REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 268 OF 2019

FRANCIS MULOMBA NGUYO.....PETITIONER

VERSUS

NATION MEDIA GROUP LIMITED.....1ST RESPONDENT

STEPHEN WAITHAKA GITAGAMA.....2ND RESPONDENT

MUTUMA MATHIU.....3RD RESPONDENT

JUDGEMENT

1. The Petitioner, Francis Mulomba Nguyo, by way of his petition dated 8th July, 2019 seeks orders as follows:

> **i. A Declaratory Order that the actions of the Respondents violated the Petitioner's rights under Articles 28, 29 and 31 of the Constitution.**
>
> **ii. A Declaratory Order that the actions of the Respondents were in violation of Articles 33 and 34 of the Constitution.**
>
> **iii. An Order that the Respondents pay the Petitioner compensation for the violation of his fundamental rights and freedoms.**
>
> **iv. An Order that the Respondents pay the Petitioner damages for the Constitutional torts and acts of negligence committed by them.**
>
> **v. A Prohibitory Order prohibiting the Respondents from further violating the Petitioner's rights and freedoms.**
>
> **vi. A Prohibitory Order prohibiting the Respondents from further publishing private details of the Petitioner including his registered mobile phone number.**
>
> **vii. Costs of the Petition.**
>
> **viii. Any further Relief or Orders that this Honourable Court may deem just and fit to grant.**

2. The 1st Respondent, Nation Media Group Limited, is a limited liability company and the publisher of the Nation newspaper. The 2nd Respondent, Stephen Waithaka Gitagama, is the Chief Executive Officer of the 1st Respondent whereas the 3rd Respondent, Mutuma Mathiu, is the Group Editorial Director of the 1st Respondent.

3. The Petitioner's case is that on 27th April, 2019 through the Saturday edition of the Nation newspaper, the respondents published the following words:

> **"Am Alice Mumbo 40 years old working with KDF in Somalia. Things will come to pass but love will always stay. Can I have a chance with you? Call/SMS 0720…875."**

[Mobile phone number redacted]

4. The Petitioner's case is that the words which were attributed to him by the advertisement were defamatory. The Petitioner claims the advertisement was false and malicious, as he did not instruct the respondents to publish it nor did he give out his registered mobile phone number. The Petitioner further avers that the words used in their ordinary meaning are defamatory as he is a male adult of sound mind and not a woman as portrayed by the advertisement.

5. The Petitioner avers that his reputation and social standing in society was greatly injured by the advertisement and that the advertisement attracted scam callers. Further, that the advertisement had inadvertently affected his business.

6. The Petitioner deposes that he reported the matter at Industrial Area Police Station under O.B. 32/29/04/2019 and the issue is under investigation by the Cyber Crime Unit. He states that the respondents as well as himself had recorded statements with the police. The Petitioner avers that despite issuing a notice of intention to sue to the respondents, they have refused and or neglected to retract the publication or apologize to him.

7. The Petitioner states that his right to dignity under Article 28 of the Constitution was violated by the publication, which had traumatised him and his family. The Petitioner avers that he had been subjected to psychological torture by the advertisement resulting in violation of his right under Article 29 of the Constitution. He also contends that Article 31 of the Constitution was violated through the public display of his phone number without his consent. Further, that Articles 33 and 34 were violated through the vilification of his morals and failure to respect his rights and fundamental freedoms.

8. Through his further affidavit sworn on 29th October, 2019, the Petitioner deposes that the Media Code of Conduct imposes liability on the editor for all the published items whether or not there is a legal agreement/disagreement/dispute and as such, the respondents owed him a duty of care as they ought to have verified the phone number before publishing it.

9. The respondents opposed the petition through a replying affidavit sworn on 26th August, 2019 by Sekou Owino, the 1st Respondent's Head of Legal and Training. Through the affidavit, the respondents aver that the Petitioner has set out various provisions of the Constitution without stating the manner, the nature and the extent of infringement of those provisions. They depose that the Petitioner has not demonstrated how they violated his rights and fundamental freedoms.

