**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 78 of 2005**

**ROBERT KARIUKI NYAGA …….…… APPELLANT**

**VERSUS**

**REPUBLIC …… RESPONDENT**

***(From original Judgment and conviction in Criminal Case No. 3032 of 2003 of the Chief***

***Magistrate's Court at Nyeri - E. J. OSORO - SRM.)***

**J U D G M E N T**

ROBERT KARIUKI NYAGA was convicted on one count of Indecent Assault on a female contrary to section 144(1) of the penal code and was sentenced to a fine of Kshs.20,000/= in default to serve 3 years imprisonment. He now challenges both the conviction and sentence before this court by way of appeal. However I wish to point out at the very earliest that the default sentence imposed by the learned magistrate was illegal. A fine of Kshs.20,000/= ordinarily attracts a default sentence of 6 months and not 3 years. Before imposing default sentences, I would urge sentencing courts to always revert to the provisions of section 28(2) of the Penal Code as amended. That is the only way to avoid illegal default sentences from being imposed. I hope sentencing courts will abide by this simple advice.

When the appeal came up for hearing, **Mr. Orinda**, Learned Principal State Counsel representing the state conceded to the appeal on a technicality. Learned State Counsel submitted that none of the witnesses who testified would appear to have been sworn before they were allowed to testify. Further on taking over the case from **Mr. C. D. Nyamweya SRM, E. J. Osoro, SRM** did not comply with the mandatory provisions of section 200 of the Criminal Procedure Code. Accordingly the trial was a nullity. On whether or not to seek a retrial, Learned Counsel was of the opinion that considering the evidence on record which was weak, the state was not seeking a retrial. Mr. **Nderi**, learned counsel appearing for appellant welcomed the state's gesture. He associated himself fully with the learned state counsel's submissions. He however added that the defence of Alibi raised by the appellant was not given due consideration.

I have carefully perused the record of the trial court and I am in agreement with the Learned State Counsel that it is not clear whether the witnesses who testified in support of the prosecution case were sworn before they were allowed to testify. If they were not sworn, then that omission was a clear violation of a procedural rule of law, which affects the weight of the evidence adduced. Section 151 of the Criminal Procedure Code provides as follows:-

"…..Every witness in a criminal case 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"

The provision is couched in mandatory terms. From the record it is not possible to tell whether the evidence adduced by the witnesses was sworn or not. That goes to the weight of the evidence. Evidence that is unsworn is a mere statement, of little or no evidential value at all.

Faced with a similar scenario, the court of appeal in the case of ***Samuel Muriithi Mwangi vs Republic, CR.APP. NO.39 of 2005*** delivered itself this:-

"……**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 (section 14, 15, 17, 18 and 19 of the oaths and Statutory Declarations Act.) 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 state that issue is raised."**

The same situation obtains here. It may well be possible that the witnesses were sworn. After all the Magistrate handling the case was a Senior Magistrate. It is therefore inconceivable that he would have received evidence without having the witnesses sworn. However it is also possible that through inadvertence he may have overlooked the swearing of the witnesses. A doubt having been created as to whether the witnesses were sworn, that doubt as in any Criminal Case must be resolved in favour of the appellant. I would therefore hold that, for the aforesaid reason and the fact that the court of appeal decisions are binding on this court, the trial of the appellant in the subordinate court was a nullity for want of swearing of witnesses. Accordingly the appeal is allowed and both the conviction and sentence set aside.

That was not the only defect that rendered the proceedings a nullity. There were two magistrates who conducted the case. One **C. D. Nyamweya, SRM** as he then was, heard the whole of the prosecution case. The case was then taken over by **E.J. Osoro** after the former had ceased to have jurisdiction and heard the defence case and wrote the judgment. At the time **Mrs. Osoro** took over the case, the record shows that she had made an order that the case starts de novo. However down the line and on the application of the prosecution the learned magistrate reviewed and vacated the aforesaid order and directed instead that the case proceeds from where it had reached before **C. D. Nyamweya**. In my view this order was wrong and clearly in breach of the mandatory provisions of section 200(3) of the Criminal Procedure Code. The Section provides thus:

"…… **Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and be heard and the succeeding magistrate shall inform the accused person of that right ……."**

From the foregoing it is quite clear that it is upto the accused person to choose how the case should be handled by the incoming or succeeding magistrate. If he elects that the case be heard De novo, to proceed from where it had reached before the proceeding magistrate or that any witness be resummoned and reheard, the trial court has no choice in the matter but to oblige. The only duty cast on the trial court is to inform the accused of the aforesaid rights. The prosecution have no role in the matter at all. In the instant case therefore, the prosecutor was clearly wrong to apply before the learned magistrate to have the initial order that the case commences de novo as requested by the accused be vacated and instead that the case

proceeds where it had been left by **Mr. Nyamweya**. The court similarly was wrong in acceding and allowing the application.

In the case of **Ndegwa v/s Republic (1985) KLR 584, Madan, Kneller and Nyarangi JA** held:-

"***No rule of Natural Justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct Individual in the system of our legal administration …….***"

That case emphasizes the importance of Complying with rules which confer statutory protection to a citizen.

In the instant case the succeeding magistrate only heard the defence case and then wrote the judgment. It means that the preceding magistrate is the one who heard the bulk and indeed the entire prosecution case. The conviction in this case was predicated on visual identification by the eye witnesses of the incident who included the complainant. In a case with similar circumstances, **Njenga v/s Republic (1985) KLR 534 Madan, Kneller and Nyarangi Ag. JJA** said:

"…… ***In a case depending on visual recognition where the principal witness is heard by one magistrate and the second identification witness by another we think it essential that the requirement of subsection (3) should be observed as it is for the protection of an accused person ……***"

I reiterate here that the provisions of section 200(3) of the Criminal Procedure Code should at all times be observed as it is for the protection of an accused person. It is the duty of the court to inform an accused person of his rights to re-call witnesses or to start the case de novo. Failure to inform the accused person of his rights renders the proceedings a nullity. The order by the learned magistrate to vacate the earlier order on the application of the prosecutor and not the appellant was equally a nullity. In the premises the appellant was denied his right to a fair trial in this case due to the said order. The charge against the appellant was serious and the witnesses who testified before the succeeding magistrate took over were the key witnesses in the case. I take the view that perhaps if the succeeding magistrate had seen and heard these witnesses herself, she may have arrived at a different conclusion not necessarily a conviction.

Accordingly and for the aforesaid reasons I would allow the appeal, quash the conviction and set aside the sentence imposed. It would appear therefore that the learned state counsel was right in conceding to the appeal.

The state did not seek a retrial and rightly so in my view. The principles applicable in determining the issue of retrial are now well settled. It is trite law that a retrial should not be ordered unless an appellate court upon consideration of admissible or potentially admissible evidence is of the opinion that a conviction may result. See **Mwangi v/s Republic (1983) KLR 522.**

Having considered the evidence on record in this case I am of the view that the evidence of identification which was the basis of conviction was not safe or free from error or mistake. The offence was committed at night. There was no light at the scene of crime. Indeed it was in a valley next to a river. The assailant is alleged to have been armed with a knife and a pistol with which he threatened the complainant and her colleagues. However the complainant and her colleagues claim to have been able to see and identify assailant courtesy of the lights from the vehicle which passed by. There was no evidence that the lights from this vehicle beamed directly into the face of the assailant. Neither are we told the speed of the said motor vehicle. If the light did not beam directly into he face of the assailant, we cannot say that the complainant saw the assailant sufficiently as to be able to identify him. Further, if the motor vehicle was being driven at a speed and the light was directed at the assailant, this witnesses could only have had a fleeting glance of the assailant which was not sufficient to enable them identify him. From the evidence available, in this case I am of the opinion that no conviction therefore will result if an order for retrial was made.

In seeking to have the case proceed from where Mr. Nyamweya had left, the prosecutor alluded to the difficulties of tracing the witnesses who had already testified. I do not think that the situation has since changed or improved. Consequently if a retrial is ordered, there is no assurance or guarantee that the witnesses will be readily availed by the prosecution for a successful retrial to be mounted.

That being my view of the matter, I decline to order a retrial and instead order that the appellant be set at liberty. I note that the appellant was ordered to pay a fine of Kshs.20,000/=. I would direct that if he paid, the same be refunded to the appellant.

***Dated and delivered at Nyeri this 31st day of May 2007***

**M. S. A. MAKHANDIA**

**JUDGE**