ARTICLE 19

The impact of Kenya's legal and institutional frameworks on media freedom

2014

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Abbreviations/acronyms

ACHPR	African Charter for Human and Peoples Rights
BCAC	Broadcasting Content Advisory Authority
CA	Communications Authority of Kenya
CC	Complaints Commission
CCK	Communications Commission of Kenya
CORD	Coalition for the Restoration of Democracy
EA	East Africa
FH	Freedom House
HCCC	High Court Civil Case
ICC	International Criminal Court
KANU	Kenya African National Union
KICA 2013	Kenya Information and Communication (Amendment) Act, 2013
KICA	Kenya Information and Communications Act, 1998
MCA	Media Council Act 2013
MCK	Media Council of Kenya
MOA	Media Owners Association
M	Million
NARC	National Alliance Rainbow Coalition
NMG	Nation Media Group
RoK	Republic of Kenya
RWB	Reporters Without Borders
SG	Standard Group

1. Background and context

Kenya's Constitution 2010[1] has a new and progressive bill of rights requiring extensive reforms to both media and information management frameworks. While State practices and approaches to media regulation have affected the progress of reform, other factors have also been in play, including the failure to address existing legislative and institutional inconsistencies. This has produced a concertina effect hampering succeeding interventions, which have consequently required more arduous and extensive interventions.

As a result, various unconstitutional laws have persisted beyond the deadline for legislative review provided by the Constitution's Fifth Schedule. Such intransigence causes concern about the full implementation of the Constitution; Kenya's media history suggests that constitutional media freedom is likely to be compromised.

ARTICLE 19 Eastern Africa (EA) is presently running a project entitled *Bolstering media freedoms through targeted legislative and policy advocacy*. Often, the assumption is that the work is done once (new) policies, laws and institutions are in place, and little or no attention is given to the outputs, outcomes and impacts of their implementation. A focus of this project is the likelihood of a disparity in the legislation and frameworks relating to freedom of expression and the extent to which their implementation adversely affects practice. This has been the basis for ARTICLE 19 EA's commissioning of this research report, which documents and analyses progress in media freedom, making proposals for improved protection for enhanced democracy and human rights.

The Constitution champions 'informed' participation: wananchi – citizens – have the right to information with which to usefully participate in debates on the conduct of national and devolved governance. By pressing those in authority to deliver, a free media with access to information can enhance people's awareness and full enjoyment of their fundamental rights and freedoms, promoting a knowledgeable and engaged citizenry. During the initial four and a half decades of independence, some 30 changes were made to the post-independence constitution, mostly designed to create an infallible, 'imperial' presidency.[2] The Executive and Judiciary became increasingly repressive towards media freedom, with media workers suffering arrests, disappearances, the destruction of property and even deaths.[3] Kenyans responded through the 1990s with sustained demands for democratisation through a comprehensive constitutional review which, though it proved dramatic,[4] eventually resulted in the improved governance framework offered by the Constitution of Kenya 2010.

After the 2002 ousting of the long-ruling independence party (the so-called Kenya National African Union regime), the era of the National Alliance Rainbow Coalition (NARC) government saw various liberating legislative and institutional reforms. For the media, 2004 saw the establishment of the self-regulating Media Council of Kenya (MCK) which was legislated for via the Media Act 2007. The Kenya Information and Communication Act of 1998 (KICA) was reviewed two years later, giving the Communications Commission of Kenya (CCK) a mandate to "exercise its (oversight) functions independent of any person or body (emphasis added)." In time, however, the NARC government grew increasingly intolerant of media freedom, as evidenced by the 2006 vandalising of the Standard Group's (SG) premises.[5] While activism aimed at achieving a free media prevailed into the last days of President Kibaki's regime (2003-2013), the implementation of the legislative and institutional reforms continued to face great challenges. For example, the regime perpetuated the punitive financial obligations imposed on the print media,[6] limiting any opportunity for indigenous small investors whilst also making life precarious for small and independent media workers.

As a result of the Fifth Schedule, the media environment anticipated extensive enabling legislative reforms within the three-year timeframe leading up to August 2013, which Parliament extended to December 2013. Instead, the opposite has happened with the passage of two controversial media laws in January 2014: the Kenya Information Communications (Amendment) Act 2013 (KICA 2013), and the Media Council Act 2013 (MCA). These laws give the state a measure of control over the governing bodies they institute, and do not consequently meet their own threshold of being "free from Government, political and commercial interests". The laws also compromise the independence of frameworks for appointments to, and removals from, office, and provide no safeguards for state funding while creating avenues for controlling the media bodies they establish. Additionally, they provide disproportionate penalties and fail to provide safeguards for the proportional application of sanctions, and also provide excessively broad functions and/or powers that will hamper the free and independent operation of media bodies.

Additionally, Kenyan media laws ignore international and regional standards of media freedom, and restrict or threaten freedom of expression in some way. Such laws allow the banning of publications, the arrest of vendors, and the arrest and detention of journalists on the grounds of 'compromising public safety, public order, morality or internal defence'. Besides the financial and penal punishments mentioned above, they also provide powers to search media establishments, and seize equipment.

Various non-legislative realities also suppress media freedom, including the application of financial leverage used to influence content though, for example, advertising contracts. Additionally, threats have been directed at media establishments. For example, the blanket media 'blackout' on the airwaves of the opposition Coalition for the Restoration of Democracy party's Saba Saba rally on 7 July 2014 arose from a Communications Authority (CA) threat to "take the necessary regulatory action, including the withdrawal of frequencies from offending stations."[7,8] Additionally, the concentration of media ownership threatens both diversity and breadth of content. This and other non-legislative methods of control undermine the public's right of access to information, as well as the media's public watchdog role. Consequently, "(w)hat you get is not always all there is to know… Doublespeak is the name of the game!"[9] There is a need, therefore, to understand the impact that constitutional, legislative and institutional reforms have both directly and indirectly on media freedom.

Finally, we present a brief review of Kenya's performance on media and information freedom according to global frameworks. In the Reporters Without Borders (RWB) World Press Freedom Index 2014, Kenya's 30.7 score placed it 90th globally.[10] With Finland leading the 181 countries with a score of 6.4, Kenya's 2014 position represented an 18-place drop from its 2013 position, with MCA and KICA 2013 being cited as significant reversals. In Freedom House's (FH) Freedom of the Press index[11], 24 African countries now outperform Kenya. Having consistently improved between 2009 (when it scored 60) and 2012 (52), Kenya has now declined to 122/180 position globally with a score of 57 in 2014. The other countries in which ARTICLE 19 EA works also score consistently poorly: the best RWB position in the region is 143 and the best FH position is 164.

The next section of this report outlines the objectives, methodology and related assumptions of the study that ARTICLE 19 EA commissioned in order to assess the impact of Kenya's legal and institutional frameworks on media freedom. Section 3 goes on to provide the constitutional, legal and institutional context of media freedom, while Section 4 reviews a sample of judicial and quasi-judicial media cases. Section 5 synthesises the issues that arise and Section 6 draws conclusions and makes recommendations for the future.

2. Methodology

With its Bolstering Media freedom through Targeted Legislative and Policy Advocacy project, ARTICLE 19 EA aims to bolster Kenya's media freedom as a critical part of the implementation of the Constitution of Kenya (2010) in order to enhance good governance and accountability. This approach specifically recognises the role of a free media in fostering participatory democracy, which in turn enhances the scope for good governance, accountability and the engagement of citizens in matters of public interest, as anticipated by the Constitution and the legislation arising from it. The project also seeks to enhance the infrastructure for a media pluralism that increases tolerance for divergent media coverage and criticism, in a context in which media regulators and bodies have enhanced knowledge and understanding of key legal media policies.

This was the context for this report, which ARTICLE 19 EA intended to:

- Analyse the application, by judicial courts and MCK's Complaints Commission (CC), of penalties against media enterprises and journalists since the enactment of Constitution of Kenya 2010;
- Analyse the impacts of media penalties on the media landscape in Kenya;
- Analyse the impacts of key legal precedents on the promotion or safeguarding of media freedom;
- Analyse the impacts of non-media specific laws which effectively limit media freedom; and
- Assess the impacts on media freedom of the scope of powers to institute, hear and determine media-based disputes of CCK, CC and the Communications and Multimedia Tribunal.

The specific tasks that had to be undertaken in order to address the above issues included, but were not limited to:

- Identifying and analysing relevant laws/policies, institutional frameworks and literature relevant to the research objectives. This would set the agenda for the key informant interviews.
- Detailing key media-related cases and other relevant interventions (for example, out-of-court settlements, CC rulings etc.) made under provisions of media laws/policies/regulations between September 2010 – December 2013.
- Interviewing judicial/tribunal officers, media associations, media analysts, media workers and any other people of interest. The sample size will be determined by the needs of the research, as well as the time and resources available.
- Identifying and analysing un-documented cases or settlements relevant to the research objectives.
- Recommending options for deepening democracy in the context of media freedom and Kenyans' constitutional rights to information.

The methodology of this report has involved multiple approaches, including a limited literature review about media and information freedom, as well as a history of the management of those two areas of freedom in Kenya. Additionally, the research has considered the Constitution and laws in the realm of media and information freedom. This shaped the research agenda and the instruments used for data collection around the issues listed above. The main data collection tool was key informant interviews with major sector stakeholders (listed in Section 8). Due to the constrained timeframe of the assignment, there were various unsuccessful attempts to interview key government informants. Interviews with key media workers were also difficult to schedule but, once arranged, these interviewees talked freely about issues affecting media freedom on the understanding that their words would not be specifically attributed since they 'were not authorised to impart such information' about their employers.

3. The legal framework for media and information freedom

From the onset, it is important to understand the constitutional background against which media freedom is enjoyed. That background is also important for the other constitutional, legislative and institutional frameworks that may impinge on the enjoyment of media and information rights. Freedom of expression and media freedom are both constitutionally guaranteed rights under Articles 33 and 34 of the Constitution of Kenya. At regional level, Kenya is obliged to uphold and protect these rights under the African Charter for Human and Peoples Rights (ACHPR),[12] while the pertinent frameworks at global level are the International Covenant for Civil and Political Rights[13] and the Universal Declaration of Human Rights.[14]

The Fifth Schedule of the Constitution 2010 stipulated that laws pertaining to media freedom should be passed within three years, i.e. August 2013. This was extended to December 2013, when KICA 2013 and MCA came into law. However, the January 2014 constitutional challenge by a coalition of media stakeholders saw the Kenyan High Court issue an injunction against the full operation of the laws, with a hearing date set for 16 October 2014.

The issues in the Bills that threaten constitutional media freedom are that they:

- Threaten media independence, allowing for undue control by government, political and commercial interests;
- Introduce undue state involvement in media regulation;
- Impose excessive fines on media outlets and journalists for professional breaches, which under KICA 2013 are equated with criminal offences, and which undermine the independence of those bodies dealing with complaints against the media.

Meanwhile, in reviewing these specific media laws, the government seemingly overlooked the need to review other existing laws which contravene the imperatives of the Constitution and of the regional and international frameworks which protect media freedom and which Kenya is obligated to uphold. In the Books and Newspapers Act 1960 (as amended) for example:

- Section 11 requires payment of a bond of USD$12,000 with sureties as security towards any monetary penalty or damages that may be imposed, before authority is granted to print a newspaper. A second conviction for not paying a bond can result in a permanent ban on publishing a newspaper;
- Sections 9 and 14 provide excessive fines and imprisonment for contravention of the Act;
- Section 19 provides extensive discretion to police officers to seize any book or newspaper which is actually or reasonably suspected to have been printed or published in contravention of the law, no matter where it is found.

Similarly, section 90 of KICA provides powers to search broadcasting establishments and seize equipment for the purpose of any legal proceedings, and section 17 provides disproportionate criminal fines and imprisonment for various offences relating to the use of radio frequencies.

Defamation remains a criminal offence in Kenya even after the repeal of sections 56, 57 and 58 of the Penal Code in the Statute Law (Miscellaneous Amendments) Act 1997. Journalists continue to be charged with "sedition" or "seditious libel" under Sections 194 and 196 of the Penal Code. Additionally, special protection against defamation charges is offered to the President, Cabinet Secretaries and to parliamentary officials in Section 198; this contradicts regional and international human rights standards, such as the African Union resolution on repealing criminal defamation laws in Africa (ACHPR/Res 169 2010) which urged States to ensure that public officials tolerate more criticism than ordinary citizens.

Additionally, the Contempt of Court Bill (2013) is also significant for media freedom. Contempt of court had previously been handled under the Judicature Act and the Civil Procedure Code; and in light of the fact that countries with similar legal jurisdictions have either never had a contempt of court law (e.g. India and Canada), or have repealed it (e.g. United Kingdom), doubts have been raised about its value for Kenya. The Bill expands the types of expressions which amount to contempt, and this will undermine freedom of expression and media freedom in Kenya. The threshold test for the application of the strict liability for contempt by publication – "the creation of a risk that will impede or prejudice the course of justice" – is so low that it does not meet international and comparative standards. The provision for the protection of journalistic sources is limited and requires elaboration. Finally, the regime of penalties makes no distinction between the powers of the superior and subordinate courts. ARTICLE 19 has done a detailed analysis of the bill from a freedom of expression perspective.[15]

In conclusion, it is appropriate to mention other selected legislation likely to have an adverse impact on the Constitution's intentions towards media and information freedom. Realising the right of access to information in Kenya is still a challenge, even with the Constitution and, in particular, its Article 35. The Access to Information Bill 2013 is the product of years of campaigning, with versions published in 2005, 2008 and 2012, recently given additional impetus by the Constitution. Of its various versions, the 2008 Bill alone was tabled before Parliament but lapsed at the first reading. However, after public consultations led by the Constitutional Implementation Committee, the 2012 bill became the Access to Information Bill of 2013, which presently awaits parliamentary debate.[16]

Other legislation that is prejudicial to media and information freedom includes the Public Order Act, which singles out "instigation" (section 20); the Prevention of Terrorism Act (2013), whose section 35 (3)(c) is adversarial to Articles 33, 34 and 35; and the Preservation of Public Security Act (1997), which allows for State control of publications (section 4 (2)(d)). Laws therefore remain on the statute book, frustrating the intentions of the Constitution with respect to media and information freedom.

4. Media and information laws and institutions at work

This section reviews the performance of the legislative frameworks above in relation to media and information freedom, with a focus on resolving issues through the MCK's CC, the CCK and the judicial courts.

4.1 The MCK's Complaints Commission

The CC was formally constituted in 2008, its operational rules being published as the Media (Complaints Commission) Rules 2009. As provided by the Media Act (2007), the CC is chaired by an advocate of the High Court of Kenya, but conducts its business through conciliation, mediation and/or arbitration. Between 2010 and 2011, the Commission received 88 complaints of which 70 were dismissed, 28 for being outside its jurisdiction, and 42 for failure to conform to procedures despite direction. According to the MCK's legal office, two notable public figures withdrew their respective complaints when they discovered that the CC process did not offer anticipated remedies,[17] three other complaints were resolved through conciliation,[18] and the rest were listed for hearing.

