Mind Quest Limited v Mwatha & 2 others (Civil Appeal E674 of 2024)
[2025] KEHC 3891 (KLR) (Civ) (5 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3891 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E674 OF 2024

SN MUTUKU, J

MARCH 5, 2025

BETWEEN

MIND QUEST LIMITED ..... APPELLANT

AND

WENDY MWATHA ..... 1ST RESPONDENT

WINNIE WANJA ..... 2ND RESPONDENT

ANNAH MBURU ..... 3RD RESPONDENT

(Being an appeal from the decision of the Office of the Data Protection Commissioner, Immaculate Kassait MBS, delivered on 22nd April, 2024 in ODPC Complaint No. 151 of 2024)

JUDGMENT

Introduction

1. Wendy Mwatha, Winnie Wanja and Annah Mburu, the 1st, 2nd and 3rd complainants before the Data Protection Commissioner (hereafter the 1st, 2nd and 3rd Respondents) lodged a complaint seeking compensation in the amount of Kshs. 700,000/- for each year Mind Quest Limited, the Respondent before the Data Protection Commissioner (hereafter the Appellant), illegally used their images (being three years since the termination of the Agreement) therefore totaling Kshs. 6,300,000/- and for the unauthorized use of their images beyond the agreed-upon period; and that the Appellant immediately ceases and desists from using the Respondents images for any purpose including in-store branding materials and promptly removes all such images from any materials in which they are currently featured.

2. The Appellant, upon being notified of the Complaint, filed a letter in response whereupon vide determination, on 22nd April, 2024, the Data Protection Commissioner (hereafter Commissioner)

rendered decision in respect of the Respondents Complaint by finding the Appellant liable for commercial use of the Respondents' personal data without their express consent and directed the Appellant to compensate the Respondents to the tune of Kshs. 1,500,000/-. It is the said decision by the Commissioner that has aggrieved the Appellant and which is the subject of this appeal.

The Memorandum of Appeal

3. By a memorandum of appeal dated 30th May, 2024, the Appellant has raised the following grounds:

    1. That the Office of the Data Protection Commissioner erred in law and fact in finding that the Appellant is liable for commercial use of the Respondents personal data without their express consent.

    2. That the Office of the Data Protection Commissioner erred in law and fact in placing evidential value on an unexecuted draft contract, supplied by the Respondents, purportedly entered between the Respondents and the Appellant's trademark, Accessorize with Style.

    3. That the Office of the Data Protection Commissioner erred in law and fact in finding, from the unexecuted contract, that the Respondents had only consented to the use of their images for three years hence reducing the period when their consent subsisted.

    4. That the office of the Data Protection Commissioner erred in law and in fact, in failing to place any reliance on the submission that it outsourced the services of the Respondents through Couture Magazine, a modelling agency, a fact which the Respondents have not disputed.

    5. That the office of the Data Protection Commissioner erred in law and in fact in failing to place any reliance on the invoice dated 17th May, 2017, addressed to the Appellant, on account of content shoot and photography services, and supplied by Couture Africa, yet the contents of the invoice shed light on some of the allegations made by the Complainants.

    6. That the Office of the Data Protection Commissioner erred in law and fact in awarding the Respondents compensation of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-) in its determination rendered on 22nd April, 2024 as it is an undisputed fact that the Respondents had already been paid Kenya Shillings Five Thousand (5,000/-) only in 2017 for the use of their images.

    7. That the office of the Data Protection Commissioner erred in law and in fact in failing to determine the complaint on merit.

4. It is on the backdrop of the above grounds that the Appellant is seeking to have the appeal allowed; the determination of the Commissioner set aside; and that, costs of the appeal be awarded to the Appellant.

Submissions

5. The appeal was canvassed by way of written submissions, of which the Court has duly considered.

6. On the part of the Appellant, counsel anchored her submissions on the decision in Jessicar Clarise Wanjiru v. Da Vinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR to argue that the Commissioner failed to appreciate in her determination the terms of engagement between the Appellant and Couture Africa, the latter having been commissioned in respect of providing photography services without any direct contractual obligation with the Respondents. That the Commissioner's omission in respect of the above evidence led to an incomplete consideration of the Appellant's role resulting in an erroneous finding of liability on the alleged misuse of personal data.

7. It was further argued that the Respondents' admission of having received payment of Kshs. 5,000/- from Couture Africa for their participation in the original photoshoot significantly undermines their assertion of unauthorized use, as it indicates initial consent to the marketing arrangement facilitated by Couture Africa. That the said disclosure negates the Commissioner's presumption that any ongoing use of the Respondents images by the Appellant in its branding activities was inherently wrongful or unsupported by proper consent. It was further argued that the Commissioner disregarded relevant evidence but also overstepped in attributing liability on the Appellant for actions that, at most, fall within the remit of Couture Africa's contractual obligations and professional responsibilities. Given that the Respondents voluntarily provided their images and acknowledged their commercial use, as evidenced by their admission, it is clear that they consented to the marketing arrangement.

8. Counsel went on to argue that for any claim of compensation to be substantiated in cases alleging violations of rights, there must be clear and compelling evidence of actual harm or distress directly attributable to the alleged violations whereas the Respondents failed to provide any credible evidence indicative of the fact that they suffered harm, distress or financial loss resulting from the continued use of their image, to wit, the award on damages was unwarranted. The decisions in David Bagine v. Martin Bundi [1997] eKLR and Alternative Media Limited vs Safaricom Limited [2005] eKLR, were cited to aid in the arguments.

9. Further, it was submitted that the Respondents' images did not constitute "protected" attributes in the context of an unlawful use claim, as they voluntarily consented to the commercial use of their likeness by participating in the original photoshoot and receiving payment for their involvement. Further, where parties have consented to the use of their images, the Respondents bore the burden of demonstrating that any misuse exceeded the agreed terms, which in this case was solely between Couture Africa and the Respondents, with the Appellant neither being privy to nor involved in that arrangement.

10. The Applicant cited sections 107 and 108 of the *Evidence Act*, and submitted that the unsigned and undated one-page blank pro forma document produced by the Respondents, bearing the title "Accessorize with Style," cannot, in the absence of identifying particulars, be construed as establishing any enforceable agreement with the Appellant as it was devoid of essential elements—such as signatures, identifying information, date and other particulars, that would substantiate the existence of a binding contractual relationship. In summation it was argued that, in any event, the Appellant was not privy to any contract between Respondents and Couture Africa on use of the latter's image, to which a claim for damages may crystallize.

11. On the part of the Respondents, they agreed with, and urged for the upholding of, the Commissioner's decision. Counsel for the Respondent submitted that the Appellant cannot truly feign lack of knowledge of the contents of the agreement whose conception was borne out of its need for contracting the Respondents herein as models. While citing the provisions of Section 25 of the Data Protection Act and the decision in Kenya National Capital Corporation Ltd v. Albert Mario Cordeiro & Another [2014] eKLR, it was argued that the Appellant was not only a beneficiary of the use of the Respondents' image rights for a limited period, but it was also a data controller in this respect. That the Respondents' claim was an exception to the doctrine of privity of contract given that the onus to conduct due diligence lay upon the Appellant as a data controller, who did not dispute using the Respondents' images, to ensure that it did not engage in an illegality or irregularity and that the services offered to it by its agent, Couture Africa Magazine, were legal and regularized.

12. It was further submitted that the Appellant did not at any one point receive express invitation or consent from the Respondents to use their images and was therefore performing an illegality and was

in blatant breach of data and privacy laws from the onset. The Respondents relied on Joel Mutuma Kirimi & Anor v National Hospital Insurance Fund (NHIF) [2020] eKLR as quoted with approval the decision in the case of T.O.S v Maseno University & 3 Others [2016] eKLR and Wanjiru v Machakos University (Petition E021 of 2021) [2022] KEHC 10599 (KLR) to support their arguments.

13. The Respondents cited Reveille Independent LLC vs. Anotech International (UK) Ltd [2016] EWCA Civ 443 to argue that the unsigned contracts presented as evidence had contractual force as the life of an unsigned contract is brought into existence by the events succeeding its making. They argued that by dint of Section 32 of the Data Protection Act, the Respondents discharged their legal burden of proof on a balance of probabilities upon the Respondents assertions of being engaged as models, there being an existing contract, and there being evidence that the Respondents' images were being used past the contractual terms and past a demand letter being issued. It was argued that, bearing the above in mind, the burden of proof shifted to the Appellant to prove consent on use of the Respondents. images.

14. In conclusion, it was submitted that the Appellant failed to demonstrate their compliance with the material statutory underpinnings of *the Constitution* and its preceding Acts and therefore, the Appeal ought to be dismissed with costs and the determination of the Commissioner upheld in its entirety.

Analysis and determination

15. This Appeal emanates from the Office of The Data Protection Commissioner pursuant to Section 64 of the Data Protection Act. It is a first Appeal to this Court. I have reminded myself that it is the role of this Court sitting as the first appellate Court, to re-evaluate the evidence tendered before the trial Court and come up with its own independent finding. (see Selle –Vs- Associated Motor Boat Co. [1968] EA 123 and Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR).

16. I have equally read the entire record before the Commissioner including the Memorandum of Appeal, rival submissions and authorities cited. To my mind, the central issue for determination is whether this Court ought to interfere with a finding of fact made by the Commissioner in the event her decision was based on no evidence, or if the Appellant has demonstrated that the Commissioner arrived at her findings based on wrong principles of law.

17. At the heart of the determination of a matter are the pleadings of parties. Pleadings filed before a court or tribunal are central to the issues arising for determination. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated as follows regarding this issue:

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

18. My understanding of the case for the Complainants, who are the Respondents in this appeal, as captured in their Affidavits supporting the Complaint is that they responded to a call by a company

called Couture Magazine seeking participation from 'dark-skinned' girls interested in accessories' photoshoot. The Respondents expressed interest in such venture, upon which they were supplied with copies of the Model Release Agreement titled "Accessorize with Style Release Form" from Couture Magazine through email.

19. The photoshoot was to take place on 22nd May 2017. On that date, the Respondents were supplied with a printed version of the agreement which they signed. The agreement was for the use of the Respondents images and likeness for promotional activities of the Accessorize with Style including in-store branding, outdoor, print, social media, internet and posters across East African Region for a period not exceeding three years for an agreed compensation of Kshs 5,000 each.

20. The Respondents claimed that three years expired in May 2020 but the Accessorize with Style continued using their images for in-store branding post three years, which was illegal according to the Respondents. It is their claim before the Office of Data Protection Commissioner that the Appellant infringed on their right to privacy contrary to Article 31 (c) and (d) of *the Constitution*.

21. The Appellant denied being privy to the agreement between the Respondents and the third party claiming that they outsourced branding and sought services of a third party through whose channels the photographs of the Respondents ended up at some of the Appellant's stores.

22. The Appellant's ground of Appeal can be summarized as follows:

    i. Finding that the Appellant is liable for commercial use of the Respondents' personal data without their consent.

    ii. Placing evidential value on an unexecuted draft contract purportedly entered between the Respondents and the Appellant's Trademark Accessorize with Style.

    iii. Basing her findings on an unexecuted contract that the Respondents had only consented to use their images for three years.

    iv. Failing to appreciate the Appellant's outsourced services of Respondents through Couture Magazine.

    v. Failing to rely on Invoice dated 17th May 2017 which sheds light on the allegations by the Respondents.

    vi. Failing to note that the Respondents had been paid Kshs 5,000 each for their images and awarding them Kshs 500,000 each in compensation.

    vii. Failing to determine the Complaint on merit.

23. The Data Commissioner analyzed the matter and arrived at her decision that the Respondents' rights were violated by the Appellant by using their images in their in-store branding and awarded the Respondents Kshs 500,000 each.

24. I have noted that, in her determination of the Complaint, the Data Commissioner grappled with the issue of absence of the contract relied on by the Respondents. In paragraph 34 of the Determination, the Data Commissioner stated as follows:

    34. In as much as the contract between the Complainants and the Respondent was not availed as proof of the same, there was evidence that the Respondent was using the Complainants' images in their in-store branding without the consent of the Complainants.

25. The Data Commissioner faulted the Respondent in failing to discharge the burden of proof placed on it under Section 32(1) of the Data Protection Act. In paragraph 35 of the Determination, she stated that:

> 35. The Respondent failed to prove and discharge the burden under Section 32(1) of the Act that they obtained consent from the Complainants to use their images.

26. The Data Commissioner concluded that by displaying the Respondents' images in their in-store branding is commercial use of personal data which is prohibited under the Act and the Regulations unless express consent is obtained.

27. I have analyzed the matter and considered all the grounds of appeal. I agree with the Data Commissioner on her analysis of the legal provisions in *the Constitution* and the Data Protection Act on the issue of protection of personal data. The problem I have with the Determination is failure by the Respondents to provide a signed agreement between them and the Appellant. The Complaint before the Data Commissioner is based on an agreement between Respondents and Couture Magazine. It is clear from the Affidavits of the Respondents that they responded to a call on their Instagram accounts from Couture Magazine to participate in an accessories photoshoot. The Respondents expressed interest and communicated to the Magazine.

28. The Respondents have claimed that they received, through email, a copy of Model Release Agreement titled "Accessorize with Style Model Release Form' and a printed copy of the same form on 22nd May 2017 which they signed. They did not get a copy of the signed copy, according to their Complaint. From this information, it is clear that the contract was between Couture Magazine but the document containing the agreement form was from Accessorize with Style.

29. I have read the entire record of appeal. I have not seen a signed copy of the agreement. What is attached to the Replying Affidavit of the Respondents is a blank copy marked as 'WW1'. This court, sitting on appeal, does not have any evidence that a contract existed between the Respondents and the Appellants and if so, what were the terms of that contract. This is crucial because the Complaint by the Respondents before the Data Commissioner was based on contract.

30. The question, therefore, is: Was there a valid contract between the Appellant and the Respondents?

31. The Black's Law Dictionary, 9th Edition, defines contact as "An Agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."

32. There are certain parameters that are required before a contract can be termed as a valid contract. In RTS Flexible Systems Ltd vs. Molkerel Alois Muller GmbH & Co, KG (UK Production) (2010) UKSC14, cited with approval in Caleb Onyango Adongo v Bernard Ouma Ogur [2020] eKLR, the Supreme Court of the United Kingdom stated that:

> ...The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

33. The Court in William Muthee Muthami vs. Bank of Baroda (2014) eKLR, observed that:

> "...In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

34. This observation is also expressed in Chesire, Fifoot and Formstons, The Law of Contract, 14th Edition on pages 34 and 35 where it is stated that:

> The first task of the plaintiff is to prove the presence of a definite offer made.... Proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offeree to accept that offer.

35. A party basing a claim on a contract entered between that party and another must prove these elements. The contract contains specific terms of that contract, and I dare say each contract is a unique document, with unique terms, spelling the offer, acceptance and consideration. Parties to that contract will be judged on their respective duties and obligations upon proving the above elements.

36. The Respondents did not produce a signed contract. This court sitting on appeal has no idea what the terms of the document they claim to have signed stated, what obligations and duties it placed on the parties. Without that document, how would this court, and by extension, how was the Data Commissioner, expected to determine whether each party fulfilled its part of the bargain. How would the court confirm that the contract restricted the Appellant to three years after which it was not supposed to use the Respondent's images? Or whether indeed the Appellant was obligated under the alleged contract to perform certain duties failing which it was to be found in breach of the contract?

37. I appreciate that *the Constitution* under Article 31 and the Data Protection Act Section 26 jealously protect individuals against misuse of personal data without the consent of data subject. I also appreciate that section 32 (1) of the Data Protection Act imposes the burden of proof on the data controller or data processor to demonstrate that there was consent of the data subject. It provides that:

> 32. Conditions of consent
>
> (1) A data controller or data processor shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose.

38. From the Data Commissioner's Determination, the Appellant did not provide evidence that it has consent to continue using the Respondents' images. In my view, this being a civil matter, the burden of proof under section 107 of the *Evidence Act* does not shift to the Appellants to prove the allegations contained in the Complaint. That burden of proof, whose standard is proof on a balance of probabilities, remains with the Respondents. What has shifted is the evidentiary burden of proof under section 109 of the *Evidence Act* which provides that:

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

39. To my understanding, therefore, the Appellant was required to prove consent of the Respondents existed. The Appellant is the party that wished the court to believe that there was a consent from the Respondents. The Appellant failed to provide that proof. However, that did not exonerate the Respondents from discharging the burden of proof, on a balance of probabilities, that there existed a contract between them and the Appellant and that the said contract restricted the Appellants from

using the Respondents' images beyond three years, and further, that time was to be construed to be running from one certain period to another.

40. I think I have said enough to demonstrate that without a signed contract between the parties, this court is not able to determine the terms of the agreement entered between the Appellant and the Respondents for failure by the Respondents to provide such contract.

41. I agree with the Appellant that the Data Commissioner for arriving at her conclusion that the rights of the Respondent data privacy were infringed. The Data Commissioner placed reliance on evidence that was not backed by a valid contract relied on by the Respondents. Even after expressing herself that "In as much as the contract between the Complainants and the Respondent was not availed as proof of the same, there was evidence that the Respondent was using the Complainants images in their in-store branding without the consent of the Complainants", the Data Commissioner still found in favour of the Complainants.

42. While I have no reason to doubt that the Appellant was using the images of the Respondents in their in-store branding as at the time the matter was before the Data Commissioner, I have no evidence to support the claim that the time for use of those images had expired since the contract signed by the parties was not available before the court.

43. Consequently, I find that this appeal is merited, and I hereby allow the same. I will exercise my discretion on the issue of costs and direct that each party bears own costs for this appeal. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 5TH MARCH 2025.

S. N. MUTUKU

JUDGE

In the Presence of : -

Ms Wambui holding brief for Mrs Kariuki for the Appellant

Ms Juma for the Respondent