



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

ELECTION PETITION NO 4 OF 2017.

IN THE MATTER OF THE ELECTIONS FOR THE GOVERNOR OF KITUI COUNTY

BETWEEN

DR. JULIUS MAKAU MALOMBE.....PETITIONER

VERSUS

1. CHARITY KALUKI NGILU.....1ST RESPONDENT

2. INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

3. GOGO ALBERT NGUMA.....3RD RESPONDENT

RULING

Introduction

The hearing of the Election Petition filed herein by the Petitioner commenced on 13th December 2017. The Petitioner is challenging the election of the 1st Respondent as the Governor of Kitui County in the general elections held by the 2nd Respondent on 8th August 2017. The Petitioner was a candidate in the gubernatorial elections. On 4th January 2017, the Petitioner called its 3rd witness, namely Benson Mulandi Nyamai to testify, and the witness sought to adopt his affidavit sworn and filed in Court on 7th September 2017 and the annexures thereto as his evidence in this Petition.

The counsels for the 1st, 2nd and 3rd Respondents thereupon objected to the production of the photograph annexed to the said affidavit and marked as “NMLI”.

The Determination

Mr. Kilukumi, the counsel for the 1st Respondent, and Mr. Masika, the counsel for the 2nd and 3rd Respondents, argued that the said photograph does not meet the requirements of section 106B of the Evidence Act, and in particular that the deponent of the affidavit has not complied with the conditions set out in the section and has not provided the certificate of authenticity required by the said section..

The counsels for the Petitioner, Mr. Muinde and Mr. Gomba, in response urged that section 106 of the Evidence Act only relates to computer generated documents, and not all photographs are generated by

digital cameras. Therefore, that the objection is misplaced as the photograph could have been generated by an analogue camera. In addition that the objection is an afterthought and is coming too late in the day, and ought to have been raised during the pre-trial conference after this Court gave directions that parties file their respective lists of contested documents. Further, that this would also have given the Petitioner the opportunity to file any relevant certificates.

I have considered the arguments made by the counsels for the Respondents and the Petitioner on the objection before the Court. The issue before the Court is whether the photograph annexed as Annexure “BNM3” to the affidavit of Benson Mulandi Nyamai sworn on 7th September 2017 in support of the Petitioner’s Petition is admissible as evidence. I will first address the issue raised as to whether the objection is properly before the Court, for reasons that the Respondents failed to comply with the directions as to filing of any contested documents.

During the pre-trial conference held on 5th October 2017, this Court did indeed direct parties to file and exchange their respective lists of contested documents, and the Respondents did not indicate that they would be objecting to the subject photograph for pre-trial directions to be given on the same. However, the procedure as to objections on the admissibility of a document is that the same is made at the time a witness seeks to tender or offer the document in evidence, and furthermore, it was not certain at the time of the pre-trial conferences which of witnesses who had filed affidavits would actually be called to testify. The Respondents’ failure to indicate their list of contested documents was therefore not fatal in these circumstances.

In addition, admissibility of documents is an issue regulated by law, and the proponent of a document has the burden of satisfying the conditions set out therein. In the present petition, the proponent of the photograph that is objected to is the Petitioner, as he is the party seeking to rely on the said document. The Petitioner cannot therefore escape this burden nor shift it to the 1st and 2nd Respondents by urging that there was no need to be given advance warning of the legal requirements as to admissibility of the photograph.

Coming to the substantive issue before the Court, the applicable law as to admissibility of photographs is section 78 A of the Evidence Act, which provides that electronic messages and digital material shall be admissible as evidence in any legal proceedings. Sections 106A and B of the Evidence Act in addition provides for the conditions for admissibility of electronic records.

In summary, section 106A of the Evidence Act provides that the contents of electronic records may be proved in accordance with the provisions of section 106B. Section 106 B on the other hand requires any information contained in an electronic record (whether it be the contents of a document or communication printed on a paper, or stored, recorded, copied in optical or magnetic media produced by a computer), is deemed to be a document and is admissible in evidence without further proof of the production of the original, providing the conditions set out in section 106B (2) for the admissibility of evidence are satisfied.

The process of producing an image on paper in the form of a photograph requires the same to be printed by a printer using a computer, and therefore a photograph falls within the definition of an electronic record, and the provisions of section 106B of the Evidence Act accordingly apply to its admissibility.

These conditions set out in section 106B(2) are as follows:

1. At the time of creation of the electronic record, the computer output containing the information was produced from a computer that was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer.
2. During the period, the kind of information contained in the electronic record was regularly fed in to the computer in the ordinary course of the activities.

3. Throughout the material part of the period, the computer was operating properly or, if not, the computer was out of operation for some period, but it was not such to affect the electronic record or the accuracy of the contents.

4. The electronic record bears the information reproduces or is derived from such information fed into the computer in the ordinary course of the regular activities.

Section 106B (4) further mandates the production of a certificate of authenticity of electronic evidence which is signed by a responsible person who was responsible for the computer on which the electronic was created or stored, in order to certify the qualifications set out above. The certificate must uniquely identify the original electronic record, describe the manner of its creation, describe the particulars of the device that created it, and certify compliance with the conditions of sub-section (2) of section 106B.

Various judicial authorities have held that the conditions and safeguards set out in section 106 B of the Evidence Act are intended to ensure the reliability and authenticity of an electronically-produced document, and the procedure set out therein is aimed at preventing printed copies of the electronic records adduced as evidence in court being manipulated altered or tampered with. This was explained in **Coalition for Reform and Democracy & Another vs Republic of Kenya & Another High Court (Nairobi)** ,Constitutional Petition No. 628 of 2014, and **Republic vs Mark Lloyd Steveson (2016) e KLR** and in **William Odhiambo Oduol vs Independent Electoral & Boundaries Commission & 2 Others (2013) e KLR**.

The integrity of electronic records was also emphasized in the judgment by Muriithi J. in **Richard Nyagaka Tong'i vs Electoral & Boundaries Commission & 2 Others, (2013) eKLR** .where a photograph produced without a certificate under section 106B was found unavailable for use by the party relying on it.

The Supreme Court of India has also held in **Anvar P. K. vs. P.K Basheer &Others. (2014) 10 SCC 473** that electronic records are more susceptible to tampering, alteration, transposition, excision, and the like; and that without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. The said Supreme Court held that similar certification provisions of the Indian Evidence Act were thus mandatory.

In the premises, given that no certificate has been produced showing compliance and authentication as required by section 106B of the Evidence Act in relation to the photograph annexed as Annexure “BNM3” to the affidavit of Benson Mulandi Nyamai sworn on 7th September 2017 in support of the Petitioner’s Petition, the said photograph is found to be inadmissible as evidence.

The 1st, 2nd and 3rd Respondents’ objection is accordingly found to have merit, and is hereby upheld. The costs of the said Objection shall abide the outcome of this Petition.

Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 5TH DAY OF JANUARY 2018

P. NYAMWEYA

JUDGE