REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL SUIT 14 OF 2018

MARY WAIRIMU MUSINDI.....PLAINTIFF/APPLICANT

VERSUS

LINET AMULI & 4 OTHERS.....DEFENDANTS /RESPONDENTS.

RULING

1. The applicants notice of motion dated 22nd July 2021 prays for the following orders;

   a) that the printed digital material /computer printout comprising of pmfi6 as identified by the plaintiff in her evidence in chief, consisting of the 4th defendants Facebook social media publications together with the public comments thereto and featuring at page 35-59 of the plaint filed on 29th March 2018 be admitted as the plaintiffs exhibit 6.

   b) that the electronic evidence /digital material comprising of pmfi7, consisting of online publications in diverse fora, spawned from and similar to the plaintiffs exhibits 1,2,4 and 5 respectively and featuring at page 60 -62 of the plaint filed on 29th march 2018 be admitted as plaintiffs exhibit 7.

   c) that the certificate of electronic evidence dated 19th September 2018 be admitted in evidence as plaintiffs exhibit 8 on grounds that that the attendance of the maker thereof cannot be procured without unreasonable delay or expense.

2. The applicant as well prayed for costs of the application.

3. The application is premised on the grounds on the face of it as well her the sworn affidavit dated 23rd July 2021.

4. The issues raised in the application are based on the evidence already adduced and is on record. As the plaintiff proceeded with prosecution of her case the respondents objected to the production of the electronic evidence enumerated in the motion. The same were therefore marked for identification namely PMFI 6 and 7 on the grounds that the makers ought to be called.

5. These pieces of evidence are essentially Facebook accounts details ostensibly done by the 4th respondent among other online publications. The same according to the applicant forms part of the defamation by the respondents. She therefore had the same downloaded and printed for purposes of the suit.

Contemporaneously with the same was a certificate of electronic evidence which she sought to produce.

6. The maker of the above pieces of evidence was not able to turn up in court so as to produce them as he was unavailable because of covid 19 interference. For the above reasons the applicant contents that it was not possible to procure him within the reasonable time and was going to be expensive.

7. The application was opposed vide the replying affidavit of Loice Wairimu Kagucia whom I believe acts for the respondents. Her contention is that the production of the two exhibits ought to be done by the maker of the certificate who shall be subjected to cross examination if necessary.

8. She went on to state that **Section 78A of the Evidence Act** must be complied with before the evidence or exhibits are admitted. It was therefore upon the applicant to prosecute her case by discharging her burden of proof.

9. The court directed the parties to file written submissions which they have complied.

APPLICANTS WRITTEN SUBMISSIONS.

10. The applicants basically dwelt on the fact that the evidence she was seeking to rely on was relevant and whether they were authentic or not, it was for the court to thereafter deal with that. The applicant largely relied on the writings of Justice Stephen Estcourt QC in his paper ***"USING SOCIAL MEDIA IN CIVIL LITIGATION".***

11. She further relied on **Section 78A of the Evidence Act** on admissibility of the electronic evidence.

12. On the issue of whether the court can have the evidence produced without calling the maker she submitted that it was not possible to procure his attendance for the reason of the disruption caused by covid 19 and the court ought to take judicial notice of the same.

13. The application quoted extensively Section 106B of the Evidence Act arguing that the two pieces of evidence perfectly fits the said portions of the law.

RESPONDENTS SUBMISSIONS.

14. The respondents submitted that there was no evidence that the maker of the documents and for that matter the certificate could not be procured as claimed by the applicant. The burden of proof as envisaged under **Section 107 of the evidence** clearly is at the applicant's doorsteps.

15. The respondent largely relied on the case of **REPUBLIC VERSES MARK LLOYD STEVENSON (NAKURU HCCR 1 OF 2016).**

ANALYSIS AND DETERMINATION.

16. The court has perused the application, the supporting affidavits as well as the submissions by the parties herein. This court is as well sized of the matter and clearly what is contentious is whether the electronic evidence ought to be produced without calling the maker.

17. My understanding of the objection by the respondent's is not that the said evidence should not be produced but it ought to be produced by the maker and nobody else. The provisions of section 107 of the Evidence Act are clear, thus;

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

18. It is therefore incumbent upon the applicant to prove her case by calling whoever she deems relevant.

19. **Section 78A of the Evidence Act** on admissibility of electronic evidence states as follows.

Admissibility of electronic and digital evidence

> ***(1) In any legal proceedings, electronic messages 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 its original form.***
>
> ***(3) In estimating 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 or communicated;***
> >
> > ***(b) the reliability of the manner in which the integrity, electronics 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.***
>
> ***(4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.***

20. This court is satisfied that the evidence so far marked for identification are clearly electronic in nature and fall within the above description by the Act.

21. Who then ought to produce the same.? Clearly it is the maker. The applicant has generally in passing implored the court to take judicial notice of the impact of covid 19 which disrupted our normal operations. That the maker of the said evidence could not come to court because of the above pathogen.

22. **Section 33 of the Evidence Act** state as hereunder;

23. ***"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— "***

24. Taking cue from the above, there is no evidence that the maker of the certificate cannot be procured within a reasonable time with minimal costs. All that the applicant has done is to ask the court to consider the effect of covid 19 which has caused her not to call the said witness.

25. In my view the reason of corvid 19 is not persuasive enough. The applicant has not demonstrated sufficiently why the witness cannot be found. Obviously covid 19 has been with us for close to two years now. Unless the witness unfortunately succumbed to the same then the reason why he cannot be availed and thus Section33 above kicks in.

26. The writings by Justice Stephen Esrcourt QC relied by the applicant are relevant only to the extent of the admissibility of electronic evidence especially those from social media like Facebook as in this case. The only parting shot in this case is that the maker of the certificate ought to turn up in court and be cross examined if need be. For now, I do not consider it necessary to refer to the write up as the **provisions of Section 33** above have not been complied with by the applicant.

27. I think this court has stated enough to show that the application ought to fail. Let the maker of PMFI 6 and 7 be called to testify and produced the same and if necessary be cross examined by the respondents.

28. The application is otherwise dismissed with costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 27TH DAY OF JANUARY 2022.

H K CHEMITEI.

JUDGE.