



**Mwihaki v National Council for Law Reporting (Petition E394 of 2020)  
[2022] KEHC 15471 (KLR) (Constitutional and Human Rights) (18 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15471 (KLR)

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

**PETITION E394 OF 2020**

**HI ONG'UDI, J**

**NOVEMBER 18, 2022**

**N THE MATTER OF ARTICLES 19, 20, 26, 28 &  
31 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND UNDER ARTICLES 26, 28 & 31 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE DATA PROTECTION ACT  
NO. 24 OF 2019 SECTIONS 25, 26, 29, 30, 32, 34, 35 & 36.**

**BETWEEN**

**CHARITY MWIHAKI ..... PETITIONER**

**AND**

**NATIONAL COUNCIL FOR LAW REPORTING ..... RESPONDENT**

**JUDGMENT**

**The Petition**

1. The petition dated October 29, 2020 was filed under articles 19, 20, 26, 28 & 31 of the [Constitution](#) for alleged contravention of rights under articles 26, 28 & 31 and sections of the [Data Protection Act](#) No 24 of 2019. The petitioner seeks the following reliefs: -
  - a. A declaration that the fundamental rights of the petitioner under articles 26, 28 and 31 of the [Constitution](#) have been violated and infringed upon by the respondent.
  - b. An order of mandatory injunction to compel the respondent to immediately remove or pull down the case reported as judicial review No 5 of 2015 between the *Republic v the Deputy*



*Commissioner of Labour, The Commissioner of Labour and the Resident Magistrate's Court at Nairobi* from its web page.

- c. In the alternative an order of *mandamus* to issue to compel the respondent to adopt relevant safeguards and security measures to ensure the identity of the petitioner is hidden and no longer accessible to members of the public and the integrity and confidentiality of the data is protected.
- d. That the cost of the petition be borne by the respondent.

### **The Petitioner's Case**

2. A summary of her case as set out in her petition and verifying affidavit sworn on even date, is that she was employed as a senior Human Resource Officer at Nairobi Java House Limited *vide* a contract of service which was terminated on November 19, 2014 after which she lodged a complaint of unfair termination with the Commissioner for Labour.
3. The termination was found to be unfair by the Commissioner for Labour and it was recommended that she be compensated by Nairobi Java House Limited.
4. On March 13, 2015 the Deputy Commissioner of Labour unilaterally proceeded to prefer criminal charges on behalf of the Commissioner of Labour against the Chief Executive Officer and the Human Resource Manager Nairobi Java House Limited for the offence of failing to provide an employee to whom Wages Regulations Order applies with a condition of employment contrary to section 49(1)(c) and section 88 of the [Employment Act](#) 2007 at the Resident Magistrate's Court at Nairobi in criminal case No 483 of 2015.
5. The Chief Executive Officer and the Human Resource Manager Nairobi Java House Limited subsequently filed a judicial review application No 5 of 2015 at the Employment and Labour Relations Court at Nairobi seeking *certiorari* orders to quash the criminal proceedings and orders of prohibition to restrain the Commissioner of Labour and his deputy from pursuing further criminal prosecution against them.
6. The said judicial review matter was reported on the Kenya Law webpage and when a search is conducted on the Kenya Law webpage using her name the case that comes up is judicial review No 5 of 2015. The same has negatively affected her employment opportunities since whenever she seeks employment and a potential employer does a background search on the internet the case always comes up and the facts of the case have made potential employees to shy away from contracting her services.
7. The criminal charges against her former employers were instituted unilaterally by the Commissioner of Labour and his deputy in their own official capacity without her consent and input. She was also not a participant in the judicial review matter yet her name is adversely mentioned therein as reported in the Kenya Law webpage.
8. The processing of the data on the judicial review matter as done by the respondent was not done in adherence to the preservation of her right to privacy; the respondent failed to undertake a data protection impact assessment before publishing the data where the information as published posed a high risk to her rights and freedoms; it concerned her personal particulars on the relationship between herself and her previous employer; and consent was never obtained prior to the publishing of the said information.



## The Respondent's Case

9. The respondent filed a replying affidavit by Long'et Terer sworn on January 25, 2021 urging that the petition be dismissed with costs. He deposed that it is the mission of the National Council for Law Reporting (Kenya Law) to provide universal access to public legal information by monitoring and reporting on the development of jurisprudence for the promotion of the rule of law. In carrying out its mandate in furtherance of jurisprudence, Kenya Law is committed to upholding the tenets of the Constitution in so far as maintain the dignity and the freedoms of the public by balancing the citizens rights to privacy as well as the right to publicly held information.
10. He deposed that under the Data Protection Act, the National Council of Law Reporting can be classified as a data controller and a data processor that indirectly collects data for a purpose that is lawful, specific and specially defined. That the Data Protection Act enables data controllers / processors to collect data indirectly (without consent or knowledge of data subjects) where the data is contained in a public record. He deposed that the purpose for which the Council of Law Reporting collects data is well outlined in section 3 of the National Council of Law Reporting which provides that the Council shall be responsible for the preparation and publication of the Kenya Law Reports and other related publications.
11. Further that every data processor is required to ensure that all personal data is processed lawfully, fairly and in a transparent manner in relation to any data subject. Great care is taken in the manner in which data is collected, used and processed in the organization with the overarching principle being that all data is uploaded in its raw format as is onto the website, save for where the law requires information to be redacted. That data that reveals race, health, status, ethnic social origin, conscience, belief, genetic data, biometric data, property details, marital status, family details including names of children, parents, spouse or spouses, sex or the sexual orientation are deemed sensitive data and specific provisions apply to the collection, storage and processing of such data.
12. He deposed that in principle, courts are responsible for ensuring that privacy requirements with respect to personal information in judgments are met, and the Kenya Law takes its responsibility to redact certain judgments of personal and private details to protect the identity of the vulnerable group in the society. That in regard to a specific request to have the content of the website anonymized, Kenya Law requires parties to a suit to request the court to have their information anonymized on the court records but where such a request has not been made in court, then all judicial decisions shall be published as received from the judiciary within the exceptions outlined in the anonymization policy.
13. The code of ethics in this matter is the Kenya Law Anonymization Guidelines (KLAG) which allows for redaction and or pulling down of information under the following limbs; in compliance with a court order banning publication of specific information; in compliance with a court order requesting for the pulling down or redaction of specific content on the website; in compliance with statutory provisions on publication; when uploading sensitive cases and when a document contains personal identifiers.
14. He averred that a user's request for anonymization is not automatic as each request is reviewed independently and a determination made based on merits of each case. Further a court order will be required to compulsorily anonymize or pull down any order of any case outside of KLAG policy requirements and all approved requests for anonymization affect print publications from the date of approval/order and will not be retroactively applied. The Kenya Law will also upon such approval or order request google to revise the information it holds but does not however have any control over external organizations or the timelines within which they effect the changes requested.



15. He deposed that the Kenya Law information obtained on the website is provided on an as is basis and no representations or warranties of any kind are made with respect to the information. It therefore acted within its mandate as provided in law and did not breach the petitioner's rights. He further deposed that there are no constitutional issues raised in the petition for the court to determine and the petitioner has not identified the specific rights that she alleges have been infringed as decided in the case of *Anarita Karimi Njeru v R* (1976-1980) KLR 1272.

