



REPUBLIC OF KENYA



KENYA LAW
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**Ondieki v Maeda (Petition E153 of 2022) [2023] KEHC 18290 (KLR)
(Constitutional and Human Rights) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18290 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E153 OF 2022

HI ONG'UDI, J

MAY 31, 2023

BETWEEN

KENNEDY ORANGI ONDIEKI PETITIONER

AND

HELLEN MAEDA RESPONDENT

JUDGMENT

1. The petition dated March 29, 2022 was filed under articles 19, 20, 21, 22, 23, 258 and 259 of the [Constitution](#). The petitioner seeks the following orders:
 - a. Spent.
 - b. A declaratory order that the actions of the respondent violated the petitioner's rights under article 31 of the [Constitution](#).
 - c. An order to have the respondent uninstall the CCTV camera accessing, spying, monitoring and recording images in the petitioner's property.
 - d. An order that the respondent pay the petitioner compensation for the violation of his fundamental rights and freedoms.
 - e. An order that the respondent pay the petitioner damages for the constitutional torts and acts of negligence committed by them.
 - f. A prohibitory order prohibiting the respondent from further violating the petitioner's rights and freedom.



- g. A prohibitory order prohibiting the respondent from erecting any form closed-circuit television CCTV camera and/or spying device to spy, monitor and record images on the petitioner's property.
- h. Costs of the petition.
- i. Any further relief or orders that this honourable court may deem just and fit to grant.

The Petitioner's Case

- 2. The petition was supported by the petitioner's affidavit of even date. He made known that he lives at apex court at Kilimani area in Nairobi where he owns house No 12, and the respondent is his adjacent neighbour at house No 13. He deposed that the dispute herein commenced on or about March 2, 2022 when the respondent installed CCTV cameras, on the premises without issuing him with a notice. The said cameras he says are positioned in a manner that can spy, monitor and record images of his property.
- 3. He deposed that he had tried to resolve the issue amicably with the respondent to no avail. His request to have the cameras repositioned so as not to spy on his property was met with hostility from the respondent. That the respondent's actions infringed on his family's right to enjoy privacy in their property. He added that the continual breach without justification amounts to the harassment of his family as their private affairs are recorded by the respondent.
- 4. In his supplementary affidavit dated September 12, 2022 he denied the stated averments by the respondent, and he deposed that he had approached the respondent after installing the CCTV cameras over the issue as already stated but the respondent was unco-operative. He therefore put up a barricade on the fence to block the camera, but the respondents uninstalled the cameras' and reinstalled them above the barricade and so continued seeing, recording and monitoring his compound.

The Respondent's Case

- 5. The respondent filed a replying affidavit dated July 14, 2022, deposing that she was not aware of this dispute prior to the filing of this petition. She denied ever being engaged on the matter by the petitioner at any point. She averred that the two closed circuit television (CCTV) cameras were installed on August 19, 2019 for her family's security contrary to the petitioner's allegations. The installation was informed by the breaking into their premises by thieves earlier in the year, and the thieves had accessed her premises using the petitioner's backyard. This was revealed by the police who had visited the crime scene to investigate the matter.
- 6. With this information she visited the petitioner's family the next day to see the path used by the thieves. The petitioner's wife, who was present and unaware of the incident, welcomed her and took her round the compound. The petitioner was not at home at that moment. The two ladies discovered that the thieves had made a wooden chair to jump over the fence to her compound. She informed the petitioner's wife of her intention to install the CCTV cameras for their security. She further put up a signage at her back gate informing the public of the presence of the CCTV cameras.
- 7. She deposed that due to the architectural design of their estate, the houses are close up, meaning one neighbour easily sees the other's compound. She however averred that the CCTV camera focus is limited to a particular position, and their view is 45 degrees as informed by the technicians. She added that during the assessment by the technicians the petitioner was invited to inspect the view of the cameras' coverage but he refused and retorted to insulting her. In view of these insults, she reported the matter to the Kilimani Police Station. She averred that the petitioner went on vide Classic FM 105 at 8 am and the Star Newspaper on April 12, 2022 to announce that he had sued her over the matter.



- Soon after, the petitioner on April 14, 2022 served the respondent with the instant court pleadings using her car windscreen, at the parking lot.
8. In closing she deposed that the petitioner had failed to demonstrate how she had invaded his privacy as the camera's view did not affect his family. Correspondingly that the allegation of the cameras being a spying device was not justified.
 9. Further to the averments herein Mrima J on May 16, 2022 ordered as follows:
 - a. The petitioners and respondents technical experts on CCTV installation to hold a joint meeting at the compound of the respondent and petitioner to ascertain the coverage of the CCTV camera mounted by the respondents and which is the subject of the petition.
 - b. The experts to file a joint report in court within 7 days of the meeting.
 10. The parties in compliance enlisted two technicians namely, Manda Muswa for the petitioner and Moses Otieno for the respondent to conduct the examination and submit their report.
 11. The joint report was accordingly prepared on May 20, 2022, and the findings were as follows:
 - a. The camera has a fixed lens camera covering 45 degrees angle.
 - b. The camera was identified to be Amcrest brand, 80 meters, IP which can be viewed by anyone, anywhere with internet and the password.
 - c. The display as at May 20, 2022, views the compound of house No 13 only.
 - d. The camera can be altered /changed to view house No 12, manually with the use of Allen key.

The Petitioner's Submissions

12. The petitioner through the firm of Ondieki Orangi and Company Advocates filed written Submissions dated June 25, 2022. Counsel on the first issue on, whether the petitioner's right to privacy had been infringed, submitted that by virtue of article 2(6) of the Constitution, article 12 of the Universal Declaration of Human Rights provides for the protection of privacy by providing that no one shall be subjected to arbitrary or unlawful interference with his privacy ,family or home. Counsel cited the cases of: (i) Coalition for Reform and Democracy(CORD) and 2 others v Republic of Kenya and 10 others (2015) eKLR (ii) Kenya Human Rights Commission v Commissions of Authority of Kenya and 4 others (2018) eKLR (iii) Okiya Omtata v Communications Authority of Kenya (2018) eKLR (iv) Republic v Oakes (1986) 1 SCR in support.
13. According to Counsel the action of installing the CCTV camera is a breach of the petitioner's right to privacy. He went on to state that any activity such as surveillance can only be justified when prescribed by the law. He noted that the Data Protection Act defines the respondent as a data controller and that it is evident that the recordings and monitoring through the respondent's CCTV is personal data under the Act. Counsel argued that the CCTV camera denies the petitioner control over his personal information, which is being accessed monitored and recorded without his consent and a justiciable cause.
14. On whether the petitioner is entitled to the reliefs sought, Counsel answered in the affirmative. He submitted that the respondent's conduct had amounted to continued harassment of the petitioner without justification. Relying on the case of Fairhurst v Woodard (2021) SCR Counsel noted that the court in that matter had awarded damages for the harassment and data protection breaches which are similar to the dispute herein. He further relied on the case of Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC). He submitted that the petitioner was entitled to



compensation for breach of his right to privacy as seen in the case of *Woolley and Woolley v Akram* (2017)SC EDIN 7.

The Respondent's Submissions

15. The respondent filed written submissions in person dated January 13, 2023. She commenced by submitting that the key issue was the CCTV camera's viewing and coverage with reference to the petitioner's home. She submitted that in view of the technicians report, it was clear that the camera's positioning was on the respondent's compound and as such the camera was not being used to spy on the petitioner. Considering this, she asserted that she had not infringed on the petitioner's right to privacy.
16. In addition to the reiterations as captured in her affidavit, she submitted that the CCTV camera's position shift was due to their view being obstructed by the overgrown foliage contrary to the petitioner's allegation. She noted that the petitioner had tried to erect a barrier around the camera which was done on her property amounting to violation of her rights. She as well submitted that due to the several break – in incidents in the apex court despite the gate being manned 24 hours led to her installing the CCTV camera for her security. She thus submitted that the petitioner was not entitled to the orders sought, since he had not proved that installation of the CCTV camera was a means of spying and recording him and his family. She urged the court to dismiss the petition.

Analysis and Determination

17. Having perused the pleadings, submissions by the parties, authorities cited and the law, it is my considered view that the issues for determination are as follows:
 - i. Whether the petitioner's right to privacy under article 31 of the *Constitution* was violated by the respondent; and
 - ii. Whether the petitioner is entitled to the reliefs sought.

Issue No (i) Whether the petitioner's right to privacy under article 31 of the Constitution was violated by the respondent

18. The key contention in this petition is the petitioner's allegation that the respondent's installation of CCTV cameras' in her compound with a camera view that captures his home is a violation of his and his family's right to privacy under article 31 of the *Constitution* and the *Data Protection Act*.
19. The respondent on the other hand asserted that she had not violated the petitioner's rights. This was anchored on the notion that the cameras were specifically installed for security purposes and only focused on her compound. Further that she had informed the petitioner's wife of her intention to install the CCTV camera and so assumed that the whole family was aware of her plans.
20. The right to privacy is envisaged under article 31 of the *Constitution* which provides as follows:

"Every person has the right to privacy, which includes the right not to have--

 - a. their person, home or property searched;
 - b. their possessions seized;
 - c. information relating to their family or private affairs unnecessarily required or revealed; or



- d. the privacy of their communications infringed."
21. The court in the case of *Jessicar Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR describing the right to privacy summarized the nature of the right as follows:
- "23. 'Privacy', 'dignity', 'identity' and 'reputation' are facets of personality. All of us have a right to privacy and this right, together with the broader, inherent right to dignity, contributes to our humanity.
24. It is the personality rights of dignity and privacy that underscore individuality and set both the limits of humanity and of human interaction. But, the reasons for protecting privacy are wider than just protecting the dignity of the individual."
22. Likewise, the court in the case of *Coalition for Reform and Democracy (CORD) (supra)* discussing this right further opined as follows:
- "287. The concept of right to privacy demarcates for the individual realms or dimensions that he needs in order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies. Such realms or dimensions of privacy substantialize the liberties that are secured because the mere securing of freedom does not in itself necessarily entail that the conditions are secured for us to be able to enjoy these liberties as we really want to".
23. Correspondingly the court in the case of *Kenya Human Rights Commission (supra)* discoursing on this right observed as follows:
- "52. Privacy is a fundamental human right, enshrined in numerous international human rights instruments. It is central to the protection of human dignity and forms the basis of any democratic society.
53. A person's right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her personal affairs relatively free from unwanted intrusions. Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable. Yet the autonomy of the individual is conditioned by her relationships with the rest of society. Equally, new challenges have to be dealt with. The emergence of new challenges is exemplified by this case, where the debate on privacy is being analyzed in the context of a global information based society. In an age where information technology governs virtually every aspect of our lives, the task before the court is to impart constitutional meaning to individual liberty in an interconnected world. Our constitution protects privacy as an elemental principle, but the court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world."
24. The court went on to state that:
- "63. A persons' right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her own personal affairs relatively free from unwanted intrusions. Information



protection is an aspect of safeguarding a person's right to privacy. It provides for the legal protection of a person in instances where such a person's personal particulars are being processed by another person or institution. Processing of information generally refers to the collecting, storing, using and communicating of information."

25. The right to privacy as envisaged under article 31 of the Constitution is operationalized by the Data Protection Act, 2019 which discloses in its preamble that its purpose is:

'To give effect to article 31(c) and (d) of the Constitution; to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors; and for connected purposes.'

26. Section 2 of Act in the context of the respondent whose CCTV camera essentially collects data is defined as follows:

"data controller" means a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purpose and means of processing of personal data."

27. On the other hand the Act defines the petitioner as follows:

"data subject" means an identified or identifiable natural person who is the subject of personal data.

28. Importantly processing of information or data is defined to mean any operation or sets of operations which is performed on personal data or on sets of personal data whether or not by automated means. Further the Act under section 25 outlines the principles of data protection, plus the duty of every very data controller or data processor.

29. Reasonably so the Act whose purpose is to protect the right to privacy, states under section 18(1) of Act that no person shall act as a data controller or data processor unless registered with the Data Commissioner. In the same manner section 26 of the Act outlines the data subject's rights as follows:

- "a. to be informed of the use to which their personal data is to be put;
- b. to access their personal data in custody of data controller or data processor;
- c. to object to the processing of all or part of their personal data;
- d. to correction of false or misleading data; and
- e. to deletion of false or misleading data about them."

30. Unquestionably as has been upheld by article 24 of the Constitution and various authorities, one's fundamental rights and freedoms cannot be limited unless within the confines of the law. In the context of this case, the limitation of the right to privacy can only be justified against the provisions of the Data Protection Act. All the same section 32 (1) of the Act sets out the threshold for such a breach as follows:

"A data controller or data processor shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose."



31. A perusal of the facts of this case shows that the petitioner's contention is that the CCTV camera was set up to spy, monitor and record images of his property without his consent or prior notice to himself. From the start it is obvious based on the respondent's deposition and evidence adduced that the CCTV cameras were not set up with such intent. They were set up in 2019 and not 2022 as claimed. This is confirmed by the evidence of Otieno in his witness statement annexed to the technicians' report. This is also supported by the OB report HM II -2... OB No 41/28/06/2019, at Kilimani Police station of the house breakings. This is what led to the respondent's urge to install the CCTV camera. It has therefore not been proved by the petitioner that the installation was for ulterior motives.
32. The respondent averred that she had informed the petitioner's wife of her intentions of installing the CCTV camera. This assertion was not proved further by either of the parties. None of them called the petitioner's wife to prove or disapprove the respondent's assertion. Her evidence would have assisted the court. It is however noted that the petitioner and respondent are close neighbours (house No 12 & 13). The respondent averred that the petitioner was very arrogant and insulting to her and the technician on March 8, 2022 when he inquired about the degree views of the camera. The matter was even reported to Kilimani Police station (OB 41/9/3/2022 HM II-4). The petitioner did in his supplementary affidavit accuse the respondent of arrogance and being abusive. There is however no evidence that he reported any such incident.
33. As discussed in the *Data Protection Act* and cited authorities, the right to privacy is to be safeguarded unless one can prove that the use of the violation was justified within the context of the law. It is undisputed based on the evidence adduced that the CCTV camera was installed by the respondent. The photograph evidence presented by the petitioner shows the installed camera while the respondent's photograph evidence shows her front gate and compound. With this in mind, it is apparent that the 45 degrees CCTV camera coverage as at May 20, 2022 only focused on the respondent's property contrary to the petitioner's allegations.
34. What is fundamental however is the joint technicians' report dated May 20, 2022. This report disclosed a number of key facts. Of relevance to this discussion is that the CCTV camera can be accessed by anyone, anywhere with internet and the password. Secondly, that the camera can be altered to view house No 12 manually using the Allen key.
35. To my mind, these findings present a clear threat to the petitioner's right to privacy which is to be safeguarded. I say so for a number of reasons. The petitioner demonstrated the actuality of the CCTV camera which can visibly be seen from his compound. With the stated findings, if the camera was to be tilted in the right angle the petitioner's information would easily be captured. The petitioner further asserted that he had not been informed of the installation of the camera.
36. Taking all these facts into account and despite the arrogance displayed, it is discernable that the respondent being a data controller as per the Act is required to adhere to the dictates of the Act so as to ensure that the petitioner and the other neighbours' rights to privacy are not violated. In this regard the Act does not give any wiggle room for data controllers as their obligations are clearly set up.
37. First it means that the respondent was required to be registered with the Data Commissioner, and secondly to prove that she had sought the consent of the petitioner. Consent under section 2 of the Act is defined as follows:

“any manifestation of express, unequivocal, free, specific and informed indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data relating to the data subject.”



38. A perusal of the averments and evidence adduced by the respondent does not indicate compliance with these dictates. There is no evidence to show that the respondent was registered as a data controller. It is apparent according to the Act that consent cannot be an assumption as deposed by the respondent. The respondent was under the obligation to receive an express and unequivocal consent from the petitioner in view of his right to privacy. No such express consent is demonstrated.
39. While it is clear that the respondent had a legitimate reason to install the CCTV camera, this ought to have been done in an orderly manner by consent or even through the management of the houses especially considering that the two parties were neighbours. Had this been done, this matter would never have landed here. Given the scenario that prevailed, I find, that the petitioner's right to privacy was breached by the respondent.

Issue No (ii) Whether the petitioner is entitled to the reliefs sought

40. Having found that the petitioner's right under article 31 of the *Constitution* was violated, the next issue for determination is whether the reliefs should be granted.
41. The Court of Appeal addressing the nature of constitutional remedies in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR pronounced as follows:

“...the South African Case of Dendy v University of Witwatersrand, Johannesburg & others - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed...”

42. By the same token, the court in the case of *Peter Mauki Kaijenja & 9 others vs Chief of the Defence Forces & another* [2019] eKLR observed as follows:

“97. ...When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right, which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation.”

43. It is noted that while the petitioner sought compensation for violation of his right to privacy, Counsel for the petitioner did not lay down any basis for this prayer, so as to ascertain the damage the petitioner suffered as a result of the violation. This is so because while the petitioner was able to prove the threat to his right to privacy, he did not demonstrate whether the respondent had used the recorded and captured images and videos if any, in a manner that injured him or amounted to a tort as alleged. This allegation was not substantiated. In that setting, I do not find that the petitioner is entitled to prayer ‘d’ and ‘e’ in the petition. It was also not shown that the respondent used any images or material captured for any personal gain or used the cameras to spy on the petitioner.
44. The upshot is that the petition partially succeeds and the following orders made:



- a. A declaratory order that the actions of the respondent violated the petitioner's rights under article 31 of the Constitution.
- b. An order to issue to have the respondent uninstall the CCTV camera accessing, spying, monitoring and recording images in the petitioner's property.
- c. A prohibitory order to issue prohibiting the respondent from further violating the petitioner's rights and freedom.
- d. A prohibitory order to issue prohibiting the respondent from erecting any form closed-circuit television CCTV camera and/or spying device to spy, monitor and record images on the petitioner's property.
- e. Prayers (d) & (e) of the petition are declined.
- f. Given that the petitioner and respondent are neighbours I find that the best order to make in terms of costs is that each party bears his/her own costs which I hereby do.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 31ST DAY OF MAY, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

