



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 448 OF 2019**

**JOSHUA KIPROP KISORIO.....PETITIONER**

**VERSUS**

**SAFARICOM PLC.....1ST RESPONDENT**

**NATIONAL POLICE SERVICE.....2ND RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT**

**THE CHIEF MAGISTRATES' COURT AT KIBERA.....4TH RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5TH RESPONDENT**

**ABDINAJIB ADAN MUHUMED.....INTERESTED PARTY**

**JUDGMENT**

1. The Petitioner, Joshua Kiprop Kisorio, has come to Court by way of a petition dated 4th November, 2019 in which he claims that the Interested Party, Abdinajib Adan Muhumed, was able to access the call data records of his Safaricom telephone number as well as the call data records of three other persons unknown to him. The Petitioner claims that the fact that his data was accessed, copied and shared with third parties by the 1st Respondent, Safaricom PLC, was a violation of his right to privacy as safeguarded under Article 31 of the Constitution. Further, that the released private information was allegedly used by the Interested Party to sabotage the Petitioner's business venture causing him to suffer loss of a commercial opportunity worth over USD 3,000,000.

2. The Petitioner's case is that following the alleged release of his private information, he made a formal complaint at the headquarters of Directorate of Criminal Investigations on 13th September, 2019. The Petitioner avers that upon the lodging of his complaint the investigative agency in collusion with the Interested Party began harassing and intimidating him with the aim of having him withdraw the complaint.

3. The Petitioner deposes that on 8th October, 2019 he was arrested by one P.C. Abdi from Hardy Police Station on the false claim that he had obtained Kshs. 112, 830 from the Interested Party through the M-Pesa platform by pretending that he was in a position to sell to him a fridge. He avers that he was subsequently subjected to criminal proceedings by the 2nd Respondent (National Police Service) before the 4th Respondent (Chief Magistrates' Court at Kibera) and prosecuted by the 3rd Respondent (Director of Public Prosecutions) which led to his incarceration for over 14 days in respect of offences that were alien to him.

4. The Petitioner asserts that the circumstances under which his call data records were accessed, copied and shared to third parties amounts to a serious violation and intrusion of his right to privacy contrary to Article 31 of the Constitution. The Petitioner further avers that the subsequent actions of the 2nd and 3rd respondents, and the Interested Party, to institute criminal proceedings in the magistrates' court on trumped-up charges amounts to an abuse of the legal process and a gross violation of the Constitution deserving appropriate sanction.

5. The Petitioner also claims that the illegal accessing, copying and sharing of his call data records by the 1st Respondent and its agents to third parties directly compromised his business venture occasioning him substantial loss and damages deserving appropriate compensation.

6. The Petitioner prays for the following orders:

**a) A Declaration be and is hereby made that the accessing, copying and sharing of the Petitioner's Call Data Records by the 1st Respondent and its agents was unconstitutional, unlawful and amounted to a violation of the fundamental rights of the Petitioner as enshrined in Articles 28, 29, 31, 46 and 47 of the Constitution and that the Petitioner ought to be**

compensated in damages as the court shall assess.

**b) A Declaration be and is hereby made that harassment, intimidation, and the unwarranted prosecution of the Petitioner by the 2nd, 3rd and 4th Respondents on trumped-up charges following an alleged complaint by the Interested Party hence Criminal Case Number 1347/2019 is unconstitutional and an abuse of Articles 27, 28, 29(a), 47, 49(1)(a)(i)(c)&(h) of the Constitution for being an abuse of administrative power, an abuse of the court process and therefore unlawful, null and void ab initio.**

**c) A Declaration that the Petitioner is entitled to compensation from the 1st, 2nd, 3rd, 5th Respondents and the Interested Party jointly and severally for economic loss of a business opportunity worth USD 3,000,000.00 due to their unconstitutional and illegal acts visited upon the Petitioner.**

**d) A Declaration that the Petitioner is entitled to general and exemplary damages on an aggravated scale from the 1st to 4th Respondents and the Interested Party jointly and severally for psychological suffering, social low esteem and damage to his reputation arising from the infringement of his rights occasioned by them.**

**e) Any other relief that this Honourable Court may deem fit and just to grant in the interests of justice.**

**f) This Court be pleased to grant the costs of this petition to the Petitioner.**

7. The Petitioner swore an affidavit on 4th November, 2019 and a supplementary affidavit on 14th February, 2019 in support of his petition.

8. The Petitioner rejects the 1st Respondent's claim that it released the call data records based on a court order stating that the 1st Respondent had divulged the information to parties other than the person named in the court order. The Petitioner deposes that it is this divulgence of his information that is in contravention of his rights to privacy.

9. The Petitioner further avers that the call data records attached to the affidavit in support of the petition is not a certified copy of his call data availed to P.C. Abdi Mohamed but is a printout of his call data for the period specified in the court order but illegally shared by the 1st Respondent with P.C. Quinto Odeke who in turn forwarded the same via email to one P.C. Alexander Ogise who in turn forwarded the same via email to the Interested Party. The Petitioner claims that this chain of events confirm that the 1st Respondent, being the sole custodian of his call data, violated the provisions of the law by allowing third parties to access and extract the information.

10. The Petitioner contends that no court order was produced to authorise the release of his information to P.C. Quinto Odeke and therefore his right to privacy was infringed.

11. The Petitioner further avers that the Interested Party made the false claim against him at Hardy Police Station with the intent of illegally obtaining his call data in order to retrieve the telephone number of his new business partner.

12. The 1st Respondent filed a replying affidavit sworn by Daniel Mwenja Ndaba on 5th December, 2019. Through the affidavit Mr Ndaba states that on 22nd August, 2019 he was served with a court order addressed to the manager of the 1st Respondent issued ex-parte in **Chief Magistrate's Court Nairobi Miscellaneous Criminal Application No. 3268 of 2019-Republic through the National Police Service v Safaricom PLC.**

13. Mr Ndaba avers that the 1st Respondent was ordered to avail to P.C. Abdi Mohamed books of subscriber's registrations, call data and customer's M-Pesa accounts for purposes of investigation including taking away copies of the documents for the period 1st January, 2019 to 21st August, 2019 in respect of the stated mobile phone number.

14. It is deposed that the 1st Respondent only sought to comply with the court order, and the Petitioner's allegation that his call data records were illegally accessed and shared is therefore denied. The 1st Respondent further denies providing the Petitioner's data records to the Interested Party, and also denies violating or infringing the Petitioner's right to privacy.

15. It is further deposed that special damages must be pleaded and strictly proved and the claim by the Petitioner for economic loss of business opportunity worth USD 3,000,000 must be specifically proved by the Petitioner.

16. The 1st Respondent consequently prays for the dismissal of the petition with costs.

17. The 4th and 5th respondents filed grounds of opposition dated 12th November, 2019 and opposed the petition on the ground that the Petitioner has not demonstrated how they have violated his constitutional rights. In reliance on the decision of **Anarita Karimi Njeru v Republic (1976-1980) KLR 1272**, they assert that the Petitioner has failed to identify and specify the rights allegedly violated and the manner of their infringement.

18. The 4th and 5th respondents contend that under Article 157 of the Constitution the Director of Public Prosecutions has the power to prosecute and is only subject to the control of the Court based on the principles of illegality, irrationality and procedural impropriety. It is their case that they have acted in accordance with the powers conferred upon them by law.

19. It is further asserted that matters of disputed facts are purely within the jurisdiction and assessment of the trial court handling the criminal case and any intervention by this Court before the conclusion of the case would be premature. They contend that the Petitioner has options, including the right of appeal, if he will be dissatisfied with the judgment of the trial court.

20. It is the 4th and 5th respondents' case that this petition is frivolous, vexatious, incompetent, improperly before this Court, and an abuse of the court process. They consequently seek its dismissal with costs.
21. The Interested Party swore an affidavit on 27th May, 2020 in opposition to the petition and denied ever requesting for the Petitioner's personal data from the 1st Respondent or accessing the same.
22. The Interested Party avers that the Petitioner is not entitled to any recourse against him for compensation for economic loss as the purported joint venture agreement between the Petitioner and one Mr Muthuri was never formalised. It is deposed that the petition is meant to solely defeat justice and further prejudice the Interested Party.
23. The Interested Party prays for the matter to be dismissed with costs.
24. I have carefully considered the parties' cases as gleaned from their pleadings and submissions. The first issue is whether the Petitioner's rights were infringed by the respondents.
25. The Petitioner filed submissions dated 27th February, 2020 in which he submits that the circumstances under which the 1st Respondent shared his call data records to unauthorised third parties amounts to serious violation of his right to privacy contrary to the safeguards contained in Articles 31(c) of the Constitution and sections 15, 27A of the Kenyan Information and Communications Act. Reliance is placed on the decision in **Republic v Nicholas Ouma Muyumba [2017] eKLR** in support of the assertion.
26. On its part, the 1st Respondent through submissions dated 28th April, 2020 contends that there are circumstances in which information may be divulged to a third party since the right to privacy is not absolute as specified in Article 24(1)(d) of the Constitution. It is further submitted that Section 27A(3)(b) of the Kenya Information and Communications Act allows telecommunication operators to disclose the registration particulars of a subscriber in connection with the investigation of any criminal offence or for the purpose of any criminal proceedings. According to the 1st Respondent, it was compelled under a court order to provide the investigating officer with the sought information. The argument is supported by reference to the decisions in **MWK v another v Attorney General & 3 others [2017] eKLR; Clarke & others v Chadburn & others [1985] 1All ER (PC)**, as cited in **Kenya Tea Growers Association v Francis Atwoli and 5 others [2012] eKLR**; and **Migori Chadwick Kerama Mathius v Kenya School of Law & 3 others [2018] eKLR**.
27. The right to privacy as envisaged under Article 31 of the Constitution can be subject to limitation under Article 24. In this case, the right to privacy was limited under a court order dated 21st August, 2011 and the 1st Respondent was compelled to provide the information requested under the order. This is in line with the provisions of the Kenya Information and Communication Act which permits a telecommunications operator to disclose the registration particulars of a subscriber in connection with the investigation of any criminal offence or for the purpose of any criminal proceedings.
28. The Petitioner's subscriber information was provided to one P.C. Abdi Mohamed for purposes of criminal investigations on the strength of a court order. The release of the information by the 1st Respondent to the investigating officer was therefore permitted under the law and cannot amount to a violation of the Petitioner's privacy. The 1st Respondent was under a legal duty to comply with the court order.
29. However, the Petitioner specifically raises alarm over the alleged access and use of his data by the Interested Party, Alexander Ogise and Quinto Odeke. He claims that these persons were not entitled to access the information under the court order dated 21st August, 2019. The Petitioner has provided the Court with an email chain at page 100 of the annexures to his supporting affidavit dated 4th November, 2019. The email chain shows that the Petitioner received two attachments from the Interested Party, which appear to have been forwarded to him from persons identified as Alexander Ogise and Quinto Odeke.
30. Although the Petitioner has established that there were third parties who irregularly accessed his information, he has not demonstrated that the same was done with the acquiescence or knowledge of the 1st Respondent so as to confer any liability for a breach of his right to privacy.
31. On the second issue, the Petitioner submits that the actions by the 2nd Respondent's officers to institute criminal proceedings before the 4th Respondent on what he believes to be trumped-up charges amounts to an abuse of the legal process and the proceedings are consequently illegitimate amounting to gross violation of the Constitution deserving appropriate sanction.
32. The 3rd Respondent through submissions dated 3rd March, 2020 contends that the Petitioner has failed to prove that the proper legal process was not followed in arriving at the decision to arrest and prosecute him. It is urged that the Petitioner should question the merits and demerits of the criminal case before the trial court.
33. The 3rd Respondent, in reliance on Articles 157(6)&(10) and 245(4) on his constitutional mandate and that of the 2nd Respondent, submits that courts ought not to usurp the constitutional mandates of the 2nd and 3rd respondents to investigate crimes and initiate criminal proceedings. This argument is buttressed by reference to the decision of **Michael Monari & another v Commissioner of Police & 3 others, Misc. Application No. 68 of 2011**. It is thus asserted that the petition is an abuse of the court process and only meant to interfere with the 3rd Respondent's constitutional mandate.
34. Through submissions filed on 10th March, 2020 the 4th and 5th respondents contend that the 2nd Respondent acted within its powers as provided under sections 24 and 35 of the National Police Service Act.
35. The Interested Party in his submissions dated 25th November, 2020 states that the Petitioner has failed to prove that the proceedings

against him were instituted in bad faith or are an abuse of the court process. The Interested Party asserts that the Director of Public Prosecutions did not violate any of the Petitioner's rights, and acted within his mandate under Article 157(4)&(10) of the Constitution. The arguments are supported by the decisions in the cases of **Douglas Maina Mwangi v Director of Public Prosecutions & another [2013] eKLR**; and **Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR**.

36. The Petitioner's allegation that the criminal charges against him are trumped-up is not backed by any evidence. The Petitioner has not established the truth of his statements through concrete evidence and has therefore not dispensed with the burden of proof under sections 107, 108 and 109 of the Evidence Act. The Petitioner's allegations are additionally based on averments which he should raise before the 4th Respondent as they concern the merits of the criminal case against him.

37. The Petitioner has further failed to substantiate his allegations against the 2nd and 3rd respondents that they acted *ultra vires* or against their constitutional and legal mandates. His allegations that the 1st, 2nd and 3rd respondents have colluded against him are purely speculative. In the case of **Christiano Juma Wabwire v Attorney General [2019] eKLR** it was held that:

**“24. I am alive to the fact, that the petitioner in his petition alluded to various constitutional violation, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the petitioner has proved violations of his rights and freedoms. The petitioner herein ought to have produced documentary evidence such as medical reports and called witnesses to ensure court considers the same. The courts of law are deaf to speculations and irregularities as it must always base its decision on evidence. I therefore find and hold that the petitioner failed to discharge the burden of proof to the required standard of proof. I find that the petitioner did not give evidence of probative value to enable this court decide the petition in his favour and grant the orders sought.”**

38. I, therefore, find that the Petitioner has not established that the 2nd, 3rd and 4th respondents have abused the legal process or acted contrary to their constitutional and legal mandates.

39. The 1st Respondent avers that the Petitioner has failed to prove how it has violated his rights under Articles 28, 29, 46 and 47 of the Constitution.

40. The 3rd Respondent asserts that the Petitioner has not demonstrated an arguable case on the breach or intended breach of any constitutional provisions, rights or fundamental freedoms or any other provisions of the law that would warrant the granting of the orders sought.

41. The 4th and 5th respondents argue that the Petitioner has not identified the rights which he alleges to have been infringed with precision and the manner of their infringement in respect to him. The cases of **Anarita Karimi Njeru v Republic [1976-1980] KLR 1272**; and **Abuya Abuya v Independent Electoral and Boundaries Commission & another [2014] eKLR, High Court at Nairobi Constitutional Petition No. 291 of 2013** are relied upon for the submission that a petition should be drafted with specificity in regard to the constitutional provisions violated, the manner of the violation and the injuries sustained.

42. The Interested Party submits that the Petitioner has not met the threshold for proving the alleged breach of his constitutional rights as laid down in **Anarita Karimi Njeru (supra)**.

43. I concur with the respondents that the Petitioner has failed to substantiate how his rights to dignity, freedom and security of person, fair administrative action and consumer rights have been violated by the actions of the 2nd to 4th respondents who have shown that they were exercising their constitutional and statutory powers.

44. The question that remains to be answered is whether the Petitioner is entitled to any of the reliefs sought. The Petitioner submits that the illegal sharing of his call data to unauthorised parties by the 1st Respondent compromised his business venture worth USD 3,000,000.00 thereby occasioning him substantial loss and damage deserving appropriate compensation.

45. The 1st Respondent submits that it has not breached the Petitioner's constitutional rights and hence no liability should attach to it for either general or special damages. It is further the 1st Respondent's submission that the Petitioner's claim of USD 3,000,000 for loss of business is based on a private contract that was not known to the 1st Respondent and it cannot therefore be held liable for the alleged loss. Reliance is placed on the decisions in **Eric Omuodo Ounga v Kenya Commercial Bank Limited [2017] eKLR**; and **Richard Okuku Oloo v South Nyanza Sugar Co. Ltd [2013] eKLR**.

46. On the Petitioner's claim for general and exemplary damages for psychological suffering, social low esteem and damage to reputation arising from the alleged infringement of his rights, the 1st Respondent submitted that the Petitioner should institute a suit for defamation, as was held in **Migori County Government & another v Josiah Onyango Okello t/a Cargo Secured Services [2019] eKLR**.

47. On the prayer for orders of certiorari and prohibition, the 4th and 5th respondents submit that the prayers are only meant to interfere with the independence of the various institutions. They further submit that the Petitioner has rushed to this Court without considering other appropriate remedies available to him. Reliance is placed on the case of **Erick Kibiwott Tarus & 2 others v Director of Public Prosecutions & 7 others [2014] eKLR**.

48. On his part, the Interested Party contends that the Petitioner is not entitled to the reliefs sought as he has failed to prove his allegations.

49. As already held, the Petitioner has not established a case against any of the respondents. The Petitioner has not demonstrated any clear link between the leakage of his information by the 1st Respondent, and the investigation and criminal proceedings against him. He further

has not established that his rights under Articles 28, 29, 46 and 47 of the Constitution have been infringed by the actions of the respondents. He is therefore not entitled to any reliefs sought in respect of the alleged infringements.

50. On the breach of the Petitioner's privacy, I find that although it is clear that the Interested Party accessed his information irregularly, there is no proof to show that the 1st Respondent deliberately leaked or was aware that the Petitioner's information was leaked to the Interested Party.

51. The Petitioner in his supplementary affidavit dated 14th February, 2020, attached as exhibit 'JKK4' the affidavit of Robert Mwirigi Muthuri who deposes that he received a telephone call from the Interested Party herein who warned him against investing in Superstore Inc. It is further averred that when Mr Muthuri asked the Interested Party where he got his private number the Interested Party informed him that he got it from the Petitioner's call records. Although the information from Mr Muthuri indicates that the Interested Party was indeed the reason why the Petitioner lost out on a business venture, it is not clear that the information was leaked by the 1st Respondent or whether the persons involved in the impugned email chain had obtained the information through other unlawful means.

52. It is for the above reasons that I cannot find that the Petitioner is entitled to any of the reliefs sought.

53. My analysis of the evidence and submissions of the parties in this petition leads me to the conclusion that the Petitioner has not proved a case against any of the respondents. Although it is established that there was leakage of the Petitioner's information to third parties, it is not clear whether the same was done with the acquiescence or knowledge of the 1st Respondent and therefore I cannot find that the 1st Respondent is liable to pay damages to the Petitioner.

54. The logical outcome is that this petition has no merit. The same is therefore dismissed. The parties will meet their own costs for the proceedings.

**Dated, signed and delivered virtually at Nairobi this 4th day of March, 2021.**

**W. Korir,**

**Judge of the High Court**