



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 16 OF 2019
ERIC OMARI.....PLAINTIFF
-VERSUS-
WASILI CABS LTDDEFENDANT

JUDGMENT

1. By a plaint dated 25th April 2019, plaintiff sued defendant for the unlawful use of his image and likeness without his consent. In the plaint, the plaintiff seeks general damages for the infringement of his right to privacy.
2. Plaintiff is a businessman and a model within Nakuru County and is involved in business and modeling activities for commercial purposes.
3. The plaintiff's contention is that on or about 6th February 2019, the defendant's brand promoter one **Mr. Emos** approached plaintiff to allow him to take plaintiff's photographs for an advertisement campaign by defendant during Valentine's Day festive season; the photographs were to be used on social media. Plaintiff was paid 2,000 and Kshs 1,000 paid to his Wasili wallet.
4. Plaintiff's argument is that on or about 8th April 2019, without his consent, the defendant printed the image of plaintiff on leaflets advertising services offered by the defendant and the leaflets were distributed to various outlets in Nakuru. And despite being asked to remove the photographs by the plaintiff, the defendant failed to do so.
5. Defendant filed a defense dated 3rd June 2019 and filed on 4th June 2019 denying the averments of the plaint, and stated that the image was used with the consent of the plaintiff. Plaintiff is geared at extorting the defendant's money.
6. The suit proceeded for a hearing and parties later filed submissions in support of their respective positions.

PLAINTIFF'S CASE

7. The plaintiff testified that he is a businessman male model and a brand ambassador for various companies like Safaricom. He adopted his statement dated 24th April 2019, and the list of the document dated 24th April 2019 as his evidence.
8. The production of the WhatsApp screenshot was opposed by the defendant's counsel and the same was not produced as an exhibit.
9. He contends he did not mention any of those companies in the witness statement but most of his work is seen on YouTube.
10. He testified that he was approached by **Mr. Amos Njoroge** who worked with defendant who informed that he was to be photographed and the photographs were to be used on valentine's day, but to the contrary, the photographs were placed on social media. He said the agreement between plaintiff and defendant was verbal. He said he was paid Kshs. 2,000 through Mpesa and Ksh 1,000 in the Wasili wallet.
11. Plaintiff contends that his complaint is based on the fact that his pictures were used on platforms they had not agreed on. The agreement was for the photos to be used on social media on Valentine's Day. But he found a poster of his picture at a table in Sukari Plaza Makaroka Lounge and strippers. He spoke to **Amos** about the issue and the posters were removed. He asked for Kshs 200,000 as compensation which Mr. Amos declined; and after sending demand letter to the defendant he filed this suit.
12. On cross-examination, he stated that it was not part of the verbal communication with Wasili cabs for his photographs to be printed on posters. He said his right to privacy has been infringed.

DEFENDANT'S CASE

13. DW1 **Amos Njoroge** adopted his witness statement dated 2nd October 2019 as his evidence. He testified that he is an event organizer and freelance promoter for products of different companies that only contact him at time of need. He said he worked with plaintiff before Wasili.

14. He further stated that the agreement between him and plaintiff was to take photographs under his company and the photographs taken were to be used to promote the Wasili Cabs during valentine's day.

15. He further confirmed that the agreement was verbal. He said he involved other models and that he paid them and only adopted his witness statement dated 2nd October 2019 as his evidence. The plaintiff who has filed suit. He further stated that he made no other poster or distribution but what has been adduced in court is what remained during valentine's day. He said that tabletop had the plaintiff's photo for promotion of valentines and that the tabletop was not used as a flier and the plaintiff was aware of the use of the table tent.

16. He further stated that the table tent was not used after Valentine's day. He urged this court to dismiss the suit.

17. On cross-examination, DW1 stated that he paid plaintiff after the photoshoot. He said the evidence adduced by plaintiff is a table tent and not calendar which was for promotion purposes; and that they did specify the plaintiff's photograph's were to be used on social media; he said the photographs were to be used for promotion.

