



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CONSTITUTIONAL PETITION NO. 10 OF 2020

IN THE MATTER OF APPLICATION UNDER ARTICLES 22,

23, 165(3)(b) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER ARTICLES 19, 22, 23, 25, 27(1), 28, 29(d),

30 & 31 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013.

AND

IN THE MATTER OF CONSTITUTION OF KENYA RIGHTS ENSHRINED IN CHAPTER FOUR

THEREOF IN SO FAR AS THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE INFRINGED

BETWEEN

MUTUKU NDAMBUKI MATINGI.....PETITIONER

-VERSUS-

RAFIKI MICROFINANCE BANK LIMITED.....RESPONDENT

JUDGEMENT

1. The Petitioner herein, **Mutuku Ndambuki Matingi**, in this petition has bought the petition based on the provisions of Articles 2(1) and (2), 19, 22, 23, 25, 27(1), 28, 29, 31, 165, 258(1) and 259(1) of the Constitution.

2. The facts according to the said petition are that the Petitioner was operating an account with the Respondent herein, Rafiki Microfinance Bank, an institution offering savings facilities, credit, money transfer services, trade finance forex and bank-assurance services. According to the Petitioner, he was approached by the Respondent's Machakos Branch located within Machakos Town sometimes in May, 2014 and applied for financial assistance towards purchasing a motor cycle which application was approved and the Petitioner was granted the loan by the Respondent on 16th December, 2014. According to the Petitioner, he subsequently repaid the loan advanced by the Respondent together with the interest accrued without fail or default.

3. It was pleaded that sometimes in May, 2015, the Respondent's duly authorized employee called the Petitioner and informed the Petitioner to go to the Respondent's Machakos branch located within Machakos Town for a meeting, a request the Petitioner adhered to and upon arrival there, he was met by a duly authorized employee of the Respondent who was accompanied by a photographer. He was informed by the said employee of the Respondent that the Respondent needed to take his photograph on the account that he was a loyal customer of the Respondent to which the Petitioner agreed. It was pleaded that though he agreed to have his photograph taken, he did not acquiesce nor consent or sign any document giving permission or authority to the Respondent to use his image or likeness for any of the Respondent's advertisements or promotions and in particular its promotion for the purchase of motor cycles known as *boda boda* entitled "GET A BODA" (hereinafter referred to as "the said promotion").

4. The Petitioner was therefore surprised when he started seeing pamphlets published by the Respondent prominently showing his image and likeness and in particular the said promotion. According to him, the said pamphlets were for the Respondent's commercial gain as the same was for promotions for the Respondent's financing of prospective buyers of motor cycles. He averred that he never participated in the said promotion for or on behalf of the Respondent and reiterated that he never signed any consent for the Respondent to use his photo or his image for any of the Respondent's promotions and/or advertisements and in particular the said promotion.

5. The Petitioner avers that on 12/2/2019 through his advocates on record, he wrote a letter to the Respondent informing them that he had not given them permission to use his photo or his image in any of their advertisements or promotions which letter was received by the Respondent on 16/9/2019. Through his said advocates, he on 4/10/2019 received a letter dated 23/9/2019 from the Respondent wherein the Respondent admitted and acknowledged that the Applicant had not given the Respondent any consent to use his photograph and or image in the said promotion and agreed to stop further publications of the Applicant's images and likeness in their promotions and in particular the said promotion.

6. However, the Petitioner was shocked and astonished when he found the said pamphlets were/are still in circulation and were being prominently displayed within Machakos Town and amongst the members of the public even after his advocates on record had addressed the same and assurances from the Respondent. According to the Petitioner, the Respondent neither recalled the said pamphlets that were already in circulation nor did they stop making the pamphlets bearing the Petitioner's image and likeness.

7. It was his case that the Respondent violated his right to human dignity and privacy as envisaged at Articles 28 and 31 of the Constitution since they did not have permission and/or consent from the Applicant to use his image and likeness in their promotions and in particular the said promotion. He averred that to date the Respondent has not apologized to him for using his image and likeness in their promotions and in particular the said promotion.

8. According to the Petitioner, as a result of the foregoing, the Respondent violated his right not be subjected to physical or physiological torture as envisaged at Article 29(d) of the Constitution since the publication of the pamphlets using the petitioner's image and likeness has led to the Petitioner being subjected to harassment and ridicule by his peers who now see him as person of debts who cannot own anything without applying for a loan. He averred that he also became a source of laughter as all his close friends and associates assumed that he could not work for his assets and wondered why he was still working as a *boda boda* rider when the Petitioner was now employed by the Respondent as a model.

9. The Petitioner lamented that the acts of the Respondent of publishing the pamphlets bearing the image of the Respondent without his consent nor expressed permission even led to the Petitioner having to drop some of his loyal customers who saw the said pamphlets and stated that they could not pay a model who was making a lot of money and therefore they would not pay for their commute. He pleaded that he was also subjected to servitude and forced labour as the Respondent made financial gains using his image and photo and in particular its said promotion while the Respondent never made any restitution to the Applicant and therefore exploited the Applicant.

10. According to the Petitioner he was to stand for elections in Machakos Riders Youth Self Help Group in October, 2019 but the same was duly rejected by members upon seeing the pamphlet who stated that they could not select a model and a man of debts as their representative.

11. The Petitioner avers that his rights and fundamental freedoms as enshrined in the Constitution have been violated and this court therefore has power to address the same.

12. He therefore sought the following reliefs:

a) A Declaration that the Respondent violated the Petitioner's fundamental rights to privacy and human dignity under Articles 28 and 31 by publishing the petitioner's image for purpose of commercial advertisements without his consent.

b) A Declaration that the Respondent violated the Petitioner's right under Article 30 of the Constitution by publishing the Petitioner's image and likeness for their own commercial gain with no personal financial advantage gained by the Petitioner herein.

c) An order of permanent injunction restraining the Respondent from publishing and/or using the Petitioner's image and likeness in any way in its advertisements or promotions in any way without the Petitioner's consent and compelling the Respondent to stop any further advertisement or promotions featuring the Petitioner's image and likeness on their pamphlets and to recall all other pamphlets already in circulation with the Petitioner's image and likeness.

d) 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 his express authority and the exploitation of the Petitioner by the Respondent for commercial gain.

e) An order for the costs for the petition.

f) Interest on (d & (e) above

g) Any other relief that this honourable court may deem fit and just to grant.

13. In the affidavit sworn in support of the petition, the Petitioner reiterated the foregoing and exhibited copies of the said advertisements and the demand letter plus the response thereto.

14. The Petitioner also relied on an affidavit sworn by one **Albanus Nyamai** who stated that he was a *boda boda* rider within Machakos town and was a colleague of the Petitioner in the said business having known the Petitioner for over 6 years. Some times in between 2017 and 2020 he have spotted pamphlets within Machakos town on street trees, and also at their *boda boda* stages with the petitioner's photo with the impression that he had a deal or was working with the respondent now.

15. When he called the Petitioner and asked him about the pamphlets the Petitioner told him he still operates *boda boda* motorcycle earning the meagre wages as they usually do. He called the petitioner again and met him with other *boda boda* motorcycle riders and they asked him why he was planning on getting rich alone through the pamphlets all over town but he denied he had any contract for his photo to be used.

16. He averred that the petitioner sometimes on October 2019 sought to be elected as Machakos Riders youth self help group official but they rejected his bid as they believed he was only mocking them since he had an enrichment contract with the respondent.

17. He deposed that again sometimes later December 2019 early January 2020, he spotted the pamphlets still in Machakos town mounted on tree posts and electric poles for advertisement with the petitioner's photo and he believed that the petitioner was still running the enrichment contract. He kept on wondering why the petitioner was riding *boda boda* if he had a contract for advertisement with the petitioner.

18. He disclosed that sometimes in August – October 2019 between January and February 2020 the petitioner sought a friendly loan from him and telling him business has been so bad and that he was thinking of quitting the *boda boda* business and go home. However, the deponent declined to assist the Petitioner as he did not have money. When he inquired from the Petitioner, the Petitioner informed him that most of his customers were telling him that from the pamphlets by the respondent, he was a bank employee and as such they would rather only deal with the deserving *boda boda* riders not the rich ones from bank advertisement.

19. It was averred that it was not until June 2020 that he realised that for all those years the adverts were running from 2017-2020 the petitioner wasn't paid by the respondents and neither had they struck any deal.

20. In response the Respondent fled a replying affidavit sworn by **Janet Mutinda**, the Respondent's Relationship Manager. According to her. Sometimes in the month of May, 2015, she approached the Petitioner who was their customer at the Bank and requested him for the capturing of his photograph for the purposes of the Respondent's said promotion a request which the Petitioner acceded to after being explained to in details the purpose for which his photograph was being taken. Upon confirming that he understood the same, the Petitioner proceeded to sign a Release Agreement authorising the same which Agreement was also signed by the deponent.

21. It was averred that the Respondent's Machakos Branch activated its said campaign on 8th August, 2019 when fliers bearing both the Petitioner's and the deponent's images were distributed. However, some time in the month of September, 2019 the Respondent received a letter from the Petitioner's advocates alleging that the Respondent had breached the Petitioner's right to privacy. However, the deponent's attempts at tracing the said Agreement bore no fruit though the deponent insisted that the Petitioner consented to the capturing of his image by the Respondent and consented to its use by the Bank in its marketing campaigns.

22. The Respondent also fled a replying affidavit sworn by **Lynette Ngila**, its Legal Officer who deposed that in 2004 the Petitioner sought a financial facility to purchase a *boda boda*. At that time the said promotion had been activated in the Respondent's different branches with advertisements running in the local media.

23. He averred that during the tenure of the repayment of the facility, **Ms Janet Mutinda Maweu** approached the Petitioner seeking his consent for the use of his photograph in the Respondent's promotion by the Respondent a request which the Petitioner acceded to. He denied that the Petitioner's photo was taken because of the Petitioner's loyalty and asserted that it has never been the Bank's practice to photograph its clients on account of their loyalty.

24. It was averred that upon receipt of the demand letter, the Respondent responded that it had initiated internal investigations into the allegations and had ceased and withdrawn any further publication and use of the Petitioner's photograph. Therefore, it was averred that the Respondent did not make any admission on the lack of consent in the use of the photograph. It was his view that in light of the Petitioner's consent, the Respondent was absolved from any wrongdoing thereby negating the need for an apology.

25. According to the deponent, the said promotion was activated on 9th August, 2019 in the Respondent's Machakos Branch where the Petitioner is an account holder and the marketing campaign and the distribution of the impugned pamphlets was conducted on the same date. It was averred that it is practically impossible for the Respondent to traverse the entire Machakos County pulling down the affixed pamphlets, despite having ceased their production and publication.

26. The deponent denied the allegations of physical or psychological torture and averred that there was no evidence of harassment, ridicule, stigmatisation or loss of business opportunity or financial gains and insisted that the use of the Petitioner's image was duly authorised and legal.

27. It was submitted on behalf of the Petitioner that *the use of the Petitioner's image and/or likeness and in particular the Petitioner's photograph* in the Respondent's promotion for the purchase of motor cycles known as *bodaboda* entitled "**GET A BODA**" for the

Respondent's financial gain was in violation of the Petitioner's right to human dignity and privacy as envisaged at Articles 28 and 31 of the Constitution since the Respondent did not have permission and/or consent from the Applicant to use his image and likeness in their promotions and in particular the said promotion.

28. It was further submitted that the use by the Respondent of the Petitioner's image and/or likeness without permission, consent and/or authority from the Petitioner also violated the Petitioner's right under Article 30 of the Constitution by publishing the Petitioner's image and likeness for their own commercial gain with no personal financial advantage gained by the Petitioner herein.

29. According to the Petitioner, the letter dated 23/9/2019 is an admission by the Respondent that it did not have petitioner's consent to use his image or likeness for any of the Respondent's advertisements or promotions and in particular the said promotion. To the Petitioner, if the Respondent had the requisite consent by the Petitioner to use the Petitioner's image in its promotion, there was no reason for it to agree to stop using the said image after the same was addressed by the petitioner's advocate. To the Petitioner, the actions by the Respondent in stopping further publication of its promotions using the Petitioner's image shows that the Respondent did not have the permission of the Petitioner to use his image in its promotion otherwise the Respondent would have continued using the Petitioner's image in its promotions after the Petitioner's advocate on record wrote to the Respondent.

30. Based on sections 107 to 109 as read with 112 of the **Evidence Act** it was submitted that though the Respondent has alleged that it obtained consent from the Petitioner to use his image in its promotion, the Respondent has not provided any evidence to show that the consent was ever obtained from the Petitioner. The Respondent being a long standing and successful financial institution, if indeed it had obtained the consent from the Petitioner should have had the same in writing and no document was produced either as an annexure or as an exhibit before the Honourable Court. However, it was submitted that the Respondent has not produced any shred to prove that the Petitioner ever gave the Respondent any consent to use the Petitioner's image or likeness.

31. According to the Petitioner, for the above Petition and claim by the Petitioner to succeed, the Petitioner has to prove the following:-

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.

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

32. In support of this submission the Petitioner relied on the case of **Jessica Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others [2017]eKLR**, **Gutter vs. Lombard and Another 2007 (4) SA 89 (SCA)**, **Angella Wells vs. Atoll Media (PTY) Ltd & Anor, Western Cape High Court Case No. 11961/2006** and **T O. S vs. Maseno University & 3 others [2016] eKLR**.

33. It was submitted that in determining whether the examination in question was lawful and/or reasonable, regard ought to be given to the centrality of human dignity in recognition and protection of fundamental freedoms and rights as underscored under *Article 19 (2) of the Constitution*, a position echoed in the International Treaties, human rights instruments and jurisprudence in other jurisdictions. According to the Petitioner, both the ***International Covenant on Civil and Political Rights (ICCPR)***, the ***International Covenant on Economic, Social and Cultural Rights (ICESCR)*** and ***African Charter on Human and People's Rights*** as well as **Dawood and Another vs. Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8** and **Mayelane vs. Ngwenyama and Another(CCT 57/12) [2013] ZACC 14**.

34. According to the Respondent, having established that the consent was not given it is quite clear that the Petitioner's right to privacy and human dignity were infringed by the Respondent when the Respondent used the Petitioner's image for promotional purposes without the Petitioner's consent and using it for a purpose that the Petitioner never intended to be part of.

35. It was the Petitioner's contention that the said action amounts to slave labour as the Petitioner was not at all rewarded for the use of his image. The Respondent simply exploited the Petitioner for its own benefits. Article 30 was cited in support of this contention.

36. In the Petitioner's view, having established that the Petitioner's rights were violated and the Petitioner exploited by the Respondent, the question now to ask is what compensation the Petitioner is entitled to. In this regard he relied on **NWR & Another vs. Green Sports Africa Limited & 4 others, 2017, eKLR**, **Meru HCCC 7 of 2019 - Joel Mutuma Kirimi & Another vs. National Hospital Insurance Fund (NHIF) [2020] eKLR** and **Milimani HCCC 494 of 2016 - Wangechi Waweru Mwende vs. Tecno Mobile Limited & Another [2020] eKLR**, and **Milimani Constitutional Petition 347 of 2015 - M W K & Another vs. Attorney General & 3 Others [2017] eKLR**.

37. On the part of the Respondent, it was submitted that

Determination

38. I have considered the issues raised in this petition. This petition essentially revolves around an alleged violation of the Petitioner's rights to dignity, privacy and the right not to be held in slavery, servitude and forced labour under Articles 28, 30 and 31 of the Constitution. In my view there is no material on the basis of which this Court can find that the Petitioner's right not to be held in slavery, servitude and forced labour was violated. To find otherwise in the circumstances of this case would be stretching the matter too far.

39. As regards the right to privacy, 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*

40. In Jessicar Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others [2017]eKLR, Mativo J, held that;

“The right to privacy consists essentially in the right to live one’s 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 give or received by the individual confidentially.”

41. The Judge traced the history of the said right when he expressed himself as hereunder:

“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. 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, signature phrase, paraphernalia or action, costume or personals signature. The tort of misappropriation of personality was first introduced in Canada in the case of Krouse vs Chrysler Canada. The tort can be expressed by stating that every individual has an exclusive right to market, for financial gain, their personality, image and name, and that the law entitles an individual to protect that right, if it is invaded. The tort of misappropriation of personality can be invoked when all of the following four elements are met:

- a) *There is an element of commercial exploitation of a person’s personality. There must be a sufficient link between the individual and the exploiting medium to establish that the plaintiff’s personality was “used” for the defendant’s commercial gain.*
- b) *The person is clearly identifiable in the medium used and to their respective community or communities.*
- c) *The person does not consent to the use of their personality.*
- d) *Damages, either emotional or financial losses, are proven although recent judicial rulings would indicate the right of privacy is recognized even in the absence of damages.”*

42. Similar sentiments were expressed in the South African case of Grutter vs. Lombard and Another 2007 (4) SA 89 (SCA), where it was noted as follows –

“The extent to which the features of a person’s identify – for example his or her name or likeness – constitutes interests that are capable of legal protection has received little attention from our courts. In the United States the appropriation of a person’s name or likeness for the benefit or advantage of another has come to be recognized as an independent tort during the course of the last century. The English common law seems to have been more reticent in that regard. In his illuminating dissertation on the subject P.P.J Coetsier observes that in Germany ‘wide protection has been afforded by the positive law to an individual’s interest in identity’ form which has emerged that ‘it is unlawful to use certain aspects of personality for commercial purposes without consent.’

“In this country it appears to be generally accepted academic opinion that features of personal identify are indeed capable (and deserving) of legal protection.”

43. It was therefore held in South African case of Angella Wells vs. Atoll Media (PTY) Ltd & Anor, Western Cape High Court Case No. 11961/2006 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.”

44. Here at home, Chemitei, J in the case of T O. S vs. Maseno University & 3 others [2016] eKLR 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.”

45. The right to privacy was dealt with extensively in Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 Others [2015] eKLR where it was held that:

“285 The right to privacy is guaranteed under Article 31 of the Constitution..

.....

286. The right to privacy has also been expressly acknowledged in international and regional covenants on fundamental rights and freedoms. It is provided for under Article 12 of the UDHR, Article 17 of the ICCPR, Article 8 of the European Convention on Human Rights (ECHR) and Article 14 of the African Charter on Human and Peoples’ Rights.

287. B. Rossler in his book, *The Value of Privacy* (Polity, 2005) p. 72, explains the right to privacy as follows:

“The concept of right to privacy demarcates for the individual realms or dimensions that he needs in order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies. Such realms or dimensions of privacy substantialize the liberties that are secured because the mere securing of freedom does not in itself necessarily entail that the conditions are secured for us to be able to enjoy these liberties as we really want to”.

288. As to whether there is need to protect privacy, he goes on to write 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”.

289. The New Zealand Supreme Court in *Brooker vs the Police* (2007) NZSC 30 at para.252 stated as follows:

“Privacy can be more or less extensive, involving a broad range of matters bearing on an individual’s personal life. It creates a zone embodying a basic respect for persons...Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society...It is closely allied to the fundamental value underlying and supporting all other rights, the dignity and worth of the human person.”

290. Applying the normative content of the right to privacy as stated above and what that right seeks to protect, we are clear in our mind that surveillance in terms of intercepting communication impacts upon the privacy of a person by leaving the individual open to the threat of constant exposure. This infringes on the privacy of the person by allowing others to intrude on his or her personal space and exposing his private zone. In the Irish Supreme Court case of *Kennedy vs Ireland* (1987) I.R 587 it was held that the phone-tapping of the two journalists in question violated their right to privacy. Hamilton J made it clear that the right to privacy must ensure the preservation of the dignity and freedom of the individual in a sovereign, independent and democratic society. In his view:

“The dignity and freedom of an individual in a democratic society cannot be ensured if his communication of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with.”

46. In Brooker vs. The Police [2007] NZSC 30 at para 252 it was stated that:

“Privacy can be more or less extensive, involving a broad range of matters bearing on an individual’s personal life. It creates a zone embodying a basic respect for persons...Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society...It is closely allied to the fundamental value underlying and supporting all other rights, the dignity and worth of the human person.”

47. There is no doubt therefore that 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 a relief. In this case, it is not in doubt that the Petitioner’s images were taken and published in order to promote the Respondent’s business. Prima facie, that amounted to a violation of the Petitioner’s right unless the said action can be justified by the Respondent. In Karugaba vs. Attorney General [2003] 2 EA 489 it was held that:

“The burden was on the Appellants to prove that the State or somebody else under the authority of any law has violated their rights and freedoms to publish guaranteed under the constitution. Once that has been established, the burden shifts to the State or the person whose acts are being complained of to justify the restrictions being imposed or the continued existence of the impugned legislation.”

48. Similarly in Lyomoki and Others vs. Attorney General [2005] 2 EA 127 it was held that:

“The principles of constitutional interpretation in Uganda are as follows:-

(i). The onus is on the petitioners to show a *prima facie* case of violation of their constitutional rights. Thereafter the burden shifts to the respondent to justify that the limitations to the rights contained in the impugned statute is justified within the meaning of Article 43 of the Constitution...”

49. Since it is admitted that the Petitioner’s image was published, that was prima facie evidence of violation of his privacy. Accordingly, the burden shifted to the Respondent to justify that the limitations to the said right. Apart from bare averments, there was no evidence that the Petitioner consented to the violation of his rights since the Respondent failed to adduce the alleged Release Agreement as signed by the Petitioner. In the premises, I have no hesitation in finding that the Petitioner’s right to privacy was violated.

50. As regards the right to dignity, in Ahmed Issack Hassan vs. Auditor General [2015] the Court held that:

“...the right to human dignity is the foundation of all other right and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated”.

See Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) SCR (2) 516. P

51. As expressed by Albie Sachs in *The Strange Alchemy of Life and Law* (OUP) at page 213:

“Respect for human dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not simply to ensure that the “haves” can continue to have, but to help create conditions in which the basis dignity of the “have nots” can be secured..”

52. Likewise, it was submitted that the Constitutional Court of South Africa in Dawood and Another vs. Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8 stated that:-

“Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. Human dignity is also a constitutional value that is of central significance in the limitations analysis.”

53. In the Petitioner’s view, it is thus apparent, regardless of one’s status or position or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected and reliance was placed on the South African Constitutional Court holding in Mayelane vs. Ngwenyama and Another (CCT 57/12) [2013] ZACC 14 that:-

“...the right to dignity includes the right-bearer’s entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one’s personal circumstances is a fundamental aspect of human dignity.”

54. In Kennedy vs. Ireland [1987] IR 587 as cited in Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic & 10 Others [205] KLR it was held that:

“The dignity and freedom of an individual in a democratic society cannot be ensured if his communication of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with.”

55. It is therefore clear that by publishing the Petitioner’s image being advanced a financial facility, the Respondent violated the Petitioner’s right to dignity.

56. As regards the damages, it is well settled that award of compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case.

57. Based on the principles stated in M W K & Another vs. Attorney General & 3 Others [2017] eKLR, I hereby enter judgement for the Petitioner against the Respondent grant the following orders:

a. A Declaration that the Respondent violated the Petitioner’s fundamental rights to privacy and human dignity under Articles 28 and 31 by publishing the petitioner’s image for purpose of commercial advertisements without his consent.

b. An order of permanent injunction restraining the Respondent from publishing and/or using the Petitioner’s image and likeness in any way in its advertisements or promotions in any way without the Petitioner’s consent and compelling the Respondent to stop any further advertisement or promotions featuring the Petitioner’s image and likeness on their pamphlets.

c. Kshs 2,000,000.00 being damages for the violation of the Petitioner’s right to dignity and privacy.

d. Interests and costs.

58. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 22nd day of February, 2021

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kiiru for the Respondent

Mr Muthama for Mr Mutua Makau for the Petitioner

CA Geoffrey