

5 **IN THE HIGH COURT OF UGANDA AT KAMPALA**

CIVIL DIVISION

HCCS. NO. 100 OF 2012

BASAJJABAKA YAKUBPLAINTIFF

V

10 **MTN UGANDA LTDDEFENDANT**

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

Introduction

15 The plaintiff through his advocates Lubega, Babu & Co sued the defendant for illegally using his photograph on a billboard for advertising purposes without his consent or authority , deriving a benefit from using his photograph in an advertising campaign and causing him stress, and putting his life at risk as he had received phone calls alleging he had bagged huge sums of money from the use of his picture.

20 The defendant through Kampala Associated Advocates , in its written statement of defence denied the plaintiff's averments. In the alternative, the defendant contended that even of the billboard contains the plaintiff's image, it is not easily discernible by a casual observer and that it is not unlawful for the billboard to carry such image.

Issues framed by parties for trial

1. Whether the plaintiff has a cause of action against the defendant
- 25 2. Whether the billboard at Entebbe International Airport (EIA) contained the plaintiff's image between 2010-2012.
3. If issues 1 and 2 are answered in the positive, whether the plaintiff's constitutional right to privacy was infringed by the defendant.
4. Remedies

30 Both counsel filed written submissions and authorities that I have carefully considered.

Whether the billboard at Entebbe International Airport (EIA) contained the plaintiff's image between 2010-2012.

According to PW1 Basajjabaka, in 2010, he was informed by two work colleagues Mugerwa and Moses, both teachers like himself, that his picture was on a billboard at the transit lounge of EIA, a revelation which took him by surprise. In April/May 2011, he was travelling to Dubai and he saw his picture on a large billboard at the transit lounge accompanied by the word 'MTN, seeing through your ears countrywide coverage and clear signal'

He was supported in his evidence by PW2 Kitagana Zaidi an old boy of the plaintiff and a fellow teacher who happened to be travelling to Kenya and Germany in 2011 when he clearly identified Basajjabaka on the billboard. Basajjabaka was also supported in his evidence by Moses Wankiiri a work colleague at Agakhan Universtiy who saw the picture on the billboard in 2012 as he transited through EIA.

It was suggested by the defence in cross examination of Basajjabaka that his image was not easily recognizable on the bill board.

I had occasion to view the photographs of the bill board as taken by Basajjbaka (PE 1,2,3) and compared them to the plaintiff and my observation was he is one of the several men captured in the photograph.

I find on a balance of probabilities that the plaintiff's image was on the billboard which the defendant in its written statement of defence admits as belongs to it.

Whether the plaintiff has a cause of action

The plaintiff averred in his statement of claim that the defendant used his picture illegally and without his consent, derived benefit from use of his picture, caused him stress and put his life at risk as people thought he had bagged money from the advert.

Both counsel submitted on whether these facts established a cause of action.

Counsel for the plaintiff submitted that the right to privacy is protected by article 27 of the Constitution and breach of that right confers a cause of action on the plaintiff.

Article 27 guarantees the right to privacy of the person in the following terms:

- 1) No person shall be subjected to-

60 a) Unlawful search of the person, home or other property or

b) Unlawful entry by others

2) No person shall be subjected to interference with the privacy of that person's home, correspondence, communication and or other property.

65 While the Constitution is loud and clear on privacy of the home, correspondence, communication and property, it does not directly address the issue under adjudication, namely, the publication of a photograph of a claimant taken in a public space. In other words, photographs taken in a home would be deemed private and their publication without consent of the owner would be deemed an infringement of the right to privacy. This point was made by Justice Madrama in **HCCS. No. 298 of 2012 Sikuku v Baati**
70 **Ltd** where the plaintiff's photographs on a billboard taken while on the employer's premises was deemed not to be an infringement of the right to privacy.

Counsel for the plaintiff rightly observed that article 17 of the International Covenant on Civil and Political rights (ICCPR) is part of our legal regime as Uganda ratified it in 1995.

75 The article proclaims

'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation'.

80 As the ICCPR is part of our legal system, it follows this court is bound to recognize the right to privacy generally even when a person is in a public space. The fact that the plaintiff avers his image was published on a billboard without his consent establishes a cause of action within the broad framework of the ICCPR which prohibits arbitrary and unlawful interference with the privacy of any person.

Whether the plaintiff's right to privacy was infringed

85 It was counsel for the defendant's contention that this article is mutatis mutandis with article 8 of the European Convention for the Protection of Human Rights and therefore it is appropriate to consider the approach adopted in **Weller and others v Associated Newspapers Ltd [2016] 3 ALL.E.R 357** where the court first looks into whether claimant had a reasonable expectation for privacy. If so then the court conducts a

90 balancing exercise between the right to privacy and freedom of expression to determine infringement and compensation.

I am inclined to accept this approach because it facilitates adjudication of the specific issue at hand .

95 In **Sikuku v Uganda Baati HCCS No. 298 of 2012** , Justice Madrama as he then was adopted a liberal interpretation of article 27 of the Constitution. In that case, the plaintiff complained the defendant had used a picture taken of him while on factory premises of the defendant and sought compensation. Justice Madrama dismissed the claim on the basis there was implied consent. In discussing the right to privacy , the judge noted that
100 the plaintiff had to demonstrate that the filming was done in the privacy of his home . In this case, it was done in the factory premises owned by the defendant who could bring in people anytime thereby excluding the rights to privacy.

Justice Madrama gave pertinent dictum on the right to privacy which he extended to pictures taken in the home of the claimant.

105 Therefore the plaintiff reasonably expected that an image of him captured while he was on a street would not appear on a billboard to advertise the defendant's business.

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Public space and the incidental use of a person's image.

Before I evaluate the evidence in the instant case, I want to review cases based on similar facts and how the courts in those cases dealt with the issue of right to privacy and photographs taken in a public space.

115 In the Weller case, the defendant published online photographs of a well known musician and his children while out shopping. The trial court found there was misuse of private information and breach of Data Protection Act. On appeal, the court held that the trial judge

was entitled to hold the claimants had a reasonable expectation the photographs would not be published.

120 This point was discussed in **Campbell v MGN Ltd [2004]2, A.C 457** where the photograph of the claimant, a famous model was printed in the Daily Mirror newspaper along with a caption that read ‘ *Naomi : I’m a drug addict*’. The claimant, admitted there was a public interest in publishing she was a drug addict but claimed damages for breach of confidentiality and compensation under section 13 of the Data Protection Act 1998.

125 On appeal , the House of Lords considered the issue whether the publication of additional material was a breach of confidence and held that additional information was confidential as its publication could have caused substantial offence to a person of ordinary sensibilities . The Court further held that the claimant’s right to privacy outweighed defendant’s freedom of expression.

130 The Campbell case suggests that the published details should be no more than necessary for the story and if they offend sensibilities of an ordinary person, then the defendant has breached the right to confidence.

Justice Adonyo in **Asege Catherine v Opportunity Bank (U) Ltd HCCS No. 756 of 2013**
135 made reference to the California civil code which stipulates that use of a person’s image without consent for commercial gain made the defendant liable in damages. My learned brother held in that case that

140 *‘...lack of a legal regime in our jurisdiction that addresses image rights cannot be taken to mean that persons who suffer wrongs cannot seek redress from courts of law when they are aggrieved.’*

The judge in this case recognized personality rights as described in the California civil code and found that the publication of Asege’s picture by the defendant in its advert for gain was an infringement on her personality rights .

Justice Adonyo found that every person has a right to control the use of his or her personality
145 which extends to the image and name which the defendant infringed .

In **Hoskings and anor v Runting and anor [2004] 2 LRC 65**, the New Zealand court dismissed an action for publication of photos of plaintiff's children taken in a public space without consent and held that freedom of expression outweighed right to privacy.

150 It is apparent that the Hoskings case and Welter case are at odds, an indication that there is still some doubt on whether the publication of private information obtained in a public setting is an infringement of the right to privacy. Given our close proximity to English law, I am inclined towards the Weller precedent.

155 It was the contention of counsel for the defendant that there is a gap in our law regulating the use of public space by the media, advertising agencies and whether there is need for consent of an individual where the portrayal is not offensive, humiliating or defamatory.

160 While this jurisdiction does not have substantive legislation that regulates the use of private information in the public space within the framework of freedom of speech and expression, article 27 of the Constitution read together with article 17 of the ICCPR provides the legal framework to adjudicate disputes based on infringement of the right to privacy in a public space. Of course there is need for substantive legislation to further clarify on the enjoyment of this right relative to freedom of speech and expression.

The facts in the instant case

165 An examination of the photographs reveals that the plaintiff is clearly visible. There are three other people in the picture including a car with a number plate. The target of the photographer was to capture a scene in a public place and it happened that the plaintiff and others were part of that scene. The plaintiff was just part of the scene which also included cars and motor cycles.

170 Counsel for the defendant submitted that the plaintiff assumed a risk of being photographed as he was in a public place. Voluntary assumption of risk is a concept in the law of negligence which will defeat an action for negligence. The test is whether the claimant had knowledge of the risk and agreed to the risk. In **Murray v Hurringay Arena [1951] 2, AAL.E.R 533**, a six year old was hit by a puck as he watched an ice hockey match, the court held there was no liability on the batsman as the claimant took the risk. This case is discussed at page 787 of **Winfield and Jolowicz, 19th edition, Sweet & Maxwell**.

175 In the instant case, while it is true the plaintiff was in a public space, he assumed the risk he could be accidentally photographed except he did not have direct knowledge as in the Murray case. Can knowledge of the risk be implied? I am inclined to the position that knowledge can be implied simply because he was in a public place.

To this extent, the plaintiff by implication consented to the risk of his photograph being
180 taken so there was no infringement for taking a photograph of the plaintiff when he was in a street. However, the publication of the image on a billboard without the plaintiff's consent was an infringement of his right to privacy as he did not expect to appear in an advert nor did he give his consent. The image is private information within the meaning of the Weller case and its use on a billboard had to be with consent of the owner.

185 **Right to privacy and freedom of expression.**

In **SCCA No. 2 of 2002 Charles Onyango Obbo v Attorney General**, the Supreme Court explained the circumstance's when a constitutional right will not be protected:

Where the exercise of one's rights prejudices the human rights of another and where such exercise prejudices the public interest.

190 My concern here is with the first test: whether the exercise of the defendant's right to freedom of expression prejudiced the plaintiff's right to privacy of his image.

While I agree with counsel for the defendant that advertising on billboards is a form of freedom of expression its exercise was prejudicial to the plaintiff's right to privacy of his image.

195 As suggested in Winfield et al at page 424, it is irrelevant that the use of the image was innocent especially as the plaintiff was not the target of the photographer but was nevertheless very visible in the photograph.

Winfield et al at page 424 suggests that

200 *'while a person may not object to the publication of a photograph in which he is merely an incidental face in the crowd, he may object if he is the subject of the photograph even if it is entirely innocuous and non-derogatory'.*

To answer issue No. 3 : the plaintiff's right to privacy was not infringed when the photograph was taken in a public space but his right to privacy was infringed when his image was published on a billboard without his consent . Therefore the right to privacy outweighed the defendant's freedom of expression.

2. Remedies.

The plaintiff prayed for general damages for the use of the photograph and psychological torture; punitive damages for violation of the right to privacy, a permanent injunction restraining the further use of the image by the defendant and an order to remove the image from the billboard and costs.

The purpose of damages in the law of tort is to compensate the plaintiff . **SCCA No. 8 of 1999 Robert Coussens v Attorney General** refers. The principle for assessing damages in torts is that in as much as possible, the plaintiff is placed in the position he was in before the injury or loss occurred. I will adopt the same approach in assessing damages for infringement of a human right.

The plaintiff complained his life was put at risk because his friends thought he had been paid by the defendant for the advert. I find this alleged injury speculative and without basis. None of the witnesses said the plaintiff's life was at risk except for the plaintiff himself.

With respect to the stress he felt as a result of comments from his colleagues, the plaintiff was not captured in an embarrassing situation and the words that accompanied the picture were aimed at promoting the defendant in a positive way. The words '**Seeing through your ears countrywide coverage and clear signal**' do not import a derogatory innuendo about the plaintiff.

In summary, the plaintiff suffered only infringement of his privacy rights per se which attracts nominal damages. I am reluctant to adopt the approach to assessment of damages in the Asege case because the facts there in were different.

In the premises, I will award nominal damages for infringement of the right to privacy in the sum of 40,000,000/.

As to punitive damages, the principle for assessment of these damages is to punish a defendant for flagrant disregard of the plaintiff's human rights. In the instant case, the image was incidentally captured as part of a scenery of public space .

235 Furthermore, the argument that the defendant gained financially from the infringement is not supported by evidence. Moreover, the billboard was pulled down as soon as the plaintiff complained. I therefore decline to award punitive damages.

A permanent injunction shall issue restraining the defendant from further use of the plaintiff's image on the billboard or any other form of publication.

In the result, the plaintiff's claim succeeds with the following orders:

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1. Nominal damages of 40,000,000/
 2. A permanent injunction shall issue restraining the defendant from further use of the plaintiff's image on the billboard or any other form of publication.
 3. Interest on (1) above at 8% p.a from date of judgment till payment in full.
 4. Costs of the suit to the plaintiff.

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DATED AT KAMPALA THIS 26TH DAY OF MARCH 2018.

HON. LADY JUSTICE H. WOLAYO

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