



Kweri v Beehive Media Limited; Capwel Industries Limited (Interested Party) (Constitutional Petition E321 of 2021) [2023] KEHC 2684 (KLR) (Constitutional and Human Rights) (31 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2684 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E321 OF 2021**

AC MRIMA, J

MARCH 31, 2023

BETWEEN

LIBURUWEN LASANGURU KWERI PETITIONER

AND

BEEHIVE MEDIA LIMITED RESPONDENT

AND

CAPWEL INDUSTRIES LIMITED INTERESTED PARTY

Infringement claims under article 31(c) and (d) of the Constitution on the right to privacy are to be dealt with by the Data Protection Commissioner as the first port of call

The dispute concerned violation of the right to privacy and dignity resulting from the use of a person's image without their authorization. The court found that the Data Protection Act had a deliberate design to ensure that all claims arising from allegations of infringement of article 31(c) and (d) of the Constitution were wholly dealt with by the Office of the Data Protection Commissioner as the first port of call. Such position could only be overruled by a party demonstrating any of the exceptions to the doctrine of exhaustion in a matter. The court noted that the Office of the Data Protection Commissioner lacked the jurisdiction to interpret the Constitution but had the jurisdiction to determine whether the petitioner's privacy rights in the Bill of Rights were denied, violated, infringed or threatened.

Reported by Kakai Toili

Jurisdiction – jurisdiction of the High Court vis a vis the Office of the Data Protection Commissioner – jurisdiction to determine claims arising from allegations of infringement of article 31(c) and (d) of the Constitution on the right to privacy – whether the High Court could determine claims arising from allegations of infringement of article 31(c) and (d) of the Constitution on the right to privacy before they were determined by Office of the Data Protection Commissioner – Constitution of Kenya, 2010, article 3(c) and (d).



Jurisdiction – jurisdiction of the Office of the Data Protection Commissioner - jurisdiction to interpret the Constitution - jurisdiction to determine whether a person’s privacy rights in the Bill of Rights had been denied, violated, infringed or threatened - whether the Office of the Data Protection Commissioner had the jurisdiction to interpret the Constitution and the jurisdiction to determine whether a person’s privacy rights in the Bill of Rights had been denied, violated, infringed or threatened - Constitution of Kenya, 2010, article 3(c) and (d).

Constitutional Law – interpretation of the Constitution – process entailed in the interpretation of the Constitution - what was the distinction between determining the denial, violation, infringement or threat to the privacy rights in the Bill of Rights and interpreting the Constitution.

Constitutional Law – constitutional petitions – matters to be determined in constitutional petitions – constitutional issues – what was a constitutional issue and what was the nature of a constitutional petition.

Brief facts

The dispute concerned violation of the right to privacy and dignity resulting from the use of a person’s image without their authorization. The petitioner claimed that the respondent published his photograph in an advertisement of the interested party’s product without his authorization. The petitioner claimed that the advertisement which was carried out in the interested party’s Facebook page with 168,576 active followers, had his image with the caption “*kamilisha methali moto moto; “cha mkufuu mwanafuu ha...”* #SokoNiUpendo”. The petitioner further claimed that the respondent without his authorization published the same advertisement on its Twitter and Instagram pages with 4,212 and 3,516 followers respectively.

The petitioner asserted that the publications were accessible to the public and his image was being unconscionably used without his knowledge and consent to sell the interested party’s products. Aggrieved, the petitioner filed the petition seeking among other orders; a permanent injunction restraining the respondent from publishing and or using the petitioner’s image and likeness in any way in its advertisements or promotions in any way without his consent and compelling the respondent to stop any further advertisement or promotions featuring his image.

Issues

- i. Whether the High Court could determine claims arising from allegations of infringement of article 31(c) and (d) of the Constitution on the right to privacy before they were determined by the Office of the Data Protection Commissioner (Data Commissioner).
- ii. Whether the Data Commissioner had the jurisdiction to determine whether a person’s privacy rights in the Bill of Rights had been denied, violated, infringed or threatened.
- iii. Whether the Data Commissioner had the jurisdiction to interpret the Constitution.
- iv. What was a constitutional issue and what was the nature of a constitutional petition?
- v. What did interpretation of the Constitution entail?
- vi. What was the distinction between determining the denial, violation, infringement or threat to the privacy rights in the Bill of Rights and interpreting the Constitution?

Held

1. Articles 22 and 258 of the Constitution were the anchor provisions relating to the *locus standi* in instituting petitions. The Constitution, the law as well as courts had expressed themselves on the manner in which petitions ought to be presented to court. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the *Mutunga* Rules) provided for the contents of petitions.
2. Although article 22(1) of the Constitution gave every person the right to initiate proceedings claiming that a fundamental right or freedom had been denied, violated or infringed or threatened, a party invoking that article had to show the rights said to be infringed, as well as the basis of his or her grievance.
3. A constitutional and human rights court was supposed to exclusively deal with constitutional issues. A constitutional issue was one which confronted the various protections laid out in a constitution. Such



- protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement.
4. The petition had several parts. They were the description of the parties, the facts, particulars of the advertisement, particulars of the defamation, legal foundations of the petition, violation of the Constitution and fundamental rights and freedoms and the reliefs sought. A cursory look at the petition revealed an obvious alleged confrontation of various protections laid out in the Constitution. The petition had, therefore, attained the threshold since it had established the link between the petitioner and the provisions of the Constitution alleged to have been contravened.
 5. Where there were alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such disputes until after the available avenues were fully adhered to or unless it was adequately demonstrated that the matter under consideration fell within the exception to the doctrine of exhaustion.
 6. A close scrutiny of the Data Protection Act revealed a deliberate design to ensure that all claims arising from allegations of infringement of article 31(c) and (d) of the Constitution were wholly dealt with by the Commissioner as the first port of call. Such position could only be overruled by a party demonstrating any of the exceptions to the doctrine of exhaustion in a matter.
 7. In a case where Parliament donated powers to an entity like the Office of the Data Protection Commissioner (Data Commissioner) to determine if one's privacy rights under article 31(c) and (d) of the Constitution were infringed, then it meant as much; that the Commissioner had such power determine whether privacy rights as provided for in the Bill of Rights had been denied, violated, infringed or threatened. However, the Commissioner lacked the jurisdiction to interpret the Constitution.
 8. The members of the Office of the Data Protection Commissioner, as an entity and individually so, were public officers and article 10 of the Constitution called upon them to infuse the national values and principles of governance while undertaking their duties. Article 3 of the Constitution obligated every person to respect, uphold and defend the Constitution. Therefore, the Commissioner must be in a position to uphold the Constitution, and in doing so, be able to determine whether a given set of circumstances revealed denial, violation, infringement or threat to the privacy rights in the Bill of Rights. That duty was to be distinguished from the duty to interpret the Constitution.
 9. Determining whether a given set of circumstances revealed denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights was just that simple. Conversely, interpretation of the Constitution was a serious judicial function. While interpreting the Constitution, the High Court was called upon to apply its legal mind to determine the applicability and extent thereof of a constitutional provision to a set of facts. In arriving at such an interpretation, the High Court was supposed to consider all the applicable principles in constitutional interpretation. The High Court may also look at comparative jurisprudence from other jurisdictions on the subject. Such a determination yielded to a binding legal principle unless overturned by a court with superior jurisdiction.
 10. Unlike the High Court, tribunals and other quasi-judicial bodies, including the Data Commissioner, did not make the law. They could, however, apply themselves to a given set of facts and determine denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights. There was, therefore, a defined distinction between determining the denial, violation, infringement or threat to the privacy rights in the Bill of Rights and interpreting the Constitution. Whereas the former was not exclusively a judicial function, the latter was. The jurisdiction, therefore, to interpret the Constitution was the exclusive duty reserved to the High Court vide article 165(3)(d) of the Constitution.
 11. The Data Commissioner had the jurisdiction to determine whether the petitioner's privacy rights in the Bill of Rights were denied, violated, infringed or threatened. The Commissioner had further



- powers to order appropriate compensation in the event of proof of the infringement. The Data Protection Act, therefore, wholly provided for the dispute at hand based on article 31 of the Constitution as well as the remedies sought in the event the dispute was successful.
12. In such a case, it was incumbent upon the petitioner to demonstrate to the court any of the exceptions to the doctrine of exhaustion. The petitioner did not do so. The doctrine of exhaustion applied in the matter and bore a complete bar to the further exercise of jurisdiction by the court on the claim based on article 31 of the Constitution.
 13. The defamatory claim was based on whether article 31 of the Constitution was found to have been infringed. That was because in the event it was found that the article 31 rights were not infringed, then the claim on defamation would not stand. It was prudent that the claim on constitutional defamation awaited the outcome of the dispute on article 31 of the Constitution.

Petition dismissed.

Orders

- i. *The court declined jurisdiction to deal with the claim on article 31 of the Constitution on the basis of the doctrine of exhaustion.*
- ii. *The claim under article 28 of the Constitution was stayed pending the determination of the claim on article 31 of the Constitution.*
- iii. *Orders on costs shall await the final outcome of the petition.*

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Followed)
2. *Bank of Baroda (Ky) Ltd v Timwood Products Ltd* Civil Appeal 132 of 2001; [2008] eKLR - (Explained)
3. *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* Petition 628, 630 of 2014 & 12 of 2015 (Consolidated); [2015] eKLR - (Mentioned)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petitions 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Explained)
5. *Fleur Investments Limited v Commissioner of Domestic Taxes & Kenya Revenue Authority* Civil Appeal 158 of 2017; [2018] KECA 341 (KLR) - (Mentioned)
6. *In the Matter of Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] eKLR - (Mentioned)
7. *John Ward v Standard Ltd* Civil Case 1062 of 2005; [2006] KEHC 2628 (KLR) - (Mentioned)
8. *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* Civil Appeal 166 of 2018; [2019] KECA 305 (KLR) - (Explained)
9. *Macharia, Mbutia v Annah Mutua Ndwiga & Commissioner of Lands* Civil Appeal 297 of 2015; [2017] KECA 290 (KLR) - (Mentioned)
10. *Munene v Kingara & 6 others* Petition 7 of 2014; [2014] eKLR - (Mentioned)
11. *Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated); [2020] eKLR - (Mentioned)
12. *Rapinder Kaur Atal v Manjit Singh Amrit* Matrimonial Case 122 of 2006 - (Mentioned)
13. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR) - (Mentioned)
14. *Turkana County Government & 20 others v Attorney General & others* Petition 113 of 2015; [2016] eKLR - (Mentioned)
15. *Wanjiru v Da Vinci Aesthetics & Reconstruction Centre & 2 others* Constitutional Petition 410 of 2016; [2017] eKLR - (Mentioned)



South Africa

1. *Fredricks & others v MEC for Education and Training, Eastern Cape & others* (CCT 27/01) [2001] ZACC 6; 2002 (2) BCLR 113; 2002 (2) SA 693 ; [2002] 2 BLLR 119 (CC) - (Mentioned)
2. *Minister of Safety & Security v Luiters* (CCT23/06) [2006] ZACC 21; 2007 (3) BCLR 287 (CC); 2007 (2) SA 106 (CC) - (Mentioned)

Ireland

Kennedy v Ireland (1987) IR 587 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 19, 20, 21, 22, 28, 29(d); 31; 159; 160(1); 165; 258 - (Interpreted)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) rules 9, 10 - (Interpreted)
3. Data Protection Act (cap 411C) Preamble ; sections 3, 5, 8(1)(f); 59; 64; 65 - (Interpreted)
4. Evidence Act (cap 80) sections 2, 107(1)(2); 109 - (Interpreted)
5. Inter-Governmental Relations Act (cap 265F) sections 33, 34 - (Interpreted)

United States

Constitution of the United States In general- (Cited)

Advocates

Mr Waigwa, Learned Counsel for Petitioner.

Mr Esibi, Learned Counsel for Respondent.

Mr Shah, Learned Counsel for Interested Party.

JUDGMENT

Background

1. The dispute before this court concerns violation of the right to privacy and dignity resulting from the use of a person's image without their authorization.
2. The petitioner, Liburuwen Kasanguru Kweri, claimed that on June 16, 2021, Beehive Media Limited, a limited liability company offering digital marketing services to Capwel Industries Limited, the interested party herein, published his photograph in the advertisement of its product, Soko Maize Flour, without his authorization.
3. The petitioner claimed that the advertisement which was carried out in the Interested Party's Facebook page with 168,576 active followers, had his image with the caption "kamilisha methali moto moto; "cha mkufuu mwanafuu ha..." #SokoNiUpendo" the link to the site being <https://www.facebook.com/XXXX/XXXX/a.250300868474098/182956023XXXX/>
4. The petitioner further claimed that on June 16, 2021, the respondent without his authorization published the petitioner's image on its Twitter handle with 4,212 followers in further advertisement of Soko Maize Flour under the caption "kamilisha methali moto moto; "cha mkufuu mwanafuu ha..." #SokoNiUpendo" the link being <https://XXXXX.com/XXXX/XXXXX/1405044692XXXX>
5. The petitioner claimed further that on the same day, the respondent published on its Instagram Page with 3,516 followers the same advertisement without his authorization. The link to the advertisement being https://www.instagram.com/p/CQK5XXXXX/?utm_source=XXXX link.



6. The petitioner asserted that the publications remained accessible to the public and his image was being unconscionably used without his knowledge and consent to sell the interested party's products.
7. The foregoing series of events resulted in the instant petition.
8. The respondent and the interested party opposed the petition.

The Petition:

9. Through the petition dated August 17, 2021, supported by the petitioner's affidavit and the further affidavit deposed to on August 17, 2021 and November 14, 2021 respectively, the petitioner sought to assert and defend his constitutional entitlements.
10. The petitioner pleaded that the advertisement containing his image was published for 9 days and failure to inform him of such use was misleading to the public regarding his endorsement and unconscionable to the extent that there was false impression that he had been appropriately remunerated.
11. It was his case that upon a concerned follower (dapper Brother @Liveen254) of the respondent inquiring whether the respondent had compensated the petitioner for using his image, he was given the misleading response implying that the petitioner had been remunerated yet no compensation had been received.
12. To that extent, the petitioner averred that it was defamatory of the respondent since he had to explain to friends and family the true position with a lot of anguish since he was believed to have kept to himself good tidings contrary to the community's dictates, lowering his reputation significantly.
13. In further giving the particular of defamation, the petitioner averred that the caption (Swahili saying) on the images made the petitioner be ridiculed as both its articulation and meaning are ridiculous and outlandish in Swahili language.
14. In further asserting the defamatory nature of the advertisement, it was his case that it was shared on various forums and other messaging services such as WhatsApp where it was shared in the Governor's forum and New Lorubae Family WhatsApp Group consisting of members from Samburu County, Maralal, Baragoi, Archers Post, South Horr, Wamba and Kisima who all thought the Petitioner had landed a windfall.
15. As a result of the foregoing, the petitioner pleaded that the respondent had occasioned him needless mental anguish, torture and stress.
16. It was its case that he was entitled under article 19, 20, 21 and 22 as read with article 23, 159, 160(1) 165 and 258 of the Constitution institute proceedings and have his fundamental rights and freedoms protected by this honourable court.
17. On the substance of the petition, the petitioner pleaded that his right to privacy and dignity guaranteed under article 31 and 28 of the Constitution respectively, had been violated by the unauthorized use of his image.
18. He further posited that his right not to be subjected to physical and physiological torture as envisioned under article 29(d) of the Constitution had been violated as a result of the harassment and ridicule he endured from his community and peers who saw his and a person who does not share good tidings despite landing a lucrative advertisement deal.



