

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
CONSTITUTIONAL PETITION NO. E001 OF 2023

JOSEPH KIAMA KIRAGU.....PETITIONER

VERSUS

CHUKA UNIVERSITY.....RESPONDENT

JUDGEMENT

1. The Petitioner filed the present Petition dated 18th January 2023 seeking the following orders reproduced verbatim: -

- i. That a declaration order be issued that the action of the Respondent infringes the Petitioner's rights, Article 28, 31 (c) and 40 of the Constitution and therefore, unlawful, unconstitutional, invalid and void *ab initio*.
- ii. That a declaration order be made that the Respondent used the Petitioner's image for commercial exploitation.

- iii. That a declaration order be made that the Petitioner was clearly identifiable in that Advertisement.
- iv. That a declaration order be made that there was no consent from the Petitioner for the usage of his image.
- v. That a declaration order be made that the Petitioner has suffered damages, both emotionally and financial damages due to the Respondent's action.
- vi. The Respondent be and is directed to bear the costs of this Petition.
- vii. This honourable court be pleased to issue such further or other orders as it may deem just and expedient for the ends of justice.

2. The Petition is premised on the grounds set out the face of the Petition and the Petitioner's supporting affidavit of even date.

3. The Petitioner stated that he was a student at Chuka University from the year 2012 to 2015 admitted under registration number BBSI/07186/12 where he undertook a course in Bachelor of Commerce and graduated on or about 14th November 2015.

4. He averred that on or about the year 2021, the Respondent uploaded his picture on their website without obtaining his consent. That as a result of the unauthorised use of his image, the legitimate expectation of his constitutional right to privacy has been breached by the Respondent. Further, that he was not compensated for the use of his photos subjecting him to economic exploitation for private gain by the Respondent. That the Respondent as a result, violated Articles 28 and 31 (c) of the Constitution which protect his right to privacy.

5. The Respondent filed a replying affidavit dated 7th October 2024 sworn by Stella K. Kaburia, the Senior Legal officer of the Respondent. She deposed that the Respondent is a public university having been issued with a Charter in the year 2013. That from the university records, the Petitioner was a student and graduated from the university in the year 2015. That from the website of the University, there was no trace of the Petitioner's photograph and his photograph has never been used on the website. She averred that the photograph exhibited by the Petitioner as "JKK 3" shows three people and it was not possible to determine who the Petitioner is. Further, it that was not possible to determine that the photograph was from the website and therefore it should not form part of the evidence.

6. The Respondent's senior legal officer stated that the persons in the photograph appear to have willingly posed for the photograph, and one of the persons in the photograph appear to have taken what is popularly known as "selfie." That it was therefore clear that the Petitioner used a photograph he had personally taken or was taken by his friend to malign the University. Further, that even if the Petitioner's image had been used by the university, the claim by the Petitioner cannot be the subject of a Constitutional Petition.
7. The Respondent also stated that Section 9 of the Data Protection Act provides for procedure for the grievance raised by the Petitioner. That the Petitioner claims his intellectual property rights have been infringed and a claim for breach of

intellectual property rights cannot form subject of a constitutional petition.

8. The Petition was canvassed by way of written submissions as directed by the court. The Petitioner filed written submissions dated 10th January 2025 and framed the following issues for determination: -

- i. Does this court have jurisdiction to handle this matter?
- ii. Have the Petitioner's constitutional rights under Articles 1,2, 28, 31 (c) ,40 (5), 165 (3) (a) (b), 4, 259 been infringed upon?
- iii. Whether the Petitioner is entitled to the reliefs sought.

9. The Respondent filed written submissions dated 4th March 2025. The Respondent framed the following issues for determination: -

- i. Whether the Petition offends the doctrine of avoidance in so far as the Petition raises a matter within the meaning of Section 56 of the Data Protection Act which lies within the exclusive jurisdiction of the Data Commissioner?
- ii. Whether the Petition is premature and offends the doctrine of exhaustion as the honourable court would only be an appellate forum within Section 64 of the Data Protection Act.
- iii. Whether the Respondent used the Petitioner's image and if so, whether the Petitioner's rights were violated?
- iv. Whether the affidavit sworn by the Petitioner on 13th December 2024, offends the Oaths and Statutory Declarations Act.
- v. Whether the Petitioner is entitled to general damages.
- vi. Who should bear the costs of the Petition.

Analysis and determination

10. From the pleadings and the material placed before me, the following issues arise for my determination:-

- i. Whether this Court has jurisdiction to hear and determine the Petition in light of the provisions of the *Data Protection Act*, particularly Sections 56 and 64, and the doctrines of avoidance and exhaustion.
- ii. Whether the Respondent used the Petitioner's image as alleged, and if so, whether such use was without the Petitioner's consent.
- iii. Whether the alleged use of the Petitioner's image, if proved, violated the Petitioner's constitutional rights under Articles 28, 31(c), and 40 of the Constitution.

