



Mbugua v Echo Network Africa (Employment and Labour Relations Petition E064 of 2022) [2024] KEELRC 343 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 343 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E064 OF 2022**

SC RUTTO, J

FEBRUARY 23, 2024

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 31(D), 41(1),
47; 50(1); 258(1) & 259(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 35(1) (C); 36; 41; 43; 44; 45;
47(3) (5); 49, 50 AND 51 OF THE EMPLOYMENT ACT CAP 226**

AND

**IN THE MATTER OF SECTIONS 4, 7, 9 AND 11 OF THE FAIR
ADMINISTRATIVE ACTIONS ACT, NO.4 OF 2015 LAWS OF KENYA**

AND

**IN THE MATTER OF SECTIONS 14 AND 16 OF
THE COMPUTER AND CYBERCRIMES ACT, 2018**

BETWEEN

MARGARET WAIRIMU MBUGUA PETITIONER

AND

ECHO NETWORK AFRICA RESPONDENT

JUDGMENT

1. The Petitioner avers that she was employed by the Respondent sometimes in October 2014 as a Project Manager. The initial engagement was for a period of six months. She was later issued with a three year contract from 1st April 2015 to 31st March 2018. The contract was subsequently renewed for a further three years. On 1st April 2021, the Petitioner’s contract was extended for another three years ending 31st March 2024.



2. The Petitioner further states that at the time of her termination, she had only worked for six months and that she had reasonable expectation to work for the remaining 31 months until the completion of her contractual term.
3. From the record, the Petitioner's employment was terminated with effect from 27th September 2021 for gross misconduct. According to the Petitioner, her dismissal was unlawful and unfair. She has further cited the Respondent for violation of her right to fair labour practises, right to fair administrative and fair hearing; and right to privacy.
4. Against this background, the Petitioner seeks the following reliefs:
 - a. A Declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 26, 31, 41, 43, 47 and 50 of *the Constitution* of Kenya, 2010 have been contravened and infringed upon by the Respondent.
 - b. A declaration that the termination of the Petitioner was unfair, unlawful and unprocedural.
 - c. Compensation for unfair termination 3,769,716.00
(Ksh. 314,143.00 x 12 months)
 - d. Pay in lieu of Notice 314,143.00
 - e. Unpaid leave days 447,049.00
(314,143/26 days x 37 days)
 - f. Balance of Contract 9,424,290.00
(314,143 x 39 months)
 - g. Gratuity at 25% per month 2,356,072.00
(314,143.00 x 25% x 3 months)
 - h. An order compelling the Respondent to issue the Petitioner with a Certificate of Service.
 - i. Cost of this Petition.
 - j. Any other befitting relief under Article 23(3) of *the Constitution* of Kenya.
5. The Respondent countered the Petition through an Answer to the Petition dated 25th May 2022 and a Replying Affidavit sworn on even date by Teresa Wanja Mwaura. The Respondent admits that the Petitioner was in its employment from 6th October 2014 up to 28th September 2021 when she was lawfully and procedurally terminated for gross misconduct.
6. The Respondent further denies violating the Petitioner's rights and to this end, has put her to strict proof. According to the Respondent, the Petitioner is not entitled to any reliefs set out in the Petition. Consequently, the Respondent has asked the Court to dismiss the Petition with costs.

Petitioner's Case

7. The Petition was canvassed by way of oral evidence. In this regard, the Petitioner testified in support of her case and to start with, she sought to rely on her Supporting Affidavit to constitute her evidence in chief. She further produced the documents annexed to the Supporting Affidavit as her exhibits before Court.



8. The Petitioner averred that on 23rd September 2021, she was working away from the office when she received an email from the Respondent's Chief Executive Officer (CEO), Dr. Jennifer Riria, for a mandatory physical meeting at the office.
9. The meeting was scheduled for 28th September 2021 at 11.00 am. According to the email, the agenda of the meeting was to discuss the program and/or schedule of activities from January to December 2022 (sic).
10. The invitation included the Petitioner, her colleague by the name Teresia Nyambura Wakahia, Human Resource, a representative from the legal department, the head of finance, the head of positioning, and the program liaison manager.
11. The Petitioner further stated that the meeting began with song and dance. To her shock, Teresia Wakahia and herself were asked to disable the passwords in their computers which were thereafter taken away.
12. The CEO went ahead and played a recording which she asked them to listen to. It was a recording of a tele-conversation between herself and her colleague Teresia Wakahia. The conversation was about the frustrations they were facing at the workplace and other personal issues.
13. The CEO later gave them some documents to sign and confirm that the voices in the recording were theirs, which they did.
14. According to the Petitioner, the communication was merely about their apprehension especially in light of the recent occurrences at their workplace. Several people had been terminated from employment with little or no regard for the provisions of the law and or procedure. There had been a lot of frustrations directed towards both of them that made them fear for their position at the workplace.
15. Each of them was thereafter issued with a letter for summary dismissal on grounds of misconduct. The letter was dated 27th September 2021, a day before the date of termination. In effect, they had been condemned unheard.
16. Both of them were asked to hand back the office keys in their possession and leave the premises within thirty minutes.
17. The Respondent's donors and partners were instructed not to deal with them in any way as a result of their alleged misconduct.
18. According to the Petitioner, everything happened so fast and she did not understand what misconduct was so gross to warrant such drastic action.
19. She averred that at the time of her termination, she had 37 leave days that she had not yet utilized. She was not informed of the status of these unpaid leave days. To date, the leave days remain unpaid and unutilized, contrary to the provisions of the [Employment Act](#).
20. The Petitioner further stated that her termination from employment has caused her and her family untold emotional and financial distress. The Respondents and their agents went ahead to plaster their names on a newspaper with nationwide circulation, labeling them, in the eyes of ordinary thinking citizens, to be untrustworthy and incompetent.
21. The Petitioner further termed her termination from employment not only illegal but a gross violation of her constitutional rights on grounds that; she was not informed of the charges against her; she was not given an opportunity to respond to the charges against her; she was not accorded a fair hearing or any hearing; she was not accorded an opportunity to have a representative of her choice during the



meeting; she had the privacy of her communication infringed by her employer without her consent and the said communication was used to terminate her employment.

Respondent's Case

22. The Respondent called oral evidence through Ms. Teresa Mwaura who testified as RW1. Ms. Mwaura identified herself as a former employee of the Respondent, having worked as the Head of Legal Affairs. Similarly, she sought to rely on her Replying Affidavit to constitute her evidence in chief. She further produced the documents filed on behalf of the Respondent as exhibits before Court. In addition, she sought to produce an audio recording, the accompanying Certificate and transcript to constitute her evidence in chief.
23. RW1 told the Court that on 22nd September 2021, the Respondent's CEO, Dr. Jennifer Riria, received a recording vide her mobile phone from an anonymous source.
24. The recording contained voice conversations between staff employed by the Respondent. After listening to the recording, the Petitioner and her colleague who were both in attendance confirmed that the contents of the recording demonstrated evidence of gross professional misconduct in the implementation of the programme on Women and Aquaculture.
25. RW1 further stated that the recording incriminated the said staff on fraud and or intents to embezzle the institution against Donor funds received to support the aforementioned programme.
26. That further, on 23rd September 2021 a meeting link was shared for a meeting to be held on 27th September 2021 at 11.00 am at the Respondent's offices.
27. RW1 further averred that the staff who were invited were the CEO, herself, the Head of Finance Resources Management, the Democracy and Positioning Programme Coordinator, the Legal Officer, the Petitioner and her colleague. All members were requested to carry their fully charged laptops to the said meeting.
28. She is aware that all the attendants at the meeting were requested to listen to the audio recording which bordered on insults and defamation of the Respondent's CEO.
29. Thereafter, the CEO circulated Disclosure Forms to all members present to indicate whether or not they had heard their voices in the recording. All members indicated the contrary other than the two implicated staff.
30. It was RW1's further testimony that the Petitioner and her conspirator in the recording, confirmed in writing that they were the persons talking in the said recording.
31. The CEO then enquired whether the two had anything to say or comment with regards to the recording and they both confirmed in verbatim that they did not have anything to say.
32. RW1 further stated that the CEO and all in attendance deliberated over the matter and it was agreed that the Petitioner and her colleague would be asked to state their defence if any which they said they had none at all.
33. The following day, the Petitioner was issued with her termination letter wherein she was given seven days to appeal the decision and also hand over company property but that was not done.
34. According to RW1, the Petitioner was given a fair hearing and a chance to defend herself before a decision to terminate her services was made.



Petitioner's Submissions

35. The Petitioner submitted that the Respondent breached her right to fair labour practices as the procedure stipulated under Sections 41 and 44 of the [Employment Act](#) was not followed in terminating her employment. She thus termed her termination unfair and unlawful. In support of the Petitioner's proposition, the case of Michael Odhiambo Opiyo vs Bidco Africa Limited (2021) eKLR was referenced.
36. In the same breath, the Petitioner further submitted that her right to fair administrative action and fair hearing was breached by the Respondent's failure to issue her with a notice of the charges against her. She further contended that she was not given an adequate opportunity to seek a representative of her choice and to defend herself. To this end, the determination in Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology (2014) eKLR was cited to bolster the Petitioner's position.
37. The Petitioner maintained that she was not given a defence hearing as she was kept in the dark about the meeting called on 28th September 2021 with regard to her termination. She further submitted that she was caught off-guard and could not give a proper defence to respond to the allegations, call her own witnesses or cross-examine witnesses.
38. In further submission, the Petitioner stated that on 29th September 2021, a day after her termination notice, the Respondent issued communication to its partners and stakeholders not to deal with her and Teresia Wakahia. She contends that by further publishing a public notice in the Daily Newspaper on 30th September 2021, cautioning members of the public not to deal with her and Teresia, the Respondent had already predetermined her fate despite stating that she had a seven-day appeal period.
39. With respect to the recording received by the Respondent's CEO, the Petitioner submitted that the phone recording was made without her consent nor her knowledge contrary to Section 14 of the [Computer Misuse and Cybercrimes Act](#). In support of her argument, she made reference to the decision in David M'iti Makwacii v Kenya Defence Forces (2019) eKLR. She maintained that the recording was therefore illegally obtained and should not be relied upon.
40. The Petitioner further contended that the recording produced as evidence by the Respondent was obtained in violation of her right to privacy contrary to Article 31(d) of [the Constitution](#) and that it would be detrimental to the administration of justice to admit it as evidence.
41. In addition, the Petitioner maintained that the recording should not be relied upon as evidence of gross misconduct as this would be contrary to the provisions of Section 106B of the [Evidence Act](#).
42. The Petitioner further submitted that the Respondent's Certificate as to the production of electronic evidence dated 2nd August 2023 has not adhered to the provisions of Section 106B (4) of the [Evidence Act](#) since it has not described how the electronic evidence was produced, does not disclose any particulars of any device involved in the production of the recording and does not deal with any matters to which the conditions mentioned in Section 106(B) (2) of the [Evidence Act](#) relate.
43. Placing reliance on the case of MNN v ENK (2017) eKLR and Samwel Kazungu Kambi v Nelly Ilongo & 2 others (2017) eKLR and urging the Court to strike out the phone conversation recorded as evidence, the Petitioner submitted that the source of the tele-conversation recording relied upon by the Respondent was not disclosed. That the device used to capture the tele-conversation was not named and that the person who processed the recording and copied it to a flash drive for production before Court was not named.



Respondent's Submissions

44. On its part, the Respondent submitted that the Petitioner did not deny or raise any objection against the contents of the recording as she had signed a Disclosure Form confirming that she had heard her voice.
45. The Respondent further submitted that a transcription was availed to the Petitioner after the meeting and has been filed in Court. The Respondent thus argued that the said transcription is admissible as evidence since the Petitioner has not denied knowledge of it or disputed discussions therein. According to the Respondent, this was indeed a valid and reasonable ground on which the Petitioner's employment was terminated.
46. It was the Respondent's further submission that before the Petitioner and her coworker were dismissed, they were invited to a meeting of 29th September 2021 to share any concerns regarding their employment. That the Petitioner simply stated that all employees should be treated fairly and did not object to the proceedings of the previous meeting.
47. In the Respondent's view, the termination of the Petitioner's employment was effected in accordance with the law and she was given the right to appeal hence she was given a fair hearing.
48. The Respondent further contended that the Petitioner has approached this Court with unclean hands and has failed to prove that her dismissal was unfair as required under Section 47(5) of the [Employment Act](#).
49. It was the Respondent's further submission that RW1 was indeed a competent witness as she was its employee and that she attended the meeting between the Petitioner and the Respondent. That further, she provided legal advice to the Respondent from time to time when called upon to do so.
50. In support of the Respondent's case, reliance was placed on the cases of Pius Machafu Isindu v Lavington Security Guards Limited (2017) eKLR and Catherine Wamuyu Mugweru vs St. Andrews Zimmerman Primary & another (2023) KEELRC 288.

Analysis and Determination

51. I have considered the pleadings by both parties, the evidentiary material on record as well as the rival submissions and isolated the following issues for determination: -
 - i. Admissibility of the Electronic Evidence by the Respondent;
 - ii. Whether the Respondent violated the Petitioner's constitutional rights; and
 - iii. Whether the Court should grant the reliefs sought in the Petition.

Admissibility of the Electronic Evidence by the Respondent

52. As stated herein, the Respondent produced an audio recording and the attendant transcription through RW1. The said audio recording which was played in Court, contained a tele-conversation between the Petitioner and her colleague by the name Teresia Wakahia.
53. RW1 stated in paragraph 3 of her Replying Affidavit that the Respondent's CEO, Dr. Jennifer Riria received the audio recording via her mobile phone from an anonymous source.
54. Cross-examined, RW1 stated that she did not know the source of the recording. She further stated in cross-examination that the Petitioner and her colleague did not consent to the recording being taken.



55. This takes me to Article 50(4) of *the Constitution* which provides as follows:
- 50(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.
56. Of relevance in this case, is Article 31(d) of *the Constitution* which provides as follows:
- [31]. Every person has the right to privacy, which includes the right not to have...(d) the privacy of their communications infringed.
57. It is thus clear that Article 50(4) of *the Constitution*, read with Article 31(d) is unequivocal that every person has a right not to have the privacy of their communication infringed and that where evidence is obtained in violation of that right, such evidence is excluded from admission.
58. In considering the import of Article 50(4) of *the Constitution*, the Court in the case of David Ogolla Okoth v Chief Magistrate court, Kibera & 2 others, [2016] eKLR opined as follows:
- “It is true evidence ought to be obtained in accordance with the provisions of both *the Constitution* and of the law. Obtaining evidence and indeed, as in this particular case, seizing the same without first obtaining appropriate warrants violates Constitutional norms. The right to property as well as the right to privacy will be violated. Likewise, the right to have a person’s dignity respected will also be violated not forgetting security of person and of a person’s property. In such instances, Article 50(4) provides “ [e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice”.
59. As stated herein, the Respondent had in its possession an audio recording of a tele-conversation between the Petitioner and her colleague, Teresia Wakahia. Worthy to note is that the Respondent did not demonstrate how the private tele-conversation between the Petitioner and her colleague came to be recorded and ended up in the audio recording that was played in Court.
60. Further, there was no evidence that the maker of the audio recording had authority to record the tele-conversation between the Petitioner and her colleague. This fact was confirmed by RW1 during cross-examination.
61. Without a doubt, a person’s private communication, as the name suggests, is private and confidential in nature hence can only be accessed upon express permission and consent by that person. As stated herein, there is no evidence that such permission or consent was granted by the Petitioner to the maker of the audio recording.
62. Indeed, there is no evidence to show how the recording was obtained and the manner in which it landed in the Respondent’s hands.
63. This leaves me without a doubt that the evidence adduced by the Respondent through the audio recording was procured in breach of the Petitioner’s right to privacy as guaranteed under Article 31(d) of *the Constitution*.
64. In light of the foregoing, the evidence contained in the audio recording falls within the ambit of the evidence excluded under Article 50(4) of *the Constitution*.



65. On this score, I agree with the determination of the Court of Appeal in *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] eKLR, where it was held that:
- “ 84. We therefore agree with the learned Judge that it would be detrimental to the administration of justice and against the principle underlying Article 50(4) of *the Constitution* to in effect countenance illicit actions by admission of irregularly obtained documents.”
66. Further to the foregoing, the said evidence being electronic in nature, ought to have been adduced in line with the relevant provisions of the *Evidence Act*.
67. In this regard, Section 78A (1) of the *Evidence Act* (cap 80) provides for admissibility of electronic and digital evidence while Section 78A (2) provides that a court shall not deny admissibility of evidence under Subsection (1) only on the ground that it is not in its original form.
68. These provisions must be read together with Section 106A which provides that the contents of electronic records may be proved in accordance with the provisions of Section 106B.
69. On its part Section 106B (1) provides as follows:
- “ 106B (1) Notwithstanding, anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as a computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.”
70. The conditions mentioned in Sub-section (1) are provided in Sub-section (2) in the following terms:
- a. the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - b. during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - c. throughout the material part of the said period the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
 - d. the information contained in the electronic record reproduces or is denied from such information fed into the computer in the ordinary course of the said activities.
71. As was held in the case of *Millitonic Mwendwa Kimanzi Kitute v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, under Section 106B of the *Evidence Act*, the proponent of an electronic record has the burden of satisfying the conditions set out therein, and for establishing the electronic record’s authenticity.



72. In this case, the Respondent being the proponent of the audio recording in question, bears the burden to satisfy the conditions set out under Section 106B (2).
73. Applying the provisions of Section 106B to the case herein, it is my finding that RW1 failed to show the manner in which the audio recording was created, the device used to do so, and its working condition. Further, there was no evidence to show that RW1 was the one who owned, operated and managed the computer that was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer. Further, the particulars of the computer used in this case were not given. In addition, RW1 did not confirm that the audio recording was reproduced or was derived from information fed into the computer used in the ordinary course of activities by the person who downloaded it.
74. RW1 further confirmed that she did not know the source of the audio recording hence it follows that she was not the originator of the audio recording. In this case, she was merely copying what someone else had created and produced.
75. As was held in the case of Elizabeth Ongoro Amollo v Francis Kajwang Tom Joseph & 2 others [2017] eKLR, what is of critical importance is that digital or electronic evidence or document(s) must be verified as to their source and mode of storage, as to the specific manner of retrieval, as to the identity of the equipment by which the retrieval was accomplished, and as to the control processes and nature of activities of the person or persons who conducted each of the operations resulting in the output sought to be admitted.
76. And further, in the case of William Odhiambo Oduol v Independent Electoral & Boundaries Commission & 2 Others (2013) eKLR, the Court agreed with the submissions of the Respondent's counsel on the need to be careful when admitting electronic evidence, thus:
- “ But electronic evidence presents unique characteristics which necessitate careful treatment. First, while alterations on physical document are often immediately visible on its face, this is not the case with electronic material. An electronic document can be, and is often, modified in the process of collecting it as evidence. A common example occurs when a file or application is opened, or copied from one computer into another or into an external hard drive. Changes which are not often immediately visible occur. Second, compared with physical or other forms of exhibit evidence electronic evidence is relatively more difficult to detect and trace the signs of tampering. It can be changed or manipulated much more easily than paper or other forms of evidence without having any obvious trace of such alteration.
- Third, computer equipment runs on an artificial intelligence which receives, interpreters and applies human commands. This artificial intelligence has been known to go awry. System crashes, viruses, and/or botnets often occur, compromising the integrity of the material captured, preserved or presented using a computer. Finally, the capturing, preserving and presenting of evidence in electronic form requires a measure of technical knowledge in the operation of the electronic equipment.”
77. Applying the foregoing decisions to the case herein, it is my finding that the Respondent has not shown compliance with the provisions of Section 106B of the [Evidence Act](#), and in particular, has failed to satisfy this court as to the source and authenticity of the audio recording in question. Indeed, RW1 was not able to provide a credible and authentic source of the audio recording including its maker.



78. As it is, such evidence accessed without following the requisite procedures, is inadmissible and impacts its probative value before the Court. With due respect to the Respondent, the evidence in question should not and cannot be recognized and admitted by the Court.
79. In the premises it is my finding that the said audio recording is inadmissible before the Court and is hereby expunged from the record.

Constitutional violation?