With 12 matters carried forward from the previous year, the Commission had 29 matters to address by the end of January 2012. Table 4.1 summarises MCK data on the complaints to the CC for the years 2012 to 2014; this shows a sharp decline from the 2010/11 levels, and a decline in the numbers of matters dismissed for being outside CC jurisdiction. However, the persistence of cases that are not in the CC's remit, as well as those being withdrawn – probably because the CC does not award financial compensation – suggest persisting ignorance over the CC's mandate.[19] The data also suggests that the CC process takes time resolving complaints: the nine that were taken up in 2013 were still pending in May 2014. It would be unfortunate if the CC were liable for the delays, as one of the deterrents for Kenyans on court action – and indeed, the reason why they seek alternative dispute resolution mechanisms – is the extensive, cost-enhancing delays of legal proceedings. The MCK data does not reveal the regional origins of the complainants; but distance to the Nairobi-based CC could deter pursuit of cases from the Kenyan counties presently experiencing a proliferation of FM stations.[20]

Table 4.1: Analysis of media complaints and resulting actions, 2012 to 2014

	2012	2013	2014
Received	18	17	6
Dismissed for lack of jurisdiction	6	3	-
Withdrawn	3	5	-
Preliminary stage (S. 35 (1))	-	-	4
Before the Commission (S. 36 (1))	-	9	2
Determined	9	-	-

Source: MCK website

While legislation does not provide for the CC to award personal damages, it allows the CC to regulate its own procedures, resulting in fines of up to Kshs 500,000 and Kshs 200,000 respectively against media establishments and journalists. Penalties of up to Kshs 200,000 in fines or up to six months imprisonment, or both, exist for offences for which no punishment is specified in legislation. Table 4.2 summarises a sample of CC judgments between 2012 and 2014, mostly involving complaints from prominent figures, notably politicians. CC judgments involve fairly rigorous quasi-judicial processes; and while the monetary penalties are substantial in relation to journalists' remuneration, they may not be that significant for the mainstream media which is likely to have insurance coverage. In the complaints reviewed here, the awards in all but one case are against the employing media establishment house rather than the offending journalist.[21] Additionally, awards are paid to the MCK as a punishment for breaches of the Code of Conduct or some other legislation, rather than to the complainant. Typically, complainants receive an apology and a mutually agreed correction published as prominently as the offending article. This arrangement is probably a weak incentive for complainants to invest in travel, accommodation, representation, etc., in return for an apology and "equally prominent" correction.

Table 4.2: Details from a selection of resolved CC cases

Francis Muthaura vs. The Standard Group, Ben Agina and Beuttah Omanga – Complaint 1/2011 and 2/2011	
• "Kenya Secret Plot against ICC" • "Rome Statute: Kenya lobbies Africa to ditch International Criminal Court (ICC)".	Judgment on 19 September 2011: (i) The Standard Group and two reporters retract story and offer apology to Muthaura of equal prominence in paper; (ii) The Standard Group pay Kshs 50,000 fine to MCK or 3 months in prison for false/misleading information to CC; (iii) The Standard Group pay Kshs 250,000 to MCK, or 3 months in prison for violating item 4 of the Accuracy and Fairness provisions of the Code; (iv) Both counsels agree on draft statement via which both journalists will apologise to Muthaura within 14 days; (v) CC denies request of identity of the journalists' informants and directs complainant towards appropriate alternative action; (i) CC also denies a request for a public reprimand of respondents.
Martin Mutisya Muthengi vs. The Standard Group – Complaint no. 093/2010	
• "NOCK loses millions in 'sweetheart deal" • "Fraudulent National Oil Corporation contract".	Judgment on 22nd September 2011: The Standard Group ordered to publish an apology given equal prominence in their paper within 14 days based on a mutually agreed statement.
Chris Murungaru vs. the Nation Media Group:	
Murungaru's alleged Anglo-Leasing connections	NTV to retract story and apologise.
Jamia Mosque Committee vs. The Kenya Times	
"In the name of Allah"	The Kenya Times to apologise within 30 days.
Miguna Miguna vs The Standard Newspaper and Runji wa Mbeu – Complaint No. 090/2010	
"Why Won't Miguna let Sleeping volcanoes lie"	The record of proceedings does not include the judgment passed.
Miguna Miguna vs. The Nairobi Law Monthly and Ahmednassir Abdullahi – Complaint No. 094/2010	
"Miguna Miguna loses it again"	Judgment 15 March 2012: (i) Nairobi Law Monthly to retract story and offer apology of similar prominence within 14 days based on a mutually agreed draft statement; (ii) The Nairobi Law Monthly to pay 6 fines of Kshs 200,000 each to the MCK; (iii) Abdulnasir Abdullahi to write personal apology to Miguna Miguna based on a mutually agreed statement; (iv) Abdulnasir Abdullahi as editor to pay fine of Kshs 200,000 to the MCK.

The Aids Law Project vs. Radio Africa T/A Classic FM and Ciku Muiruri – Complaint No. 91/2010	
"Busted"	Judgment 12 April 2012: Radio Africa to pay fines of Kshs 200,000 each for four counts, violating Clauses 8 and 12 of the Code of Conduct, for intrusion and reckless use of names.
Leonrad G. Kamwetu vs. Nation Media Group and Jaindi Kisero – Complaint No. 084/2010	
• "Fury at NBK Management Plot to Strip Preferential Share Holders of Equal Rights" • "Treasury Foils NBK Plot to Strip its Shares of Dividend Rights"	Judgment 22 March 2012: Nation Media Group fined Kshs 200,000 for unbalanced reporting and an additional Kshs 200,000 for weak professional standards contrary to the Code of Conduct.
Kenya Revenue Authority vs. Kenya Television Network – Complaint No. 075/2010	
"Port of Impunity"	Judgment 21 December 2011: Kenya Television Network should retract the story and apologise to Kenya Revenue Authority.
Esther Pasarris and Adopt-a-Light Limited vs. Weekly Citizen – Complaint No. 089/2010	
• "Hard times for Advertising Diva Passaris" • "Passaris unmasked" • "Coming soon Esther Passaris in South Africa". • "Passaris Under Siege"	Judgment date not given: (i) Weekly Citizen publish an apology and correction of the story with similar prominence within 14 days of agreeing on the text; (ii) Weekly Citizen pay fines of Kshs 200,000 to the MCK for each of five breaches of various journalistic standards, including accuracy, balance, breach of privacy, journalistic accountability and professional and ethical conduct.
Hon. Uhuru Muigai Kenyatta vs. The Star Publications Limited and Jerry Okungu – Complaint No. 4/2012)	
"What if Uhuru Ruto win?"	Judgment date 28 May 2013: (i) Respondents to publish a public apology to the complainant within 14 days, based on a mutually agreed on statement; (ii) The CC reprimands both respondents for vilifying Complainant.
Peter Mbuthia Gachuhi vs. Nation Media Group and Macharia Gaitho – Complaint No. 083/2010	
"Want Kenya to be landlocked? Just do away with kadhi courts."	Judgment date 29 March 2012: Nation Media Group to pay fines of Kshs 200,000 to the MCK within 14 days for four breaches of professional practice.
Ayub Sharif vs. Nation Media Group and Seven Others – Complaint No. 8/2011	
	Complaint dismissed for lack of sufficient evidence.
Reconciliation	
• Danson Buya Mungatana vs. Nation Television and Robert Nagila – MCK/Comp/053/09 • Jamia Mosque Committee vs. Hot 96 – MCK/Comp/063/09 (via private letter of apology) • Catherine Wanjiku vs. The Standard Group – Complaint 8/2011	

Source: MCK website and legal office

While the choice must take such costs into consideration, the decision in the complaint of Francis Muthaura, the former civil service head who was indicted at the International Criminal Court (ICC), against The Standard and its journalists must have been particularly galling because the allegations proved unfounded. In addition, the CC rejected Muthaura's request for the identities of the offending journalists' informants to be revealed. The CC process does not bar a complainant from seeking redress through a formal judicial process; and while there is no evidence of this to date, the CC could amount to a low cost assessment of the likelihood of winning a monetary claim in the courts, even if CC outcomes do not bind the courts.

In conclusion, available data suggests that the lower cost CC redress process for complaints against media workers is not much used and has definitely not diverted all complainants from the formal judicial system. More education on the role of the CC would will improve its use by complainants.

4.2 The CCK's complaints framework

The Broadcasting Content Advisory Council (BCAC) was originally an administrative body which 2009 legislation mandated to "make decisions on the administration of the broadcast content aspects and provisions of the Act (and on the) mechanisms for handling complaints… (as well as monitoring) compliance with broadcasting codes and ethics for broadcasters…". With four of its seven members being drawn from the government, this suggested an a priori operational bias. In the event, litigation by the Media Owners Association (MOA) over contested mandates hampered its work: for one, KICA does not even define 'media', while KICA 2013's definition expressly excludes print and book publishing. Additionally, 'media' appears in KICA only with reference to the MCK sitting on statutory panels. Eventually, KICA 2013 has replaced BCAC with the Broadcasting Standards Committee which is required to consult the MCK on broadcast content. Additionally, KICA 2013 replaces the Appeals Tribunal with the Multimedia and Communications Appeals Tribunal.

The CCK's annual report 2012/13 provides trends in consumer complaints between 2009/10 and 2012/13 (Table 4.3),[22]; [23] which show no consistency over the review period: a sharp rise in 2010/11 was followed by a sharp fall over the next two accounting periods. Overall, 82.4% of the complaints were resolved; but the report provides no insights into complaint content, arbitration proceedings or judgments to enable evaluation of efficiency and impacts. Since the CCK's statutory object and purpose is to "licence and regulate telecommunication, radio-communication and postal services," the bulk of the complaints are of a technical nature.

Table 4.3: Trends in CCK consumer complaints, 2009/10 to 2012/13

	2009/10	2010/11	2011/12	2012/13	
				Received	% Resolved
Unauthorised Charges/Subscriptions	7	82	139	170	85.9
Billing	26	69	43	77	74.0
Service Interruptions 48 37	23	45	47	48	77.1
Criminal Use of Services/Facilities	2	23	13	26	100.0
Service Provisioning Delays/Failures/ Termination	12	24	29	24	87.5
Quality of Service (Voice and Data)	22	57	39	23	69.6
Counterfeit Phones	0	0	0	17	88.2
Inappropriate Media Content	5	8	10	16	93.8
Digital Transition				12	100.0
Fraudulent Calls/SMS	1	26	18	12	75.0
Mobile Number Portability	0	586	91	11	90.9
Warranty Violations				0	N/A
Confidentiality/Privacy Breaches	4	6	4	9	77.8
Nuisance	6	3	3	8	87.5
Defective Terminal Equipment	30	15	9	7	57.1
Tariffs	1	2	1	6	83.3
Misleading Advertisements	5	8	5	4	75.0
Delivery Delays				3	66.7
Frequency Interference				3	100.0
SIM Registration				3	33.3
Identity Theft				2	100.0
Electromagnetic Radiation				1	0.0
Others				11	72.7
Total	151	976	475	493	82.4

Source: CCK (2014: 43-4)

Technical issues also influence media and information freedom: they include fairness in the regional allocation of frequencies, efficiency in their use,[24] and interference with neighbouring frequencies.[25] However, the table reflects the four complaint categories relating directly to media content: while 'Inappropriate media content' and 'Confidentiality/Privacy Breaches' grew, 'Nuisance' and 'Misleading Advertisements' occurred inconsistently.[26]

4.3 The courts and options

While some complainants might be dissatisfied with the CC framework as suggested by MCK complaints 043/2009 and 078/2010, and therefore resort to court action, a judge in the 2002 award of Kshs 20m[27] in Civil Case 2143/1999, observed that:

"One other thing that is important today is thorough knowledge of the provisions of the Defamation Act Cap.36 Laws of Kenya. A lot of cases can be settled out of court, or not reach the courts at all if editors of newspapers, authors, publishers or other persons concerned got the proper advise and acted accordingly. I think this is the way forward, looking at the upward trend of awards for libel by the courts."[28]

This observation came during a period of what were perceived to be politically motivated libel awards which transformed Nairobi into the 'libel capital' of Africa.[29] In this context, a former chairman of the Law Society of Kenya lamented the law's diversion from compensating aggrieved parties to enriching them.[30] Before undertaking a partial analysis of Kenyan libel cases, which suggests that awards have declined since the end of the Moi era (see below), a brief review follows concentrating on out-of-court settlements.

4.3.1 Out-of-court settlements

The realm of Kenyan out-of-court libel settlements is highly secretive, with the legal officers of the main media establishments silent about the details, such as motivation, frequency, and the terms and conditions agreed. One informant suggested such settlements often include confidentiality clauses. The impact of out-of-court settlements on media freedom depends on specific circumstances: while the ability to pay – especially through insurance – might promote reckless journalism, the inability to afford settlements can deter adventurous journalism.

Informants note that libel suits in Kenya are frequent, emanating primarily from politicians and the business community. Media houses evaluate them carefully: where a suit is considered to have great potential for success, media houses will negotiate an out-of-court settlement. However, for the many frivolous suits, media houses will delay response in the hope that claimants will eventually give up. Media houses' insurance provides them with security; but it also probably increases the frequency of libel suits.

However, another deterrent to litigation stems from the risk of double jeopardy when the defamation is tried, whereby the court process provides an opportunity for defendants to introduce other negative information about appellants to strengthen their position on contested issues. In effect, therefore, as a lawyer explained, defending a libel suit is easier than prosecuting one.

Given the secrecy over out-of-court settlements, one is left to surmise that the top rates achieved would logically be below those earned through litigation. However, the picture is complex: the evidence from prosecution cases is that plaintiffs' lawyers often make exorbitant demands higher than the politicised awards of the Moi era.[31] However, media houses with insurance probably hold out, dropping an out-of-court settlement if a complainant becomes 'unreasonable'.[32]

4.3.2 The Kenyan libel litigation landscape

The definitive libel cases in Kenya involved prominent politician and businessman Nicholas Biwott, arguably the power behind former President Moi's throne, and claims made about his integrity, including his alleged involvement in the 1990 murder of Robert Ouko, who was then foreign affairs minister. In the cases – CC Nos. 1067/1999, 1068/1999 and 2134/1999[33] - Biwott sued the authors, publishers, writers and the sellers of the Kshs 1,900 book, receiving awards which Visram J. declared to be:

"the highest ever made in this country for the tort of libel... to send a clear message to all those who libel others with impunity, and who get away with ridiculously small awards, that the Courts of law will no longer condone their mischief. No person should be allowed to sell another person's reputation for profit where such a person has calculated that his profit in so doing will greatly outweigh the damages at risk (... The judge was) particularly troubled by the inordinately low awards... (to) the Hon. Justice Gicheru (CC No. 1067/1068/1999)."

In turn, in awarding Kshs 20m to Biwott in CC No. 2143/1999, Aluoch J. noted that she:

"would find no reason to depart from the recent decisions which seem to be having an upward trend. I am persuaded by them and I will follow them in assessing damages so as to maintain some sort of uniformity."

These grand awards in the 'African libel capital' deterred media and information freedom.[34]; [35] However, the 2003 accession of the NARC government was a watershed for liberalisation, despite setbacks such as intransigence over a new constitution and the raid of Standard Group (SG) premises. The 2003 'radical judicial surgery'[36] had mixed results. However, the 2010 Constitution and its undertakings on media freedom and access to information provided hope of reforms for judicial processes in general, and for libel in particular.

One way of gauging the impact of the new constitutional and legal dispensation on libel suits is to review awards before and after reforms, an arduous task requiring sound data. In the absence of live court records on libel cases, this report reviewed a sample of judgments found on the Kenya Law Reports website (see appendix Table A–1). Meanwhile, Table 4.4 provides a summary of the Nation Media Group's (NMG) pending libel cases as of May 2014,[37] almost exclusively filed by politicians.

Table 4.4: Libel cases pending in the High Court against select media houses

Name/status	Case summary
Cases against Nation Media Group as of 20/05/2014	
Kazungu Kambi – Cabinet Secretary; former MP and Assistant Minister	Nairobi High Court Civil Case (HCCC) No. 351/2013: A statement in the newspapers that his company was ordered to pay a debt.
Njoroge Baiya – MP Limuru constituency	Nairobi HCCC No. 398/2013: A statement to the effect that he was among MPs opposing the SRC on Salaries review for MPs.
Samson Nyamweya – Chairman, Federation of Kenya Football; losing parliamentary candidate	Nairobi CMCC No. 5764/2013: Reports about probe into the Football Kenya Federation.
Jeremiah Kioni – Former MP; running mate in the 2013 presidential elections	Nairobi HCCC No. 100/2013: Reports to the effect that there were no votes for his running mate at the station in which he voted in the presidential election 2013.
Ferdinand Waititu – former MP and Assistant Minister; losing candidate in the Nairobi County gubernatorial contest; recently found by the High Court to be unfit to hold public office	A statement that he had engaged in hate speech.
Margaret Wanjiru – former MP and Assistant Minister; losing candidate for the Nairobi County Senate seat	A report of Gazette Notice which cancelled her licence to officiate marriages.
Pollyns Ochieng Daima – MP	Nairobi HCCC No. 391/2012: Serialisation of Miguna Miguna's book to the effect that he was not an effective MP.
Yusuf Haji – Senator; former MP and defence minister	Nairobi HCCC No. 456/2012: A statement that he had failed as Minister of Defence to prevent the Tana Delta clashes.
Patrick Nyoike – former Permanent Secretary for Energy	Nairobi HCCC No.330/2012: A statement to the effect that as PS for Energy he had acted improperly in the award of Oil prospecting Licenses.
Chirau Mwakwere – former MP and Transport cabinet minister	Nairobi HCCC No. 212/2006: A claim in response to a columnist's criticism that, as Minister for Transport, he had failed to curb road accidents.
Cases versus The Nairobi Star Publication Limited	
Uhuru Kenyatta – President since March 2013; previously Finance minister and MP	HCCC No. 366/2009 HCCC No. 598/2009 HCCC No. 585/2011

Sources: NMG legal department; MCK's Complaints Commission proceedings for The Star cases.

A cursory review of libel cases reveals a variety of findings: successful cases balance outright dismissals; and appeals lead to awards both upwards and downwards. The cases enable an evaluation of the reaction to Visram J.'s "inordinately low awards". With the perceived injury to Biwott's reputation in mind, frequent litigant Uhuru Kenyatta's stature is comparable, as the son of Kenya's founding president and head of the family's great political and economic empire. Dulu J.'s November 2010 judgment dismissed Kenyatta's case – CC No. 544/2009 vs. Standard Newspapers – for being "premature" and "without legal merits" given that a main suit was impending. In CC No. 60/2010, Rawal J. awarded Kenyatta Kshs 7m against The Standard, while CC No. 187/2012 against The Nairobi Starwas was redirected to the MCK's CC. During these cases, Kenyatta was arguably second only to the country's President within the Party of National Unity (PNU)'s hierarchy in the Grand Coalition government;[38] and the redirection to the CC came a month after his election as President. It is unthinkable that a Biwott litigation could have been declared premature, or have been redirected elsewhere.

The multiple interests in the media often complicate regulation. While the Information and Communications Technology policy provided for legislation against cross-media ownership,[39] the MOA successfully championed its exclusion from the Media Bill (2007). The MOA primarily represents the main media houses, notably NMG, SG and Royal Media Services (RMS), and challenged the CCK's digital migration initiative as a violation of constitutional rights under Article 34, as it licensed private sector competitors. In Petition 557/2013, the Constitutional and Human Rights Division found that the CCK was simply delivering its international obligations under Article 2 (5) of the Constitution.

In Civil Appeal No. 84/2009, The Standard and its journalist challenged a 2008 Kshs 7m award for general damages by a Kisumu High Court – CC No. 199/2001 – as being excessive. The Appeal Court found the complaint "not without merit", citing the Gicheru award which had lacked "judicial basis or justification", and reduced the amount to Kshs 4m for general damages with Kshs 500,000 for aggravated damages.

With respect to ordinary citizens – wananchi – Meru elder Phineas Nyagah sued politician Gitobu Imanyara – Civil Suit No. 697/2009 – seeking defamation, compensatory and exemplary damages, and costs with interest. In 2013, Odunga J. dismissed all pleas because the appellant failed to link the offending words in The Star to himself, thereby missing out on a possible Kshs 3m award. Meanwhile a Kenya Anti-Corruption Commission staffer sued a superior for a defamatory e-message copied to other staff – CC No. 105/2011. Waweru J.'s 2013 award of Kshs 450,000, contrasts with a Kshs 250,000 award to a Kakuma refugee camp shopkeeper defamed by fellow refugees who made no representations (CC No. 436/2005).

In CC No. 542/2007, politician Koigi Wamwere sued The Standard and a journalist, and Waweru J.'s 2011 judgment punished an insincere media house apology with a Kshs 3.5m award. Minister Marsden Madoka also won Kshs 1.5m against The Standard for a cartoon and story that maligned his competence (CC No. 938/2002).

The courts have also enhanced awards. In Civil Appeal No. 81/2009, businessman A.K. Lakha appealed a Kshs 500,000 award against The Standard in CC No. 436/2002, with the 2009 judgment raising the penalty to Kshs 2m plus costs. Senior Counsel George Oraro also filed Civil Appeal 226/2011 questioning a Kshs 3m general damages award in CC No. 1250/2004. The 2014 judgment set Kshs 5m and Kshs 4m for general and aggravated damages, while also placing a permanent injunction on the subject of the case. Finally a former senior policeman sued the Attorney General for damages for unlawful arrest, false imprisonment and/or detention, malicious prosecution and defamation between 2001 and 2004 (CC No. 136/2011); while Ong'udi J.'s 2012 judgment dismissed the other pleas but awarded Kshs 6m for malicious prosecution.

Finally, the media has itself taken to court, an RMS/MOA injunction stopping the CCK's rationalisation of the skewed distribution of frequencies. However, the MOA's injunction delayed Kenya's digital migration which the Association of Media Women of Kenya see as a means to electronic media ownerships by less wealthy members of society, such as women's groups.[40] Additionally, the sub judice provision has barred media discussion of pending public interest court cases, such as the Goldenberg scandal.[41]

4.4 A varied experience with media laws and frameworks

The foregoing discussion shows diverse media laws and frameworks at work, but is incomplete because of the lack of substantive data: media stakeholders supporting the government and the opposition have yet to espouse the constitutional imperative of freedom of access to information. Analysis of that information would improve understanding of the frameworks for managing media. Consequently, it is not clear that the alternative dispute resolution frameworks – the CC, the CCK/CA's broadcast standards and appeals tribunals and out-of-court settlements – lead to more satisfactory outcomes than formal judicial processes.

5. Threats to media freedom under the Constitution (2010)

Dissemination, the major function of media, presupposes that the media has the information to disseminate. This links media and information freedom inextricably. Often, media freedom focuses on allowing space for media workers. However, Article 31 of the Constitution, which is about privacy, is designed to ensure that the freedom of media workers does not infringe on the rights to privacy of individuals, family and private affairs, home, property or communications. It is applied in conjunction with Section 52-54 and 66 of the Penal Code to either (i) punish offending media workers, or (ii) restrict publication of undesirable information. Various other aspects of the Constitution and legislation provide a similar rationalisation of media freedom, which could be argued to underpin the President's March 2014 declaration that "there is no absolute media freedom".[42]

The Constitution (2010) was a very long time in the making:[43] while praising the result, analysts are cautious of risks in its implementation, noting that this requires a new political culture.[44] While the small sample of libel cases reviewed does not allow for a definitive assessment of the impact of the Constitution on libel awards, it is fair to conclude that the country has moved beyond the era of politicised awards, even if disparity persists in awards given to different classes in society. Meanwhile, media establishments are especially wary of the (financial) penalties introduced by KICA 2013 and the MCA, given perceived relations between the Executive and Judiciary, with the government's recent criticism of Judiciary inadequacies in its handling of terrorism suspects.[45] There have already been blatant violations of constitutional provisions: there has been a discernable push from the Executive to reduce the civic space of association, such as in the proposed amendments to the Public Benefits Organisation Act which would constrain freedom of association and the enabling environment for civil society.[46]

The deepening of media reforms might also be hampered by the underlying adversarial attitudes of the Executive and Parliament towards the media. The government has disliked the media's stance on various issues, including coverage of the post-2007 election violence and the management of internally displaced people.[47] The media's championing of the proposed constitution of 2010 was at variance with the position of key Jubilee government individuals, who overtly or covertly campaigned against the document and have been accused of undermining its implementation.[48] Furthermore, while the media championed peace during the 2013 elections, it was critical of the conduct of the general elections and the petition over the presidential election;[49] and it has also been critical of the management of the Westgate Mall terrorist attack.[50] The media has also antagonised the Legislature through its coverage of civil society demonstrations against parliamentarians demanding higher remuneration, dubbing them 'MPigs',[51] and reporting parliamentarians' improprieties when travelling abroad.[52]

Another continued threat is the lack of a media policy in which to systematically ground the concept of 'professionalism' and resulting legislation, institutions and other frameworks. While an eight-year-old Information Communication and Technology (ICT) policy exists, it is highly outdated given the sector's exponential growth. Despite constitutional liberties, the media sector's representation of self has been characteristically ad hoc – as with the injunctions to KICA 2013 and the MCA.

Some of the risks posed by the core media legislation – i.e. KICA 2013 and the MCA – to the implementation of the Constitution's freedoms have been discussed above, and await judicial resolution. Additionally, the apparent contradictions within the laws and between them and the Code of Conduct for the Practice of Journalism in Kenya are also likely to undermine professionalism; it is difficult to see how the MCK can apply the Code and accredit journalists "by certifying their competence, authority or credibility against official standards based on the quality and training of journalists in Kenya…" when 'journalist' is taken to mean anyone who "collects, writes, edits and presents news or news articles in newspapers and magazines, radio and television broadcasts, in the internet or any other manner as may be prescribed". This concern is especially heightened by the emerging role of social media as a source of breaking news.

A further threat is posed by the piecemeal review of other legislation – both media-related and non-media-related – that has a bearing on media work. For example, while the Access to Information Bill 2013 is awaiting parliamentary debate, its section 6 provides for 'exempt information' which in effect makes the Public Officers Ethics Act and the Official Secrets Act even more intimidating for journalists. While the Bill distinguishes government from private (sector) information, awards to private contractors mean that they cover public interest investments in which a public service media should be interested. This need for openness in government contracts is especially important if the constitutional imperative of participatory government is to be delivered. While an initial idea of devolving Kenya Broadcasting Services to the counties was resisted,[53] it is significant that various county governments wish to establish their own stations; however, it is equally important to ensure that such stations do not become mere mouthpieces for governors.

A further obstacle to deepening media reforms overlooked by the core legislation is the emerging intensity of cross-media ownership that blurs the divide between media, commerce and politics.[54] While the basic political divide in Kenya during the 2007 general elections was reflected in the media sector, the 2013 picture was different, with the two main media houses seeming predisposed to the winning Jubilee Coalition. Such ownership-based confluence of the media will undermine its watchdog role despite constitutional guarantees. This is especially true given that the media depends heavily on advertising, for which the national and county governments have become major clients as a result of the Constitution's implementation.[55]

A related concern about professionalism, which might also relate to both the weak industrial capacity of media employees and to the Executive's impunity over adherence to constitutional rights, can be seen in the 'demographic transition' in media houses. Weak job security is driving seasoned journalists – and their institutional memory – out of media houses,[56] to be replaced by malleable rookies, among them 'celebrities' offering 'faces, figures and voices' instead of professional journalism. The inherent risk is that the Kenyan media will consequently be unable to shed the image that "a zombie army has taken (over from) Kenya's feisty media… with local reporters going glaze-eyed through the motions."[57]

This is a disconsolate note on which to end the discussion of the risks posed for media professionalism by the emerging context in which the Constitution guarantees considerate freedoms. However, the arising legislation and political context can either undermine that freedom or offer an inadequate framework with which to control the emerging media in Kenya.

6. Summary and conclusions

The foregoing discussion has reviewed the status and application of the constitutional imperatives for media and information freedom. While the Constitution looks to enable media and information freedom, various intervening factors have so far acted to undermine the extent of the realisation of these freedoms. While this report sought to determine the impact of the Constitution on media freedom, it was not possible to gauge this systematically, especially due to data constraints which undermined the required analysis of factors prior and post the 2010 Constitution. However, it is possible to make a few general observations about how matters have changed during the life of the Constitution.

Firstly, there seems to be a lack of strong political will to fully implement the Constitution – or to amend parts of it as necessary. There have been instances of violations of the Constitution in general and in the media specifically, including the failings evident in KICA 2013 and the MCA. Such political will would ensure that all media and non-media laws and frameworks were reviewed for consistency with the Constitution.

Secondly, whereas in many other areas the government has been quick to review existing policies, or develop new ones so that they are compatible with the Constitution, the media continues to operate without a policy. This leads to the ad hoc institution of media reforms, resulting in internal inconsistencies. For example, there is a need to conceptualise what a 'journalist' is, in a way that is consistent with the MCK's accreditation role and the Code of Conduct.

The President's declaration that "there is no absolute media freedom" provides cause for concern, especially in the light of restricting clauses in the main media legislation, such as those creating oversight institutions favouring the government as opposed to non-government stakeholders. Media oversight roles seem to be intentionally confused; for example, giving a media content function to the CCK/CA when this is already an MCK function. An additional disturbing factor is the government's clear ability to manipulate the Judiciary, notwithstanding the latter institution's own reforms. Such manipulation places the media at great risk given legislated penalties. Additionally, media reforms are occurring in an era of growth for a particular type of media ownership convergence that is increasingly blurring the lines between commerce, media professionalism and politics. The effect of this was evident in the blackout on CORD's Saba Saba rally. That the CCK/CA could issue the severe threat of withdrawing licences on the eve of the CORD rally – when there have been so many incidents of hate speech it has not acted on – is a clear indicator of how far the government will go in the face of uncertainty.

