

HEARSAY - A RULE OR A MYTH?

Dissertation Submitted in  
Partial fulfillment of the requirements  
for the LL.B Degree, University of Nairobi

By

ANTONY N. NGUNJIRI

Nairobi

September, 1982

UNIVERSITY OF NAIROBI  
LIBRARY

### Acknowledgement

My sincere thanks goes first to Mr. A.G. Ringera my Evidence Law teacher and Dr. J.B.O. Ojwang my Supervisor, two good men to work with,   
 *in the wider sense.*

Secondly thanks goes to all those ladies who helped in typing this dissertation and especially Jeniffer for her time, patience and endurance, I could not have paid for.

NGUNJIRI



To       Cyrus M<sub>w</sub>angi who started it,  
          Ngugi my brother ended it and  
          Wambui Ngunjiri my mom - who was not there.

## TABLE OF CONTENTS

Introduction	P 2
CHAPTER I	P 4
A Procedure and Evidence Before the Evidence Acts	P 4
B Introduction of law of Evidence and its application in Kenya with special reference to Native courts and Hearsay rule	P 7
CHAPTER II	P 14
A Hearsay - the rule	P 14
B THE Exceptions to the Hearsay rule	P 21
(i) dying declaration	P 22
(ii) statements made in the ordinary course of business	P 23
(iii) Declaration against interest	P 25
(iv) Declaration as to Pedigree	P 27
Declaration as to reputation and character	P 28
(v) Evidence of previous judicial proceedings	P 31
(vi) statement in public documents and ancient documents	P 32
(vii) Admissions and confessions	P 35
(viii) Statements received as a part of 'res gestae'	P 37
CHAPTER III	P 46
A HEARSAY-A rule of a myth?	P 46
B Conclusion	P 57
C Recommendations	P 58

## ABBREVIATIONS, LAW REPORTS AND JOURNALS

### LAW REPORTS

A.C	=	Appeal Cases
ALL - E.R.	=	All English Reports
Cox. C.C.	=	Cox Criminal cases
Cr. app. R.	=	Criminal appeal reports
E.A.	=	East African law reports
E.A.C.A.	=	East African Court of Appeal
K.B.	=	Kings Bench
K.L.R.	=	Kenya Law Reports
T.L.R.	=	Tanganyika Law Reports
Q.B.	=	Queen Bench
W.L.R.	=	Weekly law reports

### Legal periodicals

A.L.J.	=	Australian law Journal
Columb L.R.	=	Columbia law review
C.L.J.	=	Cambridge law Journal
Calf. L.R.	=	California law review
Cri. L.R.	=	Criminal law review
Harv. L.R.	=	Harvard law review
Howard L.R.	=	Howard law review
I O W A	=	I O A L. Review
J.A.A.	=	Journal of African Administration
J.A.L.	=	Journal of African Law
L.Q.R.	=	Law quarterly review
M.L.R.	=	Modern law review
New L.J.	=	New law Journal
New York L.R.	=	New York law review
S.A.L.J.	=	South African law Journal
Yale L.J.	=	Yale law Journal
Yale L.R.	=	Yale law review



TABLE OF CASES

- A.G.V. Nyali (1955) I ALL. E.R. 644
- Agassia v. London Tramways Ltd (1873) W.R. 119
- Bessela v. Stern (1877) 2 C.P.P. 265
- Buraguhare v. R (1957) E.A. I 49
- Commissioner of Customs v. Punashand (1961) E.A. 303
- Comptroller of customs v. Western Electric (1965) 3 all E.R 549
- Eshubuguyi v. Nigeria (1931) A.C. 662
- Gichunge v. R (1972) E.A. 546
- Gwao bin Kilimo v. <sup>Kisunda</sup> bin Icuti (1938) T.L.R. 403
- Haza v. R. (1964) E.A. 476
- Haine v. Guthrie (1880) 13 Q.B.D. 818
- Homes v. Newman (1934) all E.R. 85
- John Makindi v. R. (1961) E.A. 327
- John Shaw v. Shaw (1935) 2 K.B. 113
- Kigecha Chunga v. R. (1965) E.A. 773
- Kuruma v. R. (1968) E.A. 347
- Lloyds v. Powell (1914) A.C. 773
- Ladha v. Patel (1960) E.A. 38
- Lokoya v. Uganda (1968) E.A. 332
- Malcomson v. Odea (1863) 10 H.L. 593
- Myers v. D.P.P. (1965) A.C. 1001
- Nasar Kaji v. R. 4 E.A.L.R. 136
- Omichund v. Baker (1774) Willes 538
- Oriental fire & General Ass. v. Govinder (1969) E.A. 116

Patel v. Comptroller of Customs (1965) 3 all. E.R. 59  
Queen v. Churthwardens 121 E.R. 897  
Queens drycleaners v. E.A. Community (1972) E.A. 229  
R. v. Willis (1960) I W.L.R. 55  
R. v. Daki (1960) E.A. 34  
R. v. Rowston 10 Cox 25  
R. v. Maselio (1967) E.A. 335  
R. v. Spilsbury (1835) 7 C & P 187  
R. v. Bendingfield 14 Cox C. C. 341  
R.v. Awathi bin Ali (1909-1910) 3 K.L.R. 88  
R. v. Ralph (1975) I Q. B. 907  
R. v. Brabin & Others (1947) E.A. C.A. 80  
Ratten v. R (1972) Cr. App. Rep. 18  
Re Djambi Rubber estate (1912) L.J. 631  
  
Subramaniam v. D.P.P. (1966) I W.L.R. 965  
Surujpaul v. R. (1959) 42 Cr. App. Rep. 266  
Sturla v. Freccia (1880) 5 app. cases 623 H.L.  
  
Teper v. R (1952) A. C. 480  
Thody v. Thody (1964) P. 181  
Turkey v. Oldbury Urban Council (1912) I Q.B. 317



INTRODUCTION

In any modern political society, the process of dispute settlement lies in the domain of the courts or tribunal established for this purpose only. No matter what dispute there is, be it between the state and individual or between individuals, to settle this dispute, the court or tribunal will have to come to a decision based on the Evidence adduced before it and the decision must be on the facts which were in issue.

To settle disputes, then, Evidence must be adduced, The law provides the procedure to be followed in this and this law is, the law of Evidence. In Kenya today with similar if not completely identical law of Evidence with Britain, there is an accepted principle that a party to litigation cannot adduce Evidence from his witnesses of something that witness heard outside the court to prove the truth of such statement.

In my dissertation therefore I will look at the problem not with cross on Evidence or any other textbook held high in my hand, but like a reasonable student of law trying to understand Hearsay in the Kenyan Context. I will therefore try to refer mostly to relevant sections of the Kenya Evidence Act going to the treatises and case law only for guidance.

The present law of Evidence in Kenya was imported lock, stock and barrel from Britain and there is a tendency to up date it by amendments if there is change in British law. But is the law of Evidence relating to hearsay Evidence fulfilling the qualification laid down by Lord Denning in A.G. v. Nyali (1956) 1QB1 that it be understood and be respected by people of the importing country.

I will divide this dissertation into three chapters. Chapter I will deal with rules of Evidence and procedure if any which existed in customary law with emphasis on Hearsay. It will also deal with introduction of the law of Evidence and its application in Kenya with special reference to Native Courts. The reason is that to understand a concept it is advisable to look before and after it.



CHAPTER I

Procedure and Evidence before the Evidence Act

Chapter II will deal with the rule itself, with a flashback to the history of its development and its exceptions. I will deal with a lot the exceptions as possible but one thing I am sure is that I will not be exhaustive on the requirement for admissibility of any exception for I will be concerned with the extent each is an exception to the hearsay rule. Wigmore tried to be exhaustive, he wrote 1760 pages of material on the subject but and failed.

In my chapter III, I will look at the reasons for the misunderstanding of the rule directing myself to the problem of what really is Hearsay. This will require looking at what legal commentators think of the rule and what should be done about it.

The History of the rule will only be dealt with only so far as it helps to understand the rule, some will be the importance or justification given for the rule. I do not understand the cases which to them seemed strong and lost. This is due to the fact that customary law was not administered by courts manned by lawyers with foreign legal training but by respected elders versed with the laws and philosophy of the people<sup>2</sup>. The law of procedure was generally of less importance crucial for the decision of the case than it is in English law followed today, in other words a party was likely to lose his case because of certain technical error in pleading or a certain Evidence was inadmissible, the law of Evidence as a part of the law procedure was of less importance<sup>3</sup>.

Allot says that it is mistaken to say African customary law had no basic notion for relevancy, admissibility and the weight to be attributed to any kind or particular Evidence. The only thing was that African law did not have any strict and inflexible test as to what was or was not relevant evidence. Most Evidence was admissible both Hearsay and direct evidence but different types of cogency was attached to different types of Evidence<sup>4</sup>.

Though there was no strict rules of Evidence as to relevancy and admissibility there were indigenous notions of applying checks and balance<sup>5</sup>. The fact which was observed by writers on African law<sup>6</sup> is that in customary litigation the parties told their stories at length with little or no cross-examination and hearsay Evidence would be admitted, while the evidence was often intertable and misleading to



CHAPTER I

A Procedure and Evidence before the Evidence Act

Kenya's ~~national~~ legal system is pluralistic and, as with most African countries today, three main strands of law can be discerned, reflecting the impact of different political, social, religious and economic forces. Firstly there are the general laws, based on and influenced by European ideas and methods, secondly there are the indigenous customary laws of the African tribes, and thirdly religious laws relating and limited to personal matters.

The rule against Hearsay Evidence is fundamentally a rule of procedure and accepted as a rule of evidence, to understand it then it's better to go back to the original position - to our customary laws. In our customary law we never had any rigid rule of procedure to be followed in litigation<sup>1</sup>, and even after the adoption of the English law of Evidence, this remains the case and reason why most of our people do not understand the cases which to them seemed strong and lost. This is due to the fact that customary law was not administered by courts manned by lawyers with foreign legal training but by respected elders versed with the laws and philosophy of the people<sup>2</sup>. The law of procedure was generally of less importance crucial for the decision of the case than it is in English law followed today, in other words a party was likely to lose his case because of certain technical error in pleading or a certain Evidence was inadmissible, the law of Evidence as a part of the law procedure was of less importance<sup>3</sup>.

Allot says that it is mistaken to say African customary law had no basic notion for relevancy, admissibility and the weight to be attributed to any kind or particular Evidence. The only thing was that African law did not have any strict and inflexible test as to what was or was not relevant evidence. Most Evidence was admissible both Hearsay and direct evidence but different types of cogency was attached to different types of Evidence<sup>4</sup>.

Though there was no strict rules of Evidence as regards relevancy and admissibility there were indigenous modes of applying checks and balances<sup>5</sup>. The fact which was observed by writers on African law<sup>6</sup> is that in customary litigation the parties told their stories at length with little or no interruptions and hearsay Evidence would be admitted, while the practice seems intolerable and misleading to

Handwritten notes on the left margin: "C. 100-8x" and "100-8x" written vertically.



to European educated lawyer, inadmission of what is Hearsay evidence puzzles the majority of the people not <sup>conversant</sup> with the law. Allot says that if the practice is understood it was harmless. <sup>6(a)</sup>

The absence of strict rule for the exclusion of inadmissible Evidence (is not) was not the unmitigated evil as often alleged to be <sup>7</sup> "Justice" said Hewart C.J. "must not only be done but must manifestly be seen to be done" <sup>8</sup>. In customary law there was no technical rules of hearsay, a litigant was given his full day in court, he could use analogies the undispensible and treasured asset of the unwritten records of folk wisdom. The test for admission of any Evidence even <sup>9</sup> hearsay was whether it was reliable, probative and relevant. Justice was simple and flexible with no elaborative codes of procedure or Evidence though of course there were procedural and Evidentiary rules. Flexibility was to be observed not only in the ease with which the African courts avoided the procedural snags that often give English justice a bad name but what maybe called arbitrary approach <sup>10</sup> of Justice <sup>11</sup>. In non-African courts which we have today in Kenya, the law of Evidence is the English and no concession is made for African ideas of what is relevant or admissible <sup>11</sup> or African way of finding facts. This has led to some bedevilment on the part of the unsophisticated African who comes before such a court unrepresented, to him the legal process will appear a mysterious game played under unintelligible and unpredictable rules, where the outcome of the proceeding is a matter of chance. <sup>12</sup> The Africans understanding of the English law of Evidence is meagre and without the advocate he seems lost.

Under Kikuyu customary law, the primary purpose of the judicial process was to maintain peace and stability in the society <sup>13</sup>. Also under customary law the administration of justice was very important and very close to the hearts of the people <sup>14</sup>. More over although the African had a clear concept of aspects of the law, law to him was not formulated in rigid rules but consisted of a number of guiding principles by which the administration of justice had to be steered. <sup>15</sup> The whole social setting and relationship of the parties and their position in the community were taken into consideration, and in the interest justice rules were sometimes thrown overboard. <sup>16</sup>



"Their evidence [together with evidence of any of their witnesses] was heard. After this the case was open to general discussion by those presents. Normally the hearing was in public and any one could express an opinion on the points raised, or on the issue "17.

~~The court~~

The court also concerned themselves with the history of the relations between the litigants and the balance of right and wrong in the dealings with each other. The court did this because the ultimate aim of its adjudication was not the disposal of the immediate issue only but to procure Harmonious relationship of between the parties and pronounce on the balance of justice between them.<sup>18</sup>

The English law of evidence is bogged down in technicalities dating back to the exigencies of quite different and now vanished system of trial.<sup>19</sup> This is what was imported into Kenya. It is clear in customary law that though little evidence was ruled out initially as inadmissible traditional judges did distinguish sharply between Hearsay and direct evidence.<sup>20</sup> Except maybe in cases where Hearsay would have had a great prejudicial effect it was admissible though the weight it carried depended on particular circumstances of the case. Under many customary laws justice couldn't be based on hearsay<sup>21</sup> but hearsay evidence was specifically important in regard to ancient rights where it equates tradition.<sup>22</sup>

It is unfortunate that the general law of evidence has not been influenced by African ideas. Allot says that it can be plausibly argued that mode of eliciting the facts of a case would be usually more effective in an African society than English. The colonial high courts did accept this, and on appeals the court of appeal attached great weight to the native courts finds and there was an indirect sought of acceptance. Allot says:

"The native court was in the best position to know the probabilities of the matters, the way of life of the people and whether the witnesses were telling the truth or not. So traditional method of finding out the truth and weighing the evidence could still be employed and received".<sup>23</sup>

There is evidence that rules of evidence like the hearsay rule had been accepted not to apply to native courts in early Colonial History.<sup>24</sup>



B Introduction of Law of Evidence and its application in Kenya with special reference to Native Courts and the Hearsay rule

It was a settled principle that where British administration went and established themselves, they gave recognition to anybody of law already existing in the country concerned. This did well in governing the natives but because of the influx of whites and the need to colonise them completely, the customary law was augmented by introduction of English law, English law being confined to the colonists but the natives being subject to both.

The English law consisted in the first instance of the common law, doctrine of equity and statutes of general application in force in England on 12th August 1897<sup>25</sup>. Formal statutory provisions whereby courts could administer customary law was by article 52(C)<sup>26</sup>, but the governor could abolish the courts, modify the native rules to conform to humanity and justice. The conditions and limitations to applicability of customary law related to the substance of the law itself and to its application- i.e. the class of persons and situations to which it was applicable

"In all civil and criminal cases to which natives are parties every court ..... shall be guided by native law ....."<sup>27</sup>

The common law and doctrine of equity and the statute of general application were to be in force in the protectorate so far as the circumstances and the inhabitants allowed and the limits of her majesty jurisdiction permitted and such qualifications as the local circumstances rendered necessary.<sup>28</sup>

For expediency, and because of lack of a relevant statute of general application, the Indian evidence act was by article 11(b) of 1897 order in council made applicable to Kenya. The Indian evidence act<sup>29</sup> had been a codification of the English law of evidence for British India and when it was received, it was received lock stock and barrel as a Kenyan law without any amendment not even having into consideration the difference in social backgrounds between the two countries.

The judge was in short saying that the evidence act applied to Native courts and Khasi's courts.



The colonial government tried to keep the received Evidence law at par with ~~with~~ the law in England with several amendments. The most important being that which was necessated by the decision of Woolmington v. DPP<sup>30</sup>, This was to put the burden of proof in criminal cases on the prosecution<sup>31</sup>.

The Indian Evidence act had also been amended in 1915<sup>32</sup> to make it admissible for previous convictions to be given in evidence if it would affect the sentencing there was a temporary emergency amendment in 1952<sup>33</sup>, and also that day's section 25 todays section 29<sup>34</sup>. In 1959 there was an amendment to make Bankers Books admissible<sup>35</sup>. In the same year Indian Evidence act section 25 was reamended to read exactly as Kenyas Evidence act section 29<sup>36</sup>.

In <sup>(1963)</sup> 1953 the Indian Evidence Act 1872, with the half hearted amendments done to it was repealed and replaced as far as it applied to Kenya by the Kenya Evidence Act 1963<sup>37</sup>. The present sec 3(2) of the juduc<sup>sp</sup>ature act<sup>38</sup> re enacted article 20 of the East Africa order in council but limited customary law to civil cases. The question still remains whether the Evidence Act applied to Natives and if it did how far.

Early in 1953 Conference on Native Courts had come to the conclusion that the native courts must be encouraged to adopt as soon as possible the English basic rules of procedure and Evidence modified as necessary to suit local conditions<sup>39</sup>. This suggestion was made in ignorance of a court decision which held that the Indian evidence act governed all proceedings before courts in Kenya. This had been held in Ghulum v. Ghulum (1947) E.A.C.A. 32 the judge in that case said at page 37.

"I only desire to say in respect to this ordinance (Application to Natives of Indian Ordinance<sup>40</sup> No.2 of 1908) that in my view it has no application whatever to the Inidan evidence act for reasons that the act applies to courts only and not to persons. It applies to all judicial proceeding in or before any court. Every court is bound to give effect to the provisions of the act in proceedings before it".

The judge was in short saying that the evidence act applied to Native courts and Khadi's courts.



This was over ruling the case of Mohamed v. Salim 6 E.A.L. 91 which had laid down that the Evidence act didnt apply. It appears that up to the Abolishion or call it intergration of native courts to the national court structure,<sup>41</sup> customary law cases were seen to be lacking in evidential procedure. In 1960 there was a recommendation that simple rules of Evidence and procedure be introduced which in the early stages was to act like guidance rather a code to be strictly followed and among the rules was that Direct evidence was to be preferred to Hearsay<sup>42</sup>. The same conference had submitted incorrectly and erroneasly that the Evidence Act (Indian Evidence Act) did not apply in African courts<sup>43</sup> but it had pointed out that this was a strength not a weakness.

The proviso in section 3(2) of the Judicature Act that customary cases will be decided according to substantial justice without undue regards to technicalities of procedure would not allow inadmissible hearsay because section 2 Kenya Evidence act provides that the act applies in all proceedings other than in Kadhi's courts. Were it not so provided, I do feel that in courts today which would enforce justice and morality as understood in England<sup>44</sup> would find receipts of hearsay Evidence repugnant to justice and maybe <sup>to</sup> morality! But one writer has pointed out that a customary law rule of procedure not compatible with English procedure does not automatically fall within the repugnance clause<sup>45</sup>. Customary courts were generally permitted to decide suits at customary law although superior courts could upset their decision on procedural grounds. I have not come across a decision dealing with hearsay on appeal from customary courts - for the fundamental principle remained that procedure was not contrary to natural justice merely because it was foreign to English law<sup>46</sup> and this was followed with great caution<sup>46(a)</sup>

Lord Denning<sup>47</sup> had pointed out that the British common law has many principles of manifest justice and good sense<sup>s</sup> which can be applied with advantages to people of every race but he also added after evaluting the needs of common law that the people should have a law which they understand and respect and the common law cannot fulfil this role without considerable qualifications.



CHAPTER ONE

It is evident from our Evidence Act that the evidence law took nothing in terms of principles from our customary law. Everything is alien, and most of all the hearsay rule. Customary law is an intergral part of the Indigenous way of life in Africa and it is as Lord Atkin said<sup>48</sup>, "It is the assent of the community that gives it it's validity for without their recognition of it as an obligatory rule of conduct it could not be regarded as a customary law."

Hearsay was not recognised in customary law and even after the intergration of the courts the magistrates mostly those not trained as lawyers and the people to whom justice is dispensed do not understand what is really Hearsay. In Republic of Tanzania v. Francis Kioki<sup>49</sup>, there was an appeal against the magistrates judgement and among the grounds was that he admitted Hearsay the court held:

- 7. Supra note 5
- 8. R.V. S. The evidence of who went to Emali to search and look for one David from the appellant alleged he had bought the trophies and who was alleged to be a licenced dealer and to have an export licence was direct evidence as to the search and failure to find David and not Hearsay ..... Hearsay would only be the content of what the said witness were told by a person they interrogated".

11. See section 5 K.E.A.  
 In my stay in the Law Courts at Thika during the fourth term of (October - November) 1981, it came to be evident that Hearsay in most of the time is regarded and taken to mean literal hearsay. Whenever a witness said he said he was told, the court would bring him back to what he saw, heard or did if the prosecutor does not do it earlier. Another thing I noticed was that to the witness, evidence of what he was told was outside the ambit of hearsay to them. No underfended party would even think of objecting to production of document written by somebody other than by the producer - documentary hearsay.

- 18. Supra note 1 at P. 84
- 19. Supra note 10
- 20. Gluckman M. Ideas and procedure in African law Oxford University Press (1969) P. 24

students  
 some challenge  
 apply the  
 w in its  
 term  
 pink



CHAPTER ONE

FOOTNOTES

21. Allot - Evidence in customary Law - Reading in African Law P. 83
22. 1. Allot - Evidence in customary Law - Reading in African Law P. 83
23. Infra note 1
24. 2. Kuria G.K. - Trend in marriage and succession in Kenya 1866 - 1977 p 4  
(mimeo)
25. 3. Allot - Evidence in customary Law - Reading P. 83 in African Law edited - Cotran E.P. 83
26. Infra note 1
27. 4. Ibid
28. 5. Elias To - Nature of African customary Law Manchester University Press - 1956 P. 247
29. Article 12 of the Constitution of Kenya 1962
30. 6. Allot and Gluckman
31. Section 1 of the Constitution of Kenya 1962
32. 6. (a) Supra note 3 at page 81
33. (1962) J.L.C. 463
34. 7. Supra note 5
35. Ordinance No. 30 of 1936
36. 8. R.V. SUSSEX J.J. Exp. Mac Carthy (1924) IKB 256 at 259
37. Ordinance No. 25 of 1915
38. 9. Infra note 5
39. Ordinance No. 30 of 1936
40. 10. Allot - Future of African law - Kuper and Kuper - African law - University of California Press (1965) P. 232
41. Ordinance No. 30 of 1936
42. 11. See section 5 K.E.A.
43. 12. Infra note I at P. 89
44. 13. Muriuki Godfrey History of Kikuyu 1500 - 1900 Nairobi Oxford University Press Page 126
45. Ordinance No. 30 of 1936
46. 14. D. Sithole - The polygamist.
47. Ordinance No. 30 of 1936
48. 15. Holleman J.F. - Issue in African law (-Indigenus Administration of Justice) P. 17
49. Ordinance No. 30 of 1936
50. 16. Supra
51. Ordinance No. 30 of 1936
52. 17. Supra note 13 at 129
53. Ibid
54. 18. Supra note 1 at P. 84
55. Ibid
56. 19. Supra note 10
57. Ordinance No. 30 of 1936
58. 20. Gluckman M. - Ideas and procedure in African law Oxford University Press (1969) P. 24
59. Africa Bureau.



21. Allenu - Proof in customary law - Ideas & Procedure in African law - Gluckman P. 159
22. See section 34 (a) to (f) K.E.A.
23. Infra note I at P. 89
24. Heydon E.S - law and Justice in Buganda London Butterworths 1960
25. 1897 E.A. order in council
26. Infra
27. Article 2 E.A. order in council 1902  
re-enacted as article 7 Kenya order in council 1921
28. Article 15 E.A. order in council 1902
29. Act No. I of 1872 of India
30. (1935) AC 462
31. Ordinance No. 30 of 1936
32. Ordinance No. 25 of 1915
33. Ordinance No. 35 of 1952
34. Ordinance No. 39 of 1952
35. Ordinance No. 40 of 1959
36. Ordinance No. 49 of 1959
37. Ordinance No. 46 of 1963
38. Act No. I of 1968 Cap 8
39. Native Court and Native customary law Judicial advisers conference 1953 - Special supplement to 1953 J.A. A. October 1953 P. 30 Para. 3
40. Cap 4 of 1926 serious of laws of Kenya
41. London conference on future of African law Dec. 1959 - Jan 1960 P. 38
42. Ibid
43. supra note 41 at P. 6
44. Gwao bin Kilimo v. Kisunda bin Ifuta (1938) I.T.L.R. 403  
Quoted in Harvey - Introduction to legal systems in east Africa E.A.L. Bureau.



45. Hooker - Legal pluralism - Introduction to colonial laws -  
Essays on British colonial law II P. 131

46. Supra

47. A.G. v Nyali (1955) 1 ALL E.R. 644

48. Eshubuguyi Eleko v. Government of Nigeria  
(1931) AC 662 at 673

49. Criminal appeal No. 120 of 1971

46. (a) - repugance clause afforded the judge a way to  
eradicate or restrict rules of customary law found  
wanting, on the other hand he can give it  
recognition

(c) With reference to a fact which would  
be proved by any other manner  
any other manner, the witness of a  
witness who says he perceived it by  
that sense of any manner;

(c) With reference to an opinion or belief  
the opinion which must be proved  
is held, the witness of the person  
who holds that opinion or belief, as the  
case may be, who holds it on these grounds.

Hearsay excluded of the legal and technical meaning is  
understood by the layman to mean just what it says: of itself  
and then only that. But the law is not so simple. First  
that, it was originally defined by Lord Hale:-

"Express or implied assertions, either  
other than and by one who is testifying  
and statements procured to be made when  
no witness is testifying - they are  
excluded if the witness of the statement is  
absent".

