IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT NJOMBE

MISCELLANEOUS CIVIL CAUSE NO. 6 OF 2015

IN THE MATTER OF ELECTION PETITION UNDER THE NATIONAL ELECTIONS ACT (CAP. 343 R.E. 2010) AND THE NATIONAL ELECTIONS (ELECTION PETITIONS) RULES, 2010

BETWEEN

EMMANUEL GODFREY MASONGA ..... PETITIONER

AND

EDWARD FRANZ MWALONGO
THE RETURNING OFFICER OF NJOMBE TOWNSHIP COUNCIL
THE HONOURABLE ATTORNEY GENERAL } **..... RESPONDENTS**

30th March & 4th April, 2016

RULING

MWAMBEGELE, J.:

This is a ruling in respect of an objection raised by the respondents against the production and admission in evidence of an electronic data; a Video Compact Disc (VCD) containing, allegedly, an episode captured on 05.09.2015

during the 2015 Parliamentary Election Campaigns in the Njombe Mjini Constituency. What transpired in court is that one George Menson Sanga who is the sixth witness for the petitioner (PW6), having testified-in-chief by tendering in court an affidavit thereof as required by the provisions of rule 21A of the National Elections (Election Petitions) Rules, 2010 – GN No. 447 of 2010 as amended by the National Elections (Election Petitions) (Amendment) Rules, 2012 – GN No. 106 of 2012, sought to tender the video CD as exhibit in support of what he deponed in the affidavit; his evidence-in-chief. PW6, in an attempt to corroborate his testimony that one Nolasco Lihawa Malipula, member of the first respondent's Election Campaign Team, had uttered discriminatory words against the petitioner along tribal, residence, marital and social status lines, is recorded by the court as saying:

> "I pray to tender the CD as exhibit so that it is played in court. The mobile phone with which I used to record it got lost but I had sent it to Emmanuel Masonga before it got lost. Later Mr. Masonga returned to me the clip and I have made CDs which can be played in court."

It is worth noting that the five witnesses for the petitioner, including the petitioner himself, had all testified on such statements by either their word of mouth or what actually they heard as stated in their respective testimonies and the petition itself. It was not until PW6 entered the witness box, on the same attempt to prove that the said words were indeed uttered, when he sought to tender the electronic data in corroboration of the averment.

The prayer met a stern objection from Mr. Samson Rutebuka, learned counsel for the first respondent as well as from Mr. Ntuli Mwakahesya, assisted by Mr. Abubakar Mrisha, learned senior state attorneys based in Dar es Salaam, representing the second and third respondents.

The objection by the respondents is, mainly, predicated upon the provisions of section 18 (2) (a), (b) and (c) of the Electronic Transactions Act, 2015 (henceforth "the Electronic Transactions Act"). Their doubts are primarily premised on two main grounds; namely, the reliability and authenticity of the electronic data intended to be tendered. The doubts with regard to reliability of the said video clip are summarized in their arguments as follows: They argue that by virtue of section 18 (1) of the Electronic Transactions Act, electronic data is admissible in evidence but subject to the conditions provided for under subsection (2) of the section. They argue further that the VCD sought to be tendered in evidence does not meet the conditions set out in subsection (2) of section 18 of the Electronic Transactions Act. The learned counsel for the respondents state that PW6 recorded the event on 05.09.2015 and that the phone with which he used to take and record the event got lost but that he had already sent the clip to Emmanuel Masonga; the petitioner, who later returned it to him from which the VCD was made by means of a computer. With the present technology in place, they argue, programmes like Movie-Maker and Adobe Photoshop, one can easily manipulate the contents of any electronic data. They thus doubt the reliability of the manner in which the electronic data sought to be tendered was generated, stored and communicated as no evidence has been led to prove that the computer from which the VCD was made could not be accessed by any other person. Neither can it be said that the manner in which it was communicated from PW6 to the petitioner and back to PW6 was

such that any possibilities of manipulation could be excluded, they argue. In the premises, nobody can be sure if what was said at the *locus in quo* is what has been recorded in the VCD sought to be tendered, they argue.

To reinforce the above arguments, the learned counsel for the first respondent cited ***Exim Bank (T) Ltd Vs Kilimanjaro Coffee Company***, Commercial Case No. 29 of 2011 (Unreported); at page 7 of the typed judgment.

