



**Parkar & another v NQ & 2 others (Civil Appeal 139 of 2020)
[2023] KECA 908 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KECA 908 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 139 OF 2020
HM OKWENGU, KI LAIBUTA & JM MATIVO, JJA
JULY 24, 2023**

BETWEEN

DR RAFIQUE PARKAR 1ST APPELLANT

DR NAJI SAID 2ND APPELLANT

AND

KJ 1ST RESPONDENT

NQ 2ND RESPONDENT

AGA KHAN HEALTH SERVICES KENYA 3RD RESPONDENT

*(Appeal against the ruling and orders of the High Court of Kenya at Nairobi,
(Njuguna, J.) dated 5th January, 2018 in HCCC Case No. 610 of 2007))*

JUDGMENT

1. By a plaint dated August 29, 2007, the 1st and 2nd respondents sued the appellants and the 3rd respondent in the High Court of Kenya at Nairobi seeking recovery of general and special damages. The suit arose from grave health complications allegedly suffered by the 1st respondent after undergoing medical procedures performed by the appellants herein who are medical practitioners at the 3rd respondent's hospital. The 1st and 2nd respondents attributed the health complications to professional negligence on the part of the appellants herein.
2. Before the trial court, the 1st and 2nd respondents sought to rely on medical reports, e-mail correspondence and other documents prepared by Dr Louis G Gecelter and Dr John Van Der Wat in the Republic of South Africa who attended the 1st respondent. However, in their effort to impede the production of the said documents in evidence, the appellants filed an application dated May 2, 2017, seeking orders that the said documents be expunged from the record.



3. A detailed schedule of the said documents is listed on the face of the aforesaid application. Because the list is not disputed, it will add no value for us to rehash it here. It will suffice to mention that the key ground in support of the application was that the 1st and 2nd respondents failed to avail the makers of the said documents for purposes cross-examination. Also, in support of the application, the appellants filed an affidavit sworn by Dr Richard Baraza dated May 2, 2027, who averred that in his opinion there was no link between the treatment administered by the appellants on the 1st respondent and the ailments she suffered. In his view, the 1st respondent's problems were caused by endometriosis but not the multiple surgeries she underwent, so, there was no basis to suggest that her Vesicovaginal Fistula (VVF) was possibly caused by the procedures carried out by the appellants. He also deposed that the medical reports prepared by the South African medical practitioners are contradictory.
4. In support of the application, the 3rd respondent filed a replying affidavit sworn by Valentine Situma Achungo dated July 5, 2017. The key averment is that it was necessary for the South African doctors to attend court for purposes of cross-examination. He also deposed that the respondents did not demonstrate the actual cost for availing the said witnesses.
5. In opposition to the application, the respondents stated that the appellants ignored sections 35 (1) (b) and 33 of the *Evidence Act*. Further, the respondents stated that they had exhausted their finances traveling to South Africa for treatment and therefore they were unable to procure the attendance of the doctors owing to the cost implication nor could the doctors be procured without causing delay.
6. In the impugned ruling, the learned judge stated:

' The general rule is that documents can be produced by their makers. However, there is an exception as provided for in section 33 and 35 of *Evidence Act* where documents can be produced without the maker if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

I have considered the circumstances of this case and the submissions by the counsels. The 1st plaintiff went for further medical treatment in South Africa and her case is principally based on the medical reports and documents obtained from doctors in South Africa. The plaintiff has deposed that she established that the doctors who are makers of the documents could not be available to travel to Kenya to testify. It is also deposed that, that notwithstanding, procuring the attendance of doctors would be expensive for the plaintiffs who have replenished their financial resources due to their recurrent treatments.

This court has the discretion to consider whether the delay and or expense in procuring the attendance of the makers is unreasonable or otherwise, as conferred in section 35 of the *Evidence Act*. I take notice of the matters deposed that the medical practitioners in South Africa indicated that they would not be available to come and testify and coupled with the averment on the expense and delay which would be incurred, I do make an inference that procuring such doctors would delay the court process and drag this matter forever. In the circumstances, it would therefore be appropriate to allow the plaintiffs to produce the documents although the weight to be attached to such documents may not be as much or may even be nil as opposed to when they are produced by the makers.

Since the defendants will be calling a medical expert to produce their medical report in opposition to the reports produced by the plaintiffs, they will not be prejudiced by the production of the plaintiff's medical document.



In the upshot, the application is dismissed.'

7. Resolute to overturn the above ruling, the appellants filed the instant appeal essentially asserting that the learned trial judge erred in law in dismissing their application. Expounding on the said ground, the appellants fault the learned judge for admitting the medical reports in evidence without calling the makers. They contend that the respondents did not discharge the evidential burden under section 35 of the Act. Lastly, they claim that the failure to allow them to cross-examine the makers of the documents contravenes their rights under Article 50 of the *Constitution*.
8. The appellants do not appear to have filed written submissions in support of their appeal. However, during the virtual hearing, Ms Kinyanjui advocate held brief for Mr Inamdar, the appellants' counsel and submitted orally. She submitted that the contents of the two medical reports prepared in South Africa were heavily contested by the doctors who treated the 1st respondent here in Kenya and also by an independent expert. Counsel faulted the trial court for failing to appreciate that such evidence was inadmissible without the doctors being cross-examined.
9. Ms Kinyanjui further submitted that the appellants have a right under Article 50 (1) of the *Constitution* to a fair hearing, which will be compromised if the said evidence is not subjected to cross-examination. In her view, inconvenience to parties including expenses likely to be incurred is not a reason to dispense with the requirement to test such evidence. Counsel relied on *Jane Gathoni v Musa Migui (2008) eKLR* in support of the proposition that the duty of the plaintiff to avail witnesses for cross-examination is paramount. She argued that in absence of details of the cost likely to be incurred to avail the doctors, there was no basis to conclude that the witnesses could not be availed without considerable expense. Counsel urged the court to allow the appeal and direct that in the minimum, the doctors' evidence be taken virtually. She argued that the claim affects the appellants' medical profession and it has the potential of endangering their livelihood, therefore, the evidence must be tested before condemning them.
10. Counsel for the 3rd respondent Mr. Mohammed supported the appeal. He adopted his written submissions. In his oral highlights, counsel argued that the learned judge did not exercise her discretion judiciously under section 35 (2) of the Act. He cited *Kridha Limited v Peter Salai Kituri, Civil Appeal Number 27 of 2019* in which this Court cited the *Black's Law Dictionary, 10th Edition* definition of judicial discretion as:

' The exercise of judgment by a judge guided by the rules and principles of law; a courts power to act or not act when a litigant is not entitled to demand the act as a matter of right.'
11. Mr Mohammed cited *George Kimithe Ilewe v Joseph Mathieu & Another, Misc Application No E72 of 2021* in support of his argument that discretion should not be exercised arbitrarily. He submitted that the trial judge failed to exercise her discretion properly, and that she failed to consider the affidavit of Valentine Situma Achungo dated May 5, 2017.
12. Mr Mohammed argued that the learned judge did not consider the following four points. One, the alleged ureteric injury and leakage of urine in the abdomen did not feature in the earlier records and medical reports. Two, the reports were self- contradictory. Three, absence of details of actual costs to avail the doctors. Four, absence of the respondent's financial inability to procure the doctors' attendance.
13. On his part, the 1st and 2nd respondents' counsel Mr Bwire submitted that the *Evidence Act* contemplates situations as in this case, therefore, it provides answers. He submitted that this appeal manifests the appellants' ignorance of the provisions of section 33 of the Act. He cited this Court's



