



**Muchemi v Muchemi (Cause E347 of 2025)
[2025] KEELRC 2862 (KLR) (21 October 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2862 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E347 OF 2025
SC RUTTO, J
OCTOBER 21, 2025**

BETWEEN

MONA NYAMBURA RACHAEL MUCHEMI CLAIMANT

AND

SHUJAAZINC LIMITED RESPONDENT

RULING

1. What is before this Court for determination is the Respondent/Applicant's Notice of Motion dated 16th June 2025, in which it seeks the following orders:
 - a. The audio recordings obtained by the Claimant on or about 13th September 2024 and 14th September 2024, and any transcript or reference to them, be struck out and be excluded from evidence in these proceedings.
 - b. The Claimant be prohibited from relying on the audio recordings obtained on or about 13th September 2024 and 14th September 2024 in any way in these proceedings.
 - c. The Claimant's Further Supplementary List and Bundle of Documents dated 28th April 2025 be expunged from the Court's record.
 - d. Costs of this application be borne by the Claimant.
2. The Application is premised on the grounds set out on its face and the Affidavit of Robert Burnet, the Chairman of the Respondent/Applicant's Board of Directors.
3. The grounds in support of the Motion are that the Claimant filed a Supplementary Bundle of Documents dated 28th April 2025, which includes audio recordings allegedly obtained without Mr. Burnet's knowledge or consent. It is further contended that the said recordings violate his constitutional rights to privacy under Articles 31(d), 50(4), and 28 of *the Constitution*, as well as the provisions of the Data Protection Act.



4. The Applicant maintains that the circumstances under which the recordings were made render them inadmissible, as their use would be unfair and prejudicial, contrary to the right to a fair trial guaranteed under *the Constitution*.
5. That further, including the recordings in the court record is highly prejudicial, as they could unfairly influence the outcome of the case. In the Applicant's view, the recordings are taken out of context and do not accurately reflect the factual position of the dispute.
6. In his supporting Affidavit, Mr. Burnet deposes that on 13th September 2024, he telephoned the Claimant to request a meeting aimed at reviving mutual settlement discussions that had previously broken down. These discussions had followed the Applicant's directive requiring the Claimant to resume work, a directive he avers she had declined to comply with. The Claimant agreed to meet him on 14th September 2024.
7. Mr. Burnet avers that he attended the meeting in his official capacity as Chairman of the Applicant's Board, and that the purpose of the meeting was to explore terms for a possible mutual separation between the Applicant and the Claimant.
8. He further states that the meeting was intended to be confidential, given the nature of the employment relationship and the Applicant's genuine hope to reach an amicable resolution.
9. Mr. Burnet asserts that at no point before or during the meeting did the Claimant disclose that she was recording their conversation, either by audio or video means. He is categorical that he neither expressly nor impliedly consented to any such recording.
10. He adds that he was unaware of the presence or operation of any recording device during the phone call or the meeting and conducted himself on the understanding that the discussions were private and would not be recorded or disseminated.
11. Mr. Burnet avers that he later discovered that the Claimant had recorded their conversation without his knowledge or consent, as revealed in her Statement of Claim and Supplementary Bundle of Documents filed in these proceedings.
12. According to Mr. Burnet, the secret recording has caused him considerable distress, as it undermines the trust and confidence necessary in sensitive employment discussions and exposes private and confidential matters to potential misuse.
13. The Claimant opposed the Applicant's Motion through Grounds of Opposition dated 23rd June 2025, contending that Mr. Burnet, who alleges a violation of his right to privacy, is not a party to these proceedings and has not disputed the authenticity of the recorded conversations. The Claimant contends that it is improper for the Applicant to invoke the rights of a non-party in an attempt to exclude evidence lawfully obtained and relied upon by the Claimant.
14. The Claimant further contends that Mr. Burnet's right to privacy, in the context of the impugned recordings, is neither absolute nor infringed. That she made the recordings herself, being an active participant in the conversations.
15. It is further contended that the recordings captured discussions initiated by Mr. Burnet between two individuals who were both aware of and directly involved in the subject matter of their conversation. That the Court will have the benefit of direct evidence from the Claimant, who made the recordings, while the Applicant will have an opportunity to cross-examine her on the same.



16. The Claimant maintains that the recordings are highly relevant and possess substantial probative value in relation to the issues in dispute in the main suit, and expunging the said recordings from the record would negatively impact her right to a fair hearing.

Submissions

17. The Motion was canvassed through written submissions. In support thereof, the Applicant has argued that admitting into evidence the privileged and confidential discussions between Mr. Burnet and the Claimant would not only compromise the fairness of the proceedings but would also be detrimental to the proper administration of justice.
18. As to the Claimant's assertion that the right to privacy is not absolute, the Applicant submits that the Claimant has failed to demonstrate how the intrusion into its privacy is proportionate to any legitimate public interest that could justify admitting the recordings into evidence.
19. Relying on the decision in *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] eKLR, the Applicant has submitted that since the recordings were surreptitiously made without Mr. Burnet's knowledge or consent, their admission would amount to a direct violation of the Applicant's right to privacy.
20. Referencing the case of *Mbugua v Echo Network Africa (2024) KEELRC 343 (KLR)*, the Applicant has further contended that any evidence obtained in breach of a right or fundamental freedom protected under the Bill of Rights must be excluded from consideration.
21. The Applicant has further submitted that the right to privacy is inherently tied to the principle of consent, and that the act of recording the conversation constituted a breach of both Mr. Burnet's constitutional right to privacy and the statutory safeguards provided under the Data Protection Act. In support of this position, the Applicant cited the case of *Shakunt Rajnikant Shah v Bhupendra Motichand Shah & Another* [2021] eKLR.
22. The Applicant maintains that the admission of the impugned recordings would be highly prejudicial and would undermine its right to a fair trial, contrary to Article 50(1) of *the Constitution*.
23. On her part, the Claimant has submitted that the Applicant has failed to satisfy the dual threshold established under Article 50(4) of *the Constitution*. On this score, she has argued that the Applicant has not alleged any infringement of its own right to privacy and therefore lacks the requisite locus standi to advance a claim on behalf of Mr. Burnet.
24. The Claimant has further contended that the Applicant has failed to demonstrate the manner in which the recordings would prejudice its right to a fair hearing.
25. Additionally, the Claimant argues that she is entitled to pursue justice for the alleged violation of her right to fair labour practices and should not be denied that opportunity.
26. In conclusion, the Claimant posits that the recordings possess substantial probative value, and their admission into evidence would assist the Court in evaluating the credibility of her case and ultimately serve the interests of justice.

Analysis and Determination

27. To my mind, the central issue for determination is whether the audio recordings contained in the Claimant's Supplementary List and Bundle of Documents dated 28th April 2025 are admissible as evidence before this Court.



28. It is the Applicant's assertion that the impugned audio recordings were made without the knowledge or consent of its Chairman, Mr. Burnet, thereby infringing his constitutional rights to privacy as guaranteed under Articles 31(d), 50(4), and 28 of *the Constitution*.
29. It is further averred by the Applicant that the purpose of the meeting during which the Claimant made the recordings was to discuss the terms of a mutual separation between the Applicant and the Claimant, and that the discussions were intended to be confidential, given the nature of the employment relationship between the parties.
30. On the contrary, the Claimant contends that she was an active participant in the recorded conversations and that she personally made the recordings, not a third party. She further maintains that Mr. Burnet's right to privacy is not absolute.
31. Whereas Article 31(d) of *the Constitution* guarantees every person the right to privacy, including the right not to have the privacy of their communications infringed, there is no definitive judicial position on the admissibility of covert recordings in court proceedings.
32. It bears to note that Article 50(4) of *the Constitution* stipulates that evidence obtained in a manner that violates any right or fundamental freedom under the Bill of Rights shall be excluded if its admission would render the trial unfair or be detrimental to the administration of justice.
33. Accordingly, where a court finds that evidence was obtained in violation of a person's right to privacy, such evidence is inadmissible.
34. Evidence of this nature is also inadmissible where it is found to be irrelevant, where the recordings were made by an individual who was not a party to the conversation (third-party monitoring), where its authenticity cannot be verified, or where its admission would prejudice the fair trial or would otherwise be detrimental to the administration of justice.
35. Turning to the instant case, it is essential to consider the context in which the impugned audio recordings were made in order to determine their admissibility.
36. Having reviewed the impugned audio recordings, it is apparent to this Court that the meeting between the Claimant and Mr. Burnet took place at a time when the employment relationship between the Claimant and the Applicant had become strained.
37. From the recorded discussions, it is clear that the parties were attempting to resolve the issues affecting the employment relationship and exploring possible avenues for an amicable settlement. Indeed, at the conclusion of the meeting, both the Claimant and Mr. Burnet agreed to hold a subsequent meeting to further these discussions.
38. Fundamentally, the parties were engaged in settlement negotiations, and mention was made of the possibility of a mutual separation.
39. A review of the recordings shows that the Claimant and Mr. Burnet conversed openly and candidly, in a manner consistent with bona fide negotiations aimed at reaching a settlement.
40. Article 159(2)(c) of *the Constitution* enjoins courts, in the exercise of judicial authority, to promote alternative dispute resolution mechanisms, including reconciliation, mediation, arbitration, and traditional dispute resolution methods.
41. To give effect to this constitutional imperative, parties must be able to engage freely and candidly during settlement discussions, without fear that statements made in the course of such negotiations may later be used against them in judicial proceedings.



42. Indeed, the admission of such discussions as evidence in court would, in effect, defeat the very purpose and spirit of out-of-court settlement efforts.
43. In light of the foregoing, the Court finds that admitting the audio recordings made during the discussions between the Claimant and the Chairman of the Applicant's Board of Directors, Mr. Burnet, would be prejudicial to a fair trial.
44. The total sum of my consideration is that the Applicant's Notice of Motion dated 16th June 2025 is allowed. Consequently, the audio recordings contained in the Claimant's Supplementary List and Bundle of Documents dated 28th April 2025 are hereby expunged from the record.
45. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2025.

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STELLA RUTTO

JUDGE

In the presence of:

Ms. Njoroge For the Claimant/Respondent

Ms. Gathimba instructed by Mr. Deya For the Respondent/Applicant

Court Assistant Millicent

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

