



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 82 OF 2019

MAHMOOD ABDULALI MOHAMED JAFFER KANJI.....CLAIMANT

VERSUS

GULF BADR GROUP (KENYA) LIMITED.....RESPONDENT

RULING

1. On 14th November 2019, the Claimant filed a claim against the Respondent, alleging unfair termination of employment and non-payment of terminal dues.
2. In support of his claim, the Claimant filed a list of documents, among them a document in the nature of skype communication, between himself and the Respondent's representative.
3. When the matter came up for hearing on 8th February 2021, the Respondent's Counsel raised an objection to production of the said document. After taking oral submissions by Counsel for both parties, the Court directed the Respondent's Counsel to file a formal objection.
4. On 9th February 2021, the Respondent filed a Notice of Motion, objecting to production of the aforesaid document and seeking an order that it be expunged from the record.
5. The Notice of Motion is based on the following grounds:
 - a) In the Claimant's list of documents, item number 6 is entitled '*copies of Claimant's skype conversation with the Respondent's HQ Representative.*';
 - b) At pages 28 to 39 is a reproduction of the alleged conversations (not emails) between persons whose identity cannot be discerned from those excerpts;
 - c) All these images and documents are computer generated, but the Claimant took no steps to comply with the provisions of Section 106B of the Evidence Act, which governs production and admissibility of electronic records;
 - d) In the circumstances, the bundle of documents at pages 28 to 39 is inadmissible by virtue of the provisions of the Evidence Act cited above and therefore ought to be expunged from the record.
6. The Claimant filed Grounds of Opposition on 12th February 2021, stating:
 - a) That the Respondent's Notice of Motion should be dismissed because it is solely based on the provisions of Section 106B of the Evidence Act, without paying due regard to the exemptions accorded under Section 106I of the Act;
 - b) That no evidence has been brought forth by the Respondent to show that the document they wish to have expunged from the record was tampered with by the Claimant and it is not in its original form;
 - c) That the provisions of Section 106I of the Evidence Act allows the Court to make a presumption that the electronic message relied on by the Claimant indeed left the address of the originator and was received at the address of the recipient in the same form or content;
 - d) That the presumption created by Section 106I is rebuttable if evidence is presented to the contrary by the party making the

objection.

7. The subject of this Motion is the admissibility of documents in the form of skype communication between the Claimant and the Respondent's representative.

8. The Respondent relies on Section 106B of the Evidence Act to support its objection. The said provision states:

106B. Admissibility of electronic records

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper; stored, recorded or copied on optical or electro-magnetic media produced by a computer (hereinafter 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.

(3)

(4) 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.

9. The Respondent referred to a number of cases affirming the application of Section 106B of the Evidence Act. In **Republic v Barisa Wayu Matuguda [2011] eKLR Odera J** held:

"...for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of S. 106B (4)"

10. In **William Odhiambo v IEBC & 2 others [2013] eKLR Muchelule J** stated the following:

"Section 106A of the Evidence Act (Cap 80) provides that the contents of electronic records may be proved in accordance with the provisions of section 106B. Section 106B deals with admissibility of electronic records...."

Under sub-section (4), where a party seeks to give evidence by virtue of Section 106B he has, among other things, to tender a certificate....."

11. The law is therefore clear on the conditions for admissibility of electronic evidence.

12. The Claimant however relies on Section 106I of the Evidence Act on presumption of electronic messages. This provision bears verbatim reproduction:

106I. Presumption as to electronic messages

A court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission, but the court shall not make any presumption as to the person by whom such a message was sent.

13. My reading of Section 106I is that it deals with the mode of communication known as electronic mail, which originates from one electronic mail address to another. I do not think a print out of skype communication would qualify as an electronic message as defined in Section 106I. Such a printout falls squarely within the purview of electronic record that can only be admitted in evidence within the conditions set out under Section 106B.

14. Having failed to comply with Section 106B, the Claimant cannot be allowed to rely on the subject print out of skype communication. The entire document identified as '*Claimant's Skype conversation with Respondent's HQ Representative*' appearing as number 6 in the Claimant's list of documents dated 11th November 2019 is therefore expunged from the record.

15. The costs of this Motion will be in the cause.

16. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF APRIL 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Ms. Zamza h/b Mwasaru for the Claimant

Mr. Buti for the Respondent