REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 105 of 2005

FRANCIS ERUPE ………..……………………………….. APPELLANT

VERSUS

REPUBLIC……………………………………………. RESPONDENT

(Appeal from original Conviction and Sentence in Criminal Case No. 4564 of Chief Magistrate's Court at Nyeri dated 30th March 2005 by Mrs. E. J. Osoro – S.R.M. – Nyeri)

J U D G M E N T

Francis Erupe, the appellant herein was charged and tried before the Senior Resident Magistrate at Nyeri on one count of attempted Rape contract to section 141 of the Penal Code. The particulars of the charge were to the effect that on 10th December 2004 at Nyeri District, Central Province, the appellant attempted to have carnal knowledge of **M A J,** without her consent. The appellant also faced an alternative count of Indecent assault on a female contrary to section 144(1) of the Penal Code. Particulars being that on the same day at place the appellant unlawfully tearing off her pants and touching her private parts. After hearing evidence from a total of three prosecution witnesses and the sworn statement of the appellant, the trial magistrate found the appellant guilty of the main charge, convicted him and sentenced him 10 years imprisonment. That conviction and sentence provoked this appeal.

When the appeal came up for hearing, Mr. Mugwe conceded to the appeal on the technical ground that one of the witnesses was allowed to testify during the trial without being sworn. Accordingly and for this omission on the part of the learned magistrate, the entire trial was thereby rendered a nullity. Counsel invited me to so hold.

The learned state counsel then invited me to order a retrial on the grounds that the offence was serious, that the appellant had only served 2 years out of the 10 years imprisonment. Accordingly the appellant would suffer prejudice if an order for retrial was to be made.

The appellant would hear none of the above. He submitted that the omission of the magistrate should not be visited upon him, that he maintained his innocence and claimed that the case was a fabrication, the complainant having refused to pay for the miraa he had taken from him.

I have perused both the original and the typed record and I am satisfied that P.W.2 was allowed to testify without being sworn. In respect of this witness, the record merely shows "**P.W.2 Amerukwa Giramoe: I reside at Karichen ……"** It is clear from the foregoing that the witness was not sworn before she was allowed to testify. Section 151 of the Criminal Procedure Code provides:-

“*__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.”__*

It is abundantly clear from section 151 (supra) that all witnesses in a criminal trial or cause must be examined on oath. The issue is put beyond any shadow of doubt in **ARCHBOLD, CRIMINAL PLEADING EVIDENCE & PRACTIC, 2002 Edition**:-

“II. Swearing of witnesses

OATH:

(1) General

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”.*

It is this general common law rule that has received 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. Then sections 17 and 18 state:-

“17 Subject to the provisions of section 19, oaths or affirmations shall be made by-

(a) all persons who may lawfully a be examined, or give evidence 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 question put, to and evidence given by witnesses.

18. All oaths made under section 17 of this Act or section 151 of the Criminal Procedure Code shall be administered according to such form as the Chief Justice may by rules of court p**rescribe, and until any such forms are so prescribed such oaths shall be administered according to the forms now in use.”**

Section 19 of the Act provides for reception of evidence by children of tender years. So that 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 for the discretion of the trial court. Excepting evidence received under section 19 above the evidence of witnesses in such cases can only be received on oath or affirmation. No other method is available to witnesses or even interpreters. Confronted with a case in which the witnesses were not sworn before they testified, the court of appeal in the case of **Samuel Murithi Mwangi v/s Republic, C.A. No. 3 of 2005 (unreported)** delivered itself thus:

“**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."

In this case though only one witness was not sworn the trial however was one. The evidence of the witness who was not sworn cannot be severed from the rest. It therefore follows that the entire trial was a nullity and the learned state counsel was right in conceding to the appeal. Should I order a retrial as urged by the learned state counsel? There is no doubt that he crime alleged against the appellant was a grave one. Sexual related offences are on the upsurge in this jurisdiction. There is need to counter the upsurge. Apart from the issue that one witness might have given unsworn evidence before the magistrate, such evidence, if it had been received according to law, was substantial and a conviction might well be had upon it **(See Mwangi v/s Republic 1983) KLR 522**. Further and as correctly pointed out by the learned state counsel, the appellant has so far served only 2 years out of the 10 years imposed. This is not a substantial period as would render the retrial of the appellant prejudicial and or unjust. We are, in the circumstances, inclined to order a retrial. We accordingly allow the appellant's appeal, quash the conviction recorded against him and set aside the sentence of death and order that he be tried de novo before a magistrate of competent jurisdiction other than **E. J. Osoro** who had the initial trial. Towards this end, the appellant shall remain in prison custody until 12th June 2007 when he shall be produced before the Senior Principal Magistrate's for his retrial to commence.

Dated and delivered this 30th day of May 2007

M. S. A. MAKHANDIA

JUDGE