CMM (Suing as next friends of and on behalf of CWM & 6 others) & 6 others v Standard Group & 4 others (Civil Appeal 296 of 2017) [2022] KECA 586 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KECA 586 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 296 OF 2017

MA WARSAME, F SICHALE & S OLE KANTAI, JJA

MAY 13, 2022

BETWEEN

CMM (SUING AS NEXT FRIENDS OF AND ON BEHALF OF CWM & 6 OTHERS) & 6 OTHERS ..... APPELLANT

AND

STANDARD GROUP ..... 1ST RESPONDENT

ROYAL MEDIA GROUP ..... 2ND RESPONDENT

GOOD NEWS MISSION CHURCH ..... 3RD RESPONDENT

NATION MEDIA GROUP ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Nairobi by Mativo J. delivered on 2nd February 2017 in Petition No. 56 of 2013)

JUDGMENT

1. On the 5th day of November 2012, the 1st to 4th Respondents published a story in certain print, online and visual media, on an alleged attempted arson attack at [Particulars Withheld] Girl's High School by some of its own students. The various stories published by the respondent media outlets described the seven minors, published their names, transmitted their images and detailed their alleged participation in the arson attempt and their subsequent arraignment in court.

2. Aggrieved by the publication, the appellants, suing as the next friend of and on behalf of the 7 of the students filed a petition before the High Court. It was their case that the story was published with malicious intent, given prominence with the intention of gaining popularity and profit and with utter disregard of the dignity, privacy and best interest of the minors as required by the law.

3. The appellants further contended that the respondents did not bother to confirm the age of the minors or seek their comments on the issues published and that as a result of their reckless behavior, the minors have been stigmatised, traumatised and even shunned by society for being exposed as budding arsonists.

4. By the reasons aforestated, the appellants pleaded that their fundamental rights and freedoms had been violated in the most wanton manner and sought inter alia the following orders: a declaration that the respondents had breached certain provisions of the Constitution of Kenya, the *Children Act* 2001 and international conventions; an order compelling the respondents to pay general, exemplary, punitive and aggravated damages to each minor for infringement of their rights and an order compelling the respondents to remove the stories posted on the internet regarding the minors.

5. In response to the petition, the 1st to 4th respondents maintained that the news story as covered was correct and accurate, that it was published in good faith and in public interest given that violence and arson were becoming rampant in secondary boarding schools. They asserted that the learned trial magistrate did not object to the presence of journalists and the public in her courtroom and that they were simply exercising their fundamental right to freedom of speech and expression as enshrined under *the Constitution* of Kenya 2010.

6. The 5th Respondent on the other hand stated that the trial court tried to get members of the public out of the court room for privacy given that the accused were minors, but the matter had generated immense public interest and not everyone complied. They further contended that if any live proceedings were recorded, it was done without its consent or control.

7. The matter fell for hearing before Mativo, J. who, on appreciation of the evidence, found that the appellants had failed to prove their case. The Learned Judge found that the publication of the story and corresponding photographs were a matter of public interest, hence the question of violating the appellants' rights did not arise; that the stories as published were factual and published without malice; and that the petitioners had failed to prove any loss/damage. Dismissing the petition, the Court pronounced itself as follows:

> " I have carefully studied the affidavit evidence by all the parties and the submissions filed in court and considering the nature of the case at hand, and considering that at or about the material time there was widespread unrest in many schools where properties were destroyed and sadly many students have lost life in such cases, I am satisfied that the story in question and the publication of the photographs was in my view a matter of public interest hence the question of violating the petitioners rights does not arise."

The court in concluding further stated:

> " --- this is a constitutional petition and the petitioners have to discharge the burden of proof. In view of my analysis of the facts of this case and the law as discussed above, I find that the petitioners have failed to prove their case against all the Respondents to the required standard."

8. The appellants having been aggrieved thereof filed the instant appeal. Hearing of the appeal proceedings through written submissions that were duly filed and exchanged between the parties. Mr. Lempaa, learned counsel for the appellant, also orally highlighted the appellant's written submissions and emphasised that their case was built on the parameters of the right to privacy, in cases concerning minors and the best interest of the child principle. Counsel faulted the Learned Judge for failing to find that the respondents violated the appellants' rights to privacy and offended the best interest of the child principle which he asserted should be paramount in all situations concerning minors. In support

he relied on *Republic v JWK*, Criminal Case No. 57 of 2009 where the High Court held that "the fact that the offender is a minor makes it imperative for the court to consider and be guided by the best interest of the minor."

9. The Appellant further submitted that the trial court failed to consider the issues and facts tendered before it and that the matter was not a defamation suit as characterised by the Learned Judge. In his view, counsel for the Appellant contended that they had discharged the burden of proving violations of fundamental rights of the minors.

10. In regard to the trial court's finding that the respondent media houses were justified in publishing the details of the minors in public interest and pursuant to their freedom of expression, the Appellant submitted that public interest cannot override the rights and guarantees contained in statute and that in all circumstances, the need to protect the interests of minors should outweigh all other considerations especially where, as in this case, there is a need to focus on guidance and correction of the child which is the hallmark of the criminal justice system. The learned Judge was faulted for failing to balance the appellants' right to privacy with the competing right to freedom of expression and the open justice principle of public trial.

11. Finally, on the strength of the decision in *Joseph Ihugo Mwaura and 82 others v Attorney General & others*, Nairobi Petition No 498 of 2009 (Unreported), the Appellant submitted that the High Court erred by holding that the Appellants were required to prove damages for breach of constitutional rights before awarding damages whereas Article 23(3) entitles the court to grant any appropriate relief.

12. Opposing the appeal, the 1st Respondent argued that the story published involved attempted arson and as such, being criminal in nature, provided a public interest justification. In theirview, criminal behavior could not be understood as private or confidential. Citing the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR it was further submitted the Appellants failed to discharge their duty to set out their complaint with reasonable precision and the matter in which their constitutional rights were allegedly infringed. In supporting the Learned Judge's decision, it was contended that the appellants were required to demonstrate that the respondents were liable for violations of their constitutional rights and to prove that damage had been suffered as a result of their actions before the court could exercise its discretion to award damages.

13. The 2nd respondent submitted that the appellants failed to give particulars of how their constitutional rights were violated including the nature, extent or loss. It was further argued, that the appellants being suspects in attempted arson proceedings did not have a reasonable expectation of privacy. Furthermore, it was pointed out that the appellants' advocate and the appellants themselves, who were present at the trial failed to raise any issue with the presence of journalists who had not been excluded from the proceedings by the court.

14. Defending their actions, the 3rd Respondent argued that it was merely performing its duty as a media house in open court proceedings and that it had a duty to show just and fair proceedings, focusing on public safety, security and morality. In addition, it also had a duty to uphold the best interest of other children who may have been affected by the acts of arson alleged to have been committed by the Appellants.

15. On the allegation that the learned judge erred by treating the case as a defamation suit, it was argued that concepts of justification, fair comment, absence of malice or publication in the public interest were not only limited to defamation suits and that the said tenets were important in demonstrating that the 3rd Respondent published the story without malice and were promoting justice and performing their duties as per *the Constitution* and the *Media Act*. Finally, the 3rd Respondent submitted that the

Learned Judge was within his powers under Section 27 of the *Civil Procedure Act* to impose costs after the event and exercised his discretion correctly.

16. The 4th Respondent placed blame squarely at the feet of the Court and the Appellants' advocate for failing to comply with Section 73(b) as read with Section 74 of the *Children Act* which requires minors to be arraigned in a children's court in a separate room. Instead, the minors were arraigned with adult remandees in open court. In their view, the court did not formally clear the court room suo moto or on application of the appellants' advocate and it would be unreasonable to expect members of the press and the public to investigate the details of the accused to determine if they should attend the proceedings or report on them. The 4th Respondent asserted that the obligation to do so rested with the court which has the authority and judicial capacity to balance the rights of the parties involved in the interest of justice.

17. On the issue of compensation, it was submitted that a monetary award was not automatic in cases of alleged violations of constitutional rights. Citing the case of *Gitobu Imanyara & 2 Others v Attorney General*, Civil Appeal No. 98 of 2014 it was further contended that the assessment of damages is a discretionary relief, and the trial court could not be faulted for failure to award special, exemplary, and aggravated damages where no effort had been made to place such evidence before it.

18. On its part, the Attorney General took the position that the limitation to the Appellants' rights was reasonable and justifiable and that the limitation satisfied the criterion provided under Article 24(1), (2) and (3) of *the Constitution* 2010. On the strength of the case of *Githunguri v Republic* [1986] KLR, it was further emphasised that rights cannot be absolute and must be balanced against other rights and freedoms and the general welfare of the community.

19. We have considered the record, submissions by counsel and the law. In our view, the appeal essentially turns on three issues: first, whether the appellants rights were violated; second, whether the court relied on the wrong principles of law in determining the issues before it, and third, whether the learned judge failed to give due regard to the evidence before him.

20. Our mandate as a first appellate court is clear; we must reconsider the evidence, evaluate it and draw our own conclusions conscious of the fact that we have neither seen nor heard the witnesses and should make due allowances in this respect. (See *Selle and another v Associated Motor Boat Company Limited and Others* [1968] EA 123). We also bear in mind the principles set out in the case of *Peters v Sunday Post Limited* [1958] EA 424, where the predecessor of this Court pronounced itself on the mandate of this Court that;

> " whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

21. In determining whether the trial court applied the correct principles as to whether the appellants' rights were violated, we must first discuss the competing fundamental rights in issue. It is clear that the interaction between right of the media to publish court proceedings in the public interest under the open justice principle vis-à-vis the appellants' right to privacy in protection of the best interest of the child principle lies at the heart of this appeal.

22. To begin with, it must be emphasised that the public nature of hearings is the general rule rather than the exception. This principle of open justice emanates from the right to fair hearing which is a fundamental principle in any democratic society. Article 50 of our Constitution provides:

> " 50. Fair hearing
>
> 1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
>
> 2. Every accused person has the right to a fair trial, which includes the right–
>
> a. ...
>
> b. ...
>
> c. ...
>
> d. to a public trial before a court established under this Constitution."

23. The application of this principle consequently requires that proceedings be held in an open court where the press and members of the public have free access and also allows for publication of accurate reports of any proceedings that have taken place in court. It therefore accords the 1st to the 4th Respondent media houses the right to be in court during proceedings as they occur subject to the restrictions under the law and as directed by the court in exercise of the freedom of the press (Article 34) and their freedom of expression. (Article 33(1)).

24. Of course, *the Constitution* of Kenya 2010 and statutes recognise that there are situations where derogation from the general rule is necessary in the interest of justice and for the protection of children. This is the foundation of the appellants' case: that the rights of minors in criminal development, that their best interest (as reinforced under Article 53(2) of *the Constitution* and Section 4 of the *Children Act*) must be of paramount/primary importance in every decision concerning the child whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies.

25. Likewise, Section 76 of the *Children Act* provides:

> " 76. General principles with regard to proceedings in Children's Court
>
> 5. In any proceedings concerning a child, whether instituted under this Act or under any written law, a child's name, identity, home or last place of residence or school shall not, nor shall the particulars of the child's parents or relatives, any photograph or any depiction or caricature of the child, be published or revealed, whether in any publication or report (including any law report) or otherwise."

26. The appellants' position is also echoed in the *Media Council Act* No. 46 of 2013 which outlines the code of conduct for the practice of journalists (see the second schedule section and the *Media Act* No.

3 of 2017 which also provides protection for children who interact with journalists and the media. Section 18 provides:

> " 18. Protection of Children
>
> Children should not be identified in cases concerning sexual offences, whether as victims, witnesses or defendants. Except in matters of public interest, for example, cases of child abuse or abandonment, journalists should not normally interview or photograph children on subjects involving their personal welfare in the absence, or without the consent, of a parent or other adult who is responsible for the children. Children should not be approached or photographed while at school and other formal institutions without the permission of school authorities.
>
> In adhering to this principle, a journalist should always take into account specific cases of children in difficult circumstances."

27. The trial court, while taking note of the need to protect accused minors from unwarranted publicity as stated in various laws, emphasised that the right is not absolute and can be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account all the relevant factors including those prescribed under Article 24.

28. Article 24 gives an indication of the factors that must be taken into consideration when balancing the interests of the public in the full reporting of criminal proceedings by the media against the desirability of not causing harm to the minors concerned in the proceedings. In striking a balance we must ensure that the limitation is reasonable and justifiable and take into account all relevant factors, including; the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

29. In doing so, we do not in any shape or form purport to weigh the value of one right against the value of the others and then prefer the right that is considered to be more valued. The aim of the balancing exercise is to weigh the importance of the objectives of the limitation to the general rule of open justice and determine whether the intrusion of the right to privacy and the best interest of the child principle provides more benefit against the loss that may be occasioned.

30. As was aptly stated by Nugent JA of South Africa Supreme Court of Appeal in *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* (100/06) [2007] ZASCA 56; [2007] 3 AII SA 318 (SCA);

> " Where constitutional rights themselves have the potential to be mutually limiting – in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa – a court must necessarily reconcile them. They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognizing a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other.

> ...In determining the extent to which the full exercise of one right or the other or both of them might need to be curtailed in order to reconcile them what needs to be compared with one another are the 'extent of the limitation' that is placed upon the particular right, on the one hand, and the 'purpose, importance and effect of the intrusion', on the other hand. To the extent that anything needs to be weighed in making that evaluation it is not the relative values of the rights themselves that are weighed (I have said that all protected rights have equal value) but it is rather the benefit that flows from allowing the intrusion that is to be weighed against the loss that the intrusion will entail."

31. Our starting point therefore, is to consider the best interest of the child. The UNHCR, in its *Guidelines on Determining the Best Interests of the Child (May 2008)* defines the term 'best interests' as broadly describing the well-being of a child. It further states that the best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, including courts.

32. Looking at the record before us, the appellants contend that the best interest of the child in this instance includes: the need to focus on the guidance and correction of minors which is the hallmark of juvenile justice; that the publication of a child offenders identity often serves no criminal justice objective, is psychologically harmful and acts negatively towards their rehabilitation (See *MCT v McKinney & Others*) [2006 NTCA10]); that the prospect that a child once named in the media could never put the crime behind them should be a powerful argument in favour of prohibition; that publication may lead to labelling, stigmatisation and possible impact of their ability to have access to education and work; and consequently press releases relating to offences allegedly committed by children should be limited to very exceptional cases.

33. On the other side of the scale, the Respondent media stations argue that the object of the publication was the education, safety and well-being of the public given that student unrest and burning of high schools was rampant in the country. They assert that the minors did not have a reasonable expectation to privacy given that they were involved in public criminal proceedings and even if the court were to find that there was a reasonable expectation of privacy, the same was not guaranteed. They argue that it was crucial to inform the public in the circumstances, the steps that were being taken by authorities to curb the arson menace. They state they were exercising their legitimate freedom of expression which includes the right to receive and impart information and that it was necessary to alert and inform the public on matters which shape the public life of our society and which call for consideration in action. Further, they assert that the public's right to know was weighed against the rights of the appellants and upon weighing the same right of the public to know was more substantial.

34. The Respondents further assert that there was a threat to the right to education and the media coverage aimed to emphasise the state's need to fulfil its obligation to take positive measures to enable and assist communities to enjoy the right to education. They state that although some information published may have been private in nature, it was reasonable in the circumstance and they did not act negligently or maliciously; that the presence of journalists in court was not objected to by the appellants, their advocate or the court; and, lastly, that the prospect of being named in court with the accompanying disgrace and in the context of the punishment serves as a powerful deterrent to others.

35. Given the provisions of *the Constitution*, the Children and Media Act, we agree that it is at least arguable that the minors had a reasonable expectation that their privacy would be maintained during the criminal proceedings by virtue of their age. Our courts have recognised the importance of the rights of children in many different contexts and so too has international law under various instruments including the *United Nations Convention on the Rights of the Child*, *African Charter on the Rights and*

Welfare of the Child , *African Charter on Human and Peoples' Rights* and *UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules')*.

36. It is important to note however, that to so hold does not mean that the child will have a guarantee of privacy in criminal proceedings. To hold that a minor has a reasonable expectation of privacy is only the first step. In saying so we are guided by the sentiments of the court in *Murray v Big Pictures (UK) Ltd* [2008] UKHRR 736, where it was stated:

> " The question whether there was a reasonable expectation privacy is a question of fact. If there was, the next question involves determining the relevant factors and balancing them. As Baroness Hale put it at [57], the weight to be attached to the various considerations is a matter of fact and degree. That is essentially a matter for the trial judge."

Similarly, in the Midi Television (Ptv) Ltd case (Supra) the court in discussing the considerations when striking a balance stated thus:

> " Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information."

37. It is not in dispute that instances of arson in secondary schools have been a perennial occurrence in Kenya and has been described as a crisis, a national disaster and a phenomenon since the early 1990's. From the horrors of arson attacks in [Particulars Withheld] Mixed Secondary School in 1991, to the death of 26 students in [Particulars Withheld] Girs Secondary School in a dormitory fire, to the prefects' room at [Particulars Withheld] Boys High School which was locked, doused in petrol and set on fire, to the 2001 fire set by students at [Particulars Withheld] Secondary School which killed 67 students to the recent wave of destruction of dormitories, the nation has for decades been gripped by this scourge which has generated significant public attention. Arson in secondary schools not only affects the right to education but has resulted in the loss of life, serious injuries, and destruction of property worth millions. This was aptly captured in the report of the National Crime Research Centre, titled Rapid Assessment of Arson in Secondary Schools in Kenya, 2016. Arson in schools is a matter of fundamental importance that cannot be wished away.

38. The escalating cases of arson have far-reaching consequences in terms of loss of life, injury and financial implications. Parents send their children to school in fear and eventually bear the cost of reconstructing schools and teachers, who have to teach unruly children, live in constant fear. The government which has an obligation to protect has set up a number of committees of inquiry and task forces mandated to look into the issues of student unrestincluding the Dr. Lawrence Sagini Task Force (1999); Macharia P. M. Task Force (2000) Naomi Wangai Committee/Task Force (2001); David Koech Committee/ Task Force (2008) and the recent 2019 National Assembly committee on education and research led by Hon. Julius Melly inquiring into the wave of student unrest in secondary schools in Kenya.

39. In the *Midi Television (Pty) case (supra)* the Court stated that before a ban on publication is considered there must be a demonstrable relationship between the publication and the prejudice that it might cause to the administration of justice, substantial prejudice if it occurs, and a real risk that the prejudice will occur. Similarly, in *Attorney General v Times Newspapers Ltd* [1974] AC 273 (HL), it was held that a ban on publication to protect the administration of justice would be allowed only if there was 'a real risk [of prejudice], as opposed to a remote possibility', or a risk of prejudice that was 'serious or real or substantial'.

40. In our view, the issues at stake before the trial court were of public importance and public interest. Public Interest has been defined as "that which a class of the community has a pecuniary interest, or some interest by which their legal rights or liabilities are affected". It does not refer to issues which are merely interesting or which feed our curiosity or a love of information or amusement. In determining the purpose of the limitation, we cannot find a real substantial risk to limit the rights of the public and the media. We therefore think that the learned Judge was justified in his determination that the story in question and the publication of the photographs was a matter of public interest hence the question of violating the appellants' rights did not arise.

41. Furthermore, *the Constitution* under Article 24(3) also makes it clear that the burden rests on the party seeking to restrict the general rule of open justice to establish that it is necessary on the basis of clear and cogent evidence or statutory backing. This may include situations where publicity would defeat the object of the hearing, in matters of national security, matters involving confidential information, protecting the rights of children and where the court considers it necessary in the interest of justice. A reading of this provision reveals that from the onset it was incumbent on the parties concerned to set in motion before the trial court, the restriction under Section 76 of the *Children Act* and establish the basis for it. It cannot therefore be said the 5th Respondent violated the appellants' rights.

42. In addition, the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2003*, in expounding Article 45(c) of the *African Charter on Human and Peoples*'

Rights, also permits the media to be present and report on judicial proceedings except where the court makes a determination that a limitation is necessary in the interest of justice for the protection of children. The relevant section states:

> "...
>
> e. Representatives of the media shall be entitled to be present at and report on judicial proceedings expect that a judge may restrict or limit the use of cameras during the hearings;
>
> e. The public and the media may not be excluded from hearings before judicial bodies except if it is determined to be
>
> 1. in the interest of justice for the protection of children, witnesses or the identity of victims of sexual violence
>
> 2. for reasons of public order or national security in an open democratic society that respects human rights and the rule of law."

43. In any event, the law is clear that the duty to prove any alleged violations of constitutional rights and consequential damage rests on the person alleging breach, (see section 107, 108 and 109 of the *Evidence Act*). It was therefore manifestly incumbent upon the appellants to discharge and surmount the burden as set out under section 107, 108 and 109 of the *Evidence Act*. A claimant must lay on the table evidence of all facts contended against the defendant and the trial court has a duty to examine the evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof which is on a balance of probabilities, the claim must be dismissed. (Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR. The Court in the latter case cited with approval the case of

Alphie Subiah v The Attorney General of Trinidad and Tobago Privy Council Appeal No. 39 of 2007 where the court pronounced itself on the same point stating:

> " It must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court pronounced itself on the same point stating that:
>
> "It must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is damage shown, the second stage of the award is not available as a matter of course. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages."

44. We are cognisant of the fact that criminal proceedings faced by minors may have a traumatic effect. However, the mere fact that the minors were charged in court and were facing criminal proceeding, whether carried out in public or in private, would have provoked in the appellants' feelings of distress, trauma, anguish, fear and lowered self-confidence.

45. We also find it telling that other than his daughter, the 1st Appellant in his testimony could not remember most of the names of the minors who appeared in the publication. If a parent who shares a common cause with the minors charged with his daughter cannot remember their respective names, can the impact of the publication have been so powerful to warrant stigmatisation of the minors by the public? We think not. It may very well be that the details leaked out in the neighbourhood schools and the community, even if the details were withheld especially as admitted by the 1st Appellant in his testimony that cases or arson were rampant especially in Murang'a County where there were many incidents of school unrest. In our view, that is a crucial point which cannot be reasonably overlooked in the circumstances of the case.

46. We are therefore not convinced that any effect (if any) faced by the appellants were as a result of the publication and not the nature of the trial process where they were charged with a serious crime. There is no evidence before us that link the publication of the identities of the appellants to any adverse effect claimed and we further note that the publications were immediately removed from circulation in view of the case at hand.

47. In *Medway Council v British Broadcasting Corporation* [2002] 1 FLR 104; [2001] AII ER (D) 243 (Oct) where the court considered whether broadcast of an interview should be restrained on the grounds of potential harm to the child, the court held that the law required proof of a high measure of harm. The absence of evidence that the boy had suffered any adverse effect from the publicity already given remained highly significant.

48. In the end, we see nothing objectionable in the course which the learned judge followed, and nothing whatsoever to suggest that he did not consider the material before him. The Court considered the evidence before it, applied the correct principles of law and considered the facts articulated in Article 24 of *the Constitution* in arriving at his decision and struck a balance between the relevant competing rights.

49. This appeal is accordingly dismissed in its entirety. We make no orders on costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.

.....

M. WARSAME

JUDGE OF APPEAL

.....

F. SICHALE

JUDGE OF APPEAL

.....

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR