



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAHURURU
CRIMINAL CASE NO.2 OF 2017
REPUBLIC.....PROSECUTOR
- V E R S U S -
PATRICK WAFULA MANYASI.....ACCUSED

R U L I N G

The Learned State Counsel, **Mr. Mong'are** made an application under Section 106(B)(1) of the Evidence Act seeking to produce a CD prepared by **PW2 Stephen Jaziri** from a video clip in which he recorded the incident that took place on 30/10/2013 which resulted in the murder of the deceased.

Before counsel made the above application, **Jaziri PW2** was testifying before this court, the court applied to play the video clip which PW2 said he had taken with his video camera. Upon objection by Mr. Wandugi, counsel for the defence, Mr. Mong'are sought an adjournment to the next day to enable the witness produce the video camera that he used in taking the video. However, on the next day, Mr. Mong'are sought to produce a CD in place of the camera. Unfortunately, even before the counsel sought to produce the said video clip, the prosecution never laid basis for the production of the CD – even then, the court had not been told that PW2 had prepared a CD from the video clip taken on the events leading to commission of the offence on 30/10/2013. The defence vehemently objected to that application which objection I will consider in this ruling. For any party to adduce any documentary evidence, it must lay a basis for such evidence. I think that the application to produce the CD was premature and no basis had been laid for it.

Mr. Wandugi argued that since this court had ruled on 20/3/2017 that the camera be produced, the court would be sitting on appeal of its own order if it were to reopen the matter.

I do not agree with counsel's argument that it would be tantamount to this court sitting on appeal of its own order if the court were to order that the CD be produced. If justice requires so, a court can review its own orders if moved to do so. Besides, in this case, an application to produce the video camera had not been argued between the parties. The prosecution had asked the court for adjournment to get the camera Mr. Wandugi was objecting to adjournment but not production of the camera.

Article 50 of the Constitution provides an accused with guarantees to a fair hearing. Mr. Wandugi argued that the defence was being ambushed by the application to produce the CD and the prosecution was flouting Article 50(c) and (d) of the Constitution because the prosecution had not availed the device used in recording the CD and that the prosecution had not indicated that they will rely on Section 106(B) of the Evidence Act because there is due process under the said section. Article 50(2)(c) provides that every accused person has the right to a fair trial which includes the right to have adequate time and facilities to prepare a defence whereas Article 50(2)(d) provides that one has a right to a public trial before a court established under the Constitution. In my view, Article 50(2)(d) has not been flouted in any way. This

hearing is being done publicly in this court. I think that by the prosecution ambushing the defence with this application, they flouted Article 50(2)(c), thus denying the accused the right to prepare his defence and a right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence under Article 50(2)(j). Even as the defence counsel objected to production of the video clip or the CD, the prosecution herein insisted that they had complied with Article 50(c) and (j). The prosecution should have disclosed to the defence in advance, the evidence they intend to rely on, either the video camera or the CD. Even before purporting to produce the CD under Section 106(B) of the Evidence Act, the contents thereof should have been disclosed to the defence to enable them prepare their defence.

Section 106B deals with admissibility of electronic records. It reads as follows:

“106B(1) 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 electromagnetic media produced by a computer (herein referred to as a computer output) 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 any fact stated therein where direct evidence would be admissible.”

The above provision means that any information stored in a computer which is then printed on a CD or other gadget shall be treated like any other documentary evidence and will be admissible in evidence without calling the original. However, there are conditions precedent to admissibility of the said evidence and I believe the reasons for the strict conditions are to ensure that such evidence is not tampered with as it can be easy target of tampering.

The conditions that need to be complied with in subsection (1) are set out in subsection (2) and are as follows:

- a. The computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;***
- b. During the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;***
- c. Throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or accuracy of its content; and***
- d. The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.***

Where one intends to give evidence under Section 106B of the Evidence Act, he has to *inter alia*, tender a certificate dealing with any matters to which the conditions above relate. Under subsection (4) the certificate should:

- a. Identify the electronic record containing the statement and describing the manner in which it was produced;
- b. Give 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 the computer.

Subsection (d) also provides for the making of a certificate signed by a person holding a responsible position in relation to the operation of the relevant device for the purpose of showing that the electronic record was produced by a computer.

In the decision of *Benson Mugatsia v Cornel Rasanga Amater*, Election Petition 2 of 2012, which relied on the decision of *Republic v Berisa Wayu Matuguda Criminal Case No.6 of 2008*, the court considered when a certificate will be admissible and it said:

“.....any information stored in a computer ...which is then printed or copied.....shall be treated just like documentary evidence and will be admissible as evidence without production of the original: However Section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied.”

Mr. Mong’are argued that they had complied with the making of a certificate by PW2 and the investigating officer, one Onkendi. Mr. Wandugi however argued that PW2’s certificate refers to a memory card yet the device referred to in the Act should be the computer. In the *Benson Magatsia case (Supra)* the court in considering the issue of certificate under Article 106B(4) observed:

“PW7 may be the owner of the phone handset, but said nothing about its working condition. There was no evidence regarding the computer used, its condition or reliability. There was no evidence to show, that PW7 was the one who owned, operated and managed the computer; the particulars of the computer were not given. My considered view is that the Verifying Affidavit is not certificate in terms of Section (4) and neither has PW7 satisfied the conditions of subsection (2).”

In this case, two certificates were made by PW2 Jaziri and the investigating officer, Onkendi. In his certificate, PW2 claims to have recorded the video clip, then transferred the information from the video clip, using a memory card, to a computer which was in possession of the IPOA investigators. On the other hand, Mr. Onkendi the investigating officer in his certificate at Paragraph 4 – 5 states that he received a video clip in soft copy from PW2 and that he used HP Computer to produce a video CD of the video clip. The question is, between the two, PW2 and Mr. Onkendi who transferred the data from the memory card to the computer? Due to contradictions in the certificates and the fact that, the defence have not been availed this evidence in advance, how can they ascertain that it is the original record and has not been tampered with? It is not one but two people who have dealt with the device. I find that the certificates do not accord with preconditions set out under Section 106B(4) of the Evidence Act and such evidence would not therefore be admissible.

Further to the above, it is required that a person in a responsible position do prepare the certificate. In this case, I believe that the device which ultimately produced the CD is the computer. The question is whether PW2 was the responsible person or Onkendi. A reading of Section 106B(1) clearly indicates that the electronic record or CD is a computer output. In this case it is Onkendi who seems to have been in control of the device that produced the CD and the certificate should have been made by him.

For the reasons alluded to above, this court finds that apart from the prosecution’s application being premature, the prosecution failed to comply with Article 50 on disclosure, further Section 106B of Evidence Act has not been fully complied with. The court therefore rejects the application to produce the CD in evidence.

Dated, Signed and Delivered at *NYAHURURU* this 27th day of *June*, 2017.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei - prosecution counsel

Mr. Macharia holding brief for Mr. Wandugi for accused

Soi - Court Assistant

Accused Present