IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 39 OF 2005

SAMWEL MURIITHI MWANGI ……..…… APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(An Appeal from a Judgement of the High Court of Kenya at Nyeri (Khamoni & Okwengu, JJ) dated 24th November, 2004

In

H.C. Cr. A No. 343 & 348 of 2002)

****

JUDGMENT OF THE COURT

Samuel Muriithi Mwangi, the appellant herein, was, together with two other persons who are not involved in this appeal, charged and tried before the Senior Resident Magistrate at Nyeri on one count of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The particulars of the charge were to the effect that on 21st August, 2001 at Kimahura village in Nyeri District, Central Province, the appellant, together with his two named confederates, while armed with dangerous weapons namely rungus, clubs, knives and axes, robbed Ephrain Muchoki Maranga of an International Radio cassette serial No. 616886 and one pair of shoes all valued at Kshs.2,500/- and at or immediately after the time of the robbery they killed the victim of the robbery Ephrain Muchoki Maranga. After hearing evidence from a total of eleven prosecution witnesses and the sworn statement of the appellant, the trial magistrate found the appellant guilty of the charge, convicted him and sentenced him to death. The appellant appealed to the High Court against the conviction and sentence, but by its judgment dated and delivered on 23rd November, 2004, the High Court (Khamoni & Okwengu, JJ) dismissed the appellant's appeal against the conviction and confirmed the sentence of death imposed on the appellant by the trial magistrate. The appellant now appeals to this Court by way of second appeal and that being so, the Court can only deal with issues of law. Mr. Muthui Kimani, learned counsel for the appellant, relied on the memorandum of appeal filed by the appellant himself and which has a total of six grounds. Mr. Kimani abandoned grounds one and two and as far as this Court is concerned, the only and real issue of law raised before us is to be found in ground three of the memorandum of appeal. The appellant put it thus:-

*"**3. That the high court judges erred in law in upholding a death sentence on the weight of the prosecution witnesses whereas their testimony was obtained in absence of oath contrary to section 151 c.p.c."***

We take it that "section 151 c.p.c." means section 151 of the Criminal Procedure Code. That section 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."***

Elaborating on the complaint contained in ground three, Mr. Kimani pointed out to us that in respect of all the eleven witnesses called by the prosecution, the record of the magistrate is wholly silent on the issue of whether each of them was sworn before testifying. In respect of each and every prosecution witness, the record of the magistrate goes thus:-

"*P.W.1 Anne Gathigia Muchiri*," while in the case of the appellant the record is as follows:-

"***Accused 2 sworn/states Samuel Muriithi Mwangi."***

The starting point is of course ***section 151*** of the Criminal Procedure Code and as is abundantly clear from that section all witnesses in a criminal trial or cause must be examined on oath. The issue is put in this way in **ARCHBOLD, CRIMINAL PLEADING EVIDENCE & PRACTICE**, 2002 Edition:-

"***II. swearing of witnesses.***

A. INTRODUCTION:

Common Law

8-25. This topic is closely related to that of competence and compellability of witnesses. This is particularly so in the case of children and young persons and persons of unsound mind. ……

B. 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: R v. Kelly (1848) 3 Cox 75. This general common law rule is subject to important statutory exceptions (post., §§ 8 – 31 et seq.) The witness must be sworn in open court; R v Tew (1855) Dears 429."***

The general common law rule is what has received statutory backing in ***section 151*** of the Criminal Procedure Code and the other relevant legislation touching on the matter is the Oaths and Statutory Declarations Act, ***Chapter 15*** Laws of Kenya. ***Section 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 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 questions 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 prescribe, 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.

How do these principles apply in the present appeal?

We have already said that the record of the trial magistrate does not show whether or not the witnesses 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.

What orders should we make? There is no doubt that the crime alleged against the appellant was a grave one; the victim of the alleged robbery lost his life in the process and apart from the issue that witnesses 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. We are, in the circumstances, inclined to order a retrial. We accordingly allow the appellant's appeal, quash the conviction recorded against him, set aside the sentence of death and order that he be tried *de novo* before a different magistrate. Those shall be our final orders in the appeal.

Dated and delivered at Nyeri this 4th day of August, 2006.

R.S.C. OMOLO

……

JUDGE OF APPEAL

E.O. O'KUBASU

……

JUDGE OF APPEAL

W.S. DEVERELL

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.