80. The Petitioner has averred that the Petitioner violated her constitutional rights. Specifically, the Petitioner has cited the Respondent for violation of her right to a fair hearing and fair administrative action as well as her right to privacy.

i. Fair Hearing and Fair Administrative Action

81. With regards to this issue, the Petitioner has alleged that she was not issued with the charges against her and that she was not given an opportunity to respond to such charges, adduce evidence and cross-examine witnesses. She further averred that she was not accorded a hearing. According to the Petitioner, this was contrary to the dictates of fair labour practices and fair administrative action.
82. This position was refuted by the Respondent who averred that the Petitioner was given a hearing and a chance to defend herself before the decision to terminate her services was arrived at.
83. The record bears that the Petitioner was invited through an email dated 23rd September 2021, to attend a meeting on 28th September 2021. Other employees were also invited to attend the meeting whose agenda was “Working Session on Programme”.
84. The email further advised everyone invited to the meeting to carry fully charged laptops and activity schedule from January to December 2021.
85. It is at the said meeting that the Respondent’s CEO played an audio recording, which contained a tele-conversation between the Petitioner and her colleague Teresia Wakahia.
86. From the evidence of RW1, the Respondent’s CEO asked the Petitioner and her colleague to state their defence and what they had to say with regards to the audio recording.
87. As it turned out, the meeting of 28th September 2021 was the forum in which the Petitioner was allowed to make her representations with regards to the audio recording. In other words, it was a disciplinary hearing of sorts.
88. Therefore, it may very well be said that going in for the meeting of 28th September 2021, the Petitioner was unaware that she was going in for a disciplinary hearing and the nature of the allegations that lay ahead of her.
89. Indeed, at that point, she was yet to be notified of any allegations the Respondent might have had against her. In any event, the Agenda of the meeting was not anything close to a disciplinary hearing. Further, having not been aware of what she was to be confronted with at the meeting, it follows that she was not given an opportunity to prepare a defence and present any evidence in support of her case.
90. As a matter of fact, the meeting of 28th September 2021 can best be termed as an ambush.
91. It is also noteworthy that the Petitioner’s letter of termination is dated 27th September 2021 and was to take effect the same day. This was a day before the meeting of 28th September 2021.



92. It is therefore evident that the Petitioner's termination was already predetermined and that the meeting of 28th September 2021 was merely cosmetic. Clearly, the decision to terminate the Petitioner's employment had already been made.
93. Article 50 of *the Constitution* guarantees every person right to a fair hearing while Article 47 guarantees every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
94. In light of the above constitutional safeguards, the Petitioner was entitled to be given a fair hearing before the decision to terminate her employment was made. Indeed, Section 41 of the *Employment Act* stipulates the requirements of a fair hearing prior to termination of employment. This entail notifying the employee of the allegations leveled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
95. From the record, the Respondent did not comply with any of the aforeset statutory requirements.
96. Accordingly, I am led to conclude that the Petitioner's right to a fair hearing was impaired as she was in the dark with regards to any allegations against her and the nature of the defence she was required to mount.
97. It is on account of the foregoing that I find that the Petitioner's right to a fair hearing and fair administrative action was violated by the Respondent in that she was not notified of the allegations against her and was not given a fair chance to defend herself against such allegations. This was contrary to Articles 47 and 50 of *the Constitution*.
98. In the end, the Petitioner's termination from employment was unfair and unlawful.

ii. Right to privacy

99. The Petitioner has further averred that her right to privacy was violated. With respect to this, she contends that by gaining access to a private conversation herself and her colleague, the Respondent abused her right to privacy.
100. The right to privacy with regards to communication is guaranteed under Article 31(d) of *the Constitution* which provides as follows:
 - (31) Every person has the right to privacy, which includes the right not to have...(d) the privacy of their communications infringed."
101. In unbundling what entails the right to privacy, the Court in the case of Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR had this to say:

“A person's right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her personal affairs relatively free from unwanted intrusions. Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable.”
102. The crux of the dispute herein is that the Respondent had in its possession an audio recording of a tele-conversation between the Petitioner and her colleague, Teresia Wakahia.
103. As I have found elsewhere in this Judgment, the Respondent did not demonstrate how it gained access to the said private tele-conversation between the Petitioner and her colleague. Further, I have found



that there was no evidence that the maker of the audio recording had the authority to record the tele-conversation between the Petitioner and her colleague.

104. I have also found herein that a person's private communication is confidential in nature and can only be accessed upon express permission and consent by the owner.
105. In light of the Petitioner's Constitutional right to privacy, it goes without saying that her express and unequivocal consent was required prior to the recording of her tele-conversation. No such express consent has been demonstrated in this case.
106. Therefore, I do not have any doubt that the Petitioner's right to privacy was violated when the audio recording containing her private communication was procured.
107. In the circumstances, I cannot help but find that the Respondent violated the Petitioner's right to privacy as guaranteed under Article 31(d) of *the Constitution*.

Reliefs

108. In view of the foregoing analysis, I find that the Petitioner is entitled to a declaration that her rights under Articles 47, 31(d) and 50 of *the Constitution* of Kenya were violated by the Respondent.
109. The Petitioner is also entitled to compensation for unfair termination and payment of one (1) month's salary in lieu of notice. In light of the length of the employment relationship and taking into account the constitutional violations against the Petitioner, the Court awards her compensatory damages equivalent to seven (7) months of her gross salary.
110. The Petitioner is further entitled to unpaid leave days. Be that as it may, the same shall be prorated for the period served by the Petitioner under her last contract of service.
111. The claim for the balance of her contract is declined as it is an anticipatory relief in nature. In arriving at this finding, I am guided by the determination of the Court of Appeal in the case of D K Njagi Marete v Teachers Service Commission [2020] eKLR, where it was held as follows: -

“On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the appellant would have continued to be employed until the age of 60 years. In Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR (Civil Appeal No. 25A of 2013) this Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR (Industrial Cause No. 203 of 2011) which held as follows:

“There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word „permanent employment?.”

Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms. This ground of appeal therefore fails.”



112. And further, in *Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya* [2013] eKLR, the Court held as follows:

“My answer is that indeed loss of earnings/income is a damage which can be awarded by the Court but such damage is capped at the equivalent of twelve months gross wages irrespective of the duration of a particular contract. I do not see any policy or legislative reason why those on fixed term contracts should be treated any differently from those on definite contracts with a retirement age being treated differently. It would not be fair to award those on fixed term contracts loss of earnings for balance of unserved contract and deny those in definite or ‘permanent’ contracts who are unfairly or wrongfully dismissed, say with a balance of thirty years to retirement differently. Of course, parties in exercising their party autonomy can make provision for payment of such agreed sums for wrongful dismissal or unfair termination where fixed term contracts have been agreed on and the Court would be able to enforce such contractual terms.” [Emphasis supplied].

113. On the question of gratuity, the Court finds that the Petitioner is entitled to the same for the period served under her last contract. Whereas Clause 2.2 of the Petitioner’s contract of employment provided that gratuity was to be paid upon successful completion of the contract, the employment was terminated at the behest of the Respondent in an unfair manner. Therefore, the Petitioner is entitled to gratuity earned.

Orders

114. In the end, I enter judgment in favour of the Petitioner in the following terms: -

- a. A declaration is hereby issued that the Respondent violated the Petitioner’s rights enshrined under Articles 47, 31(d) and 50 of [the Constitution](#).
- b. A declaration that the termination of the Petitioner from employment was unfair and unlawful.
- c. The Petitioner is awarded the sum of Kshs 314,143.00 being one (1) month's salary in lieu of notice.
- d. The Petitioner is awarded compensatory damages in the sum of Kshs 2,199,001.00 being equivalent to seven (7) months of her gross salary.
- e. The Petitioner is awarded the sum of Kshs 157,071.50 being unpaid prorated leave pay.
- f. The Petitioner is awarded the sum of Kshs 415,500.00 being gratuity for six (6) months served under her last contract of service.
- g. The total award is Kshs3,085,715.50.
- h. The Petitioner shall have the costs of the suit.

115. The Petitioner is entitled to a Certificate of Service pursuant to Section 51(1) of the [Employment Act](#) as the employment relationship has not been disputed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

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STELLA RUTTO



JUDGE

Appearance:

Ms. Osore for the Petitioner

Mr. Museve instructed by Ms. Guserwa for the Respondent

Millicent Kibet Court Assistant

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.

STELLA RUTTO

JUDGE

