



**Masibo v Nation Media Group Limited (Petition 158 of 2021) [2023] KEHC 20569 (KLR)
(Constitutional and Human Rights) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20569 (KLR)

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

PETITION 158 OF 2021

M THANDE, J

JUNE 30, 2023

BETWEEN

ERICA MASIBO PETITIONER

AND

NATION MEDIA GROUP LIMITED RESPONDENT

JUDGMENT

1. The Petitioner herein she is a director of Erica Style Collections Limited, a fashion concept store in Karen, Nairobi. She curates and designs clothing, bags and other fashion items for sale on order from clients. One of the ways she creates awareness for her business is by sending portfolios containing photographs of her design to various stylists who then place orders for items in the portfolio provided. Sometime in early April, 2021, she received a request for her portfolio from a stylist at Toy Toy Modelling Agency which she sent, as this was a way of creating interest in her business from potential clients.
2. The Petition herein dated 29.4.21 was provoked by the publication on 17.4.21, without her consent, of the photographs she had sent to the stylist, together with details of her shop in an article appearing on page 10 of the Saturday Magazine (the Magazine) published by the Respondent, in the Saturday Nation newspaper. She contends that the Respondent did not obtain her consent before publishing her photographs. The Petitioner is particularly aggrieved that the Respondent also published a separate image of her with one of her designer bags alongside the headline “Female Tenderpreneurs The Inside Story of fast money, sex, greed and domination” (the impugned headline), on the front and back pages of the main Saturday Nation newspaper as well as the cover page of the Magazine. This was despite the fact that the main story published on pages 4 and 5 of the Magazine insert to which the headline relates, made no reference of her or her business. She also stated that the article on page 10 regarding her business did not contain her image that was used alongside the scandalous headline. The publication



- of her images alongside the impugned headline was malicious and defamatory to her character and injurious to her reputation. As such, her rights under Articles 28 and 31(c) of *the Constitution* were violated by the Respondent. The Petition is supported by the Petitioners' affidavit sworn on even date, her supplementary affidavit and that of Judith Atieno Awuor both sworn on 26.7.21.
3. The Petitioner stated that the publication of her image alongside the impugned headline in the cover page of the Magazine was malicious and defamatory of her character and injurious to her reputation. It implied that the Petitioner was linked to the main story and that she was a tenderpreneur whose business is funded through unscrupulous, immoral and illegal means. On the day of the publication she received telephone calls from existing clients expressing concern as to her integrity. The publication has also resulted in loss of potential clients thereby occasioning her business loss of revenue in these difficult economic times caused by the Covid 19 pandemic.
 4. It is the Petitioner's case that through the publication in question, the Respondent has violated her right to privacy and dignity. The publication has also occasioned harm to her reputation, mental and emotional distress. In spite of a letter from her advocates dated 20.4.21 demanding a public apology, the Respondent has failed to do so or to respond to the letter. The Petitioner thus seeks the following reliefs:
 - a. A declaration be issued that the publication by the Respondent of the Petitioner's image without the Petitioner's consent is a violation of the Petitioner's right to privacy under Article 31(c) of *the Constitution*.
 - b. A declaration be issued that the manner in which the Respondent published the Petitioner's image alongside the headline "Female Tenderpreneurs The Inside story of fast money, sex, greed and domination" is defamatory of the Petitioner's character.
 - c. A declaration be issued that the manner in which the Respondent published the Petitioner's image alongside the headline "Female Tenderpreneurs The Inside story of fast money, sex, greed and domination" is a violation of the Petitioner's right to have her dignity respected and protected under Article 28 of *the Constitution*.
 - d. A mandatory injunction be issued compelling the Respondent, within 7 days of the order herein, to publish an apology of equal prominence to the defamatory publication clarifying that the Petitioner is not in any way linked to the headline "Female Tenderpreneurs The Inside story of fast money, sex, greed and domination" appearing in the Saturday Magazine insert of the Saturday Nation published on 17th April 2021.
 - e. The Respondent do pay to the Petitioners damages of Kshs.3,000,000/- violation of her constitutional rights and for defamation of character.
 - f. Costs of this petition and interest thereon at court rates.
 5. In her affidavit sworn on 26.4.21 in support of the Petition, Judith Atieno Owuor, a marketer by profession, deposed that she met the Petitioner at various Pop-Up Markets where the Petitioner sells goods from her business under the name Erica_A_Style. On 17.4.21, she was shocked to see the Petitioner's image alongside the impugned headline in the cover of the Magazine, as it implied that the Petitioner had built her business through unscrupulous, illegal and immoral means. This was contrary to her 2 years personal knowledge of the Petitioner as an industrious woman who had worked to build her business and brand.
 6. Dancurf Oyaro a photographer and videographer at Safari Media stated in his affidavit of 23.7.21 that he has worked with the Petitioner on various projects. He took photographs of models and fashion



items showcasing the Petitioner's business for purposes of creating a marketing portfolio. From his own knowledge of the Petitioner, she had built her business legitimately by creating and sending marketing portfolios to improve brand visibility. He was therefore shocked to see the Petitioner's image alongside the impugned headline in the Magazine, which gave the impression that she had built her business through unscrupulous, illegal and immoral means. When he contacted her on the same day, she was distraught by the said publication.

7. The Respondent's case is supported by the affidavits of Sekou Owino (Sekou), the Respondent's Head of Legal and Training, Lydia Omolo (Omolo) a fashion stylist contracted by the Respondent, Phyllis Nyambura (Phyllis), an editor with the Respondent and Johnstone Odira (Johnstone) aka Letoya Johnstone, all sworn on 2nd July 2021.
8. RW1 Johnstone adopted his affidavit. He stated that he is a fashion stylist based in Nairobi and also owns a modelling agency called Toy Toy Models. About 3 weeks before she was featured in the Magazine, the Petitioner unveiled her luxury concept line up made up of luxury bags with an African touch called Akire. The Petitioner posted the photographs of her designs and bags on Instagram. Johnstone saw the photographs and called the Petitioner to congratulate her on the launch. He then explained to her how she can benefit from the media to boost the publicity or market her products including her flagship Akire bag. He also told the Petitioner about Omolo's fashion and style page in the Saturday Magazine and how the magazine can boost her brand. Excited by the prospect of having her works showcased in the Magazine, the Petitioner on 2.4.21, sent him via email, the photos she wanted published in the Magazine. Upon receipt, he promptly forwarded the same to Omolo through his email tytoymodels@gmail.com. Johnstone asserted that the Petitioner knew that her photographs were going to be published in the Magazine and by sending the same to him, she consented to their publication. The Petitioner also sent him her biography which contained her previous works, her online platforms, details of her website and email address.
9. On 13.4.21, Omolo informed him that the photos in question were of low resolution and not compatible with the intended publication, and asked that the Petitioner sends similar photographs but of high resolution for publication. He immediately relayed the information to the Petitioner and asked her to send the high-resolution photographs which she did on the same day through her email address and the same were forwarded to Omolo. It is therefore not true that the photographs were published without her consent. On cross examination he confirmed that he did not have a contract with the Petitioner, nor did he indicate the date the images would appear in the Magazine. He confirmed that the Petitioner gives her permission to share on Toy Toy online platforms the links specified in the email. Although the email does not mention Saturday Magazine, he asked the Petitioner to send high resolution photographs which were required by the Saturday Nation and he forwarded them to Satmag. He did not however have any evidence that he told the Petitioner that the images will appear in the Saturday Magazine.
10. RW2 Lydia Omollo adopted her affidavit and stated that she creates content, collects pictures for the fashion segment for the Magazine. The Magazine has a cover page which features a cover model, which is a worldwide practice. She confirmed that Johnstone requested her to feature the Petitioner in the fashion and style segment of the Magazine and she asked him to send the pictures to be published. The pictures and the Petitioner's biography together with the contacts and the email address the Petitioner wanted to appear in the feature, were forwarded to the Magazine's email address which is satmagc@gmail.com. She further confirmed that she asked Johnson for the same picture but of high resolution for publication which the Petitioner sent through her email addressericastye1@gmail.com. These are the pictures that were published.



