



**Kaibos v Ngawa 2019 Assets Limited (Petition 1 of 2023) [2024] KEHC 15040 (KLR)  
(Constitutional and Human Rights) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15040 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION 1 OF 2023  
CM KARIUKI, J  
NOVEMBER 28, 2024**

**BETWEEN**

**DANIEL LARAYAN KAIBOS ..... PLAINTIFF**

**AND**

**NGAWA 2019 ASSETS LIMITED ..... DEFENDANT**

**JUDGMENT**

1. By petition dated 21/2/2023. The petitioner sought prayers.
  - a. A declaration be issued that the Respondent violated the Petitioner's fundamental right to privacy and human dignity under Articles 28 and 31 of *the Constitution* by publishing the Petitioner's image for commercial advertisement without the Petitioner's consent.
  - b. A declaration be issued that the Respondent violated the Petitioner's rights under Article 31 of *the Constitution* by publishing the Petitioner's image of his residential house and likeness for its commercial gain with no personal financial advantage gained by the Petitioner.
  - c. A declaration be issued that the Petitioner's intellectual property rights, right of publicity, and personality rights were infringed when the Respondent decided to publish the Petitioner's image in advertising and marketing its real estate projects for financial gain without seeking authority/consent from the Petitioner.
  - d. An order of permanent injunction be issued restraining the Respondent from publishing and using the Petitioner's image and likeness in its advertisement or promotion in any way without the Petitioner's consent.



- e. An order that the Respondent be compelled to compensate the Petitioner for damages and loss arising from the publication of the Petitioner's photograph without his express authority and the exploitation of the Petitioner by the Respondent for financial gain.
  - f. Any other relief that the Court deems fit to grant.
  - g. The Respondent bears the costs of the petition.
2. The background of the case is that:
- a. The Petitioner is aggrieved by the infringement of his image rights, right to privacy, and breach of human dignity. On January 2023, the Petitioner discovered a picture/ photograph depicting his residential house (from now on referred to as "the photograph") being used by the Respondent in advertising and marketing of the "2023 SPECIAL OFFER, PRIME PLOTS FOR SALE" with his consent.
  - b. On conducting a further online search, he discovered that the Respondent had made public commercial posts and advertisements using his photographs. They were also on its social media platforms, advertising the various properties being sold in Canan Estate, Rumuruti.
  - c. The photograph depicting him was taken by an unauthorized servant, agent, and employee of the Respondent without his knowledge or consent. The main motive for using the picture was to give the said project visibility, which would, in turn, attract many people, thus yielding more profits in terms of the many prospective purchasers who were being targeted for the said sale of plots project, the Petitioner avers.
  - d. The Petitioner avers that the Respondent's use of the image has resulted in a violation of the Petitioner's and his family's privacy rights. People flood his gate, claiming they are visiting the site, exposing the Petitioner to many people who now know his residential house, thus risking his security and that of his family.
  - e. The Respondent filed a Replying Affidavit dated 7<sup>th</sup> May 2024 in response to the Petition denying the violation of the Petitioner's right of privacy and breach of human dignity.
3. The legal foundation of the petition was stated to be the provisions of Articles 28, 19, and 31 of the Constitutions of Kenya (Laws of Kenya 2010) and Articles 1, 5, and 12 of the Universal Declaration of Human Rights (UDHR). The petition is supported by the Affidavit of Daniel Larayan Kaibos, sworn on 21/2/2025.
4. The Petition is countered by way of preliminary objection dated 24/3/2023 with three (3) grounds:
- i. That this petition does not raise any constitutional issues. Rights to dignity and privacy are facets of personality. A person's privacy includes their identity, Image, likeness, signature, etc. The photograph purportedly used by the respondent does not include the Petitioner's image, personality, or likeness. The advertisement using the said image could be argued as a breach of copyright, and therefore, no constitutional issue is used in this petition. A constitutional issue is one whose resolution requires the interpretation of *the Constitution* rather than of a statute.
  - ii. That this honorable court, sitting as a Constitutional Court in this case, does not have jurisdiction to entertain the petition where there exist parallel or alternative statutory remedies that the petitioner could explore.
  - iii. That the entire petition is fatally defective, is based on law, and should be dismissed with costs to the respondent.