19. On the foregoing factual and legal backdrop, the petitioner prayed for the following reliefs: -
- a. An order of permanent injunction restraining the respondent from publishing and or using the petitioner's image and likeness in any way in its advertisements or promotions in any way without the petitioner's consent and compelling the respondent to stop any further advertisement or promotions featuring the petitioner's image.
 - b. A declaration that the respondent violated the petitioner's fundamental rights to privacy and human dignity under article 28 and 31 by publishing the petitioner's image for purposes of commercial advertisement without his consent.
 - c. Exemplary damages for violation of the petitioner's rights.
 - d. General damages for defamation.
 - e. Punitive damages.
 - f. Costs of the suit on a full indemnity.
 - g. Interests on c, d, e, and f at commercial rates until payment in full.

The Submissions:

20. In its written submissions dated November 19, 2021, the petitioner identified issues for determination as being; whether the use of his image was invasion of privacy and dignity, whether it was used for commercial purposes and the appropriate reliefs.
21. On the first issue, the petitioner sought to rebut the respondent's claim that the image was rightfully acquired from Shutterstock after being licenced by submitting that an unjustified invasion of one's privacy is a violation of their fundamental right and must be protected and where it is violated, one is entitled to a relief.
22. It was its case that, despite the claim by the respondent that the petitioner ought to have read and pursued a case with shutterstock, the petitioner maintained that it was not a party to any agreement with any photographer and has not authorized anyone to take or use his photograph and that shutterstock is not known to him.
23. In further discrediting the respondent's claim that the image was procured for editorial use at consideration by way of licence from a public and royalty free image repository by the name Shutterstock, it was submitted that in the website, <https://www.XXX.com/blog/bot-to-use-editorial-use-only-images?kw=gclid=XXXX-ONUr5rPbHQZ1M1pyEaAgEbEALwweB> shutterstock defined editorial use to mean 'ones that have not been released for commercial and have also been taken without the consent of the individuals in the photo.
24. It was the petitioner's case that the way the respondent used his image was in utter contravention shutterstock guidelines and any attempt to rely on that argument was dead on arrival.
25. It was its case that the only conclusion one would arrive at is that the publication was an advertisement used for commercial purposes where the petitioner was the brand ambassador.



26. It was submitted that the respondent's claim that the petitioner's image was used to celebrate Father's Day was absurd since there was no mention of the word Father's Day in the publication, and even if it was there, there was no consent to use his image.
27. The petitioner buttressed the incidence of invasion of his privacy in reference to the Supreme Court decision in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR where the court borrowed from the book *The Value of Privacy* (Polity, 2005) where it was observed;

.... The concept of privacy demarcates for the individual realms or dimensions that he needs in order to be able to enjoy individual freedoms exacted and legally safeguarded in modern societies.

Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy menial happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas opinions, beliefs and ways of living and participate in a democratic, pluralistic society.....
28. The petitioner relied on the decision in *Jessica Clarise Wanjiru v DaVinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR to emphasize the need of seeking and obtaining a person's consent before using their image and likeness.
29. In respect to the right to dignity, it was submitted that regardless of one's status or position or mental or physical condition, on is by virtue of being human worthy of having their dignity or worth protected.
30. The petitioner relied on the decision in *Kennedy v Ireland* (1987) IR 587 as cited by the *Coalition for Reform and Democracy (CORD) & 2 others v Republic & 10 others* [2015] KLR where it was observed;

... The dignity and freedom of an individual in a democratic society cannot be ensured if his communication of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with.
31. In praying for Kshs 5 million shillings as appropriate compensation, the petitioner submitted that he had suffered mental anguish and distress, had lost reputation among his peers, family and society at large, lost support from NGO's and donors, post privacy and because no remorse had been demonstrated by the respondent.
32. The petitioner urged the court to allow the petition with costs on a full indemnity basis

Respondent's case:

33. Beehive Media Limited opposed the petition through the replying affidavit of Celestine Awuor, its Director, deposed to on October 20, 2021.
34. It was her deposition that the dispute is purely commercial between two private citizens and as such do not merit the consideration of a constitutional court.
35. It was her case that the respondent procured the image at a consideration from a public and royalty free image repository by the name Shutterstock Inc. for fair value and in good faith. To that end she referred the court to the receipts and invoices as proof.
36. She deposed that Shutterstock is an American company which owns a website accessed at <https://www.XXXX.com/> a leading creative market place for high quality royalty free photographs, vectors, illustrations videos and motion graphics.



