



**Matendechele v Muthokinju Paints & Cement (Constitutional Petition E361 of 2021)
[2023] KEHC 1919 (KLR) (Constitutional and Human Rights) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1919 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E361 OF 2021**

AC MRIMA, J

MARCH 10, 2023

BETWEEN

ARON ASIIBI MATENDECHELE PETITIONER

AND

MUTHOKINJU PAINTS & CEMENT RESPONDENT

JUDGMENT

Background

1. The dispute before this Court revolves around alleged invasion of the right to privacy and the attendant violation of the right to dignity resulting from use of a person's image without their consent to achieve a promotional and commercial end.
2. The Petitioner, Aron Asiiba Matendechele, claimed to have been captured by the K24, a local television channel, humorously warning Charles Musyoka, an interviewee of the channel, on electricity crisis experienced in Mukuru Kwa Njenga, a slum residence in Nairobi.
3. In the year 2021, ten years after the video was captured, the Petitioner claimed to have become an internet and social media sensation in respect of the remarks he made while addressing Charles Musyoka.
4. Subsequently, the Respondent herein, Muthokinju Paints and Cement, a limited liability company in the business of supplying building materials, is alleged to have used the Petitioner's recreated image, likeness and persona to advertise their products without his consent.
5. The Petition was opposed by the Respondent.



The Petition

6. Through the Petition dated 1st September 2021, supported by the Affidavit and supplementary affidavit of the Aron Asiiba Matendechele, deposed to on a 1st September 2021 and 9th November 2021 respectively, the Petitioner sought to ventilate the grievance occasioned to his constitutional rights by the use of his image/likeness by the Respondent.
7. Contemporaneously filed with the main Petitioner was the Notice of Motion Application (The Application) where the Petitioner sought interim reliefs pending hearing and determination of the main petition.
8. The application was subsumed in the Petition through the order of this Court issued on 28th September 2021.
9. The Petitioner pleaded that on 2nd July 2021, the Respondent, in a bid to attract wide readership and boost its sales, published a story on its Facebook handle Muthokinju Paint Cement titled '*tupige sherehe ama tupige nyumba rangi*' under the theme #Nitakufinya and #muthokinjupaintsandcement using his recreated image/ likeness and persona and therewith indicating the Respondent's mobile phone contact of 0768290403 and website, *www.muthokinju.co.ke*.
10. The Petitioner pleaded that on a reasonable man's view, the foregoing publishing bearing his recreated image, likeness and persona was in violation of his right to privacy protected under Article 31 of the Constitution.
11. It was his case that for his likeness or identity to be used in the advertisement, he ought to have consented to be a model for the Respondent's products or be retained for the modelling services in order to waive his right to privacy and dignity for the Respondent's commercial gain, or was contractually employed by the Respondent for modelling services.
12. He pleaded that failure by the Respondent to seek and obtain his consent subjected him to psychological torture because the society, peers, associates, family, business partners and affiliates perceived him to have gained financially from the advertisements.
13. It was his case that the fact that the respondents continued to reap profits out of the advertisements as a result of misappropriation of his likeness could be termed as forced labour and servitude as there was lack of his free will to elect to appear in the advertisement.
14. Apart from violation of Article 25, 28 and 31 of the Constitution, the Petitioner pleaded that the Respondent's conduct deprived him of his right to equal protection of the law protected under Article 27 of the Constitution.
15. On the following legal and factual basis, the Petitioner prayed for the following reliefs;
 - a. A declaration be issued that the impugned decision by the Respondent to use the Petitioner's identity, image/likeness and persona without consent abrogates the rights of the Petitioner to privacy and thus in violation of Article 31 of the Constitution.
 - b. A declaration be hereby issued that the impugned decision by the Respondent to use the Petitioner's identity, likeness and persona without consent for commercial gain subjects the Petitioner to forced labour and servitude and in tandem afflicts Article 25(b) and 30 of the Constitution.
 - c. A declaration be issued that the impugned decision by the Respondent to use the Petitioner's identity, image/likeness and persona without consent has exposed him to ridicule and



apprehension hence exposing him to psychological torture and thus in violation of Article 29(d).

- d. An Order for significant compensation be given against Muthokinju Paints and Cement the Respondent herein in favour of the Petitioner for violation of Articles 25(b), 29(d), 30, 31 & 41.
- e. Costs of this Petition and,
- f. Any other reliefs as this Honourable Court may deem fit to grant.

The Submissions

16. The Petitioner further urged his case through written submissions 12th November 2021.
17. The Petitioner buttressed violation of his right to privacy by stating that the likeness of an individual refers to the visual image which may be in the form of a photograph, caricature, drawing or any other visual representation.
18. It was their submission that the words used in the recreated image are similar words and phonetics uttered by the Petitioner in his maiden appearance on the Television channel and the respondent could not deny using the image of the Petitioner.
19. The Petitioner rebutted the Respondent's assertion that it did not need his consent by stating that constitutionally, the Respondent had an obligation to get affirmation from the Petitioner before using his image for commercial gain
20. The Petitioner referred to the English decision in *Faegre & Benson, LLP v Purday*, 367 F. Supp. 2d 1238(D) Minn.2005) as relied upon by the Court in [*NWR & Another v Green Sports Africa Ltd & 4 Others*](#) (2017) eKLR where the Court discussed likeness as follows;

“Likeness refers to a visual image of the Plaintiff, whether in a photograph, drawing caricature or other visual presentation. The visual image need not precisely reproduce the plaintiff's appearance, or even show his or her face, so long as it is enough to evoke the plaintiff's identity I the eyes of the public.”
21. The Petitioner further buttressed the meaning of likeness by reference to the [*Black's Law Dictionary*](#) which defines the term as follows;

“An image painting sketching model diagram or other clear representation, other than a photograph, of an individual's face, body or parts thereof, or the distinctive appearance, gestures or mannerisms of an individual.”
22. Based on the foregoing, it was submitted that the evidence, original image derived from the video as juxtaposed with the advertisement by the Respondent possess distinctive appearance, mannerisms, character facial expressions, complexion, gesture, humour and appearance of the Petitioner.
23. To the extent that there was no consent to use the same, the Petitioner submitted that the Respondent misappropriated his constitutionally protected attributes.
24. In pitching its claim that the Respondent used his image for commercial gain, the Petitioner submitted that the Respondent misrepresented to the public that he endorses and service. It was submitted that the Respondent used the Petitioner's image to garner more viewership on social sites to the detriment of his dignity, social security and in violation of his right against forced labour and servitude.



25. In asserting violation of the right to property protected by Article 40 of the *Constitution*, the Petitioner relied on the decision in *Jessica Clarise Wanjiru v Davinci Aesthetics & reconstruction Centre & 2 Others* (2017) eKLR where it was observed *inter-alia*;

“It is axiomatic that the right of publicity, often called personality rights, is the right of an individual to control the commercial use of his or her name, image, likeness or other unequivocal aspects of his identity.”

26. To demonstrate compensation awardable for the tort of passing off on his image and property rights, the Petitioner found support on the decision in *Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited* (2021) eKLR where the Court Compensated the Petitioner KShs. 2,000,000/- for the Respondent having used a client’s picture on their banner to advertise their products and services.

27. Further refence was made to the decision in *NWR & Another v Green Sport Africa Ltd & 4 Others* 2017 eKLR where the Court awarded the Petitioner KShs. 750,000/- each to two minors against the Respondent for using their pictures to advertise their products without consent.

The Respondent’s Case

28. Muthokinju Paints and Cement opposed the Petition through response to the Petition dated 18th October 2021, and The Application, through the Replying Affidavit of Agnes Njeru, the Respondent’s Head of Human Resource deposed to on an even date.

29. It was its case that the publication by the Respondent on it Facebook platform on 2nd July 2021 did not in any way amount to violation of the Petitioner’s right to privacy or any protected rights.

30. The Respondent stated that the image it published neither identified nor referred to the Petitioner and that it was not a protected image or attribute of the Petitioner capable of being commercially exploited.

31. Notwithstanding the foregoing, the Respondent stated that the image it used on its Facebook platform was in a manner that no reasonable person would have assumed that the images thereon and the person thereon was endorsing its products.

32. It was its case that at no material time did the Respondent claim that the Petitioner was endorsing it or any of its products.

33. Further, the Respondent stated that the image was not used in an offensive context. It claimed that its intention and purpose was to celebrate and participate popular culture and no material and or commercial gain was made from it by the Respondent.

34. It was its case further that the Petitioner failed to prove whether and to what extent his rights to privacy were violated.

35. It was its position that the Petitioner’s public status after appearing on TV limited his reasonable expectation of privacy and ass such could not now claim to have been violated.

The submissions

36. In its written submissions dated 14th March 2022, the Respondents denied violation of the right to property stating that the right to privacy is bounded by the collection and disclosure of private information and does not apply to information already within the public domain.

37. It was its case that the burden of proof lied with the Petitioner to specifically prove that the said publication referred to and identified him to amount to invasion of his privacy.



38. It was submitted that the Petitioner having voluntarily participated in television interviews and having been I several appearances in various media discussing the said incident, he could not seek to allege that he had a legitimate and reasonable expectation of privacy as his own conduct and action deprived his of such privacy.
39. The Respondent referred Court to the decision in *Berstain v Bester No.* (1996) SA 751 where the Defendants successfully submitted that by havig posted their photo in the 1st Plaintiff's Facebook account, the Plaintiffs had consented to the same being seen, accessed, reshared or downloaded through 3rd party service and could not be seen to be a violation of the Plaintiff's right to privacy.
40. The American decision in *US v Mara* 410 US 19 (1973) 21 was further relied upon where the Court held that a person had no reasonable expectation of privacy with respect to physical characteristics which he or she exposes to the public.
41. It was the Respondent's case that at no material time was there any allusion to the Petitioner's name, profession or other personal details in the said publication and that upon his disapproval, the Respondent removed him from its various social media accounts.
42. The Respondent further submitted that in absence of a protected image under *Copyright Act*, the Petitioner's case does not meet the test in law.
43. Further to the foregoing, the Petitioner submitted that there were no defamatory statement against the Petitioner since the advertisement in question never identified not made any statement or insinuation as regards the Petitioner's reputation, character, actions or behaviour.
44. In the end, the Respondent submitted that the Petition is speculative and does not meet precision requirement and the threshold under Article 22 of the *Constitution*. It urged the Court to dismiss it with costs.

Analysis:

45. Having considered the record before me, the following issues arise for discussion: -
 - a. The burden and standard of proof in constitutional Petitions.
 - b. Whether the impugned publication of the image by the Respondent in its Facebook handle amounted to a violation of the Petitioner's right to privacy, dignity and property.
46. I will consider the issues in seriatim.

(a) The burden and standard of proof in constitutional Petitions:

47. The two legal doctrines (the burden and standard of proof) have been subjected to a lot of legal discourse such that it may not be necessary to replicate the same in this judgment. However, briefly put, the burden of proof is a legal doctrine which principally deals with the duty of a party or parties to adduce evidence in a matter in proof of a certain fact. The standard of proof relates to the evidential threshold required for a claim to be considered as having been proved.
48. The issue of the burden of proof has two facets. There are the legal burden of proof and the evidential burden of proof.



49. Sections 107(1), (2) and 109 of the *Evidence Act*, Cap. 80 of the Laws of Kenya deals with the burden of proof. It states as under: -

Sections 107(1) and (2):

1. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
- and

Section 109:

Proof of particular fact

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

50. The foregoing provision brings out what is referred to as the legal burden of proof. That burden remains on the Petitioner throughout the case.
51. Reinforcing that the legal burden of proof in constitutional Petitions is on the Petitioners, the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR stated as follows: -

Although Article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

52. There is also the evidential burden of proof. This legal principle was discussed in Bungoma High Court Election Petition No. 2 of 2017 *Suleiman Kasuti Murunga v IEBC & 2 Others* (2018) eKLR as under: -

26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.
27. The principle of 'evidential burden of proof' is hence anchored on the rebuttable presumption of validity of election results. That, until and unless a Petitioner discharges the evidential burden of proof an election is presumed valid. It is on that background that the Court in *Singh*



v Mota Singh & Another (2008) 1 KLR 1 stated that an election is a matter of public importance not to be lightly set-aside and in the case of *Jeet Mohinder Singh v Harinder Singh Jassi*, AIR 2000 SC 258 the Supreme Court of India stated that

“the success of a candidate who has won at an election should not be lightly interfered with ...Any person seeking such interference must strictly conform to the requirements of the law....”.

28. The Supreme Court in the 2017 majority judgment had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof as follows: -
- (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
- (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law....
29. It therefore follows that the legal burden of proof is static and rests on the Petitioner throughout the trial. It is only the evidential burden of proof which may shift to the Respondents depending on the nature and effect of evidence adduced by a Petitioner.
53. The Court will now deal with the standard of proof in Constitutional Petitions.
54. The *Black’s Law Dictionary*, (9th Edition, 2009) at page 1535 defines ‘the standard of proof’ as
- [t]he degree or level of proof demanded in a specific case in order for a party to succeed.
55. In many jurisdictions and decisions world over three main categories of the standard of proof emerge. They are the criminal standard of proof of ‘beyond reasonable doubt’, the application of civil case standard of ‘balance of probabilities’ and the application of an intermediate standard of proof.
56. The Supreme Court in Presidential Petition No. 1 of 2017 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR discussed the applicable standard of proof in election petitions. In that decision, the Apex Court declined the invitation to find that election petitions were just like the normal conventional Petitions and that the standard of proof ought to be that applicable in constitutional petitions which was ‘on the balance of probabilities. The Court found that the applicable standard of proof electoral matters was the intermediate one, that is
- “beyond balance of probabilities, but below proof beyond reasonable doubt.”
57. This is how the Supreme Court, rightly so, argued: -
- (152) We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal



or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners' submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.

(153) We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as *sui generis*. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not.

58. Returning to the matter at hand, this Court hereby settles that the Petitioner bore the legal and evidential burden of proof unless the evidential burden of proof shifted to the Respondent.

59. The Court also settles that the applicable standard of proof in this matter, just like in any other Constitutional Petitions, shall be on a balance of probabilities.

(b) Whether the impugned publication of the image by the Respondent in its Facebook handle amounted to a violation of the Petitioner's right to privacy, dignity and property:

60. The right of an individual to control the commercial use of one's name, image, likeness, or other unequivocal aspects of one's identity lies within the ambit of the rights generally referred to as publicity rights or often called personality rights.

61. By their very nature, the publicity or personal rights are also generally considered as property rights as opposed to personal rights.

62. *Matavo, J (as he then was) in the High Court at Nairobi Constitutional Petition No. 410 of 2016 Jessicar Clarise Wanjiru v Da Vinci Aesthetics & Reconstruction Centre & 2 Others (2017) eKLR* rendered a comprehensive discussion on the legal principles guiding the subject of publicity rights.

63. In the end, the Learned Judge summed up the elements which a Petitioner ought to prove in a suit over alleged infringement of publicity or personality rights. He stated as follows: -

32. From the above leading decisions on the subject, 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.

64. This Court will now apply the above to the matter at hand. First, will be the paramount issue of whether the Petitioner adduced evidence that shifted the burden of proof to the Respondent such that the Respondent ought to have sought for and obtained the Petitioner's consent prior to placing the impugned advertisement.



65. As captured above, the Petitioner's claim arises from an alleged interview captured by K24 Television where the Petitioner was humorously warning one Charles Musyoka, an interviewee of the channel, on an electricity expose in Mukuru Kwa Njenga, a slum residence in Nairobi.
66. Resulting from the interview, the Petitioner alleged that the Respondent herein used the part of the television interview where the Petitioner uttered some words to the interviewee in its Facebook advertisement without his consent.
67. Having carefully perused the record, this Court did not come across either the recorded K24 Television interview or the link to the said interview. What the Petitioner provided was the name of the Respondent's Facebook page and a photograph allegedly carrying a caricature of the Petitioner developed from the television interview. The Petitioner also provided a photograph allegedly captured from the television interview with his image or likeness.
68. In a case of this nature, the K24 Television interview takes a centerstage as the basis of the instant claim. It was, therefore, incumbent upon the Petitioner to ensure that this Court has access to the K24 Television interview or a recorded version thereof. Without the initial interview where it is alleged that the Petitioner featured and uttered some words which were later used by the Respondent alongside the image and likeness of the Petitioner, this Court finds it a tall order to ascertain how the Petitioner's rights were infringed.
69. At the moment, there is no evidence that indeed the Petitioner featured in the television interview and if so, whether he uttered some words. There is still no evidence that the words which the Petitioner is alleged to have uttered were actually the ones used in the advertisement by the Respondent.
70. Of paramount importance, as well, is the fact that the Petition was heard by way of reliance of affidavit evidence. The Court did not have an opportunity to see the Petitioner in person. Up to now, this Court does not know how the Petitioner looks like. It is, therefore, not possible for the Court to ascertain whether the Petitioner was the same person who featured and uttered some words in the television interview. Such a lacuna would have been remedied by providing a link to the interview or availing a recorded version thereof.
71. The way the Petition was tailored and the manner in which the evidence in support thereof was tendered places this Court in a situation where it will have to assume several issues. Some of the issues that called for settlement free from assumption include whether there was indeed a television interview, whether the Petitioner actually featured in the interview, whether he uttered some words, whether the image in the Respondent's advertisement was that of the Petitioner or in any way derived from the Petitioner, whether the words used by the Respondent in its advertisement could in any way be attributed to the Petitioner in the interview, among other issues.
72. By placing the foregoing evidential state of affairs and aspect of the evidential burden of proof in constitutional Petitions side by side, it is apparent that the Petitioner failed to adduce evidence capable of shifting the evidential burden to the Respondent. The Petitioner's photograph alleged taken from the television interview is not proof of the interview. If anything, the photograph did not carry the words allegedly spoken by the Petitioner which were in turn allegedly used by the Respondent in its advertisement.
73. Had the Petitioner accorded this Court the opportunity to view the television interview, either through a link or a recorded version, the Court would have been placed in a position to settle all the issues which remain in limbo above. As said, with such a lacuna, this Court is unable to ascertain if any of the Petitioner's rights and fundamental freedoms were allegedly infringed. The Petitioner, therefore, failed to establish the link between himself, the provisions of the Constitution alleged to have been



contravened and the manifestation of contravention or infringement. The claim did not, hence, pass the proprietary test set by the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others case* (*supra*).

74. It is on the above basis that this Court finds that the Petitioner did not prove his claim as against the Respondent.

Disposition:

75. As I come to the end, this Court wishes to profusely apologize for the late delivery of this judgment. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a General election, the said matters had priority over the rest. The Court was also transferred in July 2022, on need basis, to a new station which had serious demands that called for urgent attention. The totality of it all yielded to the delay herein. Galore apologies once again.
76. The upshot in this case is that the Petitioner's case lacks legal leg to stand on and cannot be sustained.
77. Consequently, the following final orders do hereby issue: -
- a. The Petition is hereby dismissed.
 - b. The Petitioner shall bear the costs of the Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 10TH DAY OF MARCH, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Mr. Omamo, Learned Counsel for the Petitioner.

Miss Njoki, Learned Counsel for the Respondent.

Regina/Chemutai – Court Assistants.

