REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION 13 (E015) OF 2022

-BETWEEN-

CHARLES MUTURI MACHARIA (SUING AS THE NEXT OF FRIEND OF AND ON BEHALF OF CHRISTINE WANGARI MUTURI).....1ST APPELLANT

RICHARD MAINA NYANJUI (SUING AS THE NEXT OF FRIEND OF AND ON BEHALF OF MARGARET NYOKABI MAINA.....2ND APPELLANT

SAMWEL GITHINJI RUGA (SUING AS THE NEXT OF FRIEND OF AND ON BEHALF OF CYNTHIA WANJA GITHINJI) .....3RD APPELLANT

JOHN CHEGE KURIA (SUING AS THE NEXT OF FRIEND OF AND ON BEHALF OF FAITH NJERI CHEGE) .....4TH APPELLANT

GODFREY NG'ANG'A KAMIRI (SUING AS THE NEXT OF FRIEND OF AND ON BEHALF OF IVYPAT MUTHONI KAMIRI) .....5TH APPELLANT

JOHN MURUTI MWANGI (SUING AS THE NEXT OF FRIEND OF AND ON BEHALF OF MONIKA NYAWIRA) .....6TH APPELLANT

STEPHEN KARIUKI (SUING AS
THE NEXT OF FRIEND OF AND ON BEHALF
OF SUSAN WATIRI KARIUKI).....7TH APPELLANT

-AND-

THE STANDARD GROUP.....1ST RESPONDENT
ROYAL MEDIA GROUP.....2ND RESPONDENT
GOOD NEWS MISSION CHURCH.....3RD RESPONDENT
NATION MEDIA GROUP.....4TH RESPONDENT
THE ATTORNEY GENERAL.....5TH RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal at Nairobi (Warsame, Sichale & Ole Kantai JJ.A) in Civil Appeal No. 296 of 2017 delivered on 13th May, 2022)

Representation:

Mr. Lempaa appearing together with Mr. Ochiel Dudley for the Appellants *(Katiba Institute)*

Mr. William Muthee for the 1st Respondent *(Triple OK Law Advocates LLP)*

Mr. Karanja Munyori for the 2nd Respondent *(Kamau, Kuria & Kiraitu Advocates)*

Ms. Lynne Muchira for the 3rd Respondent *(LM Muchira & Company Advocates)*

Mr. Dennis Nkarichia appearing with Ms. Nimo Adan for the 4th Respondent *(Mohammed Muigai Advocates)*

Non-appearance for the 5th Respondent *(Attorney General's Chambers)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Constitution of Kenya recognizes a wide variety of constitutional rights and fundamental freedoms: civil, political and socio-economic, religious and cultural

rights: children and family rights: rights of persons with disabilities, older members of society, minorities and marginalized groups. Given this diversity of rights, competing constitutional rights claims are bound to arise and indeed are a common occurrence. The exercise of an individual's rights may result in the deprivation or violation of another person's rights because constitutional rights are mutually interrelated, interdependent, indivisible and form a single constitutional value system. This means that the realization of one right often relies on the respect and fulfillment of other rights. This appeal presents one such competition or clash, whose resolution is an equally complex and nuanced process. The resolution often requires careful balancing of rights. Courts and legal systems in different jurisdictions employ different methods and legal doctrines to determine the appropriate balance between competing rights. To perform this task, the courts in Kenya will construe the concerned provisions of the Constitution in a generous and purposive manner, guided by the principles set out in Article 259, through a holistic manner; in a manner that promotes the purposes of the Constitution, its values and principles; and in a way that advances the human rights and fundamental freedoms in the Bill of Rights. The Constitution itself recognizes that rights have limits in some situations where they substantially interfere with the rights of others and can be limited by law.

[2] This appeal presents two broad competing rights between, on one hand, the freedom and rights under Articles 33, 34 and 35 of the Constitution dealing, respectively with the freedom of expression, freedom of the media and the right to access to information, and on the other hand, Articles 31 and 53(2) of the Constitution which relate to the right to privacy and a constitutional imperative that a child's best interests are of paramount importance in every matter concerning the child.

[3] The competing exercise of the right to freedom of expression while maintaining another's right to privacy and the rights of a child is a common phenomenon around the globe. As a result, some of the international human rights instruments have made specific provisions to guide State parties in enacting laws to regulate

this relationship. Article 12 of the United Nations Declaration of Human Rights (UDHR), for example, guarantees that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Further, it recognizes that children are entitled to special care, assistance and social protection. On the other hand, Article 19 grants everyone the right to freedom of opinion and expression, which includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

[4] Likewise, the United Nations International Convention on Civil and Political Rights (ICCPR) at Article 19 provides for the right to hold opinions without interference; the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media, subject to certain restrictions, as are provided by law and are necessary, for respect of the rights or reputations of others. Article 53 guarantees every child the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. These two instruments have a binding effect having been ratified by Kenya in terms of Article 2(6) of the Constitution.

[5] The events, the subject of this appeal, relate to a period in the history of Kenya in 2012 when reports of destructive fires in Kenyan secondary schools, mostly suspected to be arson cases, with the suspects being students were commonplace. The phenomenon spanned all regions in Kenya and occurred in boys', girls', and mixed schools, private and public schools, and across school calendars.

[6] It is common factor that on 5th November 2012, the minors named above were students at Mugoiri Girls School in Murang'a County. They were presented before the magistrates' court at Murang'a to answer arson-related charges. It is similarly not denied that on the same day, or subsequent to that day, the 1st to 4th respondents, all media houses, published and/or televised images of the students appearing before the court in print, online and visual media. The stories carried full identities and descriptions of the seven minors. Their names, images and

school were disclosed. There were also detailed accounts of their alleged participation in the attempted burning of the school.

B. LITIGATION BACKGROUND

i. Before the High Court

[7] Aggrieved by the publication, the appellants, suing as the next friend of and on behalf of the seven (7) students filed a petition before the High Court in which they complained that in publishing the details of the minors in the manner they did, the respondents ignored the minors' right to privacy and their best interest. It was their case that the story was published with malicious intent, commercial consideration and profit; given prominence to gain popularity with utter disregard for the dignity, privacy and best interest of the minors as required by the Constitution and the law. They contended that in publishing the story, the respondents did not bother to confirm the ages of the minors or seek their comments on the issues published; and that as a result of the respondents' reckless behaviour, the minors have been stigmatized, traumatized and even shunned by society for being exposed as maturing arsonists; and that the injury to the minors was indelible as the stories had been transmitted worldwide, some in permanent form.

[8] For the reasons aforesaid, the appellants asked the court to declare that the fundamental rights and freedoms of the minors had been violated and sought, *inter alia*: a declaration that the respondents had breached Articles 29(d), (f), 31(c) and 53(2) of the Constitution, Sections 4(2), 18 and 19 the Children Act, 2001 and various provisions of the African Charter on the Rights and Welfare of the Child, International Covenant on Civil and Political Rights (ICCPR), Universal Declaration on Human Rights (UDHR) and the African Charter on Human and Peoples' Rights (ACHPR); an order compelling the respondents to pay general, exemplary, punitive and aggravated damages to each of the minors for the infringement of their rights; and an order compelling the respondents to remove the images, pictures, stories or caricatures posted on the internet and other mediums regarding the minors.

[9] In response, the 1st to 4th respondents in their defence maintained that the news story as published was correct and accurate of the events in court; that it was published in good faith and in public interest given the prevalence of violence and arson incidents in secondary boarding schools; that the learned trial magistrate did not object to the presence of journalists and the public in the courtroom; and that they were simply exercising their fundamental right to freedom of speech and expression as enshrined in the Constitution.

[10] The 5th respondent (The Attorney-General), sued as Principal Legal Adviser to the Government on behalf of the State, on his part averred that the trial court attempted to get members of the public out of the courtroom but was not fully successful as the matter had generated immense public interest and not everyone complied with the directions. Further, it was contended that if any live proceedings were recorded, it was done without the court's consent or control. Lastly, it was the Attorney General's position that the appellants had not demonstrated how the 5th respondent had violated the minors' rights.

