



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**(Coram: A. C. Mrima, J.)**  
**PETITION NO. E406 OF 2020**

RC.....PETITIONER

-VERSUS-

KKR.....RESPONDENT

**JUDGMENT**

**Introduction:**

1. The Petitioner herein, *RC*, and the Respondent herein, *KKR*, were once a happily married couple. However, as fate would have it, their union took a turn for the worse in the year 2019. As a result, the Respondent instituted Court cases against the Petitioner.
2. For purposes of this judgment, focus will be in *Milimani Chief Magistrates Divorce Cause No. 672 of 2019* (hereinafter '**The Divorce Cause**') and *Milimani Children's Case No. 1052 Of 2019: KKR -Vs- RC* (hereinafter '**The Custody case**'). In the two cases, the Respondent herein sought to divorce the Petitioner and have custody of their two children respectively.
3. In the Divorce Cause, the Respondent's fronted two grounds in support of the cause. They are adultery and cruelty by the Petitioner. To prove his case, he availed before the trial Court voluminous bundle of documents derived from emails, audio and video recordings/transcripts, flash drive data, photographs, mobile phone messages, *WhatsApp* text messages, CCTV footages and social media conversations all belonging and/or having a bearing on the goings-on in the life of the Petitioner. The documents form part of the evidence the Respondent intends to rely on at the hearing of the Divorce cause.
4. In the Petition subject of this judgement, the Petitioner largely challenges the manner in which some of the alleged evidence was obtained.

**The Petition:**

5. The Petition is filed contemporaneously with a Notice of Motion Application (hereinafter '**the application**'). Both are dated 8<sup>th</sup> December, 2020 and are supported by affidavits of the Petitioner evenly sworn on the said date. The Petition is further supported by a Supplementary Affidavit deponed on 21<sup>st</sup> December, 2020.
6. The Petitioner claim violation of her inalienable right to *fair trial* under *Article 25(c)* of the

Constitution. She also asserts that the Respondent's conduct violates her right to privacy and dignity as guaranteed under *Articles 31 and 28* of the Constitution respectively.

7. It is the Petitioner's further case that the Respondent's unauthorized, illegal and secretive surveillance, recording and hacking of her personal mobile phone, email and social media accounts violates her right under *Article 50(4)* not to have evidence obtained in a manner violating her fundamental rights and freedoms.

8. In the interest of time, the Court directed that both the Petition and the application be heard together. In essence, the application was subsumed in the Petition.

9. In the application, the Petitioner sought the following Orders: -

1. *Spent*

2. *Spent*

3. *Spent*

4. *That pending the hearing and determination of this Constitutional Petition, there be an order of stay of proceedings in MILIMANI CHIEF MAGISTRATES'S DIVORCE CAUSE NO. 672 OF 2019 KKR -vs- RC and Milimani NAIROBI CASE No. 1052 of 2019: KKR -vs- RC between the parties herein.*

5. *That the costs of this application be provided for.*

10. The Petition on the other hand sought the following reliefs: -

a. *A declaration that that the Petitioner's right to privacy and human dignity have been violated by the Respondent.*

b. *A declaration that the Respondent's action of unauthorized access and or hacking of the Petitioner's mobile phone, recording her secretly without her knowledge, hiring of private investigator or record her conversation and movements and installation of secret cameras in her bedroom and else where in the matrimonial house to record the Petitioner secretly offends Articles 28 and 31 of the Constitution of Kenya.*

c. *An order to expunge from the record of the Trial Court in MILIMANI CHIEF MAGISTRATES'S DIVORCE CAUSE NO. 672 OF 2019 KKR -vs- RC all evidence listed and marked KKRS003, KKRS004, KKRS 005, KKRS006, KKRS008, KKRS009, KKRS011, KKRS013, KKRS014, KKRS015, KKRS016, KKRS017, KKRS018, KKRS019, KKRS020, KKRS021, KKRS022, KKRS024, KKRS025, KKRS026, KKRS029, KKRS031, KKRS033, KKRS034, KKRS035, KKRS037, KKRS041, KKRS042, KKRS043, KKRS044, KKRS050, KKRS052, KKRS053, KKRS054, KKRS055, KKRS056, KKRS058, KKRS061, KKRS062, KKRS064, KKRS065, KKRS066, KKRS067" in the Supplementary Affidavit sworn by KKR on 4<sup>th</sup> May 2020 and filed in Court in Milimani Chief Magistrates's Divorce Cause No. 672 Of 2019 KKR -Vs- RC.*

d. *An order of prohibition directed as Chief Magistrates Court in Nairobi not to admit in its records any or all of the evidence/exhibits listed and marked KKRS003, KKRS004, KKRS 005, KKRS006, KKRS008, KKRS009, KKRS011, KKRS013, KKRS014, KKRS015, KKRS016, KKRS017, KKRS018, KKRS019, KKRS020, KKRS021, KKRS022, KKRS024, KKRS025, KKRS026, KKRS029, KKRS031, KKRS033, KKRS034, KKRS035, KKRS037, KKRS041, KKRS042, KKRS043, KKRS044, KKRS050, KKRS052, KKRS053, KKRS054, KKRS055, KKRS056, KKRS058, KKRS061, KKRS062, KKRS064, KKRS065, KKRS066, KKRS067" in the Supplementary Affidavit sworn by KKR on 4<sup>th</sup> May 2020 and filed in Court in Milimani Chief Magistrates's Divorce Cause No. 672 Of 2019 KKR -Vs- RC.*

e. General damages for breach of the Petitioner's rights guaranteed under Article 28 and 31 of the Constitution of Kenya 2010.

f. Costs of this Petition

g. Interest.

h. Any other Order that the Court may deem necessary for the ends of justice.

11. The Petitioner filed written submissions dated 21<sup>st</sup> December, 2020.

**The Response:**

12. The Petition is opposed.

13. In response to the Petition, the Respondent filed Grounds of Opposition and Replying Affidavit. Both are dated 12<sup>th</sup> December, 2020.

14. In the Grounds of Opposition, the Petitioner claims that the Petition is bad in law and made *mala fides*. He further claims that the Petition does not raise any constitutional issue. He relies in *Hakizimana Abdoul Abdulkarim -vs- Arrow Motors (EA) Ltd & Anor (2017) eKLR* in support of the position.

15. The Respondent contends that this Court does not have jurisdiction over the matter because the trial Court cases are on-going thus making the instant Petition *sub-judice*.

16. In view of the foregoing, the Respondent posits that the Petition is an abuse of Court process and contravenes the exhaustion doctrine; that the question whether evidence was illegally obtained is within the jurisdiction of the lower court and in any event does not apply to civil cases.

17. In the Replying Affidavit, the Respondent denied violating the Petitioner's constitutional rights in the evidence presented in the Divorce Cause. He also denied unauthorized access or hacking into the Petitioner's mobile phone or social media accounts.

18. In respect of the private investigator, the Respondent admitted that he hired one to carry on surveillance on the Petitioner. The Respondent deposed that the engagement of a private investigator is within the law. He contends that the evidence tendered in the Divorce Cause does not constitute illegally obtained evidence. On the contrary, he deposed that the evidence and exhibits, contained in the Supplementary Affidavit sworn on 4<sup>th</sup> May, 2020, constitute lawful and admissible evidence.

19. The Respondent challenged the Petition on the basis of failure to prove any hacking of email and social media accounts, phishing or illegal installation of CCTV. The Respondent strongly contends that, the Petitioner, by virtue of being his wife, had shared her password for her email and social media accounts and thus had regular access for both maintenance and administrative purposes.

20. With respect to the various electronic gadgets installed in their home, private vehicles and company premises, the Respondent claimed that all such devices were fitted with full knowledge of the Petitioner.

21. In the end, the Respondent reiterates that the question of illegally obtained evidence does not apply in civil cases and as such the admission of evidence in the Divorce Case and the Custody Case would not render any of the trials unfair or occasion failure of administration of justice.

22. The Respondent filed written submissions and list of authorities both dated 7<sup>th</sup> January, 2021.

**Issues for Determination:**

23. I have carefully considered the Petition, the response thereto, the parties' submissions and the decisions referred to.

