



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.E161 OF 2021

SHIVERENJE SIMANI.....PETITIONER

VERSUS

THE STAR NEWSPAPER.....1ST RESPONDENT

RADIO AFRICA GROUP..... 2ND RESPONDENT

JUDGMENT

1. The petitioner filed a petition dated 15th April, 2021 for the alleged contravention of, Articles 3, 10, 19, 20, 21, 22, 23, 28, 29 and 259 of the Constitution. Accordingly the petition seeks the following orders: -

a) A declaration that the petitioner’s fundamental rights and freedoms as enshrined under Article 28 of the Constitution of Kenya have been contravened and infringed by the respondents;

b) A declaration that the petitioner’s fundamental rights and freedoms as enshrined under Article 29(d) of the Constitution have been contravened and infringed upon by the respondents;

c) A declaration that the petitioner’s fundamental rights and freedoms as enshrined under Article 31(c) of the Constitution have been contravened and infringed upon by the respondents;

d) An award of general, exemplary and aggravated damages under Article 23(3) of the Constitution of Kenya for the violations of the petitioner’s rights by the respondents;

e) Payment of Ksh.500000 being the rightful reward for use of the petitioner’s image; and

f) The costs be provided for the petitioner.

Petitioner’s case

2. The crux of this petition, as supported by the averments in the petitioner’s sworn affidavit of similar date, is that the respondents on 27th July 2020 published his image on the Star Newspaper magazine and its other online platforms. He asserts that this was done devoid of his authorized consent and for commercial gain hence violating his right to privacy and dignity.

3. Furthermore, he avers that his image was contrasted with the article’s opinion on the status of gymnasiums during the Covid 19 pandemic which he does not agree with. This he shares caused an onslaught of messages from his colleagues in the fitness industry and his followers due to the opinion published in the said article.

4. The petitioner depones that he is a fitness trainer, expert, influencer and model by profession who carries a large influence in the health and fitness industry with a following of over 98000 people. He adds that his social media engagement has enabled him to influence his followers. He as a consequence earns his living by leveraging on his influence as a fitness trainer by marketing products and services from various companies to the thousands of people who follow him.

5. In closing, he accordingly avers that the respondents’ actions have adversely affected him psychologically and emotionally due to their disdain for his reputation, influence and standing in the fitness industry. This has in turn infringed his rights and affected his self-esteem. He

further depones that an attempt to negotiate a quantum of damages for the said publication has been fruitless.

6. The 1st and 2nd respondents vide a replying affidavit sworn by Vincent Okeyo on 21st June, 2021, aver that the use of the petitioner's image in the challenged article was geared toward current event news reporting on a matter of public interest and hence did not attract any commercial gain. In actual fact they claim that it was their duty to create public awareness on how gymnasiums ought to take precaution to curb the spread of the Covid-19 virus. It is on this premise they argue that use of his image was merely to put the story into perspective being a well-known fitness trainer in Kenya.

7. Moreover, the respondents claims that since the petitioner is a public figure, his images are all over his social media platforms, mainstream media and a general google search. They add that, in fact the petitioner's image as published on 27th July 2020 in their magazine was done with his authorization. Besides, they claim that the same image was published on an online publication in the People Daily Newspaper dated 27th May 2020 in a similar subject to that of the respondents. Owing to the preceding averments, the respondents argue that the petitioner has no reasonable expectation of privacy with regard to fitness matters and as a result they did not infringe on his right to privacy and dignity.

8. In conclusion the respondents argue that their actions were well within their constitutional rights as envisaged under Articles 33, 34 and 35 of the Constitution. It is hence their case that grant of the sought orders sought would be prejudicial to freedom of the media as a whole and opening floodgates for frivolous litigation.

9. The petitioner in his further supplementary affidavit sworn on 7th July 2021 avers that the respondent's allegation that the article was made in public interest is a fib as the respondents generate revenue through their online newspaper platforms by creating traffic to their websites. This in turn increases the metric shares of the page, views and clicks which in essence attracts advertisers who pay to advertise on their pages. He adds that the respondents were well aware of his large following and so used his image to attract traffic to their online platform. Accordingly, use of his image saw the respondents successfully achieve this with the post even going viral translating to monetary benefit.

10. Opposing the respondent's assertion that his images are in the public domain, the petitioner states this is because his social media page can be accessed publicly. He moreover depones that his image was published in the People Daily Newspaper with his express consent to the Media house. Further that the content in the article was his opinion.

11. The petitioner avers that he explicitly gave his photographer, Shem Obara consent to only use his image on the photographer's social media page not to publish the same on the respondents paper. He adds that he paid the photographer to take his photographs for his own personal and commercial use with his consent. The petitioner avers that he only got to find out about his image and article when his colleague inquired about the said impugned article.

12. He further avers that the respondents act did not pass the test of ethical journalism as the article was passing off as an interview of the petitioner thus putting him in danger of losing credibility with his followers. It is on this premise that he urges the court to grant him the orders sought as they will go a long way to curtail publication of images of social media influencers by traditional media who commercially benefit without offering the influencers any compensation

13. The petitioner filed written submissions and a list of authorities dated 12th July 2021 through Njoroge J. M. Advocates. Counsel identified the following as issues for determination:

i. Whether the respondent stand to advance their interests and gain commercially through the unauthorized publication of the petitioner's image; and

ii. Whether the respondents obtained consent to publish the petitioner's image.

14. Counsel submits on the first issue in the affirmative. His reason is that people can access the digital paper by paying a subscription fee of KShs.10 per month. This access is in conjunction with safaricom through the link: www.safaricom.com/discover/e-newspaper/publications/the-star. He explains that for the respondents to gain more revenue they create traffic to their website and social media pages. Since this is a challenging undertaking, use of influencers is a great resource to attract this traffic. It is at this point he notes that the respondents exploited his image to their advantage due to his profound influence on social media and this was effective.

15. Counsel further submits that the petitioner did not consent to publication of his image by the respondents in their newspaper. He explains that having paid for his image to be taken by the photographer, he has a right to the commercial use of his name, image and likeness. He moreover adds that the respondents did not seek to obtain his consent or opinion in the article which he would have gladly given. It is on this ground that he submits that the petitioners image was used for the respondents commercial gain without his consent.

16. To support the factual statements on violation of the petitioner's rights under Articles 28, 29 and 31 of the Constitution, reliance was placed on the case of **Jessicar Claire Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others (2017)eKLR** where it was held that:

“...the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individuals concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as incase, for the benefit of a magazine to make profit, it constitutes an unjustifiable invasion of the person's rights of the individual, including the person's dignity and privacy. In this dispute, no care was exercised in respecting these core rights.”

Counsel further relied on the case of **Ann Njoki Kumena v KTDA Agency Ltd [2019] eKLR**. To that end, the petitioner urges the court to

see the respondent's intention and find in his favour.

17. The 1st and 2nd respondents filed written submissions dated 16th September 2021 through Mercy Gachoya Advocate. Counsel identified the following as issues for determination:

- i. *Whether the use of the petitioner's image was for the respondent's commercial gain and benefit;*
- ii. *Whether the petitioner had reasonable expectation of privacy; and*
- iii. *Whether the petitioner's claim is merited.*

18. Counsel on the first issue submitted that the impugned article was only meant to create public awareness on the Government's rules for both gym operators and their clientele due to Covid 19. That the use of the petitioner's image was only aimed at drawing much readership. It is hence their argument that the said article passed the impact test as a tenet of ethical journalism. It is accordingly her submission that use of the petitioner's image was not used for commercial gain.

19. To support this argument counsel placed reliance on the case of **Jessicar Clarise Wanjiru** (*supra*) where it was held that:

"...the plaintiff must show that the defendant used his name, likeness or other personal attributes for commercial or other exploitative purposes. Use of someone's name or likeness for news reporting and other expressive purposes is not exploitative, so long as there is a reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest..."

Further reliance was placed on the case of **JMK & another v Standard Digital & another [2020] eKLR**.

20. On the second issue counsel submits that it is undisputed that the petitioner is a public figure in the fitness industry, and that the said image had already been published online by the photographer well before the impugned article was published. Counsel contends that in light of this the petitioner's image was accessible to the general public. It is on this premise that they argue that the petitioner had no reasonable expectation of privacy in matters of fitness in Kenya. In essence there was no infringement of his rights under Articles 28, 29(d) and 31(c) of the Constitution.

21. Finally counsel submits that the petitioner's claim is unmerited as he has failed to discharge the burden of proof as espoused under Sections 107 and 108 of the Evidence Act. That he has failed to prove that the respondents used his image for commercial gain. Further that he has equally failed to prove why he is entitled to damages and an award of KShs.500,000/- for use of his image.

Analysis and Determination

22. From the foregoing account, the issues that arise for determination are:

- i. *Whether the petitioner's rights under Articles 28, 29(d) and 31(c) of the Constitution were violated; and*
- ii. *Whether the petitioner is entitled to the reliefs sought.*

Issue (i): Whether the Petitioner's rights under Articles 28, 29(d) and 31(c) of the Constitution were violated:

23. The petitioner's central assertion is that the respondents published his image on the Star Newspaper magazine and other online platforms devoid of his consent. This he claims was done for commercial gain which in turn violated his fundamental rights. The respondents on the other hand while acknowledging the petitioner's well known status in the fitness industry argue that use of the petitioner's image was geared towards reporting on a matter of public interest which did not attract commercial gain as alleged.

24. The key theme as can be discerned from this case is the use of the petitioner's image without his authorization. At the moment there is no specific law in Kenya that provides for image rights. Jurisprudence has however sought to address this right through adjacent laws such as the Copyright Law and violation of the right to privacy and dignity as envisaged in the Constitution. This phenomenon in a picture has been described as a person's image rights.

25. A person's image rights was defined in the widely quoted case of **Jessicar Clarise Wanjiru** (*supra*) where the Court expressed itself as follows:

"17. In simple terms, image rights refer to a person's right to commercialize aspects of his personality such as physical appearance, pictures or caricatures, signature, personal logos and slogans, and also the right to prevent other people from commercially making use of them. In a claim of this nature, the plaintiff raises wrongful infringement of three inter-related, but distinct, personality interests, namely identity, privacy and dignity.

18. Identity is defined as a person's uniqueness which individualizes such person, and is manifested in various facets of personality (or indicia) which include, among other things, one's physical appearance or image and is considered a separate right of personality.[6]"

26. Likewise, the England and Wales High Court in the case of **Proactive Sports Management Ltd v Wayne Rooney & 3 others' [2010]**

EWHC 1807 (QB) at paragraph 187 defines image rights in a wider scope as follows:

“...The definition of Image Rights is comprehensive and it may be helpful to set it out in full. It is in these terms:

“Image rights means the right for any commercial or promotional purpose to use the Player’s name, nickname, slogan and signatures developed from time to time, image, likeness, voice, logos, get-ups, initials, team or squad number(as may be allocated to the player from time to time), reputation, video or film portrayal, biographical information, graphical representation, electronic, animated or computer-generated representation and /or any other right or quasi-right anywhere in the world of the player in relation to his name, reputation, image, promotional services, and/or his performances together with the right to apply for registration of any such rights.”

27. It is as a consequence now well appreciated that the nature of this right should indeed be protected as observed in the South African case of **Wells v Atoll Media (Pty) Ltd and another (11961/2006) [2009] ZAWCHC 173; [2010] 4 All SA 548 (WCC)** where it was opined that:

“[48] In Grutter v Lombard and another 2007 (4) SA 89 (SCA), at para 8 Nugent JA, in a most carefully researched judgment, noted that it was generally accepted academic opinion that features of a personal identity are capable and indeed deserving of legal protection.

[49] In the context of this case, therefore, the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as in this case, for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the personal rights of the individual, including the person's dignity and privacy. In this dispute, no care was exercised in respecting these core rights.”

28. The consensus of the existing jurisprudence as seen in the cited authorities is that violation of one’s image rights is synonymous to violation of one’s right to privacy and dignity. The Constitution under Articles 28 and 31(c) provide for protection of these rights as follows:

Every person has inherent dignity and the right to have that dignity respected and protected.

Every person has the right to privacy, which includes the right not to have--

(c) Information relating to their family or private affairs unnecessarily required or revealed.

29. The Court in the case of **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others [2015] eKLR** emphasized the importance of the right to privacy as follows:

“285 The right to privacy is guaranteed under Article 31 of the Constitution

286. 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 UDHR, Article 17 of the ICCPR, Article 8 of the European Convention on Human Rights (ECHR) and Article 14 of the African Charter on Human and Peoples’ Rights.

287. B. Rossler in his book, The Value of Privacy (Polity, 2005) p. 72, explains the right to privacy as follows:

“The concept of right to privacy demarcates for the individual realms or dimensions that he needs in order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies. Such realms or dimensions of privacy substantialize the liberties that are secured because the mere securing of freedom does not in itself necessarily entail that the conditions are secured for us to be able to enjoy these liberties as we really want to”.

288. As to whether there is need to protect privacy, he goes on to write that:

“Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part”.

30. With reference to the right to dignity, the court in the case of **Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited [2021] eKLR** it held that:

“50. As regards the right to dignity, in Ahmed Issack Hassan vs. Auditor General [2015] the Court held that:

“...the right to human dignity is the foundation of all other right and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human

dignity will automatically be promoted and protected and it will be violated if the other rights are violated". See Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) SCR (2) 516."

31. The right to privacy essentially necessitates that a person's private details are not consumed by the public without their consent which essentially violates their right to dignity. The decision in the case of **Jessicar Clarise Wanjiru** (*supra*) serves as an important reference point to underscore this point:

"23. 'Privacy', 'dignity', 'identity' and 'reputation' are facets of personality. All of us have a right to privacy and this right, together with the broader, inherent right to dignity, contributes to our humanity.

24. It is the personality rights of dignity and privacy that underscore individuality and set both the limits of humanity and of human interaction. But, the reasons for protecting privacy are wider than just protecting the dignity of the individual."

32. Similarly, the European Court of Human Rights in the case of **Von Hannover v. Germany (no. 2)** (nos. 40660/08 and 60641/08) while making a determination on the right to privacy in a case where the claimant, Princess Caroline von Hannover, had applied to the German courts for an injunction preventing any further publication of two series of photographs relating to her private life which had appeared in German magazines, on the ground that they infringed her right to protection of her private life and of her own image opined as follows:

"(i) Concerning private life

95. The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name, photo, or physical and moral integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is thus a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life. Publication of a photo may thus intrude upon a person's private life even where that person is a public figure (see Schüssel v. Austria (dec.), no. 42409/98, 21 February 2002.

*96. Regarding photos, the Court has stated that 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 (see *Reklos and Davourlis v. Greece*, cited above, § 40)."*

33. Be that as it may, the petitioner is required to prove the purported violation by the respondents by satisfying the established elements in a claim of violation of image rights. The elements that need to be proven have been captured in a number of authorities as set out below.

34. The Court in the case of **N W R & another v Green Sports Africa Ltd & 4 others [2017] eKLR** highlighted the elements as follows:

"The key elements of a Claim for unlawful use of Name or image which a petitioner ought to establish to hold someone liable for unlawful use of name or likeness can be summarized into three, which I find have been proved in the present case. These are:-

i. Use of a Protected Attribute: The plaintiff must show that the defendant used an aspect of his or her identity that is protected by the law. This ordinarily means a plaintiff's name or likeness, but the law protects certain other personal attributes as well.

In my view, the images used belong to the minors and their images are protected by the law.

ii. For an Exploitative Purpose: The plaintiff must show that the defendant used his name, likeness, or other personal attributes for commercial or other exploitative purposes. Use of someone's name or likeness for news reporting and other expressive purposes is not exploitative, so long as there is a reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest.

In my view, the first Respondent has not demonstrated that the use of the images was purely for public interest and not for commercial interest or benefit on their behalf. The second Respondent is on record stating that it sponsors such activities. Whether or not the first Respondent benefits from such sponsorship is an issue that was not adequately addressed nor can it be ruled out.

iii. No Consent: The plaintiff must establish that he or she did not give permission for the offending use..." (Emphasis added).

35. In the same way, the High Court in Uganda in the case of **Asege Winnie v Opportunity Bank (U) Ltd & Another HCCS No. 756 of 2013** observed as follows:

"Under the common law jurisprudence a personality right is the right of an individual to control the commercial use of his or her name, image, likeness, or other unequivocal aspects of one's identity. This right to personality is classified into two categories;

The right of publicity or to keep one's image and likeness from being commercially exploited without permission or contractual compensation and the right to privacy, and;

The right to be left alone and not have one's personality represented publicly without permission.

Basically under common law jurisprudence publicity rights fall in the realm of the tort of "passing off" which idea was developed on the notion of natural rights that every individual should have a right to control how, if at all, his or her "persona" is commercialised by third parties who intend to help propel their sales or visibility of own product or service.

This means that where there is a publicity rights contention then the issue for the court to deal with and decide upon is whether a significant section of the public would be misled into believing (correctly or incorrectly) that a commercial arrangement had been concluded between a plaintiff and a defendant under which a plaintiff agreed to an advert involving the image or reputation of a famous person. The actionable cause, therefore, under misrepresentation would then bring the suggestion that a plaintiff did in fact endorse or license a defendant's product or somehow has control over those products. Arising from this seemingly clear common law jurisprudence, it is my humble view that for one to succeed in an action for infringement of image rights such a person has to prove the following basic elements:

- The plaintiff must be identifiable.*
- The defendant's action was intentional.*
- The defendant must have acted for the purpose of commercial gain.*

The Canadian courts have examined this position and in the case of Krouse v Chrysler Canada Ltd (1973) 13 CPR (2d) 28 it was noted that where a person has marketable value in their likeness and it has been used in such a manner that suggests an endorsement of a product then there is ground for an action in appropriation of such a person's personality with the case of Athans v Canadian Adventure Camps (1977) CAN H1 1255, having the view that personality right included both image and name." (Emphasis added).

36. A perusal of the facts of this case as deponed in the parties' sworn affidavits is that the petitioner's status and influence in the fitness industry in Kenya is not disputed. The petitioner through the adduced evidence confirms that his image contrary to the respondents' allegation was taken by a photographer, Shem Obara who he had commissioned to take his photographs at a fee. Through their communication it can be discerned that the petitioner allowed the photographer to use his photographs but did not indicate that it could be passed off to third parties for publication. Furthermore, vide a communication dated 18th May 2020 the petitioner granted consent to the People Daily Magazine to use his image in their article which also contained his opinion. The petitioner as indicated in the communication dated 26th July 2020 informs his colleague, Bryant CF that he had not done any interview with the 1st respondent.

37. The respondents on the other hand through their letter to the petitioner's advocate dated 19th August, 2020 contest the petitioner's ownership of the image. It is on this premise and the photographer's communication with the petitioner dated 29th October, 2019 that they argue that the petitioner had fully consented to use of his image by the respondents. The respondents were additionally categorical in dismissing violation of the petitioner's rights to privacy owing to his being a public figure. In a further communication dated 16th November 2020 the respondents inform the petitioner that the photographer claims that he did not transfer any rights or ownership of the image to the petitioner. This is however not supported by any material fact or evidence. There is no evidence from the said photographer on record.

38. To begin with, Section 31(1) of the Copyright Act, Cap 130 provides that:

First ownership of copyright

(1) Copyright conferred by sections 23 and 24 shall vest initially in the author: Provided that where a work—

(a) is commissioned by a person who is not the author's employer under a contract of service; or

(b) not having been so commissioned, is made in the course of the author's employment under a contract of service,

the copyright shall be deemed to be transferred to the person who commissioned the work or the author's employer, subject to any agreement between the parties excluding or limiting the transfer.

39. My interpretation of the above provision is that the right of ownership in a work as the impugned image belongs to the author. This however is not the case where the work is commissioned by another or done in the course of ordinary course of employment. In such situations the ownership is clearly owned by the one who commissioned it or an employer. In the circumstances of this case, it is clear that the photographer's work was not done erratically but he was hired by the petitioner to take his photographs. The petitioner accordingly paid Ksh.3000 for the service.

40. While the respondents claim that they had authorization from the petitioner to post the picture, no material has been adduced to show that the photographer was their employee. Further to that nothing in the communication dated 29th October 2019 shows any consent given to the photographer to publish the photographs in the respondents magazine. Equally, there is no express authorization by the petitioner to the respondents to publish the impugned image. The respondents claim that the consent was obtained is principally far-fetched.

41. Moving over to commercial gain, the petitioner being a fitness influencer as his way of life adduces evidence to show his monetary gain as a result of leveraging on his influence. The document marked “SS3” shows that the petitioner issued an invoice dated 2021/02/03 to *Tell-em-pr* for Instagram pictures and videos for a campaign that he had done for them. The respondents are not shy to admit of their knowledge of the petitioner’s influence and command in the fitness industry and with the people that follow him. It is against this backdrop that one wonders why they failed to contact him before publishing his image. The mere fact the petitioner is a public figure with numerous images online does not waive his constitutional rights as purported by the respondents.

42. Equally while the respondents assert that the impugned article was published in public interest, they fail to produce evidence to show that, they did not gain commercially from that specific article. This is in light of them ordinarily gaining commercially in their other articles.

