



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 583 OF 2017

IRENE DONNA SHAMALA.....PETITIONER

VERSUS

NIC BANK LIMITED.....RESPONDENT

JUDGMENT

1. The Petitioner, Irene Donna Shamala, introduces herself as an advocate of the High Court of Kenya. The Respondent, NIC Bank Limited, is a body corporate established as a bank under the provisions of the Banking Act, Cap. 488 and licensed by the Central Bank of Kenya to carry out banking business in Kenya.

2. The Petitioner's petition dated 23rd November, 2017 is premised on Articles 1, 2, 3(1), 10, 19, 20, 21, 22, 23, 28, 31, 159, 258(1), 259(1) of the Constitution and Rules 3, 4, 10, 11, 13 and 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The petition is supported by the Petitioner's affidavit sworn on the date of the petition and her further affidavit dated 9th October, 2019.

3. The Petitioner seeks the following reliefs:

a) A declaration that the Respondent's action of divulging the Petitioner's personal credit information to the Petitioner's employer, which action subjected the Petitioner to humiliation, ridicule, embarrassment and odium was a violation of the Petitioner's right against being treated in a degrading manner.

b) A declaration that the Respondent's action of divulging the Petitioner's personal credit information to the Petitioner's employer, which action subjected the Petitioner to humiliation, ridicule, embarrassment and odium violated the Petitioner's right to human dignity.

c) A declaration that the Respondent's action of divulging the Petitioner's personal credit information to the Petitioner's employer, which action subjected the Petitioner to humiliation, ridicule, embarrassment and odium violated the Petitioner's right to privacy.

d) An order for compensation for the contravention of the fundamental rights and freedoms of the Petitioner.

e) An order for compensation for the mental anguish and psychological torture the Petitioner suffered after her personal credit affairs were divulged to her employer without her consent.

f) An order for compensation following the Respondent's allegations which created the impression to the Petitioner's employer and her colleagues that the Petitioner was un-creditworthy, including:

i) That the Respondent be held liable for general damages for breach of the duty of confidentiality by the Respondent.

ii) The Respondent be held liable for exemplary, aggravated and punitive damages for triggering the events which subjected the Petitioner to public humiliation, ridicule, embarrassment and odium.

g) An order that costs consequent upon the Petition be borne by the Respondent in any event.

4. The Respondent opposed the petition through a replying affidavit sworn on 26th February, 2021 by its Assistant Legal Service Manager, Kenneth Mawira.
5. The undisputed narrative that emerges from the pleadings filed by the parties in this case is that the Petitioner who is an employee of Ericsson Kenya Ltd is a customer of the Respondent. In respect of that employment relationship she received credit card No. 4132...1077 at the request of her employer. She also applied for and obtained a personal credit card No. 4285...0022 from the Respondent. She applied for the two cards in October 2014.
6. It is also common ground that the balance outstanding on the Petitioner's personal credit card as at 14th July, 2016 was Kshs. 206,617.33 whereas the one issued at the request of her employer had no outstanding balance and its use had been suspended by the employer. There is no dispute that sometimes in July, 2016 the Petitioner's employer wrote to the Respondent enquiring whether the credit card facilities had been fully settled. The Respondent wrote back indicating that the Petitioner's credit card facility had an outstanding balance. This information was subsequently communicated to the Petitioner by her employer on 14th July, 2016.
7. The Petitioner was aggrieved by the disclosure of the outstanding balance on her personal credit card facility and protested to the Respondent. The Respondent apologized to her but she nevertheless went ahead to ask for compensation for the violation of her constitutional rights. The Respondent did not communicate on the issue of compensation and the Petitioner proceeded to file this matter.
8. The Petitioner brings this petition against the Respondent for breach of the bank-customer relationship between the parties which entails a duty of confidentiality. It is the Petitioner's case that the Respondent's action had caused her emotional and psychological distress at her place of work. The Petitioner as a result asserts that her right to human dignity under Article 28, right to freedom and security of person under Article 29, right to privacy under Article 31 and consumer rights under Article 46 of the Constitution were violated by the Respondent.
9. The Respondent's defence is that the petition seeks to resolve a dispute arising from a contractual relationship framed as a constitutional petition in order to litigate a claim that is time barred; and that under the terms and conditions governing the credit card facility the Respondent reserved the right to set-off and consolidate all the debts owing to it by the Petitioner and that in no way was the apology letter an admission of liability.
10. The Petitioner filed submissions dated 9th October, 2019 and further submissions dated 22nd March, 2021. According to the Petitioner, the issue for the determination of this Court is whether the Respondent owed her a duty of confidentiality and whether this duty was breached thereby entitling her to compensation.
11. On the issue whether the Respondent owed her a duty of confidentiality, the Petitioner submits that the answer is in the affirmative. The Petitioner contends that the duty of confidentiality in a bank-customer relationship is an implied legal and fundamental duty which can only be limited by the necessity to disclose by operation of the law, the bank's interest, the customer's consent and public interest. It is the Petitioner's argument that her case did not fall in any of the exceptions and the Respondent was therefore under a duty to keep her information confidential.
12. The Petitioner submits that Article 31 of the Constitution guarantees the right to privacy with Clause (c) expressly stating that information relating to a person's family or private affairs should not unnecessarily be required or revealed. She also cites and relies on Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights for the submission that the right to privacy is a fundamental human right.
13. Relying on the decisions in the cases of **Tournier v National Provincial and Union Bank of England (1924) 1KB 461** and **Joachimson v Swiss Bank Corporation (1921) 3 KB 110**, the Petitioner submits that there is an implied term in a contract between a banker and its customer that the banker will not divulge to third parties, without the consent of the customer, the state of the customer's account or any of his transactions with the bank or any information relating to the customer, acquired through the keeping of the customer's account unless the banker is compelled to do so by an order of the court, circumstances that give rise to a public duty of disclosure or the protection of the banker's own interests. Further, that the right to privacy can be implied and is one of the duties of a banker to customer.
14. The Petitioner submits that the right to privacy is central to the protection of a human's right to dignity which fosters the protection of a person's private affairs by limiting circulation of private information about the person's affairs that may have an adverse effect on the image, reputation and dignity of a person if that information is made public. The Petitioner contends that the Respondent divulged her confidential information regarding her personal credit card facility in total disregard of the provisions of Articles 28 and 31 of the Constitution. The case of **Intercom Services Limited & 4 others v Standard Chartered Bank [2002] eKLR** is cited in support of the assertion that the relationship between a banker and its customer is founded on trust for efficient conduct of business and where this trust is eroded it is very difficult for the business to thrive and for people to conduct their business effectively.
15. It is the Petitioner's case that the Respondent is liable to compensate her by way of general damages as its actions caused her mental torture, public humiliation, ridicule, embarrassment and odium as she is now viewed as a non-credit worthy person at her workplace.
16. The Petitioner additionally argues that the Respondent was negligent in its service provision as it failed to protect her economic interests as envisaged in Article 46(1)(c) of the Constitution. It is her case that as per the provisions of Section 10 of the Consumer Protection Act, 2012 she is entitled to compensation for the loss that arose from this defective service. She proposes that an award of Kshs. 20, 000,000/= as general damages is ideal compensation.
17. The Petitioner supports her argument for award of compensation and grant of other reliefs by relying on the decisions in **Siewchand Ramanoop v the AG of T & T, PC, Appeal No.13 of 2004; Standard Chartered Bank of Kenya v Intercom Services Ltd & 4 others**

[2004] eKLR; **Jesse Waweru Wahome & 42 others v Kenya Engineers & Registration Board Petitions No. 149 & 207 of 2011**; Hon. **Nicholas R. O. Ombija v Kenya Commercial Bank Ltd [2009] eKLR**; and **Johnson Evan Gicheru v Andrew Morton & another [2005] eKLR**.

18. In her further submissions, the Petitioner asserts that this Court is vested with the requisite jurisdiction to entertain the petition. In rejecting the Respondent's submission that this is a matter to be determined through a civil case and not a constitutional petition, the Petitioner relies on the decisions in the cases of **Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguru & Another [2017] eKLR**; **Fredericks & 47 Others v MEC for Education and Training, Eastern Cape & Others (CCT 27/01) [2001] ZACC 6**; **Glorious Stella Nyamongo v Royal Media Services [2017] eKLR**; and **NWR & Another v Green Sports Africa Ltd & Another [2017] eKLR**.

19. The Respondent filed written submissions and list of authorities dated 17th February, 2020 and submitted that the issue for determination is whether the petition raises any constitutional issues and, if so, whether the Petitioner's constitutional rights were violated.

20. The Respondent submits that the petition does not raise any constitutional issues. The decisions in the cases of **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & Another [2016] eKLR** and **Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR** are cited in support of the argument that constitutional litigation is not open for every claim which may properly be dealt with under the alternative mechanism of civil or criminal law. According to the Respondent, the facts of the case reveal that the Petitioner's claim lies in the tort of defamation as defined in the case of **Joseph Njogu Kamunge v Charles Muriuki Gachari [2016] eKLR**. It is submitted that even a claim for defamation cannot hold as the statement disclosed to the Petitioner's employer was true and no malice has been proved in the publication of the information.

21. The Respondent contend that the Petitioner instituted this petition to circumvent Section 4(2) of the Limitation of Actions Act which bars any action for the tort of defamation after the lapse of 12 months. It is the Respondent's case therefore that this petition seeks to convert a civil question into a constitutional question when in fact the available remedy for the Petitioner is found in civil law. To buttress this argument the Respondent cited the case of **Minister of Home Affairs v Bickle & Others (1985) L.R.C.Cost.755** where it was held that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all and that courts will not normally consider a constitutional question unless the existence of a remedy depends on it.

22. Based on the submission that the Petitioner is before the wrong court, the Respondent submits that the Petitioner has failed to establish violation of her constitutional rights and fundamental freedoms. The Court is therefore urged to dismiss the Petitioner's case with costs.

23. I have perused the pleadings and submissions of the parties herein and in my view the issues for the determination of this Court are:

- a) Whether this Court has jurisdiction to hear this petition;
- b) Whether the Petitioner's constitutional rights were violated; and
- c) Whether the Petitioner is entitled to the reliefs sought.

24. The Respondent challenges the jurisdiction of this Court to entertain this matter on the ground that the dispute arises from a contractual relationship and that this constitutional petition is only aimed at defeating the limitation of the cause of action as the suit is time barred by dint of the Limitations of Actions Act. It is the Respondent's contention that the matter is covered under the tort of defamation and as such the jurisdiction to entertain this matter belongs to the Civil Division of the High Court.

25. The question to be answered therefore is whether the Petitioner's case falls outside the remit of a constitutional question. It is an established principle of law that the jurisdiction of a court is paramount and a court without jurisdiction has no authority to delve into a dispute placed before it by the parties. It is therefore necessary to first address this question before making a determination on the other issues.

26. The source of a court's jurisdiction and its importance was stated by the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR** as follows:

“(68) 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 counsel 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. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. 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.”

27. This Court's jurisdiction is premised on Article 165(3)(d) of the Constitution which states that:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been

denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

28. Article 22(1) of the Constitution provides that every person has the right to institute court proceedings asserting that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. Additionally, Article 23 of the Constitution affirms that the High Court has jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

29. The Respondent's position is that the Petitioner's case is a commercial dispute and not a constitutional claim and this Court should therefore invoke the exhaustion of alternative remedies doctrine and the constitutional avoidance principle to dismiss the case. The Petitioner on the other hand insists that she has raised issues touching on constitutional rights and she should not be turned away from this Court before her case can be fully interrogated and a just determination made.

30. It is appreciated that the principles relied upon by the Respondent are indeed available defences against spurious claims brought in the guise of constitutional questions. In **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR**, the Court of Appeal affirmed the legal principle that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. At the same time, the Court reiterated another legal principle that where it is possible to decide a case without reaching a constitutional issue that should be done. In upholding the importance of complying with the stated principles, the Court stressed that:

“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.”

31. The question therefore is whether the Petitioner had a viable remedy apart from invoking the Bill of Rights. The Respondent believes that the Petitioner's case is about defamation. A perusal of the pleadings will clearly show that the Petitioner does not say that the Respondent defamed her. Her claim is that the unlawful disclosure of her personal information to her employer by the Respondent violated her rights to dignity and privacy. She also asserts that her consumer rights were violated. These are claims that can be directly anchored on the Constitution.

32. As I see it, the facts giving rise to the cause of action allowed the Petitioner to either pursue a civil claim or a constitutional claim. It was upon her to determine the cause of action that she deemed could provide her with the most appropriate remedy. I do not agree with the Respondent that this Court lacks jurisdiction to entertain a petition which clearly discloses that the issues are constitutional in nature notwithstanding the fact that those issues arise from a contractual relationship. It is observed that the petition before this Court is founded on the allegation of violation of the Petitioner's constitutional rights to human dignity and privacy, and consumer rights. This Court therefore has the requisite jurisdiction to entertain this petition and thereafter make pronouncements on the prayers sought therein. I therefore find no merit in the Respondent's request for the dismissal of the Petitioner's case.

33. I now turn to the question as to whether the Petitioner's constitutional rights were violated. The principles regulating the relationship between a bank and its customers originate from a variety of sources including the contract between the parties, legislation, relevant banking practices and common law principles.

34. One of the implied terms of the banker-customer relationship as stated by Lord Atkin LJ in the case of **Tournier v National Provincial and Union Bank of England (1924) 1KB 461** is that the bank would abstain from disclosing information as to the affairs of the customer without the customer's consent. Likewise, S.Paolo & D Gaalvese in their Article titled *'The duty of confidentiality of Banks in Switzerland: where it stands and where it goes, recent developments and experience. The Swiss assistance to cooperation with the Italian authorities in investigation of corruption among civil servants in Italy'* 1995 Pace Law Review 329, define the duty of confidentiality as **“an obligation of a financial institution and of its officers and employees, to protect and withhold information acquired while handling a client's business.”**

35. The principle of confidentiality was defined by Lord Goff in the case of **Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109** as follows:

“I start with the broad general principle... that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others... The existence of this broad general principle reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection.

I realise that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties- often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract... But it is well settled that a duty of confidence may arise in equity independently of such cases.”

36. The all-encompassing nature of a bank’s duty of confidentiality was noted by Megarry, J in **Royal Bank of Canada v IRC [1972] 1 Ch 665** as follows:

“A banker’s duty of secrecy to its customers is not confined to ordinary banking transactions but would extend to any banking transaction which is effected for a customer, ordinary or extraordinary.”

37. The basis of a bank’s duty of confidentiality is thus attributed to common law. In **Tournier v National Provincial and Union Bank of England (1924) 1KB 461**, it was, however, appreciated that there were exceptions to the duty of confidentiality. Those exceptions were summarized as: where disclosure is under compulsion by law; where there is a duty to the public to disclose; where the interests of the bank require disclosure; and, where the disclosure is made by the express or implied consent of the customer.

38. In South Africa the duty of confidentiality is also recognized by the law as evidenced by a number of authorities. In the case of **Firstrand Bank Limited v Chaucer Publications (Pty) Ltd & Another (2007) ZAWCHC 59**, the Court stated that in terms of public policy, the bank has a duty not to disclose information exchanged between it and its customer to third parties unless otherwise required to do so in the greater public interest.

39. Similarly, it was held in **Stevens v Investec Bank (Pty) Ltd (2012) ZAGPJHC 226** that:

“There is no doubt that a banker-client relationship requires the highest uberrimae fides and that confidentiality is one of the essential aspects of such relationship of trust as between banker and client. Privacy in financial and banking affairs is often an important aspect of successful business enterprise in a competitive economy.”

40. In the Kenyan context, the Court of Appeal affirmed the existence and the applicability of the duty of confidentiality in the banker-customer relationship in the case of **Standard Chartered Bank of Kenya v Intercom Services Ltd & 4 others [2004] eKLR** by stating as follows:

“The Bank’s duty to secrecy regarding a customers’ account and matters relating to it is never in dispute. The banks, whether collecting banks or paying banks, have a duty to ensure that customers’ account and matters relating to it are kept secret or are made confidential. There is no doubt about that for it is on that understanding that anybody either as individual or as a corporate body would ever think of putting his money in a bank.

Further, if the same confidentiality was not assured, many crimes would be committed as a consequence of knowing what one has in his or its account, and further, commercial transactions would not flourish.”

41. It is thus reasonable to state that a customer’s relationship with a bank is based on the utmost confidence that the transactions will not, save in situations allowed by the law, be disclosed to third parties. Customers are unlikely to entrust their money and financial affairs to banks if they suspect that the confidentiality of their dealings may not be secure. This is the reason why a bank is under an obligation not to disclose any of its customers’ information. This includes all information and transactions that go through the customer’s account. From the cited case law, I have read that the obligation remains even after the closure of the account and the termination of the bank-customer relationship. It is therefore clear that if a bank has disclosed a customer’s information outside any of the recognized exceptions, the customer is entitled to redress.

42. Apart from the principles governing the banker-customer relationship, the Petitioner claims that the Respondent’s act of disclosing the information to her employer violated her right to privacy among other constitutional rights. The duty of confidentiality stems from the constitutional right to privacy as envisaged under Article 31(c) of the Constitution which provides as follows:

Every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed.

43. The Court in the case of **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR** extensively discussed the right to privacy and observed that:

“285 The right to privacy is guaranteed under Article 31 of the Constitution...

286. The right to privacy has also been expressly acknowledged in international and regional covenants on fundamental rights and freedoms. It is provided for under Article 12 of the UDHR, Article 17 of the ICCPR, Article 8 of the European Convention on Human Rights (ECHR) and Article 14 of the African Charter on Human and Peoples’ Rights.

287. B. Rossler in his book, *The Value of Privacy* (Polity, 2005) p. 72, explains the right to privacy as follows:

“The concept of right to privacy demarcates for the individual realms or dimensions that he needs in order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies. Such realms or dimensions of privacy substantialize the liberties that are secured because the mere securing of freedom does not in itself necessarily entail that the conditions are secured for us to be able to enjoy these liberties as we really want to”.

288. As to whether there is need to protect privacy, he goes on to write that:

“Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part”.

289. The New Zealand Supreme Court in *Brooker vs the Police* (2007) NZSC 30 at para.252 stated as follows:

“Privacy can be more or less extensive, involving a broad range of matters bearing on an individual’s personal life. It creates a zone embodying a basic respect for persons... Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society...It is closely allied to the fundamental value underlying and supporting all other rights, the dignity and worth of the human person.”

290. Applying the normative content of the right to privacy as stated above and what that right seeks to protect, we are clear in our mind that surveillance in terms of intercepting communication impacts upon the privacy of a person by leaving the individual open to the threat of constant exposure. This infringes on the privacy of the person by allowing others to intrude on his or her personal space and exposing his private zone. In the Irish Supreme Court case of *Kennedy vs Ireland* (1987) I.R. 587 it was held that the phone-tapping of the two journalists in question violated their right to privacy. Hamilton J made it clear that the right to privacy must ensure the preservation of the dignity and freedom of the individual in a sovereign, independent and democratic society. In his view:

“The dignity and freedom of an individual in a democratic society cannot be ensured if his communication of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with.”

44. As regards the right to dignity, Article 28 of the Constitution provides that “every person has an inherent dignity and the right to have that dignity respected and protected.” The courts have spoken to the meaning of this right in numerous cases. In the case of *Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited* [2021] eKLR, the Court expressed itself thus:

“50. As regards the right to dignity, in *Ahmed Issack Hassan vs. Auditor General* [2015] the Court held that:

“...the right to human dignity is the foundation of all other right and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated”. See *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) SCR (2) 516.

51. As expressed by Albie Sachs in *The Strange Alchemy of Life and Law* (OUP) at page 213:

“Respect for human dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not simply to ensure that the “haves” can continue to have, but to help create conditions in which the basis dignity of the “have nots” can be secured..”

52. Likewise, it was submitted that the Constitutional Court of South Africa in *Dawood and Another vs. Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8 stated that:-

“Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. Human dignity is also a constitutional value that is of central significance in the limitations analysis.”

53. In the Petitioner’s view, it is thus apparent, regardless of one’s status or position or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected and reliance was placed on the South African Constitutional Court holding in *Mayelane vs. Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14 that:-

“...the right to dignity includes the right-bearer’s entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one’s personal circumstances is a fundamental aspect of human dignity.”

54. In *Kennedy vs. Ireland* [1987] IR 587 as cited in *Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic & 10 Others* [205] KLR it was held that:

“The dignity and freedom of an individual in a democratic society cannot be ensured if his communication of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with.”

45. The decision in the case of *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR serves as an important reference point in respect of the convergence of the rights to privacy and dignity. In that regard the Court held that:

“23. ‘Privacy’, ‘dignity’, ‘identity’ and ‘reputation’ are facets of personality. All of us have a right to privacy and this right, together with the broader, inherent right to dignity, contributes to our humanity.

24. It is the personality rights of dignity and privacy that underscore individuality and set both the limits of humanity and of human interaction. But, the reasons for protecting privacy are wider than just protecting the dignity of the individual.”

46. As already stated in this judgement, it is not in dispute that the Petitioner was a customer of the Respondent. It is also agreed that there existed two separate and distinct credit card facilities one for personal use and another provided to the Petitioner by her employer. The parties are also in agreement that the information divulged to the Petitioner’s employer was that of her personal credit card facility and not her company’s credit card facility.

47. The Respondent in defence of its actions stated that it exercised its right to set-off and to combine and consolidate the debts owing to it by the Petitioner pursuant the terms of their contract. In answer, the Petitioner retorted that the set-off could only occur with her consent and the clause in the contract on disclosure of information did not include disclosure to third parties like her employer.

48. In a bank-customer relationship, disclosure of the customer’s information to third parties can only occur under compulsion by law, where there is a duty to the public, in the interest of the bank, or where there is express consent by the customer to do so. From the facts of this case and the evidence on record, it is clear that the Respondent did not satisfy the conditions for the disclosure of the Petitioner’s information to a third party. There is no doubt in my mind that the unjustified disclosure of one’s banking affairs without any legally recognized justification is a violation of the person’s constitutional right to privacy. The right to privacy protects against intrusion into one’s personal affairs by making public their personal information without their consent. Disclosure of certain information not only violates the right to privacy but also impairs the dignity of the person whose information is disclosed hence violating the right to have one’s dignity respected and protected.

49. It is therefore logical to reach the conclusion that the Petitioner’s right to privacy and dignity were violated. I am thus satisfied that the conduct of the Respondent was in total disregard to the Petitioner’s right to privacy and dignity and I find the Respondent did indeed violate the Petitioner’s rights as provided under Articles 28 and 31 of the Constitution.

50. The Petitioner submits that her consumer right as envisaged in Article 46(1)(c) of the Constitution was violated due to the Respondent’s negligent service provision which resulted in the failure to protect her economic interests. It is her submission therefore that she is entitled to compensation for the loss that arose from this defective service as envisaged under Article 46(1)(d) of the Constitution.

51. Among the consumer rights enumerated in Article 46(1) is the right to the protection of a consumer’s health, safety, and economic interests. J. A. Spanogle and R. J. Rohner in their article titled: *Consumer Law Cases and Material*, (1st Ed, 1999), state that consumer protection is about ensuring fair exchange between goods and services providers on the one hand and consumers on the other hand.

52. Section 2 of the Consumer Protection Act, 2012 defines a consumer to mean-

(a) a person to whom particular goods or services are marketed in the ordinary course of the supplier’s business;

(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act;

(c) a user of particular goods or a recipient or beneficiary of particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods and services; and

(d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of this Act.

53. What can be gleaned from the definition is that consumer protection entails measures meant to safeguard consumers of goods and services especially by legal means, from unfair market practices and fraudulent transactions. Discussing the rights of consumers in the case of *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR, the Court stated as follows:

“46. I have severally stated that although issues of consumer rights affect only the parties, ‘their impacts and consequences are substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest, hence the need for the parties to submit the necessary evidence to enable the court to analyse the issues and arrive at a formidable determination that transcends the case at hand. Consumer rights litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the expanded Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases.

47. The general principle governing the determination of cases is that the party who alleges or, as it is sometimes stated, the party who makes the positive allegation, must prove. Moreover, the onus on the Petitioner to establish violation of alleged consumer rights is not a mere formality; it is important. Differently put, the onus lies on the Petitioner to prove every element constituting his cause of action. This includes sufficient facts to justify a finding that his consumer rights were violated.

48. If, in contested proceedings, the consumer asserts that his rights have been violated, the court must make a finding whether, the consumer's allegations are true..."

54. In this case the Petitioner is required to prove the elements that constitute violation of her consumer rights. The Petitioner needs to provide sufficient facts to justify a finding that her consumer rights were indeed violated. Merely citing the rights allegedly violated without providing evidence to support the stated infringement will not result in a positive outcome for a claimant. A perusal of the facts and evidence on record divulges that the dispute in this matter is not as a result of the Respondent's quality of service but its conduct in handling the Petitioner's information in the course of their business relationship. The Petitioner has not proved that the services rendered by the Respondent were not as agreed or satisfactory so that it can be said the services rendered amounted to unfair market practices or fraudulent transactions as defined by the Consumer Protection Act, 2012. Although the Petitioner alleges that the Respondent's actions failed to protect her economic interests she does not demonstrate how this happened. It is not sufficient for the Petitioner to claim she incurred an economic loss, she also has to show what that loss is.

55. As it stands there is no material evidence on record to support the Petitioner's claim that her consumer rights were indeed violated. It is my humble view that there is nothing to show that the Respondent engaged in unfair market practices or fraudulent transactions or in any manner acted contrary to the rights protected by Article 46 of the Constitution so that it can be said that the Petitioner's consumer rights were interfered with. I accordingly find that the Petitioner has not proved her case against the Respondent on this aspect of her claim.

56. At this juncture, the question that remains to be answered is the nature of redress to be provided to the Petitioner. She states that she is entitled to general damages of Kshs. 20, 000,000/- for the violation of her constitutional rights. The Respondent, however, argues that the Petitioner having failed to establish violation of her rights is not entitled to the declaratory and compensatory reliefs sought. The Petitioner has not elucidated to this Court how she arrived at the figure of Kshs. 20, 000,000/- which is not pocket change. In awarding general damages, the Court is required to provide a justification for the figure arrived at. Support for this statement is found in the decision of **Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another [2019] eKLR** where it was held that:

"96. Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Courts. The following principles clearly emerge from decided cases;

- i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;**
- ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;**
- iii. This remedy would be available when it is the only practicable mode of redress available;**
- iv. Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable.**

97. Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right, which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. However, this measure is no more than a guide, because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law."

