



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

Petition No.466 Of 2012

(As consolidated with Petition No.416 of 2012)

BETWEEN

J W I.....1ST PETITIONER

T M K.....2ND PETITIONER

AND

THE STANDARD GROUP LIMITED.....1ST RESPONDENT

NATION MEDIA GROUP.....2ND RESPONDENT

JUDGMENT

Introduction

1. At the root of the Consolidated Petition are publications appearing in the Respondents' widely circulated newspapers, "the Standard" and "the Daily Nation" of 21st February, 2007. In those newspapers, the Respondents ran a story detailing the killing of the late S M I, a man described by the police at the time as the most wanted criminal in Kenya. Alongside the story, the 1st Respondent had published photos/images of R W, who was the wife of the late S M, together with images of six children namely, D N, A M, E W M, C W M and M K M (all minors) who stood beside her. Similarly, on page 3 of the 2nd Respondent's newspaper, there appeared pictures of A M and D N (S M's children) under a headline titled *'The agony of being the wife of a wanted man'*. On Page 5 it had also depicted images of the child, A M, sitting close to a police officer, holding a rifle and had the narration, *'M 's three year old daughter examines a rifle barrel unaware that her father S M I had been shot dead...'*
2. In another edition of its newspaper, on 22nd February 2012, the 2nd Respondent published photos of the minors, A M, D N and R W, together with their mother, F W, and juxtaposed them with the images of the late S M under the headline *'Police: M family to remain in custody'*. Further, in its publication of 25th February 2007, the 2nd Respondent published a story entitled *'...leaflets target M's close relatives'* alongside pictures of the minor, D N, reading "the Nation" newspaper with the

narration '*...one of M's son goes through a copy of the 'Nation' that reported his father's killings*'. The Petitioners have annexed the said newspapers in support of their case.

3. The Petitioners take issue with these publications and allege that the published stories, narrations and images were highly offensive and severely embarrassing to the minors as it prejudiced their innocence and psychological integrity. They further assert that the actions of the Respondents to publish the said stories, pictures and narrations were calculated, intentional, reckless and negligent since they failed to give due consideration to the general interests of the children and safeguard their constitutional rights to privacy and dignity, thus prejudicing their reputation, development and growth. They therefore claim that the constitutional rights of the minors to be protected from inhuman and degrading treatment provided under **Article 29** of the **Constitution**, their right to human dignity as enshrined under **Article 28** of the **Constitution** and right to privacy provided under **Article 31** of the **Constitution** have been violated.

The Petitions and Parties

4. In **Petition No.446 of 2012**, J W I is described as a sister to S M (deceased) and she has filed the Petition on behalf of E W, C W and M K, all children of the deceased.
5. In **Petition No.416 of 2012**, T M K is described as a sister of F W (deceased) who was the wife of S M. She has filed her Petition on behalf of R W, D N and A M, all children of S M (deceased).
6. On 29th November 2012, I directed that the two Petitions should be consolidated with **Petition No.446 of 2012** being the parent file and the Petitioners were also granted leave to amend their Petitions accordingly.

The Petitioners' case

7. The Petitioners' case is contained in their Amended Petitions amended on 8th November, 2012 and 16th November 2012, the Affidavits of the 1st Petitioner sworn on 9th October 2012 and that of the 2nd Petitioner sworn on 18th September 2012. The Petitioners also gave oral evidence and filed submissions dated 20th January 2014 and supplementary submissions dated 28th August 2014.
8. The 1st Petitioner, J W I (PW 1) testified that she is the guardian of the minors; E W (11 years), C W (9 years) and M K (9 years) and has lived with them since the death of their father and mother (S M and J W respectively.)
9. She further testified that since the publications, all the relatives of the minors have shunned them and she has been condemned to single-handedly assume parental responsibility over them. That at some point, she had to shift abode with the children (C W and M K) and moved to Ndenderu where she lived for some time before returning to Kihara Division in Gachie in February 2012. She shifted after the children became the subject of ridicule, name-calling and stigmatization. She claimed that she initially enrolled the children at [Particulars Withheld] Nursery School but when the teachers and other students discovered that they were M's children, they hated them for being a thief's children. Thereafter she took them to [Particulars Withheld] Primary School and after one year, their identity was also discovered despite having registered them as her own children under the surname name, "W". The children currently attend [Particulars Withheld] Primary School and she stated that the children have no home and live with her in a rented house.
10. She added that one child, E W, to-date lives in a children's home, , and the younger children have never bonded well with her because she lives in the Children's home and does not interact with them much.
11. She claimed that the children have always been referred to as vagabonds, thieves and all their

relatives were of the view that they should be taken to a children's home. That her own family has always sidelined her due to her decision to take care of M's children and the children have no friends as no one wants to be the friend of a thief's children.

12. On the offending publications, she testified that the images were highly offensive and severely embarrassing to the minors therefore prejudicing their innocence and their psychological integrity. That the children have over the years endured psychological torture and discrimination associated with being the children of a wanted gangster. She concluded that had their images not been published in the newspapers, they would have been safe and would have lived fairly normal lives.
13. The 2nd Petitioner, T M K, (PW 2) stated that she is the guardian of the minors, D N, R W and A M and she has lived with the said minors since the death of their parents, S M and F W.
14. She claimed that she does menial jobs in a company called Farmline and despite her meagre income, upon the death of her sister, F W, she was compelled to take up the children since none of her relatives was willing to accommodate them.
15. She stated that the children attend different schools i.e. that D N attends [Particulars Withheld] High School, R W attends [Particulars Withheld] High School and A M attends Garden Angels School.
16. In regard to the offending publications, she claimed that the children kept on asking her why their pictures were ran in the newspapers and that they have been enduring psychological torture and discrimination associated with being children of a wanted gangster. That due to the publications, all their relatives have shunned them and she has been condemned to single-handedly assume parental responsibility over them. She further claimed that while initially they were staying in [Particulars Withheld], she had to move with the children to [Particulars Withheld] because of the stigmatization they had to endure from their peers. She stated that the minors always remember the police guns held in their presence and police officers insulting their mother.
17. Mr. Maingi, learned Counsel presented the Petitioners' case and it was his submission that the publication of the photos and or images of the minors violated their fundamental right to privacy and right not to be treated in a cruel, inhuman or degrading manner as contemplated under **Articles 29(f)** and **31** of the **Constitution**, respectively, as read together with **Sections 18** and **19** of the **Children's Act of 2001** in the following manner;
 - i. The images so published were highly offensive and severely embarrassing to the minors thereby prejudicing their innocence and their psychological integrity.
 - ii. The Respondents failed to take sufficient precautions to safeguard the privacy and dignity of the minors. That their actions have left an indelible blot on their reputations, development and growth.
 - iii. The Respondents' negligent actions left the children with stigmatization and public ridicule for having been allegedly associated with a most wanted criminal.
 - iv. The juxtaposition of the minors' images with that of their alleged criminal father impliedly indicated that the children knew or were part of their father's untoward ways thereby interfering with their reputations and development.
 - v. The said pictures were intrusive of the lives of the minors and their dignity.
 - vi. The minors have inalienable rights to physical and social identity, development and respect for their privacy.

18. He further contended that the Respondents were legitimately expected to present news with utmost consideration of the childrens' interests and to be guided by the Code of Ethics under the **Media Act (2007)** and **Section 76** of the **Children's Act** with the focus being the need to appreciate vulnerability of children of tender years.
19. It was Mr. Maingi's further submission that alleged consent on behalf of the minors, as pleaded by the 2nd Respondent, could not be invoked and/or used to justify the indignity suffered by the children and the same cannot be used to override the inalienable rights of the children. On that point, they relied on the case of ***Tellis and Others vs Bombay Municipal Corporations & Others (1987) LRC 367*** and ***A Juvenile vs The State (1989) LRC 796*** where it was held that there can be no waiver of fundamental rights conferred by the Constitution.
20. He further claimed that a child has the right to privacy, distinct from that of his parents and while conceding that it was important to report the death of Simon Matheri, he submitted that the same could have been done without including the images of the children in an embarrassing and undignified position. In that regard, he submitted that the Respondents violated **Regulation 1 (g)** of the **Code of Conduct for Practice of Journalism in Kenya** which provides that all persons who are the subject of any news coverage should be treated with respect and dignity and the Press must show compassion to victims of crime and tragedy. They also claimed that **Regulation 13** of the same Code of Conduct which provides that public rights should be weighed against private rights, was similarly violated.
21. Mr. Maingi also submitted that the Court should take judicial notice of the fact that childhood is a unique period of physical, mental, emotional and spiritual development and violation of children's rights such as exposure to violence, child labour or unsafe products have lifelong irreversible and even trans-generational consequences. In that regard he relied on the cases of ***Campbell vs MGN Limited (2004) UKHL 22***; ***David Murray vs Big Pictures (UK) LTD (2008) EWCA CIV 446*** and ***AAA vs Associated Newspaper Limited (2012) QB 2103***.
22. In conclusion, it was Mr. Maingi's submission that the Respondents did not have any justification for publishing the images of the minors and urged the Court to find that the minors' right to privacy and human dignity were infringed upon by the Respondents and on behalf of the Petitioners, he prayed for an award of Kshs.2,000,000.00 as compensation for each minor. He relied on the case of ***AAA vs Associated Newspaper Limited (supra)*** where the Court awarded a minor USD 15,000 for breach of fundamental rights and freedoms. He also prayed for the costs of each Petition.

The 1st Respondent's case

23. The 1st Respondent, The Standard Media Group, opposed the Petition through Grounds of Opposition dated 18th October 2012 and they are as follows;

“(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ***The Petition seeks orders for special, general, punitive and exemplary damages***

which reliefs are not provided for under Article 23(3) of the Constitution;

(8) The redress of matters concerning the Code of Conduct for the Practice of Journalism is vested in the Complaints Commission of the Media Council established under the Media Act, 2007 for which appropriate remedy is provided;

(9) The Petition is shorn of specificity in as far as the allegations relating to psychological and emotional suffering is concerned;

(10) It has not been convincingly demonstrated in the Petition that the Article that appeared in the Respondent's newspaper in the year 2007 shall be reproduced either in print or electronic media;

(11) The financial motive imputed upon the [1st] Respondent is not demonstrated as to how reporting a matter of public interest regarding the shooting of a known criminal would increase profits;

(12) Sections 13 and 18 of the Children Act, 2001 are cited but there is no corresponding averments in the entire Petition that explain how the Petitioners have been abused or subjected to torture, cruel treatment, unlawful arrest or deprived of their liberty;

(13) The allegation that the rights of the Petitioners have been violated is wildly speculative/abstract does not meet the threshold to entitle the Petitioner to invoke the jurisdiction of the Court.”

I should state that grounds numbers 1 to 6 have already been determined by way of Preliminary Objection in this Court's Rulings of 6th June 2013 and 18th December 2013 and I therefore have only grounds 7 to 13 to consider in this judgment.

24. In addition to the above grounds, it also filed a Replying Affidavit sworn on 5th May 2014 by Ronald Luby, its Head of Legal Services, who deposed that at no time during the taking of the photographs or publication subject of the Petition was the 1st Respondent intent on prejudicing the interests of the minors and that it was neither negligent nor reckless in any way but its acts were guided by public security and interests regarding a slain criminal who had committed numerous heinous crimes. He also claimed that at no time was the 1st Respondent motivated by any commercial consideration or profits as alleged by the Petitioners and in any event, he claimed that in reporting any news, public safety, security and interests outweigh private rights and it was therefore Mr. Luby's position that the 1st Respondent had complied with all its professional expectations as outlined under the **Media Act** and the **Code of Conduct of Journalism in Kenya**.

25. Mr. Luby further stated that the 1st Respondent had no control over S M's conduct or behavior and cannot therefore be blamed for the ridicule or stigma associated with his life.

26. He added that the Petitioners' conception of the background of the minors was misguided in so far as the 1st Respondents' acts are concerned and that the images had been published after an interview with F W, the minors' mother, who had consented to the images being taken. He therefore urged the Court to consider the circumstances that culminated into the taking and publication of those images.

27. Mr. Abidha, learned Counsel who presented the 1st Respondent's case, submitted that since the images were published with the consent of the Late F W, the Petitioners cannot claim a violation of the minors' right to privacy. On that submission he relied on the case of **Samson Mumo Mutinda v Inspector General National Police Service & 4 others (2014) e KLR** where it was held that consent is a key component of the right to privacy and once granted, amounts to a waiver to a claim founded on breach of right to privacy.

28. He further submitted that the Petitioners are guilty of laches as they failed to file their claim as soon as they saw the publication and that due to the aforesaid inordinate and unexplained delay, the circumstances surrounding the current case as well as the impugned acts cannot be logically put together and it is difficult to comprehend the circumstances founding the alleged breaches. That the evidence tendered demonstrates that the effects of the publication were felt after 2011 and evidence was not tendered of any adverse effects for the period between 2007 and 2011. It was therefore his submission that the Court cannot fill in evidential gaps and on that point he relied on the cases of ***RM (Suing through next friend JK) v Attorney General (2008) 1 KLR 574*** and also ***Lt. Colonel Peter Ngari Karume v Attorney General (2009) e KLR*** where the Court held that a case for the enforcement of fundamental rights and freedoms should be filed without inordinate delay. In that context, he claimed that the five year period it took before filing of the present Petition amounts to inordinate delay.
29. It was also Mr. Abidha's submission that the Petition as framed was not particularized and had failed the basic test as enumerated in the case of ***Annarita Karimi v Republic (1976-1980) KLR 1272***. That the Petition is founded on circumstances unrelated to the impugned acts and that if the basis of the impugned acts is not known to the Petitioners, then a Petition so founded ought to be dismissed as a mere sham. On that point he relied on the case of ***B.A & Another v Standard Group Ltd & 2 Others (2012) e KLR*** and also ***Alex Muriuki v Attorney General & 4 Others (2014) e KLR***.
30. On alleged breach of right to privacy, Mr. Abidha submitted that the alleged breach occurred when the Repealed Constitution was in force and its provisions thereof apply. That in that context, right to privacy was not a right under **Section 76** of the **Repealed Constitution** and as such this Court cannot enforce it. He claimed in addition that **Article 31** of **Constitution 2010** was not a replica of **Section 76** of the **Repealed Constitution** but a modification of the said **Section 76** and that if the Court is to invoke **Article 31** of the **Constitution 2010** then it would be going beyond the law applicable at the time of the alleged cause of action on that point. He relied on the case of ***Dennis Otieno Waga v Attorney General (2012) e KLR*** where it was held that the Constitution 2010 does not have retrospective application.
31. On the issue of publication of the images, he claimed that the impugned images could not be interpreted to mean that the minors were criminals or 'most wanted criminals'. That the reputation of the deceased had been a matter of public notoriety and interest and as such the right to privacy does not cover the reputation of an individual. He further submitted that the reputation of the minors cannot be dented by publicized activities of their late father.
32. On the issues of discrimination and inhumane treatment, Mr. Abidha submitted that the evidence on record showed that the minors faced acts of discrimination from their own relatives and in the case of the 2nd Petitioner, from her employer, and the Petitioners failed to prove that the said ill-treatment had any nexus with the publication. That the children also changed schools because of the financial constraints experienced by the Petitioners and not because of the publications in issue.
33. It was therefore Mr. Abidha's submission that the evidence adduced does not support the alleged breach of the right to privacy, inhumane treatment and discrimination that allegedly resulted from the publication.
34. On the issue of damages, he claimed that an award of punitive or exemplary damages are not appropriate in this case and he relied on the case of ***Bank of Baroda (Kenya) Ltd v Timewood Products Ltd Civil Appeal No. 132 of 2001 (2008) eKLR*** where the Court held that punitive and exemplary damages can only be awarded in two circumstances, namely; where there is oppressive, arbitrary or unconstitutional action by a servant of the Government and where actions were calculated to procure profit or benefit at the expense of the Plaintiff. He therefore submitted that in the absence of those two conditions, the Petitioners are not entitled to damages.

35. In conclusion, he submitted that the alleged violations of the **Children's Act** are criminal conducts punishable by way of fines or imprisonment, if at all.
36. For the above reasons, the 1st Respondent sought orders that the Petition should be dismissed with costs.

The 2nd Respondent's case

37. The 2nd Respondent opposed the Petition through the Affidavit of Sekou Owino, its Legal Officer, sworn on 17th January 2013.
38. Mr. Owino deponed that the publication of the information subject of the Petition was necessitated by the grave public importance of the said information as it related to the shooting of S M, a man the police had characterized as the most wanted criminal in Kenya and who the police had allegedly linked with several murders and robberies in various parts of the Country.
39. He also claimed that the publication of the images of the minors was done with the consent of their mother, F W, and they had appeared in the photographs with their mother who often spoke and gave interviews to the press.
40. He alleged that in all the publications, the 2nd Respondent did not in any way link the minors to their late father's alleged criminal activities and that it only indicated that they were his children. That it had also run an interview in a prior publication in which their late mother had stated that no one in the family knew that her husband was a criminal.
41. In her submissions, Ms. Ngige learned Counsel for the 2nd Respondent, submitted that the claim before the Court was one based on reputation and essentially a defamation claim which ought to be pursued as a tort and not an infringement of human rights. She referred the Court to the decision in **Francis Gathungu Waithaka v Kenyatta University (2012) e KLR** where the Court held that private law claims should not be clothed as violations of the Constitution.
42. As regards alleged violation of the minors' rights to privacy, Ms. Ngige submitted that a child's right to privacy is not absolute and it is subject to parental guidance. She relied on the case of **Pallock v Pallock 154 F.d 601** where it was held that where there is need for privacy to be lifted, the consenting parent has to demonstrate good faith and reasonable basis to believe that such consent was necessary for the welfare of the child.
43. She further submitted that it is not all times that a publication may be deemed to be a violation of the right to privacy. On that point she relied on the case of **Bernstein & Others v Bester & Others CCT (23) 1995**. She added that it was impossible to violate the minors' right to privacy because their association with the deceased made them natural objects of interest as it was necessary to understand the world in which the deceased had lived, the environment which shaped him and an understanding of even those whom he loved. Secondly, that the publication of the images was done with the consent of their late mother and **Section 19** of the **Children's Act** confers parents' full discretion in matters concerning their children.
44. Ms. Ngige further submitted that the 2nd Respondent at the time of the publication enjoyed freedom of expression under **Section 79** of the **Repealed Constitution** and the right to privacy did not limit the said freedom of expression. On that point, she relied on the case of **S (a child) RE (2003) EWCA** where it was held that freedom of speech should not be restricted by the judiciary with *ad hoc* exceptions.
45. Ms. Ngige therefore urged the Court to dismiss the Petition with costs.

