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Court:	Communication and Multimedia Appeals Tribunal
Case Action:	Judgment
Judge:	Rosemary Kuria (Chairperson), Collins Wanderi, Vivienne Atieno, Damaris Nyabuti & R. Mukira
Citation:	Toluwalase M. Amondi v Daily Nation Newspaper (Subsidiary of Nation Media Group) (Tribunal Case 2 of 2020) [2021] KECMAT 192 (KLR) (15 October 2021) (Judgment)
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County:	Nairobi
Docket Number:	-
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Case Outcome:	-
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Representation By Advocates:	-
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Advocates Against:	-
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Toluwalase M. Amondi v Daily Nation Newspaper (Subsidiary of Nation Media Group) (Tribunal Case 2 of 2020) [2021] KECMAT 192 (KLR) (15 October 2021) (Judgment)

Toluwalase M. Amondi v Daily Nation Newspaper (Subsidiary of Nation Media Group) [2021] eKLR

Neutral citation: [2021] KECMAT 192 (KLR)

Republic of Kenya

In the Communication and Multimedia Appeals Tribunal

Tribunal Case 2 of 2020

Rosemary Kuria, Chair, Collins Wanderi, Vivienne Atieno, Damaris Nyabuti & Ramadhani Abubakar Mukira, Members

October 15, 2021

Between

Toluwalase M. Amondi

Complainant

and

Daily Nation Newspaper(Subsidiary of Nation Media Group)

Respondent

Judgment

1. The Complainant has filed an amended complaint dated 3<sup>rd</sup> June 2021. The Respondent contests said Complaint and has filed an amended response dated 25<sup>th</sup> June 2021. Both parties filed documents in support while the Respondent also filed a witness statement. The tribunal allowed the Complainant to rely only on oral testimony during the hearing. On said day, the Complainant testified on his own behalf while the Respondent called one witness. On conclusion of the hearing, the Complainant filed written submissions dated 25<sup>th</sup> August 2021, the Respondent filed its submissions dated 3<sup>rd</sup> September 2021 with the Complainant filing his rejoinder dated 8<sup>th</sup> September 2021. The Complainant prays for the following orders: -1. That the Respondent i.e. Daily Nation Newspapers and Nation Media Group Limited, shall immediately correct, apologize, and delete in all their print, online and mobile-based newspapers, the false, malicious, invalid, offensive, defamatory and illegal advertisement of the Complainant, as seen in page 35 of the Daily Nation Newspapers, on Wednesday, April 8, 2020. 2. The Respondent must provide to the Complainant, under the oath of affirmation, the statutory contractual documents that was used for the illegal publication and referenced in their irregular statement of response, before the hearing date. 3. The Respondent's authorized officers (managerial and editorial staff), including their contracted and irregularly appointed directors or Agents of Sychar Centre with the University of Nairobi Alumni member should permanently retract and renounce this illegal publication, with their personally sworn affidavits before the court. 4. The public reprimands of the Respondent media enterprise, and all their duty staff on the publication date; for their established professional misconduct and violations of the Media Code of Conduct and KICA statutes. 5. A recommendation issued by the court, for the permanent removal of the culpable editorial and managerial journalists from the public register. 6. That the respondent shall remit to the Complainant, the compensatory remedial and pecuniary costs for general and aggravated and punitive damages for professional career attritions, emotional distress and inestimable income losses which is claimed as twenty million shillings for the Complaint of 8<sup>th</sup> May 2020 and a supplementary twenty million shillings for the second Complaint admitted on 4<sup>th</sup> February 2021. 7. That the tribunal also sanctions the Respondent and their Advocate-Iseme Kamau & Maema, for the contempt of court, i.e. violations of the statutory rules on extension of time and service of documents

2. The Respondent's Advocate have not provided the Court with factual documents since after the 11<sup>th</sup> May 2020 service of complaint, but are ironically demanding for documents from the Complainant. Their irregular statement of response was lodged on 19<sup>th</sup> February 2021, i.e. over 402 days by next mention.

3. The Complainant requests for a punitive thrown away cost for those inconveniences, before the next hearing date.

#### The Complainant's Case

4. The Complainant's case is that on 8<sup>th</sup> April 2020, the Respondent maliciously published an advertisement containing the logo and name of Sychar Centre below which was displayed his private photo, his name, his alien ID number and his Nigerian passport number. Below the photo were the following words: "The above named person is neither an employee nor an agent of Sychar Centre. He is not authorized to either act or represent the Company in any manner whatsoever. Any person dealing with him shall do so at his/her own risk and responsibility".

5. The Complainant faults the Respondent for using his private media picture and bio-data without his authority. He also accuses the Respondent of exposing him to adverse publicity and to the risk of his bio-data being used to hack into his personal accounts such as M-pesa. He also says that the use of his expired Nigeria passport is derogatory. In addition, he says that the words used below his photo were calculated to denigrate his reputation and to rob him of his authorship or copyright of works that he had done on behalf of Sychar Centre. He said that the publication of the advert also affected his reputation as a professional and mediator adversely. He testified that his work with USAID was suspended at an unspecified date. The Complainant further testified that the impugned advert was republished by a

University of Nairobi Alumni member and that Mr. Kimuyu-, a director at Sychar Centre had used it to divest the Complainant of copyright ownership. On cross-examination by the Respondent, the Complainant said that he was not an employee of Sychar but that he had acted as its agent in various roles and was acting as such at the time of the hearing. He agreed with counsel that he had not produced any contracts showing that he was an agent of Sychar Centre. He also denied that the advert was really by Sychar Centre, saying that not all directors had signed it. He also responded that he could not confirm that the Kimuyu referred to in Annexure 9, in which the Complainant had demanded a retraction of the publication was the same one who had signed the indemnity form while presenting the impugned advert for publication. He maintained that his copyright was infringed by the publication of the advert, saying that the copyright and the author could not be separated.

6.The complainant maintained that he was defamed by the publication of the advert, and that he received many calls from relatives and friends after said publication but confirmed that he would not call any of these persons as witnesses.

#### The Respondent's Defence

7.The Respondent testified through its Head of Legal and Training, Sekou Owino. The witness started by making a distinction between an advertisement and a publication. A publication, he said, was a product of journalistic effort and was owned by the media house. An advertisement on the other hand, was not generated by the media house as it is the customer who buys space to convey certain information. RW told the tribunal that they had different requirements depending on the advert. In the case in question, one Peter Kiko Kimuyu went to their offices and said that he wanted to publish an advert. He gave the Respondent a copy of his ID card. He would have been given a quotation for which he paid by a post-dated cheque. RW said that Sychar Centre became known to the Respondent at the time that Kimuyu brought the advert for publication. He further said that the Respondent could not have retracted the advert as requested by the Complainant because the request came in when the advertisement had been done. Further, the witness said, the Respondent could not have withdrawn the advert because it owed a contractual duty to Sychar Centre to publish it and only Sychar could make them to take it back. RW further testified that the Respondent had no way of verifying the information in an advert which was why it required the advertiser to sign an indemnity form which was a written assurance that the information supplied to the Respondent in respect of the advertisement was correct.

8.On cross-examination by the Complainant, RW testified that the indemnity form signed by Kimuyu did not require a witness because Kimuyu himself was giving the indemnity to the Respondent. To the question why the final advert differed from the original version, RW told the tribunal the final product was arrived at after the Respondent made various inquiries from the client. RW maintained that the Respondent knew neither Sychar Centre nor the Complainant personally so as to take sides and that it did what was required so as to render the services Sychar Centre requested from it. On re-examination, RW testified that Sychar Centre was happy with the advert and paid for it after its publication.

#### Analysis And Finding

9.We have considered the pleadings, the evidence and the submissions and find the following to be the issues for the tribunal's consideration: -1.Whether the Respondent published advertising content that was defamatory of the Complainant.2.Whether the Respondent violated the Complainant's privacy by publishing his biodata.3.Whether the Respondent is entitled to the relief sought.

1. Whether the Respondent published advertising content that was defamatory of the Complainant.  
10.There is no dispute that the Respondent published an advert with the Complainant's photo, name

and identification numbers, with the words already reproduced above. This tribunal has jurisdiction to determine if said words were defamatory pursuant to section 102A(1)(a) of Kenya Information and Communications Act which provides for complaints where a person is aggrieved by any publication by or conduct of a journalist or a media enterprise such as the Respondent. No restriction is made as to the nature of the grievance.

11. What is defamation? In *Miguna Miguna vs. Standard Group Limited & 4 Others* (2017) eKLR, the court held: -A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or it exposes him/her to public hatred, contempt or ridicule or it causes him to be shunned or avoided.

12. Upon scrutinizing the words complained of, the tribunal makes a finding of fact the words in the publication, in their ordinary meaning, were a warning to the public that the Complainant might pass himself off as an employee or agent of Sychar Centre the consequence of which Sychar Centre was declaring that it would not take responsibility for.

13. The thrust of this Complaint is that the impugned words were defamatory in that because they were false and malicious, because it is not true to say that the Complainant was passing himself off as an employee of Sychar Centre but that he was actually an agent of Sychar Centre. The Respondent testified, and we have no reason to doubt, that it only came to know Sychar Centre at the time of its Mr. Kimuyu placing an advert and knew absolutely nothing about the truthfulness or otherwise of the contents of the advertisement. However, to satisfy itself of the bona fides of the advert, it requested Mr. Kimuyu to sign an indemnity form. From the evidence before the tribunal, the Complainant knew that Sychar Centre originated the advert but neglected to join them as an interested party. The tribunal agrees with the Respondent that Sychar Centre was a necessary party in this Complaint if the tribunal were to make a credible finding of fact of whether the contents of the impugned publication were false and malicious. Additionally, the Complainant testified that not all directors of Sychar Centre approved of the placement of the advert. This means that he was privy to crucial information about the circumstances in the advertisement which he withheld from this tribunal and/or did not call any witnesses about.

14. In *James Kimeu Mulinge vs Radio Africa Limited* (2019) eKLR, the Defendant admitted that it had published an advertisement found to be defamatory but pleaded that it had done so without malice, under the defense of privilege availed to media enterprises under section 7(1) of the Defamation Act.

15. For the avoidance of doubt, the subsection provides as follows: -Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless such publication is proved to be made with malice.

16. In that case, the High Court considered the defense of privilege to be prima facie a strong defense but noted that the Defendant had not called any witness to present it. Before finding for the Plaintiff, the court had this to say: -In my view, it was incumbent upon the defendant to establish who really placed and paid for the advertisement so that this court can come to the conclusion that the publication was placed by a third party who would take responsibility for the contents of the advertisement.

17. In the complaint before us, the Complainant not only did not join the third party who placed the advert, and failed to prove that the contents of the advertisement were defamatory but also that the Respondent was malicious or, if not malicious, acted in reckless disregard for the truth.

2. Whether the Respondent violated the Complainant's privacy by publishing his bio data.

18. The Complainant's bio data was published as information to identify him in the notice. According to the Code of Conduct for the Practice of Journalism which is found in the Second Schedule of the Media Council Act, the public's right to know shall be weighed against the privacy rights of people in news. The Code also provides that as a general rule, media enterprises shall avoid use of pictures and names when there is a possibility of harming the persons concerned. Additionally, Article 31(c) of the Constitution provides that every person has a right to privacy, which includes the right not to have information relating to their private affairs unnecessarily required or revealed.

19. We have already found that the Complainant avoided joining a necessary and crucial party, and appeared to withhold information essential to the just determination of this Complaint. Consequently, the tribunal finds that the Complainant did not prove that revealing his bio data, did not serve a public interest, was not an exception to the general rule concerning the use of pictures and names or that said data was revealed unnecessarily. Once again, by excluding Sychar Centre from these proceedings, the Complainant fatally hampered the tribunal's ability to make a credible finding of fact as to whether his right to privacy was violated.

20. The circumstances of this Complaint are different from those in *Jimi Wanjigi & Another vs. Stephen Gitagama & 3 Others* 2019 eKLR which was a constitutional petition based on inter alia breach of privacy. The Respondents in the petition had admitted not only publishing an impugned article but also had conceded that the contents therein were erroneous and had caused the Petitioners pain and anguish. The High Court in that case found for the Petitioners.

21. In this Complaint, the Respondent makes no such concession, and we therefore dismiss the claim of breach of right to privacy.

3. Whether the Respondent is entitled to the relief sought.

22. Having found that the Respondent is not liable for defamation and breach of right to privacy, the Complainant is not entitled to any relief.

23. The result is that the tribunal unanimously dismisses this Complaint with no order as to costs. It is so ordered

**DATED THIS 15TH DAY OF OCTOBER 2021 DATED THIS 15<sup>TH</sup> DAY OF OCTOBER 2021 AND AMENDED ON 5<sup>TH</sup> NOVEMBER 2021 DELIVERED VIRTUALLY IN THE PRESENCE OF THE HONORABLE MEMBERS OF THIS TRIBUNAL, COLLINS WANDERI, VIVIENNE ATIENO, DAMARIS NYABUTI AND R. MUKIRAROSEMARY KURIA CHAIRPERSON - COMMUNICATIONS & MULTIMEDIA APPEALS TRIBUNAL**



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