



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO.39 OF 2014

JOHNSTON KERU MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence Criminal No.522 of 2013 of the Chief Magistrate's Court at Murang'a by Hon. J.J Masiga – Resident Magistrate)

JUDGMENT

The appellant, **JOHNSTON KERU MACHARIA**, was convicted of the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code.

The particulars of the offence were that on diverse dates between 27th July 2013 and 2nd August 2013 at Getwa market, broke and entered the shop of **CHARLES CHARAGU WAIGURU** and stole from therein property valued at Kshs. 12,000/=.

He was sentenced to serve seven years imprisonment.

He now appeals against both conviction and sentence

The appellant was in person.

He raised four grounds of appeal in his amended petition of appeal.

The state opposed the appeal through M/s. Lydia Wang'ombe, the learned counsel.

Upon my perusal of the typed and the original record of proceedings it occurred that the record is silent as to whether the witnesses were sworn before they testified. Section 151 of the Criminal procedure Code provides as follows:

Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.

This issue was dealt with in the case of **RASHID WACHILU KASHEKA Vs. REPUBLIC [2015] eKLR** where the court observed as follows:

In *Mwangi v. Republic* (2006) 2 KLR 94, a case that is almost on all fours with the present

appeal and which is binding on this court, the Court of Appeal not being able to determine whether the witnesses had been sworn, declared the trial a nullity and ordered a retrial as follows:

“The usual practice of all the courts in Kenya is, of course, to show in the record that a witness has taken oath before testifying. In the record before us, there is no way in which we can determine. One way or the other, that the witnesses were or were not sworn before they gave evidence.

Most likely, they took the oath before giving evidence. But there is also the possibility that they might not have taken oath and if that is the position, it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of section 151 of the Criminal Procedure Code and the other provisions we have set out herein. That, in our view, cannot be a matter curable under section 382 of the Criminal Procedure Code. To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence. It does not matter that the issue is being raised for the first time in this appeal. If a trial was a nullity then it does not matter at what stage that issue is raised.”

The total effect of the legal provisions of section 155 of the Criminal Procedure Act and the authorities referred to above is that in criminal matters as in other contentious matters, evidence of witnesses must be receive on oath. The default in this regard makes the trial of the appellant herein defective as a nullity, and liable to an order for retrial.

I have quoted at length so that the import of not recording whether a witness was sworn or not can be appreciated. I have noted that this is not the first matter the honorable magistrate is making this grave omission.

The trial against the appellant was a nullity. I quash the conviction and set aside the sentence.

I am remitting the matter to the Chief Magistrate's court Murang'a for retrial by a magistrate of competent jurisdiction other than Hon. J.J Masiga.

The appellant to be taken for plea on 26.8.2016. In the interest of justice the case should be given priority hearing dates and where practicable to be heard on a day to day basis.

In the event that the appellant may be found guilty, the trial magistrate must factor the sentence that he has already served.

Orders accordingly.

DATED at MURANG'A this 19th day of August 2016

KIARIE WAWERU KIARIE

JUDGE