



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 6 OF 2008

REPUBLIC.....PROSECUTOR

=VERSUS=

BARISA WAYU MATAGUDA.....ACCUSED

RULING

Mr. Kirui counsel for the accused person has objected to the production of a CD made from CCTV footage filmed at Karama Lodge by **PW11 SERGEANT MICHAEL ODUOR** of CID Mombasa. Mr. Kirui submits that the CD made from the CCTV footage is not admissible as evidence in this case. Mr. Ondari learned State Counsel submits that the CD tape is admissible as evidence under the Evidence Act.

PW11 in his evidence told the court that he made the CD tape from the CCTV footage from Karama Hotel which footage he viewed together with **PW4 LYDIA KAGUNA JAPETH** the owner of Karama Hotel. If this CCTV footage was available then it amounted to primary evidence and could very easily and simply have been produced as evidence by **PW4**. Court wonders why police had to complicate matters by making a CD tape out of the CCTV footage. It would have been far more logical to produce the CCTV footage in its raw form.

That having been said we are told that the CCTV footage was erased and now all that remain this CD tape made by **PW11**. A computer is defined in S. 1 of the **Kenya Communications Act 1998**, as:

“Computer” means any electronic, magnetic, optical, or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses and includes all input, output, processing, storage, software and communication facilities which are connected or related as a system or network;”

Whereas formerly the evidence Act did not specifically cover the question of the admissibility of such electronic evidence, following great advances in this field, the courts could not continue to ignore the great impact which modern technology plays in the world in all spheres upto and including the collection and storage of evidence. This led to the enactment of amendments to the Evidence Act which include S. 106A which provides that electronic records may be proved in court. The conditions upon which such electronic evidence would be admissible are legislated for by S. 106B of the same Act. S. 106B (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”
[emphasis mine]

What this provision therefore means is that any information stored in a computer (such as a CCTV camera) which is then printed or copied to optical media (such as a CD) shall be treated just like documentary evidence and will be admissible as evidence without production of the original. Thus the CD made by **PW11** is prima facie admissible evidence, without necessarily having to produce the original CCTV footage. However S. 106B also provides that such electronic evidence will **only** be admissible if the conditions laid out in that provision are satisfied. S. 106B(4) provides –

“106B(4) 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)

(c)

(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

(5)”

This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of S. 106B(4). **PW11** did not mention any such certificate. Such a certificate must in terms of S. 106B(4) (d) be signed by a person holding a responsible position with respect to the management of the device (in this case the CCTV camera). As Mr. Kirui has pointed out such a person would be **PW4** who would sign to certify the validity and correctness of the CCTV footage. Therefore for **PW11** to attempt to produce the CD without such a certificate claiming that he watched the CCTV footage with **PW4** will not suffice. Without the required certificate this CD is inadmissible as is inadmissible as evidence and I do so rule.

Dated and Delivered in Mombasa this 22nd day of July 2011.

M. ODERO

JUDGE

In the presence of:

Mr. Ngeno holding brief for Mr. Kirui

Mr. Onserio for State