



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

HCCR NO. 34 OF 2013

STATEPROSECUTOR

VERSUS

NELSON OTIENO ODIRA1ST ACCUSED

CHIEFSON OLUOCH ODIRA2ND ACCUSED

RULING

1. During the hearing, counsel for the accused objected to the production of photographs taken by PW6, the Investigating Officer. Mr Osoro relied on the provisions of **section 78** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* which states as follows;

78 (1) In the criminal proceedings a certificate in the form in the First Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecution for the purpose, who shall have prepared a photographic print on a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargement or any other annex referred to therein, and shall be evidence of all the facts stated therein.

(2)The court may presume that the signature to any such certificate is genuine.

(3) When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it.

2. Mr Osoro submitted that the witness, Corporal Peter Mutua, did not have the requisite authority of the Director of Public Prosecution nor did he show such authority. He noted that Photos No. 6 and 7 are not stamped as required by the provision of the law and that he is not authorized to take the photographs to be produced in evidence.

3. On the other hand Ms Ongeti, counsel for the prosecution, argued that the witness took the photographs as the investigating officer and as the maker he is entitled to produce them in evidence.

4. The general principle of evidence is that the maker of the document is the person to prove the contents of the documents. **Sections 64 and 65** of the *Evidence Act* provide that a document may be proved by either primary or secondary evidence. **Section 66** of the *Evidence Act* provides for instances where secondary evidence may be given for example by way of proof of certified copies. A reading of **section 78** shows that the exception in relation to photographic evidence is specific to the terms thereof. The purpose of **section 78** of the *Act* is to enable the court admit photographic evidence without calling the

maker if certain requirements of the **Act** have been met. The section is not authority or it does not provide authority for the Director of Public Prosecution to permit only certain officers to take photographs and produce them in evidence. **Section 78** deals with production of photographic evidence in court and provides photographs taken by officers may be produced without calling the officer taking the photographs if the conditions specified in the section are met. Hence the requirement of **subsection (2)** and **(3)** of the Act which tend to buttress the issue of authenticity of the photographs.

5. In any other case, any officer who has taken a photograph may testify as to its veracity and contents as the same is primary evidence and subjected to testing by cross-examination by the accused's counsel.

6. In the circumstances, the objection by learned counsel for the accused is rejected and the photographs are hereby produced and marked as Exhibit No. 5(1), (2), (3), (4), (5), (6) and (7). Orders accordingly.

DATED and **DELIVERED** at **HOMA BAY** this 27th day of July 2014

D.S. MAJANJA

JUDGE

Mr Osoro instructed by Osoro and Company Advocates for the accused.

Ms Ongeti, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.