THE RULE AGAINST HEARSAY,
ITS HISTORY AND PLACE IN THE KENYAN LEGAL PHILOSOPHY.

A DISSERTATION SUBMITTED IN THE PARTIAL FULFILMENT
OF THE REQUIREMENTS OF THE LL.B. DEGREE, UNIVERSITY
OF NAIROBI.

BY

ONGICHO, H. ASUGAH

UNIVERSITY OF NAIROBI

OCTOBER 1993
DEDICATION

To my Parents who have been so caring for me
ACKNOWLEDGEMENTS

Human beings being naturally weak, it would not have been possible for me to accomplish this undertaking alone. I am therefore heavily indebted to all those who contributed towards the success of this undertaking, directly or indirectly. My special thanks go specifically to P. Mbote for her patient and understanding supervision. Without her guidance and help, I would have gone nowhere with this study.

Mr. and Mrs. Nyarega deserve my sincere thanks for their efforts to make sure that this work has been transformed from its initial handwritten form to what it is at the moment. My thanks are also extended to sister Pamela who kept on encouraging me even when I was about to lose hope. Lastly, but not in any way least, a word of bravo goes to Mrs. Beatrice Juma who spent many hours typing this work.
### ABBREVIATIONS

#### Articles

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.L.J</td>
<td>Australian Law Journal</td>
</tr>
<tr>
<td>Cri. L.R.</td>
<td>Criminal Law Review</td>
</tr>
<tr>
<td>Ghana L.R.</td>
<td>Ghana Law Review</td>
</tr>
<tr>
<td>Harv. L.R.</td>
<td>Harvard Law Review</td>
</tr>
<tr>
<td>Iowa L.R.</td>
<td>Iowa Law Review</td>
</tr>
<tr>
<td>L.Q.R.</td>
<td>Law Quarterly Review</td>
</tr>
</tbody>
</table>

#### Cases

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.C.</td>
<td>Appeal Cases</td>
</tr>
<tr>
<td>All E.R.</td>
<td>All England Reports</td>
</tr>
<tr>
<td>E.A.</td>
<td>East Africa Law Reports</td>
</tr>
<tr>
<td>E.A.C.A.</td>
<td>East Africa Court of Appeal</td>
</tr>
<tr>
<td>E.R.</td>
<td>English Reports</td>
</tr>
<tr>
<td>K.B.</td>
<td>King's Bench</td>
</tr>
<tr>
<td>K.L.R</td>
<td>Kenya Law Reports</td>
</tr>
<tr>
<td>K.Q.</td>
<td>Queen's Bench</td>
</tr>
<tr>
<td>U.L.R.</td>
<td>Uganda Law Reports</td>
</tr>
<tr>
<td>W.L.R.</td>
<td>Weekly Law Reports</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Introduction</th>
<th>........................</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Chapter One - The Definition, Scope and history of the Rule against hearsay</td>
<td>........................</td>
<td>1</td>
</tr>
<tr>
<td>1.1 Definition of the rule against hearsay</td>
<td>........................</td>
<td>4</td>
</tr>
<tr>
<td>1.2 The Scope and Application of the rule</td>
<td>........................</td>
<td>4</td>
</tr>
<tr>
<td>1.3 Historical development of the rule and its exceptions</td>
<td>........................</td>
<td>6</td>
</tr>
<tr>
<td>1.3.1 Development of the rule at common Law</td>
<td>........................</td>
<td>7</td>
</tr>
<tr>
<td>1.3.2 Introduction and development of the rule in Kenya</td>
<td>........................</td>
<td>10</td>
</tr>
<tr>
<td>2. Chapter Two - The Rationale behind the rule against hearsay</td>
<td>........................</td>
<td>17</td>
</tr>
<tr>
<td>2.1 Lack of opportunity to cross-examine</td>
<td>........................</td>
<td>17</td>
</tr>
<tr>
<td>2.2 The declarant was not under oath</td>
<td>........................</td>
<td>20</td>
</tr>
<tr>
<td>2.3 The danger of inaccuracy and concoction</td>
<td>........................</td>
<td>22</td>
</tr>
<tr>
<td>2.4 Lack of opportunity to observe the declarant's demeanor</td>
<td>........................</td>
<td>25</td>
</tr>
<tr>
<td>2.5 Distrust of the jury by the judges</td>
<td>........................</td>
<td>27</td>
</tr>
<tr>
<td>3. Chapter Three - The exceptions to the rule</td>
<td>........................</td>
<td>33</td>
</tr>
<tr>
<td>3.1 Rationale for hearsay exceptions</td>
<td>........................</td>
<td>33</td>
</tr>
<tr>
<td>3.2 Statements by Persons who cannot be called as witnesses</td>
<td>........................</td>
<td>35</td>
</tr>
<tr>
<td>3.2.1 Dying declarations</td>
<td>........................</td>
<td>40</td>
</tr>
<tr>
<td>3.2.2 Statements made in ordinary course of business</td>
<td>........................</td>
<td>44</td>
</tr>
<tr>
<td>3.2.3 Statements against the interest of the maker</td>
<td>........................</td>
<td>46</td>
</tr>
</tbody>
</table>
3.2.4 Statement giving opinion as to public right or custom ........................................ 48
3.3 Admission of statements given in previous proceedings ...................................... 50
3.4 Statements in documents produced in civil proceedings..................................... 51

4. Chapter Four - Conclusions and Recommendations ........... 56
   4.1 Conclusions and general observations .......... 56
   4.2 Recommendations .................................. 60
THE RULE AGAINST HEARSAY: ITS HISTORY AND PLACE IN THE KENYAN LEGAL PHILOSOPHY.

INTRODUCTION

The parties to any litigation in a court of law bear the burden of adducing evidence to prove the existence or non-existence of, either, a fact in issue or facts related to the issue. Facts in issue are the principal facts in a dispute. These are facts which are under the contention of the parties, and are sometimes referred to as factum Probandum.

In criminal cases, the principal facts are those facts which the prosecution must prove before they can secure a conviction from the court adjudicating the case. The standard of proof in such cases is beyond reasonable doubts as stipulated by the evidence Act\(^1\). In civil cases, these are facts which the plaintiff must prove in order to succeed in the remedies or reliefs he seeks from the court, or those facts which the defendant must prove before his defence can succeed. In order to prove these facts, the evidence adduced must be relevant to the fact in issue or to the facts related to the issue. Commenting on this, Elliot observes;

"the only facts which may ordinarily be proved in judicial proceedings are facts in issue, facts relevant to the issue and collateral facts, that is, those which affect the admissibility of evidence".\(^2\)

Therefore, it is clear that not all evidence that is adduced in a court of law is admissible. Only evidence which is relevant is admissible and any other evidence will be disregarded. It could, therefore, appear from the outset that all relevant facts should, as a general rule be admissible.
There have developed, however, what may be known as exceptions to this rule of relevance, so that in certain cases, relevant facts are not admissible. This has been done by introducing what are known as exclusionary rules, one of which is the rule which is the subject of this thesis. This is the rule against hearsay.

THE RESEARCH PROBLEM

The thesis to be advanced in this paper will revolve around the confusion the rule against hearsay and its exceptions is in. This rule has proved to be too technical to the layman who wishes to pursue a remedy in a court of law. It has proved equally technical even to Lawyers and Magistrates. This confusion prompted one judge to aver that the rule in its present form is "absurdly" technical. The ambiguities and technicalities involved are so great that the rule against hearsay is rendered unmeaning to the layman and unless there is an overhaul done, then the essence and objectives of this rule will be thwarted. The evidence excluded on the ground that it is hearsay may, at times be highly valuable to the layman that any omission of this evidence is viewed by the layman as unnecessary.

The application of the rule against hearsay, apart from excluding valuable evidence, has developed exceptions which are numerous and obscure. There is no clear demarcation between the species of hearsay evidence which is admissible as falling under the exceptions, and that which is inadmissible as falling outside the exceptions. Even evidence which lies within the exceptions can be held as inadmissible unless the
person tendering the evidence meets the conditions precedent provided under the exceptions.

This thesis, therefore, is going to revolve around the origin and historical development of the rule and exceptions thereto. By so doing it will be shown that the rule was once an inclusionary rule with exclusionary exceptions as opposed to the exclusionary rule with inclusionary exceptions it is today. The problem of study, therefore, is to show that the rule against hearsay as it is today has failed to meet its objectives and a recommendation will be made to the effect that the rule can best be administered if it is made an inclusionary rule with exceptions which will require strict interpretation so as to give this new rule a chance to strive. In this way, the difficulties involved when applying the exceptions to the exclusionary rule will be solved or at least minimized.

REASONS FOR UNDERTAKING THE STUDY

This study is undertaken so as to demonstrate the history of the rule against hearsay and its introduction in Kenya. It will be shown that the Kenyan Evidence Act\(^4\) did not include the word "hearsay" nor did its predecessor, the Indian Act\(^5\). The journey back to the history of the rule is intended to analyse and re-evaluate the rule in view of showing the reasons for its origin and then give possible ways of nourishing the rule into a better requirement of evidence law.

Secondly, the definition of the rule against hearsay and the ambit of its exceptions are unclear. The scope of
application of the rule has not been defined adequately. Commenting on the lack of clarity, one Judge was prompted to say:

"It is difficult to make any general statement about the law of hearsay which is entirely accurate."

This thesis is intended, consequently, to make an attempt to define this rule and analyze the scope of its application.

Thirdly, the rule against hearsay was incorporated in Kenya from the English common law and statutes which have since then undergone radical changes and re-evaluations in line with socio-economic changes in that country. The rule has however remained static and rigid in Kenya, despite the fact that there have been several socio-economic changes in the country since independence. This study is undertaken to show that owing to insufficient changes, if any, the rule needs reformulation in order to suit the present conditions and the future.

Fourthly, the rule against hearsay is unstable in its application. Although some exceptions have evolved, conditions precedent have been attached, and a person who wishes to tender - evidence falling within the exceptions, must prove them before his evidence can be accepted by the court. Owing to this factor, evidence that lies within the exceptions and which ought to be admitted, can be refused admission merely, because the person testifying or tendering the evidence has not satisfied all the conditions precedent involved. This thesis is intended to show that this area needs reform particularly as pertains the conditions precedent.
Finally, the study may be of importance to the multi-party legislature in case the legislators may intend to move motions intended to remove the mischief in the rule. The study may also be of benefit to the law reform commission in their duty to review the laws of this country. This study is therefore, aimed at proposing possible amendments to the rule against hearsay in view of making it simpler and less technical to apply.