18. On re-exam he said he took the photographs personally and the he paid the models equally. He said he paid plaintiff kshs 2000/= personally and requested technician to pay wallet promotion code of kshs 1000/= which was just a promotion code meaning free ride which they get when they work with companies.

19. He said he agreed with plaintiff to use the photographs for valentine only and that is what they did. He said the table tent was for promotion and activation purpose only and could not be distributed anywhere. DW1 said that he is not employed by Wasili but he is a freelancer marketing companies who contact him for promotion. He confirmed the table tent was used for activities and promotion purposes. He is a freelance of various companies and not an employee of Wasili.

PLAINTIFF SUBMISSIONS

20. Counsel for the plaintiff filed written submissions on 22nd July 2021. He submitted that the defendant has infringed on the privacy rights of plaintiff occasioning loss as he cannot get modeling jobs as customers are under the impression that he is on a contract with defendant.

21. He further submitted DW1 did not prove that he was not an employee of the defendant he ought to prove that as per **Section 109 of the Evidence Act**.

22. The plaintiff's counsel submitted that the defendant was aware of the infringed rights of the plaintiff as during cross-examination, the defendant asked if the plaintiff was willing to be compensated 200,000 which he declined. He submitted that the plaintiff has satisfied the elements required to sustain a case for the infringement of the right to privacy as cited in the cases of **Jessicar Claire Wanjiru vs Davinci Aesthetics & Reconstruction Center & others (2017) eKLR, Grutter Vs Lombard & Another 2007 (4) SA 89 (SCA)**.

23. He submitted that the unjustified invasion of one's privacy is a violation of one's fundamental right and must be protected and where it is violated one is entitled to relief; that the petitioner's right to privacy was infringed when his image was taken and published to promote the defendant's business.

24. He further submitted that the defendant's admission that the plaintiff's image was published is *prima facie* evidence of the violation of privacy as the defendant failed to adduce evidence that plaintiff had consented to the violation of his right to privacy.

25. On costs the plaintiff's counsel submitted that costs are awarded to compensate the successful party for the trouble taken in the prosecution or defending the suit.

DEFENDANT'S SUBMISSIONS

26. Through written submissions filed on 21st October 2021, the defendant submitted that plaintiff was contacted as a commercial model for the activation of the Wasili Brand which had just started the business. He submitted that the photoshoot was conducted as agreed and the photos were used to Promote Wasili Cabs on Valentine's day. He submitted that the table tent print was placed on the activation venue and the same was not circulated and in compliance with the terms of the contract, plaintiff was paid for the photoshoot.

27. The defendant submitted that the plaintiff has not adduced evidence to prove the alleged continuation of the infringement of the right to privacy, as required under **Section 107(1) of the Evidence Act**.

28. The defendant further submitted that each party is bound by their pleadings and not allowed to deviate from the same.

29. Defendant further submitted that the plaintiff has not stated precisely what articles of the constitution have been infringed and in what way.

30. The defendant further submitted that the plaintiff did not produce the alleged agreement to support his allegations and the court is left to

guess as to the contents of the alleged agreement between the plaintiff and **Mr. Amos Njoroge**.

31. Further that the plaintiff has failed to name the establishments where he found the flyers and neither did he call any witnesses to corroborate his averments; that there is no evidence to show the fliers were in an establishment/business premises and the flyer adduced as evidence has no timestamp and one cannot differentiate if it's a social media printout and the alleged WhatsApp conversation was doctored.

32. The defendant further submitted that the allegation that the infringement still subsist has not been proven; that the plaintiff has failed to prove the elements of unlawful use of the image.

33. He further submitted that there was consent by the plaintiff for the defendant to use his photo in the social media posts and a table tent for the promotion of the defendant's company and the presence of consent does not amount to infringement of privacy and cited the case of **Purity Wangechi Njogu v WPP Scan Group Ltd & 2 others (2019) eKLR**.

34. The defendant further submitted that defendant is not liable as it has contracted a third party to conduct the promotion and the defendant is not therefore liable. Further that the plaintiff seeks damages but is not specific on what exact purpose of the damage; that he has not proved to the court that he is a commercial model and works for gain promoting other brands and as a result of the flyers he has lost income. The defendant submitted that the plaintiff was paid Kshs 3,000/= for the use of his image upon his consent and thus any compensation should be in the line of Kshs 3,000. If the court is inclined to award damages the plaintiff should be compensated with nominal damages not exceeding 10,000 and cited the case of **Alternative Media Limited vs Safaricom Limited (2005) eKLR**.

35. Defendant submitted that demand letter was not served and urged this court to find that plaintiff has failed to prove its case against the defendant and dismiss the suit.

ANALYSIS AND DETERMINATION

36. I have considered the pleadings, submissions in support, and the rival submissions. The issues for determination are:

- a. Whether the defendant infringed plaintiff's right to privacy
- b. Whether plaintiff is entitled to damages and if so how much.
- c. Who should pay costs?

(i) Whether the defendant infringed plaintiff's right to privacy

37. The defendant confirmed that it was doing promotion in the year 2019 during Valentine period for activation of Wasili brand. DW1 testified that he was contracted by the defendant to market/promote its brand during Valentine day 14th February 2019. DW1 confirmed that there was no written agreement between him and the plaintiff. He also confirmed that the plaintiff's photo was to be used during Valentine on social media. He denied having made fliers but admitted to making table tents which are like table calendars that were used in activation venue.

38. The plaintiff's argument is that he found fliers in hotel establishment which include Sokoni Plaza, Mokoloka Lounge and Shoppers Paradise in April which was 2 months after Valentine contrary to the agreement entered between him and DW1. He said the fliers were removed after he made complaint to DW1.

39. The fact that the agreement was verbal is not disputed and the plaintiff could not therefore produce a formal agreement.

40. DW1 denied making any fliers. He said the photograph produced is what was used during Valentine. He said they only made table tents at activation venue and explained that a table tent is like a table calendar. He denied that table tents cannot be used as fliers as they are heavy material. He further confirmed in cross examination that there were table tents for promotion purposes and were only used for promotion and were supposed to be used once. He denied that the plaintiff's face was to be used on social media only and said they did not specify they would be used on social media only.

41. The plaintiff produced in court a flier though DW1 denied having made any flier. The plaintiff contends that he only gave consent for his image to be used in the advertisement of the defendant during Valentine day through social media and not after Valentine's day. From evidence adduced, plaintiff issued demand to the defendant to remove the fliers after Valentine. DW1 admitted making table tents. The demand letter dated 16th April 2019 indicate that advertisements with plaintiff's image were in tables of catering and hotel establishments in Nakuru town and its environs. DW1 in his evidence did not explain efforts they made to ensure that use of table tents was limited to Valentine day.

42. In my view the plaintiff has proved on a balance of probabilities that his image was used out of social media and beyond valentine day. Failure to confine the use of plaintiff's image to valentine day as agreed resulted in infringement of the plaintiff's privacy. There are high chances that the plaintiff has lost chances to market for rival companies for being associated to the defendant.

43. From the foregoing, the plaintiff's right to privacy was breached and he is entitled to reliefs sought.

44. FINAL ORDERS

1. I hereby declare that the defendant's use of plaintiff's image after 14th February 2019 amounted to infringement to the plaintiff's right to privacy

2. Defendant to pay plaintiff general damages of kshs 250,000

3. Costs of this suit to the plaintiff.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF MARCH, 2022

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RACHEL NGETICH

JUDGE

In the presence of:

Lepikas - Court Assistant

Ngware for Plaintiff

No appearance by defendant