The Law and Practice of Evidence in Kenya

2nd Edition

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lawAfrica

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The Law and Practice of Evidence in Kenya

Preface to the 2nd Edition

The first Edition of this book was published round about October, 2011. Only God knows how time flies!

Over the last four years or so, I have received many congratulatory messages on the publication. I have also endured the pain of critics who never cease to find fault in any scholarly work, but offer no suggestions for improvement. And so stung by their words, from October 2014, I embarked on a review of that edition with a view to remove the usual foibles of a rushed first edition. I have also taken the trouble to update the case law and statutes on the subject as much as possible in order to keep the book current and relevant. I hope that I have succeeded and that the second edition will be as much a success as the earlier one. I acknowledge my fair share of humanity. Where I have failed, I beg your indulgence and promise to make up for it next time.

I cannot pen-off this preface without a word of encouragement and advice to all interested in the evidential process. A mastery of the rules of evidence is a must for all legal practitioners. This book offers you an opportunity to understand, master and apply the rules of evidence in Kenya and beyond.

Kyalo Mbobu
February, 2016
Nairobi, Kenya

Acknowledgement

My deep gratitude goes to my research assistants comprising Ms. Mitchelle C. A. Omuom, Velma G. Gendo and Lewis K. Kyengo. This team has worked tirelessly for long hours and endured my often unintentionally abrasive comments in an effort to get this work to its current level. I shall forever remain indebted to them.

I also wish to thank LawAfrica Publishing Co. Ltd, who kindly allowed me and my team unlimited access to their database of cases and legal materials. Without their patience and invaluable support this work would not have seen the light of day.

Lastly, but certainly not least, I wish to thank my family without whose constant encouragement and sacrifices I would have given up on the way.

I pray to God to bless you all for your kindness, dedication and support.

Kyalo Mbobu
July, 2015
Nairobi, Kenya

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Chapter 1

General Introduction to the Law of Evidence

A. Meaning of Evidence

Legal scholars and jurists define "evidence" depending on the context of the use of the term. For instance, Bryan Garner defines evidence as "something (including testimony, documents, and tangible objects) that tends to prove the existence of an alleged fact"[1] He continues to say that evidence is a body of law regulating the admissibility of what is offered into the record of a legal proceeding.

According to Phipson[2] on the other hand, evidence means the testimony, whether oral or documentary, which may be legally received in order to prove or disprove a fact in dispute.

Another definition is sampled from Akiniola Aguda's book, '*Law and Practice Relating to Evidence in Nigeria'* where he defines evidence as:

> "[…] the means by which facts are proved, but excluding inferences and arguments. It is common knowledge that facts will be proved, by production of oral testimony of persons who perceived the fact, or by the production of documents, or by the inspection of things or places – all these will come within the meaning of judicial evidence".[3]

Adrian Keane in his book '*The Modern Law of Evidence*' gives a wholesome definition of the term evidence. He defines evidence as:

> "information by which facts tend to be proved, and the law of evidence as that body of legal rules regulating the means by which facts may be proved in courts of law and tribunals and arbitrations in which the rules of evidence are applied".

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1 Bryan A Garner, *Black's Law Dictionary*, Thomson West, USA, (8th edn 2004) at 595.

2 *Phipson on Evidence* by Sidney Lovell Phipson, (15th edn Sweet and Maxwell, 2003) page 2 (1-03).

3 T. Akiniola Aguda, *Law and Practice Relating to Evidence in Nigeria* (1980) page 11.

In Kenya, the authoritative definition of evidence is found in Statute. The Evidence Act[4], defines evidence as:

> "[Evidence] denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the Court in its judicial capacity."[5]

In the case of *CMC Aviation v Cruisair Ltd*,[6] the court defined evidence by reference to its function i.e. "proof is the foundation of evidence".

Meanwhile in *Ezekiel Ajwala Otin and another v C. M. Motors Ltd*[7] the High Court adopted the definition of evidence espoused within *Cassell's English Dictionary* at page 394:

> "Anything that makes clear or obvious; grounds for knowledge, induction or testimony; that which makes truth, or renders evident to the mind that it is truth."

Accordingly, for our purposes in understanding the law of evidence in Kenya, the underlying principle in the definition found within the Evidence Act is that, evidence is concerned with all the rules, means and procedures followed when proving facts during the trial of an issue in Court.[8]

The purpose of the rules of evidence, together with the rules of procedure is to ensure a fair trial for each party. The law of evidence concerns the inclusion of all the legal means, exclusive of mere arguments, by which any matter of fact in dispute is proved or disproved. Evidence is therefore submitted to prove or disapprove any matter of a fact being investigated by the Court or a tribunal.

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4 Chapter 80 of the Laws of Kenya.

5 Section 3(1) of the Evidence Act, Chapter 80, Laws of Kenya.

6 [1978] KLR 103.

7 [2012] eKLR; civil appeal 90 of 2008.

8 It is worth noting that in Kenya the basic law governing matters of evidence is not only the Evidence Act, but under section 182 of the Evidence Act, the Act ought to be read together with the provisions of any other written law which touch on the adduction of evidence.

In a nutshell, evidence is information, be it in the form of personal testimony, the language of documents, or the production of material objects, that is given in a legal investigation, to establish the fact or point in question.

B. Law of Evidence as Part of Procedural Law

The law of evidence falls under the category of law referred to as procedural law or adjectival law. It determines not only the procedure by which facts may be proved but also the circumstances under which facts may be proved in a Court of law.

The law of evidence does not confer rights and liabilities on parties but rather sets down the procedure, mechanisms and rules by which the court will admit evidence. It is therefore in effect, a procedure-setting law not a right conferring law.

C. Classification of Evidence

Evidence by which facts may be proved or disproved in court is often termed as judicial evidence. It is used to prove either facts in issue or relevant facts from which facts in issue may be inferred. It covers testimonies of witnesses, documents and objects that can be used as evidence.

In order to prove the existence or non-existence of a fact, several categories of evidence emerge. These different categories of evidence will be discussed in depth in the subsequent chapters of this book. However, a brief introduction is provided here.

Evidence may be classified into five main categories. These categories are:

1. **Testimony**

   This is the most basic form of evidence. It consists of the oral narration of a duly sworn witness of fact perceived with the witness's own senses in the court during the proceedings in question.

2. Documentary Evidence

This refers to evidence contained in documents which can be adduced in court as evidence of the existence of a fact. Documentary evidence is evidence in the form of a recorded document. While many people may think of written documents, recordings in other media are also considered documentary evidence. For example, a photograph or film would be classified as documentary evidence. The best type of evidence of a document is said to be the original and it must be adduced if it is to be relied upon. For example, a contract offered to prove the terms it contains is documentary evidence.

Documentary evidence does not, however, include pleadings. The High Court in the case of *CMC Aviation v Cruisair Ltd*[9] stated:

> "The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."

3. Real Evidence

This refers to material objects or exhibits which are produced for the court's inspection.

The objects produced in court may range from movable or immovable objects to human beings with the exclusion of documentary evidence.

It may also refer to a thing the existence or characteristics of which are relevant and material to a case. It is usually a thing that was directly involved in some event in issue in the case, For example, a bloody knife, the murder weapon, a crumpled automobile at the scene of an accident comprise of real evidence. To be admissible, real evidence, like all evidence, must be relevant, material, cogent and competent.

4. Circumstantial Evidence

Circumstantial evidence is evidence of relevant facts from which the existence and non-existence of facts in issue may be inferred.

9 *Ibid.*

This should be contrasted with direct evidence of a witness who claims to have personal or first-hand knowledge.

It may be documentary, oral or real evidence. It is testimony by a witness as to the circumstances from which an inference is to be drawn as to the existence or non-existence of the fact in issue. In the case of *Teper v R*,[10] it was held that this evidence must be narrowly examined if only because evidence of this kind may be manufactured to cause suspicion on another.

A similar warning was issued by the East African Court of Appeal in *Kipkering Arap Koske v R*[11] where the court held that:

> "it is now settled that for a court to convict on circumstantial evidence there must be evidence which points irresistibly to the accused person to the exclusion of any other person".

5. Hearsay Evidence

Hearsay evidence refers to testimony given or repeated in court by a person other than the one who perceived it.

As a general rule hearsay is a statement, other than one made by a witness in the course of giving evidence in the proceedings in question, by any person whether it was made on oath or not and whether it was made orally, in writing or by signs and gestures which is offered in court as evidence of the truth of its contents. It is also known as indirect evidence. It is inadmissible.[12]

D. Constitutional Basis of the Law of Evidence in Kenya

The Constitution of Kenya (2010) provides in article 2(1):

> "This Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government."

Article 50(4) provides the basic principle in adduction of evidence in courts and tribunals in Kenya. It states:

> "Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of

10 [1952] AC 480, 489.

11 (1949) 1 EACA 135.

12 Section 63 of the Evidence Act.

that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."

Article 49(1)(d)[13] of the Constitution of Kenya (2010) provides for the rights of arrested persons. It states:

"An arrested person has the right not to be compelled to make any confession or admission that could be used in evidence against the person;"

Article 50(2) provides that:

"An arrested person has the right—

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence."

The effect of the above Constitutional provisions is to protect accused persons from grave injustices that may arise out of the contravention of these articles.

It establishes within the Constitution and re-enforces the rulers of natural justice that a person ought not to be condemned unheard, and that an accused person ought to be given a chance to challenge the evidence adduced against him/her and defend him/herself adequately.

Consequently, the Court must conduct any case before it in a manner that promotes justice to both parties. This compels the Court to base its decisions on evidence of some probative value and no other.

This is in accordance with the natural justice function of the court which requires that the accused person be afforded an opportunity to put forward his or her evidence fully and to ask the Court to hear the witnesses whose evidence might help his or her

13 Article 50 of the *Constitution of Kenya* (2010) provides for the right to fair hearing, which under article 25 of the Constitution may not be limited.

case.[14] This is the essence of proof in cases as contemplated in the law of evidence.

The Criminal Procedure Code,[15] provides that where an accused person is charged with a crime for which he had already been convicted or acquitted, he may enter a plea of *autrefois acquit, autrefois convict* or pardon as the case may be.[16]

Article 125 of the Constitution of Kenya (2010) provides that either House of Parliament, and any of its committees, have power to summon any person to appear before it for the purpose of giving evidence or providing information.

In so doing, the Constitution grants a House of Parliament and any of its committees the same powers as the High Court to:

(a) enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;

(b) compel the production of documents; and

(c) issue a commission or request to examine witnesses abroad.

It is however worth noting that although Parliament has these powers, it is obliged to follow the rules like any other court.

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14 This position was laid in the Nigerian case of *Kano Native Authority v Raphael Obiora* (1959) 4F.S.C. 226. This requirement embodies the two rules of natural justice, thus; *audi alteram partem*, which means 'hear the other side' and *nemo iudex in sua causa*, meaning 'no one should be a judge in his or her own case'. See Duard Kleyn and Frans Viljoen (*supra* note 5) at 191.

15 Chapter 75, Laws of Kenya

16 Section 207(5) of the Criminal procedure Code provides to this effect that if the accused pleas:

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) that he has obtained the President's pardon for his offence, the Court shall first try whether the plea is true or not, and if the Court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.

The pleas of *autrefois acquit* and *autrefois convict* and pardon are meant to protect an individual being vexed twice on account of the same offence. In order to prove these defenses, the accused person must prove that the acquittal or conviction in the previous charge involved an acquittal or conviction in a subsequent charge. Where an accused person proves pardon, he or she must be discharged. See PLO Lumumba, *Criminal Procedure in Kenya* (2008) page 69.

Under article 195, County Assemblies too have similar powers. The article stipulates that a County Assembly or any of its committees has power to summon any person to appear before it for the purpose of giving evidence or providing information therefore also conferring upon the County Assembly powers akin to those of the High Court.

It is worth noting that while these powers have been given to Parliament and County Assemblies, the objectives of these sections can only be achieved when exercised strictly in accordance with the rules of evidence.

E. The Functions of Evidence Law

The law of evidence is of great importance to judicial proceedings.

Some of its functions include:

1. It prescribes the manner in which relevant facts may be adduced in Court i.e. either by way of oral or direct evidence or admissible hearsay evidence, judicial notice, presumptions or documentary evidence etc.

2. The law of evidence determines what facts may or may not be proved in a Court of law. It does this by excluding those facts which may not be proved. It is popularly known as the leading exclusionary statute. For instance, only direct evidence or evidence of relevant facts is admissible. No hearsay evidence or indirect evidence, no opinion evidence or character evidence is admissible.

3. The law of evidence elaborately lays down the competence, compellability and privileges of witnesses. It stipulates the rules on who qualifies to be a witness and who does not. It sets the standards as to who is competent to stand in court as a witness to the issue before it.

4. It determines the manner in which the examination of witnesses is conducted, i.e. the kind of questions to be asked and the order of examination as well.

5. The law of evidence also sets down the manner of proof in court i.e. by witnesses on oath subject to examination-in-chief, cross-examination and re-examination, or by means of judicial notice,

presumptions, admissions, by production of material objects or documents.

In the event of conflicts of laws, the law of evidence is governed by the law of the country in which the proceedings take place i.e. *lex fori*. This means that it cannot be governed by the law of another country where the cause of action may have arisen.

Indeed it goes without saying that the law of evidence is at the heart of the trial process, be it in civil or criminal matters. It cuts across every subject area of the law. Without a clear appreciation of rules of evidence, a court of law in Kenya cannot deal with a criminal, civil, contractual, succession or any other dispute one could think of. Therein lies the significance of a good understanding of the evidential process.

F. Basic Concepts of the Law of Evidence

There are certain basic technical terms used in the law of evidence. The meanings of some of the terms can be easily discernible from the use of ordinary language while others are slightly more technical.

What follows below is a definition of some of the most crucial terms which are applicable in the day-to-day application of the law of evidence. This list is however certainly not exhaustive.

1. Fact

The Kenyan Evidence Act[17] defines a fact as follows:

> "fact" includes—
>
> (a) any thing, state of things, or relation of things, capable of being perceived by the senses; and
>
> (b) any mental condition of which any person is conscious"[18]

A fact is therefore something that actually exists; an aspect of reality and includes not only tangible things, e.g. a motor vehicle involved in a road traffic accident, actual occurrences and relationships e.g. a marriage, but also state of mind such as intention and opinion. For

17 Section 3(1) Chapter 80.

18 *Bryan A Garner*, (*Supra* note 2) at 628. Also look at section 3 of the Evidence Act.

instance, that all people are mortal is a fact. That a witness saw, heard and touched something is a fact[19] that a man holds a certain opinion, has an intention to rob a bank, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation e.g. hunger or anger, is a fact.

It is the existence or non-existence of facts that a party would seek to prove before the court.[20]

2. Fact in Issue

A fact in issue means any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows.[21]

In any given case there are those facts which the plaintiff or prosecutor must prove in order to succeed in his claim or case together with those facts which the defendant must prove in order to succeed in his defence.

According to Prof. Cross,[22] facts in issue are all those facts which the plaintiff in a civil case or prosecutor in a criminal matter must prove in order to establish a defence.

Therefore, a fact in issue may be a fact that one party alleges and the other party controverts.[23] For example, if X is accused of murdering Y, during trial the facts in issue may be as follows. First, that X caused the death of Y will be a fact in issue. Second, that X intended to kill Y will be a fact in issue. Thirdly, that X knew or

19 Adopted from section 3 of the Indian Evidence Act of 1872 which was repealed and re-enacted in the Kenyan Evidence Act, Chapter 80, Laws of Kenya.

20 Section 3(2) of the Evidence Act provides with regard to existence of facts that '[a] fact is proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.' As regards the nonexistence of facts, subsection (3) provides that '[a] fact is disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.

21 Section 3(1)(b) of the Evidence Act.

22 Cross and Tapper on Evidence 8th edition 1995, page 20.

23 See *Bryan A Garner, (Ibid* note 22) at 629.

ought to have known that what he or she was doing will be a fact in issue.[24] Accordingly, a fact in issue requires evidence to be adduced to establish the existence or non-existence of that fact.

3. Relevant Facts

A fact is relevant if it has a probative value, that is, if it tends to persuade a court of law of the probability or possibility of the existence or non-existence of a fact in issue. Evidence is said to be relevant to a case if it has a direct connection to the facts in issue and can be used to prove or disprove that fact. This is a fact which tends to prove the existence of another fact.

The concept is elucidated in the case of *DPP v Kilbourne*[25] as follows:

> "Evidence is relevant if it is logically probative or disapprobative of matter which requires proof…it is sufficient to say that relevant evidence is evidence which makes the matter which requires proof more or less probable."

Fitzjames Stephen[26] refers to relevant facts as the 'facts from which the existence or non-existence of a fact in issue may be inferred'.

Admission of relevant facts arises from the acceptance of the fact that if the only facts open to proof or disproof were facts in issue, many claims would fail. This is because in many cases there are no eyewitnesses available who perceived of the fact in issue as it unfolded and who can offer direct evidence of it. The only other evidence available is that which establishes some other fact or facts relevant to the fact in issue.

4. Collateral Facts or Subordinate Facts

Collateral facts are of three kinds:

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24 See section 3 of the Indian Evidence Act of 1872 for a detailed illustration on this.

25 [1973]AC 729 at page 929.

26 *Digest of the Law of Evidence* by James Fitzjames Stephen, Herbert Stephen, George Emerson Beers (1901). pg.

The first type covers facts affecting the competence of a witness. A witness may be rendered incompetent to testify if, for instance, she is mentally handicapped.

The second type of collateral fact covers the credibility of a witness. A witness may lose credibility if he gives evidence in favour a party with whom there exists a relationship. An example would be a mistress giving evidence in favour of her "boyfriend"[27]. Such a witness's testimony is rendered incredible when the fact of their relationship is made evident

The last category of collateral evidence covers facts which must be proved as a condition precedent to the admissibility of certain evidence tendered to prove a fact in issue or a relevant fact. A good example is the exception to the general rule that for a document to be admitted as evidence it must be produced in its original form.

As an exception, secondary evidence i.e. a copy of a document is admissible as evidence of the contents on proof that the original has been destroyed or cannot be found after due and diligent search.

5. Prima Facie Evidence

It is the kind of evidence which normally necessitates a finding that a fact has been proved if such evidence is not rebutted.

6. Oral Evidence

These are statements made by witnesses in court. It refers to a person's testimony offered to prove the truth of the matter asserted.[28]

7. Direct and Indirect Evidence

Direct evidence refers to evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

Direct evidence is testimonial evidence in general, but sometimes it is restricted to apply only to testimony directly asserting a fact in

27 *Thomas v David* (1836) 7 C & P 350

28 *Bryan A. Garner, Black's Law Dictionary.*

issue.[29] This evidence has an independent probative force or value. It refers to a witness's own statement that he or she perceived a fact in issue by one of the five senses, or that the witness was in a particular physical or mental state. Simply put, it is evidence of a fact actually perceived by a witness.

Under section 63(2) of the Evidence Act, direct evidence refers to two things: First, with reference to a fact which could be seen, the evidence of a witness who saw it, and second, with reference to a fact which could be heard, the evidence of a witness who says he heard it.

Indirect evidence on the other hand refers to circumstantial evidence or evidence of relevant facts which we have already addressed above.

8. Intrinsic and Extrinsic Evidence

Intrinsic evidence refers to evidence brought out by the examination of the witness testifying. It can also be defined as the oral evidence given in connection with written evidence.

Extrinsic evidence on the other hand refers to evidence existing in writing. Oral evidence referred to which is outside the documents produced in court is referred to as extrinsic or external evidence. Such extrinsic evidence is usually given to add or vary or subtract from the document.

9. Parole Evidence

This refers to extrinsic evidence and is at times referred to as parole evidence rule. The rule stipulates that no extrinsic evidence shall be admissible to add or to subtract from the contents of a written document.[30]

10. Primary and Secondary Evidence

Primary evidence is also referred to as best evidence of a document. It is evidence of the highest quality available, as measured by the

29 John H Wigmore, *A Students' Textbook of the Law of Evidence.* (1935) page 40.

30 See section 98 of the Evidence Act.

nature of the case rather than the thing being offered as evidence. In this regard, primary evidence means the original document itself produced for inspection in the Court.

Section 65 of the Evidence Act[31] stipulates in this connection that where a document is executed in several parts, each part is primary evidence of the document. Where the document is executed in counter-parts, and each counter-part being executed by one or some of the parties, each counter-part is primary evidence against the parties executing it.

Under section 66 of the Evidence Act, secondary evidence is defined to include certified copies made from the original by mechanical process which in themselves ensure the accuracy of the copy, and copies compared with such copies, and copies made from or compared with the original. Secondary evidence also includes oral accounts of the contents of the documents given by some person who has himself seen or heard it.

Secondary evidence is inferior to the primary evidence or the best evidence and only becomes admissible when the primary or the best evidence is lost or unavailable.

11. Opinion Evidence

This is where a witness is called to testify as to his or her belief, thought, inference or condition concerning a fact or facts. It is a conclusion formed from observable phenomena and mental impressions.[32]

It includes the evidence of an expert, who is a specialist in a subject, often technical who may present his or her expert opinion in order to help the court or tribunal to understand the evidence and to determine a fact in issue.

31 Chapter 80, Laws of Kenya

32 See James B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1896) page 524 as quoted by Bryan A Garner.

Chapter 2

Relevance And Admissibility Of Evidence

A. Definition of Relevance and Admissibility

1. Admissibility

Admissibility of evidence is a matter of law which the court has to determine. Admissible evidence refers to that evidence which a court will receive for the purpose of determining the existence or non-existence of facts in issue. As a general rule, all evidence of sufficient relevance to prove or disprove a fact in issue is admissible so long as it is not excluded under the exclusionary rules of evidence.[33]

Under section 3 of the Evidence Act, the term 'admissible' means admissible in evidence, that is, evidence presented in court which a court will consider in reaching its determination.

In order to be admissible in evidence, all facts must be relevant, but not all relevant facts are admissible especially where these facts offend an exclusionary rule of evidence. For example, such relevant evidence may not be admitted on account of public policy or privilege. Likewise, the opinion evidence of a non-expert witness, though relevant is, as we shall see, inadmissible on account of the general rule.

2. Relevance

The classic definition of the term relevance was rendered by Fitz James Stephen in the following terms:[34]

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33 'The Exclusionary rules' of evidence are the rules which determine when relevant facts may or may not be admitted in evidence, or may be admitted under certain circumstances. They are premised on the fact that 'all facts, to be admissible, must be relevant, but not all relevant facts are admissible; Adrian Keane, The Modern Law of *Evidence* at page 26 (4th edition).

34 J.F. Stephen, *Digest of the law of evidence* (12th edn, London, 1948) Article 1

> 'Any two facts to which [the concept] is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other.'

A simple working definition is provided by Lord Simon in *DPP v Kilbourne*[35] in the following words:

> 'Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. It is sufficient to say, even at the risk of etymological tautology that relevant evidence is evidence which makes the matter which requires proof more or less probable.'

Relevance, as it were, is a question of degree determined mainly by common sense, logic and experience.[36] It denotes that an item of evidence is closely connected to a fact in issue, as to render it more or less probable and that it will help the court to determine whether the right, liability or disability which one party claims to exist (and the other party denies), actually does exist, and if so, to what extent.[37]On this basis, it is often difficult to get the precise demonstration of relevance.[38]

In Kenya, sections 5-16 of the Evidence Act set out the parameters of relevance within which evidence may be admissible. The Act, however, does not define relevance. A thorough understanding of those provisions is, therefore, most vital. It is, however, impossible to examine each section in sufficient detail. It suffices to say that our emphasis will be on two key concepts which are captured in the said provisions, namely:

I. *Res gestae* doctrine

II. Similar facts evidence

Section 5 restricts the admissibility of evidence to direct evidence, that is, evidence of the existence or non-existence of a fact in issue or evidence declared to be relevant by the law under sections 6-16 or some other specific section of the Act.

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35 [1973] AC 729, 756

36 *Cross and Tapper on Evidence* (8th edn, page 65).

37 Philip P. Durand: *Evidence for Magistrates* (page 1, para 7).

38 I.H. Dennis, *The Law of Evidence (*2nd edition, Sweet & Maxwell, 2002) page 56.

It could therefore be said that relevance denotes materiality of evidence while admissibility denotes receivability of evidence.

B. Res Gestae: Facts Forming Part of The Same Transaction - Section 6

'*Res gestae'* simply means a transaction. Section 6 refers to facts which form part of the *res gestae*, which, unlike most of the rules of evidence is inclusionary and not exclusionary. Hence, under it, evidence may be received even if that evidence offends the rule against hearsay, the opinion evidence rule among others.

Under English Common Law acts, declarations and circumstances constituting, accompanying or explaining a fact or transaction in issue are said to form part of the *res gestae* and evidence thereof is admissible. The classic formulation of the doctrine under the inclusionary common law doctrine is as follows:

> A fact or opinion which is so closely associated in time, place and circumstances with some act or event which is in issue that it can be said to form a part of the same transaction as the act or event in issue, is itself admissible in evidence.[39]

The term *res gestae* does not appear in the Evidence Act. However, the underlying English Law meaning relating to this phrase has been incorporated in sections 6-9 and 14 of the Evidence Act.

> Gilmers[40] defines *res gestae* as
>
> 'all of the things done, including words spoken, in the course of a transaction or event.'

According to Phipson[41] acts, declarations and incidents which are relevant to the fact or transaction in issue are admissible in evidence.

The justification given for the reception of such evidence is the light that it sheds upon the act or event in issue. In its absence and taken solely and exclusively, the transaction in question may not be fully or truly understood and may even appear to be meaningless,

39 Adrian Keane, *Modern Law of Evidence,* 5th edn, page 285.

40 '*The Law Dictionary*' (6th edn) page 288.

41 *Phipson on evidence* 15th edn, Sweet and Maxwell, 2003 page. 817.

inexplicable and unintelligible.[42] The importance of the doctrine, for present purposes, is its provision for the admissibility of statements relating to the performance, occurrence or existence of some fact, event or state of affairs which is in issue. Such statements may be received by way of exception to the hearsay rule.

In the words of Prof. Cross, such facts "need not possess any passport of relevance, but their association with facts possessing such passport they get admitted."[43] Cross has usefully divided the doctrine into four discreet rubrics for ease of appreciation of this complex concept:[44]

1. Statements made by observers or participants in an event.
2. Statements made concerning the performers of an act.
3. Statements made concerning the maker's state of mind or emotion.
4. Statements made concerning the maker's physical sensation.

1. Statements Made by Observers or Participants in an Event

Generally, statements made by participants in an event are admissible in evidence since they were present when the event took place. An exception would arise in cases where the statement was made after the event was concluded yet it is to be relied on as evidence. The case of *R v Bedingfield*[45] is a good illustration for this.

In that case, the accused was charged with the murder of a young girl though the accused claimed that the girl had committed suicide. The girl was living with her boyfriend until the relationship turned sour. The boyfriend allegedly cut her throat. She managed to run out even with a cut throat and managed to say 'see what Harry (Bedingfield) has done to me'. She then collapsed and died. In court the question arose as to whether this statement could be admitted

42 Adrian Keane, *Modern Law of Evidence*, 4th edn, page 255.

43 *Cross and Tapper on Evidence,* 2nd edn, Butterworks (1995) page 71, (2nd Australian Edition with supplement 1980).

44 *Cross and Tapper on Evidence*, (8th edn) page 723.

45 [1879] Vol. 14 Cox C.C. 341.

in evidence. Lord Justice Cockburn was emphatic that it could not be admitted. He said that it was not part of the transaction because it was said after the transaction was all over (the transaction being the cutting of the throat). The judge held that it was not admissible as part of the *res gestae* since the statement was made by her after the transaction.

The crucial question here is whether Bedingfield is a good decision. Does the girl's statement form part of the *res gestae*? Was it so closely associated in time, place and/or circumstances of the transaction (i.e. the cutting of the throat) as to be admissible in evidence to ascertain who committed the offence? This case was heavily criticised by Lord Wilberforce in *R v Ratten* discussed later, who stated that Bedingfield was an illustration of evidence that ought to have been admitted.

Under section 33 of the Evidence Act, the girl's statement would have been admitted. According to the section, statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases:

> 'When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes in question;'

Ordinarily, such a statement constitutes a dying declaration under the section.

In the case of *R v Ramadhani Ismael*,[46] the accused was charged with the rape of a victim, a young girl who was living in the village with her parents. After the rape incident, she unlocked the door and ran over to her parents' house, a few paces away from the accused's

46 [1950] 7 ZLR 36.

house. She got hold of her father's hand and took him to the accused house. She pointed to the accused person and said, "Daddy, this is the bwana." The question was whether this statement was part of the transaction and as such whether it was admissible. The transaction here was rape, which was already finished by the time she went to call her father. Was it admissible? Just like in Bedingfield, court held that it was not part of the transaction. The transaction in this case the rape, was already over. The court observed that when it comes to a matter of *res gestae*, minutes are of utmost importance.[47]

In *Teper v R,*[48] there was a fire in a shop. As the shop burnt a lady was heard to ask somebody who looked like the accused some minutes later 'your house is burning and you are running away?' The question was whether this statement was part of the transaction as the fact in issue; the fact in issue being arson. It was held to be part of the transaction. The basis of admissibility of such spontaneous statements made by onlookers or participants in an event is that they are part of the *res gestae* as an exception to the hearsay evidence rule and as evidence of the truth of the statements.

Recognising the irreconcilable state of case law, the Privy Council in *R v Ratten*,[49] decried the danger of concentrating unduly on the close association of facts in terms of time in determining whether a fact is *res gestae*. It ventured that a court should ask itself whether the fact or statement was made during a time of involvement, excitement or pressure when there was no time for, *inter alia*, contrivance or concoction.

In the *Ratten* case the accused was charged with the murder of his wife using a gun. He put forward the defence of accident. He said that he was cleaning his gun and it accidentally went off injuring his spouse. There was nobody else at the scene of crime or at the point where this incident occurred and the prosecution sought to tender evidence of a girl who worked with the telephone

47 See also *Thomson v Trevanion*,[1693] Skin LR 402 where the issue was about statements made by participants in or observers of events. It was decided in the case that what a wife said immediately upon being hurt and before she had time to devise or contrive anything for her own advantage, was admissible in evidence.

48 [1952] AC 480.

49 [1972] AC 378.

exchange who said that a call had been made from the accused's house at about the time of the murder. The girl said that the voice on the phone betrayed emotion, she was begging to have the police called over and before the operator could link the woman with the police the phone hang up on the woman's side. The prosecution sought to adduce this as evidence of a commotion during which the husband killed his wife. The defence claimed that it was hearsay and further said that no call had been made in the first place.

The question arose as to whether the statement by the telephone operator was admissible as part of the transaction. Did it happen contemporaneously with the facts in issue? The court held that the evidence of the telephone operator was admissible as it was not hearsay. Even if it was hearsay, the Privy Council went on to hold that the evidence would be admissible under the *res gestae* because not only was there a close association between the place and time but also because the woman's voice indicated pressure. In explaining why the operator's statement was admitted, the Privy Council noted that the important thing was not whether the words were part of the transaction but whether the words were uttered during the drama. The court also said that the particular evidence of the operator contradicted the evidence to the effect that the only telephone call outside his house during the murder was a call for an ambulance.

In *R v Christie*,[50] the accused was convicted of indecent assault of a boy. The boy gave un-sworn evidence in which he described the assault and identified the accused but made no reference to any previous identification. The House of Lords, by a majority of five to two, held that both the boy's mother and a constable had been properly allowed to give evidence that shortly after the alleged act they saw the boy approach the accused, touch his sleeve and identify him by saying, 'That is the man'. Evidence of the previous identification was admissible as evidence of the witness's consistency, to show that the witness was able to identify the accused at the time and to exclude the idea that the identification of the prisoner in the dock was an afterthought or mistake.

50 [1914] AC 545.

Evidence forming part of the *res gestae* is also admissible in civil cases. This was affirmed by Pollock C.B. in *Milne v Leisler,*[51] in the following words:

> "It is difficult not to perceive that the Courts, so far as they can, are disposed to receive in evidence whatever can throw any light on the matter in issue, and advance the search after truth. No doubt, for that reason, in the case of an exclamation by anyone in a crowd, when an accident occurs, and the conduct of a particular person is in question, it may be asked whether someone did not call out 'shame,' for it is part of the *res gestae*. The exclamation may be the result of prejudice whether it did not proceed in the ordinary course of events, or whether any reliance can be placed upon it."

The cases of Bedingfield and Ramadhani Ismael constitute bad law in that they adopted a conservative view of what formed the transaction. The cases discussed above reflect a better position since they embrace a more liberal view towards the admissibility of statements forming part of a transaction.

2. Statements Made Concerning the Performance of an Act

These statements are admissible and must be statements made explaining the fact which is in issue or is a relevant fact. This is illustrated by the two cases below.

In *R v McCay*,[52] the appellant was charged with wounding with intent. It was alleged that he had thrust a beer glass into the face of a man in a pub. A witness to the attack attended the identification parade 3 months later in an identification suite. The viewing room was sound-proofed and separated from the room containing the suspect and volunteers on parade stood by a 2-way mirror which prevented those on parade from seeing the witnesses. The witness was asked to make his identification verbally, by giving the number of the person identified, which he did saying, "It is number 8."

At trial, 3 months after the parade, the witness was unable to recall the number of the person whom he had identified. The

51 [1862] 7 H & N. 786 at 796.

52 [1991] 1 All ER 232.

prosecution asked the police officer who had conducted the identification parade, what the witness had told him when making identification. The defence counsel objected but his objection was overruled. No other evidence of identification was called and the accused was convicted.

On appeal, it was argued that the admission of evidence of the police officer as to what the witness had said at the parade was hearsay and a material irregularity. Court held that the words spoken by the witness contemporaneously accompanied, and were necessary to explain a relevant act, namely the witness's physical and intellectual activity in making the identification and were admissible as part of the *res gestae*. Accordingly, the police officer's evidence was admissible either as original evidence or as an exception to the hearsay evidence rule.

In *R v John Makindi*,[53] the accused in this case was charged with the murder of a boy over whom he stood in loco parentis (foster father). In his defence, the accused averred that the deceased was epileptic and that the seizures had caused the injuries on the boy's head. Medical evidence showed that the boy had died due to severe bleeding in the head and a doctor testified that there were blood clots in the boy's head which had opened causing a lot of blood to flow from the deceased's head and therefore occasioning his death. The prosecution tendered evidence that the accused had previously beaten up this boy and had previously been convicted and imprisoned for beating up the boy. He had threatened the boy with further beatings on account of the previous conviction. The question was whether evidence of previous beating was admissible. The court held in the affirmative that the evidence of previous beatings was admissible in the circumstances in order to show that the accused had a motive to avenge for his previous imprisonment. The evidence of the previous beatings was also admissible as a fact leading to the bleeding and ultimate death (i.e. the cumulative effect of previous beatings).

53 [1961] EA 327.

3. Statements Made Concerning the Maker's State of Mind or Emotion

In the case of *Thomas v Connell*,[54] the plaintiff filed a suit against the defendant for recovery of money paid to the defendant by one Cheetham on grounds of fraudulent preference. In order to prove the case, the plaintiff needed to prove that at or before the time of the disputed payment, Cheetham both was insolvent in fact and knew that he was insolvent. A statement made by Cheetham indicating knowledge of his insolvency was admitted in evidence. The Court held that evidence of the statement by him saying that he knew he was insolvent, was admissible to prove his knowledge of the fact at the time when the payment was made.

In *R v Moghal*,[55] a man named Rashid had been murdered by stabbing in the presence of only two persons, namely Sadiga, his ex-lover, and Moghal. Sadiga and Moghal were jointly indicted for Rashid's murder. Sadiga applied for a separate trial and her application was granted. She was tried first and thereafter acquitted. At the trial for Moghal, it was accepted by the prosecution that it was Sadiga by whose hand Rashid had died. The case against Moghul was that of an accomplice and the defence being, he was no more than a terrified spectator of the murder. He was convicted. Later, he appealed against the conviction on grounds of relevance and admissibility of evidence of a tape recording of a family conference held 6 months before Rashid's murder, in which Sadiga's voice was heard expressing her hatred for Rashid and determination to kill him. The question was whether the guilty verdict against Moghal was safe and satisfactory against evidence of the foregoing tape recording. It was held that although the verdict was safe and satisfactory, the tape recorded statement by Sadiga made 6 months before the murder to the effect that she intended to kill the victim, was admissible (to rebut the accused' defence) on behalf of the accused person.

In *R v Premji Kurji,*[56] the accused was charged with murder. The deceased had been killed with a dagger and there was evidence that

54 [1838] 4 M & W 267; 150 ER 1429.

55 [1977] 65 Cr. App R.56.

56 [1940] EA. civil appeal 58.

the accused had been found standing over the deceased's body with a dagger dripping with blood. The prosecution adduced evidence that a few minutes before, the accused had been seen assaulting the deceased's brother with a dagger and he had uttered words to the effect that 'I have finished with you, now I am going to deal with your brother.' The question was whether this statement was admissible as forming part of the same transaction. Was the statement part of the same transaction as the act of murder? Were the words uttered as part of that transaction? It was held that they were part of the same transaction because when two acts of an accused person are so interwoven as to form part of the same transaction, it is not proper to shut out evidence of one of the acts even though it may involve introducing evidence of the commission of another offence.

4. Statements made Concerning the Maker's Physical Sensation

These statements of contemporaneous physical sensation experienced by the person, are admissible as the evidence of the existence of that sensation, if indeed the existence thereof is in issue or relevant before the court.

In *Aveson v Lord Kinniard*[57] the plaintiff sued the defendant insurance company on a life policy of insurance. The defendant had insured the life of the plaintiff's wife on the basis of a warranty that she was in good health. The policy provided for payment of benefits within three months of her death. The defendant breached the payment on grounds that she was not in good health. At trial, an intimate acquaintance of the plaintiff's wife was called by the defendant and testified as to having called at the plaintiff's home on 22 November 1802, where the plaintiff's wife informed her of her poor health. The deceased also mentioned about the scheme that the plaintiff had initiated to insure her life for his benefit as well as the fear that she would not live long enough for the 10 day waiting period that the insurance policy would come into force. The plaintiff objected but his objection was overruled. The Jury entered a verdict for the defendants. On an application to set aside the verdict and the

57 [1940] EA 58.

direction of the court, it was held that the evidence was admissible to show the opinion of the plaintiff's wife on the ill-state of her health at the time of effectuating the policy.

As regards whether evidence may be admissible as evidence of an intention to do something in the future, it was held in *R v Thomson* that it would. In this case that will be discussed in detail later, evidence that the accused person intended to meet the boys on 19 March for another chance to have carnal knowledge with them at the same place, was admissible as evidence of the identification of the person who had indecently assaulted them on 16 March.

In *Gilbey v Great Western Railway Company,*[58] on 10 May 1909, the deceased was carrying a side of beef from the lift to a stall in the market when the beef began to slip, and in trying to keep it on his shoulder, he allegedly caused an injury to his left lung. He later died. Evidence given by Elizabeth Gilbey (widow of the deceased) was that he made statements to her on his return home that evening, to the effect that the illness from which he was suffering, was caused by the accident he complained of. The learned Judge was of the opinion that the statements by Mrs. Gilbey were admissible in evidence and accordingly awarded compensation to the widow. The employers appealed on grounds that there was no evidence showing that the deceased met his accident while in the course of employment; or that the accident arose out of his employment or that the deceased died as a result of that accident and therefore, that the judge had wrongly admitted the widow's statements.

The Court held that the statements made by the deceased to his wife of his sensations at the time, would be admissible to prove the existence of those sensations but not as evidence of the facts deposed to. Further, that the facts of the present case were different from those in the *Aveson's* case. Fletcher, L.J was also of the minority opinion that the evidence of the statements made to the widow, could not be admitted as evidence of the truth contained in the facts of those declarations as to the cause of the injury to the deceased workman. Buckley, L.J agreed with the other two judges.

58 [1910] 102 *The Law Times* 20.

Acts which are part of the transaction, for example, if A is accused of the murder of B by beating him, whatever is done by A or a by-stander at the beating, shortly before or after, forms part of the transaction and is a relevant fact under the doctrine or *res gestae*. It is important to note that the word transaction as used here refers to a group of facts, so connected together as to be referred to by a single legal term such as a 'crime', a 'contract' or a 'tort'. This is not used in the business or commercial sense of it.

C. Facts Causing or Caused by Other Facts

As a general rule, a fact in issue cannot be proved by showing that facts similar to it, but not part of the same transaction, have occurred at other times. Hence, if a fact in issue is whether the accused has committed a particular crime, the fact that he committed a similar crime is irrelevant for purposes of showing that he committed the crime currently in question. This is in line with the constitutional presumption of innocence as well as the general rule of character evidence. However, if a previous transaction shows the state of things under which the crime with which the accused is charged occurred is similar, evidence of the previous transaction is admissible.

In *R v Brabin and another*[59] the defendants were charged with obtaining a bribe as an inducement for forebearing to show disfavour to one Hasham Kara in his dealing with a government agency, the Central Commodity District Board. Evidence of a previous corrupt transaction between the defendants and Hasham Kara was admitted to the effect that 5 months prior thereto, the defendants had already demanded money from him in order to get his sugar supply restored. The defendants were convicted but appealed on the contention that the evidence of the earlier transaction was improperly admitted under section 7 of the Indian Evidence Act. The court held that evidence of the earlier transaction was properly admitted as it showed the state of things under which the bribe was given, that is, the relationship which existed between the persons.

In *R v John Makindi* discussed above, the court held that the evidence was admissible under section 7 of the Act to explain and

59 [1947] 14 EA 80.

substantiate the cause of death which had been the blows in question resulting into old blood clots caused by previous haemorrhages.

Note that the foregoing is not to say that evidence of previous crime is admissible in every case *per se*, but rather that:

i) it is only admissible where there is a connection between the previous crime and the crime with which the accused is charged; and

ii) when the previous crime shows the 'state of things' at the time of the commission of the present alleged crime.

More importantly, note that evidence of 'state of things' does not prove that the accused committed the crime with which he is charged. It only provides evidence of the circumstances under which the present alleged crime was committed.

The authority here is the case of *R v Premji Kurji,*[60] which is discussed above. Evidence was admitted at the trial of the fact that immediately prior to the death of the deceased, the accused had assaulted the deceased's brother with a dagger and uttered threats against the deceased. The accused was convicted as charged. On appeal, the appellant argued that this was evidence of commission of a separate offence and was therefore inadmissible. The appellate court held that the evidence at trial was rightly admitted for two reasons:

I. That the two occurrences were so closely inter-connected that the wounding of the deceased's brother must be regarded as part of the '*res gestae*' on the trial of the appellant for murder of the deceased. (Under section 6)

II. The fact that the accused had a dagger and used it immediately before the killing of the deceased with a dagger must be admissible as strong evidence of opportunity to commit the offence charged.

60 [1947] EA civil appeal 58.

D. Facts Relating to Motive, Preparation and Conduct

1. Motive

Motive is that which makes a man do a particular act or act in a particular way. For example, a person who is accused of rape may be motivated by lust or desire. A person who says they killed in self-defence will be motivated by fear. Motive is what influences a person's acts or conduct, an apprehension, depression, *inter alia*. A motive exists for every voluntary act, and it is often proved by the conduct of a person.

Mere existence of a motive is not at all incriminating, neither need the motive be adequate. Many Kenyans may entertain the temptation to steal at supermarkets, but never actually do so. It is therefore not an offence to have a motive to steal.Very heinous crimes have been committed for fairly innocuous and inconsequential motives. We read stories in the news papers of folk who murder for KShs 20 or KShs 50.

In the present context, motive is an inference drawn from the facts. A man who is badly in debt without a proper income may lead to an inference that he had a motive to steal.

In the *Makindi* case, court held that the evidence of a previous beating of the deceased by the accused, which had resulted in the latter's conviction was admissible under this section as showing a motive which the accused had for revenge on the deceased.

2. Preparation

Preparation refers to the planning and arranging of the means for commission of a crime. It includes preparation for commission, preparation of discovery, and assistance in escape among others. For example, where an accused is charged with having poisoned B, the fact that A purchased poison of the type used to kill B, is a relevant fact showing preparation. However, if A purchased poison to kill rats, the inference of guilt is overthrown.

3. Conduct of the Person or Agent of the Person or Victim of the Offence

The conduct of a person or his agent is relevant if it is in reference to a suit or proceeding, or the conduct is in reference to any fact in issue in the suit or proceeding or is relevant thereto. For example, if either before or after an alleged crime with which an accused is charged, the accused destroyed evidence or procured absence of persons who might have been witnesses or asked people to give false testimony evidence as to such conduct is admissible as relevant to a fact in issue the commission of the alleged crime.

The case of *Mandia v R,*[61] makes the foregoing discussion stand on its head. The appellant, a Magistrate, was charged and convicted of corruptly giving a bribe to a Police Constable to induce him to forebear taking prosecution on traffic offences against his driver. The appellant freely admitted giving the money, but said the motive was to test the Police Constable since he had "heard of these things and wanted to know if it was real." The trial court held that it was not necessary for the prosecution to prove corrupt motive but the intention to corrupt the Police Constable to whom the offer was made. The appellant was convicted.

On appeal, it was argued that the trial court misdirected itself on the meaning of the word 'corrupt' in section 3(2) of the Prevention of Corruption Act. The respondent argued that the appellant's motive was immaterial provided the prosecution can prove intent. Court held that:

i) corrupt motive is an essential ingredient of an offence under section 3(2) of the Act;

ii) the appellant's state of mind, that is, motive and intent, was essential in determining whether he was acting corruptly or not; and

iii) the appellant's motive was innocent.

61 [1966] EA 315.

In *R v Samuel Macharia Mwangi*,[62] the accused was charged with the murder of one Peter Nduati Mburu contrary to section 203 as read together with section 204 of the Penal Code. The evidence before the court was that PW 4 in the company of his father were going home from the shopping centre when at about 9 pm, they found the deceased, whom they knew, lying dead on the way about 70 metres from his home. There was no other person on the spot. PW 2 told the court that on his way to and from where the body of the deceased was, he met the accused, a close neighbour of the deceased, standing on his side of the land, and that on each occasion, the two talked about what had happened to the deceased. But when PW 2 who was armed with a stick for the night saw the accused having what he (PW 2) thought was a panga, and suspected that the accused had not bothered to go and see where the deceased was lying dead, he suspected the accused murdered the deceased. Court held that the accused had no motive for the said killing and accordingly acquitted him. In the words of Justice Khamoni:

> "The evidence is clear that the deceased was killed by somebody; another human being. But that evidence is not clear as to whether that killing amounted to murder as the investigations of this case, if any, never tried to get the motive behind the killing or more facts. That may have been so because the evidence connecting the accused with the killing of the deceased was not strong. But once the prosecution decided to charge the accused with murder, the prosecution had to be prepared to prove the motive leading to a clear intention to commit murder prior to the act of killing. This is because a person provoked or acting in self-defence can inflict to his opponent the type of injuries the post-mortem doctor found on the body of the deceased."

It must be noted that when the conduct of a person is relevant, any statement made to him or in his presence and hearing, which affects such conduct is relevant. Note that under section 8(4), 'conduct' does not include statements unless they accompany or explain acts other than the statements.

Under the maxim "*Silence gives consent,*" as a general rule, statements which are made in the presence of an accused person,

62 High Court crim. case number 50 of 2003 - Nyeri.

which he would normally have contradicted if they were untrue, and which he did not contradict, are evidence against him. The presumptive evidence should be applied sparingly in light of the constitutional protection of individual rights and freedoms.

A situation where the connection between statement and conduct is of great importance is in sexual offences, especially where minors are involved. In *Lobo v R*,[63] the accused was charged with indecent assault of a young child. The child was alleged to have made a complaint to her mother immediately following the incident. At trial, the mother was called to give evidence and the accused was convicted based on that evidence.

On appeal, it was argued that evidence of the mother was improperly received. It was held that the evidence of the actual terms in which a complaint is made, being relevant only upon the issue of the veracity of the complainant, is inadmissible unless the complainant is a competent witness and is called as a witness at the trial. The appellant was acquitted.

E. Explanatory and Introductory Facts

Facts are considered relevant under section 9 of the Evidence Act under the following circumstances insofar as they are necessary for that purpose:

a. To explain or introduce a fact in issue or a relevant fact;

b. To support or rebut an inference suggested by such fact;

c. To establish the identity of any thing or person whose identity is relevant;

d. To fix the time or place at which any fact in issue or relevant fact happened;

e. To show the relation of parties by whom any such fact was transacted.

63 [1926]10 KLR 55.

In *Kanyambo s/o Kitambo v R,*[64] the accused was charged with uttering a forged document. Evidence was admitted by the trial judge of the presentation of a forged document in almost similar terms by the accused, a month prior thereto in order to show his identity. The accused was convicted. On appeal, it was held that the trial judge erred in admitting this evidence, since although it was admissible *per se* under sections 9 and 11, it should not have been admitted in view of the lapse in time between the two transactions.

1. Statements and Actions Referring to Common Intention: Conspiracy

A 'conspiracy' is a combination or agreement between two or more persons to do an unlawful act, or to do a lawful act by unlawful means, and it does not matter whether the act is completed or not.[65]

It must, however, be shown that there exists reasonable grounds to believe that two or more persons have conspired together to commit an offence or an actionable wrong; and that the accused were privy to the conspiracy. This does not mean that the prosecution must prove these two things beyond a reasonable doubt as this comes only at the conclusion of the case.

A Judge or Magistrate admitting evidence under section 10 because he has reasonable grounds for believing in the existence of a conspiracy, may reject it at a later stage if that reasonable ground for belief is displaced by some other evidence. The time when, by act or declaration, reference is made to the common intention is not important so long as it is after that time when the intention is first entertained by one of the conspirators.

As pointed out in *R v Gokaldas Kanji and another*[66] a case involving a conspiracy to export diamonds illegally, it is rare that a conspiracy is proved by direct evidence of an agreement. The agreement to conspire is ordinarily deduced from any acts which give rise to the presumption of a common intention. The court observed in the

64 [1942] 1 TLR 258.

65 Adopted from Durand's: *Evidence for Magistrates,* (1969 edn)page 10.

66 [1949] 15 EA civil appeal 116.

judgment that an act or declaration of a co-conspirator even after the termination of the conspiracy is a relevant fact for the purposes of showing that such person was a party to it.

Any person who joins a conspiracy in law is regarded as an agent of the other, and just as a principal is liable for the acts of his agent in civil law, so is each conspirator liable for the acts of his fellow co-conspirators done in the furtherance of the conspiracy, whether done before, during or after his participation. This is illustrated by the *Stanley* case discussed below and is also the English Law position.

In *Stanley Musinga et al v R,*[67] The court said that "A person who joins a conspiracy is responsible in law for all the acts of his fellow-conspirators done in furtherance of the conspiracy, whether done before, during or after his participation."

This section must be read with section 395 of the Penal Code[68] which stipulates that any person who conspires to effect any lawful purpose by any unlawful means is guilty of a misdemeanour. In the case of *R v Mulji Jamnadas and others*[69] the defendants were charged with a conspiracy to effect a lawful purpose by unlawful means. The facts were that the defendants toured a neighbourhood in a lorry to recruit labour for the company's sugar works and acting together they did, in a number of occasions, compel persons by the use of force and threats of force to get into the lorry and submit to be carried away on it for labour at the sugar works. Their defense was that there was no offence known as intimidating labour into employment under the Ugandan Criminal System. In rejecting this defence, the Court observed that the defendants were doing a lawful purpose in an unlawful way and hence the offence of conspiracy had been proved. The East African Court of Appeal noted, cited from *Archbold on Criminal Pleadings, Evidence and Practice*[70]*,* that a tort which is not a criminal offence is sufficient to satisfy the provision as to "unlawful means", and upheld the convictions.

67 [1951] 18 EA(CA) 211.

68 Chapter 63,*Laws of Kenya.*

69 [1946] 13 EA civil appeal 147

70 Archbold: *Criminal Pleading, Evidence and Practice* , (1947 31st edn) page 1408

In conspiracy, where an accused person accuses a co-accused in his absence after the investigations have started, such accusations are not admissible against that person. The case in point is *R v Phillip Jonah and others.*[71] But where the evidence is about what the conspirators said or did in the furtherance of the conspiracy, such evidence is admissible against each of them.

Additionally, a husband and a wife cannot be charged with conspiracy. The theory herein is that spouses are but one person and one cannot conspire with oneself. However, if the spouses are charged jointly, with other persons, then the offence of conspiracy will stand.

2. Facts Inconsistent with or Affecting Probability (Section 11)

Any fact which either disproves or tends to disprove any relevant fact or fact in issue, is itself relevant. The admissibility thereof is a matter of logic and experience as it depends upon the proximity of the fact sought to be proved, to the fact in issue or relevant fact upon which it bears.

For example, where an accused puts forth an *alibi,* that is, a defence where an accused alleges that at the time of the commission of the offence with which he is charged, he was actually elsewhere and not at the scene of the crime. Such defence is relevant as it is entirely inconsistent with the allegation that the accused committed the crime.

Realising the apparent width of this provision, Sir Fitz James Stephen, the draftsman of the Indian Evidence Act said:

> "No statement shall be regarded as rendering the matter stated highly probable within the meaning of the section unless it is declared to be a relevant fact under some other section of this Act.[72]

70 [1934] 2 WACA 120..

72 As a result, East African courts are reluctant to apply the provisions of the statute because of its wide latitude. See *John Moody Lawrence Brown and others v R* [1957] EA 371.

However, his words cannot be taken seriously as this would render the provision superfluous.

3. Facts Affecting Quantum of Damages (Section 12)

This provision is terribly useful to lawyers who actively pursue accident victims to hospital for instructions. In a suit for damages or any other civil law situation, any fact which would help the court to determine the quantum of damages is relevant.

For example, under contributory negligence, your participation (contribution to liability) affects the amount of damages you receive. If the plaintiff in a civil suit claims damages as compensation for injuries suffered, the amount of damages which will compensate him naturally becomes a fact in issue.

M'Ibui v Dyer[73] involved a case of getting wounded in the course of arrest by a private person on suspicion of felony, psychological factors of malingering and "compensationists," were taken into account, as well as aggravation of damages by dint of injury to reputation, when determining the quantum of damages to award.

In *Suleimani Muwanga v Walji Bhimji Jiwani and another*[74] the deceased was a child. The Court considered the amount of damages for the loss of service to the mother and grandparents, the father being deceased, when ordering the quantum to be awarded.

4. Facts Affecting the Existence of a Right or Custom(Section 13)[75]

This provision is discussed at length as one of the exceptions to the hearsay evidence rule at Chapter 11 below.

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73 [1967] EA 315 (K).

74 [1964] EA 171 (U).

75 Where the existence of a custom or right is in question, any fact which shows the existence thereof is relevant.

5. Facts Showing the Existence of a State of Mind (Section 14)

When the existence of a certain state of mind of a person is in issue, any facts showing the existence of the state of mind or state of bodily feeling is a relevant fact. Section 15 of the Evidence Act is also said to be subject to this provision since evidence of similar occurrences can be used to prove the state of mind of the accused person.

In *Mohammed Saeed Akrabi v R,*[76] the accused was a school master charged with the use of criminal force with intent to outrage modesty by touching their private parts, in respect of two school pupils. Evidence called showed that on previous occasions, the accused had committed similar acts. As a result, the accused was convicted. On appeal, court held that the judge had a discretion to exclude similar facts evidence if its probative value was outweighed by the prejudicial effect; it was always bound to be a balancing act in ascertaining the purpose the evidence serves other than cause prejudice to the accused person. Further, that evidence of similar acts was admissible under sections 14 and 15 to show the intention of the accused and rebut the defence of accident or mistake (although it had not infact been raised).

In *John Makindi v R*[77] discussed earlier, it was held that it was not necessary to ascertain what defence would be advanced before admitting the evidence of previous beatings. Such evidence was admissible in anticipation of a possible line of defence. In fact, evidence as to previous beatings resulting in the accused's conviction for maltreatment of the boy and his threat: "As you have made me to be imprisoned, I will beat you until you die," were held to be admissible under section 14 as evidence showing ill-will towards the deceased.

Evidence of consumption of alcohol during a certain period may also be admitted under section 14 as tending to show the accused's probable mental and physical condition at a subsequent time when the exercise of due care on his part is put to question.

76 [1956] Vol.23 EA.civil appeal 512.

77 [1961] EA 327.

6. Similar Facts Evidence

Similar facts evidence is evidence of previous or subsequent acts which are similar to the fact in issue or relevant facts. The question usually posed here is whether such evidence can be adduced to lead to the conclusion that a particular person committed a certain offence. The answer is two-fold, in that:

(i) Such evidence may be called to prove commission of an offence which is charged. This evidence is only admissible under limited circumstances to be discussed shortly.

(ii) Yet, such evidence has a high potential for illegitimate use. This is especially so where its prejudicial effect outweighs the probative value of such evidence or if its use may conflict with the general rule on character evidence.

Needless to say, human beings are usually unfavourably impressed by accused persons shown to have a propensity for criminal activities or other forms of misadventure.

As a result, this area of law is highly technical. The most convenient departure for academic concerns is however the speech of Lord Herschell in *Makin v A. G for New South Wales*,[78] in which he articulated the rule in the following terms:

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for purpose of leading to the conclusion that the accused is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury; and it may be so relevant if it bears upon the question of whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Sir Kenneth O'Connor, P. in *John Makindi v R*,[79] observed:

78 [1894] AC 57 at 65.

79 [1961] 1 EA 327.

> "The provisions which govern the admissibility of evidence of similar offences are well known. The leading authority is *Makin v A. G* where Lord Herschell at page 65 enunciated two propositions. The first is it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

This principle is a deeply rooted and jealously guarded principle of the law of evidence as conceived in England. The Lord Chancellor in *Makin's* case (1) went on to enunciate a second proposition:

> "On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

In *Makin & Makin v Attorney-General of New South Wales,*[80] the defendants were charged with murder of a baby. It was shown that the child's mortal remains were found buried in a shallow grave at the backyard of a house occupied by them. The defendants had adopted this child from its mother in return for a sum of money, stating that they wished to bring it up because they had lost their own. The facts were consistent with an allegation that the defendants had killed the child (for the maintenance) but equally were consistent with death by natural cause followed by an irregular burial. Evidence called showed that the bodies of other babies, similarly adopted by the defendants, were found buried in the yards of houses previously occupied by the defendants. The trial court held this evidence to be admissible and the defendants were convicted.

On appeal, the famous statement by Lord Herschell, L.C was made and it was held that the evidence of previous similar occurrences was properly admitted as evidence relevant to the facts in issue. Hence, their appeal was dismissed.

80 [1894] AC 57 (PC).

For a long time, the statement by Lord Herschell was taken to be a rule of exclusion, that is, evidence of previous or subsequent similar offences was inadmissible unless an accused person expressly or by implication raised a defence of accident or such other defence open to him. Most cases up to the decision of *Harris v Director of Public Prosecutions*,[81] took this position.

In that case the appellant, a policeman who was at all material times on solitary duty in an enclosed market, was indicted on eight counts, each of which alleged a breaking into the same office in the market and stealing therefrom between May and July 1951. Evidence adduced showed that most of the gates of the market were closed and that on each occasion the thief had entered the office by the same method and stolen some money. The only evidence available to connect the appellant with seven of the counts alleged was the evidence of opportunity. With regard to the eighth count, evidence showed that the alarm had been placed on the premises , a fact that was unknown to the appellant who was, as usual, on duty in the market at the material time. Immediately after the alarm sounded, some detectives who had been lying in wait ran to the market and saw the appellant standing near the office. The accused disappeared from the scene of the crime for a period long enough to allow him hide the money where it was later found. The jury convicted him on the last count but acquitted him on the first seven counts.

The House of Lords held that the prosecution may adduce all proper evidence which tends to prove the charge without withholding any evidence until after the accused has set up a defence which calls for a rebuttal.[82] The court went on to say that, the trial judge has a duty to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. In *D.P.P v Christie*,[83] Lord Molton said that the judge in a given case has discretion to intimate to the prosecution that evidence of similar acts should not be pressed because its probable

81 [1952] AC 694 HL.

82 This holding was upheld locally in the *EA* civil appeal in *John Makindi v R* [1961] EA 327 (civil appeal).

83 [1924] 24 Cox C.C 249.

prejudicial effect 'would be out of proportion to its true evidential value'.

In that judgment, Viscount Simmons settled the matter in the following terms:

> "It would be an error to attempt to draw up a closed list of the sorts of cases in which similar facts evidence operates. Such list only provides for the instances of its general application."

Secondly, it was clarified that the prosecution need not wait for an accused person to raise a defence either of mistake, accident among others, before tendering evidence of similar facts. The prosecution, he said, was entitled to adduce all evidence which could go to prove the charge regardless of whether it was evidence of similar facts or not.

Sarkar[84] points out that in the determination of relevancy under the Indian Evidence Act, 1872, equivalent of section 15 of the Evidence Act, two things should be considered:

i. A question must be raised whether an act by the accused was intentional or accidental, or was done with particular knowledge or intention. Such evidence is admissible to rebut (even if in anticipation) a defence of accident or mistake or other innocent condition of the mind.

However, the judge has discretion to exclude such evidence if it merely tends to deepen suspicion against the accused and its prejudicial effect outweighs its probative value.

ii. Section 15 is not applicable unless it is sought to be proved that the act forms part of a series of similar occurrences.[85]

It is important to note that the provisions we are talking about here are applicable when the prosecution is leading its case or the defendant attempts to put up a line of defence, that is, prior to conviction. After conviction, it is always open for the prosecution to fall back on an accused person's previous criminal record for purposes of sentencing.

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84 Sarkar on Evidence (16th edn, 2007), page 167.

85 *Ibid* . Note 83.

The importance of this provision cannot be gainsaid in these days of organized and well planned crime such as serial killings and armed gang robbery. Such sophisticated criminals follow a certain defined pattern in the course of commission of offences. That repeated pattern of behaviour is what provides the basis for the admission of evidence, which would otherwise be highly prejudicial and inadmissible.

Whether evidence is relevant and admissible or whether in the mind of the judge, its prejudicial effect outweighs its probative value is a matter of common sense and experience.[86] A judge should look for the striking similarity or unity between the issue to be proved and the account of the series of previous similar criminal occurrences before making a decision one way or the other.

One area where this type of evidence has been extremely useful is in sexual offences as we shall see in the cases discussed below.

In *R v Scarrot*,[87] the defendant was tried on an indictment containing 13 counts, charging him with buggery, attempted buggery, assault with intent to commit buggery and indecent assault involving 8 young boys over a period of 4½ years. Counsel for the defendant applied to sever the indictment and asked for separate trials in respect of each boy, citing prejudice on the multiple indictment. The application was refused. At trial, the judge ruled that evidence given by each boy relating to the count or counts concerning him, had a striking similarity to the evidence given by the other boys and was admissible on the other counts. The defendant was convicted on one count of buggery, one count of attempted buggery and 8 counts of indecent assault on seven boys.

The Court of Appeal held that in order to be admissible, the evidence by its striking similarity, has to reveal an underlying link between the matters with which it deals and the allegations against the defendant on the count under consideration. Further, that the evidence admitted by the trial court does possess positive and probative value, and was strikingly similar such that when taken

86 See Lord Wilberforce in *Boardman v D.P.P* [1974] 3 All ER 887.

87 [1976] 1 All ER 672 [civil appeal].

together, these similarities are inexplicable on the basis of sheer coincidence. The Court of Appeal concluded that indeed, the trial court was right in admitting this evidence.

Discussing further the probative value versus the prejudicial effect, Lord Scarman stated that:

> "Such probative value is not provided by mere repetition of similar facts. There has to be some features in the evidence sought to be adduced which provides an underlying link. The existence of such a link is not to be inferred from mere similarity of facts which are themselves so commonplace, that they can provide no sure ground for saying that they point to the commission by the accused of the offence under consideration."[88]

In *R v Barrington,*[89] the appellant and the co-accused had induced 3 girls aged 11, 13 and 15, to come to the co-accused's house on the pretext of being employed as baby-sitters. While there, the appellant committed acts of indecency upon them. He was, *inter-alia*, charged with 3 offences of indecency and an offence of having sexual intercourse with a girl under 16. He denied the offences. On cross-examination, it was suggested to one of the complainants that the girls had concocted their evidence, that is, evidence of bad character. The prosecution was given leave to call 3 other girls whose evidence did not disclose the commission of similar offences, but circumstances similar to those leading to the commission of the offences against the complainants. The appellant was convicted of indecent assault and an attempt to have sexual intercourse with a girl under 16. He appealed against the conviction arguing that the evidence of the other girls ought not to have been admitted at all. That none of the other girls gave evidence of an indecent assault or any other act of indecency upon their persons.

The Court held that the evidence of the 3 other girls was admissible on the basis that the primary issue in the case, was whether the appellant had lured all the girls to the house for a sexual purpose, or whether, as the defence alleged, the purpose was an

88 Admitting similar fact evidence may be criticized in that the introduction/use of a strict test does not necessarily act as a solution to the prejudicial effect concern.

89 [1981] 1 All ER 1132.

innocent one, namely baby-sitting. That evidence tended to rebut their defence. Further, that the various facts recited by the judge in this case as constituting 'similar facts', were so similar to the facts of the surrounding circumstances that they can properly be described as 'striking'. That they did not include evidence of the commission of offences similar to those with which the appellant was charged, does not mean that they are not logically probative in determining the guilt of the appellant.

In *R v P*,[90] the respondent was convicted at trial of two counts of rape and 8 counts of incest. The indictment charged him with 4 offences of rape and 4 offences of incest in respect of each of his 2 daughters, B and S. The respondent was convicted in the case of each girl on the first count of rape and all counts of incest but was acquitted of the latter charge of rape. At trial, an application was made on behalf of the respondent, that the counts relating to the girl B should be tried separately from those relating to girl S. The trial court rejected this application and proceeded upon all counts. The respondent appealed against the refusal, the appeal was allowed and the conviction quashed. The appellant applied for certificate that a point of law of general public importance was involved. The certificate was allowed and leave to appeal to this was granted on the following points:

i. Where a father or step-father is charged with sexually abusing a young daughter of his family, is evidence that he also similarly abused other young children of the family admissible in support of such charge in the absence of any other 'striking similarities'?

ii. Where a defendant is charged with sexual offences against more than one child, is it necessary in the absence of striking similarities, for the charges to be tried separately?

The House of Lords held that, "it is not appropriate to single out the 'striking similarity' as an essential element in every case, in allowing evidence of an offence against one victim to be heard in connection with an allegation against another. That the essential feature of evidence which is admitted was that its probative force

90 [1991] 93 CAR 267 (CA), 272 (HL).

in support of the allegation that an accused person committed a crime, was sufficiently great to make it just to admit the evidence, notwithstanding that it was prejudicial to the accused as tending to show that he was guilty of another crime. Such probative force might be derived from striking similarities in the evidence about the manner in which the crime was committed." In the instant case, the evidence of B and S described a prolonged course of conduct by P against B and S, including general domination, use of force and threats; payments for abortions for the two girls by P, which when taken together gave a strong probative force to the evidence of each of the girls in the incidents involving the other. It was sufficient to make it just to admit that evidence, despite its prejudicial effect.

In *R v Tricoglus,*[91] the accused was charged with the offence of rape. It was alleged by the prosecution that the victim had been raped by a bearded man in a mini minor motor vehicle after he had driven for a short distance asking to give her a lift and she reluctantly accepted. Thereafter, she was driven to a cul-de-sac where the assault allegedly took place. The evidence of a previous victim similarly raped in the car in the same cul-de-sac and also by a bearded man was admitted. Upon conviction, the appellant went on appeal and challenged his conviction, arguing that the evidence was insufficient to link the 'bearded man' with him. Court held that the evidence of the two women who had both on separate occassions been offered lifts by a persistent bearded man driving a mini car, was improperly admitted as evidence which could be taken into account when determining the guilt of the accused on a charge of rape.

This was a very interesting outcome in light of the overall discussion on the use of evidence of 'striking similarity' test employed quite effectively by the English courts in the 1970s and 1980s in relation to sexual offences.

Scenarios Where Similar Fact evidence may be used

There are seven possible scenarios in which this evidence may be used :[92]

91 [1976] 65 CAR 16

92 *Ibid* note 89

1. Absence of a causal connection with the offence (accident).
2. Admission of causation but avoidance of guilt by plea of absence of intention.
3. Plea of automatism, that is, one did not know what he was doing among other reasons.
4. Lack of knowledge.
5. Identification.
6. Facts showing ordinary cause of business.
7. Civil cases.

1. Absence of Causal Connection or Accident

In *Makin v A.G of NSW*[93] discussed above, there was no evidence of who had buried the child in the garden of the accused persons' home. There was no causal connection between the accused and the offence. Evidence abound though that the accused had adopted several other children who had disappeared under similar circumstances. Excavations done in their gardens revealed several other skeletons of young children adopted by the defendants under similar circumstances. The question was whether the prosecution could tender evidence of these other discoveries to show a causal connection between the other deaths and the offence charged.

The Privy Council held that "the prosecution could tender evidence of the other discoveries to show that the offence committed was part of a series of similar offences perpetrated by the accused and further, to shut out accident as a possible line of defence for the accused.

In *R v Smith*,[94](also known as "the brides in the bathtub" case) Mrs. Smith was found drowned in her bathtub. The only evidence available was the fact that a few months prior to her death, Mr. Smith had insured her life in his favour (as the beneficiary). He had made a representation to his personal doctor that his wife was

93 [1894] AC 57 (PC).

94 [1915] 11 Cr. App. Rep 229.

epileptic and a few months later, his wife's dead body was found floating in the bathtub. No evidence of his involvement could be found. The prosecution adduced evidence that after death of Mrs. Smith, the accused had married two other women, insured them to his favour and made a similar epileptic representation to the doctor, only for them to be found dead in the bathtub subsequently. He was convicted and on appeal, argued that the evidence of subsequent occurrences was inadmissible.

The court held that the evidence was admissible as evidence of a series of similar offences. It would be incomprehensible coincidence that in each case somebody collapsed in the bathtub and in each case the accused stood to gain something. Further, that the evidence admissible of such similar acts is not necessarily limited to the fact of death, but may include surrounding facts and circumstances. The criteria for determining the extent thereof, is the necessity of assisting the tribunal of fact to arrive at a justifiable conclusion of the matter.

2. Plea of Absence of Intention

Here, an accused person admits the offence charged but denies an intention to commit it. If it can be shown that the accused has been involved in a series of similar occurrences, it may be inferred that he had a particular state of mind and the intention necessary to commit the said offence.

In *Mohammed Saeed Akrabi v Reginam,*[95] discussed earlier, intention was inferred from the fact that the accused had treated three other boys from the same school in a like manner as the complainants herein. The court therefore found that, there existed criminal intent to outrage modesty of the complainants.

In *Achieng v R,*[96] the accused was a Permanent Secretary within the Government of Kenya who had been given some imprest but failed to account for it. He was charged with theft by servant for stealing the sum of KShs 76,000 from that account. His defence was

95 [1956] Vol. 23 EACA 512.

96 [1972] EA 37.

that he had no intention to defraud Treasury of the money and that he intended to account for it. The prosecution, however, adduced evidence to the effect that on six previous occasions, Achieng' had taken money from his imprest account and never accounted for it, and from which an inference of guilt could be drawn to rebut the defence of absence of intention. The question was whether the evidence of the previous occurrences was admissible. The court held that it was admissible because it rebutted his defence of lack of intention to commit the alleged theft.

In *R v Mortimer*[97] the appellant was charged with murder, the allegation being that he had knocked down a woman cyclist by deliberately driving a motor vehicle at her. He claimed that it was an inevitable accident. The prosecution, however, adduced evidence that Mortimer had on two other previous occasions, knocked down other female cyclists in a similar way and had stopped his car to assault them.

It was held that this evidence of the previous incidences was admissible to show that he intended what he had done and also to negate the defence of absence of intention. It was not an accident. The nature of the event as a whole ruled out coincidence and the conclusion was gleaned from looking at the transaction as a whole. Applying the principles in the *Makin's* case, the evidence of previous occurrences was relevant to establish the guilty intent of the appellant, either to kill or cause grievous bodily harm to the woman who was killed by the motor vehicle.

3. Involuntariness

Where an accused person is shown to engage in a series of acts of distinct similarity, it is possible to rebut a defence that he was acting out of a state of automatism. Automatism is the involuntary movement of the body and limbs of a person. It is confined to acts done while unconscious or due to spasms, reflex actions and convulsions.

97 [1936] 25 CAR 150..

The attachment of criminal liability in criminal law is premised on the assumption of willingness or intentional commission of an offence on the part of the accused. Voluntariness of an act is perhaps a more fundamental element of criminal liability than the intention to cause, or foresight of results of the act which is normally thought of as *mens rea*. Its absence is what gives rise to the defence of automatism.

What do you say of an accused person who admits liability but alleges that he suffers from a disease of the mind; a sleepwalker, epileptic seizures or other spasms which cause him to commit the crime without intending to? If the acts involved a pattern of behaviour on the part of the accused, this evidence may suffice to establish guilt and negate a defence of involuntariness.

4. Lack of Knowledge

A person may raise the defence of lack of knowledge that the act allegedly done was illegal. Where it is shown through evidence that he was engaged in a series of previous or subsequent similar acts, evidence of those acts may be relevant to rebut the defence of lack of knowledge or intention.[98]

In *R v Francis*[99], Francis was charged with attempting to obtain money from a pawnbroker by pretending that he had a diamond ring to sell. He said in his defence, that he had no knowledge that the ring he was purporting to sell was not a diamond ring and that it was worthless. Evidence called showed that he had previously attempted to pledge the ring to other pawnbrokers who had discarded it as valueless. Therefore, he knew or ought to have known that the ring was worthless. The question was whether the evidence of previous transactions with these other pawnbrokers was relevant. Court held that similar fact evidence was admissible to show a series of similar occurrences and negative his plea of lack of knowledge.

In *R v Bond,*[100] Dr. Bond was charged with using some medical instruments on a woman with the intent to procure an abortion. He

98 Section 15 of the Evidence Act.

99 [1874] LR 2 CCR 128.

100 [1960] 2 KB 389.

denied the intent and in his defence, claimed that he was not using the instrument to procure an abortion but to lawfully examine the woman when a miscarriage occurred. The prosecution called Miss C, Dr. Bond's ex-girlfriend, against whom Dr. Bond had used the same instruments with intent to procure an abortion. She also testified that the doctor had stated that he was in the habit of procuring abortions and in turn had made dozens of girls happy, hence could do the same to her. The defence objected to this evidence on the grounds that it was prejudicial and irrelevant. Court admitted the evidence of the previous occurrence to show that the defendant used the instruments with intent to procure the abortion.

In *R v Armstrong,*[101] Armstrong was charged with the murder of his wife by administering arsenic poison on her. This poison was actually found in his house tied up in packets containing a fatal dose. Armstrong claimed that he used the poison to kill weeds as a gardening aid. There was actually no evidence that he had administered the poison on his wife. The prosecution, however, adduced evidence that a few weeks after Armstrong's wife's death, he had attempted to murder another man by giving him arsenic poison. The question was whether this evidence was admissible. The defence raised an objection that the evidence was prejudicial and irrelevant. The court held that the evidence was admissible to prove that the accused knew the effect of administering the arsenic poison thereby rebutting the defence of lack of knowledge. In the words of Lord Hewart:

> "… The fact that Armstrong was subsequently found not merely in possession of but actually using for a similar deadly purpose, the very poison that caused the death of his wife, was evidence from which the jury might infer that the poison was not in his possession at the earlier date for an innocent purpose."

101 [1922] 2 KB 55.

5. Admissibility of Similar Facts Evidence to Show Identity of the Accused

It would be erroneous to assume that the ambit of the doctrine of similar facts evidence is restricted to the provisions of section 15 of the Evidence Act. Similar facts evidence may be adduced and admitted under section 9 of the Evidence Act in order to show the identity of an accused person.

For example, if X did acts A, B and C and an unknown person did a similar act D within the same geographic area, it may be inferred that X was the doer of act D. This is particularly so if act D is done with such frequency or peculiarity, that there was probably only one person capable of doing the act complained of at that time and place.

In *R v Straffen,*[102] the accused was committed to Broadmoor hospital having been found unfit to plead to two charges of killing small girls without molesting them sexually and then leaving their bodies unconcealed. He escaped from the hospital and while still in the vicinity thereof, a small girl was killed without being sexually molested and her body left lying unconcealed by the roadside. On re-arrest, the accused admitted having seen the little girl but denied having killed her. The prosecution tendered evidence that in the past the accused had been charged with the offence of strangling two other little girls in the same way for no reason and left the bodies unhidden. The court held that this evidence of previous similar acts committed by the accused was admissible at least to show that the perpetrator had an abnormal propensity, which could be used to identify that the accused was concerned with the death of the little girl.

Per Slade, J:

> "I think one cannot distinguish abnormal propensities from identification. Abnormal propensity is a means of identification."

The same formula was applied in the case of *Thompson v R.*[103] In this case, the appellant was convicted of committing acts of gross

102 [1952] 2 QB 911.

103 [1918] AC 221 (HL).

indecency on some boys. It was alleged that Thompson had carnal knowledge of two boys on 16 March 1918 and then gave them a date 3 days later, on 19 March 1918. He described the place of the date as a street outside a public toilet. Thompson then met the two boys at the appointed hour. On noticing the presence of strangers, Thompson gave the boys some money and asked them to go away. It turned out that these strange persons were police and when they approached him, Thompson pleaded the defence of mistake and told them that they had got the wrong man. During trial, Thompson pleaded the defence of alibi. It was proved that the man who committed the offence made an appointment to meet the boys on 19 March 1918, at the time and place where the offence was committed, and that the appellant met the boys at the appointed place and time and gave them money. A search was done and Thompson was found in possession of a few bottles of chemicals, a further search of his house yielded photos of naked boys. The judges relied on this evidence and the use of the chemical as alleged by the boys to convict him. In the words of the court, being gay had characteristics that were easily recognisable. It elicited a distinct propensity and was therefore a reliable means of identification. The possession of the articles showed that the person who came on 19 March 1918, had abnormal propensities as the one who came on 16 March 1918, Further, the similar facts evidence was admissible as evidence tending to show the identity of the person charged.

In Kenya, the Court of Appeal sanctioned the use of propensity evidence to identify an accused by means of similar acts in the case of *Paul Ekai v R.*[104] In this case, Paul was charged with the murder of Joy Adamson, a famous conservationist. His defence was an alibi (i.e. an assertion of not being at the *locus quo)*. Ekai said that on the night of the alleged murder, he had been in Isiolo staying with his grandmother. Evidence called showed that on the material night, one of the 3 large tin trunks kept in the deceased's house, including the one containing the cash box, had been broken open by a person using a crow-bar which had been taken from the workshop at the camp and some cash stolen. The intruder had escaped using the animal enclosure. The prosecution also gave evidence that 3 weeks

104 Cr. App number. 118/81.

earlier, there had been another burglary at the camp, during which one of the 3 tin trunks containing cash had been forced open with the bar taken from the camp workshop and again the intruder had escaped through the animal enclosure. When Paul was apprehended after the murder, he was found in possession of some clothes stolen from the camp on the previous occasion. Paul was the deceased's worker and he had a good knowledge of the camp, he was unable to explain how he had come by those clothes, hence presumed to be the thief.

Taking all these factors into consideration, the court held that given his peculiar *modus operandi,* (that is, using a particular tool, breaking open a particular trunk and escaping through the animal enclosure) and the evidence of the previous theft was admissible in an attempt to prove the murder. The inference was irresistible that Paul was involved in both incidents.

In *Noor Mohammed v R*,[105] the accused was charged with the murder of his mistress through poisoning. The accused was a goldsmith and was in bad terms with her. He had access to potassium cyanide. There was no evidence that the accused had administered the poison to her. The prosecution sought to adduce evidence that the accused had had another wife, who died as a result of potassium cyanide poisoning in circumstances which suggested that the accused had lured the wife into taking poison as a cure for a toothache. The accused had never been charged with causing her death, but there was some evidence that he might have tricked her.

The accused was convicted and sentenced to death. He went on appeal challenging the admissibility of the said evidence. The appeal was allowed by the Privy Council and the sentence quashed on the grounds that:

i) The evidence admitted by the trial judge in respect to the wife's death was very prejudicial to the accused person, hence inadmissible. In the words of the court, the probative value was outweighed by the prejudicial effect even though

105 [1937] Vol. 4 EACA.

the evidence was technically admissible. This contravened the principles laid down in the *Makin's* case.

ii) The evidence plainly tended to show that the appellant had been guilty of a criminal act other than that with which he was charged, for the purpose of leading to the conclusion that he was a person likely from his criminal conduct or character, to have committed the offence for which he was being tried.

iii) The evidence could not be said to be relevant to any issue in the case. In light of the facts which, if accepted, it revealed, its admissibility could not be justified on any ground.

The question now is how to reconcile the use of similar facts evidence to establish identity with the rule against the use of evidence of propensity so well articulated by Lord Herschell in *Makin's* case.

On the face of it, it would appear that the two are irreconcilable. However, a rider may be imposed to the effect that: "If a person has a propensity so distinct as to afford a reliable means of identification, it may be used to identify him as the doer of the act which bears hallmarks of the special propensity in question."

In *Boardman v D.P.P*[106] Lord Cross stated that:

> "...the prosecution is not as a general rule allowed to adduce evidence that the defendant has done acts other than those with which he is charged in order to show that he is the sort of person who would be likely to have committed the offence in question...Circumstances, however, may arise in which evidence is so relevant that to exclude it, would be an affront to common sense...The question must always be whether the similar facts evidence taken together with the other evidence, would do no more than to raise or strengthen suspicion that the defendant committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in the face of it... In the end, the question must be one of degree."[107]

106 [1974] 3 All ER 887 at page 908.

107 at p. 175.

6. Facts Showing Ordinary Course of Business

Section 16 of the Evidence Act deals with facts showing the ordinary course of business. Office practice provides the best example of evidence showing that a certain act has been done, when the doing of that particular act comes into question. It is inferred that the uniformity of the general course was followed in the particular case, once you show a course of business. This is clearly circumstantial evidence which shows the 'state of things' under which a certain act was committed. On the applicability Indian Evidence Act 1872 equivalent of section 16, Sarkar says:

> "In well-established offices or firms, books are kept or business is conducted on such settled lines and principles that when the doing of a particular act comes in question, it may be reasonably inferred that the uniformity of the general course was followed in the particular case. When the course of business usually followed is proved, the probability is that there is departure from the common course of business in the particular transaction. In the case of public offices like the post office, where work is carried on with almost mechanical regularity, the probability becomes stronger that the letter has been dispatched in due course or reached its destination."

In *R v Harold Whip and another*[108] the two accused persons were charged with conspiracy to defraud the City Council. The case for the prosecution was that pursuant to an agreement between the two accused, one of them was a City Council Engineer and the other, an excavator. The first accused certified payments as due to the second accused firm for the excavation of hard rock which the first accused knew to be greatly in excess of what had been excavated. The first accused had therefore caused excessive payment to be made by the City Council to the contractor. The prosecution alleged that this was done fraudulently and that he had not just made an honest mistake in the estimation of the rocks. The prosecution actually brought evidence that there had been a case where the same accused person had overestimated the amounts owed to the second accused, an event which had occurred in 1953. The court held that the 1953 transaction rebutted a defence of honest mistake essentially showing

108 [1955] 28 KLR 243

the state of mind with which he had acted in the ordinary course of business.

7. Similar Facts Evidence in Civil Cases

Should the approach of courts to similar facts evidence be the same in civil as in criminal cases?

In *Mood Music Publishing Co. Ltd v De Wolfe Ltd,*[109] the plaintiffs were owners of the copyright in a musical work called 'Sogno Nostalgico'. They alleged that the defendants had infringed such copyright by supplying for broadcasting purposes a musical work entitled 'Girl in the Dark'. It was not disputed that the works were similar, but the defendants argued that the similarity was coincidental and denied copying, even though 'Sogno Nostalgico' was composed prior to the 'Girl in the Dark'. The plaintiffs were permitted to adduce evidence to show that on other occasions, the defendants had reproduced works subject to copyright. The defendants appealed.

Court held that:

i. In civil cases, the courts will admit evidence of similar facts if it is logically probative, that is, logically relevant in determining the matter which is in issue: Provided that it is not oppressive or unfair to the other side. Further, that the other side has a fair notice of it and is able to deal with it.

ii. Upon the issue in dispute in this case, it is relevant to know that there are other cases of musical works which are undoubtedly the subject of copyright, but that the defendants have nevertheless produced musical works bearing close resemblance to them.

Hence, similar facts evidence does have a place in a civil court where the matter in dispute predisposes itself to the adduction of such evidence.

109 [1976] Ch. USA (civil appeal)

F. Conclusion

Evidence of similar facts is admissible when it is of strong probative force and is highly relevant to the circumstances, to establish commission of the act, identity of the perpetrator of crime, or the state of mind in which it was done or to defeat the defence of accident or mistake or even inadvertence. When such evidence is tendered under section 15, it must be shown to be part of a series of other similar acts which is not necessary in the other sections.

In summary, the object of a party in any proceedings is to persuade the court of the existence of certain facts and the applicability of certain rules of law and of evidence to those facts. The applicability of any rule of law is a question of law. However, the existence of certain facts is determined by the evidence adduced. Such evidence may take any of two major forms, that is, excluding evidence of collateral facts:

i. Direct evidence of the facts in issue

ii. Circumstantial evidence refers to the facts from which inferences as to the existence or non-existence thereof may be drawn.110 Sections 6-16 provide illustrations of instances when circumstantial evidence is relevant and admissible.

110 Section 5 of the Law of Evudence Act

Chapter 3

Facts which need not be Proved by Evidence

A. Introduction

Facts are proved in court by oral testimony of witnesses who come to court when they are summoned for that purpose or at the instance of the party calling them.[111] Oral evidence is the traditional method of proving facts in issue. As a general rule, all facts in issue must be proved and any condition precedent must be proved by the person who seeks to adduce such evidence.

As an exception to the foregoing, the following facts are presumed to be true in the absence of proof and no evidence is required to prove them.

(1) Judicial notice

(2) Presumptions

(3) Admissions

B. Judicial Notice

While no definition has been offered under the Evidence Act, judicial notice is often defined as the liberty accorded a judicial officer acting as such, to recognize the existence or non-existence of certain facts or phenomena without calling for evidence.

The expression 'judicial notice' means recognition or notice of the truth of the facts taken by a judge which do not require proof by any evidence because the matters noticed are of common notoriety.

Section 59 of the Evidence Act affirms this position by providing that:

"No fact of which the Court shall take judicial notice need be proved".

111 See T. Akiniola Aguda, "*Law and Practice Relating to Evidence in Nigeria*"(1980) at 139.

Lord Sumner in the case of *Commonwealth Shipping Representative v P. & O. Branch Services*[112] defined judicial notice as:

> "facts which a judge or a magistrate may be called upon either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer".

Coulson J in the case of *MacQuacker v Goddard*[113] provides the rationale for judicial notice as:

> "The reason why evidence was given was for assistance of the judge in forming his view as to what the ordinary course of nature, in this regard in fact, is a matter of which he is supposed to have complete knowledge"

Thus, judicial notice is desirable for providing efficiency and consistency of facts.[114]

In both criminal and civil proceedings, a court may take judicial notice of facts notwithstanding the absence of proof by evidence. The basis for judicial notice is that there are facts that are known to everybody, the courts included. For instance, it is common knowledge that the life of a criminal is an unhappy one.[115] Where statutes decree that certain things are to be judicially noticed e.g. Articles of War for the Armed Forces.

Section 60(1) of the Evidence Act lays down the facts which the Court shall take judicial notice to include the following matters.

a. All written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya;

b. The general course of proceedings and privileges of Parliament, but not the transactions in their journals;

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112 [1923] AC. 191, 212

113 [1940] 1 KB 687(CA)..

114 G.D. Nokes, "*The Limits of Judicial Notice*" (1958) 74 L.Q.R. 59.

115 *Burns v Edman* [1970] 2 QB 541. In *Rv Simpson* [1983] 1 WLR 1494, civil appeal it was held that a flick knife was an offensive weapon since it is an 'article made … for use for causing injury to a person.

c. Articles of War for the Armed Forces;

d. (Deleted by L.N. 22/1965);

e. The public seal of Kenya; the seals of all the Courts of Kenya; and all seals which any person is authorized by any written law to use;

f. The accession to office, names, titles, functions and signatures of public officers, if the fact of their appointment is notified in the *Gazette*;

g. The existence, title and national flag of every State and Sovereign recognized by the Government;

h. Natural and artificial divisions of time, and geographical divisions of the world, and public holidays;

i. The extent of the territories comprised in the Commonwealth;

j. The commencement, continuance and termination of hostilities between Kenya and any other State or body of persons;

k. The names of the members and officers of the Court and of their deputies, subordinate officers and assistants, and of all officers acting in execution of its process, and also of all advocates and other persons authorized by law to appear or act before it;

l. The rule of the road on land or at sea or in the air;

m. The ordinary course of nature;[116]

n. The meaning of English words;[117]

o. All matters of general or local notoriety;

p. All other matters of which it is directed by any written law to take judicial notice.

116 *R v Luffe* [1807] 8 East 193 a fortnight is too short a period for human gestation; *Preston- Jones v Preston-Jones [*1951]AC 391; the duration for human gestation is nine months.

117 *Chapman v Kirke* [1948] 2KB 450 at p 454, *Ryde v Bushell* [1967] EA 817, 821; it was held that judicial notice of the meaning of English words is to be taken so as to avoid the need for unnecessary explanations as to meaning thereof.

Clearly, this list is not as exhaustive as it should be since the court's discretion is wide. Needless to say, that the circumstances of every case are peculiar and need to be considered with this in mind.

However, it must be noted that the court can only take judicial notice when the matter being noticed is of a public kind and very notorious. Again, in all matters specified in section 60(1) and also on all matters of public history, literature, science or art, the judge or magistrate may resort for aid from appropriate books or documents of reference.[118]

If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so[119] unless and until such person produces such evidence or document as it considers necessary to enable it to do so. In other words, a party who asks the court to take judicial notice of a matter of general or local notoriety has the onus of convincing the court on two points:

1. First, that the matter is so notorious as not to be the subject of dispute among reasonable persons.
2. Secondly, that the matter is capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.[120]

Phipson[121] describes notorious facts as follows:

> "facts which are notorious, e.g. the ordinary course of nature, the standards of weight and measure; the public coin and currency and its difference of value in early and modern times;…the meaning of common words and phrases…or that beans are a species of pulse; the existence of the Universities of Oxford and Cambridge, and the fact that they are national institutions for the advancement of learning and religion"

In *Re Oxford Poor Rate* Case,[122] the court took judicial notice of the fact that the Oxford University was established for the advancement

118 Section 60(2) of the Evidence Act.

119 Section 60(3) of the Evidence Act.

120 *Gupta v Continental Builders Ltd* [1978] KLR 83.

121 *Phipson on Evidence,* 11th edn at page 59.

122 [1857] 8 EIB 184.

of religion and education and was therefore not liable to pay the poor rate tax. Similarly, in *Nye v Niblett,*[123] judicial notice was taken of the fact that cats are usually kept for domestic purposes.

Notwithstanding the clear statement of the law in section 59 and section 60(1), of the Evidence Act it is established practice that in determining whether to apply judicial notice, the court will not take judicial notice of a fact unless it is both notorious and obvious.

The question whether customary law should be judicially noticed arose in the case of *Kimani v Gikanga*.[124] The issue was whether Kikuyu customary law was capable of being judicially noticed. Gikanga was father of both the respondents and uncle to the appellant and was the owner of 100 acres of land by the time he died in 1942. While the appellant was in detention, the respondents registered the title to the land under their name. Later on, the appellant sued arguing that they held 30 acres in trust for him under the *Muhoi* custom. He argued that the court should take judicial notice of the kikuyu custom of *muhoi*[125] as the basis for which he got the land. The Judges were of the opinion that the party that seeks to rely on the customary law should prove that custom as a matter of fact. This is because of the difficulty of establishing what the customary law is at any given time since it is unwritten. It considered the problem of proof of customary law in Kenyan Courts. The question arose as a result of the interpretation of section 60(1) of the Evidence Act which provides that:

> "Courts shall take judicial notice of … all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya."

It was held that where African customary law is neither notorious nor documented, it must be established for the court's guidance by the party intending to rely on it and this, the appellant had failed to

123 [1918] 1 QB 23.

124 [1965] EA 7.

125 *Muhoi* is a kikuyu customary law practice whereby a squatter acquires a right and title to land after many years of labour in contribution towards and on behalf of the landowner.

do. It was further held that as a matter of practice and convenience in civil cases, the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence or expert opinion evidence adduced by the party.

Judicial notice is important for a number of reasons:

i) First, it ensures that there is uniformity in decisions of the Courts.

ii) Second, it reduces the incidents of embarrassment of the state by the Court taking individual views on foreign matters as well as political issues such as the nature of diplomatic relations between states. *R v Botrill, exp Kuechenmeister*[126] illustrates this. The Court of Appeal in this case took note of the sour diplomatic relationship between The United Kingdom and Germany and refused to grant and application for *habeas corpus* to a German national.

iii) Third, it saves time and expenses involved in proving matters which could be proved easily and with certainty.

Attention must be drawn to the danger that lies in the application of judicial notice. Judicial notice is likely to prevent the parties of a case from being heard or advancing a particular argument on a fact. Overzealous application is likely to infringe on the right to adduce and challenge evidence as provided for in article 50(2)(k) of the Constitution of Kenya.

C. Admissions

An admission is a statement, oral or written, which suggests an inference as to a fact in issue or a relevant fact, and which is made by any of the parties to the proceedings.[127] An admission, verbal or written, made by a party in the course of the proceedings in the same case, does not require proof. The admission may be contradicted only by a showing that it was made through palpable mistake or under duress or that no such admission was made. Thus an integral characteristic of an admission is certainty. It is stated that:

126 [1947] KB 41

127 Admissions are covered under sections 17-24 of the Evidence Act

"An admission should possess the same degree of certainty as would be required in the evidence which it represents, and hence mere conjectures or suggestions as to what might have happened if certain circumstances had not occurred are not competent; neither should an alleged admission be considered where the 'subject matter to which it refers is left uncertain'."[128]

Admissions are classified into:

1. Formal Admissions-Formal admissions are a form of proof as they absolve a party who would otherwise have the burden of proof of the fact in question from having to adduce evidence to prove such fact[129].This is the concession or acknowledgment by one party of the truth of some matter alleged by the opposite party, made in a pleading, the effect of which is to narrow the area of facts or allegations requiring to be proved by evidence[130]. Further, formal admissions are binding on the party admitting the facts and thus the party cannot contradict them.[131]

2. Informal Admissions-Informal admissions are those admissions that are made but without court proceedings in mind therefore may be withdrawn when convenient[132].

A fact may be formally admitted in the following ways:

i) Express admissions on the pleadings;

ii) By default of pleading;

iii) By failure to traverse it in a pleading;

iv) By letter written by legal advisor prior to trial;

v) In answer to a notice to admit under Order 13 of the Civil Procedure Rules, 2010; and

vi) By affidavit in answer to admit to an interrogatory.[133]

128 *Corpus Juris Secundum* Vol.31 para 277 at page 1029..

129 Steve Ouma, *A Commentary on the Evidence Act Cap. 80*, (LawAfrica, 2014) page 153..

130 http://thelawdictionary.org/admission/. See *Connecticut Hospital v Brookfield*, 09 Conn. 1, 3G Atl. 1017.

131 Steve Ouma, *A Commentary on the Evidence Act Cap. 80*, (LawAfrica, 2014) page 154.

132 Steve Ouma, *A Commentary on the Evidence Act Cap. 80*, (Law Africa, 2014) page 154..

133 *Bullen & Leake & Jacob's Precedents of Pleadings,* (13th edn Sweet & Maxwell 1990) at

The distinction between the two sets of admissions is that formal admissions are made with respect to proceedings while informal admissions are made with respect to anticipated proceedings and are thus not conclusive.

Section 61 of the Evidence Act stipulates in this regard that;

> "No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may in its discretion require the facts admitted to be proved otherwise than by such admissions"[134]

The main principle is that once you admit certain facts, you will not be required to prove those facts but the court may in its own discretion require those facts to be proved.

In civil proceedings, admissions are provided for under Order 13 of the Civil Procedure Rules, 2010. A party seeking the admission of a certain fact or facts will issue a Notice to Admit to his opponent who responds by way of a Notice of Admission or Non-Admission as the case may be. A party may use an admission as the foundation for an application for judgment, a procedure known as Judgment on Admission.[135]

An admission should adhere to particularity. It should be clear and unequivocal according to the Kenyan Court of Appeal in the case of *Choitram v Nazari*.[136] It was held that a plain and obvious case, even if established after substantial argument or analysis of documents entitles a plaintiff to judgment on admissions. Madan, JA held that:

> 'Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a

425-429..

134 Section 61 of the Evidence Act..

135 Order 13 rule 2 of the Civil Procedure Rules, 2010..

136 [1976-1985] East Africa Law Reports pages 53-67. See *Kibalama v Alfasan Belgie CVBA* [2004] 2 EA 146 (CAU)..

> magnifying glass to ascertain their meaning…if upon a purposive interpretation of either clearly written or clearly implied, or both admissions of fact, the case is plain and obvious that there is no room for discretion to let the matter go to trial for then nothing is to be gained by having a trial."[137]

Further in the case of *Momanyi v Hatimy and another,*[138] the Court of Appeal stated that when it comes to admissions, the principle is the same and the views expressed in *Choitram* apply with equal force to contract as they apply to tort. This case further brings forth the principle that a judge ought not to enter judgment for a sum admitted but not sued for. A plaint ought to be amended to substitute the admitted sum for that sued for and in the absence of the amendment no summary judgment or judgment on admission can properly be entered in respect of that sum.[139]

It must be noted that section 61 does not apply to criminal cases because the prosecution cannot be relieved of the burden of proving facts which constitute offences by admissions, as opposed to the plea of guilty, of a particular fact by the accused.[140] Again, another point to be emphasized is that formal admissions must be in court documents. Oral admissions are not recognized as formal admissions.

A formal admission may be made by letter written by a legal advisor acting on behalf of a client. This was held in the case of *Ellis v Allen,*[141] Sargant, J held that the plaintiff was entitled to judgment because of an admission made by letter that there had been a subletting of property contrary to the covenants in a lease.

According to section 24 of the Evidence Act, admissions are not conclusive proof of the matters that they admit but they could operate as estoppels. Critics wonder why Parliament enacted that provision knowing that under the common law, admissions constitute

137 [1976-1985] EA 58.

138 [2003] 2 EA 600.

139 [2003] 2 EA 601.

140 See argument by T. Akiniola Aguda, (*Supra* note3) at 145, 11-13. This position is very clear in section 61 of the Evidence Act.

141 [1914] 1 Ch 904.

conclusive proof of the admitted facts. It is worth noting that while admissions are essentially not conclusive they amount to estoppel.

The idea of estoppel is to prevent a person once he asserts a certain state of things as being correct from asserting the opposite of what they had admitted.

In criminal cases, a plea of guilty amounts to an admission of the offence charged. The provision on admissions for criminal proceedings is section 207, Criminal Procedure Code.[142] It provides that if the accused admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him. The court shall thereafter convict him and proceed to pass sentence upon or make an order against him. Such an admission evidently is conclusive in those proceedings of the facts admitted. It is also conclusive for the purpose of any subsequent proceedings e.g. an appeal or retrial.

There is also the concept of admission by conduct. The admission will be inferred from positive acts or from demeanour (for example, silence after a direct accusation). A party's admission by conduct as to any material fact may generally be proved against her and evidence to explain or rebut such admission is receivable in her favour.[143]

D. Presumptions

According to *Phipson*[144] presumptions are devices by which courts are entitled to pronounce on an issue notwithstanding that there is no evidence or that there is little evidence to support it. Presumptions have the effect of placing on one or the other party the burden of proof in relation to a fact or issue regardless of where the general burden of proof in the case lies.[145]

Sarkar defines a presumption as an inference, affirmative or disaffirmative, of the existence of some fact, drawn by a judicial

142 Chapter 75, Laws of Kenya.

143 *Moriarty v London, Chatham and Dover Rly Co* (1870) LR 5QB 314

144 *Phipson on Evidence*, M. N. Howard, 15th edition. (London: Sweet & Maxwell, 2000).

145 *Phipson on Evidence*, M.N. Howard, 15th edition. (London: Sweet & Maxwell,2000).

tribunal by a process of probable reasoning from some matter of fact either judicially noticed, admitted or established legal evidence to the satisfaction of the tribunal.[146]

Presumptions are legal inferences or assumptions or positions established by law and based on the known proven set of facts. They are conclusions as to the truth of some fact in question which may or must be drawn from other facts until the contrary is proved.[147]

A presumption shifts the burden of proof to the adverse party who should produce evidence to overcome the presumption in question.

In short, a presumption may or must be drawn in the absence of evidence to the contrary. Primarily, the effect is to lower, drastically reduce or altogether extinguish the burden or proof incumbent upon the person in whose favour a presumption is drawn.

Presumptions as rules of evidence do not conflict with article 50(2)(a) of the Constitution of Kenya which presumes innocence.[148] This is due to the fact that the constitutional presumption of innocence ensures the prosecution is obliged to prove the case against the accused beyond reasonable doubt.[149]

Categories of Presumptions

There are three broad types of presumptions:

(1) Presumptions of fact

(2) Rebuttable presumptions of law

(3) Irrebuttable presumptions of law

One must be keen enough to note the difference between presumptions of fact and presumptions of law. According to *Phipson,*[150]

146 *Sarkar on Evidence* (16th edition, 2007).

147 *Phipson on Evidence*, 15th edn. (London: Sweet & Maxwell, 2000)

148 Steve Ouma, *A Commentary on the Evidence Act, Cap. 80,* [2014] LawAfrica page 102.

149 Steve Ouma, *A Commentary on the Evidence Act Cap. 80,* [2014] Law Africa pg. 102

150 *Phipson on Evidence*, 15th edn. (London: Sweet & Maxwell, 2000) pg 531.

the differences between presumptions of law and presumptions of facts are as follows:

a. Presumptions of law derive their force from law, while presumptions of fact derive their force from common sense and logic.

b. A presumption of law applies to a class, the conditions of which are fixed and uniform; a presumption of fact applies to individual cases, the conditions of which are inconsistent and fluctuating. Thus, the presumption of death arises whenever seven years' unexplained absence is proved; but when it is necessary to establish the time of the death more precisely the question must be decided on the evidence adduced in each specific case.

c. Presumptions of law are made by the court, and in the absence of opposing evidence are conclusive for the party in whose favour they operate and for the purpose for which they operate; presumptions of fact result in inferences drawn by the tribunal of fact, who may disregard them, however cogent. In practice, however, these distinctions are by no means easy to discern.

1. Presumptions of Facts

Section 4 of the Evidence Act further defines presumptions in the following terms;

1. Whenever it is provided by law that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

2. Whenever it is directed by law that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

3. When one fact is declared by law to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

These are discretionary inferences that may be drawn upon the establishment of a basic fact. The operative word in these presumptions is 'may'. A fact may be presumed upon proof of a basic fact and in the

absence of sufficient evidence to the contrary. Presumptions of facts are sometimes referred to as provisional presumptions to indicate that the party against whom they operate bears a provisional or tactical burden in relation to the presumed fact.

Unlike rebuttable presumptions of law, establishment of a basic fact does not have the effect of placing evidential or legal burden on that party. Thus, presumptions of facts can be said to amount to circumstantial evidence. Examples of presumptions of facts include the presumptions of intention, guilty knowledge, continuance of life and seaworthiness of vehicles.

In the case of *Re W,*[151] there was a presumption of fact drawn to the effect that a baby's best interests are served by being with the mother.

There are several examples of presumptions of fact. It is vital to note that most of these presumptions fall within the domain of the criminal law. The following are some of the major presumptions of facts that may arise;

(i) Presumption of guilty knowledge

A person who is in possession of stolen goods after the theft and cannot give account of those goods is either the thief or has received them knowing them to be stolen. We are talking about the doctrine of recent possession.

In *Zus v Uganda*[152] the High Court refused to apply the doctrine of recent possession after the accused was found in possession of a stolen bicycle 7 months after it had been recorded lost. The trial court had actually applied that doctrine to convict the thief of both the theft and receiving stolen goods because the accused had not given any reasonable explanation by how he had come upon the bicycle. The Court of Appeal held that 7 months cannot be described as recent and consequently quashed the conviction for theft while upholding the conviction for receiving stolen goods.

151 [1922] Times, 22 May, (CA)..

152 [1976]EA 420.

(ii) Presumption of likely facts or immutability of things:

This is covered in section 119 of the Evidence Act where it states that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. A thing or state of things which has been shown to exist within a period shorter than that within which such things or state of things usually cease to exist is presumed to be still in existence.

This presumption is also known as the presumption of continuance i.e. any proven state of affairs may be assumed to have continued for sometime the duration depending on the circumstances of the case.

An example is given in the case of *Kanji & Kanji v R*[153] where a sisal factory employee's arm was amputated by a sisal decorticator in April 1960. An examination done by a Mr. Perkins in September 1960 showed that there was no barrier or fence to protect the employees when feeding the machine with sisal leaves. The firm was held liable for failing to provide ample barriers to protect employees from the machine and this finding was held on the basis of the presumption of the immutability of things. On appeal the factory owner argued that there was some form of fence at the conveyor belt when the accident occurred in 1960. This barrier was not found to be in place in September when Mr. Perkins did his inspection. The Court held that the Magistrate was correct in presuming that the machine was in the same condition in April 1960 as it was in September 1960. It is unlikely that there was a barrier in April which disappeared by September but the factory owners were welcome to adduce evidence to prove that there had been a barrier in April. [154]

Another example is the case of *DPP v Nathani*[155] where the accused was charged with forgery with intent to deceive the East African Airways of an air ticket purporting to have been issued in

153 [1961] EA 411 (CA).

154 Also see the case of ***DPP v Nathani*** [1966] EA below

155 [1966] EA 15.

Zanzibar. The accused was licensed to issue tickets from Zanzibar and not Dar es Salaam from where the tickets had allegedly been issued. A loose-leaf volume agency list issued by the IATA on 1 February 1965 was produced by the prosecution to show that the Dar es Salaam office was not licensed. Counsel for the defendant argued that the document was admissible only to prove the position as of 1 February 1965. The defendant was nonetheless convicted. On appeal, it was held that the trial court was entitled to presume under section 114 of the Indian Evidence Act that the position was the same on the date charged in each count as that shown on the agency list.

(iii) Presumption of Regularity

This is the presumption that official and judicial acts are performed regularly. It is based on sound public policy which imputes good faith on official and judicial conduct. The burden is on he/she who alleges irregularity to bring the evidence to disprove or establish the irregularity. Looking at how our courts run, this might not be the way to go. For instance, if your file gets lost, will you allege that the file got lost by the court? Ordinarily, you will make an application for the reconstruction of the court file using the Advocates' pleadings and one fact that you will plead is that the court registry was negligent. The underlying basis of this assertion is the presumption of regularity of official and judicial acts. In *Berryman v Wise,*[156] it was held that an attorney need not prove by his certificate or by a roll of attorneys that he was an attorney. Proof that he acted as such was held sufficient. Again, in *R v Roberts,*[157] on an indictment for perjury committed in the presence of a deputy county court judge, the judge was presumed, in the absence of evidence to the contrary to have been duly appointed.[158]

156 [1791] 4 Term Rep 366.

157 [1878 14 Cox CC 101, CCR.

158 See also *Dillon v R* [1982] AC 484, PC, *Commissioner for Income Tax* v *Armstrong* [1963] EA 505.

(iv) The presumption that the common course of business has been followed in particular cases

The basis of this presumption is business practice. If some business has been carried out pursuant to such common course, it is going to be presumed to be so unless the person alleging otherwise brings evidence to the contrary. If you have a quarrel with the common course of business, it is incumbent on you to prove that the common course of business was not followed.[159]

(v) The presumption that evidence which could be produced and is not produced would, if produced, be unfavourable to the person who withholds it

If someone is withholding evidence, it would be presumed that the person withholding the evidence is doing so because it is against them. Hence, it is incumbent upon the person withholding the evidence to show that it is not so. Prior to production of such evidence, it is necessary to show that there is evidence which is being withheld by that party.[160]

(vi) The presumption that accomplices are unworthy of credit and that their evidence should not be used to convict unless it is corroborated

There are certain witnesses who are held suspect and accomplices are an example. The reasons for the unworthiness of the evidence of an accomplice are that;

i) An accomplice is a participant in the offence;

ii) Such a person would be highly tempted to "pass the buck";

iii) Having participated in the commission of the offence, an accomplice is generally an immoral person and their word should not be taken without corroboration;

iv) An accomplice is likely to favour the state in hope for a pardon.[161]

159 *Lim Kheng Kooi and another v R*(1957), MLJ 199

160 *Uzoegwa v Ifekandu and another* (2001) FWLR 72

161 *Davies v DPP* [1954] AC 378 (HL)

It is therefore necessary to get independent testimony on material particulars. The case of *Davies v DPP*[162] illustrates the point.

In this case, the appellant together with other youth attacked another group of youth with fists. One of the members of the other group subsequently died of stab wounds inflicted by a knife. Six youths including the appellant and one L were charged with murder but finally the appellant alone was convicted. L and the others were convicted of common assault. At the appellant's trial, L gave evidence for the prosecution referring to an admission by the appellant of the use of a knife by him during the attack. The judge in this case did not warn the Jury on the danger of accepting L's evidence without corroboration. On appeal, the appellant stated that he was wrongly convicted because of lack of a corroboration warning on the part of the judge. The court held that there was no good reason for quashing the conviction because L did not know before the murder that any of his companions had a knife. Essentially, the court held that L was not an accomplice in the crime of murder.

2. Rebuttable Presumptions of Law

These are inferences that may be drawn in the absence of conclusive evidence to the contrary. To rebut this presumption you need conclusive evidence. They are presumptions that are decreed by law.[163]

A good example is the presumption of genuineness in a document purporting to be the Kenya *Gazette*.[164]

There is the presumption that every person accused of a crime is innocent until proved guilty and there is conclusive evidence dispelling the innocence of the accused person.[165]

Another example of a rebuttable presumption is the presumption of sanity.[166] which presumes that all persons are of sound mind. The

162 [1954] AC 378

163 Section 4(2) of the Evidence Act

164 Section 85 of the Evidence Act

165 Article 50 (2)(a), Constitution of Kenya, 2010

166 Section 11 of the Penal Code

Court is entitled to presume the continuance of this state of affairs until the contrary is proved. It must be noted that the questions of sanity or insanity are questions of law and not of medicine. Medical insanity refers to insanity as a state of affairs, the state of a person's mind over a given period of time. Legal insanity is static; it refers to the state of a person's mind at a given point in time, consequently, when the issue of insanity arises in proceedings, it is a legal question.

Where a presumption operates in favour of the accused, the prosecution bears the legal burden to disprove the presumed fact beyond reasonable doubt. It is stated that:

> "the presumption is *functus officio* and drops out of sight…the function of a presumption of law sustaining the burden of evidence is ended by the introduction of rebutting testimony, as stated the presumption of law disappears leaving in evidence the basic fact".[167]

Essentially, these presumptions are said to be mandatory until the party against whom they operate avails cogent evidence to the contrary.

The following are some of the key examples of rebuttable presumptions of law:

(A) Presumption of Death

From time to time, the court may be called upon to infer the fact of death from circumstantial evidence. Such conclusion may be reached by the application of logic and known facts. The presumption of death is rebuttable presumption premised on the length of time of the absence of the person presumed to be dead. The greater the length of time, the weaker the support is for the inference that she/he is alive.

Section 118 A[168] provides as follows:

> "Where it is proved that a person has not been heard of for seven years by those who might be expected to have heard of him if he were alive, there shall be a rebuttable presumption that he is dead".

167 *Corpus Juris Secundum,* Vol. XXXI, para 117, page 731.

168 The Evidence Act Cap. 80 of the Laws of Kenya.

The period of seven years is an arbitrary one picked up by the judges of the English High Court when the concept was being developed in the 19th century. The point is that if a person has not been heard of for 7 years by those people who would have heard from him, he is presumed dead. For purposes of expediting matters, it is a rebuttable presumption of law premised on length of time of absence of a person. The people likely to hear from such a person are members of the person's immediate family.

For the presumption to hold the following factors have to be considered:

1. There are people who would be likely to have heard from that person in that period.
2. That those persons have not heard from the person;
3. All due enquiries have been made as appropriate in the circumstances.

In the case of *Chard v Chard,*[169] parties to a marriage celebrated in 1933 sought decrees of nullity on the grounds that the husband had been through a marriage ceremony in 1909. The first wife in respect of whom there was no evidence of ill health or registration of death was last heard of in 1917 and would in 1933 be forty-four years in age. There were reasons which might have led her not to wish to be heard of by her husband or his family in that between 1917 and 1933 the husband was continually in prison. The question that arose was whether one could presume that she was dead and therefore hold the marriage of 1933 valid. The court held that there was no evidence of a person who would have been likely to have heard of the first wife between 1917 and 1933 and consequently the presumption of death was inapplicable in which case the petition of nullity could not be upheld without more evidence.[170]

169 [1956] 2 AER 259.

170 In *Bradshaw v Bradshaw* [1956] P274, the court held that though the fact that the wife had not heard from the husband was a matter which must be taken into account, so also must be her failure to make any inquiries about him. See also *Taylor v Taylor* 643 N.E.2d 893, 895.

In *Prudential Assurance v Edmonds*[171]; this was an action based on life insurance. The issue was whether the defendant was dead or alive. The defence was that the defendant was not dead. The family gave evidence of not having heard from the man for more than seven years. However, his niece had written to her mother from Australia stating to have seen him in the street in Melbourne but that he was lost in the crowds before she could speak to him. The court held that the presumption of death could not hold in the light of this evidence by the niece.

A person seeking to establish the date of another person's death must do so by evidence proving that date. Therefore, those who found a right upon a person having survived a particular date must establish that fact affirmatively by evidence.

The presumption of death has no reference to the time of death of the missing person. Hence, where a petitioner wishes to prove the death of the missing person, cogent evidence is required as established by the court in *Re Phene's Trusts.*[172] In this particular case, a testator died having bequeathed his residuary estate equally between his nephews and nieces. One of his nephews went to America in 1853 from where he frequently wrote until august 1858 when he last wrote on board an American navy war ship. From that time on, no letter was received from him and nothing was afterwards heard of him except that he was entered in the books of the American Navy as a deserter on 16 October 1861 while on leave.

Many fruitless inquiries and advertisements were made across the country between 1853 and 1862 but to no avail. The court held that if a person has not been heard of for seven years, there is a presumption of law that he is dead, but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any time within that seven-year period is on the person claiming a right to the establishment of when that fact is essential.

171 [1877]2 App Cas 487.

172 [1870]Ch App 137.

(b) Presumption of Marriage

There are three distinct presumptions of marriage:

i) Presumption of formal validity;

ii) Presumption of essential validity; and

iii) Presumption of marriage arising from cohabitation.

i Presumption of Formal Validity

The formal validity of a marriage is dependent on the law of the place of celebration i.e. *lex loci celebrationis.* Therefore, one has to comply with the laws of the place of celebration failure to which the marriage will be invalid on the ground of non-compliance. If the parties had capacity to contract a marriage then the law presumes that they are validly married. You establish presumption of marriage through ceremony and cohabitation. Once it is admitted that a marriage was celebrated between two persons who intended to marry then the formal validity is presumed to exist.

In *Piers v Piers*[173] a couple got married in a private dwelling house while the law required as a prerequisite for the validity of such a marriage that a special licence be obtained. The parties did not obtain that kind of licence and when the marriage turned sour, the validity of the marriage came into question. It was held that the presumption of marriage in favour of the legality of marriage is not to be lightly repelled. The evidence against it or evidence to rebut it must be strong, distinct, satisfactory and conclusive.

Similarly, in *Mahadervan v Mahadervan*[174] a ceremony had been celebrated between the parties in Ceylon. Two of the requirements of the local law was that solemnization of the marriage by a Registrar either in his office or in an authorized place and that during the ceremony the Registrar do address the parties as to the nature of the union. The parties cohabited as husband and wife for a short period of time and they acknowledged each other as such. Seven years after the first ceremony, the husband went through another

173 [1849] 2 HL Cas 331.

174 [1964] P233. See also *Hill v Hill* [1959]1 All ER 281.

marriage with another woman in England and the validity of the first marriage came into question. According to the first marriage certificate, the marriage had taken place at the office of the Registrar but the wife gave evidence that it had in fact taken place at her parent's house and there was no evidence of the requisite address by the registrar to the parties. The court applied the presumption and held the Ceylonese marriage to be formally valid. Sir Jocelyn Simon held that the presumption of marriage can only be rebutted by evidence which satisfies beyond reasonable doubt that there was no valid marriage.

In *Morris v Davies,*[175] Lord Lyndhurst stated as follows:

> "The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by mere balance of probabilities. The evidence for the purpose of repelling it must be strong distinct and conclusive.:"

II Presumption of Essential Validity

Essential validity captures aspects of a marriage such as capacity. A marriage may be declared void if the parties had no capacity to marry at the time of the marriage. A party may lack capacity to marry if already married, if the parties are within limited degrees of consanguinity and affinity or if they are below the legal age of marriage. If it is proved that a marriage is formally valid, it will then be presumed subsequently that it is essentially valid in the absence of any evidence to the contrary.

In *Tweney v Tweney*[176] Pilcher J held that:

> "The petitioner's marriage to the present respondent may be unexceptionable in form and duly consummated remains a good marriage until some evidence is adduced that the marriage was in fact a nullity".

In *R v Shaw,*[177] there was proof of celebration of a prior marriage and the accused did not give evidence to rebut this evidence. The

175 (1837) 254, 265.

176 [1946] P 180 at 182.

177 (1943) Times Law Report 344.

husband, though he denied it, did not bring evidence to rebut his alleged bigamy. It was held that there was a presumption of validity of the first marriage which had not been rebutted. The court refused to grant leave to call evidence to show that the accused was already married at the date of celebration.

III Presumption of Marriage by Cohabitation[178]

When a man and woman live together holding themselves out as husband and wife and society regard them as such, the law presumes after such cohabitation that the couple is married. It must be noted that the validity of a marriage by cohabitation does not depend on the conduct of the ceremony but on the assumption of marriage after the ceremony.

Mustafa J.A. in his leading judgment in *Hottensiah Wanjiku Yawe v Public Trustee* stated:

> "I agree with the trial judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on the issue, the trial judge omitted to take into consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such a presumption."[179]

Madan, JA, (as he then was) further stated the following:[180]

> "The concept of presumption of marriage is an appreciation of the needs of the parties in life when a man and a woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage. That if a woman is left stranded either by her husband or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestow, the status of a woman to enable her to qualify for maintenance or share in the estate of the deceased husband."

178 This Presumption of marriage is also known as the common law marriage . It has nothing to do with any written law . It is no wonder that the marriage Act, 2014 makes no mention of it.

179 Civil Appeal Number 13 of 1976.

180 Civil Appeal Number 13 of 1976.

In *Sastry Velaider Aronegary v Sembecutty Viagalie*,[181] it was held that where it is proved that a man and a woman have gone through a form of marriage, the law will presume unless the contrary be proved, that they were living together in consequence of a valid marriage and not in a state of concubinage.

The decision of *Case v Ruguru,*[182] is a blot on the Judiciary. The Plaintiff, a white man, was cohabitating with the defendant and after a while the relationship became sour. The plaintiff sued for eviction of the defendant on grounds *inter alia,* of trespass and to his aid the plaintiff called evidence that he had actually been married to a white woman in 1966 and the marriage had not been dissolved. He admitted having lived with the defendant for sometime and having paid KShs 3,000 as dowry. Evidence showed that KShs 3,000 was not dowry and that no ram had been slaughtered as required by customs. The court held that as a mere licensee the defendant was liable for eviction for trespass.[183]

In the landmark case of *Hottensiah Wanjiku Yawe v Public Trustee*,[184] the court found redemption. Yawe, a pilot from Uganda and resident in Nairobi West ,was killed in a road accident in Uganda in 1972. After his death, the appellant claimed to be his widow and claimed that they had 4 children together. The Ugandan relatives of the deceased claimed that she was not his wife and that the deceased was not married. Evidence was called which showed that the deceased lived with the appellant as a wife and that he had named the appellant as a wife in his papers at work. And further that the two were reputed as husband and wife and had cohabited as husband and wife for over nine years. The Court held that long cohabitation as husband and wife gives rise to presumption of marriage and only

181 [1881] 6 App Cas 364, PC.

182 [1970] EA. 55

183 See also *Wanjiku v Macharia* [1968], where *Wanjiku* petitioned for maintenance from Macharia calling to her aid a marriage certificate. The two had gotten married in 1963, stayed together as husband and wife until the relationship turned sour. She had testified on oath that she had been married to another man in 1953 or thereabouts. The court held that they would not presume marriage because all that was required to rebut presumption of marriage by cohabitation was some evidence that leads the court to doubt the validity of marriage. In the words of the court, *Wanjiku* had no validity of marriage.

184 Civil appeal 13 of 1976

cogent evidence to the contrary could rebut such a presumption. To this end, Mustafa, JA stated:

> "I can find nothing in the Restatement of African law to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising from long cohabitation. In my view all marriages in whatever form they take, civil or customary or religious, are basically similar with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the Appellant in this case should not apply just because she was married according to Kikuyu customary law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to the issue of their union, and in my view, it is applicable to all marriages howsoever celebrated. The evidence concerning cohabitation was adduced at the hearing, and formed part of the issue concerning the fact of marriage, and even if no specific submission on that point was made by Mr. Muite, I do not think that he is precluded from relying on it before us. It is directly concerned with the burden of proof to be discharged by the appellant, and this presumption enhances the quality of the evidence adduced on her behalf and weighs heavily in her favour. There was no evidence adduced in rebuttal of that presumption. The trial judge omitted to take this crucial matter into consideration: if he had, he would probably have held that the appellant was married to the deceased and was his wife."

Evidence of cohabitation must be led and this means doing things which ordinarily can only be done by a husband and wife e.g. living under one roof, having children together, buying property together, holding themselves out as man and wife. These are not things done with mistresses. In the case of *Mary Njoki v John Kinyanjui*[185] the Court of Appeal was quite clear that before a presumption of marriage is drawn on cohabitation, cogent evidence must be led. Nyarangi JA held that:

> "The presumption does not depend on the law of systems of marriage. The presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife.
>
> In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If

185 [19854] eKLR

> the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently.'

(c) Presumption of Negligence

In the case of *Scott v London Dock co*[186] Erle CJ held that:

> "when the thing is shown to be under the management of the defendant or his servant and the accident is such as in the ordinary course of the thing does not happen if those who have the management use proper case, it affords reasonable evidence in the absence of why the accident arose from want of care".

To this end, negligence will be presumed if the circumstances of a case show that in the ordinary course of the events, an accident does not happen if those in charge exercise proper care and due diligence. The presumption is also known as the doctrine of *res ipsa loquitor* which is a Latin term meaning that the thing speaks for itself. The presumption is invoked where the plaintiff suffers damage in consequence of one or more things which were under the exclusive control of the defendant or his servant.

In practical terms, the doctrine of *res ipsa loquitor* shifts the evidentiary burden of proof to the party against whom it applies, so that if this evidentiary burden is not discharged, then the doctrine stands and negligence is presumed against that party. To put it otherwise would place a very heavy burden on a plaintiff who may not quite know the exact cause of the accident.

3. Irrebuttable Presumptions of Law

These are also known as conclusive presumptions.[187] These presumptions must be drawn on proof of a basic fact showing the occurrence or existence of the presumed fact. Once you establish

186 [1865) 3 H&C 596.

187 Section 4(3) of the Evidence Act

the basic fact pertaining to the presumption then you have to draw the inference that will give credence to that presumption. They will usually be drawn from statutory provisions. They are public policy pronouncements, which decree that in the interest of the public certain matters be dealt with in a certain way.

Under section 14 of the Penal Code[188] it is presumed that a child under the age of 8 years is incapable of committing a criminal offence. Therefore, it follows that once the age of the child has been proved to be under the age of 8, then the law requires a conclusive inference to be drawn that the child is incapable of committing an offence. The same section raises an irrebuttable presumption that a boy under the age of 12 years is incapable of rape.

Here, once the basic fact is proved, the presumed fact is also deemed to have been proved. A conclusion that the presumed fact exists must be drawn and all rebutting evidence is deemed inadmissible.

(A) Presumption of Legitimacy

At common law, the presumption of legitimacy was regarded as a rebuttable presumption that states that a child born within the subsistence of a marriage is deemed to be the child of the husband. The maxim that applies in this case is *pater est quem nuptiae demonstrant* i.e he is the father whom the marriage indicates. The Evidence Act upgraded the presumption to the status of an irrebutable presumption. It provides under section 118 that:

> "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten"

In *Gordon v Gordon and Granville Gordon,*[189] the husband brought divorce proceedings against the wife on grounds of adultery. Divorce

188 Chapter 63, Laws of Kenya.

189 [1903] AC 141.

was granted and the custody of the children was given to the husband. Prior to the grant of the decree absolute, the wife applied for variation on the grounds that the child of the marriage was not the natural child of the father but a son of the co-respondent. The court held that sexual intercourse between a man and wife must be presumed and nothing can bastardise a child born in wedlock.

This holding expresses the sharp public policy basis of the presumption. The rationale behind this presumption is that if the balance of probabilities is too light it is likely to expose children to the peril of being illegitimised.[190]

The *Michael H. and Victoria D. v Gerald D*[191] case is a good example of this legal presumption as to legitimacy. In this case, Carole and Gerald were married. During this marriage, Carole had an adulterous affair with Michael. Sometime after this affair, a child called Victoria was born. During a brief separation from her husband, Carole and Michael had blood tests performed to determine Victoria's paternity. The tests established, according to the evidence presented to the court, a 98 percent probability that Michael was Victoria's father. After a period of living with Michael and treating Victoria as Michael's daughter, Carole reconciled with Gerald. Michael, as probable biological father of Victoria, sought visitation rights with Victoria.

The court held that the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage

In *Seif Bin Ali Bajuni v Hamed Bin Ali Bajuni,*[192] a child was born ten months after the alleged father divorced the mother. The father had prepared a document in contemplation of the paternity suit seeking to deny that the child was his own. The child later filed for a claim as heir and the material issue was whether the child was the father's. The court declared that the document was properly rejected as evidence of a statement relating to the existence of any blood relationship and went on to hold that in the absence of any evidence

190 Steve Ouma, *A Commentary on the Evidence Act, Cap. 80* [2014] LawAfrica page. 112.

191 491 U.S. 110 (1989).

192 [1947] 7 ZLR 134.

of adultery on the part of the mother, the plaintiff was the legitimate child of the said father.

The presumption of legitimacy is not always applicable, there are exceptions. The presumption is rebuttable by evidence of non-access between the parties or prolonged distance which hindered access. Access or non access means presence or absence of sexual intercourse between the parties. What has to be proved to prove illegitimacy is the husband's non-access and not proof that the wife had intercourse with other men besides her husband. This is a question of fact to be proved by cogent evidence.

The case of *Poulet Peerage*[193] illustrates this. In this case, the Earl of Poulet married a lady who delivered six months thereafter. The Earl deposed that he had never had intercourse with the lady prior to the marriage and that soon after the marriage she confessed to him that she was pregnant at the time of their marriage with another man's child. After this confession, he separated from her and never acknowledged the child as his. Upon the question of the legitimacy of the child in a claim for peerage, the court held that the presumption of legitimacy was inapplicable as the child was clearly conceived before marriage.

E. Conflicting Presumptions

Where there are two conflicting presumptions how is the court to resolve the same? There are two suggested solutions to this problem:

1) To treat the two presumptions as having cancelled each other out and proceed to try the case according to normal rules relating to burden and standard of proof of evidence.

This was the solution adopted in *Monckton v Tarr*[194] where the same presumptions of essential validity of marriage applied to two different ceremonies of marriage. A, a woman married B in 1882. B deserted her in 1887. In 1895, when there was no evidence that B was alive, A married C. In 1913, while A was still alive, C married woman D. D made a claim under WCA as a widow of C. The

193 [1903] AC 395

194 [1930] 23 BWCC 504.

employer of C alleged that the 1913 marriage was void because of the 1895 marriage. D replied that the 1895 marriage was void because of the 1882 marriage. The Court found for the employer. It was held that D's appeal would be dismissed because, although the presumption of essential validity applied to the marriage of 1913 the same presumption applied to the marriage of 1895. The two presumptions cancelled each other out and it was for D to prove C's capacity to marry her which could only be done by showing that B was alive at the time/date of the 1895 marriage, so that A would have had no capacity to marry C on that date.

2) The other approach is to weigh the relative strength of a presumption by referring to the comparative likelihood of the two presumed facts, or by referring to public policy. This approach has the added advantage of flexibility compared to the set formula above. This seems to be the approach adopted in *R v Willshire*.[195]. The accused was convicted of bigamy for having married D in the lifetime of his former wife C. The accused had in fact undergone four ceremonies of marriage. With A in 1864, B in 1868, C in 1879 and D in 1880. The prosecution in order to discharge its burden of proof relied on the presumption of essential validity. The accused sought to show that the marriage of 1879 was void by virtue of his earlier conviction of bigamy relying on the presumption of fact as to continuance of life to establish that A was still alive in 1879. He was convicted The defendant appealed. It was the court's holding that the conviction be quashed. The prosecution bore the burden of proving the validity of the 1879 ceremony. Once they had proved the facts giving rise to the presumption of validity of that ceremony, the defence bore an evidential burden to adduce evidence in rebuttal. The defendant had discharged the burden by relying on the presumption of continuance of life of A.

Some critics posit that this case is as much an authority for the first proposition above as it is an authority for the second proposition.[196]

195 [1881] 6 QBD 366.

196 *Re Peatling* (1969)VR 214

F. Effects of Presumptions on the Burden of Proof

Presumptions shift the burden of proof so that the person in whose favour the presumption is made has nothing to prove and the person against whom it operates has the burden to adduce evidence in rebuttal. This applies, especially so, when the presumption is rebuttable so that the effect thereof is to discharge the burden of proof. With regard to irrebutable presumptions, once the basic facts giving rise to the presumption have been proved, the irrebuttable presumption sets in. No evidence can be called to rebut the same.

Presumptions also have the effect of reducing the time it would take proving certain matters. Certain matters are known to everyone and it would be a waste of time to discuss that in court. Therefore, presumptions assist by saving the court's time.

Chapter 4

Estoppel

A. Introduction

Estoppel is a legal principle that prevents a party from denying or alleging a certain fact owing to that party's earlier allegation, conduct, or denial.

Estoppel, in principle, simply means that what a person had stated earlier, he should not be allowed to deny the same later. Therefore, a party to litigation is estopped from asserting or denying a fact they previously acknowledged.

Phipson,[197] in his learned treatise on evidence defined estoppel as follows:

> "An estoppel is a rule whereby a party is precluded from denying the existence of some state of facts which he/she has formerly asserted. It is usually said to be only a rule of evidence because at common law an action cannot be founded thereon; but as in equity an action, and in both a defence, can be founded on estoppels, and as estoppels must be pleaded and evidence not, it may in many cases be regarded as a rule of substantive law."

The common law position was espoused by Dixon J in the case of *Grundt v Great Boulder Pty Goldmines Ltd*[198]

> "The law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations."

The rule of evidence is that estoppel cannot found an action. *Bowen, L J*, repeats this formula in substance:

> "Estoppel is only a rule of evidence; you cannot found an action upon estoppel."[199]

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197 S. L. Phipson, *Law of Evidence*, 11th edition, page 923.

198 [1937] 59 CLR 641 at 674.

199 (1891) 3 Ch 82

In the case of *Low v Bouverie*,[200] the plaintiff lent money to a borrower on the security of the borrower's beneficial life interest in certain property. The plaintiff's solicitors wrote to the defendant, who was one of the trustees of the property, to inquire whether the borrower had mortgaged or parted with his life interest in the property. In his reply, the defendant disclosed the existence of two encumbrances on the property, but failed to disclose the existence of several others of which he had received notice, but forgotten. On the faith of that assurance, the plaintiff entered into the proposed transaction. The borrower was subsequently declared bankrupt and, as a result of the prior mortgages, the plaintiff's security was worthless. The plaintiff's security being insufficient, he sued the defendant for the declaration that he was liable for the amount due on the security alleging that the advance to the borrower was made upon the faith of the defendant's written representations.

The court held that the defendant was not liable either on the grounds of fraud, breach of duty, warranty or estoppel and that for an estoppel to operate, it must be clear and unambiguous.

Lord Justice Bowen held that the representee's interpretation of the language used by the representor must be reasonable. Lord Justice Bowen qualified his statement that the language on which estoppel is founded must be "precise and unambiguous" by explaining that the language need not be open to only one construction, but must be "such as will be reasonably understood in a particular sense by the person to whom it is addressed". On the facts, *Bowen, LJ* found that the representor's language would be reasonably understood as a representation of his belief that there were no encumbrances on the property in question other than those disclosed, rather than as an assertion that there were in fact no other encumbrances. Similarly, Kay, LJ held that where no fraud is alleged, the representee must show "that the statement was of such a nature that it would have misled any reasonable man".

The representee in *Low v Bouverie* failed to discharge that onus since the "only fair meaning" which could be attributed to the representor's statements was that the encumbrances disclosed

200 [1891] 3 Ch 82.

were all the representor was aware of at the time of writing. The approaches of Bowen and Kay, *LJJ* to the question of reasonableness are consistent with the finding of Lindley, LJ that the representee "too hastily inferred" that no encumbrances existed other than those disclosed by the representor.

It is a principle of the law of evidence that facts covered by estoppel need not be proved.

Estoppel is a rule of law whereby a party to proceedings is precluded by some previous act, words or conduct to which he was party or privy from asserting or denying a fact.[201] It is a rule of exclusion making evidence of a relevant fact inadmissible.

The following are the principles that guide the application of estoppels:

1. Estoppel has to be mutual or reciprocal and consequently has to bind both parties; a stranger can neither take advantage of nor be bound by estoppel.

2. Estoppel cannot be used to circumvent the law. You cannot invoke estoppel to render an invalid act valid or *vice versa*.

3. Estoppels must be certain and that is to say that the statement which forms the basis of an estoppel should be precise, clear and unambiguous. It should be incapable of being read in more than one way. It should lead a person to just one conclusion.

4. It is immaterial whether the maker of the statement or the representor believes it to be true or false i.e. if you make a reckless statement which leads people to do certain acts to their detriment, you will be estopped.

5. The representation which is the basis of an estoppel must be a statement or representation of fact which existed in the past

201 Section 120 of the Evidence Act provides that 'When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing'.

> or is existing at the time of the making of the statement or representation. It should not be a promise in future.

For estoppel to apply, the party who purposes to rely on it must raise it in the proceedings. If the person fails to raise estoppel in the pleadings, it can amount to a waiver of the estoppel.

In the case of *Crabb v Arun District Council*[202] the plaintiff owned a piece of land which had access at point A onto a road owned by the defendants. And the plaintiff also had a right of way from that point A along this road. To enable him to sell his land in two parts, the plaintiff sought from the defendant a second access point and he also wanted a further right of way from point B. At a site meeting held between the plaintiff, his architect and a representative of the defendant, the additional access at point B was agreed to. Subsequently, the defendants fenced the boundary between their road and the plaintiff's land erecting gates at B and A.

After the plaintiff sold part of his land together with the right of access at A and also going with the right of way onto the road, the defendants removed the gate at B and fenced it off. Essentially that blocked the access to the said road thereby rendering his property uneconomical. The plaintiff sued for a declaration and injunction claiming that the defendants were estopped by their conduct from denying him a right of access at B and a right of way along the road. The trial court held that in the absence of a definite assurance by the defendant no question of estoppel could arise. Consequently, the plaintiff's action was dismissed.

On appeal, it was held that the defendants, knowing the plaintiff's intention to sell his land in separate portions, by their representation, led the plaintiff to believe that he had been granted a right of access at point B and by erecting the gates and failing to disabuse him of his belief, encouraged the plaintiff to act to his detriment in selling part of his land without reservation over it of any right of way thereby giving rise to an equity in his favour. The court also held that the equity should be satisfied by granting the plaintiff a right of access at point B and a right of way along the road. In view of the

202 [1976] 1 Ch 179.

sterilization of the plaintiff's land for a considerable period resulting from the defendants' act, the right was granted without any payment by the plaintiff.

All estoppels operate subject to the general rule that they cannot be set up to contravene a statute. An estoppel, if illegal by virtue of being contrary to a statute or common law, will not be enforceable. For example, where a statute requires a particular formality, no estoppel will cure the defect. Likewise, where a statute denies a court jurisdiction, it cannot be given to it by an estoppel.[203]

There are two principle types of estoppels, namely:

i) estoppel by record,

ii) estoppel by conduct.

B. Estoppel by Record

This refers to estoppel arising from a judgment entered by a court of competent jurisdiction. Once such a judgment has been entered and the time for raising an appeal has elapsed, it will be taken that the judgment was rightly made.

The general rule is that the order of a court of competent jurisdiction is conclusive proof of the issues decided therein between the parties thereto and their privies as to the material issue decided there.

The basis for this principle is twofold:

i) The first is that there needs to be finality to litigation i.e. the 'interest reipublicae ut sit finis litium' principle which means it is for the common good that there should be an end to litigation.

ii) Secondly, is that no one should be harassed for the same cause twice i.e. 'nemo debet *bis vexari pro una et aedem* causa', which means no one should be sued twice on the same ground.

Accordingly, the existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial, may be proved when the question arises as to whether such

203 *Halsburys Laws of England*. 4th edn Volume 16(2), 2003 para 1.2.2.

Court ought to take cognizance of such suit or to hold such trial.[204] The only condition is that the judgment must have been delivered by a court competent jurisdiction[205] and it must be among those mentioned in sections 43, 44 and 45 of the Act, except where the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.[206]

For the purposes of estoppel by record, it is important to recognize that there are two types of judgments:

1. Judgments *in rem*– this refers to adjudication on the status of a person or a thing. Examples of judgments *in rem* include judgments in divorce proceedings, probate proceedings, bankruptcy proceedings, electoral proceedings etc. All these have implications for the status of persons or things.

Section 44(1) of the Evidence Act defines judgments *in rem* as:

> "A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible."

In *Lazarus Barlow v Regent Estates*[207] the court stated that such judgments are conclusive evidence of all the matters they adjudicates against all persons in the world. Such judgments are conclusive not as against any specified persons but absolutely bind the whole world.[208]

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204 Section 43 of the Evidence Act.

205 Section 47 of the Evidence Act gives an aggrieved party room to challenge a judgment which has been pleaded by the adverse party. The section provides in this regard that 'Any party to a suit or other proceeding may show that any judgment, order or decree which is admissible under the provisions of this Act and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.'

206 Section 46 of the Evidence Act provides in this regard that 'Judgments, orders or decrees other than those mentioned in sections 43, 44 and 45 are inadmissible except where the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act'.

207 [1949] 2 KB 465, 475.

208 See also *Allen v Dundas* (1789) 3 Term Rep 125 where judgment pertaining a will was given.

2. **Judgments** *in personam* – these are judgments that do not fall within the definition in section 44 of the Evidence Act i.e. they do not affect the status of person or thing. Examples include judgments involving contracts or torts. They are conclusive proof of matters adjudicated upon and the reasons for the judgment between the parties to the proceedings. They do not bind the whole world but only the parties to the proceedings.

Halsbury[209] defines judgments in *personam* as:

> "Those which determine the rights of parties as between one another in the same dispute but which do not affect the status of either parties or things or make any disposition of property or declare or determine any interest in it except as between the litigants".

There are two aspects of estoppel by record that arise for consideration

1. Cause of Action Estoppel

Cause of action estoppel is based on the notion that a cause of action has been dealt with in a judgment and the parties to the action will be prevented from asserting or denying as against what was found. Therefore, if a particular cause of action was found to exist or not to exist, the same parties will not be allowed to revisit the same issue. Cause of action estoppel itself gives rise to a plea of '*res judicata*',[210] meaning that the matter has been heard and determined by a competent Court. Once a decision has been arrived at it binds the parties and becomes '*per rem judicatum*'. Accordingly, none of the parties should be able to raise that issue again.

In *Thoday v Thoday,*[211] Lord Diplock held that a cause of action estoppel prevents a party to an action from asserting or denying as against another party, the existence of a particular cause of action, the existence or non-existence of which has been determined by a court in previous litigation between parties.

209 *Halsburys Law of England, (*4th edn) Vol. 16 para 1525.

210 Section 7 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.

211 [1964] P 181 at 197.

This point was stressed by Lord Denning MR *in Fidelitas Shipping Co. Ltd v v/o Exportchleb*[212] where he stated:

> "Once an issue has been raised and distinctly determined between the parties, then, as a general rule neither party can be allowed to fight that issue all over again"

So pervasive is the doctrine that there is now a tendency to extend the idea underlying cause of action estoppel to claims which though not the subject of formal adjudication, could have been brought forward as part of the cause of action in the proceedings which resulted in the judgment constituting an estoppel. To this extent, the statement of Wigram VC in *Henderson v Henderson* is quite instructive. He stated that:

> "Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

With regard to criminal proceedings, section 47A of the Evidence Act amplifies this position in the following words:

> "A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged".

Despite the fact that this doctrine has the evident merit of ensuring finality of litigation, its strict application can be detrimental.

212 [1966] 1 QB 630.

In the case of *Conquer v Boot,*[213] the plaintiff had received the decision on a cause of action arising out of the defendant's breach of a warranty to build a house in a good and workman-like manner. It was held that the plaintiff was estopped from making a claim for further loss (the plaintiff had already been paid damages) by reason of same breach of warranty which he had suffered subsequent to the original litigation.

Similarly, in *Purser v Jackson*[214] it was held there that when a contract provides for arbitration in respect of disputes as and when they arise, an earlier submission to arbitration does not prevent the submission to arbitration of a dispute which subsequently arises. The earlier submission operates as an estoppel only in respect of the matters which it actually covered.The estoppel operates against only matters that were covered in the pleadings.

2. Issue Estoppel

This type of estoppel operates with regard to the issues for trial before the court. It arises when a particular fact or issue has been determined on merit by a competent court. Once the issue is determined, the chapter is closed and issue estoppel applies.

The essential ingredients for the plea of issue estoppel to succeed are as follows:

1. There must be a final judgment between the same parties;
2. The parties must be litigating in the same capacity as before;
3. The issue before the court must be the same as those in previous proceedings;
4. Estoppel must be specifically pleaded.

Dixon J in the case of *Blair v Curran*,[215] stated that a judicial determination directly involving an issue of fact or law disposes once and for all the issue so that it cannot be raised between the same parties again.

213 [1928] 2 KB 336.

214 [1977] QB.

215 [1939] 62 CLR 464, 531.

In criminal cases, issue estoppel gives rise to the plea of either *autrefois acquit*[216] or *autrefois convict*.[217]

The question then arising is whether the doctrine of issue estoppel applies to criminal cases.

In *Connelly v DPP*[218] three Law Lords expressed the opinion that issue estoppel would be applicable in criminal cases. Lord Devlin, however, felt that it was undesirable because of the difficulty of ascertaining the precise issue.

In *R v Hogan*[219] Lawson, J ranked himself with the three Law Lords and stated that issue estoppel could also apply in criminal cases. However, his decision was overruled by the court in the case of *DPP v Humphreys*,[220] where it was declared that issue estoppel did not apply in criminal proceedings. In that case, the respondent was charged with driving a motor cycle on 18 July 1972, while disqualified. The only issue at the trial was whether a police officer was correct in identifying the respondent as the driver of a motor cycle on that day. He denied driving any motor cycle during 1972 and was acquitted. Later he was charged with perjury, the allegation being that at the first trial he had wilfully made a statement which he knew to be false. The same police officer at the first trial was a prosecution witness, with others at the second trial. The judge, rejecting the plea of issue estoppel raised by the defence, allowed the police officer to give evidence again identifying the respondent as the driver of the motor cycle which he had stopped on 18 July 1972. The respondent was convicted.

The Court of Appeal allowed his appeal against conviction. The Crown appealed. The House of Lords, allowing the appeal, held that the doctrine of estoppel had no place in English criminal law and

216 French phrase meaning the accused has previously been acquitted of the offence for which he is charged.

217 French phrase meaning the accused has previously been either acquitted or convicted of the offence for which he is charged.

218 [1964] AC 1254.

219 [1974] QB 398.

220 [1977] AC 1, [1976] 2 All ER 497.

that the determination at the first trial of an issue in favour of the accused was no bar to the admission at a second trial.

Recently, in *R v Z*[221] the House of Lords held that the principle of double jeopardy did not render inadmissible evidence of previous acquittals as similar fact evidence but that the question of fairness must be addressed and judges must exercise their discretion under section 78 of PACE[222] to exclude the evidence if admission would be adverse to the fairness of the proceedings.

The following are some distinctions between issue estoppel and cause of action estoppels:

1. Issue estoppel unlike cause of action estoppel applies only to the issues raised and actually determined in the earlier proceedings and does not extend to issues which a party by exercising reasonable diligence could have raised but did not.

2. Issue estoppel cannot be raised where a party has come into possession of fresh evidence which brings into question the findings in their earlier proceedings.[223]

3. In *Arnold v National Westminster Bank PLC,*[224] it was held that a change in the law between the date of the earlier and later proceedings, although it cannot prevent a party from raising a cause of action estoppel, may prevent a party from raising an issue estoppel dependent upon the circumstances of the case and the issue determined.

In both types of estoppel, it is required that the parties must be the same ones involved in the prior judgment. It does not have to be the same parties in person but it could also be their agents.

221 [2000] 3 All ER 385.

222 UK Police and Criminal Evidence Act (1984).

223 See *Mills v Cooper* [1967] 2 QB 459.

224 [1991] 3 AULR 41.

It is a general rule that the party alleging estoppel must plead the former judgment. Failure to do so will render it merely an item of evidence in his favour to be considered by the court.[225]

Section 47A of the Evidence Act applies both to criminal and civil proceedings.[226]

C. Estoppel by Conduct

1. Estoppel by Deed

A party who executes a deed is estopped in a court of law from saying that the corrects of the deed are not truly stated.The principle underlined here is that persons who make solemn assertions or covenants under seal must be bound by those covenants.

In *Carpenter v Buller*[227] it was held that the doctrine of estoppel by deed is of limited scope as it can only be raised in actions brought on the deed. This arises when there is a written document signed by two parties; if one of the parties acted in reliance of the deed and altered his position, then the other party cannot be allowed to challenge the deed or document. For example, in *Bowman v Taylor*[228] a lease granted by the plaintiff to the defendant to use looms contained a recital that the plaintiff was the inventor of those looms. In an action for breach of covenant to pay the agreed sums for their use, the defendant was estopped from denying that the plaintiff was the inventor.

This rule is subject to the following conditions:

1. It only applies between parties privy to the deed and only in proceedings on the deed.
2. No estoppel will arise upon recitals or descriptions which are immaterial or not intended to bind.

225 See *Voogt v Winch* [1879] 2 BL Ald 662.

226 *Queen's Cleaners and Dyers Ltd v East African Community* [1972] EA 229.

227 [1841] 8 M&W 209

228 [1834] 4 LJKB 58.

For a recital to a deed to form the basis of estoppel by deed, it has to contain:

a) Unequivocal statement of facts;

b) It has to prove that there has been a contract as a result of the unequivocal statement;

c) The statement is from the parties themselves or their representatives.

3. No estoppel arises where deed is tainted with fraud or illegality. In the case of *Greer v Kettle,*[229] the court held that a party to a deed is not precluded from claiming rectification by impeaching it on the grounds of fraud, duress or lack of contractual capacity.

In the case of *East Africa Power & Dandora Quarries*[230] the plaintiff sued the defendant on a mini consumption agreement for the supply of electricity under which the defendant undertook to pay the minimum annual charge of KShs. 12,840 for a period of 46 months beginning 1 January 1965.The defendant did not dispute the agreement but claimed that it was void and unenforceable because there was no consideration; it was illegal and not in accordance with the charging provisions of the Electric Power Act; that the plaint disclosed no cause of action because the plaintiff had at the material time no license under the said Act.

The plaintiff argued that the defendant was estopped from denying the consideration which was stated in the agreement as being a request by the defendants that the plaintiff company should carry out certain works towards the installation of an electrical energy supply in return for which the defendant agreed to sign the minimum consumption agreement.

The defendant challenged the evidence of the plaintiff in regard to a license to generate or supply electricity. As a matter of fact the plaintiff did not remit original licenses or renewals of the license. The court held that there was no estoppel operating to prevent the defendant from challenging the consideration stated in the recitals

229 [1938] AC 156..

230 [1938] EA 728

to the agreement but on the evidence that the plaintiff had shown that there was good consideration. And also there was no evidence to rebut the presumption that the license granted to the plaintiff company had been renewed at the proper time, place and proper procedure.

An example of the estoppel of a tenant or a licensee is found in section 121 of the Evidence Act. It states that no tenant is allowed to deny that at the commencement of the tenancy, his landlord had title to the property.

In *Rodseth v Shaw,*[231] a case that involved a tenancy for residential tenancy and when the landlord gave the tenant notice to quit at a particular time, the tenant sought to introduce circumstances that had prevailed ten years prior to the commencement of the lease which circumstances incapacitated the landlord from leasing out the premises. What in effect the tenant was saying was that the landlord never had title and could not have leased out the premises. The court held that a tenant cannot deny that the landlord had title to grant the lease at the commencement of the tenancy agreement.

In *Ravi Bin Mohammed v Ahmed,*[232] Ahmed a subtenant, managed to buy the premises for which he was a subtenant. The tenant of the main landlord continued asking Ahmed for rent and the question arose as to whether the first tenant could insist on getting rent from Ahmed on the basis of section 121. The court held that the first tenant could not continue asking Ahmed for rent because Ahmed was not estopped from pleading and proving that his landlord's title had been determined. In the words of the court, estoppel prevents a tenant from disputing a landlord's title at the time of granting the lease not subsequently thereafter. That fact is borne out of the wording of section 121 of the Evidence Act.

> "No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property; and no person who came upon any immovable property by the license of the person in

231 [1967]EA 833.

232 [1957]EA 782.

possession thereof shall be permitted to deny that such person had a right to such possession at the time when the license was given."

2. Estoppel by Representation

Estoppel by conduct is best defined in the case of *Pickard v Sears*[233] where the court stated that:

> "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induced him to act on that belief, or to alter his previous position, the former is precluded from averring against the latter a different state of things as existing at that time."

Section 120 of the Evidence Act enacts the common law principle in the following terms:

> "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".

It follows that if a person intends his representation to be acted upon, and it is acted upon, that person will be precluded from denying the truth. Such a representation may be express as in *Carr v London and North Western Railway Co*,[234] where the defendant's agent told the plaintiff that the company held three consignments of goods to his order when only two had been received. The plaintiff purported to sell three consignments and had to pay damages to the purchaser of one of them. It was held that he could not recover these from the defendant.

The holding of the court in the case of *Hopgood v Brown,*[235] affirms the common law position espoused in section 120 of the Evidence Act. In that case, the court stated that when a representor has made a representation to another person (in words or by conduct), being under a duty to the representee to speak or act, by silence or in action, with the intention, actual or presumed, and with the result

233 [1837] 6 AD & El 469.

234 [1875] LR 10 CP 307.

235 [1955] 1 All ER. 550, [1955] 1 WLR 213.

of making the representee to act on the representation and alter his position to his detriment, the representor in any litigation between him and the representee, either by himself or by his representative, is estopped as against the representee from making or attempting to establish by evidence any averment substantially at variance with his former representation if the representee acted at the proper time and manner.

In *Balwant Singh v Kipkoech Arap Sarem*[236] it was held that estoppel by representation can only be pleaded if it meets the following qualifications:

(i) The Representation Either by Act, Omission or Conduct must be Wilful and Deliberate.

The case in point is *Greenwood v Martins Bank Ltd*.[237] In this case husband and wife had a joint account in Martins bank and the bank undertook to honour cheques signed by both signatories. Afterwards the account was closed and an account opened in the sole name of the husband, the wife having no authority to draw cheques on that account of the husband. During the existence of the second account, the wife repeatedly forged her husband's signature to the cheques and drew out money which she applied to her own uses. The husband became aware of these forgeries but was persuaded by the wife to say nothing about them. He kept quiet for 8 months. When he finally decided to report the forgeries, the wife committed suicide. The husband then brought a suit against the bankers to recover the sums paid out of the sole account on cheques to which his signature had been forged. The court held, firstly, the plaintiff owed a duty to the bank to disclose the forgeries when he became aware of them as this would have enabled the bank to take steps to recover the money wrongfully paid to the wife. Secondly, through his failure to fulfil this duty, the bank was prevented from bringing an action against the plaintiff and his wife for the tort committed by the wife, and thirdly, he had only brought the matter forward after the death of the wife. The plaintiff was estopped from asserting that

236 [1963] EA 651 (CA).

237 [1993] AC 51, 101LJKB 623, 38 Com Cas. 54; [1932] All ER Rep 318, 76 Sol Jo 544, 147.

the signatures from the cheques were forgeries and consequently he was not entitled to recover the money that he was seeking from the bank.

The correctness of this decision was cast into doubt by the decision of the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*[238], where the court took the view that in the absence of on express agreement to the contrary, the duty of care owed by a customer to his bank in the operation of his current account was limited to a duty to refrain from drawing a cheque in such manner as to facilitate a fraud or forgery. Further it was limited to a duty to inform the bank of any authorised cheques purportedly drawn on the customers account as soon it became aware of it. The court found that there was no duty on the part of the customer to disclose in this case. Hence, no question of an estoppel arose from mere silence or failure to act could arise.

(ii) The Representation must be Clear and Unambiguous to a Reasonable Person

This condition was elucidated by the court in *Century Automobiles Ltd v Hutchings Biemer Ltd*,[239] where Spry JA stated that the representation need not attain the level of precision which a lawyer would require. If it seemed clear and unequivocal to a reasonable person then the requirement is satisfied. A good illustration of this point is the case of *Canada and Dominion Sugar v Canadian National (West Indies) Steamships Ltd,*[240] where two or more persons have expressly or impliedly agreed that their legal relations shall be based on the assumption that a particular state of facts exists. Where these parties agree, expressly or by necessary implication, they are estopped from denying the existence of the assumed state of facts. As such, a receipt stating that cargo was in good order was held not to estop a purchaser from denying this fact because it referred to an ambiguous bill of lading.

238 [1985] 2 All ER 947

239 [1965] EA 304, 310, (CA).

240 [1947]AC 46 (PC).

(iii) The Representation Must be of Fact or of a Future Conduct. It must be Such as to cause Someone to do Something in Future.[241]

An estoppel cannot be urged to help a party to breach the express or implied provisions of law.

In *Chatrath v Shah*,[242] the Court observed that estoppel cannot render valid that which the law declares invalid, so that if a transaction is declared invalid by a statute then the doctrine of estoppel cannot be used to override it. The doctrine of estoppel should not be used to override the specific directions of the law.

3. Promissory Estoppel

Promissory estoppel, also known as equitable estoppel, deals with the future state of affairs and occurs where a person makes a representation to another about the state of their future legal relations or their future conduct and the other person acts upon that. In this instance, an equitable estoppel arises such that the representor is estopped from denying the representation.

Lord Cairns in *Hughes v Metropolitan* Railway *Co*[243] states as follows:

> "It is the first principle upon which all the Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal rights – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced these rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

241 *Nurdin Bandali v Lom Bank Tanganyika Ltd* [1963] EA 304 (CA) at 314.

242 [1967] EA 93 (CA).

243 [1877] 2 App CAS 439.

In *Nurdin Bandali v Lombank Tanganyika Ltd,*[244] a lorry was bought on hire purchase terms. The buyer was late in one of the payments but when he later presented the money to the seller, it was accepted. Due to the lateness in depositing the payments, the Hire Purchase Company seized the lorry and sought to sell it to recover the unpaid balance. The question arose as to whether the sellers had by accepting payments late waived their rights under the Hire Purchase Agreement. Consequently, was the Hire Purchase Company estopped from falling back on the Hire Purchase Agreement? It was held that no waiver or estoppel arose on the facts of the case. But the court recognised that promissory estoppel did indeed exist in East Africa.

In the court's view, the word 'thing' used in section 120 was capable of wide interpretation and could comprise an existing state of affairs, legal relationships or future conduct.

In so holding, the court relied on the case of *Central London Property Trust Ltd. v High Trees House Ltd*.[245] In this case, by lease under seal dated 24 September 1937, the plaintiff let to the defendant a block of flats for a term of 99 years with effect from 29 September 1937 at a rent of £2500 per annum. However, owing to the Second World War, in the early part of the 1940's only a few of the flats were let, and it became apparent that the defendant would be unable to pay the rent reserved. After negotiations between the directors of the two companies, on 3 January 1940, a letter was written by the plaintiff to the defendant confirming that the rent for the premises would be reduced from £2500 to £1250, essentially by half, as from the beginning of the term. The defendant paid the reduced rent.

By the beginning of 1945 all flats were fully let and in September 1945 the plaintiff wrote to the defendant claiming that rent was payable at the rate of £2500. Thereafter, the plaintiff initiated some friendly proceedings to claim the difference in rent for September to December 1945 quarter.

244 [1963] EA 304 (civil appeal).

245 [1947] KB 134.

In their defence the defendants pleaded that the agreement for the reduction of rent operated for the whole term of the lease and the plaintiff was estopped from demanding rent at the higher rate.

It was held that where parties enter into an arrangement which is intended to create legal relations between them and in pursuance thereof one party makes a promise to the other, which he knows will be acted upon, and which in fact is acted upon by the promisee, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even though the promise may not be supported by consideration in the strict sense. The effect of the arrangement may be to vary the terms of the contract under seal by one of less value.

The court went on to hold that the arrangement between the parties in 1945 was one which fell within the first category, i.e. where you made a promise and were bound by the promise. Hence, the agreement of the promise was binding on the promisee but it only remained operative so long as the conditions giving rise to it continued to exist and once those conditions ceased to exist in 1945 the plaintiffs were entitled to recover the full rent claimed at the rate reserved by the lease document.

In the case of *Century Automobiles Ltd v Hutchings Biemer Ltd*[246] the issue of promissory estoppel was also discussed. It was stated that for estoppel of this kind to arise:

(a) There must be a clear and unequivocal representation.

(b) There should also be an intention that it is acted on.

(c) There has to be action upon the representation in the belief that it is true.

In *Tool Metal v Tungsten Electric Co Ltd*[247] the court held that the effect of the doctrine was to suspend legal rights.

Per Arden, LJ, in *Collier v P & MJ Wright (Holdings) Ltd*:[248]

246 [1965] EA 304, 310, (civil appeal).

247 [1955] 1 WLR 761 HL.

248 [2007] EWCA Civ 1329.

> "The effect of promissory estoppel is usually suspensory only, but, if the effect of resiling is sufficiently inequitable, a debtor may be able to show that the right to recover the debt is not merely postponed but extinguished: see the High Trees case and the Tool Metal case with respect to the wartime payments."

4. Estoppel by Negligence

When the negligence of the defendant causes a person to believe in the existence of a suppressed fact, and that person acts in the belief thereof with the result that he or she suffers damage, the defendant is estopped from denying the existence of the suppressed fact.

In *Coventry, Sheppard & Co v Great Eastern Railway*[249] the railway company negligently issued two delivery orders, not purporting to be duplicates, in respect of one consignment of wheat. As a consequence, a fraudulent person was enabled to pledge the two delivery orders to obtain two advances of money as if there were two separate consignments. The company was held to be estopped by negligence from disputing that there were two consignments. Estoppel by negligence will only apply where there is a relationship of contract or agency between the parties.

Estoppel by negligence can only arise where it can be shown that the party against whom the estoppel operates was in breach of a duty owed to the victim and it is well settled law that the owner of property who loses that property may take it back or find a *bona fide* purchaser for value.

Lord McNaughten in *Farquharson Bros v J King & Co Ltd*[250] stated that estoppel by negligence is subject to the rules of negligence, Hence, it is important to establish that the owner owes a duty of care to the particular buyer and that the duty has been broken and that the buyer has suffered damage thereby. It is not always easy to establish that an owner of goods owes a duty of care to a potential buyer.

249 [1883] 11 QBD 776.

250 [1902] AC 325, page 335 HL.

In *Moorgate Mercantile Ltd v Twitchings,*[251] the owner of the goods and the buyer were finance companies and both were members of Hire Purchase Information(HPI), a company set up to keep a register of hire purchase agreements relating to motor vehicles offering additional services to members to reduce the risk of fraud and theft. The buyer received a proposal to buy the car from them, searched the HPI register, found no extant hire purchase agreement registered and bought the car to re-let it on hire purchase. The car was subject to an existing hire purchase agreement. Contrary to the usual practice the owners had not registered the hire purchase agreement.

The House of Lords held that the owners owed no duty to the buyers despite the fact that they were both members of HPI and were not estopped.

In *Mercantile Bank of India Ltd. v Central Bank of India Ltd*[252] a firm of merchants pledged railway receipts entitling them to certain goods with the Central Bank as security for a loan. The Central Bank later returned the receipts to the merchants to enable them to claim possession of the goods. The receipts were then delivered to the Mercantile Bank in order to secure another loan. It was held that the Central Bank was not estopped from asserting its prior claim to the goods. There was no relationship of contract or agency between the banks and the Central Bank had no reason to suppose that the receipts would be handed to the Mercantile Bank.

D. Conflicting Presumptions

Where there are two conflicting presumptions, the court is required to device mechanisms of resolving the same. There are two suggested solutions to this problem:

1. To treat two presumptions as having cancelled each other out and proceed to evidence. This was the solution adopted in *Monckton v Tarr.* [253]

251 [1975] 3 AER 302; [1977] AC 890

252 [1938] AC 287

253 [1930] 23 BWCC 504

Here the same presumption of essential validity of marriage applied to the two different ceremonies.

In this case, a woman, A married B in 1882. B deserted her in 1887. In 1895, when there was no evidence that B was alive, A married C. In 1913, while A was still alive, C married another woman D. D made a claim under the Workman's Compensation Act as a widow of C. The employers of C alleged that the marriage of 1913 was void due to the existence of the earlier marriage to A in 1895. D replied that the 1895 marriage was void because of the 1882 marriage between A and B. The court in finding for the employer, held that D's appeal would be dismissed because although the presumption of validity applied to the marriage of 1913, the same presumption of validity applied to the marriage of 1895. The two presumptions cancel each other out and it was for D to prove C's capacity to marry her which could only be done by showing that B was alive at the time of the 1895 marriage (so that A would have had no capacity to marry C on that date).

2. The other approach is to weigh the relative strength of a presumption by reference to the comparative likelihood of the two presumed facts or by reference to public policy. This approach has the added advantage of flexibility compared to the set formula above.

This seems to be the approach adopted in *R v Willshire* [254]. In this case, the accused was convicted of bigamy for having married D in the lifetime of his former wife, C. The accused had in fact undergone four ceremonies of marriage. First was A in 1864, B in 1868, C in 1879 and D in 1880. The prosecution in order to discharge its burden of proof relied on the presumption of essential validity. The accused sought to show that the marriage of 1879 was void by virtue of his earlier conviction of bigamy relying on the presumption of fact as to continuance of life to establishing that A was still alive in 1879. He was convicted. Upon appeal, it was held that the prosecution bore the burden of proving the validity of the 1879 ceremony. Once they had proved the facts giving rise to the presumption of validity of that

254 [1881] 6 QBD 366

ceremony, the defendant had discharged the burden by relying on the presumption of continuance of the life of A.

Some critics have proposed that this case is as much an authority for the first position above as it is an authority for the second proposition.[255]

E. Place of Estoppel in the Evidential Process

Authorities are not in agreement but essentially, estoppel could be regarded as a rule of procedure. It could also have aspects of substantive law where it debars a person from raising a defence open to them.

The majority view it as a rule of evidence, the classic exposition of which is in the case of *Low v Bouverie.*[256]

Estoppel was perceived as an aid to proof not as being essentially a principle on which you could found a case. Bowen, LJ stated:

> "estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said."[257]

But in *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd*[258] the court felt that estoppel could be viewed as substantive rule of law. Lord Wright stated that estoppel is often described as a rule of evidence as indeed it may be so described. But the whole concept is more accurately viewed as a substantive rule of law.

255 Re Peatling (1969) NR 214.

256 [1891] 3 Ch 82.

257 *Ibid* pg 105

258 [1947] AC 46 (PC).

Chapter 5

Burden and Standard of Proof

A. Introduction

The term burden of proof is derived from the Latin words '*onus probandi*'.[259] It has been defined by various legal scholars such as *Nokes*[260] as 'an obligation to adduce the evidence of a fact'. *Sarkar*[261] has given two distinct meanings to the term burden of proof: a matter of law and pleading and; as a matter of adducing evidence.

According to Phipson,[262] the phrase 'burden of proof' is used to describe the duty which lies on either of the parties to establish the facts upon a particular issue. He refers to the term as having two fundamental meanings, that is, the legal burden and the evidential burden.

The legal or persuasive burden of proof in the pleadings refers to the obligation on a party to prove to a court of law, the truth of some proposition of a fact in issue, whether by a preponderance of evidence or beyond reasonable doubt.[263] The penalty of failing to discharge the legal burden of proof in a case is the certainty of failure in the whole action.[264]

On the other hand, the evidential burden refers to the obligation of a party to adduce sufficient evidence of a particular fact in order

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259 Hence, the use of the phrase 'onus' or 'burden' interchangeably.

260 G.D. Nokes, *An Introduction to Evidence* (4th edn, Sweet & Maxwell Ltd, 1967) page 465.

261 *Sarkar's Law of Evidence* (12th edn) page 872.

262 *Phipson on Evidence,* (15th edn, London: Sweet & Maxwell, 2003) page 55.

263 See also *Cross & Tapper on Evidence* (8th edn, Butterworths) page 121.

264 See Rollino M. Perkins and Ronald N. Boyce, *Criminal Law* (3rd edn 1982) at page 78 where the legal burden is said to refer to the burden of proof in the sense of carrying the risk of non-persuasion, so that the one who has this burden stands to lose if his evidence does not convince the Court. In *Humes v Hinkson AIR* [1946] PC 156, 227 IC 295, 50 Cal WN895 it was stated that 'burden of proof' means that if no evidence is given by the party on whom the burden is cast, the issue must be found against him.

to justify a finding on that fact in favour of the party who is under the obligation.[265] This is also known as the 'burden of adducing evidence'. Failure to discharge the evidential burden carries with it the risk but not the certainty of failure in the whole or some part of the action.

According to Sir John Woodroffe and Syed Amirali, burden of proof means:

> "[…] the burden of establishing a case whether by preponderance of evidence or beyond reasonable doubt, and the duty or necessity of introducing evidence either to establish such a case, or to meet an adverse amount of evidence sufficient to constitute a *prima facie* case."[266]

The evidential burden is considered in two stages. Firstly, at the beginning of the proceedings in order to determine which party begins the suit and secondly, at any time during trial to determine whether enough evidence has been adduced in support of an asserted fact for it to become a justiciable issue. A justiciable issue is one which requires the opposing party to adduce evidence in rebuttal.

It can be said, therefore, that the legal burden of proof and the incidence thereof is a question of law. It is static since it rests only on one party. But the burden of adducing evidence is a question of mixed law and fact and it shifts in the entire course of proceedings. This means that the burden of adducing evidence does not rest on one party designated by the pleadings, but on the party, whether the plaintiff or the defendant, against whom the tribunal at the time when the question is to be determined, would give its judgment in favour of on a *prima facie* basis.[267]

265 *Cross & Tapper on Evidence* (8th edn, Butterworths) page 122.

266 Sir John Woodroffe and Syed Amirali, *Law of Evidence* (18th edn, 2009) page 1324.

267 Sir John Woodroffe and Syed Amirali, *Law of Evidence* (18th edn, 2009) page 1324.

B. Meaning and Scope of the Burden of Proof

Phipson[268] identified the scope of the burden of proof in civil and criminal cases to cover:

1. The persuasive or legal burden
2. The evidential burden

1. The Persuasive or Legal Burden

Criminal cases

The legal burden in criminal cases rests on the prosecution to prove the defendant's guilt beyond reasonable doubt. This proposition is firmly settled and it never shifts except where a statute expressly or impliedly vests the legal burden on another party.

Every accused person has the right to a fair trial, which right is based on the presumption of innocence until the contrary is proved.[269] When it is said that an accused person is to be presumed innocent, what is meant is that the prosecution is obliged to prove the case against him beyond reasonable doubt, a fundamental rule of Criminal Procedure.[270]

In *Woolmington v DPP*,[271] the accused was charged with the murder of his wife. He pleaded not guilty and testified that though he had shot his wife, the shooting was accidental. The trial court directed the jury that once it was proved and admitted that the accused shot his wife, the accused bore the burden of disproving malice aforethought. The accused was convicted and he appealed.

The House of Lords in the now famous words of Lord Sankey, L.C enunciated the following principle of law:

> "Throughout the web of English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have said as to the defence of insanity

268 *Phipson on Evidence*, (15th edn, London: Sweet & Maxwell, 2003) page 55.

269 The Constitution of Kenya, article 50(2)(a).

270 *Cross & Tapper on Evidence* (8th edn, Butterworths, 1995) page 135.

271 [1935] All ER 1 AC 462 (HL).

> and subject to any statutory exception. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of English Common Law and no attempt to whittle it down can be entertained…Hence, the submission that the accused bears no legal burden in respect of the essential ingredients of an offence, be they positive or negative and whether or not he denies any or all of them, it is the duty of the prosecution to prove beyond reasonable doubt that it was the accused who was responsible. If at the conclusion of the trial there exists a doubt on the whole of the case, created by evidence given by either the prosecution or the prisoner as to whether the prisoner killed the deceased with a malicious intent, the prosecution has not made out its case and the prisoner is entitled to an acquittal."[272]

An exception to this rule occurs in cases where there are express statutory provisions or where insanity and intoxication are pleaded as a defence.[273]

In *Okale v R*[274] the Court of Appeal for Eastern Africa in adopting the *Woolmington* position, held that conviction in every criminal case can only be based on the weight of the actual evidence adduced and that the burden of proof in criminal proceedings is throughout on the prosecution. It is the duty of the trial judge to look at the evidence as a whole and determine whether the prosecution has proved its case beyond reasonable doubt.[275]

The rule is so deeply embedded that even when an accused person alleges an alibi as a defence, this does not alter the general principle as to the burden of proof in criminal cases. A prosecutor must find a competent witness who will place the accused exactly at the scene of the crime at the material time. The identity of the

272 [1935] All ER 1 AC at page 481.

273 See section 112 of the evidence Act.

274 [1965] EA 555.

275 Facts: Four appellants had been convicted of murder. Before the trial court, the only issue was identification and the prosecution's case consisted of evidence from the widow of the deceased and evidence of a dying declaration. The judge, after discounting the evidence of the widow, proceeded to put forward a theory of his own which was inconsistent with the widow's evidence and unsupported by the medical evidence. He also accepted the evidence of the deceased's brother as to the dying declaration without giving any reasons. The judgment contained a passage suggesting that the judge had accepted the prosecution case and then cast on the appellants the burden of disproving it. The appeal was allowed.

accused at the scene of the crime is very important. The accused must be placed at the scene armed with motive, means and opportunity.

In *Shama and another v Uganda*,[276] court stated that it was the duty of the prosecution to disprove an alibi and put the accused at the scene of crime. In this case, what the prosecution had to prove was the presence of the second appellant in the house at the time the injuries found on the body of the deceased and which caused her death were inflicted. The appeal of the second appellant succeeded because the prosecution did not establish his presence at the material time, his conviction was quashed and the death sentence set aside.

In *Ssentale v Uganda,*[277] the appellant was convicted of robbery with violence on a charge of attacking the complainant and by violently removing and running off with her sweater. He appealed on grounds that there was no proper evidence of identification and that the Magistrate had not properly directed herself on the question of burden of proof relating to an alibi raised by the accused. On appeal, the court held that an accused who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer and that the Trial Magistrate had misdirected herself on this point. The appeal was allowed and the conviction quashed.[278]

It is worth noting that silence by an accused does not mean acceptance of guilt.

In *Joseph Mbithi and anor v R*[279] the appellants were charged and convicted of handling stolen cattle. In the trial court, none of the accused disputed the ownership or identity of all the cattle mentioned in the three counts before court and that they had been stolen from their 'bomas.'[280]

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276 [2002] 2 EA 589 (SCU).

277 [1968] EA 366.

278 See also *Leonard Aniseth v R* [1963] EA 206 where the same rule was applied. In *Jonathan Mutisya Valaiu v R* (In the Court of Appeal at Nairobi No. 123 of 2001), Justice Kwach, Justice Tunoi and Justice O'Kubasu all agreed with the decision in Ssentale and held that the accused has no onus of proving alibi where he pleads alibi as a defence. The appeal was allowed, conviction quashed and sentence of death set aside.

279 Criminal Appeal number 77/79 (unreported).

280 Swahili word for 'cowshed'.

The Court convicted them based on this evidence. On appeal, it was held that it was for the prosecution to prove beyond reasonable doubt that the cattle had been stolen and that mere silence on the part of the accused did not amount to proof that the accused had stolen the cattle.

Hence, the burden of proof in criminal cases in Kenya and East Africa generally remains proof beyond reasonable doubt in respect of all ingredients of a criminal offence and without exception.

Civil Cases

The general rule is that the legal burden in civil cases lies on the party who asserts the affirmative of an issue. This burden is fixed at the beginning of the trial by the state of pleadings and remains unchanged during trial. This is settled as a question of law and failure to discharge this duty results in a judgment being made against him. The legal burden thus lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, that is, "ei *incumbit probation qui dicit, non quit negat"*.[281] For example, in an action for negligence, the plaintiff bears the legal burden of proving duty of care, breach of such duty and the loss suffered in consequence.

This legal burden goes beyond a mere denial of the plaintiff's claim. For example, the defendant always bears the burden of proof of the defence of *volenti non fit injuria* or contributory negligence. In the case of breach of contract, the plaintiff bears the legal burden of proving the contract, its breach and the consequences while the defendant bears the legal burden of proving the defence of frustration or discharge, if any.

The only exception to this general rule arises where a negative assertion is an essential aspect of the plaintiff's claim. For example, in a suit for damages for malicious prosecution, the plaintiff must prove

281 Lord Maugham in *Joseph Constantine v Imperial Smelting Corporation* [1941] 2 All ER 165, 179 said, "The burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule which applies is that the burden of proof lies upon him who affirms and not upon him who denies. It is an ancient rule founded on consideration of good sense and which should not be departed from in the absence of any strong reasons."

the defendant prosecuted him unsuccessfully and in the absence of reasonable and probative cause.

In *Joseph Constantine Steamship Line v Imperial Smelting Co,*[282]the House of Lords held that if the plaintiff wished to prove that frustration was due to the defendant's negligence, then the plaintiff must allege it and prove it. That is, he who asserts must prove it.

In this case, the plaintiffs who were the charterers of a ship claimed damages from the owners for failure to load. The defendants pleaded that the contract had been frustrated by destruction of the ship owing to an explosion in one of the engines whose cause was unclear. The trial court held that the onus of proving that the frustration was caused by the defendant's default lay upon the plaintiff charterers. The Court of Appeal reversed this decision on appeal but on further appeal to the House of Lords, the Trial Court's decision was upheld.

In *Levison and another v Patent Steam Carpet Cleaning Co,*[283] the defendants were guilty of the unexplained loss of a Chinese carpet which had been delivered to them for cleaning by the plaintiff. The contract of bailment signed by the plaintiff had a clause that would have exempted the defendant from liability for negligence but not for any fundamental breach. The plaintiff's claim was dismissed. On appeal, it was held that when a bailee seeks to escape liability on grounds that he was not negligent or that he was excused by an exemption clause, then he must prove what happened to the goods. Here, the bailee failed to satisfactorily explain the circumstances surrounding the loss of the carpet and was therefore liable.

Similarly, in *M'Mairanyi and others v Blue Shield Insurance Co Ltd,*[284] the appellants were given a gratuitous lift by the owner of a pick-up motor vehicle in order to attend the funeral of a renowned politician in the area. The owner's wife drove the vehicle and the vehicle was involved in an accident while trying to avoid a pothole along the road. The appellants subsequently filed a declaratory suit against the motor vehicle insurer, seeking to have the insurer made

282 [1942] AC 154 (HL).

283 [1978] QBD 69 civil appeal.

284 [2005] 1 EA 280 (CAK)

liable for the injury they suffered. They failed to produce the subject insurance policy which included cover for injury to passengers.

The suit was dismissed for failure to discharge this burden. On appeal, the court observed that:

> "The general proposition is that the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. However, any party who asserts must prove. In this case, the insurer had asserted that it would rely on the contents of the insurance policy, of which they had special knowledge and possession. The insurer may therefore attract against it the presumption of law that evidence could but is not produced be prejudicial to the party who withholds it."

Hence, the appeal was dismissed with no order as to costs.

2. The Evidential Burden

In Criminal Cases

The evidential burden may shift constantly as evidence is adduced by either side. The onus of discharging this burden rests upon he who would fail if no evidence at all was given on either side. The best exemplification of evidential burden in criminal cases arises where the prosecution is required by law, to establish a *prima facie* case or a case sufficient to require the accused to enter a defence.

This Latin phrase '*prima facie*' means first appearance or first sight. Usually, a '*prima facie*' case is based on '*prima facie*' evidence. *Sarkar*[285] defines *prima facie* evidence as "…evidence which if accepted appears to be sufficient to establish a fact unless rebutted by acceptable evidence to the contrary. It is not conclusive."

In *Ramanlal T. Bhatt v R*,[286] the court observed that it may not be easy to define what is meant by a *prima facie* case, but at least it

285 *Sakar's Law of Evidence (*12th edn) page 876.

286 [1957] EA 332. The facts of the case were as follows: The appellant was a police inspector who was charged with two counts of official corruption in the Trial Court. He was acquitted on grounds of insufficient evidence. The State went on appeal and the High Court directed that the accused be put on his defence in respect of both counts. The appellant was convicted at the resumed hearing. He appealed to the C.O.A but the appeal on the second count was dismissed and the sentence enhanced

must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence. The court held that the onus rests on the prosecution to prove its case beyond reasonable doubt and a *prima facie* case is not made out if at the close of the prosecution, the case is merely one "which on full consideration," might possibly be thought sufficient to sustain a conviction. Further, it was held that the question whether there is a case to answer cannot depend only on whether there is some evidence irrespective of its credibility, or weight, sufficient to put the accused on his defence.

In Civil Cases

The legal burden and the evidential burden in civil cases are closely tied together. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.[287] This means that the party who alleges a fact must adduce evidence to prove the alleged fact.

In a civil suit, there is no burden cast on any party similar to the one in criminal prosecutions which requires the prosecution in all fairness to produce even evidence against its case.[288] However, the onus of discharging this burden still rests upon the party who would fail if no evidence at all was given on either side. For example, the burden of satisfying that a consent decree ought to be set aside on the ground of fraud rests on the plaintiff.

In the *Carl Ronnings* case,[289] court considered the concept of a *prima facie* case in civil cases where it was held that:

> "The words *prima facie* are frequently used to refer to a case which shifts the evidential burden of proof rather than giving rise to a legal burden of proof. I would certainly think that it would be in the applicant's interest to adduce a genuine and arguable case standard rather than one of a *prima facie* case, the earlier being a lesser standard of the two."

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to 3 years. Appeal on the first count was allowed on grounds that the Judge who heard the case had misdirected himself on the law when considering the question of whether a *prima facie* case had been made out.

287 Section 107 of the Evidence Act.

288 *Sakar's Law of Evidence* (12th edn) page 885.

289 84 KLR page 1.

These words were adopted in the Kenyan case of *Kibocha v CBK*[290] in which the court said:

> "I would say in civil cases it is a case in which from the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or a rebuttal from the latter. The *prima facie* case is more than an arguable case."

C. The General Rule on the Burden of Proof

As we have seen, the general rule is that the burden of proof lies on the party who avers and failure to discharge the obligation to prove the facts may result in failure in the whole or part of the litigation.[291]

The incidence of the burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side.[292] In criminal cases the incidence of the burden lies on the prosecution to prove the case beyond reasonable doubt while in civil cases, it usually lies on the plaintiff to prove his case on a balance of probabilities.[293]

Sir John Woodroffe summarized the incidence of the burden in the following words: "He who invokes the aid of the law must first prove his case."[294]

The following exceptions apply to the general rule aforesaid:

i. An express statutory exception

ii. An implied statutory exception

iii. Defence of insanity or intoxication

290 [2004] eKLR.

291 Section 107 of the Act.

292 Section 108 of the Evidence Act.

293 Under Order 17 of the Civil Procedure Rules, provision is made for circumstances whereby a court may opt that the defendant begins depending on the state of the pleadings.

294 Sir John Woodroffe and Syed Amirali, *Law of Evidence* (18 edition 2009) at 1325.

i. Express Statutory Exception

This exception becomes applicable only in instances where Parliament has relieved the prosecution of its original burden and placed it upon the accused. Examples are legion. These include section 15 of the Immigration Act[295] which stipulates that:

> "Whenever in any legal proceedings under or for any of the purposes of this Act any one or more of the following questions is in issue, namely:
>
> (a) whether or not a person is a citizen of Kenya;
>
> (b) whether or not a person is one of the persons mentioned in section 4(3);
>
> (c) whether or not there has been issued or granted to any person a passport, certificate, entry permit, pass, authority, approval or consent, whether under this Act or under the repealed Acts;
>
> (d) whether or not any person was at any time entitled to any such issue or grant;
>
> (e) the burden of proof shall lie on the person contending that the person is a citizen of Kenya, or one of the persons mentioned in section 4(3), or a person to whom such an issue or grant was made, or a person who was entitled to such an issue or grant, as the case may be."

Under section 16(1) of the Stock and Produce Theft Act,[296]

> "No person shall sell or deliver any stock or produce in a proclaimed district between sunset and sunrise, and any person so doing and any person buying or taking proclaimed delivery of any stock or produce which is sold in contravention of this section shall be guilty of an offence if he fails to satisfy the court that he has it lawfully, and shall be liable to a fine not exceeding one hundred shillings or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment."

Section 20(2) of the Kenya Public Order Act,[297] provides that:

295 Cap 172, of the Laws of Kenya.

296 Cap 355,of the Laws of Kenya.

297 Cap 56, of the Laws of Kenya.

> "For the avoidance of doubt, it is hereby declared that the burden of proving lawful or reasonable excuse or lawful authority shall be upon the person alleging the same, and accordingly in any proceedings for an offence under this Act or any regulations made thereunder, it shall not be incumbent on the prosecution to prove the lack of any such excuse or authority."

Under section 30(1) and (2) of the Bills of Exchange Act:[298]

> "Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value. Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."

This is but a sample of a few statutes where Parliament has expressly charged the defence with the legal burden of proof of an issue. There are many more of such instances.

ii. Implied Statutory Exception

Section 111(1) of the Evidence Act states that:

> "When a person is accused of any offence, the burden of proving the existence of circumstances; bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."

The point made by this provision is that when the existence of a certain matter or state of affairs is within the knowledge of an accused person, i.e. the exception, exemption or qualification which is peculiarly within his knowledge, he must prove it in order to avoid liability. For example, diplomats are not subject to the criminal laws of the country in which they are on assignment. It is therefore incumbent upon a diplomat to prove this fact.

298 Cap 27 of the Laws of Kenya.

In *Edwards v R*,[299] the accused was charged and convicted of selling liquor without a license. On appeal, the appellant argued that the prosecution had not adduced evidence to show that he did not hold a valid liquor license. Unknown to the appellant, there was a public register kept at the Liquor Licensing Justices which contained the names of all the people who had valid licenses. The court held that the burden of proving that the accused was a holder of a valid liquor license was on the accused and not on the prosecution since he could have confirmed this information from the public register.

In *R v Hunt,*[300] the accused was charged with unlawful possession of a prohibited drug. The relevant statutes provided that it would not apply to any concoction containing no more than 0.2% of morphine. The defendant submitted that there was no case to answer since the prosecution had not adduced evidence as to the percentage proportion of the prohibited substance found on the accused. This was overruled and the accused changed plea to 'guilty'. The Court of Appeal dismissed his appeal.

On further appeal, the House of Lords held that a statute can place a burden of proof on an accused either expressly or by implication, that is, based on the construction of a particular legislation. Parliament cannot be taken to have imposed the duty on an accused to prove his innocence in a criminal case and that the court should be very slow to draw such interference from the language of a statute. It concluded that public policy in the present case was in favour of the legal burden being imposed on the prosecution and that if the burden was on the accused, he would have difficulties because the substance is usually seized by the police.

The appeal was allowed by the House of Lords.

It is worth noting that the *Hunt* case takes us back to the argument made by the defence in the *Edwards* case.

299 [1975] QB 27.

300 [1987]1 All ER 1 (HL)

iii. Defence of Intoxication or Insanity

Section 111(2)(c) of the Evidence Act states that in cases where the accused admits an offence but asserts a defence of insanity or intoxication, the burden of proving this defence rests upon the accused.

In *Nyamweru s/o Kinyaboya*[301] the appellant claimed that he was in an advanced stage of intoxication, when he killed his wife with a knife and that the prosecution had failed to prove his guilt beyond reasonable doubt.

The court in this case held that while the defence of intoxication is a matter for the accused, there could be circumstances which point to the existence of such a condition arising out of the prosecution case. Where that is the case, the court should acquit the accused upon proof of this fact.

In *Kamau s/o Njoroge v R*[302] it was held that the burden of proving insanity rests on the accused who is deemed to have discharged this burden if the preponderance of evidence supports his defence.

It is always important to examine this defence whenever raised in court since all that the accused wants is to be exempted from liability.

In the case of *R v Saidi Kiunga*[303] the court held that whenever the accused raises the defence of insanity, such evidence must be considered judicially while always remembering that the person claiming to be exempted from criminal liability on grounds of insanity or intoxication is anything but impartial.

Other Exceptions to the General Rule

In criminal cases, the Evidence Act has recognized several other exceptions to the effect that the burden of proof lies on the accused person. These exceptions are provided for as follows:

301 (1953) Vol 20 EACA.

302 (1939) EACA 135.

303 [1953] EA 1.

i) Section 112 relates to facts especially within the special knowledge of a party to the proceedings who bears the burden of proving or disproving those facts. It may happen that in the course of proceedings, there are certain facts that happen to be within the special knowledge of the respondent. In that case the burden of proof will be upon the respondent.

ii) Section 115 states that, 'Where there is an apparent relationship between 2 or more people and it is shown that they have been acting as such, the burden of proving that there is no such relationship rests on the party who alleges that the relationship does not exist.' This would happen, for instance, in a case where a party denies the existence of a landlord-tenant relationship.

iii) Section 116 relates to disproving ownership. When a question arises on whether a person in possession of anything is the rightful owner, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

iv) Section 117 states that whenever there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

The provisions of law noted above are a clear illustration of the burden of proof being cast by statute on the accused rather than the prosecution as is the norm.

D. Shifting the Burden of Proof

The burden of proof shifts only insofar as the burden of adducing evidence is concerned. This means that the burden of establishing a case remains, throughout the entire case, where the pleadings originally put it.[304] However, the burden of adducing evidence is the obligation to prove a particular set of facts and it shifts between the prosecution and the defence depending on how each side introduces its evidence as against the other party. This means that so long as the scale containing adverse evidence preponderates to a certain extent

304 Sir John Woodroffe and Syed Amirali, *Law of Evidence* (18th edn, 2009) at 1329.

by reason of evidence adduced in that behalf, the duty of necessity rests on a party to introduce the opposing evidence which shall restore the equipoise or, if possible, strike a new balance.[305]

For example, if the court finds that the prosecution has established a *prima facie* case against the accused, the burden of adducing evidence to the contrary shifts to the defence. Here, the defence instead of denying what is alleged against him may rely on some new matter which, if true, is an answer to it, in which event the burden of proof changes yet again.

If this occurs, the defence is bound to show by a margin of probability that the facts in issue or relevant facts are not as given by the prosecution.

In *R v Subordinate Court of the first class Magistrate at City Hall Nairobi and another Ex Parte Youginder Pall Sennik and Retread Ltd,*[306] court noted:

> "When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. It is only where a law provides to the contrary pursuant to section 109 of the Evidence Act can the burden be shifted. Contrary to popular belief, Parliament can by law shift the burden of proving particular facts and the shifting of the burden is not a constitutional issue where any such other law provides."

If the defence raises the question of an alibi, the burden of disproving the alibi shifts to the prosecution.[307]

In *Bernard Maina Mwaniki v Republic*[308] the court held that where there is a defence of alibi, the burden rests on the prosecution to displace the defence of alibi, thereby shifting the burden of proof to the appellant.

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305 *Ibid* (n.42).

306 [2006] 1 EA 330 (HCK).

307 Section 110 of the Evidence Act provides in this regard that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person...

308 [2010] eKLR.

Further, when a person sets up a defence of alibi he does not assume any responsibility of proving it. Therefore, the shifting burden of proof refers to the burden of adducing evidence and it does not affect the incidence of the original legal burden of proof.

Section 109 of Evidence Act embodies this position by providing that:

> "[the] burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".

The test for 'shifting burden' the burden of proof was laid down by Lord Hansworth, M.R in the following words:

> "It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient *prima facie* to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on the one side and of saying that if there were two feathers, on one side and one on the other, that would be sufficient to shift the onus. What is meant is that in the first instance, the person on whom the onus lies must prove his case sufficiently to justify a Judgment in his favour if there is no other evidence"[309]

It is important to note that the burden of establishing a case is not the same as the burden to adduce evidence because the former never shifts but the latter does shift occasionally.

Pursuant to section 107 of the Evidence Act, once a person has proved his allegations the burden of adducing evidence then shifts to the adverse party who must challenge the allegations against him lest he fails,[310] or he may choose to respond to the allegations against him by introducing new facts.[311] Much depends upon the pleading in each case in determining who will have the burden under section 108 and who begins first.

309 *Stoney v Eastbourne R.D Council* [1927] 1 civil appeal 367,397.

310 Section 108 of the Evidence Act.

311 Section 109, *Ibid.*

In the case of *Vrajdas v Cienta*[312] the plaintiff sued the defendant on a promissory note he had made and signed in the plaintiff's favour. The defendant alleged that the promissory note was given for an illegal consideration and having admitted the note, he was called upon to begin.

Likewise, in *Kimotho v Kenya Commercial Bank*[313] the plaintiff had been employed by the defendant on a two-year contract after retirement on attaining the age of 55 years. Before the expiry of the two years, the plaintiff received a letter terminating his services with immediate effect. The defendant cited a clause in the contract of employment permitting it to terminate the plaintiff's employment without notice if the plaintiff committed any breach of the contract provisions or was guilty of grave misconduct or wilful neglect of duty. The reason given for the termination was the plaintiff's misconduct at a senior management meeting at which it was alleged the plaintiff used derogatory and unacceptable language.

The plaintiff then brought a suit against the defendant claiming damages for wrongful termination. At the trial of the suit, the defendant's witness sought to rely on an incident that allegedly happened at a senior management meeting where the plaintiff allegedly engaged in an altercation with a colleague. The alleged colleague was however not called to testify.

The court held that once the plaintiff testifies that his employment was summarily terminated without any justification, he establishes a *prima facie* case and the burden shifts to the defendant to prove facts which would justify the termination, Judgement was accordingly given in favour of the plaintiff.

Under section 110 of Evidence Act, no one is entitled to give evidence of any fact without first showing that he is legally entitled to do so. This means that, if there are conditions precedent to the admission of certain kinds of evidence, then, the requirements for admission of the evidence must be proved before the evidence is admitted.

312 (1946) 13 EACA 58.

313 [2003] 1 EA 108 (CCK).

In *Commissioner of Customs v S.K Panamchand*,[314] the plaintiff company imported blankets allegedly from West Germany. No import license was required from West Germany although a license was required for goods from other countries. The Custom Officers seized the blankets acting on information that they came from East Germany. The company sued for the return thereof. In its evidence, it produced an invoice and a document signed by a Mr. Blok who stated that the words appearing on the invoice 'country of origin'- 'W.G' were correct. The company said that they had proved that the country of origin was indeed West Germany and not East Germany hence discharged the burden of proof.

In the court's opinion, the company did not fulfil the conditions precedent to the admission of the documents and the evidence was therefore inadmissible. The court held that the company ought to have proven that the attendance of Mr. Blok was procured without unreasonable delay or expense, that the signed document was used in the course of business and that he is the one who had signed the document.

E. Standard of Proof

The phrase "standard of proof" is used to describe the degree to which the proof must be established.[315] It determines how much evidence a person must adduce to discharge a legal burden of proof and varies depending on whether it is a criminal or a civil trial. It is also defined as the level of cogency that evidence should attain before the person bearing the burden can be said to have discharged it.

Criminal cases

The standard of proof here is 'that the prosecution must prove the defendant's guilt beyond reasonable doubt.'

314 [1961] EA 303.

315 *Phipson on Evidence*, (15th edn, London : Sweet & Maxwell, 2003) page 55.

This was the standard established in the *locus classicus* decision of *Woolmington v DPP;*[316] where Court observed that just as there is evidence on behalf of the prosecution, there may be evidence on behalf of the prisoner which may cast doubt as to his guilt. In either case, the prisoner is entitled to the benefit of doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence, and it is sufficient for him to raise a doubt about his guilt. He is not bound to satisfy anybody on his innocence.

In the case of *Miller v Minister of Pensions*,[317] Lord Denning had this to say on proof beyond reasonable doubt:

> "That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed by a sentence 'Of course, it is possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short will suffice."

The case law cited above affirms the standard of proof required in criminal cases which is as noted beyond reasonable doubt.

It is important to also note that when the legal burden falls on the accused either by Statute or by reason of defence of intoxication or insanity, the accused discharges that burden by establishing a margin of probability in his favour. He is not required to prove any matter beyond reasonable doubt and it is merely enough to establish or raise a *prima facie* case in his favour, whereafter the prosecution still has its legal burden to discharge.

In *R v Carr-Briant,*[318] the court noted that:

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316 [1935] All ER 1 A.C 462 (HL).

317 [1947] 2 All ER 372,373.

318 [1943] KB 607, 612. In this case, the defendant, a Director of a firm which entered into contract for work to be done in the war department, was charged with corruption. The trial judge directed the jury that the defendant had not only to discharge the burden of proof and show that he gave the money without a corrupt motive, but had also to do so beyond reasonable doubt. The defendant was convicted and he appealed.

> "In our judgment, in any case where either by Statute or at Common law some matter is presumed against an accused person, unless the contrary is proved, the jury should be directed that it is for them to decide whether the contrary is proved. Burden of proof required is less than that required at the hands of the prosecution in proving the case beyond reasonable doubt. The burden may be discharged by evidence satisfying the jury of the probability of that which the accused person is called to establish."

In *R v Amgara*[319] the defendant was charged and convicted of two counts of importing restricted goods without lawful authority contrary to section 147 of the KEA. The Customs Management Act (now repealed) had a provision under section 167(b) which placed the burden of proving lawful authority on the accused. It was held that in cases of such an exception, the standard of proof required is less than that on the hands of the prosecution. This evidence may be discharged by evidence which satisfies the court of the probability of that which the accused is called to establish. The appeal was allowed.

Civil Cases

The standard of proof required in civil cases is 'proof on a preponderance of the evidence or balance of probability.' That is, the plaintiff must prove that what he or she alleges is more likely than not, the truth in the circumstances of the case.[320]

In *Miller v Minister of Pensions*[321] at page 324, it was stated by Lord Denning with regard to the standard of proof in civil cases that:

> "That degree is well settled, it must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable

319 [1959] EA 654.

320 In *Job Evanson Okello v Stephen* Z.K. Njoroge [2005] eKLR, court held that the standard of proof in civil cases is on a balance of probabilities and that in the absence of any contrary evidence, the trial court was right in holding that the respondent had proved his case as against the appellant. The appeal was dismissed for lack of merit.

321 [1947] 2 All ER. See also *George Wanjuki Gethi v Lucy Jezza* [2006] KLR High Court of Nakuru civil case 500 of 1998, where after having carefully re-evaluated the evidence adduced on a balance of probabilities, court held that the plaintiff had failed to prove his case against the defendant. Judgment was entered for the defendant against the plaintiff as prayed in her counter claim ordering the plaintiff to pay the rent for occupying the said suit premises.

than not,' the burden is discharged. But if the probabilities are equal, the burden is not discharged. In other words, after hearing the case, one case must be more probable than the other."

However, there are cases whereby a standard above a balance of probability, though not as high as that required in criminal cases, is required in civil cases. Though the standard of proof is not beyond reasonable doubt, a high standard is needed when dealing with cases involving:

a. Matrimonial cases

b. Fraud/Forgery

c. Contempt of court

d. Election petition cases

Matrimonial Cases

Despite being civil disputes, the public policy behind matrimonial proceedings demands a higher degree of probability than that in normal civil proceedings such as, negligence. Lord Denning in *Bater v Bater*[322] said:

"The degree depends on the subject matter. A civil case involving fraud will require a higher degree of probability than that it would normally require when asking if negligence is established. It does not adopt so high a degree as a criminal court even when determining a charge of a criminal nature but still does require a degree of probability which is commensurate with the occasion, likewise, a divorce court should require a degree of probability proportional to the subject matter."

There always exists a strong presumption in favour of the validity of a marriage. This presumption may only be rebutted by evidence which satisfies the standard of proof beyond reasonable doubt. In *Ginesi v Ginesi*[323] the court held that adultery had to be proved beyond reasonable doubt.

322 [1951] Probate page 35.

323 [1948] page 179.

In the case of *Wangari Maathai v Andrew Maathai*[324] the husband petitioned for a divorce on grounds of adultery. There was no direct evidence of adultery but the petitioner relied exclusively on the evidence of two night watchmen who testified to the long hours spent by the respondent at the petitioner's residence, giving rise to the opportunity to commit adultery.

The petition was allowed and the appellant appealed on grounds that the standard of proof required had not been met. The Court of Appeal held that in such cases, it must be satisfied beyond reasonable doubt that a matrimonial offence of adultery had been established.

Further, that the trial court was right in concluding that, based on the circumstantial evidence adduced, adultery had indeed occurred.

These cases involving matrimonial offences prove that a higher standard of proof than a balance of probability is indeed of the essence in such proceedings.

Fraud/Forgery

This is an illustration of a criminal allegation in civil proceedings due to the fact that fraud is a criminal offence under the Penal Code.

In *Hornal v Neuberger Products Co. Ltd*,[325] the plaintiff sued the defendant for breach of warranty or alternatively for fraudulent misrepresentation. It was alleged that the director of the defendant company had in the course of negotiations for purchase of a used lathe machine, stated that it had been reconditioned by a reputable firm of toolmakers. The defendants denied that the statement had been made. If it had been made, the director must have known it to be false.

The trial court found that the statement had been made but held on the claim based on breach of warranty that it had not been made contractually. With respect to the claim of fraud, the court further held that it was satisfied on a balance of probability that the statement had been made and that that was the correct standard

324 [1976-80] 1 KLR 689

325 [1957] 1 QB 247 (civil appeal).

to apply; but that it would not have been satisfied if the criminal standard was applied. Judgment was entered for the defendant on ground that the plaintiff had not shown that he had suffered damage by reason of relying on the fraudulent misrepresentation. Plaintiff appealed.

The Court of Appeal held that although the judge had applied the correct standard of proof, the plaintiff had suffered damage and was entitled to judgment.

Contempt of Court

This refers to the specialized jurisdiction given to a court of law to punish parties when contempt happens on the face of the court or outside. For cases of contempt outside court, the law requires that before anyone is punished, he must have been served with the order and the pleadings in clear terms as well as serve them with a penal notice.[326]

In *Re Bramblevale Ltd*,[327] an order was given to a Director requiring him to produce certain papers on behalf of the company. He failed to produce some in court claiming that they had been damaged. The matter went on appeal where the Court held that anyone in contempt ought to be charged. Lord Denning said:

> "A contempt of court is an offence of a criminal character which must be proved beyond reasonable doubt."

In the case of *Haron Mugo Kabuchi and others v Ndimo Farmers Co-operative Society and others*,[328] was a case on contempt.The respondents were in breach of a court order restraining them from interfering with the suit property and had also been served with a notice of penal consequences of breach of the order. However, in breach of the said orders, the respondents had interfered with the boundaries which had been fixed by the surveyor at the time the applicants filed

326 Section 5 of the Judicature Act gives the Court of Appeal and the High Court jurisdiction to deal with contempt of court just like it has original jurisdiction on any civil or criminal matter before it.

327 [1970] Ch 178.

328 [2006] eKLR High Court at Nakuru before Judge L.Kimaru (civil suit number 339 of 2001).

the suit. Counsel for the respondents submitted that the standard of proof required in contempt of court's case had not been met and which is higher than the normal standard of proof in civil cases of proof on a balance of probability.[329]

The court held that the respondents had clearly disobeyed the said order by assuming that they would not be punished by the court and further, that the applicants had established their case for contempt of court against the respondents.

Hence, the burden of proof is higher than the ordinary civil standard but not quite as high as the criminal standard.

Election Petitions

The burden of proof in election petitions lies on the petitioner to adduce evidence that establishes the alleged election offences and alleged electoral malpractices. On the other hand, the standard of proof required is slightly higher than the one adopted in civil cases but not as high as that in criminal cases, that is proof beyond reasonable doubt. Hence, the standard of proof to be discharged by the petitioner is that ordinarily applied by the court in civil cases where an allegation of fraud has been made and properly established.

In the case of *Ayub Juma Mwakesi v Mwakwere Chirau Ali and others*,[330] Justice Mohammed K. Ibrahim(as he then was) in his judgment, pointed out that the burden of proof in an election petition lies upon the person who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts.[331] He also referred to the Tanzania Court of Appeal case of *Nelson v Attorney-General and another*,[332] where the court stated the general principles of law in respect of the burden of proof in election cases.

The judges said:

329 Civil Procedure Rules, Order XXXIX, rule 2A (2); Order L, rule 1.

330 [2010] eKLR.

331 See section 107 of the Evidence Act, Chapter 80, Laws of Kenya.

332 [1999] 2 EA 160 (CAT)

> "The burden is heavy on him who assails on election which has been concluded. He must prove beyond any reasonable doubt. But as Lord Oaksey observed in *Preston-Jones* [1951] I All ER 124 at 133 '….What is a reasonable doubt is always difficult to decide and varies in practice according to the nature of the case.' The standard of proof depends on the seriousness of the allegation made."

In *Mohammed Jahazi v Shariff Nassir A. Taib*,[333] it was held that:

> "The burden of proof throughout rests on the petitioner and the quality of evidence that is advanced is to be considered with thoroughness and gravity which is commensurate with the dire consequences that can follow by virtue of the provisions of 'section 6 of the National Assembly and Presidential Elections Act and section 35 of the Constitution'. The standard of proof is slightly higher than the one adopted in civil cases, balance of probabilities, but not as high as in criminal cases which is beyond any reasonable doubt. The evidence herein and is particularly the petitioner's allegations must be subjected to the degree of proof as stated herein-above."

In the case of W*illiam Kabogo Gitau v George Thuo and others,*[334] Justice Luka Kimaru noted that:

> "With regards to the issue of the standard of proof that should be applied by the court in considering the issues in dispute in an election petition, it is now established that the standard of proof in election petitions is higher than that which is applied in ordinary civil cases..... It is this court's view that the standard of proof that must be discharged by the petitioner is that ordinarily applied by the court in civil cases where an allegation of fraud has been made. The court must be satisfied that the allegation of fraud has been properly established. That standard of proof is not akin to that required in criminal cases i.e. that of proof beyond reasonable doubt, but is higher than that which is applied in normal civil cases i.e. proof on a balance of probabilities."

The court in this case also agreed with the holdings in the following cases:

Muliro v Musonye and another,[335] where it was held that the standard of proof in establishing an election offence is higher than

333 Election petition number 9 of 1983.

334 [2010] eKLR High Court at Nairobi (election petition number 10 of 2008).

335 [2008] 2 KLR (EP) 52 at page 54.

that of proof on balance of probabilities although it is not equal to the standard of proof beyond a reasonable doubt that is applied in criminal cases.

Similarly, in *Ng'ang'a and another v Owiti and another*,[336] the court held as follows:

> "The allegation in the petition as laid above is a grave one indeed. Consequently the party laying it is expected to present evidence that is cogent, consistent and credible. Election offences approximate to criminal charges. It has been said proof thereof should be beyond reasonable doubt. On our part the proof should be as such a high standard as to be above, and quite above the balance of probabilities in civil litigation."

Maraga J (as he then was)in *Joho v Nyange and another,*[337] succinctly set out what in his opinion constituted the burden and the standard of proof that ought to be discharged in an election petition:

> "I agree with counsel for the second respondent that the petitioner being the one seeking to nullify an election he has the burden of proof. As to the standard of proof, whereas I agree with the holding in *Mbowe v Eliufoo*[338] that it has to be proved to the satisfaction of the Court and that the Court cannot be said to be satisfied when it is in doubt, I would, however, not say that the standard of proof required is beyond reasonable doubt. Like in fraud cases, I would say that the standard of proof required in election petitions is higher than on a balance of probabilities. And where there are allegations of election offences having been committed, as the election court in *Joseph Wafula Khaoya v Eliakim Ludeki and Lawrence Sifuna* Election Petition number 12 of 1993 held, a very high degree of proof is required."

F. Conclusion

The general rule regarding the burden of proof is that the party that drags another into court must bear the burden of proving the facts which he asserts.[339]

336 [2008] 1 KLR (EP) 799 at page 806.

337 [2008] 3 KLR (EP) 500 at page 507.

338 [1967] EA 240 (T).

339 Dr. Rega Surya Rao, *Lectures on Law of Evidence* (2004 edition, Asian Law House) page 151.

However, this rule is not cast in stone. It is subject to several exceptions and the burden of proving that a person comes within those exceptions, lies with he who alleges that he is within the exception. The same applies when one avers that he falls within an exemption or a qualification of the application of the law.

Standard of proof on the other hand, refers to the level of cogency that evidence adduced should attain before the person bearing the burden can be said to have discharged it. This standard differs in criminal and in civil cases where the standard in the former is beyond reasonable doubt while in the latter, it is on a balance of probabilities or, as they say, a preponderance of the evidence.

Chapter 6

Competence and Compellability

A. Introduction

1. Competence

The word "competence" refers to the ability, capacity or qualification of a witness to give evidence in a court of law.[340] It is concerned with the determination of who may give evidence generally and the circumstances under which a particular witness may testify.

The general approach in modern law is said to regard relevance of testimony, and not formal competence of the witness, as the fundamental requirement of admissibility.[341] Thus, the basic principle is, all persons are competent to testify as witnesses unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions.[342]

2. Compellability

Compellability on the other hand refers to whether or not a competent witness can be ordered by a court of law to give evidence. The general rule is that all competent witnesses are compellable, that is, can be compelled to give evidence.

For instance, an accused person is a competent witness of the defence but is not compellable to give evidence. Similarly, a judge[343] can be a competent witness but cannot be compelled to give

340 Dr. Rega Surya Rao, *Lectures on law of Evidence* (edition 2004, Asian Law House) page 180.

341 I.H. Dennis, *The Law of Evidence* (2nd edition, Sweet & Maxwell, 2002) pages 430-431.

342 Section 125(1) of the Evidence Act. Exceptions to the rule can be found in case law such as ex parte *Fernandez* [1861] 10 CB (NS) 3, 39 where the sovereign and foreign ambassadors and their suites are exceptions to the rule.

343 *Harmony Shipping Company v Davis* [1979] 3 All ER 77,181. Lord Denning, MR held that while judges are competent witnesses with regard to their judicial functions, they are however not compellable.

evidence or disclose any communication about a character.[344] When a witness cannot be compelled to testify in a court of competent jurisdiction, such a witness is said to enjoy a privilege.[345] The legal profession enjoys privilege which binds an advocate not to divulge any information emanating from his client.

This does not mean that the witness has to answer every question put to him, if say for instance, the answer may tend to incriminate the witness or where he enjoys a certain privilege. Exceptions to the General Rule, which are discussed in detail under the chapter on Privilege and Public Policy, are manifold. They include:

(i) The accused cannot be compelled to give evidence that incriminates him;

(ii) Privilege of spouse;

(iii) Privilege of court;

(iv) Communications during marriage;

(v) Privilege of official communications and records;

(vi) Privilege of information relating to commission of offences;

(vii) Legal professional privilege; and

(viii) Banker's books.

B. Competence of Witnesses

The general rule as per section 125(1) of the Evidence Act is that:

> "all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by reason of tender years, extreme old age, disease (whether of body or mind) or any similar cause."

344 Dr. Rega Surya Rao, *Lectures on Law of Evidence* (edition 2004, Asian Law House) page 180 as read with section 129 of the evidence Act.

345 Section 134(1) of the evidence Act.

Similarly, a mentally disabled person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers thereto.[346]

In the case of *R v Hill,*[347] a patient of a lunatic asylum, labouring under a delusion that he had a number of spirits continually talking to him, but with a clear understanding of the obligation of the oath, was held to be competent to give evidence for the Crown on a charge of manslaughter.

Consequently, the responsibility for determining competence lies with the Court. If a magistrate for reasons to be recorded suspects that a potential witness may not be able to understand the questions, or give rational answers thereto then the court must determine whether such a witness is competent.

C. Competence in Special Cases

1. The Accused

Section 127(2) of the Evidence Act provides that,

> "In criminal proceedings, every person charged with an offence shall be a competent witness for the defence at every stage of the proceedings, whether such a person is charged alone or jointly with other persons."

This means that the accused is allowed to give evidence on the *voir dire*, during the trial as well as in mitigation of the sentence. However, his evidence on oath will be cross-examined by the prosecution. The only requirement is that the person charged has to indicate to the court that he will be testifying in his defence. Further, the failure of the person charged to give evidence shall not be made a subject of any comment by the prosecution.[348]

The rules applicable to the accused have their foundation in the constitutional provision that an accused person has the right to be presumed innocent until proven guilty.[349] Further, the accused has

346 Section 125(2) of the Evidence Act.

347 (1851) 2 Den 254.

348 Section 127(2)(iii) of the Evidence Act.

349 See article 50(2)(a) of the Constitution of Kenya.

the right to silence[350] and that the burden of proof in criminal cases is always vested in the prosecution.[351] These provisions are further enhanced or fortified by the constitutional privilege against self-incrimination.[352]

2. Deaf and Dumb Witnesses

Merely because a person is unable to speak in order to give answers to questions asked, does not mean that he is incompetent to testify.

Under section 125(1) Evidence Act the person is not 'prevented from understanding the questions put to them and so long as he can give rational answers to questions' by some means other than speech or speaking.

The starting point is that when a deaf or dumb witness is called to testify, the Court must first conduct a *voir dire* examination to determine:

i) Firstly, whether the witness is intelligent enough to understand the nature of the questions put to them, and

ii) Secondly, whether the witness understands the nature of the oath. Once this has been established, the witness may be asked questions either in writing or by the use of signs as appropriate.

In response to these questions, the witness may give his or her evidence in any manner which he/she can make it intelligible. Making evidence intelligible[353]can be done, by writing down or by using signs which must be made in open court and the evidence so given is deemed to be oral evidence.[354]

The testimony of such a witness may be admitted subject to the discretion of the Court to exclude it if the normal requirements of understanding the question are not met.[355]

350 See article 50(2)(i) of the Constitution of Kenya.

351 *Woolmington v DPP* [1935] AC 462..

352 See article 50(2)(l) of the Constitution of Kenya.

353 Section 126(1) of the Evidence Act.

354 Section 126(2) of the Evidence Act.

355 Section 125 of the Evidence Act. See also *Hando son of Alwnaay v R* (1951) EACA, the Court ruled that '[… before convicting on any[…] plea, it is highly desirable not

Where an interpreter is used, the court must satisfy itself that the signs and the proceedings are clearly understood by such a witness. Besides, wherever interpretation is required, the facts should be recorded together with the name of the interpreter and the language used.

The case of *Desai v Republic*[356] is instructive. In this case, the appellant was convicted on his own 'plea of guilty' to a charge of corruption while the other charge of conveying stolen property was withdrawn. He was sentenced to two years' imprisonment and twenty-four strokes. He appealed against the sentence.

For the appellant it was argued that:

i) His plea was equivocal as he spoke little English and the words recorded were not likely to have been used by a person of limited education;

ii) The purpose of the bribe had not been explained to the appellant; and

iii) The magistrate had misdirected himself in holding that there were no special reasons for reducing the sentence.

Counsel for the appellant, Mr. Lakha, submitted that the words attributed to the appellant were not those likely to be used by a person of limited education. It was submitted in the High Court that the appellant speaks little English and that he answered to the charge in Kiswahili, a language with which the trial magistrate was not conversant.

The court[357] in holding that wherever interpretation is required, the fact should be recorded together with the name of the interpreter and the languages used stated:

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only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every such constituent]' In *Adan v R* [1970] EA 24, the Court of Appeal set out, *inter alia,* that the charge and the particulars of the offence should be explained to the accused, in the language that he/she understands.

356 (1971) EA 416 (CAD). See also PLO Lumumba, *Criminal Procedure in Kenya*, (LawAfrica Publishing (K) Ltd, 2008) at 67-68.

357 Sir William Duffus P, Spry V-P and Lutta, JA.

> "We would interpose here that we are of the opinion that whenever interpretation is required in any court proceedings, the fact should be recorded and the name of the interpreter and the languages used should be shown."

The case of *Hamisi s/o Salum v R*,[358] involved a trial for a charge of murder. The only eye-witness was the daughter of the deceased who was deaf and mute. The appellant was convicted of murder by the High Court. During the preliminary inquiry, evidence was given for the prosecution by a deaf and mute witness, who was a daughter of the deceased, on the allegation that she was an eye-witness to the alleged murder.

The trial magistrate noted that the witness was dumb and that her evidence was given through the medium of a sworn interpreter, aside, and who claimed to be able to interpret the signs and noises made by the witness.

At the trial, it emerged that the witness was not only dumb but also deaf. The trial judge thereupon refused to admit her evidence. The appellant was nonetheless convicted on other evidence called at the trial.

On appeal, especially on the testimony of the deaf/dumb witness, the court held that:

(i) Such a person is not incompetent as a witness if he/she understands the effect of an oath and if intelligence can be conveyed to and from her by means of signs.

(ii) The learned trial judge who tested the proposed method of interpretation and found it to be very crude had the discretion and properly exercised it in ruling that the evidence of the girl be excluded.

(iii) It was entirely within the discretion of the Trial Judge to exclude the evidence of the deaf/dumb witness especially after having tested the proposed method of interpretation and found it to be of a very crude type.

358 (1951) 18 EACA 217.

3. Husband and Wife

"Husband" and "wife" mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom.[359]

This provision reverses the position in *R v Amkeyo*,[360] where Hamilton, J stated that:

> "A wife under the Evidence Act means a woman in a monogamous marriage. Customary marriages are not monogamous and in any event they are nothing but wife purchases. They do not fit to be deemed as marriages in a civilized society."

Under the law of evidence, a husband and a wife are competent witnesses in both civil proceedings[361] and criminal proceedings. In criminal proceedings, the accused and the husband or wife of the accused person are competent witnesses for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person.[362]

In effect, the spouse to an accused person is a competent witness for the defense but cannot be compelled to give evidence unless upon the application of the accused.[363]

The rationale for this provision is to preserve the sanctity of marriage wherein the husband and wife are deemed to be one as well as the need to have free communication between spouses in their home without the fear of the other spouse testifying against them.

However, in criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of the accused, in any case where the accused is charged with:

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359 Section 127(4) of the Evidence Act.

360 [1917] 7 EALR 14.

361 Section 127(1) of the Evidence Act.

362 Section 127(2) of the Evidence Act.

363 Section 127(2)(ii) of the Evidence Act.

(i) The offence of bigamy,

(ii) An offence under the Sexual Offences Act,

(iii) Any offence affecting the person or property of the spouse,

(iv) An offence against the children of the other spouse whether born of the marriage or not.[364]

The privilege of spouses guaranteed by section 130(1) of the Evidence Act, forbids the compulsion of the spouse to disclose any communication made during the subsistence of a marriage except in the aforementioned circumstances.

If a spouse who is called as a witness for the prosecution proves adverse, that witness may be treated as a hostile witness in the normal way.[365] If a spouse waives the right of refusal, she becomes an ordinary witness and, having started her evidence, must complete it, unable to hide behind the barrier of non-compellability.[366]

In the case of *R v Blanchard*,[367] the accused was charged with the offence of buggery to his wife. The wife was called to adduce evidence. Counsel for the defendant objected and submitted that she was not competent to testify against the accused. The court overruled the objection on grounds that the offence involved the person of the other spouse. Hence, it was admissible.

In *DPP v Blary,*[368] Blary was charged with the offence of living substantially on earnings of prostitution. The prostitute being his wife, the defendant objected to the competency of the witness to adduce evidence.

It was held that the wife was not a competent witness. Further, that living on earnings of prostitution does not involve property, person or liberty of other spouse and these exceptions were to be construed strictly.

364 S.127(3), Evidence Act..

365 *R v Pitt* [1982] 3 All ER 63.

366 Adrian Keane, *The Modern Law of Evidence* (5th edn, 2000 Butterworths) page 112.

367 [1952] 1 All ER114.

368 [1912] 2 KB 89.

In *R v Kihandika*[369] the accused was married to 2 wives and was charged with the murder of one of them. The other wife gave evidence for the prosecution but the accused raised an issue on whether such evidence was admissible at trial. It was held that on a charge affecting the person of a co-wife, the other wife is a competent and compellable witness for the prosecution against the husband.

It must be noted, however, that these decisions contravene section 127(4) of the Evidence Act which provides that 'husband and wife mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom.'

In the case of *R v Lapworth*[370] the appellant was charged with attempted murder and assault causing grievous bodily harm against his wife. The wife was called by the prosecution as a witness but declined saying she would rather not testify against the accused. Counsel for the defendant objected to her giving evidence and submitted that although the wife was a competent witness, she was not compellable as against the husband.

The objection was overruled by the trial judge who directed the witness to testify, which she did. The accused was then convicted on the second count.

The appellant went on appeal challenging the admissibility of the wife's evidence. The appellate court held that where a husband is indicted for inflicting personal injury on his wife, the wife is not only a competent but also a compellable witness for the Crown.

This decision was negated in *Hoskyn v Metro Police Commissioner.*[371] Here, *Hoskyn* was charged with two offences; firstly of assaulting and occasioning actual bodily harm to B and secondly, with wounding with intent to do grievous bodily harm. The witness was reluctant to

369 [1974] EA 372 (High Court of Tanzania).

370 [1931] 1 KB 117.

371 [1979] AC 474.

testify and the prosecution applied that she be treated as a compellable witness. She was then called to give evidence accordingly.

The trial court allowed her to be treated as a hostile witness whereupon during cross-examination, she had a number of inconsistencies obviously designed to cover up for her husband. The accused was convicted and he appealed.

On appeal, the following question of general public importance was certified for determination by the House of Lords: Whether a wife is a compellable witness against her husband in case of violence on her by him.

In a majority decision which reviewed the state of law and overruled the *R v Lapworth* case cited above, it was held that where a husband is indicted for inflicting personal injury on his wife, the witness although a competent witness is not a compellable witness for the Crown.

This declaration does not accord with section 127(3) of the Evidence Act which provides that the witness or husband of the person charged shall be a competent and compellable witness for prosecution or defence without consent of the person charged in any of case where the person is charged with the offences therein specified. This author's opinion is that, *Lapworth* remains good law.

4. Accomplices

The word 'Accomplice' has not been defined in the Evidence Act. According to judicial decisions, it means a 'co-accused' or 'a person who has participated in the commission of a crime with another' or a 'guilty associate'.[372] Section 141 of the Evidence Act stipulates that:

> "An accomplice shall be a competent witness against an accused person and conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice."

However, in practice, an accused person cannot be convicted on the evidence of an accomplice alone, Such evidence as we shall see

372 Dr. Rega Surya Rao, *Lectures on Law of Evidence* (edn 2004, Asia Law House) page 190

must be corroborated. Notwithstanding the provisions of section 141 of the Evidence Act, authorities over the years have always upheld the position that the conviction of an accused person based on the uncorroborated evidence of an accomplice will be set aside on appeal.

In the case of *Nasolo v Uganda*.[373] it was held that in a criminal trial, a witness is said to be an accomplice if, *inter alia*, he participated as a principal or an accessory in the commission of the offence, the subject of the trial. Whether a witness is an accomplice is to be deduced from the facts of each case. Further, that a judge must warn himself and the assessors of the danger of acting on an accomplice's evidence without corroboration. However, failure by the judge to warn himself of the necessity for corroboration is not fatal to an accused's conviction if the judge made a finding that the evidence was corroborated. The appeal was dismissed.

It must be noted that the prosecution can only rely on the evidence of a co-accused if, in effect, he has ceased to be a co-accused[374] This may happen as a result of pleading guilty to the charges or where the co-accused has been acquitted either for want of evidence or lack of a case to answer at the close of the prosecution case. It may also happen where a successful application is made to sever the indictment so that he is not tried with the other accused or where the Attorney General enters a *nolle prosequi,* thereby putting an end to the proceedings against him.[375]

In any of these circumstances, a former co-accused becomes both a competent and compellable witness for the prosecution. However, care must be exercised in admitting such evidence.

The court in the case of *R v Pipe,*[376] laid down the rule that an accomplice who is not an accused in the proceedings in question but against whom proceedings are pending should only be called by the

373 [2003] 1 EA 181 (SCU).

374 Adrian Keane, *The Modern Law of Evidence* (5th edn, 2000 Butterworths) page 107.

375 In *R. v Palmer* (1993) 99 Cr App R 83, the court held that if there are separate committal proceedings for two accomplices and one is committed and pleads guilty, the Crown may call him, even before he has been sentenced, to give evidence at the committal proceedings in respect of the other.

376 (1966) 51 Cr App R 17.l

prosecution if they have undertaken to discontinue the proceedings against him. The extent to which this rule has been complied with is hard to tell at this moment.

5. Children of Tender Years

Modern empirical studies have debunked myths about the reliability of child evidence, for instance: children are not more likely to lie than adults; the immature tendency to mix fact and fantasy does not apply to children after the age of about six.[377] Thus, children of tender years are generally competent to testify as witnesses unless court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by reason of tender years.[378]

With respect to children, there is no precise age fixed by the law under the Evidence Act at which they are absolutely excluded from giving evidence on the presumption that they do not have sufficient understanding. Research has shown that there is no correlation between age and honesty.[379]

The Children's Act[380] defines a child of tender years to mean a child under the age of ten years.[381]

In *R v Campbell,*[382] Lord Gorddad C.J stated:

377 M Dixon, '*The Credibility of Children as Witnesses*: Memory, Suggestibility, Fact and Fantasy'(l993) 20 (4) Brief 34.

378 Section 125(1) of the Evidence Act.

379 *Longman v The Queen* (1989) 168 CLR 79.

380 Act number 3 of 2004.

381 See section 2 of the Children's Act. Note that in *Kibangeny Arap Kolil v R* [1959] EA 92, the court observed that there was no definition of a child of tender years and went on to define a child of tender years to mean, in the absence of any circumstances, any child of an age or apparent age of under 14 years. The 14 years mentioned in this case did not refer to the biological 14 years because there are some persons who may be biologically over 14 but mentally under 14. Therefore, it is for the Court to decide whether such a person is a child of tender years. Even so, this was the position then. However, currently, the Children's Act changed this position by defining a child of tender years to be a child below the age of 10 years.

382 [1956] Vol 2 All ER page 272.

> "Whether a child is of tender years is a matter of good sense of the court... Lately, we have enacted in this country the Children's Act which defines a child of tender years to be a child of 10 years."

When taking the evidence of a child of tender years, section 19(1) of the Oaths and Statutory Declarations Act[383] is instructive. The section provides as follows:

> "Where, in any proceedings before any Court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the Court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if in the opinion of the Court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing […] shall be deemed to be a deposition within the meaning of that section".[384]

The above provision by implication requires the court to carry out a *voir dire* prior to admitting the evidence of a child of tender years. This process entails the following three steps:

1. The first step is for the Court to satisfy itself and to record on the file whether or not the witness is a child of tender years.

2. The second step is for the Court to determine whether the child does understand the nature of the oath. If after questioning the child, the court forms an opinion that he or she understands the nature of the oath arising from religious belief, schooling or socialization, he or she may be allowed to testify on oath.

3. If the child does not understand the nature and significance of the oath, the Court must determine whether that child is possessed of sufficient intelligence and whether the child understands the duty of speaking the truth, to justify the reception of the evidence.[385]

383 Chapter 15, Laws of Kenya.

384 See *R v Surgenov* [1940] 1 All ER 149. *Gabriel v R* [1950] EA 159 at 160, in which the Court applied the conditions provided under section 19(1) of the Oaths and Statutory Declarations Act, Chapter 15, Laws of Kenya.

385 *Lelei v R* [2010] 2 EA 259. Reception of this child's evidence requires that he understands the duty of speaking the truth. Further, the evidence is to be taken

Further in the case of *DPP v M,*[386] Phillips L.J. reiterated:

> "A child will be capable of giving intelligible testimony if he or she is able to understand questions and to answer them in a manner which is coherent and comprehensible."

Failure to follow these rules on admissibility of evidence of a child of tender years may render the child an incompetent witness and may occasion a miscarriage of justice.[387] Further, it may form the first ground of appeal if the matter goes on appeal.[388]

In *Sakila v R,*[389] the accused was charged and convicted of defilement of a minor based on the evidence of the complainant and two other girls aged 8 and 12 respectively.

The trial magistrate appeared not to take notice of the girls' ages and convicted the accused based on their testimony. The accused appealed on grounds that the Trial Magistrate did not follow the procedure required for qualifying the evidence of those children who testified.

The Court of Appeal in allowing the appeal held that, indeed the trial magistrate had erred in this and that a *voir dire* ought to have been carried out. The *voir dire* test is employed by the courts as a cautionary step to determine competence as children are more likely to be witnesses capable of being manipulated.[390]

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unsworn.

386 [1997] 2Cr.App.R.70,DC at 75.

387 Section 125 (1) of the Evidence Act.

388 *Philip K Langat v R* (Crim App No 89/2003) High Court at Kericho. Lessit, J in allowing the appeal held that failure to carry out a *voir dire* was a fatal omission to the prosecution case. The conviction was quashed and set aside as an irregular conviction.

389 [1967] EA page 403 (Tanzania).

390 In *R v Doggett* [1999] QCA 441 the judge directed that, "The other thing as a matter of law I should say to you is that remember her age. She is still a child. When I say a child, she is under 18. You know from your own experience, and indeed commonsense will tell you, that children can imagine things. They can make things up. They can exaggerate. They can invent untrue stories; sometimes to get attention, sometimes for particular reasons, and there have been some suggestions to you in this trial – I will come to those in a moment – sometimes inexplicably. You know they may be under the influence of others. They may be inclined to agree to suggestions put to them by others, or, indeed, by barristers in the courtroom. So because she is a child, because of her age, it is necessary for you to consider her evidence carefully, to scrutinise it, and to be satisfied that you have approached the central question you come back to all the time, Am I satisfied beyond a reasonable doubt that the offences

The manner in which the courts assess a child's competence has been criticized as an assessment of the child's intellectual capacity i.e. the child's power of speech and narration.[391] The problem lies with the fact that there is no reference to the assessment of the child's moral sense.[392]

However, to rectify the moral dilemma, section 19(2) of the Oaths and Statutory Declarations Act stipulates that if any child whose evidence is received under subsection (1) wilfully gives false evidence on oath, they would be guilty of perjury and could be punished with imprisonment for this offence just as is the case of an adult.

In the case of *Yusuf Sabbwani Opicho v R,*[393] it was held that the procedure for investigation, or preliminary examination of a witness, otherwise referred to in old *French and Anglo-Norman* as the *"voire dire" or "voir dire*" is taken in two steps as summarized in *Kinyua v Republic*:[394]

> "(a) The court should first ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child witness appears in court. The investigation need not be a long one but it has to be done and it has to be directed to the particular question whether the child understands the nature of an oath. If upon investigation it appears that the child understands the nature of the oath, then the court proceeds to swear or affirm the child and to take his or her evidence.
>
> (b) If the child does not understand the nature of the oath, he or she is not necessarily disqualified from giving evidence. The court may still receive the evidence if it is satisfied, upon investigation, that the young person is possessed of sufficient intelligence and understands the duty of speaking the truth.

occurred as she said? You can accept her evidence in whole or in part, but at the end of the day in order to support a conviction you must be satisfied that the Crown has discharged its onus of proof beyond reasonable doubt."

391 I.H. Dennis, *The Law of Evidence* (2nd edition, Sweet & Maxwell, 2002) page 455.

392 I.H. Dennis, *The Law of Evidence* (2nd edition, Sweet & Maxwell, 2002) page 455.

393 [2009] eKLR.

394 [2002] 1 KLR 256.

> This investigation must be done and when done, it must appear on record. Where the court is so satisfied then the court will proceed to record unsworn evidence from the child witness."

In *Kinyua v Republic,*[395] the appellate court ordered a re-trial for want of carrying out a *voir dire* by the trial court on the child witness.

Requirement of Corroboration

There is an express requirement by law that the evidence of a child of tender years, whether on oath or affirmation, be corroborated if this evidence is to be relied on for a conviction.

Section 124 of the Evidence Act states that, the accused shall not be liable to be convicted on the evidence of a child, unless it is corroborated by other material evidence implicating the accused and in support thereof. This is supported by judicial authority as shown below.

In *Kibangeny v R,*[396] evidence of the prosecution came from two children aged 9 and 14 years respectively. Their evidence was of eye-witness although it was not corroborated.

The accused appealed against his conviction and argued that the evidence of the children was not corroborated. The appellate court held that failure of the trial court to warn itself of the danger of conviction on the evidence of the two children which was uncorroborated was fatal. In the words of the court:

> "Even where a child of tender years is sworn (or affirmed) then though there is no necessity for its corroboration, as a matter of law, a court ought not to convict upon it without warning itself and the assessors of the danger of so doing…. In such cases the trial court must either find corroboration implicating the accused or must, after warning itself of the danger of convicting without it, express itself to be convinced of the truth of the child's story notwithstanding the danger."

395 *Ibid.*

396 [1959] EA 92 civil appeal.

Before a Court can convict an accused based on the evidence of a child, it must warn itself of the dangers of convicting without corroboration.[397]

In *Oloo s/o Gai v R*,[398] the daughter of the deceased gave evidence as a prosecution witness in a case where the accused was charged with murder. The court noted that the child was aged 12 years, attended school and church, and was sufficiently intelligent as to understand the importance of telling the truth. This finding, that the court was satisfied the child understood the nature of an oath, and the fact that her evidence was allowed was not put on record. The accused was convicted.

On appeal, the court noted that it is always important for the trial court to record that it had satisfied itself after a *voir dire,* that the child was a competent witness. In this case, the appellate court held that the trial court had failed to direct itself on the danger of admitting uncorroborated evidence of a child of tender years and had also overlooked significant items of evidence bearing on the reliability of her story. Hence, the conviction could not stand. The appeal was allowed and the conviction and sentence set aside.

In *R v Kasemas Ogenda*[399] the accused was charged with the rape of the complainant, an eight-year-old girl. The trial court upon conducting a *voir dire* concluded that the child did not understand the nature of an oath but could give unsworn evidence. There was medical evidence that the girl had contracted a venereal disease and medical evidence showed that the accused had the same disease.

The court held that for a conviction to stand, evidence of a child had to be corroborated and that in this case, there was ample corroboration. The accused suffered from the same illness as the complainant yet the girl had no history of having suffered from such a disease. The conviction was upheld by the appellate court. Further, the court noted that children are unlikely to fabricate stories, have a

397 Section 124 KEA. See also *Cleophas Ochieng Otieno v Republic.*[2010] eKLR, Njoki *v R* [1988] KLR 342.

398 [1960] 1 EA 86 (CAN).

399 [1940] 19 KLR 25.

better memory and as long as they have not been directed by adults, they make good witnesses.

In *Anthony Mwangangi Ngunjiri v R*,[400] the appellant faced one principal charge of defilement contrary to section 145(1) of the Penal Code and an alternative count of indecent assault contrary to section 144(1) of the Penal Code. After a full trial and based on the evidence adduced which included that of two children, the appellant was convicted of defilement and sentenced to 12 years imprisonment. The appellant appealed *inter alia,* on the ground that the legal provisions relating to *voir dire* were not observed. The court held that where a child of tender years is called as a witness in any proceedings before any court, the court is required to form an opinion, on a *voir dire*, whether the child understands the nature of an oath in which even the child's sworn evidence may be received.

If not satisfied, the child's unsworn evidence may be received if in the opinion of the court, he has sufficient intelligence and understands the duty of speaking the truth. However, in the latter event, the evidence must be corroborated for the accused person to be convicted based on that evidence. Further, that this finding must be recorded so that the course the trial court took is clearly understood.

In the case of *Johnson Muiruri v R*,[401] the appellate court held that the trial magistrate did not conduct any *voir dire* of the two children witnesses. Hence, based on that irregularity, the conviction and sentence could not stand. A re-trial was ordered based on the circumstances and facts of the case.

However, in a case involving sexual offences, the need for corroboration is extinguished by the proviso to section 124 of the Evidence Act. It states:

> "Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

400 High Court Cr. App 11 of 2006.

401 [1983] KLR 445.

This proviso was introduced by the Sexual Offences Act[402] which was enacted by Parliament to stem the tide of rising cases of sexual offences in Kenya. While the proviso has removed the requirement for corroboration with regard to evidence of child victims of sexual offences, it is vital to note the following:

I. That indeed, should the court not be satisfied that the alleged victim is telling the truth; the requirement for corroboration shall still be enforced.

II. The legal requirement for corroboration remains with respect to the evidence of children in all other cases.

The issue of requiring evidence of children to be corroborated is not without controversy. It has been stated by a critic that this requirement is discriminatory of children and we do agree to some extent. Nevertheless, the requirement for the time being remains part of our law.

Juvenile offender of unsound mind

A recent development in Kenyan law is the perspective of children of tender years as offenders.

In the matter of *R v J.W.K*[403] a juvenile offender who was of unsound mind, and hence unable to plead, understand the proceedings and make his defence was presented before the court. He was charged with murder.

It was established that the young person was suffering from Moderate Mental Retardation and the issue before the court was an inquiry by the court into the condition of the unsoundness of mind of the offender under section 162 of the Criminal Procedure Code, which requires the court to determine whether it should proceed as per section 162 or section 167 or as by the Constitution demanded in dealing with the proceedings in the obtaining circumstances.

The court in making its determination was guided by the provisions of Article 53 of the Constitution, which provides:

402 Act number 3 of 2006.

403 Criminal Case number 57 of 2009 High Court of Kenya at Bungoma by Gikonyo, J.

> "a child's best interest is of paramount importance in every matter concerning the child"

Further, under section 162(1) of the Criminal Procedure Code[404]the court should make an inquiry to establish the mental soundness of the offender; whether or not he can plead, understand proceedings and defend himself.

In this case, the learned Judge found that:

> "The circumstances of this case require the court to give effect to the right to fair trial under article 50, rights of children under article 53, the provisions of the Children Act and the requirements of International instruments on rights of a child. … the trial should be suspended, perhaps indefinitely under section 162(2) of the CPC, and the juvenile offender committed to the care of a person who will be able to prevent him from harming himself or somebody else and for his attendance in court as per section 162(3) of CPC."

The court further directed it would be in the best interest of the said juvenile offender and advantageous for the court to have a report from the office of the probation officer and the children's officer to aid the court in identifying a person or institution that can carry out the exercise.

404 Chapter 75 of the Laws of Kenya

Chapter 7

Public Policy and Privilege

A. Introduction

Certain matters despite being relevant to the facts in issue may be excluded from being adduced in court on the ground of privilege or public policy. The distinction between public policy and privilege must be noted.

Privilege is a right which the law confers on a person by allowing him/her to refuse to testify in a certain matter or produce certain items as real evidence. Privilege covers matters which directly affect only the particular litigant or witness; for example, the legal professional privilege or privilege against self-incrimination. On the other hand, public policy immunity covers matters in which the safety and well-being of the state is directly affected such as national security, police matters, local government matters, confidential matters and proceedings in Parliament. In some instances, the disclosure of certain evidence may be prejudicial to public interest e.g. exposing the public to the risk of war which is contrary to public policy.

One of the differences is that, while privilege is a right that can be waived by a party, public interest immunity cannot be waived since it is more akin to a duty. That is, the duty to protect society from harm that might result from the disclosure of certain information. The justice that might be secured in an individual case where a party was entitled to have a document disclosed when it is relevant and admissible is outweighed by the potential harm to the public in disclosing it to a party seeking disclosure.

There are four instances where privilege can be raised.

1. Privilege Against Self-Incrimination

A person is not to be compelled to answer any question which exposes the person to the possibility of a criminal charge or forfeiture.

In *Blunt v Parklane Hotel*,[405] the court articulated the rule as follows:

> "The rule is that no one is bound to answer any question if the answer would, in the opinion of the Judge, have the tendency to espouse him to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely."

The above is ingrained in section 128 of the Evidence Act which provides that:

> "A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will incriminate, or may tend directly or indirectly to incriminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind, but no such answer which a witness is compelled to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

The privilege against self-incrimination operates in a way that it protects the accused from being asked to answer questions or produce documents or things that incriminate him on other offences and not the present charge. The privilege of a witness against self-incrimination does not bar a witness from responding to any question asked by court. There has always been a misconception that a witness may choose not to answer an incriminating question put to him or her. The correct position is that there is no privilege to desist from responding to questions under Kenyan law. Therefore, a witness must answer all questions relevant to the facts in issue before the court. Section 157(3) provides that the court may, if it sees fit, draw from the witness's refusal to answer questions, the inference that the answer, if given, would be unfavourable to the witness.

However, before an adverse inference can be drawn on the accused person, a court must be satisfied that:

i) On being questioned under caution the defendant failed to mention the fact;

ii) The fact is relied on in his defence;

405 [1942] 2 KB 253.

iii) In the circumstances existing at the time, he could reasonably have been expected to mention the fact:

iv) The only sensible explanation for his failure to mention the fact is that he had no answer at the time that would stand up to scrutiny; and

v) Apart from the failure to mention the fact, the prosecution's case against him was so strong that it called for an answer.[406]

Nevertheless, even where a witness gives an answer which incriminates him or her, that answer cannot be used against him or her in other criminal or civil proceedings except proceedings for perjury. It is not enough for the accused to claim privilege. In *R v Boyes*,[407] the court ruled that to entitle a witness to claim privilege, the court must see from the circumstances of the case and the nature of the evidence which he is called to give that there is a reasonable ground to apprehend the danger to the witness from his being compelled to answer.

In exercising this discretion, the court is guided by section 157(2) which requires that the court must have regard to the following three considerations regarding the questions.[408]

(a) Such questions are proper and must be answered if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he or she testifies;

(b) Such questions are improper and may not be answered if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he testifies;

(c) Such questions are improper and may not be answered if there is a great disproportion between the importance of the imputation

406 Ouma, S.A, *Commentary on the Evidence Act*,Chapter 80 (2014) *LawAfrica Publishing* (K) Ltd at pages 196-197.

407 [1861] All ER Rep 172.

408 Section 157(2) of the Evidence Act.

made against the witness's character and the importance of his evidence.

Again, when it comes to production of documents which may incriminate a witness, section 138 allows the witness to enter into an agreement in writing with the person seeking the production of the documents in question.

The section provides that:

> "No witness who is not a party to the suit shall be compelled to produce his title deeds to any property, or any document in virtue of which he holds any property as pledge or mortgagee, or any document the production of which might tend to incriminate him, unless he has agreed in writing with the person seeking the production of such deeds or document, or with some person through whom he claims, to produce them."

In the case of *El Mann v R*[409] the accused was required to answer certain questions for income tax purposes. He had no choice but to fill the questionnaire because failure to do so would have been an offence. The form disclosed certain offences. Counsel for the accused objected to the use of the information and called to his aid section 77 of the then Constitution of Kenya which enshrined privilege against self-incrimination. The matter was taken to the constitutional court which ruled that the section was clear and unambiguous. It referred to the accused not testifying at his trial and did not refer to questions outside the trial. Filling out the questionnaire was not a trial and therefore not covered under section 77.

However, the question of whether the response to a question asked will incriminate a witness is for the court to determine. Where it appears to court that the answer given will not incriminate the witness, the court will allow the witness to proceed with answering it. However, where it appears to court that the answer will directly incriminate the witness, the court may overrule such question.[410] Again, a witness cannot claim privilege to questions in an inquiry

409 [1969] EA 357.

410 Akiniola, T. *Law and Practice Relating to Evidence in Nigeria* (1980) Sweet & Maxwell 330.

directed by the Director of Public Prosecutions under section 388 of the Criminal Procedure Code.

Waiver of privilege of the accused

Once an accused or witness volunteers to become a witness, section 128 of the Evidence Act comes into operation and the accused becomes like any other witness. Once the accused agrees to become a witness, he is said to have waived the privilege against self incrimination. In such a case, the accused has to adduce the self-incriminating evidence the only saving grace is found in section 128 which states that no such answer which a witness shall give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

2. Privilege of Spousal Communications

This is a legal concept that protects the right to confidentiality of communication within marriage. This law prevents forced testimony from one spouse against another. This privilege applies in both civil and criminal cases. When applied, a court may not compel one spouse to testify against the other concerning confidential communications made during marriage. No spouse can be compelled to disclose any information made to her/him during marriage by the other spouse nor shall the person be permitted to disclose such communication without consent of the person who made it. This is the general rule and it extends to all communication made between spouses during the marriage.

The spouse of an accused person is therefore, not a competent witness for the prosecution. This position is reiterated in section 130 of the Act which confers the privilege to a husband and wife[411] in respect to communications made in a polygamous marriage.[412] Therefore,

411 Note that under this section "husband" and "wife" mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom.

412 Section 130(2) defines "marriage" to mean a marriage, whether or not monogamous, which is by law binding during the lifetime of the parties thereto unless dissolved

no person shall be compelled to disclose any communication made to him or her during marriage by the other spouse nor shall a person be permitted to disclose such communication without the consent of the person who made it or his representative in interests except in cases where a spouse is a competent and compellable witness for the prosecution.[413]

Note that it is not the communication that is privileged but rather it is the spouse privileged from compulsion to disclose the information. If the communication were to be picked up by a third party, it would not be privileged and there would be no bar to the third party from testifying.

In the case of *Rumping v DPP*,[414] the accused person was a Dutch seaman charged with murder. He gave a letter to a shipmate to post to his wife outside England. The letter contained a confession to the offence of murder. The letter was turned over to the police and the objection was raised on the admissibility of the letter on the grounds of spousal privilege. The court held that the letter was admissible in evidence because the privilege is unavailable where the letter has been intercepted by third parties.

The court in the case of *R v Vladimir Verbi*[415] emphasized further that the object of privilege is to ensure the mutual confidence which should subsist between a wife and a husband is not destroyed by compelling one to testify against the other. But if a third party gets a hold of that information, the contents may be disclosed in court by that person.

There are exceptions laid down in section 127(3) which may compel a person to disclose information against her/his spouse. In this section, a spouse of an accused person becomes a competent and compellable witness for the prosecution or defence without the consent of such person in any case where the person is charged with any of the following offences because in such circumstance, the spouse is the only witness.

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according to law and includes a marriage under native or tribal custom.

413 Section 130 of the Evidence Act.

414 [1964] AC 814.

415 (1942) 9 EACA 42.

a) The offence of bigamy

b) An offence under the Sexual Offences Act number 3 of 2006

c) In respect of an act or omission affecting persons or property of the wife or husband of such person or the children of either of them and not otherwise.

This privilege aims at protecting the family union itself. It seeks to instill mutual confidence that ought to exist between a husband and a wife, which should not be destroyed through one spouse being compelled to produce the communication from the other. However, for the privilege of spousal communications to apply, the communication must be made during the subsistence of the marriage. Any communication prior to marriage and after is not privileged and can be adduced in evidence. And if the communication is in the hands of a third party, then the third party can be allowed to give evidence. This means that this privilege only seeks to protect the individuals, and not the communications.[416] However, this privilege continues even after the marriage has been dissolved by death or divorce.

Again, it must be noted from this privilege that the communications can only be disclosed if the maker thereof or his or her representative in interest consents to the disclosure. Accordingly, even where one of the parties to the marriage wishes to disclose the communications, the same will not be admissible unless the maker consents.

3. Legal Professional Privilege

The concept of legal professional privilege provides that certain communications between a client and his solicitor are privileged and immune from subsequent disclosure to a third party. When legal privilege has been established neither the client nor the lawyer can for any reason be compelled to disclose details of their communication.[417] In this regard, section 134(1) stipulates that:

416 Ratanlal Ranchhoodas, *The Law of Evidence* 14th edn, Bombay Law Reporter Office, 1963 at 281.

417 Section 134 of the Evidence Act.

> "No advocate shall at any time be permitted unless with his client's express consent to disclose any communication made to him in the course of and for the purpose of his employment as an advocate by or on behalf of his client or to state the content and condition of any document with which he has become acquainted in the course of and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment."

The justification for this principle, as set down in *Grant v Downs,*[418] is that "it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers…. thereby inducing the client to retain the solicitor and seek his advice and encourage(s) full and frank disclosure of the relevant circumstances to the solicitor." The advocate/client privilege is premised on the fact that a client is entitled to legal counsel without any hindrance and advocates must be given a free hand to prepare for the case and defend their clients. This is deemed to be an essential ingredient for a fair trial. This privilege extends its application not only to the advocate but also to those clerks, servants, interpreters, etc. working for the advocate.[419]

In *Omari s/o Hassan v R,*[420] the appellant was convicted of murder and evidence was based entirely on two statements by the deceased that the accused was one of the persons who had attacked him. The trial Judge after directing himself that such a statement should be accepted with caution found that there was corroboration in the appellant's refusal to testify particularly after the counsel informed the court that refusal to testify was against his professional advice.

On appeal, it was held that although the judge was entitled to take into account a refusal to give evidence on oath, such refusal to give evidence cannot bolster a weak case or relieve the prosecution of the duty to prove its case beyond reasonable doubt. Secondly, the disclosure by the advocate that the accused had refused to follow his advice was a breach of professional confidence and the judge should not have allowed it to affect his professional mind.

418 [1976] 135 CLR 674.

419 Section 135 of the Evidence Act.

420 (1956) 23 EACA 550.

Categories of Legal Professional Privilege

There are two categories of legal professional privilege.

i) Litigation Privilege

ii) Legal Advice Privilege

i) Litigation Privilege

This privilege arises after litigation or other adversarial proceedings have been commenced or are contemplated. It covers all documents produced for the sole purpose of the litigation in question. For litigation privilege to exist there must be a reasonable likelihood of litigation and a mere vague possibility that proceedings may arise in the future will not be sufficient.

The extent of litigation privilege includes all communication between:

a) Client and counsel

b) Client and third parties

c) Counsel and third parties with reference to some anticipated litigation

The communications must be made with the dominant purpose of advancing the prosecution or defence of the matter or the seeking or giving of legal advice in connection with it.

Waugh v British Railways Board[421] is authority for the proposition that a document will not be protected by professional privilege unless submission to legal counsel in anticipation of litigation is at least the dominant purpose for which it is proposed. In this case, the plaintiff's husband, an employee of the defendants, was killed in a railway accident. In accordance with the defendant Board's usual practice a report was made concerning the circumstances of the accident. This report was made partly for the purpose of discovering whether such accidents could be avoided in the future and partly to inform with Board's solicitor in case of litigation. The plaintiff sued the Board for negligence and sought discovery of the

421 [1980] AC 521.

report. Discovery was resisted by the Board on the ground of legal professional privilege. The House of Lords held that:

a) Public interest in the administration of justice strongly required that a document such as the internal inquiry report which contained statements that would almost certainly be the best evidence as to the cause of the accident should be disclosed; and

b) For that public interest to be overridden by a claim of privilege the purpose of submission to the party's legal advisers in anticipation of litigation must be at least the dominant purpose for which it was proposed.

In *Belabel v Air India*,[422] the plaintiffs brought an action against the defendant, an Indian corporation, claiming, *inter alia*, specific performance of an agreement for an under lease of business premises. The plaintiffs sought discovery of three categories of documents, namely, communications between the defendant and it solicitors other than those seeking or giving legal advice; drafts, working papers, attendance notes and memoranda of the defendant's solicitors relevant to the proposed under lease; and internal communications. The defendant's claim of privilege covering the documents was upheld by the Court of Appeal.

It must be noted that in *R v Derby Magistrates' Court, ex p. B*[423] the House of Lords held that a witness summons could not be issued to compel the production of documents subject to legal professional privilege which had not been waived since the principle that a client should be free to consult his legal advisers without fear of his communications being revealed was a fundamental condition on which administration of justice as a whole rested. In this case, the accused was charged with murder but before his trial, he changed his plea and stated that his stepfather actually committed the murder and that though he was present and took part in the murder, he did so under duress. The stepfather was then charged with the murder and at the new trial, counsel for the defence sought to cross-examine him on instructions he had given his lawyer. The magistrate court issued summonses requiring him to produce documentary evidence

422 [1988] 2 All ER 246.

423 [1995]4 All ER 526.

of the factual instructions to his lawyer. On appeal, the House of Lords held that the court could not compel the production of lawyer-client communication.

Finally, in the context of legal professional privilege there was no relevant distinction between a translation of an unprivileged document in the control of the party claiming privilege and a copy of such a document.

Any privilege a solicitor may have in respect of that document is the privilege of the client. Since the client had no lawful excuse to be in possession of the privileged document neither could the solicitor. The claim of privilege extends to the document in the hands of the solicitor who can have no greater authority than the client possesses. As per section 137 of the Evidence Act, a client can waive the privilege but the advocate cannot waive it unless the client so authorizes.

Privilege cannot be claimed if the dominant purpose is iniquitous as happened in *Barclays Bank plc v Eustice.*[424] Here the documents in respect of which the defendants claimed privilege related to communications with their legal advisers with regard to the disposal of the defendants' assets at an undervalue. There was a strong *prima facie* case that the purpose of the transactions was to prejudice the bank's interest by depriving it of assets which would otherwise have been available to satisfy outstanding debts.

ii) Legal Advice Privilege

It covers communication (written or oral) or a document evidencing such a communication between a client and a lawyer (or an intermediate agent of either) made in confidence for the purpose of giving or obtaining legal advice (even where the advice is about litigation or in the context of litigation). This privilege relates to the advice a counsel gives to a client. Counsel may refuse to divulge the advice given to a client if it is not within the jurisdiction of the law.[425] Client may also refuse to divulge any communication pertaining to the advice given to her/him by a legal counsel in a legal capacity.

424 [1995] 4 All ER 511.

425 *Brown v Foster* (1857) 1 Hand N 736

Legal advice privilege protects communications between a solicitor, acting in his professional capacity and his client, provided that the communication is for the purposes of seeking or giving legal advice.

In *Balabel v Air India*[426] the court noted that "legal advice is not just confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context". This holding was reflected in the recent case of *Three Rivers District Council v Governor and Company of the Bank of England*[427] where the House of Lords held that legal advice privilege is not restricted to advice about legal rights and liabilities but extends to presentational advice.

Further, in *R (on the application of Morgan Grenfell & Co. Ltd.) v Special Commissioner of Income Tax*,[428] it was held that an inspector of taxes was not entitled to see documents relating to the advice that the taxpayer had obtained from his lawyer about whether a tax avoidance scheme would work.

In *Wheeler v Le Marchant*[429] the court ordered the production of letters which had been passed between the solicitors of the defendants and their surveyor, except such (if any) as the defendants should state by affidavit to have been prepared confidentially after a dispute had arisen between the plaintiff and the defendants and for the purpose of obtaining information, evidence or legal advice with reference to litigation existing or contemplated between the parties to the action. Jessel, MR said:

> "…communication with a solicitor for the purpose of obtaining legal advice is protected though it relates to a dealing which is not the subject of litigation, provided it is a communication made to the solicitor in that character and for that purpose."[430]

The key difference between litigation privilege and legal advice privilege is that correspondence with an independent third party is not covered by legal advice privilege.

426 *Ibid* 22 above.

427 [2004] 3 WLR 1274.

428 [2002] 3 All ER 1, HL.

429 (1881) 17 Ch D 675)..

430 [1881] ITch Dat 682

iii) Loss of Legal Professional Privilege

This privilege does not extend to two types of communications. First, any communication made in the furtherance of any illegal act. This was demonstrated in *Regina v Peterborough Justice, Ex Parte Hicks*[431] where the solicitors for men charged with fraud held in their possession a power of attorney allegedly forged which one of their clients had deposited with them. A search warrant was issued, and an application to set it aside was refused.

Secondly, any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment whether the attention of such advocate was or was not directed to the fact by or on behalf of the client.[432] In *R v Cox and Railton*[433] a solicitor was compelled to disclose what passed between the prisoner and himself on an occasion when they called to consult him to draw a bill of sale which was alleged to be fraudulent.

Legal privilege continues even after the employment of the advocate has ceased and only ceases when the client waives the same.[434]

Section 137 of the Evidence Act affirms that, no one shall be compelled to disclose to the Court any confidential communication which has taken place between himself and his advocate unless he offers himself as a witness in which case he may be compelled to disclose any such communication as may appear to the Court necessary to be known in order to explain any evidence which he has given but no other.

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431 [1978] 1 All ER 225.

432 Section 34 of the Evidence Act.

433 [1884] 14 QBD 153.

434 Section 134(2) of the Evidence Act. Technically, the privilege belongs to the client and the client can waive it. Under section 136(2) of the Act, if any party to a suit or proceeding calls any advocate, interpreter, clerk or servant as a witness, he shall be deemed to have consented to such disclosure as is mentioned in section 134(1) only if he questions such witness on matters which, but for such question, the witness would not be at liberty to disclose.

As per Lindley MR in *Calcraft v Guest*,[435] the rule of law is that once a document is privileged, it is always privileged i.e. privilege continues even after the termination of the lawyer/client relationship. There are two key exceptions to this rule, as follows:

Privilege may be lost through fraud or iniquitous transaction.[436] The Court of Appeal in *Kuwait Airways v Iraqi Airways*[437] considered whether documents that would normally attract litigation privilege had to be disclosed under this fraud exception. The court held that they did, but that the courts had to be careful in applying it, especially in cases where the only evidence of fraud stemmed from a disputed version of events. Where fraud is an issue in the action itself then disclosure of privileged documents should only be ordered if there is a very strong *prima facie* case of fraud. Where the issue of fraud is not an issue in the action itself, a *prima facie* case of fraud may be enough. In *R v Cox and Railton*,[438] a solicitor was compelled to disclose what passed between the prisoners and himself on an occasion when they called to consult him to draw a bill of sale which was alleged to be fraudulent.

Legal professional privilege may also be expressly or impliedly waived. In both categories of privilege, the privilege is that of the client, not of the lawyer or of the third party. Thus, only the client may waive privilege.[439] Legal professional privilege may be waived unilaterally by the client. It must be noted, that by bringing legal proceedings against his solicitor a plaintiff implicitly waives legal professional privilege in respect of relevant matters. This implied waiver does not apply to confidential communications between the plaintiff and different solicitors instructed to pursue his claim against third parties. In *Derby & Co. Ltd. v Weldon*[440]it was held that where privileged documents were inadvertently disclosed in circumstances where the solicitors must have realized that a mistake had occurred but had sought to take advantage of it, all copies of the documents in

435 [1898] QB 759 at 761, CA.

436 Section 134 of the Evidence Act.

437 [2005] EWCA Civ 286.

438 [1884] 14 QBD 153, CCR.

439 The case to illustrate this is *Anderson v Bank of British Columbia* [1876] 2 Ch. D 644.

440 [1990] 3 All ER 762.

the solicitor's possession were to be returned and an injunction was granted restraining the use of information contained in or derived from them.

Privilege is lost if document or information comes to the hands or possession of the other party even if obtained by mistake or wrongfully. If obtained wrongfully, the person in possession may be restrained by an injunction. In *I.T.C. Film Distributor's v Video Exchange*,[441] the defendants obtained the plaintiff's documents by trick within the precinct of the court and subsequently exhibited them as evidence. It was held that such evidence as had not yet been referred to should be excluded.

4. Without Prejudice Privilege

Parties to a dispute frequently make statements without prejudice as part of an attempt to settle the dispute. Without prejudice statements cannot be used in evidence without the express consent of both parties as they constitute a case of joint privilege. Such statements often relate to offers of a compromise and were it not for the privilege would result into items of evidence on the basis that they constitute admissions.

Public interest leans in favour of settling disputes and the reduction in litigation,[442] hence this privilege. Once the privilege has been invoked, it protects disclosure even after the proceedings have come to a conclusion. In *Rush and Tompkins v GLC*,[443] proceedings between a claimant and the first defendant had come to an end by means of a settlement and the claimant was pursuing remedies against the second defendant. The House of Lords ruled that without prejudice communications between the claimant and the first defendant were not liable to disclosure in the course of the proceedings between the claimant and the second defendant.

Without prejudice privilege may also attach to communications in the absence of formal proceedings between the parties regarding

441 [1982] Ch 431.

442 Per Lord Griffiths in *Rush and Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1299.

443 [1988] 3 All ER 737.

the dispute and may therefore apply to mediation or other process whether or not related to the litigation.

The foundation of the rule has traditionally been seen as lying partly in public policy and partly in the express or implied agreement of the parties to the relevant negotiations.

In *Muller and Muller v Lindsey and Mortimer*,[444] Hoffman, L.J. said:

> "...the rule has two justifications. First, the public policy of encouraging parties to negotiate and settle their disputes out of court and, secondly, an implied agreement arising out of what is commonly known understood to be the consequences of offering or agreeing to negotiate without prejudice. In some cases both of these justifications are present; in others only one or the other."

The use of the words without prejudice is simply indicative that evidence prefaced by it may be intended to lead to a settlement of a dispute and so be protected. It is not necessary to use the words without prejudice or its equivalent if it is clear from the surrounding circumstances that the evidence is part of a continuing negotiation, or obtained pursuant to one. Whilst it is not mandatory that a letter be headed "without prejudice", a statement to the effect that it is without prejudice to the writer's rights will suffice. If the first letter in a series is headed "without prejudice" or words to that effect incorporated, it might mean the privilege attaches to subsequent letters in the series.

Where negotiations start on a without prejudice basis, it is incumbent on the party who seeks to change the basis of such negotiations to spell out the change with clarity.

In *Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd*,[445] it was stated that letters asserting claims under insurance policies and holding letters written in reply are not normally protected by privilege since there is not, at that stage, an extant dispute to form the basis of negotiations

There are two points to note with regard to this type of privilege:

444 [1995] 03 LS Gaz R. 38, CA.

445 [1992] 4 All ER. 942.

i) Communication made by one person to another in order to settle disputes between them is privileged only as between those parties and their agreements. Statements made in the course of negotiations but without reference to the dispute are not privileged. In *Waldridge v Kennison*,[446] an admission that a document was in the handwriting of one of the parties was received in evidence where the party admitted these facts though not in relation to the negotiations at hand.

ii) Once negotiations have been completed as a result of without prejudice negotiations, a binding contract comes into being which may be proved as any other contract.[447]

B. Public Policy and State Interest

This refers to the privilege attaching to somebody by virtue of the nature of their public office. This is important as it touches on the interest of the state *vis-à-vis* the interest of an individual.

During the course of judicial proceedings, a conflict may arise between the interest of an individual litigant and those of the state. The point usually made is that although it may be important for an individual to garner all evidence that may assist in his case, disclosure thereof may pose a grave risk to the state interest i.e. public interest. This position was captured in the words of Field J. in *Hennessy v Wright*[448] where he stated that:

> "the publication of a state document May involve danger to a nation. If the confidential communication made by servants of the crown to each other…in discharge of their duty to the crown were liable to be made public in a court of justice at the instance of any suitor who thought proper to say *fiat justilia, ruat coelum* (let right be done, though the heavens should fall). An order for discovery might involve the country in war. Also, the publication of a state document may be injurious to servants of the crown as individuals. This would be an end to all freedom in their official communication if they knew that any

446 [1794] 1 Esp. 143.

447 The case in point here is *Bentley v Nelson* [1963] WAR 89.

448 [1888] 21 QBD 509 at 512.

> suitor could legally insist that any official communication could be produced openly in a court of justice."

A person may therefore be competent but may not be compellable to adduce evidence on the grounds of public policy because of some public interest in the administration of justice.

The general rule is that evidence must be excluded if its reception would be contrary to state interest. In *the Asiatic Petroleum v Anglo-Persian Oil Co. Ltd,*[449] the defendant acting under the direction of the board of admiralty, refused to produce a letter written to their agent on ground that it contained information concerning government plans regarding one of the Middle Eastern Campaigns of World War 1. The court upheld the defendant's objection to adduce the document.

Similarly in *Duncan v Cammel, Laird & Co. Ltd*,[450] there was a claim against the defendants for negligence in relation to the construction of a submarine. The submarine, '*Thetis*', which had been built by the respondents under contract with the Admiralty, was undergoing her submergence tests in Liverpool Bay when she sank to the bottom owing to the flooding of her two foremost compartments and failed to return to the surface, with the result that all who were in her, except four survivors, were overwhelmed. Ninety-four men lost their lives. In an action instituted by the appellants (representatives and dependants of those men) against the respondents claiming damages for negligence, objection was taken to the production of documents including the reports as to the condition of the '*Thetis*'. The defendants were directed by the board of admiralty to object to the production of numerous documents in their possession in their capacity as government contractors. The structure of a submarine is clearly a matter of state interest and affects national security and therefore ought to be kept secret. Hilbery, J refused inspection of the documents and his decision was unanimously confirmed by the Court of Appeal but the appellants were given leave to appeal to the House of Lords.

449 [1916] 1 KB 822.

450 [1942] AC 624.

The House of Lords held that documents otherwise relevant and liable to production must not be produced if the public interest required that they should be withheld. The House further stated that the test could be found to be satisfied either:

a) By having regard to the contents of a particular document; or

b) By the fact that the document belongs to a class which on grounds of public interest must be withheld from production.

This view was rejected in *Conway v Rimmer*[451] where the plaintiff, a former probationary police constable, in an action for malicious prosecution against his former superintendent sought the disclosure of a list of documents including four made by the superintendent about him during his probationary period. The Secretary of State for Home Affairs objected. The House of Lords held that the documents must be produced for inspection and if it was found that disclosure would not be prejudicial to public interest or that any possibility of such prejudice was insufficient to justify their being withheld, disclosure should be ordered.

Section 131 of the Evidence Act sets out the procedure to be followed when the state wishes to claim that a document which is demanded by legal process should not be divulged on the grounds that production would be injurious to the state interest. The requirements are as follows:

i) A statement on oath by a Minister that he has examined contents of a document forming part of some unpublished official records called for production in proceedings before a court of law;

ii) A statement of opinion that such production would be prejudicial to the public service/interest;

iii) Statement of reason, either based on the content thereof or fact that it belongs to a class which on grounds of public policy should be withheld from production.

451 [1968] AC 910 (HL).

Then and only then shall the document not be admissible. One may say that it is behind such provisions that the shortcomings of the public sector resides. For if the Minister purports to have taken all of the above considerations and to have reached the conclusion that such a document should not be produced that would seem to be the end of the matter.[452]

Section 132 seems to extend this treatment to official communications.[453] It would be remiss to discuss the topic of public policy without mentioning the case of *Burmah Oil v Bank of England*.[454] This case involved a private company that was a leading supplier of crude oil. There was an international oil crisis. The company was on the verge of collapse that would affect the economy. The English government instructed the Bank of England to advance Burmah Oil some money in an agreement where the bank was allocated some stock at an under-quoted price of the shares. After the crisis, the company claimed that they were loaned the money under duress. Burmah Oil then claimed that to prove this fact, they would need cabinet papers prepared for the meetings held prior to the agreement. The Bank of England claimed that the documents were extremely confidential and it would be against public interest to disclose them.

The House of Lords stated that there is no rule of law that a claim by the government on the grounds of public interest and immunity from production of a class of documents of a high level; The court reasoned that it was likely that a strong case could be made out that the documents in question contain certain materials that were of a confidential kind then the court has discretion to review those documents in order to determine where the balance of the public interest lay. The court said that there were two aspects of public interest. The first is the public interest preventing harm to the state that would otherwise arise from the disclosure. The second is that public interest in ensuring that as much information as possible is disclosed for the efficacious administration of justice. *In Duncan*

452 Imagine the effect such a claim would have had on a case like the *Goldenberg*

453 Except without the procedural happings of section 131 and the use of the catch-all phrase 'no public officer'.

454 [1980] AC 1090.

and another v Cammell Laird and Company Limited[455] , the House of Lords held that:

> "Although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge. Thus, in the present case, the objection raised in the respondents' affidavit is properly expressed to be an objection to produce "except under the order of this honourable court". It is the judge who is in control of the trial, not the Executive, but the proper ruling for the judge to give is as above expressed."

In summary, the court in this case stated that the document should be produced for inspection for without inspection it was impossible to decide whether the balance of public interest lay for or against disclosure. So, the House of Lords upheld the Crown's objection after examination by a majority of their Lordships. That the courts should be prepared to examine documents in these exalted spheres was accepted in principle in *Air Canada v Secretary of State for Trade*.[456] In that case, the plaintiffs, a group of international airlines, claimed that the increase in port and landing charges at Heathrow Airport were excessive and discriminatory. They brought an action against the Secretary of State and the British Airports Authority alleging that the Secretary's orders resulting in the increases were *ultra vires.*

In order to investigate the Secretary's dominant purpose, the plaintiffs sought production of documents for which the Secretary claimed public interest immunity. Two certificates were issued by Permanent Secretaries of the relevant government departments in support of documents categorized as A and B.

The documents in category A consisted of high level ministerial papers relating to the formulation of government policy whilst documents in category B consisted of interdepartmental communications between senior civil servants. Bingham, J (as he then was) was provisionally inclined to order the production of category A documents but decided to inspect them first. He made an order for inspection but stayed the order pending the appeal.

455 [1942] AC 624.

456 [1981] 3 All ER 336.

On appeal, the House of Lords held that when the Crown objects to the production of a class of documents on the basis of public interest immunity, the judge ought not to inspect the document in question until he is satisfied that it contains materials which, either would give substantial support to a contention of the party seeking disclosure or an issue arising in their case, or which would assist any of the parties to the proceedings and that disclosure is necessary for "disposing fairly the cause or matter."

Nonetheless, the categories of public interest immunity are not closed. Increasingly, courts have recognized that in certain instances such claim where properly laid ought to be given their due weight and consideration.

Privilege may be claimed by certain individuals in special circumstances or by virtue of the nature of their public office. It is important to consider these instances since they touch on the interest of the state *vis-à-vis* the interest of an individual. Some of these privileges are:

1. Privilege of Judges and Magistrates

Section 129 of the Evidence Act provides that:

> "No judge or magistrate shall except upon the special order of some court to which he is subordinate be compelled to answer any question as to his own conduct in court as such judge or magistrate or as to anything which came to his knowledge in court as such judge or magistrate but he may be examined as to other matters which occurred in his presence while he was so acting."

The implication of this provision is that the conduct of a judge or a magistrate in court cannot be questioned, and secondly, that a magistrate or judge cannot be questioned about anything which came to his knowledge while acting as a judge or magistrate except upon the order of a superior court. The rationale for the privilege is to maintain the independence of the Judiciary and to enable the judge and magistrate to conduct the affairs of the court without fear of being answerable to any person.

Judges and magistrates also enjoy immunity from law suits for work done in the course of their duties. Section 6 of the Judicature Act provides that:

> "No judge or magistrate, and no other person acting judicially shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant order or process which he would have been bound to execute if within the jurisdiction of the person issuing it."

In other words, a judge or a magistrate may not waive this privilege in his/her own right; however, a higher court may by special order waive it. Note that a judge or a magistrate may be examined about other matters which occurred in his presence whilst so acting.

In relation to this subject, the Court of Appeal stated as follows:

> "The courts expressly recognize that they are manned by human beings who are by nature fallible and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."[457]

Bosire, JA in the same case, went on further to quote the following words from the decision of the Court of Appeal of England in *Sirros v Moore*:[458]

> "If the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgment' it applied to every judge whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: if I do this shall I be liable to an action? He may be mistaken in fact. He may

457 *Jasbir Singh Rai and others v Tarlochan Singh Rai and others*, civil application number 307/2003, Omolo, JA.

458 [1974] 3 WLR 459.

> be ignorant in law. What he does may be outside his jurisdiction–in fact or in law–but so long as he honestly believes it to be within his jurisdiction, he should not be liable…he should not be plagued with allegations of malice or ill will or bias or anything of the kind…"

The privilege is therefore of limited application. This privilege is one of the cornerstones of the independence of the Judiciary. There exists no recorded case in which this privilege has been expressly overruled.

2. Privilege relating to official communications

The security of the state is of paramount importance than the administration of justice to an individual. For this reason, the law does not allow a witness to adduce evidence in court which is likely to compromise the state security and public interest. Again, documents otherwise relevant and liable to production need not be produced if owing to their actual content or the class of documents to which they belong the public interest demands that they should not be produced. Accordingly, section 131 of the Evidence Act provides that:

> "whenever it is stated on oath by a minister that he has examined the contents of a document forming part of any unpublished official record, the production of which document has been called for in any proceeding and that the minister is of the opinion that such production would be prejudicial to the public service either by reason of the content thereof or the fact that it belongs to a class which on the grounds of public policy should be withheld from such production, the document shall not be admissible".

In *Mudavadi v Semo*,[459] the respondents in an election petition asked for certain letters which had been written to chiefs on how the elections were to be conducted. It was argued that production of such letters would prejudice the interests of the state. This argument was adopted by the Court.

As regards privilege of official communication, section 132, Evidence Act provides that:

459 Election Petition Number 12 of 1979.

> "no public officer shall be compelled to disclose communication made by any person to him in the course of any duty, when he considers that public interest will suffer by such disclosure."

The Interpretation and General Provisions Act[460] defines a public officer as a person in the service of, or holding office under, the Government of Kenya, whether that service or office is permanent or temporary, or paid or unpaid. Although this privilege is vital for the administration of justice, it seems to confer too great a discretion upon the public officer. In the case of *Mohindra v Mathra Dass*,[461] the complainant claimed that the accused had made certain defamatory remarks in a written statement to the police. At trial, it became necessary to ask for the production of the statement by the police office. The police officer declined on the grounds that public interest would suffer by the disclosure. The court upheld the objection noting that there were no words of limitation that would permit a different interpretation of those words.

This section came up again for interpretation by the highest court of the land at the time in the case of *Raichura v Sondh*i.[462] In this case, the plaintiff bailee stored certain goods for the defendant in his warehouse. It was a condition in the contract that the defendant shall not be responsible for any loss, destruction or damage or deterioration to any goods warehoused or bailed with the company. The defendant at the point of delivery failed to deliver and explained its inability on the basis that they had been stolen. The plaintiff sued for the loss of goods. The issue before the court was to ascertain that the goods had been stolen. To discharge this burden, the defendant called as a witness a police inspector who made inquiries into the said theft. He concluded that the goods had been stolen without the complicity of the defendant or any of its servants. However, claiming privilege under section 132, the police officer refused to state the facts upon which the conclusion was arrived at. The trial court upheld the claim for privilege.

460 Section 3, Interpretation an General Provision Act, Chapter 2, Laws of Kenya.

461 [1941] KLR(2) 67.

462 [1967] EA 624

On appeal, it was held that the police inspector was not entitled to a claim of privilege. With regard to section 132, the court held that:

> "the communications made to the official in the course of his duty' as read together with the marginal note 'privilege of communication' ordinary relates to official communication made to a public officer from an official source."

The Court further held that where privilege was claimed it was the duty of the judge to enquire into the circumstances of the claim and to decide whether it was justifiable for the police officer to make the claim. The enduring value of this case consists of the *obiter dictum* by the three judges whereupon considering the position of the court in the administration of justice; they all agreed that a court of law had a duty to enquire into the claim to privilege.

It is doubtful whether this privilege is absolute in itself. Sometimes Courts have required that the evidence of which a witness pleads privilege be adduced in Court, albeit in camera, for the Court to make a decision as to whether the same is classified information.[463] However, this depends on the circumstances of the case.

In *Dhukale v Universal TOT Co*,[464] the plaintiffs were litigating on injuries caused by an accident. The plaintiff sought for the production of police inquiry file on the matter. The police inspector refused to produce the file claiming privilege under section 132 of the Evidence Act. It was held that it was for the court not the police to decide whether privilege in public interest can be claimed in respect of particular matters contained in police records of an accident. The court also noted that there was no privilege with regard to public officers' own observations. In other words, for this privilege to apply there has to be some form of communication from an official source.

463 See *Conway v Rimmer* [1968] 1 All ER 874.

464 [1974] EA 396.

2.1 Freedom and Access to Information

A history of legal and institutionalised secrecy of government operations has created an environment in which the right to information has historically been devalued, allowing corruption and other state excesses to thrive[465] Access to information in Kenya is anchored under Article 35 of the Constitution of Kenya, 2010. Article 35(1) provides that every citizen has the right to access:

a) Information held by the State; and

b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

The implication of article 35(1) is that a citizen does not have to give reasons for seeking information from the State. In a case where he seeks information from a private entity or another person and the request is denied and he files suit in court to compel the person to provide him with the information, he has the onus of showing that the information sought is required for the exercise or protection of a particular right or fundamental freedom.

It should be noted this right only applies to citizens as interpreted by the court. This was seen in the case of *Famy Care Limited v Public Procurement Administrative Review Board and another.*[466] The learned Justice Majanja in delivering judgment took the view that:

> "The right of access to information protected under article 35(1) has an implicit limitation that is, the right is only available to a Kenyan citizen. Unlike other rights which are available to 'every person' or 'a person' or 'all persons' this right is limited by reference to the scope of persons who can enjoy it. It follows that there must be a distinction between the term 'person' and 'citizen' as applied in article 35."

In addition, this right only applies to natural persons as seen in the case of *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company and others*[467], where court held such right can only be enjoyed by a natural person.

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465 Ruth Nzioka : *Access to Information in Kenya,* Freedominfo.org, 30 April 2015

466 [2013]eKLR

467 [2013]eKLR

At present, there is no freedom of information law in Kenya, and therefore no framework exists in which to access information from public bodies as of right. There is no law in the country that directly obligates the government to avail documents, records or other government information to the public. The situation is further aggravated by legislation that allows for the continued refusal by public bodies to disclose information or deny access to it. There are a no written guidelines legislated with regard to obtaining information from the State as there is no main legislation to derive authority from. Kenyans access information through unofficial channels or arrangements. These arrangements are:

1 Through the Ministry of Information, Communications and Technology. One of the core functions of the ministry is to enhance public access to information. No further structures are in place in the ministry. The office of the State House Spokesperson. The office co-ordinates plans and executes government communication.

2 Parliament. Parliamentary Standing Orders provide an avenue through which members of the National Assembly and the Senate can demand information from the government. This is through Personal statements, Ministerial statements, Questions and private Members motion among others.

3 Local Authority/ County government meetings. Members of the Public are notified of the meetings in which development projects are discussed and feedback is relayed on developmental issues. Members of the public are also able to request additional information on development projects and other matters of concern.

4 Websites. Ministries have put up websites in order to be IT compliant. However information from these sites is incidental to their objectives and not specifically targeted.

Presently, the framework governing the collection, storage and disclosure of public information is guided by a number of statutes

including the Records Disposal Act[468], the Public Archives and Documentation Service Act[469] and the Statistics Act[470].

Parliament is yet to enact the statutory framework needed to elaborate and implement the right to information, although the draft Access to Information Bill, 2015 has been developed and is currently undergoing debate in the National Assembly. Section 4(2) of the Bill stipulates that, every citizen's right to access information is not affected by:

a) any reason the person gives for seeking access; or

b) the public entity's belief as to what are the person's reasons for seeking access.

The draft Bill also provides instances when a public entity or a private body is exempted from the requirement of disclosure under section 6(1). Some of these instances include matters which are likely to:

a) undermine national security;

b) impede due process of law or endanger the safety of life of any person;

c) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf the application has, with proper authority been made; etc

Section 6(4) outlines a proviso to the exemptions of disclosure. It states that a public entity or a private body may be required to disclose information where the public interest in disclosure outweighs the harm to protected interests. In essence, section 4 to section 6 of the draft Bill trumps section 131 of the Evidence Act in that, the discretion to withhold or to disclose information contained in official records is removed from the relevant Minister and in order to warrant non disclosure, it must be proved that it is in the public interest to do as such.

468 Chapter 14 Laws of Kenya

469 Chapter 19 Laws of Kenya

470 No. 4 of 2006

Therefore, it is of urgent necessity that the national and county governments do operationalise article 35 of the Constitution through the enactment and effective implementation of freedom of information article of the constitution of Kenya, 2010

3. Privilege relating to Information on Commission of Crimes

As regards privilege relating to information on the commission of crimes, section 133(1) of the Act provides that "no judge, magistrate or police officer shall be compelled to say whence he or she got any information as to the commission of any offence, and no revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the law relating to the public revenue or to income tax, customs or excise. This privilege is vital to the administration of justice where it invariably relies on information received from informers and undercover police operatives. Without this privilege nobody would be willing to assist the police as an informer.

In *Kapoor Singh s/o Harnam Singh v R*,[471] the appellant was convicted on unlawful possession of gold. The police had received information from an informer and carried out investigation which revealed this fact. At trial, the defendant sought to obtain the name of the informer. The court, however, overruled this. On appeal, the court held that such information could not be given and that section 131 of the Evidence Act was clear and mandatory leaving no discretion on the court to compel police officers to disclose source of such information.

In *British Steel Corporation v Granada T.V,*[472] the House of Lords recognized that in deciding whether to order the disclosure of the identity of an informant and induce a breach of confidentiality, the courts do have some discretion. In this case Granada had received from a BSC employee copies of secret documents from BSC's files. Some of the files were used for the national steel strike. Granada had promised the informant that his identity would not be disclosed.

471 (1951) 18 EACA 283.

472 [1981] AC 1096, HL.

BSC applied for an order that Granada disclose the identity of the informant. The House of Lords ordered Granada to disclose the identity of the informant. The BSC relied on the principle of tort that a person who becomes involved in the tortuous acts of another even though innocent is under a duty to assist the injured party by disclosing the identity of the informant.

Similarly, in *R v Rankine*[473] where two police officers using an image-intensifier to watch a shop from a vantage point sixty five yards away radioed a description of what they saw to another officer. The appellant was arrested as a result and charged with unlawfully supplying a controlled drug. The case was that on at least ten occasions in the course of one hour, he had been seen selling the drugs outside the shop. The prosecution applied for a ruling that the police should not be asked to identify the location from which they observed the incident.

While delivering judgement, Lord Lane CJ stated as follows:

> "The general rule that, on the grounds of public interest, police and other investigating officers cannot be required to disclose the sources of their information except to avoid a miscarriage of justice applies to prevent the identification of premises used for surveillance operations or the owners or occupiers of such premises, since it is in the public interest that the identity of such premises remain a secret in order to retain their utility and to protect their owners or occupiers from possible reprisals. Furthermore, the rule is a rule of exclusion, subject to a duty to identify the premises in order to avoid a miscarriage of justice, so that even if the prosecution does not invoke the rule the judge is nevertheless obliged to apply it"

In *Marks v Beyfus*[474] the plaintiff claimed damages for malicious prosecution. In the course of his trial, he asked the DPP to name his informants. The judge disallowed this question. This was upheld on appeal on the ground that this was a public prosecution and any information on the informants ought not to be disclosed.

473 [1986] 2 All ER 566,CA.

474 [1890] 25QBD 494,CA.

In *R v Agar*,[475] Lord Justice Mustill stated that "there was a strong public interest, in keeping secret the source of information: but, as the authorities show, there was an even stronger public interest in allowing a defendant to put forward a tenable case in its best light."

Similarly, in *R v Hardy*,[476] it was stated that a witness in a civil or criminal matter may not be asked to disclose the name of a police informer. It must be noted, however, that a police informer who voluntarily wishes personally to sacrifice his anonymity is not prevented from doing so by the automatic application of the principle of public interest immunity at the behest of the relevant police authority. Note that if a person intends to adduce evidence of the kind of information received, they must call the informer as a witness otherwise this would be acting on dangerous hearsay evidence.

In *Njuguna v R*,[477] the appellant driving a disguised motor vehicle was successfully chased and apprehended by police officers acting on information received from an informer. Under the driver's seat was found an offensive weapon and he was subsequently charged with a felony under section 308(1) of the Penal Code. At trial, the prosecution contended that they had been told by a police informer of a plot to use a disguised car for purposes of armed robbery but the informer was not called to testify. The trial court, relying on this evidence, convicted the appellant. On appeal, it was held that the trial magistrate had hearsay evidence of most damaging kind and made no attempt to disabuse its mind of it. It was also held that even without the hearsay evidence; the trial court could not have found the necessary intent to commit a felony.

Section 133 is limited to judges, magistrates and police officers in the discharge of their duties as such. In S*hah v R*,[478] the appellant was charged with corruption under the Prevention of Corruption Act[479] whereupon he was convicted and sentenced. It was alleged

475 [1990] 2 All ER 442 (page 448).

476 [1794] 24 State Tr 199.

477 [1965] EA 773.

478 [1970] EA 39.

479 Section 5(2) of the Prevention of Corruption Act, 1947.

that he attempted to bribe an airport security officer to refrain him from reporting that the accused had kerosene in his possession. The security officer admitted he had been informed by informers as to the content of the drum the accused was carrying when asked to disclose the name of the informer, the magistrate held that the witness was protected by section 133 of the Evidence Act.

The rationale for these privileges is based on public policy and public interest and the need to encourage law abiding citizens to disclose information about the commission of offences. The goal here is to preserve the sources of information lest they dry up. By parity of reasoning the police officer who obtains or uses this information in the course of their business needs protection from the law to avoid disclosures which may be harmful to the course of justice.

5. Public Interest in Enhancing Efficient Functioning of Public Service Bodies

This immunity extends to government ministries, police officers, local government authorities and other public service bodies. Efficient functioning of state bodies is of great importance not only to the provision of quality service but also in the administration of justice. A good example is provided in the case of *D v NSPCC*,[480] where the plaintiff claimed damages for injuries caused to her health by negligence of the NSPCC in making false allegations that she maltreated her child. The society[481] sought an order for excluding it from disclosing the identity of the informer. The House of Lords upheld the NSPCC's application to withhold the discovery of the document disclosing the identity of the informant.

The Rt. Hon. Lord Hailsham of St. Marylebone in the judgment stated as follows:

> "confidentiality is not a separate head of immunity. There are, however, cases when confidentiality is itself a public interest and one of these is where information is given to an authority charged with the enforcement and administration of the law by the initiation of

480 [1978] AC 171, HL.

481 Incorporated by Royal Charter with power to bring care proceedings under the Children and Young Persons Act, 1969.

> court proceedings. This is one of those cases, whether the recipient of the information be the police, the local authority of the N.S.P.C.C. Whether there be other cases, and what these may be must fall to be decided in the future. The categories of public interest are not closed, and must alter from time to time whether by restriction of extension as social conditions and social legislation develop."

In *Rogers v Home Secretary*,[482] the Gaming's Board refused Rogers' application for certificate of consent to grant him a license under the Gaming's Act, 1968. The refusal followed a letter written by the Assistant Chief Constable of Sussex concerning Rogers. Rogers instituted proceedings for criminal libel against the Assistant Chief Constable and sought the disclosure of the letter written about him. The House of Lords refused the application being clearly impressed by the Board's function in controlling the social evils which would otherwise have been expected to follow in the wake of the newly legalized activity of gaming.

482 Also referred to as *R v Lewes Justices, exp Home Secretary* (1973) AC 388.

Chapter 8

Illegally Obtained Evidence

A Introduction

Illegally obtained evidence is evidence obtained by means of acts which are illegal and includes evidence obtained by a violation of constitutional provisions, statutory or case law. Such evidence includes evidence obtained through illegal searches, seizures and any evidence obtained by commission of a crime, tort or by a breach of a contract or by trickery, deception, bribes, threats or inducements and/or by unfair means. Involuntary confessions have also been regarded as such, and are classified as the 'fruits of the forbidden tree'[483]. In the recent decision in the case of *Wong Sun v United States*[484] the Supreme Court entered once again the war fought over the exclusion of illegally obtained evidence by holding that confessions obtained during unlawful detention may be considered fruits of the poisonous tree. The result of this decision has been to bring verbal evidence in the form of confessions and admissions as well as random conversations within the purview of the "poisonous tree" doctrine if it is the product of an unlawful arrest or entry.[485]

The question posed is what is to be done with evidence obtained by improper or criminal means or by unconstitutional means, or in breach of contract or upon the commission of a tort? Is public policy in favour of such evidence being admitted or should it be excluded from admission altogether?

There is no express provision on illegally obtained evidence in the Evidence Act, save for the provisions of sections 25 – 29 of the Evidence Act which specifically deal with involuntarily obtained confessions.

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483 *R v Warickshall* (1783) 1 Leach 263, 168 ER 234

484 371 US 471 (1963)

485 *Silverthorne Lumber Company v United States* 251 US 385 (1920)

Hence, recourse is had to the provisions of the Constitution, in particular article 50(4) which states that:

> "Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice"

Recourse is also had to other pertinent statutory provisions which address the same subject. Two particular statutes stand out in this respect:

Section 118 of the Criminal Procedure Code[486] empowers the court to issue a search warrant and provides as follows:

> Where it is proved on oath to a court or Magistrate that anything upon which or in respect of which an offence has been committed, or anything which is necessary for conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or magistrate shall by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and if the thing be found, to seize it and take it before a court having jurisdiction to be deal with according to law.

Section 60(1) of the National Police Act,[487] which is too permissive, and seems to fly in the face of section 118 of the CPC. It states:

> When an Officer in charge of a Police Station or a police officer investigating an alleged offence has reasonable grounds to believe that something necessary for the purposes of such investigation is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the CPC will in his opinion substantially prejudice such investigations, he may after recording in writing the grounds for his belief and such description as is available to him of the warrant as aforesaid, enter any premises in search or cause search to be made for and take possession of such thing provided that …or his property or the entry by others on his premises.

486 Chapter 75, Laws of Kenya.

487 Chapter 84, Laws of Kenya.

Clearly, this provision gives far too much discretion to the police since there is no way of determining whether the officer in charge of a police station, or a police officer investigating an alleged offence has complied with the law or not.

For academic purposes, a discussion of this subject would seem to be a consideration of two diametrically opposed views: on the one hand, there is the traditional view held in common law that all relevant evidence is admissible, regardless of the fact that it was obtained illegally and on the other, there is the argument that the slightest encouragement of illegal methods of obtaining evidence is a worse evil than the escape of an occasional criminal. The latter is the predominant position in the US and other jurisdictions that espouse this position.

B. The Mandatory Inclusion Approach: Common Law Position

It has long been a settled rule of common law that all evidence which is relevant to the fact in issue is admissible, and it does not matter how the same was procured. In *R v Leatham,*[488] Crompton J. made a landmark remark. In this case, during an inquiry before a Commission appointed under the Corrupt Practices Prevention Act, 1854 to investigate allegations of corrupt practices at an election for a member of Parliament, a letter was produced written by A, the person suspected of bribery, to his agent, in answer to a letter from the agent asking for an account of sums advanced. This letter was produced by the agent. It was called for and produced by the secretary of the Commission, in whose hands it had remained, and on the letter of the agent to which an answer was being called and not being produced, secondary evidence was tendered and admitted. An objection was taken to its admission.

The court held that such evidence was properly admitted and that the provision in the relevant statute "that no statement made by any person in answer to any question put by the Commission shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceedings, civil or

488 [1861] 8 Cox Cc 498, 501

criminal" was not applicable, and did not prevent the admissibility of such evidence.

In the course of the judgment, Crompton, J observed as follows:

> "Suppose, by threats and promises, a confession of murder is obtained which would not be admissible, but you also obtain a clue to a place where a written confession may be found, or where the body of the person murdered is secreted, could not the latter evidence be made use of as the first clue to it came from the murder. *It matters not how you get it; if you steal it even, it would be admissible in evidence*". [emphasis added]

In *Warickshall*,[489] this position was well illustrated where a woman was charged with receiving stolen goods. In her confession, she stated that the stolen goods were in her house and they were recovered by the police. It later turned out that the confession was not voluntary and therefore inadmissible. Evidence of the recovery of the stolen goods from her house was still found admissible on the ground that it existed as a separate fact independent of the unlawful confession. The court observed that the principle respecting confessions had no application to the admission or rejection of facts whether such facts had been obtained involuntarily or otherwise.

Improperly obtained confession evidence, such as evidence obtained by inducement, threat or promise is seen as being inherently unreliable. However, evidence although illegally or improperly obtained, such as evidence obtained through searches or covert listening devices, will remain reliable.

The *locus classicus* on this point is the case of *Kuruma s/o Kaniu v R*[490] in which Lord Goddard, CJ cited the above words of Crompton J with approval and went on to add that:

> "In their Lordships' opinion, when it is a question of the admissibility of evidence, strictly it is not whether the method by which it was obtained is tortuous but excusable, but whether what has been obtained is relevant to the issue being tried.

Under the Emergency Regulations, only a police officer or an officer above the rank of Assistant Inspector was empowered to stop and

489 (1783) 1 Leach 263.

490 [1955] 1 All ER 236.

search an individual on suspicion of commission of an offence. In this case, the appellant was convicted of being in unlawful possession of 2 rounds of Ammunition contrary to regulation 8A(1)(b) of the Emergency Regulations, (Kenya,1952). He was sentenced to death.

Evidence called in the above case showed that the appellant was an employee of a European farmer. He had been granted leave of absence to proceed to his rural home. He was stopped by a Police Constable at the roadblock, searched and found in possession of the two rounds of ammunition and a penknife. Three persons witnessed the search, but were not called to testify at the trial. He was charged and convicted of this capital offence. On appeal, he contended that evidence of possession of ammunition had been illegally obtained. It was held that the evidence was properly admitted.

Goddard, CJ[491] citing the words of Crompton, J in *Lloyd v Mostyn*[492] stated that "… the test to be applied in considering whether the evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."

In civil cases, the common law position regarding illegally or improperly obtained documents is that the court has the discretion to admit or not admit and further restrain usage of any information derived from such documents. It has been stated thus:

> "Where privileged documents belonging to one party to an action were inadvertently disclosed to and inspected by the other side in circumstances such that the inspecting party must have realized that a mistake had occurred but sought to take advantage of the inadvertent disclosure, the court has power under its equitable jurisdiction to intervene and order the inspecting party to return all copies of the privileged documents and to grant an injunction restraining him from using information contained in or derived from the documents, even if it was not completely obvious that the documents were privileged. Since the conduct of the defendant's solicitors made it plain that they were seeking to take advantage of an obvious mistake, the court would order them to return all copies of the privileged documents

491 *Ibid*. Page 239.

492 (1842) 10 M&W 478.

> which they had obtained as a result of the mistake, including the three documents in issue."[493]

Clearly, the common law position is one of expediency. This fact is confirmed by subsequent decisions by English courts which have espoused the above position virtually hook, line and sinker. For instance, in *King v R,*[494] police obtained a warrant to search a house belonging to a named woman for *cannabis sativa,* a dangerous drug. On arrival, they found the appellant who was there by chance. He was searched and found with the drug in a trouser pocket. This search was not authorized under relevant Jamaican Law. There was no evidence that the appellant was wilfully misled by the police officers into thinking there was such authorization.

The appellant was tried and convicted. On appeal, the appellant contended that there was no legal justification for his being searched and even if the evidence was admissible, the court should have excluded it as being unfair to him. The court held that there was no ground for interfering with the way in which the court's discretion was exercised. This was not a case in which evidence had been obtained by conduct which was reprehensible. If the trial court had thought otherwise, the evidence would have been excluded.

The Court stated[495] thus:

> "This constitutional right (against illegal searches) may or may not be enshrined in a written Constitution, but it seems to their Lordships that it matters not whether it depends on such enshrinement or simply on the Common Law as it would do in this country."

The court referred to the case of *R v Payne,*[496] where illegally obtained evidence was excluded, but refused to be guided by it. In the case, the defendant was taken to a police station following a road accident. He was asked whether he wanted to see a doctor. It was made clear to him that it was not part of the doctor's duty to give an opinion as to his fitness to drive. He agreed. At the trial for drunk driving, the doctor gave evidence that the appellant was

493 *Derby & Company Ltd* and *others v Weldon and others* [1990] 3 All ER 672

494 [1968] 2 All ER 610.

495 *Ibid* at p. 617.

496 [1963] All ER 848.

driving under the influence of alcohol. The defendant was convicted. He appealed. It was held that although the doctor's evidence was admissible, the Court should have refused to allow it since had the defendant realized that the doctor would give evidence, he might have refused to go through with the examination.[497]

In *Jeffrey v Black*,[498] the defendant was arrested by two police officers of a drug squad for stealing a sandwich from a public house. Officers improperly searched his house and found *cannabis*. The defendant was charged with possession of drugs. The justices ruled out the evidence of the search as inadmissible. The prosecutor appealed.

On appeal, it was held that the mere fact that evidence is obtained in an irregular fashion does not of itself prevent that evidence from being relevant and acceptable to the Court. The court cited *Kuruma v R* with approval. The court further stated that judges have the discretion to decline to allow any evidence called by the prosecution if they think it would be unfair or oppressive to allow it. It further stated that the test whether evidence was admissible was whether it was relevant or not, and not whether it had been properly obtained.

Lastly, the House of Lords addressed this issue in *R v Sang,*[499] where the appellant was charged with conspiracy to utter forged US bank notes. He pleaded not guilty. Before the prosecution case opened, counsel for the appellant applied for a trial within a trial to show that the appellant had been induced to commit the offence by an informer acting on instructions from the police and that were it not for such persuasion, the appellant would not have committed the offence. Counsel hoped to persuade the judge to exercise his discretion to disallow evidence of commission of the offence thus incited, and to direct the return of a not guilty verdict. Without hearing the evidence, the judge ruled that he had no discretion to exclude the evidence. The appellant changed his plea and was convicted and sentenced. An appeal against the judge's ruling was

497 The court in *R v Payne* was perturbed by the apparent trickery on the part of the police, which was found not to be the case in *King v R* (above). There was no evidence of oppressive conduct or trickery on the part of the police.

498 [1978] QB 490.

499 [1979] 2 All ER 1222.

dismissed by the Court of Appeal. On appeal to the House of Lords, the following question was certified for consideration: whether a trial judge has discretion to refuse to allow evidence being evidence other than evidence of admission to be given in any circumstances in which such evidence is relevant, and of more than minimal probative value?

The House of Lords held that a judge in a criminal trial always has the discretion to refuse to admit evidence if its prejudicial effect outweighed its probative value or force. Except in the cases of admissions, confessions and evidence obtained from an accused after commission of an offence, a judge had no discretion to refuse to admit relevant and admissible evidence merely because it had been obtained by improper or unfair means. It was also stated that the use by police of an agent provocateur or an informer to obtain evidence was not a ground on which a judge could exercise his discretion to exclude evidence, although it could be a factor in mitigating the sentence imposed on the accused.[500]

With the House of Lords' decision in *R v Sang*, it seems that the position of the common law rule on admissibility of illegally obtained evidence was well settled at least for the time being. If the evidence was relevant to a fact in issue, it was admissible regardless of how the same was obtained and provided it does not comprise an admission, confession or evidence obtained after the commission of the offence.

1. Legislative Developments

In the UK, Parliament has intervened in this matter through the enactment of the Police and Criminal Evidence Act (PACE) of 1984. The Act noted the common law discretion recognized in *R v Sang* under section 82(3). More importantly, the UK Act re-enacted the discretion of the courts under section.78(1), where the courts were empowered to exercise their discretion based on the adverse effect on the fairness of the proceedings resultant from the admission

500 The court emphasized that the defence of entrapment had no place in English law and could be accepted by a judge by means of the procedural device of exercising his discretion to exclude the Prosecution's evidence of commission of the crime.

of unlawfully obtained evidence. In deciding this question, a judge may take into account the circumstances in which the evidence was obtained, for example, whether by a trick, unlawfully or by oppression or otherwise.

c. The Mandatory Exclusion Approach

Until 1914, US Courts upheld a rule similar to that espoused by common law jurisdictions. All relevant evidence was considered admissible irrespective of the manner in which it was obtained. Through judicial activism, it was recognized that the 4th Amendment of the US Federal Constitution refused all illegal seizures and searches. The 4th Amendment of the US Constitution states:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"

This was ratified on 15 December, 1791 but not fully or effectively applied until 1914.

In *Weeks v US*,[501] the defendant was indicted in nine counts for the unlawful use of mail contrary to the provisions of the Criminal Code. Count 7, upon which he was convicted, charged the defendant with the use of the mail for the purpose of transporting certain coupons or tickets representing shares in a lottery or gift enterprise which violated the code. The evidence called showed that the defendant was arrested without a warrant in Kansas, Missouri. While being arrested, other police officers went to the defendant's house and being told by a neighbour where the key was kept, found it and entered the house. The defendant's house was searched and the police took possession of various papers and articles found there, which were later turned over to the US Marshall. Later, the Marshall returned without a search warrant and searched the defendant's room and carried away certain letters and envelopes. The defendant petitioned for the return of the private papers, books and other property, basing his arguments on the 4th and 5th amendments of

501 232 US 383 (1914).

the US Constitution. The court held that the letters in question were taken from the defendant's house in direct violation of the rights of the plaintiff and that the refusal of the petition for the return of the letters was a denial of the defendant's constitutional rights.

Justice William R. Day stated that:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

The statement of Day J. *in Weeks v US* rings more true in Kenya today than in the US at the turn of the century. There has been an increase in cases of abuse of human rights by the police which go unpunished.

In *Wolf v Colorado,*[502] the plaintiff, Julius A. Wolf, was convicted in the District Court of the City and County of Denver of conspiracy to perform criminal abortions. On appeal, the convictions were affirmed by the Supreme Court of Colorado. Wolf appealed the conviction by a writ of *certiorari* and the U.S. Supreme Court decided to hear the appeal. The Supreme Court held in a majority decision that in a prosecution in a state court for a state crime, the 14th Amendment of the US Constitution does not forbid the admission of evidence obtained by an unreasonable search or seizure. The 14th Amendment reads in pertinent that:

> "...nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any party within its jurisdiction the equal protection of the law."

The US Supreme Court however suggested that there was need for a uniform rule. It is important to note that despite the *Weeks* case, some state courts continued to apply common law rule.

In *Mapp v Ohio,*[503] obscene materials were discovered during a search of the defendant's residence without a warrant to search the same. The Ohio Supreme Court held that under the Ohio State Law,

502 (1948) 338 US. 25

503 (1961) 367 US 643

evidence obtained by an unlawful search and seizure was admissible in a criminal prosecution; and that under the decision of the US Supreme Court in *Wolf v Colorado* a State was not prevented by the Federal Constitution from adopting the rule that prevailed in Ohio.

On appeal to the US Supreme Court, the Ohio Supreme Court decision was reversed with a holding that the decision in *Wolf v Colorado* was bad law. The case was decided in Mapp's favour by a vote of 6–3. The court explicitly stated that the exclusionary rule applies to states, hence the state cannot use evidence gained by illegal means to convict. The Supreme Court went on to hold that as a matter of due process, evidence obtained by a search and seizure in violation of the 4th amendment was inadmissible in a State court as it was in a Federal Court.

US courts have further held that even if the evidence is not obtained in direct contravention of the letter of the Constitution, where the evidence is obtained in such manner as to be reprehensible according to the spirit of the Constitution, such evidence shall not be admitted.

1. Exceptions to the Mandatory Exclusion Approach

Many concerns have been raised on the application of the exclusionary rule. In the case of *Herring v United States,*[504] Justice Antonin Scalia of the US Supreme Court observed that:

> "Suppression of evidence, however, has always been our last resort not our first impulse. The exclusionary rule generates substantial social costs which sometimes include setting the guilty free and the dangerous at large. We have therefore been cautious against expanding it…We have rejected 'indiscriminate application of the rule and have held it to be applicable only where its remedial objectives are thought most efficaciously served, that is, where its deterrence benefits outweigh its substantial social costs."

The Supreme Court has allowed exceptions for errors made by police "in good faith".

504 555 US 135 (2009)

1. Evidence seized by police officers relying on good faith on a search warrant was admissible so that police officers, who carried out a search in reasonable reliance on a warrant later found to be defective due to a magistrate's error, should not be denied the fruits of their search. However, if the warrant was later found to be defective, it would not be admitted. If the officer obtained the search warrant by deponing dishonestly in an affidavit or where the affidavit lacked in sufficient particulars to justify issuance of such warrant, the evidence obtained in consequence thereof will not be admitted.[505]

2. Where the evidence was retrieved due to negligence regarding a government database so long as the investigator relied on the database in good faith and that the negligence was not pervasive.[506] Police conduct must be sufficiently deliberate that exclusion can meaningfully deter its admission. For instance, where the police make false entries, exclusion would be justified.

D. The Kenyan Position

The position in Kenya is that illegally obtained evidence is admissible so long as it is relevant and not prejudicial to the accused. This position is very similar to the common law position. Illegally obtained evidence is admissible subject to the discretion placed on the judge or magistrate to exclude illegally obtained evidence. Section 175 of the Evidence Act further buttresses the discretion placed on the judge. It provides as follows:

> "The improper admission or rejection of evidence shall not of itself be ground for a new trial or for reversal of any decision in a case if it shall appear to the court before which the objection is taken that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision."

The balancing act where the public interest in the proper administration of justice outweighed the public interest in the ascertainment of the truth by admission of improperly obtained

505 *United States v Leon* 468 US 897 (1984).

506 *Arizona v Evans* 514 US 1 (1995); also *Herring v United State*s (2009).

evidence was exhibited by the courts in *Distributors v Video Exchange Limited and others,* [507] where it was held thus:

> "The public interest in the ascertainment of the truth in litigation, which was the reason for the rule allowing secondary evidence of privileged documents to be adduced even though improperly obtained, was outweighed by the public interest in the proper administration of justice in regard to a litigant being able to bring his documents into court without fear that his opponent would filch them by stealth or a trick… Accordingly, the defendant would not be permitted to use in evidence in the action the copy documents exhibited to his affidavit except for those which the judge had already looked at and which had already been used in evidence and could therefore not be excluded."

Exercise of judicial discretion was addressed in *Douglas Kipchumba Rutto v Kenya Anti-Corruption Commission and others*[508]. In the case, the applicant was charged with the offences of soliciting a bribe and receiving a bribe. He challenged his prosecution on grounds that it was based on evidence of a tape recording made in breach of his right to privacy, liberty and fair hearing under the Constitution. The High Court ruling on the application held that whether or not the evidence of the tape recorder was admissible was an issue that should be handled by the criminal court and should not necessarily be determined by the High Court on application and that admissibility or otherwise of evidence is really a matter in the discretion of the trial court.

Recent developments in case law suggest that evidence obtained through entrapment by state agents is illegal and thus inadmissible in a criminal case. This was the finding in the High Court petition number 181 of 2010 between *Mohamed Koriow Nur v Attorney-General.*[509] In the case, one Mr Buchianga, an investigator at the Kenya Anti-Corruption Commission (KACC), had been assigned to investigate an alleged grabbing of a piece of land LR Number 209 of 16441 by Mr Mohamed Koriow Nur, the petitioner. Mr Buchianga proceeded to arrange a meeting with Mr Nur and he equipped himself with a tape recorder to assist him in his investigation. In

507 [1982] 2 All ER 241.

508 [2009] eKLR.

509 [2011] eKLR.

the course of the meeting, it was alleged that Mr. Nur asked Mr. Buchianga to make a favourable investigation report about the acquisition of the land in question so that the land could not be repossessed from him. Through a concealed recording, the KACC agent engaged Mr. Nur in a mock bribe-bargaining that led them to settle on a bribe of KShs 1,000,000 payable in two instalments of KShs 500,000 each. Later on, Mr. Buchianga proceeded to an agreed venue with a view to arrest Mr. Nur if he offered the bribe. Mr. Nur arrived at the scene and allegedly gave a brown A4 size envelope which contained KShs 500,000. He was promptly arrested and charged with three offences relating to the contravention of the Anti-Corruption and Economic Crimes Act, number 3 of 2003.

In determining the petition, the court first sought to address the legality and admissibility of evidence obtained through entrapment in a criminal case. Justice Warsame (as he then was) observed that in law, entrapment is viewed as a type of lawlessness by law enforcement officers and is a tactic which is rationalized under the theory that the end justifies the employment of the illegal means. In making this ruling, Justice Warsame observed that the criminal justice system would be compromised should the State be allowed to prosecute and punish someone for committing a crime which he only committed because he had been instigated into committing it by a state agent. The court concluded that the actions and conduct of Mr. Buchianga went beyond those of an undercover agent because he instigated the offence and there was nothing to suggest that without his intervention and participation, the offence would have nevertheless been committed. The judge further stated that the court must refuse to convict an entrapped person not because his conduct falls outside the prescription of the statute but because even if his guilt is admitted, the methods and manner employed on behalf of the State to bring about the evidence cannot be countenanced. For this reason, the learned Judge ruled that the evidence so obtained through entrapment by the state agent was illegal and unlawful and thus inadmissible in a criminal case against the petitioner.

In practice, therefore, the discretion lies completely with the trial court to decide the circumstances under which discretion ought to be exercised. Article 50(4) of the Constitution is applicable where

a question arises concerning the admissibility of evidence where set procedures have not been complied with or the legality of the process of obtaining the evidence is challenged as improper, unlawful or unfair. Article 50 essentially provides that the admissibility of evidence is not affected by the means used to obtain it nor does the use of illegal or unfair means to obtain evidence generally make otherwise relevant and admissible evidence inadmissible unless it would render the trial unfair or would otherwise be detrimental to the administration of justice.

Currently, article 31 of the Constitution provides that every person has the right to privacy, which includes the right not to have:

- Their person, home or property searched;
- Their possessions seized;
- Information relating to their family or private affairs unnecessarily required or revealed;
- The privacy of their communications infringed.

Ultimately, the question is one of the public policy. Does the public policy of this country yearn for exclusion or inclusion of illegally obtained evidence? Public policy dictates that citizens be accorded respect as regards the protection of their rights and liberties and at the same time dictates that those who violate other peoples' rights ought to be brought to book.

In the end, one can say that the admissibility of illegally obtained evidence may no longer be justified on the grounds of public policy in Kenya today. At least that seems to be the position espoused by article 31 when read together with article 50(4) of the Constitution of Kenya, 2010.

CHAPTER 9

CONFESSIONS

A. INTRODUCTION

The classical definition of a confession is "an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime" .[510]

However, this definition was found wanting by the court in the case of *Pakala Narayana Swami v King-Emperor*[511] where Lord Atkin defined a confession as:

> "A statement which admits in terms either an offence or substantially all the facts which constitute an offence."

The Evidence Act[512] on the other hand was no definition of the term. Section 25A which replaced old section 25(1) provides as follows:

> 25A.Confessions generally inadmissible
>
> (1) A confession or any admission of a fact tending to the proof of guilty made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police , and a third party of the person's choice.

Section 25A of the Evidence Act is more of a procedural provision than a definitive one. It provides for the circumstances under which

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510 Sir James Fitzjames Stephen, *Digest of the Law of Evidence* (12th edn, 1948) at page 21.

511 [1939] All ER 396.

512 Section 25, Chapter 80 of the Law of Kenya (now repealed) defined a confession as follows:

> "A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved an inference may reasonably be drawn that the person making it has committed an offence"

a confession may be admitted, that is, when it is made either in court or before a police officer of a prescribed rank. Hence, we turn to case law to provide a working definition.

In so doing we must recall the warning by Lord Atkin in the case of *Pakala Narayan Swami v Emperor*[513] cited above that:

> "No statement that contains self exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed".

Hence, under section 25A,[514], an admission of gravely incriminating facts taken alone or in conjunction with other facts proved, from which an inference may be drawn that the maker has committed an offence, is clearly a confession. It therefore seems that under the Evidence Act there is an attempt to narrow the gap between admissions and confessions which is in tandem with the position under English common law.[515]

B. Admissibility of Confessions

At common law, as indeed is the case under the Evidence Act, the fundamental condition for the admissibility of confession was that it should have been made voluntarily. Two reasons were given for this rule:

i) Reliability principle – Under this principle, an involuntary confession may not be reliable because an accused person subjected to threats, inducement or oppression may "confess" falsely so as to avoid the repercussions of the threat.[516]

ii) Disciplinary principle – it was argued that the police need to be discouraged from using improper means of obtaining a confession

513 AIR 1939 PC 47(52).

514 Section 25A provides as follows:

"A confession or any admission of a fact tending to the proof of guilt made by an accused is not admissible and shall not be proved as against such person unless it is made in court."

515 *Customs and Excise Comm'rs v Harz and Power* [1967] 1 AC 760 at 817-818

516 *R v Warickshall* [1783] 1 Leach CC 263.

> from an accused by being deprived of the advantage of a confession for the purpose of obtaining a conviction.[517]

In Kenya, as we have seen above,confessions are not admissible unless made either in court or before a police officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.[518]

The admissibility of out of court confessions is governed by the Evidence (Out of Court Confessions) Rules, 2009. These rules were published by the Attorney-General, in consultation with the Law Society of Kenya, the Kenya National Commission on Human Rights in exercise of the powers conferred by section 25A(2) of the Evidence Act.[519]

Under the rules an accused person may make a confession to a police officer in his/her preferred language. The accused also has a right to be given an interpreter where need arises.[520]

The rules re-affirm the position that in making the confession an accused shall not be subjected to any form of coercion, duress, threat or torture.[521]

A police officer shall not record a confession from an accused person who complains of being tortured and shows signs of torture such as open wounds, body swelling or extraordinary fatigue indicative that the accused has been tortured. This also guards the police from any false accusation that they tortured the accused so as to get the confession.[522]

The Out of Court Confessions Rules require that the accused nominates a third party to be present while the confession is being made. The recording officer is required to take down the third party's particulars including the relationship with the accused.[523]

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517 Adrian Keane, *The Modern Law of Evidence* (5th edn, Butterworth) page 354

518 See rule 2 of the Evidence (Out of Court Confessions) Rules, 2009 as read with rule 4(3) thereof.

519 These rules have replaced the much celebrated English Judges Rules which held sway up to 27 May 2009.

520 Rule 4(1)(a) and (b) of the Evidence (Out of Court Confessions) Rules, 2009.

521 Rule 4(1)(c) of the Evidence (Out of Court Confessions) Rules, 2009.

522 Rule 4(2) of the Evidence (Out of Court Confessions) Rules, 2009.

523 Rule 4(3) of the Evidence (Out of Court Confessions Rules, 2009.

The recording officer is required to caution the accused prior to making the confession. The officer should give a warning to the accused that whatever she/he says may be given in evidence and that they are under no obligation to make any statements.[524]

The confession should be recorded at the same time it is made. The date, time and place the confession was made should also be recorded.[525] Where the recording of the confession seems to be taking long, a relaxation period has to be given.[526]

The outstanding feature of the Out of Court Confessions Rules is that it provides for the electronic recording of confessions.[527]

In *Jane Betty Mwaiseje and 2 others v Republic*,[528] three appellants having been charged with murder were convicted based on their own confessions. The case against the appellants was based wholly on inculpatory statements made under caution, the statements having been recorded on video tape. The question was whether the video -tape recordings and the tape transcriptions of the conversation between a superintendent of police and the second and third appellants were admissible.

With regard to the video-tape recorded evidence, a trial within a trial with respect to each statement and video tape was conducted. The court held that video-tape recorded evidence is admissible as evidence and that it would be desirable not only to caution an accused person but also to have the caution video-tape-recorded, before leaving the police station for such an exercise. The rules on electronic recording seem to have borrowed from the *Betty Mwaiseje* case.

Where a confession is going to be recorded in electronic media, the accused shall be notified of such recording so that he may object to this if he wishes. The recording has to be done in the open.[529] The

524 Rule 5(1) of the Evidence (Out of Court Confessions) Rules, 2009.

525 Rule 5(3) of the Evidence (Out of Court Confessions) Rules, 2009.

526 Rule 5(2) of the Evidence (Out of Court Confessions) Rules, 2009.

527 Rule 6(1) of the Evidence (Out of Court Confessions) Rules, 2009.

528 Crim App 17 of 1991.

529 Rule 6(2)(b) of the Evidence (Out of Court Confession) Rules, 2009.

original record referred to as the master recording shall be adduced in court as evidence. The accused may, if he requests, be given a copy of such recording.[530]

The confessions can also be made in writing where the accused may either write his own confession statement in his preferred language or have the police officer write it down for him. If the confession is not made in English or Swahili, the recording officer shall ensure that it is translated into either language.[531]

Finally, every confession whether recorded electronically or written must contain a certificate at the end of the confession stating that the accused has read the statement, that he is aware that he can correct or add anything he wishes and lastly and most importantly that he made the statement out of free will.[532]

In cases where an accused person is arrested outside of the geographical boundaries of Kenya and such a person opts to record a confession the rule 12 provides that:

> "(a) the arresting authority shall record the confession if the governing procedures for obtaining of confessions in the arresting jurisdiction are in substantial compliance with these rules; and
>
> (b) the trial court shall be the final determining judicial body to adjudicate on the admissibility of confession so obtained".

The recording officer, aside from being the proper prosecution witness to prove to the court beyond reasonable doubt that the rules were complied with, shall also certify, in writing, that the confession was not obtained as a result of any inducement, threat or promise having reference to the charge against the accused person.[533]

530 Rule 6(4) (5) and (6) of the Evidence (Out of Court Confession) Rules, 2009.

531 Rules 7 and 10 of the Evidence (Out of Court Confession) Rules, 2009.

532 Rule 9 of the Evidence (Out of Court Confession) Rules, 2009.

533 Rules 13 and 14 of the Evidence (Out of Court Confession) Rules, 2009.

C. Confessions Made Under Threat or Duress

A confession is not admissible in a criminal case if the confession appears to the court to have been made under threat or inducement having reference to the charge against the accused. The threat should arise from a person in authority giving the accused grounds to suppose that by making the statement amounting to the confession, he will gain advantage or avoid harm in reference to the proceedings against him.[534]

A person in authority has been defined in the case of *Muriuki v R*[535] as:

> "one who has or appears to have power to influence a decision".

In contrast, in the case of *Deokinanan v R*,[536] the appellant was charged with murdering his co-worker and appropriating money which had been given to him by his employer to buy wood. He confessed to a friend and the friend reported him to the police. The accused was not doubtful when he saw his friend in the cell and repeated the confession to the friend. This confession was produced in evidence. The defence objected to this confession as it was induced. The court held that the evidence was admissible since it was not induced by a person in authority.

The best definition of the person in authority is found in the case of *Rex v Todd*[537] where the accused was induced to confess by two detectives who represented to him that they were members of an organised gang of criminals and that to gain admission to the gang he had to satisfy them that he had committed a crime of a serious nature. The accused challenged the admission of the statement. It was held that the promise was not made by a person in authority and consequently the confession was admissible. Bain, J defined the person in authority as follows:

> "A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or

534 Section 26, of the Evidence Act.

535 [1975] EA 223 (K).

536 [1968] 2 All ER 346.

537 (1901) 13 Man LR 364.

> the prosecution against him. And the reason it is a rule of law that confessions made as a result of inducements held out by persons in authority are inadmissible is clearly this, that the authority that the accused knows such persons to possess may well be supposed in the majority of instances both to animate his hopes of favour on the one hand and on the other to inspire him with awe…"[538]

Section 26 of the Evidence Act echoes the above by stating that:

> "A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

Further, if the confession is made again after the removal of the impression caused by inducement, threat or promise, it becomes admissible. This is contained in section 27 of the Act which states that :"If such a confession as is referred to in section 26 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been fully removed, it is admissible."

In the case of *Kaluma v R*[539] the accused committed an offence in Uganda and then fled to Kenya. The police officers who were sent to arrest them planned to induce them with beautiful girls but the accused got wind of this and they murdered the girls and threw them in a river and they fled back to Uganda. The accused were apprehended in Uganda and after interrogation they confessed to the murders. When they were brought to stand trial for the murders, the Kenyan investigators realised that the confessions might not be admitted as they had been procured by torturing the accused. The prosecution warned the accused to forget what they had said in Uganda and told the accused that what they said could be held against them.

538 *Ibid*., page 376.

539 [1989] 2 KLR.163.

The accused adopted the statements that they had made in Uganda and the question was whether the statements made in Kenya adopting the Uganda confessions were admissible. The court held that they were admissible as the threats in Uganda had ceased to operate by the time they made the confessions in Kenya and the defining circumstances for removing the threat of inducement had passed.

D. Onus of proving voluntariness of the confession

In the past, doubts existed as to who had the onus of proving whether a confession was made voluntarily or not. Case law has established that it lies squarely upon the prosecution.

In the case of *Njuguna s/o Kimani v R*[540] the appellant was convicted of murder with no evidence against him except for an inculpatory statement amounting to a confession made to a police officer. The accused had been taken to police custody on 15 March 1954 and remained in custody until June of that year. The accused during this period made statements amounting to confessions. The question was whether these statements were admissible against the accused. The court held that:

> "It is the duty of the court to examine with the closest care and attention all the circumstances in which a confession has been obtained from an accused especially when the accused has been in custody for a long time. The onus is upon the prosecution to prove affirmatively that a confession has been voluntarily made and not obtained by improper or unlawful questioning".

Similarly, in *DPP v Ping Lin*[541] where the appellant was convicted of supplying controlled drugs, a voluntary confession was relied on to come to the conviction. In this case the accused was found in possession of the drugs in his premises. At first he denied the charges but later and after caution from the police, he confessed to the charges and attempted a plea bargain. The police told him that if he helped them find the drug cartel bosses, the judge would be notified

540 (1954) 21 EACA 316.

541 [1967] AC 575.

and he would be considered for a lesser sentence whereupon he revealed the name of the drug lords.

The court in this case found that the statements were made voluntarily. The Court of Appeal affirmed this position. It was held that the issue whether the statement was voluntary is a question of fact and that in determining the admissibility of such evidence the court should approach this task by applying the test enunciated by Lord Sumner in *Ibrahim v R*[542] and should ask itself whether the prosecution had proved that the contested statement was voluntary in the sense that it was not obtained by fear of prejudice or hopes of advantage held out by a person in authority.

Similarly, in *Onyango Otolito v R*,[543] the appellant was convicted of house-breaking and theft. The conviction was based on a confession obtained in curious circumstances. The accused was arrested and placed in police custody, he was removed from the cell, taken to court and charged with two offences. He was cautioned and after the caution he made an exculpatory statement to a Police Inspector. He was then returned to the cells where he stayed overnight and the following day, an assistant inspector interviewed him and he admitted breaking into the house. On the same day he was charged with the two offences again and cautioned. He proceeded to make an incriminating statement to the chief inspector. At the trial, the appellant alleged that the police inspector tortured him and it was as a consequence of the torture that he made the incriminating statement. The trial magistrate overlooked the allegations of torture and proceeded to convict the accused.

On appeal, it was held that the magistrate should have addressed himself to the issue of the voluntariness of the statement. He ought to have asked the appellant whether he admitted that the statement was voluntary. If the appellant denied the voluntariness of the statement, a trial within a trial ought to have been held and this would have established the voluntariness of the statement or otherwise.

542 [1914] AC 599.

543 [1959] EA 986 (K).

Similarly, in *Wambunya v R*[544], the court held the burden of proof that the statement was given voluntarily rested on the prosecution. In this case, the appellant was convicted of murder of a seven-year -old boy who was said to be his relative. The case against the appellant hinged on a confession he made and later retracted on the ground that he was tortured into making it. The court held that retracted and repudiated confessions must be looked at with great caution and that the court be fully satisfied in all the circumstances of the case that the confession is true. In this case, there was no convincing evidence that the appellant was the last person to be seen with the deceased before entering the forest nor did anyone for certain know their activities therein. The appeal was allowed.

E. Before whom should a confession be made?

Even though confessions are made voluntarily, the rules made under section 25A[545] of the Evidence Act with regard to the persons before whom the confession can be made must be adhered to.

Section 25A(1) states that:

> "A confession …is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice".

Failure to ensure that a confession is made either before a judge, magistrate or a police officer of the requisite rank will render it inadmissible.

The issue of who should and how to record confessions has been dealt with under the Evidence (Out of Court Confessions) Rules, 2009 which are discussed above.[546]

544 [1993] KLR 133.

545 Act Number 7 of 2007 section 25A(1) and (2) were introduced after the previous amendment which required all confessions to be made in court.

546 Part B on the Admissibility of confessions

F. Repudiation and Retraction of Confessions

A confession may be objected to in either of two ways:

1. Repudiation
2. Retraction

In some cases, when a statement made by an accused person is produced in trial, the accused may allege that he never made the statement. When an accused person denies ever having made the statement, she/he is said to have repudiated the statement. In other instances, they may admit having made the statement, but allege that he only made it because of inducement, threat or promises made by a person in authority. Where the accused admits having made the statement but says that he only made it as a result of an inducement, threat or promise, the accused is said to have retracted the statement. The distinction between a retracted and a repudiated confession was discussed in the case of *Tuwamoi v Uganda*.[547]

In that case, the appellant was alleged to have entered the home of the deceased on the night of her death and stabbed her severally with his spear. The deceased's daughter awakened by the commotion, found her mother dying and asked her what had happened. The mother made a dying declaration implicating the accused which was accepted as true by the trial judge. The accused subsequently made a confession on being arrested but after two days he made a further statement completely denying the crime. When the matter reached the court, only the first statement was tendered by the prison authorities. Based on this first confession, the accused was convicted. The accused appealed complaining that the conviction was not properly founded. It was held that whether the evidence was being considered as part of *res gestae* or dying declaration, the same should have been tested for reliability to avoid injustice.

It was further held that a trial court should accept any confession which has been retracted or repudiated or both with caution and must before founding a conviction on such a confession be fully

547 [1962] EA 84.

satisfied in all aspects of the case that the confession is true. This is the standard of proof required in all cases and usually the court will only act on the confession if corroborated by independent evidence acquired by the court. The requirement of corroboration is not necessary in law and the court may act on a confession alone if fully satisfied that after considering all the material points surrounding the case, the confession cannot be but true.

The court stated in essence that:

> "A confession is retracted when the accused person admits that he made the statement recorded but now seeks to recant what he said generally on the ground that he had been forced or induced to make the statement. On the other hand, a repudiated statement is one which the accused person avers he never made".

The judges in the above case proceeded to say that in terms of effect, there is not really much difference between a retracted confession and a repudiated confession because the implication the two have is the same; that such statements should be treated with caution and should not be the basis of a conviction unless it has been corroborated in some material particular.

In the case of *Warui v R*,[548] the court held that a retracted confession was admissible only if it was corroborated by circumstantial evidence. However, in the subsequent case of *Thiong'o v R*[549] the court stated that there is no rule or law that a court cannot act on a repudiated or a retracted confession unless it is corroborated in material particulars.

In *Omarimba and others v R*[550] the respondent and four others were convicted of robbery with violence having made extra-judicial confessions about the said incident of robbery. In the course of the trial, all the accused repudiated their confessions. Nevertheless the trial magistrate admitted the statements as evidence and went ahead to convict the accused after which they all appealed. The appeal was dismissed.

548 [2004] KLR 750.

549 [2004] 2 KLR 38.

550 [2003] KLR 131

G. Trial Within a Trial

Where a confession is repudiated or retracted by the accused or he maintains that it was not voluntary, before the confession may be admitted, the court must conduct a trial within a trial to determine its admissibility. In the trial within a trial, the court must conduct its investigations whereupon the evidence of both sides is considered before giving a ruling as to whether the confession should be admitted or not.

The procedure for conducting of the trial within the trial was prescribed by the Court of Appeal of East Africa in *Kinyori s/o Karunditu v R*[551] where the appellant was convicted of unlawful possession of a firearm and ammunitions. He made an extra-judicial statement which he later retracted. After arguments on its admissibility, it was ruled admissible. Assessors returned and the police officer who had taken the statement was then recalled and heard. He produced the statement in evidence but was not cross-examined.

The court held that where extra-judicial statement has been ruled admissible in the absence of the assessors, after they return to court counsel for accused is entitled to cross-examine the person taking the statement again.

Evidence heard at a trial within a trial may not be treated as evidence at large in the case. If intended that this evidence be made available to the assessors,[552] then the witness must be recalled to be re-examined later before the assessors.

The procedure set out in *Kinyori s/o Karunditu v R*, is as follows:

i) The defendant should inform prosecution before commencement of trial that an issue will arise to enable the prosecution to refrain from referring to the statement;

ii) When the stage is reached the defence should mention that a point of law arises and submit that assessors be asked to retire;

551 (1956) 23 EACA 480.

552 At the material time, all trials for capital offences were tried with the assistance of assessors. The requirement for assessors was repeated vide Act number7 of 2007.

iii) The Crown will call its witness. The defence will examine such witness followed by any statement from the dock which defence elects to tender;

iv) Judge will rule on it and assessors will return;

v) If the statement is admissible, the prosecution witnesses to whom statement was made will then produce it;

vi) Defence is entitled to cross-examine, and the court should remind itself that the defence is entitled to cross-examine the prosecution witness as to the circumstances in which the statement was made and have recalled any witness who has given evidence on the issue in the absence of assessors;

vii) If time for the defence case reaches, the accused is entitled to speak against any questionable circumstances which he alleges attended the making of his extra-judicial statement and to affirm or reaffirm any repudiation and retraction;

viii) The accused is also entitled to recall and again to, examine any witnesses of his who spoke to the issue in the assessors' absence and examine any other defence witness thereon.[553]

This decision was followed in *Ezekia v R*[554] where the first appellant alleged that he had been beaten to make a confession and gave evidence on oath without being able to identify his assailants. The case against the appellant depended almost entirely on a confession alleged to have been made to a Justice of the Peace. The Justice of the Peace produced notes which he recorded when the appellant was taken to his office for recording of a statement. These notes were admitted in evidence and so was the confession. The appellant was convicted.

On appeal, it was held that although contemporaneous notes may be used to refresh the memory of a witness, they are not evidence and that the burden of proving that a statement made was involuntary seems to have been placed on the accused, which was incorrect.

553 Whether this procedure remains in place after the publication of the Evidence (Out of Court Confessions) Rules is yet to be tested in court.

554 [1972] EA 427.

H. Confessions by Accomplices

Confessions given by accomplices usually are admissible according to section 141 of the Evidence Act. However as a matter of practice, courts have required corroboration of such evidence. Therefore, statements implicating a co-accused can lead to conviction of such person if well corroborated.

The above is reflected in section 32 of the Evidence Act which states that:

> "When more persons than one are being tried jointly for the same offense, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take the confession into consideration as against such other person as well as against the person who made the confession".

In admission of this evidence, however, courts need to exercise a lot of caution.

I. The Judge's Rules[555]

With the entry into force of the Evidence (Out of Court Confessions) Rules, 2009, it is clear beyond doubt that the practice of referring to the English Judges Rules, 1912-18 has been rendered obsolete. Needless to say, the Judges Rules had no force of law which the new confession rules enjoy. The new rules have also modernised the law and practice of this very touchy area that was the source of rampant criticism by civil society especially in the manner in which the police dealt with suspects in days gone by.

Whether indeed or not there will be challenges in the nature of repudiation or retraction of confessions in the future remains to be seen. What is clear is that should the police and courts abide fully by

555 The origin of the judges rules is to be found in a letter dated 26 October 1906 which Lord CJ Alverstone addressed to the Chief Constable of the Birmingham police in answer to a request for advice in consequence of the fact that there were two judges on the same circuit whereby one judge had censored a member of his force for having cautioned a prisoner prior to recording his statement whilst another judge had censored another member of the force for having omitted to do so. The first four of the present rules were formulated and approved by the judges of the King's Bench Division in 1912. The remaining ones were given in 1918.

the new confession rules there will be very few challenges, if any, to the admissibility of evidence of confessions in our courts.

Chapter 10

Documentary Evidence

A. Introduction

Much as documentary evidence occupies such a prominent place in the trial process, the Evidence Act[556] has not defined the term document. This is odd. In view of its silence, we fall back on section 3 of the Interpretation and General Provisions Act,[557] which defines a 'document' to include:

> "Any publication and any matter written, expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter."

This definition seems to be drawn from the Indian Evidence Act whose section 3 defines the document as follows:

> "Any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means intended to be used, or which may be used for the purpose of recording that matter[all documents including electronic records produced for the inspection of the Court], such statements are called documentary evidence…"

This definition is reminiscent of the classic common law definition of which we can do no better than quote the words of Darling, J in *R v Daye*[558] where he defined a document as follows:

> "…any written thing capable of being evidence is properly described as a document and……. it is immaterial on what the writing may be inscribed. It might be inscribed on paper as is the common case now but the common case once was that it was not on paper, but on parchment and long before that it was on stone, marble, on clay, and it might be, and often was, on metal".

556 Cap 80, Laws of Kenya.

557 Cap 2, Laws of Kenya.

558 [1908] 2 KB 333, 340.

This definition should, however, perhaps remain a relic of the past because as Adrian Keane aptly observes, today's equivalent of paper is oftentimes a disc, tape or film.[559] These instruments convey information not only by words but also by means of symbols,diagrams, sounds and pictures.[560] Indeed, in the UK this fact has been recognized by the courts and statutes. For instance, in *Kajala v Noble*[561] where the accused was convicted of using threatening behaviour likely to occasion a breach of peace, a prosecution witness claimed to recognize the accused on the BBC news footage concerning the incident. BBC policy was not to allow originals of films to leave their premises. A video cassette recording of the incident was produced and the court being satisfied that it was an authentic copy of the original admitted it in evidence.

A question arose on appeal whether the original footage should have been produced in court. The court deferred to the old classic rule that a party wishing to rely on the contents of a document must produce an original where it is in a party's hands, but concluded that the "old rule is limited and confined to written documents in the strict sense of the term and has no relevance to tapes or films."[562]

In contrast, in civil proceedings under the rules of the Supreme Court for purposes of discovery, the word document has been defined to include a tape recording, a facsimile transmission and an electronic version residing in the memory of a computer.[563] For this reason by way of statutory exception to the rule against hearsay, the Civil Evidence Act, 1988 provides for the admissibility of statements contained in documents including those produced by a computer as evidence of any facts contained therein. The above statutes generally define a document as "anything in which information of any description is recorded."[564] This definition is wide enough to incorporate documents not only in writing but also maps, plans,

559 The *Modern Law of Evidence* (5th Edition, Butterworths) page 226.

560 The *Modern Law of Evidence* (4th Edition, Butterworths)page 199.

561 [1982]75, CAR of Appeal Report, 149, Civil Appeal.

562 [198]75, CAR of Appeal Report, 149, Civil Appeal.

563 The *Modern Law of Evidence* (*Ibid*) page199.

564 Section.13, Civil Evidence Act, 1995, S.118(i) Police & Criminal Evidence Act, 1984 and paragraph 5, Schedule 2 of the Criminal Justice Act, 1988.

graphs, drawings, discs, audio tapes, sound tracks, photographs, negatives, video tapes and films.

The Evidence Act after lagging behind for many years was eventually amended vide Act Number 9 of 2000 so that today electronic recordings are viewed as documents. Section 65(5) of the Evidence Act contemplates electronic recordings as documents and provides that documents made through a micro-film, or facsimile or a computer (computer print-out) are also included in the definition of documents in evidence and are admissible in any proceedings without further proof or production of the original, as evidence of any contents of the original or of any facts stated therein of which direct evidence would be admissible.[565]

Electronic record evidence

It is clear that the prime characteristic of a document is that it should contain and convey information. The word may also imply writing or other inscription, though in modern times, the storing of information in diagrammatic form or in a computer, or the audio or video recording of information is probably equally acceptable for many purposes. The form of a document and the materials of which it is composed are of limited contemporary importance.[566]

565 Section 65(5) of the Evidence Act. The foregoing notwithstanding, section 65(6) stipulates that a computer print-out is only admissible if it meets the following four qualifications;

a. The computer print-out containing the statement must have been produced by the computer during the period in which the computer was regularly used to store or process information for the purposes of any activities regularly carried on over that period by a person having lawful control over the use of the computer;

b. The computer was, during the period to which the proceedings relate, used in the ordinary course of business regularly and was supplied with information of the kind contained in the document or of the kind from which the information so contained is derived;

c. The computer was operating properly or, if not, that any respect in which it was not operating properly was not such as to affect the production of the document or the accuracy of its content;

d. The information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of business.

566 *R v Daye*[1908] 2 KB 333.

In *Daye,*[567] Darling, J pointed out that paper itself had been preceded by parchment, stone, marble, clay and metal. He went on to say that an object may be regarded as a document, whatever its material, provided it is writing or printing and capable of being evidence.

The courts have been disposed to recognize successive technological advancements in the storage and reproduction of information, by treating as documents for most purposes anything which is the functional equivalent of the traditional paper document. However, the courts have at the same time exhibited a reluctance to burden the new documents with the restrictive rule requiring proof by primary evidence.

Kenya and the common law on evidence had a narrow perception of a document despite the revolution in electronic technology resulting in advanced methods of capturing, storing, retrieving, receiving and analyzing information by computers. Before the evidentiary status of a computer print-out was no different from that of a photocopy of a forged cheque.[568] This prompted the legal experts to adjust their scope of 'document' to adapt to modern technological developments.

The court had to take cognizance of the fact that mechanical means have replaced human effort[569] and computer print-out was the product of mechanical device which falls under the category of real evidence.[570] In 2000 the Evidence Act was amended to introduce section 65(6), (7), (8), (9) to deal with computer print-out.

Besides, the Kenya Information and Communications Act[571] was enacted in 1998. It had the effect of introducing several new sections to the Evidence Act providing for the admission of electronic evidence, collectively known as Part VII of Chapter III of the Evidence Act. The Kenya Information and Communications

567 [1908] 2 KB 333.

568 *R v Governor of Britain Prison,ex p Levin* [1997]All ER at 289.

569 *Motorship Shapporo Maru v Owners of Steam Tanker Statute of Liberty* [1968] 2 AII ER at 195.

570 *Castle v Cross*[1985] 1 AII ER 87.

571 Chapter 411A.

Act introduces section 106B of the Evidence Act which grants admissibility to any information contained in electronic record which is printed in a paper stored, recorded or copied on optical or electro-magnetic media produced by a computer.

Section 106B of the Evidence Act defines a document to include electronic records. The section further stipulates the conditions for the admissibility of electronic records *inter alia*:

a) The computer output containing the information was produced by the computer during the period over which the computer was used to store, process information for any activities regularly by a person having lawful control over the use of the computer.

b) The information in question was regularly fed into the computer during the said period in the ordinary course of the said business;

c) The computer was properly operating during the material part of the said period, or

d) If it was not properly operating this was not to the extent of affecting the electronic record or the accuracy of its content;

e) 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;

When more than one computer is operating in succession over the said period in storing and processing the said information then all computers used for that purpose shall be deemed to constitute a single computer.

Part VII of the Evidence Act sets two special rules on computer evidence notably the authentication and data integrity. Authentication entails *inter alia* the following:

a) That the contents of the record have remained unchanged

b) That the information in the record does in fact originate from its purported source, whether human or machine

c) That extraneous information such as the apparent date of record is accurate.

The section further provides that these conditions may be satisfied by the production of a certificate signed by a person occupying a responsible position in relation to the operation of the relevant device of the relevant activities, identifying the electronic record and the manner in which it was produced and giving the particulars of any device involved in the production for the purpose of showing that the record was produced by a computer.[572]

In *Cornelia Elaine Wamba v Sheji Ent Kenya Ltd & another*,[573] a computer print-out was held to be admissible under section 33 of the Evidence Act and the print-out qualified to be a public document under section 79 of the Evidence Act.

B. Classification of documents

All documents are classified as either public or private documents. A public document can be defined as a document made by a public officer for the purpose of usage and reference by members of the public. On the other hand, a private document is that which emanates from a private person or officer. Hence, the test for determining the category into which a document falls is prescribed by section 79 of the Evidence Act.[574] In addition to the list in section 79, section 82 points out more categories of documents constituting public documents and whose *prima facie* evidence may be given in Court.

The rationale for this classification is that there are different rules governing admissibility and proof of the contents of the documents in a Court of law, and the procedure to be followed in either case is different. As we shall see, secondary evidence may be given of the existence, condition or contents of a public document, whereas the rules concerning secondary evidence of a private document are more restrictive.

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572 Section 106B(4) of the Evidence Act, Chapter 80, Laws of Kenya.

573 [2008] eKLR.

574 Section 79(1)The following documents are public documents: (a) Documents forming the acts or records of the acts of the sovereign authority; or of official bodies and tribunals; or of public officers, legislative, judicial or executive, whether of Kenya or of any other country and (b) Public records kept in Kenya of private documents. Section 79(2) provides thus: All documents other than public documents are private.

C. Proof of Public Documents

Public documents form an exception to the hearsay evidence rule since persons who made the statements in public documents are not called as witnesses. Certified copies thereof suffice or in certain cases, authentication in proof of the contents of the whole or part of the document.[575] They are admissible on grounds that the facts which they contain are of public nature and the contents were made in the course of official duty by duly authorised agents of the public.[576]

Proving a document is either by way of the production of original documents (primary evidence) or certified copies thereof (secondary evidence) for the inspection of the court. It also includes copies made from the original by a mechanical process which ensures accuracy of the copy. Additionally, secondary evidence includes copies compared with the original, counterparts of documents as against the parties who did not execute them as well as oral accounts of the contents of a document given by some person who has himself or herself seen it.[577] For certification to be valid, it must be done by an officer who has the authority to do so.[578]

Documents must be proved by primary evidence unless otherwise provided under the law.[579]Section 77(1) of the Act allows

575 Sections 80 and 81 of the Evidence Act.

576 Section 64 of the Evidence Act.

577 Section 66 of the Evidence Act.

578 Section 80 of the Evidence Act.

579 Section 68(1) of the Evidence Act outlines the following situations as circumstances when proof of documents can be done by way of secondary evidence:

a. When the original is shown or appears to be in the possession or power of the following people and when, after the notice required by section 69 of the Act has been given, such person refuses or fails to produce it.

   (i) The person against whom the document is sought to be proved; or

   (ii) A person out of reach of, or not subject to, the process of the Court; or

   (iii) Any person legally bound to produce it.

b. When the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest.

c. When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time.

d. When the original is of such a nature as not to be easily movable.

a document under the hand of a government analyst, medical practitioner, ballistics expert, document examiner or a geologist to be used in evidence. The court is at liberty to presume that the signature to any such document is genuine and that the person signing it held the office and the qualifications which he professed to hold at the time he signed it. The court can summon the maker of the report or such expert at its discretion for purposes of examination on the subject matter.[580]

Where a document is executed in several parts, each part is primary evidence of the document.[581] For example, agreements are produced in several copies such that each copy is primary evidence of the other. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.[582] Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original they are not primary evidence of the contents of the original.[583]

The right to receive or admit evidence of a certified copy of the document, depends on the public right of inspection as well as the document falling under the definition of section 79. In *Tootal Broadhurst Lee Co. Ltd v Ali Mohammed*,[584] the plaintiff sued for damages or equitable relief for infringement of a design registered in Great Britain (GB). The plaintiff relied on a document bearing the seal of the Patent office, purporting it to be a copy of the Certificate of registration of the design together with a certificate bearing the seal of the Patent office of GB. The question was whether the document

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e. When the original is a public document within the meaning of section 79 of the Act.

f. When the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence.;

580 Section 77(3) of the Evidence Act.

581 Section 65(2) of the Evidence Act.

582 Section 65(3) of the Evidence Act.

583 Section 65(4) of the Evidence Act.

584 [1954] 24 KLR 31

was a public document so that the rules regarding admissibility of certified copies applied and whether indeed such a document could be proved by means of a certified copy.

The court held that the Certificate of registration, though a public document is not a document which can be inspected by any member of the public so as to bring it within section 76 Indian Evidence Act (now section 80 Evidence Act). Furthermore, the certificate was not written at the foot of the copy as required. In the words of the court at page 32:

> "It is not, however, all public documents that can be proved by means of certified copies but only those 'which any person has a right to inspect'. There is no evidence before me and I can see nothing in the law to the effect that the Registrar of Designs keeps or is bound by law to keep a copy of every certificate of registration, which he issues for inspection by the public..."

D. Proof of Private Documents[585]

Before any private document may be admitted into evidence, it must be proved to be genuine, that is, to be what it purports to be. Additionally, the person tendering it in evidence must offer the best evidence of it available, be it primary or secondary evidence of its contents, but preferably the primary evidence thereof.

Genuineness of a document is vital since mere production of a document purportedly written by a person, is no evidence without proof of its authorship. In *Stamper v Griffen*,[586] it was stated that:

> "No writing can be received in evidence as a genuine writing until it has been proved to be a genuine one, and not as a forgery until it has been proved to be a forgery. A writing, of itself, is not evidence of one thing or the other. A writing, of itself, is evidence of nothing and therefore, is not, unless accompanied by proof of some sort, admissible as evidence."

In the case of private documents, something more will be required, that is, proof of due execution; unless the document to be proved

585 Sections 71-73 of the Evidence Act.

586 [1856] 20 CA 312, 320.

is more than 20 years old and comes out of proper custody.[587] Due execution of a private document is proved by showing that it was signed by the person by whom it purports to have been signed and when attestation is required, that it was duly attested.

Proof of execution is done by any of the following three ways:

- Testimonial evidence
- Opinion evidence
- Comparison

1. Testimonial evidence

It could take any of the following forms, that is, the testimony of a person whose handwriting is to be proved;[588] his admissible hearsay statement; statement of a person who saw the document being executed (for example an attesting witness or by-stander); admissible hearsay statement of a person other than the person whose handwriting is in question. All such a witness will say is that he saw someone sign a particular name. The name or signature will be sufficient evidence of identity of the signatory with the person whose writing is to be proved.[589]

2. Opinion evidence

A witness who has not seen a document written or signed may depose as to their opinion that the writing is that of a particular person. Such opinion is based upon his acquaintance with the handwriting of the person, through having seen him write on former/previous occasions.[590]

It is immaterial that the witness should have seen the person whose writing is in question write at all, provided he has received documents purporting to be written or signed by him. The capacity in which he has done so is also immaterial although this could go to the weight of evidence.

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587 See section 96 of the Evidence Act.

588 Section 73 of the Evidence Act.

589 *Cross & Tapper on Evidence* (8th edn, Butterworths) page 760.

590 *Cross & Tapper on Evidence* (8th edn, Butterworths) page 760.

Lord Denman, CJ addressed this question in *Doe d Mudd v Suckermore*,[591]in the following words:

> "The clerk who constantly reads the letters, the broker who has never consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing though he never saw me write or received a letter from me."[592]

There must, however, have been a sufficient opportunity for the witness to acquire such knowledge of the handwriting in question as to make it worthwhile recording his evidence as was seen in the *O'Brien* case.

In *R v O'Brien*,[593]the court observed as follows:

> "To prove handwriting, it is necessary that a witness should have either seen the person write or correspond regularly with him or acted upon such correspondence, then the witness may swear to his belief as to the handwriting, but without one of these foundations for his belief, the question is inadmissible."

In *R v Silverlock*,[594] the defendant in this case procured the insertion of the advertisement in a newspaper and by so doing, made a false pretence to Her Majesty's subjects. By means of that false pretence, he obtained a cheque from Rosa Alice Coates. Lord Russel, CJ held that there was no doubt as to what the essentials of the offence of obtaining money by false pretence are: there must be a false pretence made to a definite person, and it must be proved that such person on the faith of the false pretence parted with his money or goods. Those essentials must be stated in the count charging the offence, and the question here is whether the second count complies with these conditions sufficiently.

The advertisement was addressed to all persons to whose knowledge it may come, and who may desire to act upon it; and

591 [1837] 5 Ad & E 703.

592 [1837] 5 Ad & E 703 at 750.

593 [1911] 7 CAR 29,31.

594 [1894] 2 QB 173 at page 766.

if a particular person after seeing or hearing it, acted upon it and went to the person from whom it proceeded, and upon the faith of it parted with his money or goods, it became an advertisement to that particular person who belongs to the class of persons for whom it was intended.

Lord Russel, CJ concluded that:

> "I think, therefore, that this count does satisfy the requirements of the law by stating the essential conditions of the offence, although I feel bound to add that it is loosely, inartistically, and anything but clearly drawn."

The count was held to be bad and insufficient as there was no allegation that the false pretence was made to any particular person nor did the indictment contain the material allegation of the person from whom the money was obtained. Further, the court held that a witness giving evidence under this section need not be a professional expert or a person whose skill in the comparison of handwritings has been gained in the way of his profession or business. Lord Russel, CJ observes:

> "The question is, is he peritus? Is he skilled? Has he adequate knowledge?' One could become an expert in a specialisation without any formal or rigorous training."

In *Commercial Union Assurance Co plc v Lee Siew Khuan* (1990) SLR 1140, Chan Sek Keong, J (as he then was) held that knowledge on any particular matter need not be acquired professionally. In this case, the court held that it was entitled to rely on the evidence of an advocate and solicitor, as he was shown to know enough about diamonds to assess their value.

3. Comparison

Patterson, J in *Doe d Mudd v Suckermore* observed at page 739 that:

> "All evidence of handwriting except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains on comparing the writing in question with an example in his mind derived from some previous knowledge."

A document which is proved by comparison to have been signed or written by the person whose handwriting is in issue, is first produced and this is compared with the handwriting which is being considered in court. This usually calls for expert evidence on such matters. However, in *R v Silverlock*,[595] it was held that it is not always a requirement for opinion evidence to be excluded if it comes from a man who is skilled in comparing handwriting, and who has formed a reliable opinion from past experience, just because his experience has not been gained in the way of his business.

In *Pope v R*,[596] the appellant was charged with 3 counts of fraudulent false accounting and 3 counts of theft by servant. Charges concerned staff pay-sheets which had been made out to admittedly fictitious persons and purported to bear the appellant's signature as divisional accountant and paying officer. It was held that in view of the fact that the two witnesses who had stated that a report was in the appellant's handwriting and were not cross-examined by the appellant, there was a tacit admission that the report was in his handwriting.

An expert in handwriting should not be asked to say that a particular writing is to be assigned to a particular person with such precision. His function is to point out similarities between two specimens of handwriting or differences, and then leave the court to draw its conclusion.

An opinion with regard to the handwriting of two documents may also be given by a witness who's not an expert or the document submitted to court in order for the handwriting in each of them to be compared.[597] Conclusions based on such comparison of handwriting by non-experts should be treated with caution. Convictions have been set aside where such caution is not evident.

Historically, there are documents requiring attestation for proof of validity; such include wills, some mortgages and charges.[598] To prove the due execution of such, it is essential to call one of the

595 [1894] 2 QB 173 at page 766.

596 [1960] EA 132 (CA).

597 Section 76(2) of the Evidence Act (Cap 80 of the Laws of Kenya).

598 Section 58 of the repealed Registration of Titles Act (Cap 281 of the Laws of Kenya).

attesting witnesses in order to make the evidence admissible, if any are available. For any other evidence to be administered, it must be shown that all attesting witnesses are dead, insane, beyond judgment of court, incapable of giving evidence or that none at all can be traced.[599] If none of the attesting witnesses can be called for above reasons, steps must be taken to prove the handwriting of at least one of them. Then you resort to any of the above techniques.

If evidence of handwriting is unobtainable, evidence of those who saw the will executed or any other evidence from which an inference of due execution can be drawn becomes admissible, but not before every effort is made to prove the handwriting of one of the attesting witnesses.

The rule that one of the subscribing witnesses of an attested document must be called unless they are all unavailable used to apply to all attested documents, whether attestation was required by law or not. The ancient practice was for the witness to a deed to sit with the jury in those days when the jury comprised of witnesses and not triers of facts. More recently, the rule is rationalised on the basis of the fact that the parties thereto must be taken to have intended that the document should not be given in evidence unless the attesting witness was called when possible.

E. Proof of contents of a document

1. The General Rule

As a general rule, a party relying on the words used in a document for any purpose other than that of identifying it, must adduce primary evidence of its contents. This rule is often referred to as the most important remnant of "the best evidence rule."[600] The best exemplification of the primary evidence of a document is usually the original document itself.

This rule is, however, subject to several very important exceptions, most notably, the public documents the contents of which may be proved by a certified copy.

599 Sections 71 and 72 of the Evidence Act (Chapter 80 of the Laws of Kenya).

600 *Cross & Tapper on Evidence* (8th edn, Butterworths) page 748.

Several examples illustrate the above rule. For instance, where a party wishes to put its correspondence with an adversary in evidence, normally he will have original letters received from the adversary. He will be unable to prove the contents of the replies by the production of copies unless the case has been brought within one of the exceptions by service of a notice to produce.[601]

In *Macdonnell v Evans,*[602] a witness for the plaintiff was asked in cross-examination, whether a letter of his which was produced, was written in reply to a letter charging him with forgery. The last mentioned letter was not produced and the question was disallowed because it assumed that there was a document in existence, which should have been proved by the production of the original.

Types of Primary Evidence of contents of a document:

The Original

This refers to the primary evidence '*par excellence'* of contents of a document. At times it is necessary to have regard to the purpose of the party against whom the contents are tendered in evidence. Cross[603]admits that it is not always easy to know when a document can be said to be the original.

For example, in the case of a telegram, if contents are tendered against the sender, the original is the message handed in at the post office.

Copy of document requiring registration or enrolment

Where a document is required by law or practice or usage to be filed in a court or post office, when thus filed, the copy issued by the court or other office may be treated as the original. For example, the probate is conclusive evidence of the words of the will in respect whereof a grant was made: It constitutes the primary evidence of a will.[604]

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601 Section 69, Evidence Act.

602 [1852] 11 CB 930.

603 *Cross & Tapper on Evidence* (8th Edition, Butterworths) page 750.

604 Section 97(2)(a) of the Evidence Act.

However, the court may examine the original will if a question of construction arises. Hence, everything turns on the purpose for which the contents are tendered.

Admission

An informal admission by a party to the litigation constitutes primary evidence against him of the contents of the original document.

In *Slatterie v Pooley*,[605]it was held that a parol admission by a party to a suit is always receivable in evidence against him, although it relates to the contents of a deed or other written instrument: and even though its contents be directly in issue in the cause. In the words of Parke, B at page 580:

> "The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced: such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true, may reasonably be presumed to be so."

2. Limitations of the General Rule

Firstly, it applies only to cases in which direct reliance is placed on the words used in a document. For instance, although relationships such as those of a landlord and tenant or partnerships are typically created by a document, they can be proved by other evidence e.g. payment of rent or a witness' assertion that someone is his partner.[606]

Secondly, the rule allows reference to be made to the terms of a document for the purpose of identifying it. Here, the distinction is made between referring to a document as a means of identifying it and as a means of communicating ideas.[607]

605 [1840] 6 M & W 664.

606 *Supra* note 9, page 753.

607 *Ibid* page 754.

Thirdly, if the existence of a document is in issue, it may be proved without recourse to the original. The general rule kicks in the moment when reliance is placed upon the contents testimonially.[608]

3. Exceptions to the General Rule

The principal exceptions to the general rule provided by section.68 of the Evidence Act are the following:

i) Opponents Failure to Produce After Service of a Notice –section 68(1)(a)(i)

The notice informs the opponent that he is required to produce documents specified therein at the trial. It does not compel production as is commonly thought. It merely provides a foundation for the reception of secondary evidence.[609] It is usually served to exclude the objection that all reasonable steps have not been taken to procure the original.

The notice should not be used oppressively as a means of gaining inspection of documents without using them if they turn out to be unfavourable.[610] Rather, the party serving it must put the documents it mentions in the notice in evidence if required to do so by the opponent upon which the notice was served. Likewise, the party served with it cannot rely on the original document mentioned in it if the secondary evidence of the contents of the document has been given in consequence of non-compliance with the notice.[611]

The case of *Lakman Ramji v Shivji Jessa and Sons*[612] dealt with a situation where a document was in possession of someone against whom it was sought to be produced.This case was a suit for payment in respect of extra works done under a building contract. The defence was that the parties had agreed that a particular sum would be accepted in settlement and that a cheque had been tendered and accepted. At trial, evidence showed that the cheque was sent to the appellant in an envelope with a letter which stated that the cheque

608 *Ibid*.

609 *Ibid*, page 753.

610 *Ibid* page 754.

611 *Ibid*.

612 [1965] EA 125 (K) with reference to (section 68(1)(a)(i) of the Evidence Act.

was in full and final settlement of the debt. The appellant agreed that there was such an agreement but claimed that he had only received a cheque but with no letter. A carbon copy of the letter was produced during trial. The magistrate relied on the letter and the receipt on the back of the cheque and the respondent's evidence concerning the agreement. The question on appeal was whether the magistrate had correctly admitted a copy of a covering letter to prove its contents. The Court made the following statement at page 127:

> "It is a question as to whether a copy of the covering letter was proved to have been delivered to the appellant with the cheque sufficiently to allow secondary evidence of its contents to be proved by a carbon copy of the letter which the magistrate was satisfied had been in fact written contemporaneously to accompany the cheque which the respondent said had been put into an envelope together with a cheque for delivery to the appellant and of course it was clear that the appellant had in fact received the cheque. In the circumstances I think it was not an unreasonable inference that the appellant had also received the covering letter. There does not appear to have been any objection in the lower Court to the admission of secondary evidence of the contents of the covering letter though of course its receipt was denied. In all circumstances, I am not inclined to say that the admission of secondary evidence was wrong".

Service will be excused in the circumstances enumerated in section 69 of the Evidence Act.[613]

613 The circumstances enumerated under section 69 are:

i) When the document to be proved is itself a notice

ii) When from the nature of the case, the adverse party must know that he will be required to produce it

iii) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force

iv) When the adverse party or his agent has the original in court

v) When the adverse party or his agent has admitted the loss of the document

vi) When the person in the possession of the document is out of the reach of or not subject to the process of the court

vii In any other case in which the court thinks fit to dispense with the requirement.

ii) Stranger or Person out of Reach of Court or a Person out of the Jurisdiction of the Court (section 68(1)(a), (ii) and (iii)

When the original is in possession of a stranger to the litigation, the proper course for the party desiring to prove the contents of the document is to serve him with a summons.[614]

He may, however, be able to establish a claim to privilege in respect of the document when secondary evidence of its contents becomes admissible in which case it becomes impossible to compel production of the document.[615]

Note that section 68(1)(a) of the Evidence Act makes the admission of secondary evidence in this case to be subject to service of a notice to produce. How one is to serve the notice in such circumstances begs a question. This provision is not sound and it calls for amendment to remove the apparent ambiguity.

iii) Admission of Document (section 68(1)(b)

The provision of section 68(1)(b) is perhaps the boldest statement of logic and experience in ameliorating the rigours of the best evidence rule. When an opponent admits the existence, conditions or contents of the original, the admission should suffice as evidence of the terms of the original.

iv) Lost Documents (section 68 (1)(c)

When after diligent search, the original of a document cannot be found, its contents may be proved by secondary evidence. For instance, a party may adduce secondary evidence of the contents of a document if his opponent admits to having lost it or if a stranger served with summons does likewise. Contents of a lost will may be proved by secondary evidence to the same extent as those of any other lost document as was the case in the *Sugden* case.

In *Sugden v Lord St. Leonards,*[616]the deceased made his will 5 years prior to his death. During the last 2 years of his life, he was very sick

614 *Ibid*.

615 *Ibid*, page755.

616 [1876] IPD 154.

and it is his daughter who kept the box that contained his last will and testament. She constantly secretly opened the box and read its contents. Unfortunately, the will got lost and could not be found. At the trial, it was claimed that she could recite the contents of the will. Her solicitors suggested that she writes out the purport thereof.

The court held that the contents of a will, just like those of any other lost document, may be proved by secondary evidence. Further, that a declaration, written or oral, made by a testator both before and after execution of his will, is admissible as secondary evidence of its contents, in the event of its loss. Finally, that contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached. When the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved.

v) Production Impossible (section 68 (1)(d)

When production of the original is physically impossible, that is, it is of such a nature as not to be easily movable, then secondary evidence of its contents is admissible. Examples here include inscriptions on tombstones or walls or when a foreign court has custody of it or the law requires a document to remain fixed on a wall of a particular place.[617] The important thing is to note that any secondary evidence of the document is admissible.[618]

vi) Public Documents (section 68(1)(e)

In *Sturla v Freccia*,[619] Lord Blackburn said he understood a public document to mean:-

> "a document that is made for the purpose of the public making use of it and being able to refer to it. It is meant to be where there is a judicial or quasi-judicial duty to inquire…"

The Evidence Act[620] simply provides a list of documents which constitute public documents. These are those documents forming

617 *Cross & Tapper on Evidence* (8th Edition, Butterworths) page 756.

618 Section 68(2)(a).

619 [1850] 5 A.C 623.

620 Section 79(1) of the Evidence Act details public documents to include: Documents forming the acts or records of the acts of the sovereign authority; official bodies and

the acts or records of the acts of the sovereign or official bodies and tribunals or public officers of the 3 arms of government of Kenya or elsewhere.

Section 80 provides that such documents may be proved by means of certified copies. The rationale for admission of secondary evidence of public documents here is on account of the inconvenience that would be occasioned by production of the originals.

vii) Numerous Accounts or Documents (section 68(1)(g)

Under section 68(1)(g), when the original consists of numerous accounts or other documents which cannot be conveniently examined in court and the fact to be proved is the general result of the whole collection, then such evidence is admissible.

In *D'sa and another v R,*[621] two bank clerks were charged and convicted of the offence of fraudulent false accounting and stealing from their employer. During trial, a bank inspector gave evidence of his searches in the books of accounts of the bank, though the books were not produced. The two clerks were convicted. On appeal, the appellants contended that neither the original books of accounts nor the copies were produced. Hence, the secondary evidence adduced thereof was inadmissible.

It was held that the subject matter of the inspector's evidence, its purpose and his capacity, fulfilled the requirements of section 68(1)(g) and accordingly, this secondary evidence was rightly admitted. Further, it was clear from the magistrate's judgment that the case for neither appellant turned on the evidence of the unproved document but rather on the cumulative effect of the prosecution evidence.

viii) Bankers' Books

This exception was expressed at common law. It recognized that provided that the book is one of the ordinary books of the bank and an entry was made in ordinary course of business and the book is in the custody of the bank and the copy had been examined against the

tribunals; public officers and public records kept in Kenya of private documents.

621 [1957] E.A 627.

original, a copy of an entry in such a book was admissible as *prima facie* evidence of such entry.[622]

Several requirements have to be met before such copy of a bankers' book can be admitted.[623] These are:

> "The book was, at the time of making the entry, one of the ordinary books of the bank; and the book is in the custody and control of the bank; and the entry was made in the usual and ordinary course of banking business; and the copy has been examined with the original entry, and is correct."

Where such proof is to be tendered in court, it may be given by an officer of the bank, or, in the case of the proof required under paragraph (d) of subsection (1), by the person who has performed the examination, and may be given either orally or by an affidavit sworn before a Commissioner for Oaths or a person authorized to take affidavits.

A banker or officer of a bank cannot be compelled to produce any bankers' book or to appear as a witness to prove the matters, transactions and accounts therein recorded in proceedings to which the bank is not a party, unless by order of the court made for special cause.[624] Any party to proceedings can apply to court for an order to inspect and take copies of entries in a bankers' book for purposes of the proceedings. Where it is proved on oath to court that the inspection of a bankers' book is necessary for purposes of investigation of a crime, the court may authorize by warrant a police officer or any other person named therein to investigate the account of any specified person in any bankers' book. It has been held that a banker is not bound to disclose the state of a customer's accounts except on reasonable and proper grounds such as where the disclosure is under compulsion by law or where there is a duty to the public to disclose or where the interests of the bank requires disclosure or where the disclosure is made by the express or implied consent of the customer.[625]

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622 Section 176 of the Evidence Act.

623 Section 177(1) of the Evidence Act.

624 Section 178 of the Evidence Act.

625 *Stephen v Euro Bank Ltd and another* [2003] KLR 119.

Where a statute sets out the procedure to be followed in the production of evidence, that procedure must be adhered to strictly. The provisions of sections 176 and 177 are mandatory as regards the mode of production of evidence relating to entries in a bankers' book which if not complied with cannot be said to be properly admitted.[626] It is not open for a person affected by such order to object on grounds that he may incriminate himself.[627] The court should take care not to interfere with the liberty of the individual by limiting itself to the period relevant to the charge, when responding to such application, and also consider whether the prosecution has other evidence to support the charge before issuing the order. This is done to prevent the prosecution from going on a "fishing expedition" to find material for a case. An order should never issue where there is other evidence of commission of an offence and the prosecution simply intends to top up that evidence.[628]

4. Refreshing of Memory and Production of Documents

Section 167(1) allows a witness to refresh his memory while giving evidence concerning the subject matter which he is being questioned by referring to any writing made by himself at the time of the transaction or soon afterward of such transaction. Under section 167(2), where the document was made by another person and read by the witness at the time of the transaction or soon afterwards, the court allows the witness to refresh his memory if he knew or believed the document to be correct at the time. Where the court is satisfied that there is sufficient reason for the non-production of the original document, the court will allow a witness to refresh his memory by reference to a copy of such document.[629] An expert may refresh his memory by reference to professional treatises.[630] Section 168 allows a witness to testify to facts contained in a document, although he might not have a specific recollection of the actual facts, if he is convinced that such facts were correctly recorded in the

626 *Masere v Republic* [1989] KLR 483.

627 *Wiliams v Summerfield* [1972] 2 QB 512, 518-519..

628 *Nottingham City JJ. Ex p. Lynn* (1984) 79 Cr. App. Rep 291.

629 Section 167(3) of the Evidence Act.

630 Section 167(4) of the Evidence Act.

document. The adverse party is entitled to examine the document if he so requires and may also cross-examine the witness thereupon.

The essence of this rule is to aid in the administration of justice. However, the court must be cautious when a witness is using documents to refresh their memory. Where the witness is relying too much on the notes for their testimony there is likelihood that they are not testifying to their memory and are simply reciting their notes.

The court has discretion under section 173(1) in order to discover or obtain evidence, ask the witnesses or the parties questions about anything whether admissible or not, order production of documents or things notwithstanding objections raised by the parties. The parties are not entitled to cross-examine the witness on answers given to such questions except with the leave of court. However, the judgment must be based only on admissible evidence and answers can only be given to questions which the witness is entitled under the law to answer.

5. Objection to Production of Documents

Objection to admissibility of evidence should be taken when it is tendered and not subsequently. These objections may be classified into two classes, namely:

i) An objection which is sought to be proved is itself inadmissible in evidence.

ii) Where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient.

In the first case, an objection to the admissibility of a document is not excluded and can be raised at a later stage or on appeal even when the document has been marked as an exhibit. In the other case, the objection should be raised before the evidence is tendered once the document has been admitted in evidence and marked as an exhibit. The objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular will

not be allowed, even when a notice of objection has been issued. There must be actual objection at the earliest opportunity.

In *Trust Bank Limited v Paramount Universal Bank Limited & others,*[631] Lesiit, J observed:

> "To be fair to the defendants, they filed notices of non-admission of documents. However, the notices were not pursued during the trial of the case. In my view, it is rather late in the day for the defendants to challenge the documents already admitted in evidence during proceedings they fully participated in."

The crucial test is whether an objection if taken at the appropriate point in time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. Omission to object becomes fatal because failure by the party tendering the evidence to act on the assumption that the opposite party is not keen about the mode of proof.

A prompt objection is not prejudicial to the party tendering the evidence for two reasons:[632]

1. It enables the court to apply its mind and pronounce its decision on the question of admissibility at the instant;
2. In the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity to seek indulgence of the court for permitting a regular mode of proof and thereby removing the objection raised by the opposite party is possible.

F. Admissibility of Extrinsic Evidence affecting contents of a document

The effect of the general rule stated above is that contents of a document may be proved by production of primary or secondary evidence.[633] The general rule as to the 'exclusiveness' of evidence is

631 [2009] eKLR

632 Ouma, S.A, *Commentary on the Evidence Act Cap. 80* (2014) LawAfrica Publishing (K) Ltd) at page 291.

633 Section 64 of the Evidence Act.

that documents must be proved by primary evidence except in some instances when secondary evidence will be admissible.[634] Primary evidence means that the original document will itself be produced for the inspection of the court. Secondary evidence on the other hand refers to the certified copies of the original; copies made through the mechanical process; counterparts of the documents which were not executed or oral accounts of the contents of a document given by some person who has seen the document.

The problem here is one of admission of any evidence other than the document whose contents are under consideration. Usually it takes the form of "parol evidence," that is, oral testimony, but may consist of other documents. We turn the focus of our attention to the admissibility of extrinsic evidence to affect the contents of a document.

There are 2 concerns here:

i) Whether once a transaction has been embodied in a document, evidence may be given of its terms other than those it provides for; and.

ii) whether evidence may be given of the meaning of the terms of a document. Notice that most complete legal documents provide for the meanings of various terms therein.

In each case the problem is one of admissibility of "extrinsic evidence" i.e., any evidence other than the document, the contents of which are under consideration (sometimes extrinsic evidence comprises "parol evidence", but may also comprise evidence of other documents). The general rule is that extrinsic evidence is generally speaking inadmissible when it could, if received, have the effect of adding to, varying, subtracting from or contradicting the terms of a judicial record, or a transaction required by law to be in writing, or a document constituting a valid and effective contract..[635]

634 Sections 67 and 68 of the Evidence Act.

635 Section 98 of the Evidence Act.

In *Bank of Australia v Palmer,*[636] Lord Morris had the following to say concerning parol evidence rule:

> "Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the persons have deliberately agreed to record any part of their contract."

In the words of *Lord Denman in Goss v Nugent*[637]

> "If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract."

In *Binti Abdulla v Sharifa Binti Mohamed*,[638] a settlor by a written instrument declared a wakf (trust) of certain property stating that the income derived therefrom was to be divided between her two adopted daughters in certain proportions. A dispute arose on the construction of the said instrument. The court held that extraneous evidence to show that the settlor intended her disposition to be limited to the maintenance and support of the children was inadmissible.

The above general rule is subject to several limitations and qualifications at common law.[639]

Where the document is not in issue itself, but is merely used as evidence to prove some fact, oral evidence may be called to explain that fact. For instance, the fact that the recital of a mortgage or charge recites that; "In consideration of the sum of KShs.2,000 paid by the mortgagee the mortgagor hereby covenants." It does not prevent oral evidence of non-payment being given. Likewise, in an agreement for sale in the event of non-payment, the general rule does not prevent admission of evidence of breach.

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636 [1887] AC 540, 545.

637 [1833] 5 B & Ad 58.

638 [1959] EA 1035.

639 Corbin, Arthur, "*The Parol Evidence Rule"* (1944). Faculty Scholarship Series. Paper 2901.

In *Jafferji v Lukmanji*,[640] the mortgagor acknowledged receiving KShs. 2,000 as consideration for the mortgage in a deed of mortgage. In a suit by the mortgagee for recovery of the money, or in default for payment, the sale of the property, the mortgagor pleaded that the mortgage deed was a fictitious document and that he never received a single cent from the mortgagee. It was proved at trial that the recital in the deed that the mortgagor had received KShs. 2,000 was incorrect. The mortgagor gave evidence in support of his contention that the mortgage deed was fictitious. The mortgagee failed to contradict this evidence, and in fact, gave no evidence at all. The court dismissed the suit. The mortgagee went on appeal contending that the mortgagor's evidence was improperly admitted. Court held in dismissing the appeal that under section 99 of the Evidence Act, oral evidence was admissible to rebut the recital in the mortgage deed. The court went on to hold that the onus was on the mortgagor to establish that the recital was incorrect and that having succeeded in doing so, the onus shifted back to the mortgagee to prove the existence of consideration. The mortgagee failed to do this.

Likewise, extrinsic evidence is admissible to resolve an apparent ambiguity in a written document as was seen in *Bank of New Zealand v Simpson*[641] discussed below where Lord Davey [P.C] observed that:

> "Extrinsic evidence is always admissible, not to contradict or vary the contract: but to apply it to the facts which the persons had in their minds and were negotiating about."

In *Bank of New Zealand v Simpson*, the issue for determination was whether extrinsic evidence was admissible to construe the terms of the written contract in an action to recover money for extra commission in respect of the making of an extension of a railway. The respondent's claim was that under a term of the contract, he was entitled to charge his commission of 1½% of £35,000 and not the actual cost of construction which was £28,116. The written contract provided that the respondent, a railway engineer, received extra commission: "On the estimate of £35,000 in the event of my

640 (1946) 13 EACA 77.

641 [1900] AC 182.

being able to reduce the total cost of the works below £30,000." During trial, an application to give extrinsic evidence to the written contract was allowed, showing that the respondent's response was included in the calculation of the total cost of the construction works at approximately £30,000. There was no evidence or contention that the words of the contract had any technical meaning other than the ordinary meaning. Judgment was given to the appellant.

On appeal, Lord Campbell observed that:

> "I am of the opinion that when there is a contract for the sale of a specific subject matter oral evidence may be received, for the purpose of showing what that subject matter was, of every fact within the knowledge of the parties before and at the time of the contract."[642]

The court went on to hold that the evidence was rightly admitted to show to what items of cost the estimate related. Words with a fixed meaning in a written contract could not be explained by oral evidence to mean something different from what they intended. Where the words used were susceptible to more than one meaning, extrinsic evidence was admissible to show the facts which the negotiating parties had in their minds.

Evidence of antecedent negotiations is relevant and admissible if they retain their actual effect after the writing has been brought into existence; for purposes of identifying the subject matter of contract, or a collateral contract to that writing or the conclusion of a contract which is partly oral and partly in writing.

The date on a document is not a term of the contract. Oral evidence to prove the date on which the contract was entered into is therefore, admissible.

In *Folkes and Co. v Thakrar and another*,[643] the applicants sued the respondent company and 2 of its directors as guarantors to a contract for 2 consignments of flour delivered to the respondent. It was alleged that the 2 directors had on 18 April 1956 guaranteed payment of all money due by the company for goods supplied by the applicant. They had promised to sign a written instrument

642 *Supra*, 187.

643 [1959] EA 36.

of guarantee which they did on 22 May 1956. The instrument bore the same date. At trial, the applicant sought to show that the instructment of guarantee had been signed not on May 22, but 18 April 1956 before delivery of the first consignment and that it had been preceded by an oral guarantee.

The trial court ruled that such evidence was inadmissible and held that the guarantee was effective on 22 May 1956.

On appeal, it was held that the trial judge was wrong in treating the date written at the top of the written guarantee as a term of the contract. It was open to the applicant to call oral evidence to show that the date written on the written guarantee was not in fact the date of execution. Lastly, the court held that the written guarantee was intended to cover moneys due on goods already delivered on credit as well as money which might fall due on goods delivered in the future.

Likewise, it has been held that oral evidence is admissible to prove the date of any alteration to a document as was the case in *Mohammed Roshan & Co. v Santa Singh* discussed below.[644]

Besides the common law limitations to the general rule noted above, the Evidence Act has recognized several exceptions to the rule as follows:-

1. Invalidity of Contract Exception

When any fact may be proved by oral evidence and which would invalidate a document or entitle any person to a decree/order to rescind it or rectify it, then such evidence is admissible. For example if one person were to show by oral evidence that they became a party to a document through fraud, duress, illegality, mistake or improper execution thereof, (want of actual capacity) or consideration or mistake of law or fact, then his evidence would be admitted.[645]

In *H.J. Patel v F.B. Patel*,[646] the plaintiff sued the defendant on some instrument which on the face of it looked like a bond. The

644 [1959] EA 717.

645 Section 98 of the Evidence Act.

646 [1941] 19 KLR II 41.

defendant denied liability on grounds that the matter involved a suit on a bond which set out consideration for the payment of some KShs 13, 439.65 by installments with the usual default clause. Default having been made, the defendant denied liability on the grounds that the transaction covered by the bond was a money-lending contract and that at all material times the plaintiff was an unlicensed money-lender. The plaintiff raised a preliminary point of law that it was not open to the defendant to give evidence that the transaction was a money-lending one.

The court held that money-lending transactions by unlicensed money-lenders are illegal, null and void. Further, that evidence was admissible to prove that the consideration recited in the bond was unlawful and the bond therefore void. The transaction in this case was not actually a bond, but rather a money-lending agreement and further that since the plaintiff was an unlicensed money-lender, the transaction was illegal.

The plaintiff argued that the defendant was estopped from denying that the document was a bond, but the court held that the defendant was at liberty to adduce evidence to show the true nature of the document or to invalidate its contents.

Section 105 of the Evidence Act confirms that persons who are not party to a document may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

2. Existence of Separate Oral Agreement or Real Nature of Transaction

When there is in existence a separate oral agreement as to any matter on which a document is silent, which is not inconsistent with its terms, then it may be proved and admitted.[647] Moreover, any distinct oral agreement entered into either contemporaneously, will or as a preliminary measure to the written contract which is not inconsistent with its terms, then it may be proved.

647 Section 98(ii) of the Evidence Act.

In *Davis v Whitehead*,[648] extrinsic evidence was received to show that an apparent sale was really a mortgage. By an indenture dated (1890), the Duchess of Malborough in consideration of natural love and affection assigned to Her Highness, the Duke, a leasehold house belonging to her.The deed was in the form of an absolute assignment. The Duke mortgaged the house to raise money to pay his debts.The Duchess joined with the Duke in covenanting to pay the mortgage debt, but the equity of redemption was reserved to the Duke alone. The Duke died in 1892 and the Duchess claimed to be entitled to the house subject to the mortgage. Evidence called showed that she had assigned the house to the Duke solely to enable him mortgage it in his own name, and that it was part of the agreement that he would re-assign to her, which if he would have lived, he would have done.

The court held that the case fell within an exception of the Statute of Frauds & Consequences and could not, therefore, be pleaded successfully in opposing the claim of the Duchess.

In *Jos Hansen and Soehne A.M.B.H v Jetha Ltd*,[649] it was held that a contract of guarantee in which space for the signature of a fourth surety had been left blank, was silent as to whether the signatures of the 4 guarantors was a condition precedent of the guarantee coming into force. Further, that the statement of the 3 sureties that their signatures alone were sufficient security was not a subsequent modification of the guarantee but rather a collateral oral term evidence whereof was admissible.

In *Turner v Forwood*,[650] the plaintiff entered into a contract under seal with a company and a director whereby he assigned a debt due to him from the company in exchange for favours done to the director for some consideration. The court held that oral evidence may be given of an antecedent agreement by the director to pay in full for the debt.

648 [1894] 2 Ch 133.

649 [1959] EA 563.

650 [1951] 1 All ER 746 (CA).

3. Oral Agreement Constituting Condition Precedent or Condition Precedent Exception

The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved and admitted.[651]

In *Bilous v Bilous*,[652] a husband and wife agreed to purchase a farm for the price of KShs. 60,000 jointly by contributing KShs. 3,000 each towards the initial deposit. The wife instructed the advocate that the conveyance of the property was to be in her name alone, but that the husband would join in the mortgage where he would be the principal. This was done without the authority of the husband. Matrimonial differences arose between the parties, whereupon the wife sued for a declaration that the farm belonged to her and for an injunction to restrain the husband from setting foot thereon. The husband called evidence to the effect that a constructive or resulting trust had sprung up in his favour, but the same was excluded by the trial court, which held that it was inadmissible under the then sections 91 and 92 of the Indian Evidence Act. On appeal, this view was overruled and the appeal allowed. The appellate court held that being a third party to the contract of mortgage, evidence that a resulting or constructive trust arose in favour of the husband was admissible. And further that section 92 of the Indian Evidence Act (now section 98 of the Evidence Act) could not prevent him from showing how the mortgage came to be executed.

4. Subsequent Oral Agreement to Modify or Condition Subsequent Exception

The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property may be proved except in cases where such contract, grant or disposition is by law required to be in writing, or has been registered in accordance with the law in force for the time being, as to the requirement of such documents, is admissible.[653]

651 Section 98(iii) of the Evidence Act.

652 [1957] EA 96.

653 Section 98(iv) of the Evidence Act.

Whether such writing is to be treated as being contractual or not, depends upon the intention of the parties. This intention may be ascertained by means of extrinsic evidence or by means of inferences, which a reasonable man would draw from the terms of the document and the surrounding circumstances.

In *Arlen v Pink*,[654] the plaintiff bought a horse from the defendant who handed him a receipt for the purchase price. Court held that the receipt did not preclude the plaintiff from proving an oral warranty of the fitness of the animal.

The court in *Hulton v Watling*[655] treated the matter as being one of construction. It held that the document was contractual and that the defendant's evidence that no option was given was inadmissible. This was a case in which a document providing for the sale of a business by the defendant and containing an option to purchase the land on which the business was carried on, was the fact in issue.

5. Usage and or Custom Exception

Where the existence of any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved, then such evidence is admissible if it would not be repugnant to or inconsistent with the express terms of contract.[656]

For example, in an agreement for sale of land, a party takes the property subject to such conditions as are notified in the title, say with regards to the easements or other burdens. In *DeLasalle v Guildford*,[657] the plaintiff made it plain to his landlord, the defendant, that he would not execute the lease unless the defendant gave a warranty concerning the healthy condition of the drains. Such warranty was verbally given and the lease duly executed. The lease however, made no reference to the state of the drains. The defendant failed to maintain them as agreed. The Court held that the fact that

654 [1838] 4 M & W 140.

655 [1948] Ch. 398.

656 Section 98(v) of the Evidence Act.

657 [1901] 2 KB 215.

the drains were not maintained did not prevent the adduction of oral evidence concerning the warranty.

Another example of the use of extrinsic evidence arises in cases where one party is allowed to establish a trade usage provided that it is not in consistent with the writing. Coleridge J in *Brown v Byrne*,[658] stated:

> "In all contracts as to the subject matter of which known usages prevail, persons are found to proceed in the tacit assumption of these usages, they commonly reduce into writing the special parts of their agreement but omit to specify those known usages, which are included, however, as of course, by mutual understanding; evidence therefore, of such incidents is receivable."

6. Fact Relating the Provisions of a Contract to Existing Facts

Any fact may be proved by oral evidence, which shows the manner in which the language of a document is related to existing facts.[659]

In *Mohammed Roshan v Santa Singh*,[660] there was a contract for certain excavation work to be done at a rate of 15/= per 100 c/fr. Later, the figure 17/= was substituted for 15/= in the appellant's copy of the agreement. The alteration was signed by the respondent. The work fell into 2 stage , the appellant undertaking to carry out the second stage on similar terms, but at a higher rate of pay. The appellant sought to prove that the altered figure in the agreement applied only to the second stage. The court held that under provisio 6, evidence was admissible to show how the language of the altered document was related to the existing facts.

H. Conclusion

Justification for the best evidence rule lay in the fact that it was a means of reducing the risks of fraud, mistake and inaccuracy which might result from proof by either production of a copy of a document or parol evidence of its contents – all of which were

658 [1854] 3 E & B 703.

659 Section 98 (vi) of the Evidence Act.

660 [1959] EA 717.

forbidden by the Statute of Frauds, 1677. However, with the passage of time, the antiquated rule has witnessed progressive chipping away such that what remains of it is hardly recognizable. Nevertheless, the documentary evidence rule plays a vital role in the adduction of evidence of any written transactions entered into today.

CHAPTER 11

HEARSAY EVIDENCE

A. INTRODUCTION

The definition of the hearsay rule in English law is "assertion-based", meaning that it is founded on the concept of a "statement" or "assertion" made by a person.[661] The definition regulates the use in evidence of any statement or assertion not made by a person while testifying in proceedings.[662] Thus, this chapter deals with statements by persons who cannot be called as witnesses.

The term "hearsay" is not defined in the Evidence Act. However, section 63(1) thereof embodies the basic rule of hearsay evidence. It provides that oral evidence must in all cases be direct evidence. It is noteworthy that the term 'direct evidence' means 'original evidence' i.e. of a fact an individual has perceived on his own such as through sight, sense or by hearing. Evidence is said to be direct where it establishes the main fact in issue.[663] The Act then proceeds to give examples of direct evidence in various instances.[664]

The standard definition given by Cross is that:[665]

> "Hearsay is an assertion other than one made by a person while giving oral evidence in the proceedings, it is inadmissible as evidence of any fact asserted."

This definition is clearly inadequate as it makes no mention of documentary evidence.

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661 I.H Dennis, *The Law of Evidence*, 2nd edn (Sweet and Maxwell, 2002) page 543.

662 I.H Dennis, *The Law of Evidence*, 2nd edn (Sweet and Maxwell, 2002) page 543.

663 Steve Ouma, *A Commentary on the Evidence Act Cap. 80* (LawAfrica, 2014) page 67.

664 Section 63(2)(a), (b), (c), (d) Direct evidence according to the Act refers to evidence with reference to a fact which could be seen, evidence of a witness who says he saw it. Further, with reference to a fact which could be heard, evidence of a person who says he heard it or with reference to a fact which could be perceived by any other sense, evidence of a witness who says he perceived it by that sense. It also refers to the evidence of a person who holds an opinion with reference to a fact or the grounds thereof.

665 *Cross & Tapper on Evidence* (8th edition, Butterworths 1995) pages 46 and 564.

Bryan A. Garner[666] gives a standard definition of the term hearsay as follows:

> "A statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay evidence is testimony in court of a statement made out of court, the statement being offered as an assertion to show the truth of the matter therein, and thus resting for its value upon the credibility of the out of court asserter. Evidence not proceeding from the personal knowledge of the witness, but from the mere repetition of what he has heard others say."

The latter definition is more inclusive, though it also fails to reckon with the fact that hearsay evidence has both an express as well as an implied dimension.

The hearsay evidence rule applies to civil and criminal cases in both oral and documentary evidence. It is, however, much easier to think of it as applying to statements and not to real evidence. Some guidelines for spotting hearsay evidence are:

i. Determine whether a witness is repeating in court a statement made out of court, either by way of oral evidence or by tendering in evidence a document containing statements made by a party out of court.

ii. Determine the purpose for which the out of court statement is being repeated in court. If the purpose is to establish the truth of its contents on a fact or opinion, it is hearsay evidence. If not, for example, to show that the statement was made, it is not hearsay and is admissible in evidence.

Failure to appreciate the purpose for which an out-of-court statement is put forward may lead to absurd results as was seen in the *Rice* case.[667] In *Rice* the issue was whether the prosecution could put in evidence of a used airline ticket which specified a flight number and the name of a Mr Rice. The ticket had been found at an airport terminal shortly after the flight had landed. The ticket together with other evidence would have linked Rice to a conspiracy. Rice

666 *Black's Law Dictionary*, 5th edn 2003.

667 [1963] 1 QB 857.

claimed that the ticket was a hearsay statement by a ticket agent that Rice would take that flight. The Court of Appeal held that the ticket was indeed, a hearsay statement by the agent that a man called Rice made a booking, though it was not hearsay that Rice would make the flight. It was therefore original evidence that Rice had travelled on the flight and was subsequently convicted.

B. General Rule on Hearsay

The general rule on hearsay may be stated as follows:

> "A statement made by a person not called as a witness, which is offered in evidence to prove the truth of the facts contained in the statement is hearsay and is not admissible. If, however, the statement is offered in evidence, not to prove the truth of the facts contained in the statement, but only to prove that the statement was, in fact, made, it is not hearsay and is admissible.[668]

The general rule as to hearsay arises in the context of a witness testifying or giving evidence in court, and it relates to either oral or written evidence. In the simplest terms therefore:[669]

> "Hearsay means that a witness 'says' in court what he 'heard' from someone else, that other person not having been called as a witness for the purpose of proving the fact repeated by the witness, in order to prove that what he heard was true."

The question that should always be asked in relation to possible hearsay evidence is: What is the purpose of adducing this evidence? It is only if the purpose is to prove the truth of some fact stated in the assertion that the hearsay rule applies.[670]

Express or Implied Assertions

Hearsay evidence can be classified into express or implied assertions. Several cases suggest that the hearsay evidence rule excludes not only express assertions intended to be made by the maker, but also implied assertions inherent in a statement which were unintended by the maker.

668 Philip P. Durand, *Evidence for Magistrates* (1969) page 149.

669 Philip P. Durand, *Evidence for Magistrates* (1869) page 149.

670 I.H Dennis, *The Law of Evidence,* 2nd edition, (Sweet and Maxwell, 2002) page 545.

A number of cases are illustrative of hearsay as express assertions. In *Subramanian v DPP*,[671] the accused was charged and subsequently convicted with being in possession of a firearm without due cause, an offence which carried a mandatory death sentence. In his defence, the accused said that he carried the firearm in consequence of some threats he had received from some terrorists and which he had reported. He was overruled by the judge when he attempted to state what the terrorists told him. He appealed to the Privy Council which overruled the conviction on grounds that what the terrorists had told him should have been admitted as original evidence. It would shed light on his subsequent action.

Justice da Silva said:[672]

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

Likewise, in *Myers v DPP*,[673] the appellant was charged and convicted of dishonesty, receiving, handling and selling stolen motor vehicles. He was in the business of purchasing motor vehicles involved in accidents. He then would take the stolen motor vehicles and fix the registration numbers of the wrecked vehicles to the stolen cars as if they were wrecks repaired by him. He would also alter the wreck logbook to match the stolen one. The prosecution produced records kept on microfilms that were prepared at the factory by workers who would note the engine number, chassis number among other details on them as well as on the cards. The microfilm was prepared from records compiled by workmen on cards, which were destroyed after being filmed, and which recorded the cylinder head number of each car. Since the cylinder head number was stacked indelibly on the cylinder, it made it unalterable.

671 [1956] 1 WLR 965.

672 [1956] 1 WLR 969.

673 [1964] 2 All ER 881.

During trial, the factory manager produced the microfilm and the trial Court admitted it as evidence of the truth that the cylinder head number belonged to the stolen vehicle. The trial court admitted the evidence and the appellant was convicted, He appealed on grounds that the evidence admitted was hearsay which was not admissible. On appeal, the conviction was affirmed. The appellant appealed to the House of Lords.

It was held that the trial court and Court of Appeal improperly admitted hearsay evidence in the form of the microfilms. Per Lord Reid:[674]

> "The witness could only say that a record was made by someone else to show that if the record had been correctly made, a car had left the works having three particular numbers and he could not prove that the record was correct or that the numbers on the card were the numbers on it when it was made. This is a highly technical point; but the law regarding hearsay evidence is technical and I would say, absurdly technical."[675]

In *Patel v Comptroller of Customs*,[676] the appellant imported from Singapore into Fiji some coriander seed shipped in bags. He correctly engrossed the customs import Entry Form A in accordance with the particulars contained in the invoice, referable to the purchase of the seed. On investigation at arrival, however, five bags were found each to be contained in an outer bag marked with the appellant's trade name, but the inner bags had the following words written on them, "Alberdan/AD/4152/Coriander Favourite Singapore" and at the base of them the legend "Produce of Morocco." In the import entry form the country of origin was stated to be India.

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674 [1964] 2 All ER.

675 See also *Tenywa v Uganda* [1967] EA 102 where the appellant was charged and convicted by the trial court for stealing a bicycle. The prosecution presented evidence of a report which suggested that the original number plate of a stolen bicycle had been altered. The author of this report was not called as a witness though the trial Magistrate admitted it as evidence. On appeal, court upheld the decision by the trial court that the author of the report would have testified in court and be cross-examined on the report as to how he arrived at the conclusion, otherwise, the report is hearsay and inadmissible.

676 [1966] AC 356 (PC).

The appellant was charged and convicted with making a false declaration in a customs import entry produced to an officer of customs, in that, in respect of the five bags, instead of declaring the origin of the seed to be Morocco he declared it to be India.

On appeal, it was held that the evidence of the writings on the bag were inadmissible on account of the hearsay evidence rule. Further, it was held that the bags could be used and re-used from one country/person to another. Hence, the evidence based on that statement was hearsay and inadmissible. In the words of Lord Hodson:

> "The only entry as to which the allegation of falsity is made is the word "India" in the column headed "country of origin", and which is part of the import entry form signed by the appellant. The only evidence purporting to show that this entry was false is the legend "Produce of Morocco" written upon the bags. Their Lordships are asked by the respondent to say that the inference can be drawn, that the goods contained in the bags were produced in Morocco. This they are unable to do. From the evidentiary point of view, the words are hearsay and cannot assist the prosecution… (the Privy Council referring to *Myers v DPP*). Nothing here is known of when and by whom the markings on the bags were affixed and no evidence was called to prove any fact which tended to show that the goods in question, in fact came from Morocco."[677]

In *Njunga v R*[678] the accused was charged and convicted with the offence of being armed with intent to commit a felony. Police witnesses gave evidence at trial saying that they had been told by a police informer of the alleged attempted offence. The informer was not called to give evidence nor was his identity revealed. The accused was convicted. On appeal, it was held that the trial magistrate had before him hearsay evidence of a very damaging nature. Without the hearsay evidence, the court could not have found the necessary intent to commit a felony.

Subsequently, the appeal against the conviction was allowed.

677 *Ibid.* [1966] C356 (PC).

678 [1965] EA 773 (K).

The House of Lords decision in *R v Blastland*[679] upheld the trial Court's decision to exclude as inadmissible hearsay evidence of the content of a confession made by a person other than the accused. Counsel for the defence wanted this confession admitted in court as evidence of its truth. It was held that this was hearsay and because it was not covered by any recognized exception to the hearsay evidence rule, it was inadmissible.[680]

In *Tenywa v Uganda,*[681] the appellant was charged and convicted by the trial court for stealing a bicycle. The prosecution presented evidence of a report which suggested that the original number plate of a stolen bicycle had been altered/forged. The author of this report was not called as a witness though the trial magistrate admitted the report as evidence. On appeal, the court upheld the decision by the trial court that the author of the report would have testified in court and been cross-examined on the report as to how he arrived at the conclusion, otherwise, the report suggesting that the original number plate was altered, was hearsay and therefore, inadmissible.

Hearsay as implied assertions was considered in the following cases:

In *Teper v R*,[682] an unidentified woman bystander was heard to exclaim to a person identified as the accused:

"Your place burning and you are going away from the fire!'

It was held that this was an implied statement of identification of the accused and that it was therefore hearsay as to that fact, identification.

In *Wright v Doe De Tatham*,[683] the action concerned land owned by John Marsden, the deceased. Wright claimed as a devisee[684] under

679 [1985] 2 All ER 1095.

680 See also *Sparks v R* [1964] AC 964, where a white man was charged with indecent assault of a girl aged 3. Evidence tendered to invite the court to believe the truth of the out of court statement by the girl who did not give direct evidence herself, was hearsay, and again inadmissible because it was not covered by a recognized exception to the rule against hearsay.

681 [1967] EA 102 (U).

682 [1952] AC 480.

683 [1837] 132 ER. 877 7A and 313.

684 A devise is a gift by will, usually applicable to real property. A devisee on the other hand, is a person given real property under a will.

the deceased's will, while the plaintiff claimed as heir at law, alleging that the will was void on ground that the deceased had inadequate mental capacity to make a valid will. The plaintiff called evidence of the way the deceased as a child was treated by the servants; that in his youth, his village nickname was *Silly Jack and Silly Marsden*. The defendant adduced evidence in support of the competency of the deceased by production of letters written to him by persons who knew him well to show that they treated him as sane.

The trial court excluded the letters as hearsay and found in favour of the plaintiff. Wright appealed. The appellate court affirmed the trial court's decision and held that to admit such letters would lead to indiscriminate admission of hearsay evidence. The statements in such letters are mere instances of hearsay evidence, not on oath but implied in or vouched by conduct of persons by whose acts the litigants are not bound.

Parke B concluded that:

> "Proof of a particular fact, which is not itself a matter in issue, but which is relatively only as implying a statement or opinion of a 3rd person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself admissible."

In *R v Kearley*,[685] the accused was charged with being found in possession of and with intent to supply controlled drugs. He was arrested and held in custody. The prosecution sought to prove that he was a supplier of these drugs by adducing evidence of his telephone calls that the police had intercepted. Further, that the accused received visits at his flat from people who were either customers and or potential customers. These callers and visitors to the flat did not give evidence at the trial. The police relied on this to prove their case. On appeal, the House of Lords held that the intercepted calls/conversations by the police officers amounted to inadmissible hearsay evidence. The relevance of the conversations lay solely in the implied assertion that the accused was a drug supplier. Since an express assertion to the same effect would have been inadmissible, the implied evidence had to be excluded.

685 [1992] Vol 2 All ER 345.

The Rationale for the Rule against Hearsay Evidence

The rule against hearsay was adopted because trials were being held in court before a jury made up of ordinary men and women with little knowledge of the complexities of the evidential process. Not knowing what the rule on hearsay evidence was, the jury was likely to admit such evidence. In order to protect the integrity of the trial process, it was sought to remove hearsay evidence. The leading judicial account of the reasons for the hearsay rule is in the opinion of Lord Normand in *Teper v R.*[686]

> "[Hearsay] is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words were spoken to by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost."

Five reasons were advanced at common law to justify the inadmissibility of hearsay evidence. They are as follows:[687]

i. Allowing a witness to repeat statements in court is to allow them to adduce evidence of facts which he may not have perceived and of which he has no personal knowledge, that is, potential unreliability of manufactured evidence. In the case of *Kearley,* Lord Ackner referred to the danger of concoction of hearsay evidence as one reason for excluding police evidence of alleged incriminating telephone calls when the callers did not testify[688]. Indeed hearsay evidence is not considered as the best evidence, and the rule is that the court should have access to the best available source of evidence.

ii. Allowing a witness to adduce hearsay evidence deprives the opposite party the opportunity to cross-examine the real maker of the statement in order to test the accuracy of the assertions. Considering Lord Normand's rationale in *Teper*, this is often considered the most important rationale of the rule. Nonetheless others argue in support of hearsay evidence noting that cross-

686 [1952] AC 480 at 486.,

687 Adrian Keane, *The Modern Law of Evidence* (4th edition, 1996 Butterworths) page 220.

688 [1992] 2 AC 228 at 258.

examination may not make much of an impression in cases involving documentary evidence[689].

iii. Hearsay evidence deprives the court/tribunal an opportunity to observe the demeanour, attitude, intonation, among other attributes of the maker of the statement who is not in court. However, it is important to note that opinions differ on the value afforded to demeanour of witnesses as a guide to reliability[690]. Authors Spencer and Flin stated the following after a review of psychological literature;

> "The most that can be said for the value of the demeanour of a witness as an indicator of the truth is that it is one factor, which must be weighed up together with everything else. It would be quite wrong to promote it to the level where we use it to accept or reject the oral testimony of a witness in the face of other weighty matters all of which point the other way."[691]

iv. At the time the statement was made, the importance of such statement and the obligation on the part of the maker to say the truth might not have been uppermost in the mind of the maker.

v. The danger of inaccuracy or misstatement becomes real in oral hearsay, especially multiple oral hearsay, since the witness appearing before court might not be the first person to repeat it after the maker.

The dictum of Lord Bridge in *R v Blastland* suggests that:[692]

> "Hearsay evidence is not excluded because it has no logically probative value... The rationale for excluding it as inadmissible evidence, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a jury than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and who has not been subject to any test of reliability by cross-examination... The danger against which this fundamental rule provides a safeguard is that

689 I.H Dennis *The Law of Evidence*, 2nd edn, (Sweet and Maxwell, 2002) page 552.

690 Law Commission, CP. number. 138, paras 6.20-6.30 (England).

691 J.R. Spencer and R. Flin, *The Evidence of Children* (2nd edn, London,1993), page 280.

692 [1985] 2 All ER 1095.

untested hearsay evidence will be treated as having a probative force which it does not deserve."[693]

C. Exceptions to the Hearsay Rule

The exceptions to the hearsay rule are, generally speaking, divisible into two batches:

i. Statements made by persons who cannot be called as witnesses and;

ii. Statements made under certain circumstances

Hearsay evidence could also arise in the case of interpreters as was seen in *R v Gutosi son of Wamagale*.[694] The court said in this regard that:

"We note that the statement made by the appellant, a superintendent of police, was admitted although the 2 interpreters who had carried out double interpretation were not called as witnesses. Without the evidence of these interpreters the statement was strictly inadmissible, since the superintendent of police could only reply to what he was told/asked by the second interpreter."

1. Statements Made by Persons who Cannot be Called as Witnesses

Section 33 of the Evidence Act deals with statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable. The burden of proving the admissibility of such statements rests on the party who wishes to rely on hearsay evidence in support of their case.[695]

These statements are divided into 9 categories:

i. Statements relating to cause of death.

693 [1985] 2 All ER 1095 at page 1099; Adrian Keane, *The Modern Law of Evidence* (4th edition, 1996 Butterworths) page 221.

694 [1947] 14 EACA 170.

695 Section 110 of the Evidence Act.

ii. Statements made in the course of duty.

iii. Statements against the interest of the maker.

iv. Statements giving the opinion of any person as to the existence of any public right or custom or matter of public/general interest.

v. Statements relating to the existence of a relationship.

vi. Statements relating to family affairs.

vii. Statements relating to a transaction creating or asserting a custom.

viii. Statements made by several persons and expressing feelings.

ix. Statements given as evidence in previous judicial proceedings.

We shall proceed to examine each one of them in detail.

2. Dying Declaration Exception

Under section 33(a) of the Evidence Act when the statement is made by a person as to the cause of his death or as to any circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, such statements are admissible whether or not at the time they were made the maker was under expectation of death.

The following three conditions must be fulfilled for dying declarations to be admissible:

1. The maker of the statement must be dead.
2. The statement must relate to the cause of his death or circumstances of the transaction which resulted in his death.
3. The cause of that person's death must be the subject or a question in the proceedings.

Lord Ackner in *R v Andrews*[696] gave tests under which dying declarations may be admitted as evidence:

i. Can the possibility of concoction or distortion be disregarded?

696 [1987] AC 281

ii. If an occurrence was unusual to the point it dominated the victim's thought causing a reaction without reasoned reflection;

iii. A spontaneous statement must be connected with the event that caused it;

iv. There should be no opportunity or likelihood of concoction or distortion;

v. There should be no special feature likely to result in error

The maker need not have been expecting death at the time the statement was made. The Evidence Act has amended the common law position that the maker be in a settled and hopeless expectation of death.

The *locus classicus* on point is *Swami v King Emperor*,[697] where the court examined the admissibility of a dying declaration relating to the circumstances of the transaction which resulted in the death of the deceased. The deceased left his home one morning and told his wife that he was going to meet with the accused (Mr. X) who would pay a debt owed to him. The deceased set off and boarded a vehicle to visit Mr. X but he never returned. The next time the wife saw the husband, he was dead. X was arrested and charged with murder. The wife gave evidence of what the deceased had told her during the trial of Mr. X. This statement was held to be admissible by the trial court on the basis that it provided evidence of the circumstances of the transaction i.e. the reason for the visit and whom he was going to meet. The accused was convicted. On appeal, it was held by the Privy Council that the statement could indeed be made before someone dies, or before the cause of death is established, or before a person has any reason to expect to be killed.

Admissibility of evidence of a dying declaration is justified on the basis that although the statement was not made under oath, the certainty of death is such a strong inducement that it compels persons to say the truth before they meet their maker.

697 (1939) 1 All ER 396.

In *Pius Jasunga son of Akumu v R,*[698] a witness, the police inspector, gave evidence that he saw the deceased lying on the road with a wound in his chest. When he asked him who had injured him, the deceased replied that Pius Jasunga had stabbed him. Later in hospital the deceased made a statement by way of answering questions put to him by the police and medical staff. His mind was clear, he started talking strongly at first but he got weak with time and eventually died before he could sign the statement. The question was whether the statement was admissible in evidence. It was held that admissibility of a dying declarartion is dependent on section 33 of the Evidence Act and the weight to be attached to such statement depended to a great extent on the circumstances in which it was given. The court also noted that there was need for caution to be exercised in the reception of such evidence as evidence of identification especially when an attack occurred in darkness.

Likewise, in *Ajionzi v Uganda*[699], the appellant, the deceased and two other policemen were instructed to mount an operation at about 3:30 pm on 6 April 1997, to find a motor vehicle which had been reported stolen. In the course of executing the operation, a shooting occurred as a result of which the deceased was fatally injured. Prior to his death, however, he was able to make a dying declaration to one D/C Betungura in which he said that a fellow officer with whom he had been on duty had shot him. Following further inquiries, the appellant was arrested and charged with murder. At the end of his trial, the trial judge found him guilty as charged and sentenced him to death. He appealed on the grounds, *inter alia*, that the trial judge had misdirected himself in relying on the uncorroborated dying declaration of the deceased to establish his identity as the person who killed the deceased. It was also submitted that the trial judge erred in relying on exhibits that had been badly handled and in holding that there was sufficient circumstantial evidence to establish that he (the accused) had shot the deceased. The court held that although it is not a rule of law that there must be corroboration of a dying declaration before it can support a conviction, it is generally very unsafe to base a conviction solely on such a declaration unless

698 (1954) 21 EACA.

699 [2002] 1 EA 6 (CAU).

there is satisfactory corroboration. Evidence of a dying declaration must be received with caution particularly where an attack took place in darkness because the identification of the assailant is usually more difficult then than it would be in daylight. The circumstances in which the attack took place made a favourable identification difficult, meaning that the dying declaration required corroboration.

Under common law, the maker of the statement was required to be under "a settled and hopeless expectation of death."[700] Hence, the evidence of a dying declaration was admissible only in a murder or manslaughter trial. The Evidence Act has broadened the exception to incorporate any case in which the death of the victim is a fact in issue. Indeed under the Evidence Act, the maker of the statement may not be expecting to die at the time of the making of the statement. Needless to say, the case may either be civil or criminal.

For a statement to be admissible as a dying declaration, it must be complete. Therefore, a statement made by a man who falls into a coma while making it and never recovers is inadmissible because such statement is unacknowledged and there is no means of knowing whether the deceased would have acknowledged its veracity or would have altered it had he been able to do so.[701]

Further, if on account of information given in a dying declaration it is reasonably possible to conclude that the deceased has said all that he or she wished to say, that statement is incomplete and inadmissible if the deceased dies before completing it.

In *R v Charles Daki,*[702] the court noted that if a statement is not completed before death and there is reason to believe that the utterances could have been qualified by other words which the dying man wished to say but was prevented from uttering, the value

700 *King v Woodcock* [1789] 1 Leach 500 Eyre CB rationalised the common law exception as follows:

"The person on which this species of evidence is admitted is, that they are declarations made in extremity, when the person is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a court of law of justice."

701 *Waugh v King* [1950] AC 203[2002] 1 EA 6 (CAU).

702 [1966] EA 34 (HCU).

of the statement made is impaired and as evidence, may carry little or no weight.

In this case, the deceased was admitted in hospital for gunshot wounds. While still in hospital, he was interrogated by some policemen who asked him, "Who shot you?" and to which he answered, "Charles Daki has killed me. He has shot me with a gun. I saw him with a gun. He was on a motor cycle…" The deceased was interrupted before concluding his statement by a doctor on the ground that the patient was in pain, hence unfit for further interrogation. The prosecution arrested Charles Daki and charged him with the murder of the deceased. In support of the prosecution case, the statement was referred to by one of the prosecution witnesses. It was held that this statement was inadmissible because the deceased might have or might not have added some words to the statement, which would either have reinforced or contradicted the statement.

There must also be proximity in time of events for statements made by persons who cannot be found to be admissible.

In *Barugahare v R*[703] the accused was charged with the murder of the deceased. During trial, there was a witness who said that some 6 weeks before her death, the accused had asked her to marry him but she declined. The accused had also asked her to lend him some money, which she also declined. The Court of Appeal sympathized with him but held that the evidence adduced went outside the scope of the provisions of section 33. Further, that the facts alleged were not proximal to the cause of death.

In *Terekabi v Uganda*,[704] the court held that dying declarations need to deal only with the cause of the death or the circumstances leading to death and that there must be sufficient corroboration of a dying declaration.

703 [1957] EA 149 (CA)

704 [1975] EA 60.

3. Statements made in the Course of Duty (Section 33(b))

This exception is also adopted from English common law. At common law, an oral or written statement of fact made by a person in pursuance of a duty owed to another, to report or record that act, is admissible even after the death of that person as being evidence of the truth of its contents.

The Evidence Act has broadened this exception such that, when the statement is made by such a person in the ordinary course of business and in particular when it comes to an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of his professional duties, such a statement is admissible.[705]

The justification for admissibility of this evidence is that there may be no other evidence available concerning the actions of the deceased. Further, the statement was made in pursuance of a duty the maker owes to the employer and was contemporaneous with the act done by the deceased person. This offers some degree of guarantee that the statement is true since there is no motive to falsify the records.

It is noteworthy, that the statement cannot and should not be one especially prepared for the purpose of the proposed suit or proceeding.

In *R v Magandazi and 4 others*,[706] the accused was employed in Uganda to deliver cargo to Congo. Some of the goods got lost while in the custody of the accused. At the trial, a letter from an agent of the complainant's firm resident in Congo was produced. The author was not called to testify. Disallowing production of the letter, court observed:

> "The provision of the section should in my opinion, be only sparingly applied and rarely, if ever, be used where the statement goes to the root

705 Section 33(b) of the Evidence Act.

706 [1914] 2 ULR 108.

> of the whole matter before the court as in the present case. Further, the letter although it may be said to have been written in the ordinary course of business to report a loss, appears also to be in the nature of a special letter written with a view to the present prosecution."

The underlying rule, however, is that it must be shown that the maker of the statement is dead, or is incapable of giving evidence or his attendance cannot be procured without delay or unreasonable expense.

In *Commissioner of Customs v S.K. Panachand*,[707] the issue was whether the invoices and certificates of origin were enough to show the origin of the blankets since the maker of the said invoices and certificates had not been called. The court held that they were not admissible since it had not been shown that the maker was dead or that the delay or expense involved in calling him as a witness would be unreasonable, even though the court was prepared to take judicial notice of the distance between Nairobi and the Hague.

Idi bin Ramadhan v R,[708] involved a statement of a police constable put in evidence during the course of trial, after it had been proved that the police constable had proceeded on leave. The statement spoke of events which occurred two days prior to his recording the statement. It was held that, the police constable's statement was inadmissible for the following reasons:

1. The exception extends only to statements made during the course of business or profession in which the declarant was ordinarily engaged, and not of any particular transaction of an exceptional kind.

2. For a declaration in the course of duty to be admissible, it must be contemporaneous with the facts alleged by the declarant. It must be made by a person who has no intention to misrepresent the facts. Here, the police constable was speaking as to facts which occurred 2 days prior to the date of his statement.

707 [1961] EA 303.

708 [1949] 7 ZLR 45.

4. Statements against the interest of the maker (Section 33(c))

At common law, an oral or written statement against the interest of the maker was admissible upon his death as the truth of its contents.

The Evidence Act has expanded the ambit of this exception to incorporate any statements against the pecuniary or proprietary interest of the maker. Key things to note here are that the statement must affect an interest in the money of the maker at the time of making it and that the maker must have known that the statement would be against his interest at the time of making the statement.

This exception arises in 3 instances:

i) Statements made concerning the pecuniary interest of the maker;

ii) Statements made concerning the proprietary interest of the maker;

iii) Statements which, if true, would expose the maker to criminal prosecution or to a suit for damages.[709]

The rationale for admissibility of such evidence lies in the presumed unlikelihood that a person would in the ordinary course of human affairs speak falsely against his own interest unless the statements were true.

In *Marie Ayoub v Standard Bank of South Africa*,[710] there was a statement made in a letter in which it was said that certain persons were indebted to the deceased for the running expenses of an estate, which would be a statement against the pecuniary interest of the estate. It was held that the statement was not admissible under this exception because the maker was not dead.

This as well as other exceptions should be treated with utmost caution. A statement which *prima facie* might appear to be against a person's interest and which falls within the section, might, owing to the circumstances of a particular case, not be against his real interests at all. It could be sheer trickery on the part of the maker thereof as the court discovered in the *Dias* case.

709 Section 33(c) of the Evidence Act.

710 [1961] EA 743, 754 (civil appeal)

In *R v Dias*,[711] the accused was charged with the offence of falsifying the employer's books of account. The prosecution produced a letter written by the deceased clerk to the head of department, which purported that the accused had ordered the deceased to make the false entries. The prosecution sought to rely on this evidence as a statement that was made out of court and against the interest of the maker, hence, admissible as an exception to the hearsay evidence rule. It was held that such an admission was improper in such a case where it was very much in the interest of the deceased to do so. The letter rather than incriminate him, would have tended towards his promotion in the department and brought him into favour with his superiors. In such instances, there was need to corroborate the statement.

5. Statements of Opinion as to the existence of any Public Right or Custom

The Evidence Act provides that statements by persons who cannot be called as witnesses are admissible if they give the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, the existence of which, if it existed, he would have been likely to be aware. The statement must have been made before any controversy as to such right or custom arose, and before the institution of the suit[712].

Hence, for instance, an oral or written statement concerning the reputed existence of a public or private right, such as a right of access to the river using a certain road, would be admissible as a evidence of the truth after the maker's death, where a dispute arises concerning the existence of such right of access. However, the statement must be made by a competent person who demonstrably would have known of the existence of such public right or custom if it ever existed.

711 [1927] Vol 3 ULR 214.

712 Section 33(d) of the Evidence Act

The justification for admissibility of such statements is that the statement concerns the existence of a public or general right which is in issue and which was made before the controversy arose.[713]

In *R v Meghji Hirji Shah,*[714] a 'public right' was defined as one which is held in common by all members of the public, or one which affects a considerable portion of the community. For example, the right to use paths, highways, ferries or a village boundary. On the other hand, a 'private right' is one held by only one person or a section of the community. In this case, the appellant was charged and convicted of an offence under Chapter 17 of the Penal Code, that is, Nuisances and Offences Against Health & Convenience. The question on appeal was who bore the burden of proving the fact that the trade was offensive and or unwholesome to the public. It was held that, the onus of proof lies on the prosecution and that proof must be sufficient. The appeal was allowed as the prosecution failed to discharge this burden. In the words of the court:

> "The prosecution must prove the making of offensive or unwholesome smells which in fact, annoy a considerable number of persons in the exercise of their common rights such as the user of a public road."

In *Abbas v Fasal Mohammed*,[715] the plaintiff sued the defendant in the High Court of Zanzibar *inter-alia*, for an injunction order to restrain him from entering their land or using some roads that cut across it. The defendant admitted having used the road but alleged that it was not a private but rather a public road. The trial court reasoned that the onus was on the plaintiff to prove that claim. It was held that they were unable to do so and the claim was dismissed. On appeal, the court held that it was incumbent upon the defendant to prove that he had a right to use the plaintiff's land and if he could not do so, he was nothing more than a trespasser. Further, it was held that the creation of a number of private tracks by prescription under section 26 of the Limitation of Actions Act, did not turn the private road to a public road over which the general public was entitled to pass.

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713 Section 5 - 33(d) of the Evidence Act.

714 [1932] 14 KLR 158.

715 (1951) 18 EACA 36.

In *Rangelay v The Midland Railway Co*,[716] it was held that,

> "In truth, a public road or highway is not an easement, it is a dedication to the public, of the occupation of the surface of the land for the purpose of passing and repassing… Therefore, it is quite clear that it is a very different thing from an ordinary easement where the occupation remains in the owner of the servient tenement subject to the easement."[717]

The opinion here should be one of a person with competent knowledge, that is, a person likely to know of its existence. It should be evidence of independent opinion and not repetition of the opinions of others, which would be hearsay and inadmissible.[718]

6. Statements Relating to the Existence of a Relationship

Statements of persons who cannot be called as witnesses are admissible when they relate to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption, the persons making the statement had special means of knowledge. However, such statements must have been made before the question in dispute arose.[719] There are two justifications for this exception first, the maker of the statement had special means of knowledge, and secondly, the statement was made before the dispute arose.

Seif Ali Bajuni and others v Hamed Bin Ali,[720] involved a situation where a child was born 10 months after the marriage between the parents was dissolved. During the hearing, it was sought to introduce a document concerning the relationship written by the alleged father. The document was written in contemplation of the suit in that the father disputed parenthood; it contained the statement 'if this child shall ever file suit'.

716 [1868] LR 3 ch 311.

717 [1868] LR 3 ch 311 at page 611.

718 Section 33(d) of the Evidence Act.

719 Section 33(e) of the Evidence Act.

720 [1945] 7 ZLR. 13.

It was held that the document itself conclusively proved the existence of the controversy at the time it is alleged to have been written. Hence, it had been properly rejected by the trial magistrate.

7. Statements Relating to Family Affairs

Statements by persons who cannot be called as witnesses are also admissible when they relate to the existence of any relationship by blood, marriage or adoption between persons deceased, and it is made by will or deed relating to the affairs of the family to which the deceased belonged, or *inter alia*, in any family portrait or pedigree. Such statement must be made before the dispute arose and before the maker's death.[721]

The main justification for this exception is that it is doubtful that a person would insert information dealing with these relationships into solemn family documents unless he knew the information to be true.

However, such statements will only be admitted when there is a question as to the existence or non-existence of such family relationships and where the statement was made before the dispute arose. Such a statement will often be the only evidence available concerning what had occurred many years ago and the maker would be in a position of knowledge to make such a statement.

8. Res Gestae

Under the doctrine of *res gestae* a fact or a statement of fact or opinion which is closely associated in time, place and circumstance with some act or event which is in issue, that it can be said to form part of the same transaction, is itself admissible in evidence. The justification for the reception of such evidence, is the light it sheds upon the fact in issue and is such that in its absence, the transaction in question may not be very well understood or may even appear to be meaningless. Hence, under this doctrine both the facts as well as the statements made surrounding that fact may be received as part of the *res gestae*. These statements are normally admitted by way of an exception to the hearsay evidence rule. Professor Cross has usefully

721 Section 33(f) of the Evidence Act.

divided the instances under which such evidence is admissible into four categories.[722]

9. Evidence given in previous judicial proceedings

Under section 34 of the Evidence Act, evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, provided the following conditions are met:

i. The witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the Court considers unreasonable; and [723]

ii. The proceedings in the subsequent case is between the same parties or their representatives in interest; the adverse party in the earlier proceeding had the right and opportunity to cross-examine; the questions in issue were substantially the same in the earlier as in the current proceedings.[724]

Both at common law and under the Evidence Act, a statement made orally or in writing by a witness concerning a particular issue, in the course of giving evidence in a court of law, is admissible on the same issue, between the same parties or their legal representatives in subsequent proceedings. This is illustrated by the two cases discussed below.

In *Kanji v R,*[725] a witness had given evidence before a Magistrate during the course of a preliminary criminal enquiry. Thereafter, the witness proceeded to England on leave. During the criminal enquiry, the defence reserved its right of cross-examination. Subsequently, the Magistrate committed the accused person to trial in the absence of the witness who went to England. The prosecution sought to introduce the witness's testimony as a statement of a person who had

722 The four categories were discussed at length in Chapter 2 above

723 Section 34(1)(a) of the Evidence Act.

724 *Ibid* Section 34(1)(b),(c),(d).

725 [1912] Vol 4 EA at page 136.

given evidence in previous proceeding. The evidence was admitted and the accused convicted. The accused appealed on grounds that he was wrongly convicted. The court held that since the material witness was not available and the defence reserved their right to cross-examine the witness called during the criminal enquiry; the evidence had been properly admitted.

In *R v Hall*,[726] there was an order for a re-trial in which the accused sought to admit evidence of a witness who had given unsatisfactory evidence for the prosecution in the course of the first trial. Unfortunately, the witness had already died, his request was disallowed. On appeal, the court held that though the trial court had a discretion to refuse to admit evidence which it considered prejudicial, evidence of the transcript of the previous judicial proceedings ought to have been admitted during the trial.

10. Documents Produced in Civil Proceedings

Statements contained in documents produced in civil proceedings are admissible as an exception to the hearsay evidence rule under section 35(1) of the Evidence Act.

The rationale for the admissibility is that where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the maker of the statement had personal knowledge of matters dealt with by the statement or where the document in question is or forms part of a record purporting to be a continuous record.

In deciding on the accuracy and admissibility of such statements, the court should consider two things. First, whether the statement was made contemporaneously with the occurrence or existence of the facts stated. Secondly, whether or not the maker of the statement had any incentive to conceal or misrepresent facts.[727]

726 [1973] QB.

727 Section 36(1) of the Evidence Act.

Under these provisions, a court of law may, for instance, receive evidence of the sketch plan of an accident scene drawn by an investigating officer, who is since deceased or has been transferred to a far away location and is hence, incapable of attending court without undue delay or expense.

11. Statements by several persons expressing their Feelings

Statements by persons who cannot be called as witnesses which were made by a number of persons expressing feelings or impressions on their part, relevant to the matter in question or the facts in issue are admissible.[728]

12. Statements made under special circumstances

These are covered under sections 37 to 41 of the Evidence Act. The justification for the admissibility of such statements is on the basis of the circumstances in which they are made. Take for instance:

i. Entries made in books of accounts

Books of accounts[729] regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire. These statement are made by professionals qualified en that held. Ordinarily, a duty of care as exercised in the preparation of such accounts in order for the statements to be a true reflection of the company's or personal financial state of affairs. Such statements, however require corroboration for anyone to be found liable.

In *Odendo v Republic*,[730] the appellant was convicted of theft of money for which he was under a duty to account daily. The actual posting was done by another man. On appeal, the appellant contended that he had been convicted on the basis of a general assumption which was insufficient and that he could not have been convicted solely on the basis of books of accounts. Upholding the

728 Section 33(h) of the Evidence Act.

729 Section 37 of the Evidence Act.

730 [1974] EA 60 (HCK).

conviction, the Court of Appeal held that the charge of theft of money was made because there was a duty of care on the part of the appellant on that day. Secondly, the Court held that the evidence of the books of accounts was not the only evidence adduced, as there was additional evidence in corroboration.

II. Entries made in public records or official Register

A statement of a fact in issue or a relevant fact made by a public servant in the discharge of his official duty or by any other person in the performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself admissible.[731]

Spry, Ag. J. in *Ladha and others v Patel and another,*[732] said that for an entry to qualify as a public record:

> "It must be intended for the use of the public or be available for public inspection. Further, it must be intended to be a permanent record and a record of fact not of opinion."

In *Chandaria v R*,[733] it was argued by the State that immigration forms which had been completed by a member of the public under a duty imposed by the Immigration Rules and delivered to Immigration Authorities who kept the same on departmental files, were admissible under section 38. It was argued that the member of the public completing the forms fell within the scope of the phrase above being "any other person". However, the court held that a member of the public completing such a form was not within the scope of the phrase quoted above. Spry Ag V.P, delivering the judgment of the court noted that:

> "Reading section 38 as a whole, we think it is clear that "any other person" means any person, not a public servant, who finds himself under a specific duty to maintain or make entries in any record of a public or official nature…. We do not think it includes members of the general public completing forms necessary for their individual

731 Section 38 of the Evidence Act.

732 [1960] EA 38 (T).

733 [1966] EA 246 (civil appeal)

purposes, whether or not those forms will eventually form part of the archives of any government Department."

iii. Entries made in charts, plans and maps

Entries in charts, maps and plans are dealt with under section 39 of the Evidence Act. The entries made in such documents at first sight appear to be quite innocuous. However, these are actually statements made by the authors of the said documents. Hence, statements of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans are themselves admissible as an exception to the hearsay evidence rule. If the rule were otherwise, it would be hard to believe anything we read in such documents.

iv. Entries in the Kenya Gazette, laws or notice purported to be printed by Government Printer

When the court has to form an opinion as to the existence of any fact of a public nature, any statement of fact made in any written law of the country concerned, or in any notice purporting to be made under any such written law, or an official gazette, where the law or notice purports to be printed by the Government Printer, it is admissible.[734]

v. Entries published in public books, court rulings or public works authorized by Government

Any statement of law contained in a book purporting to be printed or published under the authority of the government of such country and containing any report of the ruling of the courts of such country, is admissible when a court has to form an opinion on the law of such country.[735]

This section also provides the means by which foreign law, of which judicial notice cannot be taken by the courts, may be proved.

734 Section 40 of the Evidence Act.

735 Section 41 of the Evidence Act.

Note, however, that section 48 replicates the English common law by providing for the admissibility of foreign law through the evidence of experts on the same.

D. Conclusion

When deciding on the admissibility of hearsay evidence, the Court must follow the above rules. Maureen and John Spencer,[736] point out several considerations which the court may take into account in order to weigh the relevance to be attached to hearsay evidence:

1. Whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statements as a witness;
2. Whether the original statement was made contemporaneously with the occurrence or the existence of the matters stated;
3. Whether the evidence involves multiple hearsay;
4. Whether any person involved had any motive to conceal or misrepresent matters;
5. Whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
6. Whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent a proper evaluation of its weight.

It is this authors opinion that, these considerations are pertinent and recommend them to any court or practitioner applying the hearsay evidence rule.

736 *Maureen Spencer and John Spencer*, Evidence-Questions and Answers, (2008) page 96.

Chapter 12

Evidence of Character

A. Introduction

Character refers to the qualities which distinguish a person from another, that is: the moral nature and the fame, either good or bad.[737] According to the *Law Dictionary*,[738] character evidence refers to the testimony concerning the reputation of a person in his community, that is, among those persons who know him best, regarding a particular trait.

There is no definition of the term 'character' under section 3 of the Evidence Act. Section 58 thereof offers a working definition which unfortunately falls rather short. It provides that the word "character" includes both reputation and disposition, without defining these terms. The disposition of a person is his inclination, proclivity or inner tendency, that is, his propensity to act, think, or feel in a given way.[739] Disposition also refers to a general tendency of character or behaviour, for example, one can be said to have a happy disposition.[740]

Reputation on the other hand refers to the opinion held by others about someone or something; it is the estimation in which a person is held in the community where he/she lives, works or is generally known.[741] It is the degree to which one is thought of either positively or negatively by others. This is really evidence of rumour and public opinion and it could very well be excluded by one of the exclusionary rules of evidence, for example, the hearsay evidence or opinion evidence rule.

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737 *Longman English Dictionary of Contemporary English* (5th edn, 2009).

738 *Gilmer's Revision* (6th edn, Anderson Publishing Co.,1986).

739 Adrian Keane, *The Modern Law of Evidence* (5th edn, 2000, Butterworths) page 421.

740 *Longman English Dictionary of Contemporary English* (5th edn, 2009).

741 Adrian Keane, *The Modern Law of Evidence* (5th edn, 2000, Butterworths) page 421.

Evidence of character is based on the rationale that indeed reputation and disposition are relevant in deciding a case. Generally, when the evidence of character is admissible, then it will have an inclination towards the credibility of a witness who appears in court, either in a criminal or civil case.

Under the common law, witnesses as to character were only allowed to testify on the general reputation of the accused and were not allowed to give evidence of specific aspects of the character of an individual when given the opportunity to testify as a witness.[742] This rule was to give everyone a chance of having a free and fair trial on issues in court without bias that would otherwise result from specific incidents and in turn influence the jury or Judge.

A character witness, according to the on-line law dictionary, refers to a person who testifies in a trial on behalf of a person (usually a criminal defendant), as to that person's good ethical qualities and morality both by the personal knowledge of the witness and the person's reputation in the community. Such testimony is primarily relevant when the party's honesty or morality is an issue, particularly in most criminal cases and civil cases such as fraud.[743]

In *R v Rowton,*[744] the defendant was charged with indecent assault of a young boy. He called several witnesses to testify as to his good moral character and the prosecution was allowed to produce two witnesses who were formerly his pupils in rebuttal. When one of the witnesses was asked about the defendant's general character for decency and morality, he replied:

> "I have no knowledge of what the neighbourhood thinks of him, because I was only a boy in school when I knew him; but my own opinion and that of my brother who was also his pupil, is that his character is that of a man capable of the grossest indecencies and the most flagrant immorality."

This evidence was admitted and the accused raised an objection on the grounds that the evidence adduced was specific as it impugned

742 *R v Rowton* (1865) 29JP 149; Adrian Keane, *The Modern Law of Evidence* (5th edn, 2000 Butterworths) page 436.

743 dictionary. law.om (Legal Dictionary).

744 [1865] 34 LJMC 57.

on his character. On appeal, court held that whenever evidence of a good character has been given in favour of a prisoner, evidence of his general bad character may be called in reply. As to the question whether the evidence in rebuttal should be evidence of general reputation or evidence of disposition, it was held that evidence in rebuttal should be evidence of his general reputation in the neighbourhood in which he lives and should not include evidence of specific good or bad acts of an accused. Further, that any evidence given in rebuttal should be confined to evidence of the reputation of the accused amongst those to whom he is known and should not include evidence of specific credible acts of an accused, nor evidence of a witness opposing his disposition.

In the words of Cockburn CJ:

> "I am of the opinion that it means evidence of general reputation. What you want to get at is the tendency and disposition of the man's mind towards committing or abstaining from committing the class of crime which he stands charged; the only way of getting at it is by giving evidence of his general character founded on his general reputation in the neighbourhood in which he lives."

Section 55 of the Indian Evidence Act acknowledges that it would be better to rely on evidence of disposition by people who knew a person rather than evidence of reputation. Consequently, the definition of character evidence was widened to incorporate disposition and reputation. That explains why section 58 of the Evidence Act incorporates the two concepts. These two words, general reputation and general disposition, seem to return the law to the good old common law position[745] since it eschews specifics in reference to a person's character.

In *R v Redgrave,*[746] the appellant was charged with persistently importuning for an immoral purpose contrary to section 32 of the English Sexual Offences Act (1956). The jury disagreed at the first trial and on re-trial, the appellant sought to tender detailed evidence of his heterosexual relationship with girls to rebut inferences from

745 Adrian Keane, *The Modern Law of Evidence* (5th edition, 2000 Butterworths) page 436.

746 [1982] 74 CAR 10 R 10, CA

his conduct as observed by police officers, that he had been making homosexual advances to them. The judge ruled that the evidence was admissible and the appellant was convicted.

The appellant appealed, *inter alia*, on the grounds that the ruling of the jury was wrong. It was held on appeal that a defendant could call evidence to show that he did not commit the acts alleged against him. However, a defendant is not allowed, by reference to particular facts, to call evidence that he is of a disposition which makes it unlikely that he would have committed the offence charged as the appellant in the instant case was trying to do. Further, that the trial judge was correct in ruling as he did for the production of that sort of evidence would have been inadmissible as a matter of law. Consequently, the appeal was dismissed.

B. Character Evidence in Civil Cases

The general rule in civil cases is that the evidence of character of the parties is inadmissible in order to render probable or improbable any fact in issue or conduct imputed to any person.[747]

It is not permissible to adduce evidence of a man's good or bad character to suggest to a tribunal or court that because of their character the conduct attributed to them is more or less probable. It should be noted that the tribunal or the court is not concerned with trying the character of the parties but with the facts of the case and the relevance and admissibility of the evidence before it.

Exceptions to the General Rule:

i. Character as a fact in issue

Character evidence is admissible where such character appears from the facts as otherwise admissible.The evidence of character of a party or non-party is admissible if it is in issue or of direct relevance.[748]

For example, in a defamation claim where the defence of justification is tendered, the character of a plaintiff directly comes

747 Section 55(1), Evidence Act..

748 Section 55 (1), Evidence Act..

into issue. To justify the reception of a defamatory statement already made, the defendant must prove that the statement was true and was not merely made.[749]

The evidence of character of a party or a non-party is admitted if it is directly in issue or of direct relevance to a fact in issue.

ii. Character which affects the quantum of damages

This is a specific exception provided for by section 55(2) of the Evidence Act and applies where character evidence adduced in any proceeding affects the quantum of damages to be awarded by the court.

Again a defamation claim is the best example. In order to rebut the defence of justification, a plaintiff would have to call, *inter alia,* cogent evidence of character to demonstrate what a reputable and upright character he is. Likewise the character of a plaintiff in an action for defamation is also of direct relevance, if he succeeds, to the quantum of recoverable damages.

The damages awardable are dependent on the estimation in which he is held by society. This means that the higher a person is placed in society, the more the damages payable to him, if the plaintiff succeeds in his claim. In *Uren v John Fairfax & Sons Pty Ltd,*[750] Windeyer, J said:

> "It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways - as a vindication of the plaintiff to the public, and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."

In our opinion, most civil suits touch on the character of the defendants be it negligence, false imprisonment, defamation, nuisance

749 *W.V.H. Rogers, Winfield & Jolowicz on Tort* (17th edn, 2006 London Sweet & Maxwell) page 546.

750 [1967] 117 CLR. 118 at 150; W.V.H. *Rogers, Winfield & Jolowicz on Tort* (17th edn, 2006 London Sweet & Maxwell) page 940.

or malicious prosecution, in which the defendant aggravates the tort, the plaintiff becomes entitled to aggravated or punitive damages.

Section 55(2) also applies in civil cases or torts involving questions of exemplary damages. These are damages awarded to compensate the plaintiff for what the court considers deplorable conduct by a defendant by way of aggravated damages. These are additional damages awarded to a plaintiff because the defendant's conduct was wilful and malicious. It can be clearly seen that in such a case, the character of a defendant must be considered in evidence.

iii. Character relevant to fact in issue

Evidence of disposition of the defendant towards wrongdoing or commission of a particular kind of civil wrong may be admissible if it is of sufficient relevance or probative force in relation to the facts in issue. Such evidence relates to particular acts of misconduct on other occasions and is designated 'Similar Facts Evidence.'

In *Mood Music Publishing Co. Ltd v De Wolfe Ltd*,[751] the plaintiffs were owners of the copyright in a musical work called *'Sogno Nostalgico*'. They alleged that the defendants had infringed their copyright by supplying for broadcast purposes a work entitled 'Girl in the Dark'. It was not disputed that the works were similar, but the defendants argued that the similarity was coincidental and denied copying, even though 'Sogno Nostalgico' was composed prior to the 'Girl in the Dark'. The plaintiffs were permitted to adduce evidence to show that on the other occasions, the defendants had reproduced works subject to copyright. The defendants appealed.

The court held that in civil cases, the courts will admit evidence of similar facts if it is logically probative, that is, it is logically relevant in determining the matter which is in issue, provided that it is not oppressive or unfair to the other side. Further, that the other side has a fair notice of it and is able to deal with it.

Otherwise, similar facts evidence apart, evidence of the disposition or reputation of the parties to civil proceedings is

751 Civil Appeal [1976] Ch 119.

generally treated as irrelevant to the facts in issue and accordingly excluded.[752]

iv. Character relevant to credit

In civil proceedings, any witness who gives evidence, whether or not a party thereto, is liable to cross-examination as to his credibility as a witness, that is, his/her character will be probed in cross-examination.[753]

However, as a general rule, the cross-examining party is not allowed to adduce evidence to contradict a witness's answer to a question concerning his credit or character.[754] This is because questions as to the character or credit of a witness are collateral to the issues before court.[755]

C. Character Evidence in Criminal Cases

At common law as well as under the Evidence Act, the general rule is that the prosecution, is not allowed to adduce evidence of the accused person's bad character or to cross-examine witnesses for the defence with a view of eliciting such evidence.[756]

The common law attached so much importance to this rule such that, in cases where bad character of the accused was inadvertently revealed to the jury, whether by a witness or counsel, the judge could exercise his discretion by discharging the jury and ordering a re-trial. Indeed, it is this general rule that informs the first limb of the statement by Lord Herschell in *Makin and another v A.G of New South Wales*,[757] to the effect that:

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for purpose of leading to the conclusion that the accused is a person likely, from his criminal

752 Adrian Keane, *The Modern Law of evidence* (5th edn 2000 Butterworths)page 423

753 Section 148 of the Evidence Act.

749 Adrian Keane, *The Modern Law of evidence* (5th edn 2000 Butterworths)page 423

755 Section 57(1) of the Evidence Act..

756 Section 57(1) of the Evidence Act.

757 [1894] AC 57 (PC); Cited with approval in *DPP v Boardman* [1975] AC 421.

conduct or character, to have committed the offence for which he is being tried…"

The Privy Council recognized in the *Makin's* case that as a general rule, evidence of the bad character of an accused was not admissible in order to prove that he was guilty of the offence with which he was presently charged. The dangers of the indiscriminate admission of such evidence are all too obvious. Juries and in our case, courts, are manned by individuals who may be unduly impressed by such evidence and rush to convict. Nevertheless, the Privy Council proceeded to recognize some exceptions in the area where an accused sought to plead mistake, inadvertence, lack of intent etc. It is to these exceptions that we shall shortly turn the focus of our attention.

In criminal proceedings, the fact that the person accused is of a good character is admissible in evidence.[758] However, it must be noted that the question of good character may not be too helpful to the accused because the Court is interested in the determination of the relevance and admissibility of the evidence in support of the facts in issue or relevant facts in the case.

Exceptions to the general rule in criminal cases

These exceptions make admissible evidence of bad character that would otherwise be inadmissible.

They are as follows:

i Evidence which forms part of a fact in issue or is directly relevant to a Fact in issue[759]

This exception was enacted vide Act number 10 of 1969 following the decision of Rudd, Ag CJ in *Mugo v R.*[760] In this case, it was argued that based on the wording of section 57(1)(a) of the Evidence Act, where the accused were charged with more than one count, a court should direct itself that any evidence which showed an accused was

758 Section 56 of the Evidence Act.

759 Section 57(1)(aa) of the Evidence Act.

760 [1966] EA 124.

guilty of an offence on any one of the counts, was inadmissible and could not be taken into account when considering any of the other counts.

In this case, the appellants were each convicted of five counts of robbery with violence following allegations that they were involved in a series of raids on five petrol stations in and around Nairobi. The accused persons were found in possession of a stolen motor vehicle that they had used to get away. Their identifications were established at identification parades where the identifying witness also misidentified innocent men. They were convicted.

On appeal, the appellants argued that the discrepancies made the identifications unreliable. Further, that the trial court should have directed itself that any evidence which showed that an accused was guilty of an offence on any of the other counts was inadmissible and could not be taken into account when considering the count in question. The prosecution asked for the sentences to be enhanced. The Court of Appeal, after a lengthy and critical look at the law, held that an identifying witness could be relied on, only in so far as they identified a particular appellant in respect of a particular count[761].

The court went on to hold that section 57(1)(a) of the Evidence Act, when properly construed in conjunction with the marginal note, was intended to prevent evidence of previous offences or charges, the accused's character not being in issue, where the only effect thereof would demonstrate a tendency or propensity to commit the offence in question. The section could not be used to exclude evidence of the commission of another offence, when such evidence was admissible as evidence of a fact in issue or evidence directly relevant to a fact in issue.

This exception was also applied in the case of *R v Cokar.*[762] It involved the trial of an appellant for entering a dwelling house by night with intent to steal. The appellant admitted climbing in through an open window of the house at midnight, where he was

761 *Ibid* pg 129

762 [1960] 2 QB 207.

found shortly afterwards by the occupant asleep on a chair next to the fireplace. The defence was that the appellant had entered merely for warmth and in order to sleep. Despite defence objections, the prosecution was permitted to cross-examine the appellant as to a previous occurrence when he had been charged with burglary but was acquitted, to show that he knew it was no offence to be found on private premises for an innocent purpose. He was convicted and sentenced to 18 months' imprisonment.

The Court of Criminal Appeal quashed the conviction holding that cross-examination as to previous proceedings resulting in an acquittal was contrary to section 1 proviso f(i) of the Criminal Evidence Act, 1898.

It was held that section 1 proviso f(i) of the 1898 Criminal Evidence Act completely prohibited any questioning advanced to an accused person about a charge in respect of which he had been acquitted. Further, that the exception contained in paragraph (1) only operated to lift the prohibition, when it was sought to prove the commission of an earlier offence or conviction, when proof of such offence or conviction was admissible in evidence: but that it was improper under that exception to question the accused in regard to a charge of which he had earlier been acquitted.[763]

II. Similar Fact Evidence Exception

Evidence which proves that the accused person has committed or been convicted of such other offence is admissible under section 14 or section 15 of the Evidence Act to show that he is guilty of the offence with which he is then charged.[764]

In such cases, the rule is that evidence which would show that the accused did what he did as part of a system advertently or with guilty knowledge is admissible, as similar facts evidence. Note that under this limb, evidence of non-criminal immorality is not

763 Adrian Keane, *The Modern Law of Evidence* (4th edn 1996, Butterworths) page 400.

764 Section 57(1)(a) of the Evidence Act. Section 14 deals with facts showing existence of any state of mind, when such state of mind is in issue or related to a fact in issue. Section 15 deals with facts forming part of or a series of similar occurrences, also referred to as Similar Facts Evidence.

admissible and only evidence of previous convictions is admissible. Paragraph (a) is limited to proof of commission or conviction of an offence.

Adrian Keane[765] defines similar facts evidence as evidence of disposition of the accused towards wrongdoing or of specific acts of misconduct on other occasions, whether or not they resulted in previous convictions. Such evidence is exceptionally admissible where it is of sufficient probative force in relation to the question of guilt on the charge before the court.

This was dealt with in *R v Cokar*[766] discussed above where the appellant had been acquitted of his previous charges yet the trial court convicted him based on the evidence of his previous charges. Cokar appealled on the ground that, the conviction was based on admission of inadmissible evidence of the previous offence. The appellate court quashed the conviction because matters relating to charges which did not result in a conviction were outside the purview of the section in the English[767] equivalent of section 57(1(a) of the Evidence Act.

III. Integral part of Defence Theory/the Inevitable Loss of Shield

If the accused person has personally or by his advocate asked questions of a witness for the prosecution with a view to establishing his own good character,[768] or has given evidence of his own good character, then evidence showing that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged, or that he is of bad character, will be admissible.[769]

765 *The Modern Law of Evidence* (4th edn, 1996 Butterworths) page 417.

766 [1960] 2 QB 207.

767 Section 1(1)of the Criminal Evidence Act.(England).

768 Section 57(1)(b) of the Evidence Act.

769 Note that section 56 of the Evidence Act is to the effect that in criminal proceedings, the fact that the person accused is of good character is admissible.

In the case of *Maxwell v DPP,*[770] a doctor was charged with manslaughter of a lady who died while he was procuring an illegal abortion. In his defence he stated that he had lived a good moral and clean life with the result that the prosecution successfully applied to cross-examine the accused on his past antecedents. The prosecution produced evidence which was admitted and which showed that the doctor had earlier been acquitted of a charge of abortion. In the words of the court:

> "If a prisoner by himself seeks to give evidence of his own good character for the purposes of showing that he is unlikely to have committed the offence with which he is charged, he may fairly be cross-examined on such issues in order to prove the contrary."[771]

The question whether a line of cross-examination followed or evidence given by an accused person is given with a view of showing that he is a person of a certain character, is an question of fact and not one which the law can decide. What is fair and proper can only be a function of logic and experience and not a legislative prescription.[772]

At common law and under the Evidence Act, if the accused does not put his own character in issue, evidence of his bad character (other than admission of similar facts evidence) is inadmissible.

This was illustrated in *R v Butterwaser,*[773] where the accused was convicted of wounding with intent to do grievous bodily harm. His counsel cross-examined two prosecution witnesses as to their bad character and previous convictions. The accused did not testify and his counsel neither adduced evidence as to his good character nor cross-examined witnesses for the prosecution to establish his good character. The trial Judge allowed a police officer to give evidence of the accused's bad character as well as previous convictions.

In cross-examination, the appellant's counsel attacked the character of the prosecutor and his witnesses putting a number of previous convictions to them, which they admitted. The appellant

770 [1935] AC 309,32 LGR 335.

771 [1935] AC 309 at 319.

772 [1935] AC 309 at 321.

773 [1948] 1 KB 4 (CCA).

himself was not called to give evidence. A police officer was called for the prosecution who read out the appellant's previous convictions. The police officer was not present on occasion of the previous convictions. The appellant was convicted and on appeal, he argued that the evidence was not admissible.

The appellate court held that although evidence in rebuttal can be adduced by the prosecution, where an accused is not called to give evidence and does not put his own character in issue, no evidence can be given by the prosecution of his bad character, merely because he has attacked the character of the witnesses for the prosecution. If after attacking witnesses for the prosecution in cross-examination, the accused had testified, he could have been cross-examined on his character under section 57(1)(b) or (c). These two provisions seem to amend the common law position so as not to require the accused person to testify.

The exception, therefore, should not be taken as an attempt by the courts to deprive an accused person of a chance to develop his line of defence or that protestations of his innocence be taken as offers of evidence of good character.

The case of *Ali bin Hassan v R*[774] is illustrative. In this case, the appellant was convicted of aiding a prisoner to escape and obstructing a police officer in due execution of his duties. He was tried and in the course of cross-examination of a police constable he elicited the assertion:

> "Yes, I know that you have recently come out of jail where you were sent for being found in possession of a big quantity of date wine."

In his evidence, the appellant said his work was to sell date wine. (This was a way of showing bias on the part of the police constable). The prosecution witness agreed and thereupon, the prosecution was allowed to question the accused on his previous antecedents.

He was cross-examined as to his bad character and previous convictions. He was convicted and on appeal, contended that the trial magistrate had wrongly admitted such evidence. The appellate court held that the trial magistrate should not have permitted the

774 [1960] EA 171 (Z).

appellant to cross-examine the police constable in the way he did. From the time it became obvious that the appellant was bringing his bad character into issue, (and at which stage his bad character was inadmissible evidence), the trial magistrate should have stopped him and warned him of the danger of pursuing such line of defence. Further, that the line of cross-examination adopted by the prosecutor was indefensible and that there was a substantial miscarriage of justice on account of failure by the trial magistrate to observe the rules of evidence.

In *R v Winfield*,[775] the accused was charged with indecent assault of a young woman. He called a witness and asked her questions which were aimed at establishing his good character with regard to sexual morality. The witness and the defendant were cross-examined on the defendant's previous allegations of similar indecent assault cases. He was convicted on appeal, the appellant argued that evidence as to his general character should not have been admitted.

Humpheys J said:

> "The deputy chairman knew, though probably the prisoner did not, that there is no such thing known to our procedure as putting half your character in issue and leaving out the other half. A man is not entitled to say, '…well, I may have a bad character as a dishonest rogue, but at all events nobody has ever said that I have acted indecently towards women.' That cannot be done. If a man who is accused chooses to put his character in issue, he must take the consequences. It is quite clear that this man did. He asked questions about his character quite apart from the facts of this case. The result was that he was properly cross-examined as to his character."

The appellate court held that an accused person may be cross-examined on any evidence adduced that puts his whole past record in issue. Further, and I quote:

> "Any accused person who wishes to put his previous good character in issue, must be prepared for any resulting questions as to his character and any previous antecedents that prove the contrary. "

775 [1939] Vol 4 All ER 164 (CCA).

In *William Stirland v DPP*,[776] on a charge of forgery, an accused put his good character in issue by saying in cross-examination that he had never been 'charged' with any offence.

The prosecution asked him in cross-examination about the circumstances of the termination of his employment in a bank, to which he gave his own reasons. Further, the prosecution asked him in cross-examination whether he left after interrogation about a forgery of a particular signature. The accused denied the allegation.

He was convicted and appealled challenging the admissibility of the evidence adduced of his previous bad acts. On appeal, it was held that an accused may be cross-examined as to any evidence given in-chief including statements as to his character, with a view to testing its veracity and his credit. Therefore, an accused person who puts his character in issue puts his whole character in issue. He cannot assert his good character in certain instances without exposing it all to scrutiny so far as this tends to disprove his claim as to good character.

According to Viscount Simon, L.C, the following propositions govern the cross -examination as to the credit of an accused person in the witness box:

i. The accused should not be asked any question "tending" to show that he has committed, or been convicted of or been charged with any offence other than that with which he is then charged or of his bad character.

ii. He may however be cross-examined as to any evidence he has given in-chief, including statements concerning his good record, with a view to testing the veracity or accuracy or showing that he is not to be believed on his oath.

iii. An accused who 'puts his character in issue' must be regarded as putting the whole of his past record in issue.

iv. An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his

defence necessitates the making of injurious reflections on the prosecutor or his witnesses.[777]

v. It is no disproof of good character that a man has been suspected or accused of a previous crime but not in a criminal court.

vi. The fact that a question put to the accused is irrelevant is in itself no reason for quashing his conviction, though it should have been disallowed by the trial judge.

The Court held that the applicant might have used the word "charged" in his evidence in the sense which it bore in section 1 proviso (f)(i) of the Criminal Evidence Act, 1898. i.e. accused before a court and not "suspected or accused without prosecution."

The above cross-examination was therefore, not relevant either as a challenge to the veracity of the appellants evidence or as going to disprove good character. Hence, it was inadmissible. Further, that it is not proper for counsel not to raise an objection to the reception of inadmissible evidence at trial in order to preserve that as a ground of appeal. However, failure to object when the evidence was given does not necessarily cause the right of the appellant to be forfeited.

iv. If the nature or conduct of the defence is such as to cast or make imputations on the character of the complainant or of a witness for the prosecution[778]

This exception renders admissible any evidence in proof of the accused person's bad character or of his previous convictions, when the conduct of the defence involves the making of imputations on the character of the complainant or a witness for the prosecution.

The same dangers that attend the third exception attend the fourth exception, that is, if the sub-section were strictly construed, a defendant may be unable to devise its own defence or case effectively, that is, the integral part of the 'defence theory'. The question is always whether the accused person is attacking the evidence of the prosecution witnesses or attacking the conduct of the prosecution witnesses outside the evidence given. This is a question of fact

777 Section 57(1)(c) of the Evidence Act. See *R v Turner* [1944] KB 463.

778 Section 57(1)(c) of the Evidence Act.

wherein only knowledge and experience would come to the aid of the court.

The *locus classicus* on this point is the case of *Royston v R*,[779] where the appellant was charged among others, on some nine counts including theft by agent, trying to obtain money by false pretences. In the course of the hearing and cross-examination of certain prosecution witnesses, imputations were made involving the character of certain prosecution witnesses. The trial court allowed the appellant to be cross-examined as to his previous criminal history. He was convicted. On appeal, the appellant argued that the evidence on character was improperly admitted.

It was held that where the imputations involving the character of prosecution witnesses are an integral part of the defence, without which the accused cannot put his case before the court fairly and squarely, the accused cannot be cross-examined on his previous criminal history.

Quoting *R v Turner,*[780] the Court of Appeal observed as follows:

> "For centuries, the law has jealously guarded the right of an accused person to put forward at his trial any defence open to him on the indictment, without running the risk of his character, if a bad one, being disclosed to the jury. It would be strange indeed if the Act of Parliament which allowed him, in most cases for the first time, to give evidence on oath, had virtually deprived him of that right in the case of one serious felony by enacting that he could only do so at the risk of having his character exposed. Put in another way, it would offend every canon of fairness if the hands of an accused person with a previous conviction, were so tied that he could not freely and adequately present his defence, without fear that the jury would come to know of his previous bad character"[781].

This line of argument was initially pursued in *R v Turner*,[782] where the accused was charged with the offence of rape. During trial,

779 [1953] EA Vol 20 EACA.

780 [1944] 30 Cr App Rep 9 at page 50.

781 See the words of Channel J in *R v Preston* [1909] (1 KB) 568 applied in all subsequent cases.

782 [1944] Vol 1 KB 463.

the counsel for the accused in cross-examination suggested to the complainant that she not only consented to intercourse but also offered to commit an act of gross indecency on him. The appellant repeated the same allegations in his evidence-in-chief. The trial magistrate found that the appellant had made imputations on the character of the complainant and opened way for the prosecution to examine him on his antecedents. He was convicted. On appeal, the appellant challenged the admissibility of evidence of his past antecedents. Further, the appellant argued that consent was a valid line of defence which he was entitled to pursue.

It was held that the defence of consent in a charge of rape is nothing more than a denial by the prisoner, that the prosecution, on whom lies the burden of proof, have established the absence of consent on the part of the complainant which is one of the ingredients of the charge. It does not involve an imputation on the character of the complainant. Further, the court held that the appellant did not lose his right of protection and should not have been cross-examined on his previous antecedents, since the questions he asked were directed towards proof of her consent and did no more than state the details or particulars of the conduct of the complainant, which according to the appellant, showed that the act complained of was not against her will.

In *Omondi and another v R*,[783] the appellants were charged with robbery with violence. During cross-examination, the first appellant suggested that a police sergeant who had given evidence against him was 'deliberately committing perjury'. Thereafter, the court allowed the prosecution to put questions to the first appellant touching on past convictions. The appellants were convicted and they appealed. The first appellant's main issue was whether questions put to him about previous convictions should have been permitted by the court. The prosecutor put the details of the first appellant's past convictions, which questions were allowed by the Magistrate, on the ground that the first appellant had put his own character in issue by accusing the sergeant of lying on oath.

783 [1967] EA 802 (K).

The court held that challenging the evidence of a witness for the prosecution is not 'to conduct the defence so as to impugn the character of a witness'. That the line of cross-examination which was adopted in this case was unfair to the first appellant and the questions should not have been allowed by the trial magistrate. The first appellant's appeal was allowed. Following the dictum of Channel, J, in *R v Preston*,[784] the court observed of the English equivalent of section 57 of the Evidence Act as follows:

> "The latter part of the section is that which is material to consider in the present case. It appears to us to mean this: That if the defendant is such as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution, upon the ground that his conduct - not his evidence in the case, but his conduct outside the evidence given by him - makes him an unreliable witness, then the jury ought also to know the character of the prisoner…"

The issue of the borderline between a reasonable line of defence and the casting of imputations on a prosecution witness was addressed in the Ugandan case of *Katwe v Uganda*[785] discussed below.

In *Katwe v Uganda,* [786] the appellant was charged with conspiracy to commit robbery. Evidence was adduced at trial that the Police Inspector acting on a tip-off with five other police officers, all in plain clothes, went in his car to patrol a road. They saw a car 150 yards ahead of them move so as to block the way. Five men armed with stones descended and came towards their car. When the police emerged, the men withdrew though they were arrested. Stones were found in their car whose number plates were greased and smeared in sand. At trial, counsel for the appellant suggested in cross-examination that the Inspector had fabricated the evidence. The prosecution was granted leave to cross-examine the fifth appellant on his previous convictions. All the appellants were convicted.

On appeal, it was argued that the trial magistrate erred in admitting evidence of bad character and that the counsel was entitled to take imputations against the Inspector because it was an integral

784 [1909] 1 KB 568 at 575.

785 [1964] EA 777.

786 [1964]EA 777.

part of the defence, without which the appellants could not have put their case before the trial magistrate fairly and squarely. The court guided by the decision in *R v Jones*, [787] adopted the following words:

> "A clear line is drawn between words which are an emphatic denial of the evidence and words which attack the conduct or character of the witness. Applying this *ratio decidendi* to the present case, it appears to this court that it comes within the line of what is forbidden. It is one thing for the appellant to deny that he had made the confession, but it is another thing to say that the whole thing was a deliberate and elaborate concoction on the part of the Inspector; that seems to be an attack on the character of the witness."

The Court may, in its discretion, direct that specific evidence on the ground of this exception shall not be led if, in the opinion of the Court, the prejudicial effect of such evidence upon the person accused will so outweigh the damage done by imputations on the character of the complainant or of any witness for the prosecution as to prevent a fair trial.[788] In *Katwe v Uganda*, the court held that the suggestion by the counsel for the applicant that the Inspector had planted stones in the appellant's car and obscured the number plate with grease and sand, went beyond what was necessary for the proper and fair presentation of his client's case before the court. Further, that the magistrate had properly exercised his discretion in admitting evidence of the bad character of the third and fifth accused.

The cardinal points upon which a court should exercise its discretion were set out in *Selvey v DPP*[789] and were rehearsed by Ackner, LJ in *R v Burke*[790] as follows; the trial judge must weigh the prejudicial effect of the questions against the damage done by the attack on the prosecution witnesses by the defence and must generally exercise his discretion, so as to secure a trial that is both fair to the prosecution and defence.

787 [1923] 19 CAR.

788 See the proviso to section 57(1) of the Evidence Act.

789 [1970] AC 304 HL.

790 [1985] 82 CAR 156.

In *Selvey v DPP,* the appellant was charged with buggery. He denied the charge and declined to answer the questions put to him. His defence was that the complainant was a male prostitute who was soliciting the appellant. At trial, the appellant while denying the charge, stated that the complainant had told him in his room on the afternoon in question, that he had already on the same day allowed an act of buggery to be performed on his person for money and would do the same again. He also suggested that indecent photos found in his room were planted on him. The trial court allowed the appellant to be cross-examined on previous convictions of indecency.

The trial judge ruled that in view of the attack on the complainant's character, the jury ought to know the appellant's previous record which included a number of convictions. When it was put to him, he kept quiet. The record was not formally proved, but the appellant's attitude was treated as an admission. He was convicted. On appeal, he argued that when the defence necessarily involved imputation on the character of the complainant, the judge should have exercised his discretion under section 1(f) (ii) of the Criminal Evidence Act, 1898, in his favour by excluding his previous record.

Dismissing the appeal, the House of Lords held that a judge had an unfettered discretion under the Act to admit or exclude the previous record or character of an accused and to allow or prohibit cross-examination on it, depending on the circumstances of each case and the overriding duty of the judge to ensure a fair trial; there is no general rule that the discretion should be exercised in favour of the accused, even where the nature of his defence necessarily involved his making an imputation on a prosecution witness. There was a real issue about the conduct of an important witness which the jury would have to settle in order to reach their verdict. The judge exercised his discretion correctly to enable them to know the previous record of a man on whose word the complainant's character had been impugned. Further, the jury was entitled to treat the appellant's attitude as tantamount to an admission of the record although the same had not been proved.

In Kenya, this discretion is the subject of statutory intervention in the proviso to section 57(1) of the Evidence Act. This discretion without a doubt is vital as it seeks to provide a balance of sorts in the manner in which a court of law should treat this type of evidence.

v. Evidence against a co-accused

This exception arises where the accused has given evidence against any other person charged with the same offence.[791]

The rationale here is that, evidence tendered by a co-accused to show the misconduct of the co-accused on behalf of the prosecution, if relevant to the defence of the accused, is admissible whether or not it prejudices the co-accused. Similarly, where the co-accused has given evidence against the accused, the accused in seeking to defend himself, should not be fettered in any way from cross-examining the co-accused. An accused person who feels that he was wrongly framed by a co-accused can challenge the admissibility of such evidence.[792]

In *Murdoch v Taylor,*[793] Murdoch who had a criminal record, was jointly tried with Lynch, who was previously of good character. Each was charged with receiving stolen property. Lynch gave evidence implicating Murdoch while Murdoch gave evidence alleging that it was Lynch alone who was in control and possession of a box containing stolen cameras. The judge held that Lynch's counsel was entitled to cross-examine Murdoch and indeed allowed him to cross-examine him as to his previous convictions. Murdoch was convicted based on that evidence.

The Court of Appeal had to determine whether Murdoch had given evidence against a co-accused. It was held that in determining whether an accused has given evidence against a co-accused, the test to apply is objective and not subjective. Secondly, that evidence against a co-accused means evidence, not necessarily given with hostile intent, but which supports the prosecution case against a

791 Section 57(1)(d) of the Evidence Act.

792 Adrian Keane, *The Modern Law of Evidence* (5th edn, 2000 Butterworths) page 47. [See *Murdoch v Taylor* [1965] AC 574, HL].

793 [1964] 49 CAR 119.

co-accused in a material respect or which undermines the defence of the co-accused. Finally, the court held that once the judge has ruled that the witness has given evidence against his co-accused, the co-accused has a right to cross-examine the person who gave the evidence in order to show that he has previous convictions or is of bad character and where it is the co-prisoner who desires to exercise the right, the court has no discretion to disallow the cross-examination.

Likewise, in *R v Hatton*,[794] the appellant and two co-defendants were charged with theft of scrap metal. The first defendant denied that there was a plan to steal while the other two agreed that there was a plan to steal but denied dishonesty. The trial judge allowed the first defendant to cross-examine the appellant as to his previous convictions, on ground that the appellant had given evidence against the first defendant, a co-accused, in that the appellant's story undermined the first defendant's story. The three were convicted. The appellant appealed on the ground that evidence which undermined part of a co-defendant's defence, was not necessarily evidence "against" him.

The appellate court held that the appellant's evidence had supported a material part of the prosecution case which the first defendant denied. As a result, the latter's conviction was rendered more likely and in turn reduced his chances of an acquittal. Moreover, the judge had correctly admitted the cross-examination of the appellant as to his previous conviction. The appeal was dismissed.

According to Cross,[795] the rationale here is that as far as an accused is concerned, if a co-accused gives evidence against him, he/she should be viewed as being in very much the same position as a witness for the prosecution. Sound policy and common sense demands that an accused should have a chance to challenge any testimony given by a co-accused.

In the *Murdoch* case,[796] the court emphasized that a co-accused can only be cross-examined if his evidence either materially

794 [1976] 64 CAR 88.

795 *Cross & Tapper on Evidence* (8th edn, 1995 Butterworths) page 446.

796 [1964] 49 CAR 119.

improved the prosecution case or undermined the defence of the co-accused person. It is the effect of the evidence upon the mind of the court which is material and not the state of mind of the person who gives it or his motivation; the test to be applied is objective and not subjective.[797]

It is important to note that cross-examination under section 57(1)(d) is directed towards the character and the credit of the co-accused and not to his guilt. In other words, the sub-paragraph confers upon an accused the right to discredit a co-accused who assumes the role of a prosecution witness and gives evidence against him. The law then allows the accused person to show by reference to the bad criminal record of the co-accused, that his testimony is not worthy of belief.

The question 'what is a similar offence?' was addressed by the case of *Metropolitan Police Commissioner v Hills.*[798] In this case, two motorists had collided with the result that a pedestrian was killed. They were not charged with the same offence but were tried together on successive counts of the same indictment for causing death by dangerous driving. The Criminal Evidence Act of 1898 substituted the words 'charged in the same proceedings' for 'charged with the same offence'. The court held that this wording was wide enough to cover all cases in which cross-examination would have been impermissible. It was not a matter of same proceedings, even if what differed was only the time element.

The admissibility of any given item of character evidence is determined by whether the evidence relates to a party in the proceedings; whether the proceedings are civil or criminal; whether the nature of the character evidence in question is good or bad and finally, the purpose for which the character evidence in question is sought to be adduced or elicited in cross-examination. [799]

In civil proceedings, character evidence is admissible if it is a fact in issue or is directly related to a fact in issue. In criminal

797 Proposition derived from the speech of Lord Donovan in *Murdoch v Taylor* [1965] AC 574, HL.

798 [1980] AC 26.

799 Adrian Keane, *The Modern Law of Evidence* (5th edn, 2000 Butterworths) page 421

proceedings, the previous criminal history of an accused person is only admissible in the limited circumstances noted in section 57 of the Evidence Act.

It is noteworthy that in a criminal case, the character evidence rule applies in the course of proceedings, that is, prior to conviction. After conviction in a criminal trial, the prosecution is allowed to adduce evidence of previous convictions of an accused person, in order to enable the court assess the applicable sentence to be meted out upon an accused.[800]

In *M'dali Juma Sumar v R*[801] the trial magistrate found the accused guilty under section 38(1) of the Traffic Order on 5 July. He then recorded his previous conviction and thereafter adjourned the matter until 7 July for judgment and sentence.

The judgment was, however, delivered by the court on 6 July.

On appeal, the appellant contended that his conviction was a nullity since it was not preceded by a judgment. The appellate court held that the deliberate taking of evidence of a previous conviction before the reasons for convicting had been reduced to writing, that is, a judgment was pronounced, amounted to a breach of legal procedure and is incapable of cure under the practice in criminal trials. Hence, it is critical to appreciate that this rule applies to criminal proceedings in the course of the trial of whatever case.

800 Section 57(2) of the Evidence Act.

801 (1950) 17 EACA 154.

Chapter 13

Opinion Evidence

A. Introduction

An opinion is a conclusion or an inference on the basis of available evidence that a witness draws from matters perceived through the five senses. The general rule is that opinions of a witness, whether the person themselves or third parties, as to the existence of some fact in issue or relevant fact are inadmissible.[802]

A witness may therefore, only speak of facts which he perceived with one of his senses not of inferences drawn from those facts.[803] If witnesses are allowed to give their opinions on ultimate issues, there is a serious danger that the judge may be unduly influenced.

The rationale underlying the general rule is that it is for the witness to state the facts as they occurred and for the judge to draw inferences or conclusions from those statements. This theory is premised on the assumption that it is possible to draw the dividing line between facts from opinions. This is not always possible since it is almost impossible for a person to talk for any length of time about something without expressing an opinion. In fact, most speech is coloured by opinion.

To this general rule, there are two exceptions. Opinion evidence may be admissible in the following instances:

1. An expert properly qualified may state his opinion on a matter calling for expertise which he possesses. This exception acknowledges the fact that in some cases, absent opinion evidence, a court may be unable to reach a conclusion based of the evidence on record.

2. A non-expert witness may state his opinion on a matter not calling for any particular expertise as a way of conveying

802 Adrian Keane , *The Modern Law of Evidence* (5th edn , 2000) page 490

803 *Ibid* page 490

facts perceived by him. The second exception recognizes that it is not always possible to distinguish between fact and opinion. It acknowledges that words of a witness testifying as to perceived facts are always coloured by opinion as to what was perceived. Where this is the case, the opinion expressed conveys the facts perceived.

B. Opinion Evidence of Experts

Expert opinion evidence is admissible as an exception to the general rule that opinion evidence of witnesses is inadmissible.

In *Folkes v Chadd*[804] a question arose as to whether a certain bank, created for the purpose of preventing the sea overflowing certain meadows, contributed to the choking and decay of a certain harbour. The evidence of one Mr. Smeaton, a chartered engineer, was allowed. Lord Mansfield, CJ stated that:

> "On certain matters, such as those of science or art, upon which the court itself cannot form an opinion, special study, skill or experience being required for the purpose, "expert" witnesses may give evidence of their opinion."[805]

Section 48 of the Evidence Act was lifted almost entirely from the above statement.

The section provides that when the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions.

Relying on Lord Mansfield's formulation, Lawton LJ in *R v Turner*[806] described the purposes for which expert evidence could be deployed in the following terms:

> "Opinions from knowledgeable persons about a man's personality and mental make-up play a part in many human judgments … An expert's

804 [1782] 3 Doug KB 157.

805 *Ibid*,. pages 44-45.

806 [1975] 1 All ER 70.

> opinion is admissible to furnish the court with scientific information which is likely to be outside the experience of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."

The duty of the expert was described in *Davie v Edinburgh Magistrates*[807] as follows:

> "The duty of the expert is to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions. Neither the judge nor the jury is bound by the views of the expert even if it is not contradicted."

This decision raises the question of "who is an expert"?

1. Who is an Expert?

Section 48 does not define the term expert. Therefore, it is upon the court to satisfy itself that the person before it is an expert in the field.

The question of whether a witness is an expert or not raises difficulties. It not important that a person appearing before court as an expert witness has veritable academic qualifications.

The important thing to keep in mind is that it is for the trial court in each case to determine whether the witness before it is an expert on a matter which requires special skill, knowledge or expertise. In other words, prior to the expert witness's testimony the court has to consider:

i) Whether the matter before it requires special skill, knowledge or expertise;

ii) Whether the witness before it is sufficiently qualified so as to testify as an expert witness.

807 (1953) SC 34.

In *R v Silverlock*,[808] a solicitor for the prosecution who had for ten years, and quite apart from his professional work, given considerable study and attention to handwriting, the court allowed this witness to be called in as an expert in order to prove by comparison with genuine letters that an advertisement was the handwriting of the accused.

Likewise in *R v Stockwell,*[809] a robbery and an attempted robbery in two buildings societies were recorded by security cameras, the trial judge's decision to admit the evidence of a facial mapping expert was upheld, notwithstanding that the expert had no scientific qualifications or training. He was an artist working in the field of medicine and life science whose job entailed comparing photographs and illustrating pictorially the essentials of anatomical features and surgical operations. His evidence was admissible on the basis of his experience and because it provided the jury with information and assistance they would otherwise have lacked.

Failure to properly qualify an expert witness's opinions in court may lead to exclusion of his/her testimony.

In the case of *Gatheru s/o Njagwara v R*,[810] it was stated that such special skills are not confined to knowledge acquired academically, but also include skills acquired through practical experience. The court said:

> "It may well be that in the present circumstances in Kenya a police officer employed on operational or investigation work acquires a sufficient practical knowledge to qualify him to speak as an expert…. but even so his competency as an expert should in all cases be shown before his testimony is properly admissible."[811]

In this case, the issue of whether a hand-made gun was a lethal weapon was raised. The police inspector had opined that it was a lethal weapon. However, the court disagreed on the basis that the police officer was not properly qualified as to how long he had

808 [1894] 2 QB 766.

809 (1993) 97 Cr App R 260.

810 (1954) 21 EACA 384.

811 Phillip Durand, *Evidence for Magistrates*, 1969 at page 122.

performed such duties as to entitle him to give evidence describing the gun as a lethal weapon.

Further, in *Charles Ng'ang'a v R*,[812] the accused was charged with the offence of causing death by dangerous driving. A policeman testified on the point of impact to which the defence objected because the policeman was not an expert on the matter. The trial court overruled the objection and on appeal it was held that unless it can be shown that a policeman has many years of experience in inspecting motor vehicle accidents, a police witness should not give opinion evidence of such matters.

Similarly, in *Odindo v R,*[813] the apellant was convicted of driving a motor vehicle under the influence of alcohol. A police inspector testified to the effect that when the appellant was brought to the control room of the Traffic Headquarters, he smelt of alcohol. The Inspector opined that accused person was smelling of drink and was incapable of coherently telling his name, he could not tell the time by the clock on the wall and he could not stand on one foot with his hand horizontally spread. The Inspector concluded his testimony by asserting that in his opinion the accused was completely incapable of having control of a motor vehicle. The judge overruled this opinion saying that the policeman should have confined his testimony to what he had observed, leaving the issue of fitness to drive to the court or a doctor.[814]

812 High Court Crim Case number 66 of 1980. (Unreported)

813 [1969] EA 12 (K).

814 The same was upheld in *Stephen v R* [1973] EA 22 (K) where the court rejected evidence by a policeman that he had found the accused in possession of a drug called cannabis sativa. The court stated that one should tell the court that you found the accused with a substance that looked and smelled a certain way and leave the experts to decide what drug it was. The court is trying to prevent lay persons from giving opinions on matters that require long years of experience.

2. Admissibility of Expert Opinion Evidence

Section 49 of the Evidence Act provides that:

> "Facts not otherwise admissible are admissible if they support or are inconsistent with the opinions of experts, when such opinions are admissible."

When an expert witness seeks to give testimony in court, they must establish their qualifications as experts before it can be relied upon.

For expert opinion to be admissible, three things need to be determined:

i) The witness is a qualified expert; either through formal educational or practical experience. The expert witness must have specialized knowledge and skill;

ii) The area of qualification or study must be an area where the said expert took extra courses or, where there is no academic background, one took extra interest to qualify him as an expert. Both conceptual and experiential training can be taken into account;

iii) Opinion must be wholly or substantially based on that knowledge. The expert must stay within his/her area of expertise;

iv) The matter to which the said expert claims expertise is not within ordinary human experience or otherwise known as "common knowledge".[815]

A witness is competent to give expert evidence only if, in the opinion of the judge, he/she is properly qualified in the subject calling for expertise.

In *Mohamed Ahmed v R,*[816] the appellant had been convicted of occupying an unsafe house which in the opinion of the district housing inspector and the superintendent of works was so unsafe as to constitute a nuisance. The Court of Appeal held that these

815 *Gatheru s\o Njagwara v R* (1954)21 EACA 385 at 385

816 [1957] EA 523.

two persons were not qualified experts and so their evidence was inadmissible.

Only in rare cases will it be necessary to hold a *voir dire* hearing to decide whether a purported expert should be allowed to give evidence, but in the vast majority of cases the judge will be able to make the decision on the basis of written material. The judge, during the trial, also has the power, should the need arise, to remove a witness's 'expert' status and limit his evidence to factual matters.

Usually, an expert witness testifies on the facts i.e. lays a foundation, before he/she can be allowed to express his opinion as an expert as to the meaning thereof. The rationale here is that opinion is not binding to the court but it should be considered with other evidence in reaching the final conclusion by the court. It is open to corroboration or rebuttal by other evidence where there is a conflict, the duty is upon the court to resolve the same or state why it prefers the evidence of one expert over the other.

That the court must still make its own conclusion instead of solely relying on expert opinion was upheld in the case of *Kitsimile Mugisha v Uganda*[817] where the Court of Appeal upheld the view that expert opinion is only opinion. It cannot take the place of substantive evidence. The court stated that courts have to make a decision on an issue upon such assistance as the expert may offer but it should not hand over its role of drawing inferences to the expert called before it. It must form its own opinion on the subject matter at hand.[818]

In essence the court should not be bound by the expert opinion. Another case in point is *Hussein v R.*[819] This case, initiated by the Immigration Department, concerned the determination of the ages of 2 sons of the appellant. The appellant was charged with making a false statement. He had stated his sons as being born in 1940 and 1944. An expert radiologist was brought in to determine the age. Evidence given by the radiologist about the age of the 2

817 Crim App. number 78 of 1976.

818 See *Hassan Sallum v R* [1964] EA 126 where the court upheld the same position noting that court should not over-rely on experts since they can make mistakes.

819 [1957] EA 344

sons established by x-ray examination indicated that one son was born in 1937 and the other in 1915. Although such evidence was not infallible, it was most unlikely to be wrong by 3 and 6 years respectively.

Experts should base opinions upon facts presented in court.

In *R v Kupikandimu and 3 others,*[820] a medical expert gave evidence in court and stated in a deposition that certain injuries described by him were inflicted before death. He gave no reasons for the opinion. To this, the court held that opinion evidence was inadmissible as to the cause of death.

When properly grounded, expert evidence of scientific conclusions is extremely persuasive, especially where the area concerned is one which commends itself to a greater degree of exactness than, say in cases of the comparison of handwriting.

3. Role of Expert Witness

The role of the expert witness has been more than adequately described by Cresswell J in *National Justice Cia Naviera SA v Prudential Assurance Co. Ltd (the Ikarian Reefer)* [821] as follows:

> "Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an Advocate. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion. An expert witness should make it clear when a particular question or issue falls outside his expertise. If after exchange of reports, an expert witness changes his view on a material having, such change of view should be communicated (through legal representatives) to the other side without delay and read the other side's expert's report or for any other reason when appropriate to the court".

820 [1946]7 ZLR 90.

821 [1993] 2 Lloyd– Rep 68 at 81-82.

Building on the above statement of law Otton LJ in *Stanton v Callaghan*[822] stressed that the expert witness owes a duty to the court as well as to the client who has retained his services. The expert's duty to the court is to assist the court in resolving issues and coming to a just conclusion, a duty that has been said to be overriding and taking precedence over any duty owed to the client.[823] Of course, there have been, and will be cases when expert witnesses have identified with a particular cause. Where that happens, the expert witness loses objectivity and the result is failure to disclose existence of information or data adverse to their side of the case. This is truly odd since, the expert witness ought to be independent of either side of the divide, at least speaking hypothetically.

Having said so, it goes without saying that in both civil and criminal proceedings, it is still the parties who select the expert witnesses. They are selected on the reasonable expectation that they will support the case of the party calling them. No litigant no matter how naïve, will call an expert to testify to something in which he does not believe. The adversarial system of trial is the culprit here. Some critics have posited that the system dictates that experts selected by parties are not a random selection from the relevant scientific or specialist community, and hence, are not representative of what that community stands for.

The logical question to ask then becomes, should the court appoint its own expert(s)? This can and is common practice in arbitral proceedings where statute expressly vests such power in the Arbitral Tribunal.[824]

Although in the UK[825] and other jurisdictions such power seem to exist, in Kenya the Evidence Act, the Criminal Procedure Code (CPC) and Civil Procedure Act (Chapter 21, Laws of Kenya) are silent on this matter. Even though the case for such a provision may be justified, it is noteworthy that even in the UK, this power is

822 [1998] 4 All ER 961 at 990.

823 Woolf Rep Access to Justice, (Lon, 1960 Chap 13, 139 at 143).

824 Act No 4 of 1995, Arbitration Act.

825 Under R. 35. 7 Civil Procedure Rules, 1985.

rarely if ever exercised.[826] A Royal Commission appointed to reform criminal justice system rejected the suggestion that court experts should be appointed in criminal cases, instead of party appointed experts.

It reasoned that a court expert's opinion would by implication carry more weight than the opinion of a party's expert. Yet "there would be no guarantee that he or she was any nearer to the truth of the matter than the expert witnesses for the parties."[827]

This is a controversial issue, more so in countries such as Kenya with no developed institutions for investigating fraud and the serious crimes. Some commentators have pointed out the prevalence of court appointed experts in civil law jurisdictions such as France and Italy. It makes sense where the investigation is under supervision of a judicial official from the start. Whether it would work in an adversarial setting is another matter since our Judges and Magistrates do not enjoy such a role. It seems that the solution may lie in accentuation of the role and independence of the expert witness, even if by way of statutory amendment.[828] This will enamor the expert witness to avoid feeling beholden to a particular party in the proceedings.

The function of the expert witness is to assist the court which lacks expertise in a particular field of human endeavour in reaching the truth. In case there is a conflict between fact and opinions of such witnesses, their testimony takes on a flavour of advocacy. As a consequence there is need and justification to limit the number of experts on each side.

826 Abbey *National Mortgages v Key Surveyors Nation Wide Ltd* [1996] 3 All ER 184 (CA).

827 Kyalo Mbobu, (*The Role of the Expert…Witness,*9 April 2010 (unpublished).

828 The law makes no distinction between an expert witness testifying in a fraud or corruption related case or one in an ordinary run of mill criminal case. The importance of the expert witness in such cases, however, cannot be underestimated especially where their testimony may expose them to risk of retaliation.

4. Opinion Evidence on Handwriting

This is recognized as an exception, by virtue of section 50 of the Evidence Act, to the general rule that opinion evidence is inadmissible.

The section refers to lay opinion evidence of handwriting and not opinion evidence of handwriting which is covered below. It provides as follows:

> "When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is admissible".

For the purposes of the above, a person is said to be acquainted with the handwriting of another person when she/he,

> "has seen that person write, or when she/he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him."[829]

In *Salum v R*,[830] the appellant was charged with forgery, altering a document and stealing. The only evidence was the opinion evidence of a handwriting expert who stated that he had compared the signature of the postal receipt with a letter written by the appellant and specimen of the handwriting of the appellant and two other messengers. The expert concluded that the signature on the receipt and the letter had been written by one and the same person. The accused was convicted. On appeal, the court held that, the expert was at fault in that he merely referred generally to his methods but did not explain to the court the particular features of similarity or dissimilarity to enable the court to weigh their relative significance. The court stated that the expert witness was wrong in saying that he had no doubt that the forged signature had been written by the appellant. The most he should have said was that the two writings

829 Section 50(2)Evidence Act.

830 [1964] EA 126 (T).

were so similar as to be indistinguishable. It is for the court to decide on the rest. Conviction in this case, was quashed.

The correctness of this decision was reinforced in the case of *Wainaina v R*,[831] where the applicant was an employee of East Africa Railways Corporation. His job required him to enter certain particulars of railway wagons in what was referred to as "train sheets". A wagon left Kipkelion Station laden with 440 bags of maize consigned to Nairobi. It was later diverted to Dandora under a false consignment note to Mabati Women Group as consignee. Specimen of appellant's handwriting was taken.

An expert gave an opinion evidence in the Magistrate's court to the effect that the false consignment note and the train sheet in which the wagon involved in the theft was entered were in the same hand i.e. applicant's handwriting. The appellant was convicted. On appeal it was argued that conviction was based on uncorroborated handwriting evidence.

It was held that whilst a handwriting expert may in a proper case, say he does not believe that a particular writing is by a particular person, the most he should ever say on the positive side is that two writings were so similar as to be indistinguishable. An expert might comment on unusual features which make the similarity more remarkable.[832]

The court also held that there was in essence, no rule requiring the corroboration of the evidence of a handwriting expert.

C. Non-Expert Opinion Evidence of Identity

The law recognizes that there are instances where a court may be unable to deal with an issue without making with the evidence of non-experts. A non-expert witness may give opinion evidence on subjects in relation to which it is impracticable to separate the witness's inferences from the facts perceived on which those inferences are based.

831 [1978] KLR 11.

832 Also see *Owners of SS. Australia v Owners of Cargo of SS Naitilis* [1927]AC 145.

Sarkar, the commentator on the Indian Evidence Act,[833] opines that:

> "In certain classes of cases, opinions of certain witnesses are not helpful but have to be admitted out of necessity. There are things or events that no language can describe and the best opinion may be that which the witness formed. Examples of instances in which a non-expert may give opinion evidence include evidence of identification, handwriting, speed, temperature, time etc."

There are instances where non-expert opinion evidence is admissible for the reason that there is no better evidence available. These include opinion evidence of identity, age, health, intoxication, insanity, value and speed. These would seem to fall in that wide general field of subjects on which evidence of opinion may be given and described by Sarkar above.

Identification covers not only, identity of persons, but also of things. A good example is where a witness opines that goods recovered after a robbery were the same goods that were stolen during the robbery.

Evidence of identity usually comprises of an opinion that the person or thing seen in court is the same as was seen at some other time, during the occurrence of the crime. This opinion is admissible whether the identity took place before the crime, at an identification parade or at the trial.

Identity parades require special care owing to the procedure and potential harm that can occur if care is not observed.

D. Identification Parades

The *Black's Law Dictionary*[834] defines an identification parade as 'a police identification procedure in which a criminal suspect and other physically similar persons are shown to the victim or a witness to determine whether the suspect can be identified as the perpetrator of the crime'.

The primary aim of an identification parade is to enable an eye witnesses to identify the suspect, whom they allegedly saw.

833 Sarkar, *The Law of Evidence*, 9th edn pages 428, 429.

834 9th edn page 1014

In an identification parade, the eye witness's ability to identify the suspect is tested and the failure to hold such parades weakens the evidential value and all that remains will be dock identification, which is weak.

The conducting of identification parades is part of the investigative process. Identification parades are guided by the Force Standing Orders.[835]

Standing Order Number 6 provides for Identification Parades

i. The police should not take a witness direct to an accused/suspected person for the purpose of identification except when they are sure that the accused or suspect is well known to him.

It is also worth noting that where an eye witness wishes to keep his/her identity secret, provisions should be made for the same.

When the whereabouts of an accused or suspected person is known to the police but there is some doubt as to whether he is the correct person, the only way to ensure a fair and correct identification is by means of an identification parade:

ii. Any person may refuse to take part in an ID parade and such person cannot be compelled to do so.

In such instances, if the accused/suspected person is subsequently charged, evidence will be given of this refusal to take part in an ID parade [by production of the ID parade form filled in by the ID parade officer on what the suspect exactly said with regard to participating in an ID parade].

iii. Whenever an identification parade is held, the conducting officer will make use of and complete all relevant portions of Form P.156 "Report of an Identification Parade". The form will be filled in all the prescribed spaces and inform and allow the suspect to sign after the conduct of the ID parade, and if necessary will be used by the conducting officer to refresh his memory in court proceedings as provided for in section 167(i) of the Evidence Act.

835 (Standing Order No. 6)

iv. Whenever it is necessary that a witness be asked to identify an accused or suspected person, the following procedure must be followed in detail.

The procedure to be followed in identification parades was discussed '*in extenso*' in the *R v Mwango s/o Manaa*[836] case. In this case, only 3 men, including the accused, were paraded. The identification parade took place in a hospital ward. Two policemen in plain clothes were in the ward at the time, but it is not clear from the record whether they were paraded or not. The officer in charge asked the witness: "Amongst these three men, who is the one who assaulted you?" As a result, the complainant identified the accused person who was charged and convicted.

The court held that the method of identification was very unsatisfactory. This case sets out the procedure to be followed when carrying out identification parades.

1. Procedure for Identification Parades

1. That the accused person is always informed that he may have a solicitor or friend present when the parade takes place.
2. That the officer in charge of the case, although he may be present, does not carry out the identification.
3. Ensure that the witnesses do not see the accused before the parade.
4. Ensure that the accused is placed among at least 8 persons, who are as far as possible of similar age, height and gender.
5. Ensure that the accused be allowed to take any persons he chooses and that he is allowed to change his position after each identifying witness has left, if he so desires.
6. Care to be exercised that the witnesses are not allowed to communicate with each other after they have been to the parade.
7. Exclude every person who has no business there.
8. Make careful note after each witness leaves the parade, recording the witness's identities or other circumstance.

836 (1936) 3 EACA 29.

9. If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see that this is done. As a precautionary measure it is suggested the whole parade be asked to do this.
10. See that the witness touches the person he identifies.
11. At the termination of parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply.
12. In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Don't say "pick out somebody" or influence him in any way whatever.
13. Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably.

The *locus classicuss* is the case of *Simon Musoke v R*[837] where it was held that it is not necessary that evidence of identification be followed by answers to questions put to applicant charged with another or one count of theft of a motor vehicle and 2 counts of robbery with violence. The evidence brought to court was that on the material day, the accused person had been seen at a funeral and at a bar dressed in a helmet readily identified by prosecution witnesses. The evidence of identification by the bar owner was rejected by the trial court on grounds that a number of questions were put to this witness to elicit reasons for identification. The stolen motor vehicle was found outside the bar and in it found, amongst other things, the helmet exhibited at trial.

On appeal, the issue was whether evidence of identification was properly disallowed. It was held that is not established practice to question a witness who has made identification at a parade as to his reasons for doing so. However, comments voluntarily made by the witness are often received as part of act of identification, but answers to questions would be of less value and of doubtful admissibility.

There is great danger when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never

837 [1958] EA 715 (CAK).

be upheld it is the duty of this court to satisfy itself that it is safe to act on such identification.

It is dangerous to suggest to an identifying witness that the person to be identified is believed to be present at parade.

In *R v Bulatikwa,*[838] the police officer conducting the parade told the identifying witness, "you know a man called Bulatikwa who you say killed your uncle. Come on to the verandah and see if you can find him". The court overruled this holding that some quite colourless language should be used such as: "is there anyone here whom you recognise?" and if the witness picks out anyone, he can then be asked "who is this?"

The weight to be given to identification at a properly conducted parade is greater than an identity made in other circumstances. The case in point is *Kipwenek Arap Masonik and 2 others v R*[839] where it was stated that:

> "Identification is a matter of opinion expressed by a witness and its value depends on the circumstances under which it is given. When the accused is away from the dock and placed amongst people similar to him, the identification made there is of the greatest significance. The opinion may be strengthened by reference to some part or unusual feature or article of discussion. But where none of these exist and the circumstances under which the opinion is expressed are against the accused then it may be reduced to so slight a value as to be negligible".

It should be noted that failure to make identification at a parade is not necessarily fatal.

However, in *R v Kariuki*,[840] no less than 112 men were paraded for identification. They were all dressed in precisely similar manner with blankets draped from neck to feet. No identification was made. But when the matter came up for trial, identification was made in court. It was arranged that failure to make identification at parade was fatal. It was held that the failure to make identification at identity parade was necessarily fatal.

838 (1941) EACA 46.

839 [1930] 12 KLR 153, 155.

840 [1948] 23 KLR 21.

In *R v Gaynor*[841] the police had trouble in finding enough individuals to form an identification parade and decided to have a group identification. The trial judge excluded the evidence on the ground that a parade could and should have been held. Again, in *R v Conway*[842] where the police officer giving evidence said: "An identification parade does not take place if we have a named person" by which he meant where the victim thought he knew the suspect, the evidence of identification was excluded. Where the suspect agrees to take part in a parade but there were insufficient numbers of like individuals, evidence of group identification or confrontation will be excluded if the police do not take all reasonable steps to hold a parade.

2. Conviction on Identification of a Single Witness

As a general rule, it is dangerous to convict an accused person on the basis of identification evidence of a single witness, although, such a conviction cannot, in law, be regarded as unlawful. Especially so, if the quality of the identification evidence is good. But as we shall see below, the determination of the quality thereof is never such an easy task.

In the case of *Roria v R*[843] 14 days after a raid on a maasai manyatta,[844] the applicant was identified at an identification parade by the witness of one of the persons killed in the raid as "either the person who killed her husband or who passed close to her when entering the manyatta".

The witness was in the manyatta at the time of the raid. The trial judge found that the witness was a truthful witness and thought that it strengthened her evidence that the applicant was a stranger to her. The assessors had unanimously disagreed with the trial judge, expressing their views that the applicant was a stranger to the witness, that the conditions under which she thought she saw the applicant

841 [2001] NICA 40.

842 [1990] 91 Cr.App.R.143.

843 [1967] EA 583, 534 (CA).

844 'Manyatta' is a traditional Maasai hut. Usually , built with criss-crossed sticks and smeared with cow dung mixed with mud on the outer side to provide cover from rain and the elements of weather.

at the raid were unfavourable to accurate identification, and that other witnesses at the manyatta were unreliable over the purported identifications of the co-accused.

It was held that, while it is legally possible to convict on uncorroborated evidence of a single witness identifying an accused and connecting him with the offence in the circumstances of this case it was not safe to do so. The court stated as follows:[845]

> "That danger i.e. of possible wrong identification is of course, greater when the only evidence against accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification".

More so, reference was made to the statement by Lord Gardner:

> "There may be a case in which identity is in question and if any innocent people are convicted today I should think in 9 cases out of ten if there are as many as 10 – it is a question of identity".

In such cases, other evidence must be availed pointing to the guilt of the accused person, from which the court can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.

The court should warn itself of these dangers in order that the record will reflect its caution to the dangers.

The celelerated case of *R v Turnbull*[846] provides the following guidelines for the trial court on how to deal with the evidence of a single unless on identification:

i) That whenever the case against an accused depends wholly or substantially on the correctness of an identification of the accused that the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before

845 *Roria v R Ibid*.

846 [1977] QB 224 (civil appeal).

convicting the accused in reliance on the correctness of the identification.

ii) The judge should also direct the jury to examine closely the circumstances in which the identification was made. When the quality of the identification evidence is good, the jury can be left to assess the value of the identifying evidence even though there is no other evidence to support it.

iii) However, when the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence that goes to support the correctness of the identification.[847]

In the case of *Joseph Ngumbao Nzaro v Republic*,[848] the Kenyan Court of Appeal expressly adopted the *Turnbull* guidelines as being good practice in matters of identification evidence. The deceased in the matter, while carrying a load of mangoes on her head was cut from the back of the head severally. A worker at a nearby shamba claimed to have witnessed the whole incident and claimed to have recognized the accused as the assailant resulting in a conviction for murder.

On appeal, the accused argued, *inter alia,* that the very early morning and surrounding vegetation rendered identification difficult.

The Court of Appeal held that before accepting visual identification as a basis for conviction, the court had a duty to warn itself of the inherent dangers of such evidence. A careful direction on the conditions prevailing at the time of identification and the length of time for which the witness had the accused under observation was essential.

The court also noted that the *Turnbull* guidelines were appropriate to the circumstances and inhabitants of Kenya having been followed in the past by both the High Court as well as the Court of Appeal. The appeal was dismissed after a finding that the

847 *Ibid* Pg.

848 [1991] EA 472; (1991) 2 KAR. 212

summing up and judgment taken as a whole combined adequate directions on the issue of identification by recognition. The Court held that:

> "Before accepting visual identification as a basis of conviction the Court had a duty to warn itself of the inherent dangers of such evidence. A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential."

Although no corroboration is required as a matter of law or indeed as a matter of express practice requirement, a practice akin to corroboration has developed in cases of visual identification. This practice is informed by the risks imminent in convicting on the basis of evidence of a single witness on identification. Yet, once a court properly directs itself, and a conviction is entered, it will be upheld on appeal. The famous case of *Charles Maitanyi v R*[849] admonished courts to exercise the greatest caution and circumspection before convicting on testimony of identification especially where the evidence is that of a single identifying witness.

Since then, the Court of Appeal has settled and consistently applied comprehensive guidelines for receiving and considering identification evidence as set out in the famous English case of *Regina v Turnbull.*[850] In the case of *Paul Kyalo Nyimo* alias S*afari v Republic*[851] the Court of Appeal re-iterated the guidelines. The Court stated:

> "…Our courts have adopted the comprehensive guidelines for receiving and considering identification evidence set out in the famous English case of *Regina v Turnbull* [1976] 3WLR 445. They are nine in number and they instruct a judicial officer who is considering evidence on identification to ask the following questions:
>
> a. How long did the witnesses have the accused under their observation?

849 [1986] 1 KLR 198.

850 *Supra*

851 [2013] eKLR.

b. What was the distance between the witnesses and the accused person?

c. What was the lighting situation?

d. Was the observation impeded in any way, as for example, by passing traffic or press of the people?

e. Had the witnesses ever seen the accused person?

f. If the witnesses knew the accused prior to the current transaction, how often?

g. If the witnesses had seen the accused only occasionally prior to the current transaction, did the witness have any specific reason for remembering the accused?

h. How long elapsed between the original observation and the subsequent identification to the police?

i. Was there any material discrepancy between the description of the accused given to the Police by the witnesses when first seen by them and his actual appearance?"

These are therefore the guidelines that the courts ought to consider prior to the conviction of an accused on the basis of the evidence of a single witness on identification.

3. Admissibility of Former Statements to Show Consistency of Identification

Former statements of witnesses are admissible where it goes to show consistency of the identification of the witness in his evidence or lack of it. Usually, such statements, are made in the first instance in the police statements' record book or in the diary kept in the ordinary course of business or life. The court in *Donaldi v R*[852] held that such evidence frequents provisions most valuable as corroboration of the evidence of the witness under section 167 or as showing that what he now swears to is an afterthought, or that he is now purporting to identify a person whom he did not recognize at the time, or an article which is not really witnesses at all.

852 (1940) 7 EACA 60. The court in *Kella v R* [1967] EA 809 (CA) reiterated the same.

4. Identification Bearing on Identity of Co-Accused

The general rule is that where there's identification of one member of a gang as against others, this may be a point for defence but, generallly speaking, it only goes to the weight of the evidence. Such evidence would be admissible where there exist other corroborative factors.

In the case of *Mugo v R*,[853] the applicants were convicted on 5 counts of robbery with violence committed at 5 petrol stations in and around Nairobi in quick succession. A stolen motor vehicle was used on each occasion. The accused persons were identified at identification parades by witnesses who also misidentified innocent men. The accused were convicted. On appeal, they argued that these discrepancies made all identifications unreliable. The Court of Appeal then held that the identifying witnesses could be relied on only insofar as they identified a particular appellant with a particular count.

5. Fingerprints

Generally, fingerprint evidence is a valuable tool for identifying an accused person. Section 48(1) provides for the admission of expert evidence of fingerprints' impressions.[854]

The rule concerning qualification of experts and presentation of facts before opinion evidence is admissible apply.

6. Identification From Footprints

Footprints are another form of identification. This is done by a comparison of footmarks of the shoes. They compare the soil type on the shoe and the soil mark at the scene of the crime. It involves several complex procedures that finally lead to the conclusion of the matter based on the footprint evidence.

The court in the case of *R v Maganga*[855] stated as follows:

853 [1960] EA 124 (K).

854 The case of *Nazir Ahmed v R* [1962] EA 345 (CA) provides an adequate discussion on the use of fingerprints in circumstance case involving car theft.

855 (1935) 2 EACA 89.

> "The proper method of comparison is to make the impressions of the shoes by the side and at a sufficient distance from those in question when the character of the soil and the interval of time permit such a thing, the most satisfactory mode of proof is to dig out and preserve the original footprints. Where that cannot be done casts in plaster of Paris should be taken, where neither of these methods are adopted and the identification is sought to be established merely by the police evidence, juries are apt to pay very little attention to it."[856]

Placing of shoes in footmarks was unsatisfactory because it obliterated any small differences which might have existed particularly where the footprint is on soft earth.

7. Corroboration of Identity by Police Dogs

The general rule is that the use of evidence of identity by police dogs to corroborate other evidence is inadmissible unless it is adequately founded.

In *Abdulla Bin Wendo and another v R*[857] the applicants were charged and convicted of murder. The only evidence of identification was from one witness. The judge relied on evidence relating to police dogs, without any foundation thereon. It was stated that:

> "We are fully conscious of the assistance which can be rendered by trained police dogs in the tracking down and pursuit of fugitives, but this is the first time we have come across an attempt to use the actions of a dog to supply corroboration of an identity of a suspect by a human. We do not wish it to be thought that we will rule out absolutely, evidence of this character as improper in all circumstances but we certainly think that it should be accompanied by the evidence of the person who trained the dog and who can describe accurately the nature of the test employed. In the instant case the dog master was not called and the evidence as to what the dogs did and how they did it is mostly scanty".

Note, in this modern age of drug trafficking and other sophisticated crimes, the use of such evidence is in ascendancy. Police sniffer

856 Also see Ainsley, Chief Justice in *Omondi v R* [1967] EA 802 (k) where he strongly deprecates use of "evidence of dogs" without foundation.

857 (1953) 20 EACA 166

dogs are thought to possess a heightened sense of smell. It will be interesting to see how the law on this subject develops.

From the above, the importance of opinion evidence of identity cannot be overemphasized. For the same reasons, courts are required to scrutinize such evidence carefully. The most commonly relied upon method of opinion evidence of identity is by the identification parade, where an accused is placed with others and witnesses are invited to attempt identification.

In *R v Pieterson*[858] Lord Taylor, CJ held that the evidence of a dog's reaction to the existence of the scent of a particular individual could be admitted if the following safeguards were adhered to:

> "First, the proper foundation must be laid by detailed evidence establishing the reliability of the dog in question. Secondly, the judge must in giving his directions to the jury, alert them to the care that they need to take and to look with circumspection at the evidence of tracker dogs, having regard to the fact that dog may not always be reliable and cannot be cross-examined."

Non-expert witnesses may also be allowed to give opinion evidence on such matters as speed, distance, time, emotional states and physical condition.

Evidential statements such as "the car was too fast" where the opinion cannot be separated from the factual situation the witness is describing are permissible. Such a witness, however, cannot usurp the court's function. An expression of opinion that a driver had been drinking (based on smell, behaviour etc.) is permissible, but the opinion of the witness that the drink rendered the driver unfit to drive is inadmissible as that is what the court has to decide.

8. Intoxication

A non-expert may give evidence on intoxication of an accused as long as that evidence does not go beyond statements on observation. A statement that the accused was too drunk to drive is a question for the courts to determine.

858 [1995] 2 Cr App Rep 11, CA. The same was held in *R v Haas* [1962] 35 DLR 2(d).

In *R v Davies*[859] Lord Parker, CJ held that although the witness could properly state the impression he formed as to whether the accused driver had taken drink, his opinion as to whether as a result of that drink he was fit or unfit to drive a car was inadmissible, being 'the very matter which the court itself has to determine'. One general rule is that a witness is not permitted to give an opinion on an ultimate issue.[860]

9. Age, Health, Emotional State, etc.

A non-expert witness is allowed to give opinion evidence on a person's age, health, bodily or emotional state, or reaction to an event or set of circumstances. Although a person's sanity is a matter calling for expertise, it would appear that a close acquaintance may express his opinion as a convenient way of conveying the results of his observations of that person's behaviour.

In *Wright v Doe d Tatham,*[861] Parke, B stated that in "criminal cases, expert psychiatric evidence is necessary in order to establish insanity".

E. Conclusion

From the foregoing, it can be established that there are two important principles, regarding the calling of expert opinion evidence:

i) Courts regularly need assistance from experts to provide them with an understanding of material or subjects with which they are not familiar, but it is only if there is a need for such assistance that expert evidence will be permitted, and it is important that the prosecutor carefully considers the need for expert evidence, before going to the trouble and incurring the expense necessary to obtain such evidence.

ii) The party who wishes to call the expert must be in a position to establish that the proposed witness has the necessary expertise

859 [1962] 1 WLR 1111, C-MAC.

860 *R v Stockwell* [1993] 97 Cr App Rep 260 at 265, where Lord Taylor, CJ stated that the rule has become "a matter of form rather than substance."

861 (1838) 4 Bing NC 489 at 543.

to give the assistance the Court requires. This will have been ascertained long before the witness is to be called to testify, by the witness providing to the party engaging him or her, a detailed report, setting out the witnesses' experience and expertise, as well as any findings and the opinion that the witness will provide in evidence.

CHAPTER 14

CORROBORATION

A. INTRODUCTION

The term corroboration is not defined in the Evidence Act. Legal scholars agree in essence though that, corrobative evidence is evidence which supports or confirms some other evidence that an accused has committed an offence with which he is charged.

Adrian Keane states[862] that evidence capable of amounting to corroboration may be defined as evidence which is admissible, credible and independent and which implicates the accused person in a material particular.[863]

This definition captures all elements of the term corroboration. It is derived from the authorities and in particular *DPP v Kilbourne*[864] where Lord Reid stated that,

> "there is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement, one naturally looks to see whether it fits in with other statements or circumstances relating to the particular statement; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."

Lord Simmons further stated in the same case that, [865]

> "Corroboration is nothing other than evidence which confirms or supports or strengthens other evidence. It is in short, evidence which renders other evidence more probable."

In *DPP v Hester,*[866] Lord Morris stated that,

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862 *The Modern Law of Evidence* (1994) 4th edn) at page 149.

863 Definition of corroboration is similarly canvassed in ***R v Mulwa*** [2002] 2 KLR 350.

864 [1973] AC 729 at 750.

865 [1973] AC 729 at 729,756.

866 [1973] AC 296 at 315 HL.

> "any risk of convicting an innocent person is lessened if conviction is based upon the testimony of more than one acceptable witness".

In the *locus classicus* case of *R v Baskerville*[867] the Court defined corroboration as:

> "…some additional evidence rendering it probable that the story of a particular witness is true. The corroborating evidence must be independent evidence which affects the accused by connecting him or tending to connect him with the crime. It is evidence that confirms in some material particular not only the evidence that the crime has been committed but also that the accused committed it. Corroboration may be found in real evidence or by the conduct of the accused or through circumstantial evidence which points to one irresistible conclusion, that the accused committed the offence".

Closer home, in *Nzukie v R,*[868] the court held as follows:

> "Corroboration evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crimes is true not merely that the crime has been committed. Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. Further, the nature of the corroboration will definitely vary according to the circumstances of the offence charged."

Rules of Corroboration

From the foregoing, a number of rules may be drawn on the subject:

1. Firstly, the evidence requiring corroboration must itself be credible.

   Lord Morris in *DPP v Hester*[869] states that:

   > "The purpose of corroboration is not to give credence to incredible/insufficient evidence but to give support to evidence adduced that is credible. It (corroboration) only applies when completely credible".

867 [1916] 1 KB 658

868 [1993] KLR. 171

869 [1973] AC 296 at 315 HL.

2. The corroborating evidence must itself be credible. No amount of corroboration of incredible evidence will render the evidence on record any more credible.[870]

3. Evidence in corroboration should not itself be, as a matter of law, evidence that requires corroboration. For instance, the evidence of a child to corroborate that of an adult. The case of *Shida Baya and others v R*[871] is illustrative of this point. This case involved five appellants charged and convicted of murder. The evidence in support was that of a child and so was the evidence in corroboration. On appeal the accused wondered whether the evidence in corroboration should itself, as a matter of law, require corroboration. The Court of Appeal held that:

   > "we however do not appreciate that evidence that requires corroboration can be corroborated by evidence which in itself requires corroboration."

4. The corroborative evidence must itself implicate the accused in a material particular with the commission of the crime. All evidence against an accused must be directly linked to the event in question.

5. A witness may corroborate himself. For example, a complainant in a rape case can testify about his/her physical condition and where there is some evidence of a sexually transmitted disease that can amount to corroboration .

Corroboration is required in order to check the accuracy and reliability of the evidence tendered in court. Corroboration ensures that a person is only convicted where there is sufficient evidence to link him/her to the offence in question. It is vital to note that, section 143 of the Evidence Act states that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

This is a very pertinent provision for practitioners of the law in that, it is possible to prove a case with the evidence of a single witness. The number of witnesses required for corroboration is immaterial as what is important is there should be two or more separate sources

870 *R v Kipkering Arap Koske* (1949) 16 EACA 135.

871 [2008] eKLR.

of evidence. The quantum or cogency of evidence in corroboration depends on the strength of the case so that a weak case needs more cogent evidence in corroboration.[872]

B. Instances Where Corroboration is Required

Generally, there is no requirement that evidence be corroborated or that a court of law be warned of the danger of acting on uncorroborated evidence. However, there are certain instances where corroboration is required. They are as follows:

1. Where Corroboration is Required as a Matter of Law

There are instances where the law expressly requires corroboration of evidence. The following are some of those instances.

a) Evidence of Children of Tender Years

Where a child is called as a witness in a court of law, nobody shall be convicted on such evidence unless it is corroborated. Section 124 of the Evidence Act stipulates in this regard that:

> "Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him".

In *Maanzo v Republic*[873] where the appellant and another person were arraigned before the High Court on a charge of defiling and drowning a three-year-old girl in a cattle dip, according to a medical report. Evidence was given by the deceased's two brothers aged nine and five.

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872 The case in point here is that of *R v Kasemas Ongeda* (1940) 19 KLR 25 where the accused raped a young girl aged eight. The young girl did not understand the nature of an oath and so her evidence was unsworn. Further evidence showed that she contracted a sexually transmitted disease from the accused. It was held that the evidence of the child was sufficiently corroborated in that the accused suffered gonorrhea at the time of the offence and the girl contracted gonorrhea within seven days of the rape

873 Criminal Appeal No 31 of 1987.

The court held that reliance on the uncorroborated evidence of the two children should be avoided and so should testimony given by her mother which, simply, was a repetition of what the boys told her. However, the court based its conviction on the medical report and held that:

> "The injury caused to the deceased must have been the natural consequence of the cruel act perpetrated on her as described in the retracted confession of the appellant. The medical evidence provided strong corroboration on the appellant's retracted statement. The appellant's conviction was therefore safe."

In *Ombaka v R*[874] the appellant was charged and convicted of two counts of indecent assault on a female and sentenced to five years' imprisonment. His conviction was based on the evidence given by a child on oath. No other evidence such as medical reports was produced by the prosecution to support their case. The state counsel in this case relied on the English legal position which states that where a child has given evidence on oath, corroboration is not mandatory.

The court however held that, the English law was not in line with the Evidence Act. It was further held that the evidence of the sexual complainants needed corroboration and that they could not corroborate each other. Therefore, the conviction of the appellant on the uncorroborated evidence could not be supported.

The Sexual Offences Act[875] however amended section 124 of introducing the following proviso:

> "Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the victim is telling the truth."

This proviso has come in very handy especially for the child sexual offence victims. In the past, many offenders went scot-free on account of the corroboration requirement. It is important though,

874 [1993] KLR

875 Act No. 3 of 2006

to underscore that this proviso applies only to sexual offences cases. In all other instances, the corroboration requirement remains.

b) Speeding Cases

Section 43 of the Traffic Act[876] provides that a person charged with a traffic offence under the section shall not be liable to be convicted solely on the evidence of one witness to the effect that in the opinion of the witness, the person charged was driving the vehicle at such greater speed. Therefore, two or more witnesses are sufficient to justify a conviction.

In *Brighty v Pearson,*[877] the appellant was charged with driving a lorry at a speed exceeding the maximum limit. The law required such evidence be corroborated. Evidence at trial was given by two police officers. Their evidence was that the same lorry was seen at a particular place on a particular road being driven at high speed by one officer and that the other officer saw it too at a different place being driven at high speed. On appeal it was held that since the lorry was seen in different places at different times, there was insufficient corroboration of evidence to convict the accused.

In the case of *Crossland v DPP* ,[878] an accident and reconstruction expert testified that he had observed the damage caused to the defendant's vehicle, carried out speed and braking tests on the car, observed the speed marks and concluded that the vehicle was not driven at less than forty one miles per hour. The accused was convicted on the basis of this evidence. The court held that this was not solely the opinion evidence of one witness. The expert had also described the objectively determined phenomena on which his opinion was based.

876 Chapter 403, Laws of Kenya..

877 [1983] Vol 4 All ER 187.

878 [1988] 3 ALL ER 712, 714.

c) Perjury

In cases when an accused is charged with perjury, the law expressly provides for the need to corroborate that evidence. The accused in this case cannot be convicted solely on the evidence of one witness as to the falsity of the statement alleged to be false. This is encapsulated in section 111 of the Penal Code. This section states that:

> A person cannot be convicted of committing perjury or of subordination of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false.'

Note that this section does not require corroboration to take the form of a second witness testifying.

In *R v Threfall,*[879] a letter suborning another to commit perjury was found to be sufficient corroboration. The section requires corroboration not only in relation to the offence of perjury in judicial proceedings, but also in relation to the making of false statements on oath in statutory declarations.[880]

d) Treason

Section 45(2) of the Penal Code Law of Kenya states that:

> "No person charged with treason, or with any of such felonies, may be convicted, except on his own plea of guilty, or on the evidence in open court of two witnesses at the least to one overt act of the kind of treason or felony alleged, or the evidence of one witness to one overt act and one other witness to another overt act of the same kind of treason or felony.

This provision is clear. It needs no further elucidation.

However, in the case of *Republic v Andrew Mungai Muthemb*a and *Dickson Kamau s/o Georges Muiruri,*[881] a distinction is raised with an overt act being viewed as a distinct independent charge rather than an element of treason. It stated that:

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879 [1914]10 Cr App Rep 112.

880 The case of ***R v Rider*** [1986] 83 Cr. App Reps 207 further illustrates this point.

881 High Court Criminal Case No 25 of 1981 (unreported).

> "the evidence must be applied to the proof of the overt act, and not to the proof of the principal treason; for the overt act is the charge to which the defendant must apply his defence. And whether the over act proved is a sufficient overt act of the principal treason laid in the indictment is a matter of law to be determined of any overt act amounting to a distinct independent charge, although it be an overt act of the species of treason charge, shall be admitted in evidence, unless it be expressly laid in the indictment; but if an overt act not laid amounts to a direct proof of any other overt act which is laid, it may be given to prove such overt act ."[882]

2. Where Corroboration Warning is Required as a Matter of Law

Similarly, there are cases where a corroboration warning is required as a matter of law. A good example here is where an accused testifies on behalf of the prosecution. This applies because an accomplice having been a participant in the offence may have a purpose of his own to serve. Therefore, he may give false evidence against the accused person either out of spite or exaggeration or due to vengefulness.

In *Davies v DPP*[883] the House of Lords held that where an accused gives evidence on behalf of prosecution, it is the duty of the court to warn itself that though it may convict on this evidence, it is dangerous to do so. This is a rule of practice though it has in the recent years assumed the force of law and where a judge does not warn herself, whatever decisions he reaches will be quashed.

In *Wilson Kinyua and another v R*[884] one of the accused denied involvement while the other admitted and said the other co-accused was involved. They were both convicted. On appeal, Kinyua argued that the trial court relied on accomplice evidence to convict without requiring for its corroboration. The Court of Appeal, in allowing the appeal, held that the confession by one of the accomplices needed

882 High Court Criminal Case No. 25 of 1981 (unreported); Archibold's *Pleading, Evidence and Practice*, (39th Edition) at page 1311 para 3020.

883 [1984] AC 378 (HL).

884 [1980] KLR 181.

to be corroborated before it forms the basis of convicting the co-accused.

Having said so, it is important to note that the practice of the court seems to contravene express statutory provisions in that, section 141 provides that an accomplice shall be a competent witness for the prosecution against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice. This is one area where the draftsman of the Act seems to be out of touch with practice on the ground.

3. Where Corroboration Warning is Required as a Matter of Practice

Judicial practice has it that when corroboration is required as a matter of practice, the Court must warn itself of the dangers of conviction in the absence of corroboration.

The Court record must reflect that the magistrate or judge has warned himself of this danger.

In the absence of such warning, the conviction will be set aside. In *R v Kirmunyo*,[885] the Court explained that a judge should warn the assessors and himself on the danger of acting on the uncorroborated evidence of the complainant but having done so, such a judge can only convict in the absence of corroboration if she/he is satisfied that the evidence of the complainant is truthful.

If no such warning is given, the conviction will be set aside.

a) Accomplice testifying on behalf of the defence

Where an accomplice testifies in his own defence, the court must warn itself of the danger of convicting on the account of that testimony of the accused.

In *Prater v R*[886] the appellant was charged and convicted of conspiracy to defraud. On appeal, he argued, *inter alia,* that the conviction was based on evidence by a co-accused during trial

885 [1943]10 EACA 63.

886 [1960] 2 QB 464.

but the evidence was not corroborated as required by law. The appellate court held that in such a case, in practice, it is desirable that corroboration be given to a jury where a witness might have a purpose of his own to serve and frames a co-accused, and then there is the need to take care.

Woodroffe[887] writes that the evidence of an accomplice is admitted from necessity. The practice is to regard evidence of such persons as tainted and untrustworthy because from the position occupied by them, their statements are not entitled to the same weight as the evidence of an independent witness. Thus, the evidence is brought up in order to bring the offender to justice.

The reasons why the evidence of an accomplice is not untrustworthy were elucidated by the court in the case of *DPP v Davies:*[888]

(i) An accomplice is likely to swear falsely to shift guilt from himself;

(ii) Being a participant in crime, and therefore an immoral person, an accomplice is likely to disregard the sanction of an oath;

(iii) Because he gives evidence under promise of a pardon, this promise could lead him to favour the prosecution.

b) Matrimonial causes

In matrimonial causes, the need for corroboration is eminent. The standard of proof of a matrimonial offence leading to dissolution of marriage is high; thus, the need to corroborate such evidence for the avoidance of miscarriage of justice.

In the case of *Galler v Galler,*[889] the court held that in divorce proceedings, the matrimonial court must be satisfied beyond reasonable doubt that the offence alleged has been committed. Where it is adultery, the witness who gives evidence that he has committed an offence with one party to the proceedings, is like an accomplice in a criminal case. A corroboration warning must be

887 Law of Evidence, (9th edn) page 952.

888 [1954]AC 378.

889 [1954] Probate 252.

given to the jury or trial court because he has some interest in the suit.

In *Fairman v Fairman*[890] it was held that when a co-respondent gives evidence in a matrimonial proceeding that he/she has committed adultery with a party to those proceedings, that evidence should be treated with the same weight as that of an accomplice in a criminal case.

4. Where there is no Requirement for Corroboration warning, yet Caution is Necessary

A) Identification

In identification cases, there is no express requirement that the evidence of a single witness pertaining thereto be corroborated. However, due to the acknowledged danger of convicting an accused on the basis of mistaken identity, a requirement akin to a corroboration was developed.

In *Roria v R*[891]the court quoted the statement of Lord Gardener, L.C during the House of Lords debate on the enactment of S. 4 of the Criminal Appeal Act 1966 of the UK. The Lord Chancellor state:

> "There may be cases in which the identity of the accused is the main question…and if any innocent people are convicted today, I should think in some cases there is the likelihood of raising the question of identity is very eminent".

The mistaken identity of accused person especially in cases of visual identification has been the greatest cause of wrong convictions. This is because there are many factors which could impede the visual identification of an accused such as poor lighting, bad sight and so forth.

In *R v Turnbull,*[892] the English Court of Appeal held that the identification of the accused in that case was unsatisfactory.

890 [1949] Probate 341

891 [1967] EA 583.

892 [1977] QB 224; [1976] 3WLR 445.

Following this finding, Lord Widgery laid down the Turnbull guidelines for identification of accused person, where a case turns on visual identification of an accused:

a) Whenever the case of the accused depends wholly or substantially on correctness of identification of accused alleged to be mistaken, the judge must warn of the special need for caution before convicting in reliance thereon.

b) There is need to examine closely the circumstances in which the identification by each witness came to be made.

c) Failure to consider these guidelines is likely to result in a conviction being quashed.

Here what is required is not a corroborative warning but rather a care warning that indicates that the trial judge was alive to the dangers of acting on evidence of visual identity of a single witness. This in the eyes of the law tends to minimize the risk of improper conviction of an innocent person.

CHAPTER 15

EXAMINATION OF WITNESSES

A. INTRODUCTION

The process of examination of witnesses is prescribed in Chapter V, Parts III and IV of the Evidence Act, the Civil Procedure Act, Order 18 of the Civil Procedure rules and sections 150-158 of the Criminal Procedure Code.

This is the means by which witnesses adduce evidence before a court of law and includes the manner in which these witnesses are called and examined by each side. It is vital to appreciate that it is the courts which manage the process of examining witnesses.

Legal Provisions in the Evidence Act

The starting point is to note that it is the Court which has the power to decide which evidence is admissible to prove a fact or a fact in issue.

This is prescribed under section 144(1) to (4) of the Evidence Act. Section 144(1) provides:

> "When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be admissible".

This clause allows the judge to question the admissibility of evidence before its adduction in the court.

A party adducing evidence in court must produce evidence which relates to facts in issue or relevant facts as contemplated under section 5 of the Kenya Evidence Act. Again, where a party intends to adduce hearsay evidence, he or she is supposed to prove to the Court whether such evidence is admissible as an exception to the hearsay rule as contemplated under section 33 of the Act.

Section 144(2) provides that:

> "The Court shall admit the evidence of any fact if it thinks that the fact, if proved, would be admissible and not otherwise."

This clause should be read together with section 110 of the Evidence Act. Pursuant to section 110, the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Section 144(3) provides that,

> "If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact and the court is satisfied with such undertaking".

The relevance of a fact depends on proof of another fact before evidence of the current fact is proved. For example, in cases where one is accused of handling stolen property, it must first be proved that he or she denied the possession of the property. However, the judge has discretion to allow a party to continue and prove a fact [that the property in question is indeed stolen] if the party undertakes to prove the last mentioned fact [that the accused denied possession] at some stage in the course of the proceedings.

Under section 144(4) of the Act:

> "If the admissibility of one alleged fact depends upon another alleged fact being first proved, the court may, in its discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact."

When the relevancy of one fact depends on the proof of another fact, the judge or magistrate has discretion to require either fact to be proved first.

Number of Witnesses

The law does not limit the number of witnesses a person can call to prove a certain fact.

However, the court has discretion to limit the number of witnesses. The purpose of this discretion is to prevent what would otherwise be endless litigation if parties were allowed to call as many witnesses as they wished.

Section 143 of the Act provides that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"

This means that a fact may be proved even by one witness as there are no strict rules on the number of witnesses that one must call in order to prove a fact. This provision implies that what is material is the probative value of the evidence in question and the credibility of the witness.

In the case of *Butler v State*,[893] the court stated that if there was no discretion on the court to limit the number of witnesses testifying in a certain case then there would be endless litigation before the courts. However, this discretion has to be exercised with due care so as not to disturb public interest and good. Discretion should be exercised so as not to impair the rights of the defendant or indeed any party.

Another vital point to note is that if there is a provision of the law requiring that a fact has to be proved with more than one witness, then the weight attached to the evidence of only one witness will be minimal.

Examples of such cases are for example, situations where a child of tender years is giving evidence or where a witness is giving evidence in traffic cases. Section 43(3) of the Traffic Act provides in this regard that,

> "a person charged with the offence of driving a motor vehicle of any class or description on a road at a speed greater than the maximum speed allowed shall not be liable to be convicted solely on the evidence of one witness to the effect that in the opinion of the witness the person charged was driving the vehicle at such greater speed."

893 1997 *Ind.* 378. The same point was reiterated in the case of *Mergentheim v State* (1886), 107 *Ind.* 567

B. Oath and Affirmation

The Criminal Procedure Code[894] provides that "every witness in a criminal cause or matter shall be examined upon oath, and the Court before which any witness shall appear shall have full power and authority to administer the usual oath". Accordingly, in criminal cases a witness must first be sworn in before testifying in Court.

For this reason as soon as a witness enters the witness box, he is asked whether he professes any religion. If the witness is either a Christian or a Muslim, he is then sworn in, in accordance with the provisions of the Oaths and Statutory Declarations Act.[895] A witness who is a Christian swears while holding a Bible in his right hand. A witness who is a Muslim places both hands on the Koran before taking the oath.

In *Mwangi v R,*[896] the appellant was charged and convicted of robbery with violence and sentenced to death on the basis of testimony given by witnesses some of whom never took an oath.

On appeal, it was held that under section 151 of the Criminal Procedure Code, all witnesses in a criminal trial or cause ought to be examined on oath. In common law, it is an established rule that the testimony of a witness to be examined *viva voce* in a criminal trial was not admissible unless he had previously been sworn to speak the truth.

Nonetheless, absence of religious belief does not affect the validity of the oath taken.[897] If a witness objects to the taking of an oath and states that he does not have religious beliefs or gives any other reason of not taking the oath, he is allowed to take an affirmation instead. Section 15 of the Oaths and Statutory Declarations Act emphasizes this position by stating;

> "Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be

894 Section 151

895 Chapter 15, Laws of Kenya.

896 [2006] 2 KLR.

897 Section 21 of Oaths and Statutory Declarations Act, Chapter 15, Laws of Kenya

> permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is required by law, which affirmation shall be of the same effect as if he had taken the oath".

The form of the required oath shall be varied by substituting for the word "swearing" with the word "affirm".

Section 16 of the Oaths and Statutory Declarations Act provides in this regard that every affirmation shall be as follows:

> "I, A.B., do solemnly, sincerely and truly declare and affirm," and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness".

Effect of an Oath or the Lack of It

Once a witness has taken an oath, he opens himself up for cross-examination so that pursuant to section 156 of the Evidence Act, a witness cannot refuse to answer questions on the basis that the answer given may tend to incriminate him. Sometimes a witness may refuse to take an oath or affirmation. Under such circumstances, the witness will not be cross-examined on what he says.[898]

In the case of *R v Rirmin bin Kunjanga,*[899] the magistrate questioned the prisoner regarding the discrepancy between his unsworn statement and his statement at the preliminary inquiry. The Court was of the view that this interrogation was improper and that no questions should be asked of an accused person who has not given evidence on oath unless for the purpose of explaining or clarifying something obscure or ambiguous in his unsworn statement.

Another point to note is that such unsworn evidence of a witness is accorded very little weight.

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898 Section 211(1) of the Criminal Procedure Code provides in this regard that:

> " At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the Court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)".

899 [1935] 2 EA Civil Appeal 64.

The importance of taking an oath was emphasized in the case of *Charles Wanjohi Murage v Republic*[900] in which the Court held that unsworn evidence is of very little or no value at all. The Court proceeded to explain that,

> "It is a mandatory requirement in criminal proceedings and indeed all Court proceedings that witnesses be sworn and or affirmed. In very rare circumstances is a witness allowed to testify without being sworn and or affirmed for instance in the case of evidence by a child of tender years. However, such evidence will only be admissible if the child has been subjected to *voire dire* examination by the trial Court".

C. Stages and Procedure in Examination of Witnesses

Examination of witnesses is conducted in form of questions posed by counsel and answers given by witnesses. The order of the examination of witnesses is provided for under sections 145 and 146 of the Evidence Act.

There are three stages of examination of witnesses;[901]

1. Examination-in-chief;
2. Cross–examination; and
3. Re-examination.

The examination of a witness by the party who calls him is called examination-in-chief.[902] Once a witness has been examined-in-chief, he or she is liable for cross-examination by the adverse party. This is called cross–examination.[903] Finally, a witness who has been cross-examined may be re-examined by the party who initially called him.[904]

The order in which the witnesses are examined is provided for under section 146(1) of the Evidence Act. Accordingly, witnesses are

900 [2010] eKLR.

901 Section145 of the Evidence Act.

902 Section 145(1) of the Evidence Act.

903 Section 145(2) of the Evidence Act.

904 Section 145(3) of the Evidence Act.

first examined-in-chief, then, if the adverse party so desires, cross-examined, then, if the party calling them so desires, re-examined.

The implication of this provision is that examination-in-chief is mandatory while, cross-examination and re-examination are discretionary.

Again, it must be noted that the evidence given in Court must follow the procedure specified in section 146 of the Evidence Act.

In the case of *Umari (Estate of) v Lands Commissioner*,[905] the issue for determination was whether the procedure set out in section 146 of the Evidence Act was also applicable before the Land Registration Court. The Court held that the Court was a "Court" within the meaning of the Evidence Act, 1963, and therefore, evidence given before it must be taken in the manner prescribed under section 146.

As regards the production of documents, it must be noted that a person called to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.[906]

1. Examination–In-Chief

Here, the person calling a witness or his counsel will seek to elicit from the witness, evidence which supports his version of the facts in issue. To this end it is expected that, no form of rehearsal of a witness should take place.[907]

In civil cases, a person is permitted to call any number of witnesses. However, if the witnesses called are unnecessary witnesses, he may be condemned to pay costs. Otherwise, there is no obligation in a person to call a certain number of witnesses or call them in any order[908].

905 [1967] EA 126 (K) at 130.

906 Section 147 of the Evidence Act.

907 Richard May & Steven Powles, *Criminal Evidence*, (5th edition Sweet & Maxwell) page 603.

908 Section143 of the Evidence Act.

In criminal proceedings the choice of witnesses rests with the prosecution, although a trial judge has the right to call a witness not called by either the prosecution or defence without the consent of either person, where the course of justice so demands. Even after the close of the defendant's case, this right may be exercised where a matter has arisen 'ex improviso' i.e., in the course of proceedings.

The prosecution is under a duty to call certain witnesses and avail others for cross-examination by the defendant.

In *R v Russel Jones*[909]; the English Court of Appeal set out the following guidelines for the prosecution's case:

(i) The prosecution must bring to court all witnesses 'named on the back of the indictment.

(ii) The prosecution has the discretion to call or tender for cross examination by the defendant any witnesses it requires to attend. This discretion is not unfettered.

(iii) The exercise of the discretion must be in the interests of justice.

(iv) The prosecution should normally call or offer to call all witnesses who can give direct evidence of the primary facts of the case, even if there are inconsistencies between one witness and another, unless for good reason, the prosecutor regards the witness's evidence as unworthy of belief.

(v) The prosecution must decide which witnesses can give direct evidence of primary facts.

(vi) The prosecutor is the judge of whether or not a witness to the material facts is unworthy of belief.

(vii) The prosecutor properly exercising his discretion is not obliged to proffer a witness merely in order to give the defendant material with which to attack the crime of other witnesses on whom his/her case relies.

As a general rule of practice in both civil and criminal cases, a party should adduce all evidence on which he intends to rely before the close of his case. However, it is pertinent to observe that recent

909 [1995] 3 All ER 239.

amendments to the Civil Procedure Rules, 2010, now require a party suing or defending any suit to file a list of witnesses at the filing of its pleadings.[910]

There are several issues that affect the testimony of witnesses. These are:

(i) Whether a witness has been asked leading questions;

(ii) Whether a witness has been allowed to refresh his memory by defendant to a former written statement he has made;

(iii) Whether a witness may give evidence unfavourable to the person by whom he is called etc; and

(iv) Previous consistent or inconsistent or self-serving statement.

i. Leading Questions

According to section 149 of the Evidence Act;

"Any question suggesting the answer which the person putting it wishes or expects to receive, or suggesting a disputed fact as to which the witness is to testify, is a leading question."[911]

A leading question has two characteristics:

(a) It suggests the answer desired;

(b) It assumes the existence of disputed facts as to which the witness is yet to testify .[912]

In *R v Thynne*[913] the court stated that leading questions are prohibited in examination-in-chief so as to guard against a witness adopting the suggestions implied in the question as opposed to answering the question on his own.

Thus, leading questions are objectionable for two reasons:

910 O. 3 R (2)(b), Civil Procedure Rules, 2010. This evidences an attempt to delimit the number of witnesses either party can call in civil cases, which is just as well if indeed parties are sure of their rights and obligations in all causes of action.

911 See Saunders (1985) 15 ACrimR 115; the Court held A 'leading question' is one which either suggests the desired answer or assumes the existence of disputed facts

912 See *Moor v Moor* [1954] 2 ALL ER 459; [1954] 1 WLR 929 & *R v Wilson* (1914) 9 CrAppR 124.

913 [1977] VR 98.

1. The risk of collusion between the person asking the leading question e.g., lawyer or prosecutor, and the witness.[914]
2. The sheer impropriety of suggesting the existence of facts which are not in evidence is thought to rob them of any probative value.

Note that in many instances, if the question can be answered "yes" or "no", the question will have been leading.

Leading questions are permissible in cross-examination as per section 151 of the Evidence Act. This section simply states that,

"Leading questions may be asked in cross-examination".

Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in a re-examination, except with the permission of the court.[915]

In some instances, leading questions save time and are indispensable to the trial process especially as an introduction to further interrogation. As a general rule, answers to leading questions are not inadmissible in evidence since the method by which they are obtained robs them of all or most of their significance, save in the following exceptional cases:

(i) A witness may always be led on the formal or the introductory part of examination. For example, Is your name Amy? Are you a lawyer?;

(ii) Leading questions are indispensable when a witness has to identify a person or thing in court. Such questions as "Was he the man who assaulted you?" Are common, or in a case to prove a partnership, in order to stimulate the memory of a witness, he may be asked whether certain named persons did or did not participate in the business;

(iii) Questions about matters not in dispute,[916] objecting to such questions would be time wasting.

914 *Cross on Evidence*, (2nd edn Australian) paras. 10-16

915 150 (1) of the Evidence Act.

916 Robinson (1897) 61 J.P. 520

In *R v Mac Donnel,*[917] it was said that questions put to a prisoner in cross-examination should be in an interrogative form, i.e. should commence 'did you'? Not 'you did'?

ii. Refreshing the memory of a witness

When an event took place a long time ago, witnesses often experience difficulties re-collecting the same. Subject to some conditions, witnesses in the course of testifying in court may refer to a document, e.g. a diary, log book or account book to refresh his memory.

It is important to note that it is the oral evidence of the witness whose memory is being refreshed, and not the document, which constitutes evidence in the particular case.

In the case of *Maugham v Hubbard,*[918]a witness, having been called to prove that he had indeed received money, referred to an unstamped acknowledgement signed by himself and thereupon told the court that he had no doubt that he had received the money though he could not remember it. The court held that the witness's evidence sufficed.

Section 168 of the Evidence Act reiterates that:

> "a witness may testify to facts mentioned in any such writings as is referred to in section 167 although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document".

The conditions required are that the document is:

a. made or verified by him contemporaneously with the events in question;

b. produced for inspection by either court or opposing party;

c. Produced in its original form.

917 [1909] 2 CAR 332.

918 [1828] 8 B & C 14.

a. Contemporaneity

A witness who has made a "contemporaneous" statement i.e. at the time of an incident or shortly afterwards when the facts were still fresh in his or her mind may be permitted to use that statement to refresh his or her memory while giving evidence. Before the witness can do this the advocate will need to obtain details as to the circumstances in which the statement was made and obtain the leave of the court.

This is a question of fact very much dependent on the facts and circumstances of the case i.e. subject matter.

Section 167(1) provides that,

> "a witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or made so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory."

It further states that, a witness may refresh his memory by referring to any writing made by any other person and read by the witness within the time mentioned in sub-section (1) above, if when he read it he knew it to be correct.

In "*Attorney-General's Reference*,"[919] the Court of Appeal held that a police officer could refresh his memory from notes compiled while the facts were still fresh in his memory from earlier brief jottings of an interview.

Likewise in *R v Chisnell,*[920] an officer was allowed to use a statement made nine months after an interview and compiled on the basis of a contemporaneous note. The court was satisfied that the note had been accurately transcribed into the statement.

In *R v Da Silva*[921] it was held that a witness who has made a "non-contemporaneous" statement may be allowed to refresh his or her memory while giving evidence provided certain criteria have

919 (1979) 69 Cr App R 411(No. 3)

920 [1992] Crim LR 507, (CA)

921 [1990] 1 All ER 29, 33.

been satisfied. The criterion is that memory could be refreshed even from a strictly non-contemporaneous document if:

(i) The witness indicates that he cannot recall the details of events because of the lapse of time since they took place.

(ii) That he made a statement much nearer the time of the events and that the contents of the statement reflected his recollection at the time he made it.

(iii) That he had not read the statement before giving evidence.

(iv) That he wishes to read the statement before he continues to give the evidence.

The degree of contemporaneity will depend upon the nature of the matter and there is no required rule that a witness who has begun to give evidence cannot subsequently refer to such a statement for this purpose.

In *R v Fotheringham*[922] a gap of twenty-two days was disregarded.

However, in *R v Da Silva,*[923] above, the trial judge held that a statement made a month after the events related therein was not contemporaneous.

b. Production of the Document

The document must be handed to the opposite party or his advocate to enable him to inspect it, and if he so desires, to cross-examine the witness with regard to its contents.

Section 169[924] states that:

"any writing referred to in section 167 or section 168 shall be produced and shown to the adverse party if he requires it, and such party may, if he pleases, cross-examine the witness thereupon".

Such documents must be read over and accepted as accurate by the witness. It is not necessary for the document to have been made by the witness but it must be read over and accepted as accurate by the witness.

922 [1989] 88 CAR 206 Court of Appeal.

923 [1990] 1 ALL ER 29, 33.

924 Evidence Act.

c. Production of the Original Document

Where the witness does not 'refresh' his memory, but has no recollection of the events in question, and seeks to give evidence as to the accuracy of the contents of the document; the original document must be used. Where the original is lost or destroyed, a verified copy will suffice. The rules governing documentary evidence have to be observed in this case.

The above rules apply to a witness's oral testimony or statement in court.

Usually a witness has given a statement to a solicitor or the person calling him or a signed statement to the police. This statement forms the basis for questions put to the witness in-chief. It is desirable that since such a statement was made a while ago, the witness should read his proofs shortly before the hearing. The adverse party is allowed to cross-examine on a document used in this way, as if refreshment had taken place in court.

iii. Unfavourable and Hostile Witnesses

a. Unfavourable Witnesses

According to Cross and Tapper,[925] a person calling a witness to prove certain facts may be disappointed by his failure to do so coupled with the witness's antipathy (hostility) to his own cause.

Thus, an unfavourable witness is one called by a person to prove a particular fact in issue or a fact relevant to the fact in issue who fails to prove such fact or proves an opposite fact. On the other hand, a hostile witness is one who is not desirous of telling the truth at the instance of the person calling him.

The general rule is that a party is not permitted to impeach the credit of a witness he calls; he may neither question the witness about, nor call evidence concerning his bad character, convictions, prior inconsistent statements or bias.

925 *Cross and Tapper on Evidence*, (8th edn), Butterworths, 1995) page 309

According to paragraph 172, 11th Report of the Criminal Law Review Committee,[926]

> "…it would be repugnant to principle and likely to lead to abuse, to enable a person, having called a witness on the basis of that he is at least in general going to tell the truth to question him or call other evidence designed to show that he is a liar.'

A witness is expected to tell the truth. However, evidence to support the reputation for integrity of a witness who has not been impeached is not allowed. A witness may be impeached by proving that he is not worthy of credit, or that the facts to which he deposes are not true, or by cross-examination, in which he may be shown to be inconsistent; and it is admissible under such circumstances to prove the good character of the witness.

Although a person is not permitted to impeach the character or credit of his own witness as stated above, he may call other witnesses to give evidence of those matters in relation to which the unfavourable witness failed to come up to proof.

Thus in *Ewer v Ambrose,*[927] the defendant called a witness to prove a partnership; and the witness testified to the contrary. It was held that while the defendant could not adduce general evidence to show that the witness was not to be believed on his oath, he was entitled to contradict him by calling other witnesses.

Therefore if a person had four witnesses upon whom he relied to prove his case, it would be very hard that, by calling first the one who happened to disprove it, he should be deprived of the testimony of the other three.

b. Hostile Witnesses

Stephen defines a hostile witness as one "who is not desirous of telling the truth at the instance of the party calling him."[928] .A hostile witness may either contradict a previously given witness statement

926 Published in 1972 in the UK.

927 [1825] 3 B & C 746.

928 *Digest of the Law of Evidence* (12th edn) Art. 147.

or refuses to say anything yet he is a sworn witness.[929] Whether a witness is hostile or not is for the judge and the Jury alone to decide but the evidence and demeanour of a potentially, hostile witness should be tested in court or in the presence of the jury.[930]

A court may allow cross-examination of a hostile witness by the person calling him. An application to treat a witness as a hostile witness may be made at any time during the witnesses' evidence, even at the re- examination of the hostile witnesses.

Author Sarkar[931] notes that it is in the discretion of the court to permit leading questions or cross-examination is absolute and independent of any question of hostility or adverseness and may be given in all cases, thereby avoiding the problems which have arisen in the equivalent section of English law in defining "adverseness" and "hostility."

The court has the discretion either to allow or disallow the application. In exercising its discretion, the court should take into account the attitude and demeanour of the witness, his willingness to co-operate, and the extent of the inconsistency between his testimony and any prior statement by the witness. Usually once the application is made, the court should consider inviting the witness to refresh his memory from material which it is legitimate to use, unless he displays on excessive degree of hostility such that there is no other course open.

Once the court rules that a witness be treated as hostile, the person calling him may ask leading questions but may neither cross-examine him on his previous misconduct or convictions, nor adduce evidence to show that he is not to be believed on oath. Generally, he may cross examine the witness on the evidence the witness was called to adduce i.e., the previous inconsistent statements etc. may be put to him.

If on cross-examination on a previous inconsistent statement, a hostile witness adopts and confirms the contents or particulars

929 Thompson (1976) 64 Cr. App. R. 96, (CA)

930 *R v Darby* (1989) Criminal LR 811 (CA)

931 Evidence, (12th edn), 1971 at page 1333

thereof, what the hostile witness says becomes part of his evidence and, subject to the assessment of his credibility by the court, it is admissible. The strength of the direction on the weight to be attached to the evidence shall vary in accordance with the circumstances of a particular case.

In *R v Thomas*[932] the accused was charged and convicted of murder of his six-month-old-baby. The accused's sister, who had made a number of admissions to the police that she had handled the child roughly, was called as a witness for the defendant. In her testimony, she went back on these admissions prompting an application that she be treated as a hostile witness, which was duly granted. Thereafter, she admitted to committing acts of violence to the child. The trial judge directed that the jury disregard her evidence. The accused was then convicted. The matter was then appealed.

The Court of Appeal in substituting the conviction, held that since the sister's evidence was to the benefit of the accused, the trial judge should have invited the jury to consider whether it cast doubt upon the prosecution case and should have pointed out that she would have every time for denying violence on the child.

It is for the court to decide whether a hostile witness is creditworthy at all. The court should give a clear warning about the dangers of acting on the evidence of a witness who has contradicted himself or herself.

In *Shampal Singh v R*,[933] the appellant was convicted on circumstantial evidence of murder by strangulation of his wife to whom he had been happily married for less than one year. On appeal, much of the argument concerned the medical evidence and counsel for the appellant sought to rely on passages from textbooks on medical jurisprudence to the citation whereof Crown Counsel objected.

He was convicted. On appeal the court held that although sections 45, 57 and 60 of the Evidence Act authorize reference by

932 [1985] CRIM LR 445 (CA).

933 [1960] EA 762.

the court to certain textbooks and treaties the proper function of such works as assisting the court to a right understanding of and conclusion upon the evidence given; when passages from such works are relied upon, they should be put to the expert witnesses for their opinions.

It has been suggested that to be more consistent with the court's truth-finding function, the court ought to allow all witnesses be challenged where their testimony contradicts previous statements not just those statements the courts find to be from a hostile witness.[934] According to section 38 of the Australian Evidence Act, 1995, a party calling a witness may, with leave, question the witness about whether the witness has at any time made a prior inconsistent statement. The leave does not depend on any hostility.

iv. Self-Serving Statements

The general rule is that a witness may not be asked in-chief whether he has formerly made a statement consistent with his present testimony. The reason for the prohibition of the reception of such statement is that it infringes the rule against hearsay and evidence of this nature may be manufactured.

Mere repetition does not enhance the veracity of a statement, because these statements are self-serving and cumulative. The admission of such statements suggests that credibility depends upon the number of times the witness has repeated the same statement rather than the inherent trustworthiness of the statement. Any statement made out of court by a witness in an attempt to corroborate testimony is considered as mere hearsay.

The rule of exclusion is generally recognized in every jurisdiction. If the statement of the witness is made prior to trial, it may be received in corroboration of testimony. Prior consistent statements are generally admissible to re-establish the credibility of a witness who has been impeached.

The admissibility of a prior consistent statement to rehabilitate a witness who has been impeached with a prior inconsistent

934 I.H. Dennis, *The Law of Evidence*, (2nd edn, Sweet & Maxwell) 2002 page 480

statement is a matter within the discretion of the trial judge. In order to rehabilitate an impeached witness, the trial court should determine if the statements have some probative force bearing on the credibility of the witness.

Prior statements that are consistent are admissible under the rules of evidence. Evidence of prior consistent statements is not evidence of the fact in issue; rather its purpose is to support a witness whose veracity has been attacked. Generally, in the absence of statute or rule declaring the impeached witness incompetent, she/he may testify to prior consistent statements.

For prior statements to be admissible, there should appear to be a real or substantial similarity between the sworn and unsworn statements. Prior statements can either be oral or in writing.

2. Cross Examination

This is the questioning of a witness immediately after his examination-in-chief by the other person to the proceedings.

Viscount Sankey viewed cross-examination as 'a powerful and valuable weapon fro the purpose of testing the veracity of a witness and the accuracy and completeness of his story'.[935] In criminal proceedings, if an accused testifies on oath he will be open to cross-examination by the prosecution as well as by a co-accused.

According to Keane,[936] the co-accused is entitled to cross-examine him whether he has given evidence favourable to the co-accused or merely evidence in own defence.

In the case of *Bingham*[937] per Lord Hope it was stated that, there is no rule preventing a witness who has been sworn but not questioned by the party calling him, being questioned by other parties. The right to cross-examine is available to any party whose interests may be affected by the testimony of the witness[938].

935 *Mechanical and General Inventions Co. and Lehwess v Austin and Austin* Motor Co. [1935] A.C. 346 at 359, HL

936 *The Modern Law of Evidenc*e, 2000 (5th edition, Butterworths) 2000 at page 170.

937 1999 1 W.L.R. at 603.

938 I.H. Dennis , *The Law of Evidence*,(2nd edition Sweet & Maxwell 2002) page 481.

As a general rule, all witnesses who testify are liable to cross-examination. This general rule is subject to the limitation that only two (certain) forms of questioning are permitted in cross-examination:

(i) Cross-examination to elicit evidence in support of cross examiners version of the facts in issue i.e "to complete and correct the witness's story."[939]

(ii) Cross-examination to cast doubt upon the witnesses' evidence.

An additional rule stated by Lord Donovan stated in *Murdoch v Taylor*[940] is that 'the right to cross–examine is, unfettered, the only limit being relevancy.'

This position is reiterated in '*R v Sweet Escott*.'[941] It was held that the matters about which one is questioned must relate to the witnesses' likely standing after cross-examination.

i. Cross-examination to support cross examiner's version of matters in issue

The cross-examiner's scope of examination is not limited to matters proved in examination-in-chief. It may relate to any fact in issue or relevant to a fact in issue. However, counsel should be careful not to put questions to a witness which are invitations to an argument.[942] Further, it is noteworthy that inadmissible evidence cannot become admissible by being put to a witness in cross-examination.

The rules of evidence which prevent admission of such evidence-in-chief will catch any such evidence in cross-examination.

Note however, that counsel may properly produce a document to the witness and ask him if he accepts the contents as true, and if he does the contents become evidence in the case. If he does not, it would be improper for counsel to request the witness to read aloud

939 C. Allen, *Practical Guide to Evidence* (1998) page 64.

940 [1965] 49 CrAppR 119; [1965] AC 574].

941 *R v Sweet-Escott* [1971] 55 Cr. APP.R 316 at 320, it was held per Lawson, J that a witness's convictions that were over 20 years old, were not "material" to the ongoing proceedings in which the witness was giving evidence.

942 '*Baldwin*' [1925] 18 Cr. App. R. 175, CCA.

from the document, the contents of which remain inadmissible hearsay evidence.

In the case of (*R v Thomson)*[943], the appellant was charged and convicted of using an instrument upon a woman for the purpose of procuring miscarriage. The woman died though not as a result of the operation. The defendant's defence was that he had done nothing to her, but that she had perfected the operation upon herself.

At trial, the defence counsel in cross-examination, sought to ask questions of a witness for the prosecution as to statements made by the woman sometime before her miscarriage that she intended to operate upon herself, and that shortly after her miscarriage that she had operated upon herself. The trial judge refused to permit such questions and went ahead to convict. On appeal, challenging trial judge's refusal to permit such questions, the Appeal Court held that these statements being mere hearsay, were not admissible in evidence for the defendant.

Chief Justice Alverstone disagreed with the Appeal Court and quoted Charles, J at page 22 as follows:

> "Therefore my judgment is this; that the statements must be confined to contemporaneous symptoms and nothing in the nature of a narrative is admissible also who caused then or how they were caused". In this case it cannot be argued that the statements were admissible as part of the *res gestae*; the statements sought to be proved were not made at the time when anything was being done to the woman."

In *Bhandari and another v S.R. Gautama,*[944] a businesswoman gave the respondent a promissory note for KShs 47,000 for monies lent to her and for professional services rendered to her in respect of her business. Later, she transferred the business to the appellants whereupon the respondent sued her and the appellant as transferees of the business for KShs 36,400 being balance due on the note.

During the trial, counsel for the appellant sought to cross-examine the respondent regarding the amount representing alleged professional services in order to show that the liability was not

943 [1912] 3 KB 19.

944 [1964] EA 606.

concerned with the business transferred to them. The trial judge found that since the appellants did not intend to call evidence to controvert the presumption that the promissory note was given for good consideration, there was no need for the applicants to cross-examine the plaintiff.

On appeal, it was held that the trial judge was wrong in not allowing questions to be put to the respondent to show the nature of the alleged professional services rendered. The court went on to hold that though counsel had stated that he was not calling evidence to controvert the presumption that the note was given for good consideration, that did not deprive counsel of the right to question the respondent. Further that, the denial of the right of the appellants' counsel to cross-examine the respondent on vital issues rendered the trial unsatisfactory.

In its judgment the court quoted *Halsbury's Laws of England*,[945] noting that:

> Cross-examination is directed to:
>
> 1. The creditability of the witness;
> 2. The facts to which he has deposed in-chief, including the cross-examiner's version thereof; and
> 3. The facts to which the witness has not deposed but to which the cross-examiner thinks he (witness) is able to depose.

ii. Cross-examination as to credit

There are a variety of ways in which the cross-examining party may seek to cast doubt upon the witnesses' evidence after the examination–in–chief.

The cross-examining party may do the following:

(a) He may cross-examine about his previous inconsistent statements or previous convictions;

(b) May question him with a view to showing his prejudice, bias or general reputation for untruthfulness;

945 (3rd edition) at page 444, paragraph 800.

(c) May question him about his unreliability by reason of any physical or mental disability. If the witness denies these matters, the cross-examiner is at liberty to call evidence to prove them;

(d) May question a witness about his previous misconduct or bad character;

(e) May question him about his means of knowledge of the facts about which he has testified to test the quality of his memory;

(f) May ask for an explanation for any mistakes, omissions or inconsistencies in his evidence insofar as they militate against his truthfulness.

In so doing, the cross-examiner is seeking to show that the witness ought not to be believed on his oath.

The main constraint to cross-examination is the discretion of the judge to prevent any questions which in his opinion are unnecessary, improper or oppressive.

Cross-examination is a very powerful weapon entrusted to counsel to seek the truth. Many a junior counsel may think that cross-examination must be oppressive and coercive. But it should be conducted with due restraint, courtesy and consideration to the witness as per Lord Sankey, LC in *Mechanical & General Inventionary v Austin*.[946]

In that case it was held that a counsel will be restrained from embarking on lengthy cross-examination on irrelevant matters or asking questions which invite argument rather than elicit evidence of a fact in issue.

In *Hobbs v Tinling,*[947] Lord Sankey summarized as follows concerning the discretion of the court to disallow questions concerning the credit of a witness:

a. Such questions are proper if such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of court as to the credibility of the witness; (section 157(2)(a)).

b. Such questions are improper if the imputation conveyed relates to

946 [1935] AC 346, 360.

947 [1929] 2 KB 51.

matters so remote in time that the truth of the imputation would not affect the opinion of the court as to the credibility of the witness; (section 157(2)(b)).

c. Such questions should be disallowed if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence. (section 157(2)(c)).

Section 157(3) concludes by stating that:

> "the court may, if it sees fit, draw from the witness's refusal to answer, the inference that the answer, if given, would be unfavourable to the witness."

This means that if the court may infer that the witness's refusal to answer a question is due to the unfavourable answer he or she may be compelled to give.

iii. Effects of failure to cross-examine

Unless a witness has proved to be unfavourable or hostile to the party calling him, failure to cross-examine amounts to tacit acceptance of a witness's evidence -in-chief i.e. he cannot later invite the court to disbelieve the witness's evidence on the matter.

The rule is summarized in *R v Pasqua*,[948] as follows:

> "there is a general duty on counsel to put a matter directly to a witness if counsel is going to later adduce evidence to impeach the witness's credibility or present contradictory evidence."[949]

Hence, a cross-examiner who wishes to submit that the witness is not truthful must lay a proper foundation by putting the matter to the witness so that he has an opportunity to give any explanation open to him.

In the case of '*Browne v Dunn'* [950], the House of Lords agreed with the above formulation of the law in a libel action in which certain witnesses were not cross examined on a particular matter. It

948 [2009] AJ Number. 702, 2009 ABCA 247..

949 See *R v Drydgen*, [2013] BCCA 253.

950 (1893) 6R 67.

held that the rule is not absolute. In some cases the story told by a witness may be so incredible that the matter upon which he is to be impeached is self-evident. The most effective cross-examination in such a situation in words of Lord Morris is 'to ask him to leave the box'.

The Alberta Court of Appeal in *R v KWG*[951] noted that,

> "[n]ot every matter of contradicting evidence or comment needs to be put to a witness. Therefore, the prosecutor was not required to expressly put allegations of collusion to the defence of other witnesses."[952] However it opined that, witnesses must be "appropriately confronted" so as to avoid a scenario where the opposing party is surprised by allegations.[953]

In a trial for libel in the case of *Hobbs v Tinling,* cited above, the defendant gave evidence that save for one lapse, he was a man of an unblemished reputation. Thereupon, he was cross-examined as to specific incidents not mentioned in the libel or in the particulars thereof; it being suggested that he was a man of bad reputation.

This line of cross-examination was opposed, but the trial court overruled it. By the conclusion of the cross-examination, the jury intervened and without summing up found for the defendants.

On an appeal challenging exercise of judge's discretion and behaviour of jury; it was held that the cross-examination was admissible as cross-examination as to credit but that if the incidents were denied by the plaintiff no further evidence could be called to rebut the plaintiffs denial, and that judge should have been told that they were not bound to accept the plaintiff's denials. Those denials, though not accepted, afforded no evidence that the incidents had taken place.

In the event the above rule of failure to cross-examine is broken, certain remedies have been recommended by *R v McNeill*.[954] The first option is to recall the witness.

951 [2014] ABCA 124.

952 para 45.

953 para 46..

954 [2000]OJ number 1357, 144 CCC (3d) 551.

The second possible remedy applies to systems with juries where the trial judge may give special instructions.

iv. Finality of answers to collateral questions

A person, who is elicited unfavourable evidence during cross-examination, may seek to adduce evidence in rebuttal. If such evidence (in rebuttal) were allowed without restriction, it would lead to a multiplicity of issues, some being of minimal relevance and hence prolong a trial.

The general rule, therefore, is that answers given by a witness under cross-examination to questions concerning collateral issues e.g. credibility of a witness, must be treated as final.[955] Finality here means that the cross-examiner is not permitted to call further evidence with a view to contradicting the witness.

The test for determining whether a question is collateral or not was formulated by Pollock, CB in *AG v Hitchcock*[956] as follows:

> "if the witnesses' answer is a matter on which the cross-examiner would be allowed to introduce evidence–in –chief, because of its connection with the issues in the case, then the matter is not collateral and may be rebutted"

To some determining a collateral question may still pose some difficulty especially as this test has been criticized for possessing an element of circularity.[957]

Relevance is a matter of degree depending on the matter which the cross-examiner seeks to prove. If the questions go merely to the credit of the witness, they are clearly collateral.

In *AG v Hitchcock*, concerning information under the revenue laws, a witness who had given material evidence as to the fact in issue was asked on cross-examination, whether he had not said that the officers of the crown had offered him a bribe to give that

955 *Harris v Tippet* [1881] 2 CaMP. 637, Att. *Gen v Hitchcock* [1847] 1 Ex. 91

956 [1847] 1 Exch 91, 99.

957 as Henry J acknowledged in Funderburk [1990] 2 All ER. 482N at 491

evidence. He denied that he had ever said so. On appeal, it was held that evidence to show that he had ever said so was inadmissible.

> Further, in *R v Burke*[958] a witness in cross-examination was asked whether he understood English. He said, through an interpreter that he did not. He was further cross-examined and asked whether he had in fact spoken to two people in the courthouse in English. He declined he had not. The counsel was not allowed to further clarify the matter by calling the people who he had allegedly spoken to in English. This is an application of the rule about the finality of answers to collateral questions.

v. Exceptions to the general rule on the finality of answers to collateral questions

There are about 5 exceptions to the general rule on the finality of answers to collateral questions.

(a) Previous inconsistent statements

Where a witness under cross-examination denies a previous oral or written statement made by him which is relevant to an issue in the case and inconsistent with his testimony, that statement may be proved against him. This common law right to cross-examine a witness about a former inconsistent statement has been recognized in section 165 of the Evidence Act.

In *R v Funderburk*,[959] T was charged with a count of sexual intercourse with, F, a minor (girl) aged 13. She gave evidence of a number of acts of intercourse with F, and her evidence of the first act described the loss of her virginity. The defendant claimed she was lying about her loss of virginity wishing to show she was sexually exploited. They wished to put to her;

(a) That she had told a person that before the first incident complained of, she had sexual intercourse with two men; and

(b) If she denied this, to call a person to prove the conversation.

The court held as follows;

958 [1858] 8 Cox CC44.

959 [1990] 2 ALL ER 482 (CA)

(i) With regard to (a) above, the proper test for cross-examination that should have been employed as to credit was that it should be allowed for the court to re-appraise the girl's evidence about her loss of virginity.[960]

(ii) As to (b) it was held that the conversation if denied, could have been proved, because the previous statement did not merely go to court but was also 'relative to the subject matter of the indictment'.

If a person wishes to contradict a witness, she should hand the document to the witness, direct her attention to the relevant part of its contents, ask her to read that part of the document to herself and then enquire if she still wishes to stand by her inconsistent evidence. If the witness adopts the previous statement, it becomes part of her evidence which has therefore changed and to that extent her credibility will have been impeached.

However, if the cross-examining party wishes to prove the point, she must prove the document and put it in evidence. She can read aloud the relevant parts asking the witness where the truth lies.

In *R v Sweet Escott*.[961] the facts were that Sweet Escott gave evidence for crown in 1970 on the preliminary investigation into a charge of blackmail. The solicitor for alleged blackmailer in cross-examination of Sweet Escott as to credit, cross-examined him on previous convictions between years 1947 – 1950, which he then denied, but later admitted. Sweet Escott had not been convicted since 1950. He was subsequently charged with perjury relating to his evidence in the Magistrates Court in the proceedings for blackmail.

The court, in this regard, held; that since the purpose of cross-examination as to credit is to show that the witness ought not to be believed on oath, the matters about which he is questioned must relate to the witnesses' likely standing after cross-examination before the tribunal which is trying him and hearing his evidence. In this case, the cross-examination of Sweet Escott on these distant convictions would not have affected the declaration of the Magistrate's to commit for trial the person accused of blackmail. Hence, the answer given by Sweet Escott relating to those convictions were not material in those

960 Also refer to the words of Lawton,LJ in *R v Sweet-Escott* (1971) 55 CAR 316.

961 [1971] 55 CAR 316.

proceedings. Thus, they could not form the basis of a prosecution for perjury.

(b) Previous Convictions

Subject to the provisions of section 57(1)(c) of the Evidence Act, a witness may be cross-examined about his spent convictions particularly in relation to his credibility.

However, as we saw earlier, section 57(1) is a powerful disincentive to the cross-examination of persons by the defendants because if the latter casts imputations on the character of a prosecution witness, the accused will lose his 'shield' and may be cross-examined for the purpose of attacking his credibility and thereby risk or have his own bad character exposed. Note, that there is wide discretion conferred to court by the proviso to section 57(1)of the Evidence Act to allow the defendant to develop a defence.[962]

(c) Bias

Per Geoffrey, Lane LJ, in *Eileen-Mendy v R*[963]

> "It has always been permissible to contradict a witness's denial of bias or partiality towards one of the persons and to show that he is prejudicial so far as the case being tried is concerned."

In the course of a trial for assault, while a detective was giving evidence a man in the public gallery was observed taking notes copiously. He left the court and held a conversation, apparently concerning the detective's evidence, with the accused's husband, who, as a prospective witness, had been kept out of court. The husband subsequently gave evidence and under cross-examination denied he had spoken to the man in question. The accused was convicted.

On appeal, the court held that the trial judge had properly allowed evidence to be given in rebuttal, as the court was entitled

962 Section 57 (1) In criminal proceedings the fact that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged, or is of bad character, is inadmissible unless such evidence is otherwise admissible as evidence of a fact in issue or is directly relevant to a fact in issue.

963 [1976](64) CAR 4, 6.

to know that in order to deceive and help the accused, the witness was prepared to cheat.

The actual summary of the holding of *Eileen-Mendy* case is as follows:;

(i) That although the general rule was that a witness's testimony as to collateral issues was final and could not be impeached by the calling of contradictory evidence on collateral matters, nevertheless, this rule was not all embracing for it had always been permissible to call evidence to contradict a witness's denial of bias or partiality towards one of the persons and to show that he was prejudiced so far as the case being tried was concerned;

(ii) That as in this case, the husband was prepared to cheat in order to deceive the jury in order to help the appellant, the jury were entitled to be apprised of that fact;

(iii) Accordingly, the evidence had been properly admitted and the appeal would be dismissed.

Note, however, that there is a fine line dividing questions put to a witness in cross-examination concerning facts tending to show prejudice or bias and those concerning collateral facts on which the witness's answers must be treated as final. Only experience will determine how a court will rule from case to case.

(d) Evidence of Physical or Mental Disability

The credibility of a witness may be impeached by expert medical evidence which shows that he suffers from physical or mental disability that affects the reliability of his evidence.

In *Toohey v Metropolitan Police Commissioner,*[964] Toohey was convicted with others of an assault with intent to rob. Defence was that the victim had been drinking and that while they were trying helping to take him home, he became hysterical and accused them of the offence charged. A doctor was called by the defendant to give evidence that alcohol could exacerbate hysteria. The trial judge held that although a doctor could give evidence that when he examined the victim he was hysterical and smelt of alcohol, he could not give

964 [1965] AC 595.

evidence that in his opinion drink could exacerbate hysteria. The Court of Appeal dismissed the appeal.

The House of Lords, in quashing the conviction held that the doctor's evidence had been improperly excluded and that the evidence was admissible not only because of its relevance to the facts in issue, regardless of its effect on the credibility of the alleged victim, but also to show that the evidence of the alleged victim was unreliable.

(e) Evidence of Reputation for Untruthfulness

Edmund Davis L J in *R v Longman:*[965]

> "It's a long established rule of common law that a person may call a witness to give evidence that in his opinion a witness called by the opponent person is not to be believed on oath."

This rule seems to challenge that which the rule of finality was designed to prevent i.e. the prolongation of trials resulting from too detailed examination of the character and credit of witnesses.

In *R v Richardson* and *R v Longman,*[966] the appellants were charged and convicted on two counts of conspiring to pervert justice. The evidence of the conspiracy depended entirely on the testimony of one Mrs. Clemence, whose evidence was in complete conflict with that of the appellants.

For purposes of discrediting her on grounds of lack of veracity, defence counsel called the occupant of the flat above Mrs. Clemence who was examined as follows:

> "Question "Would you believe the lady on her oath?"
>
> Answer "I would say that in certain parts she could be believed on her oath."
>
> Question: "From your personal knowledge of Mrs. Clemence would you believe her on her oath?"
>
> The trial judge refused to allow the witness to answer this question.

965 (1968) 52 CAR 317, 323.

966 [1968] 52 CAR 317.

> After conviction, the appellant went on appeal challenging this direction.
>
> It was held that where a witness is called to impeach the credit of a previous witness he should be allowed in examination-in-chief to state whether the impeached witness is not to be believed on oath from his personal knowledge of that witness as well as from the general reputation of the witness.

He may not in examination-in-chief indicate particular facts, circumstances or incidents which form the basis of his opinion though he may be cross examined with regard to them.

In *R v Brown and Hedley*[967] Kelly CB, held that the rule had operated for centuries without dispute and that 'so long a practice cannot be altered by the legislature'. Keane [968] strongly advocates for its repeal.

Section 163 (1) of the Evidence Act seems to affirm this practice when it provides as follows;

> "The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him -
>
> (a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;
>
> (b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;
>
> (c) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted;
>
> (d) when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character."

967 [1867] LR 1 CCR, 70

968 *The Modern Law of Evidence*, (5th edition, Butterworths,2000) at page 195

3. Re–Examination

A witness who has been cross-examined may be re-examined by the person who called him.

Indeed even a hostile witness may be re-examined by the person who called him on any new matters arising out of cross-examination by the other person. The object of re-examination is to rehabilitate the evidence of the witness. The witness may not be asked leading questions but previous consistent statements may be put by leave of court.[969]

Lord Denman, C.J. held in *Prince v Samo*[970] that, a witness who had given evidence in cross-examination about certain statements made by the plaintiff in other proceedings could be re-examnied about the plaintiff's testimony only as far as it was connected with those statements; the witness could not be asked about other unconnected parts of the plaintiff's earlier evidence.

In *R v Wong*[971] it was stated that the object of re-examination is to repair such damage as has been done by the cross-examination insofar as it has elicited evidence from the witness supporting the cross-examiners' version of the facts in issue and cast doubt upon the witnesses evidence –in-chief.

The cardinal rule of re-examination is that it must be confined to such matters as arose out of the cross-examination. The witness may be asked to clarify or explain any matters, including evidence of new facts, which arose in cross-examination. However, questions on other matters may only be asked with the leave of the court. Re-examination may not be used to rehearse again the evidence given in-chief or to introduce new matters.[972]

The general rules applying to examination-in-chief apply similarly to re-examination. For instance, it is noteworthy that leading questions may not be asked in re-examination of witnesses.[973]

969 *Ibid.*

970 (1838) 7 Ad. & El.627.

971 [1986] Crim. LR 683.

972 I.H. Dennis , *The Law of Evidence*, (2nd edition Sweet & Maxwell 2002) page 494.

973 Section 150(1) of the Evidence Act.

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