



**Maluki v Tiny Totos Kenya Limited (Cause E317 of 2020)
[2022] KEELRC 13359 (KLR) (1 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13359 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E317 OF 2020
MN NDUMA, J
DECEMBER 1, 2022**

BETWEEN

JOHN MAKAU MALUKI CLAIMANT

AND

TINY TOTOS KENYA LIMITED RESPONDENT

RULING

1. A preliminary objection was raised during the trial to have document number 8 in the bundle produced by the claimant dated July 9, 2020 which is an audio recording of events of January 6, 2020 and document number 2 (transcript of a phone call recording) dated July 26, 2021 be excluded on the grounds that the recording adduced was illegally obtained and the certificate dated July 9, 2020 and July 26, 2021 of the electronic recording be excluded from evidence before court. That the recording was not notified to the respondent's Chief Executive Officer and Chief Finance Officer and therefore infringes on the respondent's right to privacy protected under article 31(d) of the [Constitution of Kenya](#), 2010 which provides that: -
 31. Every person has the right to privacy, which includes the right not to have: -
 - (a)
 - (b)
 - (c)
 - (d) The privacy of their communication infringed."
2. The respondent submitted that any evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of the evidence would render the trial unfair or is detrimental to administration of justice.



3. The court was referred to the High Court decision by Mrima, J in [RC -vs- KKR](#) [2021] eKLR as follows: -

“ 152. If such conduct by private citizens is not checked and sanctioned accordingly, then the end result will be fanning chaos in society. It will be open to everyone to run around and gather evidence against the other in any manner. Such tendencies must be regulated. There must be order in doing things. Illegal ways of gathering information must be discouraged since the constitution and the law provide for ways within which any information may be obtained.”

4. The court was also referred to the Supreme Court decision in Presidential Election Petition No 4 of 2017, - [Njonjo Mue & another -vs- Chairperson of Independent Electoral and Boundaries Commission and 3 others](#) [2017] eKLR where the court rejected evidence obtained contrary to the provisions of the [Constitution](#). The case involved production of internal memos said to have been illegally obtained and were still the subject of discussion at the Independent Electoral and Boundaries Commission. The same were expunged from the record.

5. The claimant submitted that the evidence was validly produced before court and in terms of the procedure under the [Evidence Act](#), Cap 80 Laws of Kenya.

6. The fourth objection was that the certificates of the electronic recordings dated July 9, 2020 did not specify the email address used and the make and number of the telephone used. That it is not explained in the certificate how the recording was obtained and the serial number of the device used. That the recording was transferred months after the recording was done and there is no telling what changes may have occurred to the recording in the intervening period.

7. Upon considering the objection and submissions by both parties, the court is satisfied that the recording sought to be adduced by the claimant was illegally obtained without notification of the person whose communication was recorded.

8. Furthermore, the information given in the certificate of electronic recording dated July 9, 2020 and July 26, 2021 is not sufficiently comprehensive as to satisfy the court that the requirements under the [Evidence Act](#), Cap 80 laws of Kenya on the production of electronic evidence were satisfied by the claimant.

9. Accordingly, the court upholds the objection and directs the two items of evidence being document No 8 of July 9, 2020 and document No 2 of July 26, 2021 be expunged from the record and the electronic recordings thereof are excluded from the evidence before court for consideration.

10. Costs in the cause.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 1ST DAY OF DECEMBER, 2022.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Ogola for claimant/Respondent

Mr. Otieno for Respondent/Applicant

Ekale – Court Assistant

