



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 754 of 2005**

**CORNELIA ELAINE WAMBA.....PLAINTIFF**

**VERSUS**

**SHEJI ENT. KENYA LTD**

**JEMES MATHEKA.....DEFENDANT**

**RULING**

The Plaintiffs Cause of action herein relates to a fatal accident claim. She claims both special and general damages. The general damages are claimed both under the laws and the fatal accident Acts. The claim for general damages brings to the fore issuances of the earnings capacity of the deceased when it comes to computation of loss of earnings to the deceased estate sound dependency showed the plaintiff succeed on planning liability to the defendants and the 3<sup>rd</sup> party.

It is on the basis of laying a firm base for such an anticipated assessment a firm base for such an anticipated assessment that the plaintiff has striven to bring to court documentation relating to `income of the deceased while he was working in the United States of America. The documentation are found at page 95 of the bundle of exhibits filed in Court.

These documents are not the originals. They are electronic copies sourced by the Plaintiff from the US department of intend Revenue Service. In ability to produce the original as explained by the witnesses that from the in friction gathered from the department concerned informed the witness that the originals are kept for a period of 7 years and thereafter destroyed the data is there after preserved in electronic form in a transcript form. This is what she was advised to apply for. She did apply and received the same plus an accompanying letter certifying entries for each year.

On the basis of the background information given that the plaintiffs Counsel has urged the Court to admit the same in accordance for the following reasons.

- (1) They qualify to be produced under Section 33 (b) of the evidence Act because an amount of undue delay and expenses will be involved in bring the maker to Kenya to testify.
- (2) The persons who filed then initially normally namely the deceased if dead and cannot be called to testify.
- (3) They have satisfied the requirements in Section 65(5) of the evidence Act intact they have been electronically produced as copies of information stored in a computer. That the said information has been stored so in the ordinary cause of businesses that is how that information is stored in the USA as per the

certificate gives.

(4) They are public documents within the meaning of Section 79(9) (iii) as they are filed performance of a public duty namely to file tax returns for purposes of taxation.

(5) Alternatively they are secondary evidence which have been duly classified.

On that account and on the basis of case law cited the court was urged to admit the same.

The defence has objected not that they are in admissible but as regards their form for the following reasons.

(a) The returns are in the form of computer print out.

(b) The covering letter is not signed by the maker of the income tax returns.

(c) There is no way of confirming the genuineness of the entries in the returns.

(d) They contend that none of the conditions set out in Sections 65(b) have been satisfied.

(e) They do not qualify as public documents under Section 79 of the evidence Act as they do not form a series of actions of public officers.

(f) They do not know if the figures stated are correct or not.

In reply counsel for the applicant reiterated the earlier submissions and maintained that great expense will be involved to bring witnesses from the USA to testify herein. Secondly they still maintain that the documents have met the required ingredients in Section 33(b) of the evidence Act. They qualify to be public documents under Section 79 of the evidence Act as it has been demonstrated that they have been processed in a manner approved by the provisions of Section 65(6) of the same Act.

It is noted that the 3<sup>rd</sup> party, has no opposition to the application.

On the courts assessment of the competing arguments on the admissibility of the subject documents it is to be noted that both sides have placed reliance on the provisions of the law as supporting their stand. It is therefore proper to set out these provisions before applying them to the facts presented herein. Section 33(b) of the evidence Act Cap.80 Laws of Kenya states:-

*“33 statements, written or oral of admissible facts made by a person who is dead, or who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured, 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.*

*(a) when a the statement involved by such persons in the ordinary course of a business and in particular when it consists of an entry or memorandum made by both or records kept in the ordinary course of business or in the discharge of professional duty or of an acknowledgment written or signed by him of the receipt of money, goods section or property of any kind, or of a document used in commence written or signed by him or the date of a letter or other document usually dated written or signed by him.”*

Applying this argument to the arguments presented it is clear that there are three actions involved as relates to the said documents. There are:-

(a) the originator, who was the deceased. He filed them in compliance with the requirement of the law of the land that he files them, submits them to the relevant department for purposes of taxation. It is common ground that he is deceased and so he cannot come to testify on them.

(b) The second person is the Plaintiff who saved them the relevant departments. She did not make any entries in them she does not have custody of them save the documents she was given by the tax department. Her ability to produce them will depend on whether they have passed the eligibility test as documents kept in the ordinary course of business of the organization keeping them and lastly that it will be expensive to oral any of the affected officers to tender them in evidence.

(c) An official from the department concerned. It is common sense that USA is for and indeed an amount of expenses will be involved in getting a witness do come over to tender from in evidence.

It is agreed by all that they are tax returns. The department sourced form has given a covering letter to the effect that after 7 years the originals are destroyed and entries on the original are kept in transcript form by the said department and any inquiries subsequently by any body seeking such information will receive the same in transcript form and this is what the plaintiff requested far as advised and received. The court finds nothing to suggest that what the plaintiff says is not the correct position of how the USA Tax department does its business as there is no contrary evidence or suggestion. That that is not the position. The court therefore finds that the ingredient. In Section 33(b) has been satisfied.

Section 65(i) 5(c) and (6) on the other hand state:-

*65(1)primary evidence means the document, itself produced for the inspection of the Court.*

*5( c) a statement contained in a document and included on printed material produced by a computer (herein after referred to as a computer herein after referred to as a computer print out) shall if the conditions stipulated in subsection (6) of this Section are satisfied be deemed to also be a document for the purposes of this Act and shall be admissible in any proceedings without further proof of production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.*

(6) *The condition referred to in subsection (5) in respect of a computer print out shall be the following namely:-*

*(a) The computer print out containing the statement must have been produced by the computer during the period in which the computer was regularly used to store or process information for the purposes of any authorities regularly carried on over that period by a person having lawful control over the use of the computer.*

*(b) The computer was during the period to which the proceedings relate, used in the ordinary course of business regularly and was supplied with information of the kind contained in the document or of the kind from which the information so contained is denied.*

*(c) The computer was operating properly or if not that any respect in which it was not operating properly was not such as to effect the production of the document or the accuracy of its content.*

*(d) The information contained in the statement reproduces or is derived form information supplied to the computer in the ordinary course of business.*

Applying the above pre-requisites to the facts herein its common ground that the documents are computer print out as they bear the code number and the storage number of the computer where stored. They are accompanied by a covering letter on lieu the information is stored retrieved and or can be accused by whoever wants. There is no contrary evidence to show that the computers were defective in any way.

The court finds this ingredient satisfied.

(iv) Section 79 (1) a on the other hand reads:-

79(1) The following documents are public documents

(a) documents forming the acts or records of the acts.

(iii) Of public officer legislative judicial or executive whether of Kenyans or any other country”

Applying that to the argument herein it is clear that indeed filing of income tax returns for purposes of taxation is a printed affair. However the action of income tax assessment and enforcement of the relevant sides relating to income tax is but a public affair as it is a state duty. It is preferred by state officials and information stored in pursuance to such activities becomes public information as this accessible to whoever inquires of the same like in this case. There is no restriction placed on the information that it can only be released to he supplies of that information and that is why the plaintiff readily accessed them.

For the reasons given above and in view of the representation that the defendant is not saying that they should not be produced but is only disaffecting to their form this court has made findings that the said documents are admissible because:-

- (1) They have satisfied the ingredients they are required to satisfy under Sections 33(b), 65 and 79 of the Evidence Act.
- (2) It will be expensive to require the maker or the supplier of the information to come and produce them.
- (3) The court is satisfied with the truthfulness of how they were serviced by the Plaintiff and that she complied with the requirements of USA Law in serving the same.
- (4) No prejudice will be suffered by the defence as they still have to satisfy the test of relevance and value.
- (5) They are also subject to comments by the defence in their submissions.
- (6) The value to be attributed to them in a preserve of the courts seized of the matter.
- (7) The defence is at liberty to counter check the correctness of the information given or source their sum to counter them.

**DATED, READ AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2008.**

**R. N. NAMBUYE**

**JUDGE**