



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 7 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON NGARA NDERITU.....ACCUSED PERSON

RULING

The accused person Jackson Ngara Nderitu is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 1st day of March 2014 at Gakanja village Endarasha Location within Nyeri County he murdered Philip Irungu Muturi.

The issue before me is whether PW6, the investigation officer herein, no. 235403 Inspector Judith Magiri can produce the photographic exhibits marked PMFI 2(a) and 2(b).

When PW3 no. 59311Cpl Gideon Kamuti testified he was shown the photos by the prosecuting counsel. He testified that he could identify the photos; one, showing where the deceased was cut i.e. the part of his body, and where he was lying, two, showing the deceased body lay on the ground.

When PW6 testified she told the court that the photos were taken by PW3 as she was unable to reach the scenes of crime officers. On that basis the prosecution through the prosecuting counsel Ms. Jebet sought to produce the photographs as exhibits.

This attempt was rigorously objected to by Mr. Njuguna Kimani for the defence on the ground that it was not in conformity with s. 78 of the Evidence Act chapter 80 of the Laws of Kenya. That the photos were not taken by a gazetted officer and in his evidence PW3 had not mentioned that he was the one who had taken the photos. And in any event the process of taking the photos had not been demonstrated. He urged the court to find that the photos were in admissible and of no probative value.

In response the prosecution submitted that the photos were marked by Cpl Gideon Kamuti PW3. She urged the court to find that the prosecution had demonstrated that the investigating officer was unable to get a gazetted scenes of crime officer. She argued that we are in a digital era as a society and the police officers who were at the scene took the initiative to take the photos. Further that the investigating officer had demonstrated that she had received the photos from PW3. That the photos only show the injuries on the body of the deceased and are not prejudicial to the accused person.

To this counsel for the accused person responded that the fact that we are in a digital era was no excuse for the police not to comply with section 78 of the Evidence Act, which states;

Photographic evidence—admissibility of certificate

(1) In criminal proceedings a certificate in the form in the First Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions 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.

It appears to me that s. 78 sets out the manner in which photographic evidence may be admitted in evidence in criminal proceedings.

i. It will be through a certificate in the prescribed form;

- ii. The certificate must be by an officer appointed for that purpose by the DPP. This appears to be the basis for gazettement of scenes of crime personnel
- iii. This certificate to certify that the officer either
 - a) prepared the photographic print or prints or
 - b) prepared or as we used to say 'developed' the photographic enlargements from exposed film **submitted to him** by may have taken the photographs.

Meaning he may take the photographs himself or receive film from which he would prepare the photographic print. This photographic evidence must be accompanied by his certificate in the prescribed form.

There appears to be at least two positions on this issue.

That the person who took the photos could testify as to their veracity and contents because that would be primary evidence. In **State v Nelson Otieno Odira & another [2014] eKLR** the argument by the prosecution was that the investigating officer had taken the photos and hence was the right person to produce them. The defence argued that the said investigating officer did not have the requisite authority of the DPP and was not authorised to take the said photos. In rejecting the objection by the defence Majanja J stated;

The general principle of evidence is that the maker of the document is the person to prove the contents of the documents. Sections 64 and 65 of the Evidence Act provide that a document may be proved by either primary or secondary evidence. Section 66 of the Evidence Act provides for instances where secondary evidence may be given for example by way of proof of certified copies. A reading of section 78 shows that the exception in relation to photographic evidence is 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 added)

Another position is that without the certificate the photos are inadmissible. In **Francis Gachihi Mburu & 2 others v Republic [2016] eKLR** similar issues arose. Justice HPG Waweru allowed the appeals on the ground that section 78 of the Evidence Act had not been complied with. He stated and I quote;

What happened in the present case? The photographs by which the stolen animals and the two dead kids were identified by their owners and other witnesses were not produced in evidence by the scenes of crime officer who took and/or printed them. They were instead produced by PW10 (Cpl Bernard Kiminya), the investigating officer. There was no certificate under section 78(1) aforesaid of the Evidence Act produced which would have rendered the photographs admissible in law. As it was, those photographs, which provided the only link between the stolen animals and the dead kids and their owners and other witnesses, were not properly admitted in evidence, and it matters not that the Appellants (who were not defended) did not object to their production by PW10. The certificate under section 78(1) was an express requirement of the law and the absence of it could not, in effect, be consented to by the Appellants, particularly when they were unrepresented.

The effect of this is that the stolen animals and dead kids were not properly identified in law by their owners and other witnesses.

It is evident that in this case, the neither the investigating officer PW6 nor PW3 testified that they took the photographs. PW3 simply identified the photos. He never said he took them contrary to what PW6 stated. Secondly neither of them is a gazetted officer for the purposes of section 78(1). Contrary to the evidence of PW6 that it is PW3 who took the photos and handed them over to her, nowhere in PW3's evidence did he say he took the photos. He simply marked them for identification. It is therefore not clear who took them.

Thirdly, there was no certificate from a gazetted officer as required by section 78(1) above.

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.

The investigating officer herein could have submitted whatever evidence they had collected at the scene to a gazetted officer who would then have prepared it in the requisite manner and certified the same as required by law. She did not do that.

She could also have secured the scene for the scenes of crimes officers to visit as soon as they arrived from the other engagements. If the idea was to simply demonstrate the injuries on the body of the deceased, the scenes of crime personnel could still have taken photos of the injuries from the mortuary.

From the foregoing the submissions by the state that they did everything possible to get this evidence to court in the requisite manner are not tenable. Section 78(1) is couched in mandatory terms. There is no skirting around it.

Hence the objection by the defence against the production of the two photographs by PW6 marked PMFI 2(a) and 2(b) is sustained.

Dated, delivered and signed at Nyeri, in open court, this 30th Day of April 2018.

Mumbua T Matheka

Judge

In the presence of;

Court Assistant: Mr. Atelu

State Counsel: Mr. Murang'a for state

The accused person: Present

Counsel for the accused person: Mr. Njuguna Kimani

Mention. on 4th of June for further orders with regard to the case for the prosecution.