



**Muthama v Hornbill Pub Limited (Constitutional Petition E005 of 2023)
[2024] KEHC 15945 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15945 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION E005 OF 2023**

FR OLEL, J

DECEMBER 17, 2024

**IN THE MATTER OF THE CONSTITUTION OF KENYA RIGHTS
ENSHRINED IN CHAPTER FOUR THEREOF IN SO FAR AS THE
PETITIONER'S CONSTITUTIONAL RIGHTS WERE INFRINGED**

BETWEEN

TOM MAHOKA MUTHAMA PETITIONER

AND

HORNBILL PUB LIMITED RESPONDENT

JUDGMENT

A. Background of the Petition

1. The Petitioner filed this petition on 14.03.2023 seeking for the following orders;
 - a. A declaration be and is hereby issued that the Respondent violated the Petitioner's fundamental right to privacy and human dignity under Articles 28 and 31 of *the Constitution* by publishing the Petitioner's image for the purpose of commercial advertisement without the Petitioner's consent.
 - b. A declaration be and hereby issued that the Respondent violated the Petitioner's rights under Article 30 of *the Constitution* by publishing the Petitioner's image and likeness for its own commercial gain with no personal financial advantage gained by the Petitioner.
 - c. A declaration be and is hereby issued that the Petitioner's intellectual property rights, right of publicity and personality rights were infringed when the Respondent decided to publish the Petitioner's image in advertising and marketing its products and/or services.



- d. An order of permanent injunction be and is hereby issued restraining the Respondent from publishing and/or using the Petitioner's image and likeness in its advertisements or promotions in a way without the Petitioner's consent.
 - e. And order that the Respondent be compelled to compensate the Petitioner for the damages and/or loss arising from the publication of the Petitioner's photograph without his express authority and the exploitation of the Petitioner by the Respondent for financial gain.
 - f. Costs of the Petition be borne by the Respondent.
 - g. Any further relief or order that this Honourable court shall deem fit to grant.
2. The said petition is supported by the Affidavit of the Applicant, Tom Mathoka Muthama where he contends that on 29th July 2022, he and his friends visited the Respondent's business premises which operates as a restaurant, Lounge, and nightclub situated along the Machakos- Nairobi road and two days later discovered to his dismay that the respondents servant and/or Agent had without his authority taken photographs of him socializing within the said club and posted the said photographs in the Applicants social media page, including but not limited to its Facebook page "hornbill Machakos". The said photographs had the respondent's "watermark" inserted thereon with the sole aim to advertise and market itself.
 3. The Applicant reiterated that the said photographs were taken without his express consent, knowledge, and/or authority, and thereafter wrongfully used commercially by the respondent to give them visibility. This in turn yielded them more profits, as they used the said photographs socially, to attract a larger clientele base to their establishment. After the discovery of the respondent's illegal action, he wrote them a demand letter dated 3.08.2022, seeking for an explanation as to why they had used his image without his authority and demanded that his photographs be taken down from their social media page. This was done and was a clear admission of guilt.
 4. The respondent's illegal acts had subjected him to ridicule, especially amongst his colleagues in the legal sector, who assumed that he was working in partnership with the respondents as its brand Ambassador, which was not the case. By their illegal act, the respondent had breached/infringed his right to privacy and human dignity, and also his proprietary rights. Based on the above averments, the Applicant urged the court to find that he was entitled to be compensated for the illegal use of his image and likeness to advertise and Market the respondent's business. He also prayed to be awarded costs of the said petition.
 5. The Respondent was served as indicated in the affidavit of service filed on 17.04.2023 but did not enter appearance nor did they file a response to this Petition.

B. Submissions.

6. The Petition was dispensed with by way of written submissions. The Petitioner reiterated the averments made in the petition and its supporting affidavit. He relied on the case of FAF (Suing on her own behalf and as a next friend of SAS and NAMS) vs Norwegian Refugee Council [2019] e KLR where it was held that unauthorized publication of one's private photographs greatly undermined his right to privacy as protected under Article 28 and 31 of *the Constitution*.
7. The Respondent had published his photographs and watermarked them thus conferring intellectual property rights over the said images and used the same for profit to his detriment as his colleagues in the legal sector assumed that he was working in partnership with the Respondent as a brand ambassador. This undoubtedly breached his inherent dignity and property rights and he was therefore justified in seeking compensation for the said infringement. Reliance was placed in the case of Anhella Wells vs



Atoll Media (PTY) Limited & Another, Western Cape High Court case no 119761/2006 & JMK & another vs Standard Digital & Another [2020].

8. Since the Applicant gained from the use of his image, the Applicant urged the court to award him the sum of Kenya shillings five Million (Kshs 5,000,000/=) for wrongful use of his image and maligning his reputation.

C. Determination

9. This court has considered the Petition, the affidavit filed in support, and the submissions filed. The issues which arise for determination are;
 - a. Whether the threshold for a constitutional petition have been met.
 - b. Whether the Petitioner’s right to privacy and human dignity under Articles 28 and 31 of *the Constitution* has been infringed.
 - c. Whether the Respondent violated the Petitioner’s rights under Article 30 of *the Constitution* by publishing the Petitioner’s image and likeness for its own benefit.
 - d. Whether the Petitioner’s intellectual property rights were infringed
 - e. Whether the Petitioner is entitled to damages.

(i) Whether the threshold for a constitutional petition has been met

10. On this issue, this court is guided by the finding in the case of Anarita Karimi Njeru v Republic 1979 eKLR where the court held that-

“We would however, again stress that if a person in seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

11. In addition, Rule 4(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the “Mutunga Rules”) provides that:

“Where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.”

12. Rule 10 of the “Mutunga Rules” governs the form that a constitution should take. Rule 10(2) of the said Rules specifically provides as follows:

“(2) The petition shall disclose the following—

- a. The petitioner’s name and address;
- b. The facts relied upon;
- c. The constitutional provision violated;
- d. The nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the



suit; or in a public interest case to the public, class of persons or community;

- e. Details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
- f. The petition shall be signed by the petitioner or the advocate of the petitioner; and
- g. The relief sought by the petitioner.”

13. Upon perusal of the pleadings filed, I find that the Petition as presented has met this threshold in terms of compliance with Rules 10(2) of the Mutunga Rules and is pleaded concisely, clearly bringing out the cause of action, rights violated and declarations sought.

(ii) Whether the Petitioner’s right to privacy and human dignity as protected under Articles 28 and 31 of *the Constitution* has been infringed.

14. Article 28 of *the Constitution* provides that every person has inherent dignity and the right to have that dignity respected and protected.

15. Article 31 of *the Constitution* further provides that;

31. 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.

16. In the case of Jessica Clarise Wanjiru –vs- Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR privacy was defined as follows:

“The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.”[5]In the above sense any intrusion of personal life by whatever means or form such as photography, written articles or caricatures may be grounds for an action for breach of privacy.”

17. The Judge traced the history of the said right when he expressed himself as hereunder:

“A person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person’s unique characteristics and distinguishes the person from his or her peers. The right to the protection of one’s image is thus one of the essential components of personal development. It mainly presupposes the individual’s right to control the use of that image, including the right to refuse publication thereof. Personality rights encompass the exclusive right of an individual to market, control and profit from the commercial use of his/her name, image, likeness and persona. The distinctive characteristics of one’s image, likeness or persona include but are not limited to name, face, signature phrase, paraphernalia or action, costume or personals signature. The tort of misappropriation of personality was first



introduced in Canada in the case of *Krouse vs Chrysler Canada*. The tort can be expressed by stating that every individual has an exclusive right to market, for financial gain, their personality, image and name, and that the law entitles an individual to protect that right, if it is invaded.

