



REPUBLIC OF KENYA



KENYA LAW
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**Kuria v University of Kabianga (Petition E002 of 2022)
[2023] KEHC 809 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 809 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
PETITION E002 OF 2022
AN ONGERI, J
FEBRUARY 10, 2023**

BETWEEN

SHIMLON MWANGI KURIA PETITIONER

AND

UNIVERSITY OF KABIANGA RESPONDENT

JUDGMENT

1. The Petitioner herein Shimlon Mwangi Kuria filed this Petition dated 18/7/2022 against University of Kabianga the Respondent herein seeking the following Prayers:-
 - i. That a declaration that the Respondent violated the Petitioner's fundamental rights to privacy and human dignity under Article 28 and 31 of the constitution by publishing his image for purposes of commercial advertisement without the Petitioner's Express Consent.
 - ii. That a declaration that the Petitioner's intellectual property rights, rights of publicity and personality rights was infringed when the Petitioner's image in advertising and marketing to solicit funds from the African Development Bank without seeking authority from the Petitioner.
 - iii. That an Order of permanent injunction be issued restraining the respondent from publishing and/or using the Petitioner's image or likeness in it advertisement without express consent from the Petitioner.
 - iv. That an Order awarding the Petitioner general damages.
 - v. That costs of this Petition, and
 - vi. Any other or further relief as this Honourable Court may deem fit to grant.



2. The Petition is supported by the Affidavit of the applicant sworn on 18/7/2022 in which he deposed as follows:-
3. The Petitioner avers that he was pictured in a graduation ceremony of the University of Nairobi on 20th December, 2019.
4. The Petitioner further avers that about one year later or thereabouts, the respondent published the said picture in its website inviting stakeholders to a webinar that was to be held on 21/7/2021 to validate a proposal for a pipeline project in partnership with African Development Bank on how universities could be supported to cope/mitigate the challenge of Covid-19.
5. The petitioner avers that the Respondent used his image/likeness and persona without his express consent for marketing purposes to solicit funds from the African Development Bank.
6. The Petitioner maintained that Respondent's actions were an utter infringement of his fundamental rights and freedoms.
7. The petitioner avers that he was reliably advised that for his image to appear on such advertisement, the respondent should have sought the petitioner's consent and sufficiently paid for such services.
8. The petitioner further avers that he was reliably advised that an image/likeness and persona can only be inherent to one person and the respondent had exploited the petitioner's identity/image for commercial gain without the petitioners consent hence invading the petitioner's privacy contrary to Article 31 of the Constitution.
9. The petitioner avers that the respondent's action has subjected him to psychological torture because the society, peers, Associates, family, business partners and affiliates perceive him to have graduated from University of Kabianga thus concluding that he had been untruthful of his academic credentials from the University of Nairobi and that unless his prayers are granted, he will continue to suffer the complained violations in a manner that cannot be compensated by way of damages.
10. The Petition is opposed by the Respondent who filed a Replying Affidavit sworn by Professor Wilson Kipngeno in which he deposed as follow:-
11. The Respondent avers that the matter raised by petitioner in his petition and supporting affidavit was not within the realm of constitutional dispute to be determined by the High Court and that the same should have been litigated in a Small Claims Court or the Magistrate Court. That the petition failed to meet the structure of pleading a constitutional petition with precision as laid down in Anarita Karimi Njeru v Republic [1979]eKLR infLR Nairobi Miscellaneous Criminal Application 4 of 1979.
12. The Respondent denied being in a profit-making business and that the petitioner's picture as published in its website did not amount to infringement of the petitioner's rights but rather portrayed him in a positive light as a graduate.
13. The Respondent maintains that the petitioner lacked the property rights over pictures taken during public ceremony and that the petitioner did not show that the Respondent used his image for commercial or other exploitative activities.
14. The parties filed written submissions that I have considered.
15. The Petitioner submitted that the Respondent's use of the Petitioner's recreated image without his express consent to advertise its webinar, contravened his rights under Article 31 of the Constitution and that the use of his image by the Respondent was intended for commercial and/or other advantages to the Respondent. He cited several authorities to buttress his point among them, *Jessicar Clarise Wanjiru*



- v Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017] eKLR, *Joel Mutuma Kirimi & Anor v National Hospital Insurance Fund (NHIF)* [2020] eKLR and *Wanjiku v Machakos University* (Petition E021 of 2021) KEHC 10599 (KLR),
16. The petitioner further submitted that the Respondent infringed on his right to dignity in violation of Article 28 of the Constitution since the petitioner's ability to make choice on his private life was hindered damaging his reputation and causing him psychological torture and that the Respondent's use of petitioner's image without his consent infringing on his privacy was an automatic violation of his right to human dignity. He cited the cases of *Ahmed Issack Hassan v Auditor General* [2015]eKLR, *Dawood and another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8, *Mayelane v Ngwenyama and another* (CCT 57/12) [2013] ZACC 14 and *MWK & another v Attorney General & 3 Others* [2017] eKLR.
 17. The petitioner maintained that the Respondent contravened his personality rights that is the right to control the commercial use of his image and likeness by publishing the petitioner's image without his consent in a bid to solicit funds from the African Development Bank, thus commercially benefitting from the use of the said image. He cited the cases of *NWR & another v Green Sports Africa Ltd & 4 Others* [2017] eKLR Nairobi Constitutional Petition 343 of 2016 and *Von Hannover v Germany* (no.2), Grand Chamber Judgement of February 2012, 96.
 18. The Petitioner submitted that he be awarded Ksh 5,00,000/= for the losses he suffered as a result of the infringements on his right to privacy, dignity as well as personality right and that the respondents be ordered to pay General Damages for breach of his fundamental rights as enshrined in the constitution. He cited the case of *Edward Akong'o Oyugi & 2 Others v Attorney General* [2019] eKLR.
 19. The Respondent reiterated that the matter as raised did not fit within the realm of constitutional dispute for the determination by the High Court and urged the Court to invoke the tenet of constitutional avoidance as was explained in *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others*, Supreme Court Petition No 14, 14A, B & C of 2014.
 20. The Respondent maintained that the matter ought to have been agitated in the magistrate's courts as it would be a matter of a tortious action but the subject of strict proof on liability. He cited the case of *Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & another* (2016) eKLR, *Harrikssoon v Attorney General*, (1980) A.C 265, and *Re. Application by Bahadur*, (1986) LRC (Consult) 297.
 21. The Respondent submitted that the petition failed to meet the structures of pleading a constitutional petition with precision as laid down in the cases of *Anarita Karimi Njeru v Republic* [1979]eKto infLR Nairobi Miscellaneous Criminal Application 4 of 1979 and *Mumo Matemu v Trusted Society of Human Rights Alliance* (2014) eKLR.
 22. The respondent further submitted that the respondent is not in a profit-making business as it is largely funded by public funds and that the picture in question was taken during a public graduation ceremony and the petitioner could not claim rights over a picture taken in such public functions.
 23. The respondent reiterated that the publication of the petitioner's image in its website did not infringe the petitioner's' rights but portrayed him in a positive light as a graduate and that petitioner's claim that he suffered psychological torture and damage in his reputation are unfounded as both the University of Nairobi and University of Kabianga are universities in Kenya established under the Universities Act, 2012.
 24. The Respondent submitted that the petitioner's image was used for purposes of news reporting and not for exploitation as the Respondent was inviting stakeholders for a webinar and not to solicit



funds. The Respondent further submitted that the decisions relied upon by the petitioner were distinguishable from the petition before court as the same missed vital ingredients and that the court lacked jurisdiction.

25. The Respondent further submitted that the decisions relied upon by the petitioner were decided *per-incurium* various decisions of the superior courts and failed to take into account the concept of exhaustion of statutory remedies.
26. The issues for determination in this Petition are as follows:-
 - i. Whether Petitioner's fundamental rights to privacy and human dignity have been violated by publishing his image without his Express Consent.
 - ii. Whether the Petitioner's intellectual property rights were infringed by so doing.
 - iii. Whether the Petitioner is entitled to injunctive Orders.
 - iv. Whether the Petitioner is entitled to damages.
27. On the issue as to whether Petitioner's fundamental rights to privacy and human dignity have been violated by publishing his image without his Express Consent, I find that the answer is in the affirmative since the Express Authority of the Petitioner was required.
28. In *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017]eKLR Nairobi Constitutional Petition 410 of 2016, it was held that;

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. 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.
29. In *T.O.S v Maseno University & 3 Others* [2016] eKLR Kisumu Petition 7 of 2015, it was held that;

From the above reasoning and expositions of 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.
30. I therefore find Petitioner's fundamental rights to privacy and human dignity have been violated by publishing his image without his Express Consent.
31. On the issue as to whether the Petitioner's intellectual property rights were infringed by so doing, I find that it is not clear how the Petitioner's intellectual property rights were violated.
32. Intellectual property is the result of creativity, such as patents, copyright, trademarks and so forth. In the current case I find that it was the personality rights of the petitioner that were violated.
33. In *NWR & another v Green Sports Africa Ltd & 4 Others* [2017] eKLR Nairobi Constitutional Petition 343 of 2016 it was held that;

Personality rights encompass the exclusive right of an individual to market, control and profit from the commercial use of his/her name, image, likeness and persona. The distinctive characteristics of one's image, likeness or persona include but are not limited to name, face, body or recognizable body part, voice or voice impersonation, photograph, look-alike, signature phrase, paraphernalia or action,



costume or personals signature..... The right of publicity is the exclusive right of an individual to market his or her image, likeness or persona for financial gain.

34. On the issue as to whether the Petitioner is entitled to injunctive Orders, I find that the answer is in the affirmative.
35. I accordingly find that the petitioner has established the conditions for grant of an injunctive order. The principles governing the grant of injunctive orders were laid down in the case of *Giella v Casman Brown* (1973) E.A 358 as follows;
 - (i) An Applicant has to establish that he has a prima facie case with probability of success.
 - (ii) That he will suffer irreparable loss if the injunction is not granted.
 - (iii) That the balance of convenience tilts in his favour.
36. I direct that an Order of permanent injunction be and is hereby issued restraining the Respondent from publishing and/or using the Petitioner's image or likeness in it advertisement without express consent from the Petitioner.
37. I also find that the petitioner is entitled to damages and I award him General damages of Ksh 500,000/ =..
38. The Respondent also to pay the costs of the Petition.
39. Judgment be and is hereby entered in favour of the petitioner against the Respondent in the sum of Ksh 500,000 plus costs and interest at court rates from the date of this judgment until payment in full.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 10TH DAY OF FEBRUARY, 2023.

A. N. ONGERI

JUDGE

