



**Malinga v Girl Effect Services (Cause E596 of 2023)
[2024] KEELRC 2567 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2567 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E596 OF 2023
L NDOLO, J
OCTOBER 24, 2024**

BETWEEN

PAMELA ASEKENYE MALLINGA CLAIMANT

AND

GIRL EFFECT SERVICES RESPONDENT

RULING

1. This ruling determines the Respondent’s Preliminary Objection raised by notice dated 3rd October 2023, seeking to bar production of an audio recording and transcription of a conversation held on 21st March 2023, between the Claimant and the Respondent’s General Counsel, as evidence in court.
2. The Objection is based on the following grounds:
 - a. That the production of the audio recording offends Articles 31(d) and 50(4) of *the Constitution* of Kenya, Sections 25, 28, 29, 30 and 52 of the Data Protection Act given that the tele-conversation between the Claimant and the Respondent’s General Counsel was private;
 - b. That the audio recording was illegally obtained and it is an entrapment against the Respondent;
 - c. That the Respondent’s General Counsel was never informed by the Claimant that the meeting deliberations were being recorded;
 - d. That the Claimant never provided an explanation to the Respondent’s General Counsel why she recorded the meeting deliberations in secrecy;
 - e. That the Respondent’s General Counsel never consented to the audio recording;
 - f. That the production of such audio recording as evidence before the Court infringes on the Respondent’s right to privacy;



- g. That the audio recording is self-incriminating and inadmissible in evidence and ought to be struck out.
3. The Claimant opposes the Respondent's Objection by her replying affidavit. She depones that the grounds in the notice of Preliminary Objection dated 3rd October 2023, would require ascertainment of facts and therefore does not meet the threshold set in *Mukisa Biscuit Manufacturing v West End Distributors* [1969] EA 696.
 4. The Claimant goes further to accuse the Respondent of approbation and reprobation, pointing to paragraph 9 (viii) of the witness statement dated 14th March 2024, signed by the Respondent's General Counsel who seeks to rely on the meeting and conversation of 21st March 2023, while objecting to the production of the audio recording and transcript of the said meeting.
 5. The Claimant further depones that the conversation on 21st March 2023 between her and the Respondent's General Counsel was part of oral and email conversations as alluded in paragraph 9 of the General Counsel's witness statement dated 14th March 2024, on an amicable separation, which did not materialise.
 6. The Claimant points out that the Respondent has not denied that the conversation took place and only objects to the contents therein.
 7. The Claimant asserts that Section 45 (c) of the Data Protection Act contemplates such a recording in instances where it is necessary for the establishment, exercise or defence of a legal claim and for carrying out obligations exercising specific rights of a subject.
 8. The Claimant concludes by stating that the subject tele-conversation of 21st March 2023 contains evidence of coercion by the Respondent.
 9. The Respondent fashions its plea as a Preliminary Objection which was defined by the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* [1969] EA 696 as follows:

“A Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
 10. In its Objection, the Respondent seeks to bar the production of a piece of evidence and even if the Court were to grant the Respondent's request, that would not dispose of the entire case. The Objection by the Respondent does not therefore fall within the definition of a Preliminary Objection. This notwithstanding, I will proceed to determine its merit as an ordinary objection.
 11. In its Objection, the Respondent lists seven grounds, which may be condensed into two broad questions being; whether production of the audio recording offends *the Constitution* and the law, and whether the Respondent's rights would be violated by production of the subject audio recording.
 12. The Respondent argues that production of the audio recording is a violation of its right to privacy under Article 31(c) and (d) of *the Constitution* as well as provisions of the Data Protection Act. On her part, the Claimant submits and the Respondent does not deny that the audio recording consists of a conversation between herself and the Respondent's General Counsel.



13. The Respondent did not point out to the Court any personal information or data contained in the recording. Moreover, in her witness statement, the Respondent's General Counsel refers to the meeting giving rise to the recording.
14. The fact that the Claimant did not inform the General Counsel that she was recording the conversation does not of itself, render the evidence inadmissible. It is for the Court to determine the probative value of the recording as weighed against other evidence to be adduced by the parties.
15. For the foregoing reasons, the Respondent's Objection is overruled with costs in the cause.
16. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF OCTOBER 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Mungai for the Claimant

Mr. Mwangambo for the Respondent

