



REPUBLIC OF KENYA



KENYA LAW
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**Opwondo & 2 others v Republic (Criminal Appeal E007 of 2025)
[2025] KEHC 10704 (KLR) (22 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E007 OF 2025
S MBUNGI, J
JULY 22, 2025**

BETWEEN

GODFREY ANAKUTA OPWONDO 1ST APPELLANT

STANLEY IMBIAKHA 2ND APPELLANT

KEVIN WAKHANU IMBIAKHA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Appellants were charged of the offence of Arson contrary to Section 332(a) of the *Penal Code*.
2. The prosecution's case was that on the 5th day of August, 2020 at Emasinga village, Butsotho west location in Navakholo sub-county within Kakamega County, willfully and unlawfully set fire to three houses valued at Ksh. 800,000/= the property of Beatrice Nafula.
3. The prosecution's witness by the name PC Simon Etot the investigating officer produced witness statements by Calistus Weremba, Ndege Fredrick Opwondo, and Peter Ndege Opwondo all of whom died on 14th August 2020, several days after the incident as exhibits No. 3, 4, and 5.
4. The defence had opposed the production but the trial court gave a ruling delivered on 14th January, 2025 declining to expunge the exhibits from record, this refusal triggered the present appeal.
5. The appeal is premised on the following grounds.
 - i. That the honourable Magistrate committed reversible error by failing to apply the law and reaching a conclusion that was illegal and not supported in law.



- ii. That the trial magistrate erred in law in failing to consider the provisions of Section 33 of the *Evidence Act*. This willful blindness to the provisions of the law and admissibility of the statements of deceased persons led to an erroneous conclusion and ruling with no basis in law.
 - iii. That the trial magistrate erred in law and fact by concluding that the application was an afterthought when the same had been raised by counsel as an objection on production of deceased persons statements but the Magistrate chose not to record the objection as raised, a grave error and manifest injustice.
 - iv. That the trial magistrate erred in law by infringing the appellants rights under article 50 (2)(k) of the constitution of Kenya. The appellants have a right to adduce and challenge evidence brought against them. Allowing deceased persons statements to be used against the appellants is illegal as it is tantamount to gagging them and denying the appellants their right to challenge and cross examine the evidence to be used against them. The magistrate has erroneously and in total disregard of *the constitution* and the law allowed unchallenged and uncorroborated hearsay evidence to be used against the appellants even when it does not fall under any known exception to the hearsay rule.
 - v. That the trial magistrate erred in law by allowing production of 3 statements of now deceased persons as Exhibits 3,4 and 5 was unorthodox application of the law and illegal as it is contrary to known provisions of the law and contrary to the constitutional right to a fair hearing and right to challenge evidence in a criminal case.
 - vi. The learned trial magistrate's ruling is unfair and unjust and cannot be sustained as it, as it is contrary to the constitution of Kenya [2010], the rules of Evidence, the rules of fair play and natural justice and against fundamental justice. The flawed ruling is trial by error, manifest injustice and travesty and mockery of established principles of evidence and justice.
6. The parties agreed to dispose of the appeal through written submissions, at the time of writing the ruling the respondent had not filed submissions. Thus the ruling has been done without the benefit of the respondent submissions.
7. I have read the appeal, the supporting grounds and the submissions filed by the appellant. I have also looked at the trial courts record.

Issue for Determination:

Whether the trial court erred in law by admitting into evidence the written statements of deceased persons

Determination

8. The applicable principle legal provision is Section 33 of the *Evidence Act*, which allows for hearsay evidence in specific, limited circumstances. Section 33 provides that:-

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—

- (a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in



which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question; 16 [Rev. 2023] Evidence CAP. 80

- (b) 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;
 - (c) against the interest of maker when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;
 - (d) an opinion as to public right or custom when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen;
 - (e) relating to existence of relationship when the statement relates to the existence of any relationship by blood, marriage, or adoption between persons at whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised;
 - (f) relating to family affairs when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised;
 - (g) relating to a transaction creating or asserting, etc., a custom when the statement is contained in any deed or other document which relates to any such transaction as is mentioned in section 13(a);
 - (h) made by several persons and expressing feelings when the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.
9. From the above provision, having looked at the statements in question, it cannot be said to be dying declarations neither did they allude to the circumstances which resorted to the death of those who made them.
10. The statements talked of how the arson happened on 5th August, 2020, therefore outrightly they cannot be admissible.
11. There are numerous case law on this like, in the case of Republic v John Ng'ang'a Njeri [2018] eKLR, the High Court emphasized that statements of deceased persons are only admissible under Section 33(a) if the statement relates to the cause of the person's death or any circumstances surrounding it. In the present case, the deceased witnesses died from mob justice unrelated to the arson incident. Therefore, their statements do not fall within the scope of Section 33(a).



12. Similarly, in *Dickson Mbeya Marende alias Dickie & another v Republic* [2017] eKLR, the Court of Appeal held that statements of a deceased witness are not admissible merely because the witness is unavailable. They must satisfy both statutory and constitutional requirements, including:
- I. The unavailability of the witness due to death, infirmity, or other qualifying reasons;
 - II. The presence of adequate indicators of dependability
 - III. An opportunity for the accused to cross-examine the witness, or proof that the statement was made under oath in proceedings where the accused had such opportunity.
13. On the question of whether the accused persons can be guaranteed a fair trial under article 50(2)K of *the constitution* in event the impugned witness statements are allowed to be part of the evidence it says they cannot be guaranteed for this article guarantees every accused person the right to adduce and challenge evidence by way of cross examination.
14. Section 302 of the penal procedure code affords an accused person or his advocate a right to cross examine any witness called by the prosecution as a way of testing the credibility of the witness and the veracity of the evidence. To deny an accused person a chance to do this it amounts to an affront to his constitutional right to a fair trial which is an unlimitable right. Article 25(c) of *the constitution* states, Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited:-
- (a)
 - (b)
 - (c) the right to a fair trial; and
 - (d)
15. In considering this question, Justice Joel Ngugi in *Republic v John Ng'ang'a Njeri* [2018], EKLR said as follows.
- “A different way of stating this is the following. For all scenarios where parliament has not, by creating a statutory exception to the hearsay rule, it is assumed that admissibility of statements which will not be subjected to cross-examination or confrontation is per se prohibited as definitionally violate of Article 50(2)(k) of *the constitution*.
- Article 50(2)(k) of *the constitution* guaranteed to every accused person the right to “adduce and challenge evidence” there are certain situations where statements of witnesses who are not available can be admitted as evidence. This only applies where such statements meet three criteria:
- a. The witness must be unavailable (through death, physical infirmity, mental illness, absence from the jurisdiction, and so forth);
 - b. The statement must have sufficient indicia of reliability ; and
 - c. The statement must be admissible vide a statutory created exception to the hearsay rule or where the statement or evidence has been subjected to cross-examination or an opportunity for such cross-examination was made available to the accused person or that the statement was given under oath.”



16. The statements in the issue were not recorded by the persons who were alive but by persons who died after recording them and they did not relate to the cause of their death or circumstances surrounding cause of their death. Therefore there is no way they could have been admitted as evidence under the exceptions of hearsay rule.
17. From the foregoing, I do fault the trial magistrate for admitting the said statements, I therefore set aside the ruling of the magistrate dated 14th January, 2025 and order that the statements by Calistus Weremba, Ndege Fredrick Opwondo, and Peter Ndege Opwondo (Deceased) produced as exhibits 3,4,5 by the investigating officer PC Simon Etot be expunged from the record. Nonetheless the trial magistrate shall continue with the trial to its logical end for nothing has been raised to show that the court is not conducting the trial as it is expected. This slip up might have been as a result of misapprehension of the law which is normal in the practice of the law.
18. Right of appeal 14 days.
19. Mention 4th August, 2025 before the trial court for further directions.

DATED, SIGNED AND DELIVERED IN OPEN COURT OF KAKAEMGA THIS 22ND DAY OF JULY, 2025.

S. N MBUNGI

JUDGE

In the presence of:-

Elizabeth Angong'a-Court Assistant

Ms Osoro for the DPP present online.

Mr Malala for the Appellant, absent.

