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Image rights in Kenya

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Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited 2021 eKLR (Constitutional Petition 10 of 2020) (HC Machakos)

Samevatting

DIE REG OP IDENTITEIT IN KENIA

Kenia is 'n land wat al op verskeie terreine vele bekendes opgelewer het. Hulle is veral welbekend vir die wêreldklas middel- en langafstandatlete wat hulle oplewer. Dit sou daarom nie vreemd wees nie, indien bemarkers sou poog om die gelykenisse van bekende persone te gebruik in hulle bemarkingsveldtogte. Dit sou egter nie 'n Olimpiese atleet of ander beroemde persoon wees wat sou poog om die reg op identiteit in hierdie verband te beskerm nie. Intendeel, dit sou 'n nederige motorfietsafleweringsbestuurder wees wat 'n finansiële instelling tot orde sou roep omdat hulle sonder toestemming sy foto in hulle bemarkingsmateriaal gebruik het.

*Alhoewel die Keniaanse deliktereg gegrond is op die Engelse law of torts, vermy die hof in die Rafiki- saak die enge benadering van die Engelse howe, waarvolgens die ongemagtigde gebruik van iemand se beeld vir bemarking slegs 'n eisorsaak daarstel indien dit sou neerkom op aanklamping. Die Keniaanse hof wend hom veel eerder tot die Suid-Afrikaanse reg en steun vir gesag op die uitsprake van die Suid-Afrikaanse howe in *Grütter v Lombard* (2007 (4) SA 89 (HHA)) en *W v Atoll Media (Pty) Ltd* (2010 4 All SA 548 (WKK)).*

*Die hof in die Rafiki-saak beslis dat die ongemagtigde gebruik van sy foto 'n skending is van sy reg op privaatheid, soos vervat in artikel 31 van die Grondwet van die Republiek van Kenia. Voorts bevind die hof, met verwysing na die uitspraak van die Suid-Afrikaanse konstitusionele hof in *MM v MN* (2013 (4) SA 415 (KH)), dat die ongemagtigde gebruik van sy foto ook 'n skending is van sy reg op menswaardigheid soos vervat in artikel 28 van die Keniaanse grondwet.*

Op hierdie wyse ontwikkel howe in Afrika-lande pragmatiese oplossings wat die individu teen uitbuiting beskerm. Die beginsels wat aldus neergelê word, vergelyk goed met die omvattende beskerming wat in verskeie Amerikaanse deelstate teen ongemagtigde gebruik van iemand se beeld in bemarkingsmateriaal verleen word.

1. Introduction

Kenya is a country which has, from both an African and a global perspective, produced many famous people. On a political front, Kenya was one of the leaders in the quest for decolonisation and independence from the British Empire. On a global level, Kenya is arguably best known as the home of the greatest middle- and long-distance runners, while the Kenyan cricket and sevens rugby teams can hold their own against the best. As a result, it would certainly be expected that marketers would look towards these famous people and seek to use their images in an effort to promote their respective products in the Kenyan, African and global markets. Ironically, it would not be any of the Kenyan Olympians or other famous people who would bring the issue of image rights to a head in Kenya. Instead, it would be a humble motorcycle delivery driver who would challenge a financial institution for using his image in its marketing campaign.

Kenyan law is to some extent based on English common law. Section 3 of the Judicature Act (Cap 8) implies that the law of Kenya consists of the constitution of Kenya, Kenyan and certain colonial legislation, as well as the common law, the doctrines of equity and the statutes of general application in force in England on 12 August 1897, to the extent that circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. Civil liability in Kenya is therefore derived from the English law of torts (*Hussain General Principles and Commercial Law of Kenya* (2003) 55 *et seq*).

Because of this, one would be excused for thinking that the Kenyan courts might take the same narrow approach to the protection of an individual's image which

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English courts have taken. In terms of this approach, the unauthorised use of a person's image for commercial gain is actionable only if it amounts to passing off (*Elvisly Yours v Elvis Presley Enterprises* 1999 EWCA Civ 964; *Irvine v Talksport Ltd* 2003 2 All ER 881 (CA)). In English law, there are two requirements that must be satisfied before a party can succeed with a claim for the unauthorised use of his or her image based on the tort of passing off. Firstly, at the time when the conduct complained of took place, the plaintiff should already have acquired some measure of fame. And secondly, the conduct complained of must be of such a nature that it would create an impression with a significant portion of the proposed market that the plaintiff endorses, recommends or approves the product of the defendant (*Fenty v Arcadia Group Brands Ltd* (t/a Topshop) 2015 EWCA Civ 3).

However, in *Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited* (2021 eKLR (Constitutional Petition 10 of 2020) (HC Machakos)) the Kenyan high court took a much more pragmatic approach and cast its eyes well beyond the confines of English law to find a solution.

2. Facts

The petitioner applied for financial assistance from the respondent towards purchasing a motorcycle to transport passengers and goods, which in Kenya is colloquially known as a "Boda Boda" (par 2). The concept "Boda Boda" originates from the 1960s in the border regions of Kenya and Uganda, when motorcycles were used as a means of smuggling passengers and goods across the borders of Kenya and Uganda (Malmberg-Calvo "Case study on intermediate means of transport bicycles and rural woman in Uganda" *Sub-Saharan Africa Transport Policy Program Working Paper* (1994) 22). Currently, a "Boda Boda" is used for the short-distance transporting of passengers and goods, in exchange for a fee, to low-density areas and areas that cannot be serviced by conventional public transport (Bryceson, Mbara and Maunder "Livelihoods, daily mobility and poverty in sub-saharan Africa" 2003 *Transport Reviews* 177 192).

The respondent, a long-standing and reputable financial institution, approved the application and a loan account was extended to the petitioner. The petitioner subsequently settled the loan account without any fail or default, and the settlement included interest that accrued on the account (par 2). A year later, a duly authorised employee of the respondent made contact with the petitioner to request a meeting. The petitioner acceded to this request and on arrival at the respondent's Machakos Town branch, a duly authorised employee of the respondent was accompanied by a photographer. The employee informed the petitioner that they needed to take a photograph of him as he was one of their loyal customers. The petitioner acceded to the request but did not consent nor acquiesce nor sign any document permitting the respondent to

use the image or likeness in promoting their business (par 3).

To the petitioner's surprise, the photograph was seen in pamphlets published by the respondent for the purposes of promoting their business (par 4). The petitioner, through the service of his legal representative, wrote a letter to the respondent notifying them that he did not extend his permission for the utilisation of his photograph for promoting their business. The respondent replied to the letter by acknowledging that they were not given consent by the petitioner to use his image or likeness for promotional purposes. In the replying letter, the respondent assured the petitioner that they will recall the pamphlets and that further publication of his image or likeness in the pamphlets will be discontinued (par 5). Despite the respondent's commitment, the publication of the petitioner's image or likeness in the pamphlets persisted. The petitioner was astounded by the fact that pamphlets

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containing his image or likeness remained in circulation, especially in Machakos Town (par 6). For this reason, he launched an application against the respondent for a claim of damages arising out of the publication of his image or likeness in the said pamphlets, without first obtaining the necessary consent from him.

The petitioner's case was primarily based on the submission that the publication of his image or likeness by the respondent in the promotional pamphlets without obtaining his consent violated his constitutional rights under the Constitution of the Republic of Kenya, 2010, in three respects: Firstly, the failure to obtain his permission beforehand and the failure to apologise afterwards violated his right to human dignity in terms of article 28 (par 7). Secondly, the failure to obtain his permission beforehand violated his right to privacy in terms of article 31 (par 7). Thirdly, the publication of the said image or likeness in the said pamphlet for financial gain by and for the respondent, to the exclusion of the petitioner, violated his constitutional right to not be subjected to slavery, servitude and forced labour in terms of article 29 (par 8).

The petitioner's claims were founded on, among other things, the argument that the said publication resulted in him being a subject of harassment and humiliation among relatives, friends and acquaintances. This is because his friends perceived him as someone who could not afford anything without applying for a loan. The petitioner also alleged that his friends and associates perceived him as someone who could not work for his assets. They further perceived him as a model employed by the respondent, and they did not understand why he was still a "Boda Boda" rider if he earned money as a model (par 8). The petitioner further alleged that the respondent's act of publishing his image or likeness in the pamphlets without his consent resulted in him losing some of his loyal customers, who, after becoming aware of the pamphlets, took the posture that he was making a lot of money as a model and would not pay for their commute with him (par 9). Furthermore, his claim that the respondent's actions subjected him to servitude and forced labour flows from the fact that the respondent gained financially through the use of his image or likeness and never made any form of restitution whatsoever to him. In his view, this was tantamount to exploitation. He also alleged that the respondent's action jeopardised his opportunity to stand for the election as an official of a youth self-help group known as Machakos Riders (par 10).

3. Judgment

Odunga J held that there was no basis on which the court could find that the petitioner's right not to be held in slavery, servitude and forced labour in article 29 of the Constitution of the Republic of Kenya, 2010, was violated and that such a finding in the circumstances of this case would be stretching the matter too far (par 38).

On the other hand, after careful consideration of Kenyan and foreign jurisprudence on the matter, Odunga J concluded that the publication of the petitioner's image or likeness in the pamphlets without consent amounted to a violation of the petitioner's right to privacy in article 31 of the Constitution of the Republic of Kenya, 2010. The finding was premised on the fact that the publication of someone's image or likeness, in itself, is *prima facie* evidence that there is a violation of that person's right to privacy. Once publication is established, the burden of proof then shifts to the publisher to justify the limitation of the right, for instance, by proving that they had published the image or likeness with the consent of the person concerned. In this case, the respondent failed to discharge this burden due to lack of evidence to the effect that the petitioner had given consent (par 49).

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In coming to his conclusion, Odunga J referred to, among other things, the Kenyan case of *Jessicar Clarise Wanjiru v Davinci Aesthetics and Reconstruction Centre* (2017 eKLR (Constitutional Petition 410 of 2016) (HC Nairobi)), where Mativo J held that the right to privacy essentially comprises the right to live one's life with minimal interference by other people (par 16). Mativo J further explained that a

"person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of the image, including to refuse publication thereof. Personality rights encompasses the exclusive right of an individual to market, control and profit from the commercial use of his/ her name, image, likeness and persona. The distinctive characteristics of one's image, likeness or persona include but are not limited to name, face, signature phrase, paraphernalia or action, costume or personals signatures The tort of misappropriation of personality can be invoked when all of the following are met:

- (a) There is an element of commercial exploitation of a person's personality. There must be sufficient link between the individual and the exploiting medium to establish that the petitioner's personality was 'used' for the defendant's commercial gain.
- (b) The person is clearly identifiable in the medium used and to their respective community or communities.
- (c) The person does not consent to the use of their personality.
- (d) Damages, either, emotional or financial losses, are proven although recent judicial rulings would indicate the right to privacy is recognized even in the absence of damages" (par 25-28).

In the *Rafiki* case, Odunga J also relied on the judgment of Chemitei J in *TO S v Maseno University* (2016 eKLR (Petition 7 of 2015) (HC Kisumu)), in which the court held that

"publication or use of the images of an individual without his consent violates that person's right to privacy, . . . because a person's life is a restricted realm in which only that individual has the power of determining whether another may enter, and if so, when and for how long and under what conditions" (par 15).

Odunga J concluded that the petitioner's claim that the publication of his image or likeness by the respondent for commercial gain in the said pamphlets violated his constitutional right to human dignity as provided for in article 28 of the Constitution of the Republic of Kenya, 2010, must also succeed. This conclusion was founded on the principle that the violation of other rights (in this context the right to privacy) is tantamount to the violation of the right to human dignity (*Ahmed Issack Hassan v Auditor General* (2015 eKLR (Petition 356 of 2014) (HC Nairobi))). The latter view was strongly influenced by the principles laid down by the constitutional court of South Africa in *Dawood v Minister of Home Affairs* (2000 (3) SA 936 (CC) par 34), where the court held that human dignity is a constitutional value that informs the interpretation of many, if not all, the other rights. In determining the nature and extent of the right to dignity, the Kenyan court further relied on the principle referred to by the South African constitutional court in a matrimonial dispute governed by customary law where it was explained that

"the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances are a fundamental aspect of human dignity" (*MM v MN* 2013 (4) SA 415 (CC) par 73).

As a result, the court in the *Rafiki* case ruled in favour of the petitioner and

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- (i) declared that the respondent had violated the petitioner's fundamental rights to privacy and human dignity by publishing the petitioner's image for purpose of commercial advertisements without his consent;
- (ii) granted a permanent injunction restraining the respondent from publishing and/or using the petitioner's image and likeness in any way in its

advertisements or promotions without the petitioner's consent and compelling the respondent to stop any further advertisement or promotions featuring the petitioner's image and likeness on their pamphlets; and

- (iii) ordering the respondent to pay 2 000 000 Kenyan Shillings in damages for the violation of the petitioner's right to dignity and privacy, together with interest and costs (par 57).

4. Comparative analysis

As indicated above, the Kenyan law of torts is based on English common law (s 3 of the Judicature Act (Cap 8); Hussain 55 *et seq*). Because of this, one would be excused for thinking that the Kenyan courts might also take the same narrow approach to the protection of an individual's image which English courts have taken. In terms of this approach, the unauthorised use of a person's image is actionable only if it amounts to passing off (the *Elvisly Yours* case 543; the *Irvine* case 881). In English law, there are two requirements that must be satisfied before a party can succeed with a claim for the unauthorised use of his or her image based on the tort of passing off. Firstly, at the time when the conduct complained of took place, the plaintiff should already have acquired some measure of fame. And secondly, the conduct complained of must be of such a nature that it would create an impression with a significant portion of the proposed market that the plaintiff endorses, recommends or approves the product of the defendant (the *Fenty* case 3).

However, instead of looking towards the English law of torts for guidance, the Kenyan court in the *Rafiki* case cast its gaze towards the south of the African continent and considered South African jurisprudence on the unauthorised use of a person's image. The Kenyan court referred (par 32, 42) to the *locus classicus* on image rights in South Africa, *Grütter v Lombard* (2007 (4) SA 89 (SCA)). In this case, the appellant and respondents practised as attorneys on common premises under the name "Grütter and Lombard". In 2005 the appellant terminated his ties with the respondents and went into partnership with another attorney under the name "Grütter and Grobbelaar". The respondents continued to practise under the name "Grütter and Lombard". The appellant demanded that the respondents cease the use of the name "Grütter" in the description of their practice, but they refused. The appellant did not claim any exclusive right to use the name "Grütter", nor did he allege that the respondents made themselves guilty of passing off. The appellant merely made the case that it was well-known that he was one of the persons to whom the name "Grütter and Lombard" referred and that he no longer wished to be associated with the firm now that his relationship with them had ceased. Nugent JA concluded that the matter involved a violation of the right to privacy but explained that privacy was merely one of a variety of interests that enjoyed recognition in the concept of personality rights in the context of the *actio iniuriarum*. The interest which a person has in protection of his or her identity against exploitation cannot be distinguished therefrom and is similarly encompassed by that variety of personality rights which is worthy of protection (95D).

The supreme court of appeal held that the right to identity can be violated in one of two ways. Firstly, a person's right to identity is violated if the attributes of that person are used without permission in a way which cannot be reconciled with the

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true image of that person. Apart from the unauthorised use of a person's image, this kind of infringement also entails some kind of misrepresentation concerning the individual, such as that the individual approves or endorses a particular product or service or that an attorney is a partner in a firm, while this is not the case. The unlawfulness in this kind of case is found in the misrepresentation concerning the individual and, consequently, in violation of the right to human dignity (96C).

Secondly, the right to identity is violated if the attributes of a person are used without authorisation by another person for commercial gain. Apart from the unauthorised use of the individual's image, such use also primarily entails a commercial motive which is exclusively aimed at promoting a service or product or to solicit clients or customers. The mere fact that the user may benefit or profit from any product or service in respect of which the individual's attributes have incidentally been used is not in itself sufficient (96B).

As a result, the court found that the appellant was entitled to insist that there should be no potential for error and ordered the respondents to desist from using the name "Grütter" and rectify the matter within a period of 30 days (96E).

The Kenyan court in the *Rafiki* case also referred (par 32, 43) to the South African case of *W v Atoll Media (Pty) Ltd* (2010 4 All SA 548 (WCC)), where the Western Cape high court held that appropriating a person's image or likeness for commercial gain warrants legal protection in favour of such a person (par 49). More than any other, this case provides a prime example of how the unauthorised publication of a person's image can violate the privacy of that person and have a severe detrimental impact on that person's dignity. The photograph, which was published without consent in a magazine for surfers, called *Zigzag*, depicted the subject, who was twelve years old at the time, in a bikini, kneeling in the shallows at the shoreline on a public beach. Although the photograph was taken from behind and the subject's face was obscured by the angle of the photograph as well as her hair, Davis J concluded that the girl could be identified and in fact was identified by her friends and school mates (par 9, 10, 20). The girl was distressed to find that social media posts identified her as the girl in the picture and referred to her as "a little slut" and "PE's little porno star" (par 9). She was further distressed to see that the picture had been put up behind the cashier in a local craft store and to learn that it was seen on the walls of a local boys' school (par 9). Davis J described the photograph as a pinup published

"without any attempt to obtain consent and with the clear purpose of including it to increase the attraction of a commercial publication . . . [i]n the context of this case, therefore, the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein. However, when the photograph is employed, as in this case, for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the personal rights of the individual, including the person's dignity and privacy. In this dispute, no care was exercised in respecting these core rights" (par 8).

Davis J concluded that

"[i]n the present case . . . *Zigzag*, chose to publish a photograph of a girl in a bikini, posing provocatively. . . . The manner in which the photograph was published without any regard to the context or implications for a twelve year old girl like T does not, in my view, satisfy the test for reasonable publication. . . . I am fortified in this conclusion by reference to section 28(2) [of the bill of rights] in which it is provided that a child's best interests are of paramount importance in every matter concerning the child" (par 43-45 – original emphasis).

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Although the Kenyan court in the *Rafiki* case did not refer to any other South African precedents on the protection of a person's image against unlawful use, *Kumalo v Cycle Lab (Pty) Ltd* (2011 JOL 27372 (GSJ)) is another South African case that bears a strong factual resemblance to the Kenyan case. The plaintiff in the *Kumalo* case was a former Miss South Africa, celebrity and public figure who built a successful career in modelling, television presentation, magazine editing and business. The plaintiff was also an avid mountain biker and frequently visited the shop of the defendant, which specialises in the retail of bicycles and cycling gear. During one visit to the shop, a man approached the plaintiff and took a photograph of her (par 3). The photograph was used by the defendant to advertise his shop in a cycling magazine and advertising brochure (par 4 and 10).

The plaintiff was aggrieved by the conduct of the defendant, who sought to exploit her image or likeness for commercial gain, without her knowledge and consent. Furthermore, the photograph was of low quality and was used in a poorly designed advertisement, which did not conform to the professional standards and industry standing which she sought to uphold (par 5). The court held that the publication of the plaintiff's photograph for commercial gain without consent constituted an intrusion of her rights to identity (par 22), privacy (par 23) and dignity (par 24), and that these rights were worthy of legal protection.

Boruchowitz J concluded:

"While the plaintiff's status as a celebrity may require her to accept that when appearing in public she may attract more attention than others who are not celebrities, she retains the right to be protected against an infringement of her right to privacy and identity by the non-consensual publication for advertising purposes of a photograph taken when she was about a private shopping trip. It is universally accepted that public

figures or celebrities have a legitimate expectation of protection and respect for their private lives. [See *A v B plc* 2003 QB 195 (per Lord Woolf CJ); *Van Hanover v Germany* European Court of Human Rights (Third Section) 24 June 2004; *MGN Limited v The United Kingdom* European Court of Human Rights (Fourth Section) 18 January 2011.] The determining factor is usually whether such intrusion is in the public interest or for the public benefit. Professor McQuoid-Mason points out, however, that the defence that the plaintiff is a public figure cannot avail a defendant in cases where the plaintiff has been placed in a false light or his or her image has been wrongfully appropriated for advertising purposes. [See McQuoid-Mason *Law of Privacy in South Africa* 220; see, also, Prosser 827.] I concur in this view. The appropriation by the defendant of the plaintiff's image by using her photograph in an advertisement cannot be justified on the basis that she is a public figure or celebrity" (par 30).

5. Discussion

The legal position in Kenya and South Africa with regard to the use of a person's image without consent is remarkably similar to the position taken by courts in those jurisdictions within the United States of America that apply the common law of torts in such cases. Within the scope of the protection afforded to an individual to safeguard his or her privacy, courts in various states recognise the tort of commercial appropriation, which occurs when the image of a person is used without consent for commercial gain. To succeed with a claim under commercial appropriation, the plaintiff must prove that the respondent used the plaintiff's identity, that the use of the plaintiff's identity holds commercial or other gain for the respondent, that the plaintiff's image was used without consent and that the plaintiff will suffer loss or prejudice as a result. (For some examples, see *Allison v Vintage Sports Plaques* 136 F 3d 1443 (Alabama); *Martin Luther King Jr Center for Social Change Inc v American*

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Heritage Products Inc 296 SE 2d 697 (Georgia); *Johnson v Boeing Airplane Co* 262 P 2d 808 (Kansas); *Carson v Here's Johnny Portable Toilets Inc* 698 F 2d 831 (Michigan).) This much is affirmed by the South African court in the *Grütter* case (93B), as well as the Kenyan court in the *Rafiki* case (par 42)).

This is significant for various reasons: The United States of America is the economic powerhouse of the world, which has an entertainment and media industry worth more than US \$720 billion annually (Luck, Barker and Sassenberg *Integrated Marketing Communications* (2020) 34) and a sports industry worth almost US \$500 billion annually (Zhang, Huang and Nauright *Sport Business in Leading Economies* (2017) 383). The United States also spends more than US \$150 billion annually on advertising and marketing – almost one third of the global expenditure in this regard (Albertazzi and Coble *The Media: An Introduction* (2013) 260). The United States therefore provides fertile ground for disputes on the unlawful use of a person's image or likeness to arise. If one adds to this the fact that the inhabitants of the United States are considered to be a litigious society (Ghaun and Usunier *International Business Negotiations* (2003) 269), then the stage is set for a significant amount of conflict with regard to the use of a person's image without consent to obtain some commercial benefit, which in turn would produce many opportunities to set precedents on the law relating to the use of a person's image without consent for commercial gain.

The matter first received attention in 1891 when the New York court of appeals held in *Mackenzie v Soden Mineral Springs Co* (18 NYS 240) that the unauthorised use of an opinion and autograph attributed to a well-known physician, amounted to infringement of the appellant's privacy which justified injunctive relief against the respondent. Since then, there has been a steady flow of cases before state and federal courts across the United States. One would therefore expect that the common law on the protection of a person's image is well developed and this is generally the case.

For two African countries with significantly smaller economies, as well as significantly smaller entertainment and sports industries, to apply their own laws and jurisprudence and come up with their own pragmatic solutions to the unauthorised use of a person's image, without any notable reliance on American or European precedents, shows a high level of maturity in the recognition and protection of personality rights, particularly if those solutions measure up to the best in the world. It is a victory for the average citizen that, unlike English law, where only the image of the rich and famous enjoy some measure of protection, any individual in Kenya and South Africa, irrespective of their socio-economic status, can claim some protection against the unauthorised use of their image for commercial purposes.

6. Conclusion

The reliance which the Kenyan court placed in the *Rafiki* case on the South African precedents in the *Grütter* and *Atoll Media* cases means that some synergy between the two legal systems is developing in the context of civil liability and commercial law. In view of the growing relations between the two countries on economic, sports and other terrains, such increased synergy can only be conducive to further trade and other exchanges across the African continent.