



**Mathenge v Julie Njuhi Muiruri (t/a Human Hair Center) (Petition E032 of 2023)  
[2024] KEHC 6970 (KLR) (Constitutional and Human Rights) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6970 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E032 OF 2023  
LN MUGAMBI, J  
JUNE 13, 2024**

**BETWEEN**

**MAKENA NYAMBURA MATHENGE ..... PETITIONER**

**AND**

**JULIE NJUHI MUIRURI (T/A HUMAN HAIR CENTER) ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner filed the Petition dated 17<sup>th</sup> January 2023. It is supported by an affidavit of even date and a supplementary affidavit dated 6<sup>th</sup> September 2023.
2. The main thrust behind the Petition is the Petitioner’s allegation that the Respondent unlawfully obtained and used the Petitioner’s image for commercial exploitation in its advertisement without her consent.
3. Accordingly, the Petition seeks the following reliefs:
  - a. A Declaration that the Respondent violated the Petitioner’s fundamental rights to privacy and human dignity under Articles 28, 31 and 40 by publishing the petitioner’s image for purpose of commercial advertisements without her consent.
  - b. An order of permanent injunction restraining the Respondent from publishing and/or using the Petitioner’s image and likeness in any way in its advertisements or promotions in any way without the Petitioner’s consent.



- c. An order that the Respondent be compelled to compensate the Petitioner for damages and or loss arising from the publication of the petitioner's photograph without her express authority and the exploitation of the Petitioner by the Respondent for commercial gain.
- d. An order for the costs for the petition.
- e. Interest on (c & (d) above
- f. Any other relief that this honorable court may deem fit and just to grant.

#### **Petitioner's case**

4. On 19<sup>th</sup> January 2022, the Petitioner signed a contract of service with New Level Collection Limited to wholly offer it her services as a clothes model for one year. She was thus not allowed to enter into any other modelling agreement during the subsistence of that Contract.
5. The Petitioner deposes that in or around June 2022, she discovered that her photographs, without her consent, had been published to advertise the Respondent's hair products on the Respondent's Instagram page. The images had been utilized to advertise the Nyambura unit sold at Ksh. 52,000/-; the Mini bob unit sold at Ksh.33,000/- and the Naomi unit sold at Ksh.43,000/- (Annexure MNM- 2).
6. Following this discovery, she protested to her employer, New Level Collection Limited about the unauthorized use. Following her complaint, the Respondent took down the photographs rather than admit the unauthorized use and pay the Petitioner.
7. Moreover, her employer did not to follow the matter, instead, it is her contract of service that was terminated. She insisted that the consultancy agreement for marketing services between her employer (Shop New Level) and the Respondent is purposely fabricated to mislead the Court as the images utilized by the Respondent were not for advertising the clothing but her hair products as detailed above.
8. Further, she emphasizes that the contract of service was only between herself and her former employer (Shop New Level) and not with the Respondent as alleged. Accordingly, it is her assertion that her former employer did not have the right transfer her image rights to third parties. She is aggrieved that the Respondent and her former employer are conspiring to deny her justice.
9. It is her case therefore that the unauthorized use of her image was to market the Respondent's hair products so as to yield additional profits. Furthermore, she contends that the use of her image has resulted in people assuming that she is the Respondent's Brand Ambassador which is false. She urged the Court to allow this Petition against the Respondent for violation of her constitutional rights.

