



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL CASE NO. 18 OF 2017

REPUBLIC.....PROSECUTION

-VERSUS-

PAUL MWANGANGI MALONZI.....1ST ACCUSED

JANET NTHEYNA MWANGANGI.....2ND ACCUSED

MARIETTA KAVINDU KAMANU.....3RD ACCUSED

NZILANI MBITHI.....4TH ACCUSED

GERRALD MWENDWA MUTHOKA.....5TH ACCUSED

WILFRED MUNYAO KITHIOMA.....6TH ACCUSED

RULING

1. An objection has been raised by Mr. Makundi, and supported by Mr. Mathuva and Mr. Mutia all defence counsel, objecting to the production of photographs alleged to be of the scene of crime, by Sgt. Paul Kiilu of DCI Makueni who did not take the photographs.
2. The Prosecuting Counsel Ms. Gitau on the other hand, has insisted that the photographs can properly be produced as evidence under the law, though the person who took the photographs (allegedly the Investigating Officer) had not yet testified in court.
3. All counsel for the Prosecution and the defence, agree that sections 78, 106A and 107 of the Evidence Act (cap. 80) apply with regard to production of photographs in criminal cases. They also agree that processing of photographs has to be done by a Gazetted Officer. I need mention that these days photographs are processed electronically.
4. The relevant part of section 78A of the Evidence Act, states as follows –

78A.(1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.

(2) The court shall not deny admissibility of evidence under subsection (1) on the ground that it is not in its original form.

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(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 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”.

5. Section 106A and 106B provide for admissibility of and proof of electronic records, but do not talk about who is competent to produce electronic records.

6. The law on production of photographic evidence was amended recently because the photography process now is largely electronic. Before then, the person who took the photographs would be the one to process the photos, print them and also produce them in court.

7. The law is now different, and as shown by the applicable provisions of the law above, a person other than the one who actually took the photographs can produce the same, provided the basis is laid for such production and the process on how the person who is producing the same came to be in possession of the photographs is clearly explained to court.

8. The weight to be attached to such electronic evidence is however provided for under section 78A (3) which states-

78A.(3) In estimating the weight, if any to be attached to electronic and digital evidence, under subsection(1) in regard shall be had to –

a) The reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;

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.

9. Thus in my view though the photographs herein can be produced by the witness in the dock, if the person who took the photos is not identified and does not come to testify, and the process of handover is not shown to be flawless, then the photographic evidence will be worthless otherwise, in my view, the witness presently in the dock, is competent to produce the photographs.

DELIVERED, SIGNED & DATED THIS 23RD DAY OF SEPTEMBER 2021, IN OPEN COURT AT MAKUENI.

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George Dulu

Judge