



REPUBLIC OF KENYA



KENYA LAW
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**Wanjiru v Machakos University (Petition E021 of 2021)
[2022] KEHC 10599 (KLR) (3 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 10599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

PETITION E021 OF 2021

MW MUIGAI, J

AUGUST 3, 2022

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLES
19, 25, 28, 31 AND 40 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA RIGHTS
ENSHRINED IN CHAPTER FOUR THEREOF IN SO FAR AS THE
PETITIONER'S CONSTITUTIONAL RIGHTS WERE INFRINGED**

BETWEEN

CATHERINE NJERI WANJIRU PETITIONER

AND

MACHAKOS UNIVERSITY RESPONDENT

JUDGMENT

Petition

1. Vide petition dated 26th October 2021, the Petitioner seeks the following reliefs from the court;
 - a. A declaration be issued that the Respondent violated the Petitioner's fundamental right to privacy and human dignity under Article 28 and 31 of *the Constitution* by publishing the Petitioner's image for purpose of commercial advertisement without the Petitioner's consent.
 - b. A declaration be issued that the Respondent violated the Petitioner's rights under Article 30 of *the Constitution* by publishing the petitioner's image and likeness for its own commercial gain with no personal financial advantage gained by the Petitioner.



- c. A declaration be issued that the Petitioner's intellectual property rights, right of publicity and personality rights was infringed when the Respondent decided to publish the Petitioner's image in advertising and marketing the computer packages courses offered for financial gain without seeking authority/consent from the Petitioner.
- d. An order of permanent injunction be issued restraining the Respondent from publishing and/or using the Petitioners' image and likeness in its advertisement or promotion in any way without the Petitioner's consent.
- e. An order that the Respondent be compelled to compensate the Petitioner for damages and/or loss arising from the publication of the Petitioner's photograph without her express authority and the exploitation of the Petitioner by the Respondent for financial gain.
- f. Any other relief that the Court deems fit to grant.
- g. Costs of the petition be borne by the Respondent

Background

2. The Petitioner is aggrieved by the infringement of her image rights, right to privacy and breach of human dignity. On 10th April 2021, the Petitioner discovered a picture/photograph depicting her (hereinafter referred to as "the photograph") being used by the Respondent in advertising and marketing of the computer packages courses it offers. On conducting a further online search she discovered that public commercial posts and advertisements that were made by the Respondent using her photographs. They were also in its website advertising the list of computer packages courses being offered at Kshs.7,000/-.
3. The photograph depicting her was taken by an unauthorized servant, agent and/or employee of the Respondent without her knowledge or consent. The main motive of using the photograph was to give the said course visibility which would in turn yield more profits in terms of the many applicants who were being targeted for the said course, the Petitioner avers.
4. The Petitioner wrote to the Respondent seeking an explanation as to why it was using her image to advertise and promote its computer packages and, in its response, the Respondent admitted to using the photograph as has been its practice and further indicating that it would instead place the Petitioner ahead of all other alumnus.
5. The Petitioner avers that Respondent's use of the image has resulted in people assuming that she was or is working in partnership with the Respondent as its Brand Ambassador which is not the case. This has subjected the Petitioner to ridicule as she is seen to be bragging about basic knowledge and experience putting her to shame before her peers and society at large.

Supporting Affidavit

6. The Petition is supported by the supporting affidavit sworn on 26th October, 2021 by Catherine Njeri Wanjiru, the Petitioner herein wherein she deposed that the Respondents used the photograph without her consent.
7. She deposed that on 19th June, 2021 she wrote a letter through email to the Respondent seeking explanation why it was using the Petitioners image or photograph to market or advertise without her consent and immediately the Respondent received the said letter, it pulled down the said advertisement



showing a clear admission of guilt on its part. On 6th July, 2021 she received a response from the Respondent's vice Chancellor expressly admitting to have used the image in its website and that the Respondent breached and infringed her right to privacy.

Replying Affidavit

8. In response to the Petition, the Respondent filed a Replying Affidavit sworn on 31st January, 2022 by its legal officer, Ms Mumbi S. Mwiuhurih wherein she deposed the Respondent being a public institution partly funded by public funds is not engaged in any commercial or profit oriented business. She contends that the pictures of the Petitioner published in the University's website do not amount to an infringement of the Petitioner's right to privacy as provided in Article 31 of *the Constitution* and neither do they infringe the Petitioner's property rights under Article 40 of *the Constitution* nor her right to dignity under Article 28 for reasons that it is the practice of the University to publish pictures of its graduands, students and staff in the University website and other platforms managed and controlled by the University for the sole purpose of achieving and executing the University's obligation under the Universities Act, Machakos University charter and Machakos University statutes.
9. Secondly, the pictures posed in the university website portray the Petitioner in positive light and image as a graduate of the Institution. According to the Respondent, the pictures were taken during a graduation ceremony which is a public function, the pictures have images of other graduands that graduated from the University, the pictures were not taken for commercial gain but were posted on the University Website for purposes of educating and or informing the general public the courses available at the University. The Respondent deposed that the Petitioner does not have duly registered intellectual property rights over pictures taken at a public function and nowhere is the petitioner depicted as bragging about basic computer qualifications but rather she is depicted as a Graduate of the University. The entire Petition is misplaced and without merit and should be dismissed according to the Respondent.

Further Affidavit

10. In rejoinder, the Petitioner filed Further Affidavit sworn on 18th February, 2022 in which she stated that the Respondent admitted that it is its practice to publish images of its students in its website and across all social media platforms under its control without seeking the required consents from the students. Further the statutes establishing the Respondent including the Machakos University Charter do not permit the Respondent to publish images of their current or former students without their consent as doing such will amount to violating *the Constitution* and that is why the Respondent did not point out which provision expressly allows it to publish images of their students without consent.
11. The Petition was disposed of by way of written submissions.

Submissions

Petitioners Submissions

12. The Petitioner are dated 16th February, 2022 in which she framed the following issues for determination;-
 - a. Whether the use and publication of the Petitioner's image by the Respondent without consent was a violation of the Petitioner's right to privacy and right to human dignity.



- b. Whether the use and publication of the Petitioner’s image by the Respondent is a violation of image right and whether key elements of the claim of unlawful use of images has been established.
 - c. Whether public interest outweighs an individual’s right to privacy in image rights.
 - d. Whether the Respondent’s offensive publication and/or advertisement using the Petitioner’s images for their future use violates the petitioner’s data rights.
 - e. Whether the Petitioner is entitled to general damages for the violation of her image rights and data rights by the Respondent.
 - f. Who is to pay the costs of the suit.
13. On the issue of violation of right to privacy it was submitted that the Respondent violated the Petitioner’s privacy rights and right to human dignity as protected under Article 31(a) & (c) & 28 of the Constitution which gives one right not to have information relating to their private affairs unnecessarily revealed. Reliance was placed on the case of Jessicar Clarise Wanjiru –vs- Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR where the privacy was defined as follows:
- “The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.”[5]In the above sense any intrusion of personal life by whatever means or form such as photography, written articles or caricatures may be ground for an action for breach of privacy.”
14. Further reliance was placed on the case of Joel Mutuma Kirimi & Anor v National Hospital Insurance Fund (NHIF) [2020] eKLR quoted with approval the decision in the case of T.O.Sv Maseno University & 3 Others [2016] eKLR where Chemitei J held that;
- “From the above reasoning and expositions of the law it is clear that publication or use of the images of an individual without his consent violates that person’s right to privacy. I say so because a person’s life is a restricted realm in which only that individual has the power of determining whether another may enter, and if so, when and for how long and under what conditions.”
15. Also reliance was made in the case of JWI & Anor –vs Standard Group Limited & Another [2015] eKLR.
16. On the issue of liability, it was submitted that the opinion by KECOBO acknowledged that regardless of the admission of liability by the Respondent, the act of using the Petitioner’s image without consent was and is a violation of the Petitioner’s human dignity hence the need to protect individual’s right to privacy. It was submitted that the Machakos University Charter or statutes that establish it cannot take away the constitutional rights of an individual, that the said statutes do not permit use of images of its former students in advertisements to the public. Reliance was placed on the case of Coalition for Reform and Democracy (CORD) & 2 others –vs- Republic of Kenya & 10 others [2015] eKLR where it was held that;
- “Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law.



Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part.”

17. It was submitted that the use of unauthorized publication of the Petitioner’s photograph and image for advertising/marketing and promotion purposes by the Respondent was an aggression upon the Petitioner’s dignity as the Petitioner has a habit of leading a quiet and private life. The publication has a ripple effect on her social life and her relationship with her parents and the society at large. Reliance was placed on the cases of *Mutuku Ndambuki Matingi –vs- Rafiki Microfinance Bank Limited* [2021] eKLR and in the case of *Abmed Isaack Hassan –vs- Auditor General* [2015].
18. It was submitted that the elements of a claim of unlawful use of images had been established as per the case of *Jessica Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017]eKLR. That the use of Petitioner’s image by the Respondent in advertising was used for commercial purposes therefore the same is exploitive as the Petitioner was not compensated for the use of her image. The Respondents released the advertisement calling for prospective students to apply for the computer course where they were required to pay Kshs.7,000/- and as the number of times the Petitioner’s image have been used by the Respondent confirms that the use was intentional and in all these advertisement and publications the Respondent made maximum profits from the many application and traffic to its website.
19. It was submitted that we live in a society where computer packages offered by a university would be more attractive than one offered by an ordinary college. The Petitioner contends that her image gave the publication or advertisement more visibility and ensure massive traffic for those applying for the computer packages. That the fact that the Respondent keeps using the Petitioner’s image is a confirmation of the return, in terms of profit, that it earns from its use. The Respondent could have made the publication without publishing the Petitioner’s photos but for the profit it earns the institution .
20. The Petitioner referred to the “Is a picture worth a thousand words? An Empirical Study of Image Content and Social Media Engagement “ an Article by LI & Xie, 2019 and the case of *Tony Hillary Omondi vs Silverstone Air* [2019] eKLR the Petitioner also on another South African case, *Angella Wells –vs- Atoll Media (PTY) limited & Anor*, 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 sole to make profit, it constitutes an unjustifiable invasion of the person rights of the individual, including the person’s dignity and privacy. In this dispute, no care was exercised in respecting these core rights.”
21. While making reference to the case of *Samson Mumo Mutinda vs Inspector General National Police Service 7 4 otehrs* [2014] eKLR. It was submitted that there was no consent of the Petitioner for use or publishing of her images.
22. On the issue of whether public interest outweighs an individual’s right, it was submitted that the Respondent cannot hide behind public interest in using the Petitioner’s images for commercial gain and most importantly the Petitioner is not a public figure or a celebrity for that matter causing the impression that she was the Respondent’s brand Ambassador. Further reliance was placed on the case of *T.O S vs Maseno University & 3 Others* [2016] eKLR.



23. It was submitted that the Respondent pleaded violation of the right to privacy, the Petitioner demonstrated how the Respondent deliberately infringed on her constitutional rights and believes that she has convinced the Court on the said of breach of fundamental rights. It was submitted that the publication and or publication using the Petitioner's image and continued storage of the said image for their future use violates the Petitioners' rights.
24. as regards general damages, Reliance was placed in the case of Mutuku Ndambuki Matingi –vs- Rafiki Microfinance Bank Limited [2021] eKLR where the Court pronounced an award of kshs.2,000,000/- for the breach of Image Rights and Privacy and the case of JMK & Another vs Standard Digital 7 Another [2020] where the court awarded Kshs 4,000,000 for maligning of someone's reputation. It was submitted that as per Section 63 of the Data Protection Act, the maximum fine is Kshs 5,000,000 or 1 per centum of the annual turnover of the preceding year of undertaking, whichever is lower.
25. It was submitted that as per the Auditor Report of the office of the Auditor General, a public document, the Respondent made an income of about Kshs 1,540,000,000. The Petitioner prays for a total of Kshs, 10,000,000 for violation of image rights, right to privacy and human dignity as well as breach of data rights.

Respondent Submissions

26. The Respondent submissions are dated 22nd March, 2022 wherein it was submitted that the actions complained of by the Petitioner are within the realm of intellectual property rights (Trade Marks) or the common law tort of passing off or misrepresentation and do not have a constitutional basis and on this ground alone the Petition should fail.
27. It was submitted that for the petitioner to succeed in a claim for unlawful use of name or image, the Petitioner must establish use of a protected attribute, it is used for an exploitative purpose wherein the Petitioner must show that the Respondent used his/her name, likeness of other 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 Petitioners identity and a matter of legitimate public interest. Lastly that there was no consent.
28. The Respondent submits that the Petitioner has not satisfied the second limb of the test for the following reasons it elucidated in its replying affidavit. The Respondent asked the Court disregard the legal opinion given to the Respondent by the Copyright Board as this amounts to confidential legal advice between the Petitioner and the Board. The advice was irregularly leaked or given to the Petitioner and cannot form the basis of a cause of action. That the said legal opinion is not legally binding on the Respondent and or the Court.

Determination

29. I have considered the Petition, the Affidavits on record and the submissions on the parties.
30. It is not in contention that the Respondent used the photograph of the Petitioner to advertise and or market its computer packages for Kshs 7,000 on its website and other platforms. It is also not in contention that the Respondent used the photograph of the Petitioner in a graduation gown on the said website and its platforms. Thirdly, the Respondent admits that the consent of the Petitioner was not sought and therefore lack of consent is also not in issue.
31. The issue is whether the use of the Petitioner's photograph without her consent amounted to infringement of her right to human dignity and privacy, whether public interest outweighs an individual's right to privacy in image rights, whether the Respondent's offensive publication and/or



- advertisement using the Petitioner’s images for their future use violates the petitioner’s data rights, whether the Petitioner is entitled to general damages for the violation of her image rights and data rights by the Respondent and lastly is the issue of costs.
32. Article 28 of *the Constitution* provides that every person has inherent dignity and the right to have that dignity respected and protected.
33. Article 19 of *the Constitution* stipulates that the Bill of Rights is the cornerstone of democracy in Kenya. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom
34. Article 31 of *the Constitution* provides that;
- 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.
35. Article 1 of the Universal Declaration of Human Rights, 1949 provides as follows
- “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”
36. Article 5 of the UDHR provides that;
- “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
37. Article 12 of the UDHR provides that;
- “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”
38. Section 2 of the Data Protection Act defines data as; 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)
39. The same section defines an identifiable Natural person as a person who can be identified directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental,



economic, cultural or social or social identity. The identifiable natural person in this case is the Petitioner.

40. Section 26 of the [Data Protection Act](#) provides that ;

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.

41. In the case of *M W K v another v Attorney General & 3 others* [2017] eKLR, the court observed as follows;

“Dignity is a founding value of our Constitution. It informs most if not all of the rights in the Bill of Rights and for that reason is of central significance in the limitations analysis.

105. The value of dignity in our Constitutional framework cannot therefore be doubted. [The Constitution](#) asserts dignity to contradict our past in which human dignity was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.

106. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court acknowledges the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.”

42. This Court in the case of [Kenya Human Rights Commission v Communications Authority of Kenya & 4 others](#) [2018] eKLR posited on the right to privacy as follows:

“ 52. Privacy is a fundamental human right, enshrined in numerous international human rights instruments. It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information, and association. The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction, and liberty, a “private sphere” with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals. Activities that restrict the right to privacy, such as surveillance and censorship, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.



The Court in *JWI & another v Standard Group Limited & another* [2015] eKLR which the Petitioner has referred and stated that;

“In determining the scope of the right to privacy, the Consultative Assembly of the Council of Europe has defined Article 8(2) of the European Convention on Human Rights, which provides for the right to privacy of an individual’s private and family life, his home and correspondence, as follows;

“The right to privacy consists essentially in the right to live one’s own life with a minimum interference. It concerns private family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially”.

43. The factors to consider when determining whether the right to privacy has been violated are 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. - *Mistry v Interim National Medical and Dental Council of South Africa* (1998) (4) SA 1127 (CC),

44. In *T.O.S v Maseno University & 3 Others* [2016] eKLR to the extent that publication or use of the images of an individual without her consent violates the Petitioner right to privacy. The extent to which the right to privacy may be invaded or exposed is upon a person. The Petitioner contends that she is a private person and to that extent I find that her right to privacy has been infringed by the Respondent who ought to have known and sought consent. The practice the Respondent claims to have pictures taken of its graduates and using it without consent is unlawful. The Petitioner as a data subject has rights that must be protected. She has a right to know what her image is to be used for. This is clearly spelt out under Section 29 of the Data Protection Act, that;

A data controller or data processor shall, before collecting personal data, in so far as practicable, inform the data subject of—

- (a) the rights of data subject specified under section 26;
- (b) the fact that personal data is being collected;
- (c) the purpose for which the personal data is being collected;
- (d) the third parties whose personal data has been or will be transferred to, including details of safeguards adopted;
- (e) the contacts of the data controller or data processor and on whether any other entity may receive the collected personal data;
- (f) a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data;
- (g) the data being collected pursuant to any law and whether such collection is voluntary or mandatory; and
- (h) the consequences if any, where the data subject fails to provide all or any part of the requested data.



45. This Court is persuaded by the case of *Jessicar Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017]eKLR, Mativo J. observed;

“The right to privacy is guaranteed under Article 31 of *the Constitution* of Kenya, privacy has been defined as ‘the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information. In the above sense any intrusion of personal life by whatever means or form such as photography, written articles or caricatures may be ground for an action for breach of privacy”

46. In the South African case, *Angella Wells v Atoll Media (PTY) Ltd & Anor*, Western Cape High Court Case No. 11961/2006 it was held

“...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 sole to make profit, it constitutes an unjustifiable invasion of the person rights of the individual, including the person’s dignity and privacy. In this dispute, no care was exercised in respecting these core rights.”

47. The next issue is whether the picture was used for commercial gain. The effect of an advertisement is indeed to inform the public of the courses being offered as alluded to by the Respondent and cause them to apply for the course at a fee of Kshs 7,000 as per the advertisement.

48. On the other hand, the Respondent submitted that the publishing of pictures of Respondent’s graduands and Staff on the University website controlled and managed exclusively by the University is not aimed at commercial gain. It is for purposes of executing the University’s obligations under the Universities Act, its Charter and Statutes. The impugned images were taken at a public graduation function and also include other graduands.

49. The Petitioner also relied on the Legal Opinion dated 24/1/2022 from the Kenya Copy Right Board to the Respondent whose import is that there are violations of human dignity, right to privacy, data rights, personality rights and proprietary rights. I note that the letter dated 24th January 2022 is addressed to the Respondent and without information on how the same landed in the Petitioners possession, I will not give a lot of weight to it as the issue is in Court for determination.

50. The Black’s Law Dictionary defines a business as

“That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit. The doing of a single act pertaining to a particular business will not be considered engaging in or carrying on the business; yet a series of such acts would be so considered.”

51. Personality rights were defined in the case of *N W R & another v Green Sports Africa Ltd & 4 others* [2017] eKLR as follows;

“Personality rights encompass the exclusive right of an individual to market, control and profit from the commercial use of his/her name, image, likeness and persona. The distinctive characteristics of one’s image, likeness or persona include but are not limited to name, face, body or recognizable body part, voice or voice impersonation, photograph, look-alike, signature phrase, paraphernalia or action, costume or personals signature.



Personality rights, generally speaking, consist of two types of rights, the right to privacy and the right of publicity. The right of privacy is the right to keep one's image and likeness from exploitation without permission or compensation and generally applies to members of the general public. The right of publicity is the exclusive right of an individual to market his or her image, likeness or persona for financial gain”

52. The Petitioner also seeks a declaration that she has been subjected to slavery, servitude and forced labor contrary to Article 30 of *the Constitution*. The Petitioner claims that a person who has not volunteered a service is a slave. I find that the Petitioner has not proved how her rights have been infringed in this aspect. Her image was used without her knowledge or consent but no services were rendered to the Respondent. I am persuaded by the case of *Anarita Karimi Njeru v Republic* [1979] eKLR where it was observed that:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

53. The Petitioner seeks an award of general damages for infringement of her rights. Article 23 of *the Constitution* is a proviso on the orders that this court may grant for violation of constitutional rights;

23. Authority of courts to uphold and enforce the Bill of Rights

- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.

54. In the case of *M W K v another v Attorney General & 3 others supra*

“An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional



right and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case. The court awarded 4 Million.”

55. In the Jessica Clarise Wanjiru case supra; the Court applied a 3 pronged test to prove unlawful use of name or image which the Petitioner/Plaintiff must prove as follows;
- a) The use of protected Attribute; the Petitioner proved that the Respondent used her image on its website and on different platforms to advertise graduation ceremonies from 2009
 - b) The use of protected attribute must be for an exploitative purpose either commercial or other exploitative purpose. The Petitioner deposed that her image was used for commercial gain without compensating her. The Respondent contends that using an image of a grandaunt is it practice and puts them ahead of their peers. The question is who benefits from the use of the photograph, is it the Petitioner or the Respondent. I find that it is the later who will receive the fees that is to be paid for that course and for all other courses it offers.. The marketing and advertisement made wide publicity in the market with increased possible and actual clientele. The business growth by increased sales meant profit. To that extent by use of Petitioner’s image she ought to have been compensated.
 - c) The Petitioner must establish that she did not give consent for the offending use of her image, which she has done successfully.
56. A person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person’s unique characteristics and distinguishes the person from his or her peers. The right to the protection of one’s image is thus one of the essential components of personal development. It mainly presupposes the individual’s right to control the use of that image, including the right to refuse publication thereof- Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others supra
57. The Respondent is adamant that it could do as it wishes with the images of graduates from the school as it pleases. *The Constitution* of Kenya is here to protect those who are exploited by such institutions for their benefit without the consent of the said persons. Rights must be respected.
58. The Petitioner seeks compensation of Kshs 10,000,000 per violation for violation of image rights, right to privacy and human dignity as well as breach of data rights. After considering the circumstances of the case, I find that the Petitioner has proved that her image was used for without her knowledge and / or consent and was an intrusion into her privacy and therefore the right to privacy, right to dignity and right to property were infringed.
59. The financial gain by the Respondent from the advertisement which included other graduands does not depict financial gain for the University which is not strictly a profit-making enterprise or going concern but a public University. It is not clear whether marketing of computer courses through the advertisements increased or it was normal intakes of the University Courses.
60. Secondly, and award of Ksh 10,000,000/- must be based on proof of resulting injury, damage or loss on the part of the Petitioner. The Petitioner complained of ridicule from peers. In the absence of such proof and in light of these circumstances, nominal damages of Ksh 800,000/- to be paid by Respondent to the Plaintiff.

Disposition

- 61 In the upshot I hereby issue the following orders;



1. A declaration is hereby issued that the Respondent violated the Petitioner's fundamental right to privacy and human dignity under Article 28 and 31 of *the Constitution* by publishing the Petitioner's image for purpose of commercial advertisement without the Petitioner's consent
2. A declaration is hereby issued that the Petitioner's intellectual property rights, right of publicity and personality rights was infringed when the Respondent decided to publish the Petitioner's image in advertising and marketing the computer packages courses offered for financial gain without seeking authority/consent from the Petitioner.
3. An order of permanent injunction is hereby issued restraining the Respondent from publishing and/or using the Petitioners' image and likeness in its advertisement or promotion in any way without the Petitioner's consent.
4. Nominal damages of Kshs 700,000/-is awarded to the Petitioner.
5. The costs of the Petition are awarded to the Petitioner.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 3RD AUGUST 2022.
(VIRTUAL CONFERENCE)**

M.W. MUIGAI

JUDGE