The impact of MCK's CC is unclear, but the fact that it has received complaints which are outside its jurisdiction suggests the need for greater clarification and amplification of its function. Given the proliferation of the media in the country, the CC's outreach may be improved through some outright or periodic decentralisation, such as has been the case with circuit judges in the Judiciary. The CCK/CA works to resolve complaints, but needs to be more accessible with information so that its work can be evaluated. The media also needs to be more open about its activities, such as out-of-court settlements; as such information will feed the development of appropriate polices and legislation. On libel cases, it is fair to say that the trend has been to depoliticise awards – to the extent that a senior political figure like Uhuru Kenyatta wins some cases and loses others. While it is not possible to ascribe all of this to the Constitution specifically, it is true that the Constitution's demystification of the presidency might have gone some way to reducing political pressure in terms of libel.

7. Appendices

Table A–1: Media libel cases resolved since 2010

2014
Civil Application No. 9 Of 2014: Communications Commission Of Kenya Vs Royal Media Services Limited
Application No. 9/2014: Communications Commission of Kenya –V- Royal Media & 11 Others
Application No. 11/2014: Panafrican Network Group & Another –V- Royal Media Services & 11 Others
Application No. 13/2014: Attorney General –V- Royal Media Services & 9 Others
Civil Application No. Nai 44 of 2013 [Ur 28/2013]: Royal Media Services Ltd vs The Attorney General, Minister Of Information & Communication and Communication Commission Of Kenya
Civil Appeal No. 4 Of 2014: Royal Media Services Limited, Nation Media Group Limited and Standard Group Limited vs. Attorney General, The Ministry Of Information Communication and Technology, Communication Commission Of Kenya, Signet Kenya Ltd, Star Times Media Limited, Pan African Network Group Kenya Limited, Gotv Kenya Limited, Consumer Federation Of Kenya and West Media Limited
2013
Petition No. 557 of 2013: Royal Media Services Ltd., Nation Media Group Limited and Standard Group Limited vs. Attorney General, The Ministry Of Information Communications and Technology, Communications Commission Of Kenya, Signet Kenya Ltd, Star Times Media Ltd ,Pan African Network Group Kenya Ltd, and Go Tv Kenya Ltd., and Consumer Federation Of Kenya and West Media Ltd.
Jr Case No. 221 Of 2013: Republic vs. Director Of Public Prosecutions and Royal Media Services Ltd and Communications Commission Of Kenya
Civil Application No. Nai 341 Of 2013 (Ur 251/2013): Royal Media Services Limited, Nation Media Group Limited and Standard Group Limited vs. Attorney General, The Ministry Of Information Communications And Technology, Communications Commission Of Kenya, Signet Kenya Limited, Star Times Media Limited, Pan African Network Group Kenya Ltd, Gotv Of Kenya Limited, and Consumer Federation Of Kenya
Miscellaneous Criminal Application 43 Of 2013: Royal Media Services Ltd vs. Director Of Public Prosecutions and Communications Commission Of Kenya
Civil Application No. Nai 341 Of 2013 (Ur 251/2013): Royal Media Services Limited, Nation Media Group Limited, and Standard Group Limited vs. Attorney General, The Ministry Of Information Communications And Technology, Communications Commission Of KenyaSignet Kenya Limited, Star Times Media Limited, Pan African Network Group Kenya Ltd, Gotv Of Kenya Limited, Consumer Federation Of Kenya and West Media Limited
Civil Case No. 490 Of 2013: Nonny Gathoni Njenga, Jane Wambui Odewale vs. Catherine Masitsa and Standard Group Kenya

2012
Petition 346 of 2012: Royal Media Services Ltd. Vs. The Hon Attorney General, The Minister of Information And Broadcasting and The Communication Commission Of Kenya
Petition No 98 Of 2012: Wananchi Group (Kenya) Limited vs. The Communications Commission Of Kenya, Kenya Broadcasting Corporation and Multichoice (Kenya) Ltd
Civil Appeal (Application) No. 121 Of 2012: Communications Commission Of Kenya vs. Tetra Radio Limited
Misc Civil Application No. 73 Of 2012: Republic vs. Communication Commission Of Kenya
Petition No. 448 Of 2012: Consumer Federation Of Kenya vs. Minister For Information And Communication, The Hon. Attorney General, Communications Commission Of Kenya
Petition No. 448 Of 2012: Consumer Federation Of Kenya vs. Minister For Information And Communication, The Hon. Attorney General, Communications Commission Of Kenya
Civil Case No. 325 Of 2012: Martin Mutisya Muthengi vs. The Standard Group, The Standard Ltd and Kenneth Kwama
Civil Suit No. 169 Of 2012: Henson Nigel Graham vs The Standard Group Limited
Petition Number 187 Of 2012: Hon. Uhuru Muigai Kenyatta vs. The Nairobi Star Publications Limited
2011
Civil Suit 435 Of 2011: Ann Njeri Mungai Kihiu T/A Creative Force Events vs. The Standard Group Limited and Njoki Karuoya
Petition 244 & 284 Of 2011: Media Owners Association vs. Attorney General, Ministry Of Information And Communication, Dr Peter Bitange Ndemo, Communications Commission Of Kenya, Francis W. Wangusi and Dr Mohamed Isahakia with Jr Misc. No. 284 Of 2011 between Magic Radio Limited And The Communications Commission Of Kenya
Petition No.244 Of 2011: Media Owners Association vs. The Hon. Attorney General, The Ministry Of Information & Communication, Communication Commission Of Kenya, W.E.Z.N and Director Of Public Prosecutions – as consolidated With Jr. Misc. No.284 Of 2011 between Magic Radio Limited and The Communications Commission Of Kenya
H.C. Misc. Appl. No. 185 Of 2011: Consumers Federation Of Kenya vs. Hon. Attorney General, Minister For Information & Communications and Communications Commission Of Kenya.
Civil Case Number 107 Of 2011: Mohamed Amin vs Radio Africa Limited T/A The Star, The Nairobi Star Publication Ltd T/A The Star and Tom Mboya
Civil Case No. 74 Of 2011: William Kabogo Gitau vs. The Standard Group Limited, Standard Limited, Anne Kiguta, Dennis Onsarigo, Mohammed Ali, Paul Kelemba, and Isabela Kituri, KTN-Baraza Limited

Source: Kenya Law Report website. http://kenyalaw.org/caselaw/

8. People interviewed

Aidi, Beryl	Kenya Human Rights Commission
Bowry, Pravin	Senior Counsel, Kenya
Bwire, Victor	Deputy Chief Executive, and Programmes Manager, MCK
Gimode, Timothy	Communications Authority of Kenya
Janak, William Oloo	Chairman, Kenya Correspondents' Association
Jaoko, Florence S.	Lecturer, University of Nairobi UoN Law School; former Executive Chairperson, Kenya National Commission on Human Rights
Kegoro, George	International Commission of Jurists-Kenya Chapter
Makokha, Kwamchetsi	Consultant, Media Issues
Ngaira, Eric	Legal Officer, MCK
Ngwalla, Mike	Senior journalist, Kenya
Nyatta, Tole,	Journalism Trainer at Internews in Kenya; Contributor at BBC Worldwide
Nyutho, Edwin	Senior Lecturer, UoN School of Journalism
Ohito, David	Manager, Digital Convergence, Standard Group; and Deputy Chairman, Kenya Editors' Guild
Otieno, Churchill	Managing Editor, Standard Group
Owino, Sekou	Legal Officer, Nation Media Group
Rambaud, Brice	Media Consultant, ex-Programme Director, Internews

References

1. The Constitution and all other Kenyan legislation are available on the Kenya Law Reports website at http://www.kenyalaw.org/kl/index.php Accessed 20/05/2014.
2. See for example, Sihanya, Ben (2011) The Presidency and Public Authority in Kenya's new Constitutional Order. Society for International Development, *Constitution Working Paper* No. 2.
3. See Nyamora, Pius M. (2007), The role of alternative press in mobilization for political change in Kenya 1982-1992: Society magazine as a case study. Graduate School Theses and Dissertations. Paper 2305. Available at http://scholarcommons.usf.edu/etd/2305 Accessed 28/08/2012. See also Media Council of Kenya (2012), *The Long Walk to Media Freedom*. Nairobi: MCK.
4 See for example, Mutua, Makau (2008), *Kenya's Quest for Democracy: Taming Leviathan*. Boulder, CO: Lynne Rienner Publishers.
5 The *SG* empire includes *The Standard, The County Weekly, Standard Digital, The Nairobian, GameYetu, Think Outdoor, Publishers Distribution Services, Radio Maisha* and *KTN TV*.
6 For example, the penalty imposed in 2002 for publishing without a bond remained a US$ 13,000 fine or three years in prison or both, as provided by Section 14 of the Books and Newspapers Act.
7 This threat was carried in a 6th July 2014 CA circular to News Editors. Ironically, CA is a creature of the injuncted KICA 2013.
8 Demands for Kenya's eventual 1991 return to constitutional multi-party politics were galvanized by a heavily repressed 7 July 1990 opposition rally in Nairobi. But *Saba Saba* – 7th day of the 7th month, has its roots in the 1954 date of the founding of Tanzania's independence party, Tanganyika African National Union.
9 See Kendo, Okech, A Greater Danger To Media Freedom. *The Star*, Wednesday, July 17, 2013.
10 The scores range between 0 (best) and 100 (worst). For the methodology, see http://rsf.org/index2014/data/2014_wpfi_methodology.pdf Accessed 28/06/2014. For the Excel spreadsheet of trends in country scores, go to http://rsf.org/index2014/en-index2014.php# Accessed 28/06/2014.
11 For its method and the link to its country rankings, go to http://www.freedomhouse.org/report-types/freedom-press Accessed 28/06/2014.
12 See Article 9 - http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf Accessed 20/08/2014
13 See Article 19 - http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx Accessed 20/08/2014
14 See Article 19 - http://www.un.org/en/documents/udhr/index.shtml#a19 Accessed 20/08/2014
15 See http://www.article19.org/resources.php/resource/37421/en/kenya:-contempt-of-court-bill-2013 Accessed 20/08/2014
16 See http://www.cickenya.org/index.php/legislation/bill-tracker Accessed 20/08/2014

17 These were former Committee of Legal Experts on the Constitution chair Nzamba Kitonga vs *The Star* (MCK/Comp/043/2009), and Central Bank of Kenya governor Njuguna Ndung'u vs. *The Business Daily* (MCK/Comp/078/2010).

18 These were Danson Buya Mungatana vs. *NTV* and Robert Nagila (MCK/Comp/053/09), Stephen Mutoro vs. SG (MCK/Comp/047/09) and Jamia Mosque Committee vs. *Hot 96* (MCK/Comp/063/09).

19 Comparatively, less than 10% of the complaints received by Kenya Anti-Corruption Commission in 2002, 2003 and 2003/04 were under its jurisdiction. By 2012/13, however, the successor Ethics and Anti-Corruption Commission retained 42.7% of registered complaints. See Commission annual reports at http://www.eacc.go.ke/default.asp?pageid=20 Accessed 15/05/2014

20 The MCK counsel referred to a withdrawn complaint by an FM station listener from Garissa, 300kms from Nairobi.

21 The only journalist fined was *The Nairobi Law Monthly*'s editor, who is likely indemnified by the publication.

22 See Communications Commission of Kenya (2014), *Lives: Annual Report 2012–2013*. Nairobi: CCK.

23 The *annual* report covers a budget, accounting or financial year which runs from 1 July of one year to 30 June of the next year.

24 For example, see Obura, Fred, Report urges CCK to repossess idle frequencies. *Standard Digital*, 26 March 2012.

25 See High Court Petition No. 346/2012, in which Royal Media Services loses a suit to bar CCK from shutting down its 'illegal' broadcasts.

26 A telephone interview proved inadequate for elaborating these data.

27 As at July 2014, the exchange rate to the US$ is Kshs 87.00.

28 For case details, see http://kenyalaw.org/caselaw/cases/view/1855/ Accessed 05/07/2014

29 See (Kegoro, 2003)

30 See Ochieng', Zachary, Kenya: long road to press freedom. *News from Africa* 2003, May. Available at http://www.newsfromafrica.org/newsfromafrica/articles/art_593.html accessed 05/06/2014.

31 In CC No. 60/2010, for example, the plaintiff requested Kshs 25m and Kshs 50m in compensatory and exemplary damages respectively, but the judge awarded Kshs 15m against the book publisher. More recently however, the plaintiff in CC No. 60/2010 requested a grand Kshs 750m for compensatory and exemplary damages, and a further Kshs 20m under the Defamation Act, but was awarded Kshs 7m.

32 A main media house suggested a basement settlement rate of Kshs 200,000 in the recent past.

33 'CC' here, followed by a reference number refers to 'Civil Case', and should not be confused with CC of section 4.1 above which refers to MCK's Complaints Commission.

34 A bookseller reportedly tells author Michaela Wrong: "What would you say if I told you that strange men in suits, people who don't even know the book's title, are coming in saying, 'Are you selling *that* book?"' '*That* book' is Wrong's book on Kenyan graft, *Our Turn to Eat: the story of a Kenyan whistleblower*.

35 See Wrong, Michaela (2009), Adventures of a Book in Africa. *STANDPOINT*. At http://www.standpointmag.co.uk/node/1703/full Accessed 20/05/2014. "That book" is Wrong, Michaela (2009), *Our Turn to Eat: the story of a Kenyan whistleblower*. London: Fourth Estate.

36 See International Commission of Jurists (ICJ) and ICJ-Kenya Chapter (2005), Kenya: judicial independence, corruption and reform. Report of a December 2004 fact-finding mission.

37 NMG includes *Daily Nation, Sunday Nation, East African, Business Daily, Africa Review, Sunday Monitor, The Citizen, MwanaSpoti, NationHela Pesa Mfukoni* and *NTV*.

38 While Kenyatta was the KANU chairman till 2012, he abandoned KANU to support his 2002 presidential rival Kibaki's 2007 presidential candidacy, in return getting the PNU deputy prime minister's position while also holding the powerful Finance cabinet portfolio.

39 See page 22 of Republic of Kenya (2006), National Information & Communications Technology (ICT) Policy. Ministry of Information & Communications (January).

40 As mentioned in Section 3.3, the High Court eventually ruled that digital migration was constitutional.

41 For example, the Goldenberg inquiry could not discuss an area of spending of the proceeds of the crime because the aspect was *sub judice* (AFRICOG, 2011: 15).

42 See http://www.mediacouncil.or.ke/en/mck/images/SPEECH-BY-%20PRESIDENT-UHURU-%20KENYATTA.pdf Accessed 10/05/2014.

43 See Mutua, Makau op cit.

44 See Hansen, Thomas Obel (2011), Constitutional Reform, Transition and Preventing Violence: An Assessment of Kenya's New Constitution in Light of the Need for Political and Peaceful Transformation. Available at SSRN: http://ssrn.com/abstract=1934600 or http://dx.doi.org/10.2139/ssrn.1934600

45 See Ombati, Cyrus, DPP Tobiko terminates cases against bus crew over Thika road blasts. *Standard Digital*, Friday, 9 May 2014. Available at: http://www.standardmedia.co.ke/?articleID=2000111415&story_title=dpp-tobiko-terminates-cases-against-bus-crew-over-thika-road-blasts Accessed 10/05/2014.

46 The Miscellaneous Amendment Bill 2013 proposed the addition to the PBO Act of a S. 27 A which required all external funding to PBOs to be made through to the government-dominated PBO Federation, with any donor contributions above 15% of total funding requiring the approval of the Cabinet Secretary/Finance.

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