



**Ndirangu v Nation Media Group Limited & another (Civil Suit E149 of 2020)
[2023] KEHC 1889 (KLR) (Civ) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT E149 OF 2020**

DO CHEPKWONY, J

FEBRUARY 16, 2023

BETWEEN

CAROLINE WAMBUI NDIRANGU PLAINTIFF

AND

NATION MEDIA GROUP LIMITED 1ST DEFENDANT

JOSEPH KANYI 2ND DEFENDANT

JUDGMENT

1. The plaintiff vide a Plaint dated September 14, 2020 sued the defendants for an alleged unlawful use of the plaintiff's image by the 1st defendant without her consent. The 2nd defendant has been sued in his capacity as a photojournalist who at the time of the alleged breach was employed by the 1st defendant.
2. It is averred that as from the year 2013 to 2020, the plaintiff discovered a picture depicting herself was being used by the 1st defendant over its telecommunication based commercial articles, which the plaintiff has, since 2013, been engaging under protest the 1st and 2nd defendant to address the breach of image rights constitutionally protected, but has been ignored throughout up to date.
3. Upon conducting further online search on domain names under the Business Daily, Daily Nation, and the East African, all owned by and/or managed by the 1st defendant, the plaintiff learnt that there was extensive breach of her image rights as a result of the commercial posts that are made by the defendant all using photographs depicting the plaintiff.
4. That when the plaintiff saw the pictures of herself, she recalled that the same must have been taken by the 2nd defendant when she requested him to take some pictures which were to be delivered to the plaintiff for purposes of handling jewelry business sometime in 2013.



5. It is also averred that while the plaintiff acknowledges a picture concerning a beadwork was authorized for commercial use in favor of the 1st defendant, the same did not extend to the picture at the rooftop around a satellite as prior to taking the extra pictures that have now been violated by the defendants, the plaintiff asked the 2nd defendant whether he would charge her to have him use his lenses to take some pictures of her that she would use for her own jewelry business.
6. That the plaintiff insisted on the photos being transferred to her flash-disk and the 2nd defendant to have them deleted from its storage save for one model of beadwork photograph that the plaintiff had consented to be used since the article in question was featuring the plaintiff's beadwork business.
7. That the plaintiff did not authorize the 2nd defendant to take a picture of her at the rooftop next to a satellite with a view of sharing the same with a third party, not even the 1st defendant, as the 2nd defendant was to delete the pictures from his storage.
8. That in breach of her image rights, the defendants took possession of all the photographs depicting the plaintiff and used them for commercial purposes thus violating the image and data rights owed to the plaintiff.
9. The particulars of these breaches have been listed at paragraph 11 of the Plaint as follows;

Particulars of breach of image rights

- a. The 2nd defendant without the authority of the plaintiff, took a picture of the plaintiff with a view of commercializing the images of the plaintiff with its employer and other entities like Standard Media Group, Ropem Telcom Limited (a Safaricom Authorized Dealer), Youth Village, HDD Rwanda, just the known to the plaintiff.
- b. The 2nd defendant used the photograph depicting the plaintiff ten (10) publications under the Business Daily, Daily Nation and the East African.
- c. The 2nd defendant has been unlawfully licensing the image rights to the plaintiff's image expressly or impliedly as can be noted under the youth village.
- d. Despite the plaintiff issuing the defendant with the demand on December 10, 2019, the 2nd defendant still went ahead to utilize the images depicting the plaintiff on January, 06, 2020.

Particulars of breach of data rights

- a. The 2nd defendant without the authority of the plaintiff, took a picture of the plaintiff with a view of storing and sharing the images of the plaintiff with its employer and other entities like Standard Media Group, Ropem Telcom limited (a Safaricom Authorized Dealer), Youth Village, HDD Rwanda, just the known to the plaintiff.
- b. The 2nd defendant used the photograph depicting the plaintiff ten (10) publications under the Business Daily, Daily Nation and the East African.
- c. Despite the plaintiff issuing the defendant with the demand on December 10, 2019, the 2nd defendant still went ahead to utilize the images depicting the plaintiff on January, 06, 2020.

10. The plaintiff has prayed for judgment against the defendants for;



- a. A declaration is made in favour of the plaintiff, that the defendant's offensive publication to commercialize the images of the plaintiff did breach and violate the plaintiff's image rights.
 - b. A declaration is made in favour of the plaintiff, that the continued offensive publication of the plaintiff's image by the defendant does violate the plaintiff's Image Rights.
 - c. A declaration is made in favour of the Plaintiff, that the continued publication of the photograph depicting the Plaintiff by the Defendant despite being informed of the same by the Plaintiff and further served with a Demand Letter raises a new claim of violation of Image Rights each day the Demand Notice is ignored.
 - d. A declaration is made in favour of the Plaintiff, that the Defendant's offensive Publication to advertise or commercial its activities as from 2013 did violate the Plaintiff's Data Rights.
 - e. A declaration is made in favour of the Plaintiff, that the continued storage of the Plaintiff's image by the Defendants does violate her Data Rights.
 - f. A declaration is made in favour of the Plaintiff, that the continued publication of the photograph depicting the Plaintiff by the Defendant despite being served with a Demand Letter raises a new claim of violation of Privacy Rights each day the Demand Notice is ignored.
 - g. General damages, in favour of the Plaintiff, for the violation of the Image Rights and or Data Rights as from 2013 - 2019 when the Defendants were served with the Demand Letter.
 - h. General damages, in favour of the Plaintiff, for the continued violation of the Image Rights and or Data Rights of the Plaintiff as of January 06, 2020 being after the Defendant was served with the Demand Letter to December 10, 2019.
 - i. Costs of this suit.
 - j. Any other relief that this Honorable Court may deem just and fair to grant.
11. Despite service, the Defendants did not enter appearance nor file a Defence. On June 18, 2021, this court entered Judgment against the Defendants in default of appearance and set down the matter for formal proof hearing.
 12. The same proceeded for formal proof hearing on November 18, 2021 wherein the Plaintiff testified on her own behalf as PW1. She had her witness statement adopted as her evidence in chief and produced a list and bundle of documents as exhibits in support of her case. The Plaintiff closed her case and was directed to file written submissions to buttress her case.
 13. On March 23, 2022 when the matter came for mention to confirm the filing of written submissions by the Plaintiff, one M/S Obuori addressed court and indicated that she had just been instructed by the Defendants to enter appearance in the matter. This court directed that she did not have the right of audience before court since she had not filed a Notice of Appointment hence was not properly on record.
 14. As directed by the court, the Plaintiff did file her written submissions dated January 10, 2022, which I have read and considered in my determination of this case.

Determination

15. Having listened to the Plaintiff's case, I have also read through the pleadings and submissions filed by her and find that the issues for determination are:



- a. Whether the Plaintiff's image rights were infringed; and if yes,
 - b. What amount of damages is payable to the Plaintiff.
16. With regard to whether the Plaintiff's image rights were breached, reliance is placed on the case of *Jessicar Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017]eKLR, where the court laid down the principles to established for a claim for breach of image rights as follows;
- “The key elements of a Claim for unlawful use of Name or image which a petitioner must establish to succeed in a case of this nature are:-
- a. Use of a Protected Attribute: The plaintiff 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 plaintiff 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 Plaintiff must establish that he or she did not give permission for the offending use.
17. The Plaintiff claims to have authorized the use of only one image but the Defendants went ahead to use other photographs she had not authorized. The use of the images by the Defendants were for commercial purposes in their commercial articles. It is the plaintiff's assertion that this use was done without her consent, express or implied. At Paragraph 10 of her Written Statement dated September 14, 202, the Plaintiff indicates that there was no written agreement as to the use of her images including the authorized one and that the same was just verbal since she needed to be taken a photo while working at the beadwork.
18. I have perused the exhibit marked as CWN-003 detailing the conversation between the Plaintiff and the 2nd Defendant, and clearly it is deduced that the 2nd Defendant was only authorized to take and use the photo with beadwork and not the one at the rooftop near a satellite. Further, the 2nd Defendant admits to having been paid for the photo to be used. The same photo has been used by various organizations and enterprises in their commercial articles.
19. It is note-worthy that the 2nd Defendant did not enter appearance or file a defence so as to shed light on whether there was any agreement, formal or informal for them to use the photo in question. Without any contrary evidence or explanation, I am inclined to believe the Plaintiff's assertion that indeed her image and data rights were breached, and hence her claim meets the threshold that was set out in the Jessicar Clarise Wanjiru case cited herein.
20. Having found that the Plaintiff's image rights have been breached, I proceed to assess damages payable. The Plaintiff has prayed for an award for general damages in the tune of Kshs 16,000,000/=. However, the same has neither been explained or substantiated.
21. In the case of *Wangechi Waweru Mwende vs Tecno Mobile Limited; Rogers Ouma t/a Ojwok Photography (Third Party)* [2020]eKLR, nominal damages of Kshs 500,000/- was awarded for breach



of constitutional right to privacy. And in the case of *NWR & Another vs Green Sports Africa Ltd & 4 Others* [2017]eKLR, a Plaintiff was awarded general damages of Kshs 750,000/=. Further, in the case of *Ann Njoki Kumena vs KTDA Agency Ltd* [2019]eKLR, the Plaintiff was awarded general damages of Kshs 1,500,000/-.

22. I have taken into consideration the above findings, alongside the current economic dynamics and inflation rates and I am satisfied that an award of Kshs 2,000,000/= will suffice.

23. The Plaintiff has also prayed for general damages for continued breach of her image rights even after the demand notice had been served upon the Defendants. I want to presume that although the Plaintiff has called them general damages, they are exemplary damages. The Court of Appeal in the case of *Godfrey Julius Ndumba Mbogori & Another vs Nairobi City County* [2018]eKLR on exemplary damages held that;

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:

- i. in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
- ii. cases in which the Defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the Plaintiff and
- iii. where exemplary damages are expressly authorized by statute”.

24. The Defendants herein were served with a Demand Notice on December 10, 2019 but they disregarded the same and continued using the Plaintiff’s image without her consent. In this regard, the Plaintiff is entitled to exemplary and aggravate damages, which are assessed at Kshs 500,000/=.

25. Having found for the Plaintiff as above, the Defendants are hereby directed to pull down all the Plaintiff’s photos and delete them permanently from their storage.

26. The upshot and for avoidance of doubt, is that Judgment is entered in favor of the Plaintiff as against the Defendants jointly and severally for:-

- a. General damages in the sum of Kshs 2,000,000/=.
- b. Exemplary and aggravated damages in the sum of Kshs 500,000/=.
- c. The Defendant be and is hereby directed to pull down all the Plaintiff’s photos and or images, and to delete them permanently from their storage.
- d. Costs of the suit are hereby awarded to the Plaintiff.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF FEBRUARY , 2023.

D O CHEPKWONY

JUDGE

In the presence of:



Mr Ong'anya counsel for Plaintiff
No appearance for and by the Defendant
Court Assistant - Simon

