



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HCCR NO. 34 OF 2011

REPUBLIC.....PROSECUTOR

- V E R S U S -

EUTICUS MIMANO WAITHAKA.....ACCUSED

R U L I N G

This ruling is about the 'unknown maker' of the document marked MFI 7.

On 14th March 2017, I made a ruling with regard to the production of a receipt then marked PMFI-7 and directed that the prosecution do produce the maker of the receipt.

Further to that ruling on 13th December 2017 the prosecution recalled P.W.10 No. 72342 P.C. Gasambi Hamisi who testified that following my ruling he in the company of Damaris Macharia Waithiegeni went looking for the shop where she had purchased the said seeds and where she had obtained the receipt from.

He testified that they went to a shop along Haile Selassie Avenue, Mfangano Street and found that the Agrovet shop where she had bought the seeds in 2011 had been turned into an MPESA shop. Clearly he could not find the maker of the said document.

Mr. Gitonga for the state argued that on the basis of P.W.10's new testimony, the prosecution had complied with s.33(b) of the Evidence Act Cap 80 Laws of Kenya that his evidence was direct with regard to his findings, that the maker could not be traced.

Section 33 provides;

Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases-

s.33(b) provides for statements *made in the course of business*

When the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him

Does the receipt mark on PMFI 7 answer to any of the above underlined criteria to enable its production under the provisions of section 33(b)?

I have perused the receipt dated 5th October 2011 headed 'cash sale'. It bears writings to show that Ksh. 350 was paid for some items. And that is all.

-It bears no name of the maker/ or source. So I have no idea whom the investigating officer was looking for or whether he had any idea whom he was looking for, or where that receipt was issued from. How would he have known that where the witness was taking him is where it came from without it bearing any information about that on its face?

-It bears no evidence of being issued by a business/in the course of any business.

-It bears no stamp

-It bears no signature

-It cannot be connected to any business so as to be referred to as a statement made in the ordinary course of business

-It is a receipt from money allegedly received, but by whom?

There is nothing on it to show, even on the face of it that it was made in the course of any business.

The PW 12's testimony is about his efforts to trace the witness. However he did not even know who he was looking for, so that even though his evidence on that fact is direct and admissible, it does not prove the fact of the maker of the document MFI 7 to enable its production under s. 33(b).

The opening statement of s.33 is clear, it speaks about

“statements, written or oral or electronically recorded... made by a person...”

In my view this person, must be identifiable. In this case there is no identifiable person either in the form of a living being /or a business who would have made that receipt.

In addition, P.W.3 Damaris did refer to a receipt in her testimony which was marked as MFI 7. The receipt before me is not marked, and there is nothing to show what it was the same document referred to on 21st October 2015 when she testified.

Be that as it may it is evident that the document before me is not admissible under s.33(b) as it does not answer to the criteria, despite the effort to produce the unknown maker.

The application to produce it is therefore rejected.

Dated, delivered and signed this 23rd January 2018 at Nyeri

TERESIA M MATHEKA

JUDGE

In the presence of;

Court Assistant Harriet

Mr. Muranga for state

Accused person

Ms. Muthoni Mwai for accused