

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO 110 OF 2018

*(Originating from the decision of of the Resident Magistrate Court of Dar es Salaam at Kisutu
(Hon. Shaidi-PRM) dated 2nd day of February, 2018 in Civil Case No. 71 of 2017)*

DEOGRAS JOHN MARANDO.....APPELLANT

VERSUS

MANAGING DIRECTOR,

TANZANIA BEIJING HUAYUAN SECURITY GUARD

SERVICE CO. LTD.....RESPONDENT

JUDGEMENT

Date of last order: 19/02/2019
Date of judgement: 27/03/2019

MLYAMBINA, J.

This is a matter that concerns with personality or invasion of right of privacy which plays a vital role in shaping celebrity rights. Personality is defined as the combination of characteristic or quantities that form an individual's distinctive character.¹ So, right to personality means inherent rights associated with the personality of an individual. It aims at controlling the commercial use or any other interference of his or her identity. In order to appreciate

¹ Concise Oxford English Dictionary 11th Edition, 2008

whether there is a violation of the appellant's right to personality in this matter, I will, *albeit*, start to point out the brief background of the matter.

The appellant in this case was the employee of the respondent since December, 2015. He lodged Civil Case No. 71 of 2017 before the Kisumu Resident Magistrates Court. The claim by the appellant was that the respondent used attributes of the appellant's identity or likeness to advertise his security company without his permission. Consequently, the appellant herein sought for six relief (s) namely:

1. *That*, the defendant (respondent herein) be ordered to pay the plaintiff total amount to the tune of 200 million as a compensation for use for profit obtained from use of plaintiff's picture/likeness for promoting its services.
2. Permanent injunction restraining the defendant from use of the plaintiff likeness/picture and the like.
3. General damages as will be assessed by this honorable Court.
4. *That*, the defendant be ordered to pay interest at Court's rate from the date of judgement to the date of payment in full.
5. *That*, the defendant be ordered to pay costs of this suit.
6. Any other relief (s) the Court deem fit and just to grant.

The matter was heard ex-parte before the trial Court following the defendant's default to appear. Despite of ex-parte proof, the trial Court dismissed the suit on 2nd day of February 2018. At page 3 of the typed judgment, the trial Court had the following reasoning;

.....actually the plaintiff never told the Court that he suffered anything out of the act by the defendant and further he tells that the defendant managed to make profit out of it but he never told how the defendant realized profit. It is always the duty of he who alleges to prove his allegation not just to throw a blanket the way he did. All what was done by the defendant was done in line with the employment of the plaintiff as a security guard. I don't think and it could not be wise to ask for the permission to advertise the company using him as employee so as to attract benefit for the plaintiff himself to get salary and to meet running cost of the defendant/Company.

The appellant being dissatisfied by the decision of the trial Court, lodged this appeal on two grounds, namely:

1. *That*, the trial Magistrate erred in law and fact by failure by the trial Court to properly evaluate the evidence on that there was no any agreement between the respondent and the

appellant on use of his picture, face and or likeness for advertisement purpose.

2. *That*, the trial Magistrate grossly erred in failure to appreciate the evidence on use of his picture or likeness, face that is printed at the profiles and on banners to advertise the respondent's company and make profit out of it, but went on holding that there was no proof that the advertisement exists and the respondent still is accumulating worth out of it resulted in to unfair and just decision.

Wherefore, the appellant prayed for judgement and decree as follows:

- i) Quash the decision of the trial Court its subsequent orders.
- ii) Grant the relief (s) claimed by the appellant at the trial Court.
- iii) Costs be borne by the respondent.
- iv) Any relief as this honorable Court deems so fit.

Before I consider the arguments of both parties on merits, I have noted the respondent raised *a plea in limine lits* to the effect; *that the trial Court and this Court have no jurisdiction to entertain this matter.*

The main argument of the appellant is that the dispute between the parties is based on labour relationship. With due respect to the respondent, I think and do find that the objection is a misconception. In the found view of the Court, in order for the matter to be a labour issue, there must be, at the time of filing the suit, an employer and employee relationship.

By the time this suit was filed, as per the available record, there was no any employment relationship between the appellant and the respondent but the appellant's allegation is that there is an ongoing tort. Her ladyship Nyerere, J (*as she then was*) in the cited case of *Noah Musangile v. Tanzania Breweries Ltd*,² observed:

In strengthening the removal of the complexity in determining existence of the employment relationship "...protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the fact relating to the *performance of work and remuneration of the worker*, notwithstanding how the relationship is characterized in any contract arrangements, contractual or otherwise, that may be agreed between the parties. (*Emphasis applied*)

² (2015) LCCD 148 at page 149

Again, as properly argued by the appellant, there is no labour relationship between the appellant and the respondent as expounded under *Section 61 of the Labour Institution Act, 2004*.

The tort complained by the appellant, if exists, is not a labour matter; it is a liability emanating from appropriation of the likeness or invasion on the right to privacy of the appellant by the respondent's company.

On the merits of the appeal, the appellant through counsel Mussa Kiobya argued jointly the first and second grounds of appeal. He contended that the respondent used his picture, attributes and or likeness to advertise through company profiles and banners (exhibit P2 and P3) respectively. But the trial Magistrate erred by thinking that the picture, likeness, face of the plaintiff while in security was a proof that he was employed as a security guard and it was an error for the trial Court to conclude that his appearance was uniformity with employment.

The appellant went on to argue that in his employment contract (exhibit PI), none of the clauses allowed use of his image for advertisement, rather the use is pure meant to solicit customers requiring services from the respondent. It was purely commercial as the same circulates globally.

Further, the appellant argued that every individual has a right to his personality which extends to the name and image and has a right over to control the use of either. Thus, the act of the respondent in using the appellant likeness attributes and image for commercial benefit without his consent is exploitation as it aims at promoting its service gears from soliciting more customers.

The appellant did submit that at the trial he alleged and proved four elements: *First*, the respondent used his identity. *Second*, there was appropriation of appellant's likeness to respondent's advantage. *Third*, commercially, the appellant proved that there was no any consent/authorization and there was economical injury for use of his attributes without consent. *Fourth*, the respondent did illegally infringe upon the image right of the appellant. The respondent is soliciting more customers by advertising its security services. As a result, the respondent is earning profit out of it after circulation of those advertisement instruments.

To buttress the afore points, the appellant cited the Ugandan case of *Asenge v. Opportunity Bank (V) Ltd and 3rd Party Maad Ltd*,³ where it was held:

³ Commercial Court at Kampala (unreported) page 24

I find that the plaintiff had interest in the same and such that the defend ought to have her consent before using the same but no such consent was ever sought then the conclusion is that the defendant did earn a profit alone without the plaintiff partaking to the same.

In reply, the respondent through counsel Bernard Stephen submitted that exhibits P1 and P2 and P3 evidenced that the appellant and the respondent had employer-employee relationship which pave way to their conducts, acts and behaviors fall within the definition of labour matter.

The respondent replied further that the appellant was employed as a security guard and the company profile and banners are the professional documents for the purpose of introductory only and not promotion. Thus, the allegation that the appellant suffered mental and economic injury without justifiable reasons of audited financial statement, and profit and loss account or any professional statement justifying his mental and commercial injury render his allegations unfounded.

In the premise of the parties' arguments, I must give a general observation that, it amounts to tort or breach of the right to privacy, if without reasonable and probable cause, one uses

another's likeness, face, photograph or other defining attributes for either commercial or any gain without his/her consent.

Having gone through the employment contract of the parties in this matter, I noted true that there is no single term that authorized the respondent to use the appellants likeness and photograph to advertise its security service by the time the two parties were in engagement.

Further, there is no any term that authorized the respondent to use the appellant's likeness after termination of their agreement. In that way, there was no any sense of justice by the trial Court when it observed that; *"it was not wise to ask for the permission to advertise the company using him as employee so as to attract benefit for the plaintiff himself to get salary and meet running cost of the company."*

It is the observation of this Court that, even if the appellant was the employee by the time of the commission of the alleged tort by the respondent, that could not be an exception to the personality right of the appellant, unless there was a clear written consent from the appellant. Indeed, such consent should have been absolutely clear and certain.

Further, the right to privacy is guaranteed under Article 16 (1) of the Constitution of the United Republic of Tanzania of 1977 as amended. Article 16 (1) (*supra*) states:

Every person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communication. (Emphasis applied)

Right to privacy is further guaranteed under *Article 12 of the Universal Declaration of Human Right, 1948* which provides:

No one shall be subjected to arbitrary interference with his privacy, family home or correspondence nor to attacks upon his honour and reputation and everyone has the right to the protection of the law against such interference or attacks.

Tanzania is a signatory to the International Covenant on Civil and Political Rights. Article 17 (1) guarantees the Right to Privacy. It states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence nor to unlawful attacks on his honour and reputation and everyone have the right to protection of the law against such interference or attacks.

It is the findings of this Court, therefore, that the appellant's image deserves protection of the law as it concerns with his privacy. The respondent's act of using the appellant's image (likeness) or photograph without his written consent was illegal and amounted to interference of the appellant personal privacy. It is legally untenable to deny the appellant with general damages though business profit was not proved. After all, the respondent's act was pure appropriation of the appellant's personality. As such, the appellant deserved general damages.

Whilst personality rights are not much well established in our jurisdiction, Article 16 (1) of the Constitution serves the purposes. Other laws are *inter alia*, the *Copyright and Neighbouring Rights Act*⁴ and the *Cybercrimes Act, 2015*.⁵ For that reason, there is no standalone law by which a celebrity can protect his image or likeness. Though the *Copyright and Neighbouring Rights Act (supra)* does not have any mention on the personality right or celebrity right, Section 2 of the Act defines a performer as someone including " *an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance*"

⁴ (Act No. 7 of 1999) Chapter 218 (R.E. 2002)

⁵ (Act. No. 14 of 2015)

In the case of *Martin Luther King Jr Centre for Social Change v. American Heritage Products Inc*,⁶ it was held that the term celebrity should be interpreted in a broader sense to encompass more than the traditional categories of movie actors, rock stars and ball players. Under the direct commercial exploitation of identity' test, when an unauthorized use of a person's identity is made that is both direct in nature and commercial in motivation, the person whose identity has been misappropriated has by definition become a celebrity for right of publicity purposes.

It follows, therefore, that every individual has exclusive right to protect his/her identity or likeness. A person who exploits the personality of another on commercial basis without his/her authorization will be liable for contravening the provisions in the *Copyright and Neighbouring Rights Act (supra)* that protects celebrity rights.

Right to personality has also been given adequate protection in all common law jurisdiction. In India for instance, personality right is fully protected under among other laws, Article 19 and 21 of the Constitution of India of 1949. In the case of justice K.S.

⁶ 694 F.2d 674 (11th Circ 1983) as cited in Journal of Intellectual Property Rights Vol. 16, January 2011, p 7

Puttaswamy (Rtd) v. Union of India,⁷ justice Sanjay Kishan Kaul gave constitutional legitimacy to personality rights by stating that:

Every individual should have a right to be able to exercise control over his/ her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent.

In the case of *R. Raja Gopal v. State of Tamil Nadu*,⁸ noted two aspects of the right to privacy:

- 1. The general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and;*
- 2. The constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion.*

In the case of *Rajinikanth Shivaji Rao Gaikwad (Rajinikanth) v. Varsha Production*,⁹ the court quoted with approval the decision in

⁷ Writ Petition (Civil) No. 494 of 2012 (Supreme Court of India) August 24, 2017

⁸ 1995 AIR 264 the Supreme Court of India

⁹ 2015 (62) PTC 351 (Madras)

the case of *ICC Development (international Ltd v. Arvee Enterprises and Another*,¹⁰ in which it was held:

The right to publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, personality trait, signature, voice etc...The right to publicity vests in an individual and he alone is entitled to profit from it.

Basing on the above observation, the Court in India passed an injunction against the Defendants from using the Plaintiff's name/image/caricature/style of delivering dialogues in their forthcoming film.

In UK, unauthorized use of persons image, likeness or other unequivocal identifiers has to be challenged through copyright under the Copyright, Designs and Patents Act 1988, data protection under the Data Protection Act, 2018 and General Data Protection Regulation, 2018, trade mark under the Trade Marks Act, 1994, passing off, breach of confidence or advertising regulations, misuse of private information and confidential information under the Human Rights Act, 1998 and common law judicial authorities. The EU directives are also applicable.

¹⁰ 2003 (26) PTC 245

In *Douglas v. Hello Ltd*,¹¹ the photographs of the wedding of Michael Douglas and Catherine Zeta-Jones were published by Hello without authorization while Douglas had instead entered into an agreement with OK magazine. By paragraph 3, OK were permitted to publish the "approved article" they also agreed:

To use their best endeavors to ensure that no other media...shall be permitted to access to the wedding, and that no guests or anyone present at the wedding....shall be allowed to take photographs.

By clause 7, the Douglasses agreed that they would procure "joint ownership of all copyright in the photographs" and that their selection of their approved photographs would be provided to Ok by 22nd November, 2000. There were other several terms.

Michael Douglas, Catherine Zeta-Jones and Norther and Shell Plc filed a suit in the High Court of Justice Chancery Division against Hello Ltd, Hola S.A and Eduardo Sanchez Junco for inter alia violation on the right to privacy. When the matter was referred before Lindsay Judge, it was found that the Douglasses were entitled to damages and a perpetual injunction against Hello on the

¹¹ (No.3) [2003] 3 All ER 996

grounds that the publication of the unauthorised photographs in the jurisdiction by Hello constituted a breach of confidence, effectively because the reception was a private event.

It was further found that OK were entitled to damages from Hello on substantially similar grounds, *albeit* that the breach of confidence was, as far as they were concerned, more in the nature of trade secret. At paragraph 52 Lindsay J observed:

the notion of an exclusive contract as a means of reducing the risk of intrusion by unauthorized members of the media and hence of preserving the privacy of celebrity occasion is a notion that can reasonably be believed in as a potentially workable strategy to achieve such ends.

At paragraph 228 the Judge concluded:

In my judgement, and first regarding the claimants' case as one of either commercial confidence or of a hybrid kind in which, by reason of it having become a commodity, elements that would otherwise have been merely private became commercial, I find the Hello defendants to have acted unconscionably and that, by reason of breach of confidence, they are liable to all three claimants to the extent of detriment which was thereby caused to the Claimants respectively.

On appeal to the Supreme Court of Judicature (Court of Appeal Civil Division), it was found that, in order to succeed in such kind of claim, the individual must show that the information has the necessary quality of confidentiality and was disclosed in circumstances that give rise to a duty of confidentiality. Where the information is already in the public domain it can no longer be protected. The court went further to hold that, as with misuse of private information, information may be published where it is in the public interest. As such, Hello's appeal against the judgement in favour of the Douglasses based on privacy and commercial confidence was dismissed.

In the US, the right to privacy has transformed into the right to be left alone. The first state to recognize the protection of one's name and likeness was New York, in 1903 enacting what are now Section 50 and 51 of the New York Civil Rights Act.¹² Personal rights in the US includes five categories. *One*, protection against intrusion into one's private affairs. *Two*, avoidance of disclosure of one's private affairs. *Three*, avoidance of disclosure of one's embarrassing private facts. *Four*, protection against publicity placing one in a

¹² International Comparative Jurisprudence Vol 1, Issue 2 December 2015 page 113-120

false light in the public eye. *Five*, remedies for appropriation, usually for commercial advantage of one's name and likeness.¹³

In the case of *Cohen v. Herbal Concepts Inc*,¹⁴ a picture of the Plaintiff and her daughter was used on the label of a cosmetic product without their consent. The defendants argued that the faces of the two individuals were not identifiable in the photograph. The Court however accepted the statement of the plaintiff's husband and awarded damages to the plaintiff in recognition of her privacy rights.¹⁵

In the case of *Berber v. Times Inc*,¹⁶ a photographer took pictures of Dorothy Barber during her delivery. Ms Barber filed a suit of invasion of privacy against Time Inc for unauthorized and forceful entry into her hospital room and for photographing her despite her protests. Ms Barber was successful in her suit and the Court awarded her USD 3000 damages.¹⁷

¹³ *Ibid*

¹⁴ (1984) 63 NY.2d 379 as cited in Journal of Intellectual Property Rights Vol. 16 January 2011 page 7-16

¹⁵ Journal of Intellectual Property Rights Vol. 16 January 2011 page 8

¹⁶ *Ibid*

¹⁷ *Ibid*

In the light of the afore parties' arguments and the insights gathered from the case law cited, the Court is convinced that four condition must be proved to establish breach of personality right:

One, there must be intrusion of personal privacy of the claimant on his identity/image by the respondent and that through such intrusion the claimant suffers either social, psychological, economical or any kind of injury. In this case, there is clear evidence the respondent intruded the appellant's personal privacy.

Two, there must be appropriation of the claimant image or celebrity or likeness for the respondent's advantage in any form but in particular commercial purposes. In this case the respondent has denied but exhibit P1 P2 and P3 collectively proves that the respondent used the appellant's likeness for commercial purposes.

Three, there must be lack of consent from the claimant. In this case, it is vividly established that the respondent used the appellant's likeness without his authorization.

Four, there must be a proof that the respondent earned more profit out of the illegal use of the claimant's likeness. In this case, though there was a proof on illegal use of the appellant's likeness by the respondent there was no proof of earning more profit.

The Court is of view that though any monetary amount cannot restore the exploited personality of the appellant, the appellant is entitled with general damages out of the illegal use of his personality from 2015 to date at the tune of TZs 50,000,000/=. In the case of *Tanzania Saruji Cooperation v. African Marble Company Ltd*,¹⁸ held:

General damages are such as the law will presume to be direct, natural or probable consequence of the act complained of the defendant's wrong doing must, therefore, have been cause, if not the sole, or particularly significant, cause of damage.

In the end, however, I have noted that, though the title of the case is referring to the Director of the respondent's company; the pleaded facts in the plaint, the written statement of defence, the plaintiff's testimony and the written submissions in chief and in opposition to this appeal; are all referring to the respondent as a company. Indeed, in the record there is a withdrawal letter on the conduct of the matter dated 24th October, 2017 with reference No. RE/RM/HSCL/018/1/2017 from Resolution Experts. It reveals that the respondent's company engaged them for representation before

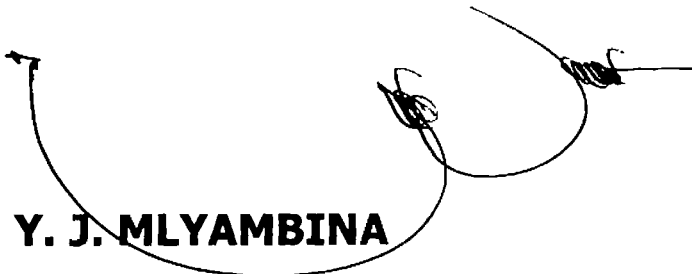
¹⁸ (1997) TLR 155 the Court of Appeal

the trial Court. Moreover, there was no any objection from the respondent on its *locus standi* to be sued both at the trial Court and before this Court.

I therefore opt to ignore the error on the title and proceed to grant the appeal with the following orders:

1. The decision of the trial Court and its subsequent orders are quashed and set aside.
2. The respondent's company to pay the appellant general damages at the tune of TZS 50 Million.
3. The respondent's company is permanently restrained from illegal use of the appellant's likeness.
4. The respondent's company to pay the appellant's case costs of this appeal and of the suit before the trial Court.

It is so ordered.


A handwritten signature in black ink, appearing to read 'Y. J. MLYAMBINA', is written over a large, stylized circular flourish.

Y. J. MLYAMBINA

JUDGE

27/03/2020

Judgement pronounced and dated 27th March, 2020 in the presence of the appellant in person and in the absence of the respondent.



Y. J. MLYAMBINA
JUDGE
27/03/2020