



REPUBLIC OF KENYA



**Maina v Talent Quest Africa (Petition E336 of 2023) [2024] KEHC 6151 (KLR)
(Constitutional and Human Rights) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E336 OF 2023

LN MUGAMBI, J

MAY 30, 2024

BETWEEN

YVONNE MAINA PETITIONER

AND

TALENT QUEST AFRICA RESPONDENT

JUDGMENT

1. The Petition is dated 15th September 2023. The Petitioner alleges that the Respondent unlawfully obtained her image and, without her consent and used it advertise for commercial exploitation.
2. The Petition is supported by the Petitioner’s affidavit in support of even date. Consequently, the Petitioner seeks the following reliefs:
 - a. A declaration be issued that the Respondent violated the Petitioner’s fundamental right to privacy and human dignity under Article 28 and 31 of *the Constitution* by publishing the Petitioner’s image for purpose of commercial advertisement without the Petitioner’s consent.
 - b. A declaration that the Respondent violated the Petitioner’s right under Article 40 of *the Constitution* by publishing the petitioner’s image and likeness for their own commercial gain with no personal financial advantage gained by the petitioner herein.
 - c. A declaration be issued that the Petitioner’s intellectual property rights, right of publicity and personality rights was infringed when the Respondent decided to publish the Petitioner’s image in advertising and marketing



the computer packages courses offered for financial gain without seeking authority/consent from the Petitioner.

- d. An order of permanent injunction be issued restraining the Respondent from publishing and/or using the Petitioners' image and likeness in its advertisement or promotion in any way without the Petitioner's consent.
- e. An order that the Respondent be compelled to compensate the Petitioner for damages and/or loss arising from the publication of the Petitioner's photograph without her express authority and the exploitation of the Petitioner by the Respondent for financial gain.
- f. Any other relief that the Court deems fit to grant.
- g. Costs of the petition be borne by the Respondent.

Petitioner's Case

3. The Petitioner states that she graduated in 2019 from the University of Nairobi with a Bachelor of Arts Degree in Journalism and Media Studies (Public Relations). She deponed that she has since worked with various organizations.
4. The Petitioner states that the Respondent published on its website an advertisement containing her photograph for housemaids' jobs in the Gulf. She complains that her image used without her consent by the Respondent for online international visibility to so as attract and yield maximum profits.
5. She stated that when the advertisement was published, people who knew her assumed that she had been hired to advertise the jobs while others believed that she was a house help acting as the Respondent's brand ambassador, which is false.
6. The Petitioner is aggrieved at the exploitation of her image without her consent which she avers is a violation of her dignity and demotion of her status as a graduate. She contends that the publication has subjected her to ridicule before her peers who consider her desperate to have taken on a housemaid role despite being a graduate.
7. The Petitioner contends that the Respondent has declined to take down her photograph and equally refused to compensate her for using her image. The Respondent has as well refused to apologize for its illegal action. For these reasons, the Petitioner brings this Petition against the Respondent for the alleged violation of her rights under Articles 28, 31 and 40 of *the Constitution*.

Respondent's Case

8. The Respondent vide a replying affidavit sworn by its former Director, David Chege Njoroge, on 22nd November 2023 denies publishing the Petitioner's image on the impugned advertisement. He alleges that since the Petitioner is a stranger to the Respondent's firm, there was no way it could have been able to access her photograph as alleged on its official website www.tga.co.ke.
9. He further refutes receipt of the Petitioner's demand letter instructing the Respondent to cease using her image. According to him this communication was never received by the Respondent and so stranger to the receipt stamp on the letter.
10. He as well argues that the Petitioner's claim is unfounded as the time of the alleged use of her image, between 2022 and 2023 and issuance of the demand letter, the Respondent's operations had ceased owing to the impact of the COVID – 19 pandemic. The Respondent is yet to recover. Equally it is



stated that the Respondent has never benefited economically as a result of usage of the Petitioner's image.

11. The Respondent is similarly concerned as the Petitioner's allegations are meant to sabotage its business. On this premise, the Respondent maintains that there was no breach of constitutional rights on its behalf and as such the Petition lacks merit.

Petitioner's Submissions

12. On 30th November 2023, Macharia, Gaitho and Murigu Advocates LLP filed submissions where the key issues were whether the Respondent violated the Petitioner's right to Privacy and dignity and whether the Petition satisfies the threshold in *Anarita Karimi Njeru v Republic (1979) eKLR*.

13. On the right to privacy, Counsel stated that the right is protected under various laws. Nationally, Article 31 of *the Constitution* and Section 25 of the Data Protection Act. Internationally, Article 12 of the Universal Declarations of Human Rights and Article 17 of the International Conventions on Civil and Political Rights. In this regard, Counsel submitted that the right to privacy and a person's consent go together. Reliance was placed in the decision in *T.O.S v Maseno University & 3 Others (2016) eKLR* where it was held that:

“From the above reasoning and expositions of the law it is clear that publication or use of the images of an individual without his consent violates that person's right to privacy. I say so because a person's life is a restricted realm in which only that individual has the power of determining whether another may enter, and if so, when and for how long and under what conditions.”

14. Similar reliance was also placed in *Kuria v University of Kabanga (Petition E002 of 2022)* [2023] KEHC 809 (KLR), *Jessicar Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017] eKLR and *Tumaz and Tumaz Enterprises Limited & 2 others v National Council for Law Reporting (Miscellaneous Civil Case E144 of 2021)* [2022] KEHC 14747 (KLR).

15. Correspondingly, Counsel argued that the Respondent's actions were in breach of the principles of data protection under the Data Protection Act. In particular, that a data controller or processor should ensure personal data is processed in accordance with the right to privacy of the data subject and processed lawfully, fairly and in a transparent manner as spelt out under Section 25. Reliance was placed in *Wanjiru v Machakos University (Petition E021 of 2021)* [2022] KEHC 10599 (KLR) where the Court found that the Respondent violated the Petitioner's right to privacy by failing to uphold the dictates of Section 26 of the Data Protection Act.

16. On the right to dignity, Counsel submitted that by unlawfully publishing the Petitioner's image, she has been and continues to be exposed to ridicule and stigma from her colleagues, family and friends. Moreover, that the Respondent's action has injured her reputation and caused her psychological torture. Reliance was placed in *Jessicar Clarise Wanjiru (supra)* where it was noted that:

“23. ‘Privacy’, ‘dignity’, ‘identity’ and ‘reputation’ are facets of personality. All of us have a right to privacy and this right, together with the broader, inherent right to dignity, contributes to our humanity.

24. It is the personality rights of dignity and privacy that underscore individuality and set both the limits of humanity and of human interaction. But, the



reasons for protecting privacy are wider than just protecting the dignity of the individual.”

17. Equal dependence was also placed in *Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited* (2021) eKLR, *Dhabiti Sacco Ltd v Sharon Nyaga* [2022] eKLR and the *Wanjiru* case (supra).
18. Counsel moving on submitted that the Petition had satisfied the threshold set out in the *Anarita Karimi* case (supra). This is since the Petitioner had demonstrated that by obtaining her image without her consent violated her right to dignity and privacy. This violation was as well evidenced in the adduced documentation. Likewise, it is palpable that the Petitioner’s social standing has been threatened among her family and friends, who know her as a graduate from the University of Nairobi.

Respondent’s Submissions

19. The Respondent in the submissions dated 14th December 2023 filed by Solomon Mugo and Company Advocates sought to discuss two issues. First, whether the Petitioner’s image had been published on its website without her consent and if so whether her constitutional rights had been violated.
20. Relying on the Respondent’s averments, Counsel submitted that the Petitioner’s photograph was never published on the Respondent’s website. In fact, Counsel pointed out that the Petitioner had failed to prove that her image had been published on the Respondent’s official website being www.tga.co.ke. Counsel further stressed that prior to closure of its business, the Respondent upheld the highest standards of professionalism and so could not have obtained the Petitioner’s image without her consent.
21. On whether the Petitioner’s rights had been violated, Counsel answered in the negative. Reliance was placed in the decision in *Jessicar Clarise Wanjiru*(supra) where it was held that:

“The tort of misappropriation of personality can be invoked when all of the following four elements are met:

 - i. 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.
 - ii. The person is clearly identifiable in the medium used and to their respective community or communities.
 - iii. The person does not consent to the use of their personality.
 - iv. 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.”
22. Like dependence was also placed in *Karugaba vs. Attorney General* (2003) 2 EA 489 and *Lyomoki and Others vs. Attorney General* (2005)2 EA 127.
23. Counsel recapped that the Respondent had ceased operating during the impugned period. Likewise, it was submitted that the Petitioner is a stranger to the Respondent. Counsel highlighted that the Petitioner’s demand letter was never served on the Respondent as alleged. Emphasis was drawn to the fact that the business was not even operational at the time.



24. Counsel as such maintained that it was not plausible for the Respondent to violate the Petitioner's rights and neither had it. Considering this, Counsel submitted that the Petitioner was not entitled to the relief sought as no justifiable reason had been established.

Analysis and Determination

25. From the foregoing account, the issues that arise for determination in my view are:
- i. Whether the Petitioner's rights under Articles 28, 31 and 40(1) of the Constitution were violated by the Respondent; and
 - ii. Whether the Petitioner is entitled to the reliefs sought.

i. Whether the Petitioner's rights under Articles 28, 31 and 40 (1) were violated by the Respondent

26. Considerable progress has been made in this Country towards protection of personal data which has culminated to the enactment of the Data Protection Act whose preambular clause states that it intended to give effect to Article 31(c) and (d) of the Constitution. Section 2 of the Act defines personal data as:

any information relating to an identified or identifiable natural person.

27. In dealing with personal data the Act under Section 25 provides the following principles:
Principles of data protection
Every data controller or data processor shall ensure that personal data is—
- i. processed in accordance with the right to privacy of the data subject;
 - ii. processed lawfully, fairly and in a transparent manner in relation to any data subject;
 - iii. collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes;
 - iv. adequate, relevant, limited to what is necessary in relation to the purposes for which it is processed;
 - v. collected only where a valid explanation is provided whenever information relating to family or private affairs is required;
 - vi. accurate and, where necessary, kept up to date, with every reasonable step being taken to ensure that any inaccurate personal data is erased or rectified without delay;
 - vii. kept in a form which identifies the data subjects for no longer than is necessary for the purposes which it was collected; and
 - viii. not transferred outside Kenya, unless there is proof of adequate data protection safeguards or consent from the data subject.

28. Under section 26, the Act outlines the rights of a person referred to as a data subject in the following manner:

A data subject has a right—

- i. to be informed of the use to which their personal data is to be put;
- ii. to access their personal data in custody of data controller or data processor;



- iii. to object to the processing of all or part of their personal data;
 - iv. to correction of false or misleading data; and
 - v. to deletion of false or misleading data about them.
29. *The Constitution* under Articles 28 and 31(c) provide for protection of the right to dignity and privacy by stating thus:
- 28. Every person has inherent dignity and the right to have that dignity respected and protected.
 - 31. Every person has the right to privacy...
30. Numerous judicial decisions have been rendered concerning the application of the right of privacy and dignity and as such, the principles underlying those rights are now firmly settled. Courts have particularly held that commercial exploitation of a person's unique characteristics without his/her consent is an interference with their rights of privacy and dignity. In *Jessica Clarise Wanjiru* (Supra) the Court expressed itself as follows:
- “17. In simple terms, image rights refer to a person's right to commercialize aspects of his personality such as physical appearance, pictures or caricatures, signature, personal logos and slogans, and also the right to prevent other people from commercially making use of them. In a claim of this nature, the plaintiff raises wrongful infringement of three inter-related, but distinct, personality interests, namely identity, privacy and dignity.
 - 18. Identity is defined as a person's uniqueness which individualizes such person, and is manifested in various facets of personality (or indicia) which include, among other things, one's physical appearance or image and is considered a separate right of personality.”
31. In the case of *Proactive Sports Management Ltd v Wayne Rooney & 3 Others* [2010] EWHC 1807 (QB) the High Court of England and Wales extensively defined image rights to include the following:
- “...The definition of Image Rights is comprehensive and it may be helpful to set it out in full. It is in these terms:
 - “Image rights means the right for any commercial or promotional purpose to use the Player's name, nickname, slogan and signatures developed from time to time, image, likeness, voice, logos, get-ups, initials, team or squad number(as may be allocated to the player from time to time), reputation, video or film portrayal, biographical information, graphical representation, electronic, animated or computer-generated representation and /or any other right or quasi-right anywhere in the world of the player in relation to his name, reputation, image, promotional services, and/or his performances together with the right to apply for registration of any such rights.”
32. Congruently, in the South African case of *Wells v Atoll Media (Pty) Ltd and Another* (11961/2006) [2009] ZAWCHC 173; [2010] 4 All SA 548 (WCC) the Court held:
- “(48) In *Grutter v Lombard and another* 2007 (4) SA 89 (SCA), at para 8 Nugent JA, in a most carefully researched judgment, noted that it was generally accepted academic opinion that features of a personal identity are capable and indeed deserving of legal protection.



(49) In the context of this case, therefore, the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as in this case, for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the personal rights of the individual, including the person's dignity and privacy. In this dispute, no care was exercised in respecting these core rights.”

33. In regard to the right to dignity, the court in Mutuku Ndambuki Matingi (supra) stated:

“ 50. As regards the right to dignity, in Ahmed Issack Hassan vs. Auditor General [2015] the Court held that:

“...the right to human dignity is the foundation of all other right and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated”. See Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) SCR (2) 516.”

34. These above principles which have been developed over a time now are the ones that the Court has to look up to assist it in deciding whether or not the publication of the Petitioner's image was an infringement of her rights to privacy and dignity. As to whether there was publication, the Petitioner exhibited the printed images which she alleged were published on the website of the Respondent but Respondent denied any responsibility for the said publication or the fact that the images were published in its website. It was thus obligatory on the Petitioner to establish that it was the Respondent that was behind the publication of her images without her consent. Section 107 (1) of the [Evidence Act](#), states whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must proof that those facts exist.

35. A three- Judge bench in EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) (Petition 150 & 234 of 2016 (Consolidated) (2019)eKLR stressed the obligation placed on a Party to tender proof of allegations made by stating thus:

“ 303. The general principal governing determination of cases is that a party who makes a positive allegation bears the burden of proving it. Moreover, the onus to establish the violation of alleged rights is not a mere formality. Differently put, the onus lies on he who alleges to prove every element constituting his or her cause of action. This includes sufficient facts to justify a finding that the rights have been violated.

304. Constitutional analysis under the Bill of Rights takes place in two stages. First, the applicant is required to demonstrate his or her ability to exercise a fundamental right has been infringed. If the court finds that the law, measure, conduct or omission in question infringes the exercise of the fundamental right, or a right guaranteed in the Bill of Rights, the analysis may move to the second stage. In the second state, the party seeking to uphold the restriction



or conduct will be required to demonstrate the infringement or conduct is justifiable in a modern democratic state and satisfies Article 24 test.

305. Cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked:-

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

306. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*:

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

307. Decisions on violation of constitutional rights should not, and must not, be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon unsupported hypotheses.”

36. Having therefore set the law on the relevant principles, it is now necessary to determine if the Petitioner discharged her burden of proof by demonstrating sufficiently that the publication of her images was done by the Respondent.

37. I have carefully perused the Petitioner’s affidavit detailing the alleged violations. She states that on diverse dates, the Respondent, their agents or people working under their instructions published her photo (s) in their website advertising housemaid jobs in Gulf and proceeds to attach copies of photos/ images that were published in annexure marked YM-2. She then proceeds to depose that the said commercial advertisement and use of her image was done without her consent and that the main motive of using her photograph was to give the Respondent visibility which would in turn yield more profits in terms of many applicants who were being targeted.

38. The Petitioner does not say when publication was done or even when she discovered that it had been done.

39. Further, the petitioner speaks generally without providing specific details as to the identity of the website that she alleges her images were posted. For instance, she does not provide the specific URL code (uniform resource locator) for the said website where she discovered her image had been published. Further, the affidavit relies on printed images from electronic record yet there is no accompanying electronic certificate under Section 106B (4) of the *Evidence Act* that could validate the photographs so as to make them admissible in evidence.

40. Furthermore, despite stating that many people saw the photographs the Respondent had used and raised concerns with the Petitioner that she was doing advertisements for house girl jobs abroad, the Petitioner did not provide even a single affidavit from any of them confirming that assertion.

41. The Petition was thus full of generalities but with marked feeble attempt to provide tangible proof.



42. Failure to gather the evidence meticulously ruined the Petitioner's case. Further, even the little that was gathered and presented in form of annexures was not properly laid before the Court hence inadmissible for non-compliance with the mandatory provisions of the [Evidence Act](#). Without prima facie proof of publication of the images by the Respondent, the Petition must inevitably collapse.
43. Who knows? May be, the Petitioner might have had a chance if things had been done otherwise. I also take note that the Petitioner is a young woman. She only graduated in 2019. In view of these considerations, I exercise my discretion against awarding costs in this Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY, 2024.

L N MUGAMBI

JUDGE

