

**IN THE HIGH COURT OF TANZANIA
(GEITA SUB-REGISTRY)**

AT GEITA

CIVIL APPEAL NO. 3790 OF 2024

(Arising from the decision of the Resident Magistrates' Court of Geita at Geita in Civil Case No. 10 of 2022, dated 29 November 2023 before Honourable J. Kijuwile, SRM)

GEITA GOLD MINING LIMITED.....APPELLANT

VERSUS

AMINA ABDALLAH NGOLOGOLO.....RESPONDENT

JUDGEMENT

Date of last Order: 22/04/2024

Date of Judgment: 02/07/2024

K. D. MHINA, J.

This is the first appeal. It stems from the Resident Magistrates' Court of Geita at Geita in Civil Case No.10 of 2022, whereby Amina Abdallah Ngologolo, the plaintiff who is now the respondent, claimed against Geita Gold Mining Limited, the defendant who is now the appellant, *inter alia* for the following orders that:

- a. Declaratory orders that the defendant's acts constitute an infringement or violation of personality, privacy, economic and image rights.

- b. Payment of Tanzania shillings five hundred million (500,000,000/=) as general damages for the unauthorised use of the plaintiff's image in marketing and promoting the defendant service business operations agendas without the plaintiff's consent and duly compensation.
- c. Payment of Tanzania shillings sixty million (60,000,000/) as specific damages.
- d. Payment of royalties arising from the benefit gained as a result of unlawfully publishing the plaintiff's image.
- e. Payment of interest on the amount in paragraphs (b) and (d) above at 8% from the date of the accrual of the cause of action to the date of filing this suit.
- f. Interest at 12% from the date of filing this suit to the delivery of judgement
- g. Cost of this suit.
- h. And any other remedies this court shall deem equitable and just to grant.

The brief facts which led to the institution of Civil case No.10 of 2022 before the Resident Magistrate Court of Geita was that the plaintiff claimed against the defendant for taking her photo while she was on her daily business routine at Mbagala Katundu market without her permission. She further alleged that the photograph was used by the defendant in the calendar of the year 2022 for business purposes.

She also claimed to be professing the Islamic faith, and according to Islamic dress norms for women, she had to wear a hijab, but in the photograph that appeared on the calendar, she was " off-hijab." Therefore, she alleged that, though the Islamic faith allows her photograph to be taken, it is not permitted to be published or put on a billboard.

The defendant denied her allegations, claiming that the plaintiff was aware and consented to the taking of her photograph.

The above controversy put the parties at issue, and both presented their testimonies before the trial Court.

After a full trial, the trial magistrate decided the dispute in favour of the plaintiff. Consequently, the defendant was ordered to pay the plaintiff general damages to the tune of 25,000,000/= and permanently restrained the defendant from illegally using or continuing to publish and use the plaintiff's photograph in their calendar or any other document.

Undaunted, the defendant, who is now the appellant, appealed to this court and preferred the following grounds to fault the trial court's decision;

- i. The trial Magistrate grossly erred in law and fact for failure to properly and reasonably evaluate EXHIBIT P2 and EXHIBIT D1 in its totality.*
- ii. The trial Magistrate erred in law and fact in holding that there was no*

- indication of consent from the Respondent to have her photo taken and published in the Appellants calendar.*
- iii. The trial Magistrate erred in law and fact for failure to justifiably appraise the facts that were adduced by the Appellant witnesses.*
 - iv. The trial magistrate erred in law and fact by ordering the Appellant to pay an excessive relief of Tsh. 25,000,000/= to the Respondent without sufficient justification and a justifiable conclusion.*
 - v. The Honorable trial court erred in law and fact in holding that the tendered and admitted calendar was used for commercial purposes.*
 - vi. The trial magistrate erred in law and fact in holding that there was an infringement/violation of the Respondent's personality, privacy, economic and image rights.*
 - vii. The trial Court erred in law for misconstruing the holding of **Deogras John Marando vs. Managing Director, Tanzania Beijing Huayuan Security Guard Sendee Co. Ltd.** Civil Appeal No. 110 of 2018.*
 - viii. The trial Magistrate grossly erred in law and fact in deciding the matter in favour of the Respondent.*

This appeal was argued by way of written submissions. Ms. Elizabeth John Mlemeta, Advocate, appeared for the appellant, and the respondent had the service of Mr. Liberatus John Rwabuhanga, Advocate.

Arguing in support of the appeal on the first ground, Ms. Mlemeta

submitted that it is a legal principle that the court's judgement has to be reasoned and that the court has to exercise discretion judiciously. She supported this principle by citing the cases of **Mkulima Mbagala vs. Republic**, Criminal Appeal No. 267 of 2006 and **Hamis Rajabu Dibagula vs. Republic**, Criminal Appeal No. 53 of 2001.

From above, she submitted that the trial court's decision lacks proper reasoning, evaluation and analysis of evidence cum exhibit tendered.

Referring to Exhibit P2, the Callender, and Exhibit D1, the flash disc and an affidavit, she elaborated that Exhibit P2 contained;

- i. **Title of the calendar:** *2022 Calendar Anglo Gold Ashanti, Geita Gold Mme, Tanzania.*
- ii. **Image:** An image of a woman, groceries and a market.
- iii. **Quotation under the image:** *Geita Gold Mining Limited was instrumental in the establishment of Katundu Market which hosts a wide and diverse range of traders.*
- iv. **Calendar:** April 2022 and the dates.
- v. **Footer of the calendar:** *Details of the address of the Appellant*

While Exhibit D1, specifically the flash disc, contained;

- i. Two video clips. Clip one is a three (3) second video clip. Clip two is a six (6) second clip.
- ii. In Clip one and Clip two, the following can be noted:
 - a. There is a video of a woman (the Respondent herein) standing behind a table full of groceries, specifically cucumbers, green peppers, cabbages, tomatoes, onions, ginger, peppers, a bucket, etc.
 - b. The woman is seen holding and twisting a plastic bag containing carrots inside.
 - c. The woman is not wearing a Hijab.
 - d. There is a background voice of a man stating in Swahili - '*Chukua, Chukua, anza kuchukua*' (clip 1) and '*Sogea, Sogea, Sogea*' (clip 2).
 - e. The woman (Respondent) is smiling.
 - f. There are other people, not less than 12 people, in the market area.

She further submitted that the image in the calendar (Exhibit P2) emanated from the video clip (Exhibit D1) as a final product of the activities seen in the video clips.

From above, she argued that the trial Court did not properly evaluate and analyse that evidence, which formed the basis of the dispute because the exhibits indicated that the respondent was aware that her video had been captured and recorded. She willingly cooperated and followed the

directives of the video shooter. At that time, the respondent was already in public, not wearing a Hijab, and there was no sign of force or coercion.

Therefore, Ms. Mlemeta insisted that the trial magistrate failed to properly analyse the contents and legal implications of exhibits D1 and P2 and prayed this court, being the first appellate court, to step into the shoes of the trial court and analyse the evidence. She supported this argument by citing **Makubi Dogani v. Ngodongo Maganga**, Civil Appeal No. 78 of 2019.

Coming to the second ground of appeal, Ms. Mlemeta argued that consent could either be expressly or impliedly, and implied consent has the following key elements that may be inferred from a person's actions or circumstances: one, lack of explicit Verbal or Written Consent; two, objective circumstances; and three, silence or lack of objection.

She elaborated that contrary to what has been reasoned and concluded by the trial Magistrate, the evidence on record specifically exhibits P2 and D1, and the testimony of DW1 and DW2 proved that though there was a non-verbal indication of consent in the video footage but, the respondent impliedly consented to the taking of her photo. Exhibit P2 established that the respondent was aware of the activity, and her conduct in Exhibit D1 indicated that she impliedly consented to the whole

process of the video and photo shooting.

In her further submission, she referred to the respondent's evidence on page 18 of the proceedings and submitted that her testimony was contrary to exhibit D1. Thus, the respondent lied under oath and should hardly be believed on other points. To support her argument, she cited the case of **Misoji Ndebile @Soji vs. Republic** [2015] T.L.R 517.

