



REPUBLIC OF KENYA



KENYA LAW
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**Mativo v KCB Bank Kenya Limited (Cause E001 of 2021)
[2025] KEELRC 628 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 628 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E001 OF 2021
K OCHARO, J
FEBRUARY 28, 2025**

BETWEEN

BENEDICT KITHUKU MATIVO APPELLANT

AND

KCB BANK KENYA LIMITED RESPONDENT

RULING

1. When this matter came up for hearing on 27th November 2024, and the Respondent's witness, Joseph Yegon [RW2], in the process of testifying, Counsel for the Claimant objected to the production of the following documents: -
 - I. A Certified copy of the statement recorded by Efrod Ngonda dated 27th September 2018, at Mwatate Police station.
 - II. A certified copy of the statement by Mwamto Mghanga dated 25th September 2018.
 - III. Bank statements of account showing a deposit of KShs. 180,000 by Benedict Mativo.
 - IV. Copy of alarm activity / History report for the Respondent's Wandanyi branch.
 - V. Flash disk containing the footage of CCTV Camera at 15:16 hours and a certificate of electronic evidence.
 - VI. A copy of the full investigation report dated 15th October 2018.
2. For an expedited determination of the objection, this Court directed the Counsel for the parties to file written submissions expressive of their respective positions on the objection and reasons for the same.
3. Counsel for the Claimant filed his dated 19th December 2024, whilst Counsel for the Respondent filed his dated 24th January 2025.



The Claimant's Submissions

4. The Respondent's Counsel submitted on the objection to the production of the various documents mentioned above, separately, thus:

I. Objection to the production of Item 2, the CCTV footage by DW-2 Joseph Yegon.

5. Counsel submitted that the law regarding the production of CCTV footage is embodied in Section 106B of the *Evidence Act*, Cap 80, Laws of Kenya. Contrary to the provision, it has not been demonstrated, either in the adopted witness statement, his testimony in Court or the certificate of electronic evidence, that the witness was the person responsible for the management and control of the CCTV camera. As such, he isn't competent to produce the CCTV footage. To buttress this submission, reliance was placed on the High Court decision in *Eric Indimuli Siaya Republic* [2016] KEHC 8519[KLR].

II. Objection to the production of item 3- Copy of the Alarm Activity/History Report.

6. The document contains a printout from a system; the witness has not produced a fully compliant Certificate of Electronic Evidence as required by the above-stated provision of the *Evidence Act*. He hasn't demonstrated how he came across the document and why it isn't in the original form.

III. Objection to the production of Item No, 4,5, and 6, Copies of Witness Statements recorded by Benedict Mativo, Efrog Ngonda and Mwamto.

7. It was submitted that it is clear that the statements are clearly part of a police file; the witness hasn't explained how the documents got into his possession.
8. It was further submitted that one of the statements is that of the Claimant, who was one of the accused persons in the criminal case- Wundanyi Principal Magistrates Court, Criminal Case No. 696 of 2016. The question that arises then is whether the statement recorded by a suspect in police custody can be produced in Court without proving that it was voluntarily recorded. To support this point, reliance was placed on the criminal case of *Republic vs Samuel Ombima Buruk* [2022] eKLR, where it was held;

“Generally, a statement by an accused person is not admissible as against him unless it is proved to have been voluntary. This could be possible in a trial within a trial within a trial, a concept that is deeply entrenched in our criminal justice system.”

9. Further reliance was placed on the decision in the criminal case of *Musili Tulo v Republic* [2014] eKLR.

IV. Objection to the production of Item No. 7 and 6-Copies of witness Statements recorded by Benedict Mativo, Efrog Ngonda and Mwamto.

10. Item No. 7 comprises of uncertified copies of Bank Statements for the following accounts;
 - a. Wundanyi KCB Bank Account No. 1153564637 belonging to KCB Wundanyi Branch Staff Welfare, a staff transactional account;
 - b. Wundanyi KCB Bank Account No. 117213852 belonging to Agnes Wafula, Agent Float Account.



11. The production of a bank statement must be within the mandatory provisions of section 68 of the *Evidence Act*. To buttress this submission, reliance was placed on the case of *Obwocha v Rotich & another* [2023] KEEL 1667[KLR].

The Respondent's Submissions

12. Counsel for the Respondent submitted that the Claimant has conflated the applicable law, leading to the meritless objections raised against the production of the various documents. The objections ignore the fact that the standard of proof in criminal proceedings is beyond reasonable doubt, and as such, the courts' approach to the rules of evidence is notoriously strict.
13. However, in civil proceedings, such as the instant, the standard of proof is on a balance of probabilities which, in the words of Denning J [as he then was] in *Miller v Minister of Pensions* [1947] 2 ALL ER 372], means "a win, however narrow"
14. The threshold is even lower in proceedings relating to employment and labour relations, matters. The strict rules of evidence do not bind the Employment and Labour Relations Court. To support this submission, reliance was on the case of *Alividza Akatsa Georgina & 3 others v IEBC* [2016] KEELRC [KLR]. Further, the structure of the ELRC Procedure Rules 2016, replaced by those of 2024, is a testament to this. They even allow the determination of cases based on documents filed. Rule 65[3] of the 2024 Rules allows the Court to conduct the hearing in a manner it considers most suitable, without regard to technicalities.
15. Under the Rules of this Court, cases must go through the pre-trial conference. There, the parties must indicate inter alia if there are any objections to any documents. A pre-trial conference in this case was conducted in the presence of the Counsel for the Claimant on 21st September 2021. There was no indication that any of the documents would be objected to. The objections are mistimed, therefore. In fortification of this point, the case of *Inclusive Agencies [Msa] Limited v Co-operative Bank of Kenya Limited* [2022] KEH 12296 [KLR] was cited.
16. The Reading of Section 80 of the *Evidence Act* must be aligned with the stipulations of *the Constitution* of Kenya 2010, and this was emphasized in the *Inclusive Agencies* case [supra] when the Court found that it could be repugnant to the rule of law to keep away public documents merely because they have not been certified by the public officer from whose custody were obtained.
17. The objection against the production of the CCTV footage is a result of a misapprehension of the provisions of section 106B of the *Evidence Act*. It is without basis. Mr. Yegon explained how he accessed the CCTV footage, which he has presented in a flash disk and given a certificate of electronic evidence. The Claimant hasn't shown why he holds that Mr. Yegon isn't a person occupying a responsible position in relation to the relevant device.
18. The Claimant has not interpreted the import of the Criminal precedents cited. They aren't relevant to the matter at hand.

Analysis and Determination

19. From the onset, it must be stated that the timing of the Claimant's objection to the production of the various documents as enumerated hereinabove is wrong. In an era, where present, is a constitutional command to the institutions, dispensers of justice [Article 159 of *the Constitution*], to so dispense expeditiously, and where statutory or subsidiary legislation procedural mechanisms have been put in place, variously, to give effect to the command, an objection like the Claimant's will seldom be granted by a court of law.



20. Undoubtedly, pre-trial conferencing is one of the procedural mechanisms that has been put in place to give the constitutional imperative effect and facilitate access to justice. It is at the pre-trial conference where uncontested and contested issues in a dispute are identified, issues for determination are distilled, documents that are to be tendered in evidence without objection and those whose production will be objected to are identified, the number of witnesses to be called by either side is stated, and compliance with other pre-trial procedural steps are confirmed.
21. To freely allow a party to successfully raise a matter that ought to have been raised during the pre-trial conference, but which was inexplicably not raised, will be tantamount to diminishing the purpose for which the stated procedural mechanism exists. There is no dispute that there was a pre-trial conference regarding this matter and that what the Claimant is raising now ought to have been raised then. Certainly, it was not raised, and the Claimant has not given any sufficient reason why it wasn't. Therefore, this Court cannot allow the Claimant to raise challenges that ought to have been raised during the pre-trial juncture but inexplicably weren't at this point of the proceedings.
22. Applicability of the rules of evidence as set out in the *Evidence Act*, Cap 80, Laws of Kenya, in dispute resolution processes, should not be in a manner that doesn't have regard to procedural rules obtaining elsewhere [in statutes or subsidiary legislation] for good purpose.
23. It is important to mention, therefore, and Counsel for the Claimant missed this, that the interplay between the rules of evidence set out in the *Evidence Act* and Criminal proceedings, and that between them and Civil proceedings, largely differ. For this reason, I conclude that the criminal case decisions cited by Counsel are inapplicable to the matter at hand as they relate to a procedure [trial within a trial], which is very foreign to civil proceedings.
24. The Claimant has had the statements that he and other persons recorded at the police station since they were served on him and before he testified in this case. At no point in his testimony did he state or allege that the statements were involuntarily given to the police. As such, it deprived the Respondent of the opportunity to cross-examine him on the assertion. His silence meant one thing: he had no reason to attack the statement[s]. He is raising the issue as an afterthought.
25. In my view, the Claimant has not placed forth a sufficient explanation as to why RW1, who has a certificate of electronic evidence, and considering his role in the investigations and the Respondent bank, cannot produce the CCTV footage and the flash disk related thereto. In my view, the objection is based on the narrow interpretation that the Claimant has given the provisions of Section 106B of the *Evidence Act*.

Conclusion

26. Flowing from the various reasons by this Court, as have come out hereinabove, I find the objection by Counsel for the Claimant lacking in merit. Upholding the same is hereby declined.
27. The witness shall proceed to produce the documents during the next hearing, on a date to be given by this Court, hereafter.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 28TH DAY OF FEBRUARY, 2025.

OCHARO KEBIRA

JUDGE