[11] The High Court (*Mativo, J.* (*as he then was*)) found in the first place, that although the law provides for the imposition of extra-judicial sanctions to protect minor offenders from unwarranted publicity, this right is not absolute and can be limited under Article 24 of the Constitution; secondly, that the publication of the story and corresponding photographs were a matter of public interest; thirdly, that the stories as published were factual and published without malice; and finally, that the appellants had failed to discharge the burden of proof of any loss or damage suffered as a result of the alleged breaches. Consequently, the learned Judge finding no merit in the petition, dismissed it with costs to the respondents.

ii. Before the Court of Appeal

[12] Dissatisfied with this outcome, the appellants moved to the Court of Appeal citing 23 grounds of appeal to challenge the aforesaid decision. For its part, the Court of Appeal condensed those grounds and framed three issues for determination; *whether the minors' rights were violated; whether the court relied*

on the wrong principles of law in determining the issues before it; and whether the learned Judge failed to give due regard to the evidence before him.

[13] On the alleged violation of the minors' rights, the appellate court was categorical that the public nature of hearing of criminal cases is the general rule rather than the exception; that the principle of open justice requires that proceedings be held in open court where the press and members of the public have free access; and that, in addition, the principle of open justice permits the publication of accurate reports of any proceedings. As a result, in the court's view, the respondents had a right to be in court and to impart information in the exercise of their rights under Articles 33(1) and 34 of the Constitution. The court, however, acknowledged that the enjoyment of these rights is subject to limitations stipulated under Article 24(3) of the Constitution; and that the burden rested with the appellants to prove that the limitation on the respondents' rights was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The court found that it was incumbent on the appellants, through the minors' advocates, to ensure that the court was cleared. Consequently, the court came to the conclusion, on this ground, that neither the court nor the prosecution violated the minors' rights for those reasons.

[14] Secondly, the court expressed the view that, though it was arguable that the minors had a reasonable expectation that their privacy would be maintained during the criminal proceedings by virtue of their age, that alone did not guarantee them their privacy during criminal proceedings; that the right to privacy in proceedings involving children is not absolute and can be limited to the extent that the limitation is reasonable in an open and democratic society in consideration of the factors prescribed under Article 24 of the Constitution.

[15] In determining the purpose of the limitation, the court found no real substantial risk to warrant the limitation of the rights of the public and the media since the issues before the criminal trial court were of public importance and interest. In the court's opinion, although the child's best interest is the primary factor, it is not the sole consideration for all other actions affecting children. The

appellate court took the position that the learned Judge of the High Court was justified in his determination that the story in question and the publication of the photographs was a matter of public interest.

[16] Thirdly, the court held that the appellants did not prove the alleged violations of the minors' constitutional rights and consequential damage; that the evidence relied on by the appellants fell short of the required standard of proof; and that whether the minors were tried in public or in private, the gravity of the charges alone, was sufficient to cause them distress, trauma, anguish and fear.

[17] Based on this fact, the court concluded on this ground that the damage suffered by the minors (if any) could not be attributed to the publication alone; that there was no evidence before it to link the publication of the identities of the appellants to any adverse effect claimed; and that the publications were immediately removed from circulation in view of the case that had been instituted in the High Court.

[18] Accepting the conclusion reached by the High Court, the Court of Appeal was satisfied that the learned judge applied the correct principles of law and that no proof was presented to suggest that he did not consider any material he ought to have taken into account; and that as a matter of fact, he considered the provisions of Article 24 of the Constitution and struck the right balance between the relevant competing rights. In consideration of all the foregoing, the Court of Appeal ultimately ruled that the first appeal lacked merit and dismissed it in its entirety. It made no order on costs.

iii. Before the Supreme Court

[19] Undeterred, the appellants have now challenged the decision of the Court of Appeal before this Court as of right pursuant to Article 163(4)(a) of the Constitution on 4 broad grounds broken down into several detailed sub-grounds. These grounds were however argued in the submissions in a cluster of 6 issues;

i. *whether the 1st to 4th respondents violated Articles 31 and 53 of the Constitution.*

ii. *whether the limitation of the rights to privacy of minors is justified to protect open justice principles requiring public trials.*
iii. *whether the provision of the right to privacy of minors is justified to limit the rights to freedom of expression.*
iv. *whether the High Court and the Court of Appeal erred in law and fact in giving judgment without considering and analyzing the evidence and submissions of the appellants.*
v. *whether the High Court and the Court of Appeal erred in concluding that the appellants had the burden of adducing evidence of damage suffered in a claim of violation of rights and freedoms; and*
vi. *whether the High Court erred in awarding costs to the respondents.*

[20] The appellants then sought 14 reliefs which we have summarized as follows:

i. *The appeal be allowed.*
ii. *A declaration be made that the 1st to the 5th respondents violated the appellants' rights to privacy, not to be subjected to torture, not to be treated or punished in a cruel, inhuman or degrading manner, to be protected from abuse, neglect, harmful cultural practices, all forms of violence and inhuman treatment, to have their best interests considered of paramount importance in every matter concerning them, as guaranteed under the Constitution, the law and international law.*
iii. *A declaration that the 1st to 4th respondents violated Rule 19 of the Code of Conduct for the Practice of Journalism by disseminating the names and images of the minor children.*
iv. *A permanent order of injunction be issued prohibiting the 1st to 4th respondents from publishing the Appellants' images or names on any media platform.*
v. *The respondents to bear the costs in this Court and the courts below.*

What is readily apparent from the prayers is that none relates to an award of damages or compensation. We shall return to this question later.

C. PARTIES' SUBMISSIONS

i. The Appellants' Submissions

[21] To advance the broad grounds, the appellants have in their submissions framed and argued 6 issues as set out in paragraph 19 above. The appellants' premise is that both superior courts below were wrong to elevate public interest over and above the express provisions of the law and the best interest of children in conflict with the law. They submitted that the two courts ignored the provisions of Section 76(5) of the Children Act which is intended to extend protection to a child by concealing a child's identity and other particulars; that the Court of Appeal misdirected itself in its conclusion that the 1st to 4th respondents were justified in the public interest to publish pictures and names of minors in an online news story, contrary to Article 31(c) of the Constitution and Section 76(5) of the Children Act; and that the court further erred in absolving the 5th respondent for not ensuring that the minors' pleas were taken in private, instead of blaming the defence counsel and the appellants for not applying to the trial court to move to her chambers. They maintained that under Article 21 of the Constitution, the 5th respondent was bound to observe, protect and promote the rights and fundamental freedoms in the Bill of Rights, especially in relation to vulnerable people such as minors. Further, Section 4(3) of the Children Act places a duty on courts where they are uncertain as to the age of a suspect to order for age assessment. They have relied on the persuasive decision of the High Court in the case of ***Republic v. JWK,*** Criminal Case 57 of 2009 [2013] eKLR, to buttress this argument.

[22] They have also relied on the case of ***Republic v. County Government of Mombasa Ex parte Outdoor Advertising Association of Kenya*** [2014] eKLR to the effect that there can never be public interest in breach of the law; and that on the facts of this case, the public had no right to know information founded on irresponsible journalism and conversely, that irresponsible journalists have no corresponding public duty to give such information to the public. They too have relied on ***Chirau Ali Mwakwere v Nation Media Group Ltd & Another***

[2009] eKLR for the proposition that the defence of public interest is not available in unethical, untruthful and irresponsible press.

[23] The appellants further urged that they did not need to make an application under Article 50(8) of the Constitution to have the plea taken in private, since Section 76(5) and (6) of the Children Act explicitly prohibits the publication of photographs and details of a child in criminal proceedings; that the Act is *lex specialist*, the specific and only law, on matters concerning the rights of the child. They faulted the learned appellate Judges for failing to appreciate that the names and pictures of the children were not essential details when reporting on criminal proceedings; and that the public could have been adequately informed about the case in general without the inclusion of the names and images of the children.

[24] Like in the South African case of ***Centre for Child Law & Others v Media 24 Limited & Others*** [2018] ZASCA 140, the appellants have emphasized that they do not seek, in this case, a blanket ban on reporting on victims of crime, but rather the protection of the minors' identities. That, it is this balance between freedom of expression and the right to dignity, privacy and the best interest of the child that needed to be struck. They have pointed out that, in their *viva voce* testimony, the 1st to 4th respondents admitted that the news stories could have been published without the pictures and other details of the minors; the respondents admitted that they did not ascertain the ages of the minors; and that as soon as they learnt that they were, in fact, children, they immediately pulled down the videos and images. They expressed their remorse but did not publish an apology.

[25] From these admissions by the respondents, the appellants have faulted the Court of Appeal for failing to find in their favour since it was apparent that there was sufficient material from which the respondents would have known that the appellants were minors. Similarly, upon admission by the respondents and upon the court finding that the publications related to minors, the appellate court erred in insisting on proof of loss and damage.

[26] Finally, the appellants have submitted that the High Court erred in ordering them to pay costs, yet in accordance with this Court's decisions in ***Jasbir Singh***

Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2013] eKLR and ***Raila Odinga & 5 Others v. IEBC & 3 Others***, PEP No. 5, 4 & 3 of 2013 (Consolidated); [2013] eKLR no costs are awardable in a constitutional petition filed in public interest; and which are neither vexatious nor amount to an abuse of the court process. This case, according to the appellants meets this threshold.

ii. The 1st Respondent's submissions

[27] The 1st respondent has relied both on its written submissions and a replying affidavit sworn on 12th July, 2022 by Millicent Ng'etich, the Head of its Legal Department. It is admitted that the 1st respondent published a report on the arraignment in Murang'a magistrate's court of the minors. It is, however, contended that the information was published in public interest and in the exercise of the freedom of expression and information as well as in pursuit of the right to life due to the escalating cases of arson that were a threat to the lives of students; that there were also financial implications arising from the numerous arson incidents in the country, dating back to the early 1990s. Due to the gravity of the phenomenon, the Government of Kenya had set up a number of committees of inquiry and task forces to look into the issues of student unrest in the years 1999, 2000, 2001 and 2008 before the alleged incident happened on 5th November 2012. Relying on a book, ***Carter Ruck on Libel and Privacy*** *(2019) 6th Edition p 613*, the 1st respondent urged that, the public interest in the matter outweighed the minors' right to privacy; that it published the information because it was key to appraise the public of the consequences of arson, to promote deterrence among students, and to protect the right to life and property and the right to education.

[28] There being no dispute that the minors had been arraigned in court as arson suspects, it was the 1st respondent's argument that the publication was a fair and accurate report of the proceedings; that it merely exposed the minors as suspects of criminal involvement and misconduct; and that, in any case, the criminal proceedings were public in nature, open to members of the public and the press, and considering also that the appellants did not apply to have the proceedings conducted in camera.

[29] It was the 1st respondent's further argument that, while the minors were entitled to the right to privacy, that right was not absolute and could be limited on the basis that the said right did not prejudice the rights of other students or people. In its opinion, criminal behaviour is not private in nature, does not attract any confidentiality and/or privilege and it is against public policy for the appellants to urge the Court to trump the important social and collective considerations to protect their right to privacy. In addition, the appellants failed to demonstrate that the impugned publication was in breach of the minors' right to privacy or any other constitutional rights.

[30] On whether the Court of Appeal erred in finding that the appellants were required to prove any damages suffered, and relying on Supreme Court decisions in ***Attorney General v. Zinj Limited***, SC Petition 1 of 2020 [2021] KESC 23 and ***William Musembi & 13 Others v. Moi Educational Centre Co. Ltd & 3 Others*** SC Petition 2 of 2018; [2021] eKLR, the 1st respondent submitted that damages can only be awarded upon a party proving the nature of rights that have been violated and the extent and gravity of injury caused. But, without prejudice to this argument, the 1st respondent has urged that should the Court be persuaded that they were in breach of the minors' constitutional rights, then a declaration to that effect would be sufficient relief under Article 23(3)(a) of the Constitution. In the result, they pray that this appeal be dismissed and in terms of the decision in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others,*** SC Petition 4 of 2012; [2013] eKLR, costs of the appeal and of the superior courts below be awarded to them.

iii. The 2nd Respondent's submissions

[31] In its grounds of opposition dated 26th July, 2022, and the submissions, the 2nd respondent opposed the appeal on four grounds: that the Court of Appeal properly exercised its discretion in dismissing the first appeal; the appellants failed to meet the constitutional threshold required to prove their claim; the appellants failed to specify which constitutional right had been breached and if so, how it was

violated by the 2nd respondent in terms of the *ratio decidendi* in ***Anarita Karimi Njeru v. Republic,*** [1979] eKLR; and finally, the matter was of public importance and interest. For those reasons, the 2nd respondent has applied for the dismissal of the appeal.

iv. The 3rd Respondent's submissions

[32] In the replying affidavit sworn on 14th November, 2022 by John Mwaura Mwangi, a senior editor, and in its written submissions, the 3rd respondent admitted broadcasting a news clip concerning the minors' arraignment in court but maintained they did so at a time when the country was facing a wave of riots in secondary schools resulting in loss of lives and immense destruction of property, which was widely reported in the media.

[33] The 3rd respondent pointed out that during the appearance in court of the minors, the presence of its photojournalist was evident in the courtroom, but the court took no steps to stop him. What was more, the Presiding Magistrate did not clear the courtroom, and neither did the suspects' advocates move the court to take plea in camera. It is also maintained that the reporting of the case was done in the normal course of business and there was no malice against the minors.

[34] The 3rd respondent, however, conceded like the 4th respondent, that upon learning that the appellants were minors, it pulled down the news clips from its website and stopped airing the story; that the entire coverage of the news was fair comment on matters of public interest and was done pursuant to the 3rd respondent's right to freedom of expression under Article 33 (1) of the Constitution and freedom of the media guaranteed in Article 34 of the Constitution. Further, that the minors' right to privacy was the subject of a criminal trial and was limited under Article 24 of the Constitution since the public had the right to be informed of such matters and the steps the Government was taking to obviate and deter further acts of arson in schools.

[35] Finally, in terms of Sections 107, 108 and 109 of the Evidence Act the 3rd respondent submitted that the appellants failed to discharge the burden of proving how the minors' constitutional rights were violated by the 3rd respondent and the

nature of the resultant injury or damage suffered. The entire appeal, we have been urged to find, is frivolous, vexatious and abuse of the court process and should be dismissed with costs.

v. The 4th Respondent's submissions

[36] The 4th respondent relied on the replying affidavit sworn on 26th July, 2022 by Sekou Owino, its Head of Legal and Training, and its submissions dated 30th March, 2023, in which they have asked us to bear in mind that, as the second appellate court, our jurisdiction is restricted to issues of law since factual aspects of the case were subjected to analysis and evaluation by the trial court and affirmed by the first appellate court.

[37] The 4th respondent's arguments follow the same lines as those of the other respondents, highlighting the prevailing situation in schools at the time; the exercise of their constitutional mandate to disseminate for public good relevant information; they could not have assumed that the suspects were children; and that as soon as they got information that the suspects were minors, they removed the offending photographs from their website.

[38] In urging the Court to dismiss the appeal, the 4th respondent submitted that the appellants failed to link the minors' alleged mental and emotional distress to the publications and were therefore not entitled to damages.

vi. 5th Respondent's submissions

[39] The 5th respondent relying on his grounds of objection dated 19th July, 2022 contends that the Court of Appeal in reviewing the evidence and affirming the decision by the High Court correctly found: that the story in question and the publication of the photographs was a matter of public interest which overrode the minors' individual rights; and that the 5th respondent did not violate those rights.

D. ISSUES FOR DETERMINATION

[40] From our own consideration of the pleadings, the judgments of the two superior courts below, the 6 issues framed by the appellants and the arguments by

counsel representing the parties, we consider the following three issues as falling for our determination:

i) *whether the Court of Appeal erred in placing public interest in the publication of the images and identities of children in a criminal trial over and above the children's best interest.*
ii) *whether upon proof of violation of the minors' fundamental rights and freedoms, the appellants were required to go further and prove damage or injury suffered as would be the case in normal civil litigation; and*
iii) *whether the High Court was right to award costs against children in public interest litigation.*

E. ANALYSIS AND DETERMINATION

Jurisdiction of the Court

[41] As a preliminary statement, we declare our satisfaction that this appeal has properly been brought as of right pursuant to Article 163(4)(a) of the Constitution. The petition filed in the High Court, the arguments before both superior courts below as well as the judgments of those courts, all involve the interpretation and application of Articles 31(c), 33(1), 34 and 53(2) of the Constitution, and as such satisfy the principles enunciated in ***Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another***, SC. Petition No. 3 of 2012: [2012] eKLR.

The first of the three main issues this appeal raises is,

i) whether both superior courts below erred by placing public interest in publishing the pictures or images of children in a criminal trial over and above the best interest of the child;

[42] We reiterate the common position that when the seven suspects were presented before court on 5th November 2012, they were children as defined in Article 260 of the Constitution. They faced arson-related charges. It is further conceded that the 1st to 4th respondents aired and published the case through their respective media houses on various platforms. However, the respondents'

justification for doing so was, first, that they did not know that the suspects were minors in view of the fact that the proceedings were conducted in the normal manner in open court suggesting that they concerned adults; that generally, criminal proceedings are, by their nature public, open to other members of the public and the press; that the publication was a fair and accurate report of the proceedings and only exposed the minors to the extent that they were suspects of criminal involvement and misconduct; that the publications were authored and videos uploaded in public interest as a matter of informing the general public of the steps being taken, including charging in court those involved, to curb the arson menace; that it was the court's responsibility, knowing that the case involved children, to conduct the proceedings in camera; and finally, that the minors' right to privacy was not guaranteed in criminal proceedings but limited.

[43] On their part, the appellants argued that the child's best interests ought to have been prioritized over public interest; that Article 21 of the Constitution places a duty on the 5th respondent and the courts as State organs, to observe, protect and promote the rights and fundamental freedoms in the Bill of Rights, especially in relation to vulnerable groups such as children.

[44] It is the appellants' further contention that the 1st to 4th respondents were guilty of irresponsible journalism; that the story was published with malicious intent, commercial consideration and profit, given prominence to gain popularity and with utter disregard for the dignity, privacy and best interest of the minors as required by the law; that the respondents neither bothered to confirm the age of the minors nor seek their comments on the issues before publishing them and that as a result of their reckless actions, the minors have been stigmatized, were traumatized and even shunned by society for being exposed as arsonists; that given the wide circulation and the permanent nature of the information, the children will have to live with that stigma and trauma throughout their lives and the injury will remain indelible.

[45] The last three paragraphs above constitute the rival arguments of the two sides in this appeal. The resolution of the issue in contention on this ground must depend on the proper construction of all the relevant provisions of the Constitution and the law. The canons of constitutional interpretation that have been infused in our judicial system over the years and which are today expressed in Article 259 of the Constitution, adjure the courts to interpret the Constitution in a manner that promotes its purposes, values and principles and contributes to good governance. Those constitutional values and principles are expressed in the Preamble to include a commitment to nurturing and protecting the well-being of the individual, the family, communities and the nation: the recognition of the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. This is in addition to the consideration of national values and principles of governance under Article 10 of the Constitution. They are also discoverable through purposive, holistic, organic and liberal interpretations of the Constitution.

[46] Applying these principles, we start with Article 53(2) of the Constitution which is the clause in the Bill of Rights dedicated to enhanced protection of children's rights, in keeping with Kenya's obligation under the 1989 UN Convention on the Rights of the Child **(CRC)** and the 1990 African Charter on the Rights and Welfare of the Child **(African Children's Charter)**. The Article requires that:

> **"53(2). A child's best interests are of paramount importance in every matter concerning the child."**

[47] This Article is a right in and of itself of the child, and not merely a guiding principle. In addition to being a self-standing right, it also strengthens the broader framework of human rights under Chapter Four of the Constitution. The reach of Article 53(2) (a child's best interests) is not to be limited to the rights enumerated in Article 53(2) (a) to (f), that is, the child's right to a name and nationality; to free basic education; to basic nutrition, shelter and health care; to be protected from

abuse, neglect; to parental care and protection; not to be detained, except as a measure of last resort, and when detained, for the shortest appropriate period of time and in a separate cell from adults and in conditions that take into account the child's age and sex, among other related rights. These provisions must be interpreted to apply to all aspects of the law, civil or criminal which affect the child bearing in mind the principle of the best interest of a child. In other words, beyond Article 53, all the other rights in the Constitution apply to children, as human beings unless they are excluded because such rights only apply to adults, for example, the right to vote or to marry.

[48] The best interest of a child principle is also reflected in international law. It is, for instance, one of the four core principles of the United Nations Convention on the Rights of the Child (CRC), which provides that;

> "**In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".**

In identical language, Article 4 of the African Children's Charter restates the principle that **"the best interests of the child shall be the primary consideration."** Both instruments, we confirm, have been ratified by Kenya.

[49] Again, in fulfillment of its commitment to undertake all appropriate legislative and other measures to implement the rights under the Conventions, Kenya enacted the Children Act, 2001 (repealed). Section 4(2) and (3)(b) thereof which was the applicable law when this dispute arose, again in the very language of the two Conventions restated the principle in the following words:

> **"(2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law,**

administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) Safeguard and promote the rights and welfare of the child;
(b) and promote the welfare of the child;
(c) …"

[50] So, what does "the best interest" of the child mean, and what is its rationale and scope? Since the best interest of a child will vary from case to case depending on the situation, its determination and what constitutes it will depend on the unique circumstances of each case as we recently explained in ***MAK v. RMAA & 4 others***, SC Petition No. 2 (E003) of 2022; [2023] KESC 21 (KLR). We said that;

"The concept of the child's best interest is flexible and adaptable. It should be adapted and defined on an individual basis, according to the specific situation of the child concerned considering their personal context, situation and needs."

[51] For the same reason, that a child's best interest is pliable, the term has not been defined by the Constitution or the two Conventions. However, the First Schedule to the Children Act, 2022 lists 18 situations (not exhaustively) of what may constitute the best interests of the child headed "Best Interest Considerations". It is important to appreciate the rationale behind this principle and why children require special treatment. We can do no better than reproduce

the following explanation in the judgment of the majority in the Constitutional Court of South Africa in the case of ***Centre for Child Law v. Minister of Justice*** 50[(CCT98/08) [2009] ZACC 18, where *Cameron J*, said:

> **"We distinguish them because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence, we afford children some leeway of hope and possibility."**

[52] Those sentiments were echoed in another case before the same court in the case of ***J v. National Director of Public Prosecution***, 59[CCT 114/13) [2014] ZACC 13, as follows:

> **"The contemporary foundations of children's rights and the best-interests principle encapsulate the idea that the child is a developing being, capable of change and in need of appropriate nurturing to enable her to determine herself to the fullest extent and to develop her moral compass. This Court has emphasised the developmental impetus of the best-interests principle in securing children's right to learn as they grow how they should conduct themselves and make choices in the wide and moral world of adulthood'**. (*Per Skweyiya, J.)*

[53] In the context of criminal justice, the Children Act, 2022 affirms the moral malleability or reformability of the child offender by emphasizing the concept of "diversion" as defined in Section 2 and stipulated in Part XV of the Children Act to mean measures taken to address the root causes of the children's behavior, provide support, and help them reintegrate into society as law-abiding citizens. The

primary goal is, among others, to reduce stigmatization; provide appropriate support services to reduce the likelihood of the children engaging in antisocial behaviour; reduce recidivism by children in conflict with the law; promote the rehabilitation, reconciliation, education and re-integration of the child, rather than punishment.

[54] Further, the protective procedures contained in the Children Act, including the prohibition of the imposition of a sentence of imprisonment and death penalty upon a child or committing a child under the age of twelve years to a rehabilitation school, or the prohibition of the use of words like "conviction" or "sentence" in relation to children, are all aimed at enhancing the best interest of the child and safeguarding their rights.

[55] Based on this recognition, that children in conflict with the law facing criminal charges are vulnerable due to their age and level of maturity, the trial process should not itself expose them further to avoidable intimidation, humiliation or distress. That explains why special courts have been established and special procedures adopted for the trial of children. Those procedures place restrictions on who can attend court proceedings involving a child and permit the trial court to hold sittings in camera at which only the presiding judicial officer, officers of the court and a children's officer are allowed to attend.

[56] How does the court reconcile this right and the competing right of the people to open justice through a public hearing under Article 50(1), freedom of expression under Article 33, freedom of the media in Article 34 and the right to access to information found in Article 35 of the Constitution?

Article 50(1) states that:

> "**Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and <u>public hearing before a court</u> or, if appropriate, another independent and impartial tribunal or body."** [our emphasis]

[57] This provision should be read with sub-Article (8) of the same Article 50, which recognizes the need to protect vulnerable persons and other persons in the course of a public hearing:

> **"(8) This Article <u>does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security</u>."** [our emphasis]

[58] We identify two things for highlighting from Article 50(1) and (8); the protection of vulnerable persons. Children, by Article 21 are recognized as vulnerable members of society. Unlike other vulnerable groups, children are more susceptible to experiencing harm or disadvantage due to the fact of their age and other social or physical circumstances. The second thing to be observed is that, while sub-article (1) grants the right to a fair and public hearing, sub-article (8) qualifies that right by extending discretion to the court to exclude the press or other members of the public from any proceedings under specific circumstances, including to protect vulnerable persons.

[59] We further invoke sub-article 2(a) of Article 50 that enjoins trial courts to ensure that;

> **"Every accused person has the right to a fair trial, which includes the right—**
>
> **(a) to be presumed innocent until the contrary is proved".**

The presumption of innocence is a fundamental principle behind the right to a fair trial. Apart from Article 50(2)(a) of the Constitution, international and regional instruments like the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and Peoples' Rights (ACHPR) also guarantee this right. The mere arrest

and arraignment before the court of the appellants for the purpose of taking a plea alone does not amount to a conviction.

[60] Enough of the applicable principles. In order to answer the question whether the courts below erred by placing public interest over and above the minors' rights to privacy and their best interest as children, we must subject the competing rights to the provisions of Article 24. We need to observe here, that apart from the limitations imposed by Article 24, there are certain rights in the Bill of Rights that are expressly self-limiting in the sense that those rights or freedoms are subject to certain declared limitations or restrictions. Self-limiting rights recognize that the exercise of one's rights should not infringe upon the rights of others or undermine public order, or safety. For example, as we shall see shortly, Articles 33 and 34 upon which the respondents rely as the rights they exercised to publish the impugned material are themselves explicitly limited by those very Articles. All the competing rights identified in this appeal are not non-derogable rights in terms of Article 25 of the Constitution. They are subject to the limitation clause in Article 24. That Article provides that:

> **"24(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-**
>
> **(a) the nature of the right or fundamental freedom;**
>
> **(b) the importance of the purpose of the limitation;**
>
> **(c) the nature and extent of the limitation;**
>
> **(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

[61] To limit a right under any of the Articles under review in this appeal, it has to be demonstrated that the principles in Article 24 have been met. In terms of sub-article (3) of Article 24 the person seeking to limit a right has the burden of satisfying those principles. It provides as follows:

"(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied".

[62] The respondents have asserted that it was the burden of the appellants to show that Article 24 limitations applied to the respondents' rights. Conversely, the appellants similarly insisted that the rights under Articles 33, 34 and 35 are also not absolute but subject to Article 24. We find the balancing of rights skillfully enunciated by *Nugent, JA* of South Africa's Supreme Court of Appeal in ***Midi Television (Pty) Ltd v. Director of Public Prosecutions (Western Cape),*** [2007] SCA 56 (RSA), appealing. The learned Judge said:

"In determining the extent to which the full exercise of one right or the other or both of them might need to be curtailed in order to reconcile them what needs to be compared with one another are the 'extent of the limitation' that is placed upon the particular right, on the one hand, and the 'purpose, importance and effect of the intrusion, on the other hand. To the extent that anything needs to be weighed in making that evaluation it is not the relative values of the rights themselves that are weighed (I have said that all protected rights have equal value) <u>but it is rather the benefit</u>

that flows from allowing the intrusion that is to be weighed against the loss that the intrusion will entail." [our emphasis].

[63] Article 24 has been the subject of interpretation in many cases at all levels of the three superior court systems in Kenya. For example, in the High Court case of ***Union of Civil Servants & 2 others v. Independent Electoral and Boundaries Commission (IEBC) & another,*** H.C. Petition No. 281 of 2014 & 70 of 2015; [2015] eKLR, ***Attorney-General & another v. Randu Nzai Ruwa & 2 others,*** Civil Appeal No. 275 of 2012; [2016] eKLR, a decision of the Court of Appeal and our own in ***Karen Njeri Kandie v. Alassane Ba & another***, SC Petition No. 2 of 2015; [2017] eKLR, where similar principles were restated in the following words:

> **"[77] After carefully considering Article 24 of the Constitution and the above cases, we find that the test to be applied in order to determine whether a right can be limited under Article 24 of the Constitution, is the 'reasonable and justifiable test', that must not be conducted mechanically. Instead, the Court must, on a case-by-case basis, examine the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right is reasonable and justifiable in an open and democratic society. The insertion of the word 'including' in Article 24 also indicates that the factors to consider while conducting the balancing act are not exhaustive but a guide as to the main factors to be taken into account in that consideration".**

See also the Court's other decision in ***Gladys Boss Shollei v. Judicial Service Commission & another,*** SC Petition No. 34 of 2014; [2022] KESC 5 (KLR).

[64] The two-step threshold for limitation of any constitutional right and fundamental freedoms are, first whether the right limited is by statute. There can be no limitation of a constitutional right except by the Constitution itself or by a

law; and secondly, it has to be established whether the limitation imposed on a right is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account certain relevant factors listed in Article 24(1)(a) to (e), which list is not exhaustive as explained in ***Karen Njeri Kandie v Alassane Ba*** (supra). In other words, the focus on limitation is not based only on the formal existence of the law creating the limitation, but also on the nature of that law itself. Article 19(3)(c) of the Constitution is an emphasis that the rights granted in the Bill of Rights **"are subject only to the limitations contemplated in the Constitution"**, recognizing the fact that there can be no other way of limiting a fundamental right except in the manner and to the extent provided for by the Constitution.

[65] The initial plea to limit a right was made by the appellants in their petition in the High Court. It is this very position that has been argued and determined by both the High Court and the Court of Appeal and now before us. They sought several declaratory orders, whose effect was to limit the respondents' rights guaranteed by Articles 33, 34 and 35 to disseminate the court proceedings to the public under the open justice principle. The basis of the limitation was expressed to be the provisions of the Children Act 2001 (repealed), the Media Act (repealed) and the Media Council Act. The appellants contended, in that regard, that by posting a story on YouTube channels that included pictures of the children accompanied by a voice-over discussion of their alleged participation in the arson attack; that by reporting, televising, and publishing the story along with the images of the children, the respondents were in violation of the right to privacy and to protect and preserve the best interest of the children.

[66] For the specific purpose of Article 24(1), and to test the principles laid thereunder, we turn to the three statutes cited in the preceding paragraph as the basis of limitation. Section 4(2) of the repealed Children Act, 2001, which was the law in force at the time this dispute arose, recapitulates that in all actions, including actions taken in courts of law concerning children, their best interests is a primary

consideration. The Children's Courts established under Section 73 (now Section 90 of the Children Act, 2022) are enjoined when hearing criminal charges against children in conflict with the law to do so separately from proceedings involving adult offenders.

[67] Generally speaking, courts were guided in proceedings involving children by Sections 74, 75 and 76 of the repealed Children Act, 2001. The former had the following provision:

> **"74. Sitting of Children's Court**
>
> **A Children's Court shall sit in a different building or room, or at different times, from those in which sittings of courts other than Children's Courts are held, and no person shall be present at any sitting of a Children's Court except—**
>
> **(a) members and officers of the court;**
>
> **(b) parties to the case before the court, their advocates and witnesses and other persons directly concerned in the case;**
>
> **(c) parents or guardians of any child brought before the court;**
>
> **(d) bona fide registered representatives of newspapers or news agencies;**
>
> **(e) such other persons as the court may specially authorise to be present.** [our emphasis]

[68] Section 75, on the other hand vested in court the following further powers, depending on the circumstances of the case:

> **"75. Where in any proceedings in relation to an offence against or by a child, or any conduct contrary to decency or**

> **morality, a person who, in the opinion of the court, is under eighteen years of age is called as a witness, the court may direct that all or any persons, not being members or officers of the court, or parties to the case or their advocates, shall be excluded from the court.** [our emphasis].

Today, Section 93(5) of the 2022 Act introduces the concept of in-camera proceedings which requires that everyone else, including even the parents or guardians of the child, the complainants, witnesses, and duly accredited journalists are excluded from the courtroom.

[69] Finally, on limitation under the repealed Children Act, the general principles regarding proceedings in the Children's Court were set out in the repealed Section 76 (5) as follows:

> **"(5) In any proceedings concerning a child, whether instituted under this Act or under any written law, a child's name, identity, home or last place of residence or school shall not, nor shall the particulars of the child's parents or relatives, any photograph or any depiction or caricature of the child, be published or revealed, whether in any publication or report (including any law report) or otherwise."** [our emphasis].

[70] The Media Act, 2007 which was repealed on 10th January, 2014 by the Media Council Act, 2013 had provisions, until its repeal, that imposed further limitations on the right to freedom of expression, freedom of the media and the right of access to information. The new Act is categorical that the public's right to know has to **"be weighed against the privacy rights of people in the news"**. See Section 13. However, for purposes of this appeal, we shall rely on the 2007 Act, which was the law governing the conduct of proceedings involving children at the time of the dispute.

[71] Section 20 of that Act enjoined the media;

> **"20. .....as a general rule, ...to apply caution in the use of pictures and names and should avoid publication when there is a possibility of harming the persons concerned. Manipulation of pictures in a manner that distorts reality should be avoided. Pictures of grief, disaster and those that embarrass and promote sexism should be discouraged".**

The Act further prescribes in the Second Schedule, the Code of Conduct for the practice of journalists, which reiterates the duty to protect children.

[72] Can these limitations be regarded as reasonable and justifiable? Do they meet the criteria of Article 24? The answer to these questions lies in the factors enumerated in Article 24 being satisfied; the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the caveat that the need for enjoyment of the right by one individual does not prejudice the rights of others, the consideration of the relationship between the limitation and its purpose, and whether there was a less restrictive means to achieve the purpose of the limited right. A limitation will only be justified if the court is satisfied that it meets this threshold.

[73] We have alluded in paragraph 60 to the fact that, apart from the limitation imposed by Article 24 on freedom of expression and of the media, similar restrictions are contained in Articles 33 and 34 themselves. The former guarantees every person the right to freedom of expression, but in the same breath declares that the exercise of that right **"is subject to the rights and reputation of others"**; that the right to freedom of expression does not extend to, among others, propaganda for war, incitement to violence, hate speech or advocacy of hatred. See Article 33(2) of the Constitution. Similarly, Article 34 is self-limiting on the freedom and independence of the media, which though guaranteed, is declared not to extend to any of the expression specified in Article 33 (2). The freedom and independence of the press are to be actualized through an Act of Parliament

pursuant to Article 34(5). The Act establishes a media regulatory body, to among other functions, set media standards and regulate and monitor compliance with those standards. In addition, a Code of Conduct for journalists has been formulated as the ethical threshold of the practice of journalism. It demands accurate and fair reporting, confidentiality and transparency as well as responsibility.

[74] While the general rule is that criminal trials are public; we have set out in the preceding paragraphs, certain established exceptions that require them to be held away from the public glare or for certain sensitive particulars to be redacted. For instance, and just like in proceedings involving children, where it is necessary to protect the identity of witnesses under the Witness Protection Act, the courts have the power and discretion to exclude the public from the courtroom or in the alternative, to adjourn the hearing from open court to chambers. These exceptions are recognized under Article 50(8) if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, or to preserve morality, public order or national security.

[75] It is in furtherance of this constitutional edict that Section 76 (5) of the Children Act (repealed), reproduced in paragraph 69 (above), demands of all agencies in the child (criminal) justice system to ensure that, a child's name, identity, home or last place of residence or school, or the particulars of the child's parents, or photograph of the child are not disclosed, published or revealed. To illustrate the seriousness of the protection Section 76(6) imposes a penalty upon;

> **"(6) Any person who contravenes the provisions of subsection (5) commits an offence and shall on conviction be liable to a fine not less than one hundred thousand shillings or to imprisonment for a term not less than one year or to both, and in the case of a body corporate, a fine of not less than one million shillings."**

[76] We state plainly that Section 76, (which is replicated in Section 95(5) of the present Act), together with Sections 74 and 75, (now Section 93 of the 2022 Act)

do not exclude the media from covering cases involving children. They include explicitly the journalists and media professionals in the class of very few persons permitted to be present in proceedings concerning children. What is restricted is what they can disclose in their reports and publications. They cannot disclose the particulars of the child, the name, image or any information that can easily lead to the identification of the child. It is clear from the reading of the law that a child who is in conflict with the law is a vulnerable victim of a failure of a system in the society and therefore all efforts must be made to protect the child from further harm even if he or she has to be processed through the criminal justice system.

[77] According to the record of proceedings of this case taken before the High Court, Hon. Elizabeth Juma Osoro, Senior Principal Magistrate, who presided over the matter in the criminal trial court, gave evidence to the effect that ordinarily when children are in court, the practice would be to close the court to other people; that in the instant case, when the file was placed before her to take the plea, she was informed that there were parents in court. She testified that the court was crowded and behind the minors were adult remandees who were waiting for their cases to be heard as well as court orderlies who are part of the court personnel; that she could also not adjourn to her chambers because it was small; that she did not see any of the media electronic equipment in the courtroom; and that she did not consent to the taking of the pictures of the students. Lastly, and of significance, she conceded that she was aware that the case concerned children, and that in such cases no member of the public would ordinarily be allowed to be in court during the proceedings.

[78] The 1st to 4th respondents similarly fell into a more serious error than that committed by the trial magistrate by failing to conform to the constitutional, statutory and ethical standards of reporting. They proceeded to take pictures of the children with abandon and recklessly posted the story and videos on online channels complete with details of their images and names, alleging their participation in the arson attack in the school. For this infringement, the 1st to 4th

respondents were jointly liable to the appellants and the trial and the appellate courts ought to have so found.

[79] It is no defence that the trial court did not stop them from taking pictures. Similarly, they cannot rely on the argument that they did not know that the suspects were children. That would amount to an admission of professional negligence because, with a little due diligence, they would have ascertained that fact. To begin with, this appeal having been brought as of right under Article 163(4)(a) of the Constitution, and therefore matters of fact that touch on evidence without any constitutional underpinning are not open for this Court's review on appeal. See ***Paul Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v. Attorney-General & 2 others***, SC Petition 45 of 2018; [2020] eKLR, ***Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae),*** SC Petition No. 3 of 2018; [2021] KESC 34 (KLR) and ***Sonko v. County Assembly of Nairobi City & 11 others***, SC Petition 11 (E008) of 2022; [2022] KESC 76 (KLR). Be that as it may, we agree with the concurrent conclusions of the courts below that the respondents must have known they were reporting a case involving children because their own publications repeatedly referred to them as minors; and that it was evident that the suspects were not only school-going but were also being charged with the offence of arson within their school. The fact that they were arraigned in court as students, in school uniform, points to them ordinarily being minors. Moreover, the fact that the court ordered for age assessment of the children and for them to be remanded at Murang'a Juvenile Home, was sufficient notice that this was not a case of adults.

[80] From the totality of the material on record, there was an infraction of the law committed by the respondents. Contrary to their assertions, the appellants bore no responsibility to ensure the court was cleared as indeed they had no power or capacity to do so.

"It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights ... All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including .....children".

See Article 21 of the Constitution.

[81] The failure by the respondents to comply with the legal safeguards is not for the paucity of a guide or template of what ought to happen when dealing with children in conflict with the law. Apart from the Constitution, international instruments and statutes, there are numerous documents to guide the courts, the defence and prosecution counsel as well as all those in the child justice system. Examples of some of these tools developed at the time of this incident include, the Child Offenders Rules, 2001, (now repealed by the Children in Conflict with the Law (Practice and Procedure) Rules 2020), the Bench Book for Magistrates in Criminal Proceedings, 2004, the National Children Policy, 2010 and the Framework for The National Child Protection System for Kenya, 2011. Others subsequently developed include the Sentencing Policy Guidelines, 2016, the Criminal Procedure Bench Book, 2018, the Guidelines for Child Protection Case Management and Referral in Kenya, 2018, the Plea-Bargaining Guidelines 2019, and the Prosecutor's Guide to Children in the Criminal Justice System,2020.

[82] While there is no denying that at the time the minors were charged there were numerous and widespread cases of arson attacks in schools, and whereas there was a general concern and therefore the public deserved to be informed, what is contested is the manner in which the respondents exercised that right in gathering and disseminating the information. Again, due to children's vulnerability on account of their age, their cases cannot be used as pawns to deter others from committing crimes, they ought to be guided, counseled and taught good behavior and how to steer clear from acts that may bring them into conflict with the law.

[83] Our analysis in the foregoing paragraphs based on the holistic and purposive reading of Articles 50(2), (8), 53 on one hand and Articles 33, 34 and 35, on the other hand, and testing the limitations in question against Article 24, leads us to conclude that the limitations imposed by the Children Act on the public hearing of cases involving children and the publication of their images, names and school are reasonable. They are justifiable in an open and democratic society, considering the human dignity of the children concerned. The limitation is derived from a statute, the Children Act and also Article 50(8) of the Constitution itself; the limitation is intended to protect a vulnerable group, the children; it is not a blanket limitation but one that only restricts the disclosure of the child's name, the school or the images. In exceptional circumstances, the proceedings may be held in-camera. The limitation does not stop the media from carrying the story; the constitutional and statutory prescription on a child's best interests does not preclude the trial and punishment of children in conflict with the law; children in conflict with the law do not enjoy immunity from criminal prosecution; the limiting provisions in the Children Act are precise as to the right or freedom to be limited and the nature and extent of the limitation. Finally, the provisions do not derogate the right in question from its core or essential content.

[84] For these reasons, and with respect, we agree with the appellants that the courts below erred in raising the status of public interest over the protection and the best interest of the children and their rights to privacy without properly subjecting the limitation to the provisions of Article 24. The intrusion upon privacy of the children by publishing their particulars was demeaning not only to their dignity as individuals, but also to the integrity of their parents and the wider society of which they are part. The names, images and videos of the appellants were not essential for purposes of public information.

[85] In disposing of this ground, we repeat that the plea was taken in open court, even though the respondents knew of the requirement under Sections 74 and 75 of the repealed Children Act. They published, contrary to Section 76(5) of the

Children Act (repealed) and Section 18 of the Media Act, 2007 (repealed) the names and images of the appellants who were minors. The combined respondents' actions were in violation of Articles 50(8), 31 and 53(2) of the Constitution. The limitation of the cited rights of the 1st to 4th respondents was in conformity with Article 24 of the Constitution.

[86] Both the High Court and the Court of Appeal erred in applying the wrong test thereby arriving at an erroneous conclusion, absolving the respondents from liability. Moreover, in our view, the Court of Appeal's finding that whether the minors were tried in public or in private, the gravity of the charges alone, was sufficient to cause them distress, trauma, anguish, fear and lowered self-confidence was not only erroneous but irrelevant in the circumstances. The consideration ought to have been whether there was a benefit in limiting the respondents' rights in the manner the law provides. Had the appellate court properly addressed itself on this question, the clear answer would have been that the benefit of upholding the best interest of the appellants outweighed the loss the 1st to 4th respondents stood to suffer. The lifetime trauma and stigma the appellants were exposed to were more detrimental than the limitation of the respondents reporting the story without the appellants' names and images. This ground, for all the reasons proffered, must succeed.

We now turn to consider the second issue, being fully persuaded that the appellants proved the contravention of the minors' constitutional rights to privacy and the best interests of the child.

ii) whether upon proof of violation of the minors' fundamental rights and freedoms, the appellants were required to go further and prove damage, loss or injury suffered as would be the case in a normal civil litigation.

[87] Like the trial court, the appellate court concluded that, one, the publication of the minors' story together with their images, names and school was factual and justified; and did not, therefore, amount to a breach of the minors' rights. Two, the two courts did not find any proof that the minors had suffered any loss or damage

as a result of the alleged violations of their constitutional rights and fundamental freedoms. For these reasons, both courts rejected the appellants' claim.

[88] Having ourselves come to the conclusion that this determination was wrong and found that indeed the appellants had successfully shown that the rights and fundamental freedoms of the minors were breached, the question the second issue seeks to answer is whether the appellants were required, upon succeeding in demonstrating that indeed there were violations, to also prove that the minors suffered loss and damage as a result of the violations.

[89] According to the Court of Appeal, the duty to prove any alleged violations of constitutional rights and consequential damage rested on the shoulders of the appellants in terms of Sections 107, 108 and 109 of the Evidence Act; that while the criminal proceedings against the minors may have had a traumatic effect on them, there was nothing to show that there would have been any difference had the proceedings have been conducted in camera, and in any case, the appellants also failed to link any damage, loss or injury the minors may have suffered to the impugned publication or to the open court proceedings.

[90] To answer this issue, it must be borne in mind that in their petition filed in the High Court, the appellants sought various declaratory orders; an order compelling the respondents to pay general, exemplary, punitive and aggravated damages to each minor for infringement of their rights; and an order compelling the respondents to remove the images, pictures stories or caricatures posted on the internet regarding the minors. All these prayers were rejected by both the High Court and the Court of Appeal in their respective judgments.

[91] By the provisions of Articles 22 and 23 of the Constitution, the High Court has the power and authority to enforce and uphold the Bill of Rights in claims of infringements. In proceedings brought by any person claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened, the court may, under Article 23 grant appropriate relief, including:

> **"(a) a declaration of rights**

(b) an injunction

(c) a conservatory order

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24.

(e) an order for compensation

(f) an order of judicial review."

[92] This Court in the case of ***Gitobu Imanyara & 2 Others v. Attorney General***, SC Petition No. 15 of 2017, described Article 23 as **"the launching pad of any analysis on remedies for Constitutional violations".** This statement has repeatedly been made in other decisions like ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae),*** SC Petition No. 3 of 2018; [2021] KESC 34 (KLR) and others. As a launching pad, it is acknowledged that the list of six remedies in Article 23(3) is not closed; that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously.

[93] Article 23 has, for the first time in our constitutional history, specifically provided for the nature of reliefs available to victims of human rights abuses, unlike the former Constitution. Under Section 84 of the latter, a person who alleged infringement could only, **"apply to the High Court for redress",** and;

> **"... the High Court** [could] **make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive)".**

[94] To answer directly the question posed by this issue, under common law principles, it is settled that an injured party is entitled to damages for the loss and

injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in Article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.

[95] In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim's constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

[96] In ***Wamwere & 5 others v. Attorney General***, SC Petition 26, 34 & 35 of 2019 (Consolidated); [2023] KESC 3 (KLR) we noted that:

> **"91. <u>Crafting of remedies in human rights adjudication goes beyond the realm of compensating for loss as it is principally about vindicating rights. Though the appellants did not lead any evidence of the loss they may have suffered due to the violation of their right and freedom from inhuman treatment, it is important for the court to vindicate and affirm the importance of the violated rights</u>.**

92.The foregoing rational is buttressed by the reasoning of the Supreme Court of Canada in City of Vancouver v Ward [2010] 2 SCR 28. In that matter, the court held that damages may be awarded if at least one of three objects is served: individual compensation; vindication, in the sense of addressing harm to 'society as a whole'; and deterrence, in the sense of 'influencing government behaviour in order to secure state compliance with the charter in the future', which would promote 'good governance'. At para 30 the court recognized that:

> **"... the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award."**

93. In awarding damages, courts exercise a very broad, open-ended remedial discretion taking into account what is just, fair and reasonable in the circumstances of the case." [our emphasis]

[97] Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims. The two courts below misdirected themselves in treating the case as if it was based on a claim of libel or one of personal injury by insisting that, even after proving an infringement, the victim must, in addition, demonstrate the extent of loss, injury or damage suffered as a result.

[98] This Court explains this distinction clearly in ***William Musembi 13 others v. Moi Educational Centre Co. Ltd & 3 others***, SC Petition No. 2 of 2018; [2021] eKLR as follows:

"... that the questions and issues that a Court has to consider in order to make an award of damages with regards to constitutional violation is manifestly different to what the Court would consider in say, tortious or civil liability claim. In the latter, the issues are clear cut and quantification of the appropriate award is in most instances, straight forward. The same, however, is not true of constitutional violation matters, such as the instant one. Quantification of damages in such matters does not present an explicit consideration of the issues; other issues such as public policy considerations also come into play. A Court obligated and mandated in evaluating the appropriate awards for compensation in constitutional violations does not have an easy task; there is no adequate damage standard that has been developed in our jurisprudence that recognizes that an award for damages in constitutional violations is quite separate and distinct from other injuries."

[99] The appellants petitioned to be awarded general, exemplary, punitive and aggravated damages for the infringement of the minors' rights. All the trial court was expected to do in considering this prayer was to assess what, in the circumstances of the case would be the appropriate compensation, or what other relief would vindicate the appellants' contravened rights. Examples of factors the court would have taken account of include the fact that the violations related to children; that some of the children had to transfer from the school; some were ridiculed, and being minors they were bound to suffer distress, trauma, anguish, fear and lowered self-confidence. On the other hand, exculpatory factors to consider would be the fact that some of the respondents, upon learning of the complaints about their publications immediately pulled down the offending story.

[100] In the result, it was erroneous for the two courts below to ignore settled principles for the award of compensation in constitutional rights violation claims; namely, that once the burden of proving a violation was discharged, it was not

necessary for the appellants to prove any damage or loss so as to be entitled to any of the reliefs contemplated in Article 23(3).

[101] Before the High Court, as earlier stated, the appellants had asked for an award of general, exemplary, punitive and aggravated damages. In their written submissions they quantified these damages at Kshs. 5,000,000, but without supporting the proposal. The 1st appellant too casually alluded to the figure in his oral testimony, but similarly conceded that he did not have any basis for it. From what we can glean from the record, this figure was not supported by any comparable decided cases. On the other hand, contrary to time-honoured practice, the learned Judge of the High Court, in dismissing the claim did not assess the damages he would have been inclined to award the appellants had they succeeded. See ***John Wainaina Kagwe v Hussein Dairy Limited***, Civil Appeal No. 215 of 2010; [2013] eKLR.

[102] Although before the Court of Appeal the appellants also applied for an award of general damages to each of the minors for the infringement of their rights, no such prayer was made in the petition filed before the Supreme Court, as already alluded to in paragraph 20 (above). We reiterate that of the 14 reliefs sought before this Court, none seeks an award of damages or compensation. They relate mainly to declaratory orders. By failing to pray to be awarded damages, the presumption is that the appellants will be content with the reliefs they have specifically applied for in their petition, the declaratory and injunctive reliefs, which are equally remedies under Article 23(3) of the Constitution.

[103] As a rule of thumb, parties are bound and must abide by their pleadings, just as courts cannot change the pleadings presented by the parties. It would be out of character for this Court to pronounce itself on any relief that has not flown directly from the parties. We cannot, no matter how well-intentioned, go beyond the grounds or prayers raised by the appellants. For this reason, we are unable to consider the question of quantum of damages that would have been awardable, and think the issue does not warrant further deliberation beyond here.

The final issue is,

iii) whether the High Court was right to award costs against children in public interest litigation.

[104] The appellant's grievance regarding costs was that the High Court erred in imposing costs on the appellants in a constitutional petition filed in public interest that was neither vexatious nor an abuse of the court process. In view of the decision we have reached, we ask ourselves whether this last issue is superfluous. We shall consider it only to buttress the Court's expressed opinion on public interest litigation. The passage below from our recent decision in the case of ***Kenya Railways Corporation & 2 others v. Okiya Omtatah Okoiti & 3 others***, SC Petition No. 13 consolidated with No. 18 of 2020 should suffice. In it, we clarified that;

> **"[97] We find it necessary to caution that, whereas Article 22 of the Constitution entitles every person to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened, and Article 258 entitles every person to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention, these provisions ought not to be abused in the name of 'public interest.' This is, more so, where the litigants seek to advance private or political interests or other considerations through proxies. Attractive as it may sound, public interest litigation must abide by laid down rules of procedure and the law and must be aimed at addressing genuine public interests and not used for personal gain or vendetta".**

[105] Although the appellants sought to vindicate their own constitutional rights through an award of damages, they too asked the court to make certain declarations regarding the right to privacy and the best interest of a child. We believe these prayers were aimed at addressing real and genuine public interest

issues in the criminal justice system. The questions raised and our resolution thereof in this judgment transcends the circumstances of this case and go beyond the private interests of the minors involved. We, therefore, find that the legal action was initiated for the enforcement and advancement of constitutional justice and in the public interest. Perhaps informed by these considerations, the Court of Appeal did not award costs against the appellants even after losing the appeal.

F. CONCLUSION

[106] In view of everything we have said, we come to the ultimate conclusion that the appellants successfully proved their case that the minors' rights and freedoms had been violated by the respondents, who are jointly and severally liable to them. The prayer for a permanent order of injunction to prohibit the 1st to 4th respondents from publishing the appellants' images or names on any media platform has no merit in view of the express declaration by those respondents that the offending publication was pulled down. At any rate, we do not think the relief can be availed more than 10 years after the act complained of without any evidence of a threat or likelihood of repetition.

We accordingly allow the appeal.

[107] Before we conclude, we wish to acknowledge the importance of responsible journalism that balances the public's right to information and respect for an individual's right to privacy. As such, journalists must approach their work with the highest standards of ethics bearing in mind the prevailing provisions of the law and the constitutional imperatives involved in every case. For the instant case, the question to ask was whether publishing the pictures of children suspected in a criminal case, would advance the best interest of the child. Journalists must seek the objective truth to obviate harm associated with misreporting.

[108] In paragraph 84 we have drawn attention to the fact that, apart from the provisions of the Constitution, international instruments and statutes there are several helpful policy documents that augment the law on children generally. Apart from simplifying the rules of procedure, these documents provide practical guidance on different aspects of children's matters which are aimed at assisting all

agencies in the child justice system to navigate the delicate contours of promoting, safeguarding, and fulfilling children's rights. Because of the elaborate nature of these documents, which we expect every judge, magistrate, prosecutor and counsel to be well conversant with, we do not intend to restate the guidelines they espouse, save to briefly summarize the following guidelines by way of emphasis of our determination;

i) At all times and in every circumstance, the child's dignity, rights and well-being must be respected. A child in conflict with the law has the right to privacy during arrest, detention and appearance in court.

ii) In reporting cases concerning children in conflict with the law, the child's image and identity, including the name, the parents, school, and residence shall not be revealed either directly or indirectly.

iii) It is the duty of the presiding officer to ensure that only those permitted by Section 93(4) of the Children Act, 2022 are allowed in the courtroom where proceedings involving a child are held. Depending on the circumstances, the presiding officer may resort to Section 93(5) of the Children Act and adjourn to an in-camera hearing. The prosecution and defence counsel as officers of the court are equally duty-bound to assist the court to comply with this requirement.

iv) The court, where proceedings concerning a child are being conducted, shall not be used at the same time for adults. Children's Courts should be exclusively for children.

v) Presiding officers can secure the privacy and confidentiality of a child in conflict with the law, a victim of physical or sexual abuse, or a child witness in court by designing an obscured or blurred screen between the child and the rest of those who are permitted to be in open court by Section 93(4) of the Children Act.

vi) Code names, pseudo names, or initials of their names must be used to describe children in all children's cases.

vii) The provisions of Article 50 of the Constitution and Section 235(c) of the Children Act must be adhered to in order to conclude cases involving children expeditiously.

G. COSTS

[109] Costs follow the event but are at the discretion of the court. We are guided by the principles on the award of costs enunciated in ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai Estate of & 4 others***, SC Petition 4 of 2012; [2013] eKLR. Without doubt, the appeal raises substantive issues of law and of public interest. We think, for these reasons, it is appropriate to order parties to meet their own costs.

H. FINAL ORDERS

[110] In light of the above, we order that:

i. ***The Petition dated 24th June 2022 is hereby allowed.***
ii. ***The Judgment of the Court of Appeal dated 13th May 2022, in Civil Appeal No. 296 of 2017 is hereby set aside, save for the determination on the costs of the appeal.***
iii. ***The Judgment of the High Court dated 2nd February 2017 in Constitutional Petition No. 56 of 2013 is hereby set aside in its entirety.***
iv. ***A declaration hereby do issue that the respondents violated the appellants' right to privacy as guaranteed under Article 31 (c) of the Constitution.***
v. ***A declaration hereby do issue that the respondents violated the appellants' right to have their best interests considered of paramount importance as guaranteed under Article 53(2) of the Constitution.***
vi. ***Parties to bear their own costs of this appeal, in the High Court and the Court of Appeal.***

vii. We hereby direct that the sum of Kshs. 6,000/-, deposited as security for costs upon lodging of this appeal, be refunded to the appellants.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **8th** day of **September 2023.**

.....

P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT

.....	.....
S.C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA