



**Makokha v Capwell Industries Limited t/a Pearl Foods Kenya & another; Kirigua
(Interested Party) (Constitutional Petition E384 of 2020) [2022] KEHC 17134 (KLR)
(Constitutional and Human Rights) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E384 OF 2020**

AC MRIMA, J

DECEMBER 16, 2022

BETWEEN

BONFACE OTIENO MAKOKHA PETITIONER

AND

**CAPWELL INDUSTRIES LIMITED T/A PEARL FOODS
KENYA 1ST RESPONDENT**

QUBE LIMITED 2ND RESPONDENT

AND

MARTIN KIRIGUA INTERESTED PARTY

JUDGMENT

Introduction:

1. The dispute before this Court revolves around alleged violation of the right to privacy occasioned by the use of a person’s image or likeness for purposes of business visibility.
2. The Petitioner, Bonface Otieno Makokha is aggrieved that, on 4th September 2020, Capwell Industries Limited T/A Pearl Foods Kenya and Qube Limited, 1st and 2nd Respondents herein respectively, published his picture on Facebook and various other social platforms without his consent, knowledge or authority for purposes of propelling their sales or visibility of their product, Pearl Pishori rice.

The Petition:

3. Through the amended Petition dated 10th December 2020, supported by the affidavit and further affidavit of Bonface Otieno Makokha deposed to on 16th November 2020 and 28th May 2021



- respectively, the Petitioner sought this Court's intervention in respect of the Respondents' invasive conduct.
4. He pleaded that the publication of his image without ever granting the Respondents consent was illegal and in violation of his constitutional rights to privacy protected under Article 31 of *the Constitution*.
 5. He posited that the Respondents' continued commercial use of his image to promote their business visibility is economically exploitative.
 6. He pleaded that there was no contractual compensation and despite effort to safeguard his exclusive rights to market, control or profit from the commercial use of his name image, likeness and persona, Respondents have not been amenable to negotiations.
 7. The Petitioner further asserted that his public representation without permission and due compensation infringed on his right to dignity guaranteed under Article 28 of *the Constitution* deserving of this Court's protection.
 8. It was his case that the Respondents' use of his identity created the false impression that he had consented and was in support of the advertised product, service and business.
 9. He pleaded that the Respondents' actions constituted arbitrary deprivation of his right to property without due process of the law provided for under Article 40(3)(b) of *the Constitution*.
 10. Separately, the Petitioner pleaded that the intrusive use of his image has negatively affected his personal life, that of his family and employer from whom the Petitioner reasonably expected such private information to be withheld.
 11. Based on the foregoing legal and factual background, the Petitioner prayer for the following reliefs;
 1. A conservatory Order in the form of an injunction do issue to restrain the Respondent, each and all of them, either by themselves or through their agents, servants, nominees or otherwise to take down all imaged and likeness of eth Petitioner for purposes of promoting their product.
 2. A declaration do issue that the Respondents' actions of publishing the Petitioner's image and likeness contravenes the right of the Petitioner as enshrined, guaranteed and protected under Article 28 and 40 of *the Constitution*.
 3. An inquiry into the earnings of the Defendants be made and such profit ademint(sic) be paid to the Petitioner.
 4. A declaration that as a consequence of the violation of the Petitioner's right to privacy the Petitioner is entitled to an order of compensation and upon inquiry and award of damages for compensation be made.
 5. Damages both exemplary, punitive and general.
 6. An order of injunction do issue, restraining the Respondent, each and all of them, either by themselves or through their agents, servants, nominees or otherwise form publishing pictures of the Petitioner on any of their platforms.
 7. The Petitioner be awarded the costs of these proceedings.
 8. Such other or further orders as to this Court may deem just.



The Submissions

12. In his written submissions dated 21st October 2021, the Petitioner submitted that the use of his likeness and image had generated 82,200 views, which is evidence enough that the Respondent were using it for economic gain thus warranting this Court's authority to make an inquiry into the profits.
13. It was his case that despite knowledge of filing of the Petition, the Respondents continued to use his image.
14. In justifying the jurisdiction of this Court, the Petitioner submitted by invoking Article 22 and 23 of *the Constitution*, he was entitled to invite this Court to exercise its interpretational power in respect of contested violation of Article 28, 31, 40 and 47 of *the Constitution*.
15. It was further submitted that the Petition was in conformity with the principle established in Anarita Karimi Njeru -vs- Republic (1976- 1980) 1KLR 1272 of identifying with precision and manner of violation of the constitutional entitlements.
16. On the substance of the dispute, it was submitted that the 1st Respondent hired the services of the 2nd Respondent to run its digital marketing platform and promotion of the 1st Respondent's product pearl pishori rice, an arrangement the Petitioner is not privy to.
17. It was his case that the source of his image notwithstanding, the use of his image was intrusive and in violation of his right to privacy and dignity.
18. In respect to his right to property, it was submitted that a person's image, persona or likeness is his sole property that requires protection whose use requires his consent.
19. It was further submitted that the Respondents ought have taken all the necessary administrative action to either take down and or stop the use of the images or offer a fair amount of competition to the Petitioner.
20. The Petitioner referred the Court to the decision in Jessica Wanjiru -vs- Davinci Aesthetics & 2 Others (2017) eKLR where it was use of a protected attribute, for an exploitative purpose without consent was found to be running contrary to *the Constitution*.
21. In conclusion it was prayed that the Petition be allowed as prayed.

The 1st Respondent's case:

22. Capwell Industries Limited T/A Pearl Foods Kenya, opposed the Petition through the Replying Affidavit of Arnold Mwambi Mwangodi, the brand the Manager Pearl rice, deposed to on 27th July 2021.
23. The 1st Respondent denied wrong doing by deposing that it entered into an arrangement with the 2nd Respondent for purposes of handling and maintaining its social accounts in addition to creating and posting content on its social page.
24. It was its case the 2nd Respondent was responsible for any dispute that would arise in the course of digital marketing and promotion of pearl pishori rice.
25. The 1st Respondent denied the claim that publication of the Petitioner had helped propel sales or visibility for pearl pishori rice.
26. It was its case that publication of the Petitioner was in consonance with guidelines and not in violation of any privacy rights under Article 31 of *the Constitution*.



27. He deposed further that the 2nd Respondent pulled down Petitioner's image the moment it was informed of potential privacy breach and therefore the Petitioner's claims were a non-starter.
28. Mr. Mwangodi further deposed that the Petitioner's image was not only lawfully-acquired but permission was sought and obtained. He denied its use ever impacting the Petitioner's family or work life.
29. In the end, he urged the Court to dismiss the Petition with costs.

The submissions

30. In its written submissions dated 11th November 2021, the 1st Respondent, while relying on the decision in *Mbuthia Macharia -vs- Annah Mutua Ndwiga & Another (2017) eKLR*, it claimed that the Petitioner had not discharged the burden of proof in accordance to section 107 of the *Evidence Act*.
31. It was submitted that the Petitioner had not tendered any evidence to support the allegation that the publication of his image negatively affected his life in violation of his right to privacy, dignity and property under Article 31, 28 and 40 of *the Constitution*.
32. The 1st Respondent added that the Petitioner had not attained the required standard of proof in respect of matters touching on image rights, personal rights to publicity rights. The decision in *Jessica Claissaire Wanjiru -vs- Davinci Aesthetics & Reconstruction Centre & 2 Others (2017) eKLR* was referred to emphasize the import of the standard of proof. In the case it was observed;
 - a. ...use of a protected attribute: the plaintiff must show that the defendant used an aspect of his 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.
 - b. 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.
 - c. No Consent: The Plaintiff must establish that he or she did not give permission for the offending use.
33. On the foregoing decision, the 1st Respondent submitted that the Petitioner has not substantiated the allegations of violation of his rights. It was its case that the simply glossed over facts relating to the publication of his image without concisely demonstrating how his rights were affected or infringed upon.
34. It was further disputed that no affidavit evidence was tendered to demonstrate how his life was adversely affected and to contextualize the 1st Respondent's alleged benefit.
35. It was submitted that the reliefs sought ought not be granted because consent was obtained. Reference was made to the 2nd Respondent's depositions where it was stated that the image was listed on the profile of Martin Kiriga where photos available at pexels.com a website where images are free to use and attribution is not required.
36. It was reiterated that there was no commercial gain in respect of sales or market visibility of pearl pishori rice.



37. The 1st Respondent hastened to add that there was no full ad frank disclosure of key material facts relating to the case that the images were pulled down by Martin Kirigua.
38. It was submitted that there was ipso facto collusion between the Petitioner and Martin Kirigua to economically blackmail the 2nd Respondent for payment for using the impugned image.
39. In conclusion the 1st Respondent submitted that the Amended Petition was without merit and should be dismissed with costs.

The 2nd Respondent's case:

40. Qube Limited, opposed the Petition through the Replying Affidavit of Ahmed Salim, its Managing Director, deposed to on 30th November 2021.
41. It was its case that as a company that handles its clients' social media accounts, and was hired by the 1st Respondent to create content for it then posts it.
42. Mr. Salim deposed that in carrying out its brief, the 2nd Respondent as a matter of practice uses images obtained from royalty free stock websites that allow images to be used for free.
43. It was his case that the websites include shutterstock, storyblock, pexels amongst others whereby the 2nd Respondent pays an annual licence fee of about USD 3,000 to access the images appearing on the websites.
44. It was his case that in the websites it is prominently displayed that images appearing thereon are royalty free and can be downloaded for free.
45. On the foregoing, it was deposed that the 2nd Respondent accessed the Petitioner's image from pexels.com (<https://www.pexels.com/photo/man-in-blue-denim-top-1621802/>) and published it only on Facebook and Twitter platforms pursuant to the assurance from pexels that the images were free to use without the requirement of attribution.
46. It was his deposition that out of abundance of caution, the 2nd Respondent contacted Martin Kirigua, interested party herein, where he confirmed that the 2nd Respondent could use the image in issue.
47. It was his case therefore that the use of the Petitioner's image was lawful and permissible upon obtaining consent and approval before using it.
48. He deposed further that upon getting the information that there was potential infringement of privacy, it pulled down the Petitioner's image.
49. It was his deposition that as at that time, the image had garnered two likes which in his estimation could not be claimed to have propelled the sales or visibility of the 1st Respondent.
50. The 2nd Respondent reiterated the 1st Respondent's assertion that the Petition was a ploy by the Petitioner and the interested Party to unjustly enrich themselves.
51. It was urged that the Petition be dismissed with costs.

The submissions

52. In its written submissions dated 4th January 2022, the 2nd Respondent sought to rely on the decision in *Jessicar Clarise Wanjiru -vs- Davinci Aesthetics & Reconstruction Centre & 2 Others (2017) eKLR* to discredit the Petitioner's case.



53. In seeking to demonstrate that the Petitioner's right was not protected at the time of use, it was submitted that the images were obtained free of copyright protection.
54. It was its submission that the Petitioner did not protest as to why his image was on pexels.com and therefore the only inference that can be made is that he consented to pexels to have his image used for free and without attribution
55. In denying that the use of the Petitioner's image did not confer any commercial benefit it was its submission that no evidence was led to prove or substantiate the claim.
56. On the foregoing, it was submitted that the Petitioner did not suffer any loss.
57. On the basis that the Petitioner did not show any displeasure at his images being in pexel.com, he submitted that there could be a possible alliance with the interested party formed with the sole responsibility of unjustly enriching themselves at the expense of unsuspecting members of public.
58. In conclusion, this Court was urged to follow the decision in Jessicar Clarise Wanjiru -vs- Davinci Aesthetics & Construction Centre & 2 Others (supra) in dismissing the Case.
59. The Interested Party did not participate in the instant proceedings.

Analysis:

60. The foregoing discourse brings out the following issues for discussion:
 - i. The burden and standard of proof in Constitutional Petitions.
 - ii. Whether the publication of the Petitioner's image or likeness amounted to a violation of his right to privacy, dignity and property.
61. A look at each of the issues follow.

a. The burden and standard of proof in Constitutional Petitions:

62. The issue of the burden of proof on a Petitioner in a Constitutional petition was addressed by the Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR as follows: -

Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

63. Further, this burden of proof is provided for under Sections 107(1), (2) and 109 of the *Evidence Act* as under: -



Sections 107(1) and (2):

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.

and

Section 109:

Proof of particular fact

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.

64. The above is the legal burden of proof which remains on the Petitioner throughout.
65. There is also the evidential burden of proof. This legal principle was discussed in Bungoma High Court Election Petition No. 2 of 2017 Suleiman Kasuti Murunga vs. IEBC & 2 Others (2018) eKLR as under:

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26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.
27. The principle of 'evidential burden of proof' is hence anchored on the rebuttable presumption of validity of election results. That, until and unless a Petitioner discharges the evidential burden of proof an election is presumed valid. It is on that background that the Court in Singh vs. Mota Singh & Another (2008) 1 KLR 1 stated that an election is a matter of public importance not to be lightly set-aside and in the case of Jeet Mohinder Singh vs. Harminder Singh Jassi, AIR 2000 SC 258 the Supreme Court of India stated that 'the success of a candidate who has won at an election should not be lightly interfered with...Any person seeking such interference must strictly conform to the requirements of the law...?'
28. The Supreme Court in the 2017 majority judgment had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof as follows: -
 - (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however,



“depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law....

29. It therefore follows that the legal burden of proof is static and rests on the Petitioner throughout the trial. It is only the evidential burden of proof which may shift to the Respondents depending on the nature and effect of evidence adduced by a Petitioner.

67. The Court will now deal with the standard of proof in Constitutional Petitions.

68. The Black’s Law Dictionary, (9th Edition, 2009) at page 1535 defines ‘the standard of proof’ as
[t]he degree or level of proof demanded in a specific case in order for a party to succeed.

69. In many jurisdictions and decisions world over three main categories of the standard of proof emerge. They are the criminal standard of proof of ‘beyond reasonable doubt’, the application of civil case standard of ‘balance of probabilities’ and the application of an intermediate standard of proof.

70. The Supreme Court in Presidential Petition No. 1 of 2017 Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR discussed the applicable standard of proof in election petitions. In that decision, the Apex Court declined the invitation to find that election petitions were just like the normal connotational Petitions and that the standard of proof ought to be that applicable in constitutional petitions which was ‘on the balance of probabilities. The Court found that the applicable standard of proof electoral matters was the intermediate one, that is ‘beyond balance of probabilities, but below proof beyond reasonable doubt’.

71. This is how the Supreme Court, rightly so, argued: -

(152) We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners’ submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.

(153) We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not



ordinary civil proceedings hence reference to them as sui generis. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not.

72. Returning to the matter at hand, this Court hereby settles that the Petitioner bore the legal and evidential burden of proof unless the evidential burden of proof shifted to the Respondents. The Court also settles that the applicable standard of proof in this matter, just like in any other Constitutional Petition, shall be on a balance of probabilities.

b. Whether the publication of the Petitioner's image or likeness amounted to a violation of his right to privacy, dignity and property:

73. The right of an individual to control the commercial use of one's name, image, likeness, or other unequivocal aspects of one's identity lies within the ambit of the rights generally referred to as publicity rights or often called personality rights.

74. By their very nature, the publicity or personal rights are also generally considered as property rights as opposed to a personal rights.

75. Mativo, J (as he then was) in the High Court at Nairobi Constitutional Petition No. 410 of 2016 Jessicar Clarise Wanjiru Vs. Da Vinci Aesthetics & Reconstruction Centre & 2 Others (2017) eKLR rendered a comprehensive discussion on the legal principles guiding the subject of publicity rights.

76. In the end, the Learned Judge summed up the elements which a Petitioner ought to prove in a suit over alleged infringement of publicity or personality rights. He stated as follows: -

32. From the above leading decisions on the subject, the key elements of a claim for unlawful use of name or image which a Petitioner must establish to succeed in a case of this nature are: -

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

77. This Court will now apply the above to the matter at hand. First, will be the paramount issue of consent.

78. The 1st Respondent admitted that indeed the image of the Petitioner was used in marketing one of its products. It, however, stated that it had contracted the 2nd Respondent to do so and that it was not liable if at all any infringement was proved.



79. The 2nd Respondent also admitted using the Petitioner's image in marketing of the 1st Respondent's product. The 2nd Respondent, however, did not admit that it did so without the consent of the Petitioner. The 2nd Respondent demonstrated that the Petitioner's consent was rightfully obtained in two ways.
80. The first way was that it obtained the Petitioner's image from a website known as pexels.com (<https://www.pexels.com/photo/man-in-blue-denim-top-1621802/>). The 2nd Respondent deposed that it usually subscribed to and paid an annual licence fee of about USD 3,000 to access the images appearing on the said website among others. The 2nd Respondent further deposed that it received an assurance from pexels.com that since it had subscribed into the website, the images in the said website were free to use without the requirement of attribution.
81. The second way was a further follow up by the 2nd Respondent after the assurance by pexels.com. It was undertaken for abundance of caution.
82. The 2nd Respondent contacted the Interested Party herein, Martin Kirigua, over the Petitioner's image. The Interested Party confirmed the position rendered by pexels.com that the 2nd Respondent could use the image in issue without any problem.
83. Armed with the twin assurances, the 2nd Respondent used the Petitioner's image as alleged.
84. The above facts were deposed to by one Ahmed Salim, the Managing Director of the 2nd Respondent, vide a Replying Affidavit deposed to on 30th November, 2021. The said dispositions were, however, neither responded to nor controverted by the Petitioner and the Interested Party.
85. In such a state of affairs, it comes to the fore that the Petitioner in laying his case vide the Petition, the affidavit in support and the written submissions managed to establish a case which shifted the evidential burden of proof to the Respondents.
86. The Respondents also gave their version of the story. They made serious averments on oath, which as said, were never responded to neither were they controverted. The Respondents having explained how the Petitioner's image came to be used laid sufficient evidence which called for a rebuttal or response from the Petitioner. In other words, the evidential burden of proof which had shifted from the Petitioner to the Respondents shifted back to the Petitioner.
87. It was, therefore, incumbent upon the Petitioner to render a response to the Respondents' position in such a manner that it will outweigh the Respondents' defence. The Petitioner chose not to.
88. The upshot is, therefore, that the Respondents' position was uncontroverted. Be that as it may, this Court has considered the Respondents' position with keenness. The Court is convinced that the Respondents' position is reasonable and plausible. The Court takes such a position since it is a fact that there are websites which upload images and information which can be assessed and used at no cost. It is not denied that pexels.com is one of them. Further, the 2nd Respondent was extremely cautious and contacted the Interested Party who was the photographer who took the Petitioner's image in issue. The Interested Party gave a no-objection to the use of the image. It was after such twin interventions that the 2nd Respondent actioned the use of the Petitioner's image.
89. The 2nd Respondent, therefore, took every reasonable step before using the Petitioner's image. Since it is not denied that the image was uploaded unto a website and could be assessed and used without attribution, then the Petitioner's contention that he did not consent to the use of his image by the Respondents does not hold. Interestingly, neither the Petitioner nor the Interested Party found it worth



to, at least, enjoin the owners of the website pexels.com into this matter. There is, as well, no averment that the Petitioner ever contested the use of his image by the website pexels.com.

90. The foregoing, therefore, adds credence to the averment by the Respondents that the Petitioner and the Interested Party were out to unlawfully benefit from the Respondents.
91. This Court also takes note of the fact that the Respondents pulled down the impugned image immediately they learnt that the Petitioner was unhappy with the use of his image.
92. Having found that the Petitioner's image was rightfully used by the Respondents, the allegations of infringement of the Petitioner's rights and fundamental freedoms do not arise. This is a matter where the Petitioner fell short of discharging the evidential burden of proof to the required standard.
93. In such a case, the Petitioner's case lacks legal legs to stand on and cannot be sustained.
94. Deriving from the above, the following final orders do hereby issue: -
 - a. The Petition is hereby dismissed.
 - b. The Petitioner shall bear the costs of the Petition.
95. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 16TH DAY OF DECEMBER, 2022.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Mr. Mogeru Learned Counsel for the Petitioner.

Miss. Janmohammed Learned Counsel for the 1st Respondent.

Mr. Otieno Learned Counsel for the 2nd Respondent.

No appearance for the Interested Party.

Kirong/Regina – Court Assistants.

