



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO E492 of 2021**

**JACKLINE VUSEVWA SELENGE.....CLAIMANT**

**VERSUS**

**OLIVIER GUIGUEMDE.....RESPONDENT**

***(Before Hon. Lady Justice Stella Rutto)***

**RULING**

1. Before me is an Application dated 16<sup>th</sup> July, 2021 filed under a certificate of urgency by the Applicant who is the Respondent in the main suit. The Applicant has through the instant Application, sought the leave of this Court to adduce electronic evidence in the form of a CD as part of his evidence.
2. The Application was certified urgent on 2<sup>nd</sup> August, 2021 and fixed for interpartes hearing on 3<sup>rd</sup> August, 2021.
3. The Application is supported by an Affidavit sworn by the Applicant wherein he avers that the electronic evidence was available at the time he filed his list of documents but it was not possible to upload the same on the Judiciary e-filing platform. He further stated that the form of evidence in the electronic format was crucial to his case and that the same will assist the Court in arriving at a just finding.
4. The matter proceeded for interpartes hearing on 3<sup>rd</sup> August, 2021, when the Claimant had the opportunity to respond to the Application orally as she had not filed a response in Court.
5. The Applicant through his Advocate Mr. Omariba, reiterated the contents of the Application and prayed that the electronic evidence in the form of a CD be admitted as evidence for consideration in support of his case.
6. On her part, the Claimant who was in person opposed the Application and deemed the evidence as being too late in time and an afterthought. She contended that the electronic evidence ought to have been brought in Court at the time the Applicant filed his response and not when the hearing of the matter had commenced. She prayed that the Application be dismissed.
7. In rejoinder, Mr. Omariba submitted that the Respondent had disclosed the existence of the audio recording in his list of documents dated 5<sup>th</sup> July, 2021 hence the Application was not an afterthought. He identified the same as appearing in number 7 of his list of documents. He further submitted that the judiciary e-filing platform did not allow for the uploading of the audio recording hence the reason the same was not availed together with the other documents in support of the Applicant's case.
8. From the Application and submission by parties, the issue for determination before me is whether the audio recording sought to be adduced by the Applicant is admissible. However, before I proceed to determine the issue of admissibility, I must address a pertinent issue that has been raised by the Claimant in her submissions regarding the timing of this Application.
9. In her submissions before Court, the Claimant questioned the timing of the Application and termed the same as an afterthought. She submitted that the said piece of evidence in electronic format ought to have been adduced earlier by the Applicant and more so, at the time of filing the list of documents.
10. The Applicant's list of documents dated 5<sup>th</sup> July, 2021 has identified as part of its list an "audio recording of the conversations and Certificate". The same is cited as no. 7 in the list. The said list of documents was filed together with the Applicant's statement of response to the Memorandum of Claim. Further, one of the Respondent's witnesses, Mr. Moses Alango has indicated at paragraph 6 of his written witness dated 6<sup>th</sup> July, 2021 that he made an audio recording and which he would wish to produce before Court.
11. It is therefore apparent that the Applicant had disclosed the existence of the recording at the outset and had through the list of documents

and witness statement by Moses Alango intimated that he will rely on the same as evidence before this Court.

12. Further, advocate for the Applicant has cited challenges in uploading the audio recording on the Judiciary e-filing platform. No doubt, the e-filing platform is technology based and it is not lost to me that such technology may have certain unforeseen limitations. The uploading of an audio recording may be such one limitation. It is therefore plausible that the Applicant was not able to upload the audio recording at the time he filed his documents.

13. I now turn to consider and determine the issue of admissibility of the electronic evidence sought to be adduce by the Applicant.

14. The electronic evidence in question is an audio recording by Mr. Moses Alango, one of the Applicant's witnesses. The recording is a conversation between the Applicant, the Claimant, one Ms. Catherine and the said Mr. Moses Alango.

15. **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.

16. 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**.

17. On its part **section 106B (1)** provides as follows;

*“106B (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 a 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.”*

18. The conditions mentioned in **sub section (1)** are provided in **sub-section (2)** in the following terms:

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.

19. The Applicant in this case, intends to rely on the audio recording made by Mr. Moses Alango. The certificate confirming the authenticity of the recording dated 8<sup>th</sup> July, 2021 and signed by the said Moses Alango states that he made the audio recording using cell phone Make One Plus 7 pro serial number, GM1910 IMEI No. 863581042392550. He stated that he later transferred the recording to his computer serial number 5CD826380H. The same recording was subsequently transferred to a CD by way of a reproduction.

20. Mr. Alango further stated in his Certificate that the computer which was used to reproduce the recording was a computer which he uses on a day to day basis and in the course of his work. He further confirmed that the computer has been in his custody for the last one year and that the same is operating properly. He added that that the said computer was used to transfer the recording and did not interfere with the electronic recording and accuracy of the content.

21. In the case of **Republic vs Barisa Wayu Matuguda [2011] eKLR** the court observed that any information stored in a computer which is then printed or copied shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. The Court however cautioned that such electronic evidence will only be admissible if the conditions laid out under section 106B are satisfied.

22. In view of the chronology of events given by Moses Alango in his certificate dated 8<sup>th</sup> July, 2021, considering the law applicable and the threshold set in the case of Barisa Wayu Matuguda (supra), I find that the CD has met the legal requirements in terms of section 106B (2) section read together 106B (1).

23. That is not all. **Section 106B (4)** requires a certificate;

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; and

c) dealing with any matters to which conditions mentioned in **subsection** relates.

24. There is also a requirement that the certificate must be signed by the person occupying a responsible position in relation to the operation of the relevant device.

25. This provision was reiterated by the court in the case of **Republic vs Barisa Wayu Matuguda (supra)**, with the Court observing that in order to be admissible, the electronic evidence must be accompanied by a certificate in terms of **section 106B(4)** and which must be signed by a person holding a responsible position with respect to the management of the device and that in the absence of such a certificate, such electronic evidence is inadmissible as evidence.

26. As stated herein, the Applicant has filed a certificate of authenticity dated 8<sup>th</sup> July, 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.

27. 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.

28. In conclusion, I find that the Application dated 16<sup>th</sup> July, 2021 is meritorious and I allow the same as prayed.

29. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUG 2021.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

The Claimant in person

Mr. Omariba for the Applicant

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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 Civil 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.

**STELLA RUTTO**

**JUDGE**