



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 445 OF 2014

DONALD ELIAKIM OHON *Alias* MUSA FAULU.....PLAINTIFF

VERSUS

FAULU KENYA DTM LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff herein has moved this court by way of the Plaint dated the 17th day of December, 2014, in which, he has sued the defendant herein seeking the following orders: -

- a. A declaration that the defendant has violated the plaintiff's rights to privacy and inherent dignity
- b. A permanent injunction restraining the Defendant by either itself, its employees, servants, agents, officers, representatives, any body or authority from using the Plaintiff's image, likeness or voice and any reproductions or adaptations containing the Plaintiff's image in any medium of communication for purposes of advertising its products and services without the Plaintiff's consent.
- c. General damages
- d. Interest and costs of the suit.

In the Plaint, the Plaintiff avers that on or about the 5th October, 2010, he entered into a contract to act in Faulu Kenya stills and TV commercial. That the contract specified that the stills, TV commercials, frames and any other reproductions or adaptations would be used in Kenya for a period of two (2) years from the date of the contract as the same were produced for purposes of advertising the defendant's business in Kenya.

It is averred that the Plaintiff's performance in the said stills and TV commercials with the famous slogan "*wakenya Nifuateni tufaulu*" was impressive and raked in grand business for the Defendant and on or about 15th June, 2011 he was employed by the Defendant on contract basis for a term of three years as its marketing support services manager, which employment was confirmed on 27th June, 2012 effective 1st July, 2012.

That due to his good performance, the Defendant honored him by reviewing his salary upwards twice; on 17th August, 2012 and 22nd April, 2013. That upon commencing his employment with the Defendant, he became its brand ambassador and in the interest of maintaining the brand image "*Musa Faulu*," he forfeited taking up opportunities for further advertisements from other companies.

That on 15th May, 2013, the Plaintiff tendered his resignation from the Defendant's employment effective the 20th May, 2013 and sought employment elsewhere and advised the Defendant to cease using any materials that bear his image for purposes of advertising their products since he was not receiving any financial benefit for the same from the defendant.

He avers that despite his request as aforesaid, the Defendant continued to use his image in flyers, brochures and services which have been circulated in its branches countrywide without his consent and in blatant violation of his constitutionally guaranteed rights to privacy and inherent dignity. Further, that the continued use of his flyers, banners, brochures and other media advertisement are antagonizing his relationship with his current employer to his detriment. He prayed for judgment as per the reliefs set out in the plaint.

The Defendant has denied the plaintiff's claim in its statement of Defence filed on the 12th January, 2015. It has denied that the Plaintiff's performance was impressive or that it raked in grand business for the Defendant as alleged in paragraph 5 of the Plaint. It, however admitted having employed the Plaintiff on or about 15th June, 2011 as its marketing support services manager for a term of three years.

The defendant contended that it performed its obligations under the agreement with the Plaintiff and in accordance with its policy with regard to payment of staff but denied that the plaintiff became its brand ambassador as alleged by the plaintiff and put the plaintiff to strict proof. They denied having used the plaintiff's image as alleged or at all and further denied receiving any benefit therefrom adding that it has a wide range of financial products which are well known in the market and that it has a comprehensive marketing advertisement plan that has always ensured that its products are well positioned and promoted in the market. It has denied causing any loss or injury to the plaintiff's character, image or reputation and avers that having paid the plaintiff all his dues after he left its employment, the suit herein is a speculative attempt by the Plaintiff to derive further advantage and pay for a relationship that has terminated. It has urged the court to dismiss the plaintiff's claim.

At the hearing each party called one witness.

The plaintiff testified in support of his case and adopted his witness statement dated the 17th day of December, 2014. He produced the documents in his list of documents dated the 28th May, 2015, supplementary list of documents dated the 27th April, 2018 and the further supplementary list of documents dated 18th day of April, 2019. He narrated his relationship with the defendant from the beginning to the time that he sued the Defendant, and what happened subsequently.

The plaintiff's case is that upon resigning from the Defendant's employment on the 15th May, 2013 and advising the Defendant to stop using his images to advertise its business via an email dated 22nd May, 2015, the defendant allegedly continued to use his images in various platforms to advertise its business in violation of his constitutionally guaranteed rights to privacy and inherent Dignity, causing the plaintiff loss and damage.

The plaintiff stated that after leaving his employment with the defendant, he was employed by Jamii Bora Bank as a mobile Sales manager and in his new appointment, and as he was going for his marketing campaigns at Murang'a, he found flyers bearing his image at the defendant's Murang'a branch which were advertising the defendant's products. He later found others in their Githurai and Machakos branches. In addition, it was his evidence that his images are still being used by the defendant for advertisement of their products on Google and Facebook, and video advertisements on various T.V stations.

On the part of the defendant, its witness Frida Wanza Mutua adopted her witness statement dated the 21st October, 2015 and produced the documents in the defendant's list of documents dated the 21st October, 2015 as exhibits. This witness who gave evidence as DW1 denied any continued use of the Plaintiff's images to carry out advertisement for the defendant. It was her evidence that the Plaintiff was employed by the defendant as the marketing support services manager but was never appointed as a brand ambassador as alleged. She denied that the defendant has published, distributed or uploaded the plaintiff's image on any platform or used his image for any advertisement of its product after he had left the defendant's employment.

At the close of the hearing, the parties filed written submissions which this court has duly considered together with the evidence on record and the authorities cited by the parties.

Upon analyzing the pleadings, and in my view, the following are the issues for determination;

1. Whether the plaintiff's suit is bad in law.
2. Whether or not the defendant continued to use the plaintiff's image to advertise its services and products after the plaintiff left the defendant's employment and if so, whether this constituted a violation of his rights to dignity and privacy.
3. Whether the plaintiff is entitled to the reliefs sought.

On the first issue, it is the defendant's submission that the plaintiff's claim is one for enforcement of his rights to inherent dignity as provided for in Article 28 of the Constitution and the Right to Privacy under Article 31 thereof. The defendant argued that the court's jurisdiction under Article 22 and 23, to enforce violations of constitutional rights, is only properly invoked by way of a petition filed for that purpose under the applicable enabling procedural rules, more conventionally known as the "Mutunga rules".

The defendant further submitted that an action for enforcement of constitutional rights cannot be subsumed in a civil claim and converted as such and neither does the court have jurisdiction to convert purely civil case based on an employment contract between the parties, into a constitutional matter seeking enforcement of rights. In support of this contention, the defendant cited the case of **Nation Media Group Limited vs. Cradle- the Children's foundation suing through Geoffrey Maganga (2016) eKLR** where the court stated;

"Second, the supreme court in Patricia Cherotich Sawe vs. Independent Electoral & Boundaries Commission (IEBC) & 4 others (2015) eKLR."

"Although the appellant invokes the principle of the prevalence of substance over form, the court did signal in the law Society of Kenya vs. the Centre for Human Rights & Democracy & 12 others;

Petition no. 14 of 2013 Article 159 (2) (d) of the Constitution is not a panacea for all the procedural shortfalls. Not all procedural deficiencies can be remedied by Article 159; and such is clearly the case, where the procedural step in question is a jurisdictional prerequisite".

Still on this issue, the defendant submitted that the plaintiff's claim as set out in his submissions and documents have no basis on the pleadings and are irrelevant to the matter. The defendant contended that a party is bound by its pleadings and that all the evidence lead and

submissions made must be on the basis of the pleadings filed in court. The defendant relied on the case of *Galaxy Paints Company Limited Vs. Falcon Guards Limited* (Court of Appeal case number 219 of 1998 (unreported) in which the court stated;

“issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the courts determination “underline mine”.

The defendant therefore argued that the plaintiff cannot raise any ground of law or cause of action or lead evidence or submissions, outside issues raised in its plaint filed in court.

Reliance was made on the case of *Joseph Mbuta Nziu vs. Kenya Orient Insurance Company Limited (2015) eKLR* in which the court referred to the Nigerian Supreme case of *Adetour Oladeji (NIG) Limited vs. Nigeria Breweries PLC SC. 91/2002*.

The plaintiff on his part relied on Articles 28 and 31 of the Constitution of Kenya 2010 and cited the case of *Jessica Clarise Wanjiru vs. Davinci Aesthetics & Reconstruction Centre & 2 others (2017) eKLR* in which the court held that;

“It is axiomatic that the right of publicity, often called personality rights, is the right of an individual to control the commercial use of his or her name, image, likeness or other unequivocal aspects of one’s identity. It is generally considered a property right as opposed to a personal right. Personality rights are generally considered to consist of two types of rights; the right of publicity, or to keep one’s image and likeness from being commercially exploited without permission or contractual compensation, which is similar to the use of a trademark; and the right to privacy, or the right to be left alone and not have one’s personality represented publicly without permission. In common law jurisdictions, publicity rights fall into the realm of the tort of passing off (emphasis added).

In this case and relying on the above decision, the plaintiff asserted that by the defendant using his images commercially without his consent or any contractual compensation after he had resigned, not only violated his right to privacy but also his property rights. It was his submission that in the case herein, he has raised wrongful infringement of three inter-related, but distinct personality interests namely; identity right, privacy rights and dignity rights.

The plaintiff relied on the case of *Rukia Indris Barri vs. Mada Hotels Limited (2013) eKLR* in which the court adopted two South African Court positions in the case *Grutter vs. Lumbard & Another (2007) (4) SA 89(SCA)* and that of *Angella wells vs. Atoll Media (PTY) Limited and Another (Western cape High Court case No. 11961/2006)*.

In the first case of *Grutter* (Supra), the court held in part:-

“-----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.”

Whereas in the second case of *Angella wells*, the court observed;

“---the appropriation of the person’s image or likeness for the commercial benefit or advantage of another may well be by use of his image to advertise the defendant’s services and products.”

In the case of *Jessica Clarise Wanjiru v Davinci Aesthetics* the court observed that publicity rights fell into the realm of the tort namely, passing off.

Whereas, I am in agreement with the defendant that the plaintiff cause of action is on infringement of his rights, what arises from the plaint is that he also has a cause of action in tort and therefore, it would not be in the interest of justice to strike out his case on that basis.

On whether the defendant continued to use his image after he had left its employment, he produced some Flyers which he allegedly found in the defendant’s branches in Murang’a and Machakos bearing the defendant’s stamp and with dates. It was also his evidence that the defendant was still using his images on Google and stated that once you search “Faulu Kenya DTM” and click “Images” his images can be viewed advertising the defendant’s products.

On the Facebook, he stated that his images are still on the defendant’s Facebook page as at 1st April, 2019. In addition, the plaintiff produced a number of video clips showing his images doing TV and Radio advertisements for the defendant.

In its submissions, the defendant asserted that the images on the Facebook produced by the plaintiff are not from its official page and that the Google images are old images that are from media bulletins, old posters and other sources separate and apart from the defendant. They submitted that the plaintiff has failed to prove any of his images had been published or distributed after his resignation.

The court has considered the submissions in respect to this particular issue. As concerns the use of the plaintiff’s image on the Flyers/Brochures, the court notes that the only evidence to connect the defendant with the use of the same after the plaintiff had left its employment are the stamps affixed thereon. There are no signatures on those stamps to authenticate them. The defendant denied having stamped the same. My considered view is that a stamp alone on a document is not conclusive evidence that the same was stamped by the party alleged to have stamped the same. The plaintiff did not even call the friends whom he had gone to visit in those branches to confirm his allegations.

On the video advertisements, 4-Digital video disks were produced as exhibits and were also shown in open court. In this regard, I wish to point out that there was no indication that the advertisements were done after the plaintiff had left the defendant's employment.

On Google and Facebook accounts, it is the plaintiff's contention that the defendant's counsel did not ask any questions to challenge or controvert the plaintiff's evidence. He also asserted that DW1 in her examination in chief admitted that the defendant uploaded advertisement images on Google. He also contended that his images are still there on both Google and Facebook page.

In his regard, though the defendant in its submission contended that the Facebook page referred to by the plaintiff is not its, the court noted that the plaintiff's images are still there both in Google and the defendant's Facebook page. DW1 in cross-examination stated that the images that were uploaded to the Google Account by the defendant were pulled down. She later changed that version and averred that if the images are still there, they do not advertise the defendant's products. This was a clear admission that the plaintiff's image is still in Google and the sole reason is for advertisement of the defendant's products. It was her evidence that they tried to delete them but if somebody's machine is not refreshed, the images can still appear. On being asked if someone from the defendant had written to the Google asking them to delete the plaintiff's images, she could not confirm.

On the Facebook page, it was DW1's evidence that the defendant wrote to them alerting them about some fraudsters who are running their page but she could not produce a copy of that letter or any other evidence to support that contention. It was her further testimony that they have communicated to the communication authority over the same issue of fraudsters running their account, but again no evidence was tabled before the court for that communication. Similarly, she stated that they have complained to the police but she did not tender any evidence to that effect. On being shown the image of the plaintiff on Facebook "*Faulu popote*", a mobile platform for the defendant, she admitted that the image is still there.

Further, it was her evidence in cross-examination that the plaintiff was the "*Musa Faulu*". She stated that she did not have evidence of the new marketing strategies but she did admit that the one for the plaintiff is one of the strategies, the same was successful and the plaintiff was part of that success.

In view of the evidence of DW1, I find that the defendant did not offer any evidence to prove that they pulled down the plaintiff's images from Google and Facebook page, yet, DW1 admitted that the defendant uploaded those images in those platforms. For that reason, I come to the finding that the defendant is still using the plaintiff's images in Google and its Facebook page to market its products.

On the reliefs sought, the court having made the above finding, it therefore follows that the defendant has violated the plaintiff's rights to privacy and inherent dignity and he is entitled to damages for that breach.

The plaintiff has sought general damages. As rightly submitted by the plaintiff, the award of damages is well within the court's discretion as was held in the case of *Charles Oriwo Odeyo vs. Apollo Justus Andabwa & Another (2017) eKLR*.

In the case of *NWR & Another vs. Green Sports Africa Limited & 4 others, 2017, eKLR*, the court held;

"It is well settled that an 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. On quantum of damages, award of damages entails exercises of judicial discretion which should be exercised judicially."

The court further held that the following principles clearly emerge from decided cases;

- I. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights.
- II. Such claim is distinct from and in addition to remedy in private law for damages for tort.
- III. The remedy would be available when it is the only practicable mode of redress available.

The plaintiff herein has relied on the case of *Joel Mutuma Kirimi & Another vs. National Hospital Insurance Fund (NHIF) (2020) eKLR* wherein Kshs. 5 million was awarded to each of the plaintiffs and that of *MWK vs. AG & Amp; 3 others (2017) eKLR* where the court awarded Kshs. 4 million for violation of Constitutional rights of dignity, degrading treatment and privacy. He has also made reference to the case of *NWR* (supra) where Kshs. 750,000/= was awarded to each plaintiff. In his view, Kshs. 11,350,150 would be a fair attempt to compensate him made up as follows;

- I. Plaintiff's salary per month at Kshs. 147,150/=
- II. Time between his resignation and the hearing of the case.

The defendant did not address the court on what it thought was a reasonable amount under this head but only submitted that the plaintiff failed to establish any basis for the grant of the prayers sought in the matter. They have also argued that the plaintiff has not demonstrated any loss suffered as alleged or at all. In support of this contention, the plaintiff cited the case of *Ethiopian Airline Limited vs. Daniel Tanui & 11 others (2019) eKLR* to the effect that a claimant who has not, in fact suffered any loss by reason of breach of contract, is never the less entitled to a verdict but the damages recoverable will purely be nominal. The court further went on to say that he who claims damages for breach of contract must prove that loss in certain terms and that breach does not, Ipso facto, attract damages.

The defendant asserted that there is no correlation between the plaintiff's salary and his claim to damages based on the allegations made.

The court has considered that aspect of the claim and the submissions in that regard. I quite agree with the defendant that there is no correlation between the plaintiff's salary and the claim for damages.

The court, however, does not agree with the reasoning by the defendant that what the plaintiff ought to have claimed is damages for breach of contract. I say this because the contract between the parties ended when the plaintiff resigned from employment and therefore, there was no contract to enforce. However, as I have already found, he is entitled to general damages for breach of his constitutional rights but which is in the realm of tort of passing off (see the case of *Jessicar* Supra).

The court should also point out that the plaintiff did not establish the specific loss that he suffered as a result of the breach of his constitutional rights aforesaid but going by the decision in the case of NWR (supra) the right of privacy is recognized even in the absence of proof of damages.

Being guided by those principles and the authorities cited I would award Kshs. 800,000 basing it on the case of NWR (supra). Prayers (a) and (b) are also granted.

The plaintiff is awarded the cost of the suit. This being a claim for general damages, the same shall earn interest from the date of this judgment.

It is ordered.

Dated, signed and delivered at Nairobi this 29th Day of October, 2020

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant