



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

PETITION NO. 14 OF 2020

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OR PROTECTION AND

ENFORCEMENT OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER

ARTICLES 35 (1)(b) and 40 (1)(a) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF INFORMATION HELD BY JOHN CUMMING AND COMPANY

ON THE TRUST CREATED OVER FORTY-FIVE SHARES IN HARDWARE DEALERS

LIMITED HELD BY PRASHANT RAJNIKANT SHAH

AND

IN THE MATTER OF A DECLARATION OF A TRUST OVER FORTY-FIVE SHARES

IN

HARDWARE DEALERS LIMITED HELD BY PRASHANT RAJNIKANT SHAH

BETWEEN

SHAKUNT RAJNIKANT SHAH.....PETITIONER

VERSUS

BHUPENDRA MOTICHAND

SHAH T/A JOHN CUMMING & COMPANY.....1ST RESPONDENT

PRASHANT RAJNIKANT SHAH.....2ND RESPONDENT

RULING

The Petitioner has invoked the provisions of Section 51 (2) of the Data Protection Act (No. 24 of 2019), in seeking the following order;

“1. The processing of personal data that is comprised of any audio recording taken of the meeting of the 11th August 2020 be exempt from the provisions of the Data Protection Act (No. 24 of 2019) for purposes of production of the audio recording to the court in these proceedings under Section 106B of the Evidence Act.”

1. According to the Petitioner, there exists an audio recording that was taken of the meeting of 11th August 2020, which would enable the Court to conclusively establish the correct account of what transpired at the meeting in issue.

2. It was the understanding of the Petitioner that if the said recording were to be produced in court, in the absence of the order sought herein, the said evidence would be tainted with illegality. It was for that reason that the Petitioner has asked this Court to declare exempt from the provisions of the **Data Protection Act**, the processing of personal data that constitute the audio recording, in order to facilitate the production of the audio recording in court.

3. When canvassing the application the Petitioner submitted that the audio recording was important because there are 2 conflicting accounts about what was said by the 1st Respondent at the meeting of 11th August 2020 (*hereinafter "the meeting"*).

4. In the event, the Petitioner was of the view that

"an independent, accurate contemporaneous account, in the form of an audio recording of the meeting"

would constitute the best evidence about what actually transpired.

5. It is common ground that the meeting was held. However, the 1st Respondent categorically denied, on oath, having made the statements attributed to him.

6. Logically, if there exists an audio recording of the meeting, it would help the court ascertain what each person said during the said meeting.

7. The Respondents position was that there was no recording of the deliberations at the meeting.

8. In the alternative, if such a recording exists, the Respondents insist that it was made secretly, without their knowledge.

9. If indeed there was an agreement, prior to the commencement of the meeting, that every person must switch off their phones, and that nobody should record the deliberations, that would imply that any recording would have been made contrary to what had been agreed upon by those who attended the said meeting.

10. The Petitioner submitted that the Respondents';

"..... assertion of an alleged non- recording agreement is completely undermined by their stated willingness to concede to the introduction of the recording as evidence conditional upon them first examining the same before it reaches the court in order to determine whether or not it should be admitted."

11. I appreciate the reasoning by the Petitioner, that the Respondents appear to be approbating and reprobating, when they indicated that they might concede to the production of the recording as evidence, subject to their first examining it prior to its being produced in court.

12. If the recording was illegally obtained, the Respondents contended that the court would be sanitizing an illegality, by allowing it to be admitted as evidence in the case.

13. It would therefore defy logic to have the said evidence admitted in evidence, because if it was illegal, the prior examination of it by the Respondents would not sanitize it.

14. On his part the Petitioner states that the alleged existence of the non-recording agreement was contrived for the purposes of resisting the application, and that this Court ought to hold that it would be unsafe to give any credence thereto.

15. The Petitioner invited the Court to adopt the reasoning of Cameron J. when he was called upon to determine whether the secret recording of a communication between an accomplice to a murder and the accused constituted admissible evidence in a criminal trial. The said reasoning was discussed at length in **S Vs ISMAIL & OTHERS [2004] ZAWCHC 39**.

16. In a nutshell, the court held that there was a distinction between "*third party monitoring*" (which was monitoring by a third party who was not a party to the conversation); and "*participant monitoring*" (which was monitoring by a party to the conversation).

17. Cameron J. held that the recordings of conversations that constitute "*participant recording*" are admissible as evidence in court.

18. I appreciate the distinction between recordings which are done by a person who was not a party to the conversation being recorded; from the recordings by a person who was a participant in the said conversation.

19. However, in order to make an informed decision about the kind of monitoring which the Petitioner is seeking to have produced as evidence, this court definitely requires more information. If the recording was done by a person who was a participant at the meeting, the Petitioner should state so categorically.

20. At present, the Petitioner has not disclosed the identity of the person who recorded the proceedings at the meeting, and therefore, the

Court is unable to ascertain whether the recording was by a participant or by a third party.

21. Secondly, it would be the person who collected the said data, by means of the recording of the deliberations at the meeting, who would be in a position to provide a valid explanation why it was necessary to make the recording of the family meeting.
22. But I appreciate that it is possible for any other participant to explain why the deliberations of the family meeting had to be recorded.
23. As the Petitioner noted in his submission;

“8.1. The provisions of Section 25(e) of the Data Protection Act No. 24 of 2019 set out as a principle of data protection that personal data is ‘collected only where a valid explanation is provided whenever information relating to family or private affairs is required.’”

24. By necessary implication, when no valid explanation has been made available to the court, the court ought not to suspend the application of **Section 28 (2) (c)**, (as the Petitioner acknowledged), which provides that data collected, indirectly, requires the consent of the data subject.
25. In this case, although it has not yet been ascertained, the Respondents have asserted that they had expressly opposed the recording of the deliberations of the meeting.
26. I also take note of the provisions of **Section 29 (b)** of the **Data Protection Act** which provides that, as far as practicable, before collecting data, the data subject be informed of the fact that personal data was being collected.
27. In effect, even if it should turn out that there was no prior agreement that the deliberations of the meeting should not be recorded, I hold the view that the Petitioner had an obligation, pursuant to **Section 29 (b)**, to satisfy the court that the Respondents were informed that the deliberations were being recorded.
28. I find that the Petitioner has not demonstrated that the Respondents were informed that the deliberations at the meeting were being recorded.
29. In my considered opinion, it would be perfectly in order for the Respondents to waive their objection to the recording being adduced in evidence, if they had listened to the recording, and if it represented an accurate record of what transpired.
30. When the law expressly provides protection of data, it is critically important that before the Court grants orders that would override such protection of privacy, the person seeking such orders satisfies the Court that there was a sound basis for precluding the potential evidence from the need to comply with the legal provisions.
31. If the Court was too quick to exempt potential evidence from compliance with the law, there was a real danger that parties would be very coy in engaging in “*without Prejudice*” negotiations or even in Mediation Sessions. The need for parties to engage robustly and freely in negotiations is to be encouraged; and that can only happen when the parties know that such engagements could not thereafter be used as evidence in court, in the event the parties did not resolve the dispute.
32. In the result, the application dated 22nd March 2021 is rejected, with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER 2021

FRED A. OCHIENG

JUDGE