



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E083 OF 2021

DHABITI SACCO LTD.....APPELLANT

VERSUS

SHARON NYAGA.....RESPONDENT

(Being an appeal from the Judgment and decree of the Hon. D. W Nyambu (CM)

delivered on 15/6/2021 in Meru CMCC No. 109 of 2019)

JUDGMENT

1. By a plaint dated 2/5/2019 and later amended on the 11/9/2019, the respondent sued the appellant seeking general and exemplary damages for invasion of privacy and violation of image rights, damages for undue enrichment, permanent injunction to restrain further unlawful use of the respondent's image in any manner whatsoever without the respondent's consent and costs of the suit plus interest. It was then pleaded that on or about January 2019, the appellant caused to be published a picture of the respondent in its annual calendar (January-December 2019 issue), by way of advertising its services with the caption, *'open and maintain a school fees account or JazaJaza account to achieve your EDUCATION DREAM.'* The respondent pleaded that the said calendar was widely circulated within the country by the appellant to advertise its products and market itself without any compensation to the respondent, therefore unjustly enriching itself. The said publication was thus illegal as it was done without the respondent's knowledge, consent or authority it being asserted that in making the publication, the appellant was solely motivated by greed and the need to earn maximum profits, and therefore the appellant was liable for infringement of the respondent's right to privacy and deprivation of property without compensation.

2. In support of her case, the respondent, **PW1** denied having any relation or an account with the appellant. She testified that the appellant had never supported her education. She accused the appellant of using her picture to market its products without her consent and/or permission. It was a calendar for 2019 captioned, "open and maintain a school fees account." She graduated in October 2018 and went for a photo shoot before returning the gown. In February, she started getting calls from her friends and relatives in Meru, Mombasa, Nairobi and Nanyuki informing her that she was on the calendar. She sent the appellant a demand letter enquiring why it had used her picture. She wanted the court to order the appellant to compensate her for using her picture. She produced the demand letter and the calendar as exhibits in court.

3. During cross examination, she reiterated that she had no relationship with the appellant. The appellant was a Sacco that operated in Maua, Meru and Isiolo counties. The photo was taken in Meru by a photographer namely Tony and she posted it on Facebook. The photographer said he had not given the appellant the photo. MC Laingo, who had been contracted to produce the calendars, contacted her and said the appellant had made a mistake. She met the appellant's representatives after the demand had been made, and they said they opted to argue the matter in court. The calendar was for the entire year and her face appeared on page 1. She was asking for compensation for the use of her photo since the calendar had widely circulated. She received many calls about the picture and she did not know how many copies of the calendar were circulated.

4. In re-examination, she stated that she paid the photographer and took her photos away. No proposals for compensation were made and the calendar was not pulled down. The appellant kept circulating it even after they had been served with the demand notice.

5. The respondent vehemently denied the claim through its defence dated 5/7/2019. **DW1, Titus Miriti Munjuri**, the appellant's C.E.O, testified that it contracted a 3rd party namely Mastermind Media Services for graphic design and printing of 3000 calendars for the year 2019 as per the local purchase order 00053 dated 07/01/2019 (January- December, 2019 issue). Upon receipt of the calendars, they distributed them to their branches within Meru town being Maua, Mikinduri, Lari, Muthara, Kianjai, Athi and Muchimikuru. The calendars were given to members and depositors. On distribution of the calendars, he received a demand letter from the respondent's lawyer and he got in touch with her. The respondent's image had allegedly been used without her consent and he had not contracted her at all. When he received the 2nd demand letter, he vainly tried to reach the respondent and/or her advocate to resolve the issue and enjoin the 3rd party. The 3rd party appointed an advocate to appear for it and it knew why it used the respondent's image. He urged the court not to visit the 3rd party's use of the respondent's picture in its calendars, on it, as it was not aware when the respondent's picture was printed on its calendars. He urged the

court to dismiss the suit, as the appellant was not liable or party to the deal between the respondent and the 3rd party. He produced the documents listed in the appellant's list of documents dated 24/10/2019 as exhibits in court.

6. During cross examination, he stated that they advertised for supply of promotional and marketing material in the Daily Nation. They were advertising their products and the photo was for the respondent in the graduation attire. If an account was opened, the respondent would be the beneficiary. The respondent did not have an account with the appellant and it never sponsored her education. The respondent did not give consent for the photograph to be used to advertise the appellant. The respondent's photograph was used for marketing and the appellant was the beneficiary of the calendars. They benefitted if accounts were opened and their services used. They had given the 3rd party authority to advertise for the mutual benefit of the appellant and the account holders.

7. In re-examination, he stated that the supplier was an independent contractor, who sourced and delivered products. The appellant benefited by the volumes but not directly from the account. The appellant also benefitted from loans.

8. After the conclusion of the trial, the trial court found that the respondent had proved her case on a balance of probabilities and awarded her general and exemplary damages of Ksh. 1,500,000 for invasion of privacy of image rights and undue enrichment; permanent injunction restraining the appellant from the unlawful use of the respondent's image in any manner whatsoever without her consent; costs of the suit and interest at court rates.

9. Aggrieved by the said decision, the appellant filed its Memorandum of Appeal on 1/7/2021 setting out ten (10) grounds of appeal. It faults the trial court for holding that it was liable yet it had tendered for services to the interested party who designed, printed and supplied the calendars to it. It faults the trial court for failing to consider its defence in its totality before arriving at its decision, and ignoring the existence of the interested party, which did not defend itself. It faults the trial court for failing to properly understand, interpret and apply the law by relying on *Ann Njoki Kumena v KTDA Agency Ltd (2019)eKLR*, which was unrelated to this case. It faults trial court for allowing the respondent's claim, which greatly prejudiced it. It faults the trial court for failing to find that it was not liable for the mistake of the interested party, who was responsible for the publication of the respondent's image in its calendars.

Submissions

10. Upon the directions by the court, the parties filed their submissions in respect to the appeal on 13/9/2021 and 26/10/2021 respectively.

11. The appellant commenced submission an attack on the trial court for lacked jurisdiction to make a declaration as to whether or not a right or a fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. This is a submission made out of context as no ground of appeal alluded to lack of jurisdiction.

12. It then submitted that the 3rd party, as enjoined in the primary suit, was an independent contractor, who was solely to blame for the use of the respondent's photograph and relied on *Board of Governors St. Mary's School v Boli Festus Andrew Sio(2020)eKLR*, on the definition of an independent contractor. It also relied on *Jessicar Clarise Wanjiru v Aesthetics & Reconstruction Center & Others(2017)eKLR*, where it was stated that, the presence of a third party was of great value to the part who had a burden of proving the case but which benefit was lost when the third party was not served.

13. It further submitted that the award of Kshs1,500,000 was excessive considering the circumstances of the authority relied on by the trial court and the case at hand, which circulation was only within Meru County. It submitted that the element of lack of consent was not proved and urged the court to set aside the trial court's judgement. This again is a submission not aligned to any of the ground of appeal and the court need not belabour what was not set to be addressed by the pleadings filed.

14. The respondent on the other hand submitted that her suit was never for the determination of any infringement of a bill of rights, but for award of damages due to unjust enrichment of the appellant by utilization of her image for commercial gains and the ascertainment of commercial/image rights. She submitted that the trial court had jurisdiction to hear and determine the matter and relied on *Owners of the Motor Vessel "Joey" v Owners and Masters of the Motor Tugs "Barbara" and "Steve" (2008) 1 EA 367 and Stanley Ntongai & 6 others v Murungi Mutundu & 4 others(2018)eKLR* for the proposition that a party who fails to question the jurisdiction of the court may not be allowed to raise the same after judgment is passed.

15. On the merits it was submitted that in a claim for damages in a suit which a party is economically exploited, the focus is solely on the beneficiary of the exploitation, who in this case was the appellant. It was then emphasised that there had been established all the key elements in the claim for unlawful use of her image, as laid down in *Jessicar Clarise Wanjiru v Aesthetics & Reconstruction Center & Others(2017)eKLR*, *David Gicheru v Gicheha Farms Limited & anor (2020)eKLR* and *Ann Njoki Kumena v KTDA Agency Ltd(2019)eKLR* was relied upon with an addition that based on the precedence set by the cited cases, the award of Ksh.1,500,000 was sufficient and the same should be confirmed.

Analysis and Determination

16. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. See *Gitobu Imanyara & 2 others v Attorney General [2016] eKLR*.

17. In this appeal, the challenge is primarily on the finding on liability of the appellant. I do not discern any ground that challenge the decision on the quantum of damages. That challenge is mounted on two fronts: -

a) That the wrong was by a third party, independent contractor, who did not defend the action, and not the appellant (grounds 1, 3, 8,

b) that the court erred in failing to give regard to the defence evidence and in properly interpreting and applying the law to the fact

18. **Order 1 Rule 15 (1) of the Civil Procedure Rules** stipulates that and mandates that *Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party); that he is entitled to contribution or indemnity; or that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.*

19. The appellant applied for leave to issue a 3rd party notice on 17/9/2019 was so granted the leave, pursuant to which leave, the third party notice was issued and served and the 3rd party, 2nd respondent, entered appearance on 25/9/2019.

20. **By dint of Order 1 Rule 22, Civil Procedure Rules**, stipulates thus, once a third party enters an appearance pursuant to the third-party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.

21. Here no directions were sought and none was given by the court as to the existence of any triable matter between the defendant and the third party with the consequence that, the third party claim had not been effectively activated to allow the third party put in its pleadings and therefore the matter remained between the appellant and the respondent only.

22. With such position of the record, the third party was never made a substantive party against whom a decision imposing a decretal burden could be premised. In **Courtenay – Evans and Another v. Stuart Passey & Associates (a firm) and another [1986] 1 ALL E.R. 932** it was held in the High Court of England:

“Where a party who is the subject of a third party notice is able to show that special circumstances exist why third party directions under RSC Order 16, r.4 ought not to be given, e.g. because of delay in bringing the third party proceedings, the court may refuse to give such directions. The effect of a refusal to give directions is to make the third party notice a nullity and to put an end to the third party proceedings...”

23. I am persuaded that there having been no Third Party Directions by the court, courtesy of default of the defendant to seek same, the proceedings against the cited third party were brought to an end and ceased to exist. It was there perfect that the trial court gave the question of third party proceedings a wide berth as he did. I find that there was no propriety in seeking to determine the liability of the 2nd respondent to the appellant once the appellant failed to take out third party directions and that the trial court cannot be faulted in the manner proposed by the appellant. I find the ground blaming the wrong on the 2nd respondent to have no merit and dismiss same.

24. On the other prong regarding the evaluation of evidence and application of the law thereto as brought forth by grounds 2, 4, 5 and 6, it is trite that a judgment of the court must be based on evidence as applied to the law and it is a strong thing for the an appellate court to reverse a factual decision at trial. An appellate court can only do so where it is demonstrated that findings were not based on evidence or just perverted the evidence on record. In **Mwanasokoni vs Kenya Bus Services Ltd [1985] KLR 931** the Court of Appeal said:-

“Accordingly on when a finding of fact, that is challenged on appeal is based on no evidence, or on a misapprehension of evidence or the judge is shown demonstratively to have acted on wrong principles in reaching a finding he did, will this court interfere”.

25. The caution is that an appellate court should circumspect and not too eager to readily and lightly reverse the factual findings by a trial court because as the recorder evidence and the opportunity to observe and hear witnesses testify, the trial court remains the master of the facts before the trial court, it was conceded that a picture belonging to the respondent was used by the appellant in its calendars. That use was devoid of the respondent’s consent, concurrence or knowledge. It is equally factual that the said calendar was widely circulated to the appellant’s employees and customers. DW1 admitted that fact in evidence when he said: -

“upon receipt of the calendars we distributed them to our branches within Meru town being Maua, Mikinduri, Lari, Muthara, Kianjai, Athi and Muchimikuru. The calendars are given to members and depositors. I had not contracted Sharon Nyaga to be used in calendars.

And during cross examination, he stated: -

“if an account is open then the account holder will be the beneficiary. Thabiti Sacco would be the account holder. The Sacco would benefit. Plaintiff did not have an account with us. We never sponsored her education. She did not give us consent for the photograph to be used to advertise the Sacco. Her photograph was used as marketing. We were a beneficiary of the calendars.”

26. This is an unequivocal admission that the appellant used and published photograph of the respondent in its calendar without her consent,

then distributed the same to its staff and customers in some five or so branches spread over four counties. The use of the photograph without deference to the plaintiff was evidently in violation of the respondent's right to privacy and to be accorded her dignity under Articles 31(c) and 28 of the Constitution. There was a financial benefit that the appellant expected to derive and reap from the publication which must have flowed to it contrary to the concurrence of the 1st respondent. I find that to have been an exploitation of the 1st respondent and her photograph by the appellant. The appellant having admitted to have been the beneficiary of such exploitation, it became liable to the 1st respondent who was then entitled to compensation. I find that the trial court cannot be faulted for having regarded the evidence in a cursory of perfunctory manner. In fact, at page 112 of the record of appeal, the trial court appropriately juxtaposed the appellant's defence with the respondent's case in reaching the decision it did at page 112 of the record of appeal, appropriately juxtaposed the appellant's defence with the respondent's case in reaching the decision it did. I find that even this on the decision cannot be justifiable. It is unmerited and therefore dismissed.

27. The upshot from the foregoing deduction is that the entire appeal is meritless and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED THIS 21ST DAY OF FEBRUARY, 2022

PATRICK J.O OTIENO

JUDGE

In presence of

Miss Kinyanjui for the appellant

No appearance for the respondent

PATRICK J.O OTIENO

JUDGE