



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 494 OF 2016

WANGECHI WAWERU MWENDE.....PLAINTIFF

VERSUS

TECNO MOBILE LIMITED.....DEFENDANT

ROGERS OUMA T/A OJWOK PHOTOGRAPY.....3RD PARTY

JUDGMENT

BACKGROUND

The Plaintiff (herein “**Wangechi Waweru Mwendu**”) vide a Plaint dated 30th November 2016, instituted a suit against the Defendant (herein “**Tecno Mobile Limited**”) claiming that the Defendant used the Plaintiff’s image and likeness without the Plaintiff’s consent.

The Plaintiff is a renowned singer, songwriter and a rapper in the Kenya music industry and popular among the upwardly mobile Kenyan youth and young adults. The Plaintiff endorsed various campaigns and brands for different corporate entities.

The Plaintiff averred that in early July 2016 the Defendant commenced a social media campaign intended to celebrate the beauty and diversity of Kenya through a marketing strategy dubbed the **see9seekenya** and specifically under the hashtag **#see9seekenya**. The online promotion was active between the 7th to 20th July 2016.

That the Defendant in a bid to popularize the campaign used the Plaintiff’s image and likeness in the form of images and audiovisual work on social media platforms including and not limited to **Instagram, Facebook, Twitter** and **YouTube** to advertise and endorse their campaign.

That the Defendant without any authority intentionally used the Plaintiff’s image and likeness in a promotional campaign and for advertising purposes for commercial benefit thus violating the Plaintiff’s Constitutional right to privacy enshrined in **Article 31 of the Constitution of Kenya 2010** and by extension her person’s rights.

The Plaintiff further averred that she neither consented to the use of her image nor submitted any of her photographs to the Defendant to be used in the campaign. As a direct and consequential result of the unauthorized use of her image the Plaintiff’s legitimate expectation of the Constitutional right to privacy had been breached by the Defendant.

LEGAL FOUNDATION OF THE CLAIM

a) **Article 11(2)(c)** recognizes culture as the foundation of this nation and provides that the State shall promote the intellectual property rights of the people of Kenya. The Plaintiffs intellectual property right to control the commercial exploitation and use of her image has been infringed.

b) **Article 22(1) of the Constitution of Kenya 2010** provides that every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. The Plaintiff’s right to privacy under the Bill of Rights has been infringed and the Plaintiff therefore has locus to institute this suit.

c) **Article 23 (1) of the Constitution of Kenya 2010** provides that the High Court has the 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. This Court has jurisdiction to hear this claim and grant appropriate relief in accordance with **Article 23**

(3) including a Declaration of Rights and an Order for compensation.

d) **Article 31 of the Constitution of Kenya 2010** provides that every person has the right to privacy which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed. The Defendant has infringed on the Plaintiff's right to privacy of her image and published photos of the Plaintiff without consent and for commercial gain.

e) **Section 33 (3) of the Copyright Act** provides that no assignment of copyright to do an act the doing of which is controlled by copyright shall have effect unless it is in writing signed by or on behalf of the assignor. The Plaintiff had not assigned the use of her image and the use of her image by the Defendant is an infringement.

f) **Section 35 of the Copyright Act** provides that copyright shall be infringed by a person who without the license of the owner of the copyright does or causes to be done an act the doing of which is controlled by copyright.

THE DEFENDANT'S STATEMENT OF DEFENCE

The Defendant in its statement of defense admits that there is no subsisting suit and/or proceedings with the Plaintiff over the same subject matter and denies each and every allegation in the Plaintiff as if the same were set for verbatim and denied herein seriatim.

NOTICE OF MOTION DATED 15TH MAY 2017

By a notice of motion dated 15th May 2017, pursuant to **Order 1 Rule 15, Order 8 Rule 3, 5 and 8 and Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act** and all other enabling provisions of the law, the Applicant/Defendant sought orders;

- a) That the Court grants leave to the Defendant to amend its defence and /or file a counterclaim against the Plaintiff.
- b) That the Court grants leave to the Defendant to issue and serve a Third Party Notice upon **RODGERS OUMA** trading as **OJWOK PHOTOGRAPHY**.

The Application was based on grounds;

- a) That the amendment was necessary to determine the real question in issue between the parties to this suit.
- b) That the pleadings had already closed and the leave of the Court was necessary for the amendment to be made.
- c) That the Defendant is entitled to indemnity and/or contribution from the proposed Third Party for any judgment that may be issued against it;
- d) That it is in the interests of justice that the Defendant is allowed to amend its defence, institute a Counter claim against the Plaintiff and the proposed Third Party be joined to facilitate the determination of the issues in this suit.

THE DEFENDANT'S AMENDED STATEMENT OF DEFENCE AND COUNTERCLAIM

In response to paragraph 2 of the Plaintiff the Defendant denies the same and the Plaintiff is put to strict and absolute prove of the same. States that its name is **TECNO MOBILE LIMITED**, a limited liability company incorporated in Hong Kong as whose address for service is as provided for herein.

The Defendant denies paragraph 5 – 11 of the Plaintiff and further states as follows;

- a) That at all material times the use of the image and likeness of the Plaintiff was with the Plaintiff's knowledge and consent;
- b) That the said video which was minutes long and featured the image for about only a very insignificant part, together with a host of more images, was duly uploaded on the Defendant's online social media accounts;
- c) That the video in which the image was used in was such that no reasonable person would have assumed that the images thereon and the people in them were endorsing the Defendant's products;
- d) That at no material time did the Defendant claim that the Plaintiff was endorsing it and or any of its products;
- e) That apart from the use of the image the subject of this suit, no mention was ever made in the video about the Plaintiff including but not limited to her name, career and music with the image the being but one of hundreds of other images both of persons, animals, things and places.
- f) That the video aforementioned was uploaded online but immediately removed as soon as the Plaintiff claimed that she was the owner of copyright to the image the subject of this suit and that she had not consented to its use.

g) That the intention and purpose of the campaign was to celebrate the beauty, richness and diversity of Kenya and its people and no material and or commercial gain was made from it by the Defendant.

The Defendant further stated that it believed that the Copyright owner to the image the subject of this suit was and is a photographer known as **OJWOK PHOTOGRAPHY** and that the Defendant shall with the consent of this Court institute Third Party proceedings against him.

In its counterclaim the Defendant stated that the word or statements made by the Plaintiff and also comments that she allowed to be published by her friends and the general public and which she allowed to remain published on her social media pages in their natural and ordinary meaning meant and were understood to mean of and concerning the Defendant inter alia that:-

- a) That the Defendant fraudulently and or illegally used the Plaintiff's image without her knowledge and or consent;
- b) That the Defendant had robbed her and was robbing artists of their rights to earn a living.
- c) That the Defendant pulled down the video in which her image was featured in a bid to get rid of evidence of its wrongdoing and was getting rid of evidence and in effect obstructing justice;
- d) That the Defendant is of bad morals, unjust and fraudulent and not deserving of its corporate status as being a competent and professional business undertaking and led by equally endowed officials who should never be trusted.

The Defendant avers that the contents of the Plaintiff's video and post (and also comments that she allowed to be published by her friends and the general public and which she allowed to remain published on her social media pages) were false, malicious and defamatory of the Defendant and the Plaintiff in so publishing and or causing the same to be published was actuated by extreme malice and spite and the same were calculated to injure the Defendant in tis professional and business image.

REPLY TO DEFENCE AND DEFENCE TO COUNTERCLAIM

The Plaintiff in her reply to defence dated 7th August 2017, stated that it is her image and likeness that the Defendant exploited in their online campaign, which image and likeness she has the right to control.

The Plaintiff further avers that the Defendant has not shown any proof of assignment of rights under the Copyright Act from the Plaintiff.

The Plaintiff stated that she is guaranteed a right to privacy under the Constitution of Kenya, 2010 and any limitation to the said right must be legally provided for under the Laws of Kenya.

In reply to defence to counterclaim the Plaintiff stated that her statements were nothing but the truth and were made with the sole intention of making it clear that she does and did not endorse the Defendant's brand and had not entered into any agreement with the Defendant to allow the Defendant to exploit her image and likeness for the campaign.

HEARING

PLAINTIFF'S CASE

On 27th June 2019, the Plaintiff, Wangechi Waweru Mwendu PW 1 testified relying on her statement that she is a renowned singer, song writer and rapper in the Kenya music industry and she endorsed various campaigns and brands for different corporate entities.

In early July 2016 she was called by her colleague and informed that her photo was on the Facebook page in the #see9seeKenyaadvertisement. PW1 checked social media pages Facebook, Twitter & Instagram and confirmed it was true.

PW1 did not provide her image, and she did not consent to her image being used nor was she consulted and she was not compensated. She claimed compensation, as she is a known brand. The Defendant, Tecno Mobile used her image and likeness in form of advertisement and she came across as endorsing the Defendant's product.

PW1 stated in cross -examination that she did not know Ojok Photographer, she had never met him or interacted with him. PW1 discovered he had her pictures, the watermark and signature on the pictures were not endorsed/signed by her. PW1 confirmed the pictures could have been taken at Blankets & Wine function she attended, She did not know photographs were taken, she did not employ or commission anyone to take pictures. The Photographer would not have a copyright as alleged by the Defendant. Whoever, took the picture never sought her permission to take or use her image /likeness.

On being tagged, PW1 stated she is tagged 30 times a day and does not use all tags.

PW1 consulted her lawyers on the matter who wrote to the Defendant on 22nd July 2016 on claim for compensation for PW1's image/likeness use and the Defendant put down all adverts thereafter. The Defendant responded vide letter dated 1st August 2016 that any copy right issue is/was best resolved between the Plaintiff and Photographer.

The Plaintiff sought prayers in the Plaint.

DEFENDANT'S CASE

On the same date, the Defendant, Serah Owuor Sano DW1 testified relying on her Witness Statement and stated that she is employed by Carl Care Service which ran the campaign for the Defendant Tecno Mobile Limited to show Kenya's unparalleled beauty richness and diversity of Kenya.

They received a letter from the Plaintiff on 22nd July 2016 through her advocates that the Plaintiff's photograph was used without her consent. The campaign ran from 7th July – 22nd July 2016 when the campaign stopped. They put down the pictures as were advised by their advocates. The Defendant did not get any commercial gain.

DW1 stated that the Plaintiff wrote a letter and said that the Defendant was fleecing artists and people said that they were not going to buy the Tecno 9 phone.

In cross examination, DW1 stated that the Plaintiff did not give written consent. They vetted to find out if the image was stolen or bought online. They contacted Ojok Photography and confirmed the Plaintiff's image was his and he ought to be the Plaintiff in this case. The video ran for 30 seconds and there were other images at the same time.

DW1 stated that they had a disclaimer;

“By submitting your photos or videos, you give Tecno the consent to use your work. Tecno reserves the right to make final decisions.”

The Defendant ran the campaign for photographers and received various submissions, PW1's image was from Ojok photographer and on his Instagram found PW1's pictures and he stated he was entitled to the photos. The Defendant is of the view the photographer has a copyright.

DW1 urged the Court to dismiss the suit.

PLAINTIFF'S SUBMISSIONS

The Plaintiff in her submissions stated that the Defendant did not pursue their Counterclaim and failed to establish the defamatory aspect of the Facebook post by the Plaintiff as they failed to produce any evidence to prove that the statement was not truthful.

The Plaintiff relied in the case of *Jessicar Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others [2017]eKLR*, Mativo J, held that;

“25. 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.

26. 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.

28. 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.”

The Plaintiff submitted that her image and likeness, used in a marketing campaign for the Defendant's products, was clearly identifiable by the general public and in the medium used for exploitation of such image and likeness by the Defendant. The Plaintiff clearly established that she did not consent to such exploitation and that there was clear damage both emotional and financial due to the actions of the Defendant.

The Plaintiff further submitted that in regard to the objection by counsel for the Defendant to the production of the video without certificate under **section 106 B (4) of the Evidence Act Cap 80**.

The Plaintiff submitted that the matter before this Court, was the unauthorized use of the Plaintiff's image by the Defendant for commercial gain. The Plaintiff invested a lot of resources, both financial and time, in cultivating her career in the music industry which is very difficult in Kenya, to get to where she is today. The Defendant has trampled on all the hard work and decided to take advantage of the work she has put into developing her brand to market its own brand.

DEFENDANT'S SUBMISSIONS

It was the Defendant's submission that on the issue of proof of assignment, the law does not allow the Plaintiff to shift the burden of proof to the Defendant unless she could first prove ownership of copyright and which she failed to. All the Plaintiff was required to prove was that she commissioned for the photograph and therefore the copyright belonged to her.

That at the very most, only a temporary or none exclusive licence would suffice for the duration of the campaign as per the terms and conditions of the campaign. One of conditions of the campaign was as follows;

"By submitting your photos or videos, you give Tecno the consent to use your work."

Section 33 (4) of the Copyright Act provides as follows;

33 (4) A non-exclusive licence to do an act the doing of which is controlled by copyright may be written or oral, or may be inferred from conduct, and may be revoked at any time, but a licence granted by contract shall not be revoked, either by the person who granted the licence or his successor in title, except as the contract may provide, or by a further contract.

The Defendant submitted that the Plaintiff has not met the threshold of proving all the ingredients required in a claim of the right to economic gain for use of one's image and likeness which were laid out in the case of Jessica Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others [2017]eKLR as follows:-

i. Use of 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.

ii. 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.

iii. No consent: The Plaintiff must establish that he or she did not give permission for the offending use.

The Defendant submitted that the Plaintiff did not comply with the mandatory provisions of section 106 (B) 4 of the Evidence Act (Cap 80) Laws of Kenya which provides:-

"In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following;

d)Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it."

Section 35(5) of the Copyright Act provides as follows:-

35(5) where in an action for infringement of copyright it is proved or admitted-

a) That an infringement was committed; but

b) That at the time of the infringement the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement whether or not other relief is granted under this section.

In Alternative Media Limited vs Safaricom Limited [2005]eKLR, the court held that;

"in a nutshell, the plaintiff has failed to place before me such material as would enable the court carry out any meaningful calculation of the damages awardable to it. I also hold that the Plaintiff has failed to prove that it is entitled to any damages for the infringement of its moral rights, pursuant to section 32 of the Copyright Act.

I decline to order either an inquiry as to damages or an account of profits. As far as I am concerned, these two remedies would have been available to the plaintiff only if it had opted to first have the issue of liability determined. In that event, once the court had made a pronouncement on the issue of liability, the Plaintiff could have been put to an election, and appropriate directions would have been made for further proceedings. But, the Plaintiff already sought to prove the damages it was entitled to, albeit unsuccessfully. In these circumstances, I can do no more than to award the plaintiff, nominal damages. Accordingly, I hereby

award to the Plaintiff the sum of Ksh 100,000/- as general damages for the infringement of its copyright.”

In Phinehas Nyagah vs Gitobu Imanyara [2013] eKLR, Odunga J held that;

“Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice. ... malice may also be inferred from the relations between the parties... the failure to inquire in the facts is a fact from which inference of malice may properly be drawn.”

DETERMINATION

The Court considered the pleadings and evidence adduced by parties and submissions. The issues that emerge for determination are as follows;

- a) Is the Plaintiff’s claim of Defendant’s use of the Plaintiff’s image and likeness published online and available to global audience without restriction amount to infringement of Plaintiff’s right to privacy protected by Article 31 COK 2010 and deprivation of legitimate expectation of compensation for use of her likeness and image sustained?
- b) Is the Defendant’s claim that at all times the copyright author or owner of Plaintiff’s image is Ojwok Photography who submitted the image to the Defendant and has been joined as 3rd Party to these proceedings sustained?
- c) Has the Defendant proved/established its counterclaim on defamation?
- d) If Liability is found, what is the quantum?

PLAINTIFF’S CLAIM

The Plaintiff’s claim is of the 1st Defendant’s use of Plaintiff’s image and likeness in social media platforms Facebook, Instagram, Twitter and You tube to advertise and endorse the campaign see9seekenya between 7th – 20th July, 2016 without her knowledge consent or approval. The plaintiff annexed to the Plaint, List of documents that included screenshots of campaign by Tecno Mobile Kenya on Official Tecno Mobile Kenya Instagram Account, which had/has the Plaintiff as one of the people in picture. Another caption with a picture of the Plaintiff on video on the Techno mobile See9seeKenya WinCamonC9 – Tecno mobile community. A copy of Plaintiff’s picture on Tecno Kenya Mobile page on the competition, the judges and winners.

The Plaintiff relied on **Articles 22 23 31 & 40 (5) of COK 2010** and **Sections 33 & 35 of Copyright Act** to vindicate her claim through access to justice by enforcing constitutional right of right to privacy.

The 1st Defendant in the Amended Defence and Counterclaim opposed the Plaintiff’s claim as follows;

Whereas the 1st Defendant admitted it ran an online campaign dubbed #see9seekenya as a way to celebrate the beauty, richness and diversity of Kenya and its people, it stated that at all material times the use of the image and likeness of the Plaintiff was with the Plaintiff’s knowledge and consent. The Defendant said the video was minutes long and featured the Plaintiff’s image for a very insignificant part, together with a host of more images which were duly uploaded on the Defendant’s online social media accounts. The Defendant indicated that at no material time did the Defendant claim that the Plaintiff was endorsing it or any of its products.

The Defendant deposed that the aforementioned video was uploaded online but immediately removed as soon as the Plaintiff claimed that she was the owner of the copy right to the image the subject of this suit and that she had not consented to its use. Therefore, the Plaintiff has suffered no damage.

The Defendant further states that at all material times it had believed that the Copy right owner to the image the subject of this suit was and is a photographer known as Ojwok Photography. The Defendant applied to join him as 3rd party. On 7th February 2018, Hon L. Onguto J granted joining the intended 3rd party by serving him through substituted service within 21 days. On 21st May 2018, the defendant filed Affidavit of Service to confirm the 3rd Party was served. The 3rd party Ojwok Photography despite service failed to appear in Court, or to be represented or to furnish the Court with reasons, circumstances leading to his absence for the Court to consider. He also did not file any document/pleadings to controvert any claim.

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’

On 1st November 2019 the Court Counsel and parties watched the Video and it depicted the Plaintiff who appeared for seconds in a Tecno Mobile advertisement captioned See9SeeKenya.

The evidence on record confirms that the Plaintiff's Image was used by the Defendant without her knowledge, approval or consent.

Mr Ogolla, Counsel for the Defendant submitted that the subject/plaintiff appeared in less than 3 seconds in a video clip of 60 seconds. The subject did not appear specifically captioned but was part of general depiction of images supplied or conveyed by different participants in the competition.

Mr Gichuhi, Counsel for the Plaintiff submitted that the 1st caption was #see9seekenya which was a derivative of Tecno mobile phone tecnoC9. The entire campaign was geared to increasing publicity of the Techno mobile C9phone and advertising by increasing the Techno brand.

The Court confirmed that it was advertisement of #see9seekenya campaign by Techno mobile. The Plaintiff appeared in a photograph/picture that was ran among other pictures/photos captioned 'people' the Plaintiff 's picture/photo appeared for almost 14 seconds or so in a clip of almost 1 minute.

After watching the video, the Defendant through Counsel objected to the video as it was contrary to **Section 106 (4) A of the Evidence Act Cap 80**. The Plaintiff through Counsel failed to present a certificate. On 6th December 2016, the Plaintiff annexed to the Plaintiff a List of Documents that included the video of the Techno Mobile Campaign that featured the Plaintiff. The Defendant was served and did not raise any issue with regard to objection to viewing of the video. On 9th& 16th March 2017, Parties through Counsel filed Case Management Checklist & Pretrial Questionnaire under **Order 11 of CPR 2010** and the issue of the certificate required under **Section 106 of the Evidence Act** was not raised. During the hearing, this Court indicated that the video would be watched at the close of proceedings, the Defendant did not raise any objection to the same or requirement of the certificate. On the day the video was presented, in the presence of Parties through their respective Counsel, no objection was raised until after we all watched the video. To ask the Court to expunge the video watched when there was ample opportunity to object to its presentation in Court is not practical in the circumstance. The Court cannot possibly 'unhear' or 'unsee' what was presented and already internalized. In adversarial proceedings, the objection ought and should have been raised before watching the video and no reason is advanced why the objection was not raised at the time. **Section 106 of Evidence Act** is not time bound. The Court allowed the Plaintiff to regularize the matter and later on presented a certificate to which parties were allowed to submit on. This Court is guided by the case of; *Keshavji Jivraj Shah vs Kanwal Sarjit Singh Dhiman [2019] eKLR supra* where the Court observed;

“21. ... the provisions of Article 159(2d) of the Constitution which requires the court to do substantive justice without undue regard to technicalities. The Constitution underpins the overriding objective in sections 1A and 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which imposes on the parties and their advocates to assist the court in ensuring substantive justice is achieved. The respondents ought not be permitted to defend their case by ambush where full discovery has been made and opportunity given to the parties, at the pre-trial conference, to raise all objections concerning admissibility of documents and other evidence in advance of the hearing.”

The import is that the video confirmed the use of the Plaintiff's image and likeness/photo/picture on the Techno mobile video that advertised the #see9seekenya campaign. The advertisement consisted of the various pictures/photos submitted in the competition by various artists in a bid to win the Techno C9 phone, which increased coverage and Defendants publicity. The Plaintiff's picture was part of the advertisement of Techno mobile brand and products and seemingly the Plaintiff's picture implied and nuanced endorsement of Techno Mobile Company brand and quality of its products. The advertisement that had the Plaintiff's photo ran for 2 weeks from 7th July – 22nd July 2016 on all social media platforms; Facebook, YouTube, Instagram and Twitter. It was not controverted that the Plaintiff is a renowned singer, songwriter and rapper popular among youth. For a multinational company resident in Kenya, by using the Plaintiff's image and likeness in the advertisement of the campaign, it may have had dedicated clientele but gained vast potential and increased clientele for its products.

With regard to whether the Plaintiff gave consent for her image /likeness/photo/picture to be used as part of the Defendant's campaign and advertisement, the Plaintiff testified that she was alerted on the use of her image in social media.

The Defendant submitted that the Plaintiff during cross examination stated that the photograph with her image was taken with her consent. The Court record confirms the Plaintiff's examination in chief was she did not provide the image, she did not consent she was not consulted and she was not compensated for use of her image.

In cross examination by Defendant's Counsel, the Plaintiff identified photographs at Pg 5 & 6 as her photographs but the signature and watermark were not hers. The Plaintiff stated that since she seemed to be smiling at the camera, she may have consented to the photographs being taken. The Plaintiff intimated the photographs could have been taken at 'Blanket & Wine' function, she could not remember but many photographs were/are taken of her at various functions. These answers do not amount to the Plaintiff admitting giving consent to taking of the specific photograph, that was used in the Defendants campaign.

The Defendant further submitted that it notified the Plaintiff by 'tagging' through social media accounts and without her raising any objections, consent on the part of the Plaintiff could be inferred from her conduct.

The Plaintiff admitted to being techno savvy and a frequent user of social media she would have raised any objection at the earliest opportunity.

In cross examination, the Plaintiff stated that she receives almost 30 tags daily and she does not go through all of them each day.

The Court was not presented with any evidence of communication, negotiations and/or agreement on the use of the Plaintiff's image and likeness in the Defendant 's campaign and advertisement. There is also no evidence of Plaintiff submitting her photograph to /in the Defendant's competition.

The Defendant stated that Ojok Photography an entrant to the Techno Mobile #see9seekenya competition presented the Plaintiff's photograph.

He was joined as 3rd party to the proceedings. Despite service he entered no appearance nor filed any documents in Court.

A tag is an alert on social media platforms/accounts. It does not amount to implied consent if one does not respond to it. It also cannot amount to consent as it is a notification of the photograph already uploaded which is akin to seeking consent after the fact. Therefore, it is not a mechanism to seek or obtain consent, the consent must be explicit. The Plaintiff did not consent to her image and likeness to be used in the Defendant's campaign and advertisement.

c) Is the Defendant's claim that at all times the copyright author or owner of Plaintiff's image is Ojwok Photography who submitted the image to the Defendant and has been joined as 3rd Party to these proceedings sustained?

The Defendant submitted that there was a condition;

'By submitting your photos or videos, you give Techno the consent to use your work.'

The 3rd Party submitted the Plaintiff's photograph which had a watermark and signature, the Plaintiff did not prove that she had copyright over the photograph as provided by **Section 2 of Copy Right Act** which defines copy right as *original work of visual art created by Artist or produced under authority..... and includes photographs....*

The Defendant relied on **Sections 32 of the Act** that provides for moral rights of the author, **Section 33 of the Act** that provides for modes of assignment and licenses of a copyright. The Defendant also relied on **Section 34 of the Act** on rights of action and remedies for exclusive license and sublicense and **Section 35 of the Act** that provides for redress for infringement of the copy right.

The totality of these provisions protect an author or artist of visual art as owner of copyright and as such the Defendant submits the 3rd Party is the copyright owner and not the Plaintiff. Nevertheless, the 3rd Party despite being served even through substituted service has never responded or appeared in Court or filed any pleadings. Therefore, the claim under Copy Right Act by the Plaintiff must fail as it is only the originator of visual art who can/may successfully plead and/or prove right to a copyright. The Plaintiff is owner of her image but not author or artist of original works herein the subject photograph.

c) Has the Defendant proved/established its counterclaim on defamation?

The Defendant pleaded in the Amended Defence, pleaded that the Plaintiff aware of the circumstances of this matter. The Plaintiff produced a video and published on line with the following words;

"Hi, it's your girl Wangechi. In early June Tecno ran an advert in Facebook, Twitter and Instagram to advertise one of their phones on a campaign. They used my image and likeness on this campaign but did not contact me or ask me for permission to use my image and likeness as an endorsement. My management reached out to them with the hope that it could be solved out of court quickly and professionally. Yet after eight weeks they deleted both images and videos from all their social media pages. As an artist, my image is how I earn a living and it is not right for brands to believe that they can get away with robbing us from our rights to earn a living. Our image and likeness is our livelihood, it is not right to steal from us artists. Tecno, pay Wagechi."

The Defendant averred the contents of the Plaintiff's video and post were false, malicious and defamatory of the Defendant and the publication was actuated by extreme malice and spite and calculated to injure the Defendant in its professional and business image. The Defendant sought full and unqualified apology, general damages, aggravated and exemplary damages costs and interest.

The Defendant relied on the following cases;

1) *Kipyator Nicholas Kiprono. Biwott vs George Mbugguss & Anor [2000] eKLR.*

"I do not find that the defendants have any defence to this suit having not given particulars of "truth and fair comment" pleaded in the defence, as required by the law..."

2) *Joseph Njogu Kamunge vs Charles Muriuki Gachari [2016] eKLR*

" a defamatory statement is presumed to be false, unless the Defendant can prove its truth. Defamation law puts the burden of proving the truth of allegedly defamatory statements on the defendant, rather than the Plaintiff."

3) *Phinehas Nyagah vs Gitobu Imanyara [2013] eKLR*

"Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice.Malice may also be inferred from the relations between the parties... the failure to inquire in the facts is a fact from which inference of malice may properly be drawn."

The Plaintiff in Defence to Counterclaim, the plaintiff admitted she did publish an online video narrating the sequence of events of the

Defendant's unauthorized use of her image and relied on the Defence of truth honest opinion and fair comment. The Plaintiff denied contents of paragraph 18 & 19 of the Counterclaim and put the Defendant to strict proof.

The Plaintiff submitted that the Defendant did not pursue their Counterclaim and failed to establish the defamatory aspect of the Plaintiff's Facebook post and failed to produce any evidence that the statement was untrue.

In the case of *Selina Patani & Anor vs Dhiranji V Patani [2019] eKLR C.A.* referred to the following cases;

a) *Clement Muturi Kigano vs Hon Joseph Nyagah HCCC 509 of 2008* where the Plaintiff's action failed for failure to produce the alleged defamatory statement as evidence of publication.

In the instant case, the alleged defamatory statement is contained in the Defendant's witness statement; paragraph 26 of Mary Osano's statement. The list of Documents filed on 24th July 2017 refers to a transcript of Defendant's defamatory video published on line. During the testimony by DW2, apart from relying on all documents/pleadings filed by Defendant, no reference was made to the transcript and who authored it. The Defendant referred to a video and post by the Plaintiff defaming the Defendant, why was the video not produced as evidence? How would the Court rely on a transcript to prove publication of the defamatory statement? **Section 107 of the Evidence Act** mandates that he who alleges must prove. The Defendant has not proved publication of the defamatory statement by the Plaintiff.

b) In *John Ward vs Standard Ltd HCC1062 of 2005* the ingredients of defamation were summarized as follows;

- *The statement must be defamatory*
- *The statement must refer to the Plaintiff*
- *The statement must be published by the Defendant*
- *The statement must be false*

The Plaintiff admitted publication of sequence of events that have culminated to these proceedings and relied on the Defences of Justification and Fair Comment as provided under **Sections 14 & 15 of Defamation Act.**

The Plaintiff's cause of action arose in 2016, the Plaintiff after sending demand letters through her advocate on 22nd July and 17th August 2016, the Defendant went silent on the matter.

The captions at **paragraphs 26 & 27** of the Supporting Affidavit to Notice of Motion filed on 15th May 2017 are excerpts of the Plaintiff's statement(s) These words are a chronology of events of the Plaintiff's claim against the Defendant as depicted and confirmed by the pleadings in Court. The Plaintiff's image was used in June –July 2016 it was in social media platforms. The Plaintiff contacted the defendant through her Counsel and the Defendant responded through their Counsel. After the Plaintiff's letter of 17th August 2016 there was silence, no response and the Plaintiff filed her claim in November 2016.

Halsbury Laws of England 4th Ed Vol 28 Pg 23 provides;

“In deciding whether or not a statement is defamatory, the Court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.”

The Defendant submitted that the letter of 1st August 2016 was to reply to the Plaintiff's letter of 22nd July 2016 and to inform the Plaintiff of the circumstances of the use of the image, ownership of the image between the 3rd Party and Plaintiff and the Plaintiff's consent thereof. Despite this communication, the Plaintiff, produced and distributed the video online and also the post along the same lines.

The video and post were not produced in Court, but the alleged words were copied out in the Defendant's pleadings. The words in their ordinary meaning are about the Plaintiff's personal experience with the Defendant on the use of her image and likeness without her consent or knowledge. Despite reaching out vide demand letter of 22nd July 2016, the Defendant pulled down her image but as to her claim the pertinent part of the Defendant's letter of 1st August 2016 read thus;

‘We believe that any issue of copyright ownership over the photo is best resolved between your client and Ojwok’

The import of this reply was that the Defendant did not wish to consider the matter further. Clearly, the Plaintiff's video and post was her opinion and events arising from the dispute that culminated in these Court proceedings. The Plaintiff's statement was not false but true arising from her experience with the Defendant. The circumstances under which the words used in the video and/or post arose within circumstances of her own experience with the Defendant. There is no defamation as these facts are borne out by the pleadings and are the Plaintiff's opinion of the ongoing dispute and not false and hence not defamatory. The Plaintiff used the social media platform to inform the public of her dispute with the Defendant which the Defendant after demand went silent until the Plaintiff filed suit in Court.

The Court associates itself with the following sentiments;

In *Musikari Kombo vs Royal Media Services Ltd [2018]eKLR C.A.* noted;

“The essence of this defence [s] is an attempt to balance two competing but vital interests in society; the individual’s right to have their character and reputation protected and safeguarded from false unwarranted and malicious or scurrilous attacks on the one hand, and the public’s right to know as exercised and fed by freedom of expression, which is an indispensable feature of a free and democratic society as well as a major tool for public accountability.”

The Defendants counterclaim for defamation is not granted as the publication was not proved, the video and photos were not produced as evidence. The Plaintiffs statement was not defamatory.

c) If Liability is found, what is the quantum?

This Court finds from the Plaintiff’s statement of claim, that the copy right claim fails as she is not author/artist of the photograph. **Article 31 of Constitution** protects the Plaintiff’s right to privacy; intrusion or infringement of the Plaintiff’s personal life by whatever means including photography audit amounts to breach of right to privacy as has been established in this case.

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 Plaintiff proved that the Defendant used her image and likeness on it campaign and advertisement on social media platforms from 7th July – 22nd July 2016 without her knowledge or consent.

b) The use of protected attribute must be for an exploitative purpose either commercial or other exploitative purpose. The Plaintiff deposed that her image was used for commercial gain without compensating the Plaintiff. The Defendant commenced a social media campaign in form of a marketing competition dubbed # see9seekenya promotion to attract entrants’ submission of photographs/pictures of Kenya rich diverse and beauty of Kenya its people and culture. The winners would be awarded with the Defendant’s C9 Techno phone/camera each. The campaign and advertisement ran on all social media platforms for 2 weeks and the Plaintiff image was one of the photos used in the advert/campaign. The marketing and advertisement of the competition made wide publicity in the market with increased possible and actual clientele as well as promotion of its latest product(s) in the market. The business growth by increased sales meant profit. To that extent by use of Plaintiff’s image she ought to have been compensated.

c) The plaintiff must establish that she did not give consent for the offending use of her image.

In the cited case, the Plaintiff stated she did not give consent to use of her image. The Respondent on the other hand deposed they hired a designer who did not appear in Court, who used the Plaintiff’s image with her consent as she was his girlfriend. The Plaintiff did not controvert this fact and the claim for infringement of privacy failed.

In the instant case, the Plaintiff testified she did not know Ojok Photographer and never met him and therefore did not give consent. Secondly, admittedly as a known artist, she is taken photos everywhere every time she would not know when and where and by whom, her photograph was taken. Thirdly, she was alerted that her image was on the Defendant’s page in all social media platforms. Fourthly, the Defendant applied and was granted leave to join 3rd Party, Ojok Photographer to the proceedings. Despite service, he did not enter appearance, attend Court or file any pleadings. There is no evidence from the 3rd Party that he is owner of copy right or he contacted/got consent from the Plaintiff to use her image. There was no Consent.

The Defendants are liable for unlawful use of Plaintiff’s image without her consent.

On quantum, the Plaintiff sought the Court to assess damages for infringement of the Plaintiff’s legitimate expectation of the protection of her constitutional right to privacy.

The Defendant referred to the case of *Alternative Media Limited vs Safaricom Limited [2005]eKLR supra*; the Court noted that the party failed to give the Court expected and basis of the claim for damages and therefore granted nominal damages.

In the instant case, in the Plaintiff left to the Court to assess damages, without any guidance as to the range of fees for specific services offered by Artist(s) that are usually in Artists Rate Cards as the basis for negotiation.

This Court considers that the Plaintiff is a singer, songwriter and rapper and has previously endorsed campaigns and brands for different corporate entities. The Plaintiff has identity as an artist and her image was used in advertising purposes to support the Defendant’s products services and business.

On the other hand, the Defendant is a multinational Company resident in Kenya. The Campaign/advertisement on all social media platforms for 2 weeks attracted attention, information of its business and possibly new and added clientele.

In light of these circumstances, nominal damages of Ksh 500,000/- is sufficient compensation for breach of constitutional right to privacy to be paid by Defendants to Plaintiff.

The Plaintiff’s claim for general, aggravated and exemplary damages is not granted because the Defendant mitigated damage, loss or injury to the Plaintiff and pulled down the offending use of Plaintiff’s image after the Plaintiff brought the issue of use without her consent to their attention vide letter of 22nd July 2016.

Secondly, these circumstances do not meet the threshold as enunciated in the case of *Bank of Baroda (Ky) Ltd vs Timwood Products Ltd*

Civil Appeal 132 of 2001 where it was held;

Punitive or exemplary damages would be granted where;

a) Where there is oppressive, arbitrary or unconstitutional action by servants of the Government;

b) Where the Defendant's action was calculated to procure him some benefit, not necessarily financial at the expense of the Plaintiff

DISPOSITION

1. Judgment is entered for the Plaintiff against the Defendants jointly and severally of Ksh 500,000/- nominal damages for infringement of Plaintiff's right to privacy without her consent.

2. The Plaintiff's claim under Copyright Act is dismissed.

3. The Defendant's Counterclaim of Defamation by Plaintiff is dismissed.

4. The Defendants shall pay the plaintiff interest and costs of the suit.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH SEPTEMBER 2020 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. GICHUHI FOR THE PLAINTIFF

WANAM SALE ADVOCATES FOR DEFENDANT- N/A

COURT ASSISTANT: TUPET