The rule is not so much about evidence as well  
as written statements. The rule has been interpreted  
and authoritatively formulated and further defined in points  
of detail. There are two different situations where the  
Hearsay rule applies, that is when the maker of the statement is  
called as a witness and the statement is not called.



CHAPTER II

A HEARSAY - THE RULE

The Kenya Evidence act which embodies the Kenya law of Evidence does not refer anywhere to hearsay. The nearest it comes to referring to it is when Direct Evidence is defined by sections 63(2). section 63(2) provides that "Direct Evidence" means:-

- (a) With reference to a fact which could be seen, the Evidence of a witness who says he saw it;
- (b) With reference to a fact which could be heard, the Evidence of a witness who says he heard it;
- (c) With reference to a fact which could be perceived by any other sense or any other manner, the Evidence of a witness who says he perceived it by that sense or any manner;
- (d) With reference to an opinion or to the grounds on which that opinion is held, the Evidence of the person who holds that opinion or, as the case maybe who holds it on these grounds.

Hearsay stripped of its legal and technical meaning is understood by the layman to mean just what it says: to Hear and then say what you heard. But Hearsay in law means more than that. It was succinctly defined by cross as:-

"Express or implied assertion of persons other than the witness who is testifying and documents produced to the court when no witness is testifying - they are inadmissible as Evidence of that which is asserted".

The rule as it is seen above applies both to oral as well as to written statements. The rule has never been completely and authoritatively formulated and writers differ in points of detail<sup>2</sup>. There are two different situations where the Hearsay rule applies, that in which the maker of the statement is called as a witness<sup>3</sup> and that in which he is not called.



The first is not hearsay properly so called and it applies when the court prevents the proof of consistency as well as facts stated by a witness, by the giving of similar statements to previous one, except where the statements reception was a part of the 'res gestae'.

The Hearsay rule was enunciated in the case of Subramaniam v. D.P. (1956) I W.L.R. 665 and the reinforced in R.V. Willis (1960) I W.L.R. 55 at page 58

"Evidence of a statement made to a witness by a person 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 is admissible when it is proposed to establish by the Evidence, not the truth of the statement but the fact that it was made".

The Hearsay rule does not forbid the proof of what somebody said out of court. What it does forbid is the proof of a fact by what somebody said about the fact outside the court<sup>4</sup>. Some whether Evidence is Hearsay depends on what the particular Evidence tends to prove.

Any fact which is declared to be irrelevant by the Kenya Evidence Act (K.E.A.) is inadmissible and any fact which is declared by the act to be admissible can not be held inadmissible by virtue of any rule of English law. For this reason the English common law rule against hearsay is not 'per se' a part of our law<sup>5</sup>. But this does not mean that what amounts to hearsay under that law shall be or will be admissible here as a certainty. In practice objections are not rear.

Although the exact scope of the rule is a matter of controversy, it is clear that the effect of the rule is to prohibit certain oral or written statements of a person other than the witness who is giving evidence being treated as Evidence of the truth of that which is asserted in the statement and notwithstanding the fact that no better Evidence of the fact stated is to be obtained<sup>7</sup>. In the Kenya case of Kigecha Chunga vR<sup>8</sup> the police had been informed that the appelliant who had disguised car and was armed with a simi was in the process of committing a felony, on a charge of being armed by day with an intention to commit a felony, the prosecution adduced Evidence of the informer but refused to name or call him as a witness.



The appellant was a director of the firm of scrap metal  
On appeal quashing the conviction, the court said;

that he was unaware of the taking and delivery of the cable  
and that he may very well have given true information.  
Very possibly this disguised car was to  
be used to commit the felony of robbery. The  
driver of the car, the appellant, very  
possibly was a part to that felonious enterprise  
very possibly the simi which was under the sit <sup>sect</sup>  
was there to play its part in the robbery. But  
the knowledge which the court below had of this  
felonious enterprise was derived from what a  
sergent of police told the court an uncalled  
unnamed and uns worn individual had told him  
without that hearsay Evidence the court below  
would have found it difficult if not impossible  
to have to determine whether the appellant had  
the intent to commit a felony and if so what  
felony"<sup>9</sup> (Emphasis mine) ~~inserted~~

In Patel v. comptroller of customs,<sup>10</sup> the appellant was  
charged with making a false declaration on customs entry forms  
declaring the origin to be morocco, he had declared the origin to  
be India on each outer bag was the appellants business name, in  
the inner bag was written 'produce of Morocco', the burden of  
proof concerning the place of origin of the goods lay on the  
defence. on appeal the judicial committee of the privy council was  
asked to infer from the legend 'produce of Morrocco' on the inner  
bag that the declaration of origin was false. The proof council  
held that on the Evidentiary point of view the words were  
heresay and could not help the prosecution.

Emphasis <sup>has</sup> have been laid on the fact that whether evidence  
in a particular instance is admissible or not, depends upon the  
question what that Evidence tends to prove. So long as the  
Evidence does not prove the truth, its not hearsay and is  
admissible. In R.V. Willis,<sup>11</sup> the appelant was jointly charged  
with one N with the larceny of a drum of cable from X, the  
cable had been taken from X and delivered two days latter to  
one of the firms customers.  
Use of hearsay for the jury reached its decision from information  
gained from outside the courtroom. During the 16th century the  
jury began to get information from testimony in court and by  
early 17th century it had received most of its information from  
that source.



The appellant was a director of the firm of scrap metal business and N was the foreman. The appellants defence was that he was unaware of the taking and delivery of the cable and that he was first made suspicious by a telephone conversation with the customers representative a few hours before delivery. The prosecutions case was founded mainly on the appellants failure to inform. The police of these suspicions. The appellants sought to explain the failure by giving Evidence of the contents of a conversation with N. which took place shortly before the appellants interview with the police. It was contended by the defence that the Evidence was admissible to show the state of mind he had at the time of the interview with the police, and so to explain his conduct. The evidence was rejected as inadmissible but on appeal, the submission was accepted and the court of appeal following subramamium v. D.P.P. <sup>12</sup> held the evidence was admissible since it was to show the appellants state of mind which was relevant in considering his conduct.

✓ In Ratten v. R <sup>13</sup>, Evidence had been admitted from a telephonist who gave evidence that she had received a call from a woman who gave the appellants address and who had asked for the police. The police had gone to the appellants house and found the appellants wife shot. The appellant claimed it was an accident. The privy concil did not think there was any element of hearsay - The Evidence was not hearsay and was admissible as Evidence of a fact relevant to an issue but also had it been hearsay, considering the facts of the case, the privy concil went on to say that the Evidence would still have been admissible under 'res gestae'.

To understand Hearsay it is always necessary to look at the given justifications for the rule. It seems clear that in the early days of the jury trials there was no objection to the use of hearsay for the jury reached its decision from information gained from outside the courtroom. During the 16th century the jury began to get information from testimony in court and by early 17th century it had received most of its information from that source.



During the first three quarters of the 17th century, hearsay was received as corroborative evidence. It is in the last quarter of that century that the rule against hearsay came into existence<sup>14</sup>. By the middle of the 18th century, the exclusionary doctrine was definitely settled. Lord Reid<sup>15</sup> had this to say about hearsay.

"Its difficult to make any general statement about the law of Hearsay Evidence which is entirely accurate but I think that books show that in the 17th century the law was fluid and uncertain but that in the early 18th century it became the general rule that hearsay evidence was not admissible. Many reasons for the rule have been put forward, but we dont know which of them influenced the judges who established the rule. The rule has never been absolute. By the 19th century many exceptions had become well established but again and in most cases we dont know how or when the exceptions came to be recognised. It does seem, however that in many cases that there was no justification either in principle or in logic for carrying the exception just so far and no further:- one might hazard a surmise that when the rule proved highly inconvenient in a particular kind of case, it was relaxed just sufficiently far to meet the case and without regard to question of principle..... the natural result has been the growth of more and more fine distinctions so that it takes even so a concise an author like Cross over a hundred crossly packed pages to explain the law of Hearsay".<sup>16</sup>

*W* Various writers give different grounds and reasons for the justification of the hearsay rules existence. The history of the rule sheds little light to the reasons for the exclusion of hearsay evidence. It has been suggested that the rule had its origin in the distrust for the jury's capacity to evaluate Evidence.<sup>17</sup> Morgan very logically sees little support for this view. He says he was true that the rule developed during the existence of the jury system and that it was being admitted in jury trials for nearly a century after the jury began to hear Evidence from witness in court and for another century it was used as corroborative Evidence<sup>18</sup>.



Morgan infact is of the view that real purpose of the hearsay rule is the protection of the party against whom it is offered, by preventing the operation of too many sources of inaccuracy, mistakes, fraud and untrustworthness, for the original declarants statement may not be exactly remembered or exactly repeated or reproduced, and that statement of the original declarant may be misunderstood by the listener<sup>19</sup>. Raju in his commentaries on the Indian Evidence Act 1872 adds that a person giving hearsay Evidence does not take personal responsibility for the correctness of the Evidence, admission of hearsay Evidence would make the judicial process more protracted for this would result in admitting what hundreds of people may have told us.

Other reasons are; that the declarant did not make the statement in the face of the whole world but in the privacy which would have enabled him to say what he would not have said or even hint in public, that the court had no opportunity when the declarant made the statement of observing his demeanour, which might have thrown light upon the circumstances under which it was made. Related to this is that there was no opportunity for the opponent to test the declarants statement by cross-examination<sup>20</sup>. This is according to Morgan probably the most serious of the objections today.

The most important reason given for the objection is that the original author of the statement was not under oath. It has been thought that the oath induces a special obligation to speak the truth and it may impress upon the witness the dangers of criminal prosecution for perjury. While this may be an important reason against hearsay Evidence, Wigmore<sup>21</sup> has said that the oath is incidental and merely ordinary company of statement made or testimony, given on the witness stand. He points that the oath counts for nothing if there is no opportunity to cross-examine the sworn witness. Cross-examination seems the most important reason for the rejection of Hearsay, for cross-examination may determine whether a declarant's observation is correct, whether his memory is accurate or whether he has altered a deliberate falsehood.

*"Kithito" Believers? Notion*

is always  
Evidence which  
question.



One cannot with absolute certainty say what reasons have influenced the development of the hearsay rule. Each ground has played a part in the minds of judges but lack of cross-examination is one of the most important, and if the Evidence is going to be admitted Ex necessitate rei and it is no longer possible to cross-examine then there must be what Wigmore calls circumstantial guarantee of trustworthiness<sup>22</sup> like in dying declarations. He also says<sup>23</sup>:-

"The theory of the hearsay rule is that the many possible deficiencies, suppression sources of error, and untrustworthiness which lie underneath the bare unattested assertions of a witness may be brought to light and exposed by the test of cross-examination."

The reasons usually advanced for rejection of Hearsay Evidence are numerous and except that of lack of oath and cross-examination, to men, other reasons, would not support the existence of the rule. The consequence of admitting hearsay whole heartedly would only prolong litigation and increase its costs and also it may be unconsciously regarded by judicial minds as corroboration of some piece of Evidence legally admissible and therefore obtaining for the later quite undue weight and significance<sup>24</sup>.

Hearsay rule is an important example of the rule which provide that the best evidence must always be given. The best evidence was laid down in omichund v. Baker<sup>25</sup> where it was said;

the judges and usages of the law have put it said down that there is but one general rule of evidence, the best that the nature of the case will allow".<sup>26</sup>

Unless the hearsay Evidence comes within the recognised exception to the rule, the best Evidence which in this case is always direct Evidence must always be given, in other words Evidence which gives the greatest certainty of the fact in question.



But the law has accepted the need for some hearsay to be admissible where the exclusion would be an abdication of the search for the truth. One Australian Judge has said that

the law would indeed be an ass were it to disclaim such Evidence in cases where it would be of real value in the elucidation of relevant issue; Happily it does not".<sup>27</sup>

## B. THE EXCEPTIONS TO THE HEARSAY RULE

There are a good number of exceptions to the hearsay rule. Cross on evidence lists eight,<sup>28</sup> but this listing is not exhaustive for the same writer has pointed out that they maybe more than twenty.<sup>29</sup> The Kenya Evidence Act (K.E.A.) part IV dealing with statements by persons who cannot be called as witnesses, may lead somebody to think that they <sup>were</sup> a few. It is not advisable to give a definite number here and now, but after analysing them, one maybe in a position to do so.

Section 33 KEA provides conditions which must be fulfilled before hearsay Evidence is given under any of its subsections. The section reads,

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 are themselves admissible.

33  
\* Section 110 K.E.A. puts the burden of proving any fact necessary to be proved in order to give Evidence of any other fact on the person who wishes to tender such Evidence, or kept out of way<sup>30</sup> by a party to the proceeding or incapable of being brought without unreasonable delay or expenses must be proved by the party who wishes to tender such Evidence. If this burden is not discharged then that Evidence cannot be adduced. In commissioner of customs v. SK. panachand <sup>31</sup>, no Evidence was adduced to show that the delay or expense involved in calling a witness from Germany was unreasonable or that he could not be procured, the court did not allow the hearsay Evidence to be given though it was willing to take judicial notice of the unreasonableness of the expense.

To give hearsay Evidence, not only must you satisfy section 110 K.E.A. but also you must bring the Evidence <sup>within</sup> the recognised exceptions.



i. DYING DECLARATIONS:

Section 33(a) deals with dying declarations that is statement made by a person who has died and it provides;

When a 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 death is in question. 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 maybe the nature of the proceedings in which the cause of his death comes into question.

Unlike under the English law, the K.E.A provides that there is no necessity of the declarant being under the hopeless expectation of death when the statement was made though our law requires the declarant to have been a competent witness<sup>32</sup> if he had been called to give evidence at the time.

The statement of the deceased must completely cover the incidents to be completely and properly admitted.<sup>33</sup> In R V. Daki<sup>34</sup> it was held that if the deceased could have added anything to the declaration before he died, the dying declaration was inadmissible because it was incomplete for no one can tell what the deceased could have added. Also in admitting dying declarations the courts refuses to admit what somebody says he was told <sup>by</sup> the deceased said - Hearsay upon Hearsay. In <sup>the</sup> case of Lokoya v Uganda<sup>35</sup>, evidence of a dying declaration had been made by the deceased to a police officer through an interpreter. The police officer gave evidence but the interpreter was not called. On appeal the court said while rejecting the dying declaration as hearsay:

"... the learned judge apparently overlooked the fact that the evidence of both dying declaration was given by a person who was unable to understand the words spoken by the deceased and therefore had to employ an interpreter. The interpreter was called to give evidence of identification but no question was put to him regarding the dying declaration or his interpretation. The result of the unfortunate oversight is the evidence regarding dying declaration must be wholly rejected as hearsay"<sup>36</sup>

✓  
GWS



It is evident that though a dying declaration is admitted as an exception of the hearsay rule if the declaration does not fit into the exception like in the Lokoya case, it is inadmissible as Hearsay though infact it is Hearsay upon hearsay.

Another requirement for the admission of dying declaration is that it must have "Some proximate relation to the actual occurrence". In Buraguhare v. R.<sup>37</sup> evidence had been given by a witness that the deceased had told him six weeks before her death that the first accused had asked her to marry him and lend him some money at the trial and no objection to the evidence had been made at the trial and it had been introduced to show motive. The court holding that the evidence was neither as to the cause of death nor as to the circumstances of the transaction which resulted in death insisted that there must be some proximate relation to the actual occurrence. The statement in the case had not even been made in clear reference to an imminently expected danger or attack. *but it is not a requirement in our law unlike England. - this is a case!*

ii. STATEMENT MADE IN THE ORDINARY COURSE OF BUSINESS ✓

Section 33(b) provides that if the requirements of section 33 are met and the original declarant cannot be produced, then when the statement was made by such a person in ordinary course of business and if made of an entry or memorandum in books or records kept in ordinary duty or acknowledgement or receipt written or signed by him, it is admissible in evidence in prove of the truth of the statements.

There have not been many reported decisions on statements made under ordinary course of Business, and since there is nothing in this provision which stipulates that there must be a duty owed by declarant to another person and which should relate to the acts of the declarant as in English law<sup>38</sup> which is *restrictive*, courts in Kenya may interpret the provision to include not only the statements made in relation to duty owed to another person but also statements made by a person in the course of his own business or his own professional duties. In fact section 16 K.E.A. which provides that "when there is a question whether a particular act was done, the existence of any course of business according to which it would have been done is relevant" <sup>leads</sup> one to believe so.



English law of which the K.E.A. is a codification and which is resorted to when the Kenyan law is not clear, says that when the statement was made the declarant must have had no ~~moti~~<sup>ve</sup> to misrepresent the facts and also there must have been an element of contemporaneity the act and the making of the record or report for accuracy. But its impossible to lay down how contemporaneous the act should be with the production of the statement.

Hamilton L. J. in Re Djambi Rubber estate <sup>39</sup> put it this way.

"The measure of contemporaneousness is not that period of time which is consistent with his duty that the party making the entry might wait to make his record"

Lack of motive to misrepresent the facts or contemporaneity of act with recording is not a condition precedent ~~of act with~~ before this type of declaration is received although it may determine its weight in evidence in proving its truth for unlike other subsections like (d) (e) and (f) of section 33, it is not specifically laid down as a requirement.

A good example of evidence admissible because it was done in the ordinary course of business would be the evidence in English case of Myer V DPP <sup>40</sup>. The accused had been charged with conspiracy and receiving stolen goods. The case against him was that he purchased wrecked cars with their log books and disguised stolen cars so as to make them conform with the log books of the wrecked cars. It was alleged that the accused then sold the cars as renovated wrecks. The owners of the stolen cars identified them as those sold by the accused. The legal problem arose when the prosecution called an officer in charge of records of the manufacturers of the stolen cars to produce microfilms of the cards filled in by workman showing the number casts into the cylinder blocks on the stolen cars. These numbers ~~con~~<sup>considered</sup> coincided with those on the cylinders in the cars sold by the accused. The trial judge admitted the evidence of the officer in charge of records and the microfilms were produced by him, the original cards having been destroyed after being filmed. The accused was convicted and failed both on appeal to the court of appeal and the house of lords. The court of appeal dismissed the appeal on the ground that the rule against hearsay was not ~~infer~~ infringed because ~~the~~ the probative force of the records didnot depend on the credit to be given to the unidentified workman but on the circumstances in

Uninclosed  
12-10-50



correct. The case went to the House of Lords before the enactment of the criminal Evidence Act 1965, it was dismissed on other grounds and it was held;

"The Evidence could not be brought within any of the established exceptions to the hearsay rule and was therefore hearsay and inadmissible for these records were not public documents, and although they were made in the course of duty and contemporaneously, it was not shown that the person who made them had died".<sup>41</sup>\*

The criminal Evidence Act 1965 allowed this type of Evidence to be admissible in England. In Kenya it falls both under section 33 (b) and section 16 if it is a criminal case and under section 35 (1) if it is a civil case. The court of appeal considered the case as it would have been done in Kenya. The microfilms could not be admissible under Subramaniam v. D.P.P. for if they were produced, they would have been produced to show the truth of what they contained. As asked by the advocate of the accused if they were not produced to prove the truth, what were they intended to prove<sup>42</sup>. The House of Lords held them as Hearsay but its admissible today in England as well as in Kenya under the exceptions that it was made in the ordinary course of business.

iii Declarations against interest:

Section 33 (c) provides:-

When the statement is against the pecuniary or proprietary interest of the person making it, or when if true, it would expose him or would have exposed him to criminal prosecution or to a suit in damages.

The statement must be presently and prime facie against the maker when made in Turker v. Oldbury Urban Council<sup>43</sup>, the court when pointing to the need for the declarant to know the statement to be against his interest said,

"Such statements [against Interest] are admitted on the ground that the declarations made by a person against his own interest are extremely unlikely to be false. It followed therefore that to support admissibility it must be shown



that the statement was to the knowledge of the person contrary to his interest".

The reason for requirement that the declarant must be having personal knowledge is to prevent reception of Hearsay upon hearsay. Lord Selbon in Sturla v. Frecca<sup>44</sup> saw it as a necessary element. ~~It~~ follows therefore if a man now dead <sup>declares</sup> that a certain piece of land not to be his and that he has no rights over it, not knowing he is entitled to inherit it under his grandfather's will which is already admitted into probate, the declaration is not admissible as against interest for the declarant did not know that the declaration was against interest when made and the ownership was not within his knowledge.

Good  
copy

iv Declarations as to public and general rights

Section 13 K.E.A. provides that

Where the existence of any right or custom is in question the following facts are relevant

- (a) Any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence.
- (b) Particular instances in which the rights or custom was claimed, recognised or exercised or in which its exercise was disputed or departed from.

While section 13 provides for relevance and provides impliedly that whatever is to be proved will be by direct Evidence, section 33 (d) provides an instance where hearsay Evidence is admissible. The subsection reads:-

When the statement gives the opinion of such person as to the existence of any public right or custom or matter of public interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

The conditions for admissibility are that

- (i) the declaration must be made by somebody unavailable as provided by section 33 and must be of opinion as to the existence of public right or custom or matter of public or general interest.



(ii) the declarant must be a person who was likely to have been aware of the existence of such a public right or custom or matter of public or general interest if it existed at all. In the MBURU BURIAL CASE<sup>45</sup>, the book Facing Mount Kenya by the late Jomo Kenyatta was referred to when there was a question of Kikuyu burial custom.

The declaration must have been made before any controversy as to such right or custom or matter had arisen. If the declaration is after the controversy to which they are tendered arose then they are not relevant in proof of the matters to which it was tendered, but the fact that the declarant was an interested party would not prevent the statement from being admissible. Also section 33 (d) provide that documents which relate the Evidence by section 13 (a) are admissible.

v. Declarations as to Pedigree:

Admissibility of declarations as to family relationship is governed by two subsections in K.E.A. sec 33 (e) and sec 33 (f)

Section 33 (e)

- When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as whose relationship by blood marriage or adoption the person making the statement had special means of knowledge and when the statement was made before the question was raised

Section 33 (f)

- When the statement relates to the existence of relationship by blood marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased persons belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing which such statements are usually made, and when the statement was made before the question in dispute;

While section 33 (e) deals with family relationship between persons who maybe alive, section 33 (f) deals with same relationship between persons deceased. In both cases the relationship between the persons by adoption, marriage or blood must be in question but not merely relevant to the issue.



It must be in issue. So if an infant is sued on contract and pleads infancy, a declaration by his deceased father will not be held to be relevant under this exception<sup>46</sup>.

The statement must have been made by a declarant shown to be related by blood marriage or adoption to the person to whom it relates to be admissible under section 33 (f) but under section 33 (e) any other person who would be shown to have special means of knowledge would suffice. So the statement in John v. Lawson<sup>47</sup> by a deceased woman who had for 24 years been the housekeeper of the family would have been admitted in Kenya for it is true that for the whole duration she had the special means of knowledge.

The statement must have been before the question in relation to which it is to be proved had arisen. Once the statement is made before the question, it does not matter even if it was made for the purpose of preventing it from arising<sup>48</sup>.

vi. Declaration as to reputation and character

A man's reputation is what people say about him when he is not there. When the object of the enquiry or when his character or reputation is in issue, strictly if a witness gives Evidence of what other people say about another person, this would infringe the rule against hearsay if the statement or Evidence is tendered to show it is true, but if it is tendered for the object of merely showing what people say then it would not be hearsay. So the exception in section 33 (h) which reads;

When the statement was made by a number of persons and expressed feelings or impression on their part relevant to the matter in question.

The Evidence of character is admissible in civil cases only when the character of such persons is such as to affect the amount of damages - section 55 (2). Evidence of good character of the accused is admissible in criminal proceeding section 56. But Evidence of bad character of the accused is



admissible only on special occasion as provided by section 57 (1) (aa) which reads;

Such Evidence is otherwise admissible as Evidence of a fact in issue or directly relevant to a fact in issue,; or

*Mingo v*

- (b) he has personally or by his advocate asked question of a witness for the prosecution with view to establishing his own character or has given Evidence of his good character; or
- (c) the nature of the defence is such as to involve imputation on the character of the complainant or of a witness for the prosecution.

Under this section the court has discretion to present Evidence being led if it's prejudicial effect on the accused will outweigh the damage done by the imputation on the complainant or prosecution witness as to affect a fair trial.

or (d) He has given Evidence against any other person charged with the same offence.

Section 57 (1) (a) does apply to the admissibility of Evidence of character for it <sup>states</sup> starts that "the proof that he has committed or been convicted of such offence" as to be admissible under section 14 and 15 of the act. Character in this context is as defined by section 58 - that it includes both reputation and disposition reputation being what other people think of you and disposition meaning or denoting tendency to think, feel or act in a particular way<sup>49</sup> although convictions tend to establish disposition<sup>49(a)</sup>, they must be conclusive or at least received as Evidence of the fact upon which they were founded. So in my opinion Evidence under section 57 (a) to be admissible depends on the reputation acquired as a result of the convictions.

*Archives*

Section 58 K.E.A. provides that Evidence of character must be given only of general reputation or disposition, so except as provided by section 57, Evidence of one isolated fact showing character is not admissible. That means no Evidence under section 57 (a) would be showing character for through strict interpretation of section 57 (1) head, I dont think previous conviction was intended to mean or include character.



The best expression of Evidence character was in R v. Rowton 10 Cox 25. The question in the case was the admissibility of the answer to the one question by a witness;

Q: What is the defendant's general character for decency and morality of conduct?

A: I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him, but my opinion and that of my brothers who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and most flagrant immorality  
*grossness*

The court held that the answer was inadmissible as it was in the nature of a statement of a particular fact and not general character. Cockburn C.J. accepted that evidence of a particular fact may be given to rebut Evidence of a particular fact and said;

"I take my stand on this ... , that Evidence to character must be Evidence to general character in sense of reputation, that Evidence of particular facts although they might go far more strongly than the Evidence of general reputation to establish the disposition and tendency of the man's mind was such as to render him incapable of the act which it stands charged must be put into consideration altogether, we must deal with the law as we find it and my opinion is the Evidence given on the present occasion in the particular answer is inadmissible"<sup>50</sup>

Evidence of character giving Evidence of conduct on as great a variety of occasions as possible to adduce for it is assumed that someone who frequently acts in a given manner has a disposition to act that way, previous convictions also tend to prove disposition <sup>50</sup>(a) and lastly Evidence of a witness can be adduced for the estimation of the disposition of one of the party prevailing among those who know him.

It is doubtful if either Evidence of good character or reputation to one type of conduct will be held relevant when another type of conduct by the accused or party is in question though in civil cases it may help in estimation of damages under section 12. *55(a)*



But in criminal cases no Evidence of accused's honesty or dishonesty would be relevant in a case where he is charged with rape. It is a practice that ~~that~~ even after conviction, ~~previous~~ previous convictions are relevant to help the court to determine the right sentence.

Its difficult to draw a line where Evidence of reputation ends and disposition starts or vice versa for character embraces both. The way the Evidence is adduced under this exception will not appear to be under the hearsay exceptions, unless someone digs deeper into the core of the subject, this exception's discussion would look like an adrration from the subject but its still Hearsay.

In Gichunge v. R. (1972) E.A. 546, the ~~court~~<sup>Court</sup> looked at the admissibility of Evidence under the whole of section 33 of the Kenya Evidence Act and at page 547 point out,

"It will be noted that statement admitted under section 33 of the Evidence Act is admissible only as to the fact there in stated. Consideration should always be given to the weight to be attached to such statements, bearing in mind the absence of cross-Examination. Opinions are only admissible to the extent provided in paragraph (d) of section 33".

So in R. v. Masalu<sup>51</sup>, where the prosecution tendered a post mortem report written by a doctor who had retired which was not stating a fact but was a statement of his opinion as to the cause of death, the post mortem report was held to be inadmissible for it was an opinion and the cause of death was so much important for the declarant to have been examined on the grounds upon which he had formed his opinion.

#### vii Evidence of previous Judicial proceedings

Section 34 (1) provides that Evidence in previous judicial proceedings by a witness is admissible in a later or at a later stage of the same proceedings to prove the facts stated therein (So long as the following are fulfilled or proved) in the following circumstances

Section 34 (1a) Where the witness is dead, or cannot be found, or is incapable of giving



Evidence or is kept out of 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 where in the case of the subsequent proceedings -

- (b) the proceeding were between the same parties or their representative in interest, and
- (c) the adverse party in the first proceeding had the right and opportunity to cross examine, and
- (d) the question in issue were substantially the same as in the second proceeding.

Under section (c), the opportunity to cross - examine does not necessarily mean the adverse party did or must have cross examined the witness so long as he had the right and opportunity to do so. In Kenya's first treason trial of R v. Muthemba & another, during the preliminary inquiry, the defence lawyers reserved their cross examination for the trial<sup>52</sup>. In Nasar Kajir v. R 4 E.A. L R 136, the court held the witness having been available and cross-examination having been reserved by the defence before the committing magistrate, his Evidence was rightly admitted.

viii Statement in Public documents and ancient documents

Public documents are defined in Kenyan Evidence Act by section 79. Once a document cannot be shown positively to come under or within that definition, it must be regarded as a private document and therefore be subject to rules governing the proof of such documents, the definition of public documents under section 79 must be distinguished from the definition of public documents under English common law as laid down by the House of Lords in Sturla v. Freccia<sup>53</sup> which required the record to have been made under a strict duty to enquire into the circumstances, that it must have been concerned with public matter and it must have been retained or meant for public inspection.

Handwritten notes on the left margin: "FF", "25", "5", "5", "DC".



In Kenya the yardstick of measuring whether a document is a public document is that it must fit into section 79 (1) (a) or (b), but the decision of Ladha v. Patel (1960) EA 38 supplemented this in the direction of English common law and provided that, it must be

(i) Intended for the use of the public or section of the public or be available for their inspection ,

(ii) It must have been intended to be permanent record and

(iii) It must be substantially a record of facts

On the inspection aspect, the House of Lords said in Myers v. DPP <sup>54</sup>.

"Public documents are prime facie Evidence of the facts which they contain but its clear that a record is not public within the scope of that rule unless it is open to inspection by at least a section of the public".

The usual method of proving a public document is by the production of a certified copy of the document or, of the parts of it as required for the proceeding. Once a copy is signed and certified as provided in section 80, it becomes admissible on its mere production. It is unnecessary to call witness to verify the truth of their contents<sup>55</sup> because of the presumption by section 83 K.E.A., Section 82 provides means by which special public documents can be proved.

By section 96 K.E.A., the court may presume that documents purported to be or proved to be not less than 20 years old was written or signed by the person whose writing it purpotes to be and in case of excution and attestation of documents by that person that he duly executed it, but the document must come from what the court considers to be proper custody. Proper custody being a question of fact. Section 96 is produced from the decision of Willes J. in Macolnson v. Odea (1863) 10 HL 593 where at p 614 he said that ancient documents coming out of proper custody and purporting on the face of them to show exercise of ownership, such as lease, or licence, maybe given in Evidence without proof of possession in payment of rent under them as being in themselves acts of ownership"



This is the progeny of our section 96 - codified as a presumption which if effected has the effect of admitting Evidence which is documentary hearsay, hence its an exception to the rule against hearsay Evidence.

UNIVERSITY OF NAIRAO  
LIBRARY

ix Admission and confessions

For the purpose of discussing this exception to the hearsay rule, a confession will be taken to mean an admission of a fact tending to prove guilt as the alternative provided by section 26 K.E.A.

An admission is a statement oral or documentary which suggests any inference as to any fact in issue or relevant to the issue. The value given to an admission depends on the circumstances under which it was made and this will determine the weight which is to be attached to it. A person must admit something of which he knows. If he knows nothing then the Evidence of the admission is valueless<sup>56</sup> but it has been found that in confessions if the right procedure is not followed, an innocent can confess to a crime he never did.<sup>57</sup> One general principle is that <sup>for</sup> an admission to have weight must have been <sup>voluntary</sup> voluntary and conscious act. This is not provided for admission in civil cases but it seems obvious. Voluntaryness of confession is provided for by section 26 K.E.A. Section 30 K.E.A. provides that a confession which is admissible does not cease to be admissible because it was made under a promise of secrecy or when drunk or as a result of answering questions which he was not bound to answer. In R. V. Spilsbury<sup>58</sup>, it was held that a confession got when a person was drunk was admissible even though he was given alcohol in the hope of making the admission. It seems that in both types of admissions the conditions of the person making the admission <sup>is</sup> generally immaterial so a statement in the nature of an admission made by a person, even to himself if overheard by someone else maybe received in Evidence if it amounts to an admission.<sup>59</sup>



Akinola Agunda in his Evidence in Nigeria also refers to admissions by conduct. Any fact which influences or is influenced by the conduct is admissible by virtue of section 8 (3) Kenya Evidence Act which provides

When Evidence of conduct of a person is relevant any statement made to him, or in his presence and hearing which affects such conduct is relevant

In Bassela v. Stern<sup>60</sup>, the plaintiff had sued the defendant for breach of promise to marry and called her sister who gave Evidence to the fact that she heard the plaintiff say to the defendant "you know you always promised to marry me and now you do not keep your promise", to which the defendant made no answers beyond giving her some money to induce her to go away. It was held that the Evidence amounted to admission of the promise and was therefore admissible.

The K.E.A provides who can make an admission. In civil proceedings, this is provided by section 17 - 21, while in criminal proceeding it is accepted that only an accused can make an admission as to guilt. In Surujpaul v. R<sup>61</sup>, the privy council said that an accused can only confess as to his acts knowledge or intention but he cannot 'confess' as to acts of other persons which he has not seen and of which he can only have knowledge by hearsay. Section 21 K.E.A. provides the circumstances under which a party's own admission is admissible as Evidence of the truth therein in his favour - that is if the admission is admissible under section 33 K.E.A. or under any section between 6-14 (see section 21 (b) ).

Section 24 says that admission are not conclusive proof of what they contain but can act like estoppels. If an admission in civil cases act like an estoppel, then the party cannot adduce Evidence to contradict or deny it and it would be admitted as the truth of the facts asserted<sup>62</sup>. Estoppel may furnish one of the reasons for making it an exception. An admission can also be taken to be a declaration against interest<sup>63</sup>.



Admissions - admissions proper and confessions - are treated as an exception to the hearsay rule though they are founded on a wider ground, namely if a party to a civil or criminal proceeding says he does not contest the truth of the facts, the court will naturally not require the opposite party to prove the fact. The court will presume the facts are true, and because the means of proving this admission, is by indirect Evidence (see section 63), 'admissions' and confessions are form of hearsay and their admissibility on whatever basis it is rationalised constitute an exception<sup>64</sup>. Morgan submits that "upon principle and authority, extra judicial admissions by a party to an action are receivable in Evidence under an exception to the hearsay rule"<sup>65</sup>.

x Statement received as a part of 'res gestae'

In determining whether a fact is so connected with a fact in issue as to form a part of the same transaction, resort must be had to the normal reasoning process of the tribunal. Two types of facts will come under this heading, (i) a fact which occurred at the same time and place with the fact in issue, (ii) facts which occurred at different times and places from the fact in issue, but in both cases, the facts must be so connected with the fact in issue as to form part of the same transaction.

The English common law doctrine of 'res gestae' is not directly applicable under the Evidence act. The provision of section 6 - which reads;

Facts though not in issue, are so connected with <sup>those</sup> in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.

This covers a wider field <sup>than</sup> ~~that~~ is covered by the English doctrine. Any Evidence which would be admissible under this English law doctrine would be admissible in Kenya under section 6 s' 'same time and place' provision which seems to be what is 'res gestae' under ~~res gestae~~ <sup>Ken</sup> under English law which provides that when a fact becomes relevant to a fact in issue because it



puts light on it as a result of its proximity to it in point of time, place or circumstances, the first mentioned fact is said to be a part of res gestae.

Lord Tomlin in Homes v. Newman<sup>66</sup> said about the doctrine,

"What is meant by saying that a document or act is admissible because it is a part of the 'res gestae' so far as I know has never been explained. I suspect it being a phrase adopted to provide a respectable legal cloak for a variety of cases which no formular to precision can be applied"

Facts admissible under the doctrine of res gestae are possible to be admitted under section 7 - 16 K.E.A. Gross on Evidence lists four situations where hearsay Evidence would be admissible under 'res gestae'.

(i) Statement accompanying and explaining relevant facts the statement must relate to the fact it accompanies or explains and must also be contemporaneous to the act and therefore throw some light to it by reason of proximity. The statement should "be so associated with the action or event which it accompanies in time or place and circumstances that they are part of the thing done"<sup>67</sup>.

The statement in R v. Bekdinsfield<sup>68</sup> "Aunt see what Harry has done to me" would be admissible in Kenya under section 6 which was not in consideration and is wider in scope than the doctrine of res gestae in Britain. The statement accompanied and explained the womans running and her cut throat

(ii) Statement concerning maker's state of mind or emotion. The only requirements are contemporaneity and that they must relate to the state of mind or emotion being in issue and the statement is not to be treated as Evidence of any other fact to which it may refer.

The admissibility of Evidence of mental or emotional state is also provided by section 14 (1) K.E.A.



Facts showing the Existence of any state of mind as intention knowledge, good faith rashness, illwill, good will, towards any person or showing existence of any state body or bodily feelings are relevant when such state of mind or body or bodily feelings are relevant when such state of mind or body or bodily feeling is in issue or relevant.

Lord Molton in Lloyd v. Powell<sup>69</sup>, pointed this

"It is well established in English jurisprudence in accordance with the dictates of common sense, that the words and acts of a person are admissible as Evidence of his state of mind".

(iii) A persons statement concerning his contemporaneous physical sensation are admissible of the fact under 'res gestae'.

The two illustrations from cross can be seen better in the light of Ratten v. R<sup>70</sup>, Ratten had been accused of murdering his wife and been convicted. At the time of the incident, the local telephone exchange had received a call from what the telephonist indentified as a woman's voice saying "get me the police please" the caller then hang up. The telephonist called the police who when they went there found the accused and the body of his wife who had been shot with a shot gun. The accused claimed that the shooting was accidental and that he had called the exchange and asked for an ambulance. The prosecution then called the telephonist. Their lordship did not think there was any element of hearsay in the Evidence which they thought showed merely that a phone call had been made from the house by a woman a few minutes before the shooting and that the woman was at the time in state of fear and shock. They thought however, that they should express their views on admissibility on the assumption that there was hearsay element and said,

The Evidence was not hearsay and was admissible as Evidence of a fact relevant to an issue, but that if the Evidence had properly been treated as hearsay, it would have been admissible as the statement ascribed to the deceased woman and shooting were closely related in place and time and the statement carried its own stamp of spontaneity".



In short the statement was admissible under res gestae.

(iv) Spontaneous statement relating to an event in issue made by participants or observers, to be admissible, they must be spontaneous and have a direct connection with the event in issue. See section 33(f)

Section 9 of K.E.A. would put this to light better.

It reads -:

Facts necessary to explain or introduce a fact in issue or relevant fact or which supports or rebuts an inference suggested by such a fact, or which establish the identity of a thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact are transacted are relevant so far as they are necessary for the purpose.

The statement to be admissible must always be to explain introduce or support etc a fact in issue. In Agassia v. London Tramway Ltd<sup>71</sup>, the statement that a driver had been out of line 5 or 6 times answered to the question "this fellows conduct need to be reported" was held inadmissible in claim for compensation on negligence. It was held it was not for explaining anything but the past acts of the driver.

Cross<sup>72</sup> suggests that for any state to be admissible under this doctrine it should be by the actor. He has authorities for his assertions, but while this is good for the English res gestae, courts in Kenya should not insist and I have found no decision laying down that the statement be made by the actor to be admissible. This is in view of the provision of the Evidence act sections 1 -16 . Infact Nigeria has refused to follow Britain<sup>73</sup>.

While res gestae can be invoked to prove motive as in Kuruma v. R<sup>74</sup> there is one qualification that even res gestae needs in Kenya as in Britain that is spontaneity, but I think this should be restricted to that section of section 6 which refers to "same time and place". In Oriental Fire and General Assurance v. Govinder and another<sup>75</sup>, the courts held that a statement to be admissible as a part of res gestae it must be spontaneously said or said at or immediately after the act.



xi Declarations By Conspirators & Others

Under section 10 K.E.A. statement of an alleged co-conspirator<sup>s</sup> is admissible against the defendant if the statement was made during the pendency of the conspiracy and if in furtherance of the conspiracy. In Rex v Awathi bin Ali<sup>76</sup>, the Evidence of one W. was held admissible when he gave Evidence of what Y had said to him and gave him names of person implicated as conspirators.

Under section 8 (3) when the Evidence of conduct is relevant any statement made by a person or in his presence and hearing which affects such conduct is relevant.

It may appear that while dealing with an exception that is between sections 6 - 16 of Kenya Evidence Act (K.E.A.) that I am dealing with relevance as meaning the same thing as admissible. The reasons are;

Section 5 K.E.A. provides that Evidence may only be given of the existence or non existence of a fact in issue and of any other fact declared by any provision of the act to be relevant and, that in everyday court proceeding only that admitted into Evidence. Also the case of John Makindi v. R.<sup>77</sup>, seems to lay down that Evidence which is declared to be admissible in Evidence and so does Durand<sup>78</sup> unless the act provides that though relevant it shall be inadmissible.



CHAPTER II

FOOTNOTES

1. Cross - what should be done about the rule against hearsay 1965 Cr. L.R. 68
2. Ibid
3. R.V. Willis (1960) I W.L.R. 55
4. Furguson - Hearsay in running down cases  
4 A.L.J. 145
5. Akinola Agunda - Evidence in Nigeria London Sweet & Maxwell Lagos Africa University Press (1966) p 57
6. Like section 33 - Difference in requirements of dying declarations admissibility in Kenya and England. See sec. 33 (a) proviso
7. Myers v. D.P.P. [1965] AC 1001  
This was before criminal Evidence Act 1965
8. [1965] EA 773
9. Supra at 774
- 10.. [1965] 3 all E.R. 59
11. [1960] I W.L.R. 55
12. [1956] I W.L.R. 969
13. [1972] Cr. App. 18
14. Carl C. Wheaton - what is Hearsay 46 IOWA 210
15. Myers v. D.P.P. [1965]<sup>AC</sup> 1001, [1964] 2 all E.R. 881
16. Supra at 1018
17. Morgan - Jury and exclusionary rules of Evidence  
4 Univ. of Chicago L. Rev. 247
18. Ibid
19. Raju - commentaries on the Indian Evidence Act 1872  
3rd edition p. 650
20. Morgan - real problems of proof
21. Wigmore SS 1362

42  
31  
11 pages



22. Ibid
23. Infra note 21
24. Kigecha Chunga v. R. [1965] EA 773
25. (1774) Willes 538
26. Supra note 25
27. Furgeson J., glass on Evidence aspect of Hearsay p. 145
28. 4th Ed. 460
29. Cross - scope of Hearsay rule 72 L.Q.R. 91
30. Addition by sec 34 to the requirements of sec. 33
31. [1961] EA 303
32. R.V. Pike (1829) C & P 598 statement of a child of 4 years quoted in cross on Evidence 4th ed.
33. Haza v. R. [1964] EA 476
34. [1960] EA 34
35. [1968] EA 332
36. Supra note 35
37. [1957] EA 149
38. Cross on Evidence 4th Ed. p 469
39. (1912) L.J. 631 at 634
40. [1965] AC 1001 [1964] 2 all. E.R. 881
41. [1964] 2 all E.R. 881 at 884 - 885
42. Supra note 41 at 886
43. [1912] 1 KB 317 at 321
44. (1880) 5 App case 623 H.L.
45. Weekly Review - Solomon judgement (1982) *NIGERIA BURIAL CASE*
46. Haines v. Guthrie (1880) 13 QB 818
47. 130 E.R. 237
48. Akinola Aguda - law and practice relating to Evidence in Nigeria London Sweet & Maxwell (1980) p 88



49. Cross on 4th Ed. p. 309
50. 10 Cox 25 at 31
51. R v. Maselu [1967] EA 355
52. B. Geogiadis and S.M. Otieno - cross examination of Hon. Charles Njonjo reserved. *Daily Nation* March 28 1981 P.5
53. (1880) 5 app cases 623
54. [1964] 2 all E.R. 881 at 889
55. See R. v. Ralph [1975] I Q B 907
56. Comptroller of customs v. western electric [1965] 3 all E.R. 549
57. How the innocent can confess  
The gurdian London March 10, 1981
58. (1835) 7 C & P 187
59. John Shaw v. Shaw [1935] 2 K B 113 at 135
60. (1877) 2 C P D 265
61. [1959] 42 Cr. app. report 266
62. 13 Halsbury law of England 456 (3rd ed)
63. I R Scott - controlling the reception in Evidence of unreliable admissions  
1981 Cr. L.R. 287 - 288
64. E. Eggleston - Evidence proof and probability 151
65. E.M. Morgan - admission as an exception to Hearsay rule  
(1921) 30 Yale L.R. 355
66. 1934 all. E.R. 85 at 87
67. Teper v. R. [1952] AC 480 at 487
68. 14 Cox C.C. 34k
69. [1914] AC 733 at 751
70. [1972] Cr. app. 18
71. (1873) W.R. 119
72. Cross on Evidency 4th ed.
73. Akinola Aguda - Law of Evidence in Nigeria  
London Sweet & Maxwell Lagos  
Africa Univ. Press 1966



74. 1968 EA 347 Also see section 8 K.E.A.
75. 1969 EA 116
76. 1909 - 1910 3K.L.R. 88
77. 1961 EA 327 - Interpretation of sections 7 and 14  
K.E.A.
78. Durand P.P. - Evidence in East Africa  
Kenya Institute of Administration  
Lower Kabete (1969)



his should be accounted for, especially when it comes from a lawyer who has to work with rules.

### CHAPTER III

#### A Hearsay - a rule or Myth?

The test of sound technical language is that <sup>it</sup> should be capable of being understood.<sup>1</sup> There is nothing divine in the meaning of the word "rule" and also no real difference to me in either cases whether used as a legal term or as a popular term. A rule has been defined as "a principle regulating, practice or procedure; a fixed and dominating custom or habit"<sup>2</sup> the dictionary adds "that regulation must not be transgressed" while Strouds law dictionary defines it in reference to specific acts of parliament, Ballentine law dictionary<sup>3</sup> says that a rule is that which is prescribed or laid down as a guide of conduct; a regulation, a prescription, a minor law uniform or custom". In short what a "rule" is here is what I call an intuitive understandable word, a word whose meaning clicks in the minds of one with basic training in law.

The word "myth" I have used and understood it to mean a commonly held belief that is an untrue or without a foundation<sup>4</sup>. Something unknown, something kept secret<sup>5</sup> the term myth can not be better understood than when demystify is defined. "demystification" says Hart<sup>6</sup>, as understood in:

"The vocabulary of radical politics, is simply the tearing aside of the veil of mystery so as to exhibit these claims of social institutions as an illusion, if not a fraud and such demystification is according to radical thought a necessary step for any serious critic of the society and indispensable preliminary to reform."

In my Chapter II, I did point out that Hearsay rule is not directly applicable to Kenya for although the Kenya evidence act is a codification of English law of evidence where deviation occurs, the act must prevail over English law.<sup>7</sup> In my Chapter I, I showed how this evidence act was received into Kenya.

It was shown - is a bit of base not showed rather jagged



This two cannot be divorced from the discussion of whether Hearsay is a rule or a myth used to answer awkward legal questions by reasons given for it's existence.

Of all uncertain fields of our law, the law of evidence relating to the admission of Hearsay is a quagmire covered by a layer of vegetation of exceptions to the rule which seem to accommodate it to the other surrounding and has been subject to a lot of legal commentaries and of which, in the risk of appearing to be making an assertion without authority, very few practising lawyers would like to enter<sup>8</sup>. This is a result of the stand they take of Evading it and any mental exercise it would entail. Stephen, that great legal draftsman realised it when he was drafting the Indian evidence act and speaking of the negative rules which are the bulk of law of evidence and of which hearsay is one said,

".....To me these rules always appear to form a hopeless mass of confusion, which can not be understood as a whole, or reduced to a system, until it occurred to me to ask the question what is the evidence which you tell me hearsay is not?"

It has been shown that evidence may or may not be hearsay depending on the reasons for its adduction. It maybe hearsay but still be admissible under one of the multitude of exception. Stephen went on and said;

"The "expression" hearsay is not evidence" seemed to assume that I knew by the light of nature what evidence was but I perceived at last that was what I did not know. I was in the position of a person who having never seen a cat is instructed in the fashion "lions are not cats nor tigers nor leopards though you may be inclined to think they are". Show me the cat to begin with and I will at once understand what is meant by saying that a lion is not a cat and why it is possible to call him one"

(emphasis mine) .



The Kenya evidence Act lays down what is evidence and allows other means of proof provided by other written laws (Sec. 182 Kenya Evidence Act). How or where does the hearsay rule, a common law rule come into our law, not only to confuse but itself confused by it's own exception. Going through some of the exception to the Hearsay rule in Chapter II someone may doubt whether it is at all related to Hearsay. Can it be said that we have the Hearsay rule because of what Sir Charles Newbold termed as "a natural tendency to look into the past over our shoulders and attempt to ascertain the law of Kenya by reference to the law of United Kingdom"?<sup>10</sup>. Considering the development of the law of evidence relating to Hearsay in Britain when it was feared to admit it least the juries go wrong, and the circumstances surrounding the codification of the Indian evidence act which was later reenacted as the Kenya evidence act, and in which no mention of Hearsay exists, the "looking over ones shoulders" to British Hearsay rule to ascertain meaning of some of our evidence Acts sections is like a partial blind following a total blind. "The present has a right to govern itself so far as it can," says Holmes and he continues, "it always be remembered that Historical continuity with the past is not a duty it is only a necessity"<sup>11</sup>

A lot of writers have tried to rationalise the Hearsay rule but have failed. Non of them has said what Hearsay in evidence or what exactly was the Hearsay rule. This is due to the exceptions and also restrictions within them. Harding has said that every one of the exceptions contain restrictions which make little sense and can only be explained through or in terms of precedent. He has pointed out that:

"Hearsay has long involved a rule of exclusion which includes too much with a heap of exception which do not let in enough and do it by a process of arbitrary selection which can be understood only with Historic footnotes."<sup>12</sup>

Jones on evidence says that the exceptions to the Hearsay rule are so many that infact the exceptions have swallowed the rule<sup>13</sup>, while morgan has it that no single



theory or principle can lend any element of consistency to the decision governing Hearsay and its exception<sup>14</sup>. Back in 1889 before even the reception of evidence act in Kenya, Lewis Edmund had seen the irrationality of Hearsay and said;

"I may well be doubted if the extremely artificial rule of admissibility of testimony before judicial tribunals have been product of anything but harm had they never existed a vast amount of learned case law built on unstable ground and which much of it of very much doubtful common sence would never have come into existence, ..."<sup>15</sup> (Emphasis Mine)

Rejection of Hearsay he contends proceeds upon principles and exceptions which are extremely difficult of apprehension and which have no counter part in common life<sup>16</sup> when we look at its application to Kenya we find that because it is of historic importance only so far as its development is concerned and that it is not resorted to as a necessity, could it be on the faith we have on the forefathers of our colonisers, who never had any faith even on themselves? Cockburn C.J. in Queen v. Churchwarden<sup>17</sup> accepted that people before then were frightened out of their wits to admit Hearsay evidence lest the juries go wrong.

Hearsay consists of a great variety of technical rules as to the admissibility of testimony incomprehensible to the public and difficult of complete apprehension even to the most learned lawyers<sup>18</sup>. In the desert of admissible Hearsay some mirage of inadmissible Hearsay can be seen by the legal "Bedouins". This, comes from the confusion surrounding "res gestae" as an exception to the Hearsay rule "res gestae" or part of the transaction is an accepted exception and provided in our Evidence Act by section 6. "Res gestae" is a confused area in the Hearsay confusion. Professor Stone seeing this commented

What is still unfamiliar is that it ~~res gastae~~ and its consequences has made the law what it is namely lurking place of motley, crowd of conception in mutual conflict and reciprocating chaos.



The books solemnly tell us declaration to be a part of re gestae must be contemporaneous with the act the explain (phipson on evidence /cross on evidence/) and at the same time they need not be contemporaneous (Taylor on evidence), each seeking to force all the conceptions constituting "res gestae under one rule or another ..... "19

Rest gestae opens the avenue for the escape from the confines of the rules that hampers the proof relevant evidence<sup>20</sup>, but the same doctrine has been stigmatised as being the delight of the quack, the despair of his opponents and the dilemma of the judges<sup>21</sup>. It has acquired high reputation as a sort of charm which has only to be repeated to smooth the way for inadmissible evidence. Lord Blackburn is credited of having said openly that "if you want to tender inadmissible evidence, say its a part of the res gestae"<sup>22</sup> and Lord Tomlin termed it as a respectable legal clock adopted for cases to which no formula to precision can be found.<sup>23</sup>

Even with the clarity of section 6 Kenya evidence act and absence of any qualification to and in ignorance of the case of R.V. Brabin and others<sup>24</sup>, which laid down that if there is any inconsistency between the Kenya Evidence Act and English case law, the act should prevail unless where the act is totally silent, the court went on to hold in Oriental fire and General Insurance v. Govinder and Others (1969) EA116, that to be a part of res gastae a statement must be spontanous with the act, This was to bring the Kenyan law in line with the confusion in United Kingdom. Stone had said that the confusion in United Kingdom arose not from cases but from refusal to make rational classification of the cases. In Kenya I can say the confusion comes from following the irratically classfied English cases. This is one of our exceptions and Hearsay rule!



It is said that the law of Hearsay evidence is imperfectly understood. But this is wrong, it cannot be either understood or known if it was capable of being understood there would have been attempts to rationalise it. Lawyers have long been afflicted by the subtlety of Hearsay, its nice distinction, its multi- various exceptions and the artificiality to which it can lead to forced presentation of evidence. Lawyers accept that its as basic as everyday court experience but a constant headache<sup>26</sup>. The rule is a headache because its a conglomeration of inconsistencies developed as a result of conflicting theories, refinements and qualifications within the exceptions only adding to its Irrationality.<sup>27</sup>

Morgan has seen the refinements and qualifications within the single exception to be inconsistent with the reason upon which the exception was built. In short a picture of Hearsay

rule with the exception would resemble  
an old fashioned crazy quilt made by patches  
cut from group of painting of cubists,  
futurist and surrealists .... ."<sup>28</sup>

Harding saw the exception as lack of lustre collections of drift wood from the past centuries reduced to a number of very irrationally limited and unsatisfactory exception by a group of decisions mostly given when the distrust of the juries was at the height and which indicate no broad conception underlying policy<sup>29</sup>. Thayer after wandering through the wilderness of the law of Evidence in his preliminary treatise was still not capable of telling us or was unwilling to say what was hearsay or according to Stephen to show as the cat. He however pointed that perplexity exists in the field of Hearsay because of failure to understand the scope of the exceptions and uncertainty whether and how far to extend or restrict their free development<sup>30</sup>. Understanding of the scope of the Hearsay or its exception and the reasons for the exception is anything but universal and there is lack of uniformity in their treatment and recognition<sup>31</sup>.



Wigmore, that learned and respected author of Wigmore on evidence after going through 1760 pages and 2 volumes<sup>32</sup> on Hearsay rule alone, tells us the Hearsay rule has been over enforced and abused and the problem for the coming generation is to preserve the fundamental value of the rule while allowing the amplest exceptions to it and abstaining from petty meticulous exceptions.<sup>33</sup>

The advice by Wigmore is good only to those who would suffer historic nostalgia if no value at all was attached to the Hearsay rule. Infact just as it does not exist in our statute law, I wish it was possible for the whole legal profession to suffer from amnesia as far as the rule is concerned. The reason is that there is infact no rule it is a myth, a legal monaster believed in by majority of lawyers and judges and non courageous enough to say its a dead rule except point half heartedly at the confusion which exists. This is done even w without looking at the difference between countries with and those without a codified law of evidence, In this field we are still waiting for a messiah but do we really need one?

A good illustrarion of the difference between us with a codified law of Evidence and those without can be seen in what the butler said he saw<sup>34</sup>.

- Q: Did you say something to the butler?  
A: Yes I did  
Q: As a result did he do something?  
A: He left the room  
Q: After a while, did he come back and say something to you?  
A: Yes  
Q: As a result where did you go?  
A: I went upstairs to the bedroom door  
Q: What did you do there?  
A: I looked through the keyhole  
Q: And what did you see?  
A: I saw what the butler said he saw.



Griew in the article illustrate the farcical side of the rule against Hearsay.

It appears in this chapter up to now that there has been no personal synthesis as developed in my mind but rather quotation after quotation. Its unfortunate but there is no other way through a confusion which would not appear confused itself, The only way was to develop a discussion which started at the problem and the confusion. In the above article the tiresome process of questioning was due to the answer which the first question was asking for was Hearsay - what the butler had said he had seen through the keyhole and because it would only be given by somebody else other than the butler to prove the truth of what the butler said, it was Hearsay and inadmissible. That is the English law.

But going back to our evidence act, section 8 (3) we know that what the butler told the witness influenced him to go up and therefore see what he saw. Our section 9 allows evidence that explains a conduct to be given. What the butler said is therefore not Hearsay according to our evidence act it is direct evidence because it influenced and explains a why the witness went and peeped through the keyhole. What he saw is also evidence. Intention can also be proved by Hearsay evidence - R.V. Willis (1956) I W.L.R. 56.

Under section 5 - 16 of Kenya evidence act, you can find a peg to hang any Hearsay evidence and infact any Hearsay evidence is admissible and the confusion arises from the mass of entangled case law and lack of differentiation between admissibility and weight to be attached. Take the case of Njunga V.R., the information by the informers was admissible to explain why the police had to chase the car under section 9 Kenya Evidence Act. The question then was, <sup>was</sup> there no better evidence? The Evidence completely lacked weight to prove what it was intended - Intention to commit a felony being armed.



Looking at the law report it is evident that the judge, come to the right conclusion from wrong reasoning. The Evidence had been given undue weight by the magistrate and the burden of proof had not been discharged, the evidence having failed to do what it was intended. In R.V. Willis (1956) I W.L.R. 55, the court admitted Hearsay evidence to disapprove intention but the weight of the evidence was against them.

It still remains that to suggest that even that the faintest kind of Hearsay testimony ought to be admitted sends a shudder through one who has been stepped in the restrictions of law<sup>36</sup>. The fact is the phrase "Hearsay is no evidence" is an expression inaccurate in everyday and has caused the nature of the rule to be generally misunderstood<sup>37</sup>. Inadmissible Hearsay is said to be a small island in the sea of exceptions even the best path finders sometimes go astray, the island seem to be a floating one that none of the writers has been able to find, and hence the rule and the exceptions.

Thayer points at a possible solution to this problem,

It seems a sound general principle to say that in rare cases a main rule is to have an extension, rather than exceptions to the rule; that exceptions should be applied only within strict bounds and the main rule should apply in cases not clearly within the exception. But here comes the question what is the exception. There lies the difficulties. A true analysis would probably re-state the law so as to make what we call the rule the exception and make viz that whatever is relevant is admissible<sup>39</sup>. (emphasis mine).

Thayer at last points the way but to ascertain the distance we have to go back to our Evidence act and maybe case law. Section 5 of K.E.A. provides "that subject to the provision of this act or any other law, no evidence shall be given in any suit or proceeding except evidence of the existence or non existence of a fact in issue and of any other fact declared by any provision of this act to be relevant". The proposition that whatever is relevant is admissible raises just the small question, meaning to be attached to 'relevant' and 'admissible'.



Admissible is defined in the K.E.A to mean admissible in evidence and in my understanding is that, the court has accepted the Evidence tendered and is to consider it in determining whether the case or the issue is proved or not proved. Relevant means "having a bearing to an issue in question". There is no need to put fine semantic distinctions on relevant and admissible but it is opportunate to point out that because the act provided some occasion where relevant evidence is not admissible like before confession, are admitted<sup>41</sup> and evidence coming within section 33 or any other provision which requires as a prerequisite that certain conditions be fulfilled if it is not fulfilled then the Evidence is inadmissible, the reason being that section 110 K.E.A. provided that the burden of proof of admissibility is on the one who wants to give such evidence.

The fact is that whatever is admissible must be relevant and whatever is relevant must be or is admissible in evidence unless provided otherwise by the evidence Act or any written law<sup>42</sup>. This seems to be the case where evidence is to be admitted under section 6 - 15 K.E.A. In John Makindi V.R. (1961) E.A. 327, which can be taken as an authority for saying that where the act provides that Evidence of a fact is relevant, it means it is admissible unless it is provided otherwise. Lewis Edmund in 1809 said that

"It is desirable to mention that it is said that hearsay testimony is rejected on the ground that it is irrelevant. This is not a correct view, ..... infact any Hearsay connected with the issue must be relevant and to say it is irrelevant is merely a disguised way of saying Hearsay is rejected because it is not considered sufficiently trustworthy ....." (Emphasis mine).

This is supposed to be the true position when Edmund spoke of "sufficiently trustworthy", he was refering to the weight to be attached to the evidence itself. The Hearsay in Njunga V.R. (1965) EA773, was so wanting that the conviction could not stand. It is not that the evidence was technically inadmissible, it is only that the verdict was against weight of Evidence. Jack B. Weinstein<sup>44</sup> after looking into the probative



force of Hearsay evidence commented and said;

"The probative force of a line of proof is its power to convince a dispassionate trier of fact that a material proposition something, referred to as an 'ultimate fact' is probably true or false. It may also be defined as an increment resulting from admission of evidence in the "degree of belief which is rational to entertain" with respect to a proposition about a matter of fact. Convincing power or probative force of any statement is affected by the trier's assessment of credibility of the declarant with respect to the specific statement."

He also went on to say that in order for a trier to determine the weight of any Hearsay evidence he should look at the statement not in isolation but as a part of the other Evidence in the case<sup>45</sup>. In our case of Njunge V.R., the judge found that the Evidence had not convincing power so he used the phrase "very possibly"<sup>46</sup> to show the weight he gave to it and instead of saying that it was impossible to convict on such evidence he says it would have been "difficult if not impossible for the court below to have convicted"<sup>47</sup>.

Morgan<sup>48</sup> is of the opinion that if we have to start a new and were unwilling to treat the Hearsay objection as affecting weight rather admissibility, we could do well to put in category of Hearsay all evidence which requires the trier to rely upon the use of language or the sincerity or the memory or the observation of the person not present and not subject to all conditions imposed on the witness. At the same time he accepts "we should have as the basis of the system the principle that the relevant evidence is admissible and should treat the Hearsay rule as an exception"<sup>49</sup>. Another writer Morris Forkoch<sup>50</sup> seems to drive the idea home for us. In essay nature of legal evidence he asks and answers the question<sup>51</sup>.

"What therefore should be done? Historically, logically and practically, only one basic question should be answered at the outset, namely is the evidence preferred logically probative of some issue of matter which has to be proved?



relevance should thus determine admissibility. A second and final question should be answered however; is there a clear reason or policy ground for exclusion? ..... within the ambit of these two principles all evidence should be admitted and the weight and not the justification should be the only question passed to the trier ....." (Emphasis mine)

### Conclusion

What then is Hearsay? Is it a rule or is it a myth? The answer - it is nothing like a rule. Throughout this chapter I have endeavoured to show the clouds that surround it. It is only resorted to if the trier of fact cannot find any better reason for rejecting evidence or by a lawyer with no better ground for objection. It has been said that it is what it is today - as a result of a conglomeration of conflicting considerations modified by Historical accident<sup>52</sup>. In the sea of admitted Hearsay the rule excluding Hearsay is a small and lonely island whose whereabouts defeats any established principle of sound legal or judicial navigation. Its reasons for existence being incapable of convincing anybody not learned in law. The lawyers and judges, having accepted its existence and justifications, have as a self extenuating measure for their belief, and to explain why logically probative Evidence is not admitted, not only taken Hearsay for granted but insists it exists. Just like god is resorted to, to explain creation by those who still disagree with the theory of evolution, so is the rule against Hearsay. Even the definition given in Subramaniam V. DPP faces some problem for example in Myer v. DPP, the prosecution argued that the microfilms were not adduced to prove the truth of the recorded particulars but only to prove that they were records kept in the ordinary course of business. This was met by the question that if they were not intended to prove the truth of the entries, what then were they intended to prove<sup>53</sup>. This was a good move for there is<sup>no</sup> evidence which is adduced for any other purpose other than to prove or disapprove a fact in issue or a fact relevant to the issue. But was not keeping them in course of business relevant to the issue whether they could be correct?



Hearsay is a myth and just like other myth it is so imprecise, that as a final and cowardly move, its better to believe in it than question it. The paradoxical saying "the president is dead - long live the president" changed to "Hearsay rule is dead - long live the Hearsay rule" is the nearest we can go. The myth is so entrenched into the law of evidence in practice that it is better for the lawyers and judges to believe in something which is not there than accept there is nothing to believe in. The rule having been swallowed by the exceptions, it can only be of importance to the legal Historians for it tends to impede (freedom of proof) and paint clouds in relatively clear skies of the law of evidence.

#### RECOMMENDATIONS

The rule against Hearsay has been simplified into the expression "Hearsay is no evidence" this expression is inaccurate in everyday and has caused the nature of the rule to be misunderstood<sup>54</sup> what then can be done?

There has been attempts in England to deal with the Hearsay rule. After Myers v. DPP (1965) AC 1001, an emphatic rumbling of disapproval was heard which almost grew to a roar. Hearsay was seen as a hindrance to the truth finding functions of the court. As a purported remedial measure Britain passed the criminal evidence Act 1965 and later the civil Evidence Act 1968. But the problems relating to Hearsay still exists. A parade is needed.<sup>55</sup>

There is only one possible solution. Abolition of the Hearsay rule by legislation would be a move so radical that most lawyers would not think of it. The solution would remain with the courts to exercise their residual discretion in receiving Hearsay evidence, along certain guideline and with certain safeguards. The courts have always had this and if they cannot on their own motion exercise it then legislation is necessary to make them obliged and aware.



This discretion to receive Hearsay evidence should be exercised having regards to the weight of the evidence in light of personal knowledge if any of the suppliers, the likely reliability and accuracy of the recorder. It is the accuracy, origin and transmission that should be the crucial factor"<sup>56</sup>. This is what actually happens in everyday court operations when reasons are being given for inadmission of Hearsay. But the question of relevance and admissibility remains.

A legislation Akin the United States federal Rule 402 would not be completely effective. The legislation I have in mind should tend towards an inclusiveness of the Hearsay rule by providing that relevant Evidence is admissible except otherwise provided by written law and the question to be asked by the court when its coming to a conclusion is of the weight to be given to any particular evidence that would be a discretion of the trier. Such a legislation would be supplemented by another which may read;

"Every statement having appreciable probative value upon any issue shall be admissible if the judge shall find that in the circumstance of the case, the evidence will assist in the finding of the truth".

Such a statute would expressly give the judge the discretion he always had and instances where logically probative Evidence is excluded on technical grounds would be minimized if not removed. This exercise of the discretion would be with regards to weight to be attached to any piece of Evidence. In instances where the legislature has been resulted to, to remedy the Hearsay problem, it is later criticised for lack of complete re-examination of the basis of the rule and failure to put it on a more rational footing and perhaps produce a comprehensive code of Evidence<sup>58</sup>. Putting Hearsay on a more rational footing, would only be accomplished by its abolition by the legislature a move which can only be done on the assumption that exists.



CHAPTER III

FOOTNOTES

1. Quoting from Patterson jurisprudence 1st printed edition page 296 - Pollock essays in jurisprudence and ethics (1882) 258.
2. Oxford English Dictionary VD8 Page 882.
3. 1969 edition.
4. Chambers 20th Century Dictionary.
5. Bullentines Law Dictionary 1969 edition.
6. Hart, H.L.-Bentham and dymystification of the law 36 M.L.R. 2 at 3.  
  
See also Mutunga W - The dymystification of the Kenya hire purchase law. 1975 8 E.A. L.R. 69
7. R.V. Brabin and others (1947) E.A.C.A. 80 see also AGUNDA T.A. - Evidence in Nigeria London sweet and Maxwell Lagos African University press 1966 page 57.
8. Experience during 4th term clinicla programme October-November, 1981 at Thika R.M.'s court See R.V. Mungai Kamau and others R.M. case No.460/81 R.V. Eliud Mwangi case No. 444/81
9. ~~Stephen - Digest of the law of evidence - Introduction~~
9. Stephen - Digest of the law of evidence - Introduction P.XI
10. President of E.A. court of appeal speech at Kenya Law school October 1967 quoted in Tudor Jackson - Laws of Kenya P.15
11. O.W. Holmes - law in science and science in law 12 Harv. L.R. 443 at 444.
12. D.e. Harving modification of the Hearsay rule (1971) 45 A.L.J. 531 at 559.
13. Jones on evidence vol. II SS 8:9
14. Morgan - some problem of proof page 140
15. Lewis Edmund - Rejection of Hearsay (1889) 5 LQR 256 at 265 - 266
16. Ibid at P. 273 - 274
17. 121 E.R. 897 at 899
18. Supra note 15
19. Stone 55 L.Q.R. 466



20. Gooderson - res gestae in criminal cases  
1956 C.L.J. 199
21. Tragerthan on evidence quoted by P.D. King  
res gestae in running down cases  
4 A.L.J. 279
22. Lord Blackburn quoted 4 A.L.J. 279
23. Holmes V. Newman 1931 2 All E.R. 85 at 87
24. Supra note 7
25. ....
26. Edward Griew - what the Butler said he saw  
1965 Cr. L.R. 91 at 93
27. Harding supra note 12
28. E.M. Morgan - looking backwards and forwards at evidence  
50 Harv. L.Rev. 909 at 921
29. Supra footnote 27
30. Thayer - present and future of evidence  
12 Harv. L.R. 71 at 81
31. Jones on evidence SS 8:1
32. Vol. V and VI
33. Quoted in Jones SS 8:1
34. Supra note 26 25 (1965)E.A. 773
36. Wigmore SS 1427
37. Raju commentaries on Indian evidence Act 1872 at p. 651
38. Supra note 30
39. Supra note 30 at p. 81
40. New webster<sup>n</sup> Dictionary college edition surjeet publication.
41. See section 26 K.E.A.
42. See saving proviso in section 182 KEA, the constitution  
could also provide otherwise see section 77(4)
43. Supra note 15



44. Weinstein, Jack B. Probative force of Hearsay  
46 IOWA 331 at 331 - 332
45. Ibid at 333
46. (1965) EA 883 at 774
47. Infra
48. E.M. Morgan - Hearsay Dangers and the application of the  
Hearsay Concept (1948) 62 Harv. L.R. 177
49. Ibid at 218
50. Forkosh - Nature of legal evidence  
(1971) 59 Cal. L.R. 1356
51. Ibid at 1382
52. Morgan E.M. Hearsay rule  
Quoted by Tribe - Triangulating Hearsay  
87 Harv. L.R. 957
53. (1964) 2 all E.R. 881
54. Raju commentaries on Indian evidence Act 1872 at 651
55. See criminal law Rev. Committee report (Britain)  
June 1972 commd. 4991 para 238
56. Neward and Samuels v. Hearsay and the civil evidence Act 1968  
1965 New. L.J. 912 at 813
57. Myer V. P.P.P. (1964) 2 all ER 881 (1965) AC 1001
58. Frieberg - Evidence Documents Act 1971 and the Hearsay Rule  
8. Melbourne Univ. L.R. 694



HEARSAY - A RULE OR A MYTH

BIBLIOGRAPHY

ARTICLES

1. Allot, A.N. - Evidence in customary law - essay in  
- contran E - Reading in African Law.
2. Allot, A.N. - Future of African Law. Essay In Kuper and  
Kuper - African Law University of California  
Press. 1965
3. 'Amicus Curie' - Hearsay and Horsence (1968) 85 S.A.L.J.  
178
4. CROSS A.R.N. - What should be done about the rule against  
Hearsay 1965 Cr. L.R. 68
5. CROSS A.R.N. - A reply  
1965 Cr. L.R. 97
6. CROSS A.R.N. - The scope of the rule against Hearsay 72  
L.Q.R. 91
7. DAVIS, Kenneth Culp - Hearsay in Non jury cases  
(1970) 39 Yale L.J. 489
8. Edmund, Lewis - Rejection of Hearsay  
(1889) 5 LQR 265
9. Eustace Seligmann - An Exception to the Hearsay rule  
(1912) 26 Harv. L.R. 146
10. Forkosh M.D. - Nature of lega evidence (1971) 59 Calif.  
L.R. 1356
11. Frieberg - Evidence (Documents) Act 1971 and the Hearsay  
rule 8 melbounce University L.R. 694
12. Furbeson J. - Aspect of Hearsay evidence essay in -Glass  
Harold Hyams - Seminars on Evidence -  
Law Book Co.
13. Gooderson R.N. - Res gestae in Criminal cases 1956  
C.L.J. 199
14. Harding D.E. - Modification of the Hearsay rule  
45 A.L.J. 531
15. Hart H.L. - Bentham & the dymystification of the law.  
36 M.L.R. 2
16. Jeans, David - Hearsay evidence.  
(1964) 84 S.A.L.J. 15



17. KING P. - Res gestae evidence in running down cases.  
4 A.L.J. 279
18. Maguire and Eptin - A preliminary Question of fact in  
determining the admissibility of  
evidence (1927) 40 Harv. L.R. 392
19. Mac Cormick - The Border Land of Hearsay (1970) 39 Yale  
L.J. 489
20. Mac Pherson - A statutory exception to the Hearsay rule.  
1965 University of Queensland Law J. 30
21. Morgan, E.M. - Hearsay danger and the application of the  
Hearsay concept 62 Harv. L.R. 177  
Morgan, E.M. - Admission as an exception to the Hearsay  
rule. 1921 30 Yale L.R. 355
22. Morgan and Maguire - Looking forward and Backwards at  
evidence. 50 Harv. L.R. 907
23. Mutunga, Willy - The dymystification of Kenya hire purchase  
law. (1975) 8 E.A.L.R. 69
24. Newark AND SAMWELS - Hearsay and the civil Evidence Act  
1968. 1969 New L.J. 812
25. NOKES - Res gastae as Hearsay 70 L.Q.R. 370  
NOKES G.D. - Some suggestion on Hearsay  
- 1965 Cr. L.R. 257
26. PECK - The rigidity of the rule against Hearsay  
21 Yale L.J. 257
27. Phipson, Sidney L. - The doctrine of res gestae in the law  
of evidence (1903) 19 L.Q.R. 435
28. Sibley N.W. - Specially admissible evidence res gestae  
(10903) 19 L.Q.R. 203
29. Ollenu N.A. - Proof in customary courts in Glückman of  
evidence and procedure in African Law.
30. Sibley N.W. - The doctrine of res gestae in the law of  
evidence (1904) 20 L.Q.R. 8 5
31. Thayer James Bradley - Presumption and the law of evidence  
(1889 - 90) 3 Harv. L.R. 141  
Thayer James Bradley - The present and the future of the  
law of evidence.  
12 Harv. L.R. 71
32. Tribe, L.S. - Triangulating Hearsay 87 Harv. L. Rev. 957
- 33.



33. Weinberg, M. - <sup>Implied</sup> ~~Drafted~~ ascertained and the scope of Hearsay rule 9 Melbourne University L.J. 265
34. Weistein, Jack B. - Probative force of Hearsay 46 I.O.W.A. 331
35. Wheatton Carl. C. - What is Hearsay 46 I O.W.A. 216
36. Wigmore - The History of the Hearsay rule 17 Harv. L.R. 437
37. Holmes<sup>m</sup> O.W. - Law in science and science in Law. 12 Harv. L.R. 443
38. Grew, Edward - What the butler said he saw 1965 Cr. L.R.91

BOOKS

1. AGUNDA, AKINOLA T. - Law and practice relating to evidence in Nigeria LONDON SWEET AND MAXWELL 1980.
2. AGUNDA, AKINOLA T. - The law of evidence in Nigeria. LONDON SWEET AND MAXWELL LAGOS AFRICAN UNIVERSITY PRESS 1966
3. COTRAN E AND RUBIN N.N - Reading in African law Vol. I FRANK CASS & CO. 1970
4. CROSS A.R.N. - Cross on evidence 4th ed. London Butterworths.
5. CROSS A.R.N. AND WILKINS N - An outline of the law of evidence 3rd ed. London Butterworths 1971
6. EGGLESTON, RICHARD - Evidence, proof and probability. WEIDNEWDELD AND NICOLSON LONDON 1978
7. ELIAST.O. - The Nature of African customary law. MANCHESTER UNIVERSITY PRESS 1956
8. GLASS, HAROLD HUAN - Seminars on evidence Law Book Co. 197
9. GLUCKMAN, MAX - Ideas and procedure in African customary law. Oxford University Press (1969)
10. HEYDON E.S. - LAW and Justice in Uganda London Butterworths (1960)
11. HOLLEMAN J.F. - Issues in African Law-Moulton & CO. (1974)



12. HOOKER - Legal Pluralism - Introduction to colonial & neo colonial laws claredon press oxford (1975)
13. Jones on Evidence 6th edition.
14. KUPER AND KUPER - African laws - adaption and developent University of California (1965)
15. Morgan E.M. - Some problem of proof under Anglo American System of litegation. Columbia University Press New York (1956)
16. Maguire - Evidence Comman sense and Comman Law Chicago foudation press (1947)  
Indian
17. RAJU V.B. - Commetaries on the Evidence Act 1882 3rd edition . Eastern Book Co.
18. Thayer James B. - Preliminary treatise of the law of Evidence at common law 1898 ed. South Hackensack N.J. (Rothman reprint 1969)
19. Stephen James Fitz - James - A digest of the law of evidence 9th ed. London. Macmillan & Co. Ltd.
20. Wigmore on Evidence 3rd edition.
21. VERHELST THIERRY - Safeguarding African customary law. Judicial and legislative processer from its adaptation and intergration.  
Occasional Paper No. 7  
Africans Studies Centre  
University of California Los Angeles.