KJH v Attorney General & 2 others (Constitutional Petition E405 of 2021)
[2023] KEHC 22402 (KLR) (Constitutional and Human Rights) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22402 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E405 OF 2021

AC MRIMA, J

SEPTEMBER 21, 2023

BETWEEN

KJH ..... PETITIONER

AND

THE HON ATTORNEY GENERAL ..... 1ST RESPONDENT

TRWW ..... 2ND RESPONDENT

CW ..... 3RD RESPONDENT

JUDGMENT

Background:

1. The Petitioner herein, KJH describes the relationship he had with TRWW , 2nd Respondent herein, as an intermittent social relationship that he eventually terminated on 13th March, 2018.

2. The Petitioner and the 2nd Respondent had two children together. A male child, JHH, aged 7 years at the time of institution of this suit and a female, PRH who was demised at infancy in October 2017, aged 1 year.

The Petition:

3. Through the Petition dated 5th October 2021, supported by the Affidavit and Supplementary Affidavit of KJH deposed to on 5th October 2021 and 20th April 2022 respectively, the Petitioner approached this Court to claim violation of his constitutional rights and those of his children as variously occasioned by the Respondents.

4. Contemporaneously with the filing of the main Petition was an evenly dated application by way of Notice of Motion wherein the Petitioner, on the same factual basis as the Petition, sought and obtained interim reliefs pending hearing and determination of the of the application and the Petition.

5. It is the Petitioner's case that, the 2nd Respondent, resentful of the termination of their social relationship, embarked on a spirited campaign of posting images of his vehicles, vehicles details, properties, electricity bills, close relatives and their deceased daughter on her Facebook page by the handle 'Wanja Nyarari' and other social media platforms without his consent.

6. The Petitioner posited that 2nd Respondent had repeatedly and unnecessarily engaged in disclosing to the public his personal details on her social media with the deliberate intention of breaching his privacy rights and that of his children.

7. The Petitioner averred that the 2nd Respondent had exceeded the foregoing limits of invasion of his privacy by posting gross and disturbing images of his deceased infant's images without his consent in violation of his right to dignity and privacy provided for Articles 28 and 31(c) of *the Constitution* respectively.

8. The Petitioner asserted that the publication had injured his standing as a legal practitioner and his source of income in legal practice impaired.

9. He pleaded further that the posting of his vehicle details was not only unconstitutional but also offended Section 5D(l)(a) and (c) of the *Traffic Act*.

10. In elaborating the details of the invasion of his privacy, the Petitioner pleaded that on 25th May 2021, at about 9.17 pm he received text messages, video and images on his WhatsApp Messenger from one Partick Njoroge Kimani, which carried his cars' digital logbook details and his car.

11. The Petitioner pleaded that on inquiring from Mr. Kimani where he obtained the digital registration details from, he informed him that Kangemi Member of Parliament, Hon. Paul Shem Sihalo had forwarded the messages to him as sent to his phone by the 2nd Respondent.

12. The Petitioner posited that he reported the acts of the 2nd Respondent at Muthangari Police Station on 16th June 2021, which crime is still pending cybercrime investigation.

13. The Petitioner was further aggrieved that the 2nd Respondent, jointly with CW , 3rd Respondent herein, unlawfully posted his deceased infant's images on Facebook and social platforms in September 2017, soliciting money from members of public purporting that his daughter died of autism.

14. The Petitioner posited that the 2nd Respondent was aware that she had no such medical diagnosis in relation to his daughter and in so alleging, ignorant contributors would support a cause against autism when in fact it is a deceptive undertaking.

15. The Petitioner further pleaded that the 2nd Respondent was not entitled to use his daughter's image in a pose where she held her while citing a non-existent and illegal entity identified as 'Princess Rossie Foundation' as the initiator of the funding without his consent.

16. The Petitioner posited further that on 5th October 2021, he received on his cell phone messages containing a video and images obtained from the 2nd Respondent Facebook Account which contained his residential house and video bearing his mother which the 2nd Respondent made disparaging comments in violation of his right to privacy.

17. The Petitioner asserted that as a result of the foregoing, the dignity of his school enrolled child had been violated for fear of being taunted on account of the 2nd and 3rd Respondent's use of his deceased sister's image for commercial exploits under false pretence.

18. It was further his case that his freedom and that of his son from physical and psychological torture as provided for under article 29(d) of *the Constitution* had been violated by the Respondent's conduct.

19. As far as the 3rd Respondent is concerned, the Petitioner posited that, under Article 45(1) of *the Constitution*, it has the obligation to protect family as the natural and fundamental unit of society and the necessary basis of social order.

20. It was his case further that the 2nd and 3rd Respondent conduct was exploitative and amounted to child labour in violation of Article 53(2) of *the Constitution* which calls for consideration of best interests of the child. It was his case that the mere fact that his daughter is deceased is no excuse to infringe on her right to rest in peace and dignity.

21. He averred that her daughter's image was exploited by the 2nd and 3rd Respondents for selfish economic gain in the guise of being charitable when in fact their conduct is not different from child labour.

22. It was further his case that the 2nd Respondent's conduct of vilifying him on social media in respect to his son violated his son's right to life guaranteed under Article 26 of *the Constitution*.

23. The Petitioner posited further that under Article 53(2) of *the Constitution* as read with Article 3(1) of the Convention on the Rights of the Child as well as section 14,16 and 18 of the Children's Act, this Court had an obligation to place the best interests of the child as a primary consideration and protect his son from harmful conduct of the 2nd and 3rd Respondents.

24. The Petitioner further averred that this Court, under Article 20, 21, 22 and 23 of *the Constitution*, ought to issue orders to pre-empt psychological injury from being caused to his son as a result of seeing his sister being displayed on social media by th 2nd and 3rd Respondents.

25. It was his case that it was incumbent upon this Court, under Article 27 of *the Constitution* to be protected from the injurious conduct of the 2nd and 3rd Respondents.

26. In the supplementary affidavit, the Petitioner rejected the propriety of the 3rd Respondent's Replying affidavit dated 24th November 2021 stating the a it was not commissioned before a Commissioner for Oaths as required under section 5 of the *Oaths and Statutory Declarations Act*.

27. As for the 2nd Respondent, the Petitioner deposed that her Replying Affidavit depose on 18th November 2021 had annexed exhibits date-marked 19th November 2021.

28. It was his case that the discrepancy was in contravention of Rule 9 and 10 of the *Oaths and Statutory Declarations Act*.

29. The Petitioner further averred that even if the Court were to overlook the foregoing technical requirements, the 2nd Respondent admitted publication of the offensive images as such, was estopped under section 24 and 120 of the *Evidence Act* from denying violation of the Petitioner's rights and that of his children.

30. It was the Petitioner's case that he pays all his son's school fees and other needs which have been thrown away by the 2nd Respondent on delivery which have yielded Children's Court Case No. E039 of 2021.

31. It was his case that he has never been violent on the 2nd Respondent, his son and the unnamed housemaid as asserted by the 2nd Respondent.

32. On the foregoing legal and factual backdrop, the Petitioner sought the following reliefs: -

1. A declaration do issue that the disclosure of the Petitioner's vehicle's details registered in the name of the Petitioner by the 2nd Respondent on her Facebook page by the name handle 'Wanja Nyarari' and publishing the same to third parties who view her said Facebook page postings and transmitting the said details to third parties without the consent of the Petitioner was a violation of the Petitioner's right to privacy.

2. A declaration do issue that the disclosure of the Petitioner's Kenya Power and Lighting private bill account for the Petitioners property by the 2nd Respondent to the members of public via her Facebook account identified as 'Wanja Nyarari' and via her WhatsApp Messenger without her the consent of the Petitioner was a violation of the Petitioner's right to privacy.

