



**Republic v Njoroge & 2 others (Criminal Case 13 of 2018)
[2023] KEHC 2837 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2837 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL CASE 13 OF 2018
JM NGUGI, J
MARCH 27, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

SAMUEL NDUNGU NJOROGE 1ST ACCUSED

JOYCE NJAMBI MUNGAI 2ND ACCUSED

WILSON MWANGI MUNYUA 3RD ACCUSED

RULING

1. The Prosecution made an application dated January 18, 2021 for the substantive prayer that “the DVD marked “A” be admitted in evidence.” There is a secondary, if improper at least at this stage, prayer for what seems like a declaratory relief “that there was integrity in the process used to produce, maintain and store the contents of the video which we seek to be admitted in evidence.”
2. The Application was opposed by the Defence. After the oral arguments on March 27, 2023, I gave an extempore ruling allowing the production of the redacted DVD but noted that the proposed evidence only passed the primary test of reliability for admission; and the Court will subject it to the ultimate test of reliability and weigh its probative value in view of the concerns raised by the Defence, when the Court will be making its ultimate determination in the case either at the prima facie case stage or in its final decision. I also indicated that I will give more detailed reasons for the ruling later. These are the reasons.
3. The background to the Application is as follows. The Accused Persons are on trial for murder. The murder trial in this case had proceeded apace until the Prosecution called PW35, Corporal Joseph Mutie, a Police Officer at DCI who is a gazetted ICT expert. During the course of his testimony, the officer sought to produce a DVD of video footage which he stated was from a restaurant known as Homeland Lounge. He stated that he had received the raw footage of the video which was from a



- CCTV camera and that he had helped redact it into a DVD video of slightly less than an hour long. During the hearing, it emerged that the actual raw CCTV footage- was more than four hours long.
4. The Court noted that what the officer sought to produce was a redacted version of the video and directed that the raw footage be supplied to the defence first before the Court could permit the production of the redacted, secondary version. At the next scheduled hearing, the Prosecutor informed the Court that the raw footage was no longer available as it had been overwritten by new data as usually happens with CCTV camera systems. The Prosecution, therefore, sought admission into evidence of the redacted, secondary DVD video. I directed the Prosecution to make a formal application so that the Defence could respond. The instant Application is the outcome of that directive.
 5. The Application is supported by the affidavit of SSP Paul Wambugu, who served as the Primary Investigating Officer in the case. In his affidavit, SSP Wambugu states that he obtained CCTV footage from Homeland Lounge located along Thika Highway as part of his investigations. The aim of that part of the investigations was to find out if the Accused Persons had visited the restaurant on January 24, 2018 in a bid to link the three Accused Persons with each other.
 6. SSP Wambugu depones that he went through the entire footage “but retrieved specific time stamps that captured the specific time the 1st Accused entered the restaurant which was 24th January, 2018 at 15:24:03 Hours until 19:49:12 Hours when together with the 2nd and 3rd Accused Persons they left the premises.” He further states that he stored the footage captured above in a DVD which he wishes to produce as evidence. SSP Wambugu further depones that the remainder of the CCTV footage is not available for production before the Court because, first, the other parts of it do not capture the Accused Persons and, second, the footage self-deletes after 7 days. He assures the Court that the evidence provided is a true account of the events of the material day and no prejudice will be suffered by the Accused Persons if the same is produced in evidence. He also terms the evidence crucial in linking the three Accused persons to each other “as accomplices in the case and shows/demonstrates that they met, communicated and planned on the day the victim was murdered.”
 7. Mr Wandugi, counsel for the 1st Accused Person, verbalized the objections of the Defence on behalf of his colleagues. His main concern, as I heard him, is that there is no guarantee that the redacted DVD is a faithful reproduction of the original, raw footage. Beyond concerns about “doctoring”, Mr Wandugi is concerned that the absence of the raw footage might lead to absence of inculpatory evidence to balance or contextualize the redacted version provided by the Prosecution. He refers to the affidavit of SSP Wambugu where he states he saw the entire footage and then decided what was relevant to make the argument that the Prosecution should not be permitted to adduce the redacted video footage because the investigator made a conscious choice what to redact; and that, therefore, the argument that the raw footage is not available is an afterthought. Mr Njuguna, counsel for the 2nd Accused Person; and Mr Mabachi, holding brief for Mr Mathenge for the 3rd Accused Person fully supported Mr Wandugi’s submissions.
 8. The appropriate premise to begin the analysis is to recognize that this is an inquiry into the admissibility of real evidence in a trial. Every inquiry of this nature begins with the fundamental principle that evidence is admissible in a criminal trial if it is relevant, material and is not otherwise excluded by a specific exclusory rule.
 9. In the present case, the evidence in question is a video-recording. The double twist here is that it not the primary evidence and it has also been redacted. The DVD in question here is not primary evidence because the original raw footage was, presumably, stored in a hard drive or server at Homeland Lounge Restaurant. The Investigating Officer viewed it on a monitor at the restaurant and then transferred it into DVD format. He readily admits that he viewed the entire raw footage and then determined



what the relevant time stamps were, and only transferred those portions which captured the Accused Persons. If the raw footage of the CCTV was available, there would be no evidentiary difficulty since it would simply be admitted as the primary and best evidence. The redacted DVD could then be admitted as clarificatory, secondary evidence based on the admitted primary evidence. The challenge here is that the raw CCTV footage is no longer available. Should the redacted DVD video-recording be admitted into evidence?

10. The first test, like in all admissibility inquiries, is one for relevance. For video-recordings, the test for relevant, at once, takes us to the question of authenticity. For the DVD evidence to pass the test of relevance, the Prosecution must, first, establish that it is authentic: it must be an accurate recording of what it purports to depict. In the present case, there is an express admission that the video-recording was transferred to a secondary format and was then redacted.
11. First, has the Prosecution brought itself within the exception to the Best Evidence Rule? The exception applies where the primary evidence is no longer available and the proponent of the evidence can demonstrate the authenticity of the secondary evidence. In my view, the exception applies here. While the Investigating Officer unwisely proceeded on the wrong premise that he would not be required to turn over to the Defence or Court the raw footage of the CCTV and that he could simply redact what he considered material and relevant to the case, the fact of the matter is that by the time the Court directed the Prosecution to make the raw footage available, the operating system had self- deleted the raw footage and overwritten it with new footage. The Court takes judicial notice that this is the default operating mode of most CCTV cameras. Based on this, the Court accepts that the Prosecution has brought itself within the exception to the Best Evidence Rule in the specific circumstances of this case. It is important to point out that this finding is based, in part, by the Court's conviction that the wrong belief by the Investigating Officer that he was not required to keep the raw footage of the CCTV was one harbored in good faith. Without this good faith safe harbor, the Prosecution would have been unable to bring itself within the exception to the Best Evidence Rule.
12. How about the fact that the DVD evidence is redacted? In my view, once the Prosecution satisfied the foundational test to fit into the exception of the Best Evidence Rule, it passes the test of primary reliability warranting admission into evidence unless the opposing party can demonstrate why the Court should exclude the evidence using its inherent discretion to ensure a fair trial by excluding evidence whose probative value is outweighed by its prejudicial effect or whose impact on the Court is potentially misleading as a result of the presence of disproportionate markers of inherent unreliability of the evidence.
13. In the present case, the Prosecution was able to credibly lay the foundation for the authentication of the video evidence. SSP Wambugu and PW35 were able to do that by:
 - a. Describing how the video was created;
 - b. Indicating that the equipment used to make the video was in good condition;
 - c. Identifying the video evidence being offered for admission into evidence as the correct video;
 - d. Indicating that the video evidence is a fair and accurate depiction of the events purportedly reflected in the video evidence.
14. In my view, these factors which the Court takes into consideration in authenticating the video evidence are the same ones that can be treated as markers of reliability of the inherent evidence – at least sufficiently not to trigger the extraordinary remedy of exclusion of relevant evidence.



15. It is crucial to point out, however, that the question of ultimate reliability of the video evidence itself and its probative value will be weighed when the Court will be considering the Prosecution evidence as a whole. It is at this point when any doubts spawned by the redaction of the video evidence will be deployed to the benefit of the Accused Persons; and the Court would be called to take a contextual view of the redacted video evidence. Any interpretive space generated by the redaction will be used to the advantage of the Accused Persons. Differently put, the “weightiness” of the video evidence will take into consideration the context – that the investigators advertently redacted the video evidence.
16. The upshot is that while the DVD evidence barely passes the threshold test for admissibility into evidence and has survived the test of exclusion in the specific circumstances of this case, it arrives in court already needlessly wounded. While there is no telling at this point in the trial how wounded the evidence is and how costly this might turn out for the Prosecution, this should be a cautionary tale for investigators and Prosecutors on how to handle video evidence in the future.
17. Where investigators hope to adduce video evidence, the best practice is to, as much as possible try to preserve the raw footage in its original format. That serves as the primary evidence. Where necessary, as will almost invariably be the case for CCTV footage, the investigators can transfer the raw footage from its raw format into a different more convenient format without altering or redacting any of the contents. This serves as the secondary evidence. If needed, in the third step, the investigators, with the guidance of the prosecutor, can redact the footage for relevance for presentation in Court.
18. Where the investigators or prosecutors have redacted the raw footage for relevance, it is crucial, and a requirement of our Constitution, that both the raw footage (in its original format or secondary format) and the redacted video evidence (which will be presented in Court) must be presented to both the Court and the Defence. This will make it possible for the defence to view the entire footage to determine if it contains any exculpatory material for the defence. It will also strengthen the authenticity and reliability markers of the video evidence and eliminate the needless risk that contextual interpretation will bring in determining its probative value.
19. In the present case, these best practices were not followed and, that ship having sailed, the Prosecution will have to await the final determination of the Court for the “weightiness” of its video evidence in light of the redaction.
20. The orders shall be those announced in open Court.

DATED AT KIAMBU THIS 27TH DAY OF MARCH, 2023

JOEL NGUGI

JUDGE

