



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 4 OF 2017

AHARUB EBRAHIM KATRI.....PLAINTIFF

VERSUS

NELSON MARWA.....DEFENDANT

RULING.

1. In the course of giving evidence, the plaintiff sought to produce:

- (a) press statement made on 14th January, 2017, extract from the Star and from the Baraka FM Web page – MFI P4
- (b) a video clip of various media houses – MFI P5.

2. This was objected to by the defence counsel on the grounds that:

- (a) the plaintiff is not the maker of the same.
- (b) the source has not been disclosed.
- (c) that the certificate of the person who produced them was not attached.

3. In response, the plaintiff's counsel submitted that the exhibit marked for identification No. 4 is an extract from a widely spread media, the Star Newspaper and Baraka FM which are widely read and listened to respectively and the video clip, marked for identification No.5, was uploaded from a website of the "Star Kenya" and a certificate to this effect filed under Section 106 (B) (4) of the Evidence Act, disclosing the source and the person who uploaded the same on 12th September, 2018.

4. I have considered the objection and response by both sides respectively and confirm that there are extracts, transcripts and video clips which were filed by the plaintiff among the list of exhibits intended to support his evidence.

5. In line with this, a certificate sworn by one Walter Budamba Kihuya on 11th September, 2018 was filed on 12th September, 2018 confirming that the electronic video evidence intended to be produced as exhibit was downloaded from his desktop ACER of Serial Number DTVK7EM00442203B2E9600 and You Tube Channel "The Star Kenya" on 14th January, 2017 (URL –<https://www.youtube.com/waph?v=3Rod6wrltj45feature=youtube>.)

6. In considering the objection and responses, I wish to restate the provisions of Section 106B of the Evidence Act on Admissibility of electronic records.

(1) Notwithstanding anything continued in this Act, any information contained in any electronic records, which is printed on a paper, stored, recorded or copied on optical or electro-magnet media produced by a computer (herein referred to as the computer output) shall be decreed 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 condition mentioned in sub-section (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 prior by a person having lawful control over the use of the computer.

(b) during the period, information of the law 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 what it was not operating or was out of operation doing that part of the period, was not such as to effect 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 functions 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 a combination of computer 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 whatsoever order, of one or more computers and one or more combinations of computers.

Then all computers used for the purpose during that period shall be operated for the purposes of this Section to constitute a single computer and references in the Section 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 during 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 Sub-section (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 Sub-section it shall be sufficient for a matter to be stated to 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 these activities.”

7. A reading through the provisions of this Section and going through the proceedings, the transcripts, extracts and video clips (material evidence) were duly filed in accordance with the provisions of Section 106B, and more particularly the provisions of Sub-section (4) of the said provision in the Evidence Act complied with by the filing of the certificate of Walter Budamba Kihuya dated 11th September, 2018. I also note that the defence has had sufficient time to prepare their case with regard to the said evidence.

8. In any case, the modern evidential rule as provided for under Article 159(2)(d) of the Constitution and Sections 1A, 1B and 3 of the Civil Procedure Act, is aimed at achieving substantive justice. It therefore frowns, on, among others, the exclusion of evidence by either party on the ground of technicalities. The main interest lies in according all parties a fair trial and the argument would be on the question of the weight of the evidence which should be tested in cross examination of the witnesses.

9. I therefore decline to uphold the objection by the defence and allow the plaintiff to produce the press statement made on 14th January, 2017 extract from the Star and FM the Baraka FM Website and video clips of various media houses which were marked for identifications P4 and P5 as Exhibits P4 and P5 respectively.

Ruling DELIVERED, SIGNED & DATED this 12th day of February, 2019.

D. CHEPKWONY

JUDGE.