



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO 343 OF 2016

**IN THE MATTER OF APPLICATION UNDER ARTICLE 165 (3), (A), (B), (4) OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF ARTICLE 28 & 53 (F) OF THE
CONSTITUTION OF THE CONSTITUTION OF KENYA**

AND

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

AND

**IN THE MATTER OF THE BETTING, LOTTERIES & GAMING ACT, CAP 131, LAWS OF
KENYA**

AND

THE CHILDREN'S ACT

AND

IN THE MATTER OF THE FOURTH SCHEDULE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF A CONSTITUTIONAL PETITION BY

N W R aka N A (SUING AS THE MOTHER AND NEXT FRIEND OF N.T.A;

A FEMALE MINOR.....1ST PETITIONER

J K O (SUING AS THE MOTHER AND NEXT FRIEND

OF T.O.O, A MALE MINOR.....2NDPETITIONER

VERSUS

GREEN SPORTS AFRICA LTD.....1STRESPONDENT

MCHEZA LIMITED.....2NDRESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....3RDRESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

AND

THE BETTING AND LICENSING BOARD.....INTERESTED PARTY

JUDGEMENT

The petitioners case

The petitioners case is that the first and second Respondents unlawfully and without the consent of the parents of N.T.A & T.O.O (minors) and in violation of Article 53 (d) of the constitution put up an advertisement by way of a Bill Board next to Unga House, Located along Woodvale Avenue, at Westlands, Nairobi County, bearing the images of the minors and promoting betting and gambling conducted by the second Respondent. The first and second Respondents are said to be engaged in gambling and regulated by the Interested Party.

The petitioners state that it is illegal to use minors or the images of minors to promote gambling, hence the erection of the Bill Boards complained of is illegal and that no payment was made for the said advertisement.

It is also alleged that the third Respondent has been paid substantial amounts of money to allow the said advertisements and that the first and second Respondents have commercially benefited from the said advertisements and that the first Respondent upon being confronted by the petitioners parents belatedly offered to pay a paltry Ksh. 10,000/= to N.T.A and offered nothing to T.O.O while the fourth Respondent is alleged to have failed to exercise control over the first and second Respondents.

The petitioners avers that they instituted these proceedings in exercise of their parental responsibility to *inter alia* protect the minors rights and that the actions complained of are illegal and violate their rights under the constitution.

First Respondents Response

The first Respondent filed grounds of opposition and a Replying affidavit on 26th September 2016. In its grounds of opposition, the first Respondent states *inter alia* that this court lacks jurisdiction in that the issues raised ought to be litigated in the children's court and that the petition does not raise a constitutional question and that the petitioners were aware that the minors took part in the photo shooting session and sports tournament organized by the first Respondent.

In the Replying affidavit it is averred that the first Respondent is a sporting organization and its main objective is to train youth in various sports activities with a view to bridging the gap between talent and opportunities through competitive sporting activities outside the school curriculum and that in recognition of the said objectives, the World Football Organization Federation of International Football Association (FIFA) approved the football tournament known as Gold Cup Edition as a forum for International Talent Identification in football activities. It also averred that the first Respondent sends letters to concerned

parents seeking for permission to allow their children to participate in the tournament as volunteers and that the photo session was conducted at Lavington Green Mall Shopping Centre within the proximity of the school with the knowledge of the petitioners and that the school approved the tournament to take place at the school grounds on 16th, 19th and 20th August 2016 respectively.

The first Respondent also denies that it personally knew the minors or even benefitted from the advertisement and insisted that the images were meant for advertisement and reiterated that the petitioners used to pick and drop the minors at the Lavington Shopping Centre, hence they were fully aware of the photo session and tournament.

Second Respondents Response

The second Respondent states that its name is Acumen Communications Ltd, but wrongfully sued as Mcheza Ltd. However, I invoke the provisions of Rule 5 (d) (i) & (ii) of The constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and order that Acumen Communications Limited be and is hereby substituted in these proceedings in place of the second Respondent and the court documents be deemed to be amended as appropriate and the case to proceed.

The second Respondent states that these proceedings ought to have been filed in the children's court and that this petition does not raise a constitutional question and denies that the first Respondent consulted it prior to erecting the Bill Boards in question nor was it aware of the bill boards until after this case was filed.

The third, fourth and the interested party did not file any Responses to the petition nor did they participate in these proceedings.

Petitioners' Advocates' submissions

The petitioners counsel submitted that at the material time the minors were aged below 18 years, and that the consent of the minors parents was not sought and obtained, and that the actions complained of constitutes a violation of the petitioners constitutional rights and also violates international conventions protecting children's rights.

First Respondents Advocates submissions

Counsel for the first Respondent submitted that the petitioners did not demonstrate how their rights were violated, that the images were not used for commercial gain and that the use of the images were not meant for commercial gain.

Second Respondents Advocates submissions

Counsel for the second Respondent submitted that this court lacks jurisdiction to entertain this case, and that it ought to have been filed at the children's court, and that the petition does not raise constitutional issues nor is there a cause of action against the second Respondent.

On the issue of Jurisdiction

A Court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court in *the matter of the Interim Independent Electoral Commission*,^[1] at paragraphs 29 and 30 discussed the issue of jurisdiction in the following manner; " *Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent.*" Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.^[2] In the words of Chief Justice Marshall of the U.S.A:-^[3]

"It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it

must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty.”

Article 165(1) of the Constitution vests vast powers in the High Court including the power to *determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and the jurisdiction ‘to hear any question respecting the interpretation of the Constitution. Article 23 (1) provides that 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.*

Article 22 (1) provides that "Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened." Article 22 (2) (a) provides that "In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by— (a) a person acting on behalf of another person who cannot act in their own name;

Article 23 (1) provides that "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."

Article 53 (1) (d) of the constitution provides that "Every child has the right—(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

From the above provisions, I have no doubt that this court is seized of the requisite jurisdiction to entertain this petition.

Whether the minors rights were violated

It is not disputed that images of the two minors were used in the Bill board in question. It is not disputed that at the time the images were used, the two minors were aged below 18 years, hence children within the definition under article 260 of the constitution and the children's act. There is nothing to show that the consent of the minors parents or guardians was sought and obtained. The petitioners case is that using the said images without the parents consent was illegal and a violation of the constitutional rights of the petitioners.

It is important to point out that the provisions of the Children's Act,[\[4\]](#) Article 53 of the constitution and international conventions guarantee the rights to children and any infringement is a breach of the statutory and constitutionally guaranteed rights of the minors.

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.[\[5\]](#)

Personality rights encompass the exclusive right of an individual to market, control and profit from the commercial use of his/her name, image, likeness and persona. The distinctive characteristics of one's image, likeness or persona include but are not limited to name, face, body or recognizable body part,

voice or voice impersonation, photograph, look-alike, signature phrase, paraphernalia or action, costume or personals signature.

Personality rights, generally speaking, consist of two types of rights, the right to privacy and the right of publicity. The right of privacy is the right to keep one's image and likeness from exploitation without permission or compensation and generally applies to members of the general public. The right of publicity is the exclusive right of an individual to market his or her image, likeness or persona for financial gain.

Misappropriation of Personality

The tort of misappropriation of personality was first introduced in Canada in the case of *Krouse v. Chrysler Canada*.^[6] The tort can be expressed by stating that every individual has an exclusive right to market, for financial gain, their personality, image and name, and that the law entitles an individual to protect that right, if it is invaded. The tort of misappropriation of personality can be invoked when all of the following four elements are met:-

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

Emerging case law has developed two torts that allow for an individual to seek damages for the use of their personal image: the "misappropriation of personality" and the "passing off" of personality. A clear illustration is the U.S. case of *Weller vs Associated Newspapers Limited*^[7] where a well-known musician Paul Weller brought a claim on behalf of three of his children in respect of photographs published by Associated Newspapers Limited ("ANL") on its MailOnline website on 21st October 2012. The photographs were taken by an unnamed photographer in Los Angeles, California. The photographs were of Paul Weller and the Claimants out shopping in the street and relaxing at a cafe on the edge of the street. The oldest child shown in the photographs was 16 years old and the other two children were 10 months old twins. Some of the photographs showed the faces of the Claimants. The article contained a description of the content of the photographs and of the activities being carried out by the Claimants with their father, but mis-described one of the Claimants – the 16 year old girl – as Paul Weller's wife. The article was removed from the MailOnline website on 22nd October 2012 due to this error in the story. The Claimants contended that the pictures of their faces should have been pixilated and brought an action for damages for misuse of private information and breach of the Data Protection Act, and an injunction.

In a land mark judgment, the court identified the following issues, namely:-

- i. Was there a reasonable expectation of privacy?*
- ii. If so, how should the balance be struck as between the Claimants' rights to privacy on the one hand and the Defendant's right to publish on the other?*
- iii. Did the publication amount to a breach of the law?*
- iv. What relief were the Claimants entitled to?*

The court^[8] considered the relevant legal principles^[9] and reached the following conclusions amongst

others, namely:-

- i. what the publisher knew, and ought to have known, was relevant to whether there was a reasonable expectation of privacy.*
- ii. the fact that it was lawful to take the photographs would be taken into account when assessing the legal tests in the case. Whether it was lawful to publish them did not determine either the first or second tests that had to be applied.*
- iii. the authorities establish that a person's image constitutes one of the chief attributes of his personality.*
- iv. when considering the rights of children in this area courts should accord a primacy of importance to their interests.*

The court held that there was a reasonable expectation of privacy. The Defendant knew that the photographs had been taken without consent, hence their publication was upsetting and embarrassing. The court concluded that the Claimants' rights under the constitution outweighed the Defendant's rights and that the right to privacy had been infringed and awarded the claimant damages. The judgment indicates the heightened protection afforded to the privacy rights of children.

The facts of the above case are strikingly similar to the case under consideration. The consent of the parents was not sought and obtained. The purported documents relied upon by the first Respondent to demonstrate that they usually seek parental consent is not signed by the minors parents nor is there evidence it was brought to their attention. The fact that he parents dropped the children to school or the venue for the sports cannot be deemed to constitute consent for using the images.

In my view, from the above leading decision on the subject, 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.*

From the material before me, there is absolutely nothing to demonstrate that the first Respondent sought and obtained the consent of the parents. By voluntarily posing for the photos, the children cannot be said to have consented for the simple reason that they lacked the requisite capacity to grant the consent on account of being minors.

A litigant bringing a misappropriation or right of publicity claim or a case of this nature must show that the defendant/Respondent used attributes of his or her identity that are protected by the law. Usually, this means showing that the defendant used the plaintiff's name or likeness. With regard to use of a name, it does not have to be a full or formal name, just something that is sufficient to identify the plaintiff. Using a well-known nickname can suffice.[\[10\]](#)

"Likeness" refers to a visual image of the plaintiff, whether in a photograph, drawing, caricature, or other visual presentation. The visual image need not precisely reproduce the plaintiff's appearance, or even show his or her face, so long as it is enough to evoke the plaintiff's identity in the eyes of the public, it will suffice.[\[11\]](#)

In all of these cases, the common rationale is that the attribute in question must be sufficient to identify the plaintiff and evoke their identity for the public. In the present case there is no dispute as to the identity of the minors. I find that the petitioners have proved their case against the first Respondent to the required standard in that the above elements have been sufficiently proved.

The second Respondent pleads that it only became aware of the Bill board after it was sued in these proceedings and that the first Respondent did not consult it prior to erecting the Bill boards. I find that no evidence was tendered to sufficiently demonstrate to the required standard that the second Respondent was aware or participated in taking the photographs or erecting the Bill boards in question. Similarly, I find no material before me to prove to the required standard a sustainable case against the third and fourth Respondents and the interested party.

Regarding whether or not this petition raises constitutional issues, it must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand the Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions.[\[12\]](#) The spirit of the constitution must preside and permeate the process of judicial interpretation and judicial discretion.[\[13\]](#)

The court should attach such meaning and interpretation that meets the purpose of guaranteeing *inter alia* constitutionalism and enjoyment of fundamental rights and freedoms.

In cases of violation of fundamental rights, the Court has to examine as to what factors the court should weigh while determining the constitutionality of the actions complained of. The court should examine the case in light of the provisions of the Constitution. When the constitutionality of an action is challenged on grounds that it infringes a fundamental right, what the court has to consider is the "*direct and inevitable effect*" of such actions. This would help the court in arriving at a more objective and justifiable approach bearing in mind that actions that amount to inhuman and degrading treatment are out rightly unconstitutional.

The claim before the court is for violation of fundamental rights under article 53 cited above. It also infringes on the petitioners constitutional right to privacy. As discussed above, having found that the elements for establishing a case of this nature have been proved, I find no difficulty concluding that the acts complained of violated the minors constitutional rights.

Damages

The petitioners claim damages as a result of said breach of fundamental rights of the minors. It is well settled that award of compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case.

On the quantum of damages, award of damages entails exercise of judicial discretion which should be

exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.^[14] The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the Courts. The following principles clearly emerged from decided cases;^[15]

- i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;*
- ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;*
- iii. This remedy would be available when it is the only practicable mode of redress available;*

Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed.^[16] When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.^[17]

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case.

It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. There is no medium of exchange or market for non-pecuniary losses and their monetary evaluation, it is a philosophical and policy exercise more than a legal or logical one.^[18] The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.

Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.

Considering the nature of the violations, the above legal principles and bearing in mind the fact that it may not be easy to quantify infringement of fundamental rights in a case of this nature, and doing the best I can, I find that an award of **Ksh. 750,000/=** to each of the minors would be reasonable in the circumstances. Accordingly, I enter judgement in favour of the minors, namely N.T.A and T.O.O. as follows:-

- i. A declaration** be and is hereby issued that the Fundamental Rights and Freedoms of the minors N.T.A and T.O.O. were violated by the first Respondents action of using their photographs in the Bill Board which was erected next to Unga House, Woodvale Avenue, Westlands, Nairobi County.*

ii. **A declaration** that the minors are entitled to damages as a consequence of the said violation.

iii. **That** judgement be and is hereby entered in favour of the minors against the first Respondent in the sum of **Ksh. 750,000/=** for **N.T.A** and **Ksh. 750,000/=** for **T.O.O** by way of general damages.

iv. **That** the above sums shall attract interests at court rates from date of filing suit until payment in full.

That the suit against the second, Third and Fourth Respondents and the Interested Party be and is hereby dismissed with no orders as to costs.

v. **That** the first Respondent do pay the costs of this Petition to the petitioners plus interests thereon at court rates.

Orders accordingly.

Signed, Dated, Delivered at Nairobi this **12th** day of **May** 2017

John M. Mativo

Judge

[1] Constitutional Application No. 2 of 2011 (unreported)

[2] Samuel Kamau Macharia v. Kenya Commercial Bank and Two others, Civ. Appl. No. 2 of 2011

[3] In *Cohens v. Virginia* 19 U.S. 264 (1821)

[4] Particularly sections 4 (2), 13, 18, 19, 22 and 76

[5] Von Hannover v. Germany (no. 2), Grand Chamber judgment of 7 February 2012, § 96

[6] {1974} 1 O.R. (2d) 225

[7] [2014] EWHC 1163 (QB), High Court (QBD) Judge Dingemans J, Date of Judgment 16 Apr 2014

[8] Mr Justice Dingemans

[9] Paragraphs [15]-[79]

[10] For instance, in *Faegre & Benson, LLP v. Purday*, 367 F. Supp. 2d 1238 (D. Minn. 2005), the court held that the defendant had misappropriated the plaintiff's name when he used the pseudonym that the plaintiff blogged under in the domain name for a website.

[11] The law protects other personal attributes or aspects of identity from unauthorized use as well. For example, courts have held that use of a celebrity's voice can violate the right of publicity. See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). One court held a defendant liable for using the slogan "Here's Johnny" as a brand name for portable toilets because it sufficiently evoked Johnny Carson's identity. See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983). In other examples, courts have held defendants liable for using a photograph of the plaintiff's race car in a television commercial, see *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), and creating a commercial featuring a robot decked out to resemble Vanna White and posing next to a

Wheel of Fortune game board, see [White v. Samsung Elec. Am., Inc.](#), 917 F.2d 1395 (9th Cir. 1992).

[12] See Mudholkar J in Sakal Papers v Union of India AIR 1962 SC 305 at p 311

[13] State vs Acheson {1991} 20 SA 805

[14] *Mbogo & Another vs Shah*{1968} EA 93

[15] V.K. Sircar, Compensation for Violation of Fundamental Rights, a new remedy in Public Law Distinct

from relief of damages in tort, <http://ijtr.nic.in/articles/art7.pdf>

[16] *Koigi Wamwere v Attorney General*{2015} eKLR

[17] *Attorney General v Ramanoop* [2005] UKPC 15, [2006] 1 AC 338

[18] As Dickson J said in *Andrews v Grand & Toy Alberta Ltd*(1978) 83 DLR (3d) 452, 475-476, (cited by this court in *Heil v Rankin* [2001] QB 272, 292, para 16)