



**Kipkoech v Huawei Technologies (Kenya) & 2 others (Cause E553 of 2021)
[2024] KEELRC 13423 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13423 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E553 OF 2021
BOM MANANI, J
DECEMBER 16, 2024**

BETWEEN

PETER KIPKOECH CLAIMANT

AND

HUAWEI TECHNOLOGIES (KENYA) 1ST RESPONDENT

FAITH CHEPKIRUI NANCY 2ND RESPONDENT

BRIAN SAKWA 3RD RESPONDENT

RULING

1. This case questions the circumstances under which the contract of service between the 1st Respondent and the Claimant was brought to a close. According to the Claimant, the 1st Respondent unfairly accused him of taking bribes from its business associates thus subjecting him to an unwarranted disciplinary process. The Claimant denies the infraction in question.
2. He contends that the 1st Respondent subjected him to a disciplinary hearing but before the results of the process were communicated to him, the 2nd and 3rd Respondents, being employees of the 1st Respondent, pushed him into tendering an involuntary resignation from employment. He contends that his attempts to rescind the resignation were thwarted by the Respondents. As such, he believes that his employment was illegitimately terminated.
3. On their part, the Respondents deny that the Claimant's employment was unlawfully terminated. They contend that the Claimant voluntarily resigned from employment thereby lawfully closing the employment relation between him and the 1st Respondent.
4. In a bid to support his case, the Claimant filed a further list and bundle of documents dated 23rd October 2023. The list contains: printouts of WhatsApp messages between the Claimant and some employees of the 1st Respondent; espace conversations between the Claimant and some employees



of the 1st Respondent; audio recordings of conversations between the Claimant and some of the 1st Respondent's employees; and certificates of electronic evidence.

5. The Respondents have now filed the application dated 2nd February 2024 through which they seek for orders striking out the various documents aforesaid. They contend that the records were illegally procured by the Claimant. They further contend that the records were procured in violation of the provisions of the Constitution and the Data Protection Act.
6. In response, the Claimant contends that the information was lawfully procured. As such, he is entitled to rely on it during the trial.

Analysis

7. The records which the Respondents seek to be struck out are electronically generated. As such, they constitute what is ordinarily referred to as electronic evidence.
8. Electronic evidence is now recognized as a form of evidence in Kenya. As a matter of fact, the Evidence Act was amended to recognize it as evidence which is admissible in judicial proceedings.
9. Section 78A of the Act was introduced to specifically deal with admission of this kind of evidence in judicial proceedings. As such, the mere fact that the evidence that a party seeks to produce in proceedings comprises of electronic correspondence does not render it illegitimate. All that the law requires for this form of evidence to be admissible in judicial proceedings is certification that it is genuine.
10. Part VII of the Evidence Act sets out an elaborate procedure for authenticating electronic evidence. Importantly, the party seeking to rely on such evidence must provide a certificate of electronic evidence which will speak to the process of production of the records.
11. The Respondents contend that the records in question comprise of their personal data. As such, they cannot be relied on without their consent.
12. I do not agree with this assertion. The records in question do not comprise data that is personal to the Respondents. Rather, they comprise of communications between the Claimant and the Respondents. As such, the Respondents cannot claim exclusive rights over the data.
13. In my view, the impugned records merely comprise of electronic communications between parties to this dispute. As such, they are admissible in evidence so long as the Claimant complies with the provisions of the Evidence Act with regard to production of electronic evidence.
14. The contention by the Respondents that the Claimant obtained the data in breach of article 50 of the Constitution is without justification. It is apparent from the record that the Claimant accessed the impugned information by virtue of his direct participation in the processes which resulted in the creation of the data in question. As such, the information got into his possession by virtue of his position as an active participant in the electronic conversations in question. Consequently, the Respondents cannot claim exclusive control over the data in a bid to validate their claim that the Claimant accessed the information in a clandestine manner.
15. Underscoring the admissibility of this form of evidence in judicial proceedings, the court in *Kinyanjui v Scania East Africa Limited (Employment and Labour Relations Cause E609 of 2020)* [2023]



KEELRC 1627 (KLR) (15 June 2023) (Ruling), quoted with approval the decision in *S -vs- Ismail and Others* (2004) ZAWCHC 39, where the South African High Court had observed as follows:-

“There is a distinction between third party monitoring’ (which was monitoring by a third party who was not a party to the conversation); and ‘Participant monitoring’ (which was monitoring by a party to the conversation). The recordings of conversations that constitute ‘participant recording’ are admissible as evidence in Court.”

16. Apart from the assertion that procurement of the electronic records offended provisions of the Data Protection Act, the Respondents asserted that the records were procured in breach of article 50 of *the Constitution*. However and as has been demonstrated above, the data was lawfully accessed by the Claimant.
17. But even assuming for a moment that the data had been improperly accessed in contravention of article 50 of *the Constitution*, I do not understand this provision as automatically foreclosing it (the data) from admission into evidence. To foreclose it (the data) from evidence, the party seeking its exclusion must demonstrate that admitting it in evidence will prejudice a fair trial or will otherwise be detrimental to the administration of justice (*Njenga v Dab Bank Kenya Limited* (Cause E400 of 2020) [2023] KEELRC 1549 (KLR) (15 June 2023) (Ruling)). I have studied the affidavit in support of the application and nowhere in the instrument do the Respondents contend that admission of the records into evidence will either prejudice a fair trial or be detrimental to the administration of justice, let alone providing a factual foundation for these attributes.

Determination

18. In the ultimate, I arrive at the conclusion that the instant application is without merit.
19. As such, it is dismissed with costs to the Claimant.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF DECEMBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondents

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