#### **Respondent's Case**

10. The Respondent filed a replying affidavit sworn on 30<sup>th</sup> March 2023 in which she swore that she was appointed as a Marketing Agent for New Level Collection Limited in 2021. Her role was to promote the sale of the Company's clothes on her digital page known as Human Hair Centre. Essentially, she would refer all clients who see the clothes on the models on her page to Shop New Level and thereafter be paid as per the contract terms. She states that her contract was subsequently renewed on 20<sup>th</sup> January 2022.
11. She avers that the Petitioner in her Contract of Service Agreement under Clause 8, granted New Level Collection Limited use of her image to its liking. As such, she stresses that the Petitioner cannot now turn and claim that her rights were breached. She asserts that contrary to the Petitioner's allegation,



- she was aware of the Respondent’s collaboration with Shop New Level and would even come for free hair and makeup at her shop every month.
12. Furthermore, she asserts that the Petitioner posted the images on her own page (kimmy\_moore Instagram) and even tagged the Respondent’s page thus consenting to the use of her image. Equally it is argued that the Petitioner utilized the images taken by her employer on her own digital platform in breach of the Contract of Service. She also points out that the Petitioner posted a total of her 49 pictures wearing her hair products without her consent. For this reason, she contends that the Petitioner is being untruthful and her claim unfounded.
  13. Moreover, she states that since the Petitioner’s former employer had rights over the Petitioner’s image, she was also authorized to use the same on her page to market the clothes whilst also marketing the hair products. She notes that in the end the Petitioner’s images were deleted from the Respondent’s platform during its usual maintenance of the page.
  14. In like manner, the Petitioner’s former employer although not a party to this suit filed a replying affidavit in support of the Respondent’s case, sworn by its Director, Nancy Mwai on 30<sup>th</sup> March 2023. She affirmed and reiterated the contents of the Respondent’s affidavit.
  15. In addition to these responses, the Respondent filed a Notice of Preliminary Objection dated 6<sup>th</sup> October 2023 on the grounds that:
    - i. That the Petition offends the doctrine of exhaustion in so far as it primarily relates to the breach of image and privacy rights under Article 31 of *the Constitution* and provisions of Data Protection Act.
    - ii. In view of breach of the doctrine of exhaustion, the court lacks jurisdiction to handle and determine the dispute herein.
    - iii. The Petition should be struck out/dismissed with costs to the Respondent.

### **Petitioner’s Submissions**

16. On 7<sup>th</sup> September 2023, Mugweru and Ndege Legal Associates filed submissions in support of the Petitioner’s case. Supplementary submissions were correspondingly filed on 25<sup>th</sup> October 2023 in view of the Respondent’s Notice of Preliminary Objection.
17. Counsel commenced by submitting that the Respondent had violated the Petitioner’s right to privacy and dignity. This was pegged on the notion that the Respondent used the Petitioner’s image to advertise her hair products without her consent. Counsel stressed that the Petitioner’s contract of service was only limited to advertising of Shop New Level’s clothes and not hair as is the dispute herein. It was further submitted that it was clear that the Respondent had obtained the images from Shop New Level and not the Petitioner hence breaching her right to privacy.
18. Reliance was placed in *Jessica Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others* (2017) eKLR where it was held that:

“A person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person’s unique characteristics and distinguishes the person from his or her peers. The right to the protection of one’s image is thus one of the essential components of personal development. It mainly presupposes the individual’s right to control the use of that image, including the right to refuse publication thereof.”



19. Like dependence was also placed in *T.O.S v Maseno University & 3 Others* (2016) eKLR.
20. Counsel further submitted that Section 2 of the Data Protection Act makes clear that consent must be express and unequivocal and an indication that the data subject agreed to use of their image. On this premise, Section 32 of the Act places the burden of proof on the data controller not the data subject. In this case, Counsel submitted that the Respondent did not get the Petitioner's image in line with the definition of consent in the Act.
21. Furthermore, Counsel submitted that use of the Petitioner's image without her consent violated her right to dignity. Reliance was placed in *Ahmed Issack Hassan vs. Auditor General* (2015) eKLR where it was held that:

“...the right to human dignity is the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights...put differently, if a person enjoys the other rights in the Bill of Rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated.”
22. Like dependence was placed in *Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited* (2021) eKLR.
23. Counsel as well argued that the Petitioner's image was used for the Respondent's commercial advantage as noticeably evidenced in the Petitioner's supplementary affidavit. Reliance was placed in *Angella Wells vs. Atoll Media (PTY) Ltd & Anor*, Western Cape High Court Case No. 11961/2006 where it was held that:

“The appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention 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 this case, for the benefit of a magazine solely to make a profit, it constitutes an unjustifiable invasion of the person's rights of the individual, including the person's dignity and privacy. In this dispute, no care was exercised in respecting these core rights.”
24. In light of this breach, Counsel argued that the Petitioner is entitled to monetary compensation. In support, Counsel cited the case of *M W K & Another vs. Attorney General & 3 others* (2017) eKLR where the Court acknowledged that compensation is a recognized public law remedy for enforcement and protection of fundamental rights.
25. Turning to the Respondent's Preliminary objection, Counsel submitted that the Petition raises constitutional issues that only this Court can adjudicate. As such these issues cannot be adjudicated upon by the Data Protection Commissioner. Reliance was placed in *Royal Media Services vs Attorney General & 6 others* (2015) eKLR where it was held that only the High Court can interpret *the Constitution*.
26. Similarly, Counsel pointed out that the Respondent's Preliminary Objection was based on the Petitioner's submissions on data protection. Counsel argued this to be legally flawed as the Court in *Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors* (1969) EA 696 emphasized that:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings.”



27. Analogous reliance was also placed in *Agnes Nduume Kioko v Alexander Njue* (2019) eKLR and *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* (2014) eKLR.

### **Respondent's Submissions**

28. Wesonga, Mutembei and Kigen Advocates filed submissions for the Respondent on 7<sup>th</sup> October 2023. Counsel sought to discuss whether the Petition offends the doctrine of exhaustion, whether the Petitioner granted a third-party, exclusive right to use her image and whether the Petitioner satisfied the ingredients for breach of privacy rights.
29. Counsel submitted that the Petition which was founded on the claim of violation of constitutional rights took a turn in the submissions and focused on the breach of the Petitioner's privacy rights under Article 31 of *the Constitution* and the Data Protection Act. It was also argued that the Petitioner did not demonstrate how her constitutional rights had been violated.
30. Counsel argued that the Petitioner's claim is anchored in the Data Protection Act where an aggrieved party is required to lodge a complaint with the Data Protection Commissioner. Reliance was placed in *Kwari v Beehive Media Limited; Capwel Industries Limited (Interested Party)(Constitutional Petition E321 of 2021)* [2023] KEHC 2684 (KLR) (Constitutional and Human Rights) (31 March 2023) (Judgment) where the Court held that:
- “A close scrutiny of the Data Act reveals a deliberate design to ensure that all claims arising from allegations of infringement of Article 31(c) and (d) of *the Constitution* are wholly dealt with by the Commissioner as the first port of call. Such position can only be overruled by a party demonstrating any of the exceptions to the doctrine of exhaustion in a matter.”
31. Therefore, Counsel argued that this Court should not entertain the matter by virtue of operation of the doctrine of exhaustion which the Petitioner has failed to exhaust. In support reliance was placed in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslim for Human Rights & 2 others (interested Parties)* (2020) eKLR where it was noted that:
- “the exhaustion doctrine serves the purpose of ensuring that there is postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of its own interest within the mechanisms in place for resolution outside courts.”
32. Moving on, Counsel submitted that it is evident that the Respondent was employed by the New Level Collection Limited as its marketing agent for its clothes. Furthermore, that it is apparent that the Petitioner gave her rights to the Company to utilize her image as detailed in the replying affidavits. It is on this basis that the Respondent used the Petitioner's image. Equally, it is noted that the Petitioner even went ahead to publish the images on her own Instagram page hence consenting to use of her image. On this premise Counsel argued that the Petitioner claim of lack of consent was unfounded.

### **Analysis and Determination**

33. It is my considered view that the issues that arise for determination are:
- i. Whether the Respondent's Preliminary objection is merited.
  - ii. Whether the Petitioner's rights under Articles 28, 31 and 44 of *the Constitution* were violated; and
  - iii. Whether the Petitioner is entitled to the reliefs sought.



## Whether the Preliminary objection is merited

34. A preliminary objection draws the attention of the Court to an important matter of law which the Court must decide before getting on with the merits of a case, for if it is successfully raised, the Court shall have no business whatsoever delving into its merits and has terminate the case.
35. The yardstick for a preliminary objection was superbly set out in Mukisa Biscuit Manufacturing Co. Ltd (Supra), later emphasized by the Supreme Court in Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others (2014) eKLR as follows:

“

“(31) To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696: “a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

36. The instant preliminary objection is based on the doctrine of exhaustion. The exhaustion doctrine reckons that if there is an authorized forum provides for resolution of a particular dispute resolution, that forum must be adopted before invoking jurisdiction of the Court. The Court of Appeal in Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR elaborated on the doctrine as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

37. The question therefore becomes, do the provisions of Data Protection Act oust the jurisdiction of this Court in favour of the Data Protection Commissioner established under Section 5 of the Data Protection Act?
38. The functions and jurisdiction of the Commissioner are outlined under Section 8 as follows:
1. The Office shall—
    - a. oversee the implementation of and be responsible for the enforcement of this Act;
    - b. establish and maintain a register of data controllers and data processors;



- c. exercise oversight on data processing operations, either of own motion or at the request of a data subject, and verify whether the processing of data is done in accordance with this Act;
  - d. promote self-regulation among data controllers and data processors;
  - e. conduct an assessment, on its own initiative of a public or private body, or at the request of a private or public body for the purpose of ascertaining whether information is processed according to the provisions of this Act or any other relevant law;
  - f. receive and investigate any complaint by any person on infringements of the rights under this Act;
  - g. take such measures as may be necessary to bring the provisions of this Act to the knowledge of the general public;
  - h. carry out inspections of public and private entities with a view to evaluating the processing of personal data;
  - i. promote international cooperation in matters relating to data protection and ensure country's compliance on data protection obligations under international conventions and agreements;
  - j. undertake research on developments in data processing of personal data and ensure that there is no significant risk or adverse effect of any developments on the privacy of individuals; and
  - k. perform such other functions as may be prescribed by any other law or as necessary for the promotion of object of this Act.
2. The Office of the Data Commissioner may, in the performance of its functions collaborate with the national security organs.
  3. The Data Commissioner shall act independently in exercise of powers and carrying out of functions under this Act.
39. Where a Data subject is aggrieved by a data violation Section 56 as follows:
- Complaints to the Data Commissioner
1. A data subject who is aggrieved by a decision of any person under this Act may lodge a complaint with the Data Commissioner in accordance with this Act.
  2. A person who intends to lodge a complaint under this Act shall do so orally or in writing.
  3. Where a complaint made under subclause (1) is made orally, the Data Commissioner shall cause the complaint to be recorded in writing and the complaint shall be dealt with in accordance with such procedures as the Data Commissioner may prescribe.
  4. A complaint lodged under subclause (1) shall contain such particulars as the Data Commissioner may prescribe.
  5. A complaint made to the Data Commissioner shall be investigated and concluded within ninety days.



40. If dissatisfied with the decision made, a person has the right to appeal under Section 64 as follows:

A person against whom any administrative action is taken by the Data Commissioner, including in enforcement and penalty notices, may appeal to the High Court.

41. Moreover, the Act under Section 65 stipulates the remedy available to an aggrieved person as follows:

Compensation to a data subject

1. A person who suffers damage by reason of a contravention of a requirement of this Act is entitled to compensation for that damage from the data controller or the data processor.
2. Subject to subsection (1)—
  - a. a data controller involved in processing of personal data is liable for any damage caused by the processing; and
  - b. a data processor involved in processing of personal data is liable for damage caused by the processing only if the processor—
    - i. has not complied with an obligation under the Act specifically directed at data processors; or
    - ii. has acted outside, or contrary to, the data controller's lawful instructions.
- (3) A data controller or data processor is not liable in the manner specified in subsection (2) if the data controller or data processor proves that they are not in any way responsible for the event giving rise to the damage.
- (4) In this section, "damage" includes financial loss and damage not involving financial loss, including distress.

42. The issue at hand is breach of the Petitioner's fundamental rights and freedoms which she has carefully pin-pointed and outlined facts detailing the manner of violation. At stake, according to the Petitioner is the violation of her right to dignity under Article 28, the right to privacy under Article 31 and the right to protection to property under Article 40, in particular, intellectual property rights. While the Act under Section 8 (1) (f) give the Data Commissioner the power to among others 'receive and investigate any complaint by any person on infringements of rights under this Act' it should be appreciated that the preambular clause states that the Act is intended to give effect to Article 31 (c) and (d) and may therefore not suffice to consider an array of other related rights the Petitioner claims were violated as a consequence of the actions complained of. I thus find that the exhaustion principle does preclude this Court from taking cognizance of the instant controversy. The Petitioner properly invoked the jurisdiction of the under Article 165 (3) (b) which empowers it "to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened."

**Whether the Petitioner's rights under Articles 28, 31 and 40 of *the Constitution* were violated.**

43. The gravamen of this petition is the alleged commercial exploitation of the Petitioner's personality rights, specifically, her image by the respondent without her consent.

44. In the case of Jessica Clarice Wanjiru Vs Davinci Aesthetics Reconstruction and 20 others (2017) eKLR, the Court citing the celebrated Canadian Case of Krouse versus Chrysler Canada Ltd identified the the key elements that a Party claiming breach of personality rights ought to establish to the satisfaction of the Court as follows:



- a. Use of a Protected Attribute: The claimant must show that the defendant used an aspect of his or her identity that is protected by the law. This ordinarily means a plaintiff's name or likeness, but the law protects certain other personal attributes as well.
  - b. For an Exploitative Purpose: The claimant must show that the defendant used his name, likeness, or other personal attributes for commercial or other exploitative purposes. Use of someone's name or likeness for news reporting and other expressive purposes is not exploitative, so long as there is a reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest.
  - c. No Consent: The claimant must establish that he or she did not give permission for the offending use.
45. In the instant Petition, the personality attribute that the petitioner complained was used by the Respondent was her image/likeness to promote her human hair products without her consent.
46. The Respondent does not dispute using the Petitioner's image to promote the product as alleged. What the respondent vehemently refutes is the claim by the Petitioner that she used the image without her authority. She states in no uncertain terms that she was engaged by the Company that had contracted the Petitioner as a model 'Shop New Level' as its marketing agent/consultant to promote the sale of its clothes through her digital platform page- the Human Hair Centre where her role was marketing the clothes and refer the clients who inquire about the clothing to the shop and would be paid under a contract. That further, the Petitioner was equally engaged as a model by the Shop New Level Collection Limited which, pursuant to clause 8 of the contract had given the New Level Collection leeway as follows: "...You accept that the Shop New Level can use your images, videos, and reels to its liking for the desired period even after termination of the contract by either party..."
47. At paragraph 12 of the replying affidavit she thus asserted:
- "...That based on the fact that the Shop New Level had rights over the Petitioner's images, reels and videos, I was authorized by Shop New Level to post the images complained of on the digital page Human Hair Centre to market Shop New Level products -clothes as I market my hair..."
48. The Respondent was supported by the by Shop New Level through the affidavit filed by its Director, Nancy Mwai sworn on 30<sup>th</sup> March 2023.
49. The Petitioner denied that the agreement she entered into with Shop New Level was meant to transfer her image rights to a 3<sup>rd</sup> party for exploitation without her consent, stating that the images were for the exclusive use of Shop New level only. She stated in paragraph 13 of the Supplementary Affidavit dated 6<sup>th</sup> September, 2023 as follows:
- "... That in response to allegations that Shop New Level allowed the Respondent herein to use my image, I wish to state that the agreement between myself and Shop New Level as a bipartite contract and the Respondent herein was not a Party to the said contract..."
50. It is trite law that a contract, only binds parties to a contract and under the doctrine of privity of contract, one cannot enforce a benefit of or under a contract for which they are not a Party. The argument by the Respondent that it was thus allowed to exploit the Petitioner's images for marketing her own hair products in an arrangement entered between her and the New Shop Level Collection that had engaged the Petitioner is thus a factual and legal fallacy. There is nowhere in the contract entered



between the Petitioner and the Shop New Level Collection where the Respondent name features, if all? It is clear therefore the attempt to sneak a 3<sup>rd</sup> Party into benefiting from the images given by the Petitioner without seeking her consent or approval was economically exploitive and taking advantage of her. As was observed in in the South African case *Wells v Atoll Media (Pty) Ltd and Another* (11961/2006) [2009] ZAWCHC 173; [2010] 4 All SA 548 (WCC), the Court opined:

(49) .... 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 this case, for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the personal rights of the individual, including the person's dignity and privacy. In this dispute, no care was exercised in respecting these core rights..."

51. Additionally, Ugandan High Court case of *Asege Winnie v Opportunity Bank (U) Ltd & Another* HCCS No. 756 of 2013 the Court stated:

52. "Under the common law jurisprudence, a personality right is the right of an individual to control the commercial use of his or her name, image, likeness, or other unequivocal aspects of one's identity. This right to personality is classified into two categories;

The right of publicity or to keep one's image and likeness from being commercially exploited without permission or contractual compensation and the right to privacy, and;

The right to be left alone and not have one's personality represented publicly without permission.

Basically under common law jurisprudence publicity rights fall in the realm of the tort of "passing off" which idea was developed on the notion of natural rights that every individual should have a right to control how, if at all, his or her "persona" is commercialized by third parties who intend to help propel their sales or visibility of own product or service.

This means that where there is a publicity rights contention then the issue for the court to deal with and decide upon is whether a significant section of the public would be misled into believing (correctly or incorrectly) that a commercial arrangement had been concluded between a plaintiff and a defendant under which a plaintiff agreed to an advert involving the image or reputation of a famous person. The actionable cause, therefore, under misrepresentation would then bring the suggestion that a plaintiff did in fact endorse or license a defendant's product or somehow has control over those products. Arising from this seemingly clear common law jurisprudence, it is my humble view that for one to succeed in an action for infringement of image rights such a person has to prove the following basic elements:

- i. The plaintiff must be identifiable.
- ii. The defendant's action was intentional.
- iii. The defendant must have acted for the purpose of commercial gain.

The Canadian courts have examined this position and in the case of *Krouse v Chrysler Canada Ltd* (1973) 13 CPR (2d) 28 it was noted that where a person has marketable value in their likeness and it has been used in such a manner that suggests an endorsement of a product then there is ground for an action in appropriation of such a person's personality



with the case of Athans v Canadian Adventure Camps (1977) CAN H1 1255, having the view that personality right included both image and name.”

53. Courts have interpreted the right to human dignity to be the bedrock for the enjoyment of all the other rights under the Bill of rights. In Mutuku Ndambuki Matingi (supra) the Court affirmed:

“

“50. As regards the right to dignity, in Ahmed Issack Hassan vs. Auditor General [2015] the Court held that:

“...the right to human dignity is the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated”. See Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) SCR (2) 516.”

54. Under our Constitution, the right to a person’s inherent dignity is protected under Articles 28 while Article 31(c) of *the Constitution* which states.

28. Every person has inherent dignity and the right to have that dignity respected and protected.

31. Every person has the right to privacy, which includes the right not to have-

c) information relating to their family or private affairs unnecessarily required or revealed.

55. The judicial pronouncements cited above all appreciate the need to protect a persons’ unique personality characteristics which includes: image, voice, name and other related features to ensure respect of a person’s dignity and privacy and protection from economic exploitation without their consent. I am persuaded that given the facts of this case, the Respondent did not accord the Petitioner the dignity and respect when she went about publishing her images advertising her Human Hair Products to promote her business without seeking her consent. The contractual relationship between the Petitioner and Shop New Level Collections did not give the other Party the freedom to bring a 3<sup>rd</sup> party on board to benefit from her images without notifying and seeking the consent from the Petitioner. She treated her as an object for promoting sales without caring to even know what her feelings about the product she was being associated with were. That was utterly belittling her personality. She deserved respect. It is against the tenets of Article 28. I thus find that her rights under Article 28 were violated by the actions of the respondents in the circumstances. The conduct was disparaging.

56. This Court finds that the Petitioner’s rights were violated by the Respondent. The Petitioner urged the Court to be guided by the decision of MWK & Another vs Attorney General & 3 Others (2017) eKLR and award her compensation. Though Petitioner did not specify any quantum, in this authority, Kshs.4,000,000 was awarded as compensation for violation of Constitutional rights.

57. The Respondent on the hand urged the Court to consider that the Respondent deleted all the offending images during normal maintenance of the Instagram page. Further that compensation should not be awarded after all, the Petitioner was duly paid/compensated for use of those images by a party who shared the same with the Respondent for mutual benefit of the third party who compensated the Petitioner.

58. The Respondent argument that there should be no compensation on the basis that the Petitioner had been compensated by the Party she had initially contracted holds no water. The contract did not allow



the Respondent to reap from where she had not sown. Even purely on the doctrine of privity of the contract no consideration had been extended to the Petitioner by her. I find the Petitioner is thus entitled to compensation by the Respondent for the commercial exploitation of her personality rights to promote her Human Hair Products.

59. In *GSN v Nairobi Hospital & 2 Others* (2020) eKLR Kshs.2,000,000/- was awarded for breach of right to privacy.
60. High Court at Meru, Civil Appeal No. E083 of 2021 *Dhabiti Sacco Limited v Sharon Nyaga* where Ksh.1,500,000/- was awarded for publication of Petitioner's picture in the annual calendar.
61. I have closely examined the three images that the Petitioner complained were used by the Respondent, to promote "Nyambura unit 18" that was selling at Kshs. 52,000 per piece, with the advert stating that the pieces were available from 16" to 24". This image attracted 38 likes. The image is not clear on the number of viewers it attracted, but it shows there was only one comment. The second image was for 'Naomi unit.' It was for size 16" -30" going for a price of Kshs. 43,000/-. This one attracted 31 likes. The number of viewers is also not indicated on the photograph. The third image was to promote what is described as "mini bob 10" and this was going for Kshs. 33,000/-. This attracted 31 likes. The number of viewers is not provided an also the comments.
62. Besides the limited traffic that the images attracted in regard to the likes, I also consider that in the email attached to the affidavit supporting to the Petition marked "MNM 3", the Petitioner addressed the issue of publication of the photographs on the Human Hair Centre page concluding thus:

"...I therefore will be charging a fee for having my image on the Human Hair Centre Page. Per Post, I charge 6000 Ksh. three images have been used as you can see in this attachment. Total comes to 18000/-. Kindly see to it that this payment is made as well..."
63. The other consideration I make is that the Petitioner admitted that immediately after she raised the complaint, the Respondent promptly deleted those photographs from her Instagram page.
64. Consequently, doing the best that I can and guided by the precedents in these kind of cases as considered above while considering the unique circumstances of this Petition, my considered opinion is that an award of Two Hundred and Forty Thousand (Kshs. 240,000/-) should adequately compensate the petitioner for the violation of her right to privacy and dignity arising from the unauthorized use of his image for promotional purposes by the Respondent.
65. I also award costs of this Petition.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13<sup>TH</sup> DAY OF JUNE, 2024.**

**L N MUGAMBI**

**JUDGE**

