



Kinyanjui v Scania East Africa Limited (Employment and Labour Relations Cause E609 of 2020) [2023] KEELRC 1627 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1627 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E609 OF 2020**

**MN NDUMA, J
JUNE 15, 2023**

BETWEEN

AGATHA WAMBUI KINYANJUI CLAIMANT

AND

SCANIA EAST AFRICA LIMITED RESPONDENT

RULING

1. The respondent in its application dated November 20, 2022 seeks the Court to exclude the exhibits marked 'Awk2' and 'EN-1' produced as evidence by the claimant. 'AWK-2' is an audio recording of a conversation that was secretly recorded by the claimant and 'EN-1' is a transcript of the recording.
2. The respondent has deposed in the Notice of Motion and the supporting affidavit that, the said evidence was obtained without consent of the parties in the disciplinary meeting that was held by the respondent against the claimant. That such recording is unlawful and the evidence obtained in such a manner violates the rights of the persons whose conversations were recorded illegally.
3. The respondent submits that the Court has discretion to exclude such evidence which is unlawfully obtained and where its prejudicial effects outweighs its Probative Value. That Article 50 (4) of the [Constitution](#) provides:-

' Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.'
4. The respondent referred the Court to the case of *S -vs- Ismail and Others (2004) ZAWCHC 39* which has also been relied upon by the claimant. In the said case, the Court draws distinction between recordings which are done by a person who was not a party to the conversation being recorded from the recordings by a person who was a participant in the said conversation.



5. In the present case, the recorded conversation was the proceedings of a disciplinary hearing in which the claimant was the subject matter.
6. The respondent refers the Court to the decision of the Court in *Shakunt Rajnikant Shab -vs- Bhupendra Motichand Shab t/a John Cumming & Company & Another [2021] eKLR* and submits that the relevant determination by the Court in this case, is that the Court declined the petitioner's request to include audio recordings as evidence because the petitioner was unable to prove that the respondents were informed that the discussion at the meeting were being recorded. That the Court must be satisfied that there is a legitimate reason to override privacy protection before admitting secretly obtained evidence.
7. That the claimant has admitted that he recorded Mr Githaiga Kamwenji and Ms Emma Muhia during the meeting of July 29, 2020 and subsequent meetings without their consent or knowledge.
8. That the Court allows this application and excludes the said evidence from record.
9. The claimant on the other hand strongly opposes the application and filed a replying affidavit dated January 20, 2023. The claimant states that the application is bad in law in situ and misconceived as recordings done by a party to proceedings who was present at the time when the recordings was done, are admissible in evidence.
10. The claimant refers the Court to the decision by Cameron J in *S -vs- Ismail and Others (2004) ZAWCHC 39 (supra)* thus:-

' 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.'
11. The claimant further submits that the general rule established by the past case law is that electronic evidence emanating from the recording done by a witness who was present is admissible in evidence. Further, the only conditions that must be complied with by such evidence is the provision of Section 78A, 106B and 106(4) (a) to (d) of the *Evidence Act* which provision the claimant's evidence the subject of this Application has complied with.
12. The claimant prays that the application be dismissed with costs.

Determination

13. The Court has carefully considered the depositions by the parties and the applicable laws as set out in the rival submissions and is of the finding that the impugned evidence was obtained by the claimant who was a participant and the subject matter of the recorded proceedings. That Minutes of a disciplinary hearing must as a matter of course be accurately recorded by the employer. Where the employer has failed to fulfil this mandate, the employee owes it to himself to ensure that the proceedings in which his rights may be adversely affected are accurately recorded. This is evidently what the claimant did and cannot be faulted for doing so.
14. The evidence recorded by the claimant is therefore admissible in evidence in this case and the application lacks merit and is dismissed with costs in the cause.
15. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 15TH DAY OF JUNE, 2023.



MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Makori for respondent

Mr. Kanjama for claimant

Ekale: Court clerk

