



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 317 OF 2014

JACK & JILL SUPERMARKET LTD. PLAINTIFF

VERSUS

VIKTAR MAINA NGUNJIRI. DEFENDANT

R U L I N G

This is a ruling following an objection that was taken by the counsel for the Defendant wherein be objected to the production of a video CD as an exhibit in the case herein.

The objection was made on the ground that the witness who purported to produce it had not met the conditions set out under Section 106 (B) of the Evidence Act. The CD was made from a footage filmed at Jack and Jill Supermarket by Robert Kadogo Matamba a freelance photographer.

The said Robert Kadogo was in the process of giving his evidence as PW 2 when he told the court that he made the CD from the video he took during the demolition of Jack and Jill Supermarket on the 23rd May, 2013 and on the 24th May, 2013 when he was called by the Supervisor of the said supermarket to capture the demolition.

It was his evidence that he captured the tractors that were digging a tunnel around the supermarket and upon removing the door, the people that had gathered at the supermarket rushed in and began looting. He testified that he filmed the events at the time and wanted to adduce the CD as evidence.

The counsel for the Defendant objected to the production of the same for the reason stated above. He argued that for a witness to produce a CD, he must have been in control of the computer at the material time. His other argument was that the witness would not tell the court whether the information contained therein is derived and was regularly fed into the computer in the ordinary course of the cattrocities.

In response to the objection, counsel for the Plaintiff averred that in compliance with Section 106 (B), a Certificate has been produced and that the provision does not require production of devices that were used in the production of the electronic records. He argued that all the conditions set out in Section 106 (B) (2) have been explained in the certificate and the only issue is whether the witness had lawful control over the computer. He asserted that lawful control of the computer does not mean ownership but is considered as legitimate permission to use the computer.

Counsel for the Plaintiff further stated that in his evidence, the witness had testified that the electronic material was produced in a cyber café studio and he urged the court to take judicial notice of the operations of a cyber café which entails a contractual engagement between a customer and the operator of the cyber café where a customer pays a certain amount of money to use the computer over a period of

time, thereby exercising a lawful right to use that computer and during that period of usage he has lawful control and the use of that computer including downloading, recording and printing of materials.

On the issue of observance of Section 106 B (2), he averred that the word **“regularly”** here meant in a regular manner and not frequency. He concluded by stating that the certificate confirms that conditions were met, the computer was in good order and details of the make and model of the computer were provided. He averred that the Defendant will not suffer any prejudice should the CD be produced in evidence.

In his reply, counsel for the Defendant referred to Election Petition Case Number 2 of 2012 where the Judge listed conditions to be satisfied for production of electronic evidence and that such evidence can only be admitted if the conditions are met. He contended that the witness had no knowledge of computer, he is just a photographer and not a computer expert as such the person who dealt with the computer should be better placed to produce the CD. With the permission of the court, and in response to the Defendant’s counsel’s submission on election petition No. 2 of 2012, the Plaintiff’s counsel averred that the authority does not require that an expert should be called to adduce electronic evidence produced by a computer as such an assertion would be incorrect. He further argued that the court should take into account how the CD was produced since anybody can produce a CD. He contended that the witness had control and management of the CD which he produced himself and was not assisted by anybody.

The relevant Section of the Evidence Act, Section 106A, provides that electronic records may be proved in court. The conditions upon which such electronic evidence would be admissible are provided for under Section 106 (B) of the same Act. Section 106 (B) (1) provides 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 electro-magnetic media produced by a computer (herein referred to as 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 of any fact stated therein where direct evidence would be admissible.”

Section 106B (2) provides that: -

“The conditions mentioned in sub section (1) in respect of a computer output, are the following-

- i. ***the computer output containing the information was produced by the computer during the period over which the computer was used to store or process the information for any activities regularly carried out over that period by a person having lawful control over the use of the computer***
- ii. ***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 ordinary course of the said activities;***
- iii. ***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 was out of the operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and***
- iv. ***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.”***

Looking at this provision, the witness claims he is a freelance photographer, he taped the demolition of the Plaintiff’s business and proceeded to a cyber café where he printed and the recorded video. This court takes judicial notice of the fact that many Kenyans who for financial reasons do not own a computer or

cannot for one reason or another access a computer normally visit a cyber café for purposes of printing and copying information on a CD amongst other things. This is what happened in this case.

Section 106 (A) and (B) means that any information stored in a computer which is then printed or copied to optical media such a CD in this case, shall be treated like documentary evidence and will be admissible as evidence without production of the original. Subsequently, the CD made by PW 2 is prima facie admissible evidence without necessarily having to produce the computer that was used to generate the CD. However, Section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied, Section 106B (4) provides: -

“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 sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.”

This provision is clear that, for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of Section 106 B (4). The Plaintiff avers that there is such a certificate. In line with this provision, PW 2 is required to identify the electronic record containing the statement and describing the manner in which it was produced as well as giving the device used for production. This Certificate has been annexed in the Plaintiff’s supplementary list and bundle of documents.

According to that certificate, PW 2 states that the video and the photographs were taken by a Cannon Camera Model Number HVIOA that was in good working order. He further states that after taking the footage, he copied it to the computer with specifications HP Model Number 00045– 532-454-917 and the photos were printed using HP Printer Model number DCR-HC26E while the video footage was copied onto the CD using the HP Model Number 00045-532-454-917. He added that the computer was in good working condition and without mechanical defects.

On the final condition that requires the certificate 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, PW 2 has executed the certificate verifying that he was the person responsible for the management of the activities and operation of the camera, computer and the printer at the material time. This position has been held in the case of **R Vs Barisa Wayu Matuguda [2011] eKLR** the court observed that:

“ . . . 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 the 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...”

“...This 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).”

Having perused the certificate for production of electronic evidence that was done by the witness (Robert Kadogo Matamba) which is part of the supplementary list and bundle of documents filed by the Plaintiff on the 9th day of February, 2015, the said certificate, in my view, meets the requirements of Section

106(B). He took and recorded the electronic evidence as a person in the ordinary course of the said activities. He has confirmed that the videos and the photos were taken using a Cannon Camera and has given the model. It was in good working condition and did not have any mechanical defects. He is the one who copied the photos and the video footage to a computer, the specifications of which he has also given. He subsequently printed the photos while the video was copied into a CD using the same computer.

As stated earlier in the ruling, I have taken judicial notice of the operations of a cyber café. The witness paid for the use of the computer and personally carried out all the activities that were necessary to produce the photos and the CD's. The owner/proprietor of the cyber café had no role to play in the said activities and in the premises, the witness is the best placed person to produce the photos and the CDs.

Counsel for the Defendant referred me to the Election Petition No. 2/2012. I have read and considered the same. I am not persuaded by the finding by the learned Judge and I beg to differ with him for the reasons given above.

In the premises aforesaid, I find that the objection has no merit and the same is dismissed. The CD and the photographs sought to be produced are admissible.

Dated, signed and delivered at Nairobi this 24th day of March, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... ***for the Plaintiff.***

..... ***For the Defendant.***