



Munene v United States International University [USIU] (Cause 105 of 2019) [2022] KEELRC 13360 (KLR) (2 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13360 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 105 OF 2019
J RIKA, J
DECEMBER 2, 2022**

BETWEEN

KAREGA MUNENE CLAIMANT

AND

UNITED STATES INTERNATIONAL UNIVERSITY [USIU] RESPONDENT

RULING

1. This Claim came up for full hearing, on November 8, 2022.
2. Parties were ready to be heard. The Claimant was ready to give evidence as the sole witness to his Claim, while the Respondent indicated it had one witness also, who was ready to give evidence in the afternoon of November 8, 2022.
3. There was a dispute on the form of oath the Claimant should take, before giving evidence.
4. He informed the Court that he would not mention the name of God, in his oath, while the Respondent's Counsel, insisted that the Claimant must swear in the name of God.
5. The Court directed Counsel for the respective Parties to make brief oral submissions on the subject.
6. Ms Guserwa, Counsel for the Claimant submitted that the Claimant is an Atheist. He does not swear in the name of God. He has a constitutional right to affirm, without mentioning the name of God. The Claimant ought to be allowed to give evidence, without stating "so help me God." Although the Constitution applies to all citizens, each has an individual right and freedom of belief. The issue should be whether, the witness believes in his affirmation and the duty to tell the truth. The objection is misplaced.
7. Mr Ashitiva, Counsel for the Respondent submitted that the Preamble to the Constitution of Kenya says, We, acknowledging the supremacy of the Almighty God of all creation... The Constitution has defined forms of oaths. The Judiciary has forms of oaths. All citizens of this Country must abide by the



set standards. The oath goes to the sanctity of the evidence to be given. It is an oath to the Court and a higher calling. It is the intention of the framers of the Constitution, Rules and Practice, that witnesses before the Court are sworn in the name of God.

8. Mr Ashitiva clarified that he did not intend to infringe the Claimant's Constitutional right to be an Atheist. It is important that the Court, as a Court of record, establishes the form of oath to be administered on an Atheist, for purposes of receiving his evidence. Lower Courts and Tribunals are expected to follow this Court's precedent. People have some allegiance to higher calling. Mr Ashitiva underlined that he does not question the Claimant's right, not to believe in any deity.

The Court Finds

9. The Constitution of Kenya, in its Preamble, as submitted by Mr Ashitiva, opens with the words,
"We the People of Kenya- acknowledging the supremacy of the Almighty God of all creation..."
10. It closes with the statement, " God Bless Kenya."
11. God is mentioned in the National Anthem, which is part of the National Symbols, under Article 9 of the Constitution. Under the 2nd Schedule to the Constitution, the anthem begins, " O God of all creation."
12. Although the reference to God in the Preamble and in the National Anthem, appears on the face of it, to be of universal application to the citizens, Article 8 affirms that there is no State Religion, and Kenya is therefore a Secular State. Our legal system is secular, and the name of God is not a legal concept. Secular means not connected with religious or spiritual matters.
13. There is no requirement under the Constitution that the phrase, " so help me God," is contained in both oaths and affirmations. The 3rd Schedule to the Constitution, provides for oaths and affirmations. It is clarified that in case of an oath, the person swearing shall conclude with, "so help me God." In case of Atheists, Non-Believers or Believers who are not allowed by their Faith to swear in the name of God, it is sufficient to state that, " I solemnly affirm."
14. Affirmation, would apply to an Atheist who appears in Court to give evidence.
15. The Oaths and Statutory Declarations Act, Cap 15 the Laws of Kenya, which governs administration of oaths and statutory declarations, and which has its origins in the colonial administration, recognizes that swearing in God's name does not apply to all persons.
16. Section 13, of this Act, which has since been deleted by Act No 18 of 2018, stated that Any African, not being Christian or Mohammedan, required by law to take an oath, would take the oath in the form common among and held binding, by the members of the tribe in which such African belonged, and when such African belonged to a tribe the members of which held no form of oath to be binding upon them, he would be required to make solemn affirmation in the form then in use.
17. The Act recognized the choice between oaths and solemn affirmations, from the inception.
18. Section 15 of the Act states that, every person, upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief or that taking of oath is contrary to his religious belief, shall be permitted to make his affirmation instead of taking an oath in all places, and for all purposes where an oath is required by law, which affirmation shall be of the same effect as if he had taken an oath.



19. Section 20 of the Act provides that in any judicial proceedings where a party or witness offers to give evidence on oath or affirmation, in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.
20. The law therefore is flexible on forms of oaths and affirmations, and retains in the Court discretion to administer different oaths and affirmations, so long as such oaths and affirmations are within the bounds of decency and are not repugnant to justice.
21. Section 21 of the Act states that where an oath has been duly administered and taken, the fact that the person to whom it was administered had, at the time of taking oath, no religious belief, shall not for any purpose affect the validity of oath. Even if an Atheist is sworn in the name of God, his lack of belief in the existence of God, would not in law, affect the validity of the oath.
22. It is doubtful that the oaths and affirmations being administered to witnesses in our Courts, serve the purpose which they were intended to serve - extraction of truthful evidence from the witness.
23. Frequently, a witness will take oath in the name of God, or is affirmed, but proceeds to openly give serial untruths to the Court.
24. Oaths and affirmations in judicial proceedings, or when administered upon State Officers, have not been shown to bind the takers, to tell the truth, or discharge the obligations of State Office, in accordance with the oaths and affirmations.
25. Presidents, Legislators, and other Senior State Officers are sworn in the name of God, to uphold and protect the *Constitution*, and spend their entire tenure of office, mutilating and ravaging the *Constitution*. Witnesses are sworn or affirmed, but this does not impress upon them, to give evidence truthfully. The invocation of the name of God, does not instil fear as intended, for the State Officers, or witnesses in judicial proceedings, to speak and act truthfully.
26. The concept of administering an oath or affirmation, as a means of extracting the truth from a witness, is rooted in Religion, and Roman Law, and found its way to African Societies, becoming an aspect of the struggle against colonialists, and a tool for tribal loyalty and bonding, in post-colonial Kenya.
27. Phillip P Durand, [AB Yale], JD [Tenn], formerly a Lecturer in Law, Kenya Institute of Administration, notes in his paper, “ *Customary Oathing and Legal Process in Kenya*,” Journal of African Law, Vol 14 No 1 [Spring 1970], that the customary oath is woven in the fabric of African traditional societies. He observes that the present state of the law, with regard to oaths and oathing in Kenya, is not satisfactory. Although by present, Durand meant 1970, the state of the law on oaths in Kenya is no more satisfactory than it was then, in the present day Kenya.
28. The Writer states that the Kikuyu community had 3 forms of oaths, which were so terribly feared, morally and religiously, that no one dared to take them, unless they were perfectly sure, and beyond any doubt, that they were innocent, or that their claims were genuine. In order of their power to frighten, he names the 3 forms of the Kikuyu oaths as muma, koringa thenge, and gethathi. The oaths are discussed in Jomo Kenyatta’s *Facing Mount Kenya*, Secker & Warburg, London [4th Impression] [Paperback], [1968],233. The first was administered in minor disputes; the second involved swearing, by killing a male goat, and was administered in more important cases, where substantial property, and 2 or more persons were involved; while the third form, was taken mostly in criminal cases such as murder or stealing.



29. Are the oaths and affirmations being administered and taken in our Courts today, so terribly feared, morally and religiously, that witnesses will not dare take them, unless they are perfectly sure and beyond any doubt, that their evidence before the Courts is truthful? Does the invocation of the name of God in oaths, put the fear of God in witnesses, and compel them to tell the truth?
30. There is need to rethink the usefulness of oaths and affirmations in judicial proceedings and public service.
31. Like many other practices in law today, oaths and affirmations, have part of their history in the Roman Law. This is to be understood as the legal system of ancient Rome, including the legal developments spanning over a thousand years of jurisprudence, from the 12 Tables [c 449] to Corpus Juris Civilis, [AD 529].
32. It is widely believed that in ancient Rome, 2 men taking an oath of allegiance held each other's testicles, and men held their own testicles, as a sign of truthfulness while bearing witness in a public forum, such as a Court of law. This school of thought, states that words such as 'testis,' 'testify,' and 'testimony,' commonly in use in our judicial proceedings, are derived from the word testicle, based on this Roman practice, of taking oath by clutching one's testicles. 'Testis' in Latin means both witness and testicles.
33. Etymologists are not unified on this form of ancient oath. Some Scholars disagree with this Roman theory, which they view as fanciful, explaining that in Proto-Indo- European tradition, 'tris' meant 'three' and a witness was therefore meant to be an impartial 3rd person. They explain that 'testis,' means 'third person standing by,' or 'witness.' The words 'testis,' 'testify,' and 'testimony,' are therefore founded on the idea of an impartial, 3rd person standing by, an observer of events, rather than the male genitalia. Another Latin term applied by this branch of Etymologists is 'terstis,' which means 3rd party or person.
34. The Bible in the old testament, however appears to support the Roman theory on testicular oaths and affirmations. In the old testament, to swear a most sacred oath, the swearer made his oath by holding on to the oath giver's genitals.
35. In Genesis chapter 24, Abraham said to the senior servant in his household, " put your hand under my thigh. I want you to swear by the Lord... that you will not get a wife for my son from the daughters of the Canaanites." So the servant put his hand under the thigh of his master Abraham, and swore.
36. In Genesis chapter 47, when the time came for Israel [Jacob] to die, he called Joseph and said to him, "put your hand under my thigh and promise that you will not bury me in Egypt..." Then Joseph swore to him, and Israel worshipped, as he leaned on the top of his staff.
37. Plenty of practices and laws, that define the legal profession and judicial proceedings today, are archaic, and based on misty Judeo-Christian and Roman traditions. They do not add value to the practice of law or judicial proceedings. Latinisms which permeate the legal discourse, horsehair wigs, baronial robes, and the requirement to administer and take oaths, fall within this category of archaic practices. Swearing a witness by God, by body organs, or by slaughtering a male goat, does not assist the course of truth and the administration of justice.
38. The *Constitution of Kenya*, creates a Secular State, our legal system is secular, and persons of different persuasions, ought to be free to live their lives, believing or not believing in any deities. Article 32 of the *Constitution* guarantees every person the right to freedom of conscience, religion, thought, belief and opinion. There is room in Kenya for Atheists. The Preamble to the *Constitution*, and the National Anthem, by mentioning God, acknowledging the supremacy of the Almighty God of all creation, appear inconsistent with the architecture of a Secular State. No one should be compelled to sing a



National Anthem which acknowledges a deity he or she does not believe to exist. The Constitution and the *Oaths and Statutory Declarations Act*, do not compel anyone to swear by God. Even the Colonial State in Kenya, did not compel Africans, a good number of whom were considered heathens, to swear by any deity. Courts have the discretion to administer oaths and affirmations chosen by the swearers, so long as those oaths or affirmations, are within the bounds of decency, and are not repugnant to justice. The biblical oaths in Genesis 24 and 47 would not be within the bounds of decency, and would be repugnant to the administration of justice, if they were to be applied in modern-day judicial proceedings.

39. The Court would recommend that in keeping with the secularity of the State, oaths and affirmations in whatever form, are discarded from our laws. They do not assist in the establishment of the truth, and in the administration of justice. They are anachronistic. A reasonable approach in giving of evidence, or in committing to act truthfully and justly, is to be found in the new testament, where James 5: 2 exhorts Christians not to make oaths, but rather, to let their 'yes' mean 'yes' and 'no' mean 'no.'
40. In the case at hand, there is an acceptable mode of affirmation, which the Claimant, as an Atheist shall take, to enable him proceed with his evidence.

It Is Ordered

- a. The Claimant shall be affirmed under the form of affirmation provided for in Section 16 of the *Oaths and Statutory Declarations Act*, in the following words -

"I, Karega Munene, do solemnly, sincerely and truly declare and affirm, that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth."

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI,
UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 2ND
DAY OF DECEMBER 2022**

JAMES RIKA

JUDGE

