



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 178 OF 2017

FAF (suing on her own behalf and as

a next friend of SAS and NAMS).....PETITIONER

VERSUS

NORWEGIAN REFUGEE COUNCIL.....RESPONDENT

JUDGMENT

1. The petitioner, who describes herself as a female adult of sound mind and a Kenyan by birth sued the respondent herein, a registered non-governmental organization, through the petition dated 3rd May 2017 in which she seeks the following orders;

i. A declaration be and is hereby made that the publication of the petitioners photograph and that of the minors by the respondent is unlawful, unconstitutional and a violation of their fundamental rights and freedoms as enshrined in Article 28 and 31 of the Constitution.

ii. A declaration that the petitioners are entitled to compensation for defamation, social low esteem and damage to their reputation.

iii. A declaration that the petitioner is entitled to deletion and or correction of the untrue and misleading information passed to the public by the respondents in publishing the untrue depiction regarding the citizenship status of the petitioner.

iv. An order that the respondent be compelled to compensate the petitioner for damages and or loss arising from the publication of the petitioner's photograph and that of the children without their express authority.

v. An order that the respondent does correct and offer an unconditional apology regarding the misleading depiction of the petitioner's citizenship status.

vi. An order for the costs for the petition.

vii. Any other relief that this honourable court may deem fit and just to grant in the interest of justice.

2. The petitioner brought the petition on her own behalf and as the next friend of SAS and NAMS (*minors-particulars withheld*). The petitioners case is that her fundamental rights and freedoms have been grossly violated by the respondent who without her consent or any justification published her private photographs and photographs of the minors on a refugee pamphlet which tended to insinuate to the members of the public that they are refugees, a claim that is not true, thereby exposing her to public ridicule and violating her right to privacy and dignity under the Constitution.

3. The petitioner states that she is a Kenyan business woman living in Dadaab where she supplies clothes, shoes and handbags to the locals and was contracted by the respondent to supply firewood and charcoal to the refugee camps. She claims that the respondent published a pamphlet portraying repatriation of refugees from Somalia which pamphlet captured her niece and son as the refugees and created the impression that they were happy to be repatriated back to Somalia.

4. She further states that she has at all material times possessed Kenyan citizenship and has never sought to obtain refugee status or refuge in another country. She also claims that she has lost contracts and business opportunities as most of her clients have enquired on her refugee

status. She attached a copy of the said pamphlet to the affidavit in support of the petition as annexure “FAF 2” and stated that the respondent used their photograph for commercial benefits but that the effect of the respondent’s actions has lowered her image among right thinking members of the society and violated her right to privacy.

5. At the hearing of the petition, Mr. Gachomba, learned counsel for the petitioner submitted that the right to privacy safeguards an individual’s dignity and that the said right is intrinsically intertwined with the right to human dignity.

6. For this argument, counsel relied on the decision in this case of JW1 & Another vs Standard Group Ltd & Another [2015]eKLR wherein it was observed that:

“ The concept of right to privacy demarcates for the individual realms or dimensions that he need in order to be able to enjoy individual freedoms 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. Protecting privacy is necessary if an individual is to lead an autonomous, independence 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.”

7. Counsel also cited a case of Barbra Georgina Khaemba vs Cabinet Secretary, National Treasury & Another [2016]eKLR wherein the Supreme Court of New Zealand decision in Brooker vs the Police [2007] NZSC 30 was cited with approval and the court held the view that:

“ Privacy can be more or less extensive, involving a broad range of matters bearing on an individual’s personal life. It creates a zone embodying a basic respect for personsRecognizing and asserting this personal and private domain is essential to sustain CIVIL AND civilized society....it is closely allied to the fundamental value underlying and supporting all other rights, the dignity and worth of the human person.”

8. Reliance was also placed on the decision in TOS VS Maseno University & 3 Others [2016]eKLR wherein Chemitei J. held

“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 had the power of determining whether another may enter, and if so, when and for how long and under what conditions.”

9. Counsel submitted that it is not only unlawful but also illegal for the respondent to capture and circulate the petitioners images without her consent. It was further argued that the respondent’s actions were not in the best interests of the children as articulated under Article 53(2) of the Constitution which provides that “ A child’s best interests are of paramount importance in every matter concerning the child.

10. Counsel also pointed out that Section 19 of the Children Act provides that *“Every child shall have a right to privacy subject to parental guidance,”* and further, that Article 10 of the African Charter on the rights and welfare of the child also states that children have a right to privacy while Article 16 of the United Nation Convention on the rights of a child (UNCRC) states that; No child shall be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or to unlawful attacks on his or her honour and reputation.

Respondents’ case

11. The respondent opposed the petition through the replying affidavit of its Regional Director **GABRIELLA WAAIJMAN** who deposes that on 29th May 2014, the respondent conducted a graduation ceremony for its vocational training students at the Dadaab Youth Education Pack (YEP) Centre and that photographs and videos were captured at the said graduation where the petitioner and her children were in attendance. She further states that the petitioners photographs were taken in the said ceremony and that she did not seem to object to the taking of the said photos as the properly posed for the same.

12. She further states that the photographer, one Nahashon, informed her that he explained to the petitioner that photographs taken in such events could be used for publications and external products and that the petitioner nodded her head slightly but did not say anything only for her to later lodge a complaint seeking for compensation.

13. In the submissions filed on 25th September 2018, M/S Gitobu Imanyara & C0, Advocates for the respondent highlighted the issues for determination to be;

- a) Is this a proper case for this Division of the High Court?
- b) Whether there was a violation of the petitioner’s right to privacy and
- c) Whether there was a violation of the petitioners right to human dignity.

14. On the first issue of whether this the proper court/division to handle the instant case, counsel submitted by way of a preliminary objection

that the instant petition does not demonstrate that privacy rights of the petitioners and the minors were violated and that this is not a proper case for the constitutional and human rights division.

15. Counsel submitted that the photographs were not taken in breach of privacy rights as they were not taken in a private place but were taken at a graduation event attended by members of the public.

16. The respondent's case was that the claim by the petitioner that the publication of her photograph in the impugned pamphlet lowered her image and reputation amongst right thinking members of the society was a clear indication that the claim is founded on the tort of defamation which claim ought not to be entertained in this division.

17. On the alleged violation of the petitioner's right to privacy, counsel relied on the decision in the South African case of **Ministry vs Interim National Medical and Dental Council of South Africa[1998](4) SA 1127(CC)** that the courts should consider whether the information was obtained in an intrusive manner; whether it was about intimate aspects of the petitioner's personal life; whether it involved data provided by the applicant for one purpose which was then used for another; and whether it was disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information could be withheld.

18. It was submitted that the respondent had demonstrated that the photograph in question was taken by its employees and with the implied consent of the petitioner. Counsel argued that from the body of language of the petitioner the respondent's employee, one **Nahashon Tado**, was of the opinion that she did not have any objection to her photograph and those of her children, being taken as they posed for the same and did not seem to be offended in any manner.

19. Counsel submitted that the petitioner's averment that the photograph was taken at a graduation ceremony is testimony to the fact that the same was not taken unlawfully since the purpose of the photograph was explained to her.

20. On the alleged violation of the petitioners rights to privacy and human dignity, counsel submitted that the particulars of infringement of the rights have not been specifically stated in the petition in line with the test set in the case of **Anarita Karimi Njeru [1979] KLR 154**. It was argued that whereas the petitioner asserts that she was portrayed as a refugee yet she is a Kenyan Citizen, she did not provide any evidence to prove that claim that she was is a Kenyan citizen save for the birth certificates of the minors (annexures "FAFI") which are not proof of citizenship. It was therefore the respondent's case that the petitioner cannot state that her right to human dignity has been infringed in terms of being portrayed as a refugee and a Somali yet she had not furnished evidence of Kenyan citizenship.

Analysis and determination

21. I have considered this petition, the response made by the respondent and the parties rival submissions together with the authorities that they cited. This court is being called upon to determine whether the petitioners' right to privacy and by extension, dignity was violated by the publication of their images in the pamphlet.

22. Article 31 of the Constitution stipulates as follows:

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.

23. The nature and importance of the right to privacy was articulated in the case of **JW1 & Another vs Standard Group Ltd** (supra) as follows:

" The right to privacy consists essentially in the right to live one's life with a minimum interference. It concerns private family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information give or received by the individual confidentially."

24. The right to privacy is however not an absolute right as it one of those rights that may, under Article 24 of the Constitution, be limited. Article 24(1) of the Constitution stipulates as follows:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

a) The nature of the right of fundamental freedom;

b) The Importance of the purpose of the limitation;

c) The nature and extent of the limitation;

d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental of others; and

e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

25. In the instant case, I find that it was not disputed that the respondent published the photograph of the petitioner and her children in a pamphlet that was widely distributed and that such public action was not done with the knowledge and/or consent of the petitioner and that it therefore amounted to an infringement of their right to privacy.

26. The respondent argued that the petitioner appeared to have consented to the photograph being taken as her body language at the time showed that she did not object to it. My finding, however, is that the mere fact that the petitioner may have appeared to be comfortable with the taking of her photograph does not connote that she consented to the said photograph being used in a widely circulate pamphlet. Furthermore, the respondent did not demonstrate that its photographer was a body language expert so as to be in a position to determine which body language means consent. In also note that the said photographer did not swear an affidavit to confirm the claim that the petitioner consented to the photograph through body language or at all. I therefore find that the petitioners' right to privacy was violated by the publication of her photograph and those of her children in a widely circulated pamphlet, without her consent.

