



**Miller v Sonko & another (Petition E513 of 2021) [2022] KEHC 16533 (KLR)
(Constitutional and Human Rights) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16533 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E513 OF 2021
HI ONG'UDI, J
DECEMBER 20, 2022
IN THE MATTER OF THE INTERPRETATION AND
ENFORCEMENT OF THE CONSTITUTIONAL RIGHTS UNDER
ARTICLE 22, 23, 28, 31, 35 AND 165 OF THE CONSTITUTION
OF KENYA
AND
IN THE MATTER OF CONTRAVENTION OF ARTICLES 28,
31(C) & (D) & 35(2) OF THE CONSTITUTION OF KENYA,
2010**

BETWEEN

CECIL GUYANA MILLER PETITIONER

AND

MIKE MBUVI SONKO 1ST RESPONDENT

AMANA SAIDI JIRANI 2ND RESPONDENT

JUDGMENT

1. The petitioner in the petition dated December 1, 2021 has raised issues in respect of unlawfully recorded telephone conversations between him and the 1st and 2nd respondents. That the same were



further posted on the 1st respondent's facebook page, twitter account and other social media platforms. He therefore filed this petition seeking the following orders:

- i. A declaration that the recorded telephone conversation between the petitioner and the 2nd respondent which was posted by the 1st respondent on his Facebook and twitter accounts was obtained in violation of the petitioners rights under article 31(d) of the Constitution as the same was done without the petitioners knowledge and /or consent and is therefore unconstitutional, null and void *ab initio* within the context of article 2(4) of the Constitution and any action, proceedings, declarations or orders founded thereon in relation to the petitioner are unconstitutional, null and void ab initio.
- ii. A declaration that the recorded telephone conversation between the petitioner and the 1st respondent which was posted by the 1st respondent on his Facebook and twitter accounts was obtained in violation of the petitioners rights under article 31(d) of the Constitution as the same was done without the petitioners knowledge and/or consent and is therefore unconstitutional, null and void ab initio within the context of article 2(4) of the Constitution and any action, proceedings, declarations or orders founded thereon in relation to the petitioner are unconstitutional, null and void.
- iii. A declaration that the posting of the recorded conversation between the petitioner and the 1st respondent on the 1st respondents Facebook page and twitter account was a violation of the petitioners rights to inherent dignity and right to have that dignity respected and protected as enshrined in article 28 of the constitution of Kenya.
- iv. An order of permanent injunction prohibiting the respondents by themselves and/or agents from posting, publishing or broadcasting on social media or any other media any video or recording of the petition obtained in contravention of article 31(d) of the Constitution.
- v. Such other orders this court may deem fit to grant.
- vi. Costs.

The Petitioner's Case

2. The petitioner's claim as set out in the petition and supporting affidavit is that on unknown dates separate private conversations between the petitioner and the 1st & 2nd respondents were recorded. The recordings (conversation one and two respectively) were done without his consent.
3. In his supporting affidavit the petitioner refers to two compact discs (CGM 1 & 2) containing the recorded conversations. He claims to have exhibited them by availing them to the court. I have not seen any such exhibits in the court record.
4. It is the petitioner's assertion that what the respondents did is a violation of his constitutional rights under articles 31(d), 28 & 35(2) of the constitution. Basically he is complaining of breach of his constitutional right to privacy since he did not give his consent to the recording and posting of the recording of the same on social media platforms.



The Respondents' Case

5. The respondents were duly served via email and whatsapp, but none of them filed a response to the petition nor application. The petition therefore proceeded unopposed.

Submissions

6. The petitioner advocates P. W Wena & company advocates filed undated submissions. It is counsel's submission that the petitioner's right to privacy and human dignity as protected under articles 28, & 31(a) & (c) was violated. He relied on [*Jessicar Clarise Wanjiru v Davinsi Aesthetics & Reconstruction Centre & 2 others*](#) [2017] eKLR where privacy is defined as:

“The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information. “[5] In the above sense any intrusion of personal life by whatever means or form such as photography, written articles or caricatures may be ground for an action for breach of privacy.”

7. Counsel also referred to article 8(2) of the [*European Convention on Human Rights*](#) which defines this right as:

“The right to privacy consists essentially in the right to live one's life with a minimum interference. It concerns private family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially.”

8. It's his submission that the motive behind the recording of the petitioner's private conversation with the respondents and the 1st respondent's subsequent posting, publication and dissemination of the petitioner's private conversation was to malign his reputation before his clients, colleagues and friends. This was therefore an infringement of his inherent right to have his dignity respected and protected.
9. Referring to section 2 of the [*Data Protection Act*](#) which defines “consent” he argued that the petitioner's consent, was never sought before all these things were done. He referred to [*Samson Mumo Mutinda v Inspector General National Police Service & 4 others*](#) [2014] eKLR where it was held:

“Consent is key component of the right to privacy and once granted amounts to a waiver to a claim founded on breach of right to privacy.”

10. Finally he referred to article 35(2) of the [*Constitution*](#) which provides:

Every person has the right to the correction or deletion of untrue or misleading information that affects the person.”

He further referred to sections 26 (e) & 40(1) (a)(b) of the [*Data Protection Act*](#) under which a data subject has a right to deletion of false or misleading data about them. He thus supported the prayer for deletion of all recorded private conversations between the petitioner and the respondents without his consent, plus all other prayers.

Determination

11. I have carefully considered the pleadings, the evidence and the submission filed. The main issue for determination is whether the petitioner has established that his right to privacy was violated.



12. The right to privacy is provided for in article 31 of the Constitution which states as follows:

- “ 31. 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.”

13. The law is clear on what entails a right to privacy. This has been elucidated clearly in a number of decided cases including *Jessicar Clarise Wanjiru* (supra).

14. The petitioner has raised a complaint in respect of some privately recorded conversations. In his supporting affidavit he has produced two certificates under section 106B (4) of the Evidence Act. These certificates are marked as CGM 1 & 2 respectively with no CD's or flash disks annexed. The CDs or flash disks are supposed to contain details of the alleged recorded conversations and the postings on the 1st respondent's Facebook, twitter account and social media.

15. Without these gadgets the court is not in a position to confirm the petitioner's claims.

16. Sections 107, 108 & 109 of the Evidence Act (chapter 80 of 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.

108. Incidence of burden .

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

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.”

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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.

17. Under the law, he who alleges a fact must prove it. It was the duty of the petitioner to prove the allegations against the respondents by placing material before this court in support of his claims, of recordings and publication. This is a requirement despite the fact that the respondents did not file a response to the petition. The court can only issue the orders sought upon being satisfied that indeed the alleged recordings and postings exist. In this case the petitioner has not proved any of the above and the petition must fail.
18. The upshot is that the petition lacks merit and is dismissed. There shall be no order as to costs since the respondents never filed any response to the petition and application.
- 19 Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 20TH DAY OF DECEMBER, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

