

PRESENTATION OF DIGITAL EVIDENCE IN KENYAN COURTS

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AGENDA

- Introduction
- Strategy /preparation of presentation
- Procedures that need to observed
- Relevant laws applicable and to be complied with
- Challenges in presentation
- Planning for the defense

INTRODUCTION

- Law of Evidence: All facts must be proved
- Commonwealth courts of law are allowed to presume certain matters
- Kenyan Court System part of Commonwealth
- Not all matters need to be proved in court.

Judicial Notice

In East Africa courts of law will normally take judicial notice of:

- All written laws, rules and principles, written or unwritten;
- Parliamentary privileges and proceedings;
- Territories that comprise the Commonwealth;
- The existence of declared hostilities and/war between countries;
- Natural occurrences and;
- Matters of general and local notoriety.

TYPES OF EVIDENCE

- Direct evidence
- Circumstantial evidence

OPINION/EXPERT EVIDENCE

- The general rule in the law of evidence excludes evidence of opinion.
- Expert witnesses are permitted to share with the court their professional opinion regarding the facts that are presented during court trials such as those that take place in criminal cases.

OPINION/EXPERT EVIDENCE

- The courts can accept opinion evidence in the following circumstances:
 1. On the interpretation of a foreign law;
 2. Scientific or artistic matters and;
 3. The authenticity or identity of a handwriting, fingerprints or other impressions, e.g. rubber stamps, official seals;

Requirement of an expert

- In Kenya/East Africa an expert who hopes to carry weight in court needs to do :
 - a) Show by evidence that he is a specialist in his area of science
 - b) Enlighten the court in the criteria of his science or art, to empower the court test the accuracy of his opinion and form its own independent conclusion by applying that criteria to the facts proved.
 - c) Adduce evidence of his observations or facts reported to him by another witness.

Matters proven by experts

- a) Questions of insanity in murder cases are proved by psychiatrists;
- b) Cause of death in homicide cases is determined by pathologists;
- c) Evidence of ballistics is adduced by forensic science experts;
- d) The level of intoxication is determined by physiologists
- e) Evidence of fraud is determined by forensic investigators (accountants, auditors, computer technologists)
- f) The existence of a general custom or right can be adduced by elders from a community.
- g) Artists/experts in music adduce evidence to show the similarity of music in scope and genre in intellectual property cases.
- h) A computer forensics expert witness will typically work with an attorney to provide testimony in a court hearing about some aspect of computer forensics.

STRATEGY

- To Prove Innocence or guilt
- Prove beyond Reasonable doubt
- Prosecution – Remove doubt
- Defense - Create doubt (maintain professionalism)
- Depends on findings of examiner/Auditor
- Pre - Trial

Procedures

- No agreed standards, Rules
- No formal test for the technical process
- Best practices observed
- Compliance with Laws/Regulations

PROCEDURES

- Prove procedure was followed
- Chain of custody
- Assist in evaluating evidence
- Relate with offense/Relevant laws
- Actus reus (guilt act)
- Mens rea (intent/knowledge)

PROCEDURES

- Conditions for Admissibility
- Computer Print Out
- Electronic records
- Certificate required
- IT Admin/Forensic Examiner/Responsible Person

RELEVANT LAWS

- Penal Code
- Evidence Act
- KCA Amendment Act
- ACECA 2003
- CMA ACT
- CDSC Act 2000
- Criminal Procedure Code

ACPO Guidelines

- Principle 1: The data held on an exhibit must not be changed.
- Principle 2: Any person accessing the exhibit must be competent to do so and explain the relevance and the implications of their actions.
- Principle 3: A record of all processes applied to an exhibit should be kept. This record must be repeatable to an independent third party.
- Principle 4: The person in charge of the investigation has responsibility for ensuring that the law and these principles are adhered to.

Challenges

- Technical complexity surpasses technical Knowledge of courts
- Strong evidence to prove each legal point
- Must be presented with significance
- Interpretation by qualified person

Challenges

- Simplified in human readable form
- Over simplification – open to interpretation
- Communicating Risk and Probability

Planning for Defense

- Pre Trial
- Look at possible avenues of defense: Trojans, Virus, Hacking, Phishing
- Look at exonerating evidence
- Account for missing evidence/items or inconsistencies
- Credibility
- Competency
- Procedure/Best practice
- Stick to facts



I REST MY CASE