



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITUI
ELECTION PETITION NO 1 OF 2017.

MILLITONIC MWENDWA KIMANZI KITUTE.....PETITIONER

VERSUS

1. INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

2. THE KITUI EAST CONSTITUENCY RETURNING OFFICER.....2ND RESPONDENT

3. NIMROD MBITHUKA MBAI.....3RD RESPONDENT

RULING

Introduction

The hearing of the Election Petition filed herein by the Petitioner commenced on 6th November 2017. The Petitioner is challenging the election of the 3rd Respondent as Member of Parliament for Kitui East Constituency in the general elections held by the 1st Respondent on 8th August 2017. Prior to the hearing, this Court had directed the parties during the pre-trial conference held on 13th October 2017 to file their list of contested documents.

On 17th October 2017, the 1st and 2nd Respondents filed a list of contested document dated 16th October 2017, in which the photograph marked “NMLI” annexed to the affidavit of Nicholas Matuku Luvai sworn on 4th September 2017 was indicated as one of the contested documents. The 3rd Respondent on the same date also filed a list of contested documents dated 16th October 2017 indicating that they were contesting the exhibit marked “NML1(a)” annexed to the witness affidavit of Nicholas Matuku Luvai in the bundle of the Petitioner’s documents.

On 24th October 2017 this Court directed that formal objections to the said documents be made at the time of production of the same for ruling by the Court.

Nichloas Matuku Luvai was called to testify as a witness for the Petitioner today, the 23rd November 2017, and after the adoption of his affidavit sworn on 4th September 2017 as his evidence, the counsels for the 1st, 2nd and 3rd Respondents objected to the production of the photograph annexed to the said affidavit and marked as “NMLI”.

The Determination

Ms. Mwinzi, the counsel for the 1st and 2nd Respondents, and Mr. Ombati, the counsel for the 3rd Respondent, 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. Reliance was placed on the decision in **Richard Nyagaka Tong’i vs Electoral & Boundaries Commission & 2 Others, (2013) eKLR** .

The counsel for the Petitioner, Ms. Mageto, in response relied on section 78 (1),(2) and (3) of the Evidence Act, and while conceding that no certificate as required by section 106B had been annexed, submitted that they were not relying on the originality of the photograph, but on the photograph having been produced under oath as a demonstration of what the deponent has stated.

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 “NML1” to the affidavit of Nicholas Matuku Luvai sworn on 4th September 2017 in support of the Petitioner’s Petition is admissible as evidence. Section 78 A of the Evidence Act in this regard 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 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 admissability.

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.

This Court in a previous ruling delivered in this election Petition on 6th November 2017 did explain and illustrate by way of various judicial authorities that section 106 B of the Evidence Act is 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. 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.

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 “NML1” to the affidavit of Nicholas Matuku Luvai sworn on 4th 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 KITUI THIS 23RD DAY OF NOVEMBER 2017

P. NYAMWEYA

JUDGE