The tort of misappropriation of personality can be invoked when all of the following four elements are met:

- a. There is an element of commercial exploitation of a person's personality. There must be a sufficient link between the individual and the exploiting medium to establish that the plaintiff's personality was "used" for the defendant's commercial gain.
- b. The person is clearly identifiable in the medium used and to their respective community or communities.
- c. The person does not consent to the use of their personality.
- d. Damages, either emotional or financial losses, are proven although recent judicial rulings would indicate the right of privacy is recognized even in the absence of damages."

18. In *Samson Mumo Mutinda v Inspector General National Police Service & 4 others* [2014] eKLR the court held that;

"The right to privacy protects a person's autonomy. The breach of the right to privacy either involves a violation of the law that permits infringement of the right consistent with the limitation provided under Article 24 or failure to obtain consent of the person. Thus the right to privacy may be waived by a person consenting to the search of his person or premises in certain circumstances. Such consent must be voluntarily and freely given."

19. Finally, in the case of *T.O.S v Maseno University & 3 Others* [2016] eKLR, Chemitei J relied on the findings of the court in *J W I & another v Standard Group Limited & another* [2015] eKLR while dealing with the question of the scope of the right to privacy, where it was held that;

"In the final conclusions of the Nordic Conference on the Right to Respect for Privacy of 1967, the following additional elements of the right to privacy are listed; the prohibition to use a person's name, identity or photograph without his or her consent, the prohibition to spy on a person, respect for correspondence and the prohibition to disclose official information."

The court stated further thus:

"...Secondly, in *Mistry v Interim National Medical and Dental Council of South Africa* (1998) (4) SA 1127 (CC), the Constitutional Court of South Africa considered the factors to be considered when determining whether right to privacy was violated in line with the information in question. The Court stated that one ought to consider; whether the information was obtained in an intrusive manner; whether it was about intimate aspects of the applicants' personal life; whether it involved data provided by the applicant for one purpose which was then used for another; whether it was disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be with.



From the above reasoning and expositions of the law it is clear that publication or use of the images of an individual without his consent violates that person's right to privacy. I say so because a person's life is a restricted realm in which only that individual has the power of determining whether another may enter, and if so, when and for how long and under what conditions."

20. In this case, it is clear that images of the Petitioner were taken without his consent and published thus putting his social life out in public, which unnecessarily exposed. Failure of the Respondent to file a response meant that the evidence presented remained unchallenged. I thus find that his right to privacy was infringed.

(i) Whether the Respondent violated the Petitioner's rights under Article 30 of *the Constitution* by publishing the Petitioner's image and likeness for its own benefit

21. Article 30 of *the Constitution* of Kenya provides that;

1. A person shall not be held in slavery or servitude.
2. A person shall not be required to perform forced labour.

22. Slavery is defined in the Black's Law dictionary as:-

"The condition of a slave; that civil relation in which one man has absolute power over the life, fortune, and liberty of another."

23. Servitude on the other hand is defined in the FindLaw dictionary

"as a condition in which an individual lacks liberty esp. to determine his or her course of action or way of life."

24. Upon review of the matters pleaded herein, I do find that the Petitioner has not demonstrated how he was subjected to slavery and servitude, by his photographs being published on the respondent's social media page. I find that his rights as conferred under Article 30 of *the Constitution* of Kenya has not been infringed.

(ii) Whether the Petitioner's intellectual property rights were infringed.

25. The World Trade Organization defines intellectual property rights as the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time. The Petitioner did not prove that he had an exclusive right over any copyright, trademark, or industrial property that he had created, which was infringed upon by the respondent's action and his claim under this heading must fail.

(iii) Whether the Petitioner is entitled to damages

26. Articles 23 and 23(3) of *the constitution* of Kenya provide the authority of the courts to uphold and enforce the bill of rights, and the court can grant several reliefs including a declaration of rights have been violated and order for the petitioner to be compensated.
27. The Supreme court in *Wamwere & 2 others Vrs Attorney General S.C Petition No 34 & 35 of 2019 (2024) KECA 487(KLR)*, held that crafting of remedies in human rights adjudication goes beyond the realm of compensation for loss as it was principally for vindicating rights. The court further held that though the appellants did not lead any evidence of the loss they may have suffered due to the violation



of their rights and freedom of inhuman treatment, it was important for the court to vindicate and affirm the importance of the violated rights.

