



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J.

CIVIL CASE NO. 12 OF 2017

RACHAEL NJOKI KAHARA.....PLAINTIFF

VERSUS

GIDEON MIGIRO NYAMBATI.....DEFENDANT

RULING

1. This ruling is in respect of an objection to the production of a printout of Whatsapp messages as evidence in these proceedings.
2. That objection is anchored on alleged non-compliance by the plaintiff with the provisions of **Section 65(a) 1** as read with **Section 106B** of the **Evidence Act**.
3. It is urged for the defendant that it is a mandatory requirement that the gadget used in the preparation of the computer printout must be confirmed to have been owned by the person preparing the report and in working condition. These details must be recorded including the Serial No. and IMI No.
4. It is the defendant's case that in the document before court, there are no details of a printer used to print out the document. There are no details of the Serial No. of cable used to transmit the information to the computer from the mobile phone and to the printer.
5. It is further urged that there are no details of phone number used to transmit the screenshot from the numbers to the handset Sony XperiorZ 2.
6. The defendant maintains that there is no document filed to confirm ownership of the machine used to print the document.
7. It is stated that for the document to be admitted, it must be through an affidavit. I am referred to the decision in **Sophia JumaSwaleh – Vs- Inspector General of Police and 3 Others, Constitutional Petition No. 337 of 2016 [2016] eKLR.**
8. In response counsel for the plaintiff submitted that this court is called to determine this case in the cyber era. On the issue of certification, counsel submitted that it is in line with **Section 65(8)** and **Section 106B** of the **Evidence Act**.
9. Am referred to the decision in **Nbi HCCC No. 317 of 2014, Jack and Jill Supermarket Ltd –Vs- Victor MainaNgunjiri** and a South African decision in **H.C of South Africa, Kwa Zulu natal Division Case No. D66316/19, David Hanekom –Vs- Jacob Zuma.**
10. It is further submitted that there shall be no prejudice on the defendant.
11. I have had an occasion to consider the objection and the grounds in support of the objection. I have had due regard to the response and the authorities cited.
12. Of determination is whether the printout of Whats App messages has met the necessary legal threshold under the Evidence Act to be produced in evidence in these proceedings.
13. It is a suitable beginning point to set out the relevant Law being **Sections 65(5) (c), (6), (8)** and **106(B)**.

“Section 65 (5)(c) a statement contained in a document and included in printed material produced by a computer (hereinafter referred to as a “computer printout”), shall, if the conditions stipulated in subsection (6) of this section are satisfied, be deemed to also be a document for the purposes of this Act and shall be admissible in any proceedings without further proof of production of the

original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.”

“Section 65(6) *The conditions referred to in subsection (5) in respect of a computer printout 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 operating 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.”

“Section 65(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.”

“Section 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.

(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 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) 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.”

14. The plaintiff filed a certificate dated 7th August 2018 expressed to be made under section 65(8) as read with section 106 and 106 B of the Evidence Act. It is that certificate that the defendant contends is non compliant with the provisions of the Evidence Act.

15. Firstly, the defendant argues that the gadgets used in the preparation of the computer printout were not confirmed to have been owned by the person preparing the report. Having examined the relevant provisions relating to the admissibility of electronic records and computer printouts, I find that it is not necessary to indicate the proprietorship of the devices used to prepare the computer print out. **Section 65 (8)** provides that the person making the certificate may be a person holding a responsible position in relation to the operation of the relevant device or a person holding a responsible position in relation to the management of the activities to which the document relates in the ordinary course of business. Similarly **Section 106 B (4)** provides that the certificate is to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the activities, whichever is appropriate.

16. In this case, the plaintiff, in her certificate averred that the computer used to generate the printout was under her lawful control during the process and she was duly authorized to extract and print documents from it. However, no mention was made of whether she was the person responsible for the operation of the phone serial number 352494062351670 make SONY XPERIA Z2 which received the whatsapp records or the printer used to produce the print out.

17. Further, **Section 65(8) (b)** of the Act also provides that particulars of any device involved in the production of the document should be given. In her certificate, the plaintiff gave particulars of the phone and the computer used to generate the print out but omitted the particulars of the printer used to generate the print out. The plaintiff failed to indicate whether she was the person operating the printer and whether she did the actual production of the print out.

18. The Court of Appeal in John Lokitare Lodinyo –vs- I.E.B.C and 2 Others [2018] eKLR addressed the question of admissibility of electronic records under S 106B and stated;

“54: 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.

*“55. 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. This Court in the case of County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others [2015] eKLR stated 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...**”*

19. In the case of **Richard Nyagaka Tong’i v Independent Electoral & Boundaries Commission & 2 others ELECTION PETITION NO. 5 OF 2013 [2013] eKLR** the court found;

“27. In the present case the petitioner has not produced a certificate under section 106B (4) of the Evidence Act and the person who operated the computer and printer during the printing of the photographs was not called to testify as to the condition of the

machines and the integrity of process of the printing of the photographs. The person who testified was the photographer who although he stated that he was with the computer operator when the photographs were made cannot vouch for the due operation of the computer and printer and the integrity of the photographs having himself admitted that they would at times sit with the operator to choose colours in which the photographs would be printed. The court cannot rule out the possibility of doctored photographs, and in accordance with section 106B, the photographs are inadmissible and shall not be considered.”

20. The defendant further contends that there were no details of phone number used to transmit the screenshot to the handset Sony Xperior Z 2. The plaintiff in the certificate stated that computer printout relates to whatsapp records of phone number 0724xxxx49 received on her phone on 3rd May 2017. The plaintiff filed a supplementary further list of documents and the first document listed thereunder was a ‘Certified Copies of the whatsapp messages sent via +2547xxxxxx45’. It is clear that the screenshots were taken by some other person other than the plaintiff and later sent to the plaintiff whereupon she downloaded and saved the image. Through her device she was able to download, save the contents of the whatsapp message on her computer and print out the document. It was thus necessary to file a certificate pertaining to the person who took the screenshot of the whatsapp messages describing the particulars of any device involved in the production of the image.

21. I now turn to whether the certificate contemplated under section 106(B) (4) should take the form of an affidavit. The Court of Appeal in **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR** was categorical that the Evidence Act does not provide the format the certificate required under sub-section 106B(2) should take and the certificate can therefore take **any form** including averments in the affidavit of the recorder. In this case the certificate dated 7th August 2018 was signed by the plaintiff as the person charged with operating the computer and mobile phone and in regard to form therefore the same is deemed to be properly before the court.

22. In the end therefore and for the reasons stated, the plaintiff has not complied with the provisions of **section 65(a) 1** as read with **section 106B** of the **Evidence Act**. The objection to the production of the print out. The objection to the production of the print out of Whatsapp messages as evidence in these proceedings is upheld.

23. I note this ruling has been delivered after some considerable delay. This state of affairs was beyond the control of the trial judge who coincidentally got involved in other official duties in the intervening period. The delay is regretted.

Dated, signed and delivered at Kisii this 19th day of February, 2020.

A.K NDUNG’U

JUDGE

Nyambati, Advocate for the defendant

M/s Ondeyo holding brief Mugunya for plaintiff