IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.) CIVIL APPEAL NO. 310 OF 2015

BETWEEN

JEMIMAH WAMBUI IKERE ……..…… 1ST APPELLANT

TABITHA MUTHONI KANINI ……..…….. 2ND APPELLANT

AND

THE STANDARD GROUP LIMITED ……...….. 1ST RESPONDENT

NATION MEDIA GROUP ……..…... 2ND RESPONDENT

(Appeal from the Constitutional and Human Rights Division at Nairobi against the whole Judgment and Decree ***(Lenaola J)*** *dated* ***19th June, 2015***

in

Petition No. 466 of 2012

As Consolidated with Petition No. 416 of 2013)

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JUDGMENT OF NAMBUYE, JA

The appeal arises from the Judgment of **Isaac Lenaola, J.** (as he then was) dated 29th June, 2015.

The background to the appeal is that Petition Number 466 of 2012 as consolidated with Petition Number 416 of 2012 were precipitated by publications appearing in the respondents' widely circulated newspapers "The Standard" and The "Daily Nation" of 21st February, 2007, in both of which the respondents ran a story detailing the killing of the late **Simon Macharia Ikere (**the deceased**)**, a man described by the police at the time as the most wanted criminal in Kenya. Alongside the story, the 1st respondent had published photos/images of **Felister Wanjiru Kogi,** who was then a wife to the deceased together with images of six children namely

DN, AM, EWM, CWM and **MKM** (all minors), who stood beside her. On page 3 of the 2nd respondent's newspaper, there appeared pictures of **AM** and **DN**, children of the deceased under the headline titled "*The agony of being the wife of a wanted man"*. On page 5, it had also depicted images of the child, **AM,** sitting close to a police officer, holding a rifle and had the narration, "***Matheri's*** *three years old daughter examines a rifle barrel unaware that her father* ***Simon Matheri Ikere*** *had been shot dead...."*

In another edition of its newspaper on 22nd February, 2012, the 2nd respondent published photos of the minors, **AM, DN** and **RW**, together with their mother, **Felister Wanjiru** and juxtaposed them with the images of the deceased under the headline "**Police': Matheri family to remain in custody."** There was a further publication of 25th February, 2007, in which the 2nd respondent published a story entitled....." ***Leaflets target Matheris close relatives"*** alongside pictures of the minor, **DN**, reading a copy of the Nation newspaper with the narration ***".....one of Matheri's sons goes through a copy of the Nation, that reported his father's killing."***

Being aggrieved by the above impugned publications, **Jemima Wambui Ikere,** the 1st appellant filed petition No. 466 of 2012 in her capacity as a sister to the deceased and a guardian to **EM, CWM** and **MKM**, all described as children of the deceased, while the second appellant **Tabitha Muthoni Kanini** filed petition Number 416 of 2012, in her capacity as a sister to late **Felister Wanjiru**, a deceased wife to the deceased and guardian to **RW, DN** and **AM** also described as all children of the deceased.

The appellants averred *inter alia*, that all the above minors' rights to protection from inhuman and degrading treatment; the right to human dignity and the right to privacy had been infringed by the impugned publications; that the said publications, narrations and images were highly offensive and severely embarrassing to the minors and therefore prejudiced the minors innocence and psychological integrity; that the impugned actions of the respondents in publishing the impugned publications were calculated, intentional, reckless, and negligent as they failed to give due consideration to the general interests of the children and safe guard their constitutional rights to privacy and dignity thus prejudicing their reputations, development and growth; that the children had over the years suffered psychological torture, and discrimination of being shunned, ridiculed, harassed, and associated with being children of a wanted *gangstar* to which they would not have been exposed had the impugned publications not been published.

That the respondents' conduct of publishing the impugned publications in the manner they were published, left an indelible blot on the minors' reputation, development and growth thus exposing them to stigmatization, public ridicule for having associated themselves with a most wanted criminal; that the *juxtaposition* of the children's images with those of their deceased father impliedly indicated that the children knew or were part of their father's untoward ways, thereby interfering with their reputation and development; that the pictures were intrusive of the lives of the children and were therefore an affront to the minors' inalienable rights to physical, social identity, holistic development and respect for their privacy; that although the respondents were entitled to publish the stories, they were legitimately expected to publish them with utmost consideration of the need not only to appreciate but also to safeguard the vulnerability of children of tender years; that the defence of consent even if it was demonstrated to exist of which they averred it was not, did not operate to justify the indignity suffered by the children. Neither did it operate to override the inalienable rights of the children; which rights are distinct from those of their parents.

On account of all the above averments, the orders for declarations that the minors' right to appellants sought from the court privacy, protection from being inhumanly treated and the right to human dignity were infringed by the impugned publications; that the respondents failed to safe guard and or uphold the best interests of the children in the manner the impugned publications were published in respect of their deceased father; that as a result of the aforesaid breach, the minors suffered, psychological and emotional pain and trauma for which the appellants sought for each of the six (6) minors compensation by way of general, punitive and exemplary damages for pain and suffering; an order of injunction restraining the respondents, their servants, and or employees or in any manner howsoever, firstly, from infringing on the minors right to privacy; and secondly from using the minors photographs of identity or in any manner howsoever publishing the minors' photographs or images, name or contents of the article appearing on the newspaper dated 21st February, 2007, whether in print or electronic media or in any other manner howsoever; an order directing the respondents to render a written apology to the minors and their guardians for infringing on their rights to privacy with similar prominence as that which was accorded to the impugned publications together with an attendant order for costs.

In rebuttal, the respondents relied on their grounds of opposition and replying affidavits, contending *inter alia*, that there was no intention to infringe or prejudice the interests of the minors in the impugned publications. They denied being negligent or reckless in any way in their separate but respective actions in publishing the impugned publications; that their respective conducts was guided by public security and interest regarding the slain deceased who had committed numerous heinous crimes; that they were not motivated by any commercial considerations or profits but by matters pertaining to public safety, security and public interest which according to them, outweigh private rights; and that they complied with all the professional expectations as provided for in the media Act and the code of conduct of Journalism in Kenya.

Further, the minors' images had been published with the consent of the late **Felister Wanjiru**; the appellants were guilty of indolence for the failure to justify the delay in seeking redress for the alleged violations, especially when they conceded that they saw the impugned publications, bought the newspapers in which they had been published, read and understood them on the very date of the publication. They failed to explain why no action was taken before the demise of **Felister Wanjiru** between the years 2007 and 2011.

They denied any breach of the minors' right to privacy provided for in the repealed Constitution and that the publications of the minors' images imputed any criminal activities on the part of the minors. Neither was there proof of any discrimination suffered by the minors. If any occurred, it had no nexus with the impugned publications. What the appellants were championing were defamation claims which fall for adjudication in a civil law forum as opposed to a constitutional court.

The petitions were canvassed by way of supportive evidence filed by the respective parties; cross-examination of the appellants by the respondents, written submissions orally highlighted by learned counsel for the respective parties, and principles of law relied upon by the respective parties in support of their opposing positions.

At the conclusion of the trial, the trial court analyzed the record, identified issues for determination, reviewed the case of **Dominic Arony Amolo versus the Attorney General** HC Misc. Application No. 494 of 2003 and the case of **Peter Ngari Kagime and 7 others versus the Attorney General** [2009] eKLR, and ruled that the doctrine of limitation of time did not apply to defeat claims for vindication of breach of human rights and fundamental freedoms and on that account, sustained the petitions for merit determination.

With regard to competence of the consolidated petitions, the trial court took into consideration the cases of **Annarita Karimi Njeru versus Republic [1979] KLR 162** and **Trusted Society of Human Rights versus Mumo Matemu & another [2013] eKLR,** and ruled that the manner in which the consolidated petitions

had been framed met the threshhold set out in the **Anarita Karimi Njeru** case (supra) as in the trial court's view, the appellants had stated with some degree of precision the provisions of the constitution allegedly violated; the manner in which these had been violated and the facts relied upon in support of the alleged violations.

As to whether the repealed or the Kenya Constitution, 2010, was the constitutional regime of law to apply in the determination of the petitions, the trial court reviewed the case of **Charles Murithi Murigi & 2 others versus Attorney General** Petition No. 113 of 2011**; B.A. & Another versus Standard Group Limited & 2 others [2012] eKLR;** and **Duncan Otieno Waga versus Attorney General,** Petition No. 94 of 2012, and ruled that, since the events precipitating the consolidated petitions occurred way back in 2007,the constitutional provisions to be applied are those of the repealed Constitution.

On the right to privacy, the trial court construed and held that **section 70** of the repealed Constitution only made provision for the protection of the privacy of a person's home, property and from deprivation of property without compensation. It did not make provision for protection of privacy of the person. The above finding notwithstanding, the trial court proceeded to determine the merits of the appellants' complaints for breach of the minors' right to privacy.

The trial court reviewed the Judgment of **ACKerman, J,** in the case of **Berstein and others versus Bester & others CCT (23) 1995; William Posser** on Privacy: 48 Calif Law Review 383.49 (960); the case of C**ogley versus RTE [2005] I.R 79; Aubry versus Edition vice varsa Inc** [**1998] 157 D.L.R. 577;** and **Walsh versus Family Planning Services Ltd [1992] 1 I.R 50** and identified elements for sustaining a claim for the right to privacy at common law as; proof of entry into private residence; the reading of private documents; listening into private conversations; shadowing of a person; the disclosure of private facts which have been acquired by a wrongful act of intrusion; disclosure of private facts in breach of confidentiality; and publishing of a photograph as part of an advertisement without the consent of the person; subject to proof of justification for the intrusion; and that consent is a defence subject to demonstration that the party giving consent was fully informed of the risk involved in giving consent to the publication.

Also reviewed was **Article 8(2)** of the European Convention on Human Rights from which the trial court distilled the right to private family and home life; physical and moral integrity; honour and reputation; avoidance of being placed in a false light; non revelation of irrelevant and embarrassing facts; unauthorized publication of private photographs; and protection from disclosure of confidential information.

From the Nordic Conference on the Right to Respect for privacy of 1967 the trial court distilled prohibition: from using, a person's name, identity or photograph without his or her consent; from the prohibition to spy on a person; respect for correspondence; and non-disclosure of official information.

Also reviewed was the case of **Mistry versus Interim National Medical and Dental Council of South Africa [1998] (4) sa1127 (CC**), from which the court identified consideration as to whether: the information was obtained in an intrusive manner; it was about an intimate aspect of the applicant's personal life; it involved data provided by the aggrieved party for one purpose but used for another; it was disseminated to the press or the general public or persons from whom it should have been withheld.

In light of the above threshholds, the trial court sustained the respondents' defence of consent because; first, the court believed that **Felister Wanjiru** spoke to the press voluntarily given the depth of the information reproduced in the said extracts as there was no other way the press could have accessed such information. Second, the pictures were taken at the deceased's Athi River house, implying consent was given for the media personnel to access the home as there was no evidence of forceable entry. Third, the late **Felister Wanjiru's** failure to institute proceedings against the respondents on her own behalf and on behalf of the minors during her life time. Fourth, the appellants' failure to give credible answers to questions put to them in cross-examination by the respondents as to why it took them close to six (6) years before seeking redress for the violations complained of.

The trial court also reviewed a text by **Hillary Delan & Eoin Carolan** titled: **The Right to Privacy** [2008] **Thomson Round Hall 22** and sustained the respondents' defence of publication in the public interest as all that the respondents did in the impugned publications was to expose the killing of the deceased who had been described as a most wanted criminal.

The trial court then construed both **sections 4** and **19** of the Children Act No. 8 of 2011 and rejected the appellants' complaint that the minors' right to privacy was violated by reason of the respondents conduct of *Juxtaposing* the deceased's image with those of the minors, because there was nothing in the said publications to suggest that the minors had anything to do with the deceased's' life style. According to the trial court, consent was impliedly and constructively given by the conduct and language of the late **Felister Wanjiru,** borne out by the in-depth content of the interview. As the appellants were not at the place where those utterances were made by **Felister Wanjiru,** they had nothing to say on the matter. The incident relied upon by **JWI** of the minors being ridiculed and shunned at school and called children of a thief involved the conduct of a teacher who knew the children from their home and not because of the impugned publications. There was no explanation given as to why the children were not subjected to the same predicament while under the care of the late **Felister Wanjiru. Tabitha Muthoni** conceded in cross-examination that she moved **DN** from Machakos Boys School to Magnate High School because she could not afford to pay fees at the former school. There was no evidence that **E** had changed schools or children's homes. There was also no link between **DKN** indicated in the birth certificates as the Father to **DN, RW** and **AM** and the deceased. There was therefore no way the three children could have suffered prejudice because of their association with the deceased.