5. The Respondent, also via affidavit of James Ngare Kamotho sworn on 7/5/2024, opposes the Petition.
6. The parties were directed to canvass matters via submissions.
7. Petitioner Submissions.
8. The appellant, in his submissions, sets out the following issues; Was the use and publication of the Petitioner's image of his house by the Respondent without consent a violation of the Petitioner's right to privacy and suitable to human dignity? Whether the said house belongs to the Petitioner? Whether the said flier belongs to the Respondent? Whether the Petitioner is entitled to general damages for the violation of privacy rights by the Respondent? Who is to pay the costs of the suit?
9. Whether the use and publication of the Petitioner's image of his house by the Respondent without consent was a violation of the Petitioner's right to privacy and suitable to human dignity?
10. Right Of Privacy
11. Article 31 of *the Constitution* provides that every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed.
 

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.” The Universal Declaration of Human Rights
12. In Kenya, Human Rights Commission Vs. Communications Authority of Kenya & 4 Others [2018] eKLR held: -
 

“Privacy is a fundamental human right, enshrined in numerous international human rights instruments. It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information, and association. The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction, and liberty, a "private sphere" with or without interaction with others, free from arbitrary state intervention and excessive unsolicited intervention by other uninvited individuals.”
13. The nature and importance of this right were articulated in the case of *JWI & Another v Standard Group Limited & Another* [2015] eKLR, where the court opined that,
 

“The right to privacy consists essentially in the right to live one's life with minimum interference. It concerns private family and home life, physical and moral integrity, honor and reputation, avoidance of being placed in a false light, no revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially.”
14. The concept of the right to privacy demarcates the individual realms or dimensions that he needs to enjoy the personal freedoms exacted and legally safeguarded in modern societies.
15. In this case, the Respondent took an image of the Petitioner's private home and used it for advertisement without the Petitioner's consent. A person's privacy also includes private family and home life, and that means Respondent's use of the image of the Petitioner's house has resulted in a violation of the Petitioner's and his family's privacy rights as people flood his gate, claiming they are visiting the site.



16. That privacy can be more or less extensive, involving a broad range of matters bearing on an individual's personal life. It is not only limited to a person's likeness or signature. It also includes his identity, which means even his personal space/his home also defines his identity; thus, taking a photograph of someone's house and using that image for financial gain without the consent of the owner is interference with the owner's privacy, which amounts to a violation of his constitutional rights.
17. Privacy, dignity, identity, and reputation are facets of personality. All of us have a right to privacy, and this right, together with the broader, inherent right to dignity, contributes to our humanity.
18. The act of going on someone's land or compound to take photos without permission would be considered trespassing and a violation of the owner's right to privacy. The use of the image without the consent of the Petitioner is unlawful and a violation of the constitutional right to privacy.
19. In the case of *Jessica Clarise Wanjiru vs. Davinci Aesthetics & Reconstruction Centre & 2 Others* (2017) eKLR, Mativo J stated: -

“From the above leading decisions on the subject, the critical elements of a claim for unlawful use of name or image which a petitioner must establish to succeed in a case of this nature are: Use of a protected attribute: the plaintiff must show that the defendant used an aspect of his or her identity that is protected by the law. This ordinarily means a plaintiff's name or likeness, but the law protects specific other personal attributes as well For an Exploitative Purpose: The plaintiff must show that the defendant used his name, likeness, or other personal attributes for commercial and other exploitative purposes.

The use of someone's name or likeness for news reporting and other expressive purposes is not exploitative as long as there is a reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest.

20. No consent: the plaintiff must establish that they did not permit the offending use. "That in this case."
21. The Respondent used one of the Petitioner's aspects of his identity, which is taking and using the image of his private home for commercial purposes, by advertising his business using the said image without the Petitioner's consent. By doing so, he violated the Petitioner's constitutional right of privacy. The use and publication of the Petitioner's image of his house by the Respondent without consent was a violation of the Petitioner's right to privacy and suitable to human dignity.

### **Whether the said house belongs to the Petitioner?**

22. The Respondent is a limited liability company that operates a real estate business in Nyahururu and Rumuruti, Laikipia County, within the Republic of Kenya. It sells and develops properties. The Petitioner was once a client of the Respondent, having bought land from it. The Respondent has been selling the other portions that are neighboring the portions the Petitioner bought from it.
23. The Petitioner went ahead and developed his portion by building his family home. He later realized that the Respondent made fliers with the image of his family home without his consent and issued them to prospective buyers with the aim of attracting them to buy the remaining plots on that "Canan Estate" project, thus making business. He confirmed that by going to one of the Respondent's offices based in Rumuruti, where one of the Respondent's sales person issued him with a flier and true to it, it had the image of his family home, yet the Respondent had not sought permission from the Petitioner to take or use the image of his family home.



24. Immediately, the Respondent started to distribute the said fliers with the image of the petitioner's family house, and people began flocking to the Petitioner's gate, claiming to visit the Respondent's site, thus violating his privacy and that of his family. The primary purpose of using the image of the Petitioner's private house was for the Respondent to attract more buyers to purchase the remaining plots, thus doing good business.
25. The Respondent used that image to convince prospective buyers that the plots were well-located and that other people had already bought and built them. I humbly submit that the house in question belongs to the Petitioner, and it is on the plots the Respondent sold him. The Respondent did not seek permission from the Petitioner to take and use pictures of his private home. The Petitioner just saw the fliers at the Respondent's office in Rumuruti when he had gone to make inquiries.
26. The Respondent selfishly used that image without the Petitioner's consent to attract more buyers. He violated the Petitioner's right to privacy by allowing people to flood through his gate in the name of visiting the site. Many people came to know the Petitioner and his wife since they are well known in Laikipia County for the work they do in society.
27. By doing this, the Respondent exposed the Petitioner's private life since everyone who came to that site got attracted to the image of the house, which was on the Respondent's fliers, and came to know the house belonged to the Petitioner. Most people get to know that information violates the privacy rights of the Petitioner and his family, and their security is compromised. The Petitioner did not wish for many people to know where he lived with his family. Still, the Respondent violated that by using the image of his private home without his consent with the aim of attracting buyers to purchase the remaining plots in its project.

**Does the said flier belong to the Respondents?**

28. The said flier belongs to the Respondent since it bears its name, and the Respondent allowed similar fliers to be used by its salespeople to issue to customers and its offices and also on social platforms. This was done with the aim of attracting people to buy plots from the Respondent in Canan Estate, Rumuruti, thus commercial gain. This is the flier that was given to the Petitioner when he visited one of the Respondent's offices based in Rumuruti. All the details on the said flier belong to the Respondent.

**Whether the petitioner is entitled to general damages for the violation of privacy rights by the respondent.**

29. The Respondent used an image of the Petitioner's private home on its fliers to attract more buyers and, thus, commercial gain without the Petitioner's consent. By doing this, the Respondent violated the privacy rights of the Petitioner and his family, and he is entitled to compensation/ general damages.
30. Article 22(1) of *the Constitution* states that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened.
31. Article 23(3) also states that in any proceedings brought under Article 22, a court may grant appropriate relief.
32. The case of *M W K v another v Attorney General & 3 others supra*

“An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle, it may well not suffice. The fact that the right violated was a constitutional right adds an extra



dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case."

### **Who is to pay the costs of the suit?**

33. Court's Jurisdiction

34. Article 23 (1) of *the Constitution* of Kenya states that;

"The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Right

35. Respondent Submissions

36. The Court is the case of Tony Hillary Omondi v Silverstone Air [2019] eKLR held: -

"Courts have over the years established that for a party to prove violation of the rights under the various provisions of the Bill of Rights, they must not only state provisions of *the Constitution* allegedly infringed in relation to them, but also manner of infringement and the nature and extent of that infringement and the nature NBI Pet. No. 1030 of 2007). I find no infringement of constitutional rights at all. They can be founded on the publication of a photograph without a person's image or likeness or anything personal. The only issue that can arise is the issue of copyright infringement, which is not a constitutional question.

37. It is the Respondent's submission that the present Petition does not disclose any infringement of a constitutional right as the photograph relied upon does not include the Petitioner's likeness, image, or anything personal. ■

38. Thus, the entire Petition is fatally defective, frivolous, and an abuse of the process of the Honourable Court. The Respondent seeks that the Petition as a whole be dismissed with costs

39. Petitioner Submissions On Preliminary Objection Dated 24/3/2023

40. Article 31 of *the Constitution* provides that every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed.

41. "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence. The Universal Declaration of Human Rights

42. In Kenya, Human Rights Commission Vs. Communications Authority of Kenya & 4 Others [2018] held:

43. Privacy is a fundamental human right enshrined in numerous international human rights instruments. It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information, and association. The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction, and liberty, a "private sphere" with or without interaction with others, free from arbitrary state 'intervention and excessive unsolicited intervention by other uninvited individuals.



44. 'The nature and importance of this right was articulated in the case of *JWI & Another v Standard Group Limited & Another* [2015] eKLR, where the court opined that;

“The right to privacy consists essentially in the right to live one's life with minimum interference. It concerns private family and home life, physical and moral integrity, honor and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially.”

45. The concept of the right to privacy demarcates the individual realms or dimensions that he needs to enjoy the personal freedoms exacted and legally safeguarded in modern societies.

46. In this case, the Respondent took an image of the Petitioner's private home and used it for advertisement without the Petitioner's consent. A person's privacy also includes private family and home life, and that means Respondent's use of the image of the Petitioner's house has resulted in a violation of the Petitioner's and his family's privacy rights as people flood his gate, claiming they are visiting the site.

47. that privacy can be more or less extensive, involving a broad range of matters bearing on an individual's personal life. It is not only limited to a person's likeness or signature. It also includes his identity, which means even his personal space/ his home also defines his identity; thus, taking a photograph of someone's house and using that image for financial gain without the consent of the owner is interference with the owner's privacy, which amounts to a violation of his constitutional rights.

48. Privacy, dignity, identity, and reputation are facets of personality. All of us have a right to privacy, and this right, together with the broader, inherent right to dignity, contributes to our humanity.

49. The act of going on someone's land or compound to take photos without permission would be considered trespassing and a violation of the owner's right to privacy. Similarly, using the image without the consent of the Petitioner is unlawful and a violation of the constitutional right to privacy.

50. In the case of *Jessica Clarise Wanjiru vs. Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017] eKLR, Mativo J stated:

“From the above leading decisions on the subject, the critical elements of a claim for unlawful use of name or image which a petitioner must establish to succeed in a case of this nature are: -

51. Use of a protected attribute: The plaintiff must show that the defendant used an aspect of his or her identity that is protected by the law. This ordinarily means a plaintiff's name or likeness, but the law protects specific other personal attributes as well.

52. For an Exploitative Purpose: The plaintiff must show that the defendant used his name, likeness, or other personal attributes for commercial and other exploitative purposes.

53. The use of someone's name or likeness for news reporting and other expressive purposes is not exploitative so long as there is a reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest.

54. No consent: The plaintiff must establish that they did not permit the offending use. ”

55. The Respondent used one of the Petitioner's aspects of his identity, which is taking and using the image of his private home, and used it for commercial purposes by advertising his business using the said



image without the consent of the Petitioner. By doing so, he violated the Petitioner's constitutional right to privacy; thus, a constitutional issue has been raised in this Petition, making the Preliminary Objection raised by the Respondent baseless, and so we humbly pray to have it dismissed with costs to the Petitioner.

56. Court's Jurisdiction

57. Article 23 (1) of *the Constitution* of Kenya states that the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress for a denial, violation, infringement of, or threat to a right or fundamental freedom in the Bill of Rights.

58. In this case, the Respondent violated the Petitioner's constitutional right to privacy, as submitted above. That means this Petition raises a constitutional issue. Hence, this Court has jurisdiction to hear and determine the Petition against the Respondent for violating the Petitioner's constitutional right to privacy.

59. This Petition raises a constitutional issue of violation of the constitutional right of privacy, so this Honorable Court has jurisdiction to hear and determine the Petition against the Respondent's claim that the Court has no authority.

60. That this Petition is not fatally defective as claimed by the Respondent, it is not bad in law, and so it should not be dismissed. Instead, the Preliminary Objection raised by the Respondent should be rejected.

61. Issues Analysis And Determination

62. After going through the pleadings, affidavits, and submissions, I find the issues are whether the alleged infringement lies within the scope of the provisions of article 31(1) of *the constitution* of Kenya (COK,2010). if aforesaid in affirmative, what is the remedy? What is the order as to costs?

63. Right to privacy (article 31)

64. The Petitioner's case is that he bought and went ahead to develop his portion of land by building his family home. He later realized that the Respondent made fliers with the image of his family home without his consent and issued them to prospective buyers with the aim of attracting them to buy the remaining plots on that "Canan Estate" project, thus making business. He confirmed that by going to one of the Respondent's offices based in Rumuruti, where one of the Respondent's sales person issued him with a flier and true to it, it had the image of his family home, yet the Respondent had not sought permission from the Petitioner to take or use the image of his family home

65. Article 31 of *the constitution* of Kenya stipulates that Every person has the right to privacy, which includes the right not to have— (a) their person, home, or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed.

66. 5.1 Importance of the right to privacy

67. The right to privacy is a quintessential right of the individual as it secures the sense of humanity, allowing the individual to not only live but also to thrive in the immutable facets of life, such as personality, consciousness, character, belief, and social interaction with other humans as well as the environment around them.<sup>37</sup> Warren and Brandeis<sup>38</sup> argued that it is essential to protect privacy as it is inextricably linked to other human rights, among other things, the rights to life, dignity, health, ownership of property, enjoyment of family life, information, and communication.



68. Therefore, a failure to respect and protect the right to privacy can have devastating effects on the individual. Recognizing and protecting it as inherent in all humankind protects against any arbitrary or unwanted interference, either by other individuals or the state, in a person's sexual sphere and moral choices.
69. In a recent ruling, the High Court of Kenya in *Kenya Human Rights Commission v Communications Authority of Kenya & 4 Others*<sup>39</sup> depicted the right to privacy as being 'central to the protection of human dignity' and forming 'the basis of any democratic society.'<sup>40</sup> It is also presumed to 'support and reinforce other rights, such as freedom of expression, information, and association.' Moreover, in the particular Kenyan context, the entrenchment of the right to privacy is essentially a lesson learned from past power abuses.
70. 5.2 The right to privacy in the drafting process of *the Constitution*
71. During the drafting process of the 2010 Constitution, the CoE endeavored to incorporate the right to privacy in a manner that it could be limited only by law, and 'only to the extent that the limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. The right to privacy was envisioned to contain general protection to individuals from state agencies as well as from private persons.
72. It was meant to cover protection for family, property, private information, and communication. Notably, according to the Commission on Constitutional Review the formulation of the content of this right did not elicit much debate during the drafting process as there was the consensus that the repealed Constitution was inadequate in its provision and enforcement of the contents of the right to privacy.
73. The inclusion of this right in the text of *the Constitution*, therefore, was not an afterthought. Indeed, privacy as a right in Kenya bears an alarming historical account of an era of extrajudicial surveillance, arbitrary intrusion in private lives and property of individuals, and violation of rights that culminated even in political assassinations. It resulted from the systemic failures and the consequent atrocities committed primarily by state machinery during the tenure of the repealed Constitution.
74. The Scope of the right to privacy: What is protected?
75. The present text of Article 31 extends the protection of the right to privacy to persons, their property, private information, and communication against any search, seizure, unnecessary disclosure, or infringement. Noteworthy in the context of sections 162 and 165 of the Penal Code is Article 31(c), which is the right to have information relating to the family or private affairs not unnecessarily required or revealed.
76. In essence, the postulation of this is that the law upholds the right to privacy in family life as well as in what it terms 'private affairs,' which in the ordinary meaning denotes 'relating or belonging to an individual as opposed to the public.'<sup>43</sup>
77. In the case of *Jessica Clarise Wanjiru vs. Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017] eKLR, Mativo J stated:

“From the above leading decisions on the subject, the critical elements of a claim for unlawful use of name or image which a petitioner must establish to succeed in a case of this nature are: -Use of a protected attribute: The plaintiff must show that the defendant used an aspect of his or her identity that is protected by the law. This ordinarily means a plaintiff's name or likeness, but the law protects specific other personal attributes as well. For an Exploitative



Purpose: The plaintiff must show that the defendant used his name, likeness, or other personal attributes for commercial and other exploitative purposes. The use of someone's name or likeness for news reporting and other expressive purposes is not exploitative so long as there is a reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest. No consent: The plaintiff must establish that they did not permit the offending use. "

78. The Court in the case of *Tony Hillary Omondi v Silverstone Air* [2019] 1 eKLR opined that,
- ...found no infringement of constitutional rights at all as the claim was founded on the publication of a photograph without a person's image or likeness or anything personal. The only issue that can arise is the issue of copyright infringement, which is not a constitutional question.
79. The instant Petition does not disclose any infringement of a constitutional right as the photograph relied upon does not include the Petitioner's likeness, image, or anything personal. —
80. The right of privacy was the right of a person to be left alone, to be free from unwarranted publicity, and to live without unjustified interference by the public in matters with which the public was not necessarily concerned. An actionable invasion of the right to privacy was the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public had no legitimate concern, or the wrongful invasion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. It also included, usually, by statute, a constitutional right to be left alone from governmental intrusion into one's private affairs. However, the rights and the needs of the Government to protect society were balanced.
81. To be actionable, the prying or intrusion into the claimant's private affairs must be of a type that was offensive to a reasonable person, except in the case of wrongful appropriation of one's name or likeness where the act complained of need not be highly offensive to constitute invasion of privacy.
82. Public disclosure of private facts or affairs occurred when a person gave publicity to a matter that concerned the private life of another. Still, it had to be a matter that would be highly offensive to a reasonable person and that it was not of legitimate public concern. In an action for invasion of privacy based on the alleged wrongful disclosure of private facts, the plaintiff/claimant had to show that the disclosure complained of was actually public. There was no liability when a defendant merely gave further publicity to information about the plaintiff that was already public.
83. In an action for a privacy right violation, a claimant had to allege and prove;
- a. that there was an unwarranted invasion of the individual's privacy;
  - b. that there was intentional intrusion on their private concerns;
  - c. that publication was without the claimants' consent, where such written consent was required; and
  - d. that the claimant's name or picture was used for trade or advertising purposes, where privacy invasion was alleged by publication of one's name or likeness for trade and advertising purposes.
84. Significantly, the Court restated that 'human rights enjoy a prima facie, presumptive inviolability' and often rank over notions of public interest. This is of particular interest to the question of the



