



**Nation Media Group Ltd & 2 others v Gulbahar (Civil Appeal  
E603 of 2022) [2025] KEHC 2325 (KLR) (Civ) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2325 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E603 OF 2022**

**TW OUYA, J**

**FEBRUARY 13, 2025**

**BETWEEN**

**NATION MEDIA GROUP LTD ..... 1<sup>ST</sup> APPELLANT**

**WALTER OUMA OPIYO ..... 2<sup>ND</sup> APPELLANT**

**DAVID WEKESA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**BULENT GULBAHAR ..... RESPONDENT**

*(Being an appeal from the Ruling and order of the Honourable Principal Magistrate E.M Kogoni delivered on the 15th day of July, 2022 in Milimani No. CMCC No. 1335 of 2020)*

**RULING**

**Background**

1. This appeal emanates from the Ruling and order of the Hon. Principal Magistrate Kogoni delivered on the 15<sup>th</sup> day of July 2022 in Milimani CMCC No. 1335 of 2020.
2. The suit was initiated in the Lower Court by Bulent Gulbahar (Respondent herein) against Nation Media Group Ltd., Walter Ouma Opiyo and David Wekesa (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein). The matter arose from an allegation of defamation through a publication and broadcast by 1<sup>st</sup> Appellant titled 'TURK ATTACK' through the 1<sup>st</sup> Appellant's television network station NTV, online social media platforms, Instagram, twitter and Facebook as well as dedicated YouTube channel, content about the Respondent which was alleged to be untrue and defamatory.
3. Vide a notice of motion dated 16<sup>th</sup> November 2021 the Respondent moved the court praying for orders that;



- i. The 1<sup>st</sup>, 2<sup>nd</sup> and/or 3<sup>rd</sup> Defendants be ordered to produce for inspection by the plaintiff a copy of the full version of the CCTV recording relating to 3<sup>rd</sup> March 2019, of which they have broadcasted a fragment on various days through its media stations and communication platforms from 5<sup>th</sup> March onwards.
  - ii. The costs of this Application be borne by the defendants on full indemnity basis.
4. The application was based on grounds and supporting affidavit sworn by Bulent Gulbahar averring inter alia that the subject incident occurred at the parking lot of Gateway Business Park along Mombasa Road on 3<sup>rd</sup> March 2019. That in the broadcast and publication the Appellants gave interview to employees wherein various false and defamatory information about the Respondent which were broadcasted and published including a CCTV fragment recording of the incident of 3<sup>rd</sup> March 2019.
5. He stated further that the CCTV footage is in full and exclusive custody and control of the Appellant and that the Respondent was left with no option but to move the court by way of an application. The application was opposed by the Appellant herein who raised a preliminary objection on the basis that the notice to produce was never served upon them pursuant to section 69 of the *Evidence Act* and that the orders sought were not capable of being enforced against the 1<sup>st</sup> Appellant.
6. The court made a ruling in favor of the Respondent issuing an order that:

It is hereby ordered:-

  - i. That the 1<sup>st</sup> defendant/ Respondent be and is hereby ordered to within twenty-one (21) days produce for inspection by the Plaintiff a copy of the full version of the CCTV recording relating to 3<sup>rd</sup> March, 2019 of which they have broadcasted a fragment on various days through its media stations and communication platforms from 5<sup>th</sup> March, 2019 onwards.
  - ii. That the costs of this application shall be in the cause.
7. The Appellants being aggrieved, appeal to the high court against the whole of the above ruling and order of the trial court on the following grounds:
  - a. That the learned magistrate erred in law and in fact by ordering the first Appellant to produce a copy of the full version of the CCTV recording, relating to the 3<sup>rd</sup> March 2019, when the same is not in the possession of the first Appellant.
  - b. That the learned magistrate erred in law and in fact in failing to take into consideration that the first Appellant was not the author of nor privy to and/or in possession, custody of the publication titled 'VIOLENT TURK'.
  - c. That the learned magistrate erred in law and in fact in failing to find that the first appellant is not in possession, custody and/or control of any CCTV recording that purportedly resulted to the publication of the broadcast titled 'VIOLENT TURK' which was not published and/or broadcasted by the first appellant.
  - d. That the learned magistrate erred in law and in fact in failing to find that save for the publication and broadcast titled 'TURK ATTACK' by the first Appellant, the first appellant is still not in possession, custody and care of the original full version of the CCTV recordings relating to the subject incident that took place on the 3<sup>rd</sup> March 2019.



- e. That the learned magistrate erred in law and in fact in failing to recognize the fact that the first Appellant herein being a different and independent entity cannot be compelled to produce CCTV recordings (if any) of another independent media house.
  - f. That the learned magistrate erred in law and in fact by finding that section 69 of the Evidence Act did not apply to the circumstances herein.
  - g. That the learned magistrate erred in law and in fact in failing to appreciate the submissions and authorities made on behalf of the first Appellant.
  - h. That the learned magistrate erred in law in making an erroneous decision that was not backed by the law.
8. The Appellants pray for orders that:
- i. The Ruling and orders of the learned Magistrate made on the 15<sup>th</sup> day of July, 2022 be set aside be in the following terms;
  - ii. The Respondent's Application dated 16<sup>th</sup> day of November 2021 be dismissed with cost to the Appellants.
  - iii. The costs of this Appeal be awarded to the first Appellant.

### **Sumissions**

9. This appeal was canvassed by way of submissions by counsel for the Appellants and Bulent Gulbahar, the respondent in person. The counsel for the appellant raised three issues: That the CCTV recording relating to the 3<sup>rd</sup> March 2019 is not in the possession of the 1<sup>st</sup> Appellant. That save for the broadcast 'Turk Attack', the 1<sup>st</sup> appellant is not the author or privy/ in possession and custody of publication titled 'Violent Turk'. That no notice to produce was ever issued and served on the appellant. The appellant urges the court to find that the orders made by the trial court made were against the law, clear statutory provisions and equity. Counsel refers to the case of Charles Ogola Obiero v Joseph Munyambu Karega (2017) eklr where the court of appeal quoted the case of Ephantus Mwangi and Another v Dancun Mwangu Wambugu(1982-88) 1 KAR 278, where it was espoused that a court of appeal can interfere with a finding of fact of a trial court when it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on the wrong principles in reaching his conclusion.
10. The respondent has on the other hand raised three main issues; That the appeal is frivolous and an abuse of the process of the court. That the appellant has not made any deposition that "Turk Attack" and "Violent Turk" are two different publications. That section 69 of the Evidence Act bars reliance on secondary evidence at trial having failed to issue notice to produce and does not apply in the instant circumstances. The respondent urges the court to hold that the appellant has failed to make a case to warrant this appellate court's interference. He cites the authority of Nation Media Group Limited v Nyawiri (Civil Appeal E065 of 2022)(2024)KEHC 3129 KLR where the court held inter alia that:
- "A court of appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on the wrong principles in reaching his conclusion."



## Analysis

11. This court has considered the record of appeal and submissions by the parties herein together with the authorities cited. The court has identified two key issues for determination: Whether the material sought to be produced is in the exclusive custody and control of the appellant and if so, whether the respondent can be compelled to avail the same. It is first paramount to be clear about what content the Respondent sought to be produced. The impugned order refers to “a copy of the full version of the CCTV recording relating of 3<sup>rd</sup> March,2019”. The said order also suggests that the Appellant has “broadcasted a fragment (of the above) on various days through its media stations and communication platforms from 5<sup>th</sup> March, 2019 onwards.”
12. The respondent has the right of access to information and the Appellant could be compelled to produce such under section 4 (1) b of the [Access to Information Act](#) which provides inter alia that:
  - “Subject to this Act and any other written law, every citizen has the right of access to information held by—
  - a. The State; and
  - b. Another person where that information is required for the exercise or protection of any right or fundamental freedom.”The key words here are “held by the state or another person...”.
13. This court also observes that the appellant in his memorandum of appeal stated categorically that they were not the author nor privy to or in possession, custody of the publication “violent attacks”, they were not in possession, custody or in control of any CCTV recording that resulted in publication of “violent attack”. That the first appellant is a different and independent entity and cannot be compelled to produce CCTV recording (if any) of another independent media house. The same sentiments were reflected in the 1<sup>st</sup> appellant’s replying affidavit sworn by Sekuo Owino on 25<sup>th</sup> May 2025 in replying to the Respondent’s application. The same sentiments are reiterated in the Appellant’s submissions. It appears that the trial court did not confine itself to the publication titled ‘Turk Attack or Violent Attack’ as these are semantics that are well understood by the appellant and the respondents herein. The impugned order refers to the entire CCTV recordings of 3<sup>rd</sup> March 2019 which may presumably contain both contents.
14. It is noteworthy that the appellant refers to Standard Group Media, a different and independent entity all together from the first Appellant herein, which it avers that is in possession of the original source of the CCTV recordings of 3<sup>rd</sup> March 2019 and who are not a party to this suit. Thus, the order is incapable of being enforced. Once this argument was advanced by the appellant, it was upon the respondent to verify the allegation and to confirm that the order as prayed for in the trial court would achieve the intended objective.
15. For the above reasons, this court holds that the Appellant could not be compelled to produce the material in issue since the respondent did not demonstrate it the same was held by the appellant.
16. This court notes that the Appellant relied on section 69 of the [Evidence Act](#) in his argument that the respondent did not serve him with notice to produce and therefore It could not be faulted for that. It is the view of this court that this was a wrong premise and the trial court was right in pointing out that the section applies to production of secondary documents and not to production of digital evidence. Section 78 of the [Evidence Act](#) (Chapter 80 Laws of Kenya) speaks to admissibility of digital evidence



but is not relevant to the issue at hand which concerns compelling a party to produce digital evidence which is in their custody and control.

17. In the instant case, the appellant contends that it is unable to provide the respondent with the said CCTV footage as it is in the custody of another entity which is not a party to this suit. Although the respondent has a right of access information under Article 35 of *the Constitution* and section of 4(3) *Access to Information Act* (No. 31 of 2016) the said right can only be granted by an entity in whose custody and control the information sought lies. The respondent has failed to demonstrate that the information sought is actually in the custody of the respondent. Moreover, the assertion by the appellant that the information is in the custody of another entity has not been controverted.
18. The effect of the impugned order by the trial court was to compel the appellant to produce for the respondent's inspection, the full version of the CCTV recording of 3<sup>rd</sup> March 2019 is both ambiguous because it does not specify the time and specific information required and unenforceable because it is addressed to a party who is not in possession and control of the required content.
19. Based on the above reasons and in line with the principle laid down in *Nation Media Group Limited v Nyawiri (Civil Appeal E065 of 2022)*(2024)KEHC 3129 KLR this court finds that the trial court misapprehended the law and evidence which is a basis for interference by this court.

#### **Determination**

20. The Appeal is hereby allowed. The ruling and order of the trial court delivered on 15<sup>th</sup> July 2022 is hereby set aside. Costs to the appellant.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> FEBRUARY DAY OF 2025**

**ROA**

**HON. T. W. OUYA**

**JUDGE**

For the Appellant: Ms. Were

For Respondent: Gulbahar in Person

Court Assistant: Martin Korir

