



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**Criminal Miscellaneous Application 70 of 2012**

**ANDREA MMBISHI**

**LIKHANDA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

The application dated 21.5.12 seeks orders that this court do exercise its discretion and revise the ruling of Hon. Principal Magistrate, M. I. G. MORANGA made on 3<sup>rd</sup> April, 2012 wherein the said trial magistrate refused to withdraw from hearing Kakamega Chief Magistrate's Criminal Case No. 1661 of 2011 and ordered the matter to proceed irrespective of the objections raised on whether the interpretation of the evidence of PW3, the complainant/victim was correct as well as allowing the complainant to testify on Oath when she did not understand the meaning of the same.

The application is based on the grounds stated in the body of the same and is supported by the affidavit of JACKSON I. KHAYUMBI, the appellant's advocate.

I have perused the proceedings of the lower court. One of the issues raised is that the complainant was referred for mental assessment and subsequently allowed to testify on Oath although the complainant did not understand the meaning of Oath.

The trial magistrate has the discretion, after conducting a *voire dire* to decide whether a witness is intelligent enough to warrant the reception of evidence. It is also the trial magistrate's discretion to decide whether the witness will give sworn or unsworn evidence.

The trial magistrate conducted a *voire dire* and ruled that the witness was intelligent enough to testify and also decided that the witness be affirmed. This is a ruling by the court and it cannot be termed as distortion of evidence. It is a ruling that, at the end of the case, will be considered by an appellate court (if there is an appeal) together with the entire evidence on record. I do not think it is necessary to dissect the case at this stage and make any decision on whether the complainant/victim ought to have given sworn or unsworn evidence.

On the issue of whether the interpretation was correct or not, I agree with the defence counsel that in view of the objections raised by the defence, the trial magistrate ought to have taken precaution and make arrangements for a different interpreter. The evidence of PW3 (complainant/victim) is not yet concluded. Measures can still be taken to have the witness testify afresh with a different interpreter/court clerk.

I have anxiously considered whether the failure by the trial magistrate to disqualify herself raised questions of bias or lack of integrity in the circumstances.

The trial magistrate made a ruling on the matter before the court in the course of the trial. There is no evidence in the affidavit in support that reveals any impropriety, lack of integrity or bias.

I have perused the record of the lower court and I am satisfied as to the regularity of the proceedings, save on the issue of the interpretation of the evidence of PW3 FARINE INZELO. I order that the entire

proceedings in respect of PW3 be expunged from the record and PW3's evidence to be recorded afresh with a different interpreter but before the same trial magistrate.

The ruling by the trial magistrate declining to disqualify herself is therefore upheld.

**Delivered, dated and signed at Kakamega this 12<sup>th</sup> day of July, 2012**

**B. THURANIRA JADEN  
J U D G E**