11. Omollo stated that in the biography that the Petitioner sent to assist in creating content for the feature to be published, she had stated that she would like to expand her circle and that she had given permission for her work to be shared. When the Magazine was published on 17.4.21, she learnt from the Respondent's social media pages including twitter that the Petitioner was not happy with the publication. The Petitioner alleged that the publication had maligned her brand. The publication of the Petitioner's photograph on the cover Magazine was not meant to malign the Petitioner. She was featured as the cover model for the Magazine. On page 10 which is the Fashion and Style page, the Magazine featured the Petitioner's designs including the Petitioner's flagship African inspired 'luxury bag by Akire'. The Magazine gave full credit to the Petitioner's designs, the Petitioner as a model and the photographer of the photos on the cover of the Magazine. At the bottom left of the cover-page, it is made clear that the photograph on the cover page is a cover model and the name of the cover model who is the Petitioner is set out clearly and that of the photographer. She stated that on page 2 of the main Saturday Nation Newspaper the Petitioner and the photographer, were given credit. Page 10 of the Magazine set out where to find the Petitioner's outfits and bags, the Petitioner's telephone contacts, social media pages and email address. This gave the Petitioner's outfits and bags great publicity as the Petitioner intended as set out in her email of 2.4.21 via which she forwarded her biography. Although the source of the Petitioner's allegations was the picture of the cover page, the Petitioner's photograph did not appear on the main story, which was published on pages 4 and 5 of the Magazine. It is also not true that the photographs of the Petitioner were published without her consent.
12. I have considered the parties' pleadings, testimony and and submissions and from the same the following issues arise for determination:
 - i. Whether the Petitioner's rights under Article 31 and 28 of *the Constitution* were violated.
 - ii. Whether the publication injured the Petitioner's reputation.
 - iii. Whether the orders sought should be granted.

Whether The Petitioner's Rights Under Article 31 And 28 Of *The Constitution* Were Violated

13. It is the Petitioner's case that the Respondent did not have direct contact with her and infringed on her right to privacy by publishing her pictures in the Magazine without her consent. The Respondent denied this and contended that the Petitioner's pictures were not obtained in an intrusive manner as she willingly sent them to the Respondent through her agent Johnstone. This she confirms at paragraph 5 of her supplementary affidavit. At paragraph 6, she states that after sending the email, Johnstone contacted her to say that he was of the view that the Respondent may be interested in publishing her images and she said she would be interested in the publication. Hence the Petitioner knew that the photos were going to be published by the Respondent in the Saturday magazine and she only sought to know when they will be published.
14. The Bill of Rights in *the Constitution* guarantees to every person the right to privacy. Article 31 provides as follows:

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.
15. Parliament enacted the [Data Protection Act, 2019](#) as an Act of Parliament to inter alia give effect to Article 31(c) and (d) of [the Constitution](#), to make provision for the regulation of the processing of personal data and to provide for the rights of data subjects and obligations of data controllers and processors.
 16. The key complaint by the Petitioner is the publication of her pictures in the Saturday Magazine by the Respondent, without her consent. Section 2 of the Act defines consent as follows:

“consent” means any manifestation of express, unequivocal, free, specific and informed indication of the data subject’s wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data relating to the data subject;
 17. Section 2 provides a general definition of data as follows:

“data” means information which—

 - a. is processed by means of equipment operating automatically in response to instructions given for that purpose;
 - b. is recorded with intention that it should be processed by means of such equipment;
 - c. is recorded as part of a relevant filing system;
 - d. where it does not fall under paragraphs (a), (b) or (c), forms part of an accessible record; or
 - e. is recorded information which is held by a public entity and does not fall within any of paragraphs (a) to (d).
 18. Section 2 goes into specifics and defines personal data is defined as any information relating to an identified or identifiable natural person. Accordingly, the pictures in question having been processed by means of equipment operating automatically in response to instructions given for that purpose fall under the definition of data. The pictures relate to the Petitioner, an identifiable natural person. As such, the said pictures are personal data of the Petitioner.
 19. Section 2 defines a “data controller” as a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purpose and means of processing of personal data, while a “data processor” is defined as a natural or legal person, public authority, agency or other body which processes personal data on behalf of the data controller.
 20. For the purposes of these proceedings, the Respondent is a data controller and processor in that it determined the purpose and means of processing the Petitioner’s personal data, to wit, the pictures in question. The Respondent further processed the Petitioner’s personal data by publishing them in its Saturday Magazine.
 21. The principles and obligations of personal data protection are set out in Section 25 of the Act which provides that every data controller or data processor shall ensure that personal data is inter alia processed in accordance with the right to privacy of the data subject.



22. Section 26 of the Act provides for the rights of a data subject as follows:

A data subject has a right—

- a. to be informed of the use to which their personal data is to be put;
- b. to access their personal data in custody of data controller or data processor;
- c. to object to the processing of all or part of their personal data;
- d. to correction of false or misleading data; and
- e. to deletion of false or misleading data about them.

