



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL REVISION 336 OF 2011**

IN THE MATTER OF SECTION 362 OF THE CRIMINAL PROCEDURE CODE

**AND**

IN THE MATTER OF TRAFFIC CASE NO. 5173 & 5174 OF 2010 AT THE CHIEF MAGISTRATE'S COURT AT MACHAKOS

**AND**

IN THE MATTER OF AN APPLICATION BY GEORGE ONYANGO & MOSICA PROPERTIES LIMITED FOR REVISION

**BETWEEN**

**1. GEORGE ONYANGO**

**2. MOSICA PROPERTIES.....APPLICANTS**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. **George Onyango** and **Mosica Properties Ltd** (“Applicants”) are, respectively, defendants in Traffic Cases No. 3173 and 3174 of 2010 at the Chief Magistrate’s Court at Machakos. The charge in both cases is using a motor vehicle with a greater load than specified contrary to **section 58(1)** of the **Traffic Act** and **Rule 41(2)** of the **Traffic Rules** and permitting the use of a motor vehicle on a road with a load greater than the load specified contrary to the same section and rules. The two cases were consolidated and trial opened before the Learned **S.M. Mungai** at Machakos Chief Magistrate’s Court .

2. The Prosecution called one **P.C Patrick Amari** as PW2. He sought to produce a weighbridge ticket dated **20/11/2010** as an exhibit. The defence objected to the production on the grounds that it was a computer generated print out and that therefore there should have been a certificate accompanying it for it to be admissible. The defence relied on **section 65** of the Evidence Act in its objection.

3. The Learned Magistrate overruled the Defence's objection and admitted the printout into evidence. The Learned Magistrate gave a short ruling. I reproduce it here:

I have considered the objection and perused **section 65** of the **Evidence Act**. The Act aforesaid is clear that computer print-outs generated by computers which are operating properly in the ordinary course of business and manned by persons with lawful control are admissible.

In the instant case, the machine was operated by **Dennis Lusweti**. He is the one who generated the ticket in the ordinary course of his business at the weighbridge as a machine operator. His evidence dwelt on his day to day work as a machine operator – not the person in-charge of its maintenance.

Until proved otherwise, it is assumed the machine was in proper working condition and the submission by defence that a certificate referred to was mandatory was therefore misplaced. The soundness of the machine was not in issue and the details of how the ticket was generated could be addressed competently by the machine operator.

I therefore overrule the defence objection and allow the prosecution's investigating officer to tender the ticket which was identified by the maker when he testified.

4. The Applicants then took out the present application requesting this Court to exercise its discretion and revise the order made by the Learned Magistrate admitting the computer print-out.

5. Before me during plenary hearing, **Mr. Nzumo** for the Applicants insisted that the computer print-out should not have been admitted in the absence of a certificate. This is especially so, argued **Mr. Nzumo**, when there was no evidence that the computer was working properly. The relief the Applicants seek is for this Court to order that the **Evidence Act** dictates that the computer print-out is inadmissible.

6. **Mr. Mwenda**, for the state, objected to the application. He submitted that as long as the computer was being operated in the course of business, there was a presumption that it was working properly which obviated the need to produce a certificate. He pointed out that the Applicants had not even made any allegations as to the soundness of the machine. While conceding that "there should have been a certificate", **Mr. Mwenda** submitted that it was proper for the Learned Magistrate to admit the evidence in the specific circumstances of this case since the Applicants were to have an opportunity to cross-examine the person who generated the computer print-out.

7. The singular question for determination is whether a computer print-out is admissible in evidence when it is not accompanied by a certificate issued by a person holding a responsible position in relation to the operation of the computer or the management of the activities to which the document relates in the ordinary course of business. I have come to the conclusion that there is no mandatory requirement that such a certificate accompanies the computer print-out before the print-out itself becomes admissible. However, where there is a question whether a computer print-out qualifies to be admitted under any of the carve-outs provided in **section 65(6)** of the **Evidence Act**, then such a certificate might be needed, and if one is presented, it shall be admissible under section 65(8) of the Evidence Act. In my view, this is the correct reading of **section 65(8)** of the **Evidence Act**. I find no evidence in that section that a certificate would be required every time a computer print-out is sought to be admitted in evidence. Instead, I read the provisions of **section 65(8)** as being permissive: a certificate is admissible to aid in the process of a computer print-out qualifying for admission under the other provisions of the Act.

8. **Section 65** of the **Evidence Act** deals with primary evidence. **Section 65(5)(c)** provides that a computer print-out shall be admissible in any proceedings "without further proof of production of the original" if the conditions stipulated in **Section 65(6)** are satisfied. **Section 65(6)**, on the other hand provides as follows:

(6) The conditions referred to in subsection (5) in respect of a computer print-out shall be the following namely:

- a) the computer print-out containing the statement must have been produced by the computer during the period in which the computer was regularly used to store or process information for the purposes of any activities regularly carried on over that period by a person having lawful control over the use of the computer;
- b) the computer was, during the period to which the proceedings relate, used in the ordinary course of business regularly and was supplied with information of the kind contained in the document or of the kind from which the information so contained is derived;
- c) the computer was operating properly or, if not, that any respect in which it was not operation properly was not such as to affect the production of the document or the accuracy of its content;
- d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of business.

9. The import of **Section 65(6)** is that a computer print-out is admissible “without further proof of production of the original” if the four conditions mentioned there are satisfied. In my view, when read together **Sections 65(6)** and **65(6)** of the **Evidence Act** are self-executing; they require no further formalities to be operational. There is certainly no requirement that a certificate be produced before a computer print-out which satisfies the four conditions is admitted into evidence. If the legislature intended that to be a *sine qua non* to the admissibility of a computer print-out, it should have said so plainly and it would have included that condition in **Section 65(6)**. We find no constraints under that section.

10. The question that naturally recommends itself, then, is what the import of **Section 65(8)** of the **Evidence Act** is. Does it not compel the production of a certificate to accompany a computer print-out as the Applicants herein insist? I think not. **Section 65(8)** reads as follows:

In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say –

- a) Identifying a document containing a print-out or statement and describing the manner in which it was produced;
- b) Giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
- c) Dealing with any of the matters to which the conditions mentioned in subsection (6) relate,

Which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence.

11. In my view, it seems clear that **section 65(8)** has been included to perfect the operationalization of the other provisions relating to computer print-outs but not to add an extra requirement for their admissibility. The section is not saying every time a person desires to produce a document under the provisions of **Section 65(6)** the person must have an accompanying certificate. Instead, the subsection is permitting the use of an accompanying certificate to prove that a particular computer print-out comes within the provisions of **Section 65(6)**. There is a subtle but profound difference between the two positions. In the former position, the *pro forma* production of an accompanying certificate is mandated; in the latter position, the production of an accompanying certificate only becomes necessary if there is a dispute whether the computer print-out in question qualifies under **Section 65(6)**. In this latter position, the party seeking to produce the computer print-out can then produce an accompanying certificate to bolster its position that the computer print-out should, indeed, be admitted as evidence.

12. Returning to the concrete application before the Court, was the Learned Magistrate in error inviting this Court’s revision in his treatment of the computer print-out? The answer flowing from the analysis

above is, of course, no. An accompanying certificate would only have been required if the Applicants insisted that one of the conditions mandated by **Section 65(6)** was inapplicable or had been flouted. In that case, it would have been incumbent upon the State to demonstrate that all the conditions were, in fact, met and a certificate under **Section 65(8)** would have come in handy to discharge that burden of production. That is not the concrete position obtaining in this case, however. Instead, the Applicants simply insisted on the production of an accompanying certificate. As far as I can tell, they did not raise an objection that any of the conditions laid down under **Section 65(6)** had not been met. To that extent, their technical objection is misplaced.

13. It follows that the application for revision is hereby dismissed as unmeritorious.

**DATED at MACHAKOS this 13TH day of MARCH 2012.**

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**J.M. NGUGI**  
**JUDGE**

**DELIVERED at MACHAKOS this 19TH day of MARCH 2012**

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**ASIKE-MAKHANDIA**  
**JUDGE**