- iv. Whether the alleged violation of rights, if established, entitles the Petitioner to the reliefs sought, including declarations and general damages.
- v. Who should bear the costs of the Petition.

11. I will begin my analysis by addressing the issue of jurisdiction. It is trite that jurisdiction is everything and once a court realizes it has no jurisdiction, it must down its tools immediately. This principle was well elaborated in the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where the Court of Appeal held that: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a

continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

12. Before delving further, I observe that the Respondent had earlier raised a preliminary objection (P.O) on the jurisdiction of the court in this Petition. The Respondents had contended that the Petition did not meet the threshold of a Petition for lack of reasonable precision, and; that the dispute could be adjudicated in other for a like a normal suit. The court (Gitari J.) ruled on 5th March 2024, dismissing the Respondent’s (P.O).

13. In raising the issue of jurisdiction once again, in the name of the data protection avenue, the Respondent treaded on hallowed grounds of *res judicata*. They were bound to raise all issues

related to jurisdiction in the Preliminary Objection. Once the court ruled on jurisdiction, that position remained valid unless or until set aside, which was not the case here.

14. The above notwithstanding, I proceed to examine the doctrine of exhaustion raised by the Respondent. The Respondent submitted that Section 56 of the Data Protection Act prescribes the process for data complainants which the Petitioner ought to have followed before filing the instant Petition. That this court's jurisdiction can only be invoked as an appellate forum.

15. The Respondent further relied on the case of **Lawrence M' Impwi Kirima v Solar Panda Company & Another [2024] KEHC 11499 (KLR)** where the court held that: -

“Since the enactment of the Data Protection Act, the jurisdiction of the

High Court to remedy breaches of the constitutional right to privacy under Article 31 must be on the principle of the constitutional avoidance and doctrine of exhaustion, be last resort and appellate forum in terms of the statute or where it is demonstrated that the scheme of process and remedy under the Act is not such as to afford quality redress or appropriate relief.”

16. The Respondent relied on **Geoffrey Muthinja & Anor v Samuel Muguna Henry & Others [2015] eKLR.**

17. On his part, the Petitioner submitted that the Petition stipulates specific provisions of the Constitution and in which the Petitioner’s rights have been violated. That canvassing the matter by way of a Constitutional Petition was

procedurally correct. Further, that the Petitioner seeks orders for a declaration of violation of his right to privacy which is protected under the Constitution and the High Court has inherent jurisdiction to protect the fundamental rights of a person without procedural restrictions. He relied on the case of **Trusted Society of Human Rights Alliance V AG & Others [2012] eKLR** where it was stated that the High Court is vested with the responsibility to protect and enforce the Constitution.

18. It is indeed settled that where legislation establishes a dispute resolution framework, such mechanism must, as a general rule, be exhausted before approaching the High Court. This principle was underscored by the Court of Appeal in **Geoffrey Muthinja & Another v Samuel Muguna Henry & Others [2015]**

eKLR cited to me by the Respondent, where the court emphasized that courts should be fora of last resort and that litigants must first utilize the available statutory mechanisms.

19. Similarly, in **Lawrence M’Impwi Kirima v Solar Panda Company & Another [2024] KEHC 11499 (KLR)**, Muriithi J. in interpreting the Data Protection Act, held that:

“Since the enactment of the Data Protection Act, the jurisdiction of the High Court to remedy breaches of the constitutional right to privacy under Article 31 must, on the principle of constitutional avoidance and exhaustion, be exercised as a last resort or appellate forum, except where it is shown that the statutory mechanism cannot afford effective redress.”

20. The doctrine of constitutional avoidance also requires that constitutional interpretation be reserved for cases where alternative legal remedies are inadequate. This was clearly stated in **Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others [2014] eKLR**, where the Supreme Court held that: -

“The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as

follows [at paragraph 59]: I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

Similarly, the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).

21. However, the doctrine of exhaustion is not absolute. In **Republic v Independent Electoral and Boundaries Commission (IEBC) ex parte**

National Super Alliance (NASA) Kenya

[2017] eKLR, the court stated as follows: -

“We have read these cases carefully and considered the salutary decisional rule of law they announce. It is important to pay attention to the rationale and policy justification for the doctrine in order to determine its outer limits. As the High Court announced in the in the Matter of the Mui Coal Basin Local Community [2015] eKLR, the rationale is thus: The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while

creating what Supreme Court Justice J.B. Ojwang’ has felicitously called an “Ascendant Judiciary.” The Constitution does not create an Imperial Judiciary zealously fueled by tenets of legal centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution - including statutory regimes - in certain cases. It expressly envisages that some of these regimes will be mainstreamed (and, hence, at certain prudential points intersect with the Judicial system) while

some will remain parallel to the Judicial system.

46. What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved - including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion

requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.”

22. In this Petition, the Petitioner alleges a violation of his constitutional rights under Articles 28, 31(c), and 40 of the Constitution, specifically the right to privacy, dignity, and property (image rights). While the Data Protection Act provides a framework for complaints regarding personal data misuse, it does not oust the constitutional jurisdiction of this Court under **Article 165(3)(b)** to determine alleged violations of fundamental rights.

23. The pleadings in this case shows that the Petitioner’s claim goes beyond mere misuse of his data. He alleges unauthorized commercial exploitation of his image, raising questions of

human dignity, privacy, and economic rights. Such questions in my view, fall within the purview of constitutional adjudication.

24. Consequently, I find that this Court is properly clothed with jurisdiction to hear and determine this Petition, the Petitioner having alleged violation of constitutional rights that transcend mere statutory breaches.

ii. Whether the Respondent used the Petitioner's image without his consent

25. The Petitioner claims that the Respondent, a public university, uploaded his image on its website without his consent, constituting an invasion of privacy and economic exploitation. The Respondent denies the allegation, contending that:

- i. The alleged photograph ("JKK 3") was not sourced from its website;

- ii. The individuals in the image are not identifiable;
- iii. The image could have been a personal photograph or “selfie” taken voluntarily.

26. The evidential burden under Sections 107 and 109 of the Evidence Act lies upon the person who asserts a fact to prove that fact exists. Thus, the Petitioner must establish, on a balance of probabilities, that his image was indeed used by the Respondent; and that such use was without his consent.

27. I have looked at the Petitioner’s exhibit JKK3 annexed to the Petition. There are three individuals in the image, two men and one woman. There is no identification of the three individuals to show the court that the Petitioner was one of the two men. The image appears like a screen shot of the

Respondent's website or to have been extracted from the Respondent's website. However, to the extent that the same was photographic evidence, there was need to produce an accompanying authenticating certificate as required under section 106B of the Evidence Act.

28. It is my finding therefore that the Petitioner has not produced sufficient proof that that he was the one appearing in the image and that the image in question was extracted from the Respondent's official website or media publication. The mere existence of a photograph depicting him with others, without source verification, falls short of proving publication by the Respondent.

29. On the evidence before me, I find that the Petitioner has not discharged the burden of proof to show that the Respondent indeed used his

image or that such use if proven was without his consent.

(iii) Whether the alleged use, if proved, violated the Petitioner's rights under Articles 28, 31(c), and 40 of the Constitution.

30. Article 28 guarantees the right to human dignity, while Article 31(c) protects the privacy of a person, including the right not to have information relating to one's private affairs unnecessarily revealed. Article 40(5) protects the right to property, which can be interpreted to extend to one's image and likeness where commercially exploited.

31. The use of a person's image for commercial or promotional purposes without consent can constitute a violation of the right to privacy and property. However, as earlier found, the Petitioner has not demonstrated that his image was used by

the Respondent. The absence of such proof means there can be no finding of constitutional infringement.

iv. Whether the Petitioner is entitled to the reliefs sought

32. The Petitioner sought a raft of declarations as enumerated at the beginning of this judgement. Those declarations were however dependent on the court making positive findings on the alleged violations. It follows that where a constitutional violation is not established, the court cannot grant declaratory or compensatory relief.

33. While I acknowledge the importance of protecting personal images from misuse, constitutional remedies cannot issue in the absence of credible evidence of violation. The claim for damages must fail for want of proof of

violation. I must also point out that the Petitioner did not seek an award of damages but only sought a declaration and may not have benefitted from damages if the Petition succeeded.

34. In the final analysis, it is my finding that the Petition lacks merit and is dismissed.

v. Who should bear the costs of the Petition

35. On costs, I have considered that the Petitioner set out to assert his constitutional rights. I exercise my discretion not to award costs to the Respondent. Each party shall therefore bear their costs.

36. The Petition is thus dismissed without costs.

Orders accordingly,

**Judgement delivered, dated and signed at
Chuka this 17th day of March, 2026.**

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R. LAGAT-KORIR
JUDGE

**Judgement delivered in presence of Mr Ngige
for the Petitioner, and Mr. Kamwaro for the
Respondent. (Muluvi Court Assistant.)**

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