23. In a further bid to protect data subjects, Section 28(1) of the Act requires that a data controller or data processor collects personal data directly from the data subject. Exceptions to this requirement include where the data is contained in a public record or the data subject has deliberately made the data public. Additionally, where the data subject or the guardian where the data subject has an incapacity, has consented to the collection from another source. Also excepted is where the collection from another source would not prejudice the interest of the data subject and the collection of data from another source is necessary. Critically, Section 29 obligates the data collector or processor to among other things, before collecting personal data, notify the data subject of its rights, the fact that personal data is being collected and the purpose for which the personal data is being collected. Section 30 prohibits a data controller or processor from processing personal data unless, the data subject consents to the processing for one or more of the specified purposes. Further, the processing shall be done in accordance with the purpose of collection.

24. What can be deduced from the foregoing is that before personal data is processed, the consent of the data subject must be procured.

25. Where a data subject makes an allegation that personal data was processed without consent, the Act places the onus of proving that consent was in fact obtained, on the data collector or processor. Section 32(1) stipulates that a data controller or data processor shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose.

26. In case of *N W R & another v Green Sports Africa Ltd & 4 others* [2017] eKLR, Mativo, J. (as he then was) highlighted the elements of a claim for unlawful use of an image as follows:

In my view, from the above leading decision on the subject, the key elements of a Claim for unlawful use of Name or image which a Petitioner ought to establish to hold someone liable for unlawful use of name or likeness can be summarized into three, which I find have been proved in the present case. These are:-

- i. 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 certain other personal attributes as well.

In my view, the images used belong to the minors and their images are protected by the law.

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

In my view, the first Respondent has not demonstrated that the use of the images was purely for public interest and not for commercial interest or benefit on their behalf. The second Respondent is on record stating that it sponsors such activities. Whether or not the first Respondent benefits from such sponsorship is an issue that was not adequately addressed nor can it be ruled out.

- iii. No Consent: The plaintiff must establish that he or she did not give permission for the offending use.

From the material before me, there is absolutely nothing to demonstrate that the first Respondent sought and obtained the consent of the parents. By voluntarily posing for the photos, the children cannot be said to have consented for the simple reason that they lacked the requisite capacity to grant the consent on account of being minors.

27. In its defence, the Respondent has relied heavily on the email by the Petitioner to Toy Toy of 2.4.21. The email reads in part:

The titles are – Re Birth of Erika A. Style, Evolution of Culture and some of the pics that I give you permission to share if my work resonates to what you are looking for in your online platform. (emphasis).

28. Looking at the said email, one can readily see that first, the email is addressed to Toy Toy models and not to the Respondent. Second, the email does not make any reference to the Respondent or to its Saturday Magazine. Lastly, in as much as the Petitioner gave Toy Toy Models the permission to share the images, that permission was limited to its online platforms.
29. It is the Respondent's case that Toy Toy Models was the Petitioner's agent and that therefore her consent was granted. However, no evidence was however adduced to demonstrate that there was an agency relationship in place. In any event, Johnstone Odira RW1 in his testimony stated that there was no contract between Toy Toy Models and the Petitioner. He also testified that he did not give an indication as to when the images would appear in the Magazine of the Daily Nation. The pictures in question were sent to the Respondent by Johnstone. In their testimony, Omolo and Phyllis confirmed that there was no direct contact with the Petitioner before publication. In her email to Toy Toy Models, the Petitioner gave permission for the images to be published in Toy Toy Models' online platform.
30. From the definition of consent in the Data Protection Act it is clear that consent cannot be implied. As such, the argument that by simply forwarding the pictures to Johnstone the Petitioner consented, is without substance as consent must be express and cannot be implied. Both Johnstone and the Respondent had a duty to notify the Petitioner that the pictures were to be published in the Magazine. This was not done. From the material placed before the Court, it is quite clear that the Respondent has failed to prove that the Petitioner's consent was obtained before publishing her pictures in the Magazine. It follows therefore that there was violation by the Respondent of the Petitioner's right to privacy under Article 31(c) of *the Constitution*.



31. In the case of Joel Mutuma Kirimi & another v National Hospital Insurance Fund (NHIF) [2020] eKLR, Ong'injo, J. stated:

Having established that the consent was not given it is apparent that the plaintiffs' right to privacy and human dignity were infringed by the defendant. When the defendant took the plaintiffs picture out of the 1st plaintiff's private account and used it for promotional purposes without their consent and using it for a purpose that they never intended to be part of.

