



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 31 OF 2014 (OS)

M N N.....PLAINTIFF

VERSUS

E N K.....DEFENDANT

RULING

1. On 9th June 2016, the defendant in the suit for division of matrimonial property, who was then giving his evidence-in-chief, was stood down to pave way for provision of machinery for the playing of an audio record.

2. The matter came next for hearing on 13th July 2017, when the defendant continued with his testimony in chief. However, when he sought to play the audio record, the plaintiff, through Ms. Ndirangu, objected. She cited section 106B(4) of the Evidence Act, Cap 80, Laws of Kenya, which requires that that sort of evidence ought to be accompanied by a certificate. She submitted that the certificate on the transcript did not comply with the said provision. She stated that the certificate must identify the electronic record containing the statement and details of the manner it was produced. She submitted that the certificate did not mention the device that was used to record the conversation, as it merely refers to an audio record without giving details. She further submitted that the details of the mobile phone used to record the conversation has not been identified, and further that the dates when the recordings were done and reduced into writing were also not indicated. She submitted further that the person who recorded the conversation, Mary Njonjo, has not executed a certificate on how she recorded the conversation, what device she used and the dates when she made the recording. She submitted further that the person who reduced the recording into a transcript has also not been identified and the method he used to do so not documented. She asserted that section 106 is in mandatory terms, and the defendant should not be allowed to rely on the transcript.

3. In response the defendant, through Mr. Wachira, submitted that the objection was premature as time had not yet come for the production of the recording or the transcript. He submitted that only Mary Njonjo could produce the recording and that she had been lined up as a witness. He submitted that the plaintiff had misunderstood section 106 of the Evidence Act, which was legislated in 2009 to provide for production of documents generated by computer. It was submitted that that provision did not apply to an audio recording captured by a device.

4. Section 106B(4) of the Evidence Act 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.’

5. Section 106B(4) should be read together with the earlier part of the provision, section 106B(1) of the Act, which 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.’

6. The provisions of section 106B have been tested in a number of cases. The case *classicus* appears to be *Republic vs. Barisa Wayu Matuguda* (2011) eKLR, where a compact disc (CD) was made from CCTV footage, and the court held that where information is stored in a computer such as a CCTV camera, which is then produced or copied to the optical device, such as a CD, should be treated as documentary evidence and is admissible. The court stated that –

‘Any information stored in a computer... which is then printed or copied... shall be treated just like documentary evidence and will be admissible without the production of the original. However, section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in the provisions are satisfied... The provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 106B(4). Such certificate must be signed by a person holding a responsible position with respect to the management of the device... without the required certificate this CD is inadmissible as evidence.’

7. The decision in *Republic vs. Barisa Wayu Matuguda* has been followed in several matters at the High Court. I shall cite only two of them. In *William Odhiambo Oduol vs. Independent Electoral & Boundaries Commission & 2 others* (2013) eKLR, the issue was admissibility of a video recording done on a Nokia phone, which was then taken to Nairobi and the video recording was then developed to 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. It was held that the certificate has 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 was appropriate. In *Nonny Gathoni Njenga & anor vs. Catherine Masitsa & anor* (2014) eKLR, the court found that DVDs sought to be relied on were not accompanied by a certificate as required by the

Evidence Act. Then there is *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 upto the moment of production in court.

8. The defendant in this case seeks to rely on a recording of a telephone conversation between the plaintiff and a witness for the defendant. There is a transcript of the conversation in the language actually used, Kikuyu, and a translation in English from the original language. The material sought to be relied on was an electronic recording of a conversation. It is not indicated how the recording was done, who and how the same was transcribed. The telephone numbers of the persons engaged in the alleged communication are also not identified. A mobile phone is an electronic device, and it is one of the devices envisaged in section 106B of the Evidence Act. The recording must be accompanied by a certificate by a person who occupied a responsible position in relation to the operation of the recording device or the management surrounding the recording and transcription thereof. A certificate which defines and describes the production and history of the recording upto the moment of production in court. To that extent the recording is inadmissible. The certificate attached to the documents placed before the court is of the translation, and not the recording. The recording cannot therefore be played or be a basis for examination of the witness in the box.

9. The objection raised by Ms. N is therefore accordingly upheld.

DATED, SIGNED and DELIVERED at NAIROBI this 19TH DAY OF OCTOBER, 2017.

W. MUSYOKA

JUDGE