The respondents' lawyers also state that the authenticity of the electronic data sought to be tendered leaves a lot to be desired on the grounds; firstly, that the brand of the cell phone was not indentified and that the witness has not stated in the affidavit if the cell phone was functioning properly thereby rendering the VCD inadmissible under subsection (3) of section 18 of the Electronic Transactions Act and that, under the subsection, the VCD cannot be admissible because it was not made by the first respondent who is an adverse party to the person seeking to tender it. And that neither can it be admissible under subsection (3) (c) as the witness was acting under the control of the petitioner. They also doubt the fact that the phone had been lost in that there is no scintilla of evidence to prove that fact; no police loss report regarding its loss has been tendered.

Mr. Mwakahesya, learned senior state attorney, having conceded to and amplified what had been submitted by Mr. Rutebuka, learned counsel for the first respondent, had additional points to make. First, that we cannot be sure that PW6 is the originator of the electronic data sought to be tendered because it has not been stated so in the petition. The learned senior state attorney, demonstrated that it is stated at para 7 (b) of the petition that the

clip was taken "by one of the people attending the said meeting at Igoma Village" without making reference to PW6. The learned senior state attorney added that in the verification clause, the petitioner states that he got the information regarding the words referred to at para 7 (b) from Asheri Machela, Leo Zacharia Makalawa and Cladius Cosmas Msemwa. The witness (PW6) has not been mentioned thus rendering it being highly doubtful if PW6 is the originator of the data, he argued.

Secondly, Mr. Mwakahesya, learned senior state attorney, argues that the VCD sought to be tendered is a document as per section 42 of the Electronic Transactions Act, which amended the Evidence Act on the definition of the term "document". In that regard, he contended, the best evidence rule requires that the original of the document must be tendered. In this case, it is the hard drive of the phone itself which is the original. By taking the same from the hard drive of the phone to the memory card changed the same to secondary evidence. Thus, the provisions of section 67 (c) of the Evidence Act ought to have been complied with; no evidence to verify that it had been lost.

Thirdly, Mr. Mwakahesya, learned senior state attorney added that the chain of custody of the electronic data sought to be tendered are such that it leaves doubts that it could not be accessed by any other person and thus leaving a lot to be desired because possibilities of the VCD being tampered with are not eliminated.

It is on the basis of such cumulative arguments that the learned minds for the three respondents maintain doubts against the admissibility of the VCD and they insist that it fails to meet the test of authenticity and reliability as

dictated by the provisions of the Electronic Transactions Act and therefore should be rejected.

Rejoining, Mr. Swalle, learned counsel for the petitioner, kicked off by a concession and stating the obvious that electronic evidence is admissible in any legal proceedings under section 18 (1) of the Electronic Transactions Act. The area of controversy, he argued, and in my opinion rightly so, is on the criteria on which the same can be admissible; as provided for under section 18 (2) of the Electronic Transactions Act. The learned counsel challenged the learned counsel for the respondents for not supporting their contentions in support of their arguments under section 18 (2) (a) of the Electronic Transactions Act with any case law. His response was in effect that such doubts as to reliability and authenticity of the VCD were based on both counsel's own opinion; not backed by any authority and therefore unfounded. The learned counsel has, generally, stated that the respondents have doubted on the storage of the electronic data intended to be tendered in evidence but, unfortunately, they have not told the court the manner in which it (the VCD/electronic record) ought to have been appositely stored to preserve its integrity.

On the requirement under section 9 (1) (c) of the Electronic Transactions Act, Mr. Swalle, learned counsel, argued that the learned counsel for the respondents have misconstrued the facts because it is clear from the affidavit of PW6 that the VCD was recorded on 05.9.2015 at Igoma Village within the Iwungilo Ward during the CCM campaign meeting. He argued further that the doubts against the originator are equally unfounded because PW6 recorded the same while proceeding to his usual business of planning for

campaigns and that PW6 being a member of CHADEMA does not show any interest with the petitioner.

On the ***Exim Bank*** case, the learned counsel stated that it is not relevant in the instant case because, first, it involved bankers' books which is not the case in the case at hand and, secondly, it was decided before the enactment of the Electronic Transactions Act in 2015. In the premises, the principle sought to be advanced which the learned counsel for the first respondent stated is at page 7 of the typed judgment, is not applicable in the instant case.

On section 18 (2) (c) of the Electronic Transactions Act, Mr. Swalle, learned counsel, stated that PW6 had not any interest to serve in recording the data as he stated in his evidence in chief what he heard and presented the VCD to verify what he earlier stated. The learned counsel thought that that is enough evidence to show that the VCD was admissible.

With regard to section 18 (3) of the Electronic Transactions Act, 2015 the learned counsel stated that the VCD is authentic and that the recording device was working properly well and also that it did not affect the recording of the electronic data; otherwise, PW6, who was under oath would have stated so explicitly. On section 18 (3) (b) of the Electronic Transactions Act, the learned counsel stated that the recorder of the electronic data is not a party to these proceedings; thus it is admissible. On the allegations hinging on section 18 (3) (c), he stated that the witness (PW6) recorded the incident on his usual ordinary course of business; he was not sent to the said meeting at Igoma by the petitioner. He conceded that no Police Loss Report has been produced to substantiate the loss of the cell phone used to record the data

but he was quick to state that the fact that the witness has stated about the loss under oath in the affidavit, is sufficient. He added that PW6 was not in court to serve the interest of the petitioner but to help the court administer justice by reaching a just and fair decision. The learned counsel challenged the learned counsel for the respondents that they should use their opportunity in cross-examining PW6 and that they will realize in that process that he had come to help the court meet the ends of justice.

The learned counsel stated in conclusion that since the law talks about and allows admissibility of data message, he did not see any reason to produce the original cell phone in evidence. He finally stated that the criteria for admission of the VCD have been met and prayed that it should be admitted in evidence as exhibit.

I have keenly heard and followed the contending learned arguments by the trained minds for the parties; those of the learned counsel for the petitioner on the one hand and those of the learned counsel for the first respondent and the learned senior state attorneys for the second and third respondents. I must state at the outset that though the arguments are light in terms of authorities back-up, they are not light in substance. Of course, as rightly hinted by Mr. Mwakahesya, learned senior state attorney, for which they can be forgiven for such misfit, the literature on the field is so scarce in this jurisdiction. I, however add here that the dearth of literature and or authorities in this jurisdiction is not an excuse, for we are living in an electronic global village in which internet has, somehow, become a fact of life. By this, I mean, research could be made on internet borrowing a leaf from other jurisdictions where such law has been into practice. In the premises, one cannot be heard to seriously complain about scarcity of reference

materials and sources thereof. I must, however, give a disclaimer here that I do not claim, neither will I attempt to do so, that I intend to exhaust all what is there in the field concerning the matter at hand for the simple reasons of novelty of the area in our jurisdiction as well as time constraint. It is not doubted that the area in new in our midst, the relevant legislation having come into force as recent as 01.09.2015; hardly seven months down the road. To be precise, I will confine my discourse to the issue whether a VCD is admissible in evidence, and if the answer is in the affirmative, how is it admissible, and finally, whether the VCD in the present case can be admitted in evidence as prayed by the petitioner or whether it should not, as objected by the respondents.

Before I embark on this rather rough road journey, suffice to orient my route with what the term "electronic evidence" entails. On this, I find assistance in Stephen Mason's "all embracing definition" (as baptized by Hon. Justice P. A. Akhihiero, of the Edo State Customary Court of Appeal in his paper titled **Admissibility of Electronic Evidence in Criminal Trials. How Practicable?** – sourced through www.nigerianlawguru.com/articles/practiceandprocedure/ADMISSIBILITYOFELECTRONICEVIDENCEINCRIMINALTRIALS.pdf). The learned author says that the phrase can be defined as:

> "Data (comprising the output of analogue devices or data in digital format) that is manipulated, stored or communicated by any man-made device, computer or computer system or transmitted over a communication system, that has the potential to make the factual account of either party more

probable or less probable than it would be without the evidence".

[Mason: **Electronic Evidence**, 2nd Edition, Lexis Nexis, Butterworths, 2010, p. 25; as referred by Hon. Justice P. A Akhihiero (supra) at page 6 footnote 11].

As it will perhaps be clear shortly, the Electronic Transactions Act, which is the epicenter of the present objection, was brewed in this very court; the commercial division of this court, to be particular, as far back as in the year 2000. For the sake of easy understanding and at the risk of making this ruling unduly long, I shall attempt to demonstrate.

In that year; 2000, a very important bold step towards the recognition of electronically generated evidence in court proceedings was taken by his Lordship Nsekela, J. (as he then was; he later became Justice of Appeal and President of the East African Court of Justice) in the case of ***Trust Bank Tanzania Ltd Vs Le-Marsh Enterprises Ltd & 2 Others*** Commercial Case No. 4 of 2000 (unreported). In a ruling handed down on 30.08.2000 on whether or not a computer print-out is a banker's book, His Lordship had this to articulate:

"The courts have to take due cognizance of the technological revolution that has engulfed the world. Generally speaking as of now, record keeping in our banks is to a large extent **"old fashioned"** but changes are taking place. The law can ill afford to shut its eyes to what is

> happening around the world in the banking fraternity. It is in this spirit that I am prepared to extend the definition of banker's books to include evidence emanating from computers subject of course to the same safeguards applicable to other bankers books under sections 78 and 79 of the Evidence Act."

It is clear that His Lordship did not take such step without basis. He stated to have found solace in the decision of the English court in the case of ***Barker Vs Wilson*** [1980] 2 All ER 80 at page 82 where Bridge, L.J. had stated thus:

> "The Bankers' Books Evidence Act 1879 was enacted with the practice of bankers in 1879 in mind. It must be construed in 1980 in relation to the practice of bankers as we now understand it. So construing the definition of **'bankers' books'** and the phrase an entry in a banker's book, it seems to me that clearly both phrases are apt to include any form of permanent record kept by the bank of transactions relating to the bank's business made by any of the methods which modern technology makes available ..."

It is to be noted that later through a judgment on the very same case which was delivered on 09.2.2001, His Lordship Nsekela, J. (as he then was) made a statement which inherently was the pregnancy of all that there is in the legal recognition of electronic evidence. I will let his words speak:

> "I do not intend to resile from what I said that the definition of banker's books should include Computer print-outs in view of the current technological revolution that is taking place, **but it would certainly be much better if the legislature took up the matter a[s] was done in England in the Civil Evidence Act, 1968 (1968 c 64) and the Seychelles Evidence (Bankers Books) Act, Cap. 75.**" [Emphasis supplied].

It was not until some six or so years thereafter that in 2006 and 2007 two pieces of legislation - the Written Laws (Miscellaneous Amendments) Act, 2006 and the Written Laws (Miscellaneous Amendments) Act, 2007 - were enacted which, respectively, saw the recognition of electronic evidence such as bankers' books and recognition of electronic evidence in criminal proceedings. Section 36 of the Written Laws (Miscellaneous Amendments) Act, 2006 amended the Evidence Act by adding a new section 78A which provides:

> "(1) a print out of any entry in the books of a bank on micro-film, computer, information system, magnetic tape or any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process which in itself ensures the accuracy of such print out, and when such print out is supported by a proof stipulated under subsection

(2) of section 78 that it was made in the usual and ordinary course of business, and that the book is in the custody of the bank, it shall be received in evidence under this Act.

And the Written Laws (Miscellaneous Amendments) Act, 2007 amended the Evidence Act by adding thereto section 40A which stipulates thus:

"In criminal proceedings-

(a) An information retrieved from computer systems, networks or servers; or

(b) The records through surveillance of means of presentations of information including facsimile machines, electronic transmission and communication facilities

(c) The audio or video recording of acts or behavior or conversation of persons charged,

shall be admissible in evidence."

In my considered view, the above progress, though restrictive in nature as to the scope of recognition of electronic evidence in legal proceedings, bear their origin from the ***Le-Marsh*** case, and further development as I will show (infra), surely finds their roots in that case.

Subsequent to such restricted development in the field, this court was once again faced with the same hurdle; this time, admissibility of a print-out of an electronic

mail commonly referred as e-mail. This was in the case of ***Lazarus Mrisho Mafie and another Vs Odilo Gasper Kilenga alias Moiso Gasper***, Commercial case No. 10 of 2008 (unreported). Therein, my brother at the Bench, Makaramba, J. was faced with an objection against the admission of such a document into evidence. Noting the legislative inadequacy in the above-mentioned two amendments of the Evidence Act, His Lordship, boldly and industriously, as justice would require, took up the task of developing the law a step further by setting out what he termed "the guiding standard for recognizing electronically stored evidence not limited only to electronic e-mail but other forms of electronic evidence in civil proceedings".

This was done through a ruling pronounced on 01.10.2010 in which, having traversed through various authorities both local and foreign (whose e-jurisprudence is fertile in the field), construed the term "document" broadly to include a computer generated print-out whose admissibility is subject to the evidentiary rules on documentary evidence under the Evidence Act, and further noting the difference between electronic document and paper document as being the degree of their permanency, underscored the need to establish its authenticity and reliability of such electronic evidence before it could be admitted into evidence.

According to His Lordship Makaramba, J., the legislative gap then was on the standards for determining authenticity in which the rules to be developed by the court was for setting out the said standards as prerequisites to be met before an electronically generated document could be admitted in evidence. The said standards, in my considered opinion, can be contained in the relevance, authenticity as well as reliability in terms of issues of originality (not hearsay), probative value (to guard against unfair prejudice), and substance in terms of truth of such evidence.

Admission of electronic evidence in the nature of bankers' book print-out cropped up once again in the ***Exim Bank*** case (supra); a case cited to me by the learned counsel for the first respondent. In that case, His Lordship Nyangarika, J. rejected to admit the banker's book print-out for what can be termed as failure to meet the test of authenticity and reliability it being electronically generated evidence. Noting the shortcomings of our legislation in terms of guidelines with respect to reception of electronic evidence in civil proceedings, His Lordship acknowledged existence of the same in India and commented that:

> "I think it would have been better if those guidelines were assimilated or followed in our courts, as there must be proof describing a process or system used to produce a result in respect of electronic evidence and show that the process or system produced an accurate result".

In that case, and by way of demonstrating how the above could be achieved, His Lordship was bold enough, and in my view rightly so, to pronounce the requirements of a certificate of a person in charge of such computer system to accompany such electronically generated print out in court. According to him, the details in the certificate would include the following ingredients:

1. The safeguards adopted by the system to ensure that data is entered or that any other operation is performed by an authorized personality
2. All safeguards adopted to prevent and detect an unauthorized change of data
3. The safeguards available to retrieve data that is lost due to system failure or

any other reason.

4. The manner in which data is transferred from the system to removable media like floppies, disks, copies or other electronic magnetic storage devices
5. The mode of verification to ensure that data has been accurately transferred to such removable media.
6. The mode of identification of such data storage devices.
7. Safeguards to prevent and detect any tampering with the system and
8. Any other facts which will vouch for the integrity and accuracy of the system"

The above, in my view, would have sufficed to constitute guidelines for both legal practitioners and the court when preparing to introduce electronic evidence into evidence. I say so, because, they go a step further to the standards articulated earlier by His Lordship Makaramba, J. in ***Lazarus Mrisho Mafie***, and, as it will unfold at a later stage of this ruling, the same are implicitly adopted in the current Electronic Transactions Act on admissibility and weight of electronic evidence.

To expound this point a little bit further, my research on the point has it that our brethren in the Isles; the High Court of Zanzibar have recently made a promising stride in this field by tackling a very similar question as the present one of admissibility of a VCD albeit in criminal proceedings. This was in ***Salum Said Salum Vs The DPP***, Criminal Appeal No. 3 of 2013 (unreported - available at http://www.judiciaryzanzibar.go.tz/judgement/high_court/Criminal%20App%20No%2003%20of%202013%20Salum%20Said%20Salum%20vs%20DPP%20-%20Electonic%20Evidence.pdf), his Lordship Abdulhakim A. Issa, J. was faced with an appeal against the decision of the trial magistrate admitting in evidence a VCD showing the acts of sexual materials of indecent assault among which the appellant was charged with.

In the judgment delivered on 17.03.2014, His Lordship having travelled through various case law including those of the High Court of Uganda, Tanzania Mainland and India, upheld the decision of the lower court. That stance was taken after deducting the tests for admissibility of the said VCD from the case of ***Kirenga Vs Uganda*** [1969] EA 562 and the Indian case of ***Ram Singh Vs Col. Ram Singh,*** AIR 1986 SC 3, which had dealt with admission of a tape recording into evidence. In the Indian case, which substantially falls in all fours with the former, the apex court of India had laid the following conditions for admissibility of a tape record:

a) The voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. Where the maker has denied the voice it will require very strict proof to determine whether or not it was really the voice of the speaker.
b) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence direct or circumstantial.
c) Every possibility of tempering with or erasure of a part of a tape recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.
d) The statement must be relevant according to the rules of Evidence Act.
e) The recorded cassette must be carefully sealed and kept in safe or official custody.
f) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbance.

From that premise, His Lordship went on to refer to various authorities before arriving at his conclusion. Given the nature of its persuasiveness in some specific instances, I feel obliged to let His Lordship's words speak for themselves and I hereby quote *in extenso*:

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"... From this decision of the Court of Appeal of East Africa, and from the case of Ram Singh v. Col. Ram Singh (Supra) three guidelines can be adduced regarding the admissibility of the tape recording evidence. These guidelines are: (1) the accuracy of the recording can be proved, (2) the voices are properly identified and (3) the evidence is relevant and otherwise admissible. Coming to the case in hand it is very clear that VCD is not part of the document as envisaged in section 3 of the Zanzibar Evidence Decree. But the scope of the term evidence under the Decree is inclusive and this allows VCD to fall under evidence as envisaged by the Decree, it is a real evidence which is allowed in our Evidence Decree. But this real evidence also has to fit in the above three guidelines.

The first is the accuracy of the VCD, here the Court has to look on the VCD and see whether the picture and actions in the VCD are those of the people who are claimed to be. There is not tampering or superimposition of the images on the VCD. This also will be determined by looking whether the VCD is writable or it is rewritable. In the first case it is easy to

conclude on its accuracy as it cannot be erased and rewritten. But in the later case more caution should be taken by the Court.

The second guideline is whether the voices and in this case the picture properly identified. The voices of those people in the VCD and their pictures should be identified, but we should remember that in some VCD there is no sound or voices at all they are just live pictures of the people taken and sometimes without their knowledge. Hence, one criterion should be sufficient in identifying those people who are in the VCD.

The third criteria are that the evidence must be relevant and otherwise admissible. Here, before the VCD is admitted in Court it must be shown that it is relevant with the issue before the Court, and the party who purports to show the CD must show its relevancy whether it is a secondary evidence, a corroborative evidence etc. And hence, the admissibility of such evidence must also fall on one or more of the provisions of the evidence decree.

Admittedly the above decision is of persuasive nature it being from the High Court and of another jurisdiction and on a criminal matter. That notwithstanding, the

clear nexus between a tape recording and a VCD cannot be ignored. Thus, the former having been included in the definition of the term "document" by the said courts (both in ***Kirenga*** and ***Ram Singh*** cases), and though it is not so with section 3 of the Zanzibar Evidence Decree, the said standards as to admission of a tape record into evidence cannot be ignored in our jurisdiction in admission of a VCD which, by all intent and purpose, and as rightly contended by Mr. Mwakahesya, learned senior stated attorney, is included in the definition of the term "document" under section 3 of the Evidence Act (as amended). The approach of broadly defining the term "document" to include such electronic evidence has widely gained approval in various jurisdictions.

It must be clear by now that the courts in this Jurisdiction have all along endeavoured to ensure that electronic evidence gains access in both civil and criminal proceedings by laying the required standards and guidelines. In so doing, they have all came up with different verdicts. Whereas in ***Le-marsh*** (supra) and ***Exim Bank***, Their Lordships, respectively, accepted and refused to admit electronic evidence upon objections being raised. The court in ***Lazarus Mrisho Mafie*** (supra) had to halt the proceedings pending the learned counsel for the parties to appear and satisfy the standards as the court enunciated them.

In my considered view, such variance in approach can be accounted to the then absence of the comprehensive legislative guideline regarding admissibility of the electronic evidence. Hence, at last, in 2015, the Legislature decided to pay heed to Nsekela J.'s (as he then was) observation to take up the matter as a whole. The Electronic Transactions Act was enacted with specific provisions with regard to legal recognition of electronic evidence in all legal proceedings. This is provided under part IV therein which, in my view is wrongly titled as "ADMISSION OF EVIDENTIAL WEIGHT OF ELECTRONIC EVIDENCE" instead of "ADMISSION AND EVIDENTIAL

WEIGHT OF ELECTRONIC EVIDENCE". I say it is wrongly titled because, firstly the latter title is logical, and secondly, that is how the same provision is couched in the UNICITRAL Model Law on Electronic Commerce, 1996 (with additional article 5 *bibs.* as adopted in 1998) as well as the South African Electronic Communications and Transactions Act, 25 of 2002 (the ECT Act) which came into operation on 30.08.2002 - see Prof. Murdoch Watney's "**Admissibility of Electronic Evidence in Criminal Proceedings: An Outline of the South African Legal Position"** in **the Journal of Information**, Law and Technology (available at http://go.warwick.ac.uk/jilt/2009_1/watney). Thus the use of the word "OF" after the word "ADMISSION" in Part IV of the Electronic Transactions Act was, it appears, a typing inadvertence. The correct word should have been "AND".

Having so digressed, I now revert to the present case.

As rightly put by the learned counsel for the parties, by virtue of the Electronic Transactions Act, 2015, electronic evidence is now admissible in legal proceedings in this jurisdiction; both criminal and civil. The Act, save for Part VII thereof, came into force on 01.09.2015 by virtue of the Electronic Transactions (Date of Commencement) Notice, 2015 – GN. No. 329 of 14.08.2015. Before that, electronic evidence was, as already alluded to above, admissible in criminal proceedings vide the Written Laws (Miscellaneous Amendment) Act, No. 15 of 2007 which amended the Evidence Act by adding Section 40A thereof (which provided for the admissibility of electronic evidence in criminal proceedings) and some instances of civil proceedings as provided for by of the Written Laws (Miscellaneous Amendments) Act, 2006 amended the Evidence Act which added a new section 78A to the Evidence Act. Now, electronic evidence, as already stated, is admissible in both criminal and civil proceedings by virtue of the Electronic

Transactions Act which added section 64A to the Evidence Act. For easy reference, let me reproduce section 64A:

> "(1) In every proceedings, electronic evidence shall be admissible.
>
> (2) The admissibility and weight of electronic evidence shall be determined in the manner prescribed under section 18 of the Electronic Transactions Act, 2015.
>
> (3) For the purposes of this section, "electronic evidence" means any data or information stored in electronic form or electronic media or retrieved from a computer system, which can be presented as evidence."

Thus, as per section 64A of the Evidence Act, for electronic evidence to be admissible in evidence, it must comply with the conditions laid down by the Electronic Transactions Act under section 18. This section provides:

> "(1) In any legal proceedings, nothing in the rules of evidence shall apply so as to deny admissibility of data message on ground that it is a data message.
>
> (2) In determining admissibility and evidential weight of data message the following shall be considered-

(a) the reliability of the manner in which the data message was generated stored and communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained;

(c) the manner in which the original was identified; and,

(d) Any other factor that may be relevant in assessing the weight of evidence.

(3) The authenticity of an electronic records system in which an electronic record is recorded or stored shall, in the absence of evidence to the contrary be presumed where-

(a) There is evidence that supports a finding that at all material times that computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of an electronic record and there are no other reasonable grounds on which to doubt the authenticity of the electronic records system;

(b) It is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it; or

(c) It is established that an electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.

(4) For purposes of determining whether an electronic records is admissible under this section, an evidence may be presented in respect on any set standard, procedure, usage or practice on how electronic records, are to be recorded or stored, with regard to the type of business or endeavours that used, recorded or stored the electronic record, and the nature and purpose of the electronic record."

As rightly stated by Mr. Swalle, learned counsel for the petitioner, the learned counsel for the parties are at one that by virtues of section 18 (1) of the Electronic Transactions Act, electronic evidence is admissible in this case. Also not contested is the fact that for an electronic evidence to be admissible, it must comply with the conditions set forth in subsection (2) of section 18 of the Electronic Transactions Act. What is at issue is whether such conditions have been met in the case at hand for the admissibility of the electronic data sought to be tendered.

The hallmark of the conditions for admissibility of an electronic evidence under the provisions of section 18 (1) is, it seems to me, its authenticity.

Under section 18 (3) authenticity of the electronic data sought to be tendered can be presumed if:

(a) There is evidence that supports a finding that at all material times that computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of an electronic record and there are no other reasonable grounds on which to doubt the authenticity of the electronic records system;

(b) It is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it; or

(c) It is established that an electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.

The learned counsel for the parties have locked horns on the authenticity of the electronic data sought to be tendered; while the learned counsel for the respondents contend that the VCD is not authentic as to warrant its being admissible in evidence, the learned counsel for the petitioner rebuts that it is. The main ground upon which the learned counsel for the respondents have pegged their objection is the undisputed fact that the cell phone which was used to record the data had since been lost. And not only that, but also the fact that the data was sent to the petitioner who kept it and later re-sent it to PW6 who later generated the electronic data by means of a computer.

I am in agreement with the learned counsel for the respondents that the manner in which the electronic data sought to be tendered in evidence was generated and stored leaves a lot to be desired as to render it inadmissible in evidence. I shall demonstrate.

First, there has been led no evidence to show that the device used to record and the computer that generated the data sought to be tendered were at all material times working properly and if not, whether their not operating properly did not affect its integrity. That notwithstanding, no evidence has been brought to the fore on whether or not no person other than PW6 could access the devices. There is no such statement in the evidence-in-chief and there was none in the evidence before me before and during the prayer to have the data tendered. Worse more, the electronic data sought to be tendered was allegedly taken on 05.09.2015. The court has not been told PW6 stayed with it for how long before sending it to the petitioner and the petitioner stayed with it for how long and for how long did PW6 again stay with it before producing the VCD and eventually seeking to produce it in evidence in court. The fact that the electronic data changed hands physically and electronically to that extent, waters down its authenticity. This, as Mr. Mwakahesya rightly put, is all about the chain of custody of the record sought to be introduced in evidence.

On chain of custody, as was stated by his Lordship Rutakangwa, JA in a paper titled **MAKOSA YA MARA KWA MARA YA KISHERIA YANAYOFANYWA NA MAHAKAMA KUU**, a paper presented at the symposium of Judges-in-Charge of the High Court of Tanzania at Bagamoyo (23 - 25 April, 2013), it is the law that, in criminal proceedings, failure to lead evidence providing a "full proof chain of custody" of potential exhibits is fatal to the prosecution case –

see: ***Paulo Maduka & Others Vs R***, Criminal Appeal No. 110 of 2007, ***Abuhi Omari Abdallah and 3 Others Vs R***, Criminal Appeal No. 28 of 2010, ***Onesmo s/o Mlwilo Vs R***, Criminal Appeal No. 213 of 2010, and ***Oscar Nzelani Vs R***, Criminal Appeal No. 48 of 2013, all unreported decisions of the Court of Appeal. In ***Paulo Maduka***, the Court of Appeal, describing what "chain of custody" entails, had this to say:

> "By 'chain of custody' we have in mind the chronological documentation and/or paper trail showing seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain [of] custody ..., is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance, having been planted fraudulently to make someone appear guilty ... the chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody could have accessed it."

While still on this point, I cannot resist the urge of quoting what was stated by Carmen R. C Ferrer on the theme "***Electronic Evidence: Admissibility***" which was made at the ISACA - San Juan Chapter February Meeting in 2006 (accessed at http://docslide.us/download/link/electronic-evidence-admissibility-carmen-r-cintron-ferrer-2006-derechos) in which it was stated:

> "... it requires that evidence is stored in a manner where it cannot be accessed by unauthorized personnel, and the location of evidence from the moment it was collected to its presentation at trial needs to be traced."

For the avoidance of doubt, I am aware that the above authorities are applicable to criminal proceedings. However, I have no speck of doubt that the principle can be applicable in any proceedings as well, more especially, in election petitions, in which, like in criminal proceedings, the standard proof is beyond reasonable doubt.

Secondly, and as if to clinch the matter, the device which was used to record the data which PW6 seeks to tender had since been lost. This reality brings about the obvious fact that the electronic data sought to be tendered is not an original. As rightly pointed out by Mr. Mwkahesya, learned senior state attorney, the Best Evidence Rule has it that the original is the one ordinarily admissible in evidence unless sufficient reasons are given for providing secondary evidence thereof. In the case at hand, the data was originally recorded by a cell phone. The data then was transferred to the petitioner's cell phone. Then the petitioner later returned to PW6 presumably by the same mode of transmission. Eventually, the data was transferred to a computer from which the VCD sought to be tendered was generated. In the premises, what is sought to be tendered is secondary evidence and no sufficient reasons have been given why the court should accept secondary evidence in evidence. This is so because, apart from the word of PW6 that the original cell phone had been lost, there is no other material brought before the court to support the averment. As rightly stated by Mr. Rutebuka,

learned counsel for the first respondent supported by Mr. Mwakahesya, learned senior stated attorney, it was expected that the witness would bring a Police Loss Report to that effect to reinforce his averment. A Police Loss Report has not been produced to substantiate the loss of the original cell phone and no reason has been given why.

Thirdly, it is indisputably true that the electronic data sought to be tendered was recorded and produced into copies of VCDs by PW6 who is not a party to the petition. However, PW6 "is not adverse in interest to the party seeking to introduce it" in evidence. On this premise, the electronic data cannot, in terms of section 18 (3) (b) of the Act, be admissible in evidence.

Fourthly, it has not been sufficiently established that the electronic record sought to be introduced in evidence "was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record". The fact that PW6 is a member of the petitioner's party and the fact that the same was taken during the campaign period and perhaps with a view to using it in case of an election petition, does not support the idea that it was recorded in the usual and ordinary course of business of PW6. PW6 has not told the court that his usual and ordinary course of business was to record such speeches in campaign meetings or any other meetings. And, as if to clinch the matter, despite the fact that PW6 is not a party to the petition, the fact that he sent it to the petitioner after recording it, suggests that he was acting under the control of the petitioner in whose interest the electronic record is sought to be tendered. On this ground as well, and in terms of section in terms of section 18 (3) (c) of the Act, the VCD sought to be tendered in evidence cannot be admissible.

In sum therefore, I would like to recap as follows. Our present jurisprudence has taken cognizance of the present technological developments in the global village by making electronic evidence admissible in both criminal and civil proceedings. This has been a response to the cry of this court commencing with the **Le-Marsh** case in 2000 followed by the ***Lazarus Mrisho Mafie*** and ***Exim Bank*** cases, among others. Electronic evidence is now receivable in evidence in all legal proceedings but subject to the conditions set out in section 18 of the Electronic Transactions Act, No. 13 of 2015. In the admissibility of such evidence, the Best Evidence Rule reigns. It is also important to ascertain that the chain of custody of the electronic data sought to be introduced in evidence is such that it did not water down its authenticity short of which the electronic data will not be admissible.

In the upshot, in the case at hand, the reliability of the manner in which the electronic data sought to be introduced in evidence was generated, stored, communicated and maintained coupled with the fact that the original device used to record it had been lost, makes the VCD sought to be introduced in evidence inadmissible. I consequently sustain the objection by the respondents. For the avoidance of doubts, no order is made as to costs.

Order accordingly.

DATED at NJOMBE this 4th day of April, 2016.

J. C. M. MWAMBEGELE
JUDGE