

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT AT NAKURU

ELRC CAUSE NO. E036 OF 2024
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

MARY NDUTA KAGUMU.....
CLAIMANT

VERSUS

NATIONAL CEMENT COMPANY.....
.....RESPONDENT

RULING

Introduction

1. The Respondent/Applicant filed a Notice of Motion dated 24th September 2025 seeking the following orders:

1. The WhatsApp correspondences contained in the Claimant's further list of documents dated 20th November 2024 and/or to be relied upon as evidence in this matter be expunged from the court record and declared inadmissible for having been unlawfully obtained and for being in contravention of the Constitution and the Data Protection Act, 2019, particularly as regards the right to private and the requirement of consent from data subjects.

2. The email correspondences listed as item 2 in the Claimant's further list of documents dated 29th May 2025 and/or sought to be relied upon as evidence in this matter, be expunged from the court record and declared inadmissible for having been unlawfully obtained and for being in contravention of the Constitution and the Data Protection Act, 2019, particularly as regard in the right to privacy and the requirement of consent from data subjects.

3. The audio recording as items 3 to 9 in the Claimant's further list of documents dated 29th May 2025 and/or sought to be relied upon as evidence in this matter be expunged from the court record and declared inadmissible for having been unlawfully obtained and for being in contravention of the Constitution and the Data Protection Act, 2019, particularly as regards the right to privacy and the requirement of consent from data subjects.

4. Any other electronic evidence, including but not limited to audio recordings, emails, WhatsApp correspondences or similar communications, sought to be introduced or relied upon by the Claimant without compliance with the Constitution, the Data Protection Act, 2019 and the certification requirements of the Evidence Act, be expunged from the court record and declared inadmissible.

5. Cost of the application should be provided for.

Respondent/Applicant's supporting affidavit

2. Accompanying the application is the supporting affidavit of Erastus Mwanzia Musyoka, the Respondent's Human Resource Manager, sworn on 24th September 2025.
3. The Respondent/Applicant avers that he had reviewed the Claimant's pleadings and noted that she relies on WhatsApp messages item 1 in her Further List of Documents dated 20th November 2024 and audio recordings and emails items 2 to 9 in her

Further List dated 29th May 2025, copies of which are annexed as “EMW-1” and “EMW-2” respectively.

4. The Respondent/Applicant avers that these communications were obtained secretly and without the knowledge or consent of its officials, making them unlawfully obtained and inadmissible.
5. The Respondent/Applicant avers that the audio recordings are inauthentic, do not involve the Respondent/Applicant’s officials, and may have been fabricated or manipulated using voice actors or artificial intelligence tools, thus lacking credibility and probative value.
6. The Respondent/Applicant avers that the recordings violate **Article 31 of the Constitution of Kenya**, which protects the right to privacy, and contravene **sections 25, 29, and 30 of the Data Protection Act, 2019**, which mandate lawful and consensual data collection and processing.
7. The Respondent/Applicant avers that the impugned evidence is prejudicial, unlawfully obtained, and threatens her right to a fair hearing under **Article 50 of the Constitution**.
8. The Respondent/Applicant therefore urged this Honourable Court to strike out and expunge the said

recordings and emails from the record in the interest of justice and proper legal procedure.

Claimant/Respondent's replying affidavit

9. In opposition to the application, the Claimant/Respondent filed a replying affidavit dated 1st October 2025.
10. The Claimant/Respondent, having reviewed the Respondent's Application, avers that it is legally flawed and intended to obstruct a fair hearing.
11. The Claimant/Respondent avers that the audio recordings in question were made during genuine conversations with senior Respondent/Applicant officials, discussing the circumstances of her termination.
12. The Claimant/Respondent avers that these recordings are authentic, not fabricated or manipulated, and were lawfully obtained using her personal phone, as a certificate of authenticity has been filed in accordance with **section 106B of the Evidence Act**. Also, the recordings were made solely to preserve evidence of her treatment and termination.
13. Under **Articles 50(1) and 48 of the Constitution**, the Claimant/Respondent avers that she is entitled

to a fair hearing and access to justice, including the right to present relevant evidence.

14. The Claimant/Respondent avers that **Sections 36 and 45 of the Data Protection Act, 2019**, support the use of such data for legal claims in the cases of **John Muriithi & 8 others V Registered Trustees of Sisters of Mercy (Kenya) t/a “The Matter Misericordiae Hospital & Another [2018] eKLR, Njenga V DIB Bank Kenya Limited [2023] eKLR, Kinyanjui V Scania East Africa Limited [2023] KEELRC 1627 (KLR)**, and **Tumaz & Tumaz Enterprises Ltd & 2 Others V National Council for Law Reporting [2022] KEHC 14747** which affirm that relevant evidence, even if obtained irregularly, may be admissible if it serves a legitimate legal purpose and does not prejudice the opposing party.
15. The Claimant/Respondent avers that the recordings meet the criteria and their exclusion would severely undermine her case.
16. The Claimant/Respondent therefore urge the Court to dismiss the Respondent’s Application and admit the recordings in the interest of justice, fairness,

and substantive adjudication under **Article 159(2) (d) of the Constitution**.

Respondent/Applicant's further affidavit

17. The Respondent/Applicant filed a response to the Claimant/Respondent replying affidavit vide a further affidavit dated 1st October 2025.
18. The Respondent/Applicant avers that no meeting or conversation occurred between the Claimant/Respondent and any Respondent/Applicant officer, as confirmed by all alleged participants.
19. The Respondent/Applicant avers that the audio recordings submitted by the Claimant/Respondent lack verification from a mobile service provider and were obtained without consent, breaching the Data Protection Act's requirements for lawful, fair, and transparent processing.
20. The Respondent/Applicant avers that the recordings were not exempted by court order, and their authenticity remains unproven.

21. Furthermore, the Respondent/Applicant avers that they do not qualify as admissible electronic records under **section 106B of the Evidence Act**.
22. The Respondent/Applicant avers that their admission would prejudice its right to privacy and a fair hearing.
23. The Respondent/Applicant urges the Court to strike out the recordings in the interest of justice.
24. Parties canvassed the application by way of written submissions.

Respondent/Applicant's submissions

25. The Respondent/Applicant submitted that the audio recordings filed by the Claimant/Respondent were unlawfully obtained, lacked verification, and breached the Data Protection Act and **Article 31 of the Constitution**, which safeguard the right to privacy. The Claimant/Respondent, having assumed the role of a data processor, failed to inform the alleged participants or obtain their consent prior to recording, as required under **section 29 of the Data Protection Act**. No court order was sought to exempt the recordings from lawful processing principles under **section 51 of the Data**

Protection Act. The Respondent/Applicant denies that any such call occurred and challenges the authenticity of the recordings, asserting they are fabricated and prejudicial. The Respondent/Applicant relied on the cases of ***Shakunt Rajnikant Shah V Bhupendra Motichand Shah t/a John Cumming & Company & another [2021] KEHC 3655 (KLR)*** and ***Kenya Human Rights Commission V Communications Authority of Kenya & 4 others [2018] KEHC 7494 (KLR)***, the Respondent emphasizes that privacy protections must be upheld and that admissibility requires strict compliance with legal standards.

26. The Respondent/Applicant argued that the Claimant/Respondent failed to disclose the source, device, or identity of the person who processed the recordings, and did not demonstrate authority to record the alleged tele-conversation. The recordings are not considered “computer output” under ***section 106B of the Evidence Act*** and cannot be authenticated by certificate alone. The Respondent/Applicant relied on the cases of ***Nthiwa Mutuku v Court of Appeal & 3 others [2021] KEHC 8264 (KLR)***, ***Zahira Sheikh V***

State of Gujarat & others AIL 2006 SC 1367, Mbugua V Echo Network Africa [2024] KEELRC 343 (KLR), MNN V ENK [2018] KEHC 4331 (KLR), and Samwel Kazungu Kambi V Nelly Ilongo & 2 others [2017] eKLR, submitting that admitting the recordings would violate privacy rights and the right to a fair hearing, and urges the Court to expunge them from the record.

27. The Respondent/Applicant submitted that the Email and WhatsApp correspondence listed in the Claimant's Further List of Documents dated 29th May 2025 and 20th November 2024 are inadmissible, having been unlawfully obtained without explanation, consent, or authentication. Their production contravenes **Article 50(4) of the Constitution**, which excludes evidence obtained in violation of rights if it renders the trial unfair or undermines justice, as affirmed in **Okiya Omtatah Okoiti & 2 Others V Attorney General & 4 Others [2020] KECA 589 (KLR)**.

28. No certificate of authenticity has been provided, contrary to **Sections 106A and 106B of the Evidence Act**. While courts in **Kinyanjui V Scania East Africa Ltd(supra)** and **Njenga V DIB Bank**

Kenya Ltd(supra) have held that irregularly obtained evidence may be admissible if relevant and not prejudicial, the Respondent argues that the Claimant's evidence lacks foundation and infringes privacy rights under **Article 31 of the Constitution**. In **Tumaz & Tumaz Enterprises Ltd V National Council for Law Reporting(supra)** emphasized that privacy is not absolute but must be balanced against justice.

29. The Respondent/Applicant therefore urges the Court to uphold its application as prayed.

Claimant/Respondent's submissions

30. The Claimant/Respondent submitted that the electronic evidence, including audio recordings, emails, and WhatsApp messages, was lawfully obtained during actual conversations involving the Claimant/Respondent and the Respondent/Applicant's officials, and directly relates to the circumstances of her termination. A certificate of authenticity has been filed in compliance with **Section 106B of the Evidence Act**, confirming the recordings are original and untampered.

31. The Claimant/Respondent argued that allegations that the recordings are fabricated or AI-generated are unsubstantiated. Courts have held, as in ***Kinyanjui V Scania East Africa Ltd(supra)*** and ***Njenga V DIB Bank Kenya Ltd(supra)***, that recordings made by a party to the conversation are admissible, even if obtained secretly, provided they are relevant and not prejudicial. The right to privacy under ***Article 31 of the Constitution*** is not absolute, as affirmed in ***Tumaz & Tumaz Enterprises Ltd V National Council for Law Reporting(supra)***, and must be balanced against the right to a fair hearing.
32. The Claimant/Respondent therefore urges the Court to admit the evidence and dismiss the Respondent/Applicant's application with costs.

Analysis and determination

33. Having considered the application, supporting affidavit, replying affidavit, further affidavit together with the rival submissions by both counsels; the issue for determination is whether the application is merited and if the impugned documents should be admitted.

34. ***Article 50 of the Constitution*** provides for a fair hearing, and in ***Kinyanjui V Scania East Africa***

Ltd(supra) and ***Njenga V DIB Bank Kenya***

Ltd(supra), courts emphasized that data, including recordings, must be handled lawfully and ethically. Unauthorized or improperly obtained recordings may be excluded if they breach privacy or data protection laws.

35. ***Sections 107, 108 and 109 of the Evidence Act*** provide that whoever alleges must prove. In this instant case, the Respondent/Applicant is seeking to expunge the audio recordings, emails, WhatsApp correspondences filed before this Honourable Court.

36. The Applicant/Respondent avers the audio recordings were not obtained with the consent of the Respondent/Applicant or their knowledge and so should be rendered inadmissible. They also pray the email correspondences produced in court which they say were also obtained without the consent of the Respondent should be rejected.

37. Indeed, it is not even clear what documents the Respondent is referring to as there is the messages dated 2nd May 2024 and are not marked "***EMW1***" as deponed by the deponent Erastus Mwanzia Musyoka in his supporting affidavit dated 24th September 2025. This is a message apparently

written by the Claimant to a person she addressed as “*Sir.*” The court is not clear as to the issue raised by the Respondent in objection to the said document.

Equally, the referred email correspondences marked “**EMW2**” are also not in the file. The court is not able to state with clarity what documents the Respondent is objecting to.

38. As for the audio recording, similarly the court has not had the benefit of deciphering the source of the same and it would be unfair to reject evidence without even having the idea of what the same is all about.

39. The court is of the considered view that, given the preliminary stage of the proceedings, it would be premature and counterproductive to focus extensively on the manner in which the information was obtained without hearing the respective parties. The focus at this juncture, is to ensure that the substantive issues in dispute are addressed fairly and comprehensively. Dwelling on the technicalities surrounding the source or method of acquiring the evidence, especially when its relevance and authenticity are not in question, risks derailing the case from its core purpose: the pursuit of justice.

Moreover, procedural objections regarding admissibility can be more appropriately dealt with during the full hearing, once all parties have had the opportunity to present their evidence and arguments and to cross examine the respective witnesses.

40. The court has considered the provision of the case of ***Okiya Omtatah Okioti & 2 Others -V- The Attorney General & 4 Others (2020) eKLR*** which stated as follows:-

“In our view, under Article 50(4) of the Constitution if a court determines that admission of evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights would be detrimental to the administration of justice, the court may reject it irrespective of whether it is in connection with a civil or criminal trial.”

41. But as already stated the court is persuaded to proceed with the hearing to its conclusion seeing there is no satisfactory evidence at this junction to justify how the audio and the emails were obtained and to determine their admissibility or otherwise.

42. In the interest of fairness and judicial economy, the court finds that the application lacks merit and it is just to allow the matter to proceed to hearing and interrogation of the issue of admissibility of the hearing during the proceedings.

43. Costs will be in the cause.

Order accordingly.

Dated, Signed and Delivered virtually at Nakuru this 6th Day of November, 2025.

ANNA NGIBUINI MWAURE
JUDGE

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 has 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE