



OFFICE OF THE OMBUDSMAN

TYPES OF EVIDENCE AND ADMISSIBILITY REQUIREMENTS

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I. The role of the Ombudsman in collecting evidence

1. Strategies to collect evidence:

- ✓ Legal framework updated: **Example:** Law n°54/2018 of 13/08/2018 on fighting against corruption and the law n°15/2004 of 12/06/2004 relating to evidence and its production;
- ✓ Systems and procedures established and digitalized
- ✓ Declaration of assets and verification of assets declared;
- ✓ Use of informants => Law n°44bis/2017 of 06/09/2017 relating to the protection of whistle blowers;
- ✓ International cooperation: Membership and partnership with regional and international organizations: East African Association of Anti-Corruption Authorities (EAAACA), Association of Anti-Corruption Agencies in Commonwealth Africa (CAACC);

Strategies (Cont'd)

- ✓ Partnership and collaboration with other institutions (**Rwanda Bureau of Investigation and National Public Prosecution Authority, RDB, RRA, RLMUA**) to search for evidence and prosecute corruption cases.
- ✓ Close collaboration with civil society organizations (example: Transparency International) to collect evidence;

II. Evidence management

Evidence is the demonstration of the truth of a fact; therefore:

- Evidence is collected in a manner which does not compromise its nature;
- Evidence is kept in a way which maintains its nature;
- Evidence is handled in a fashion which allows no doubt that it could not have been accidentally or deliberately altered or substituted;
- Presentation, admission or reception of the evidence prohibited are void in determining the issues of a case (Article 8 of the law n^o15/2004 of 12/06/2004).

III. Types of evidence

- An evidence based on a legal issue or on a fact can be proved by the use of **written evidence, testimony, presumption or circumstantial evidence, admission of a party or any other material evidence** (Article 9 of the law n^o15/2004 of 12/06/2004);
- In criminal cases, **evidence is based on all grounds**, factual or legal provided that parties have been given a chance to be present for cross-examination (Article 119 of the law n^o15/2004 of 12/06/2004);
- It is prohibited to produce evidence based on **mixture, ordeal, divination, witchcraft or any other magical, mythical, esoteric or superstitious means** (Article 5 of the law n^o15/2004 of 12/06/2004);
- The courts rule on the validity of the prosecution or defense evidence;
- Evidences collected under torture are prohibited (article 6 of the law n^o15/2004 of 12/06/2004 relating to evidence and its production).

Types of evidence (cont'd)

There are 4 types of evidence:

- Real evidence (Physical evidence): thing that was present or used in the case. **Example:** gun, vehicle, knife, bloodied clothing, etc.
- Demonstrative evidence: Evidence that demonstrates the testimony given by a witness; this can use diagrams, maps, etc.
- Testimonial evidence (Witness testimony): Statement made by a witness. As said by Miller & Roche in *False Arrest or False Imprisonment 2018*, testimonial evidence is viewed by the court to be simplest type of evidence.
- Documentary evidence: any type of evidence that helps to document the issue being discussed in the trial.

Types of evidence (cont'd)

Expert evidence:

- Expert evidence is used to assist the court when the case before it involves matters on which it does not have the requisite technical or specialist knowledge
- Admissible testimony relating to a professional, scientific, or technical subject. Expert evidence is based on formal and/or special study, training, or experience that imparts the competency to form an opinion upon matters associated with that subject.
- An expert whose assistance is sought must first vow to help the justice by taking the following oath: *«I, swear that I have fulfilled my mission completely and conscientiously, with accuracy and honesty. May I face the law if I did not do it with the due accuracy».*
- The expert drafts a report conscientiously with due professional care.

Types of evidence (cont'd)

Hearsay evidence:

- Pedro Munoz-Amato in *The hearsay rule and its exceptions, California Law Review, March 1944* said that in the admissibility of hearsay, courts should be governed by two realities:
 - that hearsay evidence has not been subjected to the tests of accuracy and veracity and so is of inferior value to the testimony of witnesses to whom those tests have been applied;
 - that, on the other hand, it is not worthless and should be considered in law suits as it is in everyday life.
- Many reasons have been advanced by judges and text-writers as the bases for the exclusion of hearsay evidence:
 - the lack of oath;
 - the dangers of error in its transmission;
 - the lack of personal knowledge by the witness of the fact declared;
 - the lack of presence of the declarant in a court of justice;
 - the lack of confrontation of the declarant by the person against whom the evidence is offered;
 - the lack of opportunity for cross-examination is the real basis for exclusion.

IV. LAYING CHARGES, PRESENTING AND SUPPORTING THE CASE IN COURT

Direct versus indirect or circumstantial evidence

- It is often difficult to obtain a conviction for corruption and money laundering crimes. Direct evidence of these crimes is only available in rare cases. Corrupt officials and money launderers often use the services of skilled accountants and lawyers to assist them in forming complex financial structures, consisting of numerous shell companies and trusts in offshore jurisdictions.
- Even if bank records show that a person received a sudden increase of cash into his/her account, the onus remains on the prosecution to find a link that connects that cash to the unlawful activity.

LAYING CHARGES, PRESENTING AND SUPPORTING THE CASE IN COURT (C'd)

- Direct evidence proves the existence of a particular fact without any inference or presumption being required. Indirect or circumstantial evidence relates to a fact or a matter, or a series of facts or matters, other than the particular fact that are sought to be proved.
- When offering indirect evidence, it is necessary to argue that such evidence, by reason and experience, is so closely associated with the fact to be proved that this fact may be inferred from the existence of what is indirect or circumstantial. Indirect evidence is, of course, used in the full range of criminal cases.
- It is of particular importance in a corruption or another economic crime case where there may be no, or very little, direct material showing how the benefit was provided or received or the involvement of the parties to it.

LAYING CHARGES, PRESENTING AND SUPPORTING THE CASE IN COURT (C'd)

- Good practice shows that financial indirect evidence is regularly used in complex corruption cases. Sometimes an investigator may be able to link specific financial transactions directly to the criminal conduct that is being alleged; however, even when financial transactions cannot be directly linked, evidence of asset movement, of property purchases, or of unexplained wealth may in itself or with other evidence give grounds to believe that the asset or wealth concerned came from an illicit source. In the corruption investigation the following sources can provide indirect evidence:
 - ▶ Financial or operational audit (private and public), including of assets, lifestyle and expenditures; Expert evidence/opinion, particularly from analysts or forensic accountants; Unlikelihood of legitimate origin of money or asset; Testimony given by an accomplice; Partial admissions by suspect of relevant financial dealing; Unusual or inexplicable business dealings; False identities, addresses and documentation; Association with other individuals, organisations, or locations (those who have been implicitly or explicitly involved in illegal conduct).

Collection of evidence

- The outcome of evidence presentation is to prove beyond reasonable doubt. The Prosecutor has an obligation to answer the following questions:
- **What:** The offence and its commission must be clear.
- ❑ **When:** The indictment precises when the offence has been committed.
- ❑ **Who:** The indictment precises who committed the offence.
- ❑ **Why:** Why the offence has been committed.
- ❑ **How:** The statement relates details of how the offence has been committed.
- ❑ **Where:** The area where the crime has been committed must be clear in the statement.
- ❑ **To whom:** The indictment relates clearly all victims.

The burden of proof

The principle:

- ✓ To protect the presumption of innocence, in criminal proceedings, the general principle is that the prosecution usually bears legal onus of proof;
- ✓ The burden of proof beyond reasonable doubt is on the Prosecutor.

Exception: Reverse of the onus of proof.

- The general principle may be expressly reversed by the legislation.
- The Legislation may require an accused person to prove his/her innocence by disproving a fact the prosecution would normally be obliged to prove.

Example: In illegal enrichment offence, the accused proves that he/she acquired the assets legally.

V. Admissibility of evidence

- For the evidence to be admissible, it must be relevant, material and competent. To be considered relevant, reliable it must have some reasonable tendency to help prove or disprove some facts. The Judge or Jury will determine the appropriate weight to give a particular piece of evidence.
- The admissibility of evidence in international human rights law requires a balancing between the interests of an individual in the protection of his/her fundamental rights (e.g. right to liberty, right to a fair trial) and the power of a sovereign state.
- Article 25 (2) of the Protocol establishing the African Court of Human and Peoples' Rights provides that the Court may receive written and oral evidence and other representations including expert testimony and it shall make a decision based on such evidence and representations;
- Article 30 (1) of the statute of International Court of Justice stipulates that the Court shall frame rules for carrying out its functions and lay down rules of procedure. As said by S. Fallah in *Admissibility of unlawfully obtained evidence before international courts and tribunals*, the ICJ has not fully exercised the rule of admissibility of evidence. Consequently, all evidence is admissible and the Court is free in assessing the probative value of it;

VI. Strengths and challenges in evidence collection

1. Strengths

- ✓ Political will of zero tolerance to corruption to facilitate evidence collection and apprehension of offenders.
- ✓ The laws instituting Ombudsman and Mediator Offices;
- ✓ Laws regulating criminal procedures and evidence productions;
- ✓ Investigation and prosecution of corruption acts;
- ✓ Cooperation between African Ombudsmen and Mediators.

2. Challenges

- Offenders use ICT tools to hide their criminal acts, so that, difficulties to collect evidences;
- Cyber attacks;
- Criminal network;
- Citizens reluctant to report corruption cases.

VII. Conclusion

- No country is immune from corruption and governments need to work together and with partners from business and civil society to tackle it successfully.
- Anti corruption Bodies need to strengthen the cooperation with national and international organizations with the mission to fight against corruption.
- As “*Africa loses \$148 billion to corruption every year*”(Akinwumi Adesina, President of the African Development Bank, Abidjan, on 9/12/2015 in commemoration of International Anti-Corruption Day), the cooperation of Office of the Ombudsman/Mediators with other organizations **in collecting and presenting evidences** is a tool to recover assets and to win the fight against corruption;
- In Rwanda, the fight against corruption relies on the high level political will of zero tolerance to corruption; as said by HE Paul Kagame, “*there can be no doubt that corruption is very costly to both governments and businesses and as such impacts negatively on our development efforts. It therefore makes economic sense and good politics to fight corruption. Equally not in doubt is the fact that success of the fight against corruption depends on good governance*” (H.E. Paul Kagame, President of the Republic of Rwanda 23rd March 2011).



END

Thank you