37. It was her deposition that Shutterstock has two types of licenses which are both royalty free. One allows licensees to utilize the images for commercial purposes and the other for editorial use only and which both have different set of rights and limitations.
38. She deposed that it only used the petitioner's image for editorial use and since it had been licensed it was not required to pay for royalties for the use of the image again.
39. It was her deposition that all shutterstock images accessed from <https://www.XXXX.com/image-photo/XXX-culturalboma-samburu-kenyajuly-21st-149071094> appear watermarked with the shutterstock logo on their website to prevent them from being illegally downloaded and used without a license.
40. It was her deposition that images on shutterstock are uploaded by contributors who operate accounts on its website and the image in question was acquired from a contributor known as papa bravo a photographer.
41. Contrary to the petitioner's position that his image was used for commercial gain, she deposed that the image was utilized by the respondent for illustrative purposes which essentially tells a story, idea or concept that could be used to illustrate news, current events, or a subject of human interest.
42. To that end, he deposed that the image was used to wish Kenyans a happy Father's Day.
43. It was her case that image's primary value was singularly to show benevolence to fathers and promote a socially acceptable appreciation of fathers in the Kenyan society.
44. Based on the foregoing, it was deposed that the attempt by the petitioner to gain royalties from the respondent was misguided since the respondent did not substitute the image with the interested party's brand, nor did it rely on the image for the endorsement of the brand.
45. She deposed that it, therefore, could not be invasion of privacy when the impugned image was sourced from a paid-for and public repository where it remains to this date still available to the public.
46. In rebutting the claim of defamation, Ms Awuor deposed that since the respondent had obtained the image for value and in good faith, the petitioner must have been compensated by the contributor who had acquired the rights to the image allowing him to upload the same on shutterstock.
47. In denying the incidence of defamation by the use of the Swahili saying, she deposed that the saying has been taken out of context by the Petitioner since it simply is used if a junior does not respect his seniors.
48. In reference to clause 6 of Shutterstock's Terms of use on infringement claims, the respondent deposed that the petitioner ought to have pursued a claim for copyright infringement against the contributor (licensor). The clause provides; "If you believe that any image or other material made available by Shutterstock infringes upon any copyright that you own or control, you may notify Shutterstock in the manner set forth in our DMCA Copyright Infringement Notice Policy'.
49. In the end, it was her deposition that the petition was misplaced and was an abuse of court process. She urged that it be dismissed with costs.

The Submissions:

50. In its written submissions dated February 8, 2022, the respondent identified three issues for determination being; whether there was defamation and violation of the right to privacy; whether it complied with licence acquired from Shutterstock, and whether there was violation of the right to privacy.



51. On the first issue, it was submitted that the respondent did not take the said photograph and the petitioner could not allege that his right to privacy was infringed upon when the impugned image was sourced from a paid-for and public repository where it remains to this date still available to the public.
52. It was submitted that to establish a case for infringement of privacy, the facts, details or images disclosed must be private and not public ones.
53. It was reiterated that since the respondent had acquired the license to use the impugned image it could be argued that the respondent required the authorization and/or consent from the petitioner before utilizing the said image.
54. In reference to the decision in *John Ward v Standard Ltd* HCC1062 of 2005 which established the ingredients of defamation, it was his submission that the posts containing the petitioner's image were made in good faith with no actual and/or deliberate malice and that the petitioner had not produced any evidence to prove that any of the elements of defamation
55. On the issue regarding compliance with license acquired from Shutterstock, it was submitted that the petitioner's image was acquired for value under the editorial license and at all material times the respondent believed that the copyright owner to the image the subject of this suit was and is the contributor.
56. In the end, the respondent was of the position that it was not clear how the sum of Kshs. 5,000,000/ = as compensation was arrived at.
57. It was its case that it was remorseful and tendered an apology during negotiations and the claim for damages ought not be granted in the circumstances since it had pulled down the posts upon raising the issue of consent.
58. The respondent further claimed that the claim had not ascended to the real of granting exemplary damages. To buttress the point, it relied on the decision in Civil Appeal 132 of 2001 *Bank of Baroda (Ky) Ltd v Timwood Products Ltd* where it was observed: -
Punitive or exemplary damages would be granted where;
 - a) Where there is oppressive, arbitrary or unconstitutional action by servants of the government;
 - b) Where the defendant's action was calculated to procure him some benefit, not necessarily financial at the expense of the Plaintiff.
59. Based on the foregoing, and the circumstances of the use of the image, the petitioner urged court to dismiss the petition with costs and should it find the respondent liable, proposed a nominal award of damages of Kshs 150,000/-.

Interested Party's case:

60. Capwell Industries Limited opposed the petition through the replying affidavit of Chetan Dalichand Shah, its Director, deposed to on February 17, 2022.
61. Mr. Shah denied in toto the petitioner's claim. It was its case that it had no knowledge of the claimed publishing as contended by the petitioner.
62. He denied that the alleged publication was for commercial and for-profit making purposes and did not help propel sales or visibility of the product as claimed.



