



**Cheruiyot v Ethics & Anti-Corruption Commission; Makhanu (Interested Party)  
(Anti-Corruption and Economic Crime Petition 3 of 2022) [2023] KEHC 3918 (KLR)  
(Anti-Corruption and Economic Crimes) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3918 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIME PETITION 3 OF 2022**

**EN MAINA, J**

**MAY 4, 2023**

**BETWEEN**

**EVANS K. CHERUIYOT ..... PETITIONER**

**AND**

**THE ETHICS & ANTI-CORRUPTION COMMISSION ..... RESPONDENT**

**AND**

**TITUS BARASA MAKHANU ..... INTERESTED PARTY**

**JUDGMENT**

1. By the Amended Petition dated September 26, 2022 which is expressed to be brought under Articles 10, 20(1), 22(1), 23(3), 24, 27, 28, 31, 32, 33, 36, 43(1), 47(1), 165(3)(d)(ii), 259, 50(2), 25(c) and 50(4) of the Constitution the Petition seeks reliefs as follows:
  - a. A declaration that recording of private communications between the interested party and the petitioner by the respondent and the interested party jointly and/or severally without the petitioner's consent in contravention of section 30(1)(a) of the Data Protection Act and without judicial authorization sought by and granted to the respondent in violation of section 64 of the National Police Service Act, in violation of section 118 of the Criminal Procedure Code, in violation of Article 24(1) and 24(3) of the the constitution of Kenya, in violation the petitioner's rights and fundamental freedoms under Articles 31(c) and (d), 32, 33, 28, 50(2), 47, 27, 50(4) and 43(1)(a) of the Bill of Rights in the constitution of Kenya, violation of the rule of law, violation of sections 25, 26, 28(3), 29, 30(1)(a), 30(1)(b)(vii) as read with subsection (3) thereof, 31, 32, 36, 39, 41, 42(1)(c) and (d), 43, 44, 45, 47, 51 and 72(2) of the Data Protection Act, violation of Article 17 of the International Covenant on Civil and Political



Rights, violation of the provisions of Article 12 of the Universal Declaration of Human Rights, violation of the provisions of Article 26 of the International Covenant on Civil and Political Rights, violation of the provisions of Article 3 of the African Charter on Human and Peoples' Rights, violation of the provisions of Article 7 of the Universal Declaration of Human Rights, violation of the petitioner's right to equal treatment by the law on investigations and equal protection of the law from discriminatory investigations, amounted to abuse of power by the respondent, amounted to violation of the law by the respondent and the interested party, is detrimental to giving of recommendation(s) by the respondent informed by the impugned recordings and/or transcripts thereof, is detrimental to the resulting recommendation(s) and is all together detrimental to the administration of justice.

- b. A declaration that the respondent and the interested party are subject to, are subject to, are not exempted from and are constitutionally and legally bound to comply with the provisions of section 64 of the [National Police Service Act](#), to comply with the provisions of section 118 of the Criminal Procedure Code, the provisions of section 60 of the [National Police Service Act](#), the provisions of Articles 24 and 31(c) and 31(d) of [the constitution](#) of Kenya and with the provisions of the Data Protection Act in any and all of their activities and/or operations that potentially reveal information relating to peoples' families or private affairs and potentially infringe on peoples' private communications.
- c. A declaration that the recording of private communications between the interested party and the petitioner by the respondent and by the interested party jointly and/or severally without the petitioner's consent in contravention of section 30(1)(a) of the Data Protection Act and/or without judicial authorization sought by and granted to the respondent violated the rule of law, violated of section 64 of the [National Police Service Act](#), violated section 118 of the Criminal Procedure Code, violated section 60 of the [National Police Service Act](#) and violated Article 24(1) and 24(3) of [the constitution](#) of Kenya, violated sections 25, 26, 28(3), 29, 30(1) (a), 30(1)(b)(vii) as read with subsection (3) thereof, 31, 32, 36, 39, 41, 42(1)(c) and (d), 43, 51 and 72(2) of the Data Protection Act and violated the petitioner's constitutional right not to have the petitioner's family or private affairs unnecessarily revealed and renders the recorded communications and/or transcripts thereof unconstitutional, illegal, unfair, null and void for all intents and purposes and is detrimental to giving of recommendation(s) by the respondent informed by the impugned recordings and/or transcripts thereof, detrimental to the resulting recommendations and is all together detrimental to the administration of justice.
- d. A declaration that the recording of private communications between the interested party and the petitioner by the respondent and by the interested party jointly and/or severally without the petitioner's consent in contravention of section 30(1)(a) of the Data Protection Act and/or without judicial authorization sought by and granted to the respondent violated the rule of law, violated of section 64 of the [National Police Service Act](#), violated section 118 of the Criminal Procedure Code, violated section 60 of the [National Police Service Act](#) and violated Article 24(1) and 24(3) of [the constitution](#) of Kenya, violated sections 25, 26, 28(3), 29, 30(1) (a), 30(1)(b)(vii) as read with subsection (3) thereof, 31, 32, 36, 39, 41, 42(1)(c) and (d), 43, 51 and 72(2) of the Data Protection Act and violated the petitioner's constitutional right not to have the privacy of the petitioner's communications infringed and renders the recorded communications and/or transcripts thereof unconstitutional, illegal, unfair, null and void for all intents and purposes and is detrimental to giving of recommendation(s) by the respondent informed by the impugned recordings and/or transcripts thereof, detrimental to the resulting recommendations and is all together detrimental to the administration of justice.



- e. A declaration that the giving away of the impugned recordings by the respondent's investigator to the interested party or granting of opportunity or permission by the respondent to the interested party to obtain audio and video recordings (or copies or a separate or duplicate or another set thereof of communications between the interested party and the petitioner held at various times between 01<sup>st</sup> June, 2021 and 17th September, 2021 at Ole Sereni Hotel along Mombasa Road in Nairobi violated the provisions of Chapter 33 paragraph 4(e) of the National Police Service Standing Orders and the recording, obtaining and distribution of the impugned recordings by the interested party to the petitioner and to the petitioner's employer was illegal, violated the rule of law, violated section 33(1) of the [Anti-Corruption and Economic Crimes Act](#), violated section 72(2) of the Data Protection Act, violated and/or resulted in violation of the petitioner's rights and fundamental freedoms under Articles 31(c) and (d), 32, 33, 28, 50(2), 47, 27, 50(4) and 43(1)(a) of the Bill of Rights in [the constitution](#) of Kenya, violated the provisions of Article 17 of the International Covenant on Civil and Political Rights, violated the provisions of Article 12 of the Universal Declaration of Human Rights, violated the provisions of Article 26 of the International Covenant on Civil and Political Rights and violated the provisions of Article 3 of the African Charter on Human and Peoples' Rights, violated the provisions of Article 7 of the Universal Declaration of Human Rights, amounted to interference with the ongoing investigations, renders the investigations unconstitutional, illegal, unfair and null and void for all intents and purposes and is detrimental to giving of recommendation(s) by the respondent informed by the impugned recordings, detrimental to the resulting recommendations, will be detrimental to any indictment and fair trial of the petitioner (if at all) and is all together detrimental to the administration of justice.
- f. A declaration that failure, refusal and/or neglect by the respondent's investigator to take the impugned evidence (audio and video recordings) before a magistrate at all or otherwise without undue delay in violation of section 118 of the Criminal Procedure Code and in violation of section 60(3)(b) of the [National Police Service Act](#) amounted to interference with the investigations, violated the provisions of Article 26 of the International Covenant on Civil and Political Rights and violated the provisions of Article 3 of the African Charter on Human and Peoples' Rights, violated the provisions of Article 7 of the Universal Declaration of Human Rights, renders the investigations unconstitutional, illegal and unfair and also amounted to failure to accord the petitioner administrative action that is reasonable and procedurally fair and violated the petitioner's right to equal treatment by the law on investigations and equal protection of the law from discriminatory investigations and is all together detrimental to the administration of justice.
- g. A declaration that admission into evidence of impugned record/ (s) of communications between the interested party and the petitioner (and/or transcripts thereof) held at various times between 01st June, 2021 and 17th September, 2021 at Ole Sereni Hotel along Mombasa Road in Nairobi for any purposes including in the ongoing investigations notwithstanding the violation of the rule of law, violation of the provisions of section 64 of the [National Police Service Act](#), violation of section 118 of the Criminal Procedure Code, violation of section 60 of the [National Police Service Act](#), violation of Article 24(1) and 24(3) of [the constitution](#) of Kenya, violation of the petitioner's rights and fundamental freedoms under Articles 31(c) and (d), 32, 33, 28, 50(2), 47, 27, 50(4) and 43(1)(a) of the Bill of Rights in [the constitution](#), violation of sections 25, 26, 28(3), 29, 30(1)(a), 30(1)(b)(vii) as read with subsection (3) thereof, 31, 32, 36, 39, 41, 42(1)(c) and (d), 43, 51 and 72(2) of the Data Protection Act, violation of section 33(1) of the [Anti-Corruption and Economic Crimes Act](#), violation of the



provisions of Chapter 33 paragraph 4(e) of the National Police Service Standing Orders, violation of the provisions of Article 17 of the International Covenant on Civil and Political Rights, violation of the provisions of Article 12 of the Universal Declaration of Human Rights, violation of the provisions of Article 26 of the International Covenant on Civil and Political Rights, violation of the provisions of Article 3 of the African Charter on Human and Peoples' Rights and violation of the provisions of Article 7 of the Universal Declaration of Human Rights renders the investigations unconstitutional, illegal, unfair, null and void for all intents and purposes and is detrimental to fair investigations, is detrimental to giving of recommendation(s) by the respondent informed by the impugned recordings, detrimental to the resulting recommendations, will be detrimental to any indictment and fair trial of the petitioner (if at all) and is all together detrimental to the administration of justice.

- h. A declaration that failure, refusal and/or neglect by the respondent and/or the interested party, in conducting the investigations, to adhere to the safeguards stipulated in the provisions of section 64 of the National Police Service Act, section 118 of the Criminal Procedure Code, section 60 of the National Police Service Act, Articles 24(1) and 24(3) of the constitution of Kenya, the safeguards stipulated in the provisions of sections 25, 26, 28(3), 29, 30(1) (a), 30(1)(b) (vii) as read with subsection (3) thereof, 31, 32, 36, 39, 41, 42(1)(c) and (d), 43, 44, 45, 47, 51 and 72(2) of the Data Protection Act, and violation of the safeguards intended by section 33(1) of the Anti-Corruption and Economic Crimes Act, violation of the safeguards under Chapter 33 paragraph 4(e) of the National Police Service Standing Orders, the failure to take the audio and video recordings before a magistrate at all or without undue delay in violation of section 118 of the Criminal Procedure Code and in violation of section 60(3)(b) of the National Police Service Act, violation of the provisions of Article 17 of the International Covenant on Civil and Political Rights, the provisions of Article 12 of the Universal Declaration of Human Rights, the provisions of Article 26 of the International Covenant on Civil and Political Rights, the provisions of Article 3 of the African Charter on Human and Peoples' Rights and the provisions of Article 7 of the Universal Declaration of Human Rights renders the investigations and the audio and video recordings thereof unconstitutional, illegal, unfair, null and void for all intents and purposes, is detrimental to giving of recommendation(s) by the respondent informed by the impugned recordings, detrimental to the resulting recommendations, will be detrimental to any indictment and fair trial of the petitioner (if at all) and is all together detrimental to the administration of justice.
- i. A declaration that the evidence in the nature of audio and video recordings (and/or transcripts thereof) of communications between the interested party and the petitioner held at various times between 01<sup>st</sup> June, 2021 and 17<sup>th</sup> September, 2021 at Ole Sereni Hotel along Mombasa Road in Nairobi which were recorded by the respondent and/or the interested party jointly and/or severally were obtained through state entrapment by the respondent in collusion with the interested party and private entrapment by the interested party, are inadmissible in evidence on account of the entrapment and admission of the said recordings into evidence by the respondent for any purposes including in the ongoing investigations renders the investigations unconscionable, irrational and unfair and is detrimental to giving of recommendation(s) by the respondent informed by the impugned recordings, detrimental to the resulting recommendations and is all together detrimental to the administration of justice.
- j. An order of prohibition does issue prohibiting the respondent from relying and/or from continuing to rely on audio and video recordings (and/or transcripts thereof) of communications between the interested party and the petitioner held at various times between 01\* June, 2021 and 17 September, 2021 at Ole Sereni Hotel along Mombasa Road in Nairobi