Winding up this ground of appeal, she stated that the respondent did not prove her case because she did not testify on whether the video shooting was obtained by coercion and that she was unaware. She cited **Puma Energy Tanzania Limited vs. Spec-Check Enterprises Ltd**, Commercial Case No. 19 of 2014 and **Wolfongo Dourado vs. Tito Da Costa**, ZNZ Civil Appeal No. 102 (CA) (Unreported) where it was held that whoever alleges a fact, unless unequivocally admitted by the adversary has to prove it, albeit on the balance of probability.

On the third ground of appeal, Ms. Mlemeta referred this Court to pages 30, 32, 37, and 38 of the trial court's proceedings and argued that the respondent consented to have her photos taken.

Amplifying this, she stated that the respondent was directed on how to pose for her photos to be taken. Therefore, the trial court did not

critically examine the testimonies of DW1 and DW2 against exhibits P2 and D1.

Faulting the trial court's decision in the 4th ground of appeal, Ms. Mlemeta submitted that the trial magistrate erred in law and fact by ordering the appellant to pay an excessive relief of TZS. 25,000,000/= to the respondent without sufficient justification and a justifiable conclusion.

It was her submission that the plaintiff did not prove the reliefs. She cited pages 13 of the proceedings and 10 of the judgment and stated that the reliefs were not proved, and the respondent neither proved her status in the society nor the income earned by the appellant out of the calendars for the court to order payment of 25,000,000/-

Therefore, she argued that the trial court failed to apply the principles in assessing general damages. To bolster her submission, she cited the cases of **Yusuph Mpini & 2 Others vs. Juma Y. Mkinga & 2 Others**, Civil Appeal No. of No. 1 of 2017 and **Fast jet Airlines vs. John Mnaku Mhozya**, Civil Appeal No. 96 of 2016, where it was held that in awarding damages the court's discretion must be exercised judiciously claiming that the trial court did not exercise its discretion judiciously according to the rules of reasoning and not according to privileges so as to avoid court to use it arbitrarily.

She said in its decision, the trial court applied the wrong principle of law as held in **Attorney General vs. Roseleen Kombe (as the Administratrix of the late Lieutenant General Imran Hussein Kombe, Deceased)** Civil Appeal No. 80 of 2002.

Regarding the 5th ground, she submitted that the calendar was never sold and not used for business purposes. The Calendar was distributed and offered to the Defendant's employees, business partners, organisations, entities, and other individuals who commercially interact with the Defendant. Therefore, the image was not used for marketing and/or promotion of the Defendant's services, business operations, and agenda. The photo was taken with the knowledge and consent of the Plaintiff. It was used to provide awareness of corporate social responsibility.

She claimed that the Callender did not indicate or endorse any commercial aspect the appellant was advertising using the appellant's image. She cited the case of this court in **John Rapahel Boko vs. Princess Leisure (T) Limited**, Civil Case No. 118 of 2022 (Tanzlii), insisting that for the claim to succeed, the three elements had to prove the use of the protected attribute, use for the exploitative purpose and without consent. She claims that there was no indication of the elements in the matter.

To the contrary, she said in this case, looking at the Calendar (Exhibit P2), there was no mention or existence of a product (mines) that the Appellant herein, a Company engaged in mining, was advertising.

On the 6th ground, Ms. Mlemeta referred to the submissions on the 2nd and 3rd grounds above that there was an implied consent by the Respondent; hence, the trial Court erred in law and fact in holding that there was an infringement/violation of the respondent's personality, privacy, economic and image rights.

Regarding the 7th ground, she submitted that the trial court erred in law for misconstruing the holding of the case of **Deogras John Marando vs. Managing Director, Tanzania Beijing Huayuan Security Guard Service Co. Ltd**, Civil Appeal No 110 of 2018 (Tanzlii), insisted that there was no intrusion of personal privacy for the video shooting was done in public, the calendar was not for commercial purposes, and there was implied consent from the respondent as she knows that the video and the photo were taken and no proof that the appellant earned profit from the calendars.

On the last ground of appeal, she submitted that based on the grounds and analysis above, the trial court erred in evaluating evidence in

the record and ruled in favour of the respondent.

