



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

H.C.C.C. NO. 7 OF 2015

ANN NJOKI KUMENA PLAINTIFF

V E R S U S

KTDA AGENCY LTDDEFENDANT

JUDGMENT

1. The plaintiff filed a case claiming that the defendant had without her knowledge or consent unlawfully photographed her and used the photographs in its marketing brochure entitled KENYA TEAS: SPECIALITY TEAS and particularly in the insert brochure entitled KENYA TEAS: OURFILED: OUR PROCESS under the caption PLUCKING GREEN LEAF. That the defendant's conduct was unlawful and constitutes unjust enrichment of itself and unlawful interference with the plaintiff's economic interest.

2. In response, the defendant stated that the principles of the tort of unjust enrichment do not apply in this suit. That the plaintiff is not entitled to royalties in a photograph she does not have copyright to. That if the plaintiff is the subject of the photograph (which is denied) then the plaintiff acquiesced to the taking of the photograph and voluntarily posed for the same and has not suffered any loss/damage nor had her fundamental rights been infringed upon as alleged.

3. However, the defendant failed to comply with Order 7 Rule 5 and Order 11 of the Civil Procedure Rules 2010, they failed to file witness statements and list of documents and the court ordered that the matter proceed by way of formal proof. In that regard, the plaintiff's case was unchallenged.

The issues which arise for determination are:-

1. Whether the rights of the plaintiff were violated.
2. Whether she is entitled to damages.

4. In the plaintiff's authority of **Rukia Idris Barri v Mada Hotels Ltd [2013] eKLR**, the learned Judge referred to the South African case of **Angella Wells – Vs - Atoll media (PTY) Ltd & Another, Western Cape High Court Case No. 11961/2006** 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 sold 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.”

Jessica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others [2017] eKLR

In dealing with a similar case of photograph publication, the court stated the following;

From the above leading decisions on the subject, the key elements of a Claim for unlawful use of Name or image which a petitioner must establish to succeed in a case of this nature are:-

a. 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.

b. 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.

c. No Consent: The plaintiff must establish that he or she did not give permission for the offending use.

5. In this case, the plaintiff has proved that the defendant took a photograph of herself, without her consent and that the defendant used her photographs for commercial purposes that is, advertisement of its products. No compensation was paid.

As submitted, the plaintiff had a right to privacy under Section 70 (c) of the retired constitution which guaranteed her protection to privacy and deprivation of property without compensation.

The right is also guaranteed under Article 31 of the Constitution which provides that ***“every person has a right to privacy which includes the right not to have their person home or property searched and, their possession seized.....”***

Under the Article 40 the right to protection of the right to property is guaranteed.

Article 28 guarantees the right to have the human dignity respected.

The threshold for the claim is use of a plaintiff's attribute for some gain by the defendant. Such attribute includes appearance, name and other personal attributes.

The attribute must have been used for commercial gain or other purpose for the benefit of the defendant and to the detriment of the plaintiff who does not gain by the use of her attributes.

That is to say that the use of the attribute was not only unlawful but exploitative. The use of the attribute is without her consent.

This the plaintiff has established this threshold as her photograph was used without her consent for commercial purpose.

Plaintiff has a right to control how her image, name or likeness is used. If used for publicity by a 3rd party, her consent must be obtained.

The plaintiff stated that her photograph was used without her consent. The denials in the defence remains allegations which were not substantiated.

The plaintiff has proved that the defendant is liable to compensate her for using her photograph for commercial gain without her consent.

The plaintiff claims damages.

The award of damages is an exercise of judicial discretion which must be based on sound reason and principle.

The brochure which was produced in this court as exhibit was for advertisement of the defendant's products.

The photograph of the plaintiff was meant to confirm that the tea is picked from their plantations for the production of the quality tea being advertised.

This was done in violation of the rights of the plaintiff which are entrenched in the constitution. Where a right is violated and the culprit has gained from that violation, the person is entitled to damages.

The plaintiff's right to human dignity and privacy were violated.

Having considered the purpose for which the photograph was used which was for commercial purposes, a reasonable award ought to be given to the plaintiff. I find that an award of Ksh. 1,500,000 is reasonable in the circumstances.

In conclusion:

I find that the plaintiff has proved her claim against the defendant. I order as follows:-

- 1) The plaintiff is entitled to declaration that the defendant's conduct amounts to infringement of the plaintiff's right to privacy and protection from deprivation of property without compensation.
- 2) The plaintiff is entitled to damages.
- 3) I award the plaintiff Ksh.1,500,000/= general damages for the violation of her rights.
- 4) I award the plaintiff the costs of the suit and interests.

Dated at Kerugoya this 15th February 2019.

L. W. GITARI

JUDGE

15.2.19