



**Miliku v Zucchini Greengrocers Limited (Petition E005 of 2022)
[2023] KEHC 20955 (KLR) (Constitutional and Human Rights) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20955 (KLR)

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

PETITION E005 OF 2022

LN MUGAMBI, J

JULY 28, 2023

BETWEEN

LIVISTONE LUSENO MILIKU PETITIONER

AND

ZUCCHINI GREENGROCERS LIMITED RESPONDENT

JUDGMENT

1. The petition is dated November 25, 2022 but was filed in court on January 10, 2023.
2. In the petition, the petitioner alleges violation of his right to privacy and the right to human dignity under Articles 31 and 28 of the *Constitution* respectively.
3. The primary grievance by the Petitioner stems from alleged publication of his image in a face book advertisement without his consent.
4. The Petitioner averred that he is entitled to protection from intrusion of his private life through unauthorized publication of his image for commercial use without his consent; terming the act a ‘misappropriation of personality.’
5. The petitioner thus sought the following reliefs:
 - a. A declaration that the respondent infringed and violated the fundamental human rights and freedoms of the petitioner being his right to privacy and the right to human dignity.
 - b. An order as to compensatory damages against the respondent for infringement of the right to publicity and privacy of the petitioner.
 - c. That the respondent bears costs of this petition.



- d. The court be pleased to issue further or other orders as it may deem just and expedient for the ends of justice.
6. The petition was supported by the affidavit of Livingstone Luseno Miliku sworn on November 25, 2022. The petitioner simply deposed that the respondent continues to use his image despite the petitioner leaving his employment as he expected that once the employment with the respondent was over, the respondent would cease using his image. He swore that his image is private and using it without his consent is an express infringement of his rights.
7. As a result, he swore that he has received unwarranted publicity and has been receiving numerous visits from people who desire that he helps them financially on assumption that he has been making monetary gain from the advert.

Response by the Respondent

8. The respondent, through its Director, SS JANDU filed a response through the replying affidavit sworn on February 20, 2023.
9. In the reply the respondent gave notice that it shall raise a preliminary objection based on the following grounds: -
 - a. The petition is an abuse of court process and does not raise any constitutional issues for determination hence the court should invoke the principle of constitutional of avoidance
 - b. The issues arise from employer/employee relationship and this Honourable Court lacks jurisdiction to entertain and determine such contractual issue, which solely lies with the employment and Labour Relations Court.
10. That the petitioner had not laid any basis to confirm that the alleged image was his.
11. The petition is frivolous, vexatious and an abuse of court process and that the petitioner is guilty of non-disclosure and concealment of material facts.

Petitioner's submissions

12. The Petitioner's Advocates, Mutea Mwangi & Associates filed written submissions on April 14, 2023. The petitioner took issue with the respondent contention that the images and videos in question were posted during the pendency of employment between petitioner and the respondent and through the submissions pointed out the petitioner only worked for the respondent between November 28, 2019 and April 17, 2020 whereas the infringements of his rights happened on September 5, 2022 at 1318 HRS EAT on the respondents face book page: <http://fb.watch/fDZAm17G3U/> approximately four months after he had already left the employment of the Respondent. (It is important to note from the outset that this crucial factual statement was revealed for the first time in the submissions of petitioner's counsel though, not through affidavit evidence of the petitioner. I shall revert to this later).
13. If any event, the petitioner's advocate argued that even if an employee/employer relationship existed, express consent of the petitioner was never sought and should have been sought before the publication was made.
14. Counsel placed reliance on the cases of *Jessica Clarise Wanjiru Vs Davinci Aesthetics and Reconstruction Centre & 2 Others (2017) eKLR* and [*Joel Mutuma Kirimi & Another Vs National*](#)



Hospital Insurance Fund (NHIF) [2020] eKLR which was quoted with approval in *TOS Vs Maseno University and 3 Others [2016] eKLR*.

15. The petitioner's advocate submitted that unauthorized use of petitioner's photograph for advertisement and commercial purposes by the respondent was an aggression upon the petitioner's dignity as the petitioner desired living a quiet private life.
16. The petitioner also cited the South African Case of *Angella Wells Vs Atoll Media (PTY) Limited & Another, Western Cape High Court Case No 11961/2006* where it was held that: -

' 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 case, for the benefit of a magazine solely to make profit, it constitutes an unjustifiable invasion of the person's rights of the individual, including the person's dignity and privacy. In this dispute, no care was exercised in respecting these core rights.'
17. As to the extent of liability in damages, the petitioner's advocate submitted that an award of Kshs 800,000/- be awarded bearing in mind the psychological turmoil that the petitioner has been subjected to as the respondent illegally made profits through the use of his image in said advertisement.
18. He also prayed for costs.

Respondent's Submission

19. The respondent urged this court to be guided by the constitutional avoidance principle and decline to entertain the current dispute as it was not strictly raising a constitutional issue. Counsel placed reliance on the High Court decision of *KKB Vs SCM & 5 Others (KEHC 289 (KLR))* where Justice Mativo held that if a case can be decided without invoking the *Constitution*, then that has to be done such as a case where the right infringed is founded on substantive law in which the proper course would be to bring the claim under that law instead of the *Constitution*. To this end, the respondent argued that the petitioner's claim ought to have been determined by a civil court or the Employment and Labour Relations Court. He cited the case of *Sports and Recreation Commission Vs Sagittarius Wrestling Club & Another* 2001 (2) ZLR 501(s) where Justice Ebrahim JA held as follows: -

' Court will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the declaration of rights.'
20. The respondent thus urged the court to dismiss the petition with costs.

Analysis and determination

21. Having reviewed the pleadings by both parties and their submissions through counsel, I discern that the following to be the issues for determination in this petition.
 - a. Whether the doctrine of constitutional avoidance applies in this case.
 - b. Whether there is sufficient proof of publication of petitioner's image by the respondent without prior consent of the petitioner



- c. Whether the publication was a violation of right to privacy and human dignity.
 - d. Whether the petitioner is entitled to general damages for the violation (if any).
22. The first issue is whether the doctrine of constitutional avoidance applies in the instant petition.
- The doctrine of constitutional avoidance which the respondent's advocate submitted on at length and cited relevant case law simply underscores the restraint that is exercised by the courts whereby they avoid deciding disputes based on the Constitution where it is clear that such disputes can properly be decided/resolved without invoking the Constitution but on other legal grounds. Justice Mativo in Lugo Vs Director of Public Prosecutions (Petition 62 of 2020) 2022 KEHC 10574 explained the concept more elaborately as follows:
- ' The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with the applicable legislation together with other legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the Constitution. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be avoided by doctrine of ripeness and constitutional avoidance. It is borne out of realization that all legislative and common law remedies are part of the legal system. In other words a constitutional issue is not ripe until the determination of constitutional issue is the only course that give the litigant the remedy he seeks. Both Constitutional avoidance and ripeness avert determination of constitutional issues until it becomes necessary to the extent that it is the only course available to assist the litigants cause. The exceptions to the doctrine of constitutional avoidance are:
- i. Where the constitutional violation is so clear and of direct relevance to the matter
 - ii. In the absence of an apparent alternative form of ordinary relief and,
 - iii. Where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.'
23. In the Supreme Court of Kenya Case of Communication Commission of Kenya vs Royal Media Group & 5 others 2014 eKLR this position was upheld with the Supreme Court asserting that principle required a court not to determine the matter as a constitutional issue if it can be properly decided on other basis.
24. Does this petition violate the principle of Constitutional avoidance?
- The respondent contended that the matter ought to have been filed before a civil court or in the Employment and Labour Relations Court as it involves an employer and employee.
25. Starting with the matter being filed in the Employment and Labour Relations Court, the supposition is that there was employer/employee relationship existing between the parties but was it?
26. The petitioner in his affidavit in support contended that at the time the publication was done, he had left the employment of the respondent.



27. Both in his petition and in the affidavit in support, although the petitioner does not specify the actual dates when employment started and ended, he stated in paragraph 2 of his affidavit in support of the petition as follows: -
- ' That the respondent continued to use my image despite having left employment with them.'
28. Moreover, in the supplementary affidavit sworn by the petitioner on 14th April, 2023, he restated the same position thus: -
- ' The petition does not involve an employer/employee relationship, whatsoever since the time of publication of pictures/images/advertisement, the petitioner was not an employee with the respondent.'
29. Under Section 107 (1) of the Evidence Act, whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.
30. In the instant case, it was the respondent who raised the issue that the petitioner was an employee of the respondent, which was disputed by the petitioner who stated that the employment had ended.
31. In that case, the legal burden of proof to establish that there was employer/employee relationship that was subsisting lay on the respondent and only after that burden was discharged that the evidential burden would then have shifted to the petitioner to demonstrate his affirmative assertion that it had in fact ended.
32. No evidence was presented by the Respondent to establish the existence of the employment hence I do not find any basis for insisting that this was an employer/employee dispute. There is absolutely no legal basis for insisting that the dispute should be resolved in the Employment and Labour Relations Court.
33. On the question of whether the matter can simply be resolved as a civil matter without resorting to the Constitution, it is necessary to consider the nature of the grievance raised in this Petition.
34. Firstly, it is not a dispute that arises from a contract. It is not alleged anywhere that the parties at any given time executed a contract for the publication of the alleged image. There was no evidence that contract between the two on this subject matter existed.
35. It may probably be argued that it is a personal injury claim for which tortious liability arises but the jurisprudence on what is presently being referred as the tort of “appropriation of personality” is still evolving and cannot be taken as well settled. It is still nascent. In fact, a reading of the current decisions including those that have been relied on in the submissions before me show that Courts fell back on the Constitution to arrive at their decisions based on infringement on the right to privacy and human dignity. For instance, Jesscar Clarice Wanjiru (supra) and Joel Mutuma Kirimi & Anor (supra) relied on the Constitution.
36. This dispute cannot therefore purely be decided on other grounds without involving the Constitution. The doctrine of Constitutional avoidance does not apply in the circumstances.
37. That takes me to the next issue, whether there was sufficient proof of publication of petitioner’s image by the respondent without prior consent.
38. It was the responsibility of the Petitioner to provide sufficient evidence of every essential fact he was relying on in order to succeed in this Petition. One of the essential fact is the proof of publication of his image by the Respondent without his prior consent.



39. A careful perusal of the Petitioner's affidavit detailing the alleged violations does not even reveal the date when the publication of the image was done or when he discovered it. This is also missing in the petition itself. It is thus not even possible to tell with exactitude when this cause of action arose.

40. When it came to how the alleged violation was effected, the petitioner chose to speak broadly stating it was in the face book of respondent without specifically identifying the said account by its unique identification detail. He deposed as follows:

' The respondent has continued to use and exploit the image of the petitioner for commercial and monetary gains, various adverts, with perfect example being video uploaded through its facebook.'

41. No particulars of the various adverts referred to were given in his affidavit or even the dates when they were published. The specific URL code (uniform resource locator) of the said facebook account where they appeared is also left out.

42. Further, despite stating that it was his image used by the Respondent, which the Respondent denied and stated that the petitioner had not proved this fact, the Petitioner did not call evidence of any person who had seen the image and recognized him despite asserting that many people that knew him had seen the image and had recognized him as one appearing in it.

43. This petition was thus characterized by generalities of no probative value. Perhaps realizing it too late in the day, the Advocate for the Petitioner tried to resuscitate the Petition in his submissions by asserting thus:

' The said infringement of rights was however, done on September 5, 2022 at 1318 HRS EAT on its facebook page [http: fb. watch/fDZAm17G3U/](http://fb.watch/fDZAm17G3U/)'

44. However, it is trite law that facts cannot be proved by way of submissions. These facts should have been introduced by way of evidence and not submissions. Without prima facie proof of publication that the image complained of was published, when it was published and where, and that it related to the Petitioner; this Petition fails as the consideration of the other issues depends on this primary fact.

45. The upshot of the foregoing is that the petition is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 28TH DAY OF JULY, 2023.

L N MUGAMBI

JUDGE