which were obtained by the respondent and the interested party jointly and/or severally for any purposes including in the ongoing investigations and/or from making recommendations and/or taking any other/further action on the said recordings and/or transcripts thereof.

- k. A mandatory injunction does issue compelling the respondent and the interested party to expunge from their investigations and both the respondent and the interested party to expunge from their records audio and video recordings (and/or transcripts thereof) of communications between the interested party and the petitioner held at various times between 01 June 2021 and 17 September, 2021 at Ole Sereni Hotel situated along Mombasa Road.
  - l. An order for compensation in general damages for violation of the petitioner's rights and fundamental freedoms as against the respondent and the interested party jointly and severally.
  - m. Exemplary damages as against the interested party.
  - n. Costs of this petition.
  - o. Interest on (xii), (xiii) and (xiv) above at court rates till payment in full.
2. The Application is made on the following grounds stated on the face of it and in the supporting affidavit:
- a. That it is an abuse of power by the respondent to admit the impugned video recordings into evidence for any purpose including the ongoing investigations.
  - b. Further, it will be an abuse of court process if the applicant is indicted and prosecuted for any offence (if at all) arising from the impugned recordings and investigations.
  - c. Granting of the orders sought will not fetter the respondent's ability to continue and complete investigations on the interested party's complaint.
  - d. The main evidence in support of the complaint and which is being relied on by the respondent as against the petitioner is the impugned recordings which were obtained without a search/written warrant and accompanied with misconduct and violations of the bill of rights and contravention of laws and applicable guidelines by the respondent and the interested party as aforesaid and the biased investigations by the respondent which renders the investigations unfair and any resultant trial of the petitioner (if at all) also unfair and is all together detrimental to the administration of justice.
  - e. The impugned recordings and misconduct by the respondent and the interested party violated and continue to violate the petitioners rights and fundamental freedoms, to wit:
    - i. Article 31 (d): The covert operation conducted by the respondent and the interested party jointly and/or severally was undertaken without a search warrant and in violation of the petitioner's/applicant's right not to have the privacy of his communications infringed.
    - ii. Article 32 (Freedom of conscience / Right to free will): Through entrapment, persistent coercion, inducement and attempted blackmail to take a course of action against Article 33: (Freedom of expression): Freedom to seek, receive, or impart information or ideas.
    - iii. Article 28 (Right to dignity): Exposure to societal ridicule and shame resulting from to perceptions of engaging in corrupt conduct and the embarrassment from potential he exposure to criminal trial and potential conviction.



- iv. Article 50(2) (Right to fair trial): Admission of the impugned video recordings into by evidence will render any resultant indictment and trial unfair (if at all).
  - v. Article 47 (Right to fair administrative action): Right to have the investigations conducted in a reasonable and procedurally fair manner.
  - vi. Right to have evidence obtained in violation of a constitutionally right excluded as such evidence will render the trial unfair,
  - vii. Right against self-incrimination: Right not to say anything that can later be used in evidence against me.
  - viii. Article 43 (Right to the highest attainable standard of health): *The constitution* of the World Health Organization defines health as 'A state of complete physical, mental, and social wellbeing and not merely the absence of disease or infirmity. With this definition peace of mind is a core component of mental health. The psychological disturbance arising from the complainant's extremely gross misconduct by using the video recordings to taunt and threaten me with forwarding the video recordings to the respondent and to my employer if I fail to do his bidding infringed on the my right to the highest attainable standard of mental health.
  - ix. The only reasonable thing to do is for the respondent to expunge the video recordings from its investigations and records and to carry out proper or warranted investigations and have proper oversight and supervision to prevent interference which impinges on the investigations, renders the investigations unfair and any resultant indictment and prosecution also unfair.
3. The Petitioner had alongside the Petition filed an Amended Notice of Motion Application dated 26<sup>th</sup> September 2022 seeking conservatory reliefs, which application was heard and determined; this court dismissed the Application vide the ruling delivered on 26<sup>th</sup> January 2023.
  4. In his written submissions the Petitioner framed 14 issues which can be summed as: whether the Respondent breached the Petitioner's rights under Articles 25,26,28(3),29, 30(1) (b) (vi) of *the Constitution*; whether the Petitioner was entrapped by the Respondent and the Interested Party; whether the admission in evidence of the impugned audio and video recordings is detrimental to the administration of justice; and whether the Petitioner is entitled to the reliefs sought.

**The case for the Respondent and Interested Party\_\_\*\***

5. The Respondent opposed the Amended Petition through the Replying and Supplementary affidavits sworn by John Nyangara on 16<sup>th</sup> May 2022 and 21<sup>st</sup> October 2022 respectively. The Interested Party opposed the Amended Petition by filing grounds of opposition, a Notice of preliminary objection which has since been disposed of and a Replying affidavit sworn by the Interested Party all dated 24<sup>th</sup> October 2022.
6. The Respondent contends that the Petition was triggered by a covert operation conducted by the Respondent on 12<sup>th</sup> August 2021 in regard to of alleged allegations of bribery against the Petitioner; that the only recording in their possession is that made through the Respondent's gadgets on 12<sup>th</sup> August 2021 and not 1<sup>st</sup> June 2021 to 17<sup>th</sup> September 2021 as contended by the Petitioner. that the Petitioner was not induced or coerced into having the recorded conversation he had with the Interested Party and that the operation was lawful.



7. The Respondent framed four issues for determination being: whether the Respondent required the Petitioner's consent or judicial authorization to carry out covert operations; whether the Amended Petition is premature; whether the recordings made on 12<sup>th</sup> August 2021 amounted to entrapment; and whether the Respondent violated the Petitioner's rights to privacy by facilitating the recording of his conversation with the Interested Party on 12<sup>th</sup> August 2021.
8. The Respondent contends that Section 11(1)(d) of the [Ethics and Anti-Corruption Commission Act](#) mandates it to investigate and recommend to the Director of Public Prosecutions any acts of corruption, bribery or economic crime or a violation of the Code of Ethics under any written law pursuant to Chapter 6 of [the Constitution](#). That Section 13 of the [Ethics and Anti-Corruption Commission Act](#) further vests it with the power to exercise that mandate. The Respondent contends that investigations are covert and there is no law that obligates the Commission to issue notice to the Petitioner or requires it to obtain warrants in order to carry out surveillance or trap operations.
9. The Respondent contends further that the allegation of breach of privacy by the Petitioner cannot arise as it is not an absolute or non -derogable right under Article 25 of [the Constitution](#); that Section 28 of the Data Protection Act permits the collection of data from other sources for purposes of investigations. Also, that the legality of the audio recordings can only be determined by the trial court when the evidence is tabled before it and that the Petition is therefore premature as it pre-empts the Respondent's investigations and/or any decision of the Office of the Director of Public Prosecutions to charge before that office has evaluated the evidence to determine whether it meets the threshold.
10. The Commission asserts that the impugned recordings do not amount to entrapment; that the Respondent's involvement in securing the recordings was passive and the Petitioner was not induced, coerced or influenced in any way in the conversation; that for the audio recordings to be held inadmissible, the Petitioner must demonstrate that his rights were unjustifiably violated rendering the proceedings unfair or inadmissible. Counsel for the Respondent distinguished third party monitoring and participant monitoring and submitted that the latter is admissible in evidence. Counsel cited the case of *S v Ismail and Others (SS88/2002) [2004] ZAWCHC 39* to support the submission that for the recordings to be admissible, they must meet the four fundamental principles which are that the recordings must have been done by a participant in the conversation and not a third party; the parties were privy to the truth of the matter they were discussing; the court or tribunal has direct evidence of the participant who made the recording; and the recording is of great probative value. Finally, Counsel submitted therefore that the recordings are not in contravention of Article 31 of [the Constitution](#) and that the Petition is unmerited and it should be dismissed.
11. On his part, the Interested Party deposed that the WhatsApp chat messages between him and the Petitioner and the Respondent began on 24<sup>th</sup> June 2021 and not 1<sup>st</sup> June 2021 as alleged by the Petitioner; that the conversations between 1<sup>st</sup> June 2021 to 17<sup>th</sup> September 2021 pertained to various instructions in the Petitioner's capacity as legal officer of Kenya Medical Supplies Authority (KEMSA); that the Petitioner merely made allegations but did not provide the particulars of the case number or court in which a case had been filed against him in regard to those conversations; that the WhatsApp chat messages produced before court were filed without a certificate of electronic evidence contrary to Section 65(5), (6) and (8) and 106B of the [Evidence Act](#). The Interested Party averred that he reported the Petitioner to the Ethics and Anti-Corruption Commission on 19<sup>th</sup> July 2021 and filed a formal complaint to have the Petitioner investigated and hence the allegation that he had coerced the Petitioner into the conversations is false. Further it is the Interested Party's case that the confirmation by the Petitioner that he was suspended from the Kenya Medical supplies Authority (KEMSA) on the basis of the complaint that he received bribes or solicited for Kshs 1,000,000 from the Interested Party is a



confirmation that the evidence was used to support (KEMSA) in undertaking administrative action; that none of the Petitioner's rights were violated and that the Petitioner is not entitled to the reliefs sought in the Amended Petition.

12. Issues for determination:

- i. Whether the audio and video recordings of the Petitioner's conversations with the Interested Party between 01<sup>st</sup> June, 2021 and 17<sup>th</sup> September, 2021 were in violation of the Petitioner's right to privacy
- ii. Whether the audio and video recordings amounted to entrapment of the Petitioner by the Respondent and whether the admission recordings in evidence would be detrimental to the administration of justice.
- iii. Whether the Petitioner is entitled to the reliefs sought

13. Analysis and determination

Issue (i): Whether the impugned audio and video recordings of the Petitioner's conversations with the Interested Party between 01<sup>st</sup> June, 2021 and 17<sup>th</sup> September, 2021 were in violation of the Petitioner's right to privacy

14. The Petitioner contends that the audio and video recordings of the Petitioner's conversations with the Interested Party between 01<sup>st</sup> June, 2021 and 17<sup>th</sup> September, 2021 were in violation of the right to privacy under Article 31 of *the Constitution* and a violation of Sections 31, 32,36,39,41 42 ,43,51, and 72 of the Data Protection Act and Section 33(1) of *Anti-Corruption and Economic Crimes Act*. That the Respondent provided an opportunity for the Interested Party to illegally obtain the impugned recordings without the Petitioner's consent. That the respondent processed the Petitioner's personal data illegally; the Interested Party arrogated to himself authority to investigate and proceeded to disclose the Petitioner's private data to his employer without lawful justification and in breach of Section's 25 and 26 of the Data Protection Act and also that the Interested Party did not have a legitimate interest in processing the Petitioner's private data.

15. Article 31 of *the Constitution* provides that:

“ 31. Every person has the right to privacy, which includes the right not to have-

- (a) their person, home or property searched;
- (b) their possessions seized;
- (c) information relating to their family or private affairs unnecessarily required or revealed; or
- (d) the privacy of their communications infringed.”

16. The right to privacy is however not an absolute right. Section 28(f) of the Data Protection Act provides exceptions where private data may be collected indirectly from a subject for purposes of investigating of a crime. The Section states:-

“ 28. Collection of personal data

- (1) A data controller or data processor shall collect personal data directly from the data subject.



- (2) Despite sub-section (1), personal data may be collected indirectly where—
- (f) collection of data from another source is necessary—
    - (i) for the prevention, detection, investigation, prosecution and punishment of crime;
    - (ii) for the enforcement of a law which imposes a pecuniary penalty; or
    - (iii) for the protection of the interests of the data subject or another person.” (emphasis mine)

17. I have considered the above stated Section 28 of the Data Protection Act alongside Section 118 of the Criminal Procedure Code upon which reliance is placed by the Petitioner. Contrary to the Petitioner’s assertions, none of these laws require that the Commission issues a notice to a party prior to commencing investigations in respect of a corruption, bribery or any other economic crime. While Section 118 of the Criminal Procedure Code makes provision for the power of the court to issue search warrants, it does not create a mandatory obligation upon the Commission or any other law enforcement agency to issue a notice prior to investigations. The provision has been the subject of several cases and in the case of Ethics and Anti-Corruption Commission and Director of Public Prosecution v Prof Tom Ojienda, SC T/A Prof Tom Ojienda & Associates Advocates and 2 others Petition No. 30 of 2019 (Consolidated with) Petition No. 31 of 2019 the Supreme Court of Kenya observed as follows:

“[73]....If the Commission is carrying out a police operation or an intelligence gathering or asset tracing exercise, it cannot be required to issue a prior mandatory Notice to the intended targets. In such a situation, the provision of Section 23 of ACECA, the *Evidence Act*, the CPC, and any other enabling legislation come into play. It’s however worth emphasizing that, at all times, whatever the nature of the investigations the Commission may be undertaking, it must do so within the confines of *the Constitution* and the law.”

18. In the case of Benson Muteti Masila & 5 Others v Chief Magistrate Milimani Law Courts & 4 others [2020] eKLR, it was held that courts should exercise restraint in interfering with the processes of investigative agencies and the office of the Director of Public Prosecution when carrying out their legislative mandates, unless in the clearest of cases where a party establishes a violation of rights: The court stated:

“111.Unhappily for the petitioners, it is not a man’s perception of himself or of his situation that determines whether he is to be investigated, or prosecuted. The law has given investigative agencies the mandate to carry out investigations, and prosecutorial power has been vested in the DPP. The jurisprudence that has emerged from our courts is that these bodies must be allowed to carry out their constitutional and legislative mandates. Only in the clearest of cases, where a party has established a violation of his rights under *the Constitution*, will the court intervene.”

19. The question then is whether the Petitioner has proved a violation of his rights. It is evidence that the Interested Party having made a report to the Respondent the impugned audio and video recordings of the Petitioner’s conversations with the Interested Party between 01<sup>st</sup> June, 2021 and 17<sup>th</sup> September,



2021 were recorded pursuant to the Commission’s investigative and intelligence gathering mandate under Section 11 (1) (c-e) of the [Ethics and Anti-Corruption Commission Act](#) to:

“receive complaints on the breach of the code of ethics by public officers; investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the [Anti-Corruption and Economic Crimes Act](#) or any other law enacted pursuant to Chapter Six of [the Constitution](#); recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct”

20. As is provided in Section 28 of the Data Protection Act and buttressed by the Supreme Court decision in the Prof. Tom Ojienda, SC case (Supra), the Commission was not required to issue notice to the Petitioner in carrying out its investigation and the Interested Party having already made a report to the commission was the “other source” for provision of the data to the Ethics and Anti-Corruption Commission as defined in Section 28(i)(f) of the Data Protection Act.

21. I am of course alive to the recent decision of the court in the case of RC v KKR [2021]eKLR where evidence was struck out for having been secretly obtained. In that case a man had secretly mounted CCTV cameras in a bedroom occupied by his estranged spouse, without her consent, and used the same to record her secret communications on her media. He then sought to rely on the recorded conversations, text, photographs in divorce proceedings. The spouse challenged this in a Constitutional Petition and succeeded. The Judge hearing the matter held as follows:-

“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.

.....

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.

....

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 Mbeti 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."



22. The above case is however distinguishable from the instant case in that in this case the Interested Party was acting in concert with the Ethics and Anti-Corruption Commission. It was not merely a personal investigation as was the case in the case of RC v KKR (Supra).
23. In view of the foregoing it is my finding that the Petitioner has not proved that the impugned audio and video recordings of the conversations between him and the Interested Party between 1<sup>st</sup> June, 2021 and 17th September, 2021 were in violation of his right to privacy and the answer to issue No(i) is in the negative.

Issue(ii) Whether the audio and video recordings amount to entrapment of the Petitioner by the Respondent and whether their admission in evidence would be detrimental to the administration of justice.

24. On the second issue, the Petitioner contends that the recordings amounted to entrapment. The Black's Law Dictionary, Tenth Edition page 650 defines entrapment as:

- “ 1. A law enforcement officer's or government agent's inducement of a person to commit a crime, by means of fraud or undue pursuit, in an attempt to cause criminal prosecution against that person.
2. The affirmative defense of having been so induced. To establish entrapment (in most states), the defendant must show that he or she would not have committed the crime but for the fraud or undue persuasion.”

25. This defence is not common in Kenya. In the case of Mohamed Koriow Nur v Attorney General [2011] eKLR where it was raised the court relied on the English case of R v. Mack, [1988] 2S.C.R. 903, where the Court stated as follows:

“Entrapment occurs when (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry, and, (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and include the commission of an offence? As far as possible, an objective assessment of the conduct of the police and their agents is required. The predisposition, or the past, present or suspected criminal activity of the accused, is relevant only as part of the determination of whether the provision of an opportunity by the authorities to the accused to commit the offence was justifiable. Further, there must be sufficient connection between the accused's past conduct and the provision of an opportunity, since otherwise the police suspicion will not be reasonable”

26. The Respondent has averred that investigations against the Petitioner are still pending. The Petitioner has not alluded to any criminal charge or pending proceedings before any court as at the date of filing this Petition. It emerges therefore that his allegation of entrapment is premature as the same is a defense and he is yet to be charged before any court of law. In any event, this defense shall be available to him at the appropriate time during the trial, should he be charged with any offence. An attempt to stop the investigations at this stage would amount to an interference with the Commission in the exercise of its mandate. The Petitioner shall have the opportunity to object to the admissibility of the audio and video recordings or any other evidence at the trial, should he be eventually charged with an offence.



27. As to whether the admission in evidence of the video recordings would be detrimental to the administration of justice for being illegally obtained that issue must be determined in light of Article 50(4) of *the Constitution* which state that:-

“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”

28. My reading of the above article is that not all evidence that is illegally obtained is inadmissible; that such evidence is inadmissible only if it would render the trial unfair or if it would otherwise be detrimental to the administration of justice.

29. This issue was directly in issue in the case of *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party): International Commission of Jurists Kenya Chapter (Amicus Curiae)* [2019] eKLR where a five Judge Bench of the High Court discussed several cases including *Nicholas Randa Owano Ombinja v Judges and Magistrates vetting Board* {2015} eKLR, the South African case of *Gumede v S(800/2015)* [2016] ZASCA.148, *S v Maguaza* 2016 (I) SACR 53 before finally concluding 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 this Petitioner and to the question whether there could be greater public policy implications arising from the conduct of the DCI.”

30. I am also of the considered view that it would be premature to determine this issue in the circumstances of this case where the Petitioner has not been arrested or even charged. The issue of whether the impugned evidence would render the trial unfair or whether it would be detrimental to the administration of justice would be best left to the trial court.

31. The Petitioner’s prayers have been restated in the preceding paragraphs. The prayers, averments and allegations of breach of constitutional rights by the Petitioners were not proved on a balance of probabilities. The Petitioner having failed to meet the threshold for grant of the orders sought, it follows that the Petition cannot succeed. It is dismissed in its entirety.

32. Costs follow the event and it is ordered that the petitioner shall bear the costs of the Petition.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 4<sup>TH</sup> DAY OF MAY 2023**

**E. N. MAINA**

**JUDGE**