In response, Mr. Rwabuhanga submitted as follows;

On the 1st ground, he disputed the appellant's assertion that the trial Court's judgment lacks proper evaluation and analysis. Referring to exhibit DW1, he claimed that it did show in clear terms that the respondent had prior knowledge that she was being filmed or her image was being captured, which suggests that the device used to capture the photo was not detailed. He said there was no evidence that exhibit P2 was the final product of actions contained in exhibit DW1. He maintained that the trial court was correct in concluding that exhibit DW1 could not conclude that the respondent consented to her image being taken.

Commenting on the cited case of **Makubi Dogani** (supra), he insisted that the case is distinguishable, for there is nothing to warrant re-evaluation of the trial court evidence.

Responding to the 2nd ground, he submitted that there was no consent, be it impliedly or expressive, warranting the appellant to use the respondent's images in the 2022 calendar.

He submitted further that the appellant's defence and testimony as to how the respondent's consent was fetched and the variance between

the appellant's defence and its witnesses' testimony renders the narratives as to whether there was any consent from the respondent doubtful. This is because the Written Statement of Defense fronts *'implied consent'* while the testimonies of witnesses front 'oral consent'.

Furthermore, he stated that the appellants resolved to front *'implied consent'* as the defence to film and use the Respondent's images in its year 2022 Calendar, but the testimony of DW1 and DW2 variances between pleadings and evidence was tantamount to the presentation of unworthy testimony from the bar, so undeserving to be taken into high regards by the court.

Submitting further, he cited **Deogras John Marando (Supra)** and elaborated that the consent given by the one whose photo is to be published by the other has to be absolutely clear and certain.

He insisted that there was no consent for the reasons that no verbal communication in exhibit D2 suggested the assertion, as stated by DW1 and DW2.

On the 4th ground of appeal, Mr. Rwabuhanga stated that the court was justifiable to award the respondent 25,000,000/= as there is evidence in the record which shows how psychologically she was injured by the

unwarranted actions of the appellant in publishing her images in 2022 as a cover photo and same being circulated in various areas.

He further asserted that according to the religious beliefs and norms of the respondent as a devoted Muslim, it was abominable for her to be filmed and her photo to be used as a cover picture under any circumstances. That action affected her reputation in her devoted Islamic family, positioning her to unexpected inconveniences and mental anguish. Supporting his arguments, he cited the case **of P.M Jonathan vs. Athuman Khalfan** (1980) TLR, which states that it was proper for the respondent to be awarded for general damages are compensatory in character. They are intended to take care of the plaintiff's loss of reputation, as well as a solarium for mental pain, psychological imbalance and suffering.

Replying to the 5th ground of appeal, he submitted that it was illogical for the appellant to claim that the calendar was not used for commercial purposes as it contradicts her defence. Referring to paragraph 7 of the WSD, he maintained that the appellant stated that the calendar was distributed, circulated, and offered to the appellant's employees, business partners, organisations, entities, and other individuals who commercially interact with the appellant and give them an understanding of the

appellant's activities.

On the issue of the appellant's compliance with Corporate Social Responsibility (CSR) policies, he submitted that no evidence was brought to that effect, including the evidence that the construction of Katundu Market in Geita or filming and taking the Respondent's photos was a part of CSR.

In construing the term commercial purposes, he cited the definition in the **Black Law Dictionary**, which, among other things, includes an act enabling the understanding of one's commercial engagements and transactions at a particular time. He said the calendars with the picture of the respondent were used for that purpose, and therefore, an act of the appellant was for commercial purposes.

Responding to the 6th, 7th and 8th grounds collective, he submitted that the appellant's actions of using the respondent's image unwarrantedly encroach on the respondent's privacy and dignity and aimed at unjust enrichment to the appellant.

He reacted to the cases cited in the submissions for the 6th, 7th and 8th that are inoperative to the circumstances of this case and maintained that the trial court painstakingly and thoroughly analysed the entire evidence on record. Further, the appellant's defence had nothing useful to

discredit the respondent's claims since no excuse can serve as a shield for the Appellant for unwarranted actions against the Respondent. It was his prayer that the appeal be dismissed with costs.

Rejoining, on the 1st ground of appeal, Ms. Mletema insisted that the video shooting was done in public (Katundu Market), and the respondent, being in the same public area well posed, was aware and with prior knowledge that she was being filmed. The calendar exhibit P2 was the final product of exhibit D1 by the appellant.

She also submitted that consent is also seen as other business persons vacating their tables to allow the respondent to be filmed.

On the 2nd ground, she submitted that the respondent was consulted and consented, and the pictures taken were used with the respondent's knowledge and implied consent. She referred to clauses 4 and 8 of the WSD and insisted that the respondent did not counter the assertions.

On the 3rd ground, she reiterated her submission to the chief. On the 4th ground, she maintained that the claim that the appellant encroached on the respondent's religious norms was baseless, for the respondent was at the marketplace and presented herself without a hijab. She insisted that the image appearing in the calendar did not defame or lower the

respondent's reputation, for there was no name or story placed in the calendar that insinuated any negative against the respondent. Therefore, the court was not justifiable in holding in favour of the respondent.

On the fifth ground, she insisted that the trial Court erred in holding that the calendar tendered by the respondent was used by the appellant for commercial purposes. The respondent just assumed that the appellant profited from her image, as opposed to what happened in the **John Raphael Boko case** (supra).

Rejoining on the 6th, 7th, and 8th grounds of appeal, she submitted that it was not correct that the respondent's image amounts to encroachment on privacy, tantamount to unjust enrichment or deprivation of image rights as alleged by the Counsel for the Respondent.

Having objectively gone through the grounds of appeal, the submissions by both parties and the entire records of appeal, I find that grounds of appeal are intertwined in such grounds 1, 2,3, 7 and 8 centred on the evaluation of evidence and the issue of consent. Ground 4 is centred on the relief awarded, and ground 5 is on whether the calendar was used for commercial purposes. Ground 6 on whether there was an infringement of the right to privacy.

Therefore, I will determine grounds Nos. 1, 2, 3, 7, and 8 together, but in two groups: grounds Nos. 1 and 2 first and later grounds Nos. 3, 7, and 8. On the other hand, I will determine grounds 4, 5, and 6 separately.

As already alluded to above, grounds Nos. 1, 2, 3, 7, and 8 both centred on the evaluation of the evidence by the trial court. The appellant claimed that the trial court failed to evaluate exhibits P2 and D1 to reach the conclusion that the respondent consented to her photo being filmed. Therefore, to determine the allegation on the grounds of appeal, I took refuge in the principle laid in the cited case of **Makubi Dogani (Supra)**, where it held that:-

"... the first appellate Court it is entitled to re-evaluate the entire evidence on record reading it together and subjecting it to a critical scrutiny and if, warranted, arrive at its own decision."

The record of the trial court indicated as follows;

Exhibit P2, a calendar of the appellant's for the year 2022 and a subject matter to this matter has the picture of the respondent holding some groceries at Katundu Market. Her photo was portrayed on the April 2022 page.

Further, Exhibit D1, a video clip, when played, shows the image of

the respondent, a recording which matches the photo in Exhibit P2.

The words heard from the video clip are "chukua chukua," which I agree with the trial court's translation, which means "take it" in English.

At the trial, the respondent (PW1) testified that she was neither aware of nor consented to her photos being taken and used in the calendar. Further, there was no written consent that she agreed to her photo being taken and used in the calendar.

On the appellant's side, DW1 testified that the respondent was instructed how to pose during the photo shoot, which means he accepted her photo to be taken and used in the calendar.

DW2, the photographer, stated that he asked the respondent to take photos and directed her to pose and smile for the photo shoot.

From the above evidence, the question is whether there was consent or not.

In deliberating and determining the question above, I will start by citing the following cases.

One, in **Deogras John Marando (Supra)**, at page 9, this Court (Miyambina J) held that;

"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".

Two, the High Court of Uganda (Civil Division) in **Onang Christopher and Seven Others vs. Roofing Limited**, Civil Suit No 139 of 2018, held that;

"This court does not agree with the plaintiff's submission that the consent must be explicit since it has no basis in law. There is no express legislation that requires such consent or authorisation to be explicitly in writing, like under the Copyright and Neighbouring Right Law.

It can be deduced from the facts and circumstances of this case that the plaintiffs indeed gave implied consent to the whole arrangement, which they are trying to deny by claiming that it was not explicit or in writing. Implied consent is an assumption that a person has given permission for an action, which is inferred from his or her actions rather than expressly or explicitly provided."

What can be gleaned from the above decisions are the following;

One, there must be consent; **two**, consent may be written; and **three**, consent may be implied.

In addition, it is significant for a person whose photo is taken to be informed of the intention or use of that photo so that he/she agrees to both the photo to be taken and the purpose and use of that photo by the taker.

Flowing from above, it is evident that in this matter there is no any written consent from the respondent to authorise her photo to be taken and used in the appellant's calendar. Neither of the appellant's witnesses tendered the written consent or testified if there was written consent.

Now, I turn to see if there is implied consent in this matter.

In her submission, Ms. Mlemeta said that the respondent willingly consented to her photo being taken. However, it is necessary to revisit the appellant's witnesses' evidence to see if they successfully established implied consent.

This is because implied consent is established by the evidence of the witnesses.

In his, DW2 stated that he asked the respondent to take her photo, and she consented. He said he even directed the respondent to pose and

smile during the photo shoot.

When DW1 was cross-examined, he said, I quote;

"In that video, she didn't speak. Before she went to that table, she agreed to take a photo. I have the photo; I didn't tender it, but if it is needed, I can provide it."

Therefore, the evidence of DW2 was not supported by the video clip (Exhibit D1). What he testified was not in exhibit D1.

In exhibit D1, the image was of the respondent, and as I alluded to earlier, the only words heard in that video clip were "chukua chukua". DW1 was the one who tendered exhibit D1. and when he was cross-examined, he stated that

"...there is no Amina plaintiff's voice in that video; she did not speak anything. I heard the word "chukua" from people. No, that isn't a consent; it was taken in September 2021. I was not there at the scene."

The law regarding implied consent is simply that it is established when existing circumstances would cause a reasonable person to believe the other had consented or an assumption that a person consented to something by his actions.

The evidence on record does not indicate the circumstances to believe or assumptions that the respondent consented to her photo being taken by her actions. Neither Exhibit P2, exhibit D1, nor the appellants' witnesses supported that assertion. Even DW1, in his testimony, admitted that the words heard from exhibit D1 do not amount to consent.

In the cited case of **Onang Christopher (Supra)**, the Court held that implied consent was established because the evidence on record clearly shows that the plaintiffs were fully informed that they were to appear in the photo and video shoot which was to be used to prepare an advert for the Defendant Roofings AZED iron sheets and the amount to be paid to them was stated. The plaintiffs (as runners) were further briefed by Moses Asonya, who was the National Athletics Coach recommended for the project by the Uganda Athletics Federation and the Director of the production at the venue of the event before the shoot and the plaintiffs further accepted to participate in the event. The National Stadium was properly decorated with plenty of Roofings Adverts, and the plaintiffs were given T-shirts with inscribed words such as 'AZED', 'Feeke', 'Kiwani' and 'Kichups', which they wore for the sole purpose of photo and video shoots for an advert of Roofings Limited. The plaintiffs were paid or were to be paid 400,000/= each for taking part in this advert shoot, and the lead

runner was to be paid 700,000/=, which amount was supposed to be paid through their national coach.

In this matter, as already alluded to earlier, there is no evidence to establish that there was an implied consent.

From the above discussion, it is quite clear that the trial court properly and reasonably evaluated Exhibit P2 and Exhibit D1 and rightly held that there was no indication of consent from the respondent to have her photo taken and published in the appellant's calendar.

That holding automatically resulted in the 1st and 2nd grounds of appeal to lack merits. Thus, I dismiss the same.

Moving to the fifth ground, I revisit exhibit P1 (the calendar). The calendar shows the following: in January, it depicts the nighttime view of Geita Gold Mine; in February, it depicts the appellant receiving the award of the overall best performer in the Mining sector for 2019/2020.

March portrayed senior executives of the appellant who received a master's in Business Administration at ESAMI in 2021. April is the photo subject to this case. May portrayed a boat called Jubilee Medical Boat, a partnership project between African Inland Church, the Vine Trust of Scotland, and the appellant that provided free basic health services to

people living on the islands of Lake Victoria.

June portrayed engineers supporting the appellant Kili challenge trust at the summit of Mt. Kilimanjaro; July portrayed the winning team from the appellant holding an award for sponsoring the 2021 Mining and Technology Exhibition.

Further, August portrayed a photo of a farmer who benefited from the appellant's special projects. September indicated the appellant's emergency response team members demonstrating at the 2021 Mining and Technology exhibition.

October portrayed the Vice President of the appellant presented documents to the Regional Commissioner of Kilimanjaro training equipment to support the Integrated Mining programme at VETA Moshi.

November portrayed a patient in a health centre built by the appellant, and December portrayed a student in a school constructed by the appellant.

In her submission, the counsel for the appellant stated that the calendar was not sold or used for business purposes. It was distributed and offered to employees, business partners, organisations, entities, and other individuals with whom they commercially interacted. This was also the

evidence of DW1 at the trial.

In determining this, I found articles on the relevance of calendars.

First is the article titled *3 Reasons Why Photo Calendars are so Great for Your Business* accessed at <https://nphoto.com/en/news/3-reasons-why-photo-calendars-are-so-great-for-your-business>; one of the benefits pointed out is calendars are the perfect tool for the marketing.

Second, an article titled *The Importance of Promoting your Business with a Custom Calendar* accessed at <https://www.conquestgraphics.com/blog/conquest-graphics/2023/09/15/the-importance-of-promoting-your-business-with-a-custom-calendar> the author pointed the benefits are to increase brand exposure and provide year-long advertisement opportunities.

Third, in the article "*Advantages of Using Promotional Wall Calendar to Promote Your Business*" by Gareth Parking, dated 6 December 2021, he wrote about the benefits of increasing brand awareness and encouraging reciprocity.

Therefore, I had a different view from what the counsel for the appellant submitted; the commercial benefit is not only from the proceeds of the calendar sale but also from the marketing, promotion, and display of

the company's achievements. That is branding, and it is a commercial benefit.

In the Kenyan case of **Dhabiti Sacco vs. Sharon Nyaga**, Civil Appeal No. E083 of 2021, the High Court of Kenya, held that;

"This is an unequivocal admission that the appellant used and published a photograph of the respondent in its calendar without her consent, then distributed the same to its staff and customers in some five or so branches spread over four counties. The use of the photograph without deference to the plaintiff was evidently in violation of the respondent's right to privacy and to be accorded her dignity under Articles 31(c) and 28 of the Constitution. There was a financial benefit that the appellant expected to derive and reap from the publication which must have flowed to it contrary to the concurrence of the 1st respondent. I find that to have been an exploitation of the 1st respondent and her photograph by the appellant."

This is a persuasive decision, but I agree with its holding. In this appeal, the appellant also distributed the calendar to its employees, business partners, organisations, entities, and other individuals with whom it commercially interacted. Therefore, the appellant cannot escape the fact that distributing that calendar was/is not connected with financial and business benefits.

Further, as rightly cited by the counsel for the respondent, that commercial purpose in a broader sense, as interpreted by the Blacks Law Dictionary 7th Edition, is construed as;

*"To advance a person's or an entity's economic interests, engagements, such as by inducing another person to buy, rent, lease, join, subscribe to, provide, **or exchange products, goods, property, information, or services or enabling the understanding of one's commercial engagements and transactions at a particular time.**" [Emphasis provided*

Thus, though the amount of commercial profit was not established but an act of distributing the calendar to the business partners, organisations, entities, and other individuals with whom it commercially interacted falls within the meaning of commercial benefit, taking into account that the appellant is a business company.

Therefore, the 5th ground of appeal must fail.

Reverting to the 6th ground, which should not detain me long, I have the following;

In our country, the right to privacy is guaranteed by the Constitution. Article 16(1) of the Constitution states that 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 communications.

This Court in the cited case of **Deogras John Marando (Supra)**, this Court while elaborating on the cited article and other articles from International Instruments, it held that;

"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".

Therefore, the unconsented use of someone's image is illegal and amounts to interference with personal privacy.

From the discussion above, it follows that since the appellant used the respondent's photo without her consent, he infringed the respondent's rights to image, privacy, and personality.

Therefore, the 6th ground is devoid of merits, and it is dismissed.

Regarding the 4th ground, the trial magistrate erred in law and fact by ordering the Appellant to pay an excessive relief of TZS. 25,000,000/= to the Respondent without sufficient justification and a justifiable conclusion, I will start by citing the case **T.O.S vs. Maseno University and three**

others [2016] eKLR cited in **John Bocco (Supra)**, where the court declared that using one's image for commercial purposes by a third party is actionable in tort.

Further, in the cited case of cited case of **Deogras John Marando (Supra)**, it was held that;

"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".

In this matter, the trial court rightly held that the respondent failed to give evidence of specific damages in terms of specific claims. The only evidence to prove infringement of personal rights.

Therefore, in the trial court, in awarding general damages, the only consideration was because the respondent's rights were infringed. It held

"Since it is established by the evidence that indeed the plaintiff's image and privacy was infringed by the defendant, I am not far from being persuaded with the common law principle famously known in its Latin acronym as "ubi jus ibi re medium", which literally mean whenever there is right, there is a remedy".

In her submission, the counsel for the appellant submitted that nothing was presented at the trial to establish the degree of reputation and

status of the respondent in society, there was no evidence that the appellant earned profit from the calendars, and the trial court did not adhere to the principles in awarding general damages.

The law here is as follows:

In **Cooper Motor Corporation vs. Moshi/ Arusha Occupational Health Services (1990) TLR 96**, the Court of Appeal, while cited **Nance vs. British Columbia Electric Raily Co. Ltd (1951) AC.601**, it held that;

"whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case... before the appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage...."

In applying the principle to the present appeal, I am fully aware that I ought not to interfere even if I would have arrived at a different figure if I had tried the case unless there is an establishment that, in assessing

damages the trial court applied wrong principles or the amount awarded is so inordinately low or so inordinately high.

By looking at the general damages awarded by the trial court and the holding in the cited case of **P.M. Jonathan** (Supra) that;

"the position as it therefore emerges to me is that general damages are compensatory in character. They are intended to take care of the plaintiff's loss of reputation, as well as to act as a solarium for mental pain and suffering."

I don't see a reason to interfere with the trial court's award for damages. The rights of the respondent were violated. Therefore, she deserves the general damages, and the amount is justifiable, taking into account that her image was used for the whole year of 2022. It has not been shown that the assessment was clearly erroneous and that it should be altered.

Therefore, the 4th ground is also dismissed.

The remaining grounds, Nos 3, 7 and 8, should not detain me long. Since I hold that the trial court properly and reasonably evaluated EXHIBIT P2 and EXHIBIT D1 and rightly held that there was no consent and the calendar was used for commercial purposes, which resulted in the violation of the respondent's rights to privacy and image. Then, the trial court was

correct in deciding the matter in favour of the respondent and awarding the damages of TZS. 25,000,000/= was proper.

Further, the record indicated that in reaching its decision, the trial court considered the evidence of the appellant's witnesses, but on the balance of probabilities, it was weaker than the respondent evidence.


Regarding the misconstruing of the cited case of **Deogras John Marando (Supra)**, the allegation on the ground of appeal is unfounded because the evidence indicated that the appellant intruded on the respondent's privacy by taking her photo without her consent, using it in a calendar, and distributing that calendar to his stakeholders, among other thing for commercial purpose I held above.

Therefore, the 3rd, 7th and 8th grounds also fail.

From the above discussion, in totality, the appeal lacks merits; both grounds of appeal fail to persuade this Court to interfere with the decision of the trial court.

Consequently, I dismiss the appeal with costs.

It is so ordered.



**K. D. MHINA
JUDGE
02/07/2024**

Court:-

The right to appeal is fully explained to the parties.



**K. D. MHINA
JUDGE
02/07/2024**