



Gurmit v Kilimall International Limited & another (Cause 663 of 2022) [2023] KEELRC 1380 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1380 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 663 OF 2022**

J RIKA, J

MAY 31, 2023

BETWEEN

HEER GURMIT CLAIMANT

AND

KILIMALL INTERNATIONAL LIMITED 1ST RESPONDENT

HANS GONG 2ND RESPONDENT

RULING

1. On January 27, 2023, the court directed that the claimant files a formal application, if the claimant has any issues with the documents filed by the respondent.
2. The respondent has filed an Audio-Visual recording of the CCTV heading to the pharmacy and Audio –Visual of the CCTV at the pharmacy. The claimant is opposed to the production of this electronic evidence.
3. It is not clear why the claimant filed grounds of opposition, instead of an application, as advised by the court.
4. 11 Ground were filed, which may be summarized as follows: 1] it is not explained how the electronic evidence was obtained by the Respondent at Signature Mall, the 2 entities being separate; certificate does not mention the device used in recording; details of the device are not stated; Head of Human Resource has not executed certificate on how he recorded the evidence; it is not explained how the evidence was shared with respondent’s Counsel; details of device used to transmit to the Counsel have not been stated; there is no audio in the CCTV footage; respondent’s Counsel refers to printing of documents, which is different from CCTV recordings; certificate of authenticity fails to meet the standards under sections 106A and 106B of the *Evidence Act*; and sharing of the audio-visual recordings and subsequent writing on the compact disc, violates order 19 rule 3[1], as the Advocate who swore the affidavit was not party to the claim.



5. The Human Resource Officer of the 1st respondent, Moses Mbithi John filed a replying affidavit, sworn on March 1, 2023. He states, on the advice of his Advocates, that the claimant was directed by the court to file a formal application. grounds of opposition are not in the nature of an application. They are only used on their own, or in combination with a replying affidavit, in opposing an application. Objection on production of electronic evidence is premature. It ought to be made upon trial.
6. The electronic evidence was obtained in 2019 during internal investigations of complaints by the Claimant, that she had been raped within the 1st respondent's premises. the evidence is the property of the 1st respondent, and any authorized Officer of the 1st respondent can produce the evidence before the court. The Human Resource Officer has explained in the Affidavit of Authenticity how the evidence was obtained, stored and shared. The evidence is accompanied by electronic certificate and meets the conditions under section 106b [2] of the *Evidence Act*. The 1st respondent has the evidential burden of disproving allegations of rape/ sexual harassment made by the claimant. The Director of Public Prosecutions and the Police, relied on the electronic evidence when they decided not to charge the 2nd respondent with the offence of rape. It is evidence that cannot be faulted.
7. Parties agreed to have the objection considered and determined on the strength of their submissions. They confirmed / gave undertaking on filing and service of their submissions, when the matter was last mentioned on April 20, 2023.

The Court Finds: -

8. A similar claim between the parties herein, appears to have been filed, heard and determined. Judgment in the Magistrate's Court at Mavoko, ELRC Cause Number 16 of 2020, is exhibited by the parties.
9. The claimant sought against the respondents orders that: a declaration that termination was unfair; declaration that the respondent acted unfairly by failing to investigate and ascertain the complaint of sexual harassment against the 2nd respondent; declaration that he 1st Respondent failed to consult the claimant and issue policy on sexual harassment; and the respondent pays the claimant dues as particularized in the claim, at Kshs. 4,635,000.
10. The trial court heard the Parties, and granted the claimant 1-month salary in lieu of notice at Kshs. 150,000; remainder of the contract period at Kshs. 400,000; 12 months' salary in compensation for unfair termination at Kshs. 1,800,000; and sick leave at Kshs. 75,000- total Kshs. 2,625,000.
11. In the current claim, similar prayers are sought, and a similar total amount of Kshs. 4,635,000 is made.
12. The claimant states in her pleadings and witness statement that the judgment was appealed at the E&LRC, where a consent order was entered to have the matter withdrawn and the " case started afresh."
13. The respondents filed a statement of response and counterclaim dated November 1, 2022. It is explained that there was a consent to set aside the Judgment of the Magistrate's Court because key issues of law and fact were not considered, and because the Magistrate's Court did not have pecuniary jurisdiction.
14. The Parties need to supply the court with the full record of the proceedings before the trial court; proceedings on Appeal; and supply a copy of the consent order, which set aside the Judgment of the Magistrate's Court. These will assist the court in confirming if the claim before it, was properly instituted.



15. As for the grounds of opposition filed by the claimant, the court agrees with the respondent, that the claimant did not comply with the directions given by the court, on objecting to any documents filed by the respondent. The court directed that any party, who objects to any of the documents on record, files a formal application specifying the orders sought. A formal application must be supported by an affidavit. The grounds of opposition raise legal and factual matters. The claimant ought to have filed a formal application as directed, and give a factual background to her objection, through a supporting affidavit. The respondent was compelled to file a replying affidavit, while there are no facts stated by the claimant through an Affidavit, requiring response of a factual nature. The claimant in effect filed an interlocutory application, asking the court to strike out evidence filed by the respondents. Rule 17 [1] of the [E&LRC \[Procedure\] Rules](#), 2016, requires that such an Application is made through a notice of motion. Under rule 17 [9], a Party may respond to an application by filing grounds of opposition, verified by an affidavit. The rules do not contemplate filing of applications, through grounds of opposition.
16. The objection as filed is not sustainable. The respondent has, through the affidavit of Human Resource Officer, Moses Mbithi John, shown that the electronic evidence in question, was properly obtained, stored and shared. It satisfies the conditions of admissibility under sections 106 B [2] and 106 B [3] of the [Evidence Act](#). It is evidence in the hands of the Respondents, which is important in defending serious allegations of rape/sexual harassment made by the claimant against the 2nd respondent. The evidence goes to the root of the allegations concerning sexual harassment. Basic requirements under the [Evidence Act](#) on its reception, have been met. What the claimant is doing through the grounds of opposition, is to pre-empt evidence which would aid the Respondents in discounting her grave allegations of sexual harassment, and unfair termination. The court is not upholding the truthfulness of the contents of the electronic evidence, but does not doubt the admissibility of the evidence. The claimant will have the opportunity to challenge the truthfulness of the evidence, upon trial. Rule 14 [4] of the [E&LRC \[Procedure\] Rules](#), 2016 states that Pleadings, may contain evidence, provided that the court may require the evidence to be verified by an affidavit or sworn oral evidence. The respondents plead electronic evidence at paragraphs 18 [g] and [h] of the statement of response. It is pleaded that the claimant engaged in consensual sex with the 2nd respondent, and the electronic evidence shows the claimant directing the 2nd respondent to a pharmacy to buy contraceptives, to facilitate the couple in engaging in consensual sex. This is important and relevant evidence. It will be explained through oral evidence of the respondent's Witness. The claimant will have adequate opportunity to cross-examine the respondent's witness, discredit the electronic evidence, and show that she was not engaged in consensual sex. It is noted, that the evidence has been in use, at the ODPP and the Police, when allegations of rape were made by the claimant against the 2nd respondent, and investigated. Why is the same evidence objectionable in the employment and labour relations jurisdiction?

It Is Ordered: -

- a. The objection by the claimant on admissibility of electronic evidence contained in the compact disc filed by the respondents, is declined.
- b. Parties shall comply with all pre-trial requirements, including filing of the requisite appeal proceedings in the E&LRC, and subsequent consent order, which paved way for the filing of the claim herein.
- c. Costs in the Cause.

DATED, SIGNED AND RELEASED TO THE PARTIES VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTION, 2020, THIS 31ST DAY OF MAY 2023.



JAMES RIKA
JUDGE

