

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. E673 OF 2024**

**MOJA EXPRESSWAY COMPANY .....****APPELLANT**  
**VERSUS**  
**CYRUS MWANIKI NDUNG’U.....****RESPONDENT**

**(An appeal arising from the determination, by the Data  
Commissioner Immaculate Kassait, on 15<sup>th</sup> May 2024, in  
ODPC Complaint No. 0264 of 2024)**

**JUDGMENT**

1. The claim, before the Office of the Data Protection Commissioner, had been initiated by the respondent, against the appellant, vide a letter, dated 7<sup>th</sup> December 2024. The respondent complained that the appellant, on or about 5<sup>th</sup> October 2023, illegally and unlawfully used his personal image on social media, for promotional purposes, despite he having left employment with the appellant, on 17<sup>th</sup> November 2022. He asserted that his data was violated or breached.
2. The appellant filed a response, vide a letter, dated 12<sup>th</sup> April 2024, conceding to having processed the personal data of the respondent, with his consent, for use in promotional activities, in line with his duties as a sales person, but contending that the respondent did not withdraw that oral consent, upon terminating the employment with the appellant. It was averred that there was mitigation, after the complaint was raised, in the form of deletion of the subject videos.
3. The Data Protection Commissioner determined the matter, on 15<sup>th</sup> May 2024, by finding and holding that a further consent, to continue using the data, after the resignation of

the respondent, from employment with the appellant, was necessary. As the image of the respondent had been used for commercial purposes, ostensibly to profit the appellant, the Data Protection Commissioner ordered compensation, at the rate of Kshs. 500,000.00.

4. The appellant was aggrieved, hence this appeal. The grounds revolve around whether consent had been obtained, and whether the award made by the Data Protection Commissioner, of Kshs. 500,000.00, was warranted.
5. Directions were taken, on 8<sup>th</sup> October 2024, for disposal of the appeal, by way of written submissions. Both sides have complied, for I have seen their respective submissions, which I have read and noted the arguments made.
6. The respondent was complaining about the use of his personal data, after he ceased to be an employee of the appellant. His argument was that he had ceased to work for the appellant, hence there was no foundation, for the appellant, to continue to use his image for its commercial activities, without his consent. He, apparently, had no issue with what happened to his data during the period of employment, and that then would mean he had consented, by conduct or otherwise, for use of that data, during that time.
7. The data had been captured within the context of employment, and once the employment relationship terminated, the basis, for the continued use of the data, was lost. I agree with the Data Protection Commissioner, that once the employment relationship terminated, which had been the basis for the use of the data, there was need to obtain a fresh consent, for the continued exploitation of the data, and the use of that material, without the fresh consent, amounted to a violation. See *Mind Quest Limited vs. Mwatha & 2 others* [2025] KEHC 3891 (KLR) (Mutuku, J).

8. On the compensation awarded, the appellant argues that the respondent did not plead nor prove damage or loss, arising or caused by the violation or contravention. My understanding, of the basis for the award, was that there was commercial exploitation of the image or data of the respondent, after the respondent had stopped working for the appellant. In the context of employment, that exploitation would have been remunerated, by salary or commission, as part of the employment terms. After termination of employment, the respondent was not being remunerated, for the continued exploitation of his data, for commercial purposes. The same was being exploited for free, which was unjust, and the Data Protection Commissioner was entitled to award compensation, for that exploitation. Perhaps an issue could be raised, with regard to assessment of that compensation, but the appellant has not addressed that, to fault the quantum awarded.
9. There is caselaw, for award of compensation in such cases. In *Kamande vs. Nation Media Group* [2022] KEHC 10167 (KLR) (Muchemi, J), where the facts were similar, for the respondent had published images of the appellant in several issues of its newspapers, without her consent, the court found and held that there was violation of privacy, and an award of Kshs. 1,500,000.00 was given.
10. The court, in *MWK & Another vs. Attorney General & 3 Others* [2017] eKLR [2017] KEHC 1476 (KLR) (Mativo, J), expressed that in cases of violation of personal data, the injury or loss is neither physical nor financial, and that presents special problems, for the judicial process. The award made, in compensation, would cover feelings of upset, frustration, worry, anxiety, mental distress, fear, guilt, anguish, humiliation, unhappiness, stress, depression, etc, which are not capable of objective proof or measurement in

monetary terms. The award made by the court, therefore, ought to be fair and reasonable.

11. I do not find, in the circumstances, and it has not been demonstrated, that the award of Kshs. 500,000.00, made by the Data Protection Commissioner, was unreasonable and unfair. Overall, I find no merit, in the appeal herein, and I, accordingly, dismiss it. The respondents shall have the costs. Orders accordingly.

**DELIVERED, VIA, DATED AND SIGNED IN CHAMBERS, AT  
BUSIA, THIS 18<sup>TH</sup> DAY OF NOVEMBER 2025.**

**W MUSYOKA  
JUDGE**

**Mr. Arthur Etyang, Court Assistant, Busia.**

**Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.**

**Ms. Azenga Alenga, Legal Researcher.**

**Advocates**

**Mr. Masila, instructed by Sina Law Advocates, Advocates for the appellant.**

**Mr. Muriithi, instructed by MM Muriithi & Company, Advocates for the respondent.**