Ogoti v Safaricom Limited & another (Civil Appeal 5 of 2021) [2022] KEHC 3208 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEHC 3208 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CIVIL APPEAL 5 OF 2021

WK KORIR, J

JUNE 30, 2022

BETWEEN

CHARLES ONCHARI OGOTI .... APPELLANT

AND

SAFARICOM LIMITED .... 1ST RESPONDENT

KENYA POWER AND LIGHTING COMPANY LIMITED ..... 2ND RESPONDENT

(Being an appeal from the ruling and order of Hon. V.O. Amboko, RM delivered on 10/5/2021 in Kabarnet CMCC No. 33 of 2018; Charles Onchari Ogoti v Safaricom Ltd & another)

JUDGMENT

1. Through the memorandum of appeal dated 17th May, 2021, the Appellant, Charles Onchari Ogoti, lodged this appeal against the ruling and orders issued on 10th May, 2021 in Kabarnet CMCC No. 33 of 2018. The Appellant is the Plaintiff in the subordinate court case whereas the 1st Respondent, Safaricom Limited and the 2nd Respondent, Kenya Power and Lighting Co. Ltd are the respective 1st and 2nd defendants.

2. The gist of the appeal is that during the hearing of Kabarnet CMCC No. 33 of 2018, the learned trial magistrate overruled an objection by the advocate for the Appellant in relation to production of a court order as evidence by a witness for the 1st Respondent. The Appellant was aggrieved by the decision and has filed this appeal.

3. The Appellant raises five grounds of appeal as follows:

    (a) That the learned trial magistrate erred in law and in fact by overruling and/or dismissing the objection raised by the Appellant's counsel;

(b) That the learned trial magistrate erred in law and in fact by failing to properly analyse Section 35 of the *Evidence Act*, Cap. 80 Laws of Kenya thereby delivering a ruling which is erroneous in law;

(c) That the learned trial magistrate erred in law and in fact by allowing the 1st respondent's witness to produce a court order for which he is not the maker citing reasons not founded and/or backed by law;

(d) That the learned trial magistrate erred in law and in fact by failing to address herself to the exceptional circumstances where any other person other than the maker of a document can produce a document for which he/she is not a maker as provided under Section 35(1)(b) of the *Evidence Act*, Cap. 80 Laws of Kenya;

(e) That the learned trial magistrate erred in law and in fact by delivering a ruling which is contrary to the provisions of Section 35 of the *Evidence Act*, Cap. 80 Laws of Kenya.

4. The Appellant consequently prays for orders as follows:

(i) That the appeal be allowed;

(ii) That the subordinate court's ruling overruling and/or dismissing the objection raised by the appellant's counsel be set aside and the objection be upheld for the maker of the document to be called to produce it in evidence.

(iii) That the primary suit be remitted to any other magistrate other than Hon. V. O. Amboko for hearing and final determination;

(iv) That the appellant be awarded costs of the appeal.

5. This appeal was canvassed by way of written submissions. The Appellant filed submissions dated 5th February, 2022. The Appellant submits that DW1 Edwin Cheruiyot being a liaison officer of the 1st Respondent was not qualified to produce the court order which had had objected to. He further submits that the DW1 was not the maker of the document and did not have personal knowledge of the same and did not therefore meet the conditions set by Section 35 of the *Evidence Act*, Cap. 80 for producing the document. The Appellant also submits that the respondents did not respond to his objection and faults the trial court for considering irrelevant and unfounded factors in overruling the objection.

6. Specifically, the Appellant submits that neither does the record of the lower court show that that DW1 came into possession of the court order in the course of duty hence triggering admission of the document under Section 80(2) of the *Evidence Act* nor did the advocate for the 1st Respondent lay a basis for the production of the said document. The Appellant also submits that the court order was not issued in favour of the said witness or the 1st Respondent thereby rendering them incompetent to respond to questions pertaining to the process that led to the acquisition of the court order.

7. The Appellant relies on Section 79 of the *Evidence Act* to submit that the document is not a public document and that allowing DW1 to produce that document would deny him the right to interrogate the contents of the document. He prays that his appeal be allowed and the ruling of the trial court dated 10th May, 2021 be set aside.

8. The 1st Respondent filed submissions and list of authorities dated 20th April, 2022. The 1st Respondent identified one issue for determination in this appeal being whether the magistrate erred in law and in fact by dismissing the Appellant's objection. Counsel submitted that the requirements set in Section

35 of the *Evidence Act* are not cast in stone and that courts have the discretion to waive them. On this point, reliance is placed on the case of *Steve Mwasya & another v Rosemary Mwasya* [2015] eKLR. It is also submitted that Section 35 of the *Evidence Act* provides for exceptions to the rule requiring the makers of documents to present them in court. The case of *David Njagi Wambu v Grace Muthoni Gituto & another* [2017] eKLR is cited in support of this assertion.

9. The 1st Respondent further contends that Section 35(2) empowers a court to admit any documentary evidence even if it is not presented by the maker. Reliance is placed on the case of *Federation of Women Lawyers (FIDA) Kenya & another v Inspector General of Police & 2 others* [2016] eKLR in support of the argument.

10. Finally, the 1st Respondent submits that the court order is a public document as per the provisions of sections 38 and 79 of the *Evidence Act* and that the same was disclosed to the Appellant at the pretrial stage but the Appellant did not indicate his intention to object to the witness producing the document. Reliance was placed on the case of *Esther Wanjiru Donde T/A Cyber Kids v Kenya Commercial Bank Ltd* [2019] eKLR.

11. The 2nd Respondent filed submissions dated 19th January, 2022. On whether the impugned document must be produced by the maker, the 2nd Respondent submitted that since no prejudice will be visited upon the Appellant and because the authenticity of the document is not challenged, it was not compulsory to have the maker of that document present it in court. On whether the production of the document is relevant to the suit, the 2nd Respondent submitted that the impugned court order forms the basis upon which the information which is subject to the suit was released and therefore the document is relevant to the suit. The statement was supported by the decision in the case of *Evangeline Nyagera (suing as the legal representative of Felix M'Ikungu Jeremia M'raibuni (deceased)) v Godwin Gachagua Githui* [2017] eKLR. The 2nd Respondent concluded that based on its submissions, the impugned ruling by the trial magistrate was legal and that the Appellant should be condemned to bear the costs of this appeal.

12. From the petition of appeal and the submissions of the parties I frame the following issues for the determination of the Court:

    i. Whether the trial magistrate misdirected herself in admitting the impugned document; and

    ii. Whether this Court should transfer Kabarnet CMCC No. 33 of 2018 for hearing before another magistrate.

13. This being a first appeal, this Court is mandated to examine the matter at hand in the context of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny prior to drawing its own independent conclusions. This principle of law finds support in the holding of the Court of Appeal in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

14. The factual background of this appeal is that during the hearing of the 1st Respondent's case, DW1 sought to produce a court order as part of his exhibits. This was opposed by the Appellant on grounds that DW1 was not the maker of that court order.

15. The Appellant's argument is that DW1 being a liaison officer of the 1st Respondent was not qualified to produce the document. It is further submitted that DW1 was not the maker of the document and did not have personal knowledge of the document as required by Section 35 of the *Evidence Act*, Cap. 80. The Appellant also submits that the respondents did not respond to his objection to the production of the document.

16. Section 35 of the *Evidence Act* provides as follows:

35. Admissibility of documentary evidence as to facts in issue

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

(a) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—

(a) notwithstanding that the maker of the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.

(3) Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner.

17. It is the Appellant's position that the admission of the court order by the trial magistrate fell short of the requirements of the cited provision. From the record of the lower court, and the submissions and pleadings in this appeal, it is clear that the authenticity of the impugned document is not challenged. The question therefore is whether the impugned document falls within the exceptions found in Section 35 of the *Evidence Act*, Cap. 80.

18. Court records are public documents by dint of Section 79(1)(a)(iii) of the *Evidence Act*. Section 38 of the *Evidence Act* provides for admissibility of public records. A reading of the stated provisions leads to the conclusion that the impugned document was admissible. The document in question being a court order fell within the ambit of Section 35(1)(a)(ii) as the same formed part of a continuous public record being the court proceedings from which the order was extracted.

19. Section 35(2) of the *Evidence Act* gives discretionary power to the court to admit any documentary evidence notwithstanding that the maker of the document is available. In allowing the production of the document, the court is at liberty under Section 35(5) to "draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances." In exercising the discretion, one of the factors to be considered by the court is the relevance of the document to the issues before the court.

20. It is important to appreciate that the choice of persons deemed to be the most appropriate witnesses is the responsibility of the parties and courts cannot compel a party to call particular witnesses. It is only the party which knows its case and knows the witnesses that are necessary to prove that case. In *Evangeline Nyegera (Suing as the Legal Representative of Felix M'Ikiugu alias M'ikiugu Jeremia M'Raibuni (Deceased) v Godwin Gachagua Githui* [2017] eKLR it was stated thus:

> "The test for admission of evidence is relevancy.... As the suit is still pending, and as there is need for fair determination of the dispute in the suit which may not be possible if a party is denied the opportunity to adduce relevant evidence, we hold the view that the appellant should not be barred from adducing secondary evidence through copies of the original documents. It is imperative that the nature of the documents, their number and relevance is shown."

21. The issue before the trial court relates to disclosure of personal information of the Appellant by the 1st Respondent. The authenticity of the court order has not been challenged and it is relevant because it lies at the centre of the dispute before the trial court.

22. Another issue raised by the Appellant is the fact that the learned trial magistrate relied on factors not raised before the court in dismissing the objection. Specifically, the Appellant argued that neither does the record of the lower court show that that DW1 came into possession of the document in the course of duty under Section 80(2) of the *Evidence Act* nor did the advocate for the 1st Respondent lay a basis for the production of the said document by DW1. A perusal of the record before the trial court indeed shows that none of these issues were canvassed or revealed by the parties to the trial court. However, as already stated, Section 35(5) of the *Evidence Act* allows the court to draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances.

23. The respondents have pointed out that the court order was among the documents that had been exchanged at the pre-trial stage. The parties, must, as expected of them exchanged the witness statements before the commencement of the trial. There is no evidence that the Appellant had indicated that he would be challenging the production of the document so that the 1st Respondent could secure the attendance of a court officer for the purpose of the production of the court order. A perusal of the trial court record shows that the Appellant was cross-examined on the impugned court order by the counsel of the 1st Respondent on 22nd February, 2021 and the order was indeed marked as a defence exhibit. The Appellant was therefore aware of the order in good time. I therefore find no fault in the decision of the magistrate to overrule the Appellant's objection to the production of the court order as an exhibit. The nature of the document was not one that required the presence of the maker before it could be admitted as evidence. I also find that the Appellant has not shown any prejudice that is likely to be visited upon him should the evidence be admitted. I therefore decline the invite by the Appellant to interfere with the trial court's ruling.

24. The second issue is whether this Court should transfer Kabarnet CMCC No. 33 of 2018 for hearing before another magistrate. Neither the Appellant nor the respondents submitted on this issue. The basis for seeking the disqualification of V.O. Amboko, RM from proceeding with the matter has therefore not been laid. The record of the trial court does not disclose anything to make this court doubt the ability of the magistrate to do justice. I therefore find no merit in this prayer by the Appellant.

25. The logical conclusion is that the appeal dated 17th May, 2021 is without merit and is hereby dismissed. The applicable principle on costs is that costs normally follow the event. In the circumstances, the costs of the appeal are awarded to the respondents against the Appellant.

DATED, SIGNED AND DELIVERED AT KABARNET THIS 30TH DAY OF JUNE, 2022.

W. KORIR,

JUDGE OF THE HIGH COURT