CHAPTER BREAKDOWN

This study will entail four chapters. Chapter one deals with the meaning of the rule and its historical background generally. The rule’s introduction and development in Kenya will also be tackled here.

Chapter two evaluates the rationale behind the rule against hearsay. This chapter endeavours to analyse the reasons that were being advanced for the development of the exclusionary rule and an attempt will be made to make a critique of each rationale. It will be shown here that the reasons relied upon by the proponents of the rule’s exclusion are so unsatisfying and cannot convince most lawyers, and even laypersons.

Chapter three takes the various exceptions which were formulated in the course of the development of the rule and have since been legislated in Kenya. The quagmire that has been caused by the introduction of conditions precedent to the various exceptions will be analysed and a critique to each exception be given. The gist of this chapter is to enumerate the merits and demerits of each exception as
applied in the Kenyan context; hence, it will be shown that these exceptions have not been selected on good grounds at all.

Chapter four will concern itself with general observations of the whole study, make conclusions and then eventually make recommendations for reform.
1. Section 107; chapter 8, Laws of Kenya


3. Per Lord Reid in Myers V Public prosecutor; (1965) AC 1001 at 1019.


5. The Indian Evidence Act, 1872; which was largely a codification of the English common law.

6. Supra; Footnote 3.
CHAPTER ONE

THE DEFINITION, SCOPE AND HISTORY OF THE RULE AGAINST HEARSAY

As it has been pointed out, the word "hearsay" has never been conclusively defined and the scope of its application is not clear. This chapter attempts to give the accepted definition of the word and analyses the scope of its application before proceeding to look at the general historical background of the rule and its exceptions. The difficulties of defining the word "hearsay" have been caused majorly because the Kenyan Act does not state this word expressly nor does it attempt to define it. However, the gist of the rule, it should be pointed out, is contained in the Section which provides that "oral evidence must in all cases be direct." But what the meaning of hearsay evidence, or evidence which is indirect, is, has not been given and this forces us to look for the meaning elsewhere.

1.1 DEFINITION OF THE RULE AGAINST HEARSAY

The rule against hearsay ranks as one of the law's most celebrated nightmares. The rule has been given different meanings by different judges and writers at different periods in the course of its development. The meaning of the rule has in most cases been linked to its scope of application because its boundaries have been restricted by exceptions thereto.

Hearsay, as understood by a layman, means exactly what the word says; to hear and say what has been heard. However, hearsay in its strict sense, means more than this in law. It is the kind of evidence which has since the eighteenth century been held to be inadmissible at common law. The formulation of the rule, as it will be seen shortly, seems to
forbid two things; firstly, it forbids assertions made on
some earlier occasion by the person who is actually testifying
from being used as evidence of the fact asserted; and secondly,
it forbids the assertions of persons other than the person
giving oral evidence in court. According to Elliot and
Phipson, the former is most often called the rule against
narrative, whilst the latter is called hearsay rule in its strict
sense. And it is the latter that is going to be examined in
this study.

The formulations advanced to define the word have had
shortcomings but suffice it to say that the definition given
by Cross has come closer to the exact meaning of the rule when
he retorts:

"express or implied assertions 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." Emphasis mine.

The rule, as it is seen above, can forbid admissibility
of relevant evidence if adduced in court by a person other
than the maker himself. It should also be noted that the rule
applies even to written statements produced in court by a
person other than the writer or author thereof.

The rule has never been given any conclusive or
authoritative judicial formulation but most authorities concur
with the view advanced in the case of Subramanian V Public
Prosecutor. In this case, the defendant sought to tender
evidence that he committed certain acts because he was
threatened with death if he refused to obey certain orders by
terrorists. He had been charged with being in possession of
prohibited firearms without lawful excuse and his defence was
that he was acting under duress in consequence of threats uttered by Malayan terrorists. The trial judge did not allow the accused to state what had been said by the terrorists and the judicial committee of the privy council advised that the conviction should be quashed because the reported assertions ought to have been received. Lord Raid proceeded to give the following definition which has since been accepted as the standard definition of the rule against hearsay:

"evidence of statements made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by evidence not the truth of the statement, but the fact that it was made." Emphasis mine.

This crucial distinction had been overlooked by the trial court in the above case. The judge should have admitted the words, not to establish the truth of the matter, that is that there was duress, but to establish the fact that those words were indeed spoken by the terrorists. The rule is, therefore designed to prevent a party from trying to prove the truth or falsity of a fact through the mouth of someone who is not before the court to give evidence and to be cross-examined. It is also logical that the rule would prevent attempts to prove the truth or falsity of a fact by that someone's written material.

According to the Kenyan law of Evidence, the Act does not state the meaning of hearsay, as has been seen earlier, but Durand avers that the rule means:

"a statement made by a person who cannot
be called as a witness, which is offered in evidence to prove the truth of the facts contained in the statement is hearsay and is not admissible. If however, the statement is offered in evidence, not to prove the truth of the facts contained in the statement, but only to prove that the statement was infact made, it is not hearsay and it is admissible.

This definition agrees with the one enunciated in the Subramanian case and could, therefore, be correct to state that the rule has the same meaning in Kenya as at the common law. There may, however, be a difference in the scope and application of the rule.

1.2 THE SCOPE AND APPLICATION OF THE RULE

From what has been advanced above, it is clear that the exact scope of the rule against hearsay still remains a subject of controversy. It is not clear as to what the rule prohibits and what it allows. However, the Subramanian case has given us a hint that the rule does not prohibit evidence adduced to establish that the statement was actually made, and not its truth.

It has generally been agreed that the function of the rule is to prohibit statements which are given in court by persons who are not authors thereof, and these statements need not necessarily be by words of mouth, but may as well be by conduct. On this position, Jones points out that:

"a hearsay statement is not necessarily confined to words, written or spoken, but may very well consist of conduct, other than the expression of words, where such conduct is shown to have been intended by the declarant as a substitute for words in expressing the matters stated, such as gestures, identifications and the like." Emphasis mine.
This notion indicates that the rule connotes more than one dimension. Mere gestures or conduct given as evidence of the truth or falsity of the statement can be inadmissible as hearsay.

There was controversy as to whether the rule covers written statements in its application and this controversy has been settled since the decision in the case of Myers v. Public Prosecutor. In this case, the accused was charged with frauds involving passing off stolen cars as models rebuilt from wrecks. In order to avoid detection the stolen cars had to have their own identity numbers removed and the identifying numbers of the wrecked cars substituted for them. Unfortunately for this enterprise, the number cast into the cylinder block could not be changed. The prosecution case thus rested on the discrepancy in the relevant cars between the numbers which could be changed; which correspond to those of a wrecked car, and the one which could not be changed and accordingly corresponded to those of a stolen car. In order to establish the relevant combinations of the numbers, the prosecution called as a witness the custodian of the manufacturer's records. These consisted of microfilmed copies of record cards which passed along the line with the vehicle, and onto which the relevant numbers were entered. After having been filmed the original records were destroyed. It was not denied that the records were inherently reliable, nor that no oral testimony would have been credible, even if those who wrote the numbers on the cards could have been found and identified. It was, however, held by the House of Lords that these records amounted to hearsay and came within no recognized exceptions to the rule. There was a formulation,
therefore, that the rule applied even to written assertions.

The purpose of citing this case and that of Subramanian is to show that the scope of the rule against hearsay is not clear. Whereas the lower court in Myers' case\textsuperscript{14} believed that this evidence was admissible, the House of Lords held it was not because it squarely fall within the scope of the rule. It could appear that the fact as to whether evidence falls within the scope of the rule or not depends on the purpose for which it is adduced. The historical background of this rule, which is now to be turned to, will indicate why the rule covers evidence depending on what it is intended to prove.

1.3 HISTORICAL DEVELOPMENT OF THE RULE AND ITS EXCEPTIONS

The rule against hearsay, as a distinct and living idea, begins only in the 1500's, and it does not gain a complete development and a final precision until the 1700's. But before tracing the history of the rule and its exceptions from this period, which may be termed as its legal birth, it will be necessary to examine a few salient features of the preceding centuries from as far back as the 1200's, in order to understand the conditions amid which it took its origin.

In tracing the history of the rule against hearsay, analysis will be made in two phases. The first phase will be the examination of the development of the rule at the common law: the second phase will deal with the introduction of the rule in Kenya.
1.3.1 DEVELOPMENT OF THE RULE AT COMMON LAW

During the early modes of trial preceding the jury system of trial, a party testifying was allowed to speak from his personal knowledge regarding facts in issue. Commenting on this period, that is before 1200's, Wigmore said the following:

"One distinction which must be noticed even before this preliminary survey - the distinction between requiring an extrajudicial speaker one who is already on the stand to speak from personal knowledge. The latter requirement had been known in the early modes of trial preceding the jury."

Emphasis mine.

It could appear that during the period before mid 1200's, the rule against hearsay was observed by persons who were on the stand.

This system of trial was terminated at around 1250 when the jury system of trial first came into being. The jurors had to be people who were adequately informed about the issue in dispute, hence there was a requirement that they had to hail from the locality of the Parties to the dispute. They were allowed to consult the neighbours of the parties in dispute whom they believed possessed any crucial information concerning the dispute. With the information acquired, the juries adjudicated the dispute and gave their verdict accordingly. It is apparent that hearsay evidence was then admissible as Phipson points out:

"Originally, so long as the jury acted both as witness and triers, the rule to them was to admit and not to exclude hearsay evidence."17
Upto that period, it appears there was no appreciation at all of the necessity of calling witnesses or allowing parties on the stand to testify. On the contrary the leading conditions and influences of the jury trial permitted and condoned the conduct of the juries' obtaining information through consultations with persons not called as witnesses. There is no indication then of any exception when the hearsay evidence obtained by the jurors could be held inadmissible.

This trend continued throughout the 1300's upto the 1400's when the first witness appeared in the scene. At this period witnesses preappointed by the jury were allowed to testify in court. The pre-appointed witnesses were prohibited from making personal opinions, but were only allowed to state facts as they knew them and it was the duty of the jury to make opinions from the facts presented. The juries were not clogged, however, from going out to consult neighbours of parties to the dispute as Thayer noted:

"What it meant was that while juries could form opinions from anything they knew, the verdict being given at their peril, while they might act on what they picked up in any way, and might form judgement upon such foundations which might count as knowledge - witnesses could not do this, or rather state it, if they did, were not to say what they thought or believed, or had heard from others, or concluded from what we now called circumstancial evidence."19

It appears the rule against hearsay was observed to some extent by the pre-appointed witnesses, whereas the jurors did not observe it at all. However, even the witnesses were free to consult with the jurors in and out of court. There was no condition precedent that the witnesses so pre-appointed
ought to have perceived the information through their own senses. They were an investigative body chosen for the supposed capacity of its members to answer the disputed question without help from the court and without aid or hinderance from the parties. They were not cross-examined by the adverse party.

From early 1500's, a new feature arose which was distinct from the previous three centuries. The parties to a dispute secured a right of presenting additional information through witnesses of their own choice. By the beginning of the 1600's this feature had been fundamentally established and the witness so called was only allowed to testify on what he had himself perceived by his own senses. He had to confirm that the testimony was *quod vidi et audivi*; that is, that it must not be testimony at second hand.

It appears thus, as in contrast with the 1400's and beginning of the 1600's, the marked feature is that the proportion between the quantity of information obtained from the ordinary witness called by the parties and of information obtained by the jury itself was in effect reversed. The former element, which in the 1400's was considered little had by the 1600's become a prominent one. The role of the jury started diminishing tremendously and the juries ceased to be what they used to be; triers and witnesses as Morgan remarks:

"Thus by the time (Middle of eighteenth century) the jury had been transformed from a body chosen by the court to determine what the facts were from their own knowledge and from such sources as they deemed reliable without any control by the courts to a body which must depend solely on materials presented in court - most if not all of them by the parties."

By mid 1700's, the rule against hearsay had been
developed fully and the witnesses called by the parties only testified as to what they had perceived by their own senses and not what they had had been told by others who could not be called to court as witness. This notion has been advanced by Chief Gilbert in the following words:

"The attestation of the witness must be to what he knows, and not to what only he hath heard, for it is his knowledge that must direct the court and the jury in the judgement of the fact and not his mere credulity .... Besides, though a person testify what he hath heard upon oath, yet the person who spoke it was not upon oath; and if a man has been in court and said the samething and had not sworn it, he had not been believed in a court of justice."23

The notion that has been advanced in this part of the chapter is that the rule against hearsay developed gradually and through many epochs. It is noted also that the rule was being observed long before the advent of the jury trial system and, therefore the present form of the rule is an adoption of the pre - 1200's days. It is, lastly, discerned that by 1872, the rule excluding hearsay evidence became well established. What has not been examined is the development of the rule in Kenya which is now turned to.

1.3.2 INTRODUCTION AND DEVELOPMENT OF THE RULE IN KENYA

It was a well established policy of the British People that whenever they settled, their law had to reign supreme. This policy assisted them to rule the "native" of the countries they colonized effectively. They therefore, subjected the so called natives to their own laws and forced them (natives) to abandon their own customary laws which had been in existence before the arrival of the British. This country was colonised by the British and its natives were
subjected to both British and customary laws. An examination of what the trial system looked like before the British colonized Kenya is not clear.

The trial system that existed before 1886, when Kenya came under the British Empire, varied from one community to another. Each community had its own system of adjudicating disputes. But it is generally agreed that trials were conducted by councils of elders headed by village heads. It should be noted that the elders, while trying a dispute acted like the jury in England from the middle of the 1200's to 1600's. The elders were people from villages or clans from which the parties to a dispute belonged. They were free to acquaint themselves with the facts of the case by using all means possible, including consulting the neighbours of the parties whose case is being arbitrated.

The elders were in most cases males although, women and children were also allowed to attend as passive listeners. Male elders presided over disputes because they were ostensibly the ones who possessed more wisdom as contrasted from their female counterparts and children. In this connection, Allot avers:

"But since African society is a society of unequal statuses, it is to be expected that a senior and respected member of the male group may get a more attentive hearing than a female or a young boy. Emphasis mine."

The procedure of carrying out proceedings in the tribunals was one where the parties first put their case in full before the tribunal and then each of them was allowed to produce witnesses to testify in his favour. The Plaintiff's
witnesses were then cross-examined by the court and perhaps challenged by the adverse party; and then defendants and their witnesses presented their case in the same way.\textsuperscript{25} The parties usually told their story in length with little or no interruption at all; and not by means of question and answer technique. The parties and their witnesses while testifying, reinforced their statements from time to time by invoking supernatural forces in their support.\textsuperscript{26} This was an equivalent of the present day oath whose intention was affirmation of what the witnesses said.

It should be noted at this stage that after reinforcing the witness' statement and cross-examining him on the same, the evidence was ruled admissible or inadmissible depending on whether it was relevant or not. It never mattered how it was acquired and a witness testifying was free to furnish the tribunal with information that was second hand. Thus, both direct evidence and hearsay evidence were admitted so long as they were relevant. Even so, customary courts often attached different degrees of cogency to different types of evidence. An eye witness' evidence, for example, was preferred and treated as overwhelming and conclusive as opposed to evidence by a person who never perceived by his own senses.

Be it as it may, by the time the British established their rule in Kenya, the rule against hearsay was not strictly observed. Although trials could sometimes sentence offenders to serious punishments, in essence the trials were reconciliatory in nature. Matters of procedure were not given any serious emphasis. Therefore, when the British established their rule in Kenya in 1886, they extended their
policy of taking the English law whenever they went to this country.

The British first made moves towards dismantling the customary legal system and replacing it with their own in 1897. This was done by passing an order in council which allowed the colonial government to apply to Kenya the doctrines of Equity and "statutes of general application" which were in force in England as on the Twelfth August 1897. The order in council also enabled the colonial government to apply to Kenya certain Indian statutes; one of which was the Indian Evidence Act, 1872. This Act was a codification of the English common law. When these laws were introduced from India, they were received without any amendments despite the fact that the socio-economic conditions of India and England were different from those at Kenya. To this extent, the rule against hearsay's common law history is relevant to its application in Kenya.

The Indian Act was repealed in 1963 by the Kenya Legislature and replaced by the Kenya Evidence Act. It should be noted, however, that the Kenyan Act remained substantially the same as the Indian Act apart from insertions of a few sections to the new Act. The rule against hearsay was one of those provisions that were adopted in the Kenyan Act without any amendment. To this far, the rule is alien in Kenya and it applies in Kenya as it did in England by the 1800's.

From this chapter, it can be deduced that the rule against hearsay developed from an inclusionary rule to an exclusionary rule with inclusionary exceptions and by mid
1700's this position had been fully adopted. It has also been shown that this position was adopted in Kenya without any amendments. Thus the exceptions to the rule against hearsay which are now available in the Kenyan Act are those which developed gradually during the historical development of the rule. What has not been examined are the reasons for this exclusionary rule which are now turned to.
FOOTNOTES

1. The Kenyan Evidence Act; chapter 80 Law of Kenya.

2. Section 63 of chapter 80 Laws of Kenya.


5. Supra; F N 3 at P. 509.

6. Subramanian V Public Prosecutor; (1856), WLR 965; per Lord Reid.

7. Jones on Evidence, Civil and Criminal; Spencer A. Guard (section 6: 1-14:54) P. 159.


9. Supra; F N 6.

10. Ubi Supra.

11. Fergusion - Hearsay in Running down cases: 4 ALJ 14S.

12. Supra; F N 7.


15. Wigmore, J.H; Evidence in Trials at Common Law; Revised by James, H. Chadbourn; Vol.V; P. 12;


18. Professor Heinnich Brunner (1872): The origin of jury courts; P. 472.

19. Thayer, J.B; Preliminary Treatise on Evidence; (1898) Harv. L.R; P. 78.

20. Edmund M. Morgan; Hearsay, Dangers and the Application of the Hearsay Concept; P. 177

21. Supr; footnote 19, P. 76.

22. Supra: footnote 20, P. 178

24. Infra; footnote 25, P. 84.

25. Allot, A.N; Evidence in African customary Law; in Les de law libraivie Encyclopediagque, Tome XVIII: P. 64


27. 1897, East Africa Order in council; Article 11 (a).

28. Judicature Act, Chapter 8, Laws of Kenya (Section 3).

29. Applied to Kenya upto 1963 when it was repealed and the present evidence Act enacted.

30. Supra; footnote 1.

31. By order No. 25 of 1925 - the amendment which made evidence of previous convictions admissible to affect the sentencing of the accused persons.
CHAPTER TWO

THE RATIONALE BEHIND THE RULE AGAINST HEARSAY

The rule against hearsay has been explained and justified in a number of ways some of which are related to the historical development of the rule. It is difficult to come up with a rationale for the exclusion of hearsay which may escape criticism, but five considerations will suffice here to illustrate the dangers the rule is perceived to avoid. This chapter is, therefore, intended to answer the question - why is hearsay evidence inadmissible in the law of evidence?

2.1 LACK OF OPPORTUNITY TO CROSS-EXAMINE

The first, and perhaps most important, reason for the exclusion of hearsay evidence is that the adverse party lacks the opportunity to cross-examine the declarant or original author of the statement. Cross-examination is the art that first came into the scene in the eighteenth century when courts and juries started basing their findings upon testimony and not hearsay.¹ This art has been interpreted to mean the process of searching for information from a witness produced in court by the adverse party. In criminal cases it is the process whereby the accused person searches for more information from the prosecution witnesses after examination in chief by asking the witnesses questions; and the prosecution also asks the accused's witnesses questions in the same way when his turn comes. In civil cases, this process avails to both parties to the litigation after either of them has produced and examined his own witnesses.

According to Wigmore, cross-examination is beyond reasonable doubt the greatest legal engine ever invented for
the discovery of truth. This connotation gives us the first reason as to why cross-examination is so important as to justify exclusion of hearsay evidence if it is absent. What a witness who is not in the witness stand says cannot be subjected to cross-examination so as to verify their truthfulness. Cross-examination will serve to expose flaws in his sincerity and truthfulness. One judge made the following remark to illustrate this point:

"I have been thus particular in planting the power of cross-examination upon a foundation laid in authority, because of the sacred character of that right. The power of cross-examination is the most efficacious test which the law has devised for the discovery of truth. Without it 'viva voce' examinations and more particularly examinations by commission, would be very unsafe; the ingenious witness, or still more ingenious examiner-in-chief, might easily evade the truth and at the same time avoid the pains and penalties of perjury. The right to be confronted with the witness, and to sift the truth out of the mingled mass of ignorance, prejudice, passion and interest, in which it is very often hid, is among the very strongest bulwarks of justice."

The fundamental feature here it seems, is that a witness on his direct examination, discloses but part of the necessary facts. He may not disclose two kinds of facts: first, those which may diminish his personal trustworthiness; and secondly, those which are unfavourable to the party on whose side is testifying. The first class of facts may remain undisclosed not only because he deliberately wants to hide them, but also because he has not seen the necessity of disclosing them. This will include cross-examination on the source of his knowledge and his personal conduct. In the second class of facts, it is
apparent that non-disclosure is mostly as a result of question-answer procedure which is a feature of examinations - in-chief and the caller of the witness will tend to ask only those questions which are favourable to him. Cross-examination will shed light on this and to this extent its absence in hearsay evidence renders it inadmissible.

While cross-examination may reveal insincerities on the part of the witness, it may also assist to expose faults in perception and memory of the witness. Morgan illustrates this point in the following words:

"Deficiencies in the capacity of the witness for accurate perception, or lack of the opportunity to use capacity adequately, want of an incentive to take advantage of the opportunity, or carelessness in the exercise of the power of perception - any of these may be brought to light by the cross-examiner. The capacity to remember, the circumstances tending to impress the matter perceived upon the memory, the incentive to keep the memory fresh - these may each be shown to be lacking in greater or lesser degree."

Thus, experience has shown that cross-examination will assist involve a witness who is manufacturing a story in inconsistencies and also help assist a witness remember what his memory might not have perceived right.

However, one weakness with this justification is that if a witness is willing to tell lies to the court and he has the backing of the counsel producing him, cross-examination, even if availed, may be of little help. This means that in certain instances, courts may admit falsehoods if cross-examination has not disclosed them. Therefore, it is not a sufficient justification to the rule against hearsay to this extent.
2.2 THE DECLARANT WAS NOT UNDER OATH

By the middle of the 1500's, a requirement had arisen whereby witnesses who had made statements upon oath were further required to be produced in court in person. This was however limited to treasonable offences only.\(^5\) In all the other cases, sworn extrajudicial statements were admissible in courts. This continued up to the middle of the 1600's when the emphasis came to be gradually transferred from the sworn extrajudicial statements as the best evidence to sworn statement on the trial as the essential and sufficient testimony. It can be inferred that by this time the law requiring a person giving evidence in court to be sworn had developed.

This reason of excluding hearsay evidence has been echoed by among others Elliot and Phipson in the following words:

"Many reasons have been given for the exclusion of hearsay evidence. Among them, there are the objections that the original maker of the assertion was not on oath when he made it, and did not make it in the face of all the world, but in a privacy which might have emboldened him to say what he would not have said or even hint at in public."\(^6\) Emphasis mine.

It appears therefore that the reason that makes evidence that is given on oath more reliable is the sanction of fear of the consequences which falsehood would bring.\(^7\)

This reason was recognized as early as 1837 in the case of Wright V Tatham, where it was stated that:

"the administration of the oath furnishes some guarantee for these sincerity of the opinion and the sanction is required for the weighty reason that an opinion,
however imposing from the real or supposed respectability of the persons expressing it, may after a diligent and patient enquiry and cross-examination before those to whose judgement all evidence is addressed, be deemed by them to rest upon a precavious foundation or upon none at all?8 Emphasis Mine.

The oath has in practice taken this form: "I swear that the evidence I shall give before this court shall be the truth and nothing but the truth, so help me God." There was fear of the dire consequences that would result from the violation of the oath and this was moreso because the name of God was invoked.

The oath also induces an obligation to speak the truth and it will expose the witness to the dangers of criminal prosecution for perjury. While this result of the oath can influence the witness to say the truth, it has been pointed out that the oath would count for nothing if there is no opportunity to cross-examine the sworn witness.9 Thus, cross-examination seems a more important reason for exclusion of hearsay evidence than absence of oath. There is no way it can be proved whether the witness's testimony is correct or it is just ablatant lie unless through cross-examination. Morgan had this to say on this point:

"No doubt the oath originally furnished a powerful stimulus to compliance with its terms. Unquestioning belief in the inevitability of the punishment which follow its violation was well-nigh universal. The sophisticated might frame its terms so as to permit literal compliance in violation of its obvious intended meaning; but compliance with its terms was imperative. What happened comparatively early to the oaths of compurgation has now unfortunately happened to the oath of a witness. The deliberate expression of a witness of
his purpose to tell the truth by a method which is binding upon his conscience probably still operates as some stimulus to tell the truth; but fear of punishment by supernatural forces for violation of an oath is generally regarded as virtually non-existent; and the threat for prosecution for perjury has little effect."10 Emphasis mine.

The inference that can be drawn is that the reasons of absence of oath as a ground of excluding hearsay evidence is not sufficient unless it is accompanied by cross-examination. Without this, chances of abusing the oath without any consequences are very high. To this extent, it can be argued that the requirement of oath is incidental to the important process of cross-examination. It is also felt that this is not a strong enough reason for excluding hearsay evidence because when it is examined closely, it is noted that witnesses do lie to the court even when they are under oath.

2.3 THE DANGER OF INACCURACY AND CONCOCTION

The original declarant's statements may not be exactly remembered by the witness who is repeating or reproducing it in court and, as such, the evidence tendered may not reflect what the author of the statement intended. Memory of the witness who is reproducing the statement is less reliable as Durand indicates:

"Hearsay evidence is notoriously unreliable, for not only is the original maker of the statement not present in court, not under oath and not subject to cross-examination on the subject to test its accuracy, but memory is always reliable when a witness is called upon to repeat what he heard on another occasion, especially when he is called upon to repeat the statement exactly as it was made."11 Emphasis mine.
With second hand hearsay, there is added weakness of inaccuracy; the statement of the person with first-hand knowledge may have been inaccurately reported to the witness by the person who first heard it. Given that the intervening person is not present, it becomes impossible to test an important link in the chain of rapportage by means of the so called great legal engine. This danger is even more serious where the evidence is being offered orally. This weakness is also true where the declarant's statement was not true.

Inaccuracy can also be as a result of exaggerations or distortions by the witness himself. A generally honest man may yield to the temptation to exaggerate to help a dear friend or to hurt an enemy. The exactness of the statement produced by a witness who is not the author thereof is at risk of being over-exaggerated in favour of the party in whose favour the witness appears in court. According to Halsbury, hearsay offers opportunities to fraudulent persons wishful to put into other people's mouths statements which they had never made. It, therefore, can be inferred that as information passes from mouth to mouth there is a possibility of some additional facts being raised and, therefore, the story is taken further away from what it initially was.

There is a possibility of confusing what the original declarant intended. This can be as a result of misinterpreting the words used by the original declarant or the documents he has authored. This weakness is more serious when the language or terms used by the original declarant are technical.
Consequently the court, if it admits hearsay evidence, would be misled into believing this inaccurated and misinterpreted evidence.

This ground of excluding hearsay evidence can be illustrated by the case of *Ratten v The Queen* where the appellant was convicted for the murder of his wife by shooting her with a shotgun. His defence was that the gun had discharged accidentally whilst he was cleaning it. To rebut this defence, the prosecution called evidence from a telephone operator who stated that shortly before the time of the shooting, she had received a telephone call from the address where the deceased stayed with the husband. She said that the call was from a female who, in a voice sobbing and becoming hysterical said: "get me the police please." Before she would make connection with the police she hung up. The defence objected to this evidence on the ground that it was hearsay and did not come within any of the recognised exceptions. It was held that this statement was hearsay and Lord Wilberforce delivering the judgement of the court said:

"There is no doubt what this reason is: it is twofold. The first is that there may be uncertainty as to the exact words used and because of their transmission through the evidence of another person than the speaker. The second is because of the risk of concoction of false evidence by persons who have been victims of assault or accident."

It can, however, be contended that as much as this may be the real test which, according to the above case, judges should apply, cogent evidence is apt to fall victim of inadmissibility. Inaccuracy and concoction are things that
have been there since time immemorial and they are even witnessed where witnesses have been brought to court, sworn and are cross-examined. Thus, cross's contention, when he observes that the argument that hearsay may be concocted is simply one aspect of the great phatological dread of manufactured evidence which be set common law or adversarial trial system is hailed here. This ground, therefore, is more of an excuse to the exclusion of hearsay evidence than a reason.

2.4 LACK OF OPPORTUNITY TO OBSERVE THE DECLARANTS DEMEANOR

The extrajudicial statement having been made in private, the court will not have an opportunity to observe the maker's demeanor to verify whether it was made as a joke or with seriousness. By observing demeanor, the court will be able to determine whether the witness is bonafide and reliable; it assists in deciding what weight to give a witness's evidence. Wigmore was, therefore, stating a very important reason to the exclusion of hearsay when he said:

"So far, then, as the essential purpose of confrontation is concerned, it is satisfied if the opponent has had the benefit of full cross-examination. So far, furthermore, as a secondary and dispensable element is concerned, the thing required is the presence of the witness before the tribunal so that his demeanor while testifying may furnish such evidence of his credibility as can be gathered therefrom." 18

Emphasis mine.

However, Wigmore describes this reason of excluding hearsay evidence as incidental and subordinate advantage to the right to the opportunity to cross-examination. It is a minor advantage which can be dispensed with when it is not feasible, whereas, cross-examination remains
indispensable. However, judicial authorities have supported this ground of inadmissibility of hearsay arguing that less weight if any, is given to evidence of a witness who is not in court. In the case of R v Blastland it was stated that:

"Hearsay evidence is not excluded because it has no logically probative value; Given that the subject matter of hearsay is relevant to some issue in the trial, it may clearly be potentially probative. The rationale of excluding it as admissible, rooted as it is the trial by jury, is a recognition of the great difficulty, even more accurate for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury has not seen or heard and which has not been subject to any test of reliability by cross-examination."20

Similar words were reiterated in Teper v The queen21 when Lord Normand said that the truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light to which his demeanour would throw on his testimony is lost.

This reason carries less weight because of two reasons. First, people are different and they behave differently in similar circumstances. There are persons who can testify in court wearing innocent faces as if they were divulging bonafide information, whereas, what they are telling the court are sheer lies. Secondly, a lawsuit is not a scientific investigation for the ascertainment of truth and, therefore, it is impossible to make a scientific conclusion from a witness's mind. Since judges and jurors cannot proof scientifically what a witness has in his mind, there is a possibility of misjudging a witness's testimony. Moreover, demeanor of an extrajudicial declarant can
be described by the witness reporting his statement and courts can then make conclusions as to his credibility. Better still, courts can rely on the declarant's past records, for example, his reputation, prior bad acts and inconsistencies.

2.5 DISTRUST OF THE JURY BY THE JUDGES

This ground will show that hearsay rule evolved as a result of lack of confidence by the judges in the capacity of lay juries to evaluate evidence. The judges feared that the juries would attach undue weight to hearsay because they were lay persons.

According to Thayer, the exclusionary rules of evidence developed as a result of jury trials in England and it was during this jury period in time when the first witness appeared in the scene. Several rules evolved accompanying this new system of trial to control and govern the evidence offered by this witness. With this development, by the end of the 1500's the functions of the juries had been separated and juries merely became triers of fact only. Under these circumstances, the powers of the jurors were reduced to those of mere listeners. It was therefore possible for these lay persons to attach undue weight to hearsay, hence it had to be excluded as Perry Meyer points out:

"it must be remembered that the hearsay rule, like others, grew out of the jury trial, and the lack of confidence in lay persons to weigh evidence properly and to determine what probative force, if any to give to admissible evidence."24

These views were shared by Lord Mausfield C.J when he averred that in England where the jury are the sole judges of the facts, hearsay evidence is properly excluded
because no man can tell what effect it might have upon their minds.

It should be noted that the application of this ground of excluding hearsay evidence depend on the kind of judicial administration prevailing in a country's legal systems. In Kenya, for example, where assessors are only allowed in the rarest cases, it would be difficult for this ground to apply. In Scotland, for example, whose judicial system is similar to that of Kenya, it has been held in the Berkley Peerage case that hearsay evidence should be freely received. Enunciating this view, the same Lord Mausfield said:

"This has struck many persons as a great absurdity and defeat in the law of that country. But the different rules which prevail there and with us seem to me to have reasonable foundation in the different manner in which justice is administered in the two countries. In Scotland and most of the Continental States, the judges determine upon the facts in dispute as well as upon the law: and they think there is no danger in their listening to the evidence of hearsay because when they come to consider of their judgement on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give any little weight which it may seem to deserve."  

This is the position that Kenya should adopt if this ground was to apply, otherwise it would have little relevancy, if any, to the Kenyan process of admitting evidence.

In point of fact, it is difficult to believe that juries face difficulties in choosing what weight to give hearsay evidence. This attitude has particularly been attacked by Morgan who by contrast said:

"the model code treats the jurors as normal
human beings, capable of evaluating relevant material in a courtroom as well as in the ordinary affairs of life. There, they hear, consider and evaluate hearsay, there they consider, hear and weigh the opinions of their fellows, lay and experts. In the courtroom, they are entitled to the expert assistance of the judge, and with that help may be expected to act reasonably."28

Morgan further shows that while distrust of the jury had nothing to do with the origin of hearsay rule, it has exerted a strong influence in delaying its liberalisation. It is only in recent cases that distrust of the jury has been cited as a ground of excluding hearsay, whereas earlier judgements justified the exclusion of hearsay by reference to either lack of oath or absence of opportunity to cross-examine the original maker of the statement. This reason is, therefore, unconvincing and the true ground of excluding hearsay should be looked for elsewhere.

Other$ reasons of minor and unconvincing nature have also come up. Firstly, that hearsay evidence, if admitted, makes the process of ascertaining truth more difficult for what we hear from others about a relevant fact may not necessarily be true.29 It makes the proceedings more lengthy because once we admit hearsay evidence, we will have to allow hundreds of persons have told us and this will prolong the process of adjudication. Secondly, some writers30 regard hearsay as excluded on the ground of irrelevancy. This is criticised because most hearsay evidence may be relevant and yet excluded and if this were the position, then all relevant hearsay would find its way into the inclusionary rule.

Whatever the reasons for the rule against hearsay, the rule itself remains highly technical and is capable of
excluding very cogent and safe evidence. In criminal cases it is likely to lead to conviction of the innocent. It should be noted that the fact that the maker of a statement is unavailable does not make it inadmissible in certain instances. It is on this basis that exceptions have developed to the rule against hearsay to admit such evidence if certain conditions precedent are satisfied.


3. Nisbelti J, in McCleskey v Leadbetter, 1 P. 551 (1846).

4. Supra: Footnote 1 at P. 188

5. Supra: Footnotes 2 P. 23


7. Supra: Footnote 1 P. 183

8. Wright v Tatham (1837) 7 A.D and El. 313

9. Supra - Footnote 2 at P. 9

10. Supra - Footnote 1 at P. 186


15. Ratten v The Queen (1972) Ac 378

16. Ubi Supra, Per Lord Wilberforce.

17. Cross, Cross on Evidence P. 508. He cited the case of Myer v DPP where the original declarant's statement looked more accurated than the oral evidence admitted and yet was refused admission.

18. Supra, Footnote 2 at P. 199.

19. Ubi Supra at P. 28


21. Tepar v The Queen (1952) AC 480


26. Ubi Supra at P. 135

27. Per Lord Mausfield in the Berkley Peerage case.


CHAPTER THREE

3. THE EXCEPTIONS TO THE RULE AGAINST HEARSAY AND GROUNDS
FOR THEIR ADMISSIBILITY

This chapter is going to deal with what has come to be known as exceptions to the general rule against hearsay whose historical background has been traced and the rationale behind it examined. However, before doing this, there will be a brief discussion of the conditions precedent which must necessarily be satisfied before the exceptions are admitted, particularly under section 33 of the Act. There will, first and foremost, be a visit on what the rationale for hearsay exceptions is. Within each exception, a rationale underlying its admissibility will suffice.

3.1 RATIONALE FOR HEARSAY EXCEPTIONS

The rationale underlying the exceptions to the rule against hearsay evolves around two principles: the necessity principle and that of probability of trustworthiness.

As concerns necessity; arguments have been advanced that there is a great necessity to admit a class of hearsay evidence which is reliable. This happens in instances where there is absence of any other means of utilizing a witness' knowledge. If his testimony given a new in court cannot be had, it will be lost entirely. For the purpose of doing justice if it is not received in the form in which it survives and can be had. It can, therefore, be argued that the only situation in which such evidence can be admitted as of necessity is when it is established in court that the original declarant cannot be available to testify in person and that the evidence in question is so invaluable that its omission
will appear unjustified.

According to Wigmore the absence must be by way of residence and not of temporary sojourn, because otherwise the trial could be postponed until the declarant's return. This, however, seems too strict a rule because so long as he is absent, whether temporarily or not, he is unavailable. Thus, unless the witness is exceptionally important as to require postponement, there is no reason why his declaration should not be admitted on grounds of necessity as evidence of a witness who is unavailable. The distinction drawn between evidence of witnesses who are unavailable permanently and those of witnesses who are unavailable temporarily does not, therefore, hold water.

The other factor underlying the admissibility of hearsay exceptions is that of circumstantial probability of trustworthiness. In support of this rule, Wigmore gave this justification:

"The second principle, which combined with the first, satisfies us to accept evidence untested, is in the nature of practicable substitute for the ordinary test of cross-examination. We see that under certain circumstances, the probability of accuracy and trustworthiness of a statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner. This circumstantial probability of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name."5

The various exceptions to the rule against hearsay that have been admitted under this ground of probability of trustworthiness may include public documents which are admitted
as exceptions to the rule against hearsay. The entry of the public officer is likely to be true and reliable because the officer would not have had a desire to falsify the information entered in the public document and if he does so, there is a danger of detection; and in fear of the consequences that may follow - this detection, he is not likely to give false information.

The critics of this principle have argued that it is not persuasive because there are possibilities that a statement made in circumstances believed to make it trustworthy may turn out to be false because of lack of prudent assessment of those circumstances. It also permits the judge to rule mechanically on admissibility without having to think of the particular circumstances of the case. Thus, it gives a judge a discretion thereby creating room for him to admit evidence which may turn out to be false.

It can be remarked here that the admissible hearsay by way of exceptions is admitted as evidence which is as good as testimonial evidence. These statements are presupposed to be by an assertor who is qualified and as if he perceived them himself. They are therefore subject to the normal requirements of a witness such as relevance and failure may mean their exclusion even though they may fall under the exceptions that have been accepted.

3.2 STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

This section, in its introductory statements, expounds the conditions precedent which must be satisfied before statements which are classified as hearsay could be admitted despite the general requirement that evidence must be direct.
The condition reads that statements, written or oral, of admissible facts made by a person who is dead, or cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance can be procured without amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible .... in the following cases. The section then proceeds to enumerate the instances in which hearsay statements can be held admissible. It is apparent, therefore that for evidence to be admissible under this section, one of the four conditions precedent must be fulfilled; as examined herein.

The first condition is that the maker of the statement cannot be found. This condition has been difficult to construe especially as regards the words "cannot be found", but courts have interpreted them to mean unavailability at the time when the witness is being sought. This was stated in the case of R V Ndolo where a witness had given evidence at a lower court before the accused was committed for trial, and by which time the witness had left his place of work making it impossible for the prosecution to serve him with witness summons. In a contention by the prosecution that his deposition be read because the witness "cannot be found", the appellant's counsel argued that had the prosecution taken reasonable steps in the early part of the trial, the witness could have been found and it was held for the prosecution the court of Appeal stating that:

"We see no reason to differ from that decision. Council for the appellant also contended that the words of the section were not satisfied because the
witness might have been found if diligence had been used. We are of opinion that the words 'cannot be found' in the section refer to the time when the witness is sought to attend the trial, and do not refer to state of affairs at some earlier period.\textsuperscript{11} Emphasis mine.

It appears, therefore, that what the court is saying is that the words "cannot be found" should not be construed to mean "could not be found."

It should be noted that it is the court which will decide whether under the circumstances, reasonable care had been taken in the search for the witness in question.\textsuperscript{12} There must be something to show that by ordinary care and exertion, and the use of ordinary means the witness cannot be found.

The second condition precedent is that the maker of the statement has become incapable of giving evidence. These words do not expressly state kind of disability that makes the witness incapable, but in a true construction they contemplate not only physical disability, but also mental incapacity. Wigmore states that a witness who has become insane is no longer qualified; his testimony in court is no longer available; and by universal concension his former testimony or disposition may therefore be used.\textsuperscript{13} It could appear also that loss of any one of the faculties necessary for testimony furnishes an equal reason for disability.

The third condition is where the witness cannot be procured. This condition envisages a situation where the witness is a live and available, but due to other reasons he cannot testify. According to Durand, it includes instances when the witness is within the jurisdiction of the court but he cannot be summoned owing to diplomatic privilege or public
privilege. It can savely be suggested that this requirement may also cover instances when the witness making, the statement is within the court's, jurisdiction and he refuses to appear voluntarily.

The last requirement is where the attendance of the maker of the statement cannot be procured without an amount of delay or expense which in the circumstances of the case appear to the court to be unreasonable. The problem that has arisen as regards this condition concerns what unreasonable delay or expense is. There is no specification in the Act as to what standard measure should be applied to determine what delay or expense is unreasonable. Courts have as a result taken it upon themselves to determine what this delay or expense could be using their inherent discretion. On this basis, courts have held that because of the introduction of new means of faster and rapid travelling, what is unreasonable delay has been reduced tremendously. Other writers like Morris argue that the delay is normally unreasonable in the East African courts if the maker of the statements are residents in Europe or outside Africa. A case in point here is Thornhill V Thornhill where in an undefended petition for divorce on grounds of adultery, the petitioner applied for an order that the evidence of a witness who had obtained a confession statement from the respondent be given on affidavit to save the cost and inconvenience involved in bringing the witness to Uganda from the United Kingdom. The Court of Appeal stated that:

"The learned judge also stated in judgement that the cost and inconvenience of bringing a witness from the United Kingdom would not be great in these days of rapid and inexpensive air travel."
With great respect, I disagree that air travel in these days is inexpensive although I agree that it is rapid. But the question seems to be this—is it justifiable legally to put the petitioner to the expense of bringing a witness from the United Kingdom to testify about a fact which is not denied and in respect of whose evidence the court has a discretion to accept on affidavit, particularly as the petition is not defended and no application was made to have the witness orally examined."17

What the court was stating here is the fact that it had a discretion to decide what unreasonable delay is under given circumstances. The court also stated that speed must be balanced with the expenses likely to be incurred.

Another question that arises here is whether courts can take judicial notice of the distance before drawing inferences as to whether there will be unreasonable delay, hence unreasonable expenses be incurred. The answer seems to be that courts can do so. In Mohamed Taki VR18, the court of Appeal for East Africa stated that:

"It might have been better if the learned Magistrate had had evidence before him of the conditions which make section 30 of the Uganda Evidence Act applicable. But he was entitled to take judicial notice of the facts that Switzerland is in Europe and Kampala is in Uganda and he seems to have been satisfied that the attendance in Kampala of a witness or witnesses from Switzerland could not be procured without an amount of delay or expense which in the circumstances of the case appeared unreasonable."19 Emphasis Mine.

The statements that can be admitted after fulfilment of these condition constitute those enumerated under sections 33 - 41 and they are the ones to be examined next.
3.2.1 DYING DECLARATIONS

In his Treatise, Thayer finds that dying declarations may have been received as far back as 1202, particularly in homicide cases. It could appear, however, that its major recognition dates to the early 1700's, the time when the rule against hearsay was being effectively enforced and certain exceptions defined. At common law, the case of Wright v Littler illustrates this development. In an action for ejectment, the genuiness of a will being in issue, evidence was received that one of the subscribing witnesses on his death bed declared it a forgery.

The principle on which dying declarations are admitted is that the statement is made in circumstances that can render it reliable as trustworthy. Supporting this view, Woodroffe points out that the principle behind the admission of dying declaration is indicated by the Maxim of the law - nemo Moritus Proesumitur Mentiri - a man will not meet his maker with a lie in his mouth. It can be suggested here that when a man is dying, the grave condition in which he finds himself is held by law to be sufficient ground for his veracity. However, this principle cannot justify the admissibility of dying declarations in Kenya because, unlike in England, dying declarations are admissible in cases other than homicide and the Act even allows their admission in civil cases. Therefore, the basis on the belief that the solemnity of the thought of the approaching death and of the fear of punishment of falsehood in the next world cannot act as a sufficient safeguard in Kenya because it is not necessary for the declarant to be in imminent danger when giving the declaration.
The scope of application of this exception is also limited to only those statements relating to the cause of the death. The deceased declarant must be the person whose death is the subject of the charge; and not any other charge. The leading case on this point is that of Mohamed Warsama VR in which the appellant had been convicted on two counts of murder of two men and the court pronounced one sentence of death. One of the deceased persons had made several dying declarations which were material as evidence of his own death but which had apparently been admitted as evidence of the death of the other deceased person. The court of Appeal for East Africa held that:

"As it could not be ascertained from the record on which count the sentence of death had been passed and as an omnibus sentence is unlawful, no lawful sentence had been passed. The dying declarations were inadmissible as evidence of the cause of death of the other deceased."26

The second limitation can be implied from the above case and is to the effect that the declaration in question must be in relation to the declarant's death. Thus a declaration by one deceased stating the cause of the death of another cannot be admissible as evidence in a litigation by that other.

The third limitation is that dying declarations must be complete in their materiality. This qualification is accepted so as to avoid convicting the accused persons in instances where the incomplete statement by the deceased person which has incriminated him would have been qualified if he had completed the statement. These qualification was enunciated in the case of Waugh V The King where it was
stated:

"Apart, however, from this question, their Lordships are of the opinion that the dying declaration is inadmissible because on its face it was incomplete and no one can tell what the deceased was about to add; that it was in any event a serious error to admit it in part; and that it was a further even more serious error not to point out to the jury that it had not been subject to cross-examination." 28

This position has been reiterated by the East Africa court of Appeal in the case of Charles Daki VR 29 where in the course of investigations into a murder, a police officer called at the hospital where the deceased had been admitted suffering from gunshot wounds and asked him who had shot him. In reply, the deceased said "Charles Daki has killed me, he has shot me with a gun. I saw him with a gun, he was on a motor cycle. Yosefu Mukalingo had visited me and I went to the garage with him." At this point, a doctor intervened and told the police officer to leave him alone. This statement was held inadmissible the court holding:

"On the face of the recorded statement and footnote thereto the deceased was interrupted by the doctor; the deceased might or might not have added something and according on the authority of Waugh VR the statement was inadmissible." 30

The final limitation is as concerns the weight to be attached to the statement. It is upon the court to decide what weight to attach to a particular dying declaration after taking all factors into account. This point was considered in the leading case of Pius Jayunga VR 31 where the appellant was convicted of murder of one J.M. An assistant inspector of police had given evidence that on the day in question he
had seen J.M on the road with a wound in his chest, that he asked him who had injured him, to which J.M had replied that P.J had stabbed him. It was held, on appeal, that the admissibility of a statement by a person who has died, as to the cause of death depended upon the Evidence Act; and the court stated further that:

"It has been said in this court that the weight to be attached to dying declarations in this country must, consequently be less than that attached to them in England, and that the exercise of caution in the reception of such statement is even more necessary in this country than in England."32

The reason why less weight is attached to dying declarations in England than in Kenya is that the admissibility of a dying declaration in Kenya does not depend, as it does in England, upon the declarant having, a settled expectation of imminent death. Thus there is lack of obligation equivalent to taking an oath.

There have been suggestions that corroboration of dying declarations is also required, but this is only as a matter of practice and not law. It may be stated that it is not safe to base a conviction on the uncorroborated dying declaration of a deceased person. This was considered in the Ugandan case of Terikabi v Uganda33 where the appellant was convicted of murder on the basis of a dying declaration of the deceased. The court of Appeal held that there must be a satisfactory corroboration of a dying declaration; and since in this case the dying declaration had been corroborated with the appellant's subsequent conduct, the appeal was dismissed.
It can therefore be deduced that in Kenya, for a dying declaration to be admissible it needs to satisfy several conditions precedent. It should also be noted that dying declarations in Kenya, unlike in England, can be admitted even in civil cases.

3.2.2 STATEMENTS MADE IN THE ORDINARY COURSE OF BUSINESS

This section contemplates statements which are made in the ordinary, everyday course of business, contemporaneous with the transaction which is in question. According to Durand, the statement cannot be one which is especially prepared for the projected suit or proceeding. In other words, the statements must be one made before any suit has been contemplated. The Ugandan case of RV Magandazi and Four others illustrates what this section envisages in the Uganda Act which is similar to that of Kenya. In this case, the accused were employed in Uganda to carry loads to the Congo. On a charge of theft of a portion of the loads by the accused, a letter from an agent of the complainant's firm residence in the Congo was placed in evidence, but the Writer was not called. The court stated that:

"the provision of the section should in my opinion be only sparingly applied and rarely, if ever, be used where the statement goes to the root of the whole matter before the court, as in the present case. Further the letter, although it may be said to have been written in the ordinary course of business to report a loss, appears also to be in the nature of a special letter written with a view to the present prosecution."

It should be noted here that for a statement to be admissible under this section the statement must have been recorded in the ordinary course of business or in the
discharge of professional duties. Professional men may, for
the due performance of the work they are employed to do,
be under an obligation to their clients to a scertain and
record facts, so as to render their record as to such facts
admissible after their death as having been made in the
course of their duty.\textsuperscript{38} This, however, depends on the nature
of employment so that counsel-client relationship does not
fall under this exception, whereas doctor patient relationship
does. Thus a post-mortem report prepared by a doctor who is not
available can be admitted under this exception if it meets
certain conditions. This can be illustrated by the case of
RV Masalu\textsuperscript{39} Here, the accused was charged with murder. The
prosecution sought to produce in evidence a post-mortem
report on the deceased made by a doctor who had since left the
country. It was held that although the statement was
technically admissible under the section similar to ours the
court should exercise its discretion to refuse to admit it
as prejudicial to the accused. The report was ruled
inadmissible.

The locus classicus case for the application of this
section is Commissioner of Customs and Excise v S.K.
Panachand\textsuperscript{40} where the court stated the qualifications to its
application by saying that:

"It should be noted (in the circumstances
of the case) for a statement to be admissible
under section 32 (2) of the Evidence Act it
is to be shown by the person seeking to have
such statement admitted:-

(a) that the attendance of the person making the
statement cannot be procured without an amount of
delay or expense which appears to the court to be
unreasonable;
b) that the document is a document used in commerce;
c) that the document was written or signed by the person whose attendance it is unreasonable to procure."

It should be noted that the burden of proof that these statements were made in the ordinary course of business lies on the person seeking its admissibility. Where the statement is a written one, he has to prove that it is in the handwriting of the person alleged to have made it and this can be done by calling handwriting experts or witnesses who saw him write the statement in question.

3.2.3 STATEMENTS AGAINST THE INTEREST OF THE MAKER

Under this exception, a statement is admissible when it is against the pecuniary or proprietary interest of the maker, or when if true, it would expose him to a criminal prosecution or a suit for damages.

This exception is based on the principle that in the normal course of affairs, a person will not make a statement that is against his own best interests unless it is true. The interest involved must be in either of the two forms; pecuniary or proprietary. The Act does not state the amount of such interest and it can be implied from the words that the pecuniary or proprietary interest can be of any amount.

Wigmore indicates that such statements may be used in so far as they tend to prove the matter against interest. So long as the statement is tendered to prove that some other person has a better title a subject matter in question, as opposed to that of the maker's own title, it is admissible under
the exception. This rule is, however, treated with caution especially because it is possible for a person to make a statement with a different motive although it may prima facie appear to be against his pecuniary or proprietary interest. Thus, if it can be proved that the maker had another reason for making the statement, and that it was for his interest, the statement is inadmissible. In the case of Sabastian Dias VR there was a prosecution for falsifying books of account; and during the trial, the prosecution relied on a letter written by a deceased clerk to the head of the department, charging the accused with having ordered him to make false entries. The court said, holding this statement inadmissible:

"...... as a written statement made by a deceased person which if true would have exposed him to a criminal prosecution. The ground on which such evidence is made admissible ...... is that a man is not likely to accuse himself of a crime. ...... in the present case the letter of Tomasi would have involved him in a very slight degree of criminality. It would have tended to his promotion in the department and brought him into favour with his superiors ...... we have here a letter accusing an accomplice and even if the writer could have been called to give evidence in person, his deposition would accordingly to well known rules have been regarded with grave suspicion and not acted on without full corroboration. Hence there was no corroboration."44

What is worthy exposing under this exception is that like in England, in Kenya statements by persons who cannot be called as witnesses which are against proprietary or pecuniary interest of the maker are admissible after careful consideration. However, in Kenya, unlike in England, statements which can expose the maker thereof to criminal
3.2.4 STATEMENT GIVING OPINION AS TO PUBLIC RIGHT OR CUSTOM

When a statement by a person who cannot be called as a witness gives the opinion of such person as to the existence of any public right or custom or matter of public interest, of which, if it existed, he would have been likely to be aware, and if made before the controversy in question arose, the statement is admissible.

The question to be answered here is, what are public rights and customs? According to Morris, public rights are those common to all inhabitants of a country and general rights are those affecting a considerable section of the community. The declarations must, therefore, relate to the general rights and, not to particular facts which support or negative the existence of a right or custom.

The ground for admission is necessity; ancient facts being generally incapable of direct proof, it becomes necessary to admit them in second hand form where the makers or ancient people are death. Phipson gives a second reason as the guarantee of truth afforded by the public nature of the rights, which tends to preclude bias and lessen the danger of misstatements by exposing them to constant contradiction. These declarations are receivable whether they directly or indirectly negative or support the right.

It should be noted that the section requires that the statements giving opinion as to public custom or right to have been made before the controversy arose. It is submitted here that declarations must have been made ante listem motam, that is before the commencement of any controversy, involving
the same subject matter, so as to prevent bias. If such declarations are accepted even if made after the commencement of the controversy, fraudulent actions will be commenced.

This is the most acceptable exception to the rule against hearsay because if the declarations considered in this exception are held inadmissible, there is no other means of receiving them unlike in the other exceptions which have alternative means of adducing evidence. Perhaps that is why it is the oldest exception to the rule against hearsay, as most textbook writers aver.

There is another exception under section 33 (e) which allows admissibility of statements relating to existence of relationships. The conditions which must be satisfied before such statement is admitted include:

(i) if they are made before the controversy in question arose;

(ii) if it relates to the existence or relationship by blood, marriage or adoption and

(iii) the maker of the statement must have special means of knowledge. It can be submitted here that the grounds upon which statements are admitted under this exception include the peculiar means of knowledge and absence of interest to misrepresent the statements by the original declarant; lack of motive to falsify issues. There are three other exceptions related to admissibility of statements relating to family affairs and transactions asserting a custom.
3.3 ADMISSIBILITY OF EVIDENCE GIVEN IN PREVIOUS PROCEEDINGS

This section deals with admissibility of testimony given by a witness in a civil or criminal proceeding and states that such testimony is admissible in a subsequent proceeding so long as certain conditions are satisfied. The conditions precedent we dealt with earlier on have to be as well.

The first condition that must be satisfied is that the subsequent proceeding must have been between the same parties or their privies. It does not matter whether the parties who were plaintiffs in the previous proceedings have become defendants or vice versa.

The second condition is that the adverse party in the first proceeding had the opportunity and right to cross-examine the witness whose testimony is sought to be admitted in the subsequent proceeding. By implication, these statements must also have been made on oath. Oath here includes affirmation. Right and opportunity to cross-examine here does not necessarily mean that the adverse party must have cross-examined the witness whose evidence is sought to be produced in the subsequent proceeding. It is enough if the opportunity was granted and it is immaterial whether the adverse party utilized the opportunity or scoffed at it. This view was stated in the case of Nazir Kanji VR.

The witness had given evidence before the magistrate at the preliminary enquiry and had then gone on leave. Before the magistrate counsel for the accused had reserved his cross-examination and defence. At the High Court trial, the evidence of the witness had been admitted under section 33 of the Indian Evidence Act, an equivalent of our section 34. On
appeal, the court discussed the question of opportunity to cross-examine by saying:

"It is undoubtedly hard on the appellant and it would have been far more satisfactory if it had been stated that Mr. Clarke was going to England so as to have given the defence an opportunity whether under the circumstances he would cross-examine or not. An extra-reason for following this course was that Mr. Clarke was practically the prosecutor in the case. But the opportunity was there and therefore the evidence is made relevant by section 33 and it is not in the power of the judge to exclude it."53

The issue in dispute must be substantially the same as in the first proceeding is the last condition. The principle involved in requiring issues in a subsequent proceeding to be the same is illustrated best by the words of Ratanlal:

"And though separate proceedings may involve issues, of which some only are common to both, the evidence to those common issues given in the former proceeding may be given in the subsequent proceeding ...... whether the questions at issue are substantially the same depend upon whether the same evidence is applicable, although different consequences may follow from the same at."54

It can be submitted, therefore, that a statement of a previous proceeding is not admissible unless the three conditions envisaged in this section are fulfilled; and over and above all the conditions precedent contemplated under section 33 of the Act must also be satisfied.

3.4 STATEMENTS IN DOCUMENTS PRODUCED IN CIVIL PROCEEDINGS

This section deals with admissibility of documentary evidence in civil proceedings when made by a person tending to establish a fact. This document must be produced in its
original form and certain conditions have been fulfilled, that is; (i) if maker of the statement had personal knowledge of the matters dealt with by the statement; or (ii) where the document in question forms part of a record made by a person in the performance of his duty to record information supplied to him by a person who had personal knowledge of those matters; and (iii) if the maker of the statement can be called as a witness.

The fact that the document has to be recorded in the performance of a duty means that this document must be a public document. This position was stated in the case of Sturla v Freccia\textsuperscript{56} where the court even went further and stated that for a document to qualify as public document, it need not only be available for public inspection, but that it should have been brought into existence for that purpose. It is submitted here, however, that this line of construction of the words "Public document" does not auger well with the line that has been adopted in Kenya. According to the Act\textsuperscript{57}, public documents are those forming the records of the acts of the sovereign authority official bodies and tribunals; and public officers, legislative, judicial or executive whether of Kenya or any other country. This section therefore overrides the interpretation given in Sturla v Freccia\textsuperscript{58} which is no longer relevant to the Kenya position.

Subsection 2 makes a proviso to the general rule that the documents to be admitted under this section must be in their original form and instead spells out that photocopy of such document can be accepted if the court deems fit. In case of such finality, the court will spell out the manner in which
such statement can be admitted; that is to say that the
court will set out the conditions, if any, upon which such
statement is to be admitted.

It is noted here that the maker of the statement must
have been an uninterested party at the time he made the
statement, hence must have made the statement before the
controversy arose. There is also a requirement that the maker
must prove that he had recorded the statement in his own
hand and signed it. The weight to be attached to such
statements depends on the circumstances of each case.

There are other exceptions to this rule whereby
statements made under special circumstances are held
admissible.\textsuperscript{59} Entries in books of business are admissible,
as well as, entries in public records. Statements and
representations of facts in issue or relevant facts made in
Published Maps or charts or plans are also admissible under
this heading. Also admitted under this heading are
statements of fact contained in laws and official gazettes;
and statements as to law contained in books.

What emerges from this chapter is the fact that our Act
has picked on particular instances when hearsay statements
can be admitted on condition that the particular conditions
precedent provided therein. However, it is submitted here
that the rationale offered for such admission is
unsatisfactory and that there are other evidence that should
also be admitted on this same grounds but are ignored, as
will be shown in the next chapter.
FOOTNOTES

1. See Chapters 1 and 2 of this thesis.

2. The introductory paragraph to section 33 of The Kenya Evidence Act; statements of persons who cannot be available.


4. Ubi Supra at P. 205

5. Ubi Supra at P. 253

6. Infra


8. Introductory statement to section 33 which sets forth conditions under which some hearsay statements are admissible.

9. Section 63 of The Kenya Evidence Act, Chapter 80, Laws of Kenya. It provides that all evidence must be direct.

10. R V Ndolo (1926) 10 K.L.R. 11

11. Ubi Supra at P. 12


13. Supra, Footnote 3 at 223.


16. Thornhill Vilhornhill (1965) E.A. 268

17. Ubi Supra at 273


19. Ubi Supra at 213

20. Section 33 (a) of the Act.

21. Thayer, J, Preliminary Treatise on Evidence (1898) 18, 549 - 550

22. Wright v Littler, (1976) 3 Burr., 1244

24. Supra; Footnote 15 at 40.
25. Mohamed Warsama VR. (1956) 23 E.A.C.A 576
26. Ubi Supra at 577
27. Waugh VR (1950) A.C 203 (P.c)
28. Ubi Supra at 212 per Lord Oaksey
29. Charles Daki VR (1960) E.A 34
30. Ubi Supra at 35
32. Ubi Supra at 333
33. Terikabi Vuganda (1975) E.A 60
34. Section 33 (b) of the Act
35. Supra Footnote 14 at 160
36. R V Magandazi and Four others (1914) 2 U.L.R 108
37. Ubi Supra at 110
38. Halsbury
40. Commissioner of Customs and Excise v S.K Panachand (1961) E.A 303
41. Section 33 (c) of the Act
42. Supra, Footnote 3 at 332
43. Dias VR (1927) U.L.R 214
44. Ubi Supra at 215, per Guthrie J.
45. Section 33 (d) of the Act
46. Supra, Footnote 15 at P. 51
4. CONCLUSIONS AND RECOMMENDATIONS

4.1 CONCLUSIONS AND GENERAL OBSERVATIONS

In the preceding chapters of this study, it has been shown that long before the development of the jury trial system hearsay evidence was admissible. It is only during the development of the jury system of trial that courts started treating hearsay evidence as inadmissible, and thus the rule against hearsay emerged. By the time full development of the jury system of trial was attained, hearsay as an exclusionary rule had also been nurtured by the common law courts to be what it is today. The initial role of the juries as fact finding machinery had been extinguished, or at least diminished, to the extent that the parties to a dispute gained exclusive rights of calling their own witnesses and the juries only remained triers of fact. When the Kenyan legislature enacted our Evidence Act, the legislators never took into consideration the social-economic set up of this country and what is there is that the common law of excluding hearsay was codified. The legislature dubbed the Indian version of the English common law which had been codified for use in British India, and it is to this far that it can be said that our rule against hearsay is similar to the common law rule and its application.

In Kenya, as well as at the common law, a statement that could, strictly speaking, have been hearsay is admissible if it is offered for purposes of proving the fact that the statement was made, but not the truth of the matter. The formulation of the rule is to the effect that the assertion is inadmissible as evidence of that which was asserted.
The argument that can be advanced here is that the scope of the rule is unclear as well as the demarcation between evidence which is offered to prove the truth of the fact in issue and evidence adduced to prove that the statement in question was made. In strict interpretation every evidence that is offered in court is intended to influence the court in one way or the other to find the truth of the matter in question. To this far, the widely recognized definition of the rule in the subramanian case\(^2\) is not wholly convincing. In this case, whereas, the Malayan court ruled that the evidence sought to be adduced fall within the domain of the rule and should necessarily have been excluded, the judicial committee of the privy council ruled that the evidence was admissible. This confusion puts the rule in a misnomer whose only remedy is a complete overhaul and restatement.

During the various stages of development of the rule, several reasons were advanced as grounds for its emergency and ever since the recognition of this rule has been based on them. However, the reasons that are cited are far from convincing anyone. The argument that hearsay evidence is inadmissible because of distrust of the jury is the weakest of them all, at least when we take the Kenyan example. In Kenya this rationale does not apply because there is no jury, and its equivalent of assessors who are only allowed in capital offence, is also dismissed on grounds that their decisions are not binding on the judge. In Kenya, therefore, where only learned Magistrates and Judges are triers of both fact and law and can give cogency to the hearsay evidence if they are given the discretion, there is no reason why the exclusionary rule should be based on this ground. It has been stated that while
distrust of the Jury had nothing to do with the origin of the hearsay rule, it has exerted a strong influence in delay or preventing its liberalization. This ground has merely acted as a barrier to the progress of the rule, if any, that would have occurred.

The other reason that has been branded, by textbook writers, the major ground for exclusion is that hearsay evidence, if admitted, cannot be cross-examined on, as the declarant is not in court. However, major as this ground may appear, its major weakness is that if a witness is not willing to tell the truth, the counsel for the adverse party cannot squeeze it out of him unless he works miracles. Indeed it is not a surprise to find many witnesses telling lies in court and consistently sticking to them even after immense cross-examination. It is no wonder, therefore, for courts to believe such lies and go further to base their findings on them. The second weakness with this ground is that the adverse party in a litigation may take advantage of the ignorance of the witness, not to squeeze the truth out of him but, to suppress it by intimidating and discrediting him. What is implied here is that a witness can only tell the truth if he is willing to do so and experience has shown that in most instances cross-examination may not assist disprove a witness who has fixed his mind to fasfy information. Therefore, lack of opportunity for the adverse party to cross-examine the original declarant is not a sufficient reason for excluding hearsay evidence which may sometimes be very reliable and if the declarant was willing to tell the truth, it may be nothing but the truth.

This same problem has also hit the other rationale related to cross-examination, that is, the declarant not being on oath,
as has earlier been shown⁶. This reason is also rendered a mere sham because the oath is in most cases disobeyed regardless of its consequences, if any.

Other arguments have also been advanced to the effect that hearsay evidence, if admissible is likely to prolong proceedings. The first objection here is to the effect that Justice should not be ignored merely because we want to arrive at decisions without delay. The stress should be; better justice delayed that no justice at all. The second objection is that hearsay evidence since it is given with great speed and without interruptions from the adverse party, will shorten proceedings and not lengthen them⁷. The exclusion of hearsay on this ground is, therefore, not convincing.

The exceptions to the rule have in modern times been subject of criticism. The reasons given for their existence are not convincing nor are the conditions precedent for their admissibility. In the first case, why should a few instances be chosen as admissible because of the possibility of trustworthiness and yet many others are ignored, although they are equally likely trustworthy? The best example is the evidence of records in the case of Myers V Public prosecutor⁸. There is no doubt that the evidence recorded in the cards could safely be assumed to be true, in the absence of evidence to the contrary, because of the circumstances in which the records were maintained and the inherent probability of correctness, but they were held inadmissible because they did not fall under any of the recognized exceptions⁹. This case clearly indicates that the exceptions to the rule are not extensive enough to cover all areas where evidence that is sought to be adduced, and which is likely to be trustworthy, can be admitted.
The second rationale behind the exceptions to the rule against hearsay is that of necessity; that in circumstances where the original declarant is dead or cannot be procured it is necessary to admit hearsay evidence from him because it may be the only way of receiving evidence from that source. If that was the rationale behind the exceptions, why, then, should there not be a general rule that all hearsay evidence produced in such circumstances is admissible? This reason is insufficient, therefore, for selecting a few instances where hearsay evidence is admitted as of necessity whereas others are ignored altogether.

Consequently, none of the reasons which have been given to justify the introduction or continued existence of the rule against hearsay in Kenya have any appreciable application; neither are the reasons advanced for the admissibility of the exceptions to the rule.

On these grounds, it is submitted that the rule against hearsay, as it applies in Kenya today, is too technical to apply and as a result, its persistent recognition is unjustifiable and lacks any convincing basis. The rule has reached a stage where it has become desirable to effect fundamental reforms to our Act to make it suit the social-economic conditions of this country and the alien law that was introduced to this country by the colonialists be left to die a natural death.

4.2 RECOMMENDATIONS

The attempt that has been made to engage the defences to the theories that have been offered in support of the rule, have revealed that they are not cabable to support the rule "as it is". The rule "as it is" is too rigid that in its application it poses
several disadvantages. Wigmore identifies these disadvantages as:

"..... First, it results in injustice where a witness who could prove a fact in issue is dead or unaivalable to be called; secondly, it adds to the cost of proving facts in issue which are not really in dispute; thirdly, it adds greatly to the technicality of the law of evidence because of its numerous exceptions .....; fourthly, it deprives the court of material which would be of value in ascertaining the truth; fifthly, it often confuses witnesses and prevents them from telling their story in the witness box in the natural way".10.

These disadvantages have for a long time now been recognized. It is high time that the Kenyan legislature, which has now gone multi-party, tackles them boldly and the problem be foreclosed. The concern here, therefore, is about the law as it ought to be.

The reforms that are recommended in this study are headed for the admissibility of all hearsay evidence apart from a few exceptions which must be expressly provided in our Act. the rule should thus state:

"All relevant evidence by persons who cannot be called as witnesses may from time to time be admitted as and when the trial judge may deem fit".

By so doing the rule against hearsay as it is today will be reversed so that as a general rule, all hearsay evidence that is relevant will be admissible. Many writers' share this view among them Thayer who stated:

"A true analysis would probably restate the law so as to make our main rule this, viz, that whatever relevant is admissible".12

However, as usual, such a general rule must have exceptions. The major exception to the general rule of admissibility should be second hand hearsay. This opinion is
advanced because of the obvious likelihood of exaggeration open to evidence that has been exchanged among many mouths. The other instances where hearsay can be rejected are to be left open to the judge listening to the dispute and at his own discretion he may hold some statements inadmissible if he feels, after reasonable consideration, that such evidence is unreliable. By so doing the judge will be rested with unlimited discretion to reject relevant evidence of slight probative value whose admission may unfairly affect the adversary. If this recommendation is adopted Kenya will have an autochthonous rule which will be capable to eliminate the absurdity and technicalities that have been caused by the imported rule we have today.
FOOTNOTES

1. Chapter 80, Laws of Kenya

2. Subramanian V Public Prosecutor; (1956) 1 WLR 965.


5. Supra; Footnote 3.

6. See chapter 2 of this thesis.

7. Edmund Lewis; On the Rejection of hearsay, (1889),5 LQR 265 at 270.


9. Cross-Rupert; what should be done about the Rule against hearsay? (1965) Cr. LR 68 at 70.

10. Supra: Footnote 4 at 271


12. Thayer, J.B.; Preliminary Treatise on Evidence (1898) Harv. L.R P. 72 at 82.
SELECTED BIBLIOGRAPHY

BOOKS


16. Wigmore, J.H - Wigmore on evidence (3rd edition)

ARTICLES


2. Cross, Rupert - The Scope of the Rule against Hearsay (1956) 72 L.Q.R 265

3. Cross, Rupert - What should be done about the Rule against hearsay (1965) Cr. L.R. 91

4. Edmund, Lewis - Rejection of hearsay (1889) 5 L.Q.J 265


10. Nokes, G.D - some suggestions on Hearsay (1965) cr. L.R. 257

11. Thayer, J.B - The present and the future of the law of evidence (1898) Harv. L.R 71


13. Wigmore, H. - The history of the rule against hearsay (1904) 17 Harv. L.R. 437

14. Fergusion - Hearsay in Running down cases; 4 A.L.J 145