- violation of the right to privacy to homosexual persons in Kenya, given that most of the arguments advanced for upholding the impugned penal provisions are founded on notions of public and religious interests. See *umaz and Tumaz Enterprises Limited & 2 others v National Council for Law Reporting* (Miscellaneous Civil Case E144 of 2021) [2022] KEHC 14747 (KLR) (1 November 2022) (Judgment)
85. Kenya is a signatory to the Universal Declaration of Human Rights ('UDHR') and has ratified the International Covenant on Civil and Political Rights ('ICCPR'). Article 17 of the ICCPR, which reinforces Article 12 of the UDHR, provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor unlawful attacks on his honor and reputation." The Human Rights Committee has noted that state parties to the ICCPR have a positive obligation to "adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right [privacy]."
  86. International obligations related to privacy: Kenya is a signatory to the Universal Declaration of Human Rights ('UDHR') and has ratified the International Covenant on Civil and Political Rights ('ICCPR'). Article 17 of the ICCPR, which reinforces Article 12 of the UDHR, provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor unlawful attacks on his honor and reputation." The Human Rights Committee has noted that state parties to the ICCPR have a positive obligation to "adopt legislative and other measures to give effect to the prohibition."
  87. Human Rights Committee general comment No. 16 (1988) on the right to respect privacy, family, home and correspondence, and protection of honor and reputation (art. 17). See the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (No. 108), 1981.
  88. . Article 2 of Kenya's Constitution states: "(5) The general rules of international law shall form part of the law of Kenya—the sovereignty of the people. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution. "Domestic laws and regulations related to privacy 8. Article 31 of *the Constitution* of Kenya protects the right to privacy.
    - i. It states: Every person has the right to privacy, which includes the right not to have—
      - i. their person, home, or property searched;
      - ii. their possessions seized;
      - iii. information relating to their family or private affairs unnecessarily required or revealed, or
      - iv. the privacy of their communications infringed."
  89. The Courts have also upheld the right to privacy of minors, emphasizing the need to obtain consent for the use of their images from their parents. In *N W R & another v Green Sports Africa Ltd & 4 Others* [2017] eKLR, the petitioner filed the petition against the respondents for violating her children's right to privacy after the respondents took and published the children's photographs without consent. (a) On the right to privacy, the court held that personality rights, generally speaking, consist of two types of rights: the right to privacy and the right to publicity. The right to privacy is the right to keep one's image and likeness from exploitation without permission or compensation and generally applies to members of the general public. The right of publicity is the exclusive right of an individual to market their image, likeness, or persona for financial gain.



90. The court held that the respondents had violated the rights of the petitioners by publishing their photographs without the consent of their parents and awarded general damages totaling Kshs.1.5 Million.
91. In the case of Tony Hillary Omondi v Silverstone Air [2019] eKLR held: -
- “Courts have over the years established that for a party to prove violation of the rights under the various provisions of the Bill of Rights, they must not only state provisions of *the Constitution* allegedly infringed in relation to them, but also manner of infringement and the nature and extent of that infringement and the nature NBI Pet. No. 1030 of 2007). I find no infringement of constitutional rights at all. They can be founded on the publication of a photograph without a person's image or likeness or anything personal. The only issue that can arise is the issue of copyright infringement, which is not a constitutional question.
92. In sum, the court finds that the instant Petition does not disclose any infringement of a constitutional right as the photograph relied upon does not include the Petitioner's likeness, image, or anything personal.
93. Thus, the court makes the orders that;
- i. This petition has no merit and thus is dismissed.
  - ii. The petitioner to bear the costs of the petition

**JUDGMENT, DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 28<sup>TH</sup> DAY OF NOVEMBER 2024.**

**CHARLES KARIUKI**

**JUDGE**

