



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 100 OF 2013

JEREMIAH NG'AYU KIONI.....PLAINTIFF

-VERSUS-

THE STANDARD MEDIA GROUP LTD.....1ST DEFENDANT

JUMA KWAYERA.....2ND DEFENDANT

RADIO AFRICA GROUP.....3RD DEFENDANT

MAINA KAGENI.....4TH DEFENDANT

DANIEL NDAMBUKI.....5TH DEFENDANT

ROYAL MEDIA SERVICES LTD.....6TH DEFENDANT

SWALEH MDOE.....7TH DEFENDANT

MEDIAMAX NETWORK LTD.....8TH DEFENDANT

ALPHONCE OLADIPO.....9TH DEFENDANT

BUNI LTD.....10TH DEFENDANT

NATION MEDIA GROUP.....11TH DEFENDANT

MOSES NGURE.....12TH DEFENDANT

RULING

1. This ruling is derived from objections raised by the 1st to 11th defendants' respective counsels before this court on 4th March, 2019 as concerns the production of certain documents by the plaintiff. On the mentioned date, the plaintiff gave evidence as PW 2 and sought to produce a Certificate for Proof of Electronic Records made by himself.
2. The said Certificate made reference to various compact discs annexed thereto and containing video and audio footage aired by the defendants. The plaintiff's case is premised on the fact that defamatory publications were made by the defendants against him.
3. *Mr. Mwangi* counsel for the 3rd, 4th and 5th defendants argued inter alia that the aforesaid Certificate was not signed by the person from whom the records were obtained as required under Section 106 of the Evidence Act, that the same does not indicate the device used in generating the recordings, neither does the said Certificate state that the records were generated in the ordinary course of operations of the particular device.
4. The said advocate also objected to the production of items 5, 6 and 7 (publications) listed in the plaintiff's supplementary list of documents on the basis that the same falls under electronic records and thus would require a Certificate pursuant to Section 106 abovementioned.
5. *Ms. Kemunto* advocate acting for the 11th defendant reinforced the arguments of her colleague that the Certificate as drawn and filed is not

in compliance with the relevant statutory provisions, hence the objection to the production of the compact discs.

6. On his part, *Mr. Munyori* counsel for the 6th and 7th defendants supported the objections raised, save to also object to certain items (3, 8, 15 and 18) listed in the plaintiff's supplementary list of documents for the reason that the same were not authored/made by the plaintiff.

7. *Mrs. Ochieng'* and *Mr. Awiti*, advocates for the 8th and 9th defendants, and the 10th defendant respectively, associated themselves with the objections raised by their counterparts.

8. In response, *Ms. Beneca* counsel for the plaintiff, submitted that Section 106 does not provide for mandatory compliance and in any case, PW 1 testified that his employer's services were rendered in generating the records. As concerns the other items objected to by the respective counsels, it is *Ms. Beneca's* contention that the same either form part of public documents or were ordinarily issued to a candidate or are certified documents.

9. I have carefully considered the arguments articulated by the parties. *Section 106B (1)* of the *Evidence Act* is clear as to the admissibility of electronic records whereas (2) makes provision for the conditions to be met for records of such nature to be admissible. These are:

(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.

10. From the foregoing, the plaintiff would be required to have met the above conditions for his electronic records to be admissible in court.

11. To begin with, while I have noted that the electronic evidence to be relied upon by the plaintiff is accompanied by a certificate as confirmed in the record, the defendants have challenged the veracity of the same on the ground that it was signed by the plaintiff, who did not obtain the said electronic records. I have looked at *Section 106B (4)* of the *Evidence Act* which provides as follows:

“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.”

12. Turning to the facts stated in the Certificate, it is asserted that the footage was downloaded by the plaintiff from the 6th defendant's YouTube channel on 5th March, 2013. The plaintiff further asserted that he engaged the services of a media-monitoring firm known as IPSOS LTD to authenticate the audio and video footage, and that the said footage was copied onto the Compact Disc.