Response

46. In response, Mr. Maingi submitted that the Petitioners' claim was for the enforcement of the fundamental rights to privacy, human dignity and right not to be treated in an inhuman or degrading manner and it cannot amount to a claim of tort of defamation. He further claimed that the fact that the Petition alludes to reputation of the minors does not make it a claim for defamation and that the evidence on reputation should be taken as a consequence of the breach of the right to privacy which is actionable *per se* and can independently stand even when there is an allusion to the compromise of reputation. In that regard, Mr. Maingi relied on the case of **Richard G. Godbehere v Phoenix Newspapers INC. (162) Ariz. 335, 558 USLW 2296, 17 Media L. Rep. 1952)** and **Max Mosley v News Group Newspapers Ltd (2008) EWHC 177 (QB)** where the Courts differentiated between defamation and privacy.
47. In response to the allegation that it was in public interest that the taking of photos and their publication was made, Mr. Maingi submitted that the Respondents could have made the publication without publishing the photos of the minors and that the Respondents were enjoined to act responsibly in the dissemination of information and not intrude on the privacy of individuals.
48. On the issue of consent having been allegedly given by the minors' mother, it was Mr. Maingi's position that no one can consent on behalf of another person and such consent would in any event have been against public policy and therefore unenforceable. That in any case, the mother of the minors was shaken at the time of the interview and as such was unable to stop journalists from taking the minors' photos. That in the circumstances, she could not give consent for them to do so.
49. It was therefore Mr. Maingi's case that the Respondents are liable for the violation of the minors' right to privacy and the Court should award them damages. He relied in that regard on the case of **Joe Doe v Methodist Hospital (Supreme Court of Indiana) No. 30S01-9504-CV-420** where the finding on attaching strict liability to privacy was propagated and made.

Determination

50. Having set out the Parties' submissions as above, there is only one main issue for determination in this Petition to wit; whether the minors' right to privacy was violated by the Respondents. As a corollary to that issue, I will if necessary, also determine whether the minors have been discriminated against and treated in a human and degrading manner. An award of damages, if at all, would be a consequence of any findings made on the main issue.
51. However, before I do so, there are two preliminary issues that I must determine; firstly, whether the Petitioners are guilty of inordinate delay in bringing the Petition and secondly, whether the Petition is incompetent as filed.
52. The 1st Respondent submitted that the Petitioners' failed to institute the claim as soon as they saw the offending publications and in that regard, I have read the record before me, and it is clear that the Petitioners have sought the enforcement of the fundamental right to privacy and protection from discrimination and also alleged inhuman treatment of the minors. If I therefore understand the Petitioners' claim on that prism, it means that their claim is properly before this Court. I say so because I know of no law that places a limitation of time on a claim for enforcement of fundamental rights and freedoms and which would bar a party from filing a Petition for enforcement of the provisions of the Bill of Rights.
53. I also say so because the law, as I know it, is well stipulated in the case of **Dominic Arony Amolo v the Attorney General HC Misc. Applic No. 494 of 2003** that a claim for enforcement of the Bill of Rights does not fall within the **Limitation of Actions Act (Cap 22 Laws of Kenya)**. The decision of **Peter Ngari Karume (supra)** relied upon by the 1st Respondent further emphasizes the same principle; that the doctrine of laches does not apply in the enforcement of the Bill for Rights cases. However, in that case the Court also stated that where there is inordinate delay, a party must justify why it took long before filing its claim.

54. In the present Petition, the alleged publications were made in early February 2007. The Petition before me was filed in December 2012. A simple count reveals that it took almost 6 years after the publication for the Petitioners to file the Petition. Can the Petitioners be accused of inordinate delay? PW1 and PW2 in their testimony confirmed that they saw the publication at the time they were published. They did not offer any explanation as to why it took them close to 6 years to institute the claim. Given that the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** have not specifically provided for time within which a claim for enforcement of the Bill of Rights should be filed, I will reluctantly allow the Petition more so given that the claim before me seeks to protect the rights of minors and their interests must supersede all other considerations. In saying so, I am aware of the rule that in every case involving children, the guiding principle is the best interests of the child. In the circumstances, I do not think that it is in the best interest of the minors to dismiss the Petition without determining it on the merits.
55. On the second issue, it is now an established principle in constitutional litigation that where a person is seeking redress from the High Court for an alleged violation of the Bill of Rights, he must set out with a reasonable degree of precision the Article (provision) of the Constitution that he alleges to have been violated, the manner in which it has been violated and the facts in support of that allegation and the reliefs he is seeking from the Court - See *Annarita Karimi Njeru v Republic (supra)* and *Trusted Society of Human Rights v Mumo Matemu and Another (2013) e KLR*.
56. In that context, the Petitioners have, in my view, set out the manner in which the minors' rights have allegedly been violated with some degree of precision and this arises from a casual reading of their Petition. It is therefore clear that the Petitioner has fulfilled the rule established in *Anarita Karimi Njeru (supra)*. In any event, I understood the 1st Respondent to claim that the Petition does not demonstrate a violation of the right to privacy but was hinged on defamation. That claim has arisen from the misconceived perception that if a cause of action does not demonstrate a violation of fundamental rights and freedoms, then the rule in *Anarita Karimi Njeru (supra)* has been violated. Far from the truth, the Petitioner's duty in any claim for the enforcement of the Bill of Rights is to draft his Petition with some degree of precision stating the provision of the Constitution that has been violated, the manner in which it has been violated, facts in support of that violation and the reliefs sought from the Court. The Respondent then has a commensurate legal duty to respond to the allegations made against him and it is the duty of the Court to determine whether, given the facts and applying the law to the set of facts, there is disclosed a violation of the Constitution. The fact that the Petition may have no merit is not a consideration under the rule in *Annarita Karimi (supra)*.
57. Having said so, I now turn to determine the larger issue before me; whether the minors' right to privacy has been violated. In that regard, the Petitioners claimed that the publication of the photos or images of the minors violated the minors' fundamental right to privacy mainly because the images were said to be highly offensive and embarrassing to the minors as they prejudiced their innocence and that the children were left with stigmatization as well as public ridicule for having been associated with a most wanted criminal. Mr. Maingi in that regard submitted that the images interfered with the minors' reputations and development and were intrusive of their lives and violated their right to privacy.
58. In response to that submission, both Mr. Abidha and Miss Ngige submitted that the publication of the images did not in any way imply that the minors were involved in the criminal activities of their deceased father and that the publications did not violate the minors' rights to privacy as it was made with the consent of their late mother, F W. That in any event, the Petitioners claim does not amount to a violation of the minors' right to privacy but was one founded on defamation.
59. In addressing the two conflicting submissions and positions, I am aware that the events giving rise to the claim before me occurred on or about the 21st of February 2007, before the promulgation of the **Constitution, 2010. Article 264** of the **Constitution 2010** provides that the **1963**

Constitution stood repealed on the promulgation day i.e. 10th August 2010. The question is whether the Petitioners could properly lodge a claim for violation of the minors' constitutional rights under the **Constitution 2010**, over events that happened during the existence of the **Repealed Constitution**.

60. On that issue, I must agree with the Respondents that this Court cannot enforce new rights created under the **Constitution 2010** unless those rights were recognized and protected under the previous Constitution. The **Constitution 2010** does not have retrospective effect and in that regard, I am in further agreement with *Majanja J* when he stated the following in *Duncan Otieno Waga v Attorney General, Petition No 94 of 2012*;

“I do not read the provision of the sixth schedule as entitling the court to retrospectively apply the Constitution. The rights and obligations referred to are preserved to the extent that they can be enforced but determination of the nature and extent of those rights and obligations are determined in accordance with the legal regime existing at the time the right or obligation accrued. The acts of the respondent in relation to the petitioner must therefore be construed by reference to the former constitution particularly Section 82 which prohibits discrimination.

Counsel for the petitioner has also referred to the provisions of Article 23(1) and 165 which read together entitle any person to apply to the court for redress where his or her fundamental rights and freedoms are threatened, violated or infringed. These provisions entitle this court to adjudicate violation of the constitution but they do not empower the court to apply the constitution retrospectively.”

(See also this Court's decision in *B.A & Another v Standard Group Limited & 2 Others (2012) eKLR* and *Charles Murithi Muriga & 2 Others v Attorney General Petition No.113 of 2011.*)

61. Having said so, I shall then determine the Petition on the basis of the rights and obligations of the parties as enshrined in the **Repealed Constitution** since it was the law in force at the time of the alleged violations forming the subject matter of the Petition before me but subject to when I shall shortly state.

62. In that context, the right to privacy was protected under **Section 70** of the **Repealed Constitution** in the following terms;

“Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of other and for the public interest, to each and all of the following, namely-

(a) Life, liberty, security of the person and the protection of the law;

(b) Freedom of conscience, of expression and of assembly and association; and

(c) Protection for the privacy of his home and other property and from deprivation of property without compensation;

The provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the right and freedom of others or the public interest (emphasis added).”

A literal and plain meaning of **Section 70(c)** of the **Repealed Constitution** would show that it

protected specific infringement of privacy, namely; the privacy of an individual's home and property. It therefore meant that when someone's home and property were for example searched arbitrarily, the right to privacy would be infringed.

63. Currently, under the **Constitution 2010**, the right to privacy is provided for under **Article 31** in the following terms;

“Every person has the right to privacy, which includes the right not to have –

(a) Their person, house or property searched.

(b) Their possessions seized.

(c) Information relating to their family or private affairs unnecessarily required or revealed; or

(d) The privacy of their communications infringed.

A casual and plain reading of **Article 31** above would reveal that the right to privacy entrenched therein is more broad and liberal in terms of what it seeks to protect as compared to protection offered under **Section 70(c)** of the **Repealed Constitution**.

64. Be that as it may, and in the above context, the question before me is whether the publication of the minors' photographs together with the accompanying stories violated their right to privacy. I will now proceed to determine that question in the context of the defense raised by the Respondents that the minors' claim can only lie in defamation. In order to determine that question, I must first address the nature of the right to privacy and what it seeks to protect and consequently juxtapose the same with the claim before me.

65. The right to privacy has long been recognized by the common law as an independent personality right. At common law, therefore, the breach of a person's privacy occurs when there is unlawful intrusion on personal privacy or unlawful disclosure of private facts about a person. Some examples of breaches of privacy recognized by the common law were mentioned by Ackermann J in his judgment in ***Berstein v Bester NO (1996) (2) SA 751***. They include entry into a private residence, the reading of private documents, listening in to private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion and the disclosure of private facts in breach of a relationship of confidentiality. The Courts have also held that the common law right to privacy is invaded by publishing a person's photograph as part of an advertisement without the consent of the person. See - ***O' Keeffe v Argus Printing and publishing Co Ltd 1954 (3) SA 244 (C), 247F-249D***.

66. In ***Berstein v Bester (supra)*** however, the South Africa Constitutional Court cautioned against a straightforward use of common law principles to interpret fundamental rights and freedoms and in determining whether an invasion of the common law right to privacy has been violated, the Court stated as follows;

“It essentially involves an assessment as to whether the invasion is unlawful. And, as with other forms of injuria, the presence of a ground of justification (such as statutory authority) means that an invasion of privacy is not wrongful. Under the Constitution, by contrast, a two-stage analysis must be employed in deciding whether there is a violation of the right to privacy. First, the scope of the right must be assessed to determine whether law or conduct has infringed the right. If there has been an infringement it must be determined whether it is justifiable under the limitation clause”.

I am in complete agreement with the above exposition of the law and I will now proceed to assess the scope of the right to privacy in the context of the Petition before me.

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

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

I am persuaded by the above definition and in addition, in the final conclusions of the **Nordic Conference on the Right to Respect for Privacy of 1967**, the following additional elements of the right to privacy are listed; the prohibition to use a person's name, identity or photograph without his or her consent, the prohibition to spy on a person, respect for correspondence and the prohibition to disclose official information.

68. Further, legitimate expectation of privacy has two components; the protection of the individual and the reasonable expectation of privacy. The reasonable expectation of privacy component has two compartments. Firstly, there must be at least a subjective expectation of privacy and secondly, the expectation must be recognized as reasonable by Society. On that aspect, in **Berstein v Bester (supra)** Ackermann J writing for the majority stated as follows;

“The subjective expectation component does more than say that privacy is what feels private. It provides an explanation for the permissibility waivers of privacy. One can have no expectation of privacy if [one] has consented explicitly or implicitly to have one's privacy invaded. It is, however, the second part of the definition- the objective component- that does more work. One's subjective privacy intuitions must be reasonable to qualify for the protection of the right. What is reasonable, of course, depends on the set of values to which one links the (empty) standard of reasonableness”.

I am in agreement with the learned judge and privacy therefore is what can reasonably be considered to be private but more importantly, in **Berstein v Bester (supra)** Ackermann J introduced a more helpful way of getting a handle on privacy and therefore introduced the continuum of privacy interests as follows;

“The truism that no right is to be considered absolute, implies that from the outset of interpretation, each right is always already limited by every other right accruing to another citizen. In the context of privacy, this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of a civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.”

Thus far, **Ackermann J's** reasoning can be summarized as follows; (a) privacy is a subjective expectation of privacy that is reasonable, (b) it is reasonable to expect privacy in the inner sanctum i.e. in the truly personal realm, (c) a protected inner sanctum helps achieve a valuable good-one's own autonomous identity. It emerges to my mind therefore that from the decision in **Berstein v Bester**, privacy is not a value in itself but is valued for instrumental reasons; the contribution it makes to the project of 'autonomous identity'. This protection in return seeks to protect the human dignity of an individual.

69. The need to protect privacy has well been enumerated by **B. Rossler** in his book, **The Value of Privacy (Polity, 2005) p. 73** where he explained it as follows;

“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”.

70. I am persuaded by the above reasoning and it is in light of the above expositions of the law that I am clear in my mind that publication of the images of an individual without his consent violates that person's right to privacy. I say so because it is also clear to my mind that the root idea of privacy is that of a privileged territory in which an individual person has the exclusive authority of determining whether another may enter, and if so, when and for how long and under what conditions. Simply put, an individual is the 'boss sovereign' over his personal territory in which he has a 'right to be let alone' but without injuring other people.

71. I have already stated above that the right to privacy generally restricts the collection, use of and disclosure of private information irrespective of whether the information may be embarrassing or false so long as it may damage the dignity of an individual. The question that I also posed above is whether the publication of the minors' photographs as the children of a 'slain' criminal constitutes a violation of the right to privacy.

72. To answer that question, I will first start by saying again that in every situation there must be a reasonable expectation of privacy. Secondly, in **Mistry v Interim National Medical and Dental Council of South Africa (1998) (4) SA 1127 (CC)**, the Constitutional Court of South Africa considered the factors to be considered when determining whether right to privacy was violated in line with the information in question. The Court stated that one ought to consider; whether the information was obtained in an intrusive manner; whether it was about intimate aspects of the applicants' personal life; whether it involved data provided by the applicant for one purpose which was then used for another; whether it was disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld.

73. In addition, just as the law should recognize the importance of the right to privacy, it ought to also consider possible defences. In that regard, consent has commonly been said to be a defense in common law privacy claims. **William Posser** in his book, **“Privacy” 48 Calif. Law Review 383, 419 (1960)** writes that **‘the Plaintiff’s consent to the privacy invasion will bar his recovery as in the case of any other tort’**. This therefore means that in common law one who has effectively consented to the conduct of another which is intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.

74. That consent is capable of operating as a defence to claims of a breach of privacy was confirmed by the Irish Court in **Cogley v RTE (2005) 4 I.R. 79** where Clarke J dismissed the Plaintiff's claim that the broadcast of certain footage in a nursing home would infringe the privacy rights of the residents of the home by reference to the fact that the Defendant secured the consent of the patients or of their relatives to the use of the material. The Judge went on to say that consent is only available as a defence where it can be shown that the claimant actually consented to the conduct which he is complaining now and when such consent was voluntarily given.

75. In a case involving a media house such as the Respondents, it has been held that the media house ought to secure written consent of all individuals who may be featured in any publication. In **Aubry v Les Editions Vice Versa Inc (1998) 157 D.L.R. 577**, the Canadian Supreme Court held

that publication of the photograph of an individual without her consent was actionable as a breach of privacy. The Courts have also held that a person's consent would only be valid where the person was fully informed about all relevant risks - See **Walsh v Family Planning Services Ltd (1992) 1 I.R 50**.

76. Applying the principles above in the Petition before and based on the evidence placed before me, I am satisfied and do find that some of the publications in question were made with the consent of the minors' late mother, F W. I say so because Annexure 'TM 5' produced in the Affidavit of TM K reveals that the Late F W had given a voluntary interview with the 2nd Respondent.

On page 3 of its newspaper, "The Daily Nation," the 2nd Respondent's newspaper edition of 21st February 2007 there was a by line which read; '*The agony of being the wife of wanted man*'. The author then wrote as follows;

"Ms. F W, 28 the wife of most wanted gangster who was gunned down by police yesterday spoke about her life with a criminal.

Until two weeks ago, when the photograph of her husband, S M I, was published in newspapers and broadcast on TV news bulletins, she always believed that he was a taxi driver at the city centre.

After the truth had finally dawned on her, Ms. W fled from her matrimonial home

The decision made her discover the other side of the gunrunner which lie he had managed to conceal from her for two years.

The night raid

"He called my brother and warned that he would follow and kill me if I refused to go back to him." She said yesterday, moments after the night raid. Cowed by the threat, she returned home and M confiscated her cell phone so that she would not contact anybody.

Mr. M was on the police list of most wanted criminals and Kshs.150,000 bounty had been placed on his head and an equal amount for members of his gang. The money would be given to anyone who gave information leading to their arrest.

Police also described him as a dangerous man who did not hesitate to pull the trigger on his victims, saying he was always armed.

"He would beat me up any time I answered him back" said the wife. She went on; "The last time was two days ago (Sunday) when he got so annoyed and carried away two beds from this house, a wall unit and an arm chair"

The furniture was transported to another of M's homes in [Particulars Withheld] . The home in [Particulars Withheld], where he was killed, had three rooms plus a washroom.

The living room was furnished with a single sofa set and a coffee table. At one corner was a 14 inch television set and a VCD player.

Two portraits that hang on the wall betrayed his obsession with violence similar to those seen in action-packed movies. A portrait of martial arts legend and actor Bruce Lee as well as another of former Hollywood award-winning actor for his role in action thrillers Arnold Schwarzenegger; were displayed on the wall.

When the Nation visited the scene of the shooting yesterday, the house in which M lived looked just ordinary.

He had spent his hours asleep on a mattress which was strewn on the floor of the bedroom. His accomplice was sleeping on a mattress on the floor in the kitchen.

And six children, who were sired by M in a separate marriage, shared a sofa set in the living room.

The kitchen was equipped with a small gas cylinder and it was evident from the dishes, that M had fed on a meal of chicken and chapati before he had retired for the night.

“On a bad day he gave me Kshs.200.00 to spend for two days but at times, I spent Kshs.1,000.00 every day for meals”, said Ms W.

The criminal was also a man of many women. Besides Ms. W, he had another wifeand another in [Particulars Withheld].

Ms. W and Ms. M first met in February 2005 when she was desperate to get a companion after her former husband of 10 years, Mr. C N, died of illness at the Kenyatta National Hospital. Amazingly, she has never seen M holding a firearm.

“Even after I saw his photograph in the newspapers and on TV, he convinced me that he was not a criminal. He warned me against listening to what other people said,” said Ms. W.

But the criminal had a human feeling for innocent children. It was best displayed in his last moments on earth.

His wife had requested him to abide by police orders and move out of the house lest they sprayed bullets through the windows and kill her and the children.

Witness and killing

“I told him to get out of the houses and surrender to police at least for the sake of the children and he obliged without question,” she said.

Yesterday, she witnessed the killing of a man who she had stayed with since February 2005 alongside an accomplice identified as “M” alias G .

According to police reports, M was the leader of a four man gang and so, two others are still at large.

One of them was identified by Ms. W as I, saying he was a frequent visitor at the house.

Nairobi police boss Njue Njagi, who visited the scene, said the hunt was on for the rest of the gang members.”

77. The Headline of the 2nd Respondent newspaper of 22nd February 2007 read; ‘Police: M family to remain in custody’. It then went on to state that; ‘Ms. F W, wife of the most wanted criminal S M I, who was gunned down by police early Tuesday morning in [Particulars Withheld] talks to the press’ The Petitioners only produced these excerpts of those stories but I am able to gather that F W (deceased) granted the interview without condition notwithstanding where she was at the time of the interview. The Publication went on as follows;

“After five months in [Particulars Withheld], Mr. M decided, without consulting her, to move to [Particulars Withheld].

The move was so fast that they left behind the furniture.

“He only explained that a long-time enemy who hailed from his native village in Kiambu had traced where we stayed. He told me we should move because the man wanted to kill him over a land tussle back home,” she said.

At [Particulars Withheld] M opened a retail shop for his wife. They lived there until October last year when, again, they lastly moved to the house in [Particulars Withheld].

Traced home

He gave the same reason – that the man had traced his new home and was preparing to kill him,” she said.

On Sunday, Mr. M was preparing to move houses again.

According to the wife, he got so much annoyed and carried away two beds from the house, a wall unit and an armchair.

He later explained he took them to another house in [Particulars Withheld] .

“I questioned him, saying we would have to sleep on the floor but he brushed me off saying he would replace the furniture”, she added.

During the Tuesday raid, the six children, as well as Mr. M and his accomplice identified as M, alias ‘M’ had spent the few hours of the night sleeping on mattresses on the floor.

Details also emerged that it never crossed Mr. M’s mind that he would be felled in a hail of police bullets.

His wife quoted him to have said ‘Nitakufa kifo cha Mungu lakini hakuna mtu atanipata na aniuue’ (I will die a natural death. Nobody will ever find and kill me).

He said the words to his wife after she questioned him about the news she had heard on TV.

Mr. M was cunning – always using the back door when he left or entered the house. For the first time, he used the front door when police came calling on Tuesday, and was felled at the door step, she said.

“At no time did he let me see his personal documents including his national identity card. So I never knew his full names until the police announcement,” Ms. W said.

He even carried his wallet to the shower.

Amazingly, for the two years the couple lived as man and wife, Ms. W knew her husband only as M.

“He smiled a lot, listened when I spoke very keenly, but he was a man of few words,” his wife told the Nation.

78. Further to the above, in the publication of 21st February, 2007 the 2nd Respondent at page 5 published an image of a young girl and a byline that read as follows; ‘M’s three-year old daughter examines a rifle barrel, unaware that her father S M I had been shot dead.’ On 25th February 2007, at page 9, it published a photo of one of the M’s son with the following caption; “Leaflets target M’s close relatives” and went on to write below the photo as follows; “one of M’s son goes through a copy of the Nation that reported his father’s killing.”

79. I will shortly reproduce the statements in “the Standard” newspaper of 21st February 2007 which the Petitioners found offending but looking at all the above statements, I note that firstly, none has identified any of the children by name. The 2nd Respondent has basically reported, in my view, the occurrences of the day and the event leading to the killing of S M I. Secondly, and from all the statements reproduced above, I am constrained to believe the 2nd Respondent that the publication was done with the consent of the Late F W who was photographed alongside her three children inside her house at [Particulars Withheld] , later while inside a police vehicle and at Kilimani Police Station where allegedly she gave a press interview. I believe she spoke to the press voluntarily given the depth of the information reproduced elsewhere above because how else would the press get such information? Further, the pictures published by the 1st Respondent at page 2 of its publication of 21st February 2007 were taken at the M’s house in [Particulars Withheld] , and therefore implying consent given to the press to be there. Further, if she had not consented to the publication of the information and given the interview, why did she not institute a claim for herself and her children against the Respondents during her lifetime? No credible answers were given by the Petitioners to these questions and no answer at all was given to the defence of consent which I find was available to the Respondents even in constitutional litigation.

80. From the evidence before me, it is therefore my finding that the publication was made with the consent of the late F W and I am unable to find any evidence that she was coerced to do so or was not in a proper state of mind to give such consent. Of course she was in a traumatic moment with her husband killed but where is the evidence that she had not consented to the press interview? The depth and breadth of the information she provided would tell otherwise.

81. In addition to the above, I also recall the fact that the Respondents claimed that the publications were made in public interest and were therefore justified. In that regard, **Hillary Delany & Eoin Carolan in their book ‘The Right to Privacy’ (2008) Thomson Round Hall 227** wrote as follows in regard to public interest;

“One of the most important examples of a situation in which the public interest may outweigh the individual’s right to privacy is where the information in question relates to a matter of public importance ...”

I adopt the above statement and it follows that the publication of information will be protected if it supports the public interest in informing and educating the public about issues of public importance. Public interest as a defence for the violation of right to privacy is therefore designed to ensure that the individual’s right to privacy does not trump important social or collective considerations.

82. Further, it is also clear to me that intrusion upon the right to privacy will usually be justified in the public interest where it is intended to expose an individual’s illegality or misconduct. It was therefore in the public interest that the publications should have been made, given that it exposed the killing of a criminal who had been marked as a ‘most wanted criminal’, which fact is not controverted by the Petitioners. I have also seen the 1st Respondent’s publication of 21st February 2007 and the heading at page 1 read; “*Chilling reality*”. On page 2 it read; ‘*Most wanted man goes down*’. The publication of those facts were necessary in the public interest and I see no reason to fetter the Respondents in that regard.

83. Having stated as above, if I understood the Petitioners well, their concern was also that the images of the minors were published alongside those of their late father and the said act was allegedly the cause of stigmatization of the minors. While it I am in agreement that the children had nothing to do with the lifestyle of their late father and that **Section 4** of the **Children Act of 2001** establishes the principle of ‘the best interest of the child’ in all matters affecting a child, I cannot find any law that can make the Respondents liable for the publication on that count alone because **Section 19** of

the **Children Act** which protects the right to the privacy of a child, is clear that it is subject to parental guidance. I have in that regard already found that the publication was made with the consent of late F W and to that extent therefore it cannot be true that the minors' right to privacy was violated where consent was impliedly and constructively given by the conduct and language of the late F W. The Petitioners were not in the places where the interviews were conducted and the pictures taken and have nothing to say on the matter.

84. In addition, I recall the evidence tendered by the Petitioners that the minors have suffered out of the publication and that they have been ridiculed and called names as children of a thief; that they have not been able to make friends at school and the Petitioners entirely blame the Respondents as the minors' woes allegedly have their root in the publication. While I sympathize with the agony the minors may have gone through, I am unable to find that their woes if at all are related to the publication.

85. I say so because it was the evidence of PW1 that a certain teacher who came from her village identified the children as being S M's children. She did not identify the children because of the publication but because she knew them from their common village. How then can it be that the publication is the cause of their identification? Secondly, she testified that the children had moved schools and she also had to move houses because of the ridicule the children faced. I am then constrained to ask, why did the children not move schools and houses during the life time of their mother whose images were also published? Further, PW2 testified that she does menial jobs and that she cannot afford the school fees of the 3 minors in her care and she also claimed that she moved the minor, D, from [Particulars Withheld] Boys School to [Particulars Withheld] High School because she could not pay fees and R's school fees were being paid by a good Samaritan. PW1 also testified that the child, E, lives in a children's home. How come there is no evidence that E is being ridiculed and had to change schools like her siblings if at all the cause of their ridicule was the publication in question? Of further interest to me is that the Petitioners produced birth certificates of the minors and the following information is relevant;

(i) The father of N, R W and A M is indicated as being D K N.

(ii) The father of E W, C W and M K is S M I.

86. Is this Court for whatever reason expected to believe that a legal document like a birth certificate is to be taken to mean anything other than what is stated in it? Where is the connection between S M and D K N and the named children? None has been given and can it then be said that the three children suffered prejudice because of their association with S M? I think not.

87. For all the above reasons I am unable to find that the right to privacy has been violated because of the publications made by the Respondents as alleged.

88. My reasoning above is sufficient to dispose of the matter, but doing so, I must consider the submission made by the 2nd Respondent that the publication was not one regarding an invasion into the right to privacy but one of defamation. I disagree with that submission and the reasons are stated elsewhere above.

89. I say so also because, although defamation and invasion of the right to privacy involve publication, the nature of the interests protected by each action differ substantially. A defamation action leads to compensation in damages for loss of reputation or a good name caused by publication of false information. To be defamatory, a publication must therefore be false and must bring the defamed person into disrepute, contempt or ridicule or must impeach the Plaintiff's honesty, integrity, virtue or reputation - See **Phoenix Newspapers Inc v Choisser 82 ARZ. 271, 312 (1957)**.

90. Privacy on the other hand does not protect reputation but protects mental and emotional interests. Indeed the gravamen of a privacy action is, *'the injury to the feelings of the Plaintiff, the mental*

anguish and distress caused by the publication'. A lawful remedy is available in, say constitutional litigation, to protect a person's interest in being let alone is available when there has been publicity of a kind that is highly offensive. Another distinction between invasion of the right to privacy and defamation is the role played by the truth. To be defamatory, a publication must be false and truth is the defense. An invasion of the right to privacy may be brought even when the publication is not untrue and the actual facts stated are actually true - See ***John Doe v Methodist Hospital (supra)***.

91. Having so said, the only remaining issue is whether the publications in question subjected the minors to inhuman and degrading. That issue is moot once the primary claim for breach of the right to privacy was dismissed. There was in any event no evidence tendered to prove these claims and that is all there is to say on that matter.

Conclusion and Disposition

92. The Petitioners were clear that their claim was not one of defamation but one for the violation of the minors' rights to privacy and I have agreed with them to that extent. I have however also found that the right to privacy as alleged was not violated and that being my finding, the Petition must be and is hereby dismissed.

93. As for costs, I see no reason to burden the Petitioners with costs and so each Party shall bear its own costs.

94. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 19TH DAY OF JUNE, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Maingi for Petitioners

Mr. Abidha for 1st Respondent and Mr. Ngige for 2nd Respondent

Order

Judgment duly delivered.

Copies to be supplied to Parties on payment of the requisite fees.

ISAAC LENAOLA

JUDGE

19/6/2015