



REPUBLIC OF KENYA



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**Mwambu v Twiga Foods Ltd (Petition E003 of 2023)  
[2024] KEHC 10889 (KLR) (17 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10889 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION E003 OF 2023**

**OA SEWE, J**

**JULY 17, 2024**

**IN THE MATTER OF A PETITION UNDER ARTICLE 22(1) OF THE  
CONSTITUTION OF KENYA, 2010 FOR THE ENFORCEMENT  
OF THE FUNDAMENTAL RIGHTS AND FREEDOMS**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF THE FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLES 28, 31 AND 40 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**AMOS MWAMBU ..... PETITIONER**

**AND**

**TWIGA FOODS LTD ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner is an adult of sound mind and a former employee of the respondent. He approached the Court vide his Petition dated 25<sup>th</sup> November 2022 complaining of violations of his rights and fundamental freedoms under Articles 28, 31 and 40 of the Constitution of Kenya. He averred that he was employed by the respondent as a sales representative from October 2019 to October 2022. He was engaged on a performance-based renewable contract.
2. The Petitioner averred, in his Amended Petition dated 20<sup>th</sup> February 2023, that in the course of his employment, he was informed by his team leader of a visit by the respondent's technical team to his area of work; and that he was required to show the technical team the respondent's customers within his area of operation. He further averred that he took the technical team to two of the respondent's best performing customers, and that on each occasion he was required to pose for photographs with the customers. He added that the entire exercise took about three hours.



3. The petitioner further averred that, after the team left, he started seeing his photographs and those of the customers they visited on the respondent's social media platforms such as YouTube, WhatsApp and LinkedIn page. He further, stated that up until the date of filing of the Petition herein, his image was still on the respondent's website <https://twiga.com>. The Petitioner pointed out that all these displays were done without his consent.
4. He further stated that in November 2022, he was shocked to see his photos with one of the respondent's customers used to brand the respondent's commercial motor vehicles during the Twiga Foods, Isuzu and NCBA partnership launch. He asserted that his image was used without his consent to commercially advertise the respondent's products and therefore amounted to violation of his right to privacy and dignity as enshrined under Articles 28, 31 and 40 of the Constitution. Accordingly, the petitioner prayed for the following reliefs against the respondent:
  - (a) A declaration that the respondent violated his right to privacy and human dignity under Articles 28 and 31 of the Constitution by publishing his image for the purpose of commercial advertisement without his consent.
  - (b) A declaration that the respondent violated his right under Article 31 of the Constitution by publishing his image and likeness for its own commercial gain with no personal financial advantage to him.
  - (c) An order of permanent injunction restraining the respondent from publishing and/or using his image and likeness in any way in its advertisements or promotions in any way without his consent; and compelling the respondent to stop any further advertisement or promotions featuring his image and likeness on its pamphlets and to recall all other pamphlets already in circulation with his image and likeness.
  - (d) An order that the respondent be compelled to compensate him in damages for loss arising from the publication of his photograph without his express authority and for the exploitation by the respondent for commercial gain.
  - (e) An order for the costs of the Petition.
  - (f) Interest on [d] and [e] above.
  - (g) Any other relief that the Court may deem fit and just to grant.
5. The respondent opposed the Amended Petition. It relied on the Replying Affidavit sworn on 11<sup>th</sup> October 2023 by its Head of Legal, Mr. Daniel Ngugi. The respondent acknowledged that the petitioner was its employee, and that his employment was terminated on the 30<sup>th</sup> November 2022. Mr. Ngugi averred that the position held by the petitioner of Trade Development Representative (TDR) transitioned to an agent model owing to redundancy.
6. The respondent further conceded that it used the petitioner's images on their commercial vehicles around November 2022 as alleged by the petitioner. It however denied any wrongdoing, contending that as an employee who had duly signed and was bound by the letters of employment dated 14<sup>th</sup> October 2019 and 6<sup>th</sup> May 2020, the petitioner had given his authority to the respondent for the use of his image. It was further the averment of the respondent that, when the petitioner signed the letters of employment, he was bound by the respondent's Social Media Policy formulated on the 18<sup>th</sup> December 2017 which allowed the respondent to use images, photographs, video and voices of its employees for commercial purposes in digital, indoor and outdoor marketing.



7. The respondent further pointed out that the photographs complained of were taken during the petitioner's employment and that consent was sought when he was asked to pose next to the customers, a move that he did not protest. Hence, according to the respondent, the fact that the petitioner was an employee amounted to express consent since the photos were taken in line with the Company's policy. It was further averred that, at the material time, the petitioner was wearing a branded T-shirt and was aware that photos would be taken during the visit by the respondent's technical team.
8. Further to the foregoing, the respondent averred that at the time the petitioner received his final cheque on the 10<sup>th</sup> December 2022, he did not raise any issue about the use of his photographs, but instead signed off a certificate stating that the receipt of the cheque for the sum of Kshs. 76,692/= represented the full and final pay for all his claims against the company. The respondent also contended that as a Trade Development Representative, the petitioner was expected to participate in commercial meetings with the respondent's internal and external stakeholders and thus the taking of photos for posting on the respondent's social media accounts was part of the petitioner's job description.
9. The respondent also pointed out that the photos have since been taken down after they were served with the Petition herein. Thus, the respondents urged for the dismissal of the Amended Petition contending that the orders sought as incapable of being granted.
10. The Amended Petition was urged by way of written submissions, pursuant to the direction given herein on 26<sup>th</sup> February 2024. In his written submissions, the petitioner proposed the following issues for determination:
  - (a) Whether the respondent violated the petitioner's fundamental rights to privacy and human dignity under Articles 28 and 31 of the Constitution by publishing the petitioner's image for the purpose of commercial advertisement without the petitioner's consent.
  - (b) Whether the petitioner is entitled to compensation for damage arising from the actions of the respondent.
  - (c) Whether the petitioner is entitled to costs.
11. Counsel for the petitioner submitted that Article 19 of the Constitution is the cornerstone of Kenya's democracy as it enshrines the rights of all people and affirms the values of human dignity, equality and freedom. He relied on Articles 28 and 31 and urged the Court to find that the petitioner has sufficiently demonstrated by way of evidence that his right to privacy and dignity were violated by the respondent. Reliance was placed on *Catherine Njeri Wanjiru v Machakos University* (Petition No. E021 of 2021) [2022] KEHC 10599 (KLR) (3 August 2022) (Judgment) and *Hilda Kamande v Nation Media Group* (Constitutional Petition E004 of 2021) [2022] KEHC 16017 (KLR) to underscore the petitioner's submissions.
12. Accordingly, the petitioner urged for an award of Kshs. 2,000,000/= together with interest and costs. He relied on Constitutional Petition No. 10 of 2020: *Mutuku Ndambuki Matinga v Rafiki Microfinance Bank Limited* for the proposition that an award of compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution.
13. In its written submissions, the respondent reiterated the factual background of the Petition and asserted that the petitioner, as its employee was bound by the Company's Social Media and Marketing Policy. Accordingly, the respondent proposed the following issues for determination:



- (a) Whether the petitioner was still an employee of the respondent at the time the respondent used the image;
  - (b) Whether the petitioner gave his consent to the use of the image;
  - (c) Whether the respondent violated the petitioner's fundamental rights to human dignity and privacy under Articles 28 and 31 of the Constitution; and
  - (d) Whether the petitioner's prayer for damages is merited.
14. The respondent submitted that, since the launch of the Twigia Foods Ltd, Isuzu EA and NCBA Bank event occurred on the 5<sup>th</sup> October 2022 while the petitioner was still an employee of the respondent, he was bound by the contract of employment and the Company's Social Media and Marketing Policy regarding the use of his image. On whether the petitioner consented to the use of his image, again it was the submission of the respondent that its Social Media Policy provided for the capture and use of employee's images in the course of their work.
15. Accordingly, the respondent submitted that the petitioner is estopped, by dint of Section 120 of the Evidence Act, Chapter 80 of the Laws of Kenya, from asserting that he did not consent to his photos being taken and used in accordance with the Company's Social Media and Marketing Policy. Reliance was placed on *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR in support of this argument.
16. On whether the respondent violated the petitioner's fundamental rights to human dignity and privacy under Articles 28 and 31 of the Constitution, the Court was urged to consider whether the factors discussed in *T O S v Maseno University & 3 Others* [2016] eKLR have been demonstrated, namely:
- (a) Whether the image was obtained in an intrusive manner;
  - (b) Whether the photograph was about aspects of the petitioner's personal life;
  - (c) Whether it involved data provided by the petitioner for one purpose which was then used for another;
  - (d) Whether the image was disseminated to the press or the general public or persons from whom the petitioner could reasonably expect such private information would be withheld.
17. In the respondent's submission, none of the above criteria was met by the petitioner and therefore this is not one of those instances where the publication constituted an infringement of right. The respondent relied on *Jessica Claris Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017] eKLR and urged for the dismissal of the Petition.
18. Although at paragraph 22 of the respondent's Replying Affidavit averments were made to the effect that the Petition does not raise any constitutional question; and that the petitioner ought to have filed a normal civil suit for compensation instead, this assertion did not form part of the respondent's closing submissions and therefore must be taken to have been abandoned.
19. Having looked at the Petition, I am in no doubt that it is compliant with the specificity rule as enunciated in *Anarita Karimi Njeru v Republic* (1979) eKLR and amplified in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR. The petitioner cited Articles 28 and 31 of the Constitution and explained, in connection with each article, what rights he claims were violated by the respondent. I am satisfied that it meets the threshold of a constitutional petition and is properly before this court for determination.
20. In my careful consideration, only two issues arise for determination, namely:



- (a) Whether the petitioner has demonstrated that his constitutional rights to dignity and privacy under Articles 28, 31 and 40 of the Constitution were violated by the respondent; and if so,
- (b) Whether the petitioner is entitled to the reliefs sought.

**A. On violation of the petitioner’s rights to privacy and dignity under Articles 28 and 31 of the Constitution:**

21. The petitioner’s case revolves around Articles 28 and 31 of the Constitution, which he claims have been violated by the respondent in that the respondent used his photographs for commercial purposes without his consent. In his view, such use amounts to exploitation of his personality; his contention being that his personality rights entitle him to control and the right to profit from the commercial use of his/her name, image, likeness and persona. Therefore, the first question to pose is whether the photos were taken and used by the respondent without the petitioner’s consent.

22. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity respected and protected.

23. Article 31 of the Constitution, on the other hand, provides that:

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

- (a) their person, home 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.

24. In similar vein, Article 12 of the Universal Declaration of Human Rights (UDHR) to which Kenya is a party, states:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

25. The Court takes judicial notice that Kenya is in a very progressive digital era, where the circulation of information occurs very easily and quickly. Information is easily accessible on the internet *via* websites and social forums such as Facebook, WhatsApp and Instagram, just to mention a few. It was therefore in recognition of this that it became necessary for the Legislature to enact such laws as would afford protection against the dissemination of personal information without consent. Accordingly, the preamble to the Data Protection Act, No. 24 of 2019, describes it thus:

AN ACT of Parliament to give effect to Article 31(c) and (d) of the Constitution; to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors; and for connected purposes.

26. Section 25 of the Data Protection Act sets out the principles of personal data protection as hereunder:

Every data controller or data processor shall ensure that personal data is—



- (a) processed in accordance with the right to privacy of the data subject;
- (b) processed lawfully, fairly and in a transparent manner in relation to any data subject;
- (c) collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes;
- (d) adequate, relevant, limited to what is necessary in relation to the purposes for which it is processed;
- (e) collected only where a valid explanation is provided whenever information relating to family or private affairs is required;
- (f) accurate and, where necessary, kept up to date, with every reasonable step being taken to ensure that any inaccurate personal data is erased or rectified without delay;
- (g) kept in a form which identifies the data subjects for no longer than is necessary for the purposes which it was collected; and
- (h) not transferred outside Kenya, unless there is proof of adequate data protection safeguards or consent from the data subject.

27. The Act also provides for the rights of a data subjects under Section 26, which provision states:

A data subject has a right—

- (a) to be informed of the use to which their personal data is to be put;
- (b) to access their personal data in custody of data controller or data processor;
- (c) to object to the processing of all or part of their personal data;
- (d) to correction of false or misleading data; and
- (e) to deletion of false or misleading data about them.

28. It is important to note that Section 2 of the Data Protection Act defines “consent” to mean:

“...any manifestation of express, unequivocal, free, specific and informed indication of the data subject’s wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data relating to the data subject.”

29. It is plain then that consent must be express, unambiguous and clear that the data subject has, based on information, agreed to the collection and processing of his/her personal data. Under Section 29 of the Data Protection Act, a data collector and processor is required to inform the data subject of:

- (a) the rights of data subject specified under section 26;
- (b) the fact that personal data is being collected;
- (c) the purpose for which the personal data is being collected;
- (d) the third parties whose personal data has been or will be transferred to, including details of safeguards adopted;



- (e) the contacts of the data controller or data processor and on whether any other entity may receive the collected personal data;
  - (f) a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data;
  - (g) the data being collected pursuant to any law and whether such collection is voluntary or mandatory; and
  - (h) the consequences if any, where the data subject fails to provide all or any part of the requested data.
30. It is plain from the foregoing that the express and unambiguous consent of the petitioner was necessary before his image, name or likeness could be used by the respondent for publicity or commercial gain. Further, according to Sections 26 and 29 of the Data Protection Act, the petitioner had the right to be informed beforehand of the use to which the data would be put. Indeed, Section 30(3) of the Data Protection Act makes it an offence to process the personal data of a data subject without the informed consent of the subject.
31. For purposes of the Data Protection Act the burden of proof is on the data controller or processor to prove that informed and express consent was obtained. Hence, Section 32 of the Act provides:
- (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.
  - (2) Unless otherwise provided under this Act, a data subject shall have the right to withdraw consent at any time.
  - (3) The withdrawal of consent under subsection (2) shall not affect the lawfulness of processing based on prior consent before its withdrawal.
  - (4) In determining whether consent was freely given, account shall be taken of whether, among others, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.
32. The contention of the respondent was that, at the time the photos were taken, the petitioner was an employee and was under the Company's Social Media Marketing Policy, which states:

#### General Marketing Guidelines

Twiga is committed to ensuring that all images, photos, videos undertaken by the Company is consistent with all regulatory requirements and applicable marketing, sales and advertising activities.

From time to time, you may be captured while you are working. Such images shall be deemed to be the property of Twiga and may be used for marketing and training purposes.

By abiding by Twiga policies and procedures you consent to the use of your photograph, image or likeness, video and/or voice by Twiga for commercial purposes for use in digital, indoor and outdoor marketing.

Such marketing may be in the form of branding on commercial vehicles, marketing posters and advertisements posted on its social media pages (Facebook, LinkedIn, Twitter and Instagram) its website pages and on digital messaging services such as WhatsApp.



33. The question to pose therefore is whether the policy, by itself, is enough to qualify as express and unambiguous consent. In my careful consideration, and in particular, given the provisions of Sections 26 and 29 of the Data Protection Act and the definition of “consent” in Section 2 of the Act, it was incumbent upon the respondent to personally explain to the respondent the purpose to which his images would be put and to obtain his express consent that the photographs would be used for the purpose set out in the Company’s Social Media & Marketing Policy.
34. In the case of *Jessica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR, the court held: -
16. The right to privacy is guaranteed under Article 31 of the Constitution of Kenya. Privacy has been defined as “The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.”<sup>[5]</sup> In the above sense any intrusion of personal life by whatever means or form such as photography, written articles or caricatures may be ground for an action for breach of privacy.
17. In simple terms, image rights refer to a person’s right to commercialize aspects of his personality such as physical appearance, pictures or caricatures, signature, personal logos and slogans, and also the right to prevent other people from commercially making use of them...”
35. Similarly, in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR, a 5-judge bench held:
- “Protecting privacy is necessary if an individual is to live 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 an 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.”
36. Additionally, in the case of *T O S v Maseno University & 3 others* [2016] eKLR the court held:
- “...the law it is clear that publication or use of the images of an individual without his consent violates that person’s right to privacy. I say so because a person’s life is a restricted realm in which only that individual has the power of determining whether another may enter, and if so, when and for how long and under what conditions...”
37. The same position was reiterated in the case of *Wanjiru v Machakos University (Petition E021 of 2021)* [2022] KEHC 10599 (KLR) (3 August 2022) (Judgment), in which the court held:
- “56. 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...”
38. On account of the foregoing, I am persuaded that the respondent violated the petitioner’s rights under Articles 28 and 31 of the Constitution.



39. As to whether the petitioner proved violation of his right under Article 40 of the Constitution, the provision states:
- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property —
    - (a) of any description; and
    - (b) in any part of Kenya.
  - (2) Parliament shall not enact a law that permits the State or any person—
    - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
    - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
  - (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
    - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
    - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
      - (i) requires prompt payment in full, of just compensation to the person; and
      - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
  - (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
  - (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
  - (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
40. The respondent acceded to using the petitioner's image up until the filing of this Petition. That is an acknowledgment that the images were used even after the petitioner's employment with the respondent was terminated on the 28<sup>th</sup> October 2022. Further, it is not contested that the images were used for commercial gain.
41. The court in *Rukia Idris Barri v Mada Hotels Ltd* [2013] eKLR referred to the South African case of *Angella Wells v Atoll media (PTY) Ltd & Another*, 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 in order to protect the individuals 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 sold to make 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."

42. Having found that the petitioner's photographs were taken without informed and unequivocal consent and used by the respondent for commercial gain, it suffices that the respondent has been found to have violated Articles 28 and 31 of the Constitution. In my careful consideration, and granted the provisions of Article 40 of the Constitution, I am not convinced that violation of Article 40 of the Constitution has been proved in the circumstances; and I so find.

**B. On whether the petitioner is entitled to the relief sought:**

43. Article 23(1) of the Constitution gives the Court the jurisdiction, in accordance with Article 165, to hear and determine petitions for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Accordingly, Sub-Article (3) is explicit that:

In any proceedings brought under Article 22, a court may grant appropriate relief, including

—

- a. a declaration of rights;
  - b. an injunction;
  - c. a conservatory order;
  - d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
  - e. an order for compensation; and
  - f. an order of judicial review.
44. It is now settled that what amounts to appropriate relief depends on the nature and circumstances of the case. Hence, in *Law Society of Kenya v Attorney General & another; Mohamed Abdulahi Warsame & another (Interested Parties)* [2019] eKLR, Hon. Chacha, J. held that an appropriate relief should be an effective remedy for purposes of enforcing the Constitution, human rights and the rule of law. He relied on *Fose v Minister of Safety and Security* [1997] (3) SA 786(CC)1997(7) BCLR 851 wherein it was held that:
- (19) Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."
45. Similarly, in *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17, it was held that:
- (45) The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate



relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of the constitutional infringement, and strike effectively at its source".

46. As pointed out herein above, the petitioner prayed for the following orders against the respondent:
- (a) A declaration that the respondent violated the petitioner's right to privacy and human dignity under Articles 28 and 31 of the Constitution by publishing his image for the purpose of commercial advertisement without his consent.
  - (b) A declaration that the respondent violated the petitioner's right under Article 31 of the Constitution by publishing the petitioner's image and likeness for their own commercial gain with no personal financial advantage gained by the petitioner.
  - (c) 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 and compelling the respondent to stop any further advertisement or promotions featuring the petitioner's image and likeness on their pamphlets and to recall all other pamphlets already in circulation with the petitioner's image and likeness.
  - (d) An order that the respondent be compelled to compensate the petitioner in damages for loss arising from the publication of the petitioner's photograph without his express authority and the exploitation of the petitioner by the respondent for commercial gain.
  - (e) An order for the costs of the Petition.
  - (f) Interest on [d] and [e] above.
  - (g) Any other relief that the Court may deem fit and just to grant.
47. Having found that the rights of the petitioner were violated, it is plain then that the declaratory orders and the prayer for a permanent injunction are warranted. As to whether the petitioner is entitled to compensation by way of damages, it is to be appreciated that from a constitutional standpoint, an award of damages is not intended to serve a punitive end; but for vindication of a right. Thus, in *Dendy v University of Witwatersrand, Johannesburg & Others*[2006] 1 LRC 291, the Constitutional Court of South Africa held that:
- ...an award of damages was a secondary remedy to be made in only the most appropriate cases...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringed and to deter their future infringement. The test was not what would alleviate the hurt which the plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."(see also *Gitobu Imanyara & 2 others v Attorney General*,supra)
48. While discussing the propriety of an award of damages in constitutional petitions, the Court of Appeal, in the case of *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others* (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (17 December 2021) (Judgment),stated: -
16. ...that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.



49. Similarly, in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

...It seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. (Emphasis supplied) The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration..."

50. Granted the breaches complained of and the manner of infringement, it is my finding that the petitioner is entitled to an award of damages.

51. Counsel for the petitioner proposed an award of Kshs. 2,000,000/= as general damages but did not present comparable authorities to justify the proposal. Indeed, in *Mutuku Ndambuki Matingi v Rafiki Finance Bank Limited* (supra) it was held that the quantum of compensation depends upon the facts and circumstances of each case. In my view, an award of Kshs. 1,000,000/= would suffice in the circumstances.

52. As to costs, there can be no doubt that the petitioners are entitled to costs, granted the aforementioned findings. Even if the Petition were to be dismissed, it would still be in the discretion of the Court to make an order as to costs as appropriate. Indeed, in *Feisal Hassan & 2 others v Public Service Board of Marsabit County & another* [2016] eKLR it was held that:

3. In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in the Constitution, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria. Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of the Constitution. Indeed, the rights of access to court under Article 22 and 258 of the Constitution for the enforcement, respectively, of the Bill of Rights and the other parts of the Constitution are in the same terms."

53. In the result, the Petition succeeds in part and orders are hereby granted as follows:

(a) A declaration be and is hereby issued that the respondent violated the petitioner's right to privacy and human dignity under Articles 28 and 31 of the Constitution by publishing his image for the purpose of commercial advertisement without his consent.



- (b) An order of permanent injunction be and is hereby issued 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 and compelling the respondent to stop any further advertisement or promotions featuring the petitioner's image and likeness on their pamphlets and to recall all other pamphlets already in circulation with the petitioner's image and likeness.
- (c) An award in damages be and is hereby made in the sum of Kshs. 1,000,000/= for the infringement of the petitioner's rights by reason of the publication of the petitioner's photograph without his express authority and the exploitation of the petitioner by the respondent for commercial gain.
- (d) That costs of the Petition be borne by the respondent.
- (e) Interest on [c] and [d] above.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17<sup>TH</sup> DAY OF JULY 2024**

**OLGA SEWE**

**JUDGE**

