

THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA - AD 2023

CIVIL APPEAL NO H1/203/2022

DATE: THURSDAY, 16TH FEBRUARY,

2023

CORAM:

SENYO DZAMEFE JA (PRESIDING)

MERLEY A. WOOD (MRS) JA

ERIC BAAH JA

FRANCIS KWARTENG ARTHUR = APPLICANT/RESPONDENT

VRS

1. GHANA TELECOM CO. LTD.
2. SCANCOM PLC (MTN GHANA)
3. KELNI GVG LTD.
4. NATIONAL COMMUNICATIONS = RESPONDENT/APPELLANT
AUTHORITY
5. THE ATTORNEY GENERAL

JUDGMENT

MERLEY WOOD JA

The 4th Respondent/Appellant is appealing against part of the ruling delivered on 22nd July 2021 by the High Court, Accra by awarding damages against it in favour of the Applicant/Respondents in such generic human rights enforcement action.

The Applicant/Respondent is a communication network subscriber to 1st Respondent's company's telecommunications network with mobile number 0208131971 and 2nd Respondent's network with mobile number 0540180813. The 3rd Respondent is a company which carries on among other businesses, information and communication technology services while the 4th Respondent is the statutory body established to regulate the provision of communication services and to enforce or implement the Electronic Communications Act, 2008 (Act 775). The 5th Respondent is the principal legal advisor to the President and the Government.

The facts leading to the instant appeal are that on 23rd March 2020, the President of the Republic of Ghana when the Covid-19 Pandemic was raging, under section 100 of the Electronic Communications Act, 2008 (Act 775) issued an Executive Instrument known as the Establishment of Emergency Communications System Instrument 2020 (E1 63) which among others directed all Communication Network Operators or Service Providers to cooperate with and to make available to the President certain personal information in their possession to him. The Appellant as the statutory body established to regulate the provision of communication services in the country under the said Act had the responsibility of ensuring compliance of the said Executive instrument.

By an Amended Originating Motion on Notice with leave dated 23rd July 2020 for the enforcement of Fundamental Human Rights and the corresponding affidavit the Applicant/Respondent prayed the court for the following reliefs:

- i. That by procuring or causing the 3rd Respondent, 4th Respondent or another person to procure the Applicant's personal information from the 1st Respondent or the 2nd Respondent without following laid down law or procedure or without the Applicant's consent, the President and the Government have violated, are violating or are likely to violate the Applicant's fundamental human rights to administrative justice, to privacy or to equality or non-discrimination;
 - ii. That by implementing or intending to implement the President's directive in EI 63 to procure the Applicant's personal information from the 1st Respondent or the 2nd Respondent, 3rd Respondent or the 4th Respondent have violated, are violating or are likely to violate the Applicant's fundamental Human Rights to administrative justice, to privacy or to equality, or non-discrimination; and
 - iii. That by relying or intending to rely on EI 63 to make the Applicant's personal information in their possession available to the President, the Government, the 2nd Respondent, the 3rd Respondent or any other person for that matter, the 1st Respondent and the 2nd Respondent have violated, are violating or are likely to violate the Applicant's fundamental human rights to administrative justice, to privacy or to equality or non-discrimination.
- b. Make an order of certiorari to quash the President's directives in EI 63 to the extent that they have violated, are violating or are likely to violate the Applicant's fundamental human rights and freedoms.
 - c. Make an order of injunction to restrain:

- i. The President, the Government, the 3rd Respondent and the 4th Respondent or their Agents, Assigns or Workmen, howsoever described or named, from relying on EI 63 to procure the Applicant's personal information from the 1st Respondent; and
 - ii. The 1st Respondent and the 2nd Respondent, their Agents, Assigns or Workmen, however described or named, from relying on EI 63 to make the Applicant's personal information in their possession available to the President, the Government, the 3rd Respondent, the 4th Respondent or their Agents, Assigns or Workmen, howsoever described or named, or to a third party; and
- d. Provide any other remedies that the Honourable Court may deem fit for the greater good of the Ghanaian society as a whole.