On defamation, the trial court ruled that claims for defamation are justiciable as tortious civil law claims falling outside the province of constitutional law.

As to whether the impugned publications subjected the minors to inhuman and degrading treatment, the trial court adopted the reasoning advanced for rejecting the appellants' complaints that the minors' right to privacy had been violated and ruled that this claim was dependent on the success of the primary claim for breach of the right to privacy and since the primary claim had failed, there was no way the auxiliary claim of the minors having been subjected to inhuman and degrading treatment could be sustained.

The appellants were aggrieved and filed this appeal raising thirteen (13) grounds of appeal, subsequently condensed into five (5) which may be summarized that the learned trial Judge erred both in law and fact when:

1. ***He failed to properly appreciate, balance and equally apply the principle of public interest to the respondents' right to publish the impugned publications as against the equally important public interest to protect the minors' independent right to character, wellbeing, innocence and integrity as contemplated for in the Children's Act (Act No. 8 of 2011).***

2. ***He failed to properly appreciate the facts presented by the appellants and not only erroneously relied on extraneous factors but also failed to give due consideration to the numerous international treaties on the rights of the Children as demonstrated in the Children's Act (Act No. 8 of 2011).***

3. ***He erroneously and without sufficient basis sustained the respondents' defence of the minors' mother's consent to the publication of the impugned publications.***

4. ***He erroneously failed to consider the minors' rights not to be subjected to inhuman and degrading treatment.***

5. ***He failed to consider submissions put forth by the appellants***.

The appeal was canvassed by written submissions fully adopted and orally highlighted by learned counsel for the respective parties. Messers **P. Maingi** and **Lempaa Suyianka** appeared for the appellants, **Mr. Abidha Nicholus O.P** appeared for the 1st respondent, while **Mr. Guto Mogere** appeared for the second respondent.

Mr. Maingi faulted the trial court for the failure to properly appreciate, balance and apply the principle of public interest equally between the right to privacy of the minors and the right to freedom of expression by the media; that the trial court not only misapprehended but also misapplied the said principle in favour of the impugned publication of the minors' images alongside those of the deceased, although in counsel's view, publication of the story of the most wanted criminal in Kenya undisputably done in the public interest, it could have been carried without unnecessarily "tagging along" the minors' images in the said impugned publications.

Counsel relied on the case of **Max Moslay versus News Group Newspaper Limited [2008] EWH C 1777 (Q.B**) at page 328 and **AAA versus Associated Newspaper Limited [2012] EAHC 2103 (QB)** at page 48 and faulted the trial court for its failure; first, to appreciate that intrusion into the minors' privacy was unwarranted, and; second to appreciate and take into consideration the existence of the undisputed written apology which, in counsel's view, was a clear admission on the part of the respondents that the intrusion into the minors privacy was unwarranted.

Counsel also relied on the case of **J.P. Macharia T/A Machira & Co. Advocates versus Wangethi Mwangi and another [1998] eKLR** and the case of **Jakoyo Midiwo versus Kenya Time Trust Limited & another [2005] eKLR**, in support of the submission that, tendering of an apology by the first respondent vitiated its entitlement to the defence of publication of the minors' images in the public interest.

On international covenants and treaties on Human Rights and fundamental freedom, counsel faulted the trial court for the failure to take into account the numerous treaties espousing the right to privacy of minors as set out in the respective petitions and submissions. Although, **section 75** of the repealed Constitution constricted enjoyment of the right to privacy of the person, the international covenants and treaties on the rights of the child as domesticated under the Children Act (Act No. 8 OF 2011) provided sufficient legal framework for sustaining the minors' entitlement to protection of their right to privacy.

With regard to parental consent, the trial court was faulted for erroneously making a deduction that merely because, the minors' mother **Felister Wanjiru** gave an interview to the respondents that in itself was sufficient to sustain the respondents' defence of consent. In counsel's view, a proper construction of **section 19** of the Children's Act is that, children have their own independent and inherent rights which parents ought to protect. The consent granted by the late **Felister Wanjiru** was therefore invalid, especially when the trial court properly appreciated that as at the material time when the interview was given, the minors' mother **Felister Wanjiru** was not only traumatized, but was also in a state of shock, frightened and confused due to the traumatic exposure to the shooting to death of the deceased.

Relying on the case of **Dawson versus Wear Mouth [1992] 2ALLER** and **Gillick versus West Norfolk A.H.A. (C.A) [1986**], counsel faulted the trial court for sanctioning parental consent of the late **Felister Wanjiru** without proof that it was in consonance with the best interests of the child principle.

On the trial court's failure to make a pronouncement on the minors' complaint of being subjected to inhumane and degrading treatment, counsel submitted that there was no justification for that default, considering the existence of extensive supportive evidence and submissions put forth by the appellants with regard thereto. Neither was there any basis for questioning paternity of some of the minors and using it as justification for denying them a remedy especially when there was explanation given by the appellants that the deceased had assumed parental responsibility over those minors, in terms of **section 23** of the Children Act.

On the findings on defamation, counsel relied on the case of **John Doe versus Methodist Hospital (Supreme Court of Indiana) No. 30501-9504- CV-420** and submitted that the appellants' claim was not founded on the tort of defamation but on violation of the right to privacy and subsection to inhuman and degrading treatment.

Opposing the appeal, **Mr. Abidha Nicholus O.P,** relied on the case of **BA & Another versus Standard Group Limited & 2 others [2006] Eklr**, **Samuel Kamau Macharia & Andrew versus Kenya Commercial Bank Limited & 2 others [2012] eKLR**, and **Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi & another [2014] eKLR**, and submitted that the rights and fundamental freedoms sought to be enforced did not lie in law as they were not provided for in the repealed Constitution, notwithstanding the appellants failure to prove the alleged stigmatization, ridicule and loss of reputation of the minors. Neither was there any evidence tendered providing nexus between those alleged infringements and the publications of the impugned images. The trial court cannot therefore be faulted for discounting the claims in favour of **DN, RW** and **AM** for the appellants' failure to explain; why the birth certificates of the said minors were processed only on 21st March, 2012; the nexus between those minors and the deceased; and the status of Simon **KN,** indicated in the birth certificates of those minors as the father.

On damages, counsel submitted that besides the appellants specifying them in the petitions and quantifying them in their written submissions, no evidence was tendered to justify the same.

On delay, counsel urged us to affirm the trial court's finding that the appellants had failed to shed light on the circumstances that precluded them from lodging the claims between 2007 and 2012 or why the late **Felister Wanjiru** did not commence those proceedings before her demise in 2011, especially when the appellants conceded that they bought the newspapers containing the impugned publications and images

on the very dates on which they were published and understood their contents.

On consent, counsel submitted that the trial court's assessment and reasoning as to why it sustained the respondents' defence of consent was well founded both in law and in fact and should therefore be affirmed.

On the limitation on the enjoyment of human rights and fundamental freedoms, counsel relied on the case of **Peter Njeru Kagime & 7 others versus Attorney General** (supra), and submitted that publication of the impugned publications having been done in the public interest about a most-wanted criminal that was sufficient justification for the limitation of the minors' enjoyment of their right to privacy.

Counsel then relied on the case of **Roshanara Ebrahim versus Ashley Kenya Limited & 3 others [2016] eKLR** and submitted that the elements for the protection of the right to privacy were absent in this case.

Mr. Guto Mogere also opposing the appeal relied on **Black's Law Dictionary** (9th Edition), **Hillary Delany** & **EOIn Carolan,** on the right to Privacy [2008] at page 227, the case of **W. versus EdGell [1990] 1ALLER 835; Margaret**

O'hartigan versus Department of Personnel et al 118wn.2d111[1991' Alexander versus Knight 197 pa super 7 of 177 A2d 142 [1963]; **Hague versus Williams 37 N.J 328, 181A.2d345 [1962**]; and **Stephen Kariuki Kamau & 5 others versus Kenya Ports Authority & 6 others [2016] eK**LR and submitted that the trial court was justified in sustaining the respondents' plea of "no wrong doing or intention" as they were simply responding to public interest by highlighting the shooting by police of the deceased, then described as the most wanted criminal.

Relying on the case of **Pallock versus Pallock 154 G.d 601**, counsel submitted that, a minor's right to privacy as provided for under **section 19** of the Children Act, 2001, is not absolute but is subject to parental guidance; that the said provision recognizes the role of parents in exercising their children's right to privacy which means that a parent has the power to consent to any matter which involves the privacy of a minor where there is need for the privacy to the lifted subject to the consenting parent demonstrating good faith and reasonable basis for believing that such consent is necessary for the welfare of the child; that the consent given by **Felister Wanjiru**, as the mother of the minors was not compromised in any way as it was based on the free will and good faith of the late **Felister Wanjiru** in a bid to inform the public that she and the minors photographed alongside her were innocent and not involved in any criminal activities of the deceased. It was also meant to protect her and the minors from the agitated public who were circulating leaflets targeting the family of the deceased.

On the complaint that the impugned publications exposed the minors to inhumane and degrading treatment, counsel submitted that the appellants failed to demonstrate that the information was obtained in an intrusive manner; or that it was about intimate aspects of the minors' personal life. Nor was the same used for commercial gain and enrichment by the respondents or for purposes other than that which the interview with **Felister Wanjiru** intended to serve.

Relying on the case of **Jeniffer Nyambura Kamau versus Humphray Mbara Nandi [2013] eKLR,** and **Mbogo & another versus Shah** [**1968] EA93**, counsel submitted that the trial court considered all the legal and factual positions, analyzed them scrupulously before reaching its conclusion. There was nothing specifically pointed out to this Court in the said judgment that could support the appellants' contention that the trial court was not objective in its assessment of the facts and application of the law to those facts.

This is a first appeal. My mandate is as set out in **Rule 29(1) (a)** of the Court of Appeal Rules (CAR) namely, to re-appraise the evidence and draw our own inferences of fact, while at the same time reminding ourselves that an appeal from the High Court to this Court is by way of a retrial. I must therefore reconsider the record, reevaluate the facts on the record myself and then draw out my own conclusions thereon. I am not bound to follow the trial court's findings of fact if it appears to me that the trial court clearly failed on some point to take account of particular circumstances; or misapprehended the facts or misapplied the law to the facts and thereby arrived at a wrong conclusion on the matter. See **Selle & Another versus Associated Motor Board Company and others [1968] EA 123**.

I have considered the record in light of the above mandate, the rival submissions and principles of law relied upon by the respective parties in support of their opposing positions. The issues that fall for my determination are the same as those summarized above.

With regard to issue number 1, there is no serious contest from the appellants that publication about the killing of the deceased by the police was in the public interest, and therefore agreeing with the trial court's finding that all that the impugned publications did was to highlight the story of the police killing of the deceased. They have however, faulted the trial court for the failure to find that there was no compelling reasons for "tagging along" the minors' images in the said impugned publication. The respondents' response is that, consent of the late **Felister Wanjiru** as the mother of the minors was sufficient justification for "tagging along" the minors' images.

In **Kenya Bus Services Ltd & 2 others versus Attorney General & 2 others [2005] ekLR**, the High Court held *inter alia* that, enforcement of a right must always be balanced against other considerations such as public interest and public policy.

Any limitation on the enjoyment of a right should not only be reasonable but must also be justifiable in an open and democratic society based on human dignity, equality and freedom.

The Supreme Court of Uganda while dealing with similar issues in **Obbo and another versus Attorney General [2004] 19A 265,** held *inter alia* that, freedom of expression ought not to be suppressed, except where allowing its exercise would directly endanger community interests.

In this appeal, the trial court upheld the respondents' freedom of expression because it met the threshhold for sustaining a publication executed in the public interest. What the appellants stressed before me is that when upholding the respondents' right to freedom of expression in the public interest, the trial court should have balanced the respondents' right to publish the publication in the public interest with the need to protect the minors' independent right to character, wellbeing, innocence and integrity as contemplated in the Children Act. This complaint in our view is tied to the trial court's sanctioning of the respondents' defence of "consent". I therefore find it convenient to

defer its determination and address it under ground 3 of the appeal.

With regard to ground 2 of the appeal, the undisputed facts of the consolidated petitions are as I have summarized them herein. Apart from the appellants complaining firstly, that the trial court did not properly appreciate the facts relied upon by the appellants in support of their consolidated petitions; and, secondly, that extraneous factors were taken into consideration by the trial court, hence the erroneous dismissal of the appellants petitions, nowhere did counsel point out to this Court the particular facts that were not properly appreciated and considered by the trial court. The extraneous factors that were taken into consideration by the trial court. The above being my view, I find no merit in this complaint and it is accordingly rejected.

As for the failure to cite and apply International Covenants and Human Rights instruments on the right to privacy of the minors, it is undisputed that the appellants' petitions were premised on **section 75** of the repealed Constitution. The appellants do not dispute the fact that the trial court construed this provision and found that the right to personal privacy was constricted as it was not provided for in the said section. However, notwithstanding the above finding, the trial court did not down its tools with regard to the appellants' claims on infringement of the minors' right to privacy. The trial court took into consideration the principle of paramountcy of the best interest of the child as contemplated not only in the Children Act, but also in the various international Human Rights covenants and instruments, cited by the appellants. There is nothing to suggest that these were never considered and applied in the determination of those petitions. It was sufficient for the trial court to bear principles distilled therefrom when determining the competing interests before it, which it did. My reasons for finding so is that, although the principle of protection of privacy of a child is provided for in **section 19** of the Children Act, the said Act is not a constitutional framework. There was therefore no way the appellants' petitions could have been sustained as constitutional petitions and determined on their merits under the provisions of the Children Act as contended by the appellants without first of all ensuring that these were properly anchored on the repealed Constitution.

I have appreciated the trial court's lengthy exploration of elements for sustaining a claim for violation of the right to privacy at common law, the European Human Rights Regime, the Nordic Conference and various foreign jurisprudential pronouncements and legal texts as assessed by the trial court. I see misdirection or error in them and therefore find no basis in this complaint. It is accordingly rejected.

Turning to consent, the appellants faulted the trial court for sustaining the respondents' defence of consent for the reasons that **Felister Wanjiru** was traumatized at the material time when she gave the interview, and therefore her reasoning capacity must have been impaired. The trial court indeed appreciated the circumstances under which the interview was given but found justification for sustaining the respondents' contention that the interview was voluntary, well informed and free from any inducement. The late **Felister Wanjiru** knew what she was talking about. This had to be so in the absence of any objection against the contents of the impugned publication by the late **Felister Wanjiru** during her life time. I have arrived at the same conclusion and therefore find nothing on the record to suggest that the trial court's finding was based on speculation. I affirm the finding that the consent given by the late **Felister Wanjiru** was well informed, unassailable and therefore provided sufficient basis for sustaining the respondents' defence of consent.

The above finding now leads me to determine the complaint of the trial court's failure to give equal protection to the right to privacy of the minors when sanctioning the respondents,' right of publication of the impugned publications in the public interest, including the minors' images. The trial court construed **section 4** in conjunction with **section 19** of the Children Act and arrived at the conclusion that consent is a defence to a claim of infringement of right to privacy. Bearing the above principle in mind, the trial court took into consideration the circumstances under which the late **Felister Wanjiru's** was interviewed by the respondents, especially those relating to undisputed circulation of leaflets targeting the family of the deceased and which undoubtedly contributed immensely to the conduct of the deceased's family in seeking police protection. I have no doubt the trial court properly appreciated these undisputed factors. That is why it arrived at the conclusion that there was need in the circumstances for **Felister Wanjiru** to publicly dissociate herself and the minors who were then under her care from the life style of the deceased for personal safety and security. I therefore find nothing on the record to suggest that there was lack of balancing of the respondents' interests to publish the impugned publications in the public interest and the minors' interest in the protection of their wellbeing, integrity, vulnerability and innocence. It is my view that, it was in the best interests of the minors that a public appeal be made by the late **Felister Wanjiru** on her own behalf and that of the minors then under her care to dissociate themselves from the deceased's life style so as not to be targeted.

It is also my observation that the trial court did not stop at just sustaining the defence of consent in favour of the respondents. It went further, in the interests of justice to both parties to determine as to whether the minors' rights to privacy had in fact been violated. It then gave reasons that no basis had been laid for sustaining that complaint as the incident relied upon by **Jemima** was triggered by the conduct of a teacher's personal knowledge of the minors as children of the deceased from their village. It had nothing to do with the impugned publications. There was also silence on the part of the appellants as to whether the other children also suffered similar predicament. Additionally, the appellants did not demonstrate that both the late **Felister Wanjiru** and the minors went through the same predicament during **Felister Wanjiru's** life time.

With regard to the trial court's failure to make a pronouncement on the appellants' complaint of exposure of the minors to inhuman and degrading treatment, I agree that indeed, no specific pronouncement was made by the trial court with regard to this complaint. The reason the trial court gave was that, this complaint was auxiliary to the core complaint of infringement of the right to privacy and since the core complaint had failed, there was no need to interrogate and make separate findings on this complaint, especially when the facts relied upon in support of both complaints were similar in material particulars.

I have revisited the opposing facts on the record on this complaint and considered them in light of the conclusions reached above by the trial court and the rival submissions on this issue. I find on my own analysis as did the trial court, that there was nothing in the impugned publications and the minors' images to suggest that the minors had anything to do with the deceased's life style. The incident relied upon by **Jemimah** related to conduct of a teacher who knew the children from their home, as children of the deceased. The said incident had nothing to do with the impugned publications. The evidence adduced by **Tabitha** on the other hand related to changing of schools for **DN** due to her in ability to afford school fees in the school he was transferred from, while there was no mention of any incidents involving the other 2 minors under **Tabitha's** care. The result of my own consideration is that the complaint was properly rejected by the trial court, a position I affirm.

As to the complaint of failure to give due consideration to the submissions filed by the appellants, no particular aspects of the appellants' submissions that were allegedly not taken into consideration by the trial court were highlighted. I am unable to find any on the record and so I reject it as well.

As for the right to seek redress for the minors, **DN, RW** and **AM**, who from the content of their birth certificates have no biological lineage with the deceased, the issue was never raised as a preliminary point. I have perused the facts relied upon and background information, affidavit in support of the petition by **Tabitha** as well as her responses on cross-examination. The issue does not appear to have been highlighted in the above processes. That notwithstanding, it is however, my view that since it is not disputed that these minors were the children of **Felister Wanjiru** described as wife of the deceased, and were living with her with the deceased in the same house, parental responsibility could be presumed in terms of section 23 of the Children's Act. I find this provided sufficient *nexus* and justification for them to seek redress for any alleged violations of their rights and fundamental freedoms notwithstanding, the success or otherwise of those petitions.

Since **Kiage, JA** is in agreement, he upshot of the above is that I find no merit in the appeal. It is accordingly dismissed. Due to the nature of the litigation, I order each party to bear own costs.

The Judgment is signed under **Rule 32(3)** of the Court of Appeal Rules (CAR), since the Hon. Mr. Justice **P.N. Waki, JA** ceased to hold office of Judge of Appeal upon retirement from service.

Dated and Delivered at Nairobi this 25th day of October, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

JUDGMENT OF KIAGE, JA.

I have had the advantage of reading in draft the judgment of the learned Nambuye JA and will not therefore rehash the facts, procedural history and submissions made.

For the reasons she has given, I too, come to the conclusion that this appeal is for dismissal. Lenaola J *(as he then was)* fully appreciated the contours and content of the right to privacy both

under the repealed Constitution and under International law. In the circumstances of this case the said right was neither violated nor infringed, and he was right to reject the appellants' petitions.

The conclusion was inescapable that the minor's mother and guardian voluntarily, and believing it to be in the interests of the family's safety, gave a detailed interview at her home and consented to the publication of the story and the carrying of photographs of herself and of the minors by the respondents in their newspapers. She never complained about the story as carried during her lifetime. Nor did the appellants until more than five years after the publication, when they filed petitions on behalf of the minors complaining of breach of certain fundamental rights and freedoms. Such consent as given in the case provided a complete and unassailable defence to the petitions.

Once the petitions failed on that main complaint, they had to fail on the related claims as well.

The appellants have not persuaded me on the various grounds of complaints contained in their memorandum of appeal and I, too, am of the view that the High Court judgment is for affirming and must be left undisturbed. Accordingly, the final orders on this appeal shall be as proposed by Nambuye JA.

DATED and delivered at Nairobi this 25th day of October, 2019

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR