



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NYERI

Criminal Appeal 81 of 2005

DOMINIC KAMAU MAINA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(Appeal from original Conviction and Sentence in Resident Magistrate's Court at Kangema in Criminal Case No. 47 of 2005 dated 7<sup>th</sup> March 2005 by Mr. G. P. Ngare – R.M.)*

*CONSOLIDATED WITH 82 OF 2005*

HIGH COURT APPEAL NO. 82 OF 2005

MICHAEL MWANGI MAINA ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(Appeal from original Conviction and Sentence in Resident Magistrate's Court at Kangema in Criminal Case No. 47 of 2005 dated 7<sup>th</sup> March 2005 by Mr. G. P. Ngare – R.M.)*

### J U D G M E N T

**Dominic Kamau Kinyua** and **Michael Mwangi Maina** the appellants herein, were charged and tried before the Resident Magistrate at Kangema on two counts of preparation to commit a felony contrary to section 308(1) of the Penal Code. After hearing evidence from a total of two prosecution witnesses and the sworn statements of the appellants the trial magistrate found the appellants guilty of the charges, convicted them and sentenced them to six years imprisonment on each count. The sentences were ordered to run concurrently. The appellants were aggrieved by the conviction and sentences aforesaid. They therefore lodged the instant appeals which I ordered to be consolidated for ease of hearing and as they arose from the same prosecution in the subordinate court.

At the commencement of the hearing of the appeals, **Mr. Orinda**, learned Principal State Counsel intimated to the court that the state was conceding to the appeal on the ground that some of the witnesses were not sworn. In saying so, I am certain that **Mr. Orinda** had in mind the provisions of section 151 of the Criminal Procedure Code, section 14 through to 19 all inclusive of the Oaths and Statutory Declarations Act and of course the recent court of appeal decision in **Samuel Muriithi Mwangi v/s Republic, Cr. App. No. 39 of 2005 (unreported)**. The appellants for obvious reasons were in agreement

with the contentions of the learned state counsel.

I have on my part carefully perused the record of the trial magistrate and am in agreement with the learned state counsel. It does not come out quite clearly whether the 2 witnesses for the prosecution were actually sworn before they commenced their testimony. Section 151 of the Criminal Procedure Code provides interalia:-

**“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 provision of the law is traceable to the general common law. The issue is put in this manner by **ARCHBOLD, CRIMINAL PLEADING EVIDENCE & PRACTICE, 2002 Edition:-**

**The general common law rule is that the testimony of a witness to be examined viva voce in a criminal trial is not admissible unless he has previously been sworn to speak the truth. Counsel has no privilege from being sworn, even if he acts only as an interpreter: *Republic v/s Kelly (1848) 3 Cox 75*. This general common law rule is subject to important statutory exceptions (post. SS 8 – 31 et seq.) The witness must be sworn in open court; *Republic v/s Tew (1855) Dears 429*.”**

That general common law rule is what has received statutory backing in **section 151 of the Criminal Procedure Code as well as sections 14 through to 19 of the Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya**

**tion 14 of that Act gives all courts and persons having by law or consent of the parties authority to receive evidence the power to administer oaths. Section 15 provides for the affirmation of persons who object to the taking of an oath while section 16 sets out the form of an affirmation to be administered. Section 17 provides for persons by whom oaths and affirmation can be made, section 18 relates to forms of oath.**

**Section 19 of the Act provides for reception of evidence by children of tender years. In a nutshell therefore the question of the witness taking an oath or an affirmation before being allowed to give evidence in a criminal trial or cause is not a matter at the discretion of the trial court. Witnesses have to be sworn or affirmed before their evidence can be validly received save for minor children as envisaged by section 19 of the Oaths and Statutory Declaration Act.**

**Dealing with a situation similar to one obtaining in the instant appeals, the court of appeal in the case of Samuel Muriithi Mwangi (Supra) observed:**

**“We have already said that the record of the trial magistrate does not show whether or not the witness who testified before him were sworn before doing so. The appellant and his counsel appeared to us to contend that the witnesses were in fact not sworn. Mr. Kaigai, the learned Senior State Counsel, submitted that it was inconceivable that a senior magistrate like Mr. Nyamweya would have received the evidence of all the prosecution witnesses without having sworn them first. The usual practice of all the courts in Kenya is, of course, to show in the record that a witness has taken an 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 their evidence. Most likely, they took the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be 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 the trial was a nullity then it does not matter at what stage that issue is raised.”**

These observations are on all fours with the situation obtaining here. Accordingly I have no hesitation in holding that the proceedings were thereby a nullity. I would in the premises allow the appeal and set aside both the conviction and sentence.

Should I order a retrial? Ordinarily this would have been the appropriate order to make in the circumstances of this case. However, the learned state counsel did not press for it. According to him, the evidence tendered in support of the charges was not overwhelming. Further it was his view that if a retrial was ordered, the prosecution could be accorded opportunity to fill in the gaps in their case.

Having carefully evaluated and analysed the evidence on record I am inclined to agree with the submissions of the learned state counsel. The circumstances leading to the arrest of the appellants is not clear. The recovery of the 4 master keys on them is also in dispute. There was another person who was allegedly in the company of the appellants who had a pistol who nonetheless escaped the dragnet. From the evidence, it is not really clear whether this third person had been with the appellants. If he had been, there is no way he would have escaped the arrest. The way the arrest of the appellants was executed, it was so elaborate that I doubt whether the third person would have escaped the dragnet. I am not also so sure that being in possession of 4 master keys must necessarily mean that one is preparing to commit a felony. People keep master keys for all sorts of reasons. In any event when arrested the appellants were walking towards the court compound and it cannot be said that they were preparing to break into the court room using the master keys. There is also evidence that the appellants had been victims of previous arrests by the police officers from the same police station. They were well known. Accordingly the possibility of the case being fabricated against them cannot be ruled out. Taking all the foregoing into account I am convinced that if a retrial was ordered and self –same evidence was tendered, a conviction may not result. **See Mwangi v/s Republic (1983) KLR 522.** Accordingly I decline to order a retrial and instead order that the appellants and each one of them be set at liberty forthwith unless otherwise lawfully held.

*Dated and delivered at Nyeri this 31<sup>st</sup> May 2007*

**M. S. A. MAKHANDIA**

**JUDGE**