- decision in *Chaol Rotil Angela v Republic (2001) eKLR* and submitted that a medical report is a document made in the discharge of professional duty, and as was stated in the said decision, before section 33 (b) comes into play, the conditions laid down in the first part of the said section must be fulfilled.
14. Buttressed by the above decision, Mr Bwire submitted that under the law, the reports prepared by the two doctors are admissible. Counsel submitted that the only requirements the respondents were required to satisfy are: (a) that the doctors (who are since deceased) cannot be produced in court without delay; (b) that they cannot be produced without unreasonable expenses; and, (c) the reports were made in the discharge of their professional duty.
 15. Mr Bwire submitted that the respondents established the above prerequisites as detailed in their replying affidavit in opposition to the application before the trial court in which they deponed that the doctors were not able to travel to Kenya and that the travel could not be procured without incurring financial expenses and delay of the proceedings. Further, counsel submitted that it was also established to the courts satisfaction that the respondents' financial position was such that they could not afford the expenses owing to recurrent medical costs, which will continue for the rest of her life.
 16. Mr Bwire further submitted that much as this appeal is premised on section 35 (1) (b) of the Act, the appellants failed to read the proviso to the said provision, which pays homage to section 33 of the Act. Mr Bwire submitted that there is no requirement under section 35 (1) (b) of the Act to undertake a higher obligation other than offering reasonable grounds indicating the inability to secure attendance of the witness. Further, Mr Bwire submitted that the trial court while exercising its discretion under section 35 (1) (b) took notice of the matters before it and upon proper consideration of the difficulty of procuring the doctors' attendance arrived at a well- reasoned decision. Counsel further submitted that the doctors are since deceased, and in any event, the appellant will have the opportunity to rebut the evidence, and therefore they will not be prejudiced. Lastly, Mr Bwire submitted that the impugned decision entailed exercise of judicial discretion, which this Court cannot lightly interfere with unless it is palpably wrong, and cited *Mbogo v Shab (1968) EA* at page 93.
 17. We have considered the arguments advanced by learned counsel for the parties and carefully perused the record. The main issue is whether the trial judge erred in admitting medical reports prepared by doctors in South Africa without calling them for purposes of cross-examination. We take to mind the fact that reports of this nature constitute expert opinion which, as a general rule, should be relevant, direct and suitably designed to equip the trial court to make informed inferences as to the truth of the facts in issue. It must be borne in mind, though, that it is not in every case that the expert is available to testify and be cross-examined on the contents of their reported opinion. In such cases, their stated opinion is subject to the rule against hearsay.
 18. Since a document containing such an opinion can only indicate to the court that which someone else (the expert) 'told' it, all documents, if offered as proof as the truth of their contents, contain at least simple hearsay. However, as decided cases suggest, necessity has given rise to a number of exceptions to the Rule against Hearsay. The requirements that a testimony be given under the sanction of the oath and subjected to the test of cross-examination have been dispensed with in situations where the declarant of the words in question is unavailable and his oral or written statement was made in circumstances which, it can be presumed, would impress his remarks with a genuinely trustworthy quality. The Courts accordingly developed exceptions to circumvent the rigidity of the Hearsay Rule in particular instances. (See *Lord Reid in Myers v Director of Public Prosecutions, 3 (1965) AC 1001, (1964) 2 All ER 881*).



19. Much of the perceived complexity in this area of the law can be avoided if the rationales for the hearsay rule, and the basic rationales, which underpin the exceptions to it, are kept in mind. As the following excerpt suggests:

' It is settled law that evidence of a statement made to a witness by a person who is not himself called as a witness 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 the evidence, not the truth of the statement, but the fact that it was made.'

Per Dickson J, in *The Queen vs O'Brien* (1977), 38 CR N,S 325, at p 327, 35 CCC (2d) 209, at p 211 (SC C), and see the locus classicus, *Subramaniam v Public Prosecutor*, [1956] 1 WLR 965 (PC).

20. Undeniably, while direct evidence is always considered to be more reliable than hearsay evidence, there are some exceptional circumstances in which the courts could allow hearsay evidence under the *Evidence Act*. For example, under Part IV of the *Evidence Act*, statements made by persons who cannot be called as witnesses are admissible in evidence. This is an exception to the hearsay rule. Specifically, section 33 lays out what those statements might be. The section lists 8 examples of such statements which are all, in their own right, exceptions to the hearsay rule. Significantly, the opening paragraph of section 33 gives the context within which the exceptions covered at that section apply. It reads:

'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.'

21. Section 35 of the Act provides for admissibility of documentary evidence as to facts in issue. It reads:

1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

- a. If the maker of the statement either—
- i. Had personal knowledge of the matters dealt with by the statement; or
 - ii. Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

- b. If the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.



2. In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection
 1. Of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—
 - a. Notwithstanding that the maker of the statement is available but is not called as a witness
 - b. Notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.
22. Essentially, a document will be admissible if the person making it is dead, cannot be found, has become incapable of giving evidence, their attendance cannot be procured, or even if it can be procured but that would actually occasion expense and delay which in view of the court is unreasonable.
23. Section 33(b) provides for admission of hearsay evidence when a statement is made in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money goods securities or property of any kind.
24. The phrases 'ordinary course of business' and 'discharge of professional duty' in section 33(2) are used to indicate the current routing of business or profession which was usually undertaken by the person whose statement it is sought to introduce. The rule extends to business or professional employment in which the declarant was ordinarily or habitually engaged.
25. Sections 33 and 35 have provisos which create exceptions to the general rule in the said sections. The rationale for having the exceptions to the hearsay rule is explained in Sarkar on Evidence (1990, Reprint) at p. 370, quoting from Wigmore on Evidence (ss 1420-1422) as follows:

' The purpose and reason of the hearsay rule is the key to the exceptions to it. The theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous: it may be sufficiently clear, in that instance, that the statement offered is free from the risk, of inaccuracy and untrustworthiness so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment -for example, by reason of the death of the declarant, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. A perception of these two principles (a necessity for the evidence and a circumstantial probability of trustworthiness) and their combined value has been responsible for most of the hearsay exceptions.'
26. In a picturesque speech, the Supreme Court of India in [Arjun Panditrao Khotkar v Kailash Kushanrao, \(2020\) 3 SCC 216](#) observed as under:
 - ' 2. Documentary evidence, in contrast to oral evidence, is required to pass through certain check posts, such as-



- (i) Admissibility;
- (ii) Relevancy and
- (iii) Proof, before it is allowed entry into the sanctum. Many times, it is difficult to identify which of these check posts is required to be passed first, which to be passed next and which to be passed later. Sometimes, at least in practice, the sequence in which evidence has to go through these three check posts, changes. Generally, and theoretically, admissibility depends on relevancy. Under Section 136 of the *Evidence Act*, relevancy must be established before admissibility can be dealt with.'

27. Admissibility of a document is tested first. This position was clarified by the Supreme Court of India in *Anvar PV v PK Basbeer*, AIR 2015 SC 180: (2014)10 SCC 473, it is held as under:

' Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility.'

28. There are actually eight different exceptions to the hearsay rule in section 33, each with its own criteria or elements. The exception under section 35 are: if the maker of the document is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.
29. In this case, the 1st and 2nd respondents' case is that the two doctors could not have been availed without delay and expenses. It has also been said both are since deceased. In such circumstances, the Court is required to evaluate the evidence regarding the availability of the witnesses and decide judicially whether the witness cannot be found or cannot be availed without unreasonable delay. The Court must satisfy itself that the provisions of the above sections have been strictly complied with.
30. In *R v Ndolo* (1926) 10 KLR 11 the High Court considered the meaning of the words 'cannot be found' under section 33 and held that it refers to the time when the witness is sought to attend trial, and it does not refer to the state of affairs at some earlier period. The Court also held that the words appear to imply that a diligent search should be required before the condition is held to have been fulfilled.
31. In *Commission of Customs v SK Panachal* (1961) EA 303 the East African Court of Appeal interpreted the meaning of the phrase 'a witness cannot be procured without unreasonable expense or delay.' In this case a statement had been made by a witness who was a customs officer who lived in The Hague. The prosecution sought to produce the statement, but the defense objected. In admitting the statement, the Court held that judicial notice should be taken of the distance between Nairobi and The Hague and for a witness to come merely to produce a statement the more so where the statement was made in the course of duty it would be unreasonable. A similar holding was made in *Mohammed Taki v R* (1961) EA 213.
32. In the instant case, the learned judge was persuaded that the witnesses could not be procured from South Africa without delay and expenses. This reasoning accords with the findings in *Commission of Customs v S K Panachal* (supra). We have carefully evaluated the reasons for unavailability of the witnesses, the law and the authorities. We are unable to accept that the learned judge misdirected herself in arriving at her decision. Accordingly, we find no merit in the appellants' argument that the learned judge erred in law and in fact in arriving at the said decision. On this ground, the appellants' appeal collapses.



33. The other argument relied upon by the appellants is that the impugned decision deprived them the right to cross-examine the two doctors, therefore, the ruling impinges on their right to a fair trial under Article 50 of the Constitution. This reasoning is attractive because the Constitution is the supreme law of the land and the Article 50 rights are rights that cannot be limited in any manner. However, that is how far this argument can stand because it collapses not on one but multiple fronts. Before the High Court, and even before us, no argument was raised challenging the constitutional validity of sections 33 and 35 of the Evidence Act. Therefore, we fail to understand how the appellants can challenge the constitutional validity of a decision, which enjoys statutory backing without challenging the statutory provisions. It is basic law that Parliamentary enactments enjoy a rebuttable presumption of constitutional validity, and the burden lies on the person alleging a statute is unconstitutional to rebut the presumption.
34. Further, no argument was advanced either before the trial court or before us to suggest that the said sections offend the right to cross-examination, much as the appellants claimed that the ruling deprived them the right to cross-examine the witnesses in violation of their Article 50 rights.
35. In any event, a decision to admit such evidence is not simply an exercise of judicial discretion as was submitted by the parties before us. It is a matter of law guided by clear provisions of the Evidence Act. Such a decision can only be overruled on appeal if found to be wrong. It is important to bear in mind the rigorous legal framework created by section 33 and 35, with reference to the level of scrutiny that a plea to admit such statements should be subjected to.
36. It is also important to mention that admission of hearsay evidence by definition denies the other party the right to cross-examination because the maker of the documents are not in court and cannot be availed for cross-examination either because the person is dead or is not able to attend Court. The test is the Court must be satisfied that the attendance cannot be procured without delay or expenses. The test for delay prescribed by the said sections perfectly accords with the constitutional dictate in Article 159 (2) (b) of the Constitution, which commands courts to administer justice without unreasonable delay.
37. Therefore, we cannot accept that the admission of such evidence violates the appellants' rights to challenge the said evidence by way of cross-examination. What the Constitution contemplates in our view is that where the evidence is hearsay, the right entails that the party is entitled to resist the admission and to scrutinize its probative value including its reliability and credibility. Where the interests of justice require that such evidence be admitted, as was the case here, no constitutional right is infringed. We say so because the appellants will have the opportunity to rebut the said evidence. Nothing prevents them from calling their own experts.
38. In any event, admission of a document in evidence is not to be confused with proof of a document. When the court is called upon to determine the admissibility of a document made by a witness who is dead or cannot be availed, the court concentrates only on the document and the exceptions permitted under the Evidence Act. Conversely, when a court is called upon to form a judicial opinion whether a document has been proved, disproved, or not proved the court does not look at the document alone or only at the statement of the witness standing in the box. It takes into consideration probabilities of the case as emerging from the whole record. In our view, it could not have been the intention of the law that the court should always apply its judicial mind to the entire record of the case, each time a document is placed before it for admission and form an opinion if it was proved before marking it as an exhibit.
39. Admissibility of a document is one thing and its probative value quite another. These two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil. As was held by the Supreme Court of India in *Ramji Dayawala v Invest Import*, AIR 1981 SC 2085, mere production and marking of a document as an exhibit by the



court cannot be held to be a due proof of its contents. Its execution and contents have to be proved by admissible evidence, that is, by the evidence of those persons who can vouchsafe for the truth of the facts in issue. But, more important, as stated above, the appellants will have the opportunity to rebut the evidence during the trial.

40. From our above discussion, we are satisfied that the learned Judge acted in accordance with the law in admitting the medical reports in evidence without calling the makers of the medical reports. It is our conclusion that the appellants' appeal lacks merit. Accordingly, we dismiss this appeal with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

DR. I. K. LAIBUTA

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