## Submissions

16. The petitioner filed submissions dated January 25, 2022, through Mungai Kalende company advocates. Relying on *MWK v another v Attorney General & 3 others* [2017] eKLR, counsel submitted that this court has the relevant powers to preserve fundamental rights and freedoms under the *Constitution*. Accordingly, the petitioner's rights and freedoms under article 26, 28 and 31 of the *Constitution* have been violated by the respondent.
17. Counsel relied on *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* [2020] eKLR and the *Bill of Rights Handbook*, 5<sup>th</sup> Edition (2005) by Lain Carrie and John de Waal at page 323 regarding article 31 of the *Constitution* and argued that the act of the respondent of posting the judgment in JR No 5 of 2020 that captured the petitioners name without her consent has been and continues to be a serious infringement of her right to privacy, human dignity and her right to life. She further reiterated that the same was posted without considering her rights and who was most likely going to be affected by the postage of the judgment hence contravening section 31(1) of the *Data Protection Act*.
18. He further relied on the cases of *Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others* [2016] eKLR; South African case of *Ministry v Interim National Medical and Dental Council of South Africa* [1998] (4) SA 1127 (CC); *Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health & 4 others* [2016] eKLR; and *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR on the right to privacy.
19. Counsel argued that the respondent's actions have caused violation of the petitioner's rights to not only her privacy but also her human dignity and ultimately her right to life. The posting of her name has mistakenly led potential employees to believe that she was the person at the center of the JR proceedings. She is no longer able to fend for herself and secure a decent job.
20. Relying on section 26(d) of the *Data Protection Act* he argued that this is a classical case where the data as published is misleading in nature, potentially damaging and a direct infringement of the petitioner's rights and should be corrected.
21. He further relied on the South African case of *Berstein v Bester No* (1996) 2 SA 75; the Indian Supreme Court in *Justice K.S Pultaswamy (Retd) and another v Union of India and Others Writ* Petition (Civil) No 494 of 2012; and *Barbra Georgina Khaemba v Cabinet Secretary, National Treasury & another* [2016] eKLR on right to privacy. She also relied on *Ahmed Issack Hassan v Auditor General* [2015] on the right to human dignity.
22. He submitted that the petitioner's rights have been violated and that the respondent is in breach of the *Data Protection Act*. Further, that the respondent fails to appreciate that she was not a party in the JR case and that there is no way she would have sought the prayers herein earlier in the JR matter hence the said argument does not justify the respondent's actions. Counsel relied on *Lyomoki and others v*



- Attorney General* [2005] 2 EA 127 and submitted that the respondent has not discharged its burden of justifying its actions.
23. Lastly, he placed reliance on *Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited* [2021eKLR & *FAF (suing as her own behalf and as a next friend of SAS and NAMS) v Norwegian Refugee Council* [2019] eKLR.

### The Respondent's Submissions

24. The respondent filed submissions dated February 1, 2022 through P. N Chibole Senior State Counsel raising the following issues;
1. Whether the respondent's conduct constitutes a violation and contravention of the *Constitution* 2010
  2. Whether the petitioner is entitled to the orders as prayed
  3. Whether the petitioner is entitled to costs
25. On the first issue, and while relying on *Annarita Karimi Njeru* (1976-1980) 1KLR 1272 and *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others* civil appeal No, 290 of 2012 [2013] eKLR, counsel submitted that the petitioner has not provided any proof on how the rights and freedoms she has listed have been violated, infringed or contravened.
26. That while the petitioner alleges that she has been negatively affected by the reporting of the judicial review case, and has been unable to secure any employment opportunities, there is no proof of any application of employment tendered before the court to prove the allegations. She relied on *Emmanuel Mambo Oduory v National Council for Law Reporting & 2 others* [2021] eKLR.
27. Counsel submitted that the petitioner has failed to state and identify the rights with precision and how the same have been infringed in respect of her and that in any event, not every breach of the law amounts to a breach of the *Constitution* since there are procedures laid down in law to remedy such breaches. She relied on *Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service* [2014] eKLR; and *Kamal Jadva Vekaria v Director General, Kenya Citizens and Foreign National Management Service* [2016] eKLR, in support of this argument.
28. Counsel submitted that the petitioner has failed to proof her allegations as required in law. To buttress this argument, she relied on *Rashid Odhiambo Allogob & 245 others v Haco Industries Limited* [2015] eKLR; constitutional petition No 128 of 2006, *Lt Col Peter Ngari Kagume & others v Attorney General* and section 107 and 109 of the *Evidence Act* cap 80 Laws of Kenya. Accordingly, the courts have a responsibility of guarding gates of justice and to only allow in those who merit the grant of the orders sought as provided for by the law.
29. On the second issue, and relying on sections 19 and 20 of the *National Council for Law Reporting*, she argued that the proceedings which the respondent reported on were court proceedings in line with their legal mandate and a fair representation of the proceedings that occurred in court, as forwarded by the judicial officer. Relying on section 52(1)(b) and 2(1)(b) of the *Data Protection Act* and the Kenya Law Anonymization Guidelines, she argued that this case is brought under two limbs of the anonymization's guidelines. To wit, in response to a user's request for anonymization and when inventorying sensitive cases.
30. In respect of a response to a user's request for anonymization, it was submitted that the same is not automatic. That each request is reviewed independently and a determination made on merits of each



