**Kipchirchir v Hornbill Rongai Limited (Civil Case E017 of 2022)**
**[2026] KEHC 5928 (KLR) (30 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 5928 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAJIADO**

**CIVIL CASE E017 OF 2022**

**CW MEOLI, J**

**APRIL 30, 2026**

**BETWEEN**

**KIMUTAI JINARO KIPCHIRCHIR ..... PLAINTIFF**

**AND**

**THE HORNBILL RONGAI LIMITED ..... DEFENDANT**

## JUDGMENT

1. By his plaint dated 28th September, 2022 Kimutai Jinaro Kipchirchir (hereafter the Plaintiff) sued the The Hornbill Rongai Limited, a hospitality and entertainment business operating a night club within Kajiado County known as ''Hornbill Rongai" (hereafter the Defendant) seeking inter alia damages for infringement of his rights to privacy, intellectual property, and reputation, arising from the Defendant's publication of the Plaintiff's image and accompanying statements on social media without his consent. The Plaintiff avers that the said publication was defamatory, commercially exploitative, and injurious to his standing as an advocate of the High Court of Kenya.

2. The Plaintiff averred that on or about 11th June 2022, he attended a birthday party at the Defendant's premises; that the event was private and that any photographs taken on the occasion were understood to be for private use; that subsequently, the Plaintiff discovered that the Defendant had posted his image on its official Instagram page, which had a significant following, accompanied by a caption suggesting, inter alia, that he was "crazy," irresponsible, and given to engaging in midweek partying.

3. He further averred that the said publication was made without his knowledge or consent and constituted an unauthorized use of his image for commercial advertising. While the statements accompanying the image were false, malicious, and defamatory in their ordinary meaning, portraying him as irresponsible, lacking professionalism, and indulging in excessive partying and alcohol consumption.

4. He further averred that the publication infringed upon his right to privacy by exposing his private recreational activities, and violated his intellectual property and personality rights by using his image for the Defendant's commercial gain without authorization. Causing substantial injury to his reputation, particularly as a legal practitioner, and leading to ridicule, loss of professional standing, strained personal relationships, and mental distress.

5. The Plaintiff therefore prayed for judgment against the Defendant by way of declaratory orders, a permanent injunction to restrain the Defendant from publishing and/or using the Plaintiff's image and likeness in advertisement or promotion of its business in any way without the Plaintiff's consent, general damages and costs.

6. The claim was denied by the Defendant by their defence dated 26th November 2022. Therein, the Defendant denied all the allegations of fact and law contained in the plaint, save for matters expressly admitted, and put the Plaintiff to strict proof thereof. Further, it was pleaded that the Defendant was a stranger to certain averments in the plaint and required strict proof in that regard.

7. More specifically, the Defendant averred that the Plaintiff voluntarily entered and remained within its premises, being fully aware of the nature of the establishment as an entertainment venue; that at no time was the Plaintiff coerced, compelled, or obligated to participate in any activity against his will; and that the Plaintiff, together with his companions, actively requested to be photographed and consented to the taking of photographs, including their use at the Defendant's discretion.

8. The Defendant further averring that the use of photography for marketing purposes is a standard and industry practice, and that notices to this effect were displayed within its premises. Hence the Plaintiff knew or ought to have known that the photographs taken could be used for promotional purposes, including on social media platforms. The Defendant stating concerning the disputed caption that it constituted ordinary language commonly used in entertainment and youth culture, and that the interpretation thereof pleaded by the Plaintiff was exaggerated, unreasonable, and devoid of context.

9. The Defendant denied that any agreement existed restricting the use of the photographs and further denied all allegations relating to infringement of privacy or copyright. And further averred that the plaint did not disclose any actionable claim, as no material had been presented to demonstrate violation of the Plaintiff's rights. The Defendant characterized the suit as an abuse of the court process aimed at unjust enrichment, as no prior demand or notice of intention to sue had been issued, and prayed that the Plaintiff's suit be dismissed with costs.

10. The trial was conducted before Mutuku J between 14th November 2023 and 8th April 2024. A total of four witnesses testified, with two called on either side.

11. The Plaintiff's case was as follows. The Plaintiff testifying as PW1 adopted his witness statement dated 28th September, 2022 as his evidence- in -chief. The statement was to the effect that he was an advocate of the High Court of Kenya who has earned a good reputation through hard work, who espouses high professionalism, leadership and family values as well as respect for public and private rights, and a teetotaler, due to his Christian faith.

12. On the material date, at the invitation of his friend Enock Welemba (PW2), he had attended the latter's birthday party hosted at the Defendant's club. Only to learn a few weeks later about his photograph published on the Defendant's Instagram page with over 11,000 followers, on 15th June 2022, with the caption complained of. Having confirmed that PW2 had not authorised the publication of the photographs, he was forced to field many questions and inquiries from his clients and friends who had seen the photograph. He asserted that in his understanding any photographs taken on the birthday

occasion, were for private consumption but had been used for advertisement purposes. He described the photographs as not only defamatory, but also representing an infringement upon his rights to privacy and copyright.

13. During cross-examination he confirmed that the Defendant did not invite him to their night club and that prior to the date of the party he did not know that there was a photographer at the club. Admitting further that he was not compelled to stay at the club after he became aware of the photographer, and posing for the photographs with 5 others at the event which was a birthday party for a friend, who did not file any suit. It was his case that the photograph of himself and six others dated 25.8.2022, while bearing a caption that did not specifically refer to him, did so by implication, as the caption appeared underneath his image.

14. While agreeing that there were other photographs of different people on the nightclub's page, he stressed that the image marked "plaintiff" related to him and that the photographs were uploaded a few days after 11.6.2022. He stated that his demand letter dated 21.9.2022 was served upon the Defendant via email. He asserted that the photograph in question referenced at paragraph 11 of his plaint damaged his reputation as an advocate of the High Court of Kenya, by portraying him as crazy and irresponsible.

15. Further that he was under the impression that the photographs taken would not be used in public, while confirming the presence of notices concerning photography in the club such as shown in the photographs filed in the case by the Defendant. However, he admitted that he had not filed a complaint with the Office of the Data Protection Commissioner (ODPC).

16. In re-examination, the Plaintiff said that he did not know the photographer, and only became aware of the club's photograph publication disclaimer notice after he saw the Defendant's documents, which notice in any event appeared blurry and hard to read.

17. The Plaintiff's witness was Enock Welemba (PW2) who equally adopted as his evidence- in -chief, his witness statement dated 28th September, 2022. Therein he had stated that he was a friend of the Plaintiff and had invited the Plaintiff to his birthday party held on 11th June 2022, and that he had later learned that the Defendant published a photograph taken at the event on social media without seeking his consent.

18. During cross-examination, PW2 confirmed that his party did not request the Defendant's photographer to take photographs, and that he had become aware of the photographs after being alerted by the Plaintiff, but did not complain to any authority or demand that the photographs be taken down. And confirming the presence of alcohol in the photographs, he admitted that none showed anyone drinking or being drunk. Stating that he had not attended the birthday party at the invitation of the Defendant, he said that despite noticing photographs being taken, he had willingly remained at the premises.

19. On behalf of the Defendant, Obed Irungu testifying as DW1 described himself as a director of the Defendant before adopting his witness statement dated 26.1.2022 as his evidence-in-chief. Which was principally to the effect that the Plaintiff voluntarily visited and remained in the club on the material night; that he requested the club photographer to take his picture alongside his company and authorised its use at the club's discretion; that the use of photography is a standard marketing practice in the entertainment business and notices to this effect were displayed at the club; that the caption accompanying the photograph complained of did not specifically refer to the Plaintiff, and in any event the words therein were common lingo in entertainment and youth culture; and that the Plaintiff's claim was without basis as the photograph in question was neither defamatory of him nor in violation of his privacy or dignity.

20. Adding that the Defendant operated the club as a bar and restaurant. He cited notices displayed at the entrance to the premises, to the effect that photographs taken at the club would be displayed on the Defendant's social media pages and nowhere else. He produced his bundle of documents dated 14.6.2023 as D Exh. 1, and disputing that the videos and photographs in controversy were taken without consent, stated that the official club photographer Peterson Nderi Wanyoike (DW2) wore a name tag to that effect.

21. During cross-examination DW1 stated that the photographs taken at the club were intended for marketing purposes; that an extra measure was taken to obtain consent by customers that they are comfortable with their photographs being taken, but not for consent to place the photographs on the Defendant's social media pages or accompanying captions; that the Defendant did not have a club photography policy; and its photographers were registered businesses working on contract basis and were not the club's employees.

22. In re-examination he reiterated that obtaining consent for the taking of photographs was an extra measure to augment what he termed as sufficient disclaimer notices on the taking of photographs displayed at the premises.

23. Adopting his written statement dated 14.06.2023 as his evidence-in-chief, DW2 stated that he was the official photographer at the club on the material date; that his duty was to take and publish photographs at the club for use in marketing the club on social media; that there were notices displayed at the entrance to the club to that effect and that any patron in the premises was deemed to have consented to such photography and publication; that on the material date the Plaintiff and others invited him to take their photograph, and having been informed that the photographs taken would be published and used for marketing purposes, consented and allowed him to proceed and photograph them; and that the Plaintiff mobilized his company to have the photograph taken. He reiterated that the Plaintiff invited him to take photographs in question, and having done so, notified the group of the fact.

24. DW2 stated under cross-examination that he was not an employee of the Defendant but was contracted by the Defendant to take photographs which were thereafter posted in the Defendant's social media pages. Adding that he informed the Plaintiff as much, although there was no written consent. He however stated that he was responsible for generating captions accompanying the photographs posted on social media.

25. In re- examination he reiterated that he obtained consent to take the photograph having informed the plaintiff of the ultimate purpose.

26. At the close of the hearing, directions were given for filing of submissions. On his part, the Plaintiff filed submissions dated 19th July, 2025, identifying four issues for determination as follows.

27. On the first question whether the Defendant obtained consent in respect of the publication of the Plaintiff's image, it was submitted that no consent was given, a fact admitted by the DW2 in cross-examination. Terming the Defendant's general notices that the premises was a photography area as insufficient, inconspicuous, and incapable of meeting the legal threshold for consent. The Plaintiff here citing the definition of consent in Section 2 of the Data Protection Act.

28. Further citing requirements in Section 29 of the Data Protection Act, the Plaintiff contended that none of these statutory requirements were complied with, and that the burden of proof of consent lay with the Defendant. The Plaintiff thus asserted that the publication was unlawful ab initio for want of consent. In support of these submissions, the Plaintiff relied on Wanjiru v Machakos University (2022) eKLR , and T.O.S v Maseno University & 3 Others [2016] eKLR.

29. Regarding the second issue, namely, whether the Plaintiff's rights to privacy and human dignity under Articles 28 and 31(c) of *the Constitution* were violated, the Plaintiff argued that the unauthorized publication of his image in a commercial context exposed his private affairs and subjected him to public scrutiny, thereby infringing upon both his dignity and privacy. Citing in support the case of Jessica Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR for the principle that the individual's right of publicity includes the right of such individual to control the commercial use of his or her name, image likeness. And that protection of individual privacy is part and parcel of autonomous and independent life, whereas intrusion upon private life was demeaning.

30. Contending that the Defendant's conduct demeaned his dignity and damaged his reputation as an Advocate, the Plaintiff urged an award of Kshs. 5,000,000 as damages for violation of his rights to privacy and human dignity, relying inter alia on Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited [2021] eKLR where Kshs. 2,000,000 was awarded for similar violations.

31. With regard to the third issue, that is, whether the Plaintiff's personality rights and rights to publicity were infringed, the Plaintiff reiterated evidence on the unauthorized commercial use of his image, and relied on the duo nature of personality rights, namely the rights to privacy and to publicity over which an individual has control, and more particularly the commercialization of his persona, as stated in Jessica Clarise Wanjiru v Davinci Aesthetics (supra) .

32. Citing N W R & Another v Green Sports Africa Ltd & 4 Others [2017] eKLR and Wanjiru v Machakos University (2022) eKLR, the Plaintiff submitted that all the elements of unlawful use had been demonstrated, namely, that the Defendant not only used his image (a protected attribute), for commercial gain (advertising its business), but did so without consent. Which unauthorized commercial exploitation of image amounts to infringement of personality and publicity rights, for which the Plaintiff urged an award of Kshs. 1,000,000/- as damages.

33. The fourth issue was whether the Defendant's publication was defamatory. On this score, the Plaintiff asserted that the publication, particularly the caption accompanying his image, conveyed a defamatory meaning capable of lowering his reputation in the eyes of right-thinking members of society. Here, reiterating the principle in Halsbury's Laws of England 4th Edition Vol. 28 that in ''deciding whether or not a statement is defamatory... the test is whether... a reasonable man... would be likely to understand them in a defamatory sense." Moreover, the offending photograph with caption fall within the definition of "words" under the *Defamation Act*, which includes visual images.

34. That the caption describing the Plaintiff as "crazy" exposed him to ridicule and injured his reputation, particularly in his profession as an Advocate. Reliance being placed on C A M v Royal Media Services Limited [2013] eKLR, where the Court of Appeal held each case must be considered on its own facts, and that the court had wide latitude to consider factors such as gravity circulation, subjective effect and conduct of the Defendant.

35. Other cases cited include Benaiah Sisungo v Tom Alwaka [2007] eKLR, Ben Kangangi v Anerlisa Muigai [2022] eKLR, Francis Oyatsi v Wachira Waruru (2010) eKLR, the Plaintiff concluding by asking the court to consider awarding him Kshs. 4,500,000/- as general damages, and Kshs. 500,000/- as punitive/exemplary damages for defamation and the costs of the suit.

36. The Defendant submissions are dated 22nd October, 2024 and address three issues, namely, whether the Defendant breached the Plaintiff's right to privacy, whether the Defendant infringed the Plaintiff's copyright, and whether the Defendant defamed the Plaintiff through the impugned publication.

37. On the first question whether the Defendant breached the Plaintiff's right to privacy, the Defendant adopted the position that the claim is premature and improperly before the Court. Here invoking the

doctrine of exhaustion, the Defendant argued that the enforcement of individual rights to protection of dignity and privacy under Articles 28 and 31 of *the Constitution*, in the context of data processing is specifically governed by the Data Protection Act.

38. And that pursuant to Sections 8, 9, 56, and 65 of the Act, the ODPC is vested with the mandate to receive complaints, investigate breaches, and facilitate dispute resolution through mechanisms such as conciliation and mediation. And that the Plaintiff having failed to lodge a complaint with the ODPC in the first instance, avoided the statutory dispute resolution framework. In support of this position, the Defendant cites Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another [2015] eKLR and Speaker of the National Assembly v Karume [1992] KLR, emphasizing that where a statute provides a clear procedure for redress, it must be strictly followed.

39. Also cited was the Court of Appeal decision in Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR, where the Court observed that it was ''imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before resort to Courts of law... The exhaustion doctrine is a sound one...'' Accordingly, the Defendant contended that this Court lacks jurisdiction until the statutory mechanisms have been exhausted, and no exceptional circumstances have been demonstrated to warrant exemption from the application of the doctrine of exhaustion.

40. Regarding whether the Plaintiff's copyright was infringed, the Defendant took the position that the Plaintiff failed to establish ownership of copyright under the *Copyright Act*. Reference being made to Sections 22, 31, and 35 of the Act, which vest copyright in the author of a work unless created under specific contractual arrangements. The Defendant therefore arguing that the photograph in question was taken by its photographer in the course of employment, and therefore copyright vests in the Defendant, not the Plaintiff, and that the Plaintiff, being merely the subject of the photograph, could not claim proprietary rights.

41. Asserting that the legal threshold for infringement includes proof of ownership, unauthorized use, and violation of exclusive rights, the Defendant asserted that none of these elements have been demonstrated. Hence the claim based on copyright infringement is unsustainable, reliance being placed on Wangeci Waweru Mwende v Tecno Mobile Limited; Rogers Otuma t/a Ojwok Photograph [2020] eKLR, for the proposition that with regard to photographs, only the originator of visual art, and not the owner of an image, could bring a successful claim for infringement of copyright.

42. Concerning the third issue whether the impugned photograph was defamatory of the Plaintiff, the Defendant submitted that the Plaintiff failed to establish the essential elements of the tort of defamation. Namely, that the statement was defamatory, referred to the Plaintiff, and was published to a third party. Quoting the nature of a defamatory statement as defined in Halsbury's Laws of England 4th Edition Vol. 28 and Selina Patani & Another v Dhiranji V. Patani [2019] eKLR, that defamation concerns injury to reputation in the estimation of right-thinking members of society. Also cited was the case of Wycliffe A. Swanya v Toyota East Africa Ltd & Another, HCCC No. 1062 of 2005, which outlines the ingredients of defamation.

43. The Defendant contending further that the caption accompanying the photograph was merely a playful and non-malicious expression common in social settings, did not specifically refer to the Plaintiff, and could not possibly lower the Plaintiff's reputation. Additionally, the Defendant underscored the absence of evidence from third parties demonstrating reputational harm, once more quoting Selina Patani v Dhiranji V. Patani (supra) to the effect that a person's own view about his/her reputation is not material in a claim for defamation.

44. The Defendant also invoked Section 13(1) of the *Defamation Act* concerning the defence of unintentional defamation, citing JMK v Standard Digital & Another [2020] eKLR, where the Court held that such a defence is available where the publisher did not know the material was defamatory and acted without negligence. The Defendant reiterating that the publication complained of was innocent, not directed at the Plaintiff personally, and falls within permissible social expression.

45. In conclusion, the Defendant submitted that the Plaintiff's claim fails on all fronts. Reiterating that the claim based on right to privacy is barred by the doctrine of exhaustion under the Data Protection Act and Article 159 of *the Constitution*; the copyright claim collapses for lack of ownership under the *Copyright Act*; and the defamation claim fails for want of proof of defamatory meaning, reference, and reputational harm. The Defendant therefore urged the Court to dismiss the suit with costs.

**Analysis and Determination**

46. The court has considered the pleadings, rival the evidence on record, and the submissions of the parties. There is no dispute that the Plaintiff was among persons attending PW2's birthday party held at the Defendant's club on 11th June 2022 and that in the course of the event, photographs including the Plaintiff were taken and later published by the Defendant on its social media pages, specifically Instagram on 15.06.2022. The court must determine whether the Plaintiff has proved that the said actions violated his rights to privacy and human dignity and whether the publication was defamatory of him.

47. The court proposes to consider the last issue first. But before that, to address the preliminary issue raised by the Defendant, which goes to the jurisdiction of this Court, namely, whether the Plaintiff's claim is caught up by the doctrine of exhaustion, due to the Plaintiff's failure to first invoke the dispute resolution mechanisms established under the Data Protection Act.

48. The Defendant's objection taken in closing submissions, rather than at the earliest opportunity before the trial, is that the gravamen of the Plaintiff's complaint concerns the processing and use of personal data, namely, his image, and therefore falls within the mandate of the ODPC. Pursuant to Sections 8, 9, 56, and 65 of the Data Protection Act, which vest in the Commissioner with power to receive complaints, conduct investigations, and facilitate resolution through conciliation or mediation.

49. The Defendant relying here on the established principle in Speaker of the National Assembly v Karume [1992] KLR and Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR, to the effect that where a statute provides a clear procedure for redress, that procedure ought to be strictly followed.

50. The Plaintiff admitted during the hearing that he had not lodged any complaint before the ODPC. The doctrine of exhaustion is now firmly entrenched in Kenyan jurisprudence and is underpinned by Article 159(2)(c) of *the Constitution*. However, courts do make exceptions, particularly where the alternative forum is inadequate or ineffective; where a cause raises pure constitutional questions; where there is a risk of violation of fundamental rights and freedoms that requires immediate judicial intervention; or where the statutory body lacks jurisdiction to grant the relief sought.

51. While the present dispute undoubtedly relates to the processing of personal data within the meaning of the Data Protection Act, it also transcends that statutory framework. The Plaintiff has pleaded violations of constitutional rights under Articles 28 and 31, infringement of privacy and publicity rights, the right to human dignity, as well as defamation. Thus, the Plaintiff's claims invoke both the Court's civil and constitutional jurisdiction.

52. Moreover, the remedies sought by the Plaintiff include declarations with respect to alleged constitutional violations, general damages for defamation, aggravated and exemplary damages, and injunctive relief. Looking at Part VIII, the Enforcement Section of the Data Protection Act, it is apparent that for the purposes of the dispute before the court, the ODPC is bereft of the requisite jurisdiction to entertain this mixed-grill claim, or to grant the full spectrum of reliefs sought therein.

53. The Court is therefore persuaded that this matter falls within the recognized exceptions to the doctrine of exhaustion. While it may have been more desirable and appropriate for the Plaintiff to initiate a complaint with the ODPC regarding some of the aspects of his complaint, the failure is not in the circumstances of this case a bar to his suit before this court which is properly clothed with jurisdiction to hear and determine the matter in its entirety.

54. Returning to the merits of the case, the Plaintiff's claim is based on the photograph admittedly taken by DW2 during the birthday party and published by the Defendant on social media for purposes of marketing the club. The photograph contains images of several persons including the Plaintiff who being all smiles, are apparently posing for the photograph. Beneath it is a caption that reads ''hornbillrongai Relationship advice: Make sure you're the crazy one (emoji) Then come join us for Midweek madness (emoji) ''.

55. In addition to being aggrieved by the publication of the photograph, the Plaintiff pleaded that the above statement was false and defamatory in its ordinary meaning and portrayed him as crazy; a party animal who parties and drinks himself silly midweek; and irresponsible inter alia. And that the post injured his reputation as a hardworking and respected advocate of the High Court of Kenya. Section 2 of the *Defamation Act* defines the term "'words"' to include ''pictures, visual images, gestures and other methods of signifying meaning".

56. The applicable law as to the burden of proof is spelt out in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
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> The above provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
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> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

57. The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

> " Whereas under Section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and

substantially asserts the affirmative of the issue, Section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

58. Much earlier, the same court in Karugi & Another v Kabiya & 3 Others [1987]KLR 347 had observed that:-

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

59. 19. Concerning the rationale underlying the law of defamation, the Court of Appeal had this to say in Musikari Kombo v Royal Media Services Limited [2018] eKLR:

> " The law of defamation is concerned with the protection of a person's reputation. Patrick O'Callaghan in the Common Law Series: The Law of Tort at paragraph 25.1 expressed himself in the following manner:
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> "The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...' Defamation protects a person's reputation that is, the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit and it affords redress against those who speak such defamatory falsehoods..."

60. Actions founded on the tort of defamation often surface the tension between private interest and public interest. While Article 33(1) of *the Constitution* guarantees every person's right to freedom of expression including the freedom to seek, receive or impart information or ideas, sub-Article (3) states that "In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others". Similarly, while Article 34 of *the Constitution* guarantees the freedom of the media, Articles 28 and 31 protect the inherent dignity of every person and the right to privacy.

61. These rights were in the past reinforced by the provisions of the *Defamation Act*, and in addition more recently by the Data Protection Act enacted in 2019. Contemplating the competing private interest and public interest at play here, Lord Denning MR stated in Fraser v Evans & Others [1969]1 ALLER 8;-

> " The right of speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise it without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed."

62. In Selina Patani & Another v Dhiranji V. Patani [2019]eKLR the Court of Appeal reiterated that the law of defamation is concerned with the protection of a person's reputation, that is, the estimation in which such persons are held by others. The Court stating inter alia that:

> " In rehashing, we note the ingredients of defamation were summarized in the case of John Ward v Standard Ltd. HCC 1062 of 2005 as follows:

i. The statement must be defamatory.

ii. The statement must refer to the plaintiff.

iii. The statement must be published by the defendant.

iv. The statement must be false."

63. To succeed in his claim therefore, the Plaintiff herein was under duty to establish the above ingredients on a balance of probabilities. The Defendant on its part admitted to making the impugned publication of the photograph while denying that the caption beneath it was defamatory, or specifically related to the Plaintiff. However, it is evident that the caption in question refers to the photograph and given the admitted purpose of the publication, the photo and the caption are inseparable. That being the case, the key matters for determination are whether the publication was defamatory and false.

64. Starting with the first question whether the publication was defamatory, a defamatory statement is defined in Halsbury's Laws of England 4th Edition Vol. 28 paragraph 10 as:

> "...a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business".
>
> See also the definition of a defamatory statement in SMW v ZWM (2015) eKLR by the Court of Appeal.

65. In Elizabeth Wanjiku Muchira v Standard Ltd [2011] eKLR, the court held that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the

> "Probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published."-Clerks & Lindsell on Tort 17th Edition 1995-page 1018."

66. In Musikari Kombo (supra) the Court of Appeal stated that:

> "The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined:
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> "In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense."

67. Clearly therefore, defamation involves publications which an ordinary and reasonable man would view as conveying a defamatory imputation, therefore tending to cause injury to the reputation of the subject. Consequently, for a plaintiff to succeed in his claim, he must demonstrate the tendency of the offending statement to injure his reputation or standing and in that regard, it is not his opinion of himself that matters, but that of the ordinary person.

68. This was the position taken in SMW v ZWM [2015] eKLR , the Court of Appeal holding that:

> " Black's Law Dictionary 8th Edition defines defamation as the act of harming the reputation of another by making a false statement to a third person. (Emphasis added). A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right-thinking members of society generally or if it exposes him/her to public hatred, contempt, or ridicule or if it causes him to be shunned or avoided: see Gatley on Libel and Slander(10th Edition).A plaintiff in a defamation case must prove that the words were spoken /written; that those words refer to him/her; that those words are false; that the words are defamatory or libelous and that he/she suffered injury to reputation as a result...
>
> The trial judge had considered the testimony of witnesses with a view to assessing their credibility and at no point did any of the Appellant's witnesses at trial consider the appellant to have been defamed by the contents of the letter. The witnesses who testified at trial constitute and pass the ordinary reasonable man test as they were not only neighbours but also people known to the disputants. There was no evidence of any public ridicule, hatred or even shunning experienced by the appellant.
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> The appellant had only testified at the trial court that he felt shy to interact with some of his friends in tea farming. The appellant appears to have had an apprehension of defamation on himself ostensibly based on how he himself considered his standing in the society. That is not what defamation is in law. The appellant himself further testified before the trial court that nothing had changed in his dairy farming business. Moreover, despite being a tea farmer in Gatundu, he had since relocated to his Karen home at the time of these proceedings where the chances of any possible defamation of him became slimmer based on the existing solitary and liberal lifestyle adopted by urbanites. As elucidated earlier, the test to be applied is that of the reasonable ordinary man, not the appellant or the respondent..."

69. The Court of Appeal in Selina Patani & Another v Dhiranji V. Patani (supra) discussing the burden thrust upon a plaintiff in this regard stated:-

> " The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants' claim for defamation. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury or damage suffered to their reputation.
>
> The evidence on record is the testimony by the 2nd appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellant's character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellant's reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication. In the absence of third party evidence, we find no error

of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation."

70. The Plaintiff here pleaded and testified that the published photograph and caption were defamatory in their natural and ordinary meaning, since they bore the imputation that he was, among others, crazy, a party animal, and irresponsible. That as a result, the Plaintiff's reputation and standing as an advocate of the High Court was lowered, in the eyes of right-thinking members of society. On its part, the Defendant vehemently denied that the impugned articles could be interpreted in a defamatory sense.

71. The Plaintiff attached to his material portions taken from conversations with his girlfriend, friends and clients who contacted him expressing their dismay after seeing the photograph in question. However, none of these were called as witnesses to shed light on how their estimation of the Plaintiff had been affected by the publication. For his part, PW2 only confirmed seeing the photograph and no more. The Plaintiff ought to have adduced evidence through witnesses to support his averment that the words published either caused or had the tendency to cause injury to his reputation in the manner pleaded, and resulting in his public ridicule or ostracization. And not merely a reflection of entertainment and youth culture lingo, as asserted by the Defendant.

72. In the absence of such evidence, the court is of the view that the Plaintiff failed to prove that the publication was defamatory. This finding is sufficient to dispose of the matter without considering the remaining issues, namely, whether the publication was false. The Plaintiff having failed to prove a key ingredient of defamation, the claim based on defamation must fail.

73. Regarding the question whether the Plaintiff's rights to human dignity and privacy as protected under Articles 28 and 31 of *the Constitution* have been infringed, the court has considered the decision of Mativo J (as he then was) in Jessica Clarise Wanjiru (supra) to the effect that:

> "It is axiomatic that the right of publicity, often called personality rights, is the right of an individual to control the commercial use of his or her name, image likeness, or other unequivocal aspects of one's image and likeness. It is generally considered a property right as opposed to a personal right.
>
> Personality rights are generally considered to consist of two types of rights: the right of publicity, or to keep one's image and likeness from being commercially exploited without permission or contractual compensation, which is similar to the use of a trademark; and the right of privacy, or the right to be left alone and not have one's personality represented publicly without permission. ...
>
> A commonly cited justification for this doctrine, from a policy standpoint, is the notion of natural rights and the idea that every individual should have a right to control how, if at all, his or her 'persona' is commercialized by 3rd parties. Usually, the motivation to engage in such commercialization is to help propel sales or visibility for a product or service, which usually amounts to some form of commercial speech".

74. A core issue to be determined here is that of consent to the impugned publication. Did the Plaintiff consent to the publication and commercial use of his image by the Defendant? Consent is defined in the Data Protection Act as " any manifestation of express, unequivocal, free, specific and informed indication of the data subject's wishes by a statement or by a clear affirmative action signifying agreement to the processing of personal data relating to the data subject".

75. Section 37 of the Act outlaws the use of personal data for commercial purposes without express consent from the data subject, whereas Section 32, imposes the burden of proof for establishing a data subject's

consent to the processing of their personal data for a specified purpose, upon the data controller or data processor.

76. While it is admitted that the Plaintiff willingly posed for the controversial photograph and remained in the premises despite being aware of ongoing photography, during cross-examination, he denied speaking to DW2 and said that he got the impression at the time that the photographs were not for public use. It was not suggested to the Plaintiff that as an individual he gave express consent for the commercial use of the photograph taken by the Defendant.

77. On his part, DW2 claimed to have expressly sought and obtained the consent of the Plaintiff and his group not only to take photographs, but to post them on social media for marketing purposes. However, he admitted that the consent was not in writing; what could have been easier than obtaining signatures of the subjects on a chit to signify consent to commercial use of the proposed photographs? The context in which the alleged consent was obtained is a party in what appears to be a busy club night and the photograph, certainly not the only one taken on the material date, involved a group of people. Is it believable that DW2 could recall every person in the subject photograph, or patrons in the club who gave consent and were photographed and/or the conversation with them? It seems unlikely.

78. Like DW1, DW2 also sought to rely on general notices allegedly displayed within the premises, a copy of which was tendered as evidence and reads inter alia: When You Enter Hornbill Rongai You Enter An Area Where Photography, Audio & Video Recording May Occur. By Entering, You Consent To Such Recording Media & Its Release , Publication, Exhibition Or Republication."(sic)

79. It was stated by the Defendant's witnesses that this notice was placed at the entrance to the club, without specifically stating the precise location, size and visibility of the notice, which the Plaintiff contested. Clearly the Defendant's arrangements represent a casual and almost cynical regard for its duties under the Data Protection Act and especially the rights of data subjects, such as the Plaintiff, under Section 26 of the Data Protection Act.

80. The evidence adduced by the Defendant does not discharge the strict burden imposed by the law in this case to prove that informed and specific consent was obtained from the data subject, in this case the Plaintiff. The notice set out above reads like a general disclaimer notice on the part of the Defendant, and considered alongside the oral defense testimonies, falls woefully short of the quality of consent that the law requires to be obtained from a data subject by a data processor to authorize publication or commercial use of the subject's personal data, such as his image.

81. In the result, the court finds that no valid consent was obtained from the Plaintiff to publish or commercially exploit the image, rendering the publication prima facie unlawful.

82. In Jessica Clarise Wanjiru (supra) the court stated: -

> " The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information."
>
> (5) In the above sense any intrusion of personal life by whatever means or form such as photography, written articles or caricatures may be grounds for an action for breach of privacy....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.

> 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, signature phrase, paraphernalia or action, costume or personal signature. The tort of misappropriation of personality was first introduced in Canada in the case of Krouse vs Chrysler Canada. 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:
>
> a. 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.
>
> b. The person is clearly identifiable in the medium used and to their respective community or communities.
>
> c. The person does not consent to the use of their personality.
>
> d. 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."

83. In this case, the Plaintiff's photograph was taken in a social setting (a birthday party hosted at a nightclub), which while not being strictly a private space, did not entitle the Defendant to disseminate the photograph to the public at large without the Plaintiff's consent. The unlawful dissemination constitutes an intrusion into his private life, especially given his professional standing as an advocate. Moreover, the dissemination was admittedly intended for commercial purposes, that is, to market the club on the social media space. Which amounted to commercial exploitation of personal identity and attributes, and directly implicates upon dignity.

84. Thus, not only was the Plaintiff's social recreational activity exposed to a wide audience, in violation of his right to privacy, his publicity rights were violated by the unlawful use of his image by the Defendant to market the club. The Plaintiff has demonstrated that the publication unlawfully interfered with his autonomy and control over his personal image, in itself demeaning of his human dignity.

85. It is settled that an award of damages in matters involving violation of constitutional rights is discretionary, guided by the nature of the infringement, the manner in which it was committed, the conduct of the Defendant, and the effect on the Plaintiff. The Court must also ensure that the award is reasonable, proportionate, and comparable to awards made in similar cases.

86. The Plaintiff sought a sum of Kshs. 5,000,000/= for violation of his rights to privacy and dignity under Articles 28 and 31 of *the Constitution*, and a further KShs. 1,000,000/- for violation of his publicity rights. As observed earlier, personality rights encompass both the right to publicity and to privacy and in most decided cases, a modest universal award is made. The evidence demonstrates that the Defendant published the Plaintiff's image on a public social media platform with over 11,000 followers for commercial purposes without obtaining his consent. Thus deprived the Plaintiff of control over his personal image and exposed his private social activity to the public domain.

87. However, the Court must weigh this against the surrounding circumstances. The photograph was taken in an entertainment setting, and the Plaintiff voluntarily posed for it. The court has reviewed the sample of other photographs on the Defendant's social media pages where the Plaintiff's photograph was posted. Although having his image among some of these photographs may not be flattering to the Plaintiff, there was no evidence of sensitive or intimate exposure, nor was his image manipulated or used in a grossly offensive manner. While the publication was unlawful for want of consent, the degree of intrusion was not of the most severe nature.

88. In comparable cases, courts have awarded moderate sums where privacy violations arise from unauthorized publication of images for commercial purposes, but without aggravating features. In Wanjiru v Machakos University [2022] KEHC 10599 (KLR) the court awarded the sum of Kshs 700,000/= for the unlawful use of images to advertise on a billboard, while in Wangechi Waweru Mwende v Tecno Mobile Limited; Rogers Ouma t/a Ojwok Photography (Third Party) [2020] eKLR the court gave an award of Kshs 500,000/= for the commercial use of images without consent.

89. In more recent cases, such as Kuria vs University of Kabianga (2023) KEHC 809 (KLR) , Musya vs Hornbill Pub Ltd. (2024) KEHC 16216 (KLR) and Muthama vs Hornbill Pub Ltd. (2024) KEHC 15945 (KLR), the Plaintiffs were awarded between KShs. 500,000/- and KShs. 1000,000/- for the unlawful use of their images for commercial purposes in violation of their rights to dignity, privacy and publicity.

90. Relevant considerations here are the commercial nature of the use of the Plaintiff's image, absence of consent, the fact that the Defendant is a business entity that stood to benefit from the publication, and the need to deter similar conduct. At the same time, there was neither proof of direct financial loss suffered by the Plaintiff, nor specific commercial gain made by the Defendant, attributable to the publication.

91. In the court's view, a global award in the sum of KShs. 1,500,000/- (One Million Five Hundred Thousand) suffices as compensation for the violation of the Plaintiff's rights to privacy, publicity and human dignity.

92. The Plaintiff also prayed for exemplary and aggravated damages. Such damages are awarded where the Defendant's conduct is shown to be oppressive, arbitrary, or calculated to make a profit exceeding any compensation payable, which was not demonstrated in this case.

93. In the present case, while the Defendant acted without proper consent, the evidence does not disclose malice, recklessness of a high order, or deliberate targeting of the Plaintiff. The publication appears to have been part of a general marketing practice rather than a calculated attempt to injure the Plaintiff. Further, upon being challenged, there is no evidence that the Defendant persisted in the offending conduct in a manner warranting punitive sanction. The threshold for exemplary or aggravated damages has not been met.

94. The court will therefore enter judgment for the Plaintiff against the Defendant by granting a permanent injunction in terms of prayer (e) of the plaint, and damages in the sum of KShs. 1,500,000/- (One Million Five Hundred Thousand) with costs of the suit and interest . Any other relief sought in the plaint and not specifically granted is deemed as spent.

**DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 30TH DAY OF APRIL 2026**

**C. MEOLI**

**JUDGE**

In the presence of:

For the Plaintiff: Ms. Macharia

For the Defendant: Mr. Warutumo

C/A: Lepatei