



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Criminal Case 7 of 2007**

REPUBLIC PROSECUTOR

VS

JULIUS KARISA CHARO ACCUSED

R U L I N G

In the course of this trial the prosecution called PC Gilbert Sang (PW9) to testify on the investigation of this case and also to produce a post-mortem examination report prepared by Dr. Kirasi Olumbe. The attempt was centered by Miss Njoroge's objection who urged that in the absence of Dr. Olumbe the only other person qualified to produce the report would be another pathologist. The submissions on this issue was adjourned to counsel to produce authorities in support of this proposition. When the hearing resumed Miss Njoroge referred the court to the case of **Wanjiku V Republic** HCC NO. 139 of 2002 reported in the (2002) 1 KLR at 825. In that case this court (Onyancha, J) stated in relation to the production of a Government Analyst report, that in the absence of the maker, the by a person from the Government Chemist or Analyst Office. He did not, however, say the level or qualification of this officer. But I suppose his Lordship could have possibly meant a driver, secretary, or messenger in the Government Chemists office. It must, if necessity have meant another chemist or analyst in place of the marker The law provides that documents prepared by persons who, under certain circumstances can not be availed to produce them in court, may be nonetheless produced after certain steps taken and conditions satisfied. To begin with section 33(b) of the Evidence Act provides for the admissibility statements of unavailable marker if the statement

- i. Was made in the ordinary course of his business; or
- ii. Was made in the discharge of professional duty,(and other grounds not relevant at this stage)

It is clear from the provisions of section 33 that where a document, as in this case, a post-mortem report, was prepared by Dr. Olumbe in the discharge of his professional duty, and it is shown that his attendance cannot be procured or procured without an amount of delay or expense which in the opinion of the court would be unreasonable, the report is admissible.

Section 77 of the Evidence Act states that such a document if prepared by a medical officer (among others) in the course of his duty and in his hand may be used in evidence.

It is agreed that a document prepared in the circumstances set out above is admissible. The problem that is encountered is who can produce such a document? There have been a criticism on the manner documents are generally produced in the courts, particularly, the subordinate courts. I have myself stated in **David Jefwa Kalu V R** Cr. Appl No. 133/03 that

“ Medical evidence if sought to be adduced ought to be so done with propriety and not in such

slipshod manner”

Very clear warning was issued by the Court of Appeal in **Sibo Makovo V R** Criminal Appeal NKR No. 39/1996 in the following words

“ it appears to us that production of P3 forms in courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called”.

In that case a P3 form filled by a medical officer was produced by a police constable in respect of a case of rape. Decided cases in this point are unanimously that with regard to the production of expert evidence in court, police officers must not be the people to play that role. The ordinary consideration being the chance for the accused person and his counsel to cross-examine the person called to produce the document. Since, medical (or scientific) evidence normally tends to be conclusive, great care has to be taken to ensure that where the person who conducted the examination is not available the person called in his place is technically qualified in the field in question to provide opinion.

This is the input of section 48 – which provides

“ 48.(1) when the court has a point of foreign law, or os science or art, or as to identity or genuineness of handwriting or finger or other impression, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science, or art, or in question as to identity or genuineness of handwriting or finger or other impression”

This is the kind of opinion that cannot be expected from a police officer whose duties do not involve scientific analysts.

To my mind police officers role in the production of documentary evidence ought to be restricted police abstracts and other non-technical documents. For the reasons stated I find and direct that PC Sang cannot produce the post-mortem report on behalf of Dr. Olumbe who has relocated at Australia and the efforts made in trying to procure his attendance, from what I have stated above, there must be pathologists who are conversant with his writing and signature.

Those are the orders of this court.

[Dated and delivered at Malindi this 22nd day of July 2005]

W. OUKO

JUDGE

22/7/05.

Delivered in the presence of

Mr. Ogoti

Miss Njoroge

The 3 assessors

The accused

CC – Gladys