13. In respect to the second condition, I have perused the filed Certificate and established that the plaintiff did not state the particulars of the device used in the production of the electronic records though he asserted that the footage was obtained from IPSOS LTD. Further to this, PW 1 who testified as an employee of IPSOS LTD stated that the footage was obtained from a computer belonging to the company, the details of which are not illustrated in the Certificate. In the circumstances, the particulars of the device remain unclear. It would therefore appear this condition has not been met.

14. In addressing my mind to the third condition, I am similarly required to consider the conditions set out under *Section 106B (2)* (supra). I have perused the Certificate filed and found no indication of the conditions set out in the above section, though I once again noted PW 1's evidence that IPSOS LTD carries the responsibility of monitoring what goes on in the media, in addition to obtaining videos on media coverage from its archives. Be that as it may, this is not in any way captured in the Certificate as statutorily required.

15. I have equally addressed my mind to the fourth condition. Therein lies the requirement that the person who signed the Certificate be a

person responsible for the operation of the relevant device or management of the same. In the present instance, it is the plaintiff who signed the Certificate and not PW 1 who would have been better placed to do so, given that he was said to be an employee of IPSOS LTD. In any event, it is PW 1 who was required to produce the audio and video footage and not the plaintiff. In the premises, the plaintiff was not the appropriate person to have signed and produced the Certificate.

16. Having arrived at the above finding in regards to the Certificate of Electronic Records, I shall now deal with the challenged items forming part of the plaintiff's supplementary list and bundle of documents. To begin with, the production of items 3 (confirmation letter from IEBC [Independent and Electoral Boundaries Commission]), 8 (twitter and facebook posts), 15 (copy of statement by the plaintiff captured in the Daily Nation on 11th March, 2013), 18 (copy of Form 36 for Ndaragwa Constituency) and 19 (list of Nyandarua County Polling Stations) were objected to for the reason that the plaintiff is not the maker thereof.

17. As concerns the above items, it is my opinion that items 3, 8 and 15 do not require calling of the makers and hence there is nothing hindering the plaintiff from filing copies of the same. However, as concerns items 18 and 19 mentioned hereinabove, I take the reasoned view that whereas the availed copies have been certified, the same carry confidential information and would thus require the makers to be called so as to produce them.

18. Items 5 (publication by the Star Newspaper dated 5th March, 2013), 6 (publication by the Star Newspaper dated 6th and 7th March, 2013) and 7 (a search from www.kenic.org.ke as proof of the registered domain for the star.co.ke) were also challenged on the basis that the same fall under electronic records, thus requiring a Certificate, whereas the plaintiff's counsel was convinced that primary documents and thus supported by the filed Certificate.

19. I make reference to Section 65 (5) of the Evidence Act on primary evidence which expresses the following:

“Notwithstanding anything contained in any other law for the time being in force—

(a) a micro-film of a document or the reproduction of the image or images embodied in such micro-film; or

(b) a facsimile copy of a document or an image of a document derived or captured from the original document; or

(c) a statement contained in a document and included in printed material produced by a computer (hereinafter referred to as a “computer print-out”),

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.”

20. To my mind, the aforementioned items constitute primary evidence. That being the case, Subsection (6) cited hereinabove requires the conditions set out in Section 106B (2) (supra) to be met. This goes to show that a Certificate ought to accompany such documentation for it to be admissible.

21. I have already established that the Certificate as filed does not meet the requisite conditions. Even if I had come to a contrary conclusion, it is my observation that the Certificate on record makes no reference to items 5-7, thereby causing them to be inadmissible as it were.

22. In the premises, I will allow the preliminary objections to the extent shown here above.

Dated, signed and delivered at NAIROBI this 3rd day of April, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st and 2nd Defendants

..... for the 3rd, 4th and 5th Defendants

..... for the 6th and 7th Defendants

..... for the 8th and 9th Defendants

..... for the 10th Defendant

..... for the 11th Defendant

..... for the 12th Defendant