

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. E251 OF 2022

ISLAMIC RELIEF KENYA..... PLAINTIFF

-VERSUS-

ALEX KIBOR 1ST DEFENDANT

EVANS KIPTOO 2ND DEFENDANT

RULING

1. **Islamic Relief Kenya**, (*hereafter the Plaintiff*) filed suit against **Alex Kibor** and **Evans Kiptoo** (*hereafter the 1st & 2nd Defendant/Defendants*) on a cause of action founded on fraud, willful negligence, breach of fiduciary duty and abuse of office wherein it sought judgment as against the Defendants jointly and severally by way of-;

a. *Compensation for the financial losses suffered by the organization in the sum of Kshs. 66,100,613.36/-;*

b. *A permanent injunction order that the assets purchased using the proceeds of the Defendant's fraud against the organization including motor vehicle registration No. KCU 797S, a maisonette erected on Plot Number Ruiru/Kiu/Block 2/2889 situate in Ruiru as identified by the forensic report dated 19/12/2019 be sold and the proceeds be remitted to the Plaintiff;*

c. *General damages for breach of fiduciary duty and breach of trust;*

- d. Special damages in the sum of Kshs. 2,000,000/- being the costs incurred by the organization in relation to the matter;*
- e. Interest on special damages at such rate and for such period as the Court may deem fit;*
- f. Costs of the suit; and*
- g. Any other relief as the honorable Court may deem fit.*

2. The 1st Defendant filed a statement of defence denying the key averments in the plaint.
3. Similarly, the 2nd Defendant also filed a statement of defence denying the key averments in the plaint meanwhile put the Plaintiff to strict proof of the averment in its plaint.
4. The suit commenced for hearing of the Plaintiff's case on 24/09/2024 wherein one **Abdirashid Yusu Elmi** testified as **PW1**. Thereafter, on 11/06/2025 and 30/10/2025, **Antony Ngige** testified as **PW2**. The gist of **PW2's** evidence was premised on an expert report dated 19/12/2019 being Forensic Audit & Investigation of the Islamic Relief Kenya, Kilifi Office, which formed the Plaintiff's Further List of Documents dated 24/06/2025.
5. Upon the conclusion of **PW2's** evidence in chief, counsel for the 1st Defendant raised an objection towards production of the said report dated 19/12/2019 on grounds that the report lacked a certificate of electronic evidence and the certificate dated 24/06/2025 attached to the report was deposed by someone else whereas no certificate of electronic evidence had been evinced by **PW2**.

6. Adjunctly, counsel to the 2nd Defendant equally objected to the report's production on grounds that the person adducing the report is the one to depose the certificate of electronic evidence. Counsel further urged the Court to expunge **PW2's** evidence from the record as he has yet to be served with a certificate of electronic evidence in compliance with provisions of the **Evidence Act**.
7. In response, counsel for the Plaintiff, while placing reliance on **Section 106B** of the **Evidence Act**, argued that the purpose the certificate of electronic evidence ought to be made and sworn by the person who printed the document in question as may concern the fact that the same had been printed out and sent for purposes of being adduced as evidence in Court; That the printing device that was used is certified by the certificate is not the expert who adduced the document in Court. Counsel maintained that the document was duly served upon respective counsel.
8. In rejoinder, counsel for the 1st Defendant contended that the issue is how the report came about by witness analysis and using a device to come up with a report. He argued that the report was typed and the author presumably signed it. He further stated that the document in question was electronically printed in its office and shared by email whereas the document becomes original so long as it has the certificate. The difficulty is that the witness cannot testify on how the report was made, gadgets used and *et cetera*.
9. Equally, in riposte, counsel for the 2nd Defendant maintained that the report was printed and shared electronically from his

counsel's office and the original report was in custody of the witness, **PW2**.

10. Upon the closing of oral arguments from the bar, this Court directed that it would deliver a ruling on the objection raised by the Defendants, concerning production of the report, which arguments, I have duly considered. Consequently, this Court postulates that the sole issue for **determination concern-**:

a) *Whether the Expert report dated 19/12/2019 ought to be admitted into evidence?*

Whether the expert report dated 19/12/2019 ought to be admitted into evidence?

11. As concerns admissibility of electronic records, the same is codified in **Sections 106A** and **106B** of the **Evidence Act**. **Section 106A** succinctly provides that electronic records may be proved in accordance with the provisions of **Section 106B** of the **Evidence Act**.

Section 106B of the **Evidence Act** provides that-:

“(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.

(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 sub section (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 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 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)...”

12. Meanwhile, **Section 65(8)** of the **Evidence Act** provides that -:

“(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.”

13. Notably, the above provisions must equally be juxtaposed as against **Section 78A** of the **Evidence Act** which provides that-;

(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

14. Here, it must be remembered that **PW2** testified in his capacity as an expert witness concerning the Forensic Audit & Investigation of the Islamic Relief Kenya, Kilifi Office. His professional and academic credentials were duly captured in the tail end of the said report in question. **Section 35** of the **Evidence Act** provides for admissibility of documentary evidence as to facts in issue.

15. Further, it is not in dispute that the report was prepared and or authored by **PW2**. However, what I garner from the Defendants objection is that they appear to conflate the issue as pertains to the generation of the report and production of the report in question.
16. At the risk of repetition, **PW2** testified on the premises of a report he authored and prepared himself upon conducting laborious investigations and gathering of material towards composition of the said report. While the report itself referenced source data from an array of documentary evidence & electronic and digital evidence, the report itself was not an electronic record nevertheless was composed upon reliance from information and data from electronic and digital evidence.
17. While it necessitates mentioning that what was filed before the Court was a photostat of presumably the original report, likewise the Defendants must have been served with either photostat or duplicates of the original report. In any event they do not dispute non-service of the said report therefore for all intents and purposes they had the benefit of the report as at when **PW2** took the stand to render his evidence.
18. As earlier stated, why do I state that the Defendants appear to conflate issues? The Defendants vehemently took issue with the fact that the certificate of electronic evidence/affidavit was prepared by **Simon Mukabane** dated 24/06/2025 who is an officer in the Plaintiffs law firm, a fact not disputed. Notably, in the said certificate, the deponent captures at Paragraphs **3, 4 & 5** thereof, that he received the report and proceeded to print out the same using devices within his possession and of regular use.

19. In my view the said certificate complied with **Section 65(8)** of the **Evidence Act** whereas the deponent needed not reference **Section 106B** of the **Act** in preparation of the same.
20. Pertinently, a distinction must be made between “electronic record” and “electronic and digital evidence”. Conspicuously, the **Evidence Act** does not define either. However, it must be stated that terms are related but not synonymous. Why do I say so, the latter may mean the former whereas the former encapsulates the latter, in different scenarios.
21. **Lexis Nexis at Item 64 (2025)**: On a commentary of **Halsbury’s Laws of England, Volume 11(2020) Para. 1-496**, On admissibility of electronic documents and related certificates states that-;
- “in any legal proceedings, an electronic document is admissible in evidence in relation to any question as to the authenticity of an electronic transaction. For these purposes, an electronic document is anything stored in electronic form, including text or sound and visual or audiovisual recording”*
22. To the foregoing end as to the purport of a certificate of electronic evidence, the Court of Appeal in **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] KECA 397 (KLR)** while discussing the application of **Section 106B** observed 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”.

23. The Court proceeded to consider the requisite contents of a certificate meeting the conditions in the section before stating that:-

“The Evidence Act does not provide the format the certificate required under sub-section 106B (2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.”

24. Similarly, in **John Lokitare Lodinyo v Independent Electoral and Boundaries Commission & 2 others [2018] KECA 439 (KLR)** the Court of Appeal in reiterating its above decision stated that:

“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... 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.

25. Applying my mind to the above provisions and aforecaptioned dicta, it necessitates reminder that the report was an expert report prepared by the **PW2** in documentary form for ease of evidentiary production. **PW2's** evidence complied with **Section 35** of the **Evidence Act**. As to the certificate of electronic evidence attached to the report the same was in compliance with **Section 65(8)** of the **Act**. Whereas I note that the report contained excerpts of "electronic and digital evidence", the Defendants will have the liberty to cross-examine **PW2** as to the contents of the report and or whether there was compliance with **Section 106B** with specificity to the "electronic and digital evidence" encompassed and or populated therein towards preparation of the said report.
26. **In the end, I reasonably believe the Defendants objection is not well taken and the same is dismissed.**

The only rider that I may add is that Defendants before cross-examination must confirm that they have the entirety/complete report inclusive of the appendixes and schedules attached thereto for their benefit. Whereafter upon the close of the Plaintiff's case, this Court directs that the Plaintiff do furnish the court with the original report for its benefit together with the appendixes and schedules referenced in the report.

Orders Accordingly

Delivered Dated and Signed at Nairobi this 6th day of November, 2025.

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JANET MULWA.

JUDGE