



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 188 OF 2020**

**SAIMA YUSUF KASSIM.....CLAIMANT**

**VERSUS**

**AFFRICAN SAFARI DESTINATIONS LIMITED.....RESPONDENT**

**RULING**

1. The Respondent/Applicant filed a Notice of Motion Application dated 13<sup>th</sup> May 2020 seeking for Orders:

i. Spent

ii. *THAT the Honourable Court be pleased to expunge from the record the Excel report/list of the unreported (offline-transactions) carried out by the Respondent and from which the Claimant's computation of commission is based upon (referred to in paragraphs 10 & 11 of the Claimant's further affidavit/Response to Respondent's defence) contained in the Claimant's supplementary bundle of documents dated 19<sup>th</sup> February 2021.*

iii. *THAT the Honourable Court be pleased to expunge from the record the Computer print-out from Quick Book accounting system operated by the Respondent of the official /reported sales made by the Respondent from December 2012 to 2016 incorporating a reconciliation of the Excel report and the Quick Book print-out contained in the Claimant's supplementary bundle of documents dated 19<sup>th</sup> February 2021.*

iv. *THAT the costs of this application be borne by the Claimant.*

2. The Application is premised on the grounds that the matter is scheduled to come up for hearing of the main suit on 20<sup>th</sup> July 2021 and the Claimant has not annexed a certificate of electronic records for the computer print-out contained in the Supplementary Bundle of documents dated 19<sup>th</sup> February 2021 and that the Excel report does not indicate the maker and the Respondent would consequently not be able to authenticate the documents through cross-examination and that the computer print-out from Quick Book accounting system indicates it was generated on 1<sup>st</sup> June 2020 at 5:16 pm. The Applicant asserts that the Claimant having been terminated from employment on 10<sup>th</sup> July 2017, she illegally obtained the computer print-out as she was not in the Respondent's employment on 1<sup>st</sup> June 2020. It asserts that the Respondent/Applicant's right to a fair hearing will be highly prejudiced unless the Honourable Court intervenes and expunges the offending documents from the court's record. The Respondent asserts that it is in the interest of justice that the application be allowed and the supplementary list of documents dated 19<sup>th</sup> February 2021 be expunged from the record. The Application is supported by the Affidavit sworn by the Respondent's Dipesh Galani who denies preparing neither the alleged Computer print-out from Quick Book accounting system or the alleged Excel report/list of the unreported (offline-transactions). He depones that a perusal of the computer print-out from Quick Book accounting system has handwritten dates and typed notes on it indicating that it has been tampered with. He urges the Court to expunge the offending documents from the Court's record before the matter is heard on 20<sup>th</sup> July 2021.

3. The Claimant/Respondent filed a Replying Affidavit sworn on 15<sup>th</sup> June 2021 averring that her claim against the Respondent is *inter alia* for a commission that she earned but was not paid for by the Respondent. That the said commission was to be computed at the rate of 10% of all sales/revenue earned by the Respondent and that the revenue was to be based on the actual revenue generated by the Claimant. She depones that she is aware that as a tax evasion measure, the Respondent had two parallel systems in place, that is, one maintained and reflecting the actual/true earnings by the company and another one maintained for purpose of under declaring its actual tax liability. She asserts that the Respondent is an entity fully operated and managed by Dipesh Galani even though it is a limited company in law and that she generally managed the company as the said Dipesh would frequently travel to Australia for periods of about three months to attend to his other business. The Claimant/Respondent avers that since the Respondent had not paid all her commission at the time of termination of her employment, she informed him she was leaving with a back-up or copy of the Quick Book accounting system in place as her evidence of the commissions she earned during her tenure and so as to ensure settlement of her dues. That it is from the said back-up that she printed the

Quick Book print-out for the period between December 2012 and 2016 and which back-up does not in any way interfere with the company's system as it is not real time and cannot reflect any reports beyond her last day in the company. Further, that she cannot make amendments to the same and that when it comes to printing, the back-up always indicates the time when the printing was done. She further avers that she is ready to return the back-up disk to the Respondent or destroy the same or deal with the same as shall be instructed by this Honourable Court upon conclusion of this matter. She asserts that the present Application is an attempt by the Respondent to defeat her deserved claim before this Honourable Court and urges the Court to dismiss the same with costs.

4. The Application was canvassed by way of written submissions. The Respondent/Applicant submits that the applicable law on admissibility of electronic evidence is the Evidence Act, (Chapter 80 of the Laws of Kenya) under Section 78A(1) which provides that electronic messages and digital material shall be admissible as evidence in any legal proceedings. The Respondent submits that Sections 106A and B of the Evidence Act further provide for the conditions for admissibility of electronic records and that a certificate of electronic records as provided under Section 106B is mandatory. It submits that the impugned documents produced by the Claimant are inadmissible since she has not annexed certificates of electronic records for the same and they ought to therefore be expunged. It relies on the case of **Mumias Sugar Company Limited & 5 Others v Musa Ekaya [2017] eKLR** where the court held that it is easy to have the original information stored in an electronic device distorted in the process of obtaining the evidence given the advancement in technology and that hence the requirement for the conditions provided in Section 106B of the Evidence Act have to be met. The Respondent submits that in the case of **Republic v Barisa Wayu Matuguda [2011] eKLR**, the court held that the provision is clear that for electronic evidence to be deemed admissible, it must be accompanied by a certificate in terms of section 106B(4)(d) signed by a person holding a responsible position with respect to the management of the device and that the evidence is inadmissible without the required certificate. The Respondent/Applicant submits that the Claimant's supplementary bundle of documents dated 19<sup>th</sup> February 2021 which lacks reliability, authenticity and credibility should not be allowed into evidence as it would result in the travesty of justice, as was held by the Supreme Court of India in **Anvar P. K. vs. P.K Basheer & Others. (2014) 10 SCC 473** and that in view of the Claimant's own admission that she took away a backup/copy of the quick book accounting system, there is a high likelihood that apart from the immediately visible alterations in her supplementary documents, alterations have been made on the electronic records that are not immediately visible to the Honourable Court and to the Respondent. The Respondent submits that in **William Odhiambo Oduol v Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR**, the Court adopted the following submission as to why electronic evidence is susceptible to manipulation and on the need for caution and compliance with section 106B of the Evidence Act:

*“But electronic evidence presents unique characteristics which necessitate careful treatment. First, while alterations on physical document are often immediately visible on its face, this is not the case with electronic material. An electronic document can be, and is often, modified in the process of collecting it as evidence. A common example occurs when a file or application is opened, or copied from one computer into another or into an external hard drive. Changes which are not often immediately visible occur. Second, compared with physical or other forms of exhibit evidence electronic evidence is relatively more difficult to detect and trace the signs of tampering. It can be changed or manipulated much more easily than paper or other forms of evidence without having any obvious trace of such alteration.” (emphasis theirs)*

5. The Claimant/Respondent submits that the absence of an electronic signature on an electronic document does not of itself render the document liable for dismissal and simply requires further evidence in its further proof. That Section 106B(1) of the Evidence Act is particularly worded that such evidence 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. (emphasis theirs). She further submits that the Claimant's supplementary bundle documents does not fall within the purview of Section 105 of the Evidence Act because the Claimant and the Respondent had an employer-employee relationship and the Claimant has by virtue of evidence shown that there was an agreement for payment of commission. That the burden of proof under Section 117 of the Evidence Act shifted to the Respondent who is within the knowledge of such matter and to whom the burden is therefore cast. That the statement also falls within the ambit of Section 33(c) of the Evidence Act - PART IV on statements by persons who cannot be called as witnesses and which provision states:

*“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—*

*Against the interest of maker—*

*when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.”*

6. She submits that the evidence in question being the amount of revenue generated by the Respondent and contained in its report, is against the pecuniary interest of the Respondent and that it has not produced any evidence to counter the one produced by the Claimant. That under Section 10(7) of the Employment Act, the burden of disproving, inter alia, remuneration and the scale rests on the Employer by virtue of its failure to produce the employment contract. That the Rule of law enjoins this Honourable Court to grant the parties herein an opportunity to ventilate their matter on merits before making a final decision and that the Court will further require to be versed with the issues in the case before making a determination such as whose duty it was to produce what evidence and the consequences of certain acts and omissions of the parties. That the cross examination of the parties will provide such an opportunity and the Respondent will have the option of making such an argument as part of its final submissions. The Claimant/Respondent submits that the authority provided by the Respondent/Applicant is distinguishable from the current case because the results were transmitted by the IEBC which was the body singularly having the gadgets and in whose control they remained. That in comparison to the present suit, the Respondent/Applicant who is in control of the gadgets/system and whose obligation it is to produce the same is fighting the one provided by the Claimant.

7. The application seeks to have evidence that has been annexed by the Claimant to be expunged. Whereas the Rules do not provide for an express means of challenge to evidence adduced, the Court has considered the rival arguments and the authorities cited in coming to this determination. The Respondent/Applicant asserts the Claimant/Respondent illegally obtained evidence in relation to various transactions

time stamped 1<sup>st</sup> June 2020. She on her part asserts that the evidence was not acquired in 2020 but in 2017 when she left and that the time stamp appears when the document is accessed. The bundle in question was filed on 19<sup>th</sup> February 2021 and if indeed the same was accessed for purposes of filing then the date should have been 19<sup>th</sup> February 2021 not the date noted being 1<sup>st</sup> June 2020. In the premises as the documents seem to be inconsistent and have no certificate of the manner and means of production as electronic evidence, the same is expunged from the record as it offends the law in terms of production of electronic evidence. The Claimant is at liberty to file a properly authenticated bundle of documents containing the information she asserts is in her possession within 14 days of this Ruling. As tomorrow is a Gazetted Public Holiday to mark *Idd Ul Adha*, the matter will be given a fresh hearing date immediately after the delivery of this Ruling.

So ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JULY 2021.**

**NZIOKI wa MAKAU**

**JUDGE**