



Maganga v Aquavita Limited (Employment and Labour Relations Cause 215 of 2019) [2024] KEELRC 171 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 171 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 215 OF 2019**

K OCHARO, J

FEBRUARY 9, 2024

BETWEEN

RUTHERFORD MAGANGA CLAIMANT

AND

AQUAVITA LIMITED RESPONDENT

RULING

1. This matter came up for hearing on the 18th of October 2023, when the Claimant who had taken the stand to testify was stood down midway through his testimony to enable this Court to render itself on an objection raised by Counsel for the Claimant. Counsel for the Claimant objected to Counsel for the Respondent's cross-examining the Claimant on the emails on page 64 of the Respondent's bundle of documents.
2. The gravamen of the objection was that the Claimant could not be cross-examined on the email[s] as the same was electronic evidence for which no certificate of electronic evidence had been produced as required by the *Evidence Act*. Further, Counsel sought that the email[s] be expunged from the record.
3. In response, Counsel for the Respondent stated that the Claimant's objection was coming in, too late in the day. It ought to have been raised at the pre-trial conference, or way before this matter was fixed for hearing. In any event, the Claimant was allowed to produce email correspondences [see page 20 of the Claimant's bundle of documents], notwithstanding that they were not accompanied by a certificate of electronic evidence.
4. I have carefully considered the submissions made by Counsel for the parties and note that none of them cites any specific legal provision or principle in support of the positions they advanced. This said, however, this Court is not incapacitated from rendering itself effectively on the issue raised.
5. Cross-examination is an essential tool to ensure the accuracy and completeness of testimony. Its function is to shed light on the credibility of evidence in chief and bring out additional facts of



probative value. In contrast to evidence in chief, cross-examination may be conducted through leading questions.

6. The scope of cross-examination is not limited to matters asked about in direct examination. It is generally “wide open” to any questions, limited only by relevance, and good faith basis for the question. A court can limit cross-examination when; the matter is immaterial, irrelevant or incompetent; the questions are unduly repetitious and argumentative; questions are intended to harass, annoy, or humiliate a witness; it is aimed at wasting time, confuse and mislead and; the probative value is substantially outweighed by the danger of unfair prejudice.
7. The Claimant’s Counsel has not at all suggested that these or any of these limiting factors exist to warrant this court exercise its discretion on limiting the cross-examination by Counsel for the Respondent. Further, the issue of the certificate of electronic evidence as raised by Counsel for the Claimant doesn’t fit in any category of the limiting factors. In any event, and as shall shortly come out hereunder, with great respect the point raised by Counsel is misplaced.
8. Section 78A (1) of the [Evidence Act](#) Cap 80 governs the admissibility of electronic and digital evidence by providing that: -

“78A. Admissibility of electronic and digital evidence.

- (1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
 - (2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
 - (3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—
 - (a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
 - (c) the manner in which the originator of the electronic and digital evidence was identified; and
 - (d) any other relevant factor.
 - (4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”
9. Section 106A of the same Act provides that the contents of electronic records may be proved in accordance with the provisions of section 106B.



10. On its part section 106B 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.”

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

- (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 derived from such information fed into the computer in the ordinary course of the said activities.”

11. Per Section 106B (4), a party proves that the electronic record meets the Section 106B (2) conditions by preparing and filing a certificate: -

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- “(a) identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and



(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”

12. The provisions of the law hereinabove cited relate to the admissibility of electronic evidence and the centrality of the certificate of electronic evidence in the admission. In my view, the issue of admissibility of specific electronic evidence can only be raised at an appropriate moment, the moment when the party desiring to produce and have the same admitted as evidence, makes the move. As a result, I hold that the craving by the Claimant to have the emails expunged from the record did set in prematurely and is misplaced, considering the circumstances of the matter and the point at which it was raised.
13. By reason of the foregoing premises, I find the Claimant’s objection lacking in merit. It is declined. The matter shall proceed from where left. The Respondent’s Counsel shall be at liberty to cross-examine on the emails.

READ, DELIVERED AND SIGNED THIS 9th DAY OF FEBRUARY, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Wachira for Respondent

Mr. Kanyonge for Claimant

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