3. An order that the 2nd Respondent pay general damages and exemplary damages on an aggravated scale to the Petitioner for the psychological suffering occasioned by the unlawful and unconstitutional violation of his right to privacy vide electronic media posting complained of.

4. A permanent injunction do issue, to restrain the 2nd Respondent, by herself, via he stated Facebook page account/handle 'Wanja Nyarari', (or by any other different name Petitioner posted, used or associated with the 2nd Respondent) on any media platform WhatsApp Messenger, YouTube, Twitter, Instagram, or any other electronic and social Media, or by her servants, agents, proxies from posting thereat, or thereon any details of the Petitioner's images, documents, properties, or any material connected with the Petitioner infringing on the Petitioner's right to privacy.

5. A permanent injunction do issue, to restrain the 2nd and 3rd Respondents, by themselves, via the 2nd Respondent's stated Facebook page account/handle 'Wanja Nyarari', (or by any other different name Petitioner posted, used or associated with the 2nd Respondent) on any media platform WhatsApp Messenger, YouTube, Twitter, Instagram, or any other electronic and social Media, or by her servants, agents, proxies from posting thereat, or thereon any images infringing on the deceased PRINCESS ROSSIE HARRISON'S right to rest in peace and in dignity or otherwise using her image to solicit for any donations, or money or otherwise howsoever, and for thereby posting any content and or images infringing on the minor J.H.H's rights to privacy and dignity.

6. An injunction do issue until the attainment of the age of majority of the minor J.H.H to restrain the 2nd Respondent by herself, via he stated Facebook page account/handle 'Wanja Nyarari', (or by any other different name Petitioner posted, used or associated with the 2nd Respondent) on any media platform WhatsApp Messenger, YouTube, Twitter, Instagram, or any other electronic and social Media, or by her servants, agents, proxies from posting thereat, or thereon any details of the Petitioner's images, documents, properties, or any material and/or electronic material and or images infringing on the minor J.H.H's right to privacy and dignity.

7. Such other orders as this Honourable Court shall deem fit and just to grant int eh circumstances.

8. Costs of this proceedings

Petitioner's Submissions:

33. The Petitioner further urged his case through written submissions and supplementary written submissions dated 15th November 2021 and 20th April 2022 respectively.

34. In buttressing the internationally acknowledged importance of the right to privacy, the decision in Mutuku Ndambuki Matingi -vs- Rafiki Microfinance Bank Limited [202I] eKLR was referred to where it was observed: -

> 45. .... The right to privacy has also been expressly acknowledged in international and regional covenants on fundamental rights and freedoms. It is provided for under Article 12 of the International Covenant on Civil and Political Rights, of the Universal Declaration of Human Rights, Article I 7 European Convention on Human Rights (ECHR) and Article 14 of the Article 8 of the African Charter on Human and Peoples' Rights.

35. In the above case, the Court went further and made the following remarks: -

> 47. There is no doubt therefore that unjustified invasion of one's privacy is a violation of one's fundamental right and must be protected and where it is violated one is entitled to a relief. In this case, it is not in doubt that the Petitioner's images were token and published in order to promote the Respondent's business. Prima facie, that amounted to a violation of the Petitioner's right unless the said action can be justified by the Respondent.

36. The Petitioner asserted his son's right to privacy in accordance to section 19 of the Children's Act by referring to T 0. S -vs- Maseno University & 3 others [20I6] eKLR where the Judge held as follows: -

> 19. Based therefore on the evidence placed before this court, it is clear in my mind and I am satisfied that there was wrongful invasion of the minors' right to privacy. The 4th Respondent went ahead to expose photographs, names, place of residence and personal details of minors who were not parties to the suit without consent. This was in clear violation of Section 19 of the *Children Act* which guarantees a child's right to privacy. It is also clear in my mind that the exposure of the document was intentional."

37. With respect to violation of the Petitioner's deceased daughter's right to dignity, the Petitioner submitted that even the dead have the right to dignity. To that end, he relied on the decision in Joan Akoth Ajuang & another v Michael Owuor Osodo the Chief Ukwala Location & 3 others; Law Society of Kenya & another [2020] eKLR where it was observed: -

> 210. In my humble view, whereas the dead have no individual guaranteed rights, Human dignity does not end with death. In all cultures across the world, the burial of the dead is a solemn event accompanied by elaborate rituals. In other cultures, only those who commit suicide or those who drown are buried at night. The dead are respected and that is why we have graves, tombs, crypts, mausoleums and pyramids. Veneration of the dead is based on love, respect and dignity for the deceased.

38. To further assert the rights of the dead, and the fact that the 2nd and 3rd Respondent ought to be stopped from commercializing the deceased daughter, the Petitioner invoked 'interest theory' and the scholarly works of Kirsten Rabe Smolensky titled 'Rights of the Dead' where she observes as follows: -

> ....An Interest Theory approach is superior to other philosophical theories of "rights" because it acknowledges that the dead can have interests that survive death. There is wide support in case law and legislative history for this idea. For example, courts care very deeply

> about testamentary wishes, particularly those regarding mortal remains, and often go to great lengths to ensure that the decedent's wishes are respected. It appears that dignity and autonomy are the driving forces behind the creation of many posthumous legal rights.

39. On the right to life, the Petitioner submitted that the 2nd and the 3rd Respondents had not rebutted his averments that the actions complained of has caused him mental anguish.

40. With respect to J.H.H, it was the Petitioner's case that psychological harm had been caused to him thus affecting his right to life and dignity. Support to that end was drawn from Musa Mbwagwa Mwanasi & 9 others -vs- Chief of the Kenya Defence Forces & another (2021) eKLR were right to life and dignity was discussed as follows: -

> .... It is trite law that the right to life not only encompasses the prohibition against unlawful taking away of actual life but includes the deprivation of the rights that facilitate the means through which a person's life is sustained in dignity i.e. the right to human dignity and means of livelihood.

41. The Petitioner further reiterated his case on freedom from torture and cruelty as perpetrated by the 2nd and 3rd Respondents actions by submitting that it constitutes breach of Article 29(f) of *the Constitution* as against the deceased infant.

42. In the supplementary submissions, the Petitioner sought to strike out the 2nd and 3rd Respondents' Affidavits for being fatally defective.

43. It was his submission that the 3rd Respondent purported to file a Replying affidavit dated 24th November 2021 that was not commissioned as required under section 5 of the Oaths and Statutory Declaration Act.

44. It was submitted that the 3rd Respondent effectively did not oppose the Petition.

45. The foregoing position found favour in the Supreme Court decision in Gideon Sitelu Konchellah -vs- Julius Lekakeny Ole Sunkili & 2 Others (2018) eKLR where it was observed: -

> ..... We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it is of no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavits as filed in the Court Registry and confirmed that none of the copies was signs commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.

46. With regard to the 2nd Respondent's Affidavit, it was his case that it was purportedly sworn on 18th November 2021 and the exhibits annexed date-marked 19th November 2021 which discrepancy is incompatible with the purported oath of 18th November 2021.

47. It was submitted that the foregoing was in contravention of the third schedule of the *Oaths and Statutory Declarations Act* which mandates that the exhibits be identified in support of the specific affidavit sworn on the specified date on which the commission of oaths administers the oath.

48. It was submitted further the foregoing cannot be a procedural technicality. To that end, the decision in Francis A. Mbalanya -vs- Cecilia N. Waema (2017) eKLR was referred to where it was observed: -

> The law that requires the sealing and marking o annextures with serial letters is in mandatory terms, and must be complied with.
>
> In the instant case, the law has provided in mandatory terms the manner on which evidence by way of annextures can be received by court. the failure to comply with that law, like in the instant case, can only lead to one thing, the striking out of the offending documents.

49. It was the Petitioner's further submission that notwithstanding the foregoing, the 2nd Respondent in her supplementary Affidavit deposed to on 24th November 2021, admitted the Petitioner's case of publishing the images complained of thereby creating an estoppel under Section 24 and 120 of the *Evidence Act*.

50. It was his submission that the admission obviates any necessity for the Petitioner to prove the publication.

51. In the end, the Petitioner urged the Court to allow the Petition as prayed.

52. The Attorney General, 1st Respondent herein did not take part in the Petition.

The 2nd Respondent's case:

53. TRWW , challenged the Petition through her Replying Affidavit and Supplementary Replying Affidavit deposed to on 18th November 2021 and 24th November 2021 respectively.

54. It was her deposition that she stayed with the Petitioner for 5 years and on the 13th March, she ended the relationship because of the Petitioner's violent behaviour.

55. She deposed that the Petitioner had brutally beaten her up together with her son and the house help and reported the incident to the Police. To that end, she referred to the Police Report and Medical Examination Report.

56. It was further his case that only J.H.H was confirmed to be his biological child through a DNA test but refused to confirm paternity of the deceased daughter and always disputed the said child as she suffered from Down syndrome.

57. He deposed that the Petitioner has never had any parental responsibility over the minor and his relationship with J.H.H has irretrievably broken down due to the Applicant's violent nature towards him.

58. The 2nd Respondent denied the Petitioner's paternity with respect to deceased daughter. She demanded an exhumation to confirm paternity.

59. With respect to posting of images complained of by the Petitioner, she disputed the Petitioner's claim that she posted images on his vehicle with malicious intent.

60. To the contrary she deposed that she posted the images out of fear that she was being stalked by someone driving the car in the image.

61. As regards the Petitioner's private house electricity bill, it was her deposition that the same were not derived from her Facebook account as claimed by the Petitioner.

62. The 2nd Respondent further disputed the Petitioner's claim that she posted images and videos of his close relatives, intending to breach his right to privacy. It was her case that she posted them in good faith with the intention of bringing to the public's attention a missing person's case.

63. She deposed that before she made the post, the Petitioner's mother had appeared on the national television station, Inooro TV, for an interview in which she asked for the public's help in locating her lost son and regaining her land that was grabbed.

64. It, therefore, was her case that the information complained of coils not be considered as private.

65. She deposed further that she posted gross and disturbing images of their deceased daughter and that the Petitioner was misleading the Court.

66. Further, she disputed sharing images of logbook details with one Patrick Njoroge Kimani stating that she did not know him.

67. The 2nd Respondent further denied making claims of autism of her deceased infant and soliciting for funds from members of the public.

68. She deposed that there is no claim that the deceased had autism. In reference to Haematology Investigation Report, it was her case that she had mental disorder known as Down Syndrome

69. With respect to PRINCESS ROSIE FOUNDATION, she deposed that it did exist but holds functions every year in Princess Rosie's name to support the marginalized in society.

70. She deposed that the image/flier posted offering help to autistic individuals was not posted in bad faith and with malicious intent to denigrate and violate the infant's right to dignity, but rather to remember and to celebrate the short life she lived and shared with her.

71. She deposed that she had never published the Petitioner's private residential house on her Facebook account.

72. She deposed that the annexures by the Petitioner seem to have originated from his own gallery and that the Petitioner had edited the photo and affixed her name on them.

73. She deposed that the Petition herein was spawn out from our break up and the Petitioner has been full of bile and vengeful spirit.

74. In the supplementary affidavit, she deposed that the contribution and donation collected through her post in support of autistic kids was used on the 16th October, 2021 at the Utungi Angels home.

75. In reference to a letter from Utungi Angels home, it was her case that sponsored an event at the home and bought necessities out of the contributions she had collected from well-wishers.

The 3rd Respondent's case:

76. CW opposed the Petition through her Replying Affidavit deposed on 24th November 2021.

77. It was her case that she is a stranger to the Petitioner's allegation that there is a non-existent and illegal entity called Princess Rossie Foundation.

78. In elaborating how her name ended up in the alleged violation of the Petitioner's right to privacy, she deposed that she was the 2nd Respondent's personal assistant and she one day was asked to buy a sim card for J.H.H to be used for home schooling during Corona Pandemic period.

79. She deposed that she was not in any way connected to the funds that send funds to that number neither did she contribute in posting of the imaged that contained the purported phone number.

The 2nd and 3rd Respondents Written submissions:

80. Through joint written submissions dated 24th March 2022, the 2nd and 3rd Respondents (hereinafter referred to as 'the Respondents') submitted that allegations against them are riddled with bias and bad faith caused by termination of the relationship between the 2nd Respondent and the Petitioner.

81. The Respondents submitted that the vehicle of the Petitioner was posted on Facebook out of necessity for fear of her life after being stalked by the individual driving the car.

82. It was their case that the right to privacy is not absolute. The decision in J L N & 2 others -vs- Director of Children Services & 4 others [2014] eKLR was cited where in the case, the Court quoted W v Edgell [1990] 1 ALL ER 835 where it was observed that disclosure may be done in instances where: -

    i. A real and serious risk of danger to the public must be shown for the exception to apply;

    ii. Disclosure must be to a person who has legitimate interest to receive the information;

    iii. Disclosure must be confined to that which is strictly necessary (not necessarily all the details).

83. Further support was drawn from David Lawrence Kigera Gichuki -vs- Aga Khan University Hospital [2014] eKLR where it was observed: -

> ...The protection of privacy has been considered of sufficient importance to warrant constitutional protection under our constitution. However, while it is important to protect the privacy of an individual either from unlawful searches or seizures, or from unlawful disclosure of private information, it is not one of the rights that cannot, under Article 25, be limited. It is thus not an absolute right and is subject to the limitations set out in Article 24 of *the Constitution*.

84. The Respondents reiterated the deposition of the 2nd Respondent and submitted that the circumstances of the disclosure of private information was within the parameters set out the case of W v Edgell case (supra).

85. The Respondents rejected the Petitioner's claim of posting gross and disturbing images of the deceased infant by submitting the Petitioner did not come to court with clean hands.

86. It was their case that evidence produced by the Petitioner ('JH7') in support of his allegation neither contains evidence of statements or images depicting breach of the Petitioner's personal privacy nor does it mention the minor (J.H.H.)

87. It was, therefore, their case that the Petitioner did not demonstrate breach of his privacy in anyway.

88. The Respondent submitted that at no point did they make the claim that the deceased infant, P.R.H, was suffering from autism.

89. The Respondents challenged the probative value of annextures by the Petitioner on failure to authenticate them.

90. To buttress their case, they referred Court to Republic -vs- Mark Lloyd Stevenson [2016] eKLR where it was observed: -

37. For avoidance of doubt and for future guidance, it is important to point out that authentication is required where any "real" evidence (as opposed to testimonial evidence) is sought to be adduced at trial.1 This applies both to e-evidence as well as other documents or items sought to be admitted into evidence. Authentication of proposed evidence is a crucial step in its admission – one which reliance on section 78A of the *Evidence Act* (or even section 106B) does not obviate."

91. Based on the foregoing, the Respondents submitted that exhibit JH11 looked doctored and that JH5 and JH10 lacked the appearance, substance, internal patterns and other distinct characteristics that would suggest it originated from Facebook.

92. In the end, it was submitted that Petitioner had failed to establish a legal basis for allegation of his rights. It was urged that the Petition be dismissed with costs.

Analysis:

93. Having considered the pleadings, the submissions and the decisions referred thereto, what stands out at the heart of this Petition is the issue as to whether the Petitioner's privacy rights were infringed. Once that main issue is answered in the affirmative, then the allegations of the subsequent breach of other rights follow. In other words, if this Court finds that the Petitioner's privacy rights were not violated by the Respondents as alleged, then the allegations of breach of the subsequent rights will also fall by the wayside.

94. On that score, it is of paramount importance to look at the constitutional provision underpinning the protection of the right to privacy. That is Article 31 of *the Constitution*.

95. Article 31 of *the Constitution* provides as follows: -

> 31. Privacy:
>
> Every person has the right to privacy, which includes the right not to have—
>
> (a) their person, home or property searched;
>
> (b) their possessions seized;
>
> (c) information relating to their family or private affairs unnecessarily required or revealed; or
>
> (d) the privacy of their communications infringed.

96. In order to give effect to the above constitutional provision, Parliament enacted the Data Protection Act, No. 24 of 2019 (hereinafter referred to as 'the Data Act').

97. The Preamble of the Data Act states that it is an Act of Parliament to give effect to Article 31(c) and (d) of *the Constitution*; to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors; and for connected purposes.

98. The Data Act further provides for the rights of a data subject, the enforcement of rights of data subjects, investigation of complaints by data subjects, compensation for breach of the rights of data subjects, the registration of data controllers and data processors, the principles and obligations of personal data protection, processing of sensitive personal data, among many other aspects of personal data.

99. Section 3 of the Data Act provides for the objectives as follows: -

The object and purpose of this Act is-

(a) to regulate the processing of personal data;

(b) to ensure that the processing of personal data of a data subject is guided by the principles set out in section 25;

(c) to protect the privacy of individuals;

(d) to establish the legal and institutional mechanism to protect personal data; and

(e) to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with this Act.

100. Section 5 of the Data Act establishes the Office of the Data Protection Commissioner which is a body corporate with perpetual succession and a common seal and has the power to conduct business in its corporate name. I will hereinafter refer to the said office as 'the Data Commissioner' or 'the Commissioner'.

101. One of the many functions of the Data Commissioner is provided for in Section 8(1)(f) as 'to receive and investigate any complaint by any person on infringements of the rights under this Act'.

102. The Commissioner further has powers to conduct investigations on its own initiative, or on the basis of a complaint made by a data subject or a third party. That is provided for in Section 9 of the Data Act. And, in dealing with the complaints, the Commissioner ought to facilitate conciliation, mediation and negotiation of the disputes. The Commissioner also has powers to undertake any activity necessary for the fulfilment of any of the functions of the Office of the Data Commissioner.

103. In discharging its functions and exercising its powers, the Commissioner is authorized under Section 59 of the Data Act to seek the assistance of such person or authority as it deems fit and as is reasonably necessary to assist the Data Commissioner in the discharge of the functions.

104. Section 65 of the Data Act gives the Data Commissioner the power to determine the compensation payable to a data subject who suffers damage by reason of a contravention of any requirement of the Data Act and in instances where the Commissioner finds as much.

105. With a view to protect the integrity of the processes under the Data Act, the statute provides for enforcement notices under Section 58 in respect of those who fail to comply with any provision of the Data Act.

106. Under Section 64 of the Data Act, any appeal from the decision of the Commissioner lies to the High Court.

107. A close scrutiny of the Data Act reveals a deliberate design by Parliament to ensure that all claims arising from allegations of infringement of Article 31(c) and (d) of *the Constitution* are wholly dealt with by the Commissioner as the first port of call. Such position can only be overruled by a party demonstrating any of the exceptions to the doctrine of exhaustion in a matter.

108. Reverting to the instant matter, the Petitioner's main complaint is the alleged publication of his images and photographs, pictures of his properties and children in the social media platforms without his consent, by the Respondent. The Petitioner alleged breach of his Article 31 rights under *the Constitution*. He consequently sought for declarations as well as compensatory damages.

109. This Court ascribes to the position that in a case where Parliament donated powers to an entity like the Data Commissioner to determine if one's privacy rights under Article 31(c) and (d)

of the Commissioner are infringed, then it means as much; that the Commissioner has such power to determine whether privacy rights as provided for in the Bill of Rights has been denied, violated, infringed or threatened. However, the Commissioner lacks the jurisdiction to interpret *the Constitution*.

110. The reason for the foregoing holding is simple. The members of the Office of the Data Commissioner, as an entity and individually so, are public officers and Article 10 calls upon them to infuse the national values and principles of governance while undertaking their duties. Article 3 obligates every person to respect, uphold and defend *the Constitution*. Therefore, the Commissioner must be in a position to uphold *the Constitution*, and in doing so, to be able to determine whether a given set of circumstances reveal denial, violation, infringement or threat to the privacy rights in the Bill of Rights.

111. The above duty is to be distinguished from the duty to interpret *the Constitution*. Determining whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights is just that simple. Conversely, interpretation of *the Constitution* is a serious judicial function. While interpreting *the Constitution*, the High Court is called upon to apply its legal mind to determine the applicability and extent thereof of a constitutional provision to a set of facts. In arriving at such an interpretation, the High Court is supposed to consider all the applicable principles in constitutional interpretation. (See the Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR). The High Court may also look at comparative jurisprudence from other jurisdictions on the subject. Such a determination yields to a binding legal principle unless overturned by a Court of superior jurisdiction.

112. Unlike the High Court, Tribunals and other quasi-judicial bodies, including the Data Commissioner, do not make the law. They can, however, apply themselves to a given set of facts and determine denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights.

113. There is, therefore, a defined distinction between determining the denial, violation, infringement or threat to the privacy rights in the Bill of Rights and interpreting *the Constitution*. Whereas the former is not exclusively a judicial function, the latter is. The jurisdiction, therefore, to interpret *the Constitution* is the exclusive duty reserved to the High Court videArticle 165(3)(d) of *the Constitution*.

114. In the instant matter, the Data Commissioner has the jurisdiction to determine whether the Petitioner's privacy rights in the Bill of Rights were denied, violated, infringed or threatened. The Commissioner has further powers to order appropriate compensation in the event of proof of the infringement.

115. The Data Act, therefore, wholly provides for the dispute at hand based on Article 31 of *the Constitution* as well as the remedies sought in the event the dispute is successful.

116. In such a case, it was incumbent upon the Petitioner to demonstrate to the Court any of the exceptions to the doctrine of exhaustion. A brief look at the doctrine then follows.

117. The doctrine in doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR. The Court stated as follows:

> 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for

resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

> 42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:
>
> Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
>
> 43. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.
>
> This is Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:
>
> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

118. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
>
> What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or

where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

119. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No. 166 of 2018 Kenya Ports Authority v William Odhiambo Ramogi & 8 others [2019] eKLR held as follows: -

> The jurisdiction of the High Court is derived from Article 165 (3) and (6) of *the Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of *the Constitution* encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.
>
> At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of *the Constitution* and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court

under Article 165 (5) of *the Constitution* became automatic. And in our view, it could not be ousted or substituted.

120. Further, in Civil Appeal 158 of 2017, Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

> 23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

121. Courts have in many occasions reiterated the position that where there are alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such disputes until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.

122. In this case, the Petitioner did not demonstrate any of the exceptions to the doctrine of exhaustion.

123. The upshot is that the doctrine of exhaustion applies in this matter and bears a complete bar to the further exercise of jurisdiction by this Court on the claim based on Article 31 of *the Constitution*.

124. Having found that the Petitioner ought to have lodged his complaint on Article 31 of *the Constitution* under the provisions of the Data Act, then this Court ought to exercise restraint and postpone its consideration of the matters raised in the Petition as to accord the dispute to be dealt with, in the first instance, under the Data Act.

125. Since there is a likelihood of the continuation of the dispute between the parties herein, the best order on costs is that each party bears its own.

126. Consequently, the following final orders do hereby issue: -

a. This Court declines jurisdiction to deal with the claim on Article 31 of *the Constitution* on the basis of the doctrine of exhaustion.

b. The Petition is hereby struck out.

c. Each party to bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 21ST DAY OF SEPTEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

N/A for the Petitioner.

N/A for the 2nd and 3rd Respondents.

Regina/Chemutai – Court Assistants.