UNIT: GPR 201 EVIDENCE LAW
GROUP: TWO

PRESENTED TO: MR: MUTHOMI T HIANKOLU
GROUP MEMBERS

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<td>CHARLES MULANDI</td>
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QUESTION

“Properly trained and experienced courtroom lawyers know that vital information and pointers aren’t just gleaned from dry facts and evidence. Whether it’s during Investigations, inquiries, fact-finding missions, examinations or trials; inklings, nuances and fleeting impressions are gauged when one observes another testify under oath or give an account of an event. Innocuous statements, expressions, gestures or other idiosyncratic things human beings engage in under pressure can suddenly gain currency. A nose twitch, dry lips, sweating or just uneasy glances often give away the guilty in the most uncanny manner. And when carefully analyzed and pieced together, such statements or physical reactions can begin to congeal into something coherent, logical and revealing. Remarks made innocently or repeated by one or more people in describing an incident or event might expose some hidden conspiracy, which would otherwise have gone undetected. That’s why trials have been in use since the Ancient world — they’re effective.”  __Miguna, M. (2012), Peeling Back the Mask, Gilgamesh Africa, at p. 413.
There are three general concepts the writer brings out in this excerpt the first one is the effectiveness of a trial especially seen the light of a legal process aimed at achieving fairness and justice to the parties, secondly is the usage of evidence law as a basis in any fact-finding situation e.g. trial, inquiry or investigations and thirdly is the difference between dry facts and evidence analyzed from the point of view of relevance and admissibility. Let us look first in more detail these two concepts in the ensuing paragraphs.

“That is why trials have been in use since Ancient world and they’re effective.” According to Adriaan Lanni in her book Law and Justice in the Courts of Classical Athens she traces trials back to the fourth and fifth century in the Athenian Court systems; even though the best known example of Athenian Justice System is an outrage: the trial and execution of Socrates.

Adriaan makes a note and opines that “Most interestingly, the Athenians understood the desirability of a regular application of abstract principles to particular cases, but made this the dominant ideal only in the homicide and maritime cases. Popular courts tried the vast majority of trials in the Athenian court system, and they are the focus of modern scholarship on the nature of Athenian litigation. In these cases, litigants regularly discuss matters that are extraneous to the application of the relevant statute to the event in question. For example, popular court litigants make arguments based on their opponents’ actions in the course of the litigation process, or the financial or other effects a conviction would have on the defendant and his innocent family. I argue that these extra-legal arguments were vital to making a case in an Athenian popular court rather than aberrations in an essentially modern legal system.”

1 Adriaan Lanni is the assistant professor of law at Harvard Law School. A former member of the Harvard Society of Fellows, she holds a law degree from Yale Law School and a Ph.D. in ancient history from the University of
2 Adriaan Lanni (2006), Law and Justice in the Courts of Classical Athens, Cambridge Press, at p.1
3 Ibid at p.3
Adriaan’s sentiments has been shared by others like Robinson E.W who noted that both legal and extra-legal argumentation were considered relevant and important to the jury’s decision because Athenian juries aimed at reaching a just verdict that took into account the broader context of the dispute and the particular circumstances of the individual case. Even the relative importance of legal and contextual information in any individual case was open to dispute by the litigants. Robinson E.W further argues that litigants and jurors by and large considered the purpose of the trial to be the arrival at a just resolution to the dispute. The primary goal was to resolve the specific dispute that gave rise to the litigation, using social context as an instrument toward that end. His contention is that Athenian jurors attempted to reach a “fair” or “just” decision based on the evidence before it rather than strictly applying the laws to the case on that note we agree with Miguna Miguna that trials have been with us since the ancient world.

Are trials effectives as alluded by the writer?

