

JUDICIAL CHAMBER RULING

July 30, 2019

Nur Sultan

The Supreme Court of the Republic of Kazakhstan Civil Chamber comprised of

M.T.Taimerdenov, the presiding judge,  
S.A.Abdrahmanov and T.A.Ibrashev, the judges,  
and with the participation of the plaintiffs XXX XXX,

having heard in an open hearing via video conference with the Almaty City Court the civil suit by XXX XXX (hereinafter the plaintiffs, the applicants) against Eldar Agif-Ogly Mamedov regarding violation of the right to one's own image and moral damage claim, as submitted by the plaintiffs' representative XXX via a motion requesting to revise the Almaty City Court Civil Chamber ruling of August 17, 2018,

HAS ESTABLISHED THE FOLLOWING:

The plaintiffs filed the said suit against the defendant.

They claimed that E.A.Mamedov, the defendant, had had no right to make and Internet-posting of a video depicting their images without their consent, the posting having resulted in distribution and various insults and threats.

Following the posting and distribution of the said video, the plaintiffs have been subjected to public comments and have found themselves in the focus of the public attention, that having led to biased attitudes towards them at the workplace and at the educational institution.

On May 18, 2018, District court N 2 of the Auezov District of Almaty issued its judgement partially granting the suit, having ruled as follows:

Eldar Mamedov (under alias Eldar Gamilzade) has unlawfully distributed via Facebook a video containing the images of the plaintiffs XXX XXX.

Eldar Agif-Ogly Mamedov shall pay XXX 10,000 tenge in moral damages.

Eldar Agif-Ogly Mamedov shall pay XXX 5,000 tenge in moral damages.

The remaining claims shall be rejected.

On August 17, 2018, Almaty City Court Civil Chamber amended the first instance court judgement on the case, having vacated the part on granting the claims and having ordered issuing a new judgement to reject the suit in full.

The applicant, citing violation and misapplication of the substantive law by the appeals court, has requested to vacate the disputed ruling and restore the first instance court judgement.

Having heard the plaintiffs' arguments supporting the motion, having reviewed the case, and having examined the motion itself, the Chamber has found that the motion shall be granted based on the following reasons.

Under part 5, article 438 of the Civil Procedure Code, judicial acts that have entered into force shall be subject to amendment through cassation if serious violations of substantive and procedural law, as listed in article 427 of the Civil Procedure Code, have led to issuing an unlawful judicial act.

The appeals court have made such violations in this case.

As it is clear from the case materials, on January 30, 2018, the defendant posted a Facebook video depicting the plaintiffs' images, without their consent, with the following caption: "Perhaps, someone's children, sisters or friends, make a REPOST, let them talk [to them], may be not too late to explain, to correct, or at least to shame (emojis) #ястыз #казахстан #алмата #есентаймол #кинопарк #воспитание #увд #законодатели #нравственность #все #люди #хорошие #поступки #невсе #девушки #нежлоб #душа #болит P.S. for making namaz in public there is a fine and *oi-bai* [reprimand], but for the pink [lesbian], for the blue [gay] it's total freedom".

On January 31, 2018, the defendant deleted the said video. However, by that time the video had been viewed by more than 60,000 users, had attracted a lot of comments, and had spread over other social media such as YouTube, Instagram, VKontakte, etc.

The said actions of the defendant have placed the applicants in the focus of public attention, their private life having become public against their will. Besides, they have experienced spoiled relations with colleagues and relatives.

The first instance court, having invoked article 145 of the Kazakhstan Civil Code, declared unlawful the distribution by the defendant of the video depicting the plaintiffs' images.

The appeals court dismissed those arguments, found the plaintiffs' behavior, as depicted in the video and distributed in social media, immoral and obscene, and ruled that the applicants shall not be entitled to claim rights protection under article 145 of the Civil Code.

Therefore, the first instance court judgement was amended and the suit was rejected.

However, the appeals court conclusions are erroneous.

Under article 145 of the Civil Code, no one shall have the right to use a person's image without that person's consent.

That E.A.Mamedov distributed the video, that he never informed the plaintiffs of his intention to film them, and that they never gave their permission to publish the video in a social media is not disputed by the parties, has been established in the case files, and the Chamber has no doubt regarding that fact.

The defendant has violated the plaintiffs' right to privacy, they having found themselves in the focus of public discussion.

Under point 3, article 115 of the Civil Code, personal non-property benefits and rights include life, health, human dignity, honour, personal and business repute, private life, personal and family privacy, the right to one's name, copyright, the right to security of person.

Under the Civil Code, the person whose personal non-property right has been violated shall be entitled, under point 1, article 141 of the Code, to claim moral damage.

Under point 3 of the Kazakhstan Supreme Court regulative decision of November 27, 2015, "On application by courts of the legislation on moral damage compensation," personal non-property benefits and rights that, if violated, denied or limited, could imply moral damage shall include benefits and rights enjoyed by citizens by virtue of birth, as provided by law, that are integral to the citizen's personality. Citizens' rights as provided by law shall include the right to security of house and property; the right to personal and family privacy, the privacy of phone and telegraph communications and correspondence; the right to use one's name; the right to use one's image.

All the said legal provisions are aimed at implementing part 1, article 18 of the Constitution of the Republic of Kazakhstan that guarantees everyone the rights to personal and family privacy and to protection of his/her honour and dignity.

It has been established that the defendant's actions, as disputed, have triggered a wave of **offensive comments against the plaintiffs**, thus having violated their personal non-property rights.

Based on the above, the Chamber has found lawful the first instance court conclusions.

The appeals court has committed a meaningful and gross violation of the substantive law and the plaintiffs' constitutional rights.

Therefore, the disputed judicial act shall be subject to revision: the part rejecting the suit shall be vacated and the relevant part of the first instance court judgement shall remain in force.

Judicial costs shall be settled under article 109 of the Civil Procedure Code.

Based on subpoint 8, part 2, article 451 of the Civil Procedure Code,

**THE CHAMBER HAS RULED AS FOLLOWS:**

The Almaty City Court Civil Chamber ruling on the case of August 17, 2018, shall be amended.

The part rejecting the suit shall be vacated and the District court N 2 of the Auezov District of Almaty judgement of May 18, 2018, shall remain in force.

Eldar Agif-Ogly Mamedov shall be ordered to reimburse judicial costs to XXX (1,805 tenge) and XXX (1,930 tenge).

The motion filed by the plaintiffs' representative shall be granted.

M.T.Taimerdenov, the presiding judge  
S.A.Abdrahmanov and T.A.Ibrashev, the judges

True copy                      Judge T.A.Ibrashev