



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.243 OF 2017

IN THE MATTER OF ESTATE OF WASHINGTON OLWENY AKA WASHINGTON

OLWENY ELIAKIM, WASHINGTON OLWENY ODAWA (DECEASED)

PHELESIAH AKOTH OLWENY.....1ST PETITIONER

EDWIN OTIENO OLWENY.....2ND PETITIONER

TIMOTHY OCHIENG OLWENY.....3RD PETITIONER

VERSUS

NORAH ATIENO OLWENY.....1ST OBJECTOR

ANNE WANJIRU.....2ND OBJECTOR

ALLAN ONYANGO OLWENY.....INTERESTED PARTY

RULING

During her evidence in chief on 28th January 2021, the 1st objector Norah Atieno Olweny testified and referred to a bundle of photographs marked as NA06, Leaf 1, 2, 3, 4, 5, 6, & 7. Mrs. Gichuru, counsel for the Petitioners raised the objection that no certificate had been filed in compliance with **Section 106B of the Evidence Act** and as such the photographs should be expunged from the record.

In response, Mr. Biko Advocate for the 1st objector submitted that the Court should take judicial notice of the fact that the photographs before it were not recent and that they were taken by ordinary camera before the law on electronic evidence came into force. He further submitted that the petitioners did not raise any objection when Ms. Kinuthia Advocate for the 2nd Objector produced similar photographs in their presence. Further that the petitioners had been served with the original photographs 2 (two) years ago and therefore they have had sufficient time to analyze them and ought to have raised any issues they had long before the hearing of the case.

In rejoinder, Mrs. Gichuru submitted that if the 1st Objector's alleged that the photographs were not electronic then counsel ought to have cited the relevant law to support his position that they ought to be allowed. That this was not a matter for the court to take judicial notice but a matter of law. On the issue that she had not raised any objection with regards to the production of photographs by Ms. Kinuthia Advocate for the 2nd objector, she submitted that she has not put her issues on record and had considerable latitude to decide whether or not to object to the production of any document before court.

The question I must answer is whether the photographs in this matter fall into the ambit of **Section 106B of the Evidence Act** to warrant the certificate that as submitted by Mrs. Gichuru would like to see. For ease of reference I have recited **Section 106B** here [\[i\]](#).

The section of the law provides for the admissibility of electronic records. The context is provided by **Section 106A** which states: **Section 106B** to apply in proof of electronic records

The contents of electronic records may be proved in accordance with the provisions of section 106B.

An Electronic record is not defined under the definition section of the Evidence Act.

I found these definitions: **In Kenya Information and Communications Act no 2 of 1998**

“Electronic record” means a record generated in digital form by an information system, which can be transmitted within an information system or from one information system to another and stored in an information system or other medium;

In the **Government ICT Standards Electronic Records and Data Management Standard First Edition 2016^[1]**

Electronic records may be any combination of text, data, graphics, images, video or audio information that is created, maintained, modified or transmitted in digital form by a computer or related system.

Section 106B(1) goes on to say that it is **any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as “computer output”)**.

At the outset the question is whether the photographs we are dealing with here are the contents of electronic record i.e. whether they were **created, maintained, modified or transmitted in digital form by a computer or related system**.

A reading of the provisions of **Section 106B (2)** sets out conditions upon which such information in electronic record made by computer output becomes admissible. It states that such information **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.**

Further **Section 106B (4)** is the one that provides for the requirement of a certificate in the following terms:

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;

From the evidence given by the 1st objector there is nothing indicative that the photographs she was referring to were **created, maintained, modified or transmitted in digital form by a computer or related system**. The only evidence is that they are photographs which the objector would wish to produce in evidence.

Be that as it may, on the application of Section 106B I found the case of **MNN vs ENK [2017] eKLR** the judge reviewed several cases on the issue. At paragraph 6 he stated;

*“The provisions of Section 106B have been tested in a number of cases, the case classicus appears to be **Republic v Barisa Wayu Matriguda [2011] eKLR** where a compact disc (CD) was made from CCTV footage, and the court said:*

*The decision in **Republic vs. Barisa Wayu Matuguda** has been followed in several matters at the High Court. I shall cite only two of them. In **William Odhiambo Oduol vs. Independent Electoral & Boundaries Commission & 2 others (2013) eKLR**, the issue was admissibility of a video recording done on a Nokia phone, which was then taken to Nairobi and the video recording was then developed to CD. The court noted that the video was recorded, saved in the internal memory of the phone, the phone was connected to a computer using a micro-USB data cable, the file was copied to an empty hard disk, an empty CD was then inserted into the computer CD write RAM, the video file was then written on the CD or VCD using a CD writing application. It was emphasized that it was important to trace the devices for audit purposes. It was held that the certificate has 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 was appropriate. In **Nonny Gathoni Njenga & anor vs. Catherine Masitsa & anor (2014) eKLR**, the court found that DVDs sought to be relied on were not accompanied by a certificate as required by the Evidence Act. Then there is **R. vs. Robson & Harris (1972) 1 WLR 651**, where the issue was the admissibility of tape recordings of alleged conversations between the defendants and a prosecution witness. It was held that in considering the question of admissibility the court was required to satisfy itself that what the prosecution alleged to be original tapes were shown, prima facie, to be original by evidence which defined and described the production and the history of the recording up to the moment of production in court. (All emphasis mine)*

This case gives a very vivid demonstration of what electronic evidence means under **Section 106(B)**.

From another angle in **Samwel Kazungu Kambi vs Nelly Ilongo & 2 Others [2017] eKLR** the court was dealing with photocopies of photographs. The Judge observed:

22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed. (Emphasis mine)

The court was dealing with a Petitioner who put together photographs whose source he could not verify. Related to this case is the ground

that he was not an eye witness and could testify as to whether the photographs were a true reflection of what had happened.

In my considered view this a case where the relevant issue is the contents of the photographs. Are these photographs electronic evidence?

It appears to me that, until it is established that these photographs were taken in the manner defined to bring them into the purview of electronic records, it remains an issue as to whether these photographs ought to have been accompanied by the certificate required by **Section 106B**.

It is my finding that it has not been established that the photographs before me respond to the definition of electronic record at **Section 106B** of the Evidence Act to warrant the certificate envisaged under **Section 106B (4)** of the same Act.

It is **Section 78 of the Evidence Act** that provides for the production of a certificate to accompany photographs produced in criminal proceedings. The format of that certificate is provided for under the First schedule of the Act. However there is no similar provision with regard to matters as the one before me when it has not been established that they are electronic records; while **section 78A** provides for the admissibility of electronic and digital evidence by stating that *'In any legal proceedings, electronic messages and digital material shall be admissible as evidence'*. The provision proceeds to lay the conditions upon which this evidence may be produced.

The need for scrutiny of digitally produced photographs was explained in **Elizabeth Ongoro Amollo v Francis Kajwang Tom Joseph & 2 others [2017] eKLR**. The learned Judge citing **Zachariah B. Parry** in an article *'Digital Manipulation and Photographic Evidence: Defrauding The Courts One Thousand Words at a Time'* published in the **Journal of Law, Technology & Policy [Vol. 2009] 175** drew a distinction between traditional photograph and digital photography where it was stated:

“Traditional photography is an analog science. Light enters through a camera’s lens and the image the camera views is faithfully recorded onto a negative. This negative is then printed into a recognizable image....

Digital photography is the new norm for image capture. Digital cameras, in contrast to their analog complements, do not store information in a continuous medium. Instead, information is recorded in discrete bits of information called binary code, which is a string of ones and zeroes that makes up the storage language of hard drives, compact discs, computers, and all other digital devices. By using a series of numbers, instead of the continuous crests and troughs characteristic of analog information, digital image manipulation is much easier, cheaper, and infinitely more difficult to detect than an analog alteration.”

The judge then drew the conclusion:

Accordingly, whilst photographic evidence is admissible pursuant to Section 78 of the Evidence Act, there is a compelling basis to demand that, unlike traditional photographs, digital photographs must be carefully verified as electronic evidence under Section 78A of the Evidence Act given the distinction expressed by Zechariah, above.

It has not been demonstrated that that the photographs before me were taken digitally. I have no doubt in my mind that there is the possibility of manipulation of digital and electronic information due to the advancement in technology. However that is not the allegation here and it is my view that that even if that was so, it can only be established when that evidence has been produced in court and subjected to scrutiny.

There is a reason why parties exchange documents and documentary evidence long before the hearing date. This is to enable them get time to respond to what has been shared, and where they are represented to seek legal counsel. These photographs were exchanged as long ago as 2018. The parties had all the time to scrutinize the photographs and raise any objections as to their contents or otherwise, if they had any at all. It is not demonstrated that there are allegations that the photographs are fake, or do not represent the persons they depict or that they have been altered in any way yet the petitioners.

We are all bound to uphold the values of our Constitution; the courts are bound to ensure that justice is done in each case irrespective of procedural requirements. I doubt that the requirement for a certificate was intended to shut out evidence but an additional evidence of authenticity.

Faced with a similar issue the Judge in **Mable Muruli v Wycliffe Ambetsa Oparanya & 3 others [2013] eKLR** stated

Under Article 159 2(a) it is stated that justice shall be done to all irrespective of status. Further justice shall be administered without undue regard to procedural technicalities. I do find that the CDs can be produced as evidence. The court will evaluate the probative value of that evidence or even the authenticity of the CDs.

The essence of justice is that a party should be able to approach the court and present his or her case. Such presentation should be supported by his or her oral evidence, electronic and documentary evidence. On the other side the defendants or respondents should also be accorded an opportunity to produce their evidence. By the end of the day each party should be able to go back home satisfied that they have presented their case to the court and the court was able to take their evidence. This is in line with the provisions of Article 50 which gives the right to every person to have any dispute resolved by the application of the law in a fair and public hearing before a court. Shutting out the electronic evidence will make the petitioner go back home while nursing the notion that the court did not take her evidence. In Presidential Election Petition No. 5 of 2013 Nairobi the court was able to view electronic evidence and such issues as the authenticity of the evidence did not arise.

The words of the learned Judge reflect my view of this matter. That the Objector will get to produce her evidence, she will be subjected to cross examination and the court will determine the probative value of that evidence.

We have already been shown a similar photographs which were put to the witness Eliakim Edwin Juma by counsel for the 2nd objector. He was examined about its contents. No objection was raised by the Petitioners yet those same photos appear similar to the photographs being questioned here. That evidence is on record.

Every case must be considered on its facts; while the witness herein may not have called the photographer or the person who processed the said photographs, which she is at liberty to do, she has testified that she was present when the photographs were taken and can testify to the incidents that the photographs depict. That is her oral evidence given on oath. It is evident from her testimony, unlike in the incidents described in some the foregoing cases, that she was there when the photographs were taken, and her testimony as to their contents can be tested in cross examination. To that extent I would allow her to rely on and produce the photographs annexed to her affidavit sworn on the 15th October 2018.

Never the less, in the interests of justice, any of the parties intending to rely on photographs is at liberty to avail further evidence on those photographs, and the opposing side will be at liberty to controvert the same.

The Objection is overruled.

Right of Appeal 30 days.

DATED AND DELIVERED THIS 15TH MARCH 2021 (VIA ZOOM)

Mumbua T Matheka

Judge

Court Assistant: Edna

Mrs. Gichuru for Petitioners

Mr. Aim & Mr. Biko for 1st Objector

Ms. Kinuthia for 2nd Objector

Prof. Wabwile for Interested Party

[1] <http://icta.go.ke/pdf/Electronic%20Records%20Management%20Standard.pdf>

[i] (1) Notwithstanding anything contained in this Act, **any information contained in an electronic record which is printed on 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.

(2) The conditions mentioned in subsection (1), in respect of a **computer output**, are the following—

(a) the **computer output** containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) 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 the ordinary course of the said activities;

(c) 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 or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) 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.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—

(a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(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) 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 shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities