



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 31 OF 2014 (OS)**

**MNN.....PLAINTIFF**

**VERSUS**

**ENK.....DEFENDANT**

**RULING**

1. On 17<sup>th</sup> May 2018, Ms. Ndirangu objected to production by the plaintiff's third witness, Thuo Kibe, of an audio recording in compact disk (CD) form. The witness had testified that he had been given a memory card, P. Exhibit No. 65, to burn into a CD. He described how he had downloaded the data from the memory card to his laptop using a data cable connected to the laptop and the relevant mobile phone. He converted the data into audio format and burnt the CD. He went on to say that he then prepared a certificate on the process of the said conversion. It was the production of the CD and of the certificate that were objected to

2. Ms. Ndirangu submitted that the two did not meet the criteria set out in section 106B (1) (4) of the Evidence Act, Cap 80, Laws of Kenya. She submitted that the certificate on the conversion did not comply with the said provisions. She stated that the certificate did not mention the device used to record the conversion, in terms of the particulars of the device. She further submitted that the certificate did not give particulars of the laptop and the cable used to transfer the conversation to the laptop. She further stated that the certificate did not indicate whether the mobile phone, the cable and the laptop were all properly working at the time. She submitted that it was not possible to verify the accuracy, the genuineness of the contents. She emphasized that the provision relates to the traceability of the devices for audit purposes, and therefore the model, serial number and type of device ought to be given.

3. I stood down the witness so that I could rule on the matter.

4. Section 106B(1) of the Act states as follows -

*'Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer input) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where evidence would be admissible.'*

5. The other relevant portion of the provision is Section 106B(4) which states as follows -

*'In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following -*

*(a) identifying the electronic record containing the statement and describing the manner in which it was produced;*

*(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;*

*(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and*

*(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.'*

6. Ms. Ndirangu cited the decision by Muchelule J. in *William Odhiambo Oduol vs. Independent Electoral & Boundaries Commission & 2 others* (2013) eKLR, which Mr. Wachira submitted was not relevant to the matters now before court. In that case the issue was admissibility

of a video recording done on a Nokia phone, which was then taken to Nairobi and the video recording developed to a CD. The court noted that the video was recorded, saved in the internal memory of the phone, the phone was connected to a computer using a micro-USB data cable, the file was copied to an empty hard disk, an empty CD was then inserted into the computer CD write RAM, the video file was then written on the CD or VCD using a CD writing application. It was emphasized that it was important to trace the devices for audit purposes.

7. There is also the old decision in *R. vs. Robson & Harris* (1972) 1 WLR 651, where the issue was the admissibility of tape recordings of alleged conversations between the defendants and a prosecution witness. It was held that in considering the question of admissibility the court was required to satisfy itself that what the prosecution alleged to be original tapes were shown, *prima facie*, to be original by evidence which defined and described the production and the history of the recording up to the moment of production in court.

8. The critical provision for the purpose of this ruling is section 106B(4) of the Evidence Act, which says –

*‘... giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer.’*

9. The particulars to be given of the devices used in the production are for the purpose of demonstrating that the record was produced using a computer. The provision, in my humble view, does not require mere description of the devices used, but particulars of the devices. The objective is to demonstrate that the recording was genuine or authentic. It is meant for audit purposes, so that a person wishing to conduct an audit of the process would be certain of the devices that they would have to use therefor.

10. I agree with Ms. Ndirangu, section 104B had not been complied with respect to providing the particulars required by section 104B (4). The witness, the purported maker of the CD sought to be put in evidence, showed have given details of the mobile phone used and not just the telephone number. The details for the phone in question should include the make, brand, type and relevant serial numbers. Particulars or details of the USB cable used and the laptop computer used were also not given in terms of type or brand or model, and serial numbers therefor.

11. In view of the above, I shall uphold the objection raised by Ms. Ndirangu. The material sought to be produced should first be made compliant with section 104B of the Evidence Act. The matter shall be placed hereafter before Muchelule J for further directions.

**DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>TH</sup> DAY OF JULY, 2018.**

**W. MUSYOKA**

**JUDGE**