10. The respondents state that after the publication of the impugned advertisement, they carried out an investigation which revealed that there was a typographical error in the last digit of the phone number that was provided by the author of the advertisement. It is therefore their case that the impugned advertisement was published honestly and in good faith.

11. The respondents deny that the words in the advertisement in their ordinary meaning are defamatory. They state that the Petitioner has not shown that the advertisement refers to him and lowers his reputation in the eyes of reasonable persons hence making it defamatory.

12. The respondents further assert that the Petitioner has not produced any document to show that he and the respondents recorded statements with the police. The respondents additionally aver that the Petitioner has not identified the crime they allegedly committed or shown that they have been charged with any criminal offence.

13. On the allegation that the impugned advertisement attracted scam callers, the respondents aver that the same has not been substantiated through evidence. Further, that the Petitioner has not proved that the respondents encouraged scam callers to contact the Petitioner.

14. The 1st Respondent confirms having been served with the Petitioner's demand letter on 20th May, 2019 but avers that by that time the retraction of the advertisement would not have served any useful purpose.

15. After careful consideration of the parties' pleadings and submissions, I find that the first issue for determination is whether this Court has jurisdiction to hear and determine the matter. Through submissions dated 29th April, 2020, the respondents urge the Court to find that the Petitioner has not established contravention of constitutional rights as he has simply set out various provisions of the Constitution without stating the manner, the nature and extent of the infringement of those provisions. Reliance is placed on the case of **A. M. v Premier Academy [2017] eKLR.**

16. The respondents further submit that since the Petitioner's claim related to the publication of an alleged defamatory advertisement the proper course of action was to file a civil suit instead of a constitutional petition. The Court is urged to find that the matter is civil claim clothed as a constitutional violation. This argument is buttressed by reference to the decisions in **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another (2016) eKLR**; **Francis Gathungu Waithaka v Kenyatta University [2012] eLKR**; and **Josphat Koli Nanok & another v Ethics and Anti-Corruption Commission [2018] eKLR**.

17. The respondents further submit that the Petitioner has cited various provisions of the Media Council Act, 2013 in their petition without explaining how those provisions were violated. Further, that under the doctrine of exhaustion of statutorily available remedies, this Court has no jurisdiction to resolve disputes hinged on the Media Council Act, 2013 as Section 34 of the Act provides that a person aggrieved by any publication or conduct of a journalist or media enterprise may make a written complaint to the Complaints Commission. It is thus urged that a complaint relating to the violation of the Media Council Act, 2013 ought to be filed before the Complaints Commission before the dispute is brought to court. On the mandatory nature of the doctrine of exhaustion of statutory remedies, reliance is placed the decision in **Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR**.

18. The respondents have raised interesting arguments, the first being that defamation matters are typically pursued through civil suits and not constitutional petitions. The Petitioner, however, claims that the respondents are liable for constitutional torts against him.

19. As correctly submitted by the respondents, the violation of the right to privacy is a tort which generally give rise to a civil claim for defamation. However, there is the constitutional right to privacy which is mainly aimed at protecting personal privacy against unlawful invasion by the State. The constitutional right to privacy was discussed in **John Atelu Omilia & another v Attorney General & 4 others [2017] eKLR** as follows:

> **"A "constitutional tort" refers to a private civil suit brought to redress a constitutional violation. Constitutional torts are violation of one's constitutional rights by a government servant. "Constitutional tort" actions are an avenue through which individuals can directly appeal to the Constitution as a source of right to remedy government-inflicted injury. This sort of access is a recent phenomenon. Before the twentieth century, the Constitution primarily served a structural function, with litigation focused on the limits of government power. Suits seeking to hold government liable for individual injuries were brought in state courts pursuant to the common law. It was not until the U.S. Supreme Court decisions in *Monroe vs. Pape* and *Bivens vs. Six Unknown Named Agents of Federal Bureau of Narcotics* that individuals began arguing that the Constitution entitled them to damages for wrongful injury.**
>
> **When examined as an individual remedy, it becomes clear that the "constitutional tort" action has had more than a narrowing influence on rights. By shifting the attention of the courts to the injury suffered by individuals, "constitutional tort" actions have influenced courts, encouraging the establishment of constitutional rights that both protect individuals from governmental injury and regulate the discretion of the government to inflict injury. As a result, the concept of individual harm is now incorporated into the substance of many constitutional rights. Instead of having a wholly negative effect on the scope of constitutional rights, the "constitutional tort" remedy contributes to a broader process of rights definition where abstract constitutional provisions are translated into terms relevant to individuals' injuries. Regardless of whether or not one can justify monetary awards for constitutional rights violations on compensation or deterrence grounds, as an individual remedy, the "constitutional tort" action serves a unique role in the range of remedies courts use to enforce the Constitution. The "constitutional tort action sets and enforces limits on governmental discretion in a way that structural injunction and other remedies cannot.**
>
> **"Constitutional tort" actions compensate and deter constitutional rights violations. That is, remedying an individual's injury with a damage award which enforces the Constitution and sets adequate monetary disincentives to unconstitutional action. "Constitutional tort" actions are not only about rights protecting individuals from certain forms of injuries but also about norms that regulate government action; a court determines both that the plaintiff has a right rooted in the law and that a defendant has a correlative duty to the plaintiff to avoid violating that right. Thus, a protective right in a sense imposes a correlative duty on the government.**
>
> **A court must bear in mind constitutional norms when deciding whether the case before it is in principle one in which the wrong doer should be held liable. The principles themselves, are embodied in a test, focusing on the subjective question as to whether the conduct complained is consistent with constitutional norms. The particular question to be decided in this matter is the liability of the state for acts committed by its agents while on duty.**
>
> **The principles of liability for malicious prosecution and their application have therefore to be developed to accord more fully with the spirit, purport and objects of the Constitution. This means that the existing principles of common-law of tort have to be understood and applied within the normative framework of the Constitution."**

[Citations omitted]

20. In the case of **Kimunai Ole Kimeiwa & 5 others v Joseph Motari Mosigisi (The then District Commissioner, Rongai District) & 3 others [2019] eKLR,** the Court stated that:

> **"As Prof. Michael Well explains, the prime objective of a constitutional tort is to protect a broad range of common law interests encompassed within the Bill of Rights' liberty interests in circumstances where the official's conduct is fairly characterized as an abuse of power."**

21. It therefore seems that the recommended and common course of action for defamation cases is to file a civil case. This was underscored in **Jacqueline Okuta & another v Attorney General & 2 others [2017] eKLR** where the Court stated that:

> **"It is to be borne in mind that defamation of an individual by another individual is a civil wrong or tort, pure and simple for which the common law remedy is an action for damages."**

22. From the cited cases, it is apparent that 'constitutional torts' provide an avenue for individuals to demand compensation for the violation of their rights by the State. This is a claim that is mostly pursued against the State where there has been an abuse of power. One may therefore agree with the respondents that the Petitioner ought to have filed a civil suit instead of commencing constitutional proceedings. It is, however, my view that the issue does not end there and whether a claim for violation of the constitutional right to privacy can be pursued against a non-state actor is an issue that needs to be revisited later in this judgement.

23. There is also merit in the respondents' contention that there is an alternative and adequate remedy availed in Section 34 of the Media Council Act, 2013 which requires any person aggrieved by any publication by or conduct of a journalist or media enterprise to make a written complaint to the Complaints Commission. Under the same provision the Complaints Commission is authorised to refer any complaint filed before it to the Communications and Multimedia Tribunal established under the Kenya Information and Communications Act, 1998. It is therefore apparent that in the circumstances of this case, a constitutional petition was not the only remedy available to the Petitioner. Nevertheless, the question that remains to be answered is whether the Petitioner was entitled to a direct recourse to a constitutional petition.

24. In order to comprehensively address the Petitioner's case, one of the issues I need to determine is whether the respondents' actions amounted to defamation. The respondents submit that their action was not actuated by ill will or malice. It is their case that they honestly believed that the phone number belonged to Alice Mumbo and they therefore urge the Court to find that the allegation that the publication was actuated by malice does not lie.

25. In the case of **Musikari Kombo v Royal Media Services Limited [2018] eKLR** it was held by the Court of Appeal that:

> **"20. The law of defamation is concerned with the protection of a person's reputation. Patrick O'Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:**
>
> **"The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction …' Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods…"**
>
> **It follows that a claimant in a defamation suit ought to principally establish in no particular order:**
>
> > **i. The existence of a defamatory statement;**
> >
> > **ii. The defendant has published or caused the publication of the defamatory statement;**
> >
> > **iii. The publication refers to the claimant."**

26. The Court further stated that:

> **"23. … As succinctly put by this Court in <u>S M W vs. Z W M [2015] eKLR</u>:**
>
> > **"A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided."**
>
> **24. The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined:**
>
> > **"In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense.""**

27. From the cases above, it is clear that in order for the Petitioner to prove his claim, the ingredients of the tort of defamation must be met. The ingredients of defamation are that: there exists a defamatory statement, the statement was published by the respondent, and the statement refers to the claimant.

28. The statement complained has already been reproduced in this judgement. It was indeed published by the 1st Respondent. However, a plain reading of the text would not reveal to the average person that the statement was referring to the Petitioner unless one carried out a thorough investigation into who the registered owner of the mobile number is. As far as an average person is concerned, the published statement concerned a woman who worked with KDF, not the Petitioner. There was no reference to the Petitioner by name, business or residence. The respondents have explained that the Petitioner's number appeared in the newspaper due to an error in the publication of the telephone number of the person who asked for the advertisement to be placed in the newspaper. One cannot therefore read malice in the actions of the respondents.

29. The last ingredient of defamation is that the publication complained of should have exposed the claimant to public ridicule or caused him or her to be shunned or avoided. In the instant case, the Petitioner alleged that his business associates, church peers, relatives and members of the public who held him in high social standing and regard inquired from him why he put up such an advertisement with his registered mobile phone number.

30. The Petitioner has gone ahead to claim that his business associates were also shocked and traumatized by the advertisement which portrayed him as an immoral person. Further, that as a result of the advertisement people made commercial decisions that negatively affected his business. However, the Petitioner has not produced any evidence to prove that his business suffered losses as a consequence of the publication. Furthermore, he has not called any witnesses or produced affidavits by his business associates, church peers, relatives or members of the public to show that his reputation was lowered as a result of the publication. He has not even stated the kind of business he is engaged in nor has he produced any evidence to confirm the existence of such a business.

31. According to sections 107 to 109 of the Evidence Act, Cap. 80, the burden of proof rests on the person who desires the court to give

judgement in their favour. If the Petitioner wanted this Court to believe that the statement was defamatory and negatively affected his social standing in his community and amongst his professional connections, he needed to provide evidence in support of his averments. Since he failed to do so, I cannot reach a conclusion that the advertisement was defamatory.

32. In conclusion, I find that although the Petitioner claims that the respondents defamed him through the impugned publication, he has not established all the ingredients of defamation in order to prove his case. It is therefore my finding that there was no defamation of the Petitioner by the respondents.

33. It is, nevertheless, noted that the Petitioner has not merely hinged his claim on the tort of defamation. He has gone ahead to allege violation of various constitutional rights. The Petitioner through his submissions dated 7th November, 2019 contended that his right to privacy under Article 31 was violated through the public display of his phone number without his consent. He relied on the cases of **M W K & another v AG & 3 others [2017] eKLR** and **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR** in support of the submission that Articles 33 and 34 were violated through the vilification of his morals and failure to respect his rights and fundamental freedoms. The Petitioner asserts that for any limitation of the right to privacy to hold, there should be justification in the terms of Article 24 of the Constitution.

34. The Petitioner submits that the advertisement by the 1st Respondent portrayed him to his family members, business associates and church members as an immoral person. He further claims that his business has been negatively affected by the disclosure of his phone number. The Petitioner relies on the already cited case of **M W K & another v AG.** The Petitioner contends that the respondents disregarded Article 29(c) of the Constitution by failing to verify the details of the advertisement before publishing it.

35. The Petitioner submits that the respondents have a statutory obligation under Section 3 of the Media Council Act, 2013 to be accurate, fair, accountable and transparent and to respect the personal dignity and privacy of others. The Petitioner asserts that the respondents in putting up his private phone number in the advertisement grossly violated his rights to privacy and inherent human dignity.

36. On the claim of violation of the right to privacy, the respondents submit that phone numbers do not fall under the purview of information relating to private affairs and therefore the allegation that they violated the Petitioner's rights to privacy is baseless and without merit. They urge that the display of Petitioner's telephone number on its own does not violate Article 31 of the Constitution as the information was not obtained in an intrusive manner, but was submitted to the respondents by a member of the public. The respondents claim that the number by itself does not disclose any private affairs of the Petitioner and does not amount to revealing to the public the private affairs of the Petitioner.

37. On the Petitioner's claim that his right to dignity was violated, the respondents contend that in order to establish violation of this particular right, the Petitioner should have first demonstrated that at least one of his other rights in the Bill of Rights was violated. It is urged that the Petitioner having failed to establish the infringement of any constitutional right, his claim that his right to dignity was violated should collapse. In support of this assertion, the respondents rely on the case of **ANM & another (suing on their own behalf and on behalf of AMM (Minor) as parents and next friend) v FPA & another [2019] eKLR**. It is additionally submitted that the Petitioner has not placed before this Court any material to prove that his business associates, church peers, relatives and members of the public have been inquiring as to why he put up the advertisement in question. The Court is urged to find that there is no evidence of loss, damage or injury to support the alleged loss of dignity.

38. On the right not to be subjected to torture, the respondents submit that the alleged psychological torture was not intentionally inflicted on the Petitioner and for that reason the Petitioner's claim falls outside the definition of the term "torture". Additionally, they submit that the Petitioner did not tender any medical evidence to prove that he suffered either psychological or physical torture.

39. Article 31 protects the right of an individual 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.**

40. The Petitioner claims that the release of his private mobile phone number amounts to an infringement of his right to privacy. He also asserts that after the publication of his phone number in the impugned advertisement he was subjected to scam callers and lewd messages. In the case of **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR** the Court posited on the right to privacy as follows:

> **"52. Privacy is a fundamental human right, enshrined in numerous international human rights instruments. It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information, and association. The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction, and liberty, a "private sphere" with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals. Activities that restrict the right to privacy, such as surveillance and censorship, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.**
>
> **53. A person's right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her personal affairs relatively free from unwanted intrusions. Privacy, in its simplest sense,**

allows each human being to be left alone in a core which is inviolable…"

41. In the case of **T. O. S. v Maseno University & 3 others [2016] eKLR**, the Court held that:

> **"15. 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."**

42. The right to privacy as provided by the Constitution generally protects the privacy of a person against unlawful government invasion. The key aspect of this right is to avoid disclosure of personal matters. Although no arguments were made about the enforcement of this right against individuals, I am of the view that this is one of the rights in the Bill of Rights that is applicable horizontally and vertically. This is a right that can be abused by both the State and private actors like the respondents herein.

43. In order to determine whether the right to privacy has been violated, one must first appreciate what this right is all about. The Supreme Court of Alabama in **Hogin v Cottingham, 533 So. 2d 525 (1988),** after analysing various decided cases summarised the law on the right to privacy as follows:

> **"It is generally accepted that the invasion of privacy tort consists of four distinct wrongs: 1) the intrusion upon the plaintiff's physical solitude or seclusion; 2) publicity which violates the ordinary decencies; 3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; and 4) the appropriation of some element of the plaintiff's personality for a commercial use."**

44. The Court went ahead and stated that:

> **"…the right of privacy is "`the right of a person to be free from unwarranted publicity,' or [from] `the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."**

45. Even though the respondents claim that publishing the Petitioner's phone number was an innocent typographical error, it does not take away the fact that the Petitioner's private life has been interfered with by the calls and text messages he received from individuals seeking to connect with the lady named in the impugned advertisement. It goes without saying that the advertisement was meant to attract mates for the lady named therein and any person desirous of getting in touch with her would use the Petitioner's published mobile phone number. The Petitioner's privacy was intruded by a deluge of calls and text messages from love-struck men (women could be in the mix) seeking the love of what in their mind is a beautiful gun slinging lady clad in battle fatigues. The injury sustained as a consequence of the violation of the Petitioner's right to privacy is the unwanted deluge of calls and text messages. This could not have happened were it not for the respondents' careless actions. The respondents' claim that the mere disclosure of the Petitioner's telephone number does not amount to a violation of the right to privacy is not a viable defence. An individual's telephone number is private information which can only be disclosed within the accepted parameters of the law.

46. In order to establish a cause of action for invasion of privacy on account of public disclosure of private information, three elements must be met. The Court of Appeals of Georgia summarised those elements in **Zieve v Hairston, 266 Ga. App. 753 (Ga. Ct. App. 2004)** thus:

> **"To establish this cause of action, a party must prove: (1) the disclosure of the private facts was a public one; (2) the facts disclosed were private, secluded, or secret facts; and (3) the matter made public was offensive and objectionable to a reasonable person of ordinary sensibilities under the circumstances."**

All these elements have been met in the instant case and I therefore agree with the Petitioner that his right to privacy was infringed by the impugned advertisement.

47. In regard to the claim that the Petitioner's right to human dignity was violated by the respondents' actions, I rely on the statement in **Dawood v Minister of Home Affairs, [2000] (3) SA 936 (CC)**, as cited at paragraph 132 of the Supreme Court case of **Martin Wanderi & 106 others v Engineers Registration Board & 10 others [2018] eKLR,** that:

> **"Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. . . dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."**

48. The Supreme Court interpreted the cited paragraph to mean that "**the right to dignity [is] at the core of a violation of other fundamental rights and freedoms.**" In other words, where it is established that a right under the Constitution has been infringed upon, then the infringement of the right to human dignity under Article 28 is highly likely to have also occurred. In this case, I have found that the Petitioner's right to privacy was infringed upon by the actions of the respondents and it therefore follows that his right to human dignity was also violated.

49. On the rights to freedom and security of the person under Article 29; freedom of expression under Article 33; and freedom of the media under Article 34, I find that the Petitioner has not precisely demonstrated how these rights were affected by the advertisement. In support of

this finding I rely on the dictum in **Anarita Karimi Njeru v Republic [1979] eKLR** that:

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

50. I concur with the respondents that the Petitioner has not precisely pleaded his case on the infringement of his rights under Articles 29, 33 and 34 of the Constitution and I cannot therefore find in his favour in respect of the alleged violation of these constitutional rights.

51. The question that remains to be answered is whether the Petitioner is entitled to all or any of the reliefs sought. The Petitioner submits that the respondents are liable of constitutional torts against him and that they owed him a duty of care to adhere to standards set for journalists as per the Constitution, the Media Council Act, 2013 and the Code of Conduct made under the Act. This argument is supported by the case of **John Atelu Omilia & another v Attorney General & 4 others [2017] eKLR**. The Petitioner contends that the respondents misused public space to his detriment and are thus liable to compensate him for the constitutional torts. The Petitioner prays for monetary compensation of Kshs. 20,000,000/- and an order prohibiting the 1st Respondent from further publishing his private details. The Petitioner also prays for costs of the petition.

