



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**ELECTION PETITION NO. 4 OF 2017**

**SAMWEL KAZUNGU KAMBI..... PETITIONER**

**VERSUS**

**NELLY ILONGO THE RETURNING OFFICER,**

**KILIFI COUNTY.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**KINGI AMASON JEFFAH.....3<sup>RD</sup> RESPONDENT**

**RULING NO. 6**

**[REASONS FOR THE DECISION ON THE ORAL APPLICATION ARGUED ON 10<sup>TH</sup> NOVEMBER, 2017]**

1. On 10<sup>th</sup> November, 2017 when the Petitioner Samwel Kazungu Kambi testified, he indicated that he wanted to produce the annexures to his supporting affidavit sworn on 5<sup>th</sup> September, 2017 as exhibits in support of his case. Mr. Khagram for the 1<sup>st</sup> Respondent, Nelly Ilongo the Returning Officer, Kilifi County and the 2<sup>nd</sup> Respondent, the Independent Electoral and Boundaries Commission indicated that he was objecting to the production of the photographs annexed to the Petitioner's supporting affidavit. He had no objection to the production of the other documents as exhibits.

2. Mr. Khagram submitted that Section 78 of the Evidence Act, Cap. 80 requires that any photographic evidence had to be accompanied by a certificate in the form in the Schedule to the Act. He opined that the intent of the Petitioner in producing the evidence was to establish that there was criminal wrongdoing on the part of the respondents.

3. According to counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, there was no statement as to who took the photographs, when they were taken and how they were taken. Further, that the device used to take the photographs was not disclosed.

4. He urged the court not to admit the photographs as exhibits and indicated that he had no objection to the production of all the other annexures as exhibits.

5. Mr. Balala for the 3<sup>rd</sup> Respondent, Amason Jeffah Kingi, indicated that he was opposed to the production of all the annexures to the Petitioner's supporting affidavit. He commenced his submissions by pointing out that the exhibits were not properly on record as they had not been marked and commissioned by an advocate. He, however, withdrew this assertion when it was pointed out to him that the exhibits were properly marked and signed by a commissioner for oaths.

6. Mr. Balala then proceeded to indicate his support for the submissions by the 1<sup>st</sup> and 2<sup>nd</sup> respondents' counsel. He pointed out that Section 78(3) of the Evidence Act gives the court liberty to summon the maker of the certificate referred to in Section 78(1). He asserted that in this case that liberty was taken away from the court as no certificate had been exhibited.

7. Counsel for the 3<sup>rd</sup> Respondent pointed out that the provisions of the Evidence Act presume that there is a photograph before the court but what we have in this case are photocopies in black and white which are not clear. He urged the court not to allow the production of the evidence. He cited the decision of **Richard Nyagaka Tong'i v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR** to support his submissions.

8. In reply, Mr. Aboubakar for the Petitioner submitted that the objection to the production of the exhibits was not merited as the same ought to have been raised at the pre-trial conference when discussions were held on how to proceed with the Petition. Reliance was placed on Rule 15 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. It was submitted on behalf of the Petitioner that the respondents having failed to raise the issue at the pre-trial stage were estopped by Section 120 of the Evidence Act from bringing up the matter now.

9. On the cited Section 78 of the Evidence Act, Mr. Aboubakar submitted that the said provision applies to production of photographic evidence in criminal cases and is thus irrelevant to election disputes. According to counsel, the applicable law was as discussed in **Mable Muruli v Wycliff Ambetsa Oparanya & 3 others [2013] eKLR**. It was the Petitioner's view that the respondents' objection to the production of the exhibits was just but an issue of technicality.

10. It was pointed out on behalf of the Petitioner that if the respondents wanted the originals of the photographs they should have raised the issue at the pre-trial conference so that the photographs could be availed to them.

11. In reply to the Petitioner's submissions, Mr. Khagram stated that at no time did they indicate to the Petitioner that they would not be opposing the production of the photographs. His view was that they had raised the issue at the appropriate stage of the proceedings.

12. On his part, Mr. Balala contended that estoppel was not applicable in this case. He also pointed out that the **Mabel Muruli** case cited by the Petitioner's counsel dealt with the production of a photograph in electronic format and was thus not applicable in the circumstances of this case.

13. After the advocates completed their submissions on the issue, I reflected upon the respondents' objection to the production of the exhibits by the Petitioner and upheld their opposition to the production of the photographic evidence. I however allowed the production of the other exhibits. I promised to give reasons for my decision in the course of the trial. This ruling serves that purpose.

14. In the case of **Mable Muruli** (supra) the issue was that the CDs the Petitioner and his witnesses intended to adduce did not meet the requirements for production of evidence contained in electronic records. Upon considering Section 106B of the Evidence Act, Said Chitembwe, J concluded that although **"the entire section 106B concentrates on information stored in a computer my view would be that even a CD is part and parcel of an electronic record."**

15. In rejecting the application to strike out the paragraphs of the affidavits in which the deponents had referred to the CDs, the learned Judge held that:

**“From the pleadings herein I do note that the applicant was aware of the production of the CDs. The 1<sup>st</sup> respondent did respond to those allegations extensively. His witness also attacked the authenticity of the CDs. During the pre-trial the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not raise any issues relating to the CDs and by then they had already filed their responses and respective affidavits....**

**With regard to the request by the respondents to expunge the paragraphs relating to the production of the CDs, I do find that the reasoning is grounded on technicalities. Even if the CDs are produced and watched by the court that does not mean that the court will automatically be convinced with what it will see. Article 259 of the Constitution requires courts to dispense justice without undue regard to technicalities. Shutting out the CDs on the basis that they were not authentic or the gadgets used have not been described will be tantamount to obstructing substantive justice.”**

16. The learned Judge went ahead and stated that:

**“The essence of justice is that a party should be able to approach the court and present his or her case. Such presentation should be supported by his or her oral evidence, electronic and documentary evidence. On the other side the defendants or respondents should also be accorded an opportunity to produce their evidence. By the end of the day each party should be able to go back home satisfied that they have presented their case to the court and the court was able to take their evidence. This is in line with the provisions of Article 50 which gives the right to every person to have any dispute resolved by application of the law in a fair and public hearing before a court. Shutting out the electronic evidence will make the petitioner go back home while nursing the notion that the court did not take her evidence. In Presidential Election Petition No. 5 of 2013 Nairobi the court was able to view electronic evidence and such issues as the authenticity of the evidence did not arise.”**

17. In my view the above cited case does not address the kind of evidence that was placed before me. What had been placed before this court in this case were photocopies of photographs.

18. Edward Muriithi, J dealt with a situation similar to the one faced by this court in **Richard Nyagaka Tong’i** (supra) and held that:

**“27. In the present case the petitioner has not produced a certificate under section 106B (4) of the Evidence Act and the person who operated the computer and printer during the printing of the photographs was not called to testify as to the condition of the machines and the integrity of process of the printing of the photographs. The person who testified was the photographer who although he stated that he was with the computer operator when the photographs were made cannot vouch for the due operation of the computer and printer and the integrity of the photographs having himself admitted that they would at times sit with the operator to choose colours in which the photographs would be printed. The court cannot rule out the possibility of doctored photographs, and in accordance with section 106B, the photographs are inadmissible and shall not be considered.**

**28. Counsel for the petitioner had in his submissions before the court defended the photographs on the basis that since the respondents had cross-examined the witnesses on the photographs, they were estopped in terms of section 120 of the Evidence Act from now turning back to reject the photographs which they had already used in the cross-examination of witnesses. Counsel for the Respondents countered that their cross-examination was in accordance with the directions of the court and without prejudice to their right to make submissions on their admissibility, pointing out that estoppel does not operate against the provision of Statute. I accept the principle of law that the operation of a statute cannot be affected by estoppel, acquiescence or waiver. See for example *Tarmal Industries Ltd. v Commissioner of Customs and Excise* (1968) EA 471; *Doge v Kenya Cannery Ltd* (1989) KLR 127 and *R. v Kenya Revenue Authority ex. p. Aberdare Freight Services Ltd.* (2004) KLR 530.**

**29. I therefore find that the photographs marked SOO1 are not available for use by any party before the court having been produced without due compliance with section 106B of the Evidence Act. The court will nonetheless consider the testimony of the photographer and the other witnesses as eye-witness accounts.”**

19. In the case before me, no information has been supplied concerning the source of the photographs. Even assuming that they were printed from a digital camera or a mobile phone, and further assuming that these devices fall within the definition assigned to a “computer” by Section 3(1) of the Evidence Act, then applying the standards set by Section 106B(2), one would find that the conditions therein were not met.

20. Under Section 106B, for an electronic record to meet the standards for production as an exhibit, the computer should be demonstrated to have been under the control of a particular person during the relevant period. The information ought to have been fed into the computer in the ordinary course of the activities that need to be proved. There is also need to establish that at the material time the computer was operating properly but in case of any defect it should not have been to the extent that it would affect the electronic record or its accuracy. Another condition is that the electronic record should be derived from information fed into the computer in the ordinary course of the activities in question.

21. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.

22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed.

23. The conditions set down in Section 106B were not met by the Petitioner. He could not therefore be allowed to produce the photographs. His claim that the respondents were estopped by virtue of Section 120 of the Evidence Act from challenging the evidence having not raised the issue at the pre-trial conference is not valid. The production of evidence did not feature in the pre-trial conference. Knowing the kind of the evidence he intended to rely on, it was upon the Petitioner at that early stage to bring up the discussion. He did not do so. The respondents never gave him any hint that they would not be opposing the production of the photographs. The estoppel envisaged by Section 120 of the Evidence Act is therefore not applicable in the circumstances of this matter.

24. I allowed the production of the other exhibits as they were photocopies of documents whose source could easily be verified and explained by the Petitioner.

25. My brief ruling of 10<sup>th</sup> November, 2017 is therefore explained in the terms of the reasons contained in this ruling.

**Dated, signed and delivered at Malindi this 21<sup>st</sup> day of November, 2017.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**