

TANZANIA / JUDGMENT

SERENGETI BREWERIES LTD VS BREAK POINT OUTDOOR CATERERS LTD COMM CASE NO

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM
COMMERCIAL CASE NO. 132 OF 2014 SERENGETI BREWERIES
LIMITED..... PLAINTIFF VERSUS BREAK POINT OUTDOOR
CATERERS LIMITED..... DEFENDANT

RULING

Mansoor, J: Date of Judgement- 18th September 2015 During the course of the hearing the testimony and taking the evidence presented by PW1, one Justine Mollé, who prayed before the Court to tender a document extracted from the computer, listing all the invoices, debit notes and opening balance of the account of the plaintiff showing the total value of the invoices issued to the defendant by the plaintiff (marked as Annexure SBL8 in the Reply to the written statement of defence) an objection was taken by the Counsel for the defendant, Advocate Mafuru Mafuru saying that this document is a computer printout and it has not been authenticated, thus it should not be admitted as evidence. The Counsel relied on the case of Lazarus Mirisho Ma fie & another vs Odilo Gasper Kilenge @ Moiso Gasper Commercial Case No, 10 of 2008 (unreported), decided by Hon Justice Makaramba J. In that case, the main contention was that the email containing the alleged defamatory statements being part of electronic evidence is not admissible in evidence in civil proceedings and should therefore be rejected. The Court in the case decided by Hon. Makaramba, J, (the case of Lazarus) (supra) , was called upon to consider the 2 admissibility of electronic evidence in civil proceedings generally, which at the time of deciding that case, the issue of recognition and admissibility of electronic evidence was not yet covered under our laws of evidence or civil procedure. In the case decided by Makaramba, J, the Lazarus Case, it was noted by the Hon Judge that following the case of the Trust Bank of Tanzania Versus Le-Marsh Enterprises Limited and 2 others Commercial Case No. 4/2000, (unreported,) whereby his Lordship Nsekela J, dealt with an issue of whether or not a computer printout is a bankers book under the Evidence Act, 1967 and whereby ,Hon Judge Nsekela, while admitting that a computer printout is not a bankers book, he however called upon the Courts to take due cognizance of the technological revolution that has engulfed the world, thus he extended the definition of bankers

book to include evidence emanating from computers subject to the same safeguards applicable to other bankers books under S.78 and 79 of the evidence Act. Judge Makaramba in his Ruling in the Lazarus Case, he recognized the introduction in our laws of the admissibility of 3 electronically stored information generated for use in the court of law as evidence in criminal proceedings incorporated in the Evidence Act 1967 through Written Laws (Misc. Amendments) Act No 15 of 2007), by adding section 40A. His Lordship Hon. Judge Makaramba however noted that the amendment in 2007 in the evidence Act did not provide for the admissibility or receiving evidence in civil proceedings of electronic records including e-mails except in the course of admitting records extracted from bankers' books. He also noted that as a result of the case of Le-Marsh by Hon Justice Nsekela J, it was introduced in the Evidence Act, a new s.78A inserted by Section 36 of the Amending Act, i.e. Act No. 2/2006, which provides as follows:- 78A - (1) A printout of an 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 4 accuracy of such print out, and when such printout is supported by a proof stipulated under sub section

- (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. The Judge said the term "document" is already defined in the Evidence Act, 1967, thus, the task of the Court in that case was to establish whether a computer printout of statements contained in an e-mail is a document in the context of the terms of the law of evidence. In terms of section 3 of the Tanzania Evidence Act, 1967 (cap 6 R.E. 2002) a document means "Any writing, handwriting, typewriting, printing, Photostat, photography and every recording upon any tangible thing, any form of communication, representation by letter, figures, marks, symbols or by more than one of these means, which may be used for 5 the purpose of recording any matter provided that such recording is reasonably permanent and readable by sight" The Hon. Judge Makaramba extended the definition of a word document under section 3 of the Evidence Act by interpreting it broadly to cover evidence generated by computer including e-mail, subject to the general evidentiary rules on documentary evidence found in part III of the Evidence Act, (Cap 6 R.E. 2002). This is found at page 20 of his typed Ruling in the Lazarus Case. Hon. Judge Makaramba went on stating that the existing laws of evidence or admissibility of documents suffice to cover electronically generated information, thus as for standards on relevancy and hearsay, the existing rules of evidence suffice, he said an e-mail being a computer generated evidence, its weight can be reduced unless there is sufficient authentication to convince the court that it is an accurate copy, in that, the 6 person tendering an e-mail will have to prove that the original of the e-mail sought to be tendered in evidence is authentic and that the e-mail has not been altered since the date it was retrieved from the computer. Hon. Judge Makaramba went further to say that an e-mail can be authenticated in the form of an audit trail, showing how the original document (e-mail) was turned into an electronic image, stored in the computer system from where it was retrieved and then produced to the court, and he went further saying that if an audit trail cannot be produced, the electronic evidence may be rejected. The

Hon. Judge Makaramba in the case of Lazarus, set out the rules and standards of admission of an e-mail in the court, as evidence, the set rules and standards for admission of an email in the Lazarus Case are as the follows, and the Court has to determine the following before admitting an email:- 7

1. Is the e-mail relevant as determined under the Evidence Act;
2. If the e-mail authentic in the sense that can the proponent show that the e-mail is what it purports to be;
3. If the e-mail is offered for its substantive truth, is it hearsay as defined under the Rules in the Evidence Act, and if so, is it covered by an applicable exceptions to the hearsay Rules under the Evidence Act;
4. Is the e-mail an original or duplicate, if not, is there admissible secondary evidence to prove its contents;
5. Is the probative value of the e-mail substantially outweighed by the danger of unfair prejudice or other identified harm? The Hon. Judge Makaramba, said at page 36 of his Ruling, in the last paragraph that the above standards should be the set 8 Court Rules for guiding the Court in determining the admissibility of electronically stored information (ESI), which is not limited to e-mails only but may encompass other forms of electronic evidence such as computer print outs, website messages, etc.," In the course of my reading on this matter I have also come across the case of Exim Bank (T) Limited Versus Kilimanjaro Coffee Company Limited. Commercial Case No. 29 of 2011 (unreported), whereby Hon. Judge Nyangarika, also had discussed an issue of admission of Electronic Evidence. Hon Judge Nyangarika had agreed with what Justice Makaramba had said in the Lazarus Case regarding the rules set by Hon. Judge Makaramba for guiding the courts in determining the admissibility of electronically stored information (ESI), he also said at page 6 and 7 of his typed Ruling that" in the case of Lazarus Mirisho Mafie and Another V. Odelo Gasper Kalenga @ Moiso Gasper, Commercial Case No. 10/2008, HC (Unreported), this Court while dealing with an objection to admit an e-mail which is also an electronic 9 evidence as an exhibit in Court in Civil Proceedings, Mg brother Makaramba, J considered the standards to be set bg rules for guiding the court in determining the admissibilitg of electronicllg stored information (ESI), be it in the forms of e- mails, or encompass forms o f electronic evidence or computer printouts, website messages, and the like, and held that apart from the tests o f hearsag rule, authenticitg, relevancg, and unfair prejudice, there must be a statement made bg a declarant offered to prove the truth o f its contents which excludes hearsag or covered bg one of the exceptions to the hearsag rule. " The Hon. Judge Nyangarika summarised what Hon. Judge Makaramba had said in the Lazarus case, he said "The other tests are that such evidence should pass the test of the original writing rule. This rule provide that a partg relging on such evidence must be prepared to introduce an original, a duplicate original, or be able to demonstrate that one o f the permitted forms of Secondarg Evidence is admissible." 10 Judge Nyangarika continued at page 8 of his typed Ruling that "of course,

following the case of the Trust Bank Tanzania Limited Versus Le Marsh Enterprises Limited & 20 others Commercial Case No. 4/2002, unreported, Law of Evidence Act, (Cap 6 R.E. 2002), has been amended by Written Laws (Miscellaneous Amendment) (No. 2) Act of 2006, and Written Laws (Miscellaneous Amendment) Act No. 15 of 2007 and it can be argued that its effect is that electronic records, including emails and printout statements, in relation to the banking business are now admissible as evidence in court.” Hon Judge Nyangarika went further to give the procedure on how to accept the evidence of electronically generated printouts, he said “for a computer generated printouts to be accepted as evidence in civil proceedings one has to comply to the standards set out in S. 78 and 79 of the Evidence Act, and such printouts must be accompanied by a certificate to the effect that it is a printout of such an entry by the accountant or branch manager of the relevant bank, and further to that there must be a certificate from the person in charge of the computer system to the effect that to the best of his knowledge and beliefs, such computer system, operated properly at the material time when he was provided with all the relevant data and the print out in question represent correctly or is appropriately derived from the relevant data and that the print out statement were examined with the original entries and were found to be correct, and a brief description of the computer system where the print out was retrieved from the person in charge of the computer for purposes of authenticity showing that the print out statement were not tampered with and are correct in every respect” Hon Judge Nyangarika was however dealing with an issue of admission of a printout relating to banking transactions, of which our Evidence Act has covered its admissibility under S.78A, of the Evidence Act. The Admission procedures of a banker’s book or an extract of a Bankers Book is also covered extensively by S.78 and S.79 of the Evidence Act, and this includes the electronically retrieved documents relating to bankers books. 12 For the case at hand a print out which is sought to be tendered is not related to banking transaction, and it is not an e-mail, but it is a print out from the computer. It is a document as defined by the Evidence Act, and as extended by Hon. Justice Makaramba in his decision in the case of Lazarus (Supra). A document at common law as defined by Darling J in Rvs Daye (1908) 2 KB 333 as comprising of “any written thing capable of being evidence, it is an instrument, a thing capable of conveying evidence”. In a paper titled, “ Consultation Paper, Documentary and Electronic Evidence, Law Reform Commission of Dublin, published in December 2009, found in www.lawreform.ie , have defined electronic evidence, and electronic documentary evidence as follows: “Electronic evidence is anything upon which information could be visibly inscribed with recognisable and legible characters. Electronic evidence can include any data generated or stored in digital form whenever a computer is used. It includes information manually entered into an electronic device by an individual, information generated in a computational transaction or a response to a request by an individual, when an electronic device generates information acting as an automaton, or information produced and stored where a device processes information within its matrix. Electronic documentary evidence is, therefore, any information captured, generated or maintained in databases, operational systems, applications programmes, computer generated models, which extrapolate outcomes, electronic and voice mail messages and even instructions held inertly within a

computer memory bank”” In the Report of the Law Reform Commission of Dublin, at page 201 to page 236, there is an entire chapter dealing on questions of how to authenticate electronic documentary evidence and how to establish the integrity and reliability of a 14 piece of electronic documentary evidence. It is important to note that the chapter has identified several and different forms of electronic documentary evidence and examined how different electronic documents can be brought before the courts and what questions arise surrounding their admissibility, and authenticity, and also examines the process by which electronics and automated documentary evidence can be brought before the courts, the procedure for discovery process of the electronic documents and questions of record management and destructions, procedure for regenerating or creating new documents if needed in evidence if the documents have been destroyed, and how to streamline the process of presentation of electronic evidence electronically. In this paper there are different ways of authenticating different types of electronic evidence e.g. for a digital medium like a disk or a hard drive, the only way suggested by the Law Reform Commission that this can be authenticated and admissible in litigation is if a chain of custody is proven, and that the evidence was not altered in any way or manipulated. 15 For video or audio recording, and where a tape recording is derived from the audio or video recording, the Law Reform Commission recommended that a device used to record the video or audio must be produced in court. For analogue and digital photographic images, it is advisable that the courts must undertake a preliminary hearing to determine the admissibility of these kinds of documents to undo any doubts of image distortion and detect any fraudulent manipulation. There is also an outlined proposed procedures given in the paper for admitting telephone records and mobile telephone records. It is suggested that these kind of evidence which are deemed to have been generated digitally should be classified as automated real evidence for the purposes of litigation, and that it will suffice for such documents to be proved by the Certificate process of the Evidence Act, and a Certificate of a person in control of a device, as suggested by Hon Judge Nyangarika in the case of Exim Bank T Limited vs Kilimanjaro Coffee Company Limited (supra). 16 This Report of the Law Reform Commission of Dublin, quoted the decision of re Wards of Court in Re MK and WK, the Eastern Health Board vs MK and Another (1999) 2 1LRM 321. The disputed electronic evidence in this case was a tape recording of interview with the young complainants; the debate was this evidence was described as “hearsay evidence”, and Keane J, said: “there may be cases where a tape recording, once established as being authentic, may be the best evidence of the happening of a particular event” (page 9 of the judgement); He continued “A tape recording may give an extremely accurate picture of how an accident happened. Likewise a tape recording may give a more accurate picture of a burglar than a witness who merely had a fleeting glance at him in a moment of crisis. Even in the case of reported speech a tape recording may be more accurate than hearsay because it can give us the exact words which the 17 person whose speech was recorded used and also the demeanour of that person at the time when he used them.” Keane J, thus supported the admission of such data, and placed it superior to oral testimony in such circumstances. I’m aware that following the decisions by Hon. Judge Nyangarika, and Hon Judge Makaramba, discussed herein above,

there is the recent change in our laws regarding Electronic Transactions. There is an amendment of the Evidence Act made recently by Act No. 13 of 2015. (The Electronic Transactions Act, 2015). Section 42 of the Act amended section 3 of the Evidence Act, and it reads as follows: 42: The principal Act is amended in section 3 by deleting the definition of the term “document” and substituting it with the following: “Document” means any writing, handwriting, type writing, printing, Photostat, photography, computer data and every 18 recording upon any tangible thing, any form of communication or representation including in electronic form, by letters, figures, marks or symbols or more than one of these means, which may be used for the purpose of recording any matter provided that recording is reasonably permanent and readable” Section 43, 44 and 45 of the Act amended S.19, 34B and 34 of the Evidence Act by inserting the word “Electronic” immediately after the word “written” and ‘statement” whenever they appear. The Act also introduced S.64A, which is on Admissibility of Electronic Evidence it reads: S. 64A: (1) in every proceedings, electronic evidence shall be admissible.

- (2) The admissibility and weight of Electronic evidence shall be determined in the manner 19 prescribed under section 18 of the Electronic Transaction 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. Section 18 of the Electronic Transaction Act 2015, Act No. 13 of 2015 is on admissibility and evidential weight of data messages, it provides as follows: 18:(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. 20
 - 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; 21
 - 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;
 - 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 22 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”. Also section 10(2) of the Electronic Transaction Act, recognize that a person can provide a certified print out of the document, if the law requires production of a certified copy of the document. The introduction of the Electronic Transaction Act, 2015 is a revolution that made the recognition to all types and forms of electronic evidence including recognition of data massages, validity of any transaction in electronic form, keeping and recognition of electronic contracts. The general rules on authenticating the electronic transaction under S. 18 of the Act is that nothing in the rules of evidence 23 shall apply so as to deny the admissibility of data message on the ground that the document is a data message, provided that the guidelines as to admissibility and evidential weight set out in that sections are complied with. Thus a person who wants to produce as evidence a data message or a computer stored information or data must bring a certificate certifying the reliability of the manner in which the electronic document was generated, stored and communicated, the integrity of the electronic document and the manner in which it was maintained and the manner in which the original was identified. The court is given discretion under S. 18 (2) d) of the Electronic Transactions Act to require or consider any other factor that may be relevant in assessing the weight of evidence. The court is also given discretion under S.18(3) of the Electronic Transaction Act, to presume the electronic document to be authentic if there is evidence that supports a finding that at all material times the computer system or similar device was 24 operating properly or the fact that the device was not working 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 record system; and if it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceeding and or store it under the control of the party seeking to introduce the record, the court is given the discretion to make a presumption that the electronic document is authentic. Under S.18 (4) of the Electronic Transaction Act, 2015, the court is permitted, for purposes of determining whether electronic record is admissible to require evidence to be presented in respect of any set standard, procedure or usage or practice on how electronic records was 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. 25 Thus, the Electronic Transaction Act, 2015 recognized the electronic evidence, and provided the procedure of its admissibility, and for according their evidential value in

civil proceedings. As can be seen special provisions as to evidence relating to electronic record have been introduced in the Evidence Act as well as in the Electronic Transactions Act: The contents of electronic records may be proved in accordance with the provisions of Section 64A of the Evidence Act. The Electronic Transactions Act has recognized a revolution in the way people transact business. In fact, there is a revolution in the way the evidence is produced before the court. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Section 64A, can be proved only in accordance with the procedure prescribed in Section 18 of the Electronic Transactions Act, Act No. 13 of

2015. Section 18 of the Electronic Act deals with the admissibility of data message which is the electronic record. 26 The purpose of these provisions is to approve secondary evidence in electronic form, generated by a computer. It may be noted that Section 64A starts with a clause that “in any proceedings, electronic evidence shall be admissible” and Section 18 of the Electronic Transactions Act start with a clause that “in any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on ground that it is a data message” Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub- Section (2) of section 18 of the Electronic Transactions Act are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 18(2) of the 27 Electronic Transactions Act, which I have reproduced herein above. Under Section 18(3) of the Electronic Transactions Act, there is a presumption that all electronic records system in which an electronic record is stored or recorded is authentic unless the contrary is proven. The court shall presume that the electronic records system is authentic if there is evidence to show the following:
- a) if there is evidence that supports a finding that at all material times the 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; 28
 - 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. A person desiring to give a statement in any proceedings pertaining to an electronic record, it is permissible under Section 18 (4) of the Electronic Transactions Act, for purposes of determining whether the electronic record is admissible to present evidence of any set standard, procedure, usage or practice on how electronic records are to be recorded or stored, with regards to the type of business or endeavors that used, recorded or stored the electronic

record and the nature and purpose of the electronic record. Thus under Section 18

- (4) of the Electronic Transactions Act, the Court is permitted to adopt any procedure for determining the admissibility of electronic evidence presented before it. This provision is therefore in my opinion in line with what the Report of the Law 29 Reform Commission of Dublin has been recommending, that the modes or procedures of determining the authenticity and admissibility of a particular electronic data or record shall depend on the type of data or record, any set standard or procedure, usage or practice on how the electronic evidence was recorded or stored, with regards to the type of business or endeavors that used , recorded or stored the electronic record and the nature and purpose of the electronic record. Thus for the electronic record, the subject of this case to be admitted the following conditions must be satisfied:
- (a) There must be a certificate which identifies the electronic record containing the statement;
 - (b) The certificate must describe the manner in which the electronic record was produced;
 - (c) The certificate must furnish the particulars of the device involved in the production of that record; 30
 - (d) The certificate must deal with the applicable conditions mentioned under Section 18(2) of the Electronic Transactions Act; and
 - (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device. Further to that the person giving the certificate must state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout pertaining to which the statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the 31 whole trial based on proof of electronic records can lead to travesty of justice. Before I admit the electronic document n dispute the above conditions must be satisfied, it is so ordered. DATED at DAR ES SALAAM this 18th day of SEPTEMBER, 2015 32

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