



**Wairimu v Thika Road Holdings Limited (Constitutional Petition E407 of 2020)  
[2023] KEHC 1923 (KLR) (Constitutional and Human Rights) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1923 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E407 OF 2020**

**AC MRIMA, J**

**MARCH 10, 2023**

**BETWEEN**

**SUSAN WAIRIMU ..... PETITIONER**

**AND**

**THIKA ROAD HOLDINGS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Background**

1. Sometimes in December 2017, Susan Wairimu, the Petitioner herein, claimed that she participated in a Christian themed photoshoot at Thika Road Mall (hereinafter referred to as ‘the Mall’) within Nairobi City County.
2. Being a model, the Petitioner asserted that the photographs were aimed at expanding her portfolio to make her marketable to potential agencies who would then, with her consent, either publish and or use or cause the photographs to be published or used in print and or electronic media for personal commercial benefit.
3. However, contrary to the Petitioner’s expectations, on diverse dated between 22<sup>nd</sup> and 23<sup>rd</sup> December, 2017, Thika Road Holdings Limited, the Respondent herein, caused to be published her photographs on its Facebook account, a social media platform, with the user name TRM- Thika Road Mall @ThikaRoadMall”.
4. It is the Petitioner’s case that her photographs were published as advertisement for promotional campaign by Thika Road Mall during the December 2017 Christmas holiday using the online metadata tag #GetSpottedGetGifted” with accompanying statement dubbed “For an Extra special Christmas celebration, come shop at TRM and get a Christmas Gift.”



5. The Petitioner claimed that she only came to know of the publication and use of her photograph by the Respondent through her friend.
6. She claimed that the use of her photograph was without notice, her consent, authorization and approval and as such was used unlawfully and unjustifiably.
7. The Petitioner asserted that the continued unjustified use of her photographs had caused her mental anguish and anxiety since the Respondent was accruing commercial and monetary benefit, global exposure and reputational growth to her detriment for lack of compensation.

**The Petition:**

8. Through the Petition dated 9<sup>th</sup> December 2020, supported by the Petitioner's Affidavit and Further Affidavit deposed to on 9<sup>th</sup> December 2020 and 18<sup>th</sup> June 2021 respectively, the Petitioner approached this Court seeking to protect and vindicate violation of her constitutional rights.
9. She pleaded that her photographs were acquired by the Respondent in questionable circumstances and its publication, without her consent, infringed on her right to protection of personal property under Article 40(1) of *the Constitution*.
10. The Petitioner further posited that the publication of her photographs infringed on her right to dignity and privacy protected by *the Constitution* in Articles 28 and 31(c) respectively.
11. It was her case that the Respondent ought to be held liable for financially exploiting and appropriating her photographs by using them for promotional campaign whilst depriving her the exclusive right to control the commercial benefit derived from her own photographs.
12. The Petitioner pleaded that the failure by the Respondent to compensate her despite her personal request yielded the instant Petition wherein prayed for the following reliefs: -
  - a. A declaration be and is hereby issued declaring that the Petitioner's right to human dignity under Article 28 of *the Constitution* of Kenya, 2010 was violated by the Respondent's unauthorised, unjustified and unlawful publication, use and exploitation of the Petitioner's photograph;
  - b. A declaration be and is hereby issued declaring that the Petitioner's right to privacy under Article 31(c) of *the Constitution* of Kenya, 2010 was violated by the Respondent's unauthorised, unjustified and unlawful publication, use and exploitation of the Petitioner's photograph;
  - c. A declaration be and is hereby issued declaring that the Petitioner's right to protection of personal property under Article 40(1) of *the Constitution* of Kenya, 2010 was violated by the Respondent's unauthorised, unjustified and unlawful publication, use and exploitation of the Petitioner's photograph;
  - d. A declaration be and is hereby issued declaring that the Petitioner is entitled to general damages as a consequence of the breaches of her rights and fundamental freedoms by the Respondent as a consequence of prayers (a), (b) and (c) hereinabove;
  - e. Further and as a consequence of prayer (d) hereinabove, this Honourable Court be pleased to award the Petitioner general damages for the unauthorized publication, use and exploitation of her photograph by the Respondent;



- f. A permanent injunction restraining the Respondent whether by itself, its employees, agents and/ or otherwise from further publishing or causing to be published the Petitioner's photograph on the internet/World Wide Web through an account and/ or profile owned, managed and/ or controlled by the Respondent on the Respondent's social media account and profile on Facebook, and/ or in any other social and/ or electronic media;
- g. A mandatory injunction compelling the Respondent to permanently remove the Petitioner's photograph from the Respondent's social media account and profile on Face book and/ or in any other social and/ or electronic media;
- h. Any other relief this Honourable Court deems fit to grant;
- i. Costs of this Petition; and
- j. Interests on (h) and (i) hereinabove at Court rates from the date of filing this Petition until payment in full.

**The submissions:**

- 13. The Petitioner urged her case further through written submissions dated 27<sup>th</sup> September 2021 and dated 19<sup>th</sup> November 2021.
- 14. From the outset, the Petitioner submitted that under Article 22(1) and 258(1) of *the Constitution* as appreciated alongside the decision in International Community of Women living with HIV Registered Trustees -vs- Co-ordination Board & 2 Others; Teresia Otieno (interested Party) 2021 eKLR, she had locus standi before this Court to seek legal redress for violation of her rights and fundamental freedoms.
- 15. The Petitioner rebutted the Respondents claim that she trespassed into Thika Road Mall and participated in the photoshoot without the Respondent's consent by submitting that no document or existence of the Respondent's right of admission or the requirement by the Petitioner to seek permission to access the Mall for purposes of the photoshoot on the day it happened.
- 16. The Petitioner argued that the Respondent ought to be stopped from approbating and reprobating by stating that since the Respondent went ahead to publish her images, it could not be heard to state that the Petitioner had trespassed into the Mall.
- 17. The Petitioner drew the Court's attention to the fact that the Respondent did not dispute ownership and control of the social media account and profile on Facebook. Reference was made to the various exhibits indicating existence of the Petitioner's images on the Respondents social media account from the time the Petitioner lodged her complaint with the Respondent to the date he instituted the Petition herein.
- 18. In respect to the Respondent's challenge on the Certificate of Evidence filed under Section 106B of the *Evidence Act*, the Petitioner submitted that the Respondent's contention regarding admissibility of screenshots do not fall under the scope of Section 106B of the *Evidence Act* to be admissible.
- 19. It was her case that the Certificates as filed in her Affidavit are compliant with Section 106(B) of the *Evidence Act* since the electronic record was identified to be the screenshots of the Respondents social media account and profile of Facebook.
- 20. It was further submitted that the particulars of the Computer and printer involved in producing the Petitioner's image were given in compliance with Section 106(B0(4)(b) and (c) of the *Evidence Act*.



21. As regards the challan geo veracity of the links in the 1<sup>st</sup> and 2<sup>nd</sup> Certificate, the Petitioner submitted that the very links appearing on the screenshots on the Respondents account and Profile on Facebook have not been disputed by the Respondent.
22. It was her case that the assertion by the Respondent that the Petitioner was under an obligation to undertake background checks into the domains hosting the alleged website and social media account in order to verify and prove that the links relate to the Respondent go beyond the statutory framing and requirements of Sectin106B of the Evidence Act.
23. In submitting on the aspect of failure to obtain consent, it was stated that the moment the Petitioner denied giving consent, the onus shifted to the Respondent to demonstrate through evidence that it obtained consent prior to publication.
24. The Petitioner submitted that no such proof was availed before this Court and up until the filing of the Petition and the further affidavit, the publication was ongoing.
25. The Petitioner rejected the Respondent's claim that it obtained consent from the Photographer by stating that her consent could only move from her to the Respondent.
26. In refence to the email correspondence between the Respondent and the Petitioner dated 5<sup>th</sup> December 2017, it was submitted that consent given by the Petitioner to the Photographer did not extend to any publication thereof whether by the Photographer or the Respondent.
27. In further buttressing the lack of capacity by the Photographer to authorize consent for use of her pictures, the Petitioner further submitted that the email correspondence between the Respondent and the Photographer did not indicate the existence of an agency, master, servant and employer-employee relationship between her and the Photographer.
28. The Petitioner submitted that consent for publication of her photographs by the Respondent on its social media account could not be implied as a consequence of the Photographers publication of the said photographs in his own social media account.
29. It was the Petitioner's case that the publication of her photograph on the Photographer's social platform did not absolve the Respondent of its own responsibility and accountability for its publication of her photograph.
30. Based on the foregoing, the Petitioner submitted that her right to privacy protected under Article 31(c) of the Constitution had been violated.
31. To buttress the importance of protection of the right to privacy, the Petitioner relied on the decision in Jessicar Clarise Wanjiru -vs- Davinci Aesthetics & Reconstruction Centre & 2 Others (2017) eKLR where the right to privacy were discussed as follows: -

.... Personality rights, generally speaking, consist of two types of rights, the right to privacy and the right of publicity. The right to privacy is the right to keep one's image and likeness from exploitation without permission or compensation and generally applies to members of the general public. The right to publicity is the exclusive right of an individual to market his or her image, likeness or persona for financial gain.
32. The Petitioner submitted that they had established the three elements that point to violation of the right to privacy as developed in Jessicar Clarise Wanjiru -vs- Davinci Aesthetics & Reconstruction Centre & 2 Others (2017) eKLR which include theuse of a protected attribute, for an exploitative purpose without her consent.



33. In submitting on the right to dignity, the Petitioner referred to MWK & Anor -vs- Attorney General & Others (2017) eKLR where it was observed that: -
- .... The photographing and publication of the child's image strikes at the Dignity of the child, it is harmful to the child, and it is potentially harmful because it invaded on her privacy and dignity. Dignity is a founding value of our Constitution. It informs most if not all of the rights in the Bill of Rights and for the reason is of central significance in the limitation analysis...
34. In respect to the right to privacy, the Petitioner relied on Jessicar Clarise Wanjiru -vs- Davinci Aesthetics & Reconstruction Centre & 2 Others (2017) eKLR where it was observed: -
- .... 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 one's identity. It is generally considered a property right as opposed to personal right....
35. In the end, the Petitioner submitted that she was entitled to the reliefs sought having demonstrated violation.
36. As for declarations, she drew support from Bitange Ndemo -vs- Director of Public Prosecutions & 4 Others (2016) eKLR where it was stated that: -
- ... A declaration is a formal statement by the Court pronouncing upon the existence or non-existence of a legal constitutional state of affairs. ...it does not contain an order which can be enforced against the respondents, as it only declares what is the legal position....
37. On the prayer for damages, the Petitioner, while referring to various decisions including the in Ann Njoki Kumena -vs- KTDA Agency Ltd (2019) eKLR urged to be awarded Kshs. 1,500,000/-.

#### **The Respondent's case:**

38. The Respondent opposed the Petition through the Replying Affidavit and Supplementary Affidavit of Anand Garikipati, its Chief Executive Officer, deposed to on 12<sup>th</sup> March 2021 and 25<sup>th</sup> June 2021 respectively.
39. It was his deposition that, Thika Road Holding, being the proprietor of the mall reserved the right of admission to any entrant and more so those seeking entry for purposes of commercial gain.
40. It was, therefore, his deposition that the Petitioner by her narrative trespassed into the mall and proceeded to participate in a photoshoot with a view to deriving a commercial benefit.
41. He deposed that the Petitioner was using the Court process to sanitize and authenticate her attempt to derive financial benefit from the Respondent as a result of the trespass.
42. He deposed that the mall was free to use the photographs of one Dvan Dennis Njoroge, a photographer who had requested the Respondent through email correspondence of 5<sup>th</sup> December 2017 to undertake photoshoot within the mall during the Christmas season.
43. He deposed further that the photographer undertook the photoshoot for a period of one hour and thirty minutes running from 3.00pm on 6<sup>th</sup> December 2017 and it followed that the models involved would be engaged as the photographer's agents, servants and or employees.



44. Further to the foregoing, the Respondent stated that the Photographer had ownership of the work and outcome thereof over the models because he was the proprietor of the assignment and the equipment that was used.
45. It was his case that the Petitioner having participated voluntarily in the photoshoot executed by the images were not taken in an intrusive manner and the mall was not at fault in using the photographs at its convenience having been granted unequivocal consent.
46. He deposed that the photographer on 21<sup>st</sup> December 2017, via email correspondence to the Respondent forwarded the photographs from the photoshoot to the Respondent for use as may be required.
47. It was his deposition that the Photographer could only have forwarded photographs of his models since he was the legitimate owner of the said photographs and was responsible having obtained authority and ownership.
48. He deposed further that since the Petitioner did not reprimand or withdraw her consent to the Photographer who proceeded to use her photographs from the photoshoot in his social media platforms for her publicity, she granted unlimited consent to the photographer to use her photographs as he desired for publicity purposes.
49. It was his case that the Petitioner's photographs were not used in any way outside of procuring her publicity either directly or any other party to whom the photographer granted consent to use including but not limited to the Respondent.
50. It was its case that the Respondent did not require consultation, approval or consent of the Petitioner to use the alleged photographs, save the Respondent's only, which case was given unconditionally in writing.
51. The Respondent denied knowing Caroline Ogutu by stating that she is not an authorised agent or servant of the Respondent and as such had no authority to engage the Petitioner as alleged by the Petitioner.
52. He deposed further that the Petitioner did not adduce any evidence to demonstrate that the Respondent derived any commercial benefit or that it continued to use the photographs for the claimed period.
53. In the end, the Mr. Garikipati deposed that the Petitioner had failed to establish a basis to justify her claim essentially rendering the Petition frivolous and a waste of Court's time.
54. To that end, he deposed that the Petitioner blindly gave consent, failed to ascertain extent of proprietary value and commercial value of the photographs and failed to enter into a contractual agreement with the photographer.
55. In the Supplementary Affidavit Mr. Garikipati challenged the veracity of the links to the Respondent's website and social media pages by stating that they are not in any way connected to and owned by themselves. It was his position that the links are a product of mere copying and pasting and not conclusive evidence, proof and authenticity of ownership.
56. He deposed that the Petitioner failed to undertake background checks into the domains hosting the alleged website and social media platform in order to verify and prove that the links relate to the Respondent's website and social media pages.



57. It was his deposition that Section 106B of the *Evidence Act* relied upon by the Petitioner to authenticate the links is of no basis since the said section is silent on authentication of the online links. It was his case that the Petitioner's certificate lacks evidentiary value and ought not to be admitted into evidence by this Court.

58. In the end it was urged that the Petition be dismissed.

**The submissions:**

59. The Respondent filed written submissions dated 20<sup>th</sup> September 2021 in further support of its case.

60. In reference to Sections 2 and 23 of the *Copyright Act*, it was submitted that the photographer was solely responsible for generation and formulation of a concept for the photoshoot, procurement of photography equipment, sourcing and securing for a suitable location, setting up the set, procuring the subjects of the photoshoot, objects and landscape and then the clicking of the shutter to compose and or generate the alleged photograph.

61. To that end, the Respondent submitted that the photographer is properly defined as an author within the ambit of the *Copyright Act*.

62. The Respondent asserted that the only consent that was required from the Petitioner was her participation in the photoshoot. It claimed that devoid her consent, the photoshoot could not proceed and if it did, it would amount to an intrusion of privacy and dignity contrary to Articles 31 and 28 of *the Constitution* respectively.

63. The Respondent submitted that under Section 23 of the *Copyright Act*, the Photographer held copyright of the photographs and as such, wielded exclusive authority to publish or use them and grant consent to any party including the Respondent to publish or use the photographs.

64. The Respondent buttressed its position as to the literary works of the Photographer by referring to the English decision in *Designers Guild Ltd -vs- Russel Williams (Textiles) Ltd* (2000) 1 W.L.R 2416 where it was observed: -

...there can be no copyright in an idea which is merely in the head, which has not been expressed in copyrightable form, as a literary, dramatic, musical or artistic work.... every element on the expression of an idea artistic work (unless it got there by accident or compulsion) is the expression of an idea on the part of the author.

65. In addressing the issue of consent, it was submitted that the Petitioner's grant or denial was inconsequential since property right and copyright was vested properly and fully with the Photographer.

66. This Court's attention was drawn to Petition No. E466 of 2021, *J.W.I & Another -vs- Standard Group Limited & Another* where the Court referred to the decision in *Mistry -vs- Interim National Medical and Dental Council of South Africa* (1998) (4) SA 1127 (CC) where the Court in determining whether the right to privacy was infringed upon ought to consider the following factors: -

...whether the information was contained in an intrusive manner; whether it was about intimate aspects of the applicant's personal life; whether it involved data provided by the applicant for one purpose which was the used for another...

67. The Respondent faulted the Petitioner for opposing its application to join the Photographer in the Petition stating that he would have shed light on the issue of consent.



68. The Respondent submitted that the burden of proving that there was no consent rested with the Petitioner. It was reiterated that the photographer's presence was crucial. The decision in *Jessica Clarise Wanjiru -vs- Davinci Aesthetics & Reconstruction Centre & 2 Others* (2017) eKLR was referred to where it was observed that:

The Respondent successfully applied to enjoin the designer as a party, but he was not served. To me, the presence of the designer in these proceedings was of great value to the petitioner who had a burden of proving that there was no consent at all.

From the material before me, there is absolutely nothing to demonstrate that the Petitioner has discharged her burden of prove to the required standard on the question of whether or not there was a consent. I find that there is not sufficient evidence to demonstrate absence of consent on the part of the Petitioner.

69. On the claim that it received commercial benefit from using the photograph, the Respondent submitted that there was no evidence to that end, a requirement under Section 107 of the *Evidence Act*.

70. The Respondent urged that the Petition be dismissed and costs be awarded to it for the frivolous Petition.

#### **Analysis:**

71. 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 publication of the Petitioner's image or likeness amounted to a violation of her right to privacy, dignity and property.

72. I will consider the issues in seriatim.

#### **The burden and standard of proof in constitutional Petitions:**

73. 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.

74. The issue of the burden of proof has two facets. There are the legal burden of proof and the evidential burden of proof.

75. 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



**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.

76. The foregoing provision brings out what is referred to as the legal burden of proof. That burden remains on the Petitioner throughout the case.
77. Reinforcing that the legal burden of proof in constitutional Petitions is on the Petitioners, the Supreme Court in *Communications Commission of Kenya & 5 Others vs. 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 vs. 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.

78. 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 vs. 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 vs. 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 vs. Harminder 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.
79. The Court will now deal with the standard of proof in Constitutional Petitions.
80. The Black’s Law Dictionary, (9<sup>th</sup> 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.
81. 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.
82. 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’.

83. 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.

84. 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.

85. 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 publication of the Petitioner’s image or likeness amounted to a violation of his right to privacy, dignity and property:

86. 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.

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

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

89. 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.

90. This Court will now apply the above to the matter at hand. First, will be the paramount issue of consent.

### **The Consent:**

91. A careful consideration of the record affirms the position that the Respondent allowed a photographer, one Dvan Dennis Njoroge, (hereinafter referred to as 'the photographer') to carry out a photo shoot within the mall. The photographer was to be wholly in-charge of the exercise including getting the models. There is also no doubt that the Petitioner was one of the models.
92. The arrangement between the Respondent and the photographer arose from the photographer's email dated 5<sup>th</sup> December, 2017 to the Respondent. The email partly read as follows: -
- ..... The photos will be posted in my social handles @dvan--dennis but its OK if the mall uses them .....
93. The foregoing was the basis on which the Petitioner's photographs were used by the Respondent in its social media accounts.
94. This Court has considered the correspondences between the parties even before the Petition was instituted. The Respondent disclosed the source of its basis in using the photographs to be the consent given by the photographer. The position was reiterated in the Response to the Petition and the dispositions by the Respondent's representative.
95. Responding to the issue, the Petitioner did not deny the contents of the email dated 5<sup>th</sup> December, 2017, but instead insisted that the Respondent was to get express consent from her.
96. The Petitioner opted not to enjoin the photographer as a party in the proceedings. She conveniently left him out from the onset of the proceedings. Even when the Respondent opted to orally have the photographer enjoined as a party, still the Petitioner vehemently opposed such an attempt.
97. The above ignites the discussion on the evidential burden of proof in this case. It is a fact that when the Petitioner laid her claim in the Petition and supported it through dispositions, the evidential burden shifted to the Respondent.
98. On filing the Response to the Petition and the dispositions, the Respondent discharged the evidential burden of proof. It managed to prove that it had been allowed by the photographer to use the Petitioner's photographs. The Respondent adduced documentary evidence on the permission.



99. Given the foregoing set of circumstances, the evidential burden of proof then shifted back to the Petitioner. It was, therefore, incumbent upon the Petitioner to disprove the contents of the email. The Petitioner was readily expected to impugn the contents of the email and to bring the photographer to account for his email. Surprisingly, the Petitioner avoided that route. She, instead, held to the position that regardless of what the photographer had said and done, she was to give her express consent. The Petitioner also opposed any attempt to have the photographer enjoined in the proceedings.
100. Having taken that line of action, the Petitioner then failed to discharge the evidential burden of proof which had then shifted back to her. There was no evidence to rebut the Respondent's position that it had been allowed by the photographer to use the photographs of the models who included the Petitioner. That was, therefore, implied consent for the use of the photographs.
101. In this case, therefore, the failure by the Petitioner to enjoin the photographer in the proceedings was incurably fatal.
102. This Court now returns the verdict that the Respondent was reasonably given the consent by the photographer to use the Petitioner's photographs.
103. Having found that the Petitioner's image was rightfully used by the Respondent, the allegations of infringement of the Petitioner's rights and fundamental freedoms do not arise. This is a matter where the Petitioner fell short of discharging the evidential burden of proof to the required standard.

**Disposition:**

104. 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.
105. The upshot in this case is that the Petitioner's case lacks legal leg to stand on and cannot be sustained.
106. 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 10<sup>TH</sup> DAY OF MARCH, 2023.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered virtually in the presence of:

Mr. Wakhisi, Learned Counsel for the Petitioner.

Mr. Kagiri, Learned Counsel for the Respondent.

Regina/Chemutai – Court Assistants.