63. He deposed that the legally binding contract between it and the respondent running between January 4, 2021 to December 31, 2021 was for sole and exclusive provision of services of creative design, advertising and communication of its brands and social media accounts.
64. To that end, he deposed that in the contract, Clause 12.2 indemnified the interested party based on material created by the respondent in any claim for libel, slander, piracy, plagiarism, invasion of privacy or infringement of copyright.
65. He deposed, therefore, that about the alleged post of June 16, 2021, it was indemnified. He hastened to add that the material was not provided by the interested party rather, it was independently sourced by the respondent.
66. He deposed that upon being served with a demand notice by the petition on June 23, 2021, it immediately requested the respondent to take it down from all its social media accounts.
67. It was his deposition that the respondent and the interested party did not violate the petitioner's privacy since it lawfully acquired the images from Shutterstock upon paying the licence fee.
68. Mr. Shah urged court to dismiss the petition with costs.

The submissions:

69. The interested party filed written submissions dated February 25, 2022 in further support of its case.
70. On the issue of proof in respect of alleged violation of articles 28 and 31 of the *Constitution*, the Court of Appeal decision in *Mbutia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR was referred to and it was submitted that the Petitioner had not had discharged its burden by tendering evidence.
71. Subsequent to the foregoing, and in reference to the decision in *Jessica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR, it was the interested party's case that the petitioner had not met the required Standard of proof.
72. It was the interested party's case that the petitioner had neither availed any piece of evidence demonstrating how his rights had been infringed nor how the it had benefitted commercially.
73. In urging the court not to allow the petition, the interested party submitted that in the advertisement had garnered only 169 likes on Instagram and 176 likes on Twitter, figures which were of no significant commercial value. It stated that the likes did not equate to sales and profits.
74. In the end, the interested party submitted that the petitioner had no claim. it urged that the petition be dismissed with costs.

Analysis:

75. I have carefully considered the pleadings, the responses, the written submissions and the various decisions referred to by the parties. One of the preliminary issues raised by the respondent has a jurisdictional inclination. It is contended that the petition fails the test of raising constitutional issues and as such, this court ought to down its tool.
76. For the reason that the issue impugned the jurisdiction of this court, this court must determine it at the earliest. (See the Supreme Court of Kenya in Petition No 7 of 2013, *Mary Wambui Munene v Peter Gichuki Kingara and six others* [2014] eKLR).



77. This matter focuses on the parameters of constitutional petitions. Articles 22 and 258 of the Constitution remain the anchor provisions relating to the *locus standi* in instituting petitions.

78. The Constitution, the law as well as courts have expressed themselves on the manner in which petitions ought to be presented to court. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as ‘the Mutunga Rules’) provide for the contents of petitions. Rule 10 thereof provides seven key contents of a petition as follows: -

Form of petition.

10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

- (a) the petitioner’s name and address;
- (b) the facts relied upon;
- (c) the constitutional provision violated;
- (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
- (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
- (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
- (g) the relief sought by the petitioner.

79. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of petitions. They provide as follows: -

- (3) Subject to rules 9 and 10, the court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
- (4) An oral application entertained under sub rule (3) shall be reduced into writing by the court.

80. Rules 9 and 10 are on the place of filing and the notice of institution of the petition respectively.

81. The Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR had the following on constitutional petitions: -

Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic, (1979) KLR 154: the necessity of a link between the



aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

82. The conduct of constitutional petitions is also guided by various laws. For instance, the Evidence Act applies to matters generally relating to evidence. The Evidence Act is clear on its application to constitutional petitions and affidavits in section 2 thereof. The provision provides as follows: -

1. This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's Court, but not to proceedings before an arbitrator.
2. Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.

83. Sections 107(1), (2) and 109 of the Evidence Act are on the burden of proof. They state as follows:

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

84. A Constitutional and Human Rights Court is supposed to exclusively deal with constitutional issues. Courts have defined what constitutional issues are. In Fredricks & other v MEC for Education and Training, Eastern Cape & others (2002) 23 ILJ 81 (CC), the Constitutional Court of South Africa rightly so, delimited what a constitutional issue entails and the jurisdiction of a constitutional court as follows: -

The Constitution provides no definition of 'constitutional matter'. What is a constitutional matter must be gleaned from a reading of the Constitution itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of the Constitution are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the constitutional court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

85. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.



86. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the bill of rights or the Constitution itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement.
87. Summing it up in the words of Langa, J in Minister of Safety & Security v Luiters, (2007) 28 ILJ 133 (CC): -
... When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights and values...
88. Whereas it is largely agreed that the Constitution of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in Rapinder Kaur Atal v Manjit Singh Amrit case (*supra*) ‘... Courts must interpret it with all liberation they can marshal...’
89. Resulting from the above discussion and the definition of a constitutional issue, this court agrees with the position in Turkana County Government & 20 others v Attorney General & others [2016] eKLR where a multi-judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.
90. Returning to the matter at hand, the petition is premised on the alleged infringement of articles 28 and 31 of the Constitution in the use of the petitioner’s image. In the main, the petition prayed for the following reliefs: -
- a. An order of permanent injunction restraining the respondent from publishing and or using the petitioner’s image and likeness in any way in its advertisements or promotions in any way without the petitioner’s consent and compelling the respondent to stop any further advertisement or promotions featuring the petitioner’s image.
 - b. A declaration that the respondent violated the petitioner’s fundamental rights to privacy and human dignity under article 28 and 31 by publishing the petitioner’s image for purposes of commercial advertisement without his consent.
 - c. Exemplary damages for violation of the petitioner’s rights.
 - d. General damages for defamation.
 - e. Punitive damages.
 - f. Costs of the suit on a full indemnity.
 - g. Interests on c, d, e, and f at commercial rates until payment in full.
91. The petition has several parts. They are the description of the parties, the facts, particulars of the advertisement, particulars of the defamation, legal foundations of the petition, violation of the Constitution and fundamental rights and freedoms and the reliefs sought. A cursory look at the petition reveals an obvious alleged confrontation of various protections laid out in the Constitution.



92. The petition has, therefore, attained the threshold discussed in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* case (*supra*) since it has established the link between the petitioner and the provisions of the *Constitution* alleged to have been contravened. What remains is the proof of the manifestation of contravention or infringement of the alleged articles 28 and 31 of the *Constitution*.
93. Having so found and given the nature of the petition, this court's attention has been drawn to the prayers sought in the petition. They include a declaration of rights and compensation. What this court now ought to do is to ascertain if the issues raised in the petition are in any way confronted by the doctrine of exhaustion. In that case, a brief look at the doctrine suffices.
94. The doctrine in doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR. The Court stated as follows:
52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanisms in line with article 159 of the *Constitution* and was aptly elucidated by the High Court in *R v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, where the court opined thus:
42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:
- Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
42. While this case was decided before the *Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the constitutional rationale and basis for the doctrine.
- This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:
- It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose



of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The *ex parte* applicants argue that this accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.

95. The court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R v Independent Electoral and Boundaries Commission (IEBC) & others ex parte The National Super Alliance Kenya (NASA)* (*supra*), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited* case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 others v Aelous (K) Ltd and 9 others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the court, it is not barred by the doctrine of exhaustion. This is



especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

96. The above decision was appealed against by the respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No 166 of 2018 *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR held as follows: -

The jurisdiction of the High Court is derived from article 165(3) and (6) of the *Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the *Constitution* encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of article 189 of the *Constitution* and sections 33 and 34 of *Inter-Governmental Relations Act* of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in *Republic v Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed constitutional violations seeking to be enforced are not mere “bootstraps.” We have keenly addressed our minds to the learned Judges’ decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under article 165(5) of the *Constitution* became automatic. And in our view, it could not be ousted or substituted.

97. Further, in Civil Appeal 158 of 2017, *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR, the learned Judges of the Court of Appeal relied on an earlier decision in *Speaker of National Assembly v Njenga Karume* (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the rules of natural



justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

98. Courts have in many occasions reiterated the position that where there are alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such disputes until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.
99. In ascertaining whether the doctrine of exhaustion applies in this matter, the provisions of the [Data Protection Act](#), No 24 of 2019 (hereinafter referred to as ‘the Data Act’) come to play.
100. The preamble of the Data Act states that it is an Act of Parliament to give effect to article 31(c) and (d) of the [Constitution](#); to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors; and for connected purposes.
101. Article 31(c) and (d) of the [Constitution](#) provides as follows: -
31. Privacy:
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.
102. The Data Act further provides for the rights of a data subject, the enforcement of rights of data subjects, investigation of complaints by data subjects, compensation for breach of the rights of data subjects, the registration of data controllers and data processors, the principles and obligations of personal data protection, processing of sensitive personal data, among many other aspects of personal data.
103. Section 3 of the [Data Act](#) provides for the objectives as follows: -
- The object and purpose of this Act is-
- (a) to regulate the processing of personal data;
 - (b) to ensure that the processing of personal data of a data subject is guided by the principles set out in section 25;
 - (c) to protect the privacy of individuals;
 - (d) to establish the legal and institutional mechanism to protect personal data; and
 - (e) to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with this Act.
104. Section 5 of the [Data Act](#) establishes the Office of the Data Protection Commissioner which is a body corporate with perpetual succession and a common seal and has the power to conduct business



- in its corporate name. I will hereinafter refer to the said office as ‘the Data Commissioner’ or ‘the Commissioner’.
105. One of the many functions of the Data Commissioner is provided for in section 8(1)(f) as ‘to receive and investigate any complaint by any person on infringements of the rights under this Act’.
 106. The Commissioner further has powers to conduct investigations on its own initiative, or on the basis of a complaint made by a data subject or a third party. That is provided for in section 9 of the [Data Act](#). And, in dealing with the complaints, the Commissioner ought to facilitate conciliation, mediation and negotiation of the disputes. The Commissioner also has powers to undertake any activity necessary for the fulfilment of any of the functions of the Office of the Data Commissioner.
 107. In discharging its functions and exercising its powers, the Commissioner is authorized under section 59 of the Data Act to seek the assistance of such person or authority as it deems fit and as is reasonably necessary to assist the Data Commissioner in the discharge of the functions.
 108. Section 65 of the [Data Act](#) gives the Data Commissioner the power to determine the compensation payable to a data subject who suffers damage by reason of a contravention of any requirement of the Data Act and in instances where the Commissioner finds as much.
 109. With a view to protect the integrity of the processes under the Data Act, the statute provides for enforcement notices under section 58 in respect of those who fail to comply with any provision of the Data Act.
 110. Under section 64 of the Data Act, any appeal from the decision of the Commissioner lies to the High Court.
 111. A close scrutiny of the [Data Act](#) reveals a deliberate design to ensure that all claims arising from allegations of infringement of article 31(c) and (d) of the [Constitution](#) are wholly dealt with by the Commissioner as the first port of call. Such position can only be overruled by a party demonstrating any of the exceptions to the doctrine of exhaustion in a matter.
 112. Reverting to the instant matter, one of the petitioner’s complaint is the alleged publication of his images and/or photographs by the respondent in its social media accounts without his consent. The petitioner alleged breach of his article 31 rights under the [Constitution](#). He then sought for a declaration as well as compensatory damages.
 113. This court ascribes to the position that in a case where Parliament donated powers to an entity like the Data Commissioner to determine if one’s privacy rights under article 31(c) and (d) of the Commissioner are infringed, then it means as much; that the Commissioner has such power determine whether privacy rights as provided for in the Bill of Rights has been denied, violated, infringed or threatened. However, the Commissioner lacks the jurisdiction to interpret the [Constitution](#).
 114. The reason for the foregoing holding is simple. The members of the Office of the Data Commissioner, as an entity and individually so, are public officers and article 10 calls upon them to infuse the national values and principles of governance while undertaking their duties. Article 3 obligates every person to respect, uphold and defend the [Constitution](#). Therefore, the Commissioner must be in a position to uphold the [Constitution](#), and in doing so, to be able to determine whether a given set of circumstances reveal denial, violation, infringement or threat to the privacy rights in the Bill of Rights.
 115. The above duty is to be distinguished from the duty to interpret the [Constitution](#). Determining whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights is just that simple. Conversely, interpretation of the [Constitution](#) is a serious judicial function. While interpreting the [Constitution](#), the High Court is called



- upon to apply its legal mind to determine the applicability and extent thereof of a constitutional provision to a set of facts. In arriving at such an interpretation, the High Court is supposed to consider all the applicable principles in constitutional interpretation. (See the Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR). The High Court may also look at comparative jurisprudence from other jurisdictions on the subject. Such a determination yields to a binding legal principle unless overturned by a court with superior jurisdiction.
116. Unlike the High Court, Tribunals and other quasi-judicial bodies, including the Data Commissioner, do not make the law. They can, however, apply themselves to a given set of facts and determine denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights.
 117. There is, therefore, a defined distinction between determining the denial, violation, infringement or threat to the privacy rights in the bill of rights and interpreting the *Constitution*. Whereas the former is not exclusively a judicial function, the latter is. The jurisdiction, therefore, to interpret the *Constitution* is the exclusive duty reserved to the High Court *vide* article 165(3)(d) of the *Constitution*.
 118. In the instant matter, the Data Commissioner has the jurisdiction to determine whether the petitioner's privacy rights in the Bill of Rights were denied, violated, infringed or threatened. The Commissioner has further powers to order appropriate compensation in the event of proof of the infringement.
 119. The *Data Act*, therefore, wholly provides for the dispute at hand based on article 31 of the *Constitution* as well as the remedies sought in the event the dispute is successful.
 120. In such a case, it was incumbent upon the petitioner to demonstrate to the court any of the exceptions to the doctrine of exhaustion. The petitioner did not do so.
 121. The upshot is that the doctrine of exhaustion applies in this matter and bears a complete bar to the further exercise of jurisdiction by this court on the claim based on article 31 of the *Constitution*.
 122. Turning to the defamatory claim which is based on article 28 of the *Constitution*, it is apparent that the claim is based on whether article 31 of the *Constitution* is found have been infringed. I say so because in the event it is found that the article 31 rights were not infringed, then the claim on defamation will not stand.
 123. Going by the holding in respect to the article 31 rights above, it is only prudent that the claim on constitutional defamation do await the outcome of the dispute on article 31 of the *Constitution*.
 124. Having found that the petitioner ought to have lodged his complaint on article 31 of the *Constitution* under the provisions of the Data Act and that the defamation claim ought to await the outcome of the earlier claim, then this court ought to exercise restraint and postpone its consideration of the matters raised in the petition as to accord the dispute to be dealt with, in the first instance, under the *Data Act*.
 125. Consequently, the following final orders do hereby issue: -
 - a. This court declines jurisdiction to deal with the claim on article 31 of the *Constitution* on the basis of the doctrine of exhaustion.
 - b. The claim under article 28 of the *Constitution* is hereby stayed pending the determination of the claim on article 31 of the *Constitution*.
 - c. Orders on costs shall await the final outcome of the petition.
 126. Orders accordingly.



DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF MARCH, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Waigwa, Learned Counsel for the Petitioner.

Mr. Esibi, Learned Counsel for the Respondent.

Mr. Shah, Learned Counsel for the Interested Party.

Regina/Chemutai – Court Assistants

