



Nzomo v Kenya Airport Parking Services Ltd & another (Cause E257 of 2021) [2023] KEELRC 2190 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2190 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E257 OF 2021
AN MWAURE, J
SEPTEMBER 22, 2023**

BETWEEN

JACINTA LOKO NZOMO CLAIMANT

AND

KENYA AIRPORT PARKING SERVICES LTD & ANOTHER RESPONDENT

RULING

1. This ruling as pertains to objection raised in the course of hearing of the main suit when the respondent brought up issues of admissibility of audio recordings as perceived to be electronic evidence.
2. The court has carefully considered the oral submissions by the claimant and the respondent respectively.
3. Section 78A (1) of the *Evidence Act* (cap 80) provides for admissibility of electronic and digital evidence while section 78A (2) provides that a court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form. These provisions must be read together with Section 106A which provides that the contents of electronic records may be proved in accordance with the provisions of section 106B which states:-

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 "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.

4. Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—
 - a. by combination of computers operating in succession over that period; or
 - b. by different computers operating in succession over that period; or
 - c. in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

5. In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
 - 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.

6. For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.
7. In decision of *Jackline Vusevwa Selenge v Olivier Guiguemde* [2021] eKLR which relied on the decision of *Republic vs Berisa Wayu Matuguda* Criminal Case No.6 of 2008, the court considered when a certificate will be admissible and it held:

“As stated herein, the Applicant has filed a certificate of authenticity dated July 8, 2021 by the said Moses Alango wherein he confirms the authenticity of the recording. The certificate has identified the electronic record contained in the statement, described the manner in which it was produced and given particulars of the device involved in the production of the electronic record (CD). The certificate has also been signed by the said Moses Alango upon confirming that he is the person responsible in respect of the management of the computer which was used in the reproduction of the CD.

In the foregoing circumstances, I find that the electronic evidence contained in the CD and which the Applicant seeks to adduce, has also met the legal threshold set out under section 106B (4) hence is admissible as evidence in these proceedings.”

8. In light of the above, the Claimant vide her Certificate, Confirming the Authenticity, Accuracy and Manner of Production of Audio Recordings and Computer Printouts dated June 23, 2022 sworn by the Claimant confirms the authenticity of the recordings as it has identified the electronic records contained in the statement, described the manner in which it was produced and given particulars of the device involved in the production of the electronic record (CD). The certificate has also been duly signed by the Claimant upon confirmation that she is the person responsible in respect of the management of the computer which was used to transfer the recordings to the SanDisk Cruzer Blade.
9. In view of the fact that the respondent did not oppose the production of the audio recordings during or within the period of pre-trials up to the time the case was in the middle of the hearing this opposition seems to be an afterthought.
10. The court finds no reasons to reject the admission of the audio at this point. The same are admitted as evidence in this court.
11. Case will proceed on 9/11/2023.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

ANNA NGIBUINI MWAURE

JUDGE



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.

ANNA NGIBUINI MWAURE

JUDGE

