



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL REVISION NO.19 OF 2017

HON. D.P.P.....APPLICANT

- V E R S U S -

THE CHIEF MAGISTRATE'S COURT.....RESPONDENT

REVISION ORDER

This matter is before me for purposes of revision which was prompted by the State Law Office in Criminal Case No.868 of 2015 Republic v Michael Mutua Nzwele was before Hon S. Mwangi for hearing on 25/5/2017. It is not clear from the record how it all began but it seems PW1 Dedeon Matheka refused to be sworn for reasons that he is not a Christian.

The court interrogated him for a while and ordered that he must be sworn to test his credibility because he had been untruthful in what he had told the court, that is, his age.

The State Counsel sought an adjournment and wrote to this court to intervene and invoke its supervisory powers.

I have perused the file. The law that guides the administration of oaths is the Oaths and Statutory Declaration Act Cap.15 Laws of Kenya. The relevant provisions are Sections 12 to 17:

“12. Powers of magistrates and certain court officers to administer oaths

A magistrate, the Registrar of the High Court, a deputy registrar and a district registrar may administer any oath or affirmation or take any affidavit or statutory declaration (voluntarily made and subscribed in accordance with the provisions of Part III) which might lawfully be administered or taken by a commissioner for oaths appointed under Part II.

13. Oaths by Africans

Any African, not being a Christian or a Mohammedan, required by law to take an oath shall take the oath in the form common among and held binding by the members of the tribe to which such African belongs, and when such African belongs to a tribe the members of which hold no form of oath binding upon them he shall be required to make solemn affirmation in the form now in use.

14. Authority to administer oaths and affirmations

All courts and persons having by law or consent of the parties authority to receive evidence are authorized to administer, by themselves or by an officer empowered by them in that behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them by law.

15. When affirmation may be made instead of oath

Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is required by law, which affirmation shall be of the same effect as if he had taken the oath.

16. Form of affirmation

Every affirmation shall be as follows: “I, A.B., do solemnly, sincerely and truly declare and affirm,” and then proceed with the

words of the oath prescribed by law, omitting any words of imprecation or calling to witness.

17. Persons by whom oaths and affirmations to be made Subject to the provisions of [section 19](#), oaths or 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;

(b) interpreters of questions put to, and evidence given by, witnesses.”

Section 12 gives powers to magistrates to administer oaths or affirmation which should be voluntarily made. When a witness comes to court, the court enquires whether he subscribes to any religion and he is sworn according to that religion, that is, Christian, Muslim or Hindu. If he does not subscribe to any religion he should be affirmed. Some religions do not allow taking of oaths, e.g. the Friends Church and in such circumstances, the witness is affirmed and cannot be forced to take an oath.

In this case the most relevant sections are Section 13 and 15. It is clear that one cannot be forced to take the oath. Once one gives the reason why he cannot take an oath then he must be affirmed. In this case the witness does not profess Christianity and it would be futile forcing him to take an oath. If he had lied to the court, the court must take that into account when considering his credibility and the worth of his evidence. The fact that one is on oath is not guarantee that he will tell the truth. A liar will always remain one.

For the above reasons, I find that the court fell into error when it insisted that the witness should be sworn. For that reason, I hereby quash and set aside the order of the court made on 28/6/2017 ordering the witness to be sworn. The witness should be affirmed in accordance with his beliefs. Since it appears from the records that the trial magistrate had taken a position on the witness credibility and the magistrate may not be comfortable hearing the matter.

I direct that the case be placed before another competent magistrate other than Ms. Mwangi to hear and determine the case after giving directions on how to proceed. It is so ordered.

Signed and Dated at NYAHURURU this 21st day of June 2017.

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R.P.V. WENDOH

JUDGE