REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. REVISION NO. 1 OF 2016

REPUBLIC ……..…… PROSECUTOR

VERSUS

MARK LLOYD STEVESON …… ACCUSED

(Arising from Ruling and Order dated 2nd June, 2016 in Kiambu Criminal Case No. 1645 of 2014 presided over by Hon. R. Oganyo, Chief Magistrate)

RULING

INTRODUCTION

1. By a letter dated 23rd June, 2016, the Office of the Director of Public Prosecutions (ODPP) sought revision of an order made by the Kiambu Chief Magistrates' Court in Criminal Case No. 1645 of 2014. The brief facts are that the criminal case in the Magistrate's court has been concluded and the case is awaiting a ruling on "No Case to Answer." The Prosecution is, however, apprehensive that the no case to answer ruling might embed an irreversible error made by the Hon. Magistrate on 2nd June, 2016 when she ruled a particular document produced by the Prosecution as inadmissible in evidence. As such, the Prosecution was compelled to close its case without submitting the document (marked as MFI 11) as evidence. Needless to say, the Prosecution fears that without this crucial evidence they might not be able to prove their case beyond reasonable doubt as required by the law. The ruling on the "No Case to Answer" case is scheduled for 21st July, 2016 hence the urgency of the matter.

2. The Prosecution requests that the High Court reviews the decision and order by the Hon. Magistrate and set aside and that the High Court directs the Trial Court to admit the evidence the Prosecution believes was erroneously rejected and consider the same when making a determination on a "No Case to Answer" Ruling. The Prosecution further requests that the file be made available for the prosecution to peruse and prepare written submissions.

3. When the letter was first brought to my attention, I made preliminary orders to the effect that the Prosecution letter dated 23rd June, 2016 appeared to raise plausible issues for potential exercise of the court's revisionary powers if the facts were borne out. Since the issue could irreversibly affect the trajectory of the criminal trial whose ruling on prima facie case was awaited, the issue was urgent. At the same time, it seemed only fair that both parties should be given a fair opportunity to be familiar with the

decision and order the Prosecution was impugning before addressing the Court on the same. I, therefore, ordered that the Trial Court file be made available to the parties for perusal and that the parties prepare themselves to address me on the question of revision on 5th July, 2016. The parties appeared before me on the 5th July and made lengthy submissions.

BRIEF HISTORY

4. On 2nd November, 2015, one of the Complainants, Susan Harris, took the stand to testify as PW2. Among other things, she sought to testify that she had received assurances through phone, SMS and email about repayment of her money in a transaction which had given rise to a charge of obtaining by false pretences by the Accused Person. This is what transpired:

> HARRIS: I received 34,000 dollars from Charlotte. I received money from PW1. It was 4000 dollars. When PW1 also received he shared with me and Charlotte. We later got SMS, telephone calls and meetings regarding how our money would be received back.
>
> [*Email dated 9th March, 2011 – MFI 11*]
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> KIRIMI: I did not get this document. At the point of its production, I will raise an objection.
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> KINYANJUI: The one I am showing the witness is email dated 9th March, 2011
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> KIRIMI: That I have. There is, however, a long one I don't have. I will raise an objection.
>
> COURT: Email dated 9th March, 2011 to be marked for identification for now. Any objection to be raised when produced.

5. The date for that production came on 13th May, 2016. The Prosecution had the Investigating Officer, Gedion Wamocha who testified as PW7 on the witness stand. In the midst of a flurry producing other documents, Gedion Wamocha testified as follows:

> WAMOCHA: MFI11 is an email printout dated 9th March, 2011 to Susan Harris and copied to Timothy Wimo. It is titled as "Susan Loan Agreement Final." There is an attachment which is a loan agreement and a chronology of events. The author is one Mark Stephenson. The document was brought to me by Mark Stephenson accompanied by his lawyer Sam Keengwe on the day I recorded his statement.
>
> MR. KIRIMI: We object to reference to that document. It amounts to a confession. It does not meet the fundamentals of recording a confession. It is an email printout. No accompanying certificate as per section 64 of Chapter 80. That will be against principles of justice of self-incrimination. It will greatly compromise the mind of Court to the detriment of the Accused Person. May the witness not continue to refer to it. The same is not even signed by the Accused so it bears no mark that it came from the Accused Person.
>
> PROSECUTING COUNSEL: We oppose. The witness has talked of an email presented to him in the course of investigations. Section 78(A) of Chapter 80 classifies emails as admissible evidence. Section 78(b) court should not deny admissibility [on the groudns] that it is not signed. In any event those are issues for cross examination. It came from Accused. The objection should be denied.
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> KIRIMI: In reply. The counsel is misleading the Court. Email is addressed to Susan Harris and copied to Timothy Nimmo. None of them referred to it when they testified. The document allegedly attached in the email is not signed. In any event this amounts to admitting accused's statement before he is put on defence. The same section 78(a)(4) has qualifications to be met before emails are produced. So many courts disallow the same.

FOUR ISSUES FOR DETERMINATION IN THE REVIEW

6. After hearing the submissions of both the Prosecuting Counsel, Mr. Kinyanjui, and those of his Defence counterpart, Mr. Kirimi, I have enumerated four questions raised and which need to be delineated and determined for the proper disposal of the Review. The four issues are:

> a. First, was the Court's unchallenged power to review the Trial Court's decision and order properly invoked? Differently put, does the Court have the jurisdiction to entertain the Review request under the present circumstances?
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> b. Second, was the evidence of the email dated 9th March, 2011 together with its attachment properly excluded as inadmissible confession?
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> c. Third, was the email properly excluded as consisting self-incriminating evidence contrary to the Constitutional rights of fair trial?
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> d. Fourth, was the email properly excluded for lack of authentication?

PRELIMINARY ISSUE: OBJECTION TO THE INVOCATION OF THE REVIEW JURISDICTION OF THE HIGH COURT

7. The first objection goes to the core question of whether the question presented is an appropriate one for the Court to invoke its power to review the Trial Court's order in the circumstances. Since the determination of this question could, on its own, be dispositive to the matter, I will deal with this objection first. Mr. Kirimi argued that the Court was not clothed with the jurisdiction to exercise its power to revise the Trial Court's decision and order in this case. This was because, argued Mr. Kirimi, the Prosecution had the option to appeal the decision of the Court and it failed to do so. Indeed, added Mr. Kirimi, the Prosecution had indicated an intention to appeal with the fourteen days allowed by the law. That they chose to appeal and, instead, wait to request the High Court to review the Trial Court Order should mean that the power should not be exercised in their favour.

8. This led to the second reason why Mr. Kirimi thought the power to review should not be used here: it is that, in his opinion and reading of the events, the Prosecution was acting in bad faith. He thought the Prosecution was acting in bad faith because they failed to appeal the Trial Court's Order, waited to close their case and for the Defence to prepare its submissions on a "No Case to Answer". Indeed, Mr. Kirimi submitted that the Prosecution waited until they received his submissions on case to answer – which were accepted in the Prosecution Office on 23rd June, 2016 – before it decided to invoke the Court's power to review the Trial Court Order. He was of the view that the Court should not reward such demonstration of bad faith and abuse of the Court Process with invocation of its supervisory powers over the Trial Court.

9. Finally, Mr. Kirimi appeared to argue – though without too much conviction – that his reading of Section 364(5) of the Criminal Procedure Code was that where there is a right of appeal a party cannot invoke the High Court's power to review a magistrate's court's order. I can easily dispose of this third limb of his argument. Section 364(5) of the CPC reads as follows:

> (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained *at the insistence* of the party who could have appealed.

10. In my view, the correct reading of the section is that a party who has a right of appeal cannot "insist" on invoking the High Court's power of review; in other words, such a party does not have a right to have the court review the decision s/he is aggrieved of. The only sure way to have such grievances heard and considered as a matter of right is through an appeal. The section does not, however, mean that a party which has a right of appeal cannot thereby invoke the Court's power to review a Magistrate's court's order or decision.

11. For clarification, it is important to state the trite position that the High Court will usually exercise its

power to review or even exercise an appeal over an interlocutory matter before a magistrate's court only in exceptional circumstances. While difficult to determine with mathematical precision when the court will use this power, it is only be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750), "grave injustice might otherwise result or where justice might not by other means be attained." As the authors correctly write, the Court will generally "hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below." Hence, the propriety of exercising revision power for interlocutory matters is decided on the facts of each case and with "due regard to the salutary general rule that appeals are not entertained piecemeal." (***Walhaus & Others v Additional Magistrate, Johannesburg & Another****, 1959 (3) SA 113(A)* at 120D; ***S. v Western Areas Ltd & Others*** *2005 (5) SA 214 (SCA)* at 224D.

12. With these principles in mind, I was persuaded that this was a proper case to exercise the Court's inherent powers for revision given the impact that the Trial Court's ruling, if incorrect, would potentially have on guilt or otherwise of the Accused Person.

13. This leaves us with Mr. Kirimi's two-sided arguments on whether it is appropriate to exercise review powers in the present instance. Much of Mr. Kirimi's arguments are based on the correct appreciation of the facts. After reviewing the facts and listening to the perspectives of both Mr. Kirimi and Mr. Kinyanjui for the Prosecution, I find no evidence that the Prosecution acted in bad faith. I have found no indication in the court file that the Prosecution had indicated that they will appeal the Trial Court's ruling. I also accept Mr. Kinyanjui's version of events: that he wrote to the Court on 23rd June, 2016 before he had laid eyes on the submissions by the Defence. Indeed, Mr. Kinyanjui submitted, plausibly, that he had not become aware of the submissions by the Defence on No Case to Answer until the date of the present hearing. If we peel away the bad faith argument, little is left of Mr. Kirimi's arguments against invocation of the Court's power to review the decision and order of the Trial Court. I therefore hold that this is a proper case for the court to exercise its power to review the ruling and order of the Trial Court.

WAS THE EMAIL DATED 9TH MARCH, 2011 AND THE ATTACHED DOCUMENT A CONFESSION?

14. Mr. Kirimi's next salvo was a substantive one: He argued that the Learned Trial Magistrate was correct in refusing to admit the evidence proferred by the Prosecution because the evidence amounted to a confession yet it did not meet the statutory requirements for such admission.

15. Mr. Karimi was referring to Section 25A(1) of the Evidence Act which provides that:

> (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.

16. Mr. Kirimi argued, as he did in the Court below, that since the attachment to the email dated 9th March, 2011 which Mr. Wamocha sought to produce would have "tended" to prove the guilt of the Accused Person, it amounted to a confession and should, therefore, not have been admitted. Consequently, Mr. Kirimi submitted, it was correct that the Learned Trial Magistrate excluded the evidence.

17. The US Federal Law defines a confession thus: the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing. (18 U.S. Code § 3501).

18. *Blacks Law Dictionary online* defines a confession as: A voluntary statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act or the share and participation which he had in it.

19. One of the aspects of these definitions of a confession that is not self-evident is that confessions usually refer to statements or conduct made after the commission of a crime linking the person making the statement with the crime. The distinction is crucial because it leaves out of the definition of a confession a statement that is made in the course of conduct that is itself the commission of a crime or that refers to previous statement which was offered not as an admission of guilt but in the course of conduct that becomes subject of the criminal investigation itself. Hence, a person who is, for example, charged with hate speech heard by an Investigating Officer among others cannot offer, in an effort to exclude the evidence itself, the defence that the utterance which is the subject of the charge amounts to a confession.

20. It is for this reason that it is unpersuasive for the Accused Person to argue that the email dated 9th March, 2011 addressed to Susan Harris which is offered to prove his intention to defraud Susan Harris is a confession because it tends to link the Accused Person with the crime charged. The email dated 9th March, 2011, if authenticated, is offered to prove that the Accused Person participated in conduct which, seen in totality, proves a guilty mind. It is not offered to prove that the Accused Person "confessed" to the crime charged. The email itself was authored on 9th March, 2011 long before the Accused Person was charged with an offence and therefore incapable of "confessing" to any crime.

21. In my view, therefore, it was incorrect for the Trial Court to exclude the email dated 9th March, 2011 together with its attachment as a "confession" for it was not one.

SHOULD THE EMAIL DATED 9TH MARCH, 2011 AND THE ATTACHED DOCUMENT BE EXCLUDED AS SELF-INCRIMINATING EVIDENCE?

22. Mr. Kirimi also argued that the email and attachment were properly excluded because they are self-incriminating evidence and are therefore improper evidence under the Constitution. The crux of his argument was that the evidence was self-incriminating because it was not produced by PW2 (Susan Harris) to whom the email was allegedly addressed to but by PW7 – the Investigating Officer. Mr. Kirimi pointed out that PW7 (Mr. Wamacho) was clear in his testimony that he had received the document from the Accused Person. He protested that the evidence was not produced by the cybercrime expert even though one was called testify. He further found issue with the fact that no evidence was led to connect the email address on the document – riverstonesoil@gmail.com – with the Accused Person.

23. Mr. Kirimi also faulted the fact that the alleged email contained no identifying marks like the signature of the Accused Person. To make matters worse, argued Mr. Kirimi, the alleged email has no body of content save for the attachment. Mr. Kirimi vigorously argued that there is no nexus linking the alleged email and attachment and without expert evidence, its authenticity is not established. In other words, he concluded, there is simply no way of establishing that the document emanated from the Accused Person.

24. In his response, Mr. Kinyanjui pointed out that Susan Harris not only referred to the email in question but was about to produce it in evidence when an objection was taken. His point, therefore, was that it was improper for the same Defence that objected to the production of the email to turn around and complain that it was being produced by the wrong party. Mr. Kinyanjui argued that the Trial Court erred because it did not give the Prosecution an opportunity to establish the authenticity of the email. He argued that, at a minimum, the Court should remand the case back to the Trial Court with instructions that it gives the Prosecution an opportunity to establish the authenticity of the email before considering its admissibility. He would make the same argument about the confession argument.

25. On my part, though both Counsels conflated the two issues, I see much wisdom in severing them. The issue of self-incrimination goes to the now constitutionalized common law privilege that is now found in Article 50(2)(i) and 50(2)(l). These two constitutional provisions are also known, respectively, as the "right to remain silent" (otherwise popularized under the US Constitutional clause of similar import "the Fifth Amendment") and the "right against self-incrimination." These two rights are related and I will refer to both of them generically as the right against self-incrimination.

26. The second issue is one of authenticity of the documents sought to be admitted into evidence. This is a separate issue which is only tangentially related to the self-incrimination discourse. I will deal with the issue of self-incrimination first.

27. The policy objectives of the right against self-incrimination was stated by Murphy J in ***Pyneboard Pty Ltd v Trade Practices Commission*** **(1983)** *152 CLR 328* at 346 (also described as an "overaching principle" in ***R v White*** **[1999]** *2SCR 417*) at 438:

> The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigations. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society's acceptance of the inviolability of human personality.

28. The modern rationale for the right against self-incrimination was given by the European Court of Justice in ***Saunders v United Kingdom*** *A/702 (1997) 23 EHRR 313.* In this case, Saunders had been asked to produce certain documents and to produce certain documents. He faced punishment for contempt of court under a Statute if he refused to cooperate. At the same time, if he answered any questions or produced any documents, they could be used against him at trial. In pointing out that the rule against self-incrimination implicated not the requirement to provide information but the use of the information provided, the Court found that the questioning was in breach of Article 6 of the European Convention of Human Rights (on self-incrimination). The Court explained that the right against self-incrimination lies:

> ….in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence … The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood …..it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purposes of DNA testing.

29. It is important to restate what the right against self-incrimination means. Perhaps, the statement by Templeman LJ in ***Rank Film Distributors Ltd v Video Information Centre*** *[1981] 2 All E.R. 76; [1982] A.C. 380* best captures the core of the right:

> in any legal proceedings a person, whether a party to the proceedings or not, cannot be compelled to answer any question or **produce any document or thing** if to do so would expose him to proceedings for an offence. (*emphasis supplied*)

30. I believe that this statement captures the position under the Kenyan Constitution: The right against self-incrimination covers both testimonial as well as documentary evidence. As long as the evidence sought to be adduced is or was compelled either in court or outside court by an Investigating Officer or some other person in authority, such evidence is given due to testimonial obligation and will be excluded from the criminal trial of the Accused Person who is so compelled.

31. It follows that any questioning of or eliciting of any documents or things from an Accused Person without the proper administration of caution or under circumstances in which the rules on confessions would apply is covered by the right against self-incrimination.

32. In this case, it is clear from the testimony of PW7, Mr. Wamacho, that it is the Accused Person who, in response to his questioning, produced the email dated 9th March, 2011 together with the attachment. The Prosecution did not have any other independent source of the two documents. Indeed, even though

PW2 (Susan Harris) was, allegedly, the recipient of the two documents, she did not state so in evidence. Instead, the Prosecution sought to produce the email which was, in the words of PW7 "brought to [him] by the Accused" Person. This makes it plainly clear that the two documents are inadmissible in evidence because they violate the right against self-incrimination.

33. In my view, it would have made no difference even if the Prosecution had been given more opportunity to show that the two documents were not self-incriminating: Mr. Wamacho had already testified that he obtained the documents from the Accused Persons upon questioning. Consequently, for the two documents to be admissible, the Prosecution would have had to independently obtain them from a different source and not rely on the ones produced by the Accused Person as the right against self-incrimination covers those documents taken to Mr. Wamacho by the Accused Person. To be clear, what is excluded is not the contents of the two documents but the act of producing them by the Accused Person. Hence the contents of the document may not be privileged but the act of producing the documents may be (See ***United States v Doe*** *465 U.S. 605 (1984) US Supreme Court*).

34. On this score, therefore, I find that the exclusion by the Trial Court of the email dated 9th March, 2016 together with the document attached thereto to have been proper.

WAS THE EMAIL DATED 9TH MARCH, 2011 AND THE ATTACHED DOCUMENT PROPERLY AUTHENTICATED?

35. There is, in my view, a second reason why the email dated 9th March, 2011 and the attached document were properly excluded from evidence: they were not properly authenticated. The Prosecution complains that they would have authenticated the documents had they been given the opportunity to do so but that the Trial Court summarily dismissed their attempts to do so.

36. With respect, however, the record does not bear out Mr. Kinyanjui's submissions. I reproduced, at the beginning of this ruling, what transpired at the trial. In both occasions where the Prosecution attempted to introduce the two documents as evidence, the Prosecuting Counsel simply asked the witness at the stand whether they wished to produce the email dated 9th March, 2011 as evidence. Even in the face of vigorous protest by the Defence, the Prosecution did not retrace its steps to first authenticate the documents in question. It is, therefore, not correct to argue that the Trial Court failed to give the Prosecution an opportunity to authenticate the documents. It is incumbent upon a party who wishes to proffer evidence to lay the foundation for it and properly identify the item of evidence sufficiently to support a finding that the item is what the party wishing to proffer the evidence claims it is. The Prosecution never attempted to do so. It is on the basis of this that the admission into evidence of the two documents can be properly challenged.

37. For avoidance of doubt and for future guidance, it is important to point out that authentication is required where any "real" evidence (as opposed to testimonial evidence) is sought to be adduced at trial.1 This applies both to e-evidence as well as other documents or items sought to be admitted into evidence. Authentication of proposed evidence is a crucial step in its admission – one which reliance on section 78A of the Evidence Act (or even section 106B) does not obviate.

38. To avoid confusion it is important to set out where authentication fits into the evidence map. The admission and consideration of tangible exhibit in evidence follows the following steps:

> a. ***First,*** the Court determines if the proposed evidence is relevant. Here, the Court simply determines the probative value of the proposed evidence: whether the proposed evidence has tendency to make the existence of any fact that is of consequence to the determination of a fact in issue more or less probably that it would be without the evidence. If the proposed evidence passes the *Relevancy Test*, it proceeds to the second step.
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> b. ***Second***, in the case of tangible exhibits (like the two documents in this case), the Proponent for the evidence authenticates the proposed piece of evidence that is the Proponent must prove that the evidence is what the proponent claims it to be. The court only proceeds to the third step if the

proposed evidence passes muster under the *Authentication Test*. It is important to explain here that the term "authentication" though the technically correct word which is widely used for this step can be misleading. In fact, what is meant by "authentication" at this stage is merely that a proper foundation for admission of the document or exhibit has been laid. It does not, at all, mean that the exhibit must now be accepted and believed. The Trial Court, as the fact finder, must ultimately weigh (in step 4 below) the admitted evidence in light of all the circumstances. The weighing can only happen after the foundation for the proposed evidence has been laid.

c. ***Third,*** the Court, at the urging of the parties or on its own motion, determines if there is any other rule of evidence that excludes the proposed evidence. Here is the Court considers whether the evidence is excluded by the Constitution (for example the right against self-incrimination discussed above, prohibition against hearsay evidence or whether the proposed evidence would lead to unfair prejudice with its probative value substantially outweighed by the danger of unfair prejudice. If the proposed evidence survives this *Exclusion Test*, then the proposed evidence is admitted into evidence and the Court proceeds to the fourth step.

d. ***Fourth***, the Court considers the weight to be accorded to the admitted evidence. At this stage the opponent may still bring to the Court's attention evidence opposing authenticity of the evidence, thereby allowing the Court to give less weight to the evidence or no weight at all.

39. That brings us to the present case. Granted that the relevance of the contents of the two contested documents is not in question, the all-important question becomes: Was the email dated 9th March, 2011 and the attached document properly authenticated in order for them to be admitted into evidence and for the Court to consider its weight? I do not think so. To demonstrate why this is so, I will outline what a proper authentication would look like when the proposed tangible evidence is an email printout like in the present case.

40. First, it is important to reiterate that the purpose of authentication is to demonstrate to the Court that there is a reasonable probability that the proposed evidence is what the proponent claims it is. For example, the Trial Court must be put in a place where it can determine that it is reasonably probable that there was no material alteration of the evidence after it came into the custody of the proponent. This requirement is no less true for email print-outs sought to be introduced under section 78A of the Evidence Act as in the present trial.

41. For email print-outs (as well as other printed electronic messages), the most convenient authentication technique would be circumstantial. Elsewhere, this is defined as "evidence of its distinctive characteristics and the like - including appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." (US Federal Rule of Evidence 901(b)(4)).

42. For example, many email messages can be authenticated circumstantially by "distinctive characteristics" including information known only to the sender or the use of nicknames or internal patterns which taken in conjunction with other circumstances create sufficient evidence to support a finding that the email message in question is what its proponent claims it is. For example, in ***United States v Safavian*** *435 F. Supp. 2d (D.D.C. 2006*), the US District Court for the District of Columbia remarked that "the emails in question have many distinctive characteristics, including the actual email addresses containing the "@" symbol, widely known to be part of an email address, and certainly a distinctive mark that identifies the document in question as an email. In addition, most of the email addresses themselves contain the name of the person connected to the address, such as abramofj@ftlaw.com....The contents of the emails, also authenticate them as being from the purported sender and to the purported recipient, containing as they do discussions of various identifiable matters, such as Mr. Safavian's work…and various other personal and professional matters."

43. An email may also be authenticated through testimony by the recipient that the sender closed with a nickname known only by the recipient (See, for example, ***United States v. Siddiqui***, *235 F.3d 1318 (11th Cir. 2000).* Similarly, an email may be admissible if coupled with testimony that the author of the email called the testifying party to discuss "the same requests that had been made in the email." As the *Siddiqui*

Court remarked in affirming that the context and contents of emails can be used to authenticate the admission of emails into evidence:

> In this case, a number of factors support the authenticity of the e-mail. The e-mail sent to Yamada and von Gunten each bore Siddiqui's e-mail address 'msiddiquo@jajuar1.usouthal.edu' at the University of South Alabama. This address was the same as the e-mail sent to Siddiqui from Yamada as introduced by Siddiqui's counsel in his deposition cross-examination of Yamada. Von Gunten testified that when he replied to the e-mail apparently sent by Siddiqui, the 'reply-function' on von Gunten's e-mail system automatically dialed Siddiqui's e-mail address as the sender. The context of the e-mail sent to Yamada and von Gunten shows the author of the e-mail to have been someone who would have known the very details of Siddiqui's conduct with respect to the Waterman Award and the NSF's subsequent investigation. In addition, in one e-mail sent to von Gunten, the author makes apologies for cutting short his visit to EAWAG, the Swiss Federal Institute for Environmental Science and Technology. In his deposition, von Gunten testified that in 1994 Siddiqui had gone to Switzerland to begin a collaboration with EAWAG for three or four months, but had left after only three weeks to take a teaching job. Moreover, the e-mail sent to Yamada and von Gunten referred to the author as 'Mo.' Both Yamada and von Gunten recognized this as Siddiqui's nickname. Finally, both Yamada and von Gunten testified that they spoke by phone with Siddiqui soon after the receipt of the e-mail, and that Siddiqui made the same requests that had been made in the e-mail. Considering these circumstances, the district court did not abuse its discretion in ruling that the documents were adequately authenticated. ***Siddiqui***, 235 F.3d at 1322-23.

44. Emails can also be authenticated through technological footprints such as internet protocol addresses or an IP address. Since an IP address identifies which computer sent an email, the Service Provider can be called to testify that the IP address from where the email was sent is the residence or business premises of the opponent. Similarly, an expert can also testify that a particular email was retrieved from an author's email hard drive. In the present case, a Technology (Cyber-crime) expert testified for the Prosecution but he did not testify as to this aspect of the case. Mr. Kirimi is right that if the Prosecution wanted to produce the piece of evidence in question, it would have been appropriate for this expert to lay the foundation by authenticating it through the email's technological footprint.

45. Mr. Kinyanjui heavily relied on section 78A of the Evidence Act in his submissions. That section provides as follows:

> **78A. Admissibility of electronic and digital evidence**
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> (1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
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> (2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
>
> (3) 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 or communicated;
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> > (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; and
> >
> > (d) any other relevant factor.

(4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

46. My understanding of this section is that it makes explicit that electronic messages are admissible as evidence in Kenya provided that they satisfy the other requirements for such admission. This section does not obviate the need for establishing the relevance of the proposed evidence in the same way it does not excuse the need for authentication of the proposed evidence. This section is also helpful in codifying the factors to be taken into account in assessing the weight to be given to an authenticated and admitted electronic message.

47. I did not understand Mr. Kinyanjui to be saying that he wanted the email printout admitted under section 78A(4). This section, in essence, provides for a route for print-outs of electronic documents to be admitted as evidence where such documents are produced in the course of business *and* are accompanied by certification by a person in the employ of the business in question that the document was, indeed, generated in the course of business. Neither conditions are satisfied here.

48. For completeness, it is important to refer to the provisions of sections 106B(1), (2) and (3) as well as section 106(I) of the Evidence Act even though neither parties brought them up. The former sections reinforce the admissibility of electronic records including computer print-outs and provide for a straightforward way of automatically authenticating them if certain conditions enumerated in section 106B(2) are met by producing a certificate of authenticity. That certificate needed must satisfy three conditions:

a. It must identify the electronic records and production process;

b. It must show the particulars of the producing device; and

c. It must be signed by the responsible person.

49. In the present case none of these conditions were met. In any event, for a computer output to be considered a document for admissibility under section 106B(1), it must satisfy the conditions in section 106B(2) namely that:

a. The output must have been produced during regular use;

b. It must be of a type expected in ordinary use;

c. The computer generating the output must be operating properly or it must be shown that the accuracy of the computer is not otherwise affected; and

d. Where multiple computers are involved, those operating in succession and considered as one.

50. It should be fairly obvious that the Prosecution does not satisfy the conditions for section 106B(1) to apply. For one to come under this section, the computer output proposed as evidence must both certify the conditions in section 106B(2) and be accompanied by a Certificate under section 106(4). In this case, the accompanying certificate serves the authenticating purpose.

51. Finally, neither does the presumption in section 106(I) of the Evidence Act come to the rescue of the State in this case. Section 106(I) of the Evidence Act provides that:

A court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the

message as fed into his computer for transmission, but the court shall not make any presumption as to the person by whom such a message was sent.

52. This section applies when an electronic message (such as an email) has been received by an addressee who wishes to produce it as such. The presumption afforded to the message is that it is the same message that was fed into the computer by the sender. In other words, the Court is permitted to presume that the electronic message received by the receiver or addressee is the same one sent by the sender or originator of the message. The presumption goes to the authenticity of the electronic message as produced by the addressee by permitting the Court to assume that there was no manipulation of the contents of the message between the sending and the reception of the message.

53. It is important to note that this section applies to situations where the addressee produces the electronic message and seeks its admission as proof that it was the same message sent to him or her. The section is categorical on two things: First, it is expressly categorical that the presumption does not extend to the identity of the author of the message. Hence, a proponent of such evidence would have to introduce some other evidence to link the message with its alleged author. Second, the section does not obviate the need for authenticating the proposed evidence (electronic message). Indeed, the section is a substantive instruction to the trial court on what to do with an admitted piece of evidence. It does gives no guidance whatsoever to the process of admission of such a piece of evidence. Differently put, such a piece of proposed evidence must, first, be admitted in the usual way described above.

DISPOSITION AND ORDERS

54. The outcome of this revision, then, is that the Learned Trial Court was correct in refusing to admit the evidence for the reason that the proposed evidence would have violated the right against self-incrimination. Further, we have added a second reason that the Trial Court would have been justified to rely on in rejecting the document: lack of proper authentication of the proposed evidence. I have, however, concluded that the proposed evidence would not have been excludable by reason of being inadmissible confession. In the end, however, the outcome that matters for the parties is that the rejected evidence remains excluded.

55. This criminal matter is sent back to the Trial Court to proceed with the trial in accordance with this ruling. The Deputy Registrar is directed to send back the Trial Court file in Criminal Case No. 1645 of 2014 and a copy of this ruling to the Honourable Chief Magistrate to complete the criminal trial.

Dated and delivered at Kiambu this 27th day of July, 2016.

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JOEL NGUGI

JUDGE

1 For clarity, it should be stated that authentication or laying of foundation is required even for testimonial evidence. However, in the case of testimonial evidence, it happens almost automatically during evidence in chief.