



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL CASE NO. E006 OF 2020[MURDER]**

**CORAM: HON. R.E. ABURILL J**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**JOHN OCHIENG' OCHIENG'.....ACCUSED**

**RULING ON ADMISSIBILITY OF PHOTOGRAPHIC EVIDENCE**

1. The accused person herein **John Ochieng' Ochieng'** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence are that on the 20<sup>th</sup> day of October 2020 at Simur village, Simur Sub-location in Ugenya Sub-County within Siaya County, he murdered Catherine Anyango Ochieng'.
2. The prosecution called five witnesses including PW5 CPL Nixon Lukwa who testified as the investigating Officer in this case. The prosecution then applied to produce two photographs as part of exhibits without the certificate of the Scenes of Crime personnel who processed or generated the photographs that were taken by the investigating officer using his personal digital phone.
3. The learned Prosecution Counsel Ms. Nambisia applied to have the two photographs produced as primary evidence. She argued that since the person who took the photographs was the one producing them, the same is allowed under Sections 64 and 65 of the Evidence Act.
4. The Prosecution relied on the persuasive holding by **Majanja J** in the case of **Republic v Nelson Otieno Odira & another [2014] e KLR** where the learned Judge held:

***“4....A reading of section 78 shows that the exception in relation to photographic evidence in specific to the terms thereof. The purpose of section 78 of the Act is to enable the court admit photographic evidence without calling the maker if certain requirements of the Act have been met. The section is not authority or it does not provide authority for the Director of Public Prosecution to permit only certain officers to take photographs and produce them in evidence. Section 78 deals with production of photographic evidence in court and provides photographs taken by officers may be produced without calling the officer taking the photographs if the conditions specified in the section are met. Hence the requirement of subsection (2) and (3) of the Act which tend to buttress the issue of authenticity of the photographs.***

***5. In any other case, any officer who has taken a photograph may testify as to its veracity and contents as the same is primary evidence and subjected to testing by cross-examination by the accused's counsel.”*** (Emphasis supplied)

5. The Defense Counsel Mr. Ochieng' Ochieng' objected to the production of photographs taken by PW5, the Investigating Officer on the ground that the photographs were without a certificate as required under the Evidence Act and were therefore inadmissible.

**DETERMINATION**

6. I have considered the submissions of both the learned Prosecution Counsel and the learned Defense Counsel. The only issue before me for determination in this application is whether PW5, the Investigation Officer herein, No. 69126 Sergeant Nixon Lukwa can produce the photographs marked for identification as PMFI 2(a) and 2(b) as evidence in the absence of the certificate as provided for in **Section 78 of the Evidence Act**. Section 78 of the Evidence Act provides:

***(1) In criminal proceedings a certificate in the form in the Schedule to this Act, given under the hand of an officer appointed by order of the Attorney-General for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.***

(2) *The court may presume that the signature to any such certificate is genuine.*

(3) *When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it.*

7. In his Article titled '*The Image of Truth: Photographic Evidence and the Power of Analogy*,' Mnookin postulates that:

***“Recall from the discussion of the Mumler trial that photographers claimed a particular expertise in the interpretation of photographs.’ It would seem, then, that if photographs were to be admitted into the courtroom as substantive evidence, they should first be certified by a photographer—a qualified expert—as worthy of belief. Without such a certification, judges might admit into evidence images that were as misleading as they were persuasive. This was precisely the fear of the author who labeled photographs “a most dangerous perjurer.” [i] (Emphasis supplied)***

8. The question of admissibility of photographs as evidence without certification has been extensively litigated and the authorities abound to shed light on this. A Certificate of photographic evidence is required to prove the authenticity of not only the photograph but also the process of its generation to satisfy the court that both the process and outcome were free from any form of manipulation. The said certificate is even more necessary when the witness who wishes to produce the photo is not the one who produced it and who is authorized to do so under the law.

9. In *Samwel Kazungu Kambi vs Nelly Ilongo & 2 Others [2017] eKLR* the court stated:

***“Sub-section (4) of Section 106B 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 could also have the signature of the person in charge of the relevant device or the management of the relevant activities.***

***The source of the photocopies of the photographs 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 a true reflection of the incident he witnessed. The conditions set down in Section 106B were not met by the Petitioner. He could not therefore be allowed to produce the photographs. His claim that the respondents were 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 the 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.”***

10. In the instant case, the witness producing the photographs, (PW5) is not the officer authorized by law to generate such photographs. Neither is he the person who generated it. By his own testimony, he only took the photographs using his mobile phone then took it to the Scene of Crime officer, Busia, to generate the same. The Scenes of Crime Busia did not make any certificate to that effect. Lack of certificate is serious defect that the Prosecution ought to have even attempted to cure by enlisting the Officer who generated the photographs as a witness to appear in Court to testify and to afford the Defense an opportunity to cross-examine the said officer. In the persuasive case of *Francis Gachihi Mburu & 2 others v Republic [2016] eKLR* the court in explaining the provisions of Section 78 of the Evidence Act stated:

***“The flip side of this provision of course is that the officer himself, properly appointed, who prepared the photographic print or photographic enlargement from exposed film that he himself exposed or that was submitted to him, may appear in court himself and produce the photographs. Otherwise, if the photographs are to be produced in evidence by someone else, then they must be accompanied by the certificate under section 78(1) quoted above.”*** (Emphasis supplied)

11. Similarly, a two-judge bench of the High Court in *Erick Indimuli Siaya v Republic [2016] eKLR*, it was held:

***“Photographic evidence may be admissible in criminal cases on condition that the photographic prints or enlargement have been prepared by an officer appointed by the Director of Public Prosecutions (hitherto by the Attorney General). The officer shall then be required to prepare a certificate to the effect that he produced the prints and enlargements from the exact film or any other annex where they were exposed. The certificate shall accompany the photographs at the time of production.’ Confronted with a similar scenario, the court of concurrent jurisdiction in *John Kibii Langat vs Republic [2005] eKLR*[ii] allowed the appeal for want of production of a certificate under Section 78 of the Evidence Act.***

12. The Prosecution has not demonstrated the attempts that they have made in ensuring compliance with Section 78 of the Evidence Act in so far as certificate of photographic evidence is concerned. No evidence was adduced to show the difficulties faced by the Prosecution in getting the certificate from the authorized officer as required by the law. In fact, the Prosecution witness who is the investigating officer in this case told this Court that they had to travel to Busia County to get the Scenes of Crime officer to produce the photographs taken using his phone, when they could not get an officer at Siaya in time. This demonstrates that the Prosecution was fully aware of the requirements of the law and was intent on complying with the same. As to why they stopped mid-way in ensuring full compliance with the law baffles reason.

13. *Matheka J* in *Republic v Jackson Ngara Nderitu [2018] eKLR* the learned Judge sustained an objection by the defense against the production of the two photographs on the ground that section 78 of the Evidence Act had not been complied with and provided an alternative if the gazetted officer was unavailable. The learned Judge stated thus:

***“I am of the view that section 78 lays the law on how photographic evidence will be admitted in evidence. The photos may be***

*taken by gazetted officer or any other officer. The officer who took them is a competent witness who ought to testify as to their veracity and contents. However, in both cases the production of those photos must be accompanied by the scenes of crimes officer's certificate that he either took the photos or developed them from whichever source. In the absence of the scenes of crimes officer someone else could produce the certificate on their behalf but the court is at liberty to call him for cross examination if necessary.*" (Emphasis supplied)

14. I must nonetheless point out that in this case, if the only probative value of the photographs was to demonstrate the injuries on the body of the deceased as stated by PW5, then the photographs could be taken at any other time and place including in the morgue, in a manner that ensures compliance with the law. Further, there is a postmortem report produced by the Doctor showing injuries detected on the deceased' body hence these photographs are not the only evidence of injury on the deceased. The prosecution case will therefore not be prejudiced at all if the production of the photographs is declined. I find no justification for the rush by the investigating officer.

15. It is worth mentioning that the Court of Appeal in *Evans Kalo Callos v Republic [2014] eKLR* in dismissing an appeal that sought to rely on the admission of photographic evidence without a certificate as a ground, the superior Court's reasoning was guided by the fact that there was no objection by the Appellant to the production of the photographs during the trial. The Court stated:

*"No objection was taken during or at any stage of the trial or subsequently to either the reference to the photographs by the witnesses or to the production of the photographs as evidence. There is nothing in section 78 of the Evidence Act that prevented the trial court from admitting the photographs into evidence. There is accordingly no merit in the appellant's complaint that photographic evidence was improperly admitted into evidence."* (Emphasis supplied)

16. The present case is clearly distinguishable from the above case as the defense has rightly objected to the production of the photographs as exhibits during the trial.

17. The requirement for a certificate is a legal position that court must not help any party to get away with. In *National Bank of Kenya Ltd v Wilson Ndolo Ayah [2009] eKLR* the Court of Appeal stated:

*"It is public policy that citizens obey the law of the land. Likewise is good policy that courts enforce the law and avoid perpetuating acts of illegality. It can only effectively do so if acts done in pursuance of an illegality are deemed as being invalid."*

18. As a superior court of law, this court must not condone the act of the investigators to disregard the explicit requirement of the law when it comes to the gathering and eventual adduction by the prosecution of photographic evidence. In the absence of the certificate or person who produced the photographs, the order which would have been appropriate, but which unfortunately was not sought by the prosecution, was to bond the authorized officer who generated the photographs to appear in court to testify and to afford the Defense an opportunity to cross-examine him or her. This was never sought.

19. For the above reasons, the only order that commends itself to this court is to reject the application by the Prosecution to produce the said photographs as evidence. Accordingly, the objection by the defense counsel against the production of the two photographs by PW5 marked as PMFI 2(a) and 2(b) is hereby sustained. The application is declined and dismissed.

20. I so order.

**Dated, Signed and Delivered at Siaya, in open court, this 27<sup>th</sup> Day of July 2021**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Senior Principal Prosecution Counsel: Mr. Edward Kakoi

Counsel for the accused person: Mr. Ochanyo h/b for Mr. Charles Ochieng' Ochieng'

The accused person: Present

Court Assistants: Modestar and Mboya

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