



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO 6 OF 2017

IN THE MATTER OF PARLIAMENTARY ELECTION FOR TARBAJ CONSTITUENCY (WAJIR COUNTY)

BETWEEN

IDRIS ABDI ABDULLAHI.....PETITIONER

VERSUS

AHMED BASHANE.....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC)...2ND RESPONDENT

RETURNING OFFICER TARBAJ CONSTITUENCY.....3RD RESPONDENT

RULING (7)

INTRODUCTION

The Petitioner through Counsel requested the Court to play the CD video recording marked **AIA-10** to be admitted as evidence to prove the matter as pleaded in **paragraph 42** of the Petition filed on 5th September 2017.

The Petitioner deposed in his Supporting Affidavit filed on the same date with the petition; that the 1st Respondent was at all times seen to campaign using the Jubilee colors and even wore Jubilee Party clothing during the campaigns purporting to be the candidate of Jubilee Party for the position of Member of National Assembly and yet the 1st Respondent was nominated under the PDR party and not the Jubilee Party.

(Annexed and marked **AIA-10** are photographs of the 1st Respondent and videos of campaigns of the PDR party during campaigns)

RESPONDENTS' OBJECTIONS

The 2nd and 3rd Respondents through Counsel informed Court that they adopted and relied on the 1st Respondents submissions on the objection. The 1st Respondent's Counsel objected to production of the CD video recording on the following grounds; he contended that the CD video recording was not accompanied by the certificate which is required as prescribed by **Section 106 B of Evidence Act Cap 80** which deals with admissibility of electronic records. **Section 106 B(4) of the Act** is couched in mandatory terms that a certificate is issued in order to have electronic records admitted in evidence.

Secondly, although the Petitioner's paragraph 42 of his Supporting Affidavit alluded to annexure **AIA-10** photographs and CD video recording they were not produced at the time the Petition was filed. To date, the photographs have not been produced as deposed by the Petitioner.

Thirdly, the Petitioner took the stand and testified in Court, he did not produce any certificate for electronic evidence, he did not mention or refer to the said evidence until he closed his case.

Fourthly; the necessity to produce the certificate of electronic records is that it must be by a person responsible in the management of the electronic record and it is to safeguard the electronic record because it may be manipulated. The certificate would identify the electronic record containing the statement and describing the manner in which it was produced. The certificate ought to be signed by a person occupying a responsible position in relation to the operation of the relevant device.

Fifthly, the 1st Respondent relied on the following cases to buttress the same point, that to rely on an electronic record as admissible in Court; one must provide a certificate.

The Petitioner through the Chief Campaign Manager desired to produce a CD as part of his evidence. The Respondent objected on the basis that; ‘the particulars of the device used by the witness to develop CD had not been disclosed as required by **Section 106B**, the certificate accompanying the CD had not been produced and that the Petitioner had not discharged the burden imposed on him by **Section 107 of the Evidence Act.**’

The Respondent took the view that; ‘the device used to capture the information was the witness’s own handset and with regard to the certificate the affidavit verifying video recording should [have] been taken to be the certificate’

Hon Justice A. Muchelule held;

‘Coming back to Section 106B(4)...The petitioner has to show that it [verifying affidavit that is taken to be a certificate]meets the conditions set in Subsection 2.and in (a) & (b) of Subsection 4 of [Section 106B of the Evidence Act.] From the evidence of PW7 it does appear that the video was first recorded and saved in internal memory of the phone. The phone must then have been connected to a computer using a micro USB data cable; the video file was accessed from a computer through the cable; the file copied to the computer hard disc; an empty CD was inserted into computer’s CD –writer RAM; and the video file was then written on the CD as a VCD using a CD writing software. PW7 maybe the owner of the phone handset, but said nothing about its working condition.There was no evidence regarding computer used, its condition or reliability.’

Relying on the case of **REPUBLIC vs BARISA WAYU MATUGUDA [2011]eKLR** which stated that without the required certificate [**SECTION 106 B**] the CD was inadmissible.

The same principle was espoused in **NONNY GATHONI NJENGA & JANE WAMBUI ODEWALE & 2 OTHERS CIVIL CASE 490 OF 2013** as follows;

However in the interest of justice, it is in my view that the Plaintiffs are at liberty to produce such certificate for the admissibility of the said evidence. When that is done, the Court will be able to examine the evidence and evaluate the probative value of the said DVDs as well as authenticity. The Respondent alleged that the CDs were obtained illegally, however. That cannot be ascertained at this stage until the certificate is filed and the Court is able to determine the source of the DVDs.

In the case of;

NDWIGA STEVE MBOGO vs IEBC & 2 OTHERS ELECTION PETITION NUMBER 10 OF 2017

Relying on **Section 78A (3) (a) of the Evidence Act and Section 106 B (2) of the same Act** the Trial Court stated as follows;

In my considered opinion, the Petitioner failed to show that the videos he seeks to produce in evidence were reproduced or were derived from information fed into the laptop used in the ordinary course of activities by the person who downloaded them... she confirmed that she had never uploaded any videos to Face book or Utube. She did not say it was part of her ordinary activities to download videos...in any event [they] were merely copying what someone else had produced. Neither of them was the originator of the contents of the video...At the moment, there is a huge gap between the equipment used to produce the original video shoot and the Facebook as well as Utube accounts from they obtained the materials.

PETITIONER’S RESPONSE:

The Petitioner through Counsel relied on **Section 78 1A of the Evidence Act** in addressing admissibility of the video recording which states that in any legal proceedings electronic messages and digital material shall be admissible as evidence.

In **Section 78 (2)b of the Act**, it prescribes that the Court shall not deny admissibility of evidence under Sub section(1) only on the ground that it is not in its original form. The Petitioner stated that the CD video recording was obtained by the Petitioner and was served with the Petition and Supporting affidavit and it was adopted and the Respondents had the opportunity to cross examine the Petitioner on the evidence and they did not address that issue.

The video sought to be played is a video published by 1st Respondent and was derived from his social media portal and when the CD video recording was produced the source of the video was not impugned.

The requirement for certificate for the video recording is not substantive but a procedural and technical issue and the substance of it is not impugned it is the procedure of producing it that is what is being challenged.

This Court discerned the issues of procedure at the very beginning in reliance of **Rule 5 of the Elections (Parliamentary& County) Election Petition Rules 2017** which states;

The effect of any failure to comply with these Rules shall be a matter for determination at the Court’s discretion subject to the provisions of Article 159 (2) (d) of the Constitution.

Article 159 2(d) of COK 2010 prescribes;

2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

1(d) Justice shall be administered without undue regard to procedural technicalities; and

The Petitioner stated that the substantive justice takes priority to the procedural and technical aspects of the law as mandated by the above cited law.

If the Court denies admissibility of the CD video recording it will amount to denying the Court the opportunity to conclusively address the issue that the 1st Respondent campaigned in Jubilee coloured attire and he was a PDR Party candidate and this is the best evidence to prove so. This fact misled the public to voting for him as the Jubilee candidate.

The Petitioner relied on the case of **NONNY GATHONI NJENGA & JANE WAMBUI ODEWALE & 2 OTHERS CIVIL CASE 490 OF 2013** supra where the Trial Court stated that in the interest of justice the Plaintiffs were at liberty to produce a certificate for admissibility of the video-recording.

The Petitioner informed the Court that the CD video recording was not produced now but was produced earlier albeit without a certificate and each party to the proceedings and the Court obtained a copy to prove what is deposed in paragraph 42 of his Supporting affidavit.

The Petitioner relied on **Section 78A of the Evidence Act** on admissibility of electronic and digital evidence and the Court should admit the recording as greater prejudice will be occasioned if the same is not admitted. The Petitioner stated that no prejudice would be occasioned by admitting the CD video recording as it is about substantive justice and not procedure and the Court may set any conditions necessary to admit the same.

The Respondents replied to the submissions as follows;

The requirement of the certificate is mandatory under **Section 106B of the Evidence Act**. The Petitioner had various opportunities during trial to produce the certificate with the CD video recording; at the time of filing petition, at the time of filing the Supplementary affidavit, during the Pre-Conference proceedings, when the Petitioner adduced evidence and to date the certificate was not filed. The Petitioner did not provide any explanation why the certificate was not attached or produced in court.

Rule 5 of the Elections (Parliamentary & County) Election Petition Rules 2017 is contained in subsidiary legislation which cannot override the mandatory provisions of **Sections 78A & 106B of the Evidence Act**.

DETERMINATION:

The issue is whether the CD video recording marked AIA -10 referred to in the Petitioner's Supporting Affidavit at paragraph 42 should or should not be admitted as evidence to be played and seen by the Court in the presence of parties.

The Court record confirms as follows;

On 5th September 2017 when the Petition Supporting affidavit and annexure were filed the CD recording and photographs marked AIA-10 were not attached or produced. It was availed pursuant to leave granted to file Supplementary affidavit on 24th October 2017 and the copy of the CD recording for this Court was to be given to the DR Family Division for safe custody until the closure of hearing and the parties would address the Court on admissibility of the recording as evidence in Court. Therefore, neither of the parties the Petitioner nor the Respondents had the opportunity to raise issue(s) regarding the CD video recording until it was admitted as evidence in Court.

The 2nd related issue is whether in spite of the Petitioner not producing a certificate with the CD video recording the same may still be admitted as evidence;

The relevant law on the matter is as follows;

The evidence Act;

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.....

106B. Admissibility of electronic records

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.....

Section 106 4 (a)- (d) Evidence Act Cap 80;

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 ...identifying the electronic record, giving such particulars of any device involved in production of the electronic record..... purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device... shall be provided.

From the above legal provisions, and cited authorities by the Respondent, the law requires that **Section 78 A and 106 B of the Act** are read conjunctively and complied with. The CD video recording in this case is both an electronic record and provides electronic and digital evidence. Therefore it ought to be produced with a certificate as provided by **Section 106B of the Act**, and fulfills the requirements of authenticity and validity of the information and/or evidence contained in the said CD video recording. The certificate shall contain information that complies with Section 78A(3) of the Act. The certificate shall provide vital information as to the source, process and delivery of the electronic record or evidence to the Court and parties so as to enable admission of the electronic record as evidence. The content of the certificate would aid and satisfy the court as to reliability of generation of the electronic record/evidence; the integrity of the process and the origin of the content.

Therefore, although the requirement of the certificate is a procedural and technical matter, **Section 106B (4) of the Act** is mandatory and cannot be ousted by **Article 159 (2) (d) of COK2010**. The Constitution of Kenya is supreme law but in application of **Article 159 2(d)** matters of form the Court may rely on the provision. This Court finds that the mandatory Provisions of the Evidence Act are about form and substance. Before the Court can admit electronic records/evidence a certificate is mandatory to confirm source, process, custody and delivery of the said electronic record before admission so as to preempt manipulation of the record.

The CD video recording in the instant case ought to have the certificate that will confirm its authenticity and integrity before admission as such evidence shall also establish the validity and integrity of the election process in these proceedings.

The Petitioner stated that in light of the **NONNY GATHONI NJENGA & JANE WAMBUI ODEWALE & 2 OTHERS CIVIL CASE 490 OF 2013**, the Petitioner maybe given time to provide the certificate. In the circumstances of this case; that will be impossible; because, the certificate would be prepared now after the issue is raised in Court and its content shall be difficult for parties to verify the validity and integrity of the certificate. Finally, it is at the tail end of the election proceedings which are Statutorily time bound and the request cannot be accommodated. A certificate at this stage would an after thought.

The upshot of the application, submissions and cited legal provisions and cases, this Court concurs with **WILLIAM ODHIAMBO ODUOL vs IEBC & 2 OTHERS ELECTION PETITION 2 OF 2012 HCT KISUMU supra** and other authorities on the same point;

The certificate is mandatory requirement in the absence of which the CD video recording cannot be admitted as evidence. The objection to production of the CD video recording is upheld. It shall not form part of the evidence in these proceedings.

DELIVERED DATED & SIGNED IN OPEN COURT ON 8TH FEBRUARY 2018

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR GITONGA FOR PETITIONER

MR NGACHA FOR 1ST RESPONDENT

MR OLAHA FOR 2ND & 3RD RESPONDENTS