24. I discern the following issues for determination: -

(i) *Whether this Court's jurisdiction is ousted on the basis of the Petition's failure to raise any constitutional issue, or the Petition being sub-judice the Divorce Cause and the Custody case or on the basis of the doctrine of exhaustion.*

(ii) *The nature and admissibility of illegally obtained evidence in civil disputes.*

(iii) *Whether the Respondent illegally obtained the contested evidence as contained in the Respondent's Supplementary Affidavit deponed on 4<sup>th</sup> May, 2020 in the Divorce Cause.*

(iv) *Remedies.*

25. I will hence deal with the issues sequentially.

**(a) Whether this Court's jurisdiction is ousted on the basis of the Petition's failure to raise any constitutional issue, or the Petition being sub-judice the Divorce Cause and the Custody case or on the basis of the doctrine of exhaustion.**

26. Any challenge on jurisdiction must be addressed at the onset. This Court has in the recent past, in ***Petition No. E282 of 2020 David Ndi and & 4 Others -vs- The Attorney General & Others*** (unreported), discussed the legal concept of jurisdiction at length. This is what the Court stated: -

24. *Jurisdiction is defined in Halsbury's Laws of England (4<sup>th</sup> Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". Black's Law Dictionary, 9<sup>th</sup> Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.*

25. *In Words and Phrases Legally Defined Vol. 3, John Beecroft Saunders defines jurisdiction as follows: -*

*By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.*

26. *That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of **Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited** [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -*

*Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...*

27. *Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in **Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016** [2018] eKLR stated as follows: -*

*Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;*

1) .....

2) *The jurisdiction either exists or does not ab initio ...*

3) *Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*

4) *Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.*

28. *On the centrality of jurisdiction, the Court of Appeal in Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR stated that: -*

*So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.*

29. *On the source of a Court's jurisdiction, the Supreme Court of Kenya in Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission (2011) eKLR held that: -*

29. *Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent ....*

30. *Later, in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others (2012) eKLR Supreme Court stated as follows: -*

*A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.*

31. **And, in Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR, the Court of Appeal further stated: -**

**[44] .... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading**

**and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...**

27. This issue of jurisdiction in this Petition has three limbs. The first limb is whether the Petition raises any constitutional issue.

28. The Respondent contends that the Petition does not raise any constitutional issue. Relying on *Hakizimana Abdoul Abdulkarim -vs- Arrow Motors (EA) Ltd & Anor (2017) eKLR*, *Rapinder Kaur Atal vs. Manjit Singh Amrit Petition No. 236 of 2011 (2011) eKLR*, *CNM vs. WMG (2016) eKLR* and *Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others (2002) 23 ILJ 81 (CC)*, the Respondent holds that the matter does not involve determination of any constitutional issue and that Article 50(4) of the Constitution does not apply to civil matters.

29. The Respondent contends that since the dispute between the parties is premised on challenging evidence which was allegedly collected in breach of the Data Act, the Computer Misuse Act and the Kenya Information and Communications Act, 2009, then such challenge to a breach of statutory provision does not result into a constitutional issue. In buttressing the submission, the Respondent relied in *Turkana County Government & 20 Others vs. Attorney General & Others (2016) eKLR*.

30. The Petitioner is of the contrary position. She posits that this Court has jurisdiction over the matter as conferred under Article 165(3) of the Constitution. It is further posited that the Petition is anchored on Articles 28, 31 and 50 of the Constitution. It is submitted that the Petitioner has pleaded and tendered evidence that support the violation and/or threatened violation of her rights and fundamental freedoms. The Petitioner asserts that the Petition is further based on violations of various statutory provisions.

31. The Petitioner further attempts a definition of what a constitutional issue is. Accordingly, such an issue is one whose resolution requires the interpretation of the Constitution rather than that of a statute. The Petitioner relied on *Council of County Governors vs. Lake Basin Development Authority & 6 Others (2017) eKLR*, *Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others (2002) 23 ILJ 81 (CC)*, *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR* and *James Kugocha vs. Chief County Officer Department of Infrastructure (2018) eKLR* in further analysis of what a constitutional issue is and how the Petition raises constitutional issues.

32. On the basis of the Court of Appeal in *Okiya Omtatah Okoiti & 2 Others vs. Attorney General & 4 Others (2020) eKLR*, the Petitioner contends that Article 50(4) of the Constitution applies to civil matters as well as to criminal matters.

33. Long before the downing of the new constitutional dispensation under the Constitution of Kenya 2010, Courts have variously emphasized the need for clarity of pleadings. I echo the position.

34. *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (commonly referred to as 'the Mutunga Rules') also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

*Form of petition.*

10. (1) *An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.*

(2) *The petition shall disclose the following—*

(a) *the petitioner's name and address;*

(b) *the facts relied upon;*

(c) *the constitutional provision 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.

35. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of petitions. They provide as follows: -

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

36. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.

37. The Supreme Court in **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others** case (*supra*) had the following on Constitutional Petitions: -

*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 vs. 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.*

38. Both parties are in agreement with what a constitutional issue is. They both referred to **Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others** case (*supra*) where the Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -

*The Constitution provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of the Constitution itself: if regard is had to the provisions of... Constitution, **constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of the Constitution are also constitutional issues. So too .... is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights.** If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...*

39. In the United States of America, a *constitutional issue* refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.

40. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which

*confronts the various protections laid out in a Constitution.* Such protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate *the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement.* In the words of **Langa, J** in **Minister of Safety & Security vs. Luiters, (2007) 28 ILJ 133 (CC):** -

*... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...*

41. Whereas it is largely agreed that the Constitution of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as **Lenaola, J** (as he then was) firmly stated in **Rapinder Kaur Atal vs. Manjit Singh Amrit case** (supra) ‘... Courts must interpret it with all liberation they can marshal...’

42. Resulting from the above discussion and the definition of a constitutional issue, this Court is in agreement with the position in **Turkana County Government & 20 Others vs. Attorney General & Others case** (supra) where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.

43. I have perused the Petition. It mainly challenges part of the evidence to be adduced in the Divorce Cause and the Custody case. The Petitioner alleges that the evidence infringes, *inter alia*, on her rights under Articles 28, 31 and 50(4) of the Constitution. Those rights are part of the Bill of Rights. The Petitioner has also averred and deponed how the rights are allegedly contravened by the Respondent. By way of pleading, the Petitioner has attempted to establish a link between herself, as the aggrieved party, the provisions of the Constitution alleged to have been contravened and the manifestation of contravention or infringement.

44. In other words, the Petitioner seeks the intervention of this Court on the basis that the Respondent has and/or is confronting her rights and fundamental freedoms guaranteed under the Bill of Rights (Articles 28, 31 and 50) in the Constitution. In such a scenario, the issues transcend the borders of ordinary issues into the realm of and crystallize into constitutional issues.

45. In this case, even by taking the caution in **Hakizimana Abdoul Abdulkarim -vs- Arrow Motors (EA) Ltd & Anor** case (supra), into account, still the Petition, no doubt, reveal that it has fully complied with Rule 10(1) and (2) of the Mutunga Rules as well as the requirements in **Communications Commission case** (supra).

46. The Petition raises pure and serious constitutional issues for consideration by this Court. This Court is duty bound under Article 165(3) of the Constitution to determine any question as to whether a right or fundamental freedom in a Bill of Rights has been infringed, denied, violated or threatened.

47. I, hence, find that the contention that the Petition is devoid of raising any constitutional issue cannot be maintained. The same is for rejection.

48. The second limb of the issue is on whether the jurisdiction of this Court is ousted by the *sub-judice* rule. The Respondent contends that the pendency of the Divorce Cause and the Custody case ousts the jurisdiction of this Court as all issues on the cases ought to be addressed before the trial courts.

49. In answer to this limb, I will run through how the Supreme Court in **Advisory Opinion Reference No. 1 of 2017, Kenya National Commission on Human Rights -vs- Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR** handled the issue of *sub-judice*.

50. The Supreme Court was approached by the Applicant, Kenya National Commission of Human Rights. It sought the Court’s Advisory Opinion on the purposive interpretation of *Chapter 6* of the Constitution of

Kenya specifically in the context of the affairs of political parties.

51. The Applicant contended that there was lack of clarity and/or guidance in High Court and the Court of Appeal decisions on the place of *chapter 6* of the Constitution, especially in respect of leadership and integrity qualifications of persons offering themselves to be elected or appointed to public service.

52. Before the matter could proceed, one of the Interested Parties filed a Preliminary Objection claiming that the application before the Court was *sub-judice* two other cases before the High Court namely; *Constitutional Petition No. 142 of 2017 and Constitutional Petition No. 68 of 2017*. It asserted that the application was an abuse of the Supreme Court's advisory opinion jurisdiction.

53. Upon considering the parties' arguments and counterarguments, the Apex Court comprehensively addressed the often raised jurisdictional challenge of *sub-judice*. It first defined the term, outlined its purpose and then set the threshold for its operation. The Court observed as follows: -

*[67] The term 'sub-judice' is defined in Black's Law Dictionary 9<sup>th</sup> Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.*

54. Upon setting the above foundation for the operation of the doctrine, the Learned Judges then pitched the issued emanating from the two High Court cases against the ones raised by application before them. They went ahead and observed as follows: -

*[68] In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of the Constitution. The issues and orders in the two Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of the Constitution. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of the Constitution on leadership and integrity.*

*[71] In so doing, (determining the two Constitutional Petitions) the High Court shall be compelled, to determine whether a Constitutional test is set up in Chapter Six of the Constitution, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These are substantially the same issues subject of the Advisory Opinion sought by the Applicant comprised at pages 13 to 19 of the Reference before this Court.*

55. From the foregone, the Court was of the finding that the application before it was caught up by *sub-judice* doctrine. It refused to usurp the jurisdiction of the High Court in the following terms: -

*[72] We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of the Constitution, the High Court is the Court of first instance with regard to jurisdiction for interpretation and application of the Constitution and that Court has already been moved.*

***[73] Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of the Constitution. This Reference is sub-judice and this Court will not usurp the High Court's jurisdiction under Article 165 (3).***

56. The Supreme Court, hence, declined jurisdiction because it was demonstrated that the issues before the Court were the same as those before the High Court.

57. In this case, whereas the parties in the Divorce Cause and the Custody case are the same as those in the Petition before this Court, the issues raised in the Petition before this Court are different from the issues before the other Courts. The Petitioner, in essence, seeks the pronouncement of this Court on whether some evidence which the Respondent intends to use in the other cases was illegally obtained and if so, whether such evidence offends Article 50(4) of the Constitution.

58. I have carefully perused the pleadings in the Divorce Cause and the Custody case. I have found that the issue of the constitutionality of the evidence is not contained in any of the pending suits. In any event, the issue raised in the Petition before this Court can only be determined by the High Court courtesy of Article 165(3) of the Constitution.

59. I, hence, find that the objection based on *sub-judice* doctrine fails.

60. The third limb of the objection is based on the doctrine of exhaustion.

61. The Respondent strongly submits that the Petitioner has not exhausted the remedies under *Section 56 of the Data Protection Act, No. 24 of 2019* (hereinafter '***the Data Act***'), neither has she referred the matter to the National Police Service under the *Computer Misuse and Cybercrimes Act, No. 5 of 2018* (hereinafter '***the Computer Misuse Act***') nor has the Petitioner complied with the complaint mechanism under *Section 84T of the Kenya Information and Communications Act, 2009* (hereinafter referred to as '***the KICA***'). As such, the Respondent vehemently submits that this Court ought to down its tools.

62. The Respondent buttresses the submission by reference to *Master Freighters Limited vs. Kenya Bureau of Standards & Another (2019) eKLR* and *Geoffrey Muthinja Kabiru & Another vs. Samuel Munga Henry & 1756 others (2015) eKLR*.

63. The Petitioner did not respond to this limb. I will, nevertheless, deal with it.

64. The doctrine of exhaustion was recently dealt with in detail by a 5-Judge Bench in ***Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR***. The Court stated as follows: -

*52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in ***R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR***, where the Court opined thus:*

*42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in ***Speaker of National Assembly v Karume [1992] KLR 21*** in the following oft-repeated words:*

*Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for*

such special procedures.

43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is **Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR**, where the Court of Appeal stated that:

*It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.*

65. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra)*, after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

*What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case (supra)*, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)*

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR*.

62. In the instant case, the Petitioners allege violation of their fundamental rights. **Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion.**

***This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.***

66. Returning to the case at hand, Section 56 of the Data Act provides for complaints to be made to the Data Commissioner. It states as follows: -

*A data subject who is aggrieved by a decision of any person under this Act may lodge a complaint with the Data Commissioner in accordance with this Act.*

67. The Computer Misuse Act is an Act of Parliament to provide for offences relating to computer systems; to enable timely and effective detection, prohibition, prevention, response, investigation and prosecution of computer and cybercrimes; to facilitate international co-operation in dealing with computer and cybercrime matters; and for connected purposes. In that regard any complaints arising out of the ambit of the said Act are ordinarily dealt with by the National Police Service.

68. Section 84T of KICA focuses on complaints against a licensee who breaches any aspect of fair competition. The provision partly states as follows: -

*(1) The Commission may, on its own motion, investigate any licensee who commits any act or omission in breach of fair competition.*

*(2) Any person having a complaint of a breach of fair competition against a licensee shall lodge a complaint to the Commission and the Commission shall, if it appears that a breach of fair competition has been or is being committed, investigate the act and omission and .....*

69. The Commission is the Communications Authority of Kenya.

70. The complaints levelled by the Petitioner against the Respondent do not, hence, fall under those contemplated under the KICA so as to be lodged to the Commission. Likewise, the National Police Service is not seized of the mandate to deal with the interpretation of the Constitution and/or the determination of the constitutionality of some actions.

71. Section 9 of the Data Act provides for the powers of the Data Commissioner. It states thus: -

*(1) The Data Commissioner shall have power to –*

*(a) conduct investigations on own initiative, or on the basis of a complaint made by a data subject or a third party;*

*(b) obtain professional assistance, consultancy or advice from such persons or organisations whether within or outside public service as considered appropriate;*

*(c) facilitate conciliation, mediation and negotiation on disputes arising from this Act;*

*(d) issue summons to a witness for the purposes of investigation;*

*(e) require any person that is subject to this Act to provide explanations, information and assistance in person and in writing;*

*(f) impose administrative fines for failures to comply with this Act;*

*(g) undertake any activity necessary for the fulfilment of any of the functions of the Office; and*

*(h) exercise any powers prescribed by any other legislation.*

(2) *The Data Commissioner may enter into association with other bodies or organisations within and outside Kenya as appropriate in furtherance of the object of this Act.*

72. The Data Act accords the Data Commissioner the power to carry out investigations upon receipt of a complaint. The Act then gives the Commissioner the discretion to impose what is defined as ‘*administrative fines for failures to comply with the Act.*’

73. The Data Act does not, therefore, donate the power to determine complaints on the constitutionality of actions to the Data Commissioner.

74. By juxtaposing the foregoing against the exceptions to the doctrine of exhaustion, it is clear that the issues in this matter fall within the twin exceptions to the doctrine. First, an order directing the dispute between the parties herein be dealt with by the Data Commissioner will not serve the values enshrined in the Constitution. The issues verge on constitutional interpretation and important constitutional values are at stake.

75. Second, Courts must restrictively construe statutory provisions which oust the Court’s jurisdiction. A closer scrutiny of the provisions of the Data Act confirms that the Act does not provide for an adequate audience which is proportionate to the interests the Petitioner wishes to advance in this dispute. As demonstrated above, the Data Commissioner lacks the legal mandate to determine the constitutionality of the issues raised in the dispute.

76. This is, therefore, a dispute in which the doctrine of exhaustion does not apply.

77. Having considered the three limbs on jurisdiction, suffice to say that none of them has any legal legs to stand on. They all fall by the wayside. In sum, this Court has the jurisdiction over the issues raised in the Petition.

**(b) The nature and admissibility of illegally obtained evidence in civil disputes in Kenya:**

78. The Respondent vehemently posits that the aspect of illegally obtained evidence under Article 50(4) of the Constitution does not apply to civil cases. The concept is limited to criminal cases.

79. On the basis of an English case in *Hildebrand vs. Hildebrand (1992) 1 FLR 244*, the Respondent argues that Courts are at liberty to consider evidence which is otherwise wrongfully obtained since Courts have an overarching duty on the parties to give full and frank disclosure. It is argued, based on the said duty that such evidence is admissible. The decision developed the ‘***Hildebrand Rules.***’

80. The scope of the Hildebrand Rules was limited by the Court of Appeal of England and Wales in *Immerman vs. Immerman (2010) EWCA*. The limitation stretched to the time when discovery of documents is to be made and in addition the Court found that where the documents obtained were subject to some form of legal or professional privilege, the Hildebrand Rules were inapplicable.

81. The Respondent submits that the issue of admissibility is properly so undertaken by a trial Court which has a duty to examine all the circumstances surrounding the evidence and the applicability or otherwise of the Hildebrand Rules. It is argued that such duty cannot be usurped by a Constitutional Court. The Respondent further argued that the Court of Appeal in *United Airlines Limited vs. Kenya Commercial Bank Limited (2017) eKLR*, a decision referred to by the Petitioner as well, relied on the *Immerman* case. The Respondent also argued that even the Court of Appeal in *Okiya Omtatah Okiiti & 2 Others vs. Attorney General & 4 Others (2020) eKLR* was of the view that the admissibility of evidence ought to be dealt with by the trial Court, which Court, may even decline to accept such evidence.

82. The Petitioner is of the converse position on the matter. She posits that the issue of admissibility of illegally obtained evidence in civil cases is now firmly settled in law to the effect that such evidence is inadmissible both in criminal and civil cases. The Petitioner relied on the Court of Appeal in *United Airlines Limited vs. Kenya Commercial Bank Limited (2017) eKLR* and *Okiya Omtatah Okiiti & 2*

*Others vs. Attorney General & 4 Others (2020) eKLR.*

83. **Article 50(4)** of the Constitution provides as follows: -

***Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.*** (emphasis added).

84. As the Petitioner contends that the infringement of Article 50(4) of the Constitution has resulted into further infringement of her rights under Article 28 and 31 of the Constitution, I will reproduce the said provisions as well, and as follows: -

**Article 28: Human Dignity**

*Every person has inherent dignity and the right to have that dignity respected and protected.*

**Article 31: Privacy**

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.*

Kenya's flagship railway project dubbed 'The Standard Gauge Railway (SGR)' was a cause for litigation before the Constitutional Court and the Court of Appeal on account of illegally obtained evidence.

85. The Petitioners in High Court ***Constitutional Petition No. 58 of 2014 consolidated with Petition No. 209 of 2014, Okiya Omtatah Okoiti & 2 others v Attorney General & 3 others [2014] eKLR*** sought to stop the construction of the SGR on the basis that China Road and Bridge Corporation (hereinafter referred to as '***the CRBC***') was awarded the contract for the construction of the SGR in flagrant violation of the law and the Constitution.

86. The Respondents challenged the Petitions. At the heart of the contest was admissibility of annexures the Petitioners had made to their Affidavits in the form of correspondence emanating from the CRBC, the Ministry of Transport, Office of the then Deputy Prime Minister, Embassy of the Republic of China, Attorney General's Chambers, Kenya Railways Corporation, and Public Procurement Oversight Authority.

87. One of the Respondents, *Kenya Railways Corporation*, in its Cross-Petition asserted the position that a Constitutional Petition could not be founded on alleged '*public documents*' obtained in breach of the Constitution and the Evidence Act. It claimed use of such documents would breach their right to fair hearing guaranteed under Article 50 and right to privacy under Article 31 of the Constitution

88. The High Court, in determining the place of illegally obtained evidence, expunged from the record the said documents on account that they were inadmissible for having been obtained illegally. It observed thus: -

***...if litigants choose to use clandestine means to procure information such actions would heavily compromise the need for Article 35 of the Constitution and would obviously violate the other parties' fundamental right to privacy under Article 31 of the Constitution. Had the Petitioners followed lawful channels and procedures available in law in obtaining the information, then the***

**question of violation of the Respondents' rights to privacy as alleged in the Cross-Petition would not have arisen. Indeed, in Dubai Aluminium Co Ltd vs Al-Alawi (1999) 1 WLR 1964 where confidential documents had been obtained by a private investigator's agents by making so-called 'pretext calls', the Judge held that there was a strong prima facie case of criminal or fraudulent conduct in obtaining of the information involving breaches of the England Data Protection Act of 1984. Rix J stated thus therefore;**

It seems to me that if investigative agents employed by solicitors for the purpose of litigation were permitted to breach the provisions of such statutes or to indulge in fraud or impersonation without any consequence at all for the conduct of the litigation, then the courts would be going far to sanction such conduct. Of course, there is always the sanction of prosecutions or civil suits, and those must always remain the primary sanction for any breach of the criminal or civil law. But it seems to me that criminal or fraudulent conduct for the purposes of acquiring evidence in or for litigation cannot properly escape the consequence that any documents generated by or reporting on such conduct and which are relevant to the issues in the case are discoverable and fall outside the legitimate area of legal professional privilege. It is not as though there are not legitimate avenues which can be sought with the aid of the court to investigate (for instance) banking documents. That apparently is true in Switzerland as well. In any event, the material being investigated is usually material which falls within the other party's possession or control, and which in all probability he will in due course be obliged to disclose himself.

89. Aggrieved, the Petitioners went on appeal in Nairobi **Civil Appeal 13 of 2015 Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR**. One of the questions that the Learned Appellate Judges considered was whether the Trial Judge erred in ordering to be expunged from the record documents that had been presented by the Petitioners in support of the Petitions.

90. In the appeal, the Appellants urged that the Learned Trial Judges misconstrued Article 50(4) of the Constitution and the Evidence Act and wrongly excluded the impugned documents. It was their argument that they were public documents and as per Article 35 of the Constitution, were within their right of access to information.

91. In determining the issue of illegally obtained evidence, the Learned Appellate Judges first made reference to the decision in **Nicholas Randa Owano Ombija vs. Judges and Magistrates Vetting Board [2015] eKLR** where the following was said: -

*What does the law state regarding illegally obtained evidence? In the case of Karuma, Son of Kaniu vs. The Queen [1955] AC 197 which was an appeal to the Privy Council on a criminal conviction anchored on an illegally procured evidence, the Privy Council held that "the test to be applied both in civil and in criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained" In that case the Privy Council decision was supported by the decision in Reg. vs. Leatham (1861) 8 Cox C.C.C 498 which was referred to in the judgment. In Reg. vs. Leatham (supra), it was said "it matters not how you get it if you steal it even, it would be admissible in evidence" In Olmstead vs. United States (1928) 277 US 438 the Supreme Court of the United States of America opined that "the common law did not reject relevant evidence on the ground that it had been obtained illegally." In Helliwell vs. Piggot-Sims [1980] FSR 356 it was held that "so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning."*

*There is no doubt that the documents relating to the appellant's vetting of 10<sup>th</sup> September 2012 are relevant as his case hinges on them. Common law principles show that evidence, if relevant, is admissible even if it has been illegally obtained. The case of Karume vs. The Queen though a criminal case shows that common law principles developed in criminal law cases apply in civil cases.*

92. The Court of Appeal made further reference to its more recent decision in **United Airlines Limited vs.**

**Kenya Commercial Bank Limited [2017] eKLR** where the Learned Judges having regard to provisions of Article 50(4) took a different trajectory and **rejected** the contention that illegally obtained evidence is admissible in criminal law as long as it is relevant. The Judges stated that the decision in *Karuma son of Kaniu -vs- R* (supra) was no longer good law. The Court of Appeal, however, held that Article 50(4) of the Constitution only applies to criminal cases and not civil suits. The Court stated as follows: -

***As submitted by learned counsel for the respondent, illegally obtained evidence was for a long time admissible in criminal law as long as it was relevant (see Kuruma Son of Kaniu vs R [1955] 1 All ER 236. However, the Constitution of Kenya 2010 has now shifted the paradigm and Article 50(4) of the Constitution now disallows such evidence...***

***...the Kuruma case (supra) is therefore no longer good law. This article nonetheless applies to criminal law and not civil law, as it succinctly refers to “trial” as opposed to suit, and also relate to rights of an accused person. Admissibility of documentary evidence is explicitly provided for under the Evidence Act.***

93. Adding its voice to the new found position as regards admissibility of illegally obtained evidence, the Learned Judges in ***Civil Appeal 13 of 2015 Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others*** case (supra) generally agreed with the interpretation of Article 50(4). The Court, however, dissented with the position that Article 50(4) of the Constitution applies to criminal cases only and not to civil suits. The Court noted that **Article 50** deals generally with ‘**fair hearing**’ and accords ‘**every person**’ the right to fair hearing. As such, it is not open for Courts to make a distinction that Article 50(4) was only in respect of criminal cases.

94. The Learned Judges opined that Article 50(4) invited Courts to reject illegally obtained evidence irrespective of whether it is in connection with civil or criminal trial. The Judges of Appeal remarked as follows: -

***80. The interpretation given by the Court in that case that Article 50(4) of the Constitution applies only to criminal law and not civil law is, with respect, doubtful. Article 50 of the Constitution deals generally with “fair hearing”. In Article 50(1) for instance, reference is made to “every person” as having the right to a fair hearing. This is in contrast to Article 50(2) which is specific “every accused person”. In our view, under Article 50(4) if a court determines that admission of evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights would be detrimental to the administration of justice, the court may reject it irrespective of whether it is in connection with a civil or criminal trial. This view accords, we believe, with the Supreme Court decision in Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR.***

95. I will now consider the Supreme Court of Kenya’s position on the applicability of Article 50(4) of the Constitution. The decision which readily surfaces is the ***Presidential Election Petition No. 4 of 2017, Njonjo Mue & another -vs- Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR.*** One of the contentions in this matter was whether Internal Memos used at deliberative stage by IEBC’s Commissioners could be used by the Petitioners as admissible evidence before Court.

96. It was the Respondents’ case that the said Internal Memos were illegally obtained and were still the subject of internal discussions within the IEBC and as such, the Petitioners could not place any right to use them in the pretext of exercising right of access to information. It was further their case that the Petitioners could not explain how they came into possession of internal memos which under Section 27 of the IEBC Act, fell within information that the Commission was entitled to decline as it was still being used at a deliberative stage.

97. Upon weighing and balancing the Petitioner’s right to access information *vis-à-vis* that of the Commission to decline to divulge documents being used at deliberative stage, the Learned Judges of the Supreme Court, in the first instance, remarked as follows: -

that Article 35(1)(a) and (b) of the Constitution, read with Section 3 of the Access to Information Act would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2<sup>nd</sup> Respondent.

98. The Supreme Court, however, agreed with the Respondent's claim that the Petitioners ought not to have accessed the impugned information. The Court went ahead and addressed the limitation of the right. It specifically referred to those instances where such information relates to a matter under deliberation by a person or entity and made following findings: -

*[14] This right to access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information.*

*[16] The rights of access to information relevant to the matter before us is therefore from the foregoing, limited by operation of law, in this instance, being the procedures for access of any information under Section 27(2) of the Independent Electoral and Boundaries Commission Act, as read together with Sections 6(1) of the Access to Information Act. Article 24(1) of the Constitution, further sets limitations on rights including necessarily the right to access to information. It provides thus:*

*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 need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others; and*

*(d) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. **(Emphasis added)***

99. The Supreme Court further spoke to the balance Courts must strike while protecting litigants' right of access to information under Article 35 against the requirement of adherence to prescribed procedure while seeking such information. They observed as follows: -

***(23) Having found that there are procedures provided for under the law through which any person who seeks to access information should follow, the question that follows is; what happens where a person 'unlawfully' or 'improperly' obtains any information held by an entity" Can a court of law admit such evidence... We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information... Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process.***

100. In the end the Learned Judges of the Supreme Court struck out the illegally obtained Internal Memos for want of admissibility. They spoke to the sanctity of Article 50(4) in respect of the right to fair hearing and stated that the right to privacy and property must be protected. While expunging the Internal Memos from the record, the Court stated thus: -

***(24) The Petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of the 2<sup>nd</sup> Respondent. Further, it has been alleged that these memos have only been shown in part, and taken out of context to advance the Petitioners' case against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and to an extent, the 3<sup>rd</sup> Respondent. No serious answer has been given to that contention. The use of such information before the Court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information. This is the point of divergence between the instant matter, and the case of Nicholas Randa Owano Ombija v. Judges and Magistrates Vetting Board (supra). In the present instance, there has been a clear violation of laid out procedures of law attributable to access of information, and violation of the rights of privacy and protection of property that the 2<sup>nd</sup> Respondent is guaranteed under the Constitution and Section 27 of the IEBC Act. This is because the limitation imposed by both Article 50(4) and Section 27 aforesaid squarely apply to the matter before us.***

***[25] The Court also has to find a balance between the Petitioners' rights to access of information as guaranteed under Article 35 of the Constitution, against those of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' rights to privacy and protection of property also guaranteed under Articles 31 and 40 of the Constitution. If access was in the instance, obtained through the laid down procedure under Section 27 of the Independent Electoral and Boundaries Commission Act, and Section 6(1) of the Access to Information Act, then the rights of both the Petitioners and the Respondents would be protected, by dint of the applicable laws that set out the limitations for access of any such information.***

101. Taking cue from the above decision of the Supreme Court in respect of the import of Article 50(4), the Court of Appeal in ***Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others (supra)*** observed as follows: -

***... it is clear from that decision (Supreme Court in Njonjo Mue (supra) that by dint of Article 50(4) of the Constitution, the adage, "it matters not how you get it if you steal it even, it would be admissible in evidence" is not representative of the state of the law in our legal system, irrespective of whether the dispute is of a criminal or civil nature.***

***83. We reiterate that the appellants claimed to have been supplied with the contentious documents by "conscientious citizens" and "whistle-blowers". Based on the foregoing, the appellants ought to have requested the concerned Government Departments to supply them with the information they required, and to which they were entitled to receive in accordance with Article 35 of the Constitution. It was not necessary for the appellants to resort to unorthodox or undisclosed means to obtain public documents. If they deemed the documents were relevant (as indeed they were) then, they ought to have invoked the laid down procedure of production of documents.***

***84. We therefore agree with the learned Judge that it would be detrimental to the administration of justice and against the principle underlying Article 50(4) of the Constitution to in effect countenance illicit actions by admission of irregularly obtained documents. However well intentioned "conscientious citizens" or "whistle-blowers" might be in checking public officers, there can be no justification, as pointed out by the Supreme Court, for not following proper procedures in the procurement of evidence. We do not have any basis for interfering with the decision of the High Court to expunge the documents in question.***

102. As I come to the end of this discourse, I must refer to a recently decided High Court case by a 5-Judge Bench on illegally obtained evidence. It is ***Philomena Mbeti Mwilu vs. Director of Public Prosecutions & 3 Others; Stanley Muluvi Kiima (Interested Party) International Commission of Jurists Kenya Chapter (Amicus Curiae) (2019) eKLR.***

103. The High Court in affirming the position that illegally obtained evidence may only be excluded in a

trial in two instances referred to the South African case of **Gumede vs. S (800/2015) (2016) ZASCA 148**. The South African Constitutional Court while dealing with evidence obtained as a result of an unlawful search in violation of the right to privacy stated as follows: -

23. *This Court in S v Tandwa [7] made it clear that s 35(5) does not provide for automatic exclusion of unconstitutionality obtained evidence. In this regard it had this to say (paras 116 to 117):*

*'[116] . . . .*

*Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.*

*[117] In determining whether the trial is rendered unfair, courts must take into account competing social interests. The court's discretion must be exercised "by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to accused persons". Relevant factors include the severity of the rights violation and the degree of prejudice, weighted against the public policy interest in bringing criminals to book. Rights violations are severe when they stem from the deliberate conduct of the police or are flagrant in nature. There is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused. Rights violations are not severe, and the resulting trial not unfair, if the police conduct was objectively reasonable and neither deliberate nor flagrant.... (emphasis added).*

104. The High Court in **Philomena Mbete Mwilu vs. Director of Public Prosecutions & 3 Others** case (supra) also referred to **S v Magwaza 2016 (1) SACR 53** where the South African Constitutional Court had the following to say: -

*[15] Although s 35(5) of the Constitution does not direct a court, as does s 24(2) of the [Canadian] Charter, to consider "all the circumstances" in determining whether the admission of evidence will bring the administration of justice into disrepute, it appears to be logical that all relevant circumstances should be considered (Pillay at 433h). Collins lists a number of factors to be considered in the determination of whether the admission of evidence will bring the administration of justice into disrepute, such as, for example, the kind of evidence that was obtained; what constitutional right was infringed; was such infringement serious or merely of a technical nature; and would the evidence have been obtained in any event. In Collins (at 282) Lamer J reasoned that the concept of disrepute necessarily involves some element of community views, and "thus requires the Judge to refer to what he conceives to be the views of the community at large". Pillay (at 433d – e) accepted that whether the admission of evidence will bring the administration of justice into disrepute requires a value judgment, which inevitably involves considerations of the interests of the public.'*

105. The High Court then went ahead and rendered itself as follows: -

**310. The Kenyan position on the rule that there is no automatic exclusion of illegally obtained evidence is thus shared in other jurisdictions. In our view, the determination of the question whether to exclude illegally obtained evidence on the basis that it will render the trial unfair is a matter within the jurisdiction of the trial court. However, there is the broader question of whether the illegally obtained evidence is otherwise detrimental to the administration of justice, which is an issue that as a court dealing with a petition alleging violation of constitutional**

***rights, we are under an obligation to consider. This is a duty that takes us beyond examining the question of fairness to the Petitioner and to the question whether there could be greater public policy implications arising from the conduct of the DCI.***

106. From the foregoing, the obtaining constitutional position in Kenya in respect to the applicability of Article 50(4) of the Constitution is that the determination of the question whether to exclude illegally obtained evidence is a matter within the jurisdiction of the trial Court. However, in instances where a determination is to be made on whether the illegally obtained evidence will ***render the trial unfair*** or is ***otherwise detrimental to the administration of justice***, then a Constitutional Court has the mandate to deal with the matter.

**(c) Whether the evidence contained in the Respondent's Supplementary Affidavit deponed to on 4<sup>th</sup> May, 2020 in the Divorce Cause is illegally obtained evidence and whether such evidence ought to be excluded from the Divorce Cause:**

107. The Respondent herein, who is the Petitioner in the Divorce Cause, filed a supplementary affidavit in the Divorce Cause. The affidavit was sworn on 4<sup>th</sup> May, 2020. The Respondent herein, through the supplementary affidavit in the Divorce Cause, seeks to adduce 68 pieces of evidence. I will, henceforth, refer to the said affidavit as '***the supplementary affidavit***'.

108. The Petitioner herein, RC, objects to 45 out of the 68 pieces of evidence sought to be adduced against her in the Divorce Cause. The evidence runs upto 840 pages and is contained in two bundles.

109. The Petitioner has categorised the evidence she is challenging into **three clusters**. The *first cluster* consists of 6 flash disks. The Petitioner contends that those flash disks have not yet been availed to herself. They are, however, listed under items 3, 22, 54, 64 and 67 in the Schedule of evidence in the supplementary affidavit.

110. The *next cluster* are transcripts of recorded conversations and the *last cluster* are photographs and images printed and based on camera captions mostly by a private investigator. The messages include *WhatsApp* messages and *WhatsApp* downloads as well as computer downloads.

111. The Petitioner objects to the said pieces of evidence on the grounds that they were variously obtained through secret, intrusive, unauthorized and illegal manner through secretly installed audio recording devices, unauthorized access to the Petitioner's email and social media accounts, through secretly installed surveillance cameras by a private investigator and all data obtained without the Petitioner's authority.

112. Referring to the affidavits of the parties, the Petitioner reiterates that the impugned 45 pieces of evidence ought to be disallowed as part of the evidence in the Divorce Cause. She contends that the said evidence has not been prepared for production in Court to enable the Court arrive at a just decision, but with the sole and singular intent of embarrassing, blackmailing and intimidating the Petitioner and to force her to abandon her claim to their matrimonial home and family assets and for custody of their children.

113. The Petitioner vehemently denies the insinuation by the Respondent that she did not change her passwords to her accounts so as to give the Respondent access to her accounts for maintenance purposes. Instead, the Petitioner deposes that she has constantly been changing her passwords, but the Respondent has always been hacking her accounts and mobile phones with a view of harvesting evidence for purposes of the various proceedings the parties are engaged in.

114. In any event, the Petitioner contends further that if at all she gave the Respondent any access to her accounts, which she vehemently denies, then the access stood extinguished and withdrawn the moment the Respondent decided to collect evidence in support of divorce proceedings the Respondent had filed against the Petitioner in the lower Court.

115. The Petitioner submits that the manner the Respondent obtained the impugned evidence infringes on her right to privacy as guaranteed under Article 31 of the Constitution as well as her right to dignity and having that dignity respected under Article 28 of the Constitution. She further submits that the right to privacy protects the very core of the personal sphere of an individual and envisages the right to live one's own life with minimum interference.

116. Whereas the Petitioner is aware that the right to privacy is not absolute, she contends that the same can only be limited in the manner contemplated under Article 24 of the Constitution.

117. It is the Petitioner's further submission that the Respondent's conduct in issue contravenes international instruments which by virtue of Article 2 of the Constitution of Kenya, they form part of the law on Kenya. They are Article 12 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Civil and Political Rights.

118. The Petitioner also submits that the impugned conduct infringes on the Data Act and the Computer Misuse Act.

119. The decisions in *JWI & Another vs. Standard Group Limited & Another (2015) eKLR*, *Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others (2015) eKLR*, *Okiya Omtatah Okoiti vs. Communication Authority of Kenya & 8 Others (2018) eKLR*, *Kenya Human Rights Commission vs. Communication Authority of Kenya & 4 Others (2018) eKLR* and *Joel Mutuma Kirimi & Another vs. National Hospital Insurance Fund (NHIF) (2020) eKLR* were variously referred to in demonstrating several aspects of the breach of the right to privacy.

120. The Respondent fronts the position that the issue as to whether the impugned evidence is illegally obtained ought to be dealt with before the trial Court. It is submitted that the allegation that the Respondent intends to embarrass the Petitioner does not arise since divorce proceedings are usually conducted in camera. Further, adultery is a ground for dissolution of marriage in law.

121. In this matter, it is the trial Court to determine whether to exclude the impugned evidence unless it is demonstrated by the Petitioner that the evidence will be detrimental to the administration of justice.

122. In ***Philomena Mbete Mwilu vs. Director of Public Prosecutions & 3 Others case*** (supra) the High Court was clear that under Article 50(4) of the Constitution, it is the trial Court to determine whether or not to exclude illegally obtained evidence unless it is demonstrated before the High Court, sitting as a Constitutional Court, that such evidence is detrimental to the administration of justice.

123. The Court, in a progressive and forward-looking approach, dealt with the broader question which was whether the illegally obtained evidence is otherwise detrimental to the administration of justice. The Court stated thus:

***..... This is a duty that takes us beyond examining the question of fairness to the Petitioner and to the question whether there could be greater public policy implications arising from the conduct of the DCI.***

124. There is no much contestation in the manner the impugned evidence was obtained. The question which now begs an answer is whether in public policy considerations the evidence is otherwise detrimental to the administration of justice.

125. The High Court dealt with the public policy consideration in ***Philomena Mbete Mwilu vs. Director of Public Prosecutions & 3 Others case*** (supra) as follows: -

*311. The DCI in this matter obtained an order to examine an account in KCB Bank belonging to Blue Nile East Africa Ltd. In the course of examining the account the subject of that order, he may have stumbled on information that somehow led him to the Petitioner's accounts with IBL. If at that point he had reasonable cause to investigate the Petitioner's accounts, he had the option of*

accessing those accounts by invoking the aid of the provisions of sections 118-121 of the CPC and section 180 of the Evidence Act. Instead, the DCI appears to have misrepresented to Mohamud that the order in **Miscellaneous Application No. 2225 of 2018** empowered him to access and investigate accounts in IBL, including the Petitioner's.

312. The Petitioner is the second highest ranking officer in an arm of government, the judiciary. The DCI obtained access to her accounts on the basis of a misrepresentation, by using a court order that was not obtained in respect of her accounts. There is thus demonstrated a clear violation of the Petitioner's right to privacy guaranteed under Article 31. To countenance such conduct with respect to a person of the rank of the Petitioner must beg the question: how do the rights of ordinary citizens fare? **In our view, the conduct of the DCI in this respect was so egregious and objectively unreasonable and deliberate that to allow reliance on any evidence obtained as a result would be detrimental to the administration of justice.....**

126. The conduct which was frowned upon by the High Court in the *Philomena Mbeti Mwilu vs. Director of Public Prosecutions & 3 Others* case (supra) was the outright disregard of the law by the DCI. In that case the DCI misrepresented facts and used an order obtained in another unrelated matter to access the personal bank accounts of the Deputy Chief Justice who was the Petitioner.

127. In this case, the Respondent used many ways to gather the impugned evidence. One of them was the use of a private investigator who trailed the Petitioner and took several photographs of and concerning the Petitioner. Whereas the use of private investigators is permissible in law, the manner in which the investigators carry out their duties and gather evidence must be in tandem with the Constitution and the law. There is neither evidence that the Petitioner consented to being trailed and photographed nor a Court order sanctioning such conduct on the part of the investigator. If police officers, while investigating crimes, must either obtain the consent of the person who is under investigation or obtain orders of the Court to access the suspect's private information, what of private investigators?

128. There was also the issue of using secretly implanted CCTV devices and other sound recording devices implanted either in vehicles or elsewhere to record the Petitioner's conversations and movements. The Petitioner denied any knowledge on such arrangements and contends that they were solely carried out by the Respondent. In one instance, the Petitioner filed a disposition by *Douglas Lihanda*, a gardener in one of the houses next to the parties' residence in Ridgeways in Nairobi confirming that a recording device had been planted at a place where the Petitioner used to make calls from. That disposition was not impugned.

129. The Respondent contends that all CCTV installations in their matrimonial home, vehicles and office were installed with the full consent of the two parties who are the Directors of their company.

130. The Petitioner admits to the installation of CCTV system in their matrimonial home. She, however, clarifies that the cameras were mounted at the gate, in the living room, at the TV room, in the dining room and in the Master bedroom which is currently and exclusively occupied by the Respondent. The Petitioner further clarifies that there was never any installation of a camera in their son's bedroom, which room the Petitioner currently occupies. The Petitioner contends that when she differed with the Respondent and was thrown out of the Master bedroom she occupied their son's bedroom. It is when the Respondent secretly installed a camera in the room.

131. The Respondent, again, did not respond to that disposition.

132. It is common knowledge that CCTV installations are aimed at enhancing security. In a marriage set-up, when such installations are to be mounted either inside the matrimonial home or within the compound, the couple must agree over it. The reason being that the cameras capture various images and have a bearing on someone's privacy. In the event the installation is done without the knowledge or consent of one of the spouses, serious constitutional issues bordering on one's privacy and dignity are likely to arise.

133. Therefore, the conduct of secretly mounting CCTV cameras and recording devices in order to record another person's private conversations and movements, unless legally permissible, is not only uncouth, but least expected in this constitutional dispensation. Such amounts to an outright infringement of one's privacy and dignity.

134. In this case, I find and hold that the CCTV cameras installed at the gate, in the living room, at the TV room, in the dining room and in the Master bedroom which is currently occupied by the Respondent were all installed with the knowledge and consent of both the Petitioner and the Respondent. However, there is no evidence to confirm that the Petitioner consented to the installation of a camera in their son's bedroom after she started living therein.

135. There is as well no contestation to the installation of the CCTV system at the couple's company premises.

136. There is, however, an issue on fitting of the vehicle which was in use by the Petitioner with a tracking device and a voice recorder. The Petitioner was well aware of the installation of the tracking device in her vehicle or the vehicle she usually used. She was, however, unaware of the further installation of a voice recorder in the car. The Petitioner contends that, as a wife to the Respondent and a Co-Director in their family company, she is well aware that the tracking devices fitted in their personal vehicles or company devices do not have any voice recording devices.

137. The Respondent contends that the decision to install the tracking devices fitted with audio recordings was a company resolution and as a result all the company vehicles were so fitted with the said devices. The Respondent relied on the Affidavit sworn by one *Charles Micah Musau* sworn on 12<sup>th</sup> December, 2020 to that effect.

138. I have carefully perused the Affidavit sworn by one Charles Micah Musau. It has some annexures thereto. One of them is Monthly Minutes of the parties' company Transport Department. The minutes is dated 7<sup>th</sup> August, 2018. The minutes are not a resolution of the company. They were only departmental minutes which in any event were subject to approval of the company by way of a resolution. Such minutes, without any evidence of adoption by the company through a resolution, cannot speak for and on behalf of the company. There is also no evidence confirming that whatever is contained in the minutes is what was eventually installed in all the company vehicles courtesy of a company resolution.

139. The minutes also propose the fitting of both audio and video devices in the company vehicles. In the absence of a resolution of the company to that effect then the company or any of its departments remained under a duty to further and fully disclose to the Petitioner that all the company vehicles were **also** fitted with voice recorders.

140. The Petitioner contends that the company only approved the installation of tracking devices without audio recordings. Neither the company nor the Respondent informed the Petitioner of the voice recorders installed in the company vehicles or the vehicle which was in use by the Petitioner.

141. I now find, that the secret installation of the voice recorder in the vehicle usually used by the Petitioner was in violation of the Petitioner's rights to privacy and dignity.

142. In justifying the Respondent's access to the Petitioner's email accounts and social media accounts, the Respondent alleged that he had helped the Petitioner, as his wife, to initially set up those accounts and as such he had access and further that the Petitioner had given him access to carry out maintenance of the accounts. The Petitioner filed an affidavit disputing such. However, the Respondent did not, in any other way, counter the Petitioner's position.

143. Be that as it may, even by taking it that the Petitioner truly gave the Respondent her passwords, which position is denied, the access to the accounts was conditional. The Respondent was only allowed to carry out maintenance of the accounts and nothing more. By accessing the Petitioner's personal data in her accounts, the Respondent overstepped the conditional right of access.

144. I must say that the Constitution regards every person as a distinct individual whose rights and fundamental freedoms are individually and variously guaranteed and protected. Marriage does not take away the constitutionally-guaranteed rights and fundamental freedoms of a spouse neither are such rights and fundamental freedoms of one spouse subsumed by the other spouse upon marriage.

145. Article 45(3) of the Constitution affirms the foregoing as follows: -

***Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.***

146. The Respondent cannot, therefore, allege that as the husband who he had the Petitioner's passwords to her private accounts, had unconditional access to the Petitioner's accounts. I say so because the Constitution clearly speaks against such. Further, whereas the issue of the Petitioner granting the Respondent her accounts' passwords is denied and instead the Petitioner contends that she has severally changed her passwords, but the Respondent, being an experienced ICT expert, has always hacked into her accounts, the Respondent did not specifically counter the assertions.

147. It primarily seems that the Respondent gathered the evidence in order to support the Divorce Cause. Be that as it may, there are several lawful ways the Respondent would have opted for to obtain the information he needed. For instance, had he reported the matter to the police, investigations would have been undertaken in respect to the issue of abortion which is a criminal offence. In the course of those investigations, it is possible that most of the information which the Respondent obtained and is part of the supplementary affidavit would have been unveiled. Further, depending on the system of marriage the parties contracted under, bigamy may be a criminal offence.

148. Article 3 calls upon every person to respect, uphold and defend the Constitution. It is the Constitution which prohibits the use of illegally obtained evidence which impedes the administration of justice.

149. The Learned Judges in the ***Philomena Mbete Mwilu vs. Director of Public Prosecutions & 3 Others case*** (supra) posed the following question: '.... *To countenance such conduct with respect to a person of the rank of the Petitioner must beg the question: how do the rights of ordinary citizens' fare?*

150. Everyone is equal before the law. That is the essence of Article 27 of the Constitution. Unless constitutionally and statutorily permissible, discrimination is outrightly outlawed. Therefore, suffice to say that the considerations made by the Court in the *Philomena Mbete Mwilu vs. Director of Public Prosecutions & 3 Others case* (supra) ought to apply to other cases as well.

151. The Court in *Philomena Mbete Mwilu vs. Director of Public Prosecutions & 3 Others case* (supra) allowed the Petition primarily on the grounds that the DCI had used unorthodox means to obtain evidence against the Petitioner. The DCI is a State organ which is mandated to conduct criminal investigations. If such a body can be faulted for flouting the law in the course of its lawful duties, what of an ordinary person who takes it upon himself to carry out investigations on issues which border on criminal conduct without the involvement of the police or the Courts? Such a person has no option than complying with the Constitution and the law.

152. If such conduct by private citizens is not checked and sanctioned accordingly, then the end result will be fanning chaos in the society. It will be open to everyone to run around and gather evidence against the other in any manner. Such tendencies must be regulated. There must be order in doing things. Illegal ways of gathering information must be discouraged since the Constitution and the law provide for ways within which any information may be obtained.

153. It is on that basis that the Supreme Court did not hesitate to reject evidence which was obtained contrary to the Constitution and the law in ***Presidential Election Petition No. 4 of 2017, Njonjo Mue & another -vs- Chairperson of Independent Electoral and Boundaries Commission & 3 others case*** (supra). The Court of Appeal as well as the High Court have severally so followed suit.

154. This case is, therefore, not an exception. Whereas one can argue that the trial Court is best suited to determine the admissibility or otherwise of the impugned evidence, the circumstances of this case call for greater and further public policy considerations by this Court.

155. There is a great danger in the administration of justice if the manner of gathering evidence will not be confined to within the Constitution and the law. It cannot be the norm that every '*Tom, Dick and Harry*' can do as it pleases in obtaining adverse evidence against another. There must be order in commanding things both in the public realm as well as in private affairs. It is that order which is dictated upon by the Constitution and the law.

156. The foregoing discussion has, hence, demonstrated that it is in public interest that everyone abides by the Constitution and the law. It is indeed long overdue, and its high time that everyone must accept that this Country is under a different constitutional dispensation. The people of Kenya spoke and their sovereignty reigns.

157. In the end, this Court finds and hold that in this case, any evidence procured from the CCTV camera secretly installed in the parties' son's bedroom, evidence from any voice recorder, evidence gathered by the private investigator and any evidence from the Petitioner's email and social media accounts, all amount to illegally obtained evidence and that, such evidence, offends the administration of justice.

158. Having so said, and for clarity, I will now run through the evidence sought to be expunged from the record before the Divorce Cause by the Petitioner.

159. **KKRS003** is the flash drive containing footage of the accident caused by the Respondent outside his residence. Its production cannot in the remotest possibility be said to infringe any of the Petitioner's rights under the Constitution. CCTV surveillance of outdoor happenings are public and cannot infringe anyone's right to privacy or dignity.

160. **KKRS004** is the Police Occurrence Book (OB) report details. Its use in the Divorce Cause will not in any way prejudice the administration of justice. The very nature of the contents of the OB is that it's a public document. As such, it is admissible. **KKRS005**, **KKRS006** and **KKRS013** are audio recordings having a bearing on the Petitioner's alleged abortion. They are obtained from CCTV gadgets which were secretly mounted in the son's bedroom. The manner in which that evidence was procured infringes Article 31 of the Constitution and as such are inadmissible.

161. **KKRS007** are reports emanating from the Custody case. Court documents are for all purposes and intents admissible before another Court of law. **KKRS008** is the recording of the Petitioner and the Respondent conversation. Having regard to the provisions of Article 31(d) of the Constitution its production violates the Petitioner's right to privacy. **KKRS009** are pictures of school diary signed by the Petitioner, they do not in any way violate her rights claimed in this Petition.

162. **KKRS011** is the recording of conversations between the Petitioner in presence of the Respondent, one Rohan and Esther which the Respondent, in the recording, among other things admits as being a good father. To the extent that it contains communications in respect of the Petitioner, it violates her right to not to have her communications infringed. **KKRS013** is the recording of the Petitioner's conversation about an alleged abortion she had. Its admission to evidence violates the Petitioner's right to have private communications. **KKRS014** are telephone conversations of the Petitioner with an alleged lover of hers named Rohan. Its admission into evidence violates Article 31(d) and consequently Article 50(4) of the Constitution.

163. **KKRS015** is the video and photo evidence of and belonging to the Respondent in his house. The Petitioner cannot purport to claim violation of her constitutional rights for production such evidence. They are not hers and the Petitioner has not demonstrated how they infringe on her rights.

164. **KKRS016** is transcription of the telephone conversation between the Petitioner and a person allegedly called Rohan. The same offends Article 31(d) and 50(4) of the Constitution and are not

admissible.

165. The evidence contained in **KKRS017** and **KKRS018** is two-fold. One relates to the Petitioner's conversation with her son and another one with her alleged lover. In view of the manner in which the evidence was procured, it violates the Petitioner's right to privacy. **KKRS019, KKRS020, KKRS021, KKRS022, KKRS024 and KKRS026** are recordings and information of the Petitioner's private conversations and her alleged lover's bio-data. Their admission will violate her rights under Article 31 and 50(4) of the Constitution.

166. **KKRS025** contains information relating to business and investments owned and run by the Petitioner and the Respondent. This information which is in the knowledge of both parties and its production by the Respondent cannot be said to be in violation of any of the Petitioner's claimed constitutional rights.

167. **KKRS029** is an apology from the Petitioner to two persons named Peninah and Kenneth. It was recorded at the Police station by the Petitioner. The production of the said document will not in any way infringe on her rights asserted herein.

168. **KKRS 031** are medical reports. The Respondent does not indicate where they were obtained from. It also cannot be discerned from Respondent's Supplementary Affidavit how he got them as exhibits. The Respondent had the burden of demonstrating how the Reports came to his possession. Since there is no indication to that end, that evidence is inadmissible.

169. **KKRS033** is a pregnancy scan of the Petitioner which the Respondent claims the Petitioner had an illegitimate pregnancy for which she procured an abortion. *It was found by the Respondent in the drawers of their son's bedroom.* In view of the fact that the house is their matrimonial home and that they are still a married couple, the same cannot pass the test of illegally obtained evidence. The Petitioner does not controvert the place the Respondent obtained the same. Had it been from a hospital record, it would have infringed on the Petitioner's right to privacy. That evidence is admissible.

170. **KKR 034** is a mere Police Occurrence Book (OB) report details. Its use in the Divorce Cause will not in any way prejudice the administration of justice. The very nature of the contents of the OB is that it's a public document. As such, it is admissible.

171. **KKRS035, KKRS41 and KKRS42** are purchase receipts, airline booking tickets and hotel receipts of the Petitioner. They were procured from the Petitioner's private custody. Given the manner in which they were procured, the evidence is inadmissible.

172. **KKRS037** are personal diary entries that do not entitle the Respondent access to without consent of the Petitioner. The diary information is hence inadmissible.

173. **KKRS043** are screenshots of the Petitioner's personal communication. They are an affront to the right under Article 31 of the Constitution. **KKRS050** are admissible, they are information caught at public place relating to violence.

174. **KKRS052, KKRS053, KKRS054 and KKRS058** are exhibits harnessed from the CCTV cameras which cameras the Petitioner was well aware of. They are admissible.

175. **KKRS056, KKRS 058** is a photo and OB details. The same have no bearing on the Petitioner's rights claim. They are admissible.

176. **KKRS061, KKRS062, KKRS064, KKRS065, KKRS066 and KKRS067** are all evidence captured through unorthodox means by the Respondent. They violate the Petitioner's rights under of the Constitution.

177. From the foregoing, exhibits marked as **KKRS 5, 6, 8, 11, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24,**

26, 31, 35, 36, 37, 38, 41, 42, 43, 44, 55, 61, 62, 64, 65, 66 and 67 amount to illegally obtained evidence and is detrimental to the administration of justice.

**Disposition:**

178. Flowing from these findings and conclusions, the disposition of the Petition dated 8<sup>th</sup> December, 2020 is as follows: -

**(a) A declaration hereby issues that the Respondent's action of secretly installing a CCTV camera in the parties' son's bedroom which room the Petitioner currently occupies, the Respondent's actions of secretly and variously installing voice recorders with a view to record the Petitioner's private conversations, the Respondent's action of secretly using a private investigator and the Respondent's actions of accessing the Petitioner's email and social media accounts without the consent of the Petitioner all offend Articles 28, 31 and 50(4) of the Constitution.**

**(b) An order, be and hereby issue, expunging the evidence and exhibits listed and marked as KKRS005, KKRS006, KKRS008, KKRS011, KKRS013, KKRS014, KKRS016, KKRS017, KKRS018, KKRS019, KKRS020, KKRS021, KKRS022, KKRS023, KKRS024, KKRS026, KKRS031, KKRS035, KKRSO36, KKRS037, KKRS038, KKRS041, KKRS042, KKRS043, KKRS044, KKRS055, KKRS061, KKRS062, KKRS064, KKRS065, KKRS066 and KKRS067 in the Supplementary Affidavit sworn by KKR on 4<sup>th</sup> May, 2020 and filed in Milimani Chief Magistrate's Divorce Cause No. 672 of 2019; KKR vs. RC.**

**(c) An order of prohibition, be and is hereby, directed at the Chief Magistrates Court in Nairobi or any other Court not to admit in its records any of the exhibits and evidence marked as KKRS005, KKRS006, KKRS008, KKRS011, KKRS013, KKRS014, KKRS016, KKRS017, KKRS018, KKRS019, KKRS020, KKRS021, KKRS022, KKRS023, KKRS024, KKRS026, KKRS031, KKRS035, KKRSO36, KKRS037, KKRS038, KKRS041, KKRS042, KKRS043, KKRS044, KKRS055, KKRS061, KKRS062, KKRS064, KKRS065, KKRS066 and KKRS067 in the Supplementary Affidavit sworn by KKR on 4<sup>th</sup> May, 2020 and filed in Milimani Chief Magistrate's Divorce Cause No. 672 of 2019; KKR vs. RC.**

**(d) The Respondent shall bear the costs of the Petition.**

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF APRIL, 2021**

**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

**Mr. Owino, Counsel for the Petitioner.**

**Mr. Khan, Counsel for the Respondent.**

**Elizabeth Wambui – Court Assistant.**