REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 87 OF 2018

BHAVNA PATEL MANDALIYA.....APPELLANT

-VERSUS-

CHETAN AROON SOLANKI.....RESPONDENT

RULING

1. Bhavan Patel Mandaliya, (hereafter the Plaintiff) has sued **Chetan Aroon Solanki** (hereafter the Defendant) for defamation seeking among other reliefs, damages, and a permanent injunction to restrain the Defendant from publishing or making defamatory statements concerning the Plaintiff. The Defendant filed a statement of defence on 14th June 2018 denying the key averments in the plaint.

2. On 12th October 2021 the matter came up for hearing. During the Plaintiff's evidence-in-chief, the Defendant's counsel, Mr. Mogeni objected to the production of the Plaintiff's documents numbered 2-22 in her list of documents dated 30th January, 2019, comprising of emails. Counsel submitted that no certificate made in compliance with Section 106 (A) and (B) of the Evidence Act had been tendered in respect of the said documents. Ms. Sheikh, counsel for the Plaintiff responded that the objection was a new development not raised initially and that the emails had been retrieved by cybercrime personnel and ought to be admitted. In her view, the disputed documents could be produced as they did not offend the law as submitted by defence counsel. In a brief rejoinder Mr. Mogeni submitted that the objection could only be raised at the hearing stage and not earlier. He reiterated that the documents are not compliant with the Evidence Act.

3. The court has considered the arguments with respect to the objection by the defence counsel and perused the Plaintiff's List of Documents dated 30th January 2019. Admissibility of electronic records is governed by sections 106 A and B of the Evidence Act. Section 106 A provides that electronic records may be proved in accordance with the provisions of section 106B. Section 106B of the Evidence Act states that:

> **"(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 sub section (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 management of the relevant activities (whichever is appropriate), 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)…"

4. On the other hand, Section 65 (8) of the Evidence Act states:

"(8) 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 conditions mentioned in the 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."

5. On a plain reading, the above sections impose similar conditions for the production of documentary and electronic record evidence. Secondly section 106 A as read with section 106B (4) require that the certificate envisaged be produced where it is desired to produce electronic records as evidence. Emails and Facebook account records (document no. 1-14, & 22 in the Plaintiff's List of Documents dated 30th January 2019) such as proposed to be produced by the Plaintiff herein constitute electronic evidence and the Plaintiff is required to tender the certificate envisaged in section 106B (4) in order to do so.

6. The Court of Appeal in **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR** while discussing the application of Section 106 (B) observed that:

"Section 106B of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document *"if the conditions mentioned in this section are satisfied in relation to the information and computer."*

In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced".

7. The court proceeded to consider the requisite contents of a certificate meeting the conditions in the section before stating that:

"The Evidence Act does not provide the format the certificate required under sub-section 106B (2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder."

8. Similarly, in **John Lokitare Lodinyo –vs- I.E.B.C and 2 Others [2018] eKLR the Court of Appeal** in reiterating its above decision stated that:

> **"Essentially, the sections provide that electronic evidence which is printed out shall be treated like documentary evidence and will be admissible without production of the computer used to generate the information. The appellant claimed that his technical team downloaded the forms and had them printed. He admitted that the forms were from the IEBC public portal. Ordinarily, this would have meant accessing the IEBC portal, which one could only do if they had access to the internet, proceeding to log onto the IEBC portal page, clicking on the Forms 35A uploaded on Kacheliba Constituency, downloading the Forms 35A onto the computer's hard disk and finally printing the documents via a printer connected to the computer… It is at this juncture that the provisions of Section 106B of the Evidence Act come into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do."**

9. The Plaintiff in this case cannot run away from the requirements of section 106 A and B of the Evidence Act, whether the proposed electronic evidence was retrieved by cybercrime personnel or not. Secondly, the Defendant could only raise the objection at the hearing stage and not earlier. In the result, the Court upholds the Defendant's objection in respect of documents no. 2-14, & 22 contained in the Plaintiff's List of Documents dated 30th January 2019.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 6Th DAY OF DECEMBER, 2021

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Ms. Shella

For the Defendant: Mr Mogeni

C/A: Carol