

CRITICAL EXAMINATION OF THE LEGAL AND PRACTICAL CHALLENGES ON THE USE OF WITNESS STATEMENTS IN CIVIL CASES IN TANZANIA

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Abstract

Traditionally, the common law (which is an adversarial legal system) requires a witness to appear physically before the court and adduce his evidence *viva voce*. However, another approach has been recently developed whereby a witness may give his/her evidence through a witness statement. However, this approach – which aims at accelerating justice, seems to be favorable for complex cases, such as commercial disputes, arbitral proceedings and election petitions – is not free from challenges. Thus, the purpose of this paper is to examine practical and legal challenges relating to the use of witness statements in civil proceedings in Mainland Tanzania. Apart from some lacunae in the legal framework (like not providing a room to rectify the witness statement already filed in the court), determination of the actual time for filing a witness statement is among the challenges noted in this paper. As such, the paper recommends, among others, for the amendment and harmonization of laws and rules governing witness statements in Mainland Tanzania.

Keywords: Witnesses, witness statement, evidence, oral evidence, civil cases.

1.0 Introduction

A witness is an eye and ear of justice as he/she assists a court of law to render a judicious and just decision.¹ The reason is that the court is not usually present at the *locus in quo* whenever a crime or civil wrong is committed. It squarely depends on the evidence given by the witness to legally and fairly determine the disputed matter brought before it. Traditionally, a person who witnessed an event is supposed to appear physically before the court and adduce his evidence *viva voce*. This practice ensures, among others, fairness of the proceeding. Further, it enables the judicial officer who is presiding over the matter, *viz.*, the judge or magistrate, to test the credibility and veracity of the witness by looking at his demeanor. Moreover, the court stands in a better position to examine the truthfulness of the facts given by the witness.

Under the common law, which is an adversarial system, there are three stages of receiving witness evidence: examination-in-chief or evidence-in-chief, cross-examination and re-examination. In Tanzania, these stages are regulated by the

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1 J. Bentham, 'Introductory View of the Rationale of Judicial Evidence (1838-53)', in *Evidence Advocacy and Ethical Practice* eds. J. Hunter & K. Cronin, K, (London: Butterworth, 1995) 30 at 35.

Evidence Act.² In all these stages, normally a witness has to appear personally in court and answer oral questions put to him/her. In addition to receiving oral evidence, another approach has been recently developed whereby a witness may give his/her evidence by using an alternative way – that is, through a written witness statement. In other words, the witness may be summoned to appear in person and give his/her evidence orally in some stages not all the three stages.

Currently, it is possible in Tanzania for a witness of certain civil suits not to be physically present before the court of law to give his/her evidence-in-chief; instead, the evidence-in-chief that was supposed to be adduced orally may be given in the form of a written witness statement. Because of its advantages, this relatively new approach is gaining momentum in Tanzania (as in many common law jurisdictions around the world) and is becoming a popular means of giving evidence in courts of law, especially in civil cases and arbitral proceedings. In this scenario, a witness statement is adopted in place of a direct oral testimony by the witness and it substitutes the first stage of examining a witness. This method, which was developed in other jurisdictions, has also recently been entrenched in the Tanzanian legal framework governing procedural civil matters in the court of law.³

The development of information and communication technology (ICT) has, to some extent, contributed much to watering down the necessity for the witness to appear physically before the court of law or tribunal to adduce oral evidence. It is now possible for the witness to testify remotely, for instance, via video conference whenever the circumstances permit.⁴ Further, since a witness statement is a written document, it is currently possible to be in an electronic form.

Nonetheless, using witness statements instead of oral evidence in civil cases is said to have some challenges in the administration of justice.⁵ It is argued sometimes that this approach does not guarantee the genuineness and credibility of witness statements.⁶ Occasionally, a witness's statement include far more than the witness's actual evidence or the real facts perceived by the witness, and sometimes it takes away the witness's own words.⁷ Through

2 Cap. 6 R.E 2023. See particularly Sections 146 and 147.

3 See particularly Order VIII and Order XVIII of the Civil Procedure Code (Cap. 33 R.E. 2023) ('the CPC').

4 See especially the Judicature and Application of Laws (Remote Proceedings and Electronic Recording) Rules (G.N. No. 637 of 2021); and United Republic of Tanzania, *Witness Care and Protection Guidelines* (Dodoma: National Prosecutions Services, 2023). See also F. Lederer, 'The Legality and Practicality of Remote Witness Testimony,' *William & Mary Law School Scholarship Repository* 9 (2009); and United Republic of Tanzania, *Report on the Review of Evidence Law in Tanzania* (Dodoma: Law Reform Commission of Tanzania, 2019).

5 J. Hope, 'Witness statements in International Arbitration,' 3 *Journal Article for International Law* 2 (2009), 2.

6 *Ibid.*

7 *Ibid.*

decided cases and other literature, this paper examines some practical and legal challenges faced by the judiciary and legal practitioners on the use of witness statements in civil proceedings in Tanzania.

The article is organised into eight main parts starting with introductory matters. The second part provides the justifications for the orality principle in common law and adversarial system.

The third part of this article offers the conceptual framework for witness statements followed by part four, which discusses the rationale and advantages of using witness statements instead of oral evidence in civil cases. The fifth part presents a comparison between witness statements, affidavits and other pleadings. The legal framework regulating witness statements in civil matters is underscored in part six of the paper. The seventh section highlights the challenges of using witness statements followed by the last part, which presents the conclusion and recommendations.

2.0 Orality Principle of Evidence and its Justifications

Oral evidence is the evidence that is spoken aloud or given by mouth in court. It is the kind of evidence given by the witness in the form of questions and answers based on his memory. Oral evidence is founded on the principle of orality, which is a cornerstone of the adversarial system.⁸ Under this principle, witnesses have to give their evidence orally assuming that they are capable of speaking up for themselves.⁹ The orality principle deals with how the witnesses' communication is handled by the court during proceedings.¹⁰ Echoing the principle of orality, the court in *Butera v. DPP*¹¹ stated that:

[...] a witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility than a witness whose evidence is given in documentary form. Oral evidence is public; written evidence may not be.

The traditional practice, which is regulated by procedural laws requires that every witness has to give his evidence orally unless otherwise he is prevented from doing so due to bodily or mental diseases, such as dumbness or deafness.¹² The Tanzanian Evidence Act states that '[a]ll facts, except the contents of

8 S. Lazer, 'The Principle of Orality: An Analysis of the Principles Governing the Prevalence of Direct Oral Testimony in English Adversarial Trial System and the Impact of Reforms to Reduce its Status,' Unpublished PhD Thesis, University of Huddersfield School of Law 2020 at 28.

9 *Ibid* at 10.

10 D. Stolt, "The Role of Written Witness Statements in International Arbitration: A Comparative Study of the Practice Regarding the Presentation of Witnesses as Evidence in the Nordic, German and British Civil Procedure as well as in International Arbitration", Unpublished Master Thesis, University of Helsinki 2014 at 10.

11 [1987] 164 C.L.R. 180 at 189.

12 Evidence Act section 128.

documents, may be proved by oral evidence.’¹³ This provision emphasizes that all pieces of evidence have to be given or proved orally with an exception to the contents of the document, whereby a document itself or its copy may be produced for inspection by the court.¹⁴ The word “may” as used by the above section seems to permit proving facts by other means such as writings or signs apart from oral evidence.

Nevertheless, the use of oral evidence becomes imperative, especially when a court deals with an expert witness. It is a trite rule that evidence of expert witness must be adduced *viva voce*. In *South India Corporation (Travencore) Private Ltd v. H.J Stanley and Sons Ltd*,¹⁵ the court held categorically that the opinion of the expert or expert evidence must be given orally and a mere certificate by him is not admissible.

The Civil Procedure Code (CPC),¹⁶ as another procedural law, stipulates that “[t]he evidence of the witnesses in attendance shall be taken orally in open court in the presence and under the personal direction and superintendence of the judge or magistrate.”¹⁷ This rule emphasizes that a witness has to give his evidence *viva voce* in open court, even though the practice shows that the evidence of witnesses, especially in civil cases is taken in chambers. While interpreting the above provision which is *pari materia* with the Ugandan Civil Procedure Code (CPC), the High Court of Uganda in *Ongwen Antony & Another v. Ocaya Michael*¹⁸ explained that; the provision ensures that witness testimony is probative, credible, fairly and efficiently presented.¹⁹ Moreover, it enables the judicial personnel presiding over the civil proceeding to evaluate the witness by assessing the extent of the witness’ actual recollection and knowledge.²⁰

There is another justification that oral evidence that is given by a witness in an open court is preferred, among others, because it is easily accessible by both the court and the public than documentary evidence.²¹ This is because the public can follow the witnesses’ oral utterances rather than the witnesses’ documents, which are normally filed before the court and may only be accessible to the court’s officers such as judges, magistrates, advocates and clerks.

13 Evidence Act, section 61. As per section 53 of the Interpretation of Laws Act, Cap 1 R.E 2019, ‘may’ imports discretion as opposed to ‘shall’, which is imperative.

14 Sections 63 and 64(1) of Evidence Act. Also, section 100(1) of the same Act excludes the use of oral evidence when the terms of the contract have been reduced into the document. The parole evidence rule is also applicable when dealing with the contents of document, especially a written contract.

15 (1967) HCD 168.

16 Cap. 33 R.E 2022.

17 Order XVIII rule 4.

18 Civil Appeal No. 012 of 2017, at 10-11.

19 *Ibid.*

20 *Ibid.*

21 E. Magner, ‘The Best Evidence Oral Testimony or Documentary Proof?’, 18 *UNSW Law Journal* 1, (1995), 94.

As can be gathered above, the common law and adversarial legal system ordinarily put credence on the oral testimony of witnesses. The reason is that since oral testimony mostly requires the physical appearance of witnesses, courts are placed in a better position to assess the reliability, credibility and demeanour of witnesses.²² The belief is that witnesses who give out their testimony orally have a higher percentage of giving the best evidence. This explains why it is argued that “evidence elicited orally in the courtroom surroundings is often more reliable than that which a witness is prepared to sign up to in a pre-trial written statement.”²³

3.0 Contextualization of Witness Statements and Their Advantages in Civil Cases

Although the use of witness statements is regulated by various laws (both principal and subsidiary legislation), as will transpire later, none of the laws comprehensively define what amounts to a ‘witness statement.’ The Black’s Law Dictionary defines a witness statement as “a recorded account made under oath or in preparation of court proceedings, of a person’s knowledge of facts about something.”²⁴ It is a written text signed by a person containing the evidence that, the witness would be permitted to give orally.²⁵ Put differently, the statement is as good as the oral evidence that the witness would, if summoned, give in evidence and must include a statement of truth by the intended witness, which implies a signed statement that he believes the facts in it are true. Thus, it is a written, signed statement or text by a person who records the testimony of a witness given to the court and the adverse party before the hearing.

A witness statement is further defined as “a formal document, addressed to the Court, in which a witness sets out all the facts that they are aware of that apply to the case.”²⁶ This signifies that a witness statement is an official document that provides the court with the necessary facts of a suit. Those facts comprise the narrative of a person concerning an event experienced or personally witnessed and which are presented in written form. Normally, a witness statement takes on board records of facts that the witness perceived by his senses. In other words, a witness statement usually contains key incidents that the witness saw, heard, felt, touched, smelled or tested and to some extent other facts.²⁷

22 D. Stolt *op.cit* fn 8 at 37.

23 *Ongwen Antony and Another v. Ocaya Michael (supra)*, at 14-15.

24 B.A. Garner, ed. *Black’s Law Dictionary*, 8th edn (California: West Publishing Co, 2004), at 1174.

25 A. Keane, *The Modern Law of Evidence*, 6th edn (London: Oxford University press, 2006), at 148. See also the U.K Chancery Division Guide, 2016.

26 L. Rochel, ‘Witness statement and being a witness in a dispute’, <https://www.rochelegal.co.uk/resources/help-guides/witness-statements-and-being-a-witness/>, (accessed on 23 April 2024).

27 See Evidence Act, section 62.

From the above construction, a witness statement is a public document,²⁸ which can be used as documentary evidence before the court of law.²⁹ It is a public document because it forms part of the records of the acts of the judiciary.³⁰ As it will be transpired later, in a civil legal regime of most common law jurisdictions, including Tanzania, witness statements are filed and used in lieu of the evidence in chief. In other words, it is as good as an examination in chief presented in the written manner or a witness' testimony in chief reduced into writing and which is akin to an oral examination in chief given under oath.³¹

The use of a witness statement instead of an examination in chief is an exception to the general rule of examining the witness orally. This exception has been useful, especially when the court's time is limited, the suit is so complex having many parties and witnesses and also has a lot of exhibits or documents to be produced.³² The main objective of departing with oral evidence is to improve efficiency and save cost of civil proceedings. It also aims at saving time and assisting adverse parties in being aware of what evidence would have to meet.³³ This aims at eliminating any indicator of surprise (trial by ambush) before and during the hearing of the dispute.

Witness statement also provides expeditious disposal of the proceedings by curing the problem of delay in adjudicating cases through direct oral testimony.³⁴ The approach further intends to prevent objections to the leading questions and fasten determination of the cases.³⁵ Moreover, it helps the parties and judges or magistrates to concentrate on the real issue(s) in the dispute. This is because it assists in the identification of the real issue and encourages the parties to make admission of certain facts.³⁶ The ultimate goal of admitting witness statements is to accelerate justice and expediency in the administration of justice.

28 Section 3 of the Evidence Act defines a document as "...any writing, handwriting, typewriting, printing, Photostat, photography, computer data and every recording upon any tangible thing, any form of communication or representation including in electronic form, by letters, figures, marks or symbols or more than one of these means, which may be used for the purpose of recording any matter provided that recording is reasonably permanent and readable."

29 Section 3 of Evidence Act defines documentary evidence to mean as all documents produced as evidence before the court

30 According to section 83(a)(iii) of the Evidence Act, any document that forms the acts or records of the acts of the judicial body is a public document.

31 *Nas Hauliers Ltd. & 2 Others v. Equity Bank (T) Ltd. & Another*, High Court Commercial Division at Dar es Salaam, Commercial Case No. 105 of 2021 (unreported), at 12.

32 S. Magoiga, 'The Use Witness Statement in Prosecuting Civil Cases: Reflection on Laws, Procedure and Consequences,' a paper presented to the Tanganyika Law Society CLE Virtual Seminar, October, 2023, at 4.

33 C. Jackson, "Review on Civil litigation Costs, (Interim report), published on May 2009, Volume 2, Chapter 42, at 446.

34 S. Magoiga *op.cit* fn 30 at 8.

35 *Ibid.*

36 J. Hope, *op.cit* fn 3 at 442.

When a witness statement is used as a substitute for examination in chief of a witness, it usually shortens the duration of evidential taking or hearing especially in complex cases or cases that require expeditious disposal, such as commercial or business-oriented cases.³⁷ In a scenario where parties are represented by counsel, a witness statement aims at avoiding the advocate's slow movement in asking questions to his witness to give his evidence in chief.³⁸ Further, the use of witness statements does away with objections that might be raised during examination in chief by parties' counsel or adverse party; hence sparing the court's precious time in interrupting witnesses or guiding parties to the suit.

It is a trite law under the Evidence Act that a party who called the witness should not ask leading questions during the examination in chief.³⁹ The adverse party or his counsel may object if leading questions are asked at that phase of examining witnesses. All these objections and interruptions of witness by adverse party or court may be dispensed with if witness statements are opted instead of examination in chief. By using witness statements, the court will remain with only two stages of examining witnesses, namely cross-examination and re-examination.

A witness statement is useful because the narration of the witness is arranged chronologically and the other party is aware of its contents. In this situation, the cross-examination of the witness may focus on the vital issues that go to the heart of the dispute.⁴⁰ Eventually, it may put the court in a good position to ascertain the real facts or issues, hence adjudicating the dispute easily and providing good judgment.

It further assists the parties to the case not to be taken by surprise by the witness as it is experienced in the direct oral testimony.⁴¹ In the absence of a witness statement, the opponent party may be shocked by new facts given by the witness hence posing a big problem to ask the right questions. The rule is that a party who intends to rely on the statement of the witness must serve a copy of the statement to the adverse party before the commencement of the hearing. In that sense, it gives ample time to the adverse party to cross-check the evidence and prepare himself to counter it. Thus, it enables the opponent to make good preparations for cross-examination. The admissibility of the witness statement is important to the litigants and the counsel for the adverse party, as the same

37 S. Magoiga, *op.cit* fn 30 at 6.

38 *Ibid.*

39 Evidence Act, section 151(1).

40 M. Kocur, 'Witness Statement in International Commercial Arbitration', in *The Challenges and Future of Commercial and Investment Arbitration*, ed. B. Kalisz (Warsaw: Court Arbitration Leviatam, 2015), at 168.

41 *Ibid.*

creates a suitable condition for the other party to choose the witness to be cross-examined.

A witness statement is helpful for timid witnesses. Most of the common people have no confidence or are not bold when they appear before the court of law to give testimony and sometimes due to that fear they do not cooperate, by refusing to appear during evidence in chief. Additionally, deviating from oral testimony to witness statements may sometimes be prompted by parties' illness that makes them unable to appear before a court for examination in chief. Furthermore, witness statements shorten the duration that is usually spent during an evidentiary hearing.

All the above justifications for adopting witness statements instead of evidence in chief were summarized by the High Court of Uganda in *Ongwen Antony & Another v. Ocaya Michael*⁴² in these words:

[...] the fair and expeditious disposal of proceedings and the saving of costs, elimination of surprise, promotion of fair settlements and avoidance of trial, identification of the real issues and elimination of unnecessary issues, encouragement for admissions of fact, reduction in pre-trial applications, shortening of evidence in chief, improvement in cross-examination and concentration of parties on the real issues. When witness statements are used in the place of an oral examination in chief, Court time is concentrated on cross-examination rather than examination-in-chief.

In those complex cases, oral evidence, especially evidence in chief consumes considerable precious time of the court. This is because almost everything said by the witness has to be recorded by hand especially during this point in time when recording witness' evidence by machine has not commenced in many Tanzania courts.

3.0 Witness Statement vis-à-vis Affidavits and Other Pleadings

Apart from witness statements, evidence may be presented before the court of law via affidavits.⁴³ This signifies that the court may decide evidence to be given by an affidavit instead of or in addition to a witness statement since an affidavit is a sworn written statement used to give evidence.⁴⁴ In conjunction with a chamber summons, an affidavit is also commonly used to support certain applications before the tribunal or court of law.⁴⁵ As such, a witness statement and an affidavit appear to be more or less the same thing for some people.

⁴² Op. cit, p. 11.

⁴³ *Mohans Oysterbay Drinks Limited v. British American Tobacco Kenya Limited*, High Court of Tanzania Commercial Division at Dar es Salaam, Commercial Case No. 90 of 2014 (unreported), at 5.

⁴⁴ B. Curzon & P. Richards, *The Longman Dictionary of Law*, 7th edn (London: Pearson Longman, 2002), at 18.

⁴⁵ Order XLIII rule 2 of the CPC, for instance, provides that "Every application to the Court made under this Code shall, unless otherwise provided, be made by a chamber summons supported by affidavit.

Pleadings such as the plaint and the Written Statement of Defence (WSD) may often contain parties' evidence. Occasionally, there has been confusion in treating witness statements the same as affidavits or other pleadings. The reason is that these documents share some characteristics. Many advocates are most familiar with affidavits unlike the witness statements as the latter documents are not commonly used in civil cases. The questions to ponder at this juncture are whether witness statements are drafted the same as affidavits, or whether the two documents are the same or they substitute each other.

Both affidavits and witness statements require either a deponent (of an affidavit) or a witness (in a witness statement) to swear or affirm the truthfulness of their contents. This is signified by the presence of a jurat of attestation in both documents. Besides, both documents are regulated by the CPC. Whereas affidavits are governed by Order XIX of the CPC, witness statements on the other hand are regulated by Order VIII and Order XVIII of the CPC. Like an affidavit, a witness statement should not contain argumentative facts.⁴⁶

Essentially, both witness statements and affidavits are more or less interpreted the same. For instance, the Court of Appeal in *Mantrac (T) Ltd. v. Good Will Ceramics (T) Ltd.*⁴⁷ ruled that only offensive part(s) of the witness statement that contain argumentative facts could be expunged by the court leaving the rest of the document like what is normally done to the affidavit that contains some offensive paragraphs.⁴⁸

Both affidavits and witness statements have some common features like the jurat of attestation, the date and place made, be sworn/affirmed statements of the maker and the name of the person before whom it is sworn or affirmed.⁴⁹ Some requirements governing pleadings and affidavits also apply to the witness statement. They include, for example, verification of information by the maker and numbering of paragraphs, to mention just a few.

A defective witness statement like a defective affidavit can be amended by the leave of the court. This statement is justified by the decision in *Aggreko International Projects Ltd. v. Triumphant Trade and Consultancy Services Ltd.*⁵⁰ whereby the Court of Appeal of Tanzania ruled that:

46 *Mantrac Tanzania Limited v. Good Will Ceramics Tanzania Limited*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 269 of 2020, (unreported).

47 *Ibid.*

48 *Ibid* at 12.

49 *Mohans Oysterbay Drinks Limited v. British American Tobacco Kenya Limited* (*supra*), at 7.

50 Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 83 of 2020 (unreported).

[...] considering that the witness statement is similar to examination in chief in a written form, we... borrow a leaf from the situation whereby an affidavit which is taken to be evidence on oath may with a leave of the court be amended by way of a supplementary affidavit [...].

Despite the above similarities, affidavits and witness statements are legally not the same even though they may be deployed for the same purpose in civil proceedings. An affidavit may be taken by the commissioner for oaths, solicitors, judges or magistrates whereas the law does not categorise who can take a witness statement. A deponent is a person who gives evidence by using an affidavit whereas a person who gives evidence by way of the statement is known as a witness.⁵¹

Order VI of the CPC, which generally governs pleadings does not apply to the witness statement. On this assertion, the High Court of Tanzania in *Joseph Kitambi & Another v. CRDB Bank PLC & 2 Others*⁵² ruled categorically that:

The law governing witness statement is GN. No. 355 of 20/05/2022. As per paragraph 5.1 of the said GN No. 355 of 2022, a witness statement is the equivalence of oral evidence. *Since a witness statement is evidence in writing hence not forming part of the pleadings, it is the finding of this Court that there was no infraction of Order VI Rule 15 (3) of the CPC by the defendants in relation to the verification of witness statement as claimed by the plaintiff to render the same incurably defective.* (Emphasis added).

In the above case, the plaintiff's counsel objected, among others, that the witness statement did not comply with the requirements provided for by Order VI of the CPC. This objection was overruled by the court. Nonetheless, witness statements are applicable during the evidence stage as a substitute for examination in chief, unlike pleadings which are presented to the court during the pleading stage.

Unlike an affidavit which is presented to support an application, the adverse party has the right to cross-examine the maker of the witness statement. This means that in most cases as it will be highlighted later in this paper, a witness who files the witness statement has to appear for cross-examination, unlike a deponent of an affidavit. The witness statement unlike an affidavit may not contain the words such as 'I swear' or 'I affirm'. Nonetheless, the absence of these words does not make a witness statement to be defective provided it conforms to the prescribed form.⁵³

51 P. Kibuka, 'What you need to know about witness statement in Tanzania?' <https://www.thecitizen.co.tz/tanzania/oped/q-a-with-isidora-company-what-you-need-to-know-about-witness-statements-in-tanzania-2690126>, (accessed on 23 April 2024).

52 High Court of Tanzania at Dar es Salaam, Land Case No. 40 of 2018.

53 *Nas Hauliers Limited and Two Others v. Equity Bank (T) Ltd and Another* (*supra*), at 22.

A deponent of an affidavit usually has to state his religion and take an oath or an affirmation in the first paragraph or beginning of the affidavit. This does not apply to the witness statement. The High Court in *Mohans Oysterbay Drinks Ltd. v. British American Tobacco (K) Ltd.*⁵⁴ is an authoritative decision that extensively differentiated a witness statement and an affidavit. In distinguishing the two documents, the court ruled categorically that:

An affidavit is not a witness statement [...]. A person who gives evidence by affidavit, affirmation or deposition is called a "deponent"; and a person who gives evidence by witness statement is a 'witness'. Thus, a witness statement is not an affidavit, and the rules governing affidavits cannot be made to apply to witness statements.⁵⁵

Affidavits are the testimony of the persons who swear them whereas witness statements are equivalent to the oral evidence, which their makers would if called, give in evidence.⁵⁶ The two documents, *ie*, a witness statement and an affidavit are mutually exclusive. This means that in certain circumstances the court may order filing of an affidavit on top of a witness statement that has already been filed before. For example, a witness who absents himself from cross-examination after filing a witness statement may be compelled by the court to file an affidavit stating the reasons for his absence.

About the difference between the jurat of the affidavit and that of the witness statement, the court in *Mohans Oysterbay Drinks Ltd v. British American Tobacco Kenya Limited (supra)* pointed out that:

The jurat of an affidavit is a statement set out at the end of the document which authenticates the affidavit. It must be signed by the deponents; it must be completed and signed by the person before whom the affidavit was sworn whose name and qualification must be printed beneath his signature; and, contain the full address of the person before whom the affidavit was sworn; An affidavit must be sworn before a person independent of the parties or their representatives. Only the Commissioner for Oaths may administer oaths and take affidavits. A witness statement, on the other hand, must include a statement of truth by the intended maker that the facts stated in the witness statement are true so as to 'avoid verifying a witness statement containing a false statement without an honest belief in its truth.'⁵⁷

54 Commercial Case No. 90 of 2014 (unreported).

55 *Ibid* at 6.

56 *Ibid* at 8.

57 See page 8.

Normally, affidavits begin with the words 'I (full name) of (address) state on oath...'; instead of ending with a statement of truth, an affidavit ends with a jurat, which is a section at the end of the document that affirms the authenticity of the affidavit.⁵⁸ All these requirements do not apply to the witness statement.

4.0 Legal Regime on Witness Statement in Civil Matters

The legal regime regulating witness statements in civil cases in Tanzania consists of both principal and subsidiary legislation. The principal legislation includes the Evidence Act and the Civil Procedure Code. The subsidiary legislation on the other hand comprises the High Court (Commercial Division) Rules (2012) and the National Election (Election Petition) Rules (2020) as examined below.

4.1 The Evidence Act

The Evidence Act is the principal legislation that regulates the admissibility of all kinds of evidence,⁵⁹ such as oral, documentary and real evidences, to mention just a few. Before the amendment of the Evidence Act in 1980,⁶⁰ the proof of witness statement in both civil and criminal cases was limited to persons who cannot be called as witnesses or persons who cannot appear physically before the court based on various reasons, such as death, entitlements, privileges, or disability.⁶¹ The evidence of persons who cannot be called as witnesses may be in written form and presented before the court.⁶² Unlike the witness statement, which has to conform to a prescribed format, evidence of persons who cannot be called witnesses does not have a specific format. The reason is that sometimes the written statement of the person may be prepared unknowingly that it may be used as evidence before the court. A good example at this juncture is the dying declaration which usually explains the cause or circumstances that resulted in the death of the declarant.⁶³

The written statement of the person who cannot be called as a witness is normally transmitted to the court through another person as opposed to the witness statement that has to be filed to the court by the witness himself or his counsel.⁶⁴ Moreover, the maker of the witness statement has to appear for cross-examination, unlike the maker of the written statement of the person who cannot be called as a witness.

58 D. Stolt, *op. cit* fn 8 at 41.

59 Section 3 of the Evidence Act defines evidence as "...the means by which an alleged matter of fact, the truth of which if submitted to investigation, is proved or disproved; and without prejudice to the preceding generality, includes statements and admissions by accused persons."

60 The amendment of the Evidence Act was made vide the Evidence (Amendment) Act No. 19 of 1980.

61 Evidence Act, section. 34.

62 *Ibid.*

63 *Ibid* section 34(a).

64 S. Singh, *Principles of the Law of Evidence*, 15th Edn (Allahabad: Central Law Publications, 2005), at 181.

Section 34C of the Evidence Act is the specific provision that deals with the admissibility of a witness's statement in civil matters in Tanzania.⁶⁵ The section states, among others, that:

[...] in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document tending to establish that fact shall, in production of the original document, be admissible as evidence of that fact in lieu of the attendance of the witness [...].

However, the application of this section by civil courts in Tanzania since it was introduced in the Evidence Act almost 44 years ago, is argued to be very minimal.⁶⁶ The novelty of the witness statements, as a new approach deviating from oral testimony and the lack of regulations to govern them for a long time, probably have contributed to the non-applicability of this section. Recently, the High Court of Tanzania made use of section 34C in *Akiba Commercial Bank PLC v. UAP Insurance Tanzania Ltd.*⁶⁷ In this case, the court admitted the statement of the plaintiff's sole witness who passed away before the trial.

The above provision sets out various prerequisites to be satisfied by the maker of the witness statement. For instance, the maker should be the person who can appear as a witness and adduce his testimony orally in the civil proceeding in question.⁶⁸ This entails that the maker must have personal knowledge of the facts of the dispute. Further, the witness statement to be presented at the court should be the original document.⁶⁹ The court may also receive witness statements due to the impracticability of securing the maker's attendance, for instance, is not in Tanzania, is dead, or due to bodily or mental unfitness facing him.⁷⁰ The section also permits admitting witness statements despite the availability of the maker who is not called as a witness.⁷¹ Occasionally, the court may receive a certified copy instead of the original witness statement.⁷²

Generally, section 34C of the Evidence Act emphasises that the production of a witness statement is a substitute of his/her physical attendance. Nevertheless, the section is silent on whether a witness who has presented a statement may also be called for cross-examination by the adverse party.

65 This provision was added in the Evidence Act in 1980 via section 8 of the Evidence (Amendment) Act No. 19 of 1980.

66 S. Magoiga *op.cit* fn 30 at 8.

67 High Court of Tanzania at Dar es Salaam, Commercial Case No. 24 of 2018 (unreported).

68 Section 34(C)(1).

69 Section 34(C)(1)(b).

70 Section 34(C)(1).

71 Section 34C(2)(a).

72 Section 34(C)(2)(b).

4.2 The Civil Procedure Code

In 2021 the CPC was amended to accommodate witness statements as one of the ways to present evidence in tribunals and courts of law.⁷³ Order VIII rule 22(1) was amended to permit a judge or magistrate who presides over the first pretrial settlement and scheduling conference, among others, to “determine whether the trial shall proceed orally or by witness statements and giving appropriate direction in that behalf.” Further, Order XVIII of the CPC was deleted and substituted with a new Order. The new Order XVIII (2)(1) permits the examination of the witness in chief to be conducted either orally or through the witness statement.

Further, the new Order gives out requirements to be considered for the statement to be received by the court. These requirements are like the statement must be made on oath or affirmation, contain the name age, address and occupation of the witness, be in the witness’s own words and not include matters of information or belief.⁷⁴ Moreover, the statement must be dated and signed or otherwise authenticated by the intended witness, be numbered in paragraph and must be in the language of the court.⁷⁵

The plaintiff who intends to rely on the witness statement has to file the witness statement in not less than seven days before the hearing; whereas the defendant has to file the witness statement fourteen days after the closure of the plaintiff’s case.⁷⁶ Each party is required to serve the witness statement to the opposite party within five days of being filed.⁷⁷ Failure to file the witness statement and serve the same to the opposite party within the prescribed time without substantial reasons may necessitate the court to strike out the filed statement.⁷⁸

Since the witness statement is a substitute for examination in chief, the other stages of examining the witness follow after filing the witness statement. As such, a witness whose statement has been filed has to appear in person during the hearing of the suit for formal production of the statement, tendering exhibits, or cross-examination.⁷⁹ It is not clear what is the purpose of formal production since the witness statement is already filed in court. This practice may just elongate unnecessarily the hearing time. It is suggested that witness statements have to be filed in court without formal production as it is done when complaints and WSD are filed in court. After the formal production of the witness statement, the rules require the filed statement to be read loudly by or

73 It was amended by the Civil Procedure Code (Amendment of the First Schedule) Rules (G.N. No. 761 of 2021).

74 Order XVIII rule 3(a-e) of the CPC.

75 Order XVIII rule 3(f-i).

76 Order XVIII rule 3(1-2).

77 Order XVIII rule 3(3).

78 Order XVIII rule 4.

79 Order XVIII rule 5(1)(2).

on behalf of the witness.⁸⁰ Certainly, this procedure may unreasonably prolong the proceedings because the court and all parties are already served with the witness statement. The witness statement may be struck out by the court if the witness fails to appear in person during the hearing stage of the suit.⁸¹ In sum, witness statements have to comply with the approved forms.⁸²

The CPC's Orders regulating witness statements are criticised for not providing consequences for the failure to file witness statements by either party.⁸³ As noted above, the CPC rules stipulate only the consequences of failure to serve the witness statement. All in all, failure to file witness statements as directed by the Court is equal to failure to produce witnesses or perform any other act necessary to further progress of the suit when the case is called for hearing.⁸⁴

4.3 The High Court (Commercial Division) Procedure Rules

Although the use of witness statements seems to be a new approach in the realm of civil procedure in Mainland Tanzania, it is no longer a new method of tendering evidence in the High Court Commercial Division since it has been commonly used for almost twelve years now. The High Court (Commercial Division) Procedure Rules were originally made in 2012⁸⁵ and amended in 2019.⁸⁶ The rules provide procedures for handling all commercial cases in the High Court Commercial Division. Apart from other procedures, the rules introduced the use of witness statements. The main goal for introducing witness statements in commercial matters before the High Court Commercial Division is to ensure expediency in the administration of justice by speeding up cases of a commercial and business nature.⁸⁷ This is because commercial cases must be determined within as short a time as possible not to disrupt businesses and minimize the loss that may be incurred by businessmen through regular attendance in courts.

In essence, cases of a commercial nature as per the current rules require all facts to be proved on the strength or weakness of the witness statements. This indicates clearly that witness statements are fundamental in proving and disproving claims in commercial cases before the High Court Commercial

⁸⁰ Order XVIII rule 5(3).

⁸¹ Order XVIII rule 5(5).

⁸² See the Civil Procedure (Approved Forms) (Amendment) Notice, 2022, GN. No. 355 published on 20 May 2022.

⁸³ *Assemble Insurance Tanzania Limited v. Deloitte & Touche*, High Court of Tanzania at Dar es Salaam, Civil Case No. 139 of 2019 (unreported), at 7. See also *Fair Deal Auto Pvt Limited v. City Boys Electronics Co. Ltd*, High Court of Tanzania at Dar es Salaam, Civil Case No. 187 of 2019 (unreported), at 2.

⁸⁴ *Assemble Insurance Tanzania Limited v. Deloitte & Touche*, (*supra*), at 6-7.

⁸⁵ GN No. 250, 2012 published on 13 July 2012. These are also referred to as Principal rules.

⁸⁶ Amended by GN. No. 107 published on 01 February 2019.

⁸⁷ *Africarriers Limited v. Shirika la Usafiri Dar es Salaam and Another*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No 350 Of 2020 (unreported), at 19.

Division.⁸⁸ The importance of these rules was also emphasised by the Court of Appeal of Tanzania in *A.A.R Insurance (T) Ltd. v. Beatus Kisusi*.⁸⁹ In this case, Luanda, J.A. (as he then was) stated that:

[...] with the coming of the new rules the procedure of adducing evidence in Commercial court has changed, where by the witness is required to file his witness statement along with the intended exhibits.

According to the rules, a witness statement given on oath or affirmation substitutes the evidence in chief in all cases that are instituted through a plaint.⁹⁰ In *Eco Bank (T) Ltd. v. Future Trading Co. Ltd.*,⁹¹ the Court of Appeal stated that a witness statement in commercial court is deemed to be evidence in chief. Thus, the same shall pass the test of admissibility to strike out the irrelevant facts, scandalous and inadmissible parts of the statement. In the same line of argument, it is an irregularity for the court to allow a party to testify orally after holding that his witness statement is defective.⁹²

Parties must file the witness statement within fourteen days of the completion of the Final Pre-Trial Conference (FPTC).⁹³ Essentially, filing a witness statement within the stipulated time is mandatory as the rule uses the word “shall”.⁹⁴ In explaining the meaning of the phrase ‘of completion of the FPTC’ Magoiga, J in *Akiba Commercial Bank PLC v. UAP Tanzania Company Ltd. (supra)* stated that:

[...] the use of the phrase “of the completion” used in the Rule, means the day which the act was done has to be the starting point to count and, as such is part of the day which the subsequent act has to be done.

The rules further provide other requirements of the witness statement. That is, be made on oath or affirmation, contain name, address, and occupation of the witness, be as far reasonable practicable be in the intended witness’ own words, be dated and signed or authenticated by the intended witness, be substantially in the form prescribed in the rules and also be numbered in paragraphs.⁹⁵ The witness statements are also required to be written in the language of the court or in any language accompanied by a certified translation.⁹⁶

88 P. Kibuka *op.cit* fn 49.

89 Court of Appeal of Tanzania at Mwanza, Civil Appeal No. 67 of 2015 (unreported).

90 Rule 49(1).

91 Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 82 of 2019 (unreported).

92 *Mantrac Tanzania Limited v. Good Will Ceramics Tanzania Limited, (supra)*.

93 Rule 49(2).

94 *Africarriers Limited v. Shirika la Usafiri Dar es Salaam and Another, (supra)*, at 17.

95 Rule 50(1).

96 Rule 54(1)(2)(3)(4).

The court may strike out the witness statement that has not been served to the other party within a prescribed time.⁹⁷ The purpose of filing and serving the witness statement to the adverse party was stated in *Afriscan Group (T) Ltd. v. Said Msangi*.⁹⁸ In this case, the court ruled that:

[...] the purpose of filing and serving the witness statement to an adverse party is to allow them to assess the same and prepare for cross-examination, it follows that any party that fails to file the same has no back door through which he can testify more so where such move is deemed to ruin the statements of the witnesses of the adverse party.⁹⁹

It is also the duty of the party who relies on the witness statement to cause such a witness to appear for cross-examination during the hearing of the case. The rationale to summon a witness for cross-examination is because “the mere filing of the witness statement does not make it to amounts to evidence in chief until when the witness appears in Court to testify.”¹⁰⁰ Non-appearance of a witness for cross-examination for unjustifiable reasons may cause the court to strike out the filed witness statement.¹⁰¹ Consequently, if he is the sole plaintiff’s witness who defaulted to appear, the suit may be dismissed by the court; whereas if he is the defendant’s sole witness, the suit may proceed *ex parte*, the defendant’s counterclaim, if any, may be dismissed and the court may deliver a judgment provided the plaintiff’s case was closed.¹⁰² As far as the contents of the witness statement are concerned, these rules are replicas of Order XVIII rule 3 of the CPC.

The rules are strictly followed to the extent that lapse of only a day may lead to a dismissal of the suit.¹⁰³ They are further interpreted in such a manner to prevent opening pandora’s box for the party to disobey and stifle the court’s orders.¹⁰⁴ Generally, witnesses’ statements are essential to proving or disproving claims in all suits of a commercial nature before the High Court Commercial Division.

Although the rules are silent on the consequences of filing a witness statement, however, several decisions of the court have ruled that failure to file the witness statement within the prescribed time as ordered by the court is tantamount to

⁹⁷ Rule 55.

⁹⁸ High Court of Tanzania at Dar es Salaam, Commercial Case No. 87 of 2013 (unreported), at 9.

⁹⁹ *Ibid.*

¹⁰⁰ *Nas Hauliers Limited and Two Others v. Equity Bank (T) Ltd and Another (supra)*, at 23

¹⁰¹ Rule 56. See also *NIC Bank Tanzania Limited v. Hirji Abdallah Kapikulila*, High Court Commercial Division at Dar es Salaam, Misc. Commercial Application No. 253 of 2017 (unreported).

¹⁰² *Kuenhe (Tanzania) Limited v. SVT Tanzania Limited*, High Court of Tanzania at Dar es Salaam, Commercial Case No. 100 of 2022 (unreported).

¹⁰³ *Abid Ally Sykes T/A Afrinet Solutions v. M-PESA Limited*, High Court of Tanzania at Dar es Salaam, Commercial Case No. 15 of 2023 (unreported).

¹⁰⁴ *Assemble Insurance Tanzania Limited v Deloitte & Touche, (supra)*, at 10.

failure to prosecute the case through the intended witness.¹⁰⁵ Consequently, the late-filed witness statement may be struck out from the record and the overriding objective may not be invoked to cure this defect.¹⁰⁶ The reason is that,

[...] overriding objective is not meant to enable parties to circumvent the mandatory rules of the Court or to turn a blind eye to the mandatory provisions of the procedural law which go to the foundation of the case.¹⁰⁷

Additionally, the rules are silent on whether the court can reject or strike out a witness statement that does not comply with rules 48 and 49.¹⁰⁸ Further, the rules do not state whether the Court can permit a witness to use the defective witness statement. This may happen, for example, when a statement is not dated or where the place of attestation is not shown or if the court can order an amendment of a defective witness statement.¹⁰⁹ This issue goes hand in hand with another question whether the court may permit amendment of a defective witness statement bearing on mind that it is as good as evidence in chief that has been reduced into writing.¹¹⁰

The court in *Ivee Infusion EPZ Ltd. v. Mak Medics Ltd.*¹¹¹ struck out without giving the plaintiff a leave to amend the witness statement of the only witness that was argued to be incurably defective.

Nonetheless, in all these *lacunas*, the court may use discretionary and inherent powers, among others, provided by section 95 of the CPC or the overriding objective principle under sections 3A and 4A of the CPC to make ends of justice meet.

4.4 The National Elections (Election Petitions) Rules

Election petitions are among the cases that require expeditious disposal by a court of law to enable the rightful elected candidate to take an oath or affirmation and continue executing his duties legally. Most election petitions involve many parties, many witnesses, and also many exhibits. It is from this prudence that the use of witness statements was introduced in election petitions. In exercising the power to make rules given by the provision of section 117(1) of the National Election Act,¹¹² in 2020 the Chief Justice of Tanzania

105 *Equity for Tanzania Limited v. Feme Mining Equipment and Agriculture Ltd*, High Court of Tanzania at Dar es Salaam, Misc. Civil Case No. 99 of 2020 (unreported) and *Puma Energy Tanzania Ltd v. Spec Check Enterprises Ltd*, High Court of Tanzania at Dar es Salaam, Commercial Case No. 19 of 2014, (unreported) and *Simply Fresh Tanzania Limited and Three Others v. Yasmine Haji*, High Court of Tanzania at Dar es Salaam, Commercial Case No. 76 of 2020 (unreported).

106 See *Africarriers Limited v. Shirika la Usafiri Dar es Salaam and Another*, (*supra*).

107 *Ibid* at 19.

108 *Mohans Oysterbay Drinks Limited v. British American Tobacco Kenya Limited* (*supra*), at 9.

109 *Ibid*.

110 *Nas Hauliers Limited and Two Others v. Equity Bank (T) Ltd and Another* (*supra*), at 24.

111 High Court of Tanzania at Arusha, Commercial Case No. 3 of 2019 (unreported).

112 Cap. 343 R.E 2022.

promulgated new rules governing election petitions.¹¹³ The new rules stipulate categorically that “hearing of election petitions before the court shall be by way of a witness statement in lieu of evidence-in-chief.”¹¹⁴ Basically, before this new rules, hearing of the election petition was done through filling an affidavit.¹¹⁵ Substituting the use of affidavits by witness statements as hinted earlier indicates that both documents perform more or less the same functions.

Rule 22 (3) provides for the time frame of filling the witness statement to wit, the statement shall be filled in not less than forty-eight hours to the office of the registrar. Additionally, the rules require witness statement to be made in affirmation or oath, contain the name, age address, and occupation of the witness, be so far as practicable in the intended witness’s own words, and not include the matter of information or belief which are not admissible and where admissible must state the sources.¹¹⁶ Further, the statement should not contain lengthy quotations from documents or engage in legal or other arguments, be dated and signed or authenticated by the witness, must be in numbered paragraphs and be in the language of the court.¹¹⁷ Moreover, the rules enjoin witness statements to be enclosed in a sealed envelope and be opened by the court when the witness who has given a statement is called to give evidence.¹¹⁸

All in all, the laws examined above appear to provide more or less similar procedures in the admissibility of witness statements in civil matters in Tanzania, especially in commercial and election petitions. The next part examines the challenges that have been encountered by legal practitioners and other stakeholders in using witness statements as a substitute for oral testimony.

5.0 Legal and Practical Challenges Facing the Use of Witness Statements in Tanzania

As has been noted above, the use of witness statements theoretically is not a new subject in Tanzania. It was introduced in the country in the 1980s. However, practically the use of witness statements in civil cases unlike in criminal cases is a fairly novel phenomenon to most legal practitioners.¹¹⁹ Apart from the lacuna in the rules governing witness statements, as pointed out earlier, there are other practical and legal challenges such as non-compliance by some advocates of the legal requirement in the drafting of witness statements.¹²⁰

113 The National Elections (Election Petitions) Rules, GN No. 782 of 2020 published on 18 September 2020. These new rules replaced the old rules of 2010, which came into operation under the GN No. 447 of 2010.

114 Rule 22(1).

115 See the National Elections (Election Petitions) Rules, 2010.

116 Rule 22(5).

117 Rule 22(5).

118 Rule 22 (8).

119 S. Magoiga, *op.cit* fn 30 at 25.

120 *Ibid.*

Even though there are prescribed forms for filling personal witness' words, nonetheless it is still a challenge in drafting accurately the witness statement per the law. This problem is sometimes caused by limited expertise among lawyers or persons engaged in preparing witness statements. A poorly drafted witness statement may include irrelevant and extraneous facts rather than what is narrated by the witness.¹²¹

Determining the actual time for filing a witness statement is another challenge. Although the legal framework examined above provides the time frame when parties can file the witness statement, nevertheless, it is still a challenge for many practitioners to interpret rule 49(2) of the High Court (Commercial Division) Procedure Rules. Briefly, this rule enjoins parties to file witness statements 'within fourteen days of the completion of the final pre-trial conference.' Many advocates have failed to properly construe the phrase 'within fourteen days'. The issue has always been whether the computation of 14 days commences on the very day the FPTC was conducted or the next day. This matter has been comprehensively dealt with by a good number of decisions such as *Equity for Tanzania Ltd/ v. Feme Mining Equipment and Agriculture Ltd. (supra)*, *Abid Ally Sykes T/A Afrinet Solutions v. M-PESA Ltd. (supra)* and *Akiba Commercial Bank PLC v. UAP Tanzania Co. Ltd. (supra)*. In all these decisions the court ruled that the calculation of 14 days includes the day when FPTC was conducted.

The other challenge that has exacerbated the above issue is whether other laws, such as the Interpretation of Laws Act¹²² and the Law of Limitation Act¹²³ can be used in commercial cases in addition to the rules, especially in the computation of time to file witness statements. In *Meng Qi International Ltd. v. Corporate Security Services Ltd.*¹²⁴ the High Court interpreted rule 49(2) of the Commercial Court in line with the Law of Limitation Act in determining the exact time to file witness statements. The main issue in this case was whether the witness statements were filed within the required time as per rule 49(2) of the High Court Commercial Court. However, the same Court in *Abid Ally Sykes T/A Afrinet Solutions v. M-PESA Ltd. (supra)*, High Court of Tanzania ruled that Commercial Court rules are self-satisfactory and no need to import the interpretation from other laws such as the Law of Limitation Act.

The practice also shows that most witness statements are not drafted by witnesses but rather by their legal counsel. Even when a witness prepares his statement, the same has to be thoroughly reviewed by the advocate to do away with unnecessary objections that ultimately may delay the expeditious hearing

121 C. Jackson *op.cit* fn 31 at 446.

122 Cap. 1 R.E 2019.

123 Cap. 89 R.E 2019.

124 High Court of Tanzania at Dar es Salaam, Commercial Case No. 49 of 2016 (unreported).

of the suit. On the one hand, this practice may increase the cost to a party to the dispute as he has to find a legal practitioner to draft the statement.¹²⁵ This explains why sometimes it is argued that “witness statements have ceased to be the authentic account of the lay witness, instead they have become an elaborate costly branch of legal drafting.”¹²⁶

At times, there is a mismatch of the oral and written witness statement or the witness story may differ with what is stated in the witness statement drafted by his counsel.¹²⁷ Even though the witness statement may not be changed by his counsel, what the witness stated may not be exactly what is finally recorded in the witness statement.

This assertion is supported by the statement of Lord Woolf who argued that “the statements can bear very little relation to what a witness of fact would say.”¹²⁸ This implies that sometimes there can be a substitution of the witness’ words by the words of his counsel.¹²⁹ Generally, the witness statement induced or coached by the lawyer may detract and reduce to a great extent the credibility of a witness.¹³⁰ Nonetheless, the Tanzanian Advocates Professional Conduct and Etiquette Regulations prohibit such a practice.¹³¹ In verbatim they state that “an advocate shall not knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or authority.”¹³²

The witness and his counsel, if any, have to prepare various drafts to get the best one. If this situation happens, sometimes it may distort the original witnesses’ words. The effect of this practice is that the witness statements may be written in an accurate, technical and sophisticated style and in a language that is not the mother tongue of the witness.¹³³ Explaining this aspect the High Court of Uganda ruled that:

[...] developing statements through numerous drafts, getting the witness to retell the story over and over, is a process which may corrupt memory and render the final product less reliable than the first "unvarnished" recollection.¹³⁴

125 D. Stolt *op.cit* fn 8 at 35.

126 L. Woolf, ‘A report on Access to Justice, <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1996.tb02694.x>, (accessed on 05 May 2024).

127 D. Stolt *op.cit* fn 8 at 35.

128 L. Woolf, *op.cit* fn 123.

129 *Ongwen Antony and Another v. Ocaya Michael (supra)*, at 13.

130 M. Sammartano, ‘Witness Statements: A Useful Tool or an Obstacle?’, 2020, <https://littletonchambers.com/article-webinars/witness-statements-a-useful-tool-or-an-obstacle>, (accessed on 14 May 2024).

131 GN. No. 118 published on 09 March 2018.

132 Rule 92(2)(f).

133 D. Stolt *op.cit* fn 8 at 35.

134 *Ongwen Antony and Another v. Ocaya Michael (supra)*, p. 16.

Echoing the same point, Coumbe argued that:

When a written brief is prepared, the witness's evidence in chief is, in effect, given in legal offices instead of the courtroom. Inevitably there is a greater risk that the true recollection and words of the witness will be contaminated by the reconstruction, language and advocacy of the lawyers preparing the brief. A draft brief will often go through multiple revisions [...].¹³⁵

Too much use of the lawyer or party's counsel to craft a witness statement may have consequences such as changing or treating this document to be like other pleadings or memoranda. On this point, Stolt argues that "some poor witness statements drafted by lawyers, however, are merely a repetition of the party's pleading and do not serve their purpose as a means of evidence."¹³⁶ Mwambegele, J. (as he then was) in *Puma Energy Tanzania Ltd. v. Spec Check Enterprises Ltd.* (*supra*) was confronted with this challenge and stated expressly that the witness statements are occasionally drafted similarly or as a repetition to the plaint that has been filed.

Thus, it is like a copy-and-paste work of the plaint.

The pieces of legislation examined above do not provide room for amendment of the witness statement already filed in court. This challenge was noted by the Court of Appeal in *Aggreko International Project Ltd. v. Triumphant Trade and Consultancy Service Ltd.* (*supra*). In this case, the court stated expressly that the law does not specifically provide for amendment of witnesses' statements. Silence of the law may enable some judges or magistrates to deny a leave to amend witness statements thus resulting in a miscarriage of justice.

Further, all the reviewed above principal and subsidiary legislation do not indicate who can take witness statements. Put differently, the law governing witness statements in Tanzania is silent on the authorised persons to take witness statements in civil suits. As such, there is a risk of corrupting memory or coaching the witness by a person who takes witness statements through the process. This situation may unlikely happen to the advocates since they are guided by the law, professional conduct and etiquette as noted above.

Recording of witness statement is also another challenge. Most witness statements are recorded without the presence of a third person who can prove that what is recorded is the same narration of the witness. This leaves a loophole for the person to prepare the witness statement for his whims, hence may include more facts than what is given out by the witness. It is important to note

¹³⁵ G. Coumbe, "Witness Statement in Civil Cases-Show me the Evidence", A Paper Presented at a "Litigation Skills Masterclass" Seminar, Stamford Plaza, Auckland, 25 November 2015.

¹³⁶ D. Stolt *op.cit* fn 8 at 55.

that some people are illiterate as they do not know how to read and write. Under this situation, the drafter of the witness statement may write different facts or contents from what is narrated or known by the witness.

8.0 Conclusion and Recommendations

The use of witness statements in civil cases has been adopted in Tanzania, especially to accelerate the hearing of complex disputes and those cases that require urgent determination. This new approach has the spirit of reducing the backlog of cases in courts. Essentially, deviation from orality to witness statement has been mostly driven by economic reasons. As noted above, the approach is compulsory for commercial cases and election petitions. In other types of civil cases, it is at the discretion of the judge or magistrate presiding over the suit to opt whether to use witness statements or oral testimony.

The article has noted that various laws and rules regulate the use of witness statements in civil cases, such as the Evidence Act, the Civil Procedure Code, the High Court (Commercial Division Procedure) Rules and the Election Petition Rules. These rules provide useful guidance on how best witness statements may be prepared (*i.e.*, contents) and their presentation before the court. Since witness statements are legal documents, the role of advocates in their preparation cannot be underrated. As such, the article has identified and discussed various challenges faced by legal practitioners in the use of witness statements in civil cases in Tanzania.

As noted earlier some of the witnesses are illiterate and do not know how to write and read. The recorder or drafter of the witness statement may be a lawyer who has an interest or who may ensure that what he wants is reflected in the statement. Therefore, the law has to set conditions requiring the independent person (a third party) to witness the entire session of recording the witness statement. After recording, the content of the statement must be read aloud before the witness to allow the witness to prove what is written is the same as what has been narrated by him. Also, the court may have the discretion to determine whether that impartial person is needed to appear or not, based on the circumstances of the case. This would assist in ensuring the credibility and originality of the witness statement.

Further, the laws and rules must allow amendment of witness statements. This is because there is no provision in the pieces of civil legislation that gives room for the amendment of the witness statement. It depends on the discretion of the court to give or deny a leave to amend the witness statement so far that the amendment would not prejudice the rights of the other party. As noted earlier, Mkuze, J. (as she then was) in *Aggreko International Project Ltd. v. Triumphant Trade and consultancy Service Ltd.* (*supra*) used the court's discretion to permit

amendment of witness statement. Since the Court of Appeal is not strictly tied up to follow its previous decision, other justices of appeal can come up with other decisions that bar the amendment of the witness statement.

There is also a need for legal frameworks regulating witness statements to be harmonised. The article has noted that the legal frameworks governing the admissibility of the witness statement, to some extent, do not have similar conditions. For instance, rules that govern timing and time framework for filing witness statements. The CPC requires filing statements seven days after mediation whereas the High Court Commercial Procedure Rules require filing statements within fourteen days after completion of FPTC. Further, the requirement of a witness to take an oath or affirmation as reflected in rule 48(1) of the High Court (Commercial Division Procedure) Rules, Order XVIII of the CPC and rule 22 (5) of the National Election (Election Petition) Rules should also be imported in section 34C of the Evidence Act. Therefore, the laws regulating witness statements should consort with each other.

Since the spirit behind the use of witness statements in civil cases is to save time, speed up proceedings and reduce the backlog of cases, this paper recommends the amendment of the laws to remove all provisions that may hinder the achievement of this goal. In particular, the rules that require formal production and reading loud the filed statement by or on behalf of the witness should be deleted for the overriding objective of expediting civil proceedings.

Further, it is important for the advocates/lawyers to only help the witness in preparing the statement rather than influencing or dictating what to say or write. If an advocate does so it will be like asking a leading question during the examination in chief or re-examination stage. Witness statement has to be verbatim account of what a witness said and not what his counsel has crafted, influenced, or coached the witness to say.¹³⁷ Before admissibility of the witness statement, the court must scrutinize the document to ensure that it contains only the witness' own words, not the advocate's words.¹³⁸ In this aspect, the court should spend prudently its mandate to control lawyers or recorders of witness statements who try to own witness statements.¹³⁹

The legal framework regulating the admissibility of witness statements in Tanzania should be amended to stipulate persons who can take witness statements such as advocates and other lawyers. It has been noted, among others, that the Tanzanian civil legal framework does not describe persons who can record witness statements. The law ought to prescribe persons and their

¹³⁷ *Ongwen Antony and Another v. Ocaya Michael (supra)*, at 13.

¹³⁸ *Ibid.*

¹³⁹ *D. Stolt op.cit* fn 8 at 36.

qualifications because it would help to get rid of the challenge of the statement being recorded by an unqualified person. The High Court of Uganda has emphasised that the court must ensure that:

[...] any witness statements taken and presented before it were taken either by an advocate or, if for some reason that is not practicable, by somebody who can be relied upon to exercise the same standard as should apply if the statements were taken by an advocate.¹⁴⁰

Additionally, witness statements may be used only to represented parties, unlike unrepresented ones. Also, witness statements may be adopted where the court is seated with only a magistrate or judge and distinguished from the court that has the assessors.¹⁴¹ Also, witness statements should be reserved for only complex disputes whereas simple cases can be determined orally.

140 *Ongwen Antony and Another v. Ocaya Michael (supra)*, at 17.

141 *E. Magner op.cit* fn 19 at 79.