REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1005 OF 2016

(Before Hon. Justice Ocharo Kebira)

KENNETH NDUATI IRUNGU.....CLAIMANT

VERSUS

RMA MOTORS (KENYA) LIMITED.....RESPONDENT

RULING

1. This matter came up for hearing on the 9th day of November 2021, when the Claimant testified and closed his case. The Respondent's witness took the stand and commenced her testimony in chief. She did not finish giving her testimony as Counsel for the Claimant objected to production of some documents. Counsel for the Respondent held that the documents are in, their nature and, the circumstances of this matter, documents that the witness can legally produce. This necessitated, the Court's direction that the witness be stood down, pending a determination on the objection.

2. Mr. Omolo Counsel for the Claimant opposed the production of the following documents:

(a) The email dated March 14, 2016, by Sheila Anyango Sewe to Roselyn Njoroge.

(b) Email of 30th November 2015, and the Respondent's estimates dated November 19th, 2015.

(c) The invoice dated 23rd December 2015.

(d) Email correspondences between Mrs Manwaring and the Respondent's representatives.

(e) The investigation report.

3. As basis for the objection to production of the email correspondences, counsel submitted that the emails are electronic evidence, it was imperative therefore that a certificate be filed and produced, pursuant to the provisions of section 106 of the Evidence Act. Further that the emails were neither addressed to the Claimant, nor authored by the witness.

4. The investigation report was not authored by the witness, and that the same is not signed, he submitted further.

5. He summed up the submissions by stating that the witness is not a competent person to produce the documents in the circumstances.

6. Counsel Mr. Ndungu for the Respondent in response stated that the issue being raised now ought to have been raised at the pre-trial conference.

7. Counsel submitted that the Claimant admitted in his evidence that he received one of the emails whose production as evidence he is assailing.

8. Counsel submitted that section 78A provides for admission of electronic evidence, and that under section 78(2) the Court shall not deny admissibility on ground that the document(s) referred to in section 78 (1) is not in the original form.

9. In respect of the investigation report, they have the author, [the investigator] as a witness, he shall produce it.

10. He further submitted that the witness was the Human Resource Manager at the material time, therefore she has knowledge of the facts of the matter, and the documents can be produced by her upon basis of that knowledge.

11. In response to these submissions by Counsel for the Respondent, Counsel for the Claimant, stated that the investigation report can be produced by the author.

12. As regards the timing of the objection, Counsel stated that he wouldn't have raised it earlier than at the hearing of the matter.

13. He further submitted that Counsel's submissions that the Claimant accepted receiving the email stands on loose ground. It is not the Claimant who is seeking to produce the document (email), and his comment on it in his evidence does not become a license for the production and admissibility of the document.

14. As a Human Resource manager, she cannot testify on contents of documents she did not author.

15. From the submissions by counsel for the parties, I hold that two issues commend themselves to this Court as the issues for determination, thus:

(a) Whether the email correspondences referred to hereinabove, can be admitted as evidence.

(b) Whether the Claimant is estopped from raising the objection as he did not do so at the pre-trial conference.

16. Section 78A of the Evidence Act provides:

"78A. Admissibility of electronic and digital evidence.

(1) In any legal proceedings, electronic message and digital material shall be admissible as evidence.

(2) The Court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in the original form.

(3) In the weight, if any, to be attached to electronic and digital evidence, under subsection (1) regard shall be had to -

(a) The reliability of the manner in which the electronic and digital evidence was generated, stored and communicated;

(b) The reliability of the manner in which the electronic and digital evidence was maintained;

(c) The manner in which the originator of the electronic and digital evidence was identified; and

(d) Any other relevant factor.

17. And section 106 B

"106 B. Admissibility of electronic records

(1) Notwithstanding /anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, record or copied or optical or electro-magnetic media produced by a computer (herein referred to as "computer out") 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 any fact stated therein where direct evidence would be admissible ……"

18. Section 106 B (4) of the Evidence Act provides:

"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 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 purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which the 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 section it shall be sufficient for a matter to be stated to be of the best knowledge of the person stating it."

This subsection must be read in conjunction with section 106 B.

19. In my considered view, whereas section 78 A of the Evidence Act provides general electronic and digital evidence and admissibility thereof, section 106 B deals with a specific form of electronic evidence, computer output. The legislature had a purpose in compartmentalizing the admissibility of electronic evidence as they did here. Therefore, it is not in order for one to purport to invoke a provision which in nature covers general situations in exclusion of a provision that is specific on a particular circumstance as in the instant case. Counsel for the Respondent's attempt to invoke the provisions of section 78A in isolation from those of section 106 B of the Evidence Act is not in order therefore.

20. In **Abdi Abdullahi vs Ahmed Bashe & 2 others (2018) eKLR** the Court held:

"From the above legal provisions, and cited authorities by the Respondent, the law requires that section 78 A and 106 B of the Act are read conjunctively and complied with. The CD video recording in this case is both electronic and digital evidence. Therefore it ought to be produced with a certificate as provided for by section 106 B of the Act, and fulfils the requirements of authenticity and validity of the information and/or evidence contained in the said CD video recording…….. The content of the certificate would aid and satisfy the court as to the reliability of generation of the electronic record/evidence. The integrity of the

process and the origin of the content."

21. Production of the certificate contemplated in section 104 B (4) is mandatory and in absence of the same, the electronic record, put in another way computer output cannot be admitted as evidence. This was so stated in the case of Idris Abdi Abdullahi (supra).

22. In **Samuel Kazungu Kambi vs Nelly Kongo & 2 others (2017) eKLR**, the Court held;

> ***"Sub-section 4 of section 106 B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate should also have the signature of the person in charge of the relevant device or management of the relevant activities.***
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> ***The source of the photocopies of the photograph annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the Court that the photographs were true reflection of the incident he witnessed.***
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> ***The conditions set down in section 106 B were not met by the Petitioner. He could not therefore be allowed to produce the photographs. His claim that the Respondents are estopped by virtue of section 120 of the Evidence Act from challenging the evidence having not raised the issue at the pre-trial conference is not valid. The production of evidence did not feature in the pre-trial conference. Knowing the kind of evidence, he intended to rely on, it was upon the Petitioner at that early stage to bring up the discussion. He did not do so. The Respondents never gave him any hint that they would not be opposing the production of the photographs. The estoppel envisaged by section 120 of the Evidence Act is therefore not applicable in the circumstances of this matter.***

23. No doubt the email correspondences that the witness seeks to produce fall under the ambit of section 104 B of the Evidence Act, Cap 80 Laws of Kenya, electronic record. Production of the certificate contemplated under sub-section 4 thereof to assure the Court of their authenticity and reliability was imperative. Absent of it, the witness cannot be allowed to produce them, and they cannot be admitted as evidence.

24. Counsel for the respondent raised the issue of estoppel. That the issue of the production of the emails ought to have been raised at the pre-trial stage, and having not done so, the Claimant cannot raise it now. I do not agree with counsel on this line of thought. First, where there is no express suggestion by the parties at the pre-trial conference relieving one of them or both of them, from the statutory duty regarding production of evidence, the parties are bound to expect that in matters production of evidence, the relevant statutory procedure must be adhered to. Second, I have gone through the pre-trial proceedings, I see nowhere, where the issue of production of evidence arose, for the Respondent to signify his intention as to oppose or not production of any documentary evidence. I agree that here was the most appropriate stage where objection would be raised.

25. In the upshot, the objection is upheld, the email correspondences specifically referred to hereinabove falling under items 3, 5 and 6 of the Respondent's bundle of documents cannot be admitted as evidence.

26. Orders accordingly.

RULING READ AND DELIVERED VIRTUALLY THIS 17TH DAY OF DECEMBER, 2021

OCHARO KEBIRA

JUDGE

IN PRESENCE OF:

KELLY FRANCIS FOR OMOLLO FOR CLAIMANT.

MR. NDUNG'U FOR THE RESPONDENT.