28. In *CMM (Suing as the next friend and on behalf of CWM) & 6 others Vrs The Standard Media Group & 4 others (2023) KESC 68 KLR*, the Supreme Court equally addressed itself to what a trial court should do in its assessment of an award of compensation in Constitutional rights violation claims, when it held that;

“All the trial court was expected to do in considering this prayer was to assess what, in the circumstances of the case would be the appropriate compensation, or what other relief would vindicate the appellants contravened rights.....”

“that once the burden of proving a violation was discharged, it was not necessary for the applicant to prove any damages or loss so as to be entitled to any of the reliefs contemplated under Article 23(3).”

29. Finally in *The matter of African commission on Human and Peoples’ Rights Vrs Republic of Kenya, Application Number 006/2012 Judgment (Reparations) 23 June 2022 (the Ogiek case)* the African Court of Human and People’s Rights at paragraph 99 and 90 held that;

“The court confirms therefore that international law requires that the determination of compensation for moral damage should be done equitably taking into account the specific circumstances of each case. The nature of the violations and the suffering endured by the victims, the impact of the violations on the victim’s way of life and the length of time that the victim had to endure the violations are among the factors that the court considers in determining moral prejudice.....”

“While it is not possible to allocate a precise monetary value equivalent to the moral damage suffered by the ogiek, nevertheless, the court can award compensation that provides adequate reparation to the ogiek. In determining reparations for moral prejudice, as earlier pointed out, the court takes into consideration the reasonable exercise of judicial discretion and bases its decision on the principles of equity taking into account the specific circumstances of each case.....”

30. I do find that the Petitioner is entitled to damages for the infringement of his right to his privacy. It has been proved that the Respondent’s agent/servant, took photographs of the Petitioner, while he was enjoying a social evening with his friends at the Respondent’s business premises, and proceeded to watermark and publish the said photographs in their social media handle, Facebook page “hornbill Machakos” with intent to advertise and attract customers to its premises.

31. The said illegal act, was done without the Applicant’s express consent and/or authority, and that makes the respondent liable to pay damages.

32. In *Wanjiru v Machakos University (Petition E021 of 2021)* [2022] KEHC 10599 (KLR) the court made an award to the Applicant in the sum of Kshs 700,000/= for use of images on a billboard.

33. In *Wangechi Waweru Mwendu v Tecno Mobile Limited; Rogers Ouma t/a Ojwok Photograpy (Third Party)* [2020] eKLR the court gave an award of Kshs 500,000/= for use of images without consent.

34. The Petitioner urged the court to award him a sum of Kshs 5,000,000/= but taking into account the nature of the violation, the length of time the violation was perpetrated, the petitioner’s social standing as an advocate, and the impact of the illegalities I do award him as sum of Kshs 1,000,000/= for breach of his right to privacy.



D. Disposition

35. The upshot is that this petition is merited and I do order as follows;

- a. A declaration is hereby issued that the Respondent violated the Petitioner’s fundamental right to privacy and human dignity under Articles 28 and 31 of *the Constitution* by publishing the Petitioner’s image for the purpose of commercial advertisement without the Petitioner’s consent.
- b. An order of permanent injunction is hereby issued restraining the Respondent from publishing and/or using the Petitioner’s image and likeness in its advertisements or promotions in any way without the Petitioner’s consent.
- c. The Respondent shall compensate the Petitioner for the damages of Kshs 1,000,000/=.
- d. Costs of the Petition be borne by the Respondent and the same is assessed at Kshs 200,000/ = all inclusive.

36. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 17TH DAY OF DECEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th day of December, 2024.

Mr. Musya for ___ Petitioner

N/A for Respondent

Susan/Sam - Court Assistants

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