



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 26 OF 2015

REPUBLIC..... PROSECUTION

VERSUS

ABDALLAH KAHI.....ACCUSED

RULING

1. PC Peter Kemei Kebenei, testifying as PW9. Produced two photographs as evidence which he stated had been processed by him from exposed films presented to him by one Samuel Kosgei of Vihiga Police Station. The said photographs were marked as Exhibit 1a and 1b to which Mr. Shifwoka, counsel for the accused person had no objection.

2. PW9 went ahead and produced a Certificate to that effect and to which production Mr. Shifwoka objected. He stated that none of the other witnesses referred to it including the investigating officer. He added that the Investigating Officer admitted on cross-examination that he had never seen any certificate or gazette notice accompanying the photographs. Mr. Shifwoka added that the certificate was an afterthought being produced in ambush and in an attempt to cover up any gaps or holes that the production may have dug up. He stated that admission of the Certificate was against Article 50 (2) (j) and (k) and 50 (6) of the Constitution of Kenya which states that documents that are to be relied on by the prosecution ought to be availed to the accused person before hearing. Mr. Shifwoka added that the certificate was produced after the objection which were to render the photographs inadmissible. He thus prayed that the certificate of the photographic evidence dated 17th May 2018 be rejected by this Court.

3. Mr. Ongige, prosecution counsel submitted that the objection was made in bad faith and argued that Mr. Shifwoka ought to have objected to the production of the photographs as the rules provide that the person producing photographic evidence must attach a certificate to the same. Mr. Ongige added that PW9 mentioned the gazette notice that appointed him and certified him as competent to produce the photographs. He argued that the production of the Certificate was not an afterthought as it had already been made and the officer producing the certificate being gazetted must have had the gazette notice at the time of processing the photographs. Mr. Ongige added that the certificate was produced in good faith and urged the court to admit the certificate.

4. In a rejoinder, Mr. Shifwoka stated that even when photographs have been produced, the mere production thereof does not make them admissible by the court. It is the Certificate that legitimizes the photos for the court to admit them as evidence. Mr. Shifwoka added that there was no gazette notice attached to the Certificate as required by section 78 of the Evidence Act. He added that the appointment of PW9 on 18.1.2010 by the Attorney-General is null and void as he ought to have been appointed by the DPP as prescribed under Section 78 of the Evidence Act and not the Attorney-General. He said the appointment was inappropriate and the certificate is to be disregarded and not admitted.

5. The main issue for determination is how photographic evidence ought to be admitted in court.

6. Section 78 of the Evidence Act, Cap 80 of the Laws of Kenya, provides as follows:

‘78. Photographic evidence—admissibility of certificate

(1) In criminal proceedings a certificate in the form in the First Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.

(2) The court may presume that the signature to any such certificate is genuine.

(3) When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it.

78A. Admissibility of electronic and digital evidence

(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) only on the ground that it is not in its original form.

(3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), 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.

(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 a 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.'

7. Before the amendment of Section 78 above vide the Statute Law (Miscellaneous Amendments) Act, 2012, the said section previously read as follows:

'(1) In criminal proceedings a certificate in the form in the schedule to this Act, given under the hand of an officer appointed by order of the Attorney-General for the purpose, who shall have preferred a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.

(2) The court shall presume that the signature to any such certificate is genuine.

(3) When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it.'

8. The High Court in *Erick Indimuli Siaya vs. Republic* [2016] eKLR, stated as follows on the said provisions, that: -

'Our understanding of the above provision is that photographic evidence may be admissible in criminal cases on condition that the photographic prints or enlargement have been prepared by an officer appointed by the Director of Public Prosecutions (hitherto by the Attorney General). The officer shall then be required to prepare a certificate to the effect that he produced the prints and enlargements from the exact film or any other annex where they were exposed. The certificate shall accompany the photographs at the time of production.

In the instant case unfortunately, the production of the photographs by PW6 was not accompanied by a certificate prepared by him pursuant to Section 78(1) of the Evidence Act. Furthermore, there was no evidence that PW6 was an appointed officer by the Director of Public Prosecutions specified under the said provision. In that respect, we hold that the photographs were not admissible in evidence and that it was an error on the part of the trial magistrate to admit them as evidence. A similar scenario was replicated in *John Kibii Langat vs Republic* [2005] eKLR in which a court of concurrent jurisdiction allowed the appeal for want of production of a certificate under Section 78 of the Evidence Act.'

9. In another case, *Republic vs. Jackson Ngara Nderitu* [2018] eKLR, it was stated that:

'...It appears to me that s. 78 sets out the manner in which photographic evidence may be admitted in evidence in criminal proceedings.

i. It will be through a certificate in the prescribed form;

ii. The certificate must be by an officer appointed for that purpose by the DPP. This appears to be the basis for gazetting of scenes of crime personnel:

iii. This certificate to certify that the officer, either

a) prepared the photographic print or prints, or

b) prepared or as we used to say 'developed' the photographic enlargements from exposed film submitted to him by may have taken the photographs.

Meaning he may take the photographs himself or receive film from which he would prepare the photographic print. This photographic evidence must be accompanied by his certificate in the prescribed form.

There appears to be at least two positions on this issue.

That the person who took the photos could testify as to their veracity and contents because that would be primary evidence. In State v Nelson Otieno Odira & another [2014] eKLR the argument by the prosecution was that the investigating officer had taken the photos and hence was the right person to produce them. The defence argued that the said investigating officer did not have the requisite authority of the DPP and was not authorised to take the said photos. In rejecting the objection by the defence Majanja J stated;

‘The general principle of evidence is that the maker of the document is the person to prove the contents of the documents. Sections 64 and 65 of the Evidence Act provide that a document may be proved by either primary or secondary evidence. Section 66 of the Evidence Act provides for instances where secondary evidence may be given for example by way of proof of certified copies. A reading of section 78 shows that the exception in relation to photographic evidence is specific to the terms thereof. The purpose of section 78 of the Act is to enable the court admit photographic evidence without calling the maker if certain requirements of the Act have been met. The section is not authority or it does not provide authority for the Director of Public Prosecution to permit only certain officers to take photographs and produce them in evidence. Section 78 deals with production of photographic evidence in court and provides photographs taken by officers may be produced without calling the officer taking the photographs if the conditions specified in the section are met. Hence the requirement of subsection (2) and (3) of the Act which tend to buttress the issue of authenticity of the photographs. In any other case, any officer who has taken a photograph may testify as to its veracity and contents as the same is primary evidence and subjected to testing by cross-examination by the accused’s counsel. (emphasis added).’

Another position is that without the certificate the photos are inadmissible. In Francis Gachihi Mburu & 2 others v Republic [2016] eKLR similar issues arose. Justice HPG Waweru allowed the appeals on the ground that section 78 of the Evidence Act had not been complied with. He stated and I quote;

‘What happened in the present case? The photographs by which the stolen animals and the two dead kids were identified by their owners and other witnesses were not produced in evidence by the scenes of crime officer who took and/or printed them. They were instead produced by PW10 (Cpl Bernard Kiminya), the investigating officer. There was no certificate under section 78(1) aforesaid of the Evidence Act produced which would have rendered the photographs admissible in law. As it was, those photographs, which provided the only link between the stolen animals and the dead kids and their owners and other witnesses, were not properly admitted in evidence, and it matters not that the Appellants (who were not defended) did not object to their production by PW10. The certificate under section 78(1) was an express requirement of the law and the absence of it could not, in effect, be consented to by the Appellants, particularly when they were unrepresented.

The effect of this is that the stolen animals and dead kids were not properly identified in law by their owners and other witnesses.’

‘...I am of the view that section 78 lays the law on how photographic evidence will be admitted in evidence. The photos may be taken by gazetted officer or any other officer. The officer who took them is a competent witness who ought to testify as to their veracity and contents. However, in both cases the production of those photos must be accompanied by the scenes of crimes officer’s certificate that he either took the photos or developed them from whichever source. In the absence of the scenes of crimes officer someone else could produce the certificate on their behalf but the court is at liberty to call him for cross examination if necessary.

The investigating officer herein could have submitted whatever evidence they had collected at the scene to a gazetted officer who would then have prepared it in the requisite manner and certified the same as required by law. She did not do that.

She could also have secured the scene for the scenes of crimes officers to visit as soon as they arrived from the other engagements. If the idea was to simply demonstrate the injuries on the body of the deceased, the scenes of crime personnel could still have taken photos of the injuries from the mortuary.

From the foregoing the submissions by the state that they did everything possible to get this evidence to court in the requisite manner are not tenable. Section 78(1) is couched in mandatory terms. There is no skirting around it.’

10. I find that PW9 rightly produced the photographs together with the certificate as premised by Section 78 of the Evidence Act. The fact that he was appointed by the Attorney-General and not the Director of Public Prosecutions as it was before does not render the photographs inadmissible. In any case, the Attorney General had similar powers then to appoint such officers to take or produce photographic evidence. The photographs could only be inadmissible had the witness failed to produce the certificate or the authenticity of his signature be put to question, which is not the case.

11. It is my conclusion that the impugned photographs were properly produced before court and are admissible as evidence. They shall accordingly be marked as exhibits.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF June, 2019

W MUSYOKA

JUDGE