57. In view of the failure by the Petitioner to provide the basis for asking for the proposed amount, I will have to be guided by the principles that have been established through case law to guide the courts in arriving at just awards in constitutional claims. Some of those principles were identified by the Court of Appeal in the case of **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR** as follows:

"Having restated that the assessment of damages is a discretionary relief, we cannot also fault the learned Judge for failure to award exemplary and aggravated damages on the grounds of heavy burden to the innocent tax payer and secondly due to the improved political environment and the positive steps taken by the government in dealing with human right violations. We find support in the recent decision of the Supreme Court of Canada in Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28 where the Court while considering a colossal award for a Constitutional violation and Sec 24 of the Canadian Charter, held that:

"... In the end, s. 24(1) damages must be fair to both the claimant and the state. In considering what is fair to both, a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests..."

Similarly, in the case of *Dandy (supra)* the court held that:

“...The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

58. Earlier on in *Peter M. Kariuki v Attorney General [2014] eKLR*, the Court of Appeal highlighted the principles governing assessment of damages as follows:

“On the purpose of awards of damages, the Supreme Court of Uganda in *CUOSSENS V ATTORNEY GENERAL, (1999)1 EA 40*, noted that the object of an award of damages is to give an injured party compensation for the damage, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury. Where the injury in question is non-pecuniary loss, assessment of damages does not entail arithmetical calculation because money is not being awarded as a replacement for other money; rather it is being awarded as a substitute for that which is generally more important than money, and that is the best that a court can do in the circumstances.”

59. It would have been of much help to the Court had the parties cited decisions in which awards were made in respect of violation of the rights to privacy and dignity. Previous awards are a good guide in assessing the appropriate damages to award. In the case at hand, I take note of the fact that the Respondent apologized immediately the mistake was pointed out by the Petitioner. Although the Petitioner claimed that her reputation was lowered in the eyes of her co-workers, there is no evidence that the information was known to any other worker apart from the personnel in the human resource department. The disclosed private information was therefore not pervasive and entrenched so as to warrant a big award. It is therefore clear that there was indeed violation of the Petitioner’s rights but the damage was minimal. The Petitioner did not establish the humiliation, ridicule, embarrassment, odium, mental anguish and psychological torture she allegedly suffered as a consequence of the violation of her rights. The kind of award to be made in cases like this is one that will offer some form of redress to the Petitioner and at the same time serve as a reminder to the Respondent of the necessity to protect its customers’ confidentiality. In my view KShs. 200,000/-, which I hereby award to the Petitioner against the Respondent, is sufficient compensation as general damages.

60. The Petitioner also seeks exemplary, aggravated and punitive damages against the Respondent. It is important to state that these damages will normally be awarded where the Respondent’s conduct aggravated the violation of the rights. In the present case I do not find that these damages are justified or called for. These kind of damages are normally awarded to punish the Respondent, primarily where the conduct was motivated by malice-see *GSN v Nairobi Hospital & 2 others [2020] eKLR*. There is no evidence of conduct outside the normal by the Respondent. As already observed, the Respondent actually apologized to the Petitioner. I therefore find that the Petitioner has not made out a case for award of exemplary, aggravated or punitive damages and I therefore decline the prayer for an award of these damages.

61. As for costs, the law applicable to the award of costs in constitutional petitions is found in Rule 26 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* which grants the Court discretion to award costs but with the rider that in exercising the discretion the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms. In the circumstances of this case I find no reason why the victor should not get the costs of the proceedings. As such I direct the Respondent to meet the Petitioner’s costs.

62. In summary, judgement is entered in favour of the Petitioner as follows:

- a) A declaration is hereby issued that the disclosure of the status of the Petitioner’s personal credit card facility by the Respondent to the Petitioner’s employer without the consent of the Petitioner was a violation of the Petitioner’s right to privacy under Article 31 and right to dignity under Article 28 of the Constitution;
- b) The Petitioner is awarded general damages of KShs. 200,000/- against the Respondent for the violation of her constitutional rights; and
- c) The Petitioner’s costs for the proceedings shall be met by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2021.

W. KORIR,

JUDGE OF THE HIGH COURT