1. The right to a fair trial is a fundamental right enshrined in many constitutions. It would be unfair and unjust to judge someone without subjecting that person to some sort of trial. This is in accordance with the natural justice function of the court which requires that the accused person be afforded an opportunity to put forward his or her evidence fully and to ask the Court to hear the witness whose evidence might help his or her case. (This position was laid in the Nigerian Case of Kano Native Authority vs Raphael Obiora where this requirement embodies two rules of natural justice thus audi alteram partem which means “hear the other side” and nemo iudex in sua causa meaning “no one should be a judge in his or her own case”.

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4 Robinson, E.W (1997), The First Democracy, Early Popular Government Outside Athens, Stuttgart at page

5 See Article 50 of the Constitution of Kenya which has a right to Fair Trial

6 [1959] 4 FSC 226
2. Trials in administering justice, ensures the accused in criminal cases and the defendants in civil cases to raise or come up with defenses open to them to mitigate the charges against them and on the same light, it allows the prosecution or the plaintiffs in criminal and civil cases respectively to rebut the defenses pleaded by the accused and the defendants. Therefore trials are mechanisms established to hear the claims of the parties in dispute and are effective in the sense that it enables the judges, jurors or triers of the case to determine and resolve the dispute in a manner that is fair and just to all parties involved in the dispute.

3. Trials are effective in checking the credibility of witnesses. When trials are carried out, it enables the jury to access the truthfulness or believability of a witness testimonial statements. This enables them to prove or disapprove a disputed issue of facts.

4. Trials are effective in the findings of new facts crucial for the administration of justice. Trials are carried out over a period of time. This enables the findings of new facts which with their absence would have led to the miscarriage of justice.

5. Trials are effective also in setting precedent law. When cases are tried and determined by the court, they are saved and set aside for future reference. The doctrine of precedence is a basic principle of administration of justice that like cases should be decided alike. In a system based on a case law, a judge in a subsequent case of similar facts with a previous case must act in accordance with the decision held in the previous case.

6. Trials are also a testing machine for the competence of judges, jurors and triers of cases. Judges have been held responsible over the decisions they have made in cases they handled ages ago. The vetting board recently has recommended for the suspension and termination of judges due to their incompetence in handling cases. On this regard we agree with Miguna Miguna that indeed trials are effective.
The author tries to illustrate the versatility of law of evidence as used in various situations. The law of evidence has been used in many inquiries i.e. the Saitoti Chopper Crash inquiry, section 34 (2) (b) of the Kenyan Evidence Act cap 80 says that “a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused” this clearly shows that inquiries are based on rules of evidence, police and investigators have been known to piece up evidence to come up with credible cases before the courts. It is important to note that there are some statutes which have an exception to the rules of evidence e.g. Section 2. (1) of the KEA 7 says “This Act shall apply to all judicial proceedings in or before any court other than a Kadhi’s court, but not to proceedings before an arbitrator” the section stresses the point that the law of evidence does not apply in arbitration, reference can also be made to section 86 of the Public Procurement and Disposal Regulation 2006 which says “The Review Board shall not be bound to observe the rules of evidence in the hearing of a request under these Regulations” 8 rationale is to remove the burden of someone seeking justice under administrative review, be that as it may still one is required to provide basic documentary evidence to support their case. In this regard we agree with Miguna Miguna that whether it is investigations, examination, inquiry or any other fact finding mission the rules of evidence will mostly apply.

The writer tries and differentiate between dry facts and evidence and their importance in law especially rules of evidence is demonstrated most when one deals with issues of relevance and admissibility.

Adrian Keane gives a more wholesome definition of evidence as “Information by which facts tend to be proved and the law of evidence as that body of legal rules regulating the means by which facts may be proved in courts of law and tribunals and arbitrations in which the rules of evidence

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7 KEA-Kenya Evidence Act Cap 80 
are applied". In the Kenyan case **CMC Aviation vs. Cruisair Ltd** the courts defined evidence by reference to its function i.e proof “proof” is the foundation of evidence.

Judicial Evidence is mainly concerned with either proving or disproving the contested facts in every case before courts or tribunals. It is important to note that in every case there might be several facts but not all facts will be in issue (contested or contestable).

When the writer talks about dry facts and evidence he also tries to separate what is relevant and admissible i.e. the *facta probanda* and *facta probana*. The case **DPP vs Kilbourne** presents the best definition of relevance.

As a general rule, all evidence of sufficient relevance to prove or disprove a fact in issue is admissible so long as it is not excluded the exclusionary rules of evidence. (“The Exclusionary Rules” of evidence are the rules which determine when relevant facts may or may not be admitted in evidence or may be admitted under certain circumstances. They are premised on the fact that “all facts, to be admissible, must be relevant, but not all relevant facts are admissible”.

The exclusionary character of the law of evidence has sometimes produced controversial and even unsatisfactory results.

**Myers vs DPP** best illustrates the technical nature of law of evidence particularly in relation to relevance and admissibility in this case evidence collected in form of microfilm showing the accused changing chassis numbers was inadmissible because they were regarded as hearsay. It

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10 [1978] KLR 103

11 Means Fact in Issue - refers to those facts whose proof is necessary in order to establish the claim or defence of a party, and have been alleged one the one side and disputed on the other.

12 Relevant Fact - means a fact offered to prove another fact i.e. facta probanda (is a fact from which the existence or non-existence of a fact in issue may be inferred.)

13 [1973] AC 729 pg 929

14 [1965] AC 1001
was held that the trial court and Court of Appeal improperly admitted hearsay evidence in the form of microfilms. Per Lord Reid “This is a highly technical point but the law regarding hearsay evidence is technical and I would say absurdly technical.” On this regard we agree with Miguna Miguna that there is a difference between dry facts and evidence (Judicial Evidence that is admissible in court).

The writer seems to be talking about corroboration and some extent hearsay when he says “remarks made innocently or repeated by one or more people in describing an incident or event might expose some hidden conspiracy, which would otherwise have gone undetected.

Article 63 (3) (d) of European Convention of Human Rights and Fundamental Freedoms (ECHR) promotes the general rule by trying to put the accused and the accuser on an equal footing, therefore A is generally forbidden to give evidence on behalf of B.  

The general rule in civil cases is that hearsay is admissible. In criminal cases the approach was exclusionary, unless the evidence was admissible by exception.  

Murphy suggests that the rule on hearsay has been around since the 17th Century he explains through case law to the historical perspective for example he writes that Wigmore, suggests the fons et origo of the hearsay rule is Fenwick's Trial, a treason trial in the seventeenth century where the statement of a witness who was not called to give evidence was held inadmissible. By the seventeenth century, attempts were made to rationalise the hearsay rule as part of the Best Evidence rule. The modern version of the hearsay rule, encapsulating the three strands

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15 Charanjit Singh Landa (2009): Unlocking Evidence, Bookpoint at page 185
16 In Kenya Order XVIII Rule 3 (2) of the Civil Procedure Act Cap 21 matters in which affidavits shall be confined suggests that hearsay is allowed.
17 Ibid at page 189
18 Murohy (200): Murphy on Evidence, Buttersworth at page 181
instantiate above, as enunciated by Cross, is as follows:” Express or implied assertions of persons other than the person who is testifying, and assertions in documents produced to the court when no witness is testifying, are inadmissible as evidence of the truth of that at which was asserted.”\textsuperscript{20}

Oral assertions are the most common form of hearsay the leading case is \textit{Subramaniam v Public Prosecutor}.\textsuperscript{21} and in \textit{R v Gibson}\textsuperscript{22} a conviction for unlawful wounding was quashed because the prosecutor had been allowed to narrate a statement which he heard an unidentified woman make immediately after a stone had been thrown at him. Again, in \textit{R v Saunders}\textsuperscript{23} it must be noted that as long as the assertion is not being used as evidence of the truth, it is admissible to show that it was in fact made as in \textit{Woodhouse v Hall}\textsuperscript{24} a conviction for conspiracy to defraud was quashed on account of the reception of a police witness’\’s answer to certain questions. \textit{In this regard we totally disagree with Miguna that remarks made innocently can be used as evidence, they will have to be tested against the exclusionary rules of hearsay.}

This statement also brings up corroborating evidence. This is evidence tending to confirm some fact of which other evidence is given. The definition of corroboration is based on the dictum of Lord Reading CJ in \textit{R V. Baskerville}\textsuperscript{25}; “We held that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him/her with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also the


\textsuperscript{21} [1956] 1 WLR 965, PC.

\textsuperscript{22} 1887) 18 QBD 537.

\textsuperscript{23} 1989] 1 QB 490.

\textsuperscript{24} (1980) 72 Cr App R 39.

\textsuperscript{25} [1916] 2 KB 658, 667
prisoner committed it.” Consequentially, the more corroboration in present, the easier it is to prove a fact. In *D.P.P. V. Kilbourne* 26Lord Simon stated; “corroboration is therefore nothing other than evidence which “confirms” or “supports” or “strengthens other evidence………… it is, in short, evidence which renders other evidence more probable.”

Some instances when corroboration is required as a matter of law include; these are instances when a conviction cannot be obtained without corroboration:

a) Perjury- corroboration is required since if conviction of perjury was made too easy, then a greater number of witnesses to cases would avoid giving evidence owing to fear of conviction.

b) Treason- This is defined in section 40 of the Penal Code of Kenya. With regards to corroboration, section 45(2) of the Penal Code of Kenya provides that no person charged with treason, may be convicted, except on his own plea of guilty, or on the evidence in open court of two witnesses at the least to one avert act of the kind of treason or felony alleged, or the evidence of one witness to one act and one other witness to another act of the same kind of treason. Treason still the punishment of death sentence.

c) Sedition- This is defined in section 48(b) of the Penal Code of Kenya. The rule requiring corroboration for treason is not similar to section, as much as they are both serious offences.

d) Paternity- The corroborating evidence in this instance must implicate the alleged father of the child for a paternity order. Some instances where corroboration is required as a matter of practice include; these are instances where conviction can be obtained without corroboration;

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26 [1973] A.C. 729
On the assertion by Miguna Miguna that words repeated by different people to describe an event may lead to a conclusion of conspiracy or otherwise we totally agree with him, if we look at it from a corroboration point of view.

There is a small connotation about making a statement under oath and the general process of evidence i.e. examination-in-chief, cross examination or re-examination. The law of evidence is of great importance to judicial proceedings and one of its important functions is that the law of evidence also sets down the manner of proof in court i.e. by witness on oath subject to examination-in-chief, cross examination and or judicial notice, presumptions, admissions, by production of material objects or documents. Section 17 (a) of Cap 15 of Kenyan laws i.e. The Oaths and Statutory Declarations Act states that oaths and affirmations shall be made by (a) all persons who may lawfully be examined, or give or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence.

Cross examination is a right not a privilege and if denied the right, the denial can vitiate the proceedings.

The aim of this examination is to destroying this advantageous effect, either by getting witness to retract or modify the testimony and/or indirectly by discrediting the witness generally.

Sec. 163 of KEA\(^\text{27}\) gives ways of impeaching the credit of a witness in this examination. You call the witness to testify to the worthiness of credit of a particular witness. You can call proof that a witness has been bribed or that the witness has accepted the offer of a bribe or any other corrupt inducement to give evidence. You could also impeach by proving former statements oral or written made by the witness which are inconsistent with any part of the witness’s evidence.

\(^\text{27}\) Kenya Evidence Act Cap 80
The writer alludes to the use of physical appearance and demeanor to adduce or rebut evidence especially when it comes to cross examination also we need to analyze whether demeanor evidence is admissible in court this assertion by the author. 28

Oscar Wilde once said “It is only shallow people who do not judge by appearances” 29 Simply put, demeanor evidence is the body’s compass, pointing in the direction of credibility. It includes gestures, intonations, posture, mannerisms, eye movements, inflections, and expressions. Judges and juries listen and look very closely to demeanor evidence to assess the credibility. Research has repeatedly shown that demeanor evidence significantly determines court decisions. 30 Recently the U.S. Supreme Court has reinforced the importance of demeanor evidence in the 2009 case of Melendez-Diaz v. Massachusetts. 31 The Melendez-Diaz Court based its decision on the 6th Amendment’s Confrontation Clause and stressed the essential practice of jurors to see and to hear people testify, not just examine affidavits.

The first lesson in demeanor evidence is its long-standing legal tradition. The Melendez-Diaz case did not arise from nowhere. Western justice has long used demeanor evidence to prove guilt, albeit not always in ways we would now approve. In 1050 c.e. Lady Emma, twice crowned Queen of England, was accused of adultery with the Archbishop of Canterbury. To test her deception or innocence, she had to walk barefoot over nine red-hot plowshares. If her skin was undamaged, she was innocent. But if her feet were scalded, she would be hung. Her son, the King, was already

28 The Author is Miguna Miguna
29 Oscar Wilde in Pictures of Dorian Gray
31 29 S. Ct. 2527; 174 L. Ed. 2d 314; U.S. LEXIS 4734 (2009)
busy claiming her properties and rescinding her titles. To everyone’s amazement, however, she walked across the plowshares unharmed and her repentant son begged for forgiveness. 

Thankfully, today’s courts value demeanor even more, but apply it differently. The U.S. Supreme Court in U.S v. Scheffer 33(1997) said that juries are “lie detectors” and another Supreme Court ruled that credibility in witness assessments includes tone of voice and variations in behavior. 34 Jurors use witness demeanor as human technology, not to detect lies in witnesses, but to determine both scientific truth and persuasive truth.

Demeanor evidence is an area of great research by both legal researchers and neuroscience and the following are some of the latest trends and insights 35

1. First, telling scientific truth and testifying to persuasive truth is not the same thing. Being technically correct is not the same as being persuasively competent. One must distinguish the credibility of the witness from the conclusion of their opposite number. After all, qualified lawyers on both sides will testify to opposing scientific truth. Juror research teaches that demeanor credibility consistently ranks as a significant factor in juror persuasion.

2. Second, demeanor evidence is important because it is how humans communicate and make decisions. One of the lessons of neuroscience is that our demeanor says much more than our words. Scholars estimate, for example, that at least 80% of our communication is nonverbal. 36 Everyone notices the processes of communication more quickly and more efficiently than the content of communication. Jurors generally find how

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a forensic expert conveys their research equally compelling as the results themselves. Words conveying information came later in our evolutionary stage than physical expression. Our prehistoric ancestors had to quickly scan the environment for predators. In fact, a large part of our demeanor assessments are conducted in the brain’s most ancient regions.37 So, demeanor evidence is an instinctual part of our behavior. Yet, our demeanor assessments are not always correct. Evidence shows that judges and juries not only rely upon demeanor evidence in assessing witness credibility; they report that they are pretty good at it.38 Jurors will depend more upon non-verbal cues to assess credibility as expert credentials and forensic technology become more complex and standardized. Forensic scientists will likely face increasingly sophisticated demeanor testimony as more and more scientists are called to testify. They serve justice by presenting competent demeanor evidence.

3. Third, not only do judges and jurors scrutinize witness demeanor, but they do so almost instantaneously. Research has shown that our brains process demeanor as quickly as 100 milliseconds.39 This means that jurors size up witnesses before they utter their first word or even take the stand. Jurors will begin assessing the witness even as he or she walks into the courtroom or takes the oath. Those immediate impressions tend to last throughout deliberations.


39 Ibid
4. Fourth, research also shows that juries find the eyes of a witness to be the single most important visual cue to assess credibility.\textsuperscript{40} In one case, a defendant insisted upon wearing sunglasses at the trial and unsuccessfully appealed the conviction based upon how the sunglasses may have undermined the testimony.\textsuperscript{41}

5. Fifth, a confident witness is more persuasive than a hesitant one.\textsuperscript{42} In the case \textit{Morales v. Artuz, 281 F.3d 55; U.S. App. LEXIS 2179 (2002)}, it was stated that acting confidently, even passionately helps establish credibility. One study found that jurors are twice as likely to trust a confident witness over an uncertain or unsure witness \textsuperscript{43} or even three times as much.\textsuperscript{44}

In some cases like rape or assault the victims demeanor when writing the statement can be used as evidence in the Australian case \textit{Commonwealth vs John Starkweather} \textsuperscript{45} in this case a police officer tendered the demeanor of the victim while recording statement as evidence, the defense team objected to this as hearsay. During Examination in Chief the prosecutor asked the police officer "\textit{And during the course of asking her these questions, sir, how did her demeanor change, if at all?}"

In this case the judge citing \textit{Commonwealth vs Arana} \textsuperscript{46} "\textit{Demeanor evidence may be of particular importance in a case such as this, where the trial devolves to a contest of credibility concerning whether the charged offense, here rape, occurred. See id. at 225-226. In our view, Sergeant Watson's firsthand observations of the victim's demeanor in the emergency room, and}

\textsuperscript{40} Vrij, A. (2008). Detecting lies and deceit: pitfalls and opportunities. Chichester, UK: Wiley
\textsuperscript{41} Ibid
\textsuperscript{42} Morales v. Artuz, 281 F.3d 55; U.S. App. LEXIS 2179 (2002).
\textsuperscript{44} Ibid
\textsuperscript{45} 79 Mass.App.Ct.791
\textsuperscript{46} Ibid
physical and emotional state of mind in the wake of the sexual attack, played an integral role in assessing credibility. The reference to a recorded statement in this demeanor-related context was not error under the first complaint doctrine” 47.

Professor Cross has this to say about demeanor evidence 48- Evidence of demeanor out of court was rejected in R v Keast 49, but that of demeanor in court but out of the witness box was accepted in Australia in R v Martin 50 Nokes included in the demeanor of a witness among the items of real evidence. If a witness gives his evidence in a forthright way, unperturbed by cross-examination, the court will no doubt be more disposed to believe him than would be the case with a halting and prevaricating witness. In Coombs v Bessel 51 an appeal was allowed because what the trial judge had regarded as unsatisfactory demeanor in testifying transpired to be the result of a medical condition. When the court acts on the remarks or behavior of a witness as constituting a contempt, it may be said to accept real evidence because it is not asked to do more than act on its powers of perception in determining the fact in issue - the contemptuous conduct., if personality of a witness is in issue in a case such as his suitability to care for a child or to direct a company the court may attach some weight to its assessment of him in giving evidence 52 On this regard we agree with Miguna Miguna to some extent

47 Berry J AT Page 801
48 Cross & Tapper on Evidence 12th Edition Butterworths at page 64
49 1998) Crim LR 748
50 (no.4) (2000) SASC 436,78 SASR 140.)
51 (1994) 4 Tas 149
52 See ( secretary of the state for trade and industry v Reynard (2002) EWCA Civ 497)
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6. Civil Procedure Act of Kenya Cap 21

7. Criminal Procedure Code of Kenya Cap 75

8. Constitution of Kenya

9. Cross & Tapper on Evidence 12th Edition Butterworths at page 64


12. Evidence Act Cap 80 of Kenya Laws

13. Harvey, The Advocate’s Devil (1958) 79


20. Oscar Wilde in Pictures of Dorian Gray


22. Robinson, E.W (1997), The First Democracy, Early Popular Government Outside Athens, Stuggart at page 1