The 1st Respondent in its affidavit in answer indicated that the 3rd Respondent is known to it as designated by the government to manage the common platform which hosts all the requested information under the Emergency Communication System Instrument, 2020 (E.I 63). Its case is that that the circumstances of the time required all stakeholders to promptly expedite action in actualizing the objectives of EI 63 and therefore as a responsible corporate citizen, it must strictly adhere to the law covering its operations including protecting the personal data of its subscribers. To him the information required is for contact tracing of people infected by the corona virus and also to identify places visited by persons affected or suspected to be affected It is its case that the releasing of the information in compliance with EI 63 gives the President power to write and request for such data to aid national security, or law enforcement. Furthermore, that EI 63 was regularly promulgated and has full operation as at March 2020. It denied that it has violated or violating or likely to violate the Applicant's fundamental human rights regarding administrative justice, privacy and equality or non-discrimination.

According to the affidavit in response by the 2nd Respondent, it has utmost respect for the laws of Ghana and the protection of the privacy of its subscribers including the Appellant but averred that he would not disclose personal information of its subscribers to third parties unless it is in accordance with requisite laws. It further states that it has a duty consequent upon the outbreak of the pandemic to co-operate and support the government to deal with the pandemic. It said it engaged the 4th Respondent, being the industry regulator to put in place measures to comply with EI 63 without endangering the privacy of its subscribers and to that end it provided guidelines as per Exhibit M1.

The gist of the 3rd Respondent case is that the impugned EI 63 is proportionate in its implementation as it does not obliterate the Applicant's right to privacy; that the Applicant has not been able to demonstrate that his rights to privacy and to administrative justice have been violated and that any alleged interference with the said rights as demonstrated in their submissions and arguments, are justified having regard to the provisions of the Constitution.

The pith of the 4th Respondent's case is that the E.I 63 which was made in the wake of the corona virus by the President was pursuant to powers conferred on the President by section 100 of Act 775. That under E.I 63, the 4th Respondent was tasked to set up an Emergency Communication system to address public health emergency and it is justified under article 18(2) of the Constitution and also the claims by the Applicant are misplaced.

The Appellant's case is that E.I. 63 which was made in the wake of Covid 19 is justified under article 18(2) of the Constitution and further that the Applicant's claims are misplaced.

The High Court in its Ruling on 22nd July 2021 found at page 297 of the record of appeal held that:

“Having looked at all the arguments I declare that EI 63 was made in accordance with law and any personal information of Applicant with 1st and 2nd Respondent necessary for contact tracing for the Public Health purpose of the Covid-19 pandemic meets the legitimacy, proportionality and legality tests under the Wednesbury principles excluding the exceptions I have found to have violated the Applicant’s fundamental human rights and freedoms. To that extent EI 63 therefore does not constitute a violation of Applicant’s fundamental human rights. This applies to all other subscribers of all networks and service providers.”

The Court further held at pages 299-230 of the record of appeal that:

“The Applicant is not entitled to the reliefs for an order of certiorari to quash the President’s directives in E.I. 63 to the extent that they have violated, are violating or likely to violate his fundamental human rights and freedoms because it is not the whole of EI 63 that constitutes a violation.”

Again, it held at page 290 that:

“the request to provide merchant codes is not proportionate to the purpose of EI 63 and it is therefore irrational”.....it is hereby ordered that the provision for details of merchant code and details of mobile money operators and all details relating to same be expunged and is hereby expunged from E.I. 63.”

Also, at page 300 of the record of appeal the court stated thus:

“Having established that Applicant’s rights to privacy has (sic) been interfered with or violated through the request 3rd Respondent made to 1st and 2nd Respondents to provide the unhashed mobile money details of Applicant, he is entitled to the award of damages. This is not an open license for all mobile money users to seek damages for such violation

of their rights. I award Applicant GH¢20,000 damages each against 3rd and 4th Respondents and GH¢10,000 against 1st Respondent."

Being aggrieved by and dissatisfied with the award of damages, the 4th Respondent/Appellant filed a Notice of Appeal on 12th August 2021 on the following grounds of appeal:

- i. That the learned High Court Judge erred in awarding damages against the Appellant in such generic human rights enforcement action in which the Respondent provided no evidence of a personal rights violation.
- ii. That the learned High Court Judge erred in awarding damages against the Appellant when no special or general damages relief was claimed by the Respondent in the enforcement of fundamental human rights action.
- iii. The damages awarded by the learned High Court Judge against the Appellant and in favour of the Respondent is harsh and excessive, and
- iv. The Ruling is against the weight of the affidavit evidence.

The relief sought is that the award of damages in the Ruling of the High Court (GJ7) Accra dated 22nd July 2021 be reversed and a decision entered in favour of the Appellant and any other orders that the Court may deem fit.

ARGUMENTS OF APPELLANT

In arguing the first three grounds together, Counsel for the Appellant submits that since the Respondent neither claimed general or special damages nor did it establish any loss or a personal violation of its rights, the judge erred in awarding same. He further argues that the object of awarding damages is to put the innocent party in the position he ought to have been had the breach or wrong not occurred and in this instant case the Respondent did not prove that the Appellant had engaged in acts that had occasioned

injury to him. He refers to the definition of damages as found in *Black's Law Dictionary 9th Edition 2009* page 445 and in the case of *Royal Dutch Airlines (KLM) vrs Farmex Limited [1989-1990] 2 GLR 623*.

It is Counsel's submission that because the Respondent did not claim any damages in the action, the Appellant was not afforded the opportunity to respond to that and thus the award is a violation of the audi alteram partem rule. Furthermore, he contends that for special damages to be awarded, it has been held that same must be pleaded, particularized and losses incurred must be proved as in the case of *Klah vrs Phoenix Insurance Co Ltd [2012] SCGLR 1139*; *Ankomah vrs City Investment Co. Ltd [2012] 2 SCGLR 1123 at 1125*; *Chahin and Sons vrs Epope Printing Press [1963] 1 GLR 163*; *Delmas Agency Ghana vrs Food Distributors International [2007-2008] SCGLR 748 at 749* and *African Automobile vrs TOR [2011] SCGLR 907 at 912*.

Also Counsel contends that this is not a proper case for damages to be awarded, that the breach of constitutional rights did not result in the award of punitive damages and further that the award was harsh, excessive and not moderate and reasonably foreseeable. He refers to the cases of *Awuni vrs WAEC [2003-2004] 1 SCGLR 471*; *Overseas Tankship (UK) Ltd vrs Mordock & Eng. Co. Ltd (no. 1): The Wagon Mound's case (1961) All ER 404 PC*; *(1966) AC 388*; *Hughes vrs Lord Advocate (1963) AC 837 HL* and *Greenland vrs Chaplin (1850) 5 Exch. 245 at 248*.

It is again the submission of Counsel for the Appellant that in proof of a violation of the right to privacy of a group of people, the claimant should demonstrate that he directly suffered some personal harm or loss. Counsel contends that awarding damages in such a generic action without proof of personal harm or damage could open the flood gates for individuals to bring frivolous actions against the state claiming damages without proof.

In arguing Ground 4 which is that the ruling is against the weight of the affidavit evidence Counsel refers to the case of *King vrs Gyan [2017-2020] 1 SCGLR 912 at 913* which says that “an appellate court has to examine the relevant pieces of evidence on record including the exhibit, oral or written submissions of counsel to ascertain whether the trial court below or the first appellate court was justified in arriving at a finding of fact or law in the judgment.” He submits that the High Court committed an error by ordering an amendment of EI 63 and setting timelines for the amendment, following its decision to strike down certain parts of it.

He contends that the consequential orders found at page 299 of the Record of Appeal is beyond the powers of the court, for even though the President can enact executive instruments when parts of it are struck down, the President cannot be ordered to re-enact the said EI 63 with time lines.

In conclusion, he prays this Court to reverse all the consequential orders in favour of the Respondent, who having lost on the major relief for certiorari cannot be awarded damages.

ARGUMENTS OF RESPONDENT

In responding to Ground 1, Counsel for the Respondent contends that the Respondent provided untraversed court-confirmed and un-appealed affidavit evidence of personal human rights violations since the motion was brought under Article 33(1) of the 1992 Constitution. He noted that the fundamental requirement for sustaining an action under the said article is that the alleged violation must be personal to the claimant. He thus refers to the cases of *Adjei-Ampofo vrs Accra Metropolitan Assembly & Attorney General (No 1) [2007-2008] SCGLR 611*; *FEDYAG vrs Public Universities of Ghana (PUG) [2010] 28 GMJ 11 SC*; *Sam (No.2) vrs Attorney-General [2000] SCGLR 305*; *New Patriotic Party vrs Attorney General (CIBA) [1996-97] SCGLR 729*. Counsel submits

that the claim was successful because the Respondent provided evidence that showed that his right to privacy was violated by the Respondents and the Appellant.

He refers to paragraphs 4, 9, 10, 11, and 12 of his affidavit in support of the originating motion which indicate that his mobile numbers 02081431971 and 054010813 together with other personal private information were part of the millions of mobile phone numbers and other private personal information which the Respondent has unlawfully directed or authorized the 1st and 2nd Respondents (Vodafone and MTN) to disclose or submit to the 3rd Respondents (Kelni GVG) in violation of the right to privacy. It is Counsel's submission that having not traversed these depositions they have been admitted and refers to the cases of *Tutu vrs Gogo Civil Appeal No 25/07* dated April 28, 1969, CA unreported; digested in (1969) CC 76; *Fori vrs Ayirebi & Others [1966] GLR 627 at 647*; *Francis Assuming & 640 Others vrs Divestiture Implementation Committee (Civil Appeal No. SC J4/28/2007* delivered on May 7, 2008; *Republic vrs Court of Appeal, Accra, Ex parte Tsatsu Tsikata [2005-2006] SCGLR 614*.

He further contends that the claims of the Respondent were confirmed by the trial High Court at page 292 of the Record of Appeal when she held that the Applicant/Respondent's personal information had been unlawfully disclosed or otherwise processed in violation of the right to privacy. See page 281 of the Record of appeal.

Counsel further contends that damages by way of compensation are a natural consequence of personal human rights violations and it is within the court's discretion to award such damages. See *Maharaj vrs Attorney-General of Trinidad & Tobago [1978] 2 WLR 902* and *Lloyd vrs Google LLC [2021] UKSC 50* and *Awuni vrs WAEC supra*.

Regarding **GROUND TWO** the Respondent's Counsel submits that a court may on its own grant a remedy which is not specifically pleaded for by a party, so long as there is proof on record in support of the remedy. He submits that his relief (d) is for any other remedies the Honourable Court will deem fit and a court is not barred from granting suo motu, a relief which the Court found to be proven and refers to the case of *Re Gomoah Ajumako Paramount Stool; Acquah vrs Apaa & Anor* [1998-99] SCGLR 312; *Republic vrs High Court, Kumasi; Ex Parte Boateng* (2007-2008) SCGLR 404 and *Millicent Asare Boafo vrs Peter Ababio* CA Suit No H1/71/2012 dated 10th May 2012.

In respect of **GROUND THREE** that is that the Damages awarded by the Learned High Court Judge against the Appellant and in favour of the Respondent is harsh and excessive, it is the submission of Counsel that being in an information technology age in which personal information needs to be protected from rogue private institutions, data protection laws and mechanisms are put in place. Therefore a breach of privacy rights and the cost and injury associated with it are contrary to the claim of the Appellant that the claim was not foreseeable. He refers to the cases of *S and Marper vrs The United Kingdom* (European Court of Human Rights paragraph 99; the Indian case of *Puttaswamy vrs Union of India* (Puttaswamy I) (Civil) No. 494 of 2012 1,262-263 Sup. Ct. India Aug 24, 2017; *Madhewoo M vrs The State of Mauritius and Anor*, 2015 SCJ 177; *Ackah vrs Agricultural Development* [2017-2018] 1 SCGLR 226; *Raphael Cubagee vrs Michael Yeboah Asare & 2 Others* Suit No. J6/04/2017 of February 28, 2018.

It is the submission of Counsel in response that the courts are cautious of tampering with damages awarded by trial courts and refers to the cases of *Akuffo vrs Issaka* [1966] GLR 476; *Bressah vrs Asante & Asante* [1965] 1 GLR 117; *Standard Chartered Bank (Gh) Ltd vrs Nelson* [1998-99] SCGLR, *Juxton-Smith v KLM Dutch Airlines* [2005-2006] SCGLR 438 and *Karam vrs Ashkar* [1963] 1 GLR 8.

ANALYSIS

We shall proceed to determine this appeal challenging the award of damages. The question is, was the Respondent entitled to the award of damages?

We will deal with the first three grounds together just as Counsel for the Appellant did.

GROUND I, II AND III

- i. That the learned High Court Judge erred in awarding damages against the Appellant in such generic rights enforcement action in which the Respondent provided no evidence of personal rights violation.
- ii. That the Learned High Court Judge erred in awarding damages against the Appellant when no special or general damages relief was claimed by the Respondent in the enforcement of fundamental human rights action.
- iii. The damages awarded by the Learned High Court Judge against the Appellant and in favour of the Respondent is harsh and excessive, and

It is important at this point to consider the procedure for enforcing fundamental human rights.

Article 12(2) of the 1992 Constitution states that everyone in Ghana irrespective of race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedom of the individual but subject to the rights and freedoms of others and for the public interest.

Article 18(2) provides that: *“no person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the*

country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.”

Article 33(1) of the Constitution provides that anyone aggrieved that a provision of the Constitution on the fundamental human rights and freedoms **has been, or is being or likely to be contravened** may apply to the High Court for redress.

Article 33(2) states that the High Court may under clause (1) of this article issue such directions or orders including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as it may consider appropriate.

Per Article 33(4) The Rules of Court Committee may make rules of court with respect to the practice and procedure of the Superior Courts for the purposes of this article.

Pursuant to the provision of Article 33(4), Order 67 of the High Court (Civil Procedure) Rules was enacted in 2004 with the following provisions:

Order 67(1) states that anyone who seeks redress in respect of any enforcement of any fundamental human right under Article 33(1) shall apply to the High Court.

The application which shall be supported by an affidavit signed by the applicant or by his lawyer and shall contain particulars such as the name and address for service of the applicant and his lawyer; the facts upon which the applicant relies, the relief or remedy sought by the applicant and the grounds on which the applicant seeks the relief or remedy and the full name and address for service of any person directly affected by the application.

Order 67 rule 8 stipulates that the High Court may issue such directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as it may consider appropriate for the purpose of

enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms of the Constitution to the protection of which the applicant is entitled.

In *Boyefio vrs NTHC Properties [1997-1998] 1 GLR 768*, it was held that *“the law was clear that where an enactment has prescribed special procedure by which something was to be done, it was that procedure alone that was to be followed.”*

It was held in the *Republic vrs High Court, Accra; Ex parte Sanger-Dery [2016-2017] 1 GLR 768* that where a statute provides for a relief which can be ordered by a Court or an adjudicative tribunal, the court or tribunal cannot grant any other relief. In the case of the *Republic vrs High Court, Kumasi: Exparte Mobil Oil GH Ltd. [2005-2006] SCGLR 312* the court speaking through Twum JSC stated that *“There is a special family of public remedies available when public law rights are infringed. These are principally certiorari, prohibition and mandamus.”*

As submitted by Counsel for the Respondent, a claim under Article 33(1) will fail unless the alleged violation is in respect of the claimant personally.

In the instant case, the trial judge held that the Applicant/Respondent was not entitled to the relief for an order of certiorari to quash the President’s directives to the extent that **they have violated, are violating or likely to violate his fundamental human rights** and freedoms because it is not the whole of EI 63 that constitutes a violation. And the judge went further to award damages for the Applicant/Respondent having established that his rights to privacy were interfered with or violated through the request the 3rd Respondent made to 1st and 2nd Respondents to provide the unhashed mobile money details of the Appellant.

Black's Law Dictionary 11th Edition defines damages at page 488 as follows: "money claimed by, or ordered to be paid to, a person as compensation for loss or injury." Martin Frank Gahan L Newell in a *Treatise on the Law of Malicious Prosecution, False Imprisonment and the abuse of Legal Process* 491 (1892) defined the term as "a sum of money adjudged to be paid by one person to another as compensation for loss sustained by the latter in consequence of an injury committed by the former or the violation of some right." Frank Gahan in *The Law on Damages* 1 (1936) defines damages as "Damages are the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong."

Damages therefore are to be paid as compensation for loss or injury and a party can only claim general damages in a cause of action by showing proof of harm.

Award of damages in human rights issues was succinctly engraved in *Awuni & Others vrs West African Examination Council (WAEC) [2003-2004] SCGLR 471* where damages were awarded to the appellants. Kpegah JSC held that: "The appellants have been frustrated in planning their future in the academic field and entire life for the past four years not only as a result of the unlawful suspension of their entire results but also their illegal barring from taking any examinations under the auspices of the council for three years. I find intolerable and unconscionable the situation the appellants went through by the decision of the council; especially when under their own regulations they are not entitled to withhold the entire results of the appellants and in addition bar them for three years. In the circumstances, I think a token and moderate compensatory award coupled with the relevant orders and directions to the council will fairly and reasonably redress the contravention of the appellants rights...."Under clause (4) of article 33, the Rules of Court Committee of the Judicial Council is entrusted with the responsibility to make rules to regulate the practice and procedure for enforcing the fundamental rights of the individual by the courts. And it is common knowledge that this constitutional responsibility has not yet been discharged by the appropriate authority."

Kpegah JSC in the *Awuni vrs WAEC* case supra further held that *“It must be borne in mind in the Maharaj case the Appellant had already served his sentence before his appeal was heard and the Board of the Privy Council felt the only way such a wrong could be adequately redressed was not only quashing the conviction and order of imprisonment but also by the award of some damages.”* See page 503 of the Record of Appeal.

He however cautioned that *“I must however caution that this should be limited to its own facts since it is not intended to represent any general principle regulating a court’s discretion which will open the flood gates for the award of all types of damages in public law proceedings.”*

However, Twum JSC in the *Awuni vrs WAEC* case supra stated the position of the law as follows: *“The kingpin of the argument in support of the majority holding that damages be awarded was inspired by a Privy Council judgment in the case of Maharaj v Attorney-General of Trinidad and Tobago [1979] AC 385. It contains a holding that the reliefs available to a person who complains of a breach of a constitutionally guaranteed fundamental human right, may include the award of damages. But the Privy Council was at pains to point out that, that right depends on a determination of the merits....I can accept that damages should be awarded to a person who complains that his personal liberty has been restricted without due process; or that forced labour (article16) was exacted from him. I have read article 33 over and over again and I have come to the conclusion that it does not create the remedy of damages. In my opinion whether a party is entitled to damages or not must be determined according to common law principles. I am of the firm opinion that successful natural justice challenges should not necessarily carry in their wake award of damages...”*

Date-Bah JSC at page 576 of the *Awuni vrs WAEC* case supra stated that *“It may be that the award of damages may not be necessary where the offending decision is quickly set aside. But where as here an aggrieved person has had to bear the consequences of an offending decision for a*

considerable period, the award of damages, pursuant to the High Court's power under article 33(1) is justifiable."

He further went on to state that *"in effect, the damages that are awarded for breach of a constitutional right under chapter five of the Constitution in cases where no actual damage is proved are damages which are "at large" in the sense in which Lord Hailsham LC used this expression in Cassell & Co Ltd vrs Broome [1972] AC 1027 at 1073, HL where he said "The expression 'at large' should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment , and where in consequence no precise limit can be set in extent.....pain and suffering for loss of amenity."*

The constitution, statutes and case law have established the special kind of remedies that can be sought in a case of human rights violations. They are habeas corpus, certiorari, mandamus, prohibition and quo warranto as per Order 67 (8) of C.I. 47. In this instance, damages were not a prayer or relief by the Respondent. However, the court found that *"the request for 1st and 2nd Respondents and all other network or Service Providers to provide details of Applicant and all other subscribers information on international roaming constitutes interference with Applicant's right to privacy and all other subscribers which is a right protected by Article 18 (1& 2) of the 1992 Constitution."* (See page 292 of the record of appeal). The court further found at page 281 of the record of appeal that *"...I find that Applicant and all other mobile money subscribers right to privacy have been violated, are being violated and will continue to be violated in contravention of their human rights guaranteed under the constitution."*

It must be borne in mind that the court refused to grant the relief of certiorari. The court stated thus at page 299 of the record of appeal that:

“I find that Applicant is not entitled to the relief for an order of certiorari to quash the President’s directives in EI63 to the extent that they have violated, are violating or are likely to violate his fundamental human rights and freedoms because it is not the whole of EI 63 that constitutes a violation. To accede to Applicant’s request would be to throw away the baby with its bath water. I have made orders for those offending portions to be expunged from EI 63 to prevent any further violation of Applicant and all other subscribers fundamental human rights and freedoms, particularly the rights to privacy. The Covid-19 pandemic is still with us with new and virulent variants also emerging, therefore EI 63 is still necessary to deal with the Covid-19 pandemic.”

We are mindful of the factors that will lead to an appellate court interfering with an award of damages in the lower court as stated in the case of ***Standard Chartered Bank (Ghana) vrs Nelson [1998-99] SCGLR 810*** at 824 where Hayfron Benjamin JSC stated as follows:

“In reference to the authority immediately cited above, it is clear that an appellate court may reverse or vary the award of damages on the grounds (a) that the judge acted on some wrong principles of law or (b) that the amount awarded was so extremely high or so extremely high or so very small as to make it, in the judgment of this court an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

Greer LJ stated in *Flint vrs Lovell* as follows: *“in order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted under some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it in the judgment of this Court an entirely erroneous estimate of the damage to which the plaintiff is entitled.”*

The Appellant submitted that since the Respondent did not claim damages as a relief, he was not entitled to damages but in the Awuni case supra Date-Bah JSC stated that

this sort of argument is easily disposed of for in his view, *“a claim for redress under article 33 encompasses, in law, a claim for damages as a possible component of the redress. It is up to the courts to determine where such relief is appropriate.”*

As already stated the Court held that the Respondent having been able to show that personal information had been disclosed his *“right to privacy had been violated, was being violated and will continue to be violated in contravention of their human rights guaranteed under the constitution.”* It is therefore entirely within a court’s discretion to award such damages upon a finding of a violation and so we will not disturb the exercise of the court’s discretion. We also find that the damages awarded are not excessive.

We accordingly dismiss these grounds of appeal.

Ground IV: The Ruling is against the weight of the affidavit evidence.

It is trite that every appeal is by way of rehearing and our jurisdiction is invoked by Rule 8(1) of the Court of Appeal Rules, CI 19. This involves going through the entire record to satisfy ourselves that a party’s case is more probable than not, and that the finding of the court below is supportable from the evidence led. See the cases of *Ansu-Agyei vrs Fimah [1993-94] 1 GLR 299* at 305 and *Tuakwa vrs Bosom [2001-2002] SCGLR 61*. The Appellant who complains that a judgment is against the weight of evidence bears the burden of demonstrating that certain pieces of evidence on the record which having not been properly evaluated led to a different conclusion from what ought to have been. See the case of *Djin vrs Musa Baako [2007-2008] SCGLR 686*.

It is also trite law that it is the trial court that has the right to make primary findings of fact and where they are supported by the record, the appellate court is not permitted to interfere with same. The findings will however be interfered with upon certain conditions. In *King vrs Gyan [2017-2020] 1 SCGLR 912* relied on by Counsel for the

Appellant it was held at page 913 that *“an appellate court has to examine the relevant pieces of evidence on record including the exhibit, oral or written submissions of counsel to ascertain whether the trial court below or the first appellate court was justified in arriving at a finding of fact or law in the judgment.”*

Counsel for the Appellant submits that the High Court committed an error by setting timelines for an amendment of EI 63 following its decision to strike down parts of the executive instrument. He further submitted that the consequential orders are beyond the powers of the court and the court cannot order the President to re-enact the instrument.

We agree with Counsel for the Appellant when he submitted that the judge committed an error by setting timelines for the amendment of EI 63. The trial judge at page 299 of the record of appeal gave the consequential order that EI 63 *“be amended within twelve months to reflect the orders of the court.”* Under the principles of separation of powers, the executive formulates policy which is drafted into bills. The legislature has the mandate to pass bills into law. The judiciary may declare a statute or a provision thereof to be unconstitutional or unlawful, but it cannot compel the executive or legislature to pass a law, worse giving time lines for such an exercise. All that a court can do is to recommend law reform. The decision of the trial court ordering an amendment of EI 63 within a certain time frame, was made without jurisdiction.

The appeal against the order of the trial judge awarding damages to Respondent is unmeritorious and therefore dismissed.

Cost of Twenty Thousand Ghana Cedis (GH¢20,000.00) is awarded in favour of the Applicant/Respondent against the 4th Respondent/Appellant.

(SGD)

MERLEY A. WOOD (MRS.)

(JUSTICE OF APPEAL)

(SGD)

I AGREE

SENYO DZAMEFE

(JUSTICE OF APPEAL)

(SGD)

I ALSO AGREE

ERIC BAAH

(JUSTICE OF APPEAL)

COUNSEL:

- **DR. JUSTICE SREM SAI FOR APPLICANT/RESPONDENT**
- **YAW BERHENE BONSU WITH EMMANUELLA KORKOR TETTEH FOR
RESPONDENT/APPELLANT**