43. Taking into consideration the preceding analysis, it is evenhanded to state that the petitioner has established the element of use of a protected attribute which was used for an exploitative purpose without his consent as elaborated in the shared authorities above. The respondents on the flip side have failed to dislodge the petitioner’s evidence. It is my humble view that the conduct of the respondents was in total disregard of the petitioner’s right to privacy and dignity. I am satisfied that the respondents did indeed violate the petitioner’s rights as provided under Article 28 and 31(c) of the Constitution.

44. Article 29(d) of the Constitution states as follows:

Every person has the right to freedom and security of the person, which includes the right not to be-
(d) subjected to torture in any manner, whether physical or psychological;

45. The Court of Appeal in the case of **Michael Maina Kamami & another v Attorney General [2019] eKLR** while examining what amounts to torture observed as follows:

“...Black’s Law Dictionary, 10th edition, defines “torture” as

“The infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure”.

46. The Court went further to note that:

“The European Court of Human Rights has defined torture and inhuman treatment in the Greek Case 1969 Y. B. Eur. Conv. on H.R. 186 (Eur. Comm’n on H.R in the following terms;

“The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word ‘torture’ is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to an act against his will or conscience.”(Emphasis added).

47. A look at the facts of this case with regard to this decision discloses that the petitioner has not adduced any evidence to demonstrate that he was subjected to psychological torture and suffering by the respondents actions. The petitioner merely states that the respondents’ actions adversely affected him psychologically due to their disregard of his reputation, influence and standing in the fitness industry. While the petitioner says that he received numerous messages from his colleagues and followers due to the nature of his article, the evidence produced only indicates one colleague’s apprehension and enquiry. Primarily the petitioner has failed to establish the element of psychological torture as addressed in the Court of Appeal case.

Issue No.(ii) Whether the Petitioner is entitled to the reliefs sought

48. Drawing from the above conclusion that the rights of the petitioner under Article 28 and 31 of the Constitution were violated, the next question to be answered is whether the petitioner is entitled to the reliefs sought. The petitioner submits that his image was used by the respondents in their publication but the petitioner was not given any monetary consideration for its use whereas they used it to their advantage. He explains that the use of his image attracted traffic to their pages which in turn translated to commercial gain. The petitioner as a result submits that he is entitled to a payment of KShs.500,000/- and general, exemplary, aggravated and punitive damages consequential to the declarations of violations of the fundamental rights and freedoms.

49. To start with, it is worthy to note that the petitioner did not elucidate how he arrived at the KShs.500,000/- figure as reward for use of his image by the respondents. An attachment of payments he has received from previous similar work could have for instance supported this claim and justified the amount. Without any reference as to how the petitioner computed this amount, it is my view that the claim cannot succeed. This was a special damage which must not only be pleaded but also proved. I find the claim not proved.

50. Moving on, where it is determined that a party’s rights have been violated, that party is entitled to damages as per the court’s estimation in its discretion. I am persuaded by the decision in the case of **Peter Mauki Kaijenja & 9 others vs Chief of the Defence Forces & another [2019] eKLR** where it was held that:

“96. Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be

exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Courts...

51. When it comes to an award of general damages, the courts are guided by the principles that have been established through various authorities to guide them in determining the appropriate award in constitutional matters. The Court of Appeal while shedding light on this principle in the case of **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR** opined as follows:

*“...the South African Case of **Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291** where the Constitutional Court of South Africa held that:*

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

52. Likewise, the Court of Appeal while stating the principles of assessment of this damage in the case of **Peter M. Kariuki v Attorney General [2014] eKLR** held as follows:

“it bears repeating that assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions...”

53. The Court went on further to state that:

*“On the purpose of awards of damages, the Supreme Court of Uganda in **Cuossens v Attorney General, (1999)1 EA 40**, noted that the object of an award of damages is to give an injured party compensation for the damage, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury. Where the injury in question is non-pecuniary loss, assessment of damages does not entail arithmetical calculation because money is not being awarded as a replacement for other money; rather it is being awarded as a substitute for that which is generally more important than money, and that is the best that a court can do in the circumstances.”*

54. Accordingly, one of the factors that should be considered while making an award of general damages, as seen in the case of **Zipporah Seroney & 5 others v Attorney General [2020] eKLR** is:

“124. Taking into account the cited principles, and considering that the award of general damages is not a mathematical exercise, the best guide is the awards previously made to persons whose constitutional rights were violated in circumstances similar to that of the deceased. This is the only way of determining a just and reasonable compensation considering that the parties did not make any proposals in their submissions on what they think should be the appropriate damages in this case.”

55. Guided by the cited authorities, a look at previous similar case law on award of general damages will be prudent. I have considered the following cases:

(i) **Ann Njoki Kumena v KTDA Agency Ltd [2019] eKLR** awarded general damages of KShs.1,500,000/-;

(ii) **Rukia Idris Barri v Mada Hotels Ltd [2013] eKLR** awarded general damages of KShs.300,000/-

(iii) **N W R & another v Green Sports Africa Ltd & 4 others [2017] eKLR** awarded general damages of KShs.750,000/-.

56. I have considered the above cited authorities and the awards made. I am alive to the fact that the petitioner is not complaining about the article that accompanied his image. His major complaint is that his consent was never sought prior to the publication. Otherwise, the article was not defamatory, and there is no proof that the respondents made any monetary gain from the publication as alleged. On this violation of the right of privacy and publicity I will award him KShs.250,000/-.

57. As for the claim of exemplary and aggravated damages, I am inclined to be in agreement with the opinion in the case of **Michael Rubia v Attorney-General [2020] eKLR** where it was observed that:

*“168. In the case of **Gitobu Imanyara & 2 others v Attorney General [2013] eKLR** Lenaola, J (as he then was) discussed the issue of award of exemplary damages and held that:-*

*“54. Regarding the prayer for exemplary damages by each Petitioner, in the case of **Obongo vs. Kisumu Municipal Council (1971) EA 91**, the Court of Appeal referred to the English case of **Rookes vs. Barnard & Others (1964) AC 1129** where it was*

held that exemplary damages in tort may be awarded in two classes of cases i.e.

- i) Where there is oppressive arbitrary or unconstitutional actions by the servants of the Government; and
- ii) Where the Defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff

On that issue, I share the same thoughts as Majanja, J. in Benedict Munene Kariuki & 14 others vs. The Attorney General Petition Number 722 of 2009 [2011] eKLR, where he stated as follows;

"I am constrained to depart, from the position taken by my learned brother. In my view, these cases under Section 84 of the Constitution are cases concerning the Constitution. It is unnecessary to consider the element of "unconstitutional action" when the relief is awarded for unconstitutional conduct. It is also clear that the principle in Obongo v Kisumu Municipal Council (Supra) was a case in tort so that the issue of "unconstitutional action" was an additional factor the Court would consider in awarding exemplary damages. I shall therefore not award exemplary damages. "Further, in the case of Wachira Waihere vs. the Attorney General HC Misc. App.No.1184/2003 (O.S.) the Court did not find it appropriate to award aggravated and exemplary damages and stated that;

"In the light of the acknowledged change in the government, and the attempts at dealing with human rights violation, we find it inappropriate to award exemplary or aggravated damages."

58. The Court went on to determine as follows:

"170. I need not cite any other authority to show that the general trend in this jurisdiction is to avoid award of exemplary or punitive damages in public law claims. This principle is grounded on two reasons namely that the State has improved in its respect of human rights and that the taxpayer should not be burdened with heavy awards in claims touching on the public purse. I therefore decline to award the estate of the deceased exemplary or aggravated damages. In my view, general damages and special damages shall suffice to right the wrongs suffered by the deceased."

59. The upshot is that there is merit in the petition. I accordingly enter judgment for the petitioner against the respondents jointly and severally as follows:

- (a) A declaration that the petitioners fundamental rights and freedoms as enshrined under Articles 28 and 31 (c) of the Constitution of Kenya have been contravened and infringed upon by the respondents.
- (b) The claim for violation of the petitioner's fundamental rights and freedoms under Article 29(d) of the Constitution of Kenya is dismissed.
- (c) The claim for exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya is dismissed.
- (d) The claim for payment of KShs.500,000/- as reward for use of the petitioner's rights by the respondents is dismissed.
- (e) General damages for violation of the rights to dignity and privacy is made in the sum of KShs.250,000/-.
- (f) Interest at court rates on the general damages shall be from date of judgment.
- (g) Costs to the petitioner.

DELIVERED ONLINE, SIGNED AND DATED THIS 9TH DAY OF DECEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT