



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 65 OF 2012**

**RUKIA IDRIS BARRI.....PLAINTIFF**

**VERSUS**

**MADA HOTELS LTD.....DEFENDANT**

**J U D G M E N T**

1. The Plaintiff's case as pleaded in the **plaint dated 15<sup>th</sup> February 2012** is that on about 7<sup>th</sup> November 2011 the Defendant caused to be published a picture of the Plaintiff ("taken several years ago for advertisement") in the *Kenya Airways Limited* inflight "traveler magazine" *Msafiri*, **Edition 78, November–December 2011** issue; that the said publication was without the Plaintiff's knowledge, consent or authority; that the publication was thus illegal and a gross invasion of the Plaintiff's constitutional rights of privacy and dignity of the person; that in making the publication the Defendant was solely motivated by greed and the need to earn maximum profits; that the Plaintiff (then an employee of Kenya Airways Limited) was prejudiced by the publication as her employer did not permit her to engage in other gainful activities such as advertisement for other entities; and that she was thereby greatly injured in her character, and her relationship with her employer has been compromised.
2. The Plaintiff sought the main reliefs of an appropriate injunction and general damages.
3. In its statement of defence the Defendant pleaded that at all material times the Plaintiff was a casual employee of the Defendant at its *Baobab Lodge Hotel* as receptionist/curio-shop attendant; that as a way of marketing itself the Defendant from time to time advertises in select travel magazines; that the advertisements may take the form of pictures of its hotel buildings, facilities and employees; and that in all cases the pictures of employees are taken with the knowledge and consent, express or implied, of the employees.
4. The Defendant admitted publishing the Plaintiff's pictures but averred that the picture was taken with her knowledge and consent; that she was well aware that the picture would be published by the Defendant; and that the publication was done in good faith. The Defendant denied that the publication amounted to an invasion of the Plaintiff's privacy or that it was motivated by greed or profiteering.
5. There does not appear to have been filed any reply to defence.
6. At the hearing the Plaintiff testified. She did not call any other witness. One witness testified for the Defendant. He was **LAWRENCE ALOIS SILA** (DW1). The Plaintiff's bundle of documents dated 15<sup>th</sup> February 2012 was by consent admitted in evidence as **Exhibit P1**. The Defendant had no

documents.

7. The Plaintiff's testimony was as follows. She was currently working with Kenya Airways as an inflight attendant. She joined Kenya Airways in 2004. In 1997 she did her hotel training with the Defendant at its Baobab Lodge in Kilifi. Her engagement there was for six months. She emphasized that it was training, not employment.

8. The Plaintiff further testified that while at Baobab Lodge the Defendant, with her consent, took her photograph for use in a brochure to advertise the Defendant's facilities for a year in 1997/1998. She was thus surprised to see the same picture appear in the November/December 2011 issue of the *Msafiri* magazine. She never consented for her picture to appear in this magazine, as Kenya Airways does not allow its employees to advertise for other entities without its consent. The picture had been taken 14 years earlier. In 2011 she was already married and had children. She complained immediately to the Defendant after she saw the picture by letter. The letter was not acknowledged or replied to. She had **not** given to the Defendant unlimited consent to use the picture as and when it chose.

9. In cross-examination the Plaintiff reiterated that she was never employed by the Defendant and that it was not true that she was a casual employee or receptionist and curio-shop attendant. She explained that the training included reception and cashiering, but not in the curio shop. The picture in question was taken with her consent and it was to be used only in the hotel brochure for 1997/1998. It was **not** for general advertisement. That was her verbal agreement with the Defendant.

10. The Plaintiff further testified that by publishing her picture 14 years later the Defendant was motivated by greed because its intention was to attract more customers to its hotels. She acknowledged that she did not lose her job with Kenya Airways because of publication of the picture. In response to a question asked by the Court the Plaintiff stated that she never received any payment from the Defendant for the picture when initially taken and used. She also stated that there was no tangible harm to her career prospects by the initial publication and use of the picture.

11. For the Defendant, DW1 stated that he was the Group Personnel Manager of the Defendant. Part of his work was to look after the welfare and other activities of the staff of the Defendant. The Defendant runs a chain of hotels in East Africa.

12. DW1 further testified that he knew the Plaintiff. She had worked with the Defendant at its Baobab Lodge at Kilifi as a receptionist/curio-shop attendant on a casual basis. He denied that the Plaintiff was a mere trainee; he asserted that she never trained with the Defendant.

13. DW1's main testimony regarding the issues at hand was as follows. The Plaintiff agreed that her picture be taken and used to advertise the hotel; no payment was made to her; there was no limit in duration within which the picture could be used; the Defendant would have stopped using the picture if the Plaintiff had indicated that she no longer wanted it to be used; there was no such demand from her; and there was never any intention on the part of the Defendant to injure the character of the Plaintiff. After the Defendant received the Plaintiff's letter of demand it had not used the Plaintiff's photograph again.

14. DW1 also testified that the Defendant regularly uses the pictures of its employees to advertise itself and its facilities; the Plaintiff's picture was flattering to her and no harm was intended or caused to her by its use.

15. In cross-examination DW1 stated that the terms for the taking and use of the Plaintiff's photograph were never in writing; that he did know what those terms were as they were agreed between the Plaintiff and the Director of the Lodge; that he (DW1) was not a party to the discussions regarding the same; and that there was no need to get the Plaintiff's fresh consent 14 years after the photograph was first taken and used.

16. The parties filed written submissions, the Plaintiff filing hers on 16<sup>th</sup> January 2013 and the

Defendant on 21<sup>st</sup> January 2013. I have considered those submissions, including the cases cited.

17. The parties filed a joint statement of issues dated 30<sup>th</sup> May 2012. The issues as framed by them are as follows –

- i. Whether the picture the subject-matter of these proceedings was for advertisement and was it done with the Plaintiff's knowledge, consent and/or authority?
- ii. Whether as a result of the publication the Plaintiff has been prejudiced and if so, how?
- iii. Whether the Plaintiff's picture was taken with her express or implied consent?
- iv. Whether the publication of the Plaintiff's picture was done in good faith or otherwise?
- v. Whether the Plaintiff was employed by the Defendant and in what position?
- vi. Whether the said publication has greatly injured the Plaintiff in her character, and whether her relationship with her employer has been compromised.
- vii. Whether the Plaintiff is entitled to the remedies/reliefs sought.

18. To my mind the following are the proper issues in this case -

- i. **What were the terms between the Plaintiff and the Defendant regarding the taking and use of her photograph?**
- ii. **Did the Defendant require the Plaintiff's consent to use her photograph as it did 14 years down the line?**
- iii. **Did the Plaintiff suffer any injury as a consequence of the use of her photograph without her consent 14 years down the line?**
- iv. **Is the Plaintiff entitled to the reliefs sought?**

### **Issue Nos 1 and 2**

19. We have only the Plaintiff's evidence regarding the terms under which the Defendant took her photograph. She has testified that the photograph was for one single use only in the hotel brochure for the year 1997/1998. The agreement was verbal with a representative of the Defendant. That representative was not DW1 who had only hearsay evidence regarding the matter. In this connection it matters not whether the Plaintiff was an employee of the Defendant or just a trainee.

20. The Plaintiff's testimony regarding the conditions for her photograph being taken and used by the Defendant is uncontroverted. I accept that testimony. The Defendant was to use her photograph on one specific occasion only. That occasion was publication in a hotel brochure for 1997/1998. Any further use of the photograph by the Defendant therefore necessarily required her consent. No such consent was sought or obtained when the Defendant used the photograph 14 years down the line.

### **Issue No. 3**

21. Did the Plaintiff suffer injury as a consequence of the unauthorized use of her photograph by the Defendant? In essence what the Plaintiff is complaining about in this suit is the invasion by the Defendant of her **human dignity and privacy**. The two are fundamental rights protected under the **Bill of Rights** in our **Constitution**.

22. **Article 28** of the Constitution states as follows –

**“Every person has inherent dignity and the right to have that dignity respected and protected.”**

**And Article 31** protects the right to privacy. A person’s privacy includes his or her identity, likeness, etc.

23. In the South African case of **Grutter v Lombard and Another 2007 (4) SA 89 (SCA)**, it was noted as follows –

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

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

24. In another South African case, **Angella Wells v Atoll Media (PTY) Ltd & anor, Western Cape High Court Case No. 11961/2006** it was held

**“...the appropriation of a person’s image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as in case, for the benefit of a magazine sole to make profit, it constitutes an unjustifiable invasion of the person rights of the individual, including the person’s dignity and privacy. In this dispute, no care was exercised in respecting these core rights.”**

25. The law as set out about above in those South African cases is good law, and I respectively adopt it. The High Court of Kenya should have no hesitation at all in according protection for human dignity and privacy where they are exploited for commercial purposes without consent.

26. In the present case there was no consent of the Plaintiff sought or obtained for the commercial exploitation of her likeness taken with her consent for a limited purpose only 14 years earlier. In the meantime her circumstances had changed. She was no longer a young single girl. She was now a married woman with children. It matters not that the photograph in question (of a young lady carrying a fish on her head) was not of itself offensive. It would not matter in fact (except in so far as damages are concerned) that the photograph was flattering. It was nonetheless an unacceptable exploitation of ones photograph or likeness for commercial purposes without their consent. It was an invasion of her right to privacy and human dignity.

**On liability therefore I find for the Plaintiff.**

#### **Issue No. 4**

27. What reliefs are due to the Plaintiff? She is certainly entitled to the injunction sought and I hereby grant it. As to general damages, I have considered the offence caused to the Plaintiff by the unauthorized use of her photograph, particularly in her changed personal circumstances (employment and marital status). I have balanced these with the fact that she really suffered no tangible loss in her employment or

in her personal life. At any rate there was no evidence of such loss. Nonetheless the Plaintiff is entitled for some damages for the invasion of her constitutionally guaranteed rights of human dignity and privacy. **I will award her general damages of KShs 300,000/00.** That sum shall carry interest at court rates from the date of judgment until payment in full. The Plaintiff shall have costs of the suit. There will be judgment accordingly.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 22<sup>ND</sup> DAY OF AUGUST 2013**

**H. P. G. WAWERU**

**JUDGE**