32. And in the case of J W I & another v Standard Group Limited & another [2015] eKLR, Lenaola, J. stated:

71. I have already stated above that the right to privacy generally restricts the collection, use of and disclosure of private information irrespective of whether the information may be embarrassing or false so long as it may damage the dignity of an individual. The question that I also posed above is whether the publication of the minors' photographs as the children of a 'slain' criminal constitutes a violation of the right to privacy.

72. To answer that question, I will first start by saying again that in every situation there must be a reasonable expectation of privacy. Secondly, in *Mistry v Interim National Medical and Dental Council of South Africa* (1998) (4) SA 1127 (CC), the Constitutional Court of South Africa considered the factors to be considered when determining whether right to privacy was violated in line with the information in question. The Court stated that one ought to consider; whether the information was obtained in an intrusive manner; whether it was about intimate aspects of the applicants' personal life; whether it involved data provided by the applicant for one purpose which was then used for another; whether it was disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld.

33. As can be seen from the above decision, the factors to be considered to determine violation of the right to privacy include first, whether the information was obtained in an intrusive manner, second, whether the information in question is about intimate aspects of the applicant's personal life, third, whether the information in question was provided for one person and used for another, fourth, whether such information was disseminated to the press or general public or persons the applicant could reasonably expect such private information would be withheld.

34. The Petitioner is mainly aggrieved because her photos or images were published in the Magazine by the Respondent without her consent. What the Petitioner is ideally seeking is her image rights. A person's image rights was defined in the case of *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR, Mativo, J. (as he then was) expressed himself as follows:

17. In simple terms, image rights refer to a person's right to commercialize aspects of his personality such as physical appearance, pictures or caricatures, signature, personal logos and slogans, and also the right to prevent other people from commercially making use of them. In a claim of this nature, the plaintiff raises wrongful infringement of three inter-related, but distinct, personality interests, namely identity, privacy and dignity.



18. Identity is defined as a person's uniqueness which individualizes such person, and is manifested in various facets of personality (or indicia) which include, among other things, one's physical appearance or image and is considered a separate right of personality.[6]"
35. The right to privacy necessitates that a person's private details are not consumed by the public without their consent which essentially violates their right to dignity. The learned Judge went on to state:
23. '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.
24. It is the personality rights of dignity and privacy that underscore individuality and set both the limits of humanity and of human interaction. But, the reasons for protecting privacy are wider than just protecting the dignity of the individual.
36. In the South African case of *Wells v Atoll Media (Pty) Ltd and another* (11961/2006) [2009] ZAWCHC 173; [2010] 4 All SA 548 (WCC) the Court stated the following on protection of this right:
- (48) In *Grutter v Lombard and another* 2007 (4) SA 89 (SCA), at para 8 Nugent JA, in a most carefully researched judgment, noted that it was generally accepted academic opinion that features of a personal identity are capable and indeed deserving of legal protection.
- (49) In the context of this case, therefore, the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as in this case, for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the personal rights of the individual, including the person's dignity and privacy. In this dispute, no care was exercised in respecting these core rights."
37. The consensus in the existing jurisprudence as seen in the cited authorities is that violation of one's image rights is synonymous to violation of one's right to privacy and dignity.
38. It is not disputed that the Petitioner's pictures were published in the Saturday Magazine. The evidence on record shows that the publication was done without the consent of the Petitioner. The Respondent did not discharge its burden of rebutting the evidence of the Petitioner in this regard. Accordingly, I have no hesitation in making a finding that the Petitioner's right to privacy was violated.
39. Closely related to the right to privacy is the right to human dignity. Article 28 guarantees to every person has inherent dignity and the right to have that dignity respected and protected. When the right to privacy is violated, and there is exposure of a person's private data to the public and to persons from whom such data was to be withheld. The circumstances herein are that the Petitioner's pictures were disseminated to the press and by extension, the general public. Further the pictures were provided by the Petitioner to Johnstone for one purpose, namely to upload them on to his online platforms. The pictures were however used for another unintended purpose, to wit, publication in the Magazine by the Respondent. The record shows that the Petitioner was not even aware that the pictures would be



published and only saw them in the Magazine upon publication. In view of this, my finding is that the action of the Respondent, in the circumstances, constituted violation of the Petitioner's right to human dignity.

Whether The Publication Injured The Petitioner's Reputation

40. The Petitioner argued that the manner in which the Respondent used her image alongside the headline "Female Tenderpreneurs The Inside story of fast money, sex, greed and domination" knowing her to be a female entrepreneur was injurious to her reputation. She contended that there was an inexorable link between a person's reputation and their dignity which is protected under Article 28 of *the Constitution*. She relied on the court of appeal case in *Standard Limited & 2 others v Christopher Ndarathi Murungaru* [2016] eKLR and *JMK & Another v Standard Digital & Another* [2020] eKLR - the court awarded Kshs. 4,000,000/= general damages and a further award of Kshs. 400,000/= in lieu of an apology. She urged the Court to allow the petition as prayed.
41. The Respondent on the other hand argued that the assertion by the Petitioner is not valid for the reason that the photos were published with her consent; that both the Petitioner and her witness Judith Atieno admitted that there are instances where the title of the main story of the Saturday Magazine does not relate to the cover model; that at the bottom left corner of the cover page of the Magazine, it is clearly set out that the Petitioner is a cover model and her photographer is also credited; that the main story of the Magazine does not contain the Petitioner's pictures, works or details; that the Petitioner's work and photos were published in the fashion and style segment of the magazine. Further, that the Petitioner was looking for and indeed obtained massive publicity for her products which were showcased in the fashion and style segment of the Magazine. This shows that the Respondent was not malicious.
42. The Petitioner contends that her image was used on the front page of the Saturday Nation and there is nothing to show that the image is not associated with the impugned story. On cross examination, the Petitioner admitted that she does not read the Saturday Magazine often and does not know how the magazine works. Phyllis Nyambura testified that what is on the front page is just a snapshot of what is in the magazine and one needs to read the Saturday Magazine to get the whole picture. Readers of the magazine also know that the cover model is not related to the main story, a fact admitted by the Petitioner and her witness.
43. The Petitioner further contends that although she sent pictures of other models, it is only her pictures that was put on the cover of the Magazine. The Respondent argued that it was logical to put the Petitioner's picture on the cover as the curator and stylist of the Akire bag which she wanted publicity for. Further that her contention that her picture on the cover page is not on the fashion and style segment of the Magazine is baseless as the editor reserves the right to decide which pictures are to be used and where they should be put in the Magazine.
44. It is a well established principle of law that he who alleges must prove. Section 107 of the *Evidence Act* provides as hereunder:
 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.



45. Section 109 places the burden of proof on the person who alleges as follows:

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.

46. It is the Petitioner's case that the publication of her image alongside the words "Female Tenderpreneurs The Inside story of fast money, sex, greed and domination" injured her reputation. The burden of proving that the publication injured her reputation was squarely on the Petitioner. At the hearing, the Respondent's witnesses, RW2 and RW3 clearly explained their position as to why the said words appeared on the cover page with the Petitioner's photos. It is there way of structuring the magazine and that is how it has always been done. In fact, RW3 gave a few examples to demonstrate the same. The Petitioner admitted that she is not a frequent reader of the Saturday Magazine and that she did not know how the Magazine works. Her witness, confirmed that she did not read the Magazine. Nonetheless, any reasonable person who takes their time to read the Magazine would clearly see that the words complained of by the Petitioner do not appear in the fashion segment, where the Petitioner's work is published. Further, her picture does not appear on the main story. I accordingly find that the Petitioner's claim is not supported by evidence.

47. In the case of *S M W v Z W M* [2015] eKLR the Court considered what amounts to a defamatory statement and held as follows:

15. Black Law's Dictionary 8th Edition defines defamation as the act of harming the reputation of another by making a false statement to a third person.(emphasis added). A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided: see *Gatley on Libel and Slander* (10th edition). A plaintiff in a defamation case must prove that the words were spoken / written; that those words refer to him/her; that those words are false; that the words are defamatory or libelous and that he/she suffered injury to reputation as a result. In the case before the court, it is not disputed that the letter in issue was written by the Respondent and the words referred to the Appellant: see *Winfield & Jolowicz on Tort* (8th edition) 1967 at page 255

"The answer is the reasonable man. This rules out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another's reputation, or who are so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary citizen, whose judgment must be taken as the standard."

48. Similarly, in the case of *Joseph Njogu Kamunge v Charles Muriuki Gachari* [2016] eKLR Mativo, J. (as he then was) stated:

The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff's reputation in the estimation of right minded persons in the society or they must tend to cause the plaintiff to be shunned or avoided by other persons. In other words, the words complained of must be shown to have injured the reputation, character or dignity of the plaintiff. Abusive words may not be defamatory per se. The words must be shown to have been construed by the audience as defamatory and not



simply abusive. The burden of proving the above is upon the plaintiff to demonstrate that a reasonable man would not have understood the words otherwise than being defamatory.

Further, the words must be malicious. Malicious here does not necessarily mean spite or ill will but there must be evidence of malice and lack of justifiable cause to utter the words complained of. Evidence showing the defendant knew the words complained of were false or did not care to verify can be evidence of malice. The defamatory words must be shown to have been published by the defendant.

The foregoing ingredients of defamation were reiterated in the case of John Edward vs Standard Ltd where the court stated as follows:-

"A statement is said to be defamatory when it has a tendency to bring a person to hatred, ridicule, or contempt or which causes him to be shunned or avoided or has a tendency to injure him in his office, profession or calling. The ingredients of defamation are:-

- i. The statement must be defamatory.
- ii. The statement must refer to the plaintiff.
- iii. The statement must be published by the defendant.
- iv. The statement must be false."

49. Applying the above elements, I find that the Petitioner has not demonstrated to the satisfaction of the Court, that the matter complained of lowered her reputation in the estimation of right minded persons in the society or in any way injured her reputation. She has not shown that the impugned words caused her to be shunned or avoided by other persons. She has also not demonstrated any malice on the part of the Respondent. The Petitioner failed to discharge the burden placed upon her of proving that a reasonable man would not have understood the impugned words being alongside her picture in the Magazine, otherwise than being defamatory. The tort of defamation has thus not been proved.

Whether The Orders Sought Should Be Granted

50. The Petitioner has urged that she is entitled to damages for the invasion of her constitutionally guaranteed rights of human dignity and privacy and urged the Court to grant the same. The Respondent contended that it has demonstrated that the title of the main story of the Magazine had nothing to do with the Petitioner and there is nothing in the main story to link the Petitioner. She is therefore not entitled to damages. On the claim that she has lost potential clients and possible revenue, the Respondent submitted that no evidence was adduced and that she got publicity for her business in any event. It however submitted that in the event the Court finds the Respondent liable, then damages should not exceed Kshs. 500,000/=. It relied on the case of Emmanuel Omenda v Safaricom Ltd [2012] eKLR.
51. From the evidence on record, I find that in spite of her claim, the Petitioner has not demonstrated that she has lost potential clients and possible revenue as a result of the publication in question. There is also no demonstration that the publication was defamatory, or that the Respondent made any monetary gain from the same as alleged. She has however been able to demonstrate violation of her rights under Articles 28 and 31 of *the Constitution* and is therefore entitled to damages. I have looked at authorities on the unauthorised use photographs. In Rukia Idris Barri v Mada Hotels Ltd [2013] eKLR the Court awarded the Plaintiff general damages of KShs.300,000/=. In the case of N W R & another v Green Sports Africa Ltd & 4 others [2017] eKLR an award of KShs.750,000/= in general damages



was given while in *Shiverenje Simani v Star Newspaper & another* [2021] eKLR the Court awarded general damages of 250,000/=.

52. As I consider this matter, I am mindful that it is impossible to quantify infringement of fundamental rights in a case of this nature. I also consider that the Petitioner's proved complaint is that her consent was never sought prior to the publication of her pictures in the Saturday Magazine. Doing the best I can and taking guidance of the cited authorities, I find that an award of Kshs.500,000/= is reasonable in the circumstances. Accordingly, I enter judgement in favour of the Petitioner as follows:

- i. A declaration be and is hereby issued that the publication by the Respondent in the Saturday Magazine of 17.4.21 of the Petitioner's image without her consent is a violation of her right to privacy under Article 31(c) and the right to have her dignity respected and protected under Article 28 of *the Constitution*.
- ii. The Respondent shall pay to the Petitioner general damages assessed at Kshs.500,000/= which shall carry interest at Court rates from the date of this judgment until payment in full.
- iii. The Petitioner shall have costs.

DATED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JUNE 2023

M. THANDE

JUDGE