case. On whether the case merits being anonymized, she submitted that the test lies on whether it can be classified as a sensitive case.

31. It was argued that this case can be viewed as a sensitive case under the limb of sexual offence. That in such cases, the KLAG provides that the following are to be anonymized, the names of the victims; the names of the parents, relatives' witnesses; the victims place of residence and any other personal information. Further that the KLAG revolve around protecting the victim and not the alleged perpetrator. The same applies in criminal cases in which accused persons charged with sexual offences are either acquitted on appeal or who are declared to be not guilty by the trial court.
32. Counsel submitted that the petitioner is not entitled to the prayers sought as she has failed to prove her case on merit. Further that whereas this court has a constitutional mandate to protect and safeguard the rights and freedoms of the individual the claimant must demonstrate to the satisfaction of the court that her rights were violated.
33. On the third issue, and while relying on Nairobi civil appeal No 147 of 2015 *Kenya Human Rights Commission & another v Attorney General & 6 others* [2019] eKLR and *Jasbir Singh Rai case* (supra) she submitted that the respondent should be awarded the costs.

### **Analysis and Determination**

34. Having carefully considered the parties' pleadings and submissions, case law and the law, I find the following issues to arise for determination: -
  - i. Whether the petition has met the threshold for a constitutional petition
  - ii. Whether the petitioner's rights under articles 26, 28 and 31 of the *Constitution* have been violated by the respondent

### **Issue No (i). Whether the petition has met the threshold for a constitutional petition**

35. In a constitutional petition, a party that alleges violation of rights must plead his or her case with reasonable precision on the way the rights have been violated. This principle was set out in the case of *Anarita Karimi Njeru v The Republic* (1976-1980) KLR 1272 which was upheld by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR which observed as follows:

“...The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to articles 1, 2, 3, 4, 10, 19,20 and 73 of the *Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching



on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.”

36. Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides for the form of a petition as follows: -

- (2) The petition shall disclose the following: -
- (a) the petitioner’s name and address;
  - (b) the facts relied upon;
  - (c) the constitutional provisions violated;
  - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
  - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
  - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
  - (g) the relief sought by the petitioner

37. In Timothy Njoya v Attorney General & another [2014] eKLR Lenaola J held: -

“I agree with the above reasoning, and with respect, the petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated, by whom and even state the article of the Constitution that has been violated and the manner in which it has been violated - See *Anna Rita Karimi Njeru v Republic* (1976-1980) 1 KLR 14 and *Trusted Society of Human Rights v Mumo Matemu and another* petition No 279 of 2012.”

Also see:

- i. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR.
- ii. *Humphrey Mutegi Burini & 9 others v Chief of the Kenya Defence Forces & another* [2017] eKLR.

38. It is evident that for a constitutional petition to be sustainable the petitioner must cite constitutional provisions, and precisely identify the provisions that are alleged to have been violated or threatened to be violated. He/she must also demonstrate the manner in which the said provisions have been violated or are threatened with violation from the facts and evidence of the case. Looking at the petition, I agree with the respondent that the petitioner has only stated the constitutional provision violated but has failed to demonstrate how they have been violated and the harm suffered if any.

39. This court nonetheless notes that, in the case of Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another



*(amicus curiae)* (petition 229 of 2012) [2012] KEHC 2480 (KLR) (Constitutional and Human Rights) (20 September 2012) (Judgment), the judges stated: -

45. We must point out that *Anarita Karimi Njeru* was decided under the Old Constitution. The decision in that case must now be reconciled and be brought into consonance with the New Constitution. In our view, the present position with regard to the admissibility of petitions seeking to enforce the Constitution must begin with the provisions of article 159 on the exercise of judicial authority ....

However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case ....

Indeed, both the respondents and the interested party have proceeded from this understanding. They have sought to explain at length the contours of article 73 and chapter six of the Constitution in response to the petitioner's allegations. If one needed evidence that these parties understood the claim facing them, it is to be found in their various papers filed in court and the oral submissions made in court. This being a constitutional issue of immense public importance and interest, we refuse to worship at the altar of formal fetishism on this issue and hold that the controversy at issue has been defined with reasonable precision to warrant a proper judicial determination on merits.

40. In view of the above cited case law, it is clear that the respondent has to be given proper notice about the nature of the claims being made so that they can adequately prepare their case. The court therein while noting that the said case was not an epitome of precise, comprehensive, or elegant drafting, it nonetheless found that the complaints raised by the petitioner were concrete enough for the court to consider. It also noted that the respondents understood the claim and that was the reason why they substantively responded to the claim it.

41. Considering what is on record, it is evident that the petitioner has raised substantive issues concerning the respondent and which the respondent has responded to adequately because it has understood the nature of the claim. The issues raised in this petition are breach of the right to privacy, right to human dignity and right to life. The respondent herein has elaborated the right to privacy and on breach of data protection laws. Although I note that the petition is not pleaded precisely and that the manner of violation and harm is not mentioned, the court is bound to consider this petition as it can be deciphered from the petition what the issues in the matter are.

**Issue No (ii). Whether the petitioner's rights under articles 26, 28 and 31 of the Constitution have been violated by the respondent**

42. Having stated that although the petition as pleaded does not meet the threshold in the *Anarita Karimi case* and that the court can proceed to hear the matter that notwithstanding because the respondent has understood the nature of the claim, it is now important for this court to consider whether the said rights have been violated by the respondent, as pleaded.

43. Sections 107 and 109 of the Evidence Act cap 80 Laws of Kenya provides as follows: -



107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

See *Christian Juma Wabwire v Attorney General* [2019] eKLR.

44. The burden of proof laid on a petitioner in a constitutional petition was addressed by the Supreme Court in [\*Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others\*](#) [2014] eKLR as follows: -

“Although article 22(1) of the [\*Constitution\*](#) gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the [\*Constitution\*](#) alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

45. What is evident is that the petitioner had the burden of proving the alleged constitutional violations. She has set out the constitutional provisions violated, and alleged that she has been unable to fend for herself or secure employment as a result of the publication. That further as a result her rights to privacy, human dignity and ultimately life have been violated. She has also argued that she was not a party in the judicial review case and therefore could not raise the issues being raised herein in that case. Further that the publication is a classic case that falls under section 26 (d) of the [\*Data protection Act\*](#), that it is misleading in nature and potentially damaging.

46. The respondent has submitted that it acted within the confines of the law and that it was within its legal mandate, to do so. Further that should the petitioner seek anonymization then there needs to be a court order. That while the petitioner has talked about not being able to secure any employment, she has failed to prove the same.

47. Sections 19 and 20 of the [\*National Council for Law Reporting Act\*](#) provides as hereunder;

19. Judges to supply judgments, to the Editor

Every judge of superior court of record shall as soon as practicable after delivering a judgment, ruling or an opinion cause to be furnished to the Editor a certified true copy of the judgment, ruling or opinion delivered by him.

20. Returns to be made by registrars of superior court



The registrar of the High Court or the registrar of the Court of Appeal shall at the end of each month furnish the Editor with a list of all judgments, rulings or opinions delivered by the High Court or the Court of Appeal as the case may be.

48. Section 26 of the [Data Protection Act](#) provides as follows: -

26. A data subject has a right —

- (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.

49. Section 31 of the said Act provides;

31. (1) Where a processing operation is likely to result in high risk to the rights and freedoms of a data subject, by virtue of its nature, scope, context and purposes, a data controller or data processor shall, prior to the processing, carry out a data protection impact assessment.

50. Section 52 provides;

52. (1) The principles of processing personal data shall not apply where —

- a) processing is undertaken by a person for the publication of a literary or artistic material;
- (b) data controller reasonably believes that publication would be in the public interest; and
- (c) data controller reasonably believes that, in all the circumstances, compliance with the provision is incompatible with the special purposes.

(2) Subsection (1) (b) shall only apply where it can be demonstrated that the processing is in compliance with any self-regulatory or issued code of ethics in practice and relevant to the publication in question.

51. I have looked at this petition and I must state that although the petitioner has cited violation of articles 26, 28 and 31 of the [Constitution](#) by the respondent, she has failed to adduce any evidence to demonstrate how the same have been violated. She has talked about the publication by the respondent being misleading and potentially damaging and therefore invoked section 26 (d) of the [Data Protection Act](#). She has however not explained to this court who has been misled by the information, how it is misleading, and why it is misleading. She has also not adduced any evidence to show how the publication is damaging. I agree with the respondent that there is no evidence of an application that has been made to a potential employer and declined on the basis of the judgment (JR case), and which application has been presented before this court.

52. In arriving at that conclusion, I am guided by the case of [Emmanuel Mambo Oduory v National Council For Law Reporting & 2 others](#) [2021] eKLR where the court stated that:

There is no evidence that the plaintiff has been declined employment because of the reported ELRC case. In any case, if one reads the judgment, there is no evidence that a prospective employer would conclude that the plaintiff is a person who sexually harasses fellow employees. There is no letter from an employer who declined to employ the plaintiff



due to his alleged behavior. The law reporting cannot be adjusted to suit the plaintiff's interest. I see no good reasons as to why the reporting should anonymize the plaintiff. The plaintiff was not charged with any sexual offence and his name is not included in the register of sexual offenders.

53. The right to privacy is provided for under article 31 of the Constitution. The said article states:
31. Every person has the right to privacy which includes the right not to have-
    - (a) their person, home or property searched;
    - (b) their possession seized;
    - (c) information relating to their family or private affairs unnecessarily required or reviewed; or
    - (d) the privacy of their communication infringed.
54. The petitioner has not demonstrated how that right has been violated. In any event section 52 of the Data Protection Act as cited above gives exceptions where the principles of processing personal data shall not apply. In this case as cited by the respondent and pursuant to sections 19 and 20 of the National Council for Law Reporting Act the respondent clearly demonstrates that it was acting within its mandate. The petitioner has not demonstrated the contrary and she also has not demonstrated that the respondent did not comply with its self-regulatory guidelines, in this case KLAG when it processed her data.
55. Concerning the right to life, article 26 of the Constitution provides;
- (1) Every person has a right to life.
  - (2) The life of a person begins at conception
  - (3) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.
  - (4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.
56. An evaluation of the material before this court reveals that no evidence has been adduced to show how the petitioner's right to life under article 26 has been violated. Having found that the rights under articles 26 & 31 of the Constitution have not been violated, it follows that there is equally nothing to show how the right to dignity under article 28 was violated. My finding is that none of the violations complained of has been violated.
57. The award of costs is discretionary. The court will always take appropriate measures to ensure that every person has access to the court for determination of their rights and fundamental freedoms. The petitioner will therefore not be condemned to pay costs.
58. The upshot is that this petition lacks merit and is hereby dismissed with no order as to costs.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. ONG'UDI**



**JUDGE OF THE HIGH COURT**

