



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
THE ELECTIONS ACT, 2011
ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2017
ELECTION PETITION NUMBER 10 OF 2017

BETWEEN

NDWIGA STEVE MBOGO.....PEITITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

PHILICE KAYIEMBA (THE RETURNING OFFICER OF THE
INDEPENDENT AND ELECTORAL AND BOUNDARIES COMMISSION

STAREHE CONSTITUENCY.....2ND RESPONDENT

NJAGUA CHARLES KANYI.....3RD RESPONDENT

RULING NO.2

1. This Ruling is about the admissibility of Videos which the petitioner wishes to rely upon as part of his evidence.
2. From the list presented by the petitioner, there are a total of six videos.
3. The petitioner called 2 witnesses who are said to have made the videos in question. The purpose and intention of calling the said 2 witnesses was to persuade the court that the videos were admissible in evidence, pursuant to the provisions of the Evidence Act.
4. **PW 7, DOREEN ADHIAMBO OWINO** is a student at the Kenya School of Law.
5. She signed a certificate on 5th September 2017, indicating that the videos in question were downloaded by her. **PW 7** also provided the particulars of the laptop which she used to download the videos.

6. In her assessment, the equipment which she used was in good working condition. Therefore, she asked the court to admit the videos in evidence.
7. During cross-examination, Doreen informed the court that she had downloaded the videos from you-tube and facebook, both of which are web pages.
8. She made it clear that the videos had not been recorded by her, nor was she present when the videos were being recorded.
- 9. PW 7** said that she did not know when the videos were recorded.
10. She said that she would be unable to confirm whether or not the contents of the videos had been stage-managed.
11. As she was unaware of the identity of the persons who had shot the videos, Doreen confirmed that she was asking the court to admit the evidence of videos shot by persons whom she did not know.
12. Her further answer was that she had no way of confirming whether or not the events captured actually occurred.
- 13. PW 7** said that, as a student of Law, she had knowledge about the provisions of the Evidence Act.
14. In that regard, she knew that video evidence is considered to be documentary evidence.
15. And she concluded her cross-examination, by the 1st and 2nd Respondents, by saying that only the maker of a document can produce it in evidence.
- 16. PW 7** conceded that she was not the maker of the videos.
17. When the 3rd Respondent cross-examined her, Doreen said that the videos had been downloaded by her, from the petitioner's facebook account.
18. She said that the petitioner indicated that he had shot the videos personally.
19. But Doreen was unable to confirm that in the petitioner's affidavit, he had said that he was the person who shot the videos.
20. Interestingly, however, although Doreen had been part of the team which crafted the petition, she said that she would not be surprised if the petitioner's affidavit did not specify that it is he who had shot the videos.
21. Another interesting revelation by Doreen was that "*the person?* who had uploaded the videos to you-tube was "*KTN News*".
22. Doreen was unaware of the date when **KTN News** had uploaded the videos to you-tube.
23. However, Doreen was categorical that it is she who had personally downloaded the videos. The only help which she got was when doing the transcription
24. The person who assisted Doreen did actually make some changes to the transcription which Doreen had undertaken.
25. During re-examination, Doreen said that the list of videos filed in court also had links to the facebook and the you-tube web pages.
26. Having downloaded the videos, Doreen had made available to the court, both the hard-disc and the

transcript.

27. She concluded by saying that according to her certificate, it is Kelvin Ofula who had done the transcription.

28. PW 8, KELVIN OFULA, said that he is an **I C T** Expert. He explained that he had completed his Degree course on Computer Science, in July 2017.

29. However, he was yet to graduate.

30. PW 8 obtained videos from Doreen, but the said Doreen did not disclose to Kelvin the identity of the person who shot the videos.

31. Doreen also did not tell Kelvin the identity of the person who had posted the videos on facebook and you-tube.

32. Although Kelvin said that it was possible to identify the person who had posted the videos on facebook and you-tube, in this case he did not identify the person who had uploaded the videos.

33. According to Kelvin, he could not tell either the time when, nor the location where the videos were taken.

34. Kelvin said that he had ability to verify whether or not the contents of the video were an act or a play.

35. He added that there is software which could enable him determine the authenticity of the videos.

36. In this case, he said that the videos had not been edited. However, the certificate did not specify that the videos were not edited.

37. Kelvin did not identify the equipment which had been used to shoot the videos.

38. According to Kelvin, he holds a certificate which was issued to him by the Egerton University, showing that he is a programmer.

39. He was aware that the Information Technology, Practitioners Act regulates **I C T** professionals, and that such professionals were required to have current practicing certificates.

40. However, as he had not yet graduated, Kelvin did not have a practicing certificate. Nonetheless, Kelvin insisted that he was an expert, based on his certificate on programming.

41. Kelvin did not know the gadget used to record the videos or the person who had recorded them.

42. And although Kelvin said that the videos were authentic, he had not provided the test-name, if any, which he had used to verify the authenticity.

43. As regards transcription, Kelvin said that nobody had helped him undertake that task. He also said that nobody had undertaken the process of transcription of the videos before him.

44. He emphasized that if anybody said that he (*Kelvin*) worked on a transcript which had already been done, such a person would be lying.

45. Pursuant to Rule 12 (3) of the Election Petition Rules, 2017;

“Each person who the petitioner intends to call as a witness at the hearing shall swear an affidavit”.

46. Therefore, Mr. Tiego advocate submitted that Doreen could not be a witness for the petitioner because she had not sworn an affidavit.

47. Mr. Tiego pointed out that Doreen's name was not on the petitioner's list of witnesses, which was filed on 12th October 2017.

48. Notwithstanding the provision requiring witness affidavits to be filed at the earliest possible opportunity, Rule 12 (8) of the Election Petition Rules gives discretion to the Election Court to grant leave to a witness to testify if the court concluded that there was sufficient cause to grant such leave.

49. In this case, neither Doreen nor Kelvin was the maker of the original videos.

50. Secondly, whilst there were some insinuations that it is the petitioner who had shot the videos, it later transpired that the videos in question were shot by a person or persons working with the television channel **K T N**.

51. Accordingly, I find and hold that the maker of the videos herein was the person who shot them.

52. It is always crucial to bear in mind the fact that electronic evidence can be easily manipulated, using computers or other electronic gadgets or instruments.

53. Therefore, before the court can determine that electronic evidence was admissible, it is important for the court to take into account the integrity of such evidence.

54. Pursuant to Section 78 A (3) (a) of the Evidence Act;

“In estimating the weight, if any, to be attached to electronic and digital evidence under subsection (1) regard shall be had to –

a) the reliability of the manner in which the electronic and digital evidence was generated, stored and communicated;

b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;

c) the manner in which the originator of the electronic and digital evidence was identified;

d) any other relevant factor”.

55. In this case, the originator, **K T N** was only identified in the course of cross-examination. Indeed, reference to **K T N** as the originator is inaccurate because that is an entire television channel.

56. To date, the petitioner has not yet disclosed to the court the actual person or persons who originated the videos.

57. The petitioner has identified two people who were involved in the downloading and the transcription of the videos.

58. Even assuming that from the time the videos were downloaded, they were maintained and stored so securely that the integrity of their contents was not in doubt, I still find that there is no information provided by the petitioner, to enable the court verify that the contents of the videos were intact and unadulterated from the time when they were originally recorded.

59. Of course, I am alive to the fact that the probative value of evidence is an issue which arises when the evidence was already being considered.

60. However, I believe that when the party wishing to adduce evidence is unable or fails to demonstrate that the said proposed evidence can be of some probative value, the court would not be advancing the course of justice by declaring the evidence to be admissible.

61. Section 106 B (2) of the Evidence Act lays down the conditions which must be met before electronic records can be declared admissible.

62. The first condition was that the computer output containing the information;

“a) ...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 period, was not such as to affect the electronic record or the accuracy of its content; and

d) the information contained in the electronic record reproduces or is derived from information fed into the computer in the ordinary course of the said activities”.

63. In my considered opinion, the petitioner has failed to show that the videos he seeks to produce in evidence were reproduced or were derived from information fed into the laptop used in the ordinary course of activities by the person who downloaded them.

64. Doreen is a Law student. She confirmed that she had never uploaded any videos to face book or to you-tube. She also did not say that part of her ordinary activities was to download videos from face book or you-tube, onto her laptop.

65. Therefore, when Doreen and Kelvin put together the videos, that appears to have been an activity which was not part of their regular activities.

66. In any event, the 2 persons were merely copying what someone else had produced. Neither of them was the originator of the contents of the videos.

67. Therefore, they could not vouch for the contents.

68. I feel obliged to give an example to illustrate what I think the petitioner was trying to do.

69. When a person watches news items on television, he may choose to record it. If the said person was to later replay the recording, he would not be the originator of the contents.

70. The person who produced the original record would be the most appropriate person to produce the record in evidence. I so find because the person could then be able to answer questions concerning all the circumstances surrounding the original recording.

71. If the courts were to allow any person who had watched the news on television, and who may have recorded it, to adduce the content of the news items in evidence, it would be akin to allowing secondary evidence to be admitted in evidence, when primary evidence had not been shown to be unavailable.

72. In this instance, it is only the person or persons who shot the videos, on behalf of **K T N**, who would have been the proper person to produce the contents thereof in evidence.

73. At the moment, there is a huge gap between the equipment used to produce the original video shoot, and the face book as well as the you-tube accounts from where Doreen and Kelvin obtained the material.

74. I find that the petitioner has not demonstrated that the equipment used to record the original video was in good working condition, or that it had any nexus with whatever equipment that was used to upload the original content to face book and to you-tube.

75. Therefore, the petitioner was unable to show that there was integrity in the processes used to produce and to maintain the contents of the videos which he sought to produce in evidence.

76. In the circumstances, the court holds the view that the videos are inadmissible in evidence.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of November 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mrs. Maumo for the Petitioner

T. Tiego for the 1st Respondent

T. Tiego for the 2nd Respondent

Okatch for the 3rd Respondent

Collins Odhiambo – Court clerk.