



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndururi v Office of the Data Protection Commissioner & 2 others;  
Office of the Attorney General & 3 others (Interested Parties) (Petition  
E193 of 2024) [2025] KEELRC 822 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 822 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E193 OF 2024**

**B ONGAYA, J**

**MARCH 14, 2025**

**IN THE MATTER OF ARTICLES**

**2,3,10,19,20,21,22,23,24,25,27,28,29,30,31,40,41,47,48,50,159,162**

**OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF VIOLATION OF RIGHTS UNDER**

**ARTICLES 27,28,29,30,31,40,41,47,48,50 OF THE**

**CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**(PROTECTION OF RIGHTS AND FUNDAMENTAL**

**FREEDOMS) PRACTICE AND PROCEDURE RULES,2013**

**IN THE MATTER OF ARTICLES 5,6,7,12,13,14,17,22 OF THE**

**GENERAL DATA PROTECTION REGULATION**

**IN THE MATTER OF SECTIONS 4,6,7,8&9 OF THE FAIR**

**ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**IN THE MATTER OF ARTICLES 5,6,7,13,14,16,17,18,21 OF**

**THE EUROPEAN UNION GENERAL DATA PROTECTION**

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**REGULATION 2016**

**IN THE MATTER OF SECTIONS**

**3,4,8,9,25,26,28,29,30,31,32,36,40,44,45,48,49,56,57,59,63,64,65,72,**

**73 OF DATA PROTECTION ACT NO 24 OF 2019**

**IN THE MATTER OF SECTIONS 7, 8, 9(1) (2) (3), 10, 13 AND**



**15 OF THE EMPLOYMENT AND LABOUR RELATIONS ACT**  
**2007**  
**IN THE MATTER OF THE DECISION BY THE ODPC IN**  
**COMPLIANT NO 289 OF 2024**

**BETWEEN**

**DENNIS GITONGA NDURURI ..... PETITIONER**

**AND**

**OFFICE OF THE DATA PROTECTION COMMISSIONER .... 1<sup>ST</sup> RESPONDENT**

**TWIGA FOODS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**IBM EAST AFRICA LTD ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**OFFICE OF THE ATTORNEY GENERAL ..... INTERESTED PARTY**

**KNCHR ..... INTERESTED PARTY**

**COMMISSION ON THE ADMINISTRATION OF JUSTICE .... INTERESTED PARTY**

**KATIBA INSTITUTE ..... INTERESTED PARTY**

**RULING**

1. The Petitioner/applicant filed an application by the notice of motion dated 27.11.2024 through Munene Njuguna & Co Advocates. The application was under Articles 2, 3(1), 10, 19, 20, 21(1), 3(3), 22(1), 23(1), 24, 25(a), (b), & (c), 27, 28, 29(d), (f), 30, 31, 40(1), (2), 41(1), 2(a), (b), 47, 48, 50,(1), 159(1), (2), & 162 (1), (2), (a), of Constitution, sections 4 (1,2,3,4), 6 (1,2,3,4 ,&5), 7(1,&2), 8 & 9 (1,2,3,&4) of the Fair Administrative Action Act No.4 of 2015; sections 3,4, 8(1) (f) (3), 9 (1) (a, b, d&e), 25(a, b, c, d, e, f, g, h, ) 26,28, (1), (2) (a), 29, 30 (1a, 2 &3), 31, 32, 36, 40,44, 45, 48, 49, 56,57, 59, 63,64, 65,72, (1,2 &3), and 73 of the Data Protection Act No.24 of 2019; and, sections 7, 8,9(1, 2 &3), 10, 13 and 15 of the Employment and Labour Relations Act, 2007 - (which act appears not to exist). The applicant prayed for the following orders:
  - a. That the application be and is hereby certified urgent, be heard ex parte in the first instance and service thereof be dispensed with.
  - b. That pending the hearing and determination of the petition an order of temporary injunction doe issue restraining the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and or their partners, agents, employees, and or any other third party to whom the petitioner’s image had been licensed from further distributing and or using the petitioner’s image for marketing or any other purpose without the petitioner’s consent.
  - c. That pending the hearing and determination of the petition a mandatory injunction does issue compelling the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to erase the petitioner’s image wherever they have



used and or stored it and to contact all third parties to whom the petitioner's image had been licensed, to take all reasonable steps to erase the petitioner's image wherever they have used and or stored it.

- d. That the applicant be and is hereby granted exemption under section 9(4) of the *Fair Administrative Action Act* from the obligation to exhaust the appellate remedies provided for under section 64 of the Data Protection Act of 2019 on account of continuous injury to the petitioner's constitutionally guaranteed rights.
  - e. That the Honourable Court does grant any other appropriate orders as it deems fit.
2. The application is supported by the applicant's affidavit and upon the following grounds:
- a. That the applicant hereinafter the petitioner, was an employee of Twiga foods limited, hereinafter Twiga, working as a sales representative from 01.04.2018 to 30.07.2018 a period of only four months.
  - b. That unknown to the petitioner, Twiga had partnered with International Business Machine, hereinafter IBM in a joint commercial venture.
  - c. That on the evening of 11.04.2018 while returning company trucks, he and other sales representatives were verbally informed that Twiga administrators would make rounds the next day at their respective sites and so they were required to be neat and in company uniform i.e., overall or dustcoat.
  - d. That on 12<sup>th</sup> April 2018 the said representatives of African descent came and took the petitioner's picture and those of his driver while offloading farm produce and left without saying much.
  - e. That unknown to the petitioner, the pictures were then forwarded to IBM who posted one particular photo on Flickr and jointly named the image "IBM & TWIGA pictures 23" and put a licensable badge on the image meaning any person could be licensed to use the photo under terms and conditions set by Twiga and IBM.
  - f. That apart from posting his image of Flickr, both IBM and Twiga went further and partnered with CNN and put a 16 page advertisement feature on CNN's website using the petitioner's image and depicting him as an employee and the advertisement feature has been on CNN's website to date.
  - g. That due to the global success of the venture, which made Twiga among notable technology driven companies in the world, other agents, partners and third parties heavily marketed Twiga and or wrote extensive articles on Twiga using this particular image on all platforms, including Flickr, Tik Tok, X, Facebook, LinkedIn, Instagram, magazines, newspapers, CNN, IBM among other places as early as 15.04.2018 less than three days after the image was taken which articles are using the image to date.
  - h. That the image was obtained illegally through misrepresentation and undue influence and has been used by Twiga and IBM in a manner contravening the terms of the contract of employment as well as the petitioner's constitutionally guaranteed rights to privacy, dignity and property among others.
  - i. That the petitioner is being treated in a manner that is discriminative and has been racially profiled by IBM and Twiga, he has lost control over the use of his image and has been made a



global brand ambassador for Twiga without his knowledge, which has resulted in psychological trauma, loss of dignity and financial loss.

- j. That further, his security has been put at risk as he is now globally known as an employee of Twiga and risks his image being used for cybercrime related activities and also for memes, especially in the age of artificial intelligence.
  - k. That both Twiga and IBM have refused to take steps to inform third parties to erase the image even after demand letters and proceedings before the Office of the Data Protection Commissioner hereinafter ODPC.
  - l. That when the ODPC was presented with the petitioner's complaint against Twiga, IBM and others, the ODPC denied the petitioner a fair administrative action and delivered a per-incuriam decision dated 13.05.2024 without according the petitioner a fair hearing.
  - m. That the ODPC denied the petitioner justice on account of not allegedly having served a demand letter, thereby denying the petitioner a statutory remedy for the violation of his right to privacy, leaving him at the mercy of international conglomerates. That the ODPC further denied the petitioner the investigative record and documents relied upon and which were necessary for appeal, rendering an appeal impractical.
  - n. That when the petitioner filed for judicial review, IBM's response was that they had no notice of proceedings and the process at the ODPC despite the weight of evidence against them.
  - o. That further IBM, and Twiga were still marketing their venture on CNN as at that date of the determination and also after the judicial review proceedings had been filed, making the judicial review process the improper forum in the circumstance and the suit was thus withdrawn with costs.
  - p. That the decisions by the ODPC and that of Twiga and IBM continue to occasion irreparable loss and damage to him as Twiga, IBM and other third parties continue to use the image for commercial purposes globally without consent, which is a violation of his constitutionally guaranteed rights to privacy, dignity and property among others.
  - q. That the petitioner is a citizen of the Republic of Kenya and therefore entitled to equal protection of the law as other citizens of the said republic.
  - r. That the actions complained about by the petitioner, pose a gross indictment to principles of constitutionalism and the rule of law and if allowed to stand, the said actions will occasion great injustice and or lawlessness.
3. In turn the 3<sup>rd</sup> respondent's filed a Notice of Preliminary Objection dated 10.12.2024 through Ronn Law Advocates LLP and made on the following grounds:
- a. That the Honourable Court has no jurisdiction to entertain the petition dated 27.11.2024 and the application dated 27.11.2024 against the 3<sup>rd</sup> respondent since there is no employer-employee relationship between the petitioner and the 3<sup>rd</sup> respondent.
  - b. That the petition dated 27.11.2024 and the application dated 27.11.2024 are time barred having been brought outside the statutory limitation of 3 years in view of section 89 of the *Employment Act*, cap 226.
  - c. That the petition dated 27.11.2024 and the application dated 27.11.2024 are misconceived, incompetent, bad in law and an abuse of the court process.



4. In response the 2<sup>nd</sup> respondent filed a Grounds of Opposition dated 10.12.2024 through Kaplan & Stratton Advocates and made on the following grounds:
  - a. That the Honourable Court lacks jurisdiction to entertain the application and petition as the cause of action does not arise from a contract of employment but rather the 1<sup>st</sup> respondent's decision dated 14.05.2024.
  - b. That the application and petition before the court are incompetent, barred in law and an abuse of the court process. The petitioner has sought to file the cleverly disguised appeal against the 1<sup>st</sup> respondent's decision dated 14.05.2024 as a constitutional petition in clear disregard of section 64 of the Data Protection Act.
  - c. That the Honourable Court lacks the jurisdiction to stay the operation of the appellate procedure available to the petitioner pursuant to section 64 of the Data Protection Act as read with section 9(2) of the [Fair Administrative Action Act](#) and which jurisdiction lies before the High Court.
  - d. That any cause of action giving rise to the proceedings herein arising from a contract of employment would be statute barred pursuant to section 90 of the [Employment Act](#).
5. The parties filed their respective submissions. The court has considered the parties' respective positions and makes finding as follows:
  - a. Section 64 of the Data Protection Act provides as follows:

64. A person against whom any administrative action is taken by the Data Commissioner, including in enforcement and penalty notices, may appeal to the High Court.
  - b. At prayer 2 of the petition the applicant has prayed thus "2. A judicial review order of certiorari does issue quashing the determination of the data commissioner dated 13<sup>th</sup> May 2024 in ODPC complaint No.289 of 2024 Dennis Gitonga Versus Twiga Foods Limited.
  - c. The applicant seeks an order to exempt him from the exhaustion of the appellate jurisdiction under section 64 of the Act.
  - d. The Court returns that the appellate procedure is the elaborate statutory procedure for challenging the decision of the Data Commissioner both on merits and procedure. There is no established ground to defeat the statutory ground. That preliminary point will succeed and the petition amenable to striking out.
  - e. The Court considers that the injury appears to persist. It also appears that it accrued while the petitioner was in employment of 2<sup>nd</sup> respondent. In any event, whether parties were in a contract of employment and involvement of the 2<sup>nd</sup> respondent are matters of fact requiring evidence to be taken and the same being in dispute, the preliminary objection based on want of Court's jurisdiction allegedly because there exists no employment relationship will fail.
  - f. In so far as the injury is continuing as alleged for the applicant, under section 90 of the [Employment Act](#), 2007 the time of limitation for a cause of action for a continuing injury is 12 months from cessation thereof. Thus, if indeed the injury is continuing, then time of limitation has not lapsed and in that consideration, each party to bear own costs of the proceedings. Further, the issue whether the injury is continuing as a disputed matter of fact would need to go on full hearing and therefore not qualified as a proper preliminary point.



- g. The Court has upheld the 3<sup>rd</sup> respondent's submission that appeal under section 64 of the Data Protection Act is the proper manner of challenging the Commissioner's impugned decision. On that account the petition will be struck out.
- h. In the consideration of the finding on exhaustion principle, the application will as well fail as the petition is an abuse of court process.

In conclusion the petition is hereby struck out and the application dismissed with orders each party to bear own costs of the application and the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
FRIDAY 14<sup>TH</sup> MARCH, 2025**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