52. The respondents on their part submit that the Petitioner has failed to establish that he is entitled to the orders sought and the petition should be dismissed with costs to them. The respondents, nevertheless, submit that if this Court is persuaded that the Petitioner's right to privacy was violated an award of Kshs. 100,000/= will be adequate compensation. The proposed award is supported by the decision in **FAF (suing on her own behalf and as a next friend of SAS and NAMS) v Norwegian Refugee Council [2019] eKLR.**

53. I have determined that the Petitioner has not established that the impugned advertisement defamed him. I have also determined that the Petitioner has not established violation of his rights under Articles 29, 33 and 34 of the Constitution. However, I am satisfied that the Petitioner's right to privacy under Article 31 and right to human dignity under Article 28 were violated by the impugned publication and he is therefore entitled to appropriate relief. In **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR,** the Court held that:

> **"134. In view of my conclusions herein above, I find that this Petition succeeds. I have however considered the reliefs the Petitioner has invited this court to grant. However, I think this is a proper case for this court to fashion appropriate reliefs as the justice and circumstances of the case demand. This Court is empowered by Article 23 (3) of the Constitution to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. Perhaps the most precise definition "appropriate relief" is the one given by the South African Constitutional Court in** *Minister of Health & Others vs Treatment Action Campaign & Others* **thus:-**
>
> > "...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal.""

54. The Petitioner prays for Kshs. 20,000,000/- as compensation for the constitutional wrongs visited upon him by the respondents. The respondents have suggested that the Petitioner be awarded Kshs 100,000/- as compensation for the violation of his right to privacy and rely on the decision in **FAF (suing on her own behalf and as a next friend of SAS and NAMS) v Norwegian Refugee Council [2019] eKLR** where the Court awarded the petitioner a global sum of Kshs 210,000/- as compensation for the violation of Article 31 of the Constitution.

55. The decision cited by the respondents not only provide a template but a reasonable figure to work on. On the other hand, the amount proposed by the Petitioner is exorbitant and not supported by precedent. The Petitioner has not explained to the Court how he computed the amount. The amount sought by the Petitioner is meant to cripple the 1st Respondent for an innocent slip of the 'pen'. What is required in a case like this is a token award to simply affirm the Petitioner's rights to dignity and privacy.

56. Had the respondents bothered to publish a correction, even a belated one, the amount to be awarded would be lower than the amount to be awarded where no apology has been made. As was held by the Supreme Court of Connecticut in **Prystash v Best Medium Publishing Co., 157 Conn. 507 (Conn. 1969)**, damages may be mitigated by a showing that the defendant had published a timely and adequate retraction or correction of the objectionable matter in controversy. In this matter, the respondents declined to retract the advertisement on the ground that a correction would not have served any purpose.

57. An additional factor to be considered in determining the award is the wide publicity of the publications of the 1st Respondent which must have resulted in the Petitioner receiving many calls and text messages thereby disturbing his peace and interfering with his usual calls and text messages. In the circumstances, I find Kshs. 400,000/- reasonable as general damages for the violation of the Petitioner's rights to privacy and human dignity.

58. In conclusion, I find that the Petitioner has not established a case for defamation. He has also not pleaded with precision the alleged violation of his rights under Articles 29, 33 and 34 of the Constitution. However, I have determined that although there was a typographical error, the respondents' impugned publication infringed upon the Petitioner's right to privacy as his telephone number was exposed to the public without justification hence attracting unnecessary calls and text messages. As such, I find that the Petitioner suffered violation of his rights to human dignity under Article 28 and privacy under Article 31 of the Constitution.

59. As for the costs of this suit, it is trite that costs should follow the event. The petition has largely succeeded and the Petitioner is therefore entitled to costs and is indeed awarded the costs of the proceedings against the respondents.

60. The petition is therefore allowed and I grant the following reliefs:

i. A declaratory order is issued that the Petitioner's rights to privacy under Article 31 and human dignity under Article 28 of the Constitution were infringed by the respondents' publication;

ii. The Petitioner is awarded Kshs. 400,000/- as general damages for the violation of his constitutional rights to privacy and human dignity; and

iii. The respondents shall bear the Petitioner's costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2021

W. KORIR,

JUDGE OF THE HIGH COURT