in the nature of a self-regulatory body that provides remedies in cases of breach of the code of conduct by journalists. The Commission has no powers, under section 38 of the Media Council Act to award the kind of remedies that the Constitution contemplates for violated or infringed rights and fundamental freedoms including a person’s right to reputation and dignity. It cannot therefore be seriously argued that such a body is a substitute for the High Court in matters of enforcement of rights and fundamental freedoms, as argued by the appellants.

Before we say *omega*, we would like to recall the words of Justice Frankfurter in ***Pennkamp v. Florida, supra***:

***“Power in a democracy implies responsibility in its exercise.***

***No institution in a democracy, either government or private, can have absolute power.”***

Having carefully considered this appeal, we are satisfied that the preliminary objection taken by the appellants, before the High Court well and truly deserved to be dismissed. In the event, this appeal has no merit and is hereby dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of November, 2016**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**