27. Turning to the claim that the petitioners right to dignity was violated though the publication of the photograph in the impugned pamphlet, the petitioner claimed that she was portrayed as a refugee who was 'happy' to be repatriated back to Somalia when in fact she is a Kenyan citizen. It was therefore the petitioner's claim that the publication lowered her image before right thinking members of the society. My finding is that if indeed the petitioners case is that she is Kenyan citizen who was wrongly been portrayed by the respondent, as a refugee, then the burden of proof rested on her to establish, firstly; that she is a Kenyan citizen and secondly; that her image was dented following the said publication. In this regard, I note that nothing would have been easier than the petitioner to present, before this court, proof of Kenyan citizenship in the form of either national identity card or a Kenyan passport. This burden was not discharged and the irresistible conclusion that I arrive at is that this claim was not proved to the required standards.

28. Be that it may, even assuming that the petitioner had presented documents of proof of citizenship, I am still not convinced that being portrayed as a refugee amounts to lowering the standing of any person in the society considering that refugees are not lesser beings and that there is therefore nothing really demeaning about anyone being a refugee. My take is that refugees, despite the difficult circumstances that they find themselves are entitled to the fundamental human rights and equal protection under the law. For the above reasons I find that the claim on violation of the right to dignity was not proved.

29. Apart from the declaratory orders sought in the petition, the petitioner also sought an order to compel the respondent to compensate the petitioner for defamation, social low esteem and damage to reputation. The petitioner also sought damages for loss arising from the publication of their photograph without their express authority.

30. Article 23 of the Constitution stipulates as follows on the orders that this court may grant for violation of constitutional rights.

23. Authority of courts to uphold and enforce the Bill of Rights

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction; [underlining mine]

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

31. In the South African case of **Grutter v Lombard and Another 2007 (4) SA 89 (SCA)**, it was noted as follows –

“The extent to which the features of a person's identify – for example his or her name or likeness – constitutes interests that are capable of legal protection has received little attention from our courts. In the United States the appropriation of a person's

name or likeness for the benefit or advantage of another has come to be recognized as an independent tort during the course of the last century. The English common law seems to have been more reticent in that regard. In his illuminating dissertation on the subject P.P.J Coetser observes that in Germany ‘wide protection has been afforded by the positive law to an individual’s interest in identity’ form which has emerged that ‘it is unlawful to use certain aspects of personality for commercial purposes without consent.’

In this country it appears to be generally accepted academic opinion that features of personal identify are indeed capable (and deserving) of legal protection.”

32. Similarly, in another South African case, Angella Wells v Atoll Media (PTY) Ltd & Anor, Western Cape High Court Case No. 11961/2006 it was held

“...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 case, for the benefit of a magazine sole to make profit, it constitutes an unjustifiable invasion of the person rights of the individual, including the person’s dignity and privacy. In this dispute, no care was exercised in respecting these core rights.”

33. From the above cited cases, it is clear that the South African courts have set the pace in according protection for human dignity and privacy where they are exploited for commercial purposes without consent. In the present case, while it is clear that the consent of the petitioners was not sought or obtained before their images were used in the pamphlets, I find that the petitioner did not establish that the said pamphlets/publication was used for purposes of the respondent’s commercial gain and neither was it proved that the respondent was a business enterprise or a profit making organization. Be that as it may, and irrespective of the purpose of the said publication, I still find that the respondent cannot escape liability for violation of the petitioners’ right to privacy by publishing their images in a widely distributed pamphlet without their consent. I further find that the publication was nonetheless an unacceptable exploitation of ones photograph or likeness for the respondent’s purposes or programs without the petitioners’ consent and thus, an invasion of their right to privacy.

34. The petitioners did not submit on the quantum of damages payable for the said violation and neither was it established that the petitioners suffered any tangible loss as a result of the said publication. I am nonetheless of the view that, in the circumstances of this case, the petitioners are entitled to some damages for the invasion of their constitutionally guaranteed right of privacy. Consequently, I am of the view that an award of KShs. 210,000 will be adequate compensation for the violation of the petitioners’ right to privacy.

35. In conclusion, having found that the petitioner and her children’s right to privacy were violated, I am inclined to allow the instant petition in the following terms:

a. A declaration is hereby issued that the publication of the petitioner’s photograph and that of the minors by the respondent is unlawful, unconstitutional and a violation of their fundamental rights and freedoms under Article 31 of the Constitution.

b. An order of compensation in the global sum of kshs. 210,000 being general damages to be distributed at kshs 70,000/- for each of the claimants/petitioners herein.

c. An order that the petitioner be paid the costs of this petition.

Dated, signed and delivered in open court at Nairobi this 9th day of January 2019.

W. A. OKWANY

JUDGE

In the presence of :-

Miss Gachomba for the petitioner

Mr. Imanyara for the respondents

Court Assistant – Kombo