THE PEJURY PROBLEM IN KENYA

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By

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C O N T E N T S

LIST OF ABBREVIATIONS

1.	AC	--	Appeal Case (Law Reports)
2.	All ER	--	All England Reports
3.	C.A.	--	Court of Appeal
4.	Cap	--	Chapter
5.	Col. L R	--	Columbia Law Review
6.	Cr. Appa. Rep.	--	Criminal Appeal Report
7.	Cr. L R.	--	Criminal Law Review
8.	EA	--	Eastern Africa Law Reports
9.	E.A.C.A.	--	East Africa Court of Appeal
10.	Ed.	--	Edition
11.	KLR	--	Kenya Law Report
12.	LR	--	Law Reports
13.	LT.	--	Law Report
14.	QB	--	Queens Bench
15.	ULR	--	Uganda Law Report
16.	Vol.	--	Volume

TABLE OF CASES:

22. Penal Code, Cap 63 S.3, S 108(1)(1), S 108(1)(a), S 108(1)(c), S 108(1)(d), S 108(1)(e), S 108(1)(f), S 108(2), S 109, S 111.

23. Rent Restriction Act Cap 296, Subsid. Rule 11.

C. Ordinances:

1. East African Order in Council, 1889 Article 13.

2. East African Order in Council 1897 Article 11.

3. East African Order in Council 1902 Article 15(2).

4. East African Order in Council 1911 Article 2(2).

TABLE OF STATUTES

A. The Constitution of Kenya S.60.

B. 1. Arbitration Act 1889 (52 & 53 Vic. C49 S 22.

2. Agricultural Produce (export) Act Cap 319 S(13)(3).

3. Agricultural Produce (marketing) Act Cap 320.

4. Agricultural Act Cap 318, Subsidiary; Rule 5.

5. Bankrupcy Act (1883) (182 Geo. 5.C.6) S.27(3).

6. Children and Young Persons Act 1933 (22 Geo 5 C.12) S.38.

6(a). Children and Young Persons Act, Cap 141 S 2.

7. Commissioners For Oaths Act 1889 (52 & 53 Vic. C.10) S 2.

8. Commissions of Inquiry Act Cap 102, S.10 (1).

9. Civil Procedure Code Cap 21.

10. Criminal Procedure Code Cap 75, S.151, S.152(1).

11. Evidence Act, Cap 80, S.3(1), S.124, S.125.

12. Evidence Act (1851) (14 & 15 Vic. C.44) S.16.

13. Foreign Tribunals Evidence Act, 1956.

14. Indian Penal Code 1960, S.191.

15. Interpretation and General Provisions Act, Cap 2, S 3(1).

16. Judicature Act, Cap 8 S.3(1)(b).

17. Land Control Act Cap 302 S(21).

18. Magistrate Jurisdiction (Amendment) Act No.14, 1981.

19. Oaths Act 1888 S.1.

Oaths Act 1909 (9 Edw.7, C.39) S.2(2).

20. Oaths and Statutory Declarations Act Cap 15, S 11, S 13, S 15, S 16, S 19(1), S 19(2), S 20.

21. Perjury Act 1911 (1 & 2 Geo. 5.C.6) S (1)(1), S (1)(2) S (1)(3), S 7(1), S (15).

28. R v Schelesinger (1867) 10 QB 670.

29. R v Tate (1871) 12 Cox CC. 7.

30. R v Townsend (1866) 4 F & F 1089.

31. R v Tyson (1867) LR 1 CCR. 107.

32. R v Voster R & R 459.

33. R v Wheeler /1917/ 1 KB 283.

34. Shah v R /1958/ EA 332.

35. Shaw v R /1911/ 6 Cr. App. Rep. 103.

36. Singh v R 24 KLR 81.

37. Sweet Escott v R /1971/ 55 Cr. App. Rep. 316.

~~WAKAHIU G N~~

INTRODUCTION

Thesis

THE PERJURY PROBLEM IN KENYA

What a sarcarsm it is for a witness to swear falsely by the Almighty God that the evidence "I will give in court will be the truth, the whole truth and nothing but the truth". Over fifty people have suggested that the sworn statement that one will give nothing but the truth is a "hollow phrase".[1]

Mr Ole Tukai of the Kikuyu Court said that over 50% of the affidavits sworn are lies.[2] In other countries where there is law safeguarding the smooth administration of justice, the perjury problem is no less accute. In 1933 HARRY HIBSCHMAN of America said that there was perjury in 75% of all criminal cases, 90% perjury in all divorce cases and 50% perjury in all civil cases and there was laughter from the audience.[3]

The principal complaint is that the oath is often breached. But an oath is a reference to a supernatural power. One must have faith in that power. However, facts do not show that people of the world have a common religion. The law came up with a more mundane provision for truth giving viz perjury law. Professor WIGMORE stated that, "..... the oath's rigid requirements received so much attention that the perjury penalty became a more auxiliary to the oath ....."[4] Desipite this, the practice of cheating in court is rampant.

This dissertation sets to investigate how far the law has gone in its realisation of the objective of punishing perjurers and deterring potential perjurers. This is done by looking into the mode and scope of operation of the law.. The rules of oath, judicial proceeding materiality, the requisite Men's rea and corroboration are among those extensively discussed.

These rules being the substantive rules of the law of perjury should be capable of telling us why there is minimal prosecution for perjury or subornation of perjury and why out of the prosecutions instituted, only a few of them are successful.. Indeed between 1924 and 1963 when we have reported cases of perjury, we have only a total of twelve prosecutions for perjury. Out of the twelve, it is only in five cases that the accused were convicted. The conclusion to be drawn from the data is that a certain encumberance hinders the institution of perjury prosecution and that where prosections are preferred, the chances of success are limited. It is the object of this research to reveal such encumberance.

Once a problem is identified, the next natural step is to suggest its solutions. There are three basic, but debatable alternatives by which the adaptability of criminal law to political, economic and social change may be achieved [5], These are:-

(a) by use of general terms,

(b) by analogy in interpretation of statute

(c) by a complete revision of the main body of criminal law.

But each of these is bound to conflict with at least one of the old established principles of traditional law and jurisprudence. The object of this research is to submit suggestions which suit Kenya in the reconstruction of the law of perjury in dealing with political, social and economic circumstances of those for whom the law is promulgated.

There are a number of problems which one encounters in the enforcement of law and administration of justice. It may not become opportune for us to consider them in details in the research itself. Because perjury law is subject to those problems, I should want to point them out at this stage.

The first set of problem is in the law making. The language style is aimed at precision. The draftsman"..... uses words and phrases that have a legal flavour, language that stops the ordered progress of eye and mind to make lawyers and laymen ponder whether some special meaning is hinted at. The draftsman ends by being less intelligible even to lawyers.."[6]

The second problem is the incompatibility of legal concepts with the common man's perception of phenomena.[7] The direct relevance of this problem is the problem of an oath. The common man's perception is that there is a religious duty to speak the truth. But the law infact disregards religion for the purpose of perjury.

There is lack of publicity in law, which results into mockery of some principles of law.[8] The first quarrel that a reasonable man in Kenya can have with criminal law is the principle Ignorantia juris neminem excusat.. In England, that

ignorance of the law does not excuse anybody may be justified in that law is infact part of the English custom. Other factors such as a low illiteracy rate and ease of communication exist. The totality of the circumstances imply that everybody may be reasonably presumed to know the law, and thus nobody may cite ignorance as a defence. The question is; are those factors similarly observarable about the relationship between the people and the law in Kenya? The question is answered in the negative.[9]

These are only a few of the problems that exist in our legal system. A researcher dealing with a specific aspect of the law must add this baggage of problem to those he finds in his field of study. Thus , the perjury problem must be seen in the perspective of these problems.

Literature Review

The first book I have extensively relied on is Smith and Hogan's Criminal Law[10]. The book gives a fairly good exposition of the law of perjury both at common law and under the Perjury Act of 1911. However, the writers were writing a book in criminal law and not perjury law alone. Thus, there is only a little devotion to the history of perjury law, the notion of oath and the other circumstances not within the substantive law of perjury itself, but which are capable of affecting the operation of it.

The other book is Russel On Crime[11]. This is a much detailed book. It has a good account and description of 'judicial proceeding' the 'oath','materiality' and 'corroboration'. Under the two regimes of law in England. His book provides a

large number of cases which one can rely on in his analysis of legal aspects.

Kenny in his Outlines of Criminal Law[I2] has a better description of judicial proceeding. Interpreting the Perjury Act, he divides the categories of perjury into three viz grade A, B, and C. His grading system helps us understand the issue of 'judicial proceeding' as meant by the Act.

D.W. Pollard has written an Article[I2] on ~~whcich~~ which I have relied very much, especially in his reproduction of the report of the Justice Committee published in I973 on 'False Witness' and ~~bee~~ the report of ~~bee~~ the Law Commission working Paper No. 33 on "Perjury and Kindred Offences". His comments on the recommendations of those jurists are quite sound. However since this research deals with the Kenyan position, Pollard's work can only be used for analogy.

An article has been written by Purrington W A, entitled "The Frequency of Perjury".[I3] He gives a good account of the failure of perjury law both in substance and procedure. He includes the role played by attorneys in the procuration of perjury and also explains why there is laxity by courts to institute proceedings. He seeks to find solutions to the ~~variour~~ various problems.. However, his work can only be used as a guide to research in the Kenyan situation.

Collingwood J J R has written a book on "Criminal Laws of East and Central Africa[I4]" in which he reserves two or three pages for perjury law. His comment is a sketchy account of a few observations. The book doesn't show the problems experienced in Kenya resulting from the wholesale importation of Egnlish

into Kenya. Problems such as lack of a proper or appropriate definition of 'Materiality' which creates confusion in England are contemplated here. He doesn't expose a perjury problem, but only the provisions of the Penal Code. His book lacks anclytical value. Had his book contained the 'perjury problem' he would have suggested solutions, but unfortunately, these are totally lacking in his work.

Collingwood's book may not be said to be time honoured. He includes an African Native Court in his description of a judicial proceeding. But that court is now abolished. Most of the statutes he uses are defunct colonial ordinances.

The book brings up a point, but the facts of the case cited to illustrate are not really appropriate. For instance to point out that there cannot be perjury unless the statement is false, even if there is an intention to mislead. He cites Singh V R[15]. However, the case does not really illustrate his point as its facts show.

From his book, a reader may not readily know what a 'Judicial Proceeding' is or what 'Lawfully Sworn' means. The book is too sketchy on the law of perjury. It also lacks analytical quality on the subject. It is inadequate.

Weinsten has authored a book entitled Perjury. This book is a very detailed research on a single case 'The Hiss-Chambers Case'. It is a kind of a biography. It doesn't discuss the various issues of law that arise. An average reader may not hope to get much knowledge of the law from this biography.

Justification for the Study

The law of perjury is supposed to be important because if the stream of facts is blocked the ~~stopcam~~ stream of law should fare no better. The English Justice Committee observed that, "there can be little doubt that a large proportion of the wrong decisions reached in our civil and criminal courts result from perjury ....."[16] The dimension and extent of perjury problem in England ~~whereas~~ may not be similar in Kenya. The principles of Common Law may be used by virtue of S 3 of the Penal Code.[17] This research is to analyse how the law is administered in England and what problems are met there. Then we will see how those problems are imported into Kenya via that section of the Kenyan Code. The writer sets to fill in gaps left in the literature reviewed above. Where enough analysis of the law has not so far been done, it is the business of this writer to do that in this dissertation as far as possible. No new contribution is really being made except the recommendations which will be postulated in the conclusional chapter.

Chapter Breakdown:

Chapter one will deal with the History of the law of perjury and the nation of oath, since oath or affirmation or declaration are the sole notions that perjury law revolves around.

The first sub-title will be an examination of the nature and form of an oath. The second will deal with capacity to take oath and also persons who can be subject to perjury, by virtue of their having taken oath.

A third sub-title will deal with an ~~examnetion~~ examination of Kenya's position with regard to oath. Finally, we will examine how English law of perjury was imported into Kenya.

Chapter two will consist the bulk of my work, dealing with the essential elements of the crime. The first element we will examine is 'Lawfully Sworn' . The second will consist of an examination of the description of 'Judicial proceeding'. Much research will be done on 'Materiality' since it seems to be the most controversial element. A discussion will be exposed on the 'requisite men's rea' and ' actus reus, being the mental condition of the perjurer and his physical perjurious acts respectively. Finally in that chapter, I will discuss the law of subornation of perjury.

Chapter three will deal with the practical problems facing the application of the law of perjury. The first of them will be the treatment of the requirement of corroboration. I will then discuss the concept of self-contradiction and its treatment in Kenya. Finally, I will examine the contribution made to hamstring the smooth process of truth-giving and the hampering of successful prosecution by the Adversary system of the courts.

The last Chapter will be conclusional. Also in it I will include recommendations.

Methodology of Study

The method of study will be principally archival. Extensive use of books, journals and periodicals will be resorted to.

I will also conduct field research and include the obtained information for analysis or proof of assertions.

FOOTNOTES

I. Interview held with different members of the public at different dates between January and April I986 in Nairobi and Kiambu District. Mr Ole Tukai, DM II Kikuyu Court confirmed that in Kenya, there were more perjury cases which went unprosecuted than my prior research could show.

2. Interview held with Mr. Ole Tukai DM II Kikuyu Court, on I9th March I986.

3. HARRY HIBSCHMAN, 'You do Solemnly Swear! Or that Perjury Problem'. Journal of Criminal Law, Criminology and Police Science. Vol 24 (I933 - 34) pg - 90I.

4. WIGMORE ON Evidence Volume 6 (Little, Brown and Co. (Canada) Ltd. I976), pg - 204 433

5. HERMANN MANNHEIM Criminal Justice and Social Reconstruction (London, Routledge & Kega Paul Ltd, I946). pg - 204.

6. MELLINKOFF D: The Language of the Law. (little, Brown & Co., Boston I963) pg - 424.

7. J.M. KAKOOZA ' Some Problems in Law enforcement and administration of Justice' (University of East Africa Social Sciences Council Conference I968 - 69 Law papers) Makerere Institute of Social Research.

8. Ibid

9. Ibid

IO. SMITH AND HOGAN Criminal Law; 4th Edition (London, Butterworths I978) pp 7II et seq

II. RUSSEL ON CRIME, I2th Edition, (Stevens & Sons London, I764), Vol I pp 29I et seq

II (a) Kenny; outlines of criminal Law

I2. D W Pollard 'False Witness' Cr LR (I974) pp 588 et seq

I3. PURRINGTON W[illegible] 'The Frequency of Perjury' Col 1[illegible] I9[illegible]8 vol 8 pp [illegible]67 et seq.

I4. COLLINGWOOD JJ R Criminal Laws of East and Central Africa, (London, Sweet & Maxwell (Lagos) African Unversities Press, I96[illegible]) pp IO7 et seq

I5. 24 K L R.8I

I6. Quoted in POLLARD LOCCIT P 588

I7. S 3 of the Penal code, Cap 63 stipulates that the code shall be interpreted in accordence with principles of legal interpretation obtaining in England, and expressions used shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, [illegible]o be used with meaning attaching to them in English Criminal Law.

Chapter One

THE HISTORY OF THE LAW OF PERJURY; AND THE NOTION OF OATH

In order to understand the present day and prospective operation of the 'Law of Perjury, it is helpful to know the various stages that the concept has undergone, in England and in Kenya. The Law has been variously applied to different classes of persons in different contexts. All in all, the notion of oath has been a Key factor, because it is the Breach of the oath that imports penalty. The examination of the notion of oath as the common denominator of the crime of perjury is therefore beneficial. In Omychund V Baker[1], COKE CJ was able to say that oaths are as old as creation.

Before the Normans conquered Britain, all means applied to incite persons to give the truth were tied to supernatural conscience. These included the oath, ordeal or battle. After the conquest, these methods ceased to be used, or were abolished, or changed in nature.

The Norman rule brought into Britain an atmosphere conducive to the development of the law in genaral, though customs and principles which consolidated into law had been in existence prior to it.

Two main developments could be observed after the conquest viz ; the establishment of a more comprehensive administrative system of bodies called shries and hundreds[2], and a seperate system of ecclesiastical courts. Within a century of the invasion

the Anglo-Saxon Kings had grown to develop two great departments VIZ; the chancery and the Exchequer, and a judicial system called courts of Shires of Lords and of the King. Between 1154 and 1189, under King Henry II, judges produced a coherent system of English law, deriving ultimate authority from the King whose position was paramount. [3]
With these systems of institutions, the changes or rejection of the old forms of ascertaining truth-giving was facilitated.

In 1215, the Lateran Council ~~condemed~~ condemned ordeals and prohibited further participation in them.[4] Ordeals and battle were seen as barbaric. People lost faith in the Ordeal, and Priests began to feel some moral obligation to arrange the results they considered right. In any case, it was tempting providence to seek miracles as a matter of routine. The ordeal was intended to preclude human judgement on the merits of the case. Judgement preceded proof because once it was adjudged that one should perform the ordeal test, there was no further decision to make. The essence of the dispute and any principles on which the case was determined were for God, not man to discover and apply. There was no question of deciding whether facts alleged were individually ascertainable. Rights and liabilities could not be worked out in detail. Thus, the oath began to take much prominence, although feaudal aristocrats, distrustful of an oath preferred evidence backed up by the sword. In France, where the practice was that of the ordeal, Montesquieu said; "It is in order that our subject no longer take oaths about obscure facts nor perjure themselves about those which are certain".[5]

But even where the Ordeal and battle were supported, oath was not completely disregarded. A person would at times be required to swear before he fought that he had no more concealed about him. Despite the resistance, the church managed to forge prominence in the oath sanction,

by using the King's powerful position. For example, pursuant to the Lateran Council's criticism of other modes of trial, King Henry III forbid his itinerant justices to use ordeal methods. St. Louis also abolished judicial combats in the courts immediately under his jurisdiction

Despite this abolition the judiciary continued to employ the torture system in courts, to be able to extract true evidence. This is known from the black records of the Inquisition and from the story of Joan of Arc, expressed in the following quotation from the account of her trial;

> "We, the Judges, being in the great Town of the Castle of Rouen .... We did require and ~~loam here~~ warn her; To speak the truth, she would immediately be put to the torture, the instruments of which were here in this Same Town, under her eyes. There were also present the executioners, who by our order had made all the necessary preparations for torturing her, in order to bring her back by this means into the way and knowledge of the truth, and thus to procure for her salvation both of body and soul, which she doth expose to such grave peril by her lying inventions."[7]

Torture method was used by Pope Innocent IV in 1215 to collect information and support an inquisition in his courts.[8]

The relevance of this exposition is that it shows that the Law of Pejury has a deep going historical root. The torture used to penalise perjurers can be equated to the ~~forries~~ fines and imprisonments that were imposed later as penalties.

In England specifically, the judicial torture method was less used, but the oath system was used for the purpose of obtaining evidence or information for administrative uses. The jury system was introduced by

the Norman Kings to inform King's judges of suspected criminals without concealment. They were neighbours who were supposed to have personal knowledge of the facts. They would swear to the truth of their testmony. In writs of trespass, the use of the jury was warranted by the allegations of breach of the King's peace.

Concurrent with the jury system was the wager of Law or Compurgation in actions of debts and detenue. In compurgation, the Defendant was required to swear that he did not owe the money or, did not detain the alleged goods. He was supposed to produce eleven oath helpers to testify to his credibility. However, the system worked well only in local courts. The defendants could ably hire professional perjurers to help him out, and later in 1600, the court porters were under a liability to produce them, thus fictionalising the nation.[9]

In both compurgation and the jury system falsification of evidence was punishable. The assize were punished by deprivation of their property if their veredictum was overtuned by the twenty-four-member grand jury. They could also be imprisoned if they were not found to be oath-worthy by passing untrue verdicts.[10]

Pollock and Maintland wrote;

> "In Cnut's days, the man who swore falsely upon a relic lost his hand or redeemed it with half his property .... which was divided equally between his lord and the bishop."[11]

The Star Chambers had already started to recognize perjury as a Common Law Criminal offence - a Misdeamenour - before Parliament intervened. In 1540, Parliament declared subornation of perjury a criminal offence. This could be attributed to the fictionalisation of compurgation and also the possibility that the jurors could be influenced or be bribed by

the people for whom they passed verdicts. As from 1540, anybody who aided, abetted, counselled or procured another person to perjure would himself be under criminal liability. In 1562, Perjury was itself declared a criminal offence by an Act of Parliament. Under that law, anybody who gave false testimony, knowingly in a judicial proceeding would be liable to a penalty. The penalties imposed in for both perjury and subornation of perjury were pecuniary ones.

In the meantime, the jurors had began to shed their character of informats returning verdicts on the basis of their own knowledge. In the later middle ages, the society became more complex and the jurors were less likely to have sufficient personal knowledge to decide cases. The judges began to admit witnesses who stood apart from the jurors and permited them to give evidence in the court.
In R V Rowland ap Eliza,[12] the Star Chamber declared perjury by a witness to be a Common Law misdeamenour.

The Law was extended beyond the limits of judicial proceeding later. In R V Foster[13] it was held that in any matter where the law required oath to be taken, the taking of its falsely would at least be a Common Law misdeamenour, though not punishable with the sanctions of perjury.

Some writers such as Smith and Hogan suggested that perjury started as a religious offence. However, as seen above, the offence started from the administrative structures of the Norman government in pursuit of administrative information.. Indeed as we shall see presently, religion plays a very little role in the law of perjury.

Nature and form of an oath

It is observed that the law of perjury, even in its old forms revolves around the notion of an oath. It is felt therefore that a closer examination of this aspect is an important basis for understanding

the concept we are dealing with.

The early form of the oath was based on objective theory. The oath taker summoned divine ~~veneance~~ vengeance upon falsification, and reward for truth giving. It was a universally accepted mode. But with the later developments that encumbered its use, the notion started to be predicated on a subjective theory.

Best on Evidence writes:

> "Imprecation is (however) no part of the essence of our oath, but is a mere adjunct of questionable propriety ..... The object of the Law in requiring an oath is to get at the truth by obtaining a hold on the conscience of the witness". [13]

For the object is to purge the conscience and impress the witness with a sense of religious obligation, so as to secure purity and truth, ~~Under~~ under the influence of this sanctity, the oath-taker must have a belief. Rules of Law developed to require 'belief' inter alia.

Oath is based on the premise of fear of eternal retribution. Its efficacy presupposes a belief in retribution and capacity to be influenced thereby, which influence should occur when the witness is about to testify The place and time of the said retribution becomes material. The issue is whether it is in present life, or life after death.

The question was dealt with by Brett Mr. in AG V Bradlaugh [14] when he said that the distinction is not necessary. He said:

> "There is no necessity that the person taking the Oath should believe that he will be ~~trible~~ liable to be punished in a future state. If there be any belief in a religion according to which it is supposed that a Supreme Being would punish a man in this world for wrong doing, that is enough."

The rationale behind this arguement is based on the fact that oath is calculated to play on the psychology of the witness. It is supposed to cast fear, and fear in hell would just be as inducing as fear on earth.

The problem arises when one doesn't have this fear in either place due to paganism or otherwise. Thus, the oath should be seen as an aspect for only a small, or big, closed category of people - the believers. We shall see how the problem of closing out others was solved, and much later examine whether the developments have contributed ~~anfying~~ anything to the Law of perjury [15].

FORM:

A witness, being a believer will have his own ceremonies which he considers binding and hence subjecting him to the risk of punishment. S 15(1) of the Perjury Act, stipulates that the forms and ceremonies of swearing or affirming used are immaterial. If the oath-taker has declared and accepted the ceremony as binding on him. [16] The rationale behind this is to avoid the various excuses that one may try to cite for invalidating the oath once caught in perjury. After all why should form matter and the essence of an oath is belief. We shall see later if there is need to prescribe a form of oath to base it on secular rather than theological belief, to cast fear of the wrath of Law rather than of God. [17]

The Oaths Act directs that oath must be administered in a prescribed manner unless objection to this is raised. [18] Although that is a cardinal principle, for the purpose of perjury Act it doesn't matter.
The form prescribed is that a Jew holds the Old testament or a Christian holds the new testament and then with his hand uplifted says:-

"I swear by the Almighty God that the evidence I shall give ....
shall be the truth and the whole truth, nothing but the truth ....

so help me God" [18]. This adoption in the statute ~~of form~~ was extracted from Common Law. In some instances, a witness would kiss the book, with which he swore, but this practice was discarded as being repulsive and unsanitery.[19]

Capacity to take oaths and Persons subject to Perjury

As seen earleir, oath is only known to those who are closed in that class of believers.

The main question is, "How do you ascertain that a witness has capacity to take oath?". Courts practise two method to do this viz ;

(i) the presumption that a person believes;

(ii) where the presumption cannot be raised, the conducting of a voir dire.

In the first case, there is a presumption of belief unless the witness objects to the taking of oath. The burden rests on the objector. In the case of a child, it is the judge who has a duty to conduct a voir dire to determine whether the child understands the nature of an oath[20]. It must be noted that these rules developed in England where Christianity had taken firm hold as the exclusive religion. As such there would be little sense to inquire from a witness, he being a christian whether he believed. Hence the presumption of belief.

Due to previously existing rules of substantive law, the child had been deprived of capacity to take oath. However this wound was healed by the enactments of the Children and Young Persons Act which conferred capacity on children under certain circumstances.[21] It was a codification of common law which had grown to allow a child who understood the nature of

an oath to give sworn evidence. Where a child takes oath, he is liable to perjury penalty on falsification.[22]

Mentally deranged persons were also viewed as being incapable of taking oath. Today, the rule is like that of children, capacity being dependent on the mental condition of each witness. It is for the judge to say whether the insane person has the sense of religion and whether he understands the nature and sanction of an oath at the particula time.[23]

Since ~~bee~~ the essence of oath is belief, it follows that non-believers are stripped of their capacity. This then leads to an exclusion which imports injustice to suitors who need their testimony. People who were so incapacitated were those who had the requsite belief, but forbiden by theological attachments from taking oath, and those who lacked belief of any kind. These groups emerged as a result of the literary romanticism, political liberalism, industrial invention, legal freespeach and theological free thought which prevailed in Europe in the 18th century

Since the insistence on oath was no longer palatable to this social, economic and political ~~dynamssim~~ dynamism,, an attempt at dispensation of the oath was made. Parliament came up with the Oaths Act which provided an alternative by declaring that such person could affirm if he objected to the taking of the oath, or if taking it would not be without unreasonable delay or inconvenience.[24] The dispensation of the oath, owing to lack of capacity or belief, or even belief which was incongruent with the taking of oath, might be said to be the commencement of the problem of 'lawfully sworn' to be discussed ~~latter~~ later.

In early times at Common Law, the accused could not call witnesses, but later, he was allowed to produce them to testify without oath, and finally, they could be sworn[25]. Today, the accused can give sworn evidence in making his defence if he opts to. A co-accused can also give evidence for the prosecution, though his testimony ought to be corroborated. These categories of people are liable to perjury penalty if they intentionally lie.

Under the Penal Code, a person sworn as an interpreter must not wilfully cheat.[26] This was judicially recognised in ANTOINE ERNESTA V R [27] where the testimony of the Appellant was given in a language other than that of the court. It was translated by the trial judge and recorded by the registrar The judge had not been sworn as an interpretor. On appeal in a trial for perjury, it was held inter-alia that it is essential that where the judge undertakes the duties of an interpreter, he should administer the interpreter's oath to himself.

A point of emphasis here is that a person called upon as a witness must solemnly declare or affirm or take an oath. Under Kenya's Criminal Procedure Code, "Every witness in any cirminal case or matter shall be examined upon oath, and ... the court ... shall have full power and authority to administer the usual oath."[28] A witness who refuses to be sworn or when sworn refuses to answer a question put to him or to produce anything he is required to produce or to sign his deposition may be committed to jail for eight days.[29] The rationale behind the compulsory

nature of an oath seems to be to avoid wasting of courts' time.

As we shall see later, lack of capacity to take the oath is not a defence in the law of perjury.[30]

KENYA'S POSITION WITH REGARD TO OATH

Let it be known that Kenya's position with regard to the notion of the oath is similar to the position under the English Law. The law in Kenya is embodied in the oaths and statutory declarations Act.[31]

To begin with, 'oath' and 'affidavit' in the case of persons for the time being allowed by law to affirm or declare instead of swearing include 'affirmation and declaration, and 'swear' in the same case includes 'affirm' and 'declare'[32]

By the provisions of the Interpretaion and General Provisions Act, a Statutory declaration if made -

(a) in Kenya means a declaration made under the Oaths and Statutory Declarations Act.

(b) in the Commonwealth, elsewhere than in Kenya means a declaration made before a justice of the peace, notary public, commissioner for oaths or that person having authority therein under any law for the time being in force to take or receive a declaration.

(c) In any other place, means a declaration made before a Kenya Consular Officer Or pro-consul or a British Consular Officer or pro-consul, or before any person having authority under any Act, or ~~imerial~~ imperial enactment for the time being in force to take or receive a declaration.[33]

Under the Oaths and Statutory Declarations Act, "if any person knowingly and wilfully makes any statement which is false in a material particular in a statutory declaration, he shall be guilty of an offence ... (and is laible on indictment to) ... imprisonment for less than two years or a fine of less than sh.2,000 or both". [34]

The provision makes perjury in a declaration a criminal offence, although the same is also catered for under the Penal Code.

In Kenya, it is recognised that there is the existence of many and different religious beliefs. The Oaths and Statutory Declaration Act hence provide that

"Any African, not being a Christian or a ~~Mohamedan~~ Mohammedan, required by law to take an oath shall take the oath in the form common among and held binding by the members of the tribe to which such African belongs and when such AAfrican belongs to a tribe the members of which hold no form of oath binding upon them, he shall be required to ma solemn affirmation in the form now in use." [35]

A further provision is 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 the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of making 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 oath." [36]

This means that the dispensation of oath, and a provision for an alternative in Kenya are just as in Britain and they are based on the same grounds. This has been discussed earlier.[37] Perhaps the question of 'belief' should be more emphasised on in Kenya than in England. Kenya is an emergent country, having got rid of the colonial claims by nationalist revolutions and negotiations. Again, it is a multi-racial country. It is therefore more likely to provide for a wider scope of beliefs than England.

In an attempt to resolve the issue of 'belief' the Oaths and Statutory Declarations Act provides 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 the oath, no religious belief shall not for any purpose affect the validity of the oath."[38]

Although this provision also dominates the law of oaths in England, there is a presumption of belief, unless the witness be a child or a mentally deranged person. In Kenya, this presumption of belief is of less if any significance. While Christianity is almost the exclusive religion in England, there are various religions in Kenya. Mohammedans will swear by the Koran, Christians by the Bible and so on.

Theological attachments normally will come up with different forms of swearing or affirming. In all cases, solemnity is the main pursuit, to induce a

person to speak the truth. For the purpose of the law in Kenya, the forms and ceremonies used to solomnise the statements do not matter. Although it is stipulated that the form of affirmation will be, "I A. B...do solemnly, ~~sincery~~ sincerely and truly declare and affirm....." and omitting any words of imprecation,[39] the law also provide that the form of oath or affirmation is immaterial as long as it is binding, not repugnant to justice or decency and not purporting to affect any third party.[40]

This also can beviewed as an attempt to cover a wide scope of theological forms, which if otherwise provided would hinder the operation of the law. However, in view of the fact that belief as stimulant to truth giving is totally disregarded in Kenya, unlike Britain, an alternative for it should be provided. This imperatively requires the form of oath or ~~affimation~~ affirmation to be changed, so that solomnity is predicated on fear of the wrath of secular law rather than supernatural or impersonal discipline. The suitability of this proposal will be discussed later.[41]

Children are also allowed to tender sworn or unsworn evidence. For them it is provided that;

> "Where ... any child of tender years called as a witness does not, in the opinion of the court or such Person, understand the nature of an oath, his evidence may be recived, though not given upon oath if in the opinion of the court, ... he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth, and his evidence in any proceeding against any person for any offence, though not given on oath, but otherwise taken and reduced into writing .... shall be deemed to be a disposition....'[42]

The Children and Young Persons Act defines a 'child' as a person under fourteen years of age.[43] A clearer description was reveal in Kibangeny V R[44], where the court dealt with the evidence of two boys both of whom were estimated to be under fourteen years old.

The court said that, " we take .... (tender years) to mean, in th absence of special circumstances, any child of an age, or apparent age, of under fourteen years ...."[45]

The first situation where a child may give evidence is where he understands the nature of an oath. It is the duty of the court to ascertain whether the child understands the nature of an oath, by conducting a voir dire. Religious belief is fundamental to the understanding of an oath, as was stated in Oloo s/o Gai V R [46] where the court dealt with the evidence of a girl of six-years.

If after questioning, the court is convinced that the child does in fact, understand the nature of an oath, arising from religious beliefs, the child may be sworn or affirmed. While the courts' practice insist on belief, at least with regard to children, the law remains persistent on disregard for the same. There is a conflict of rules here, and the effect of this to the law of perjury will be seen later..[47]

The second situation where a child may give evidence is where he does not understand the nature of an oath, but is possessed of sufficient intelligence and understands the duty of speaking the truth. The court must, by conducting - voir dire, satisfy itself that the two requirements appear. The question arises as to who m the court would consider to be necessary in order to satisfy itself that the child understands the duty to give the truth. ie, whom should the child understand as having cast this duty. One cannot fail to see why 'belief' should be vital in this instance.

The law provides that, "if any child whose evidence is received .... wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment." [48]

In Kenya therefore, a child also becomes liable to perjury penalty even though he is not sworn or affirmed. His deposition will be treated as if he had made it after being sworn, for the purpose of perjury under the Penal Code. The position of an oath in Kenya is more or less the same as the English position. The only difference that one finds on close examination is the treatment of 'belief', the effects of which will be examined later.[49]

RECEPTION OF ENGLISH PERJURY LAW INTO KENYA

When the English Perjury Act was enacted in I9II, the classes of persons liable to perjury penalties had already been established. The Act Consolidated and modified the law previously existing in statutes going to the tune of one hundred and thirty years. That Common Law which was enacted is what was received in Kenya. The provisions of both Common Law and the Perjury Act will be discussed in the next chapter.

The first reception was by virtue of the East African Order in council of I889 which provided that;

> "Jurisdiction shall so far as circumstances admit, be exercised upon the principles of, and in conformity with, the substance of law for the time being in force in England."[51]

But the specific application fo criminal law, of which Perjury Law is part, was by virtue of the I897 East African Order in Council which provided that;

> "Her Magesty's Criminal Jurisdiction in the Protectorate shall be so far as the circumstances admit, be exercised on the principles of, and in conformity with, the enactments ... of the Governor of India .... and where inapplicable shall be exercised in accordance with Common Law and statutes in England in force on the I2th of August I897."[52]

In I902, the law was changed to read that;"Such Criminal jurisdiction shall so far as circumstances admit, be exercised inter alia in conformity with the Indian Penal Code."[53]

The I902 Law was found inadequate, since it professed exclusive use of the Indian Law, which the settler politicking had it as unsuitable for them since it had been promulgated for a subject people. An amending order was made in I9II, which stated;

"Such criminal jurisdiction shall so far as circumstances admit be exercised in conformity with the Indian Penal Code .... and so far as the same shall not apply, shall be exercised in conformity with the substance of Common Law .... and acording to the procedure and practice followed in England .... the said shall be in force so far as circumstances of the protectorate and its inhabitants admit."[54]

Although no cases have been reported between I889 and I9II, it is clear that when dealing with the question of perjury, the courts had two alternatives of substantive law to apply. Between I889 and I902 the courts could apply Common Law of Perjury only. Between I902 and I9II, only the Indian Penal Law of perjury could be applied. After I9II and upto I930, when Penal Code commenced courts could apply either Indian Law or Common Law depending on the circumstances of each case.

Indian Law, like many other colonial laws was set to recognise "circumstances of each case" which made it to be discriminative and unable to confer equal rights and privileges to the colonised. No doubt, the ~~settlers~~ Settlers feared its exclusive use of it here. As far as the law of Perjury is concerned, the discriminating effect was felt in DIWAN S/O KARIM V R[56]. In that case, the accused were, together with others charged with theft, Owing to the sickness of of one of them, the trial was protracted. In the interim, there was a change of magistrates. The accused gave contradicting statements t the two magistrates.. He was charged with Perjury. He contended that the statements charged as perjury were not material to the proceeding. The court in affirming the convictions stated that " Under the Indian Penal Code, such materiality is not essential as an ingredient of the offence."[57] This is quite different from the Law in England where the statement charged must be " material to the proceeding

The difference is that Indian Law was there as a fast-time trap for lie-tellers, while the English Law was more lenient to the offender.

That is one of a myraid of instances where the Indian law was found unfair, by the settlers. They felt it was high time that Kenya had its ~~on~~ own Penal Code. Petitions were sent to the colonial office in England and in response, the office sent a Gold Coast and St. Lucia Codes as models. These were considered together with the Nigerian Code, itself based on the Queenslands code. The pedigre of these codes should be well discerned because the Gold Coast, St. Lucia and Queensland's codes were themselves based on an English Bill of criminal law of I880 which did not become law, due to organised opposition. They were all a codification of what was considered to be Principles of English Law.

The Nigerian Penal Code was selected on recommendations of Coombes who had working experience in both Kenya and Nigeria as Attorney General and Puisne Judge respectively. Although the Perjury Act had been in operation in England by I925 when the Kenya Penal Code was drafted by Ehrhadt, the law relating to Perjury reflected the common law Principles.[58] To illustrate this are the following examples :

> The English law required that the particularities of the charges assigned as perjury must be stated. This was upheld in David Nunes V R [59] where the court said;
>
> "In our opinion, the charge lacks the particularity rightly in an assignment of perjury, as it is clear by the old form of indictment, which set out the accused (must have) wilfully, knowingly and falsely swore ... whereas in truth and in fact ... (the statements were false)" [60]

The court also added that there must be corroboration as to falsity of the statement.

English law of swearing children was also followed in R V Mokoto s/o Makau where BARTLEY J said,

> "It is clear that .... a child cannot make an affirmation unless he has an objection to making the oath ... Jannifer (the testifying child) cannot be affirmed under the laws in force in Kenya. I had no hesitation therefore in following the English Law and practice in admitting Jannifer's evidence."[61]

Summing up the law relating to Perjury in Kenya, the court said in Makan Singh V R; [62]

> "It seems to us that the Law on the subject of false testmony could not be better summed up than it was by Norman J in ... R V Ahmed Ali (I869, II WR , CR P 27) where he states; "It appears to us that the true rule is that no man can be convicted of giving false evidence except upon proof of facts, which ..... show not merely that it is incredible, but that it is impossible that the statement ... made upon oath can be true."[63]

The Penal Code reverted to the leniency offered to the offender under common law. The effect of this on the efficacy of the Perjury Law in Kenya will be examined later.[64]

CONCLUSION

It is hoped that the above exposition clarified the development of oath sanction, and its essence. The oath has always owed its existence to religious conscience. For the purpose of the law, this has little significance for an affirmation will be equally binding. The classes of persons who would subject themselves to the perjury penalties in case of falsification have

also been detailed. The infiltration of English law principles into Kenyan law has been seen. These aspects help the reader to understand the problems which the law has either created or has been unable to solve, which is the subject of the ensuing chapter.

FOOTNOTES

I.. (I744) I Atk , 2I

2. BAKER J H An Introduction to English Legal History 2nd ed. (London, Butterworths I979) p II

3. Ibid p I2

4. FRY MAGERY; Arms of the Law (Methuen, London, I942) Vol I P I42

5. Quoted in MAGERY Op. Cit.. p 35

6. HOLDSWORTH History of English Law (Methuen, London, I942) Vol I pg I42

7. MURRAY, Jeanne d Arc (Hemman London I907) pg I25, Quoted from MEGERY op cit pg 39

8. MEGERY ot. cit. pg 37

9. BAKER op. cit. pg 65

IO. POLLOCK AND MAINTLAND, The Histroty of English Law 2nd Edi Vol II (Cambridge UNiversity Press, I968) pg 542

II. Ibid pg 54I

I2. (I6I3) 3 Co Inst. I64 (TAC)

I3. R & R 459

I3 Best on Evidence

I4. (I885) LR I4 QBD I67 at I69

I5. Infra

I6. The Perjury Act preserves this doctrine contained by the Oaths Act of I888.

I7. Infra

I8. Oaths Act (I909) (9 Edw 7 . c. 39) S. 2 (2) This form is shown in BOLAND & SAYER'S Oaths and Affirmations; London, Stevens & Sons Ltd, I96I) pp I00 etseq

19. WIGMORE on Evidence.. Vol 6 (little, Brown & Co. (Canada) Ltd, 1976) pg 389
20. Ibid pg 401
21. Children and YOung Persons Act1933 (22 Geo. 5, C 12) ; S. 38
22. BOLAND & SAYER; op cit. pg 51. Also the Children and Young Person Act of 1933 S. 38 stipulates this.
23. WIGMORE, op. cit pg 407
24. This was what was held in R V Moore (1892) 8 TLR 287, which was confirmed by the Oaths Act (1888), S. 1
25. WIGMORE - op cit p 411
26. Penal Code cap 63 s. 109
27. [1962] EA 505
28. Criminal Procedure Code; cap 75, S 151
29. Ibid S. 152 (1)
30. Infra
31. Oaths and Statutory Declarations Act Cap 15
32. Interpretation and General Provisions Act cap 2 s.. 3 (1)
33. Ibid
34. Oaths and Statutory Declarations Act. Cap 15 S. 11
35. Ibid S 13
36. Ibid S. 15
37. Supra
38. Oaths and Statutory Declarations Act Cap 15 S. 21
39. Ibid S. 16
40. Ibid S. 20
41. Infra
42. Oaths and Statutory Declarations Act. Cap 15 S. 19 (1)
43. ~~Kenya Evidence Act. Cap 80 S. 124~~

43(a) Children and Young Persons Act, Cap 141 S. 2.

Chapter Two

THE ESSENTIAL ELEMENTS OF THE CRIME OF PERJURY

At Common Law, Perjury, strictly so called, consisted in giving false evidence on oath in a matter which was material in a judicial proceeding. Swearing outside a judicial proceeding where a statement was one required to be made by law, was a misdemeanour ~~misdemeanour~~ if it was found to be false. These two elements were combined by the Perjury Act which defines Perjury; Viz

> "If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false, or does not believe to be true, he shall be guilty of perjury...."[1]

In Kenya,

> "Any person who, in any judicial proceeding, as for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then depending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury."[2]

LAWFULLY SWORN AS A WITNESS

The position of the law is that every witness must be sworn or affirmed when giving evidence. The issue then arises as to what 'lawfully sworn' means for the purpose of the law of perjury. In England.

> "For the purpose of this Act, the forms, and ceremonies used in administering an oath are immaterial if the court or person

before whom the oath is taken has power to administer an oath for the purpose of verifying the statement in question and if the oath has been administered in a form and with ceremonies which th e person taking the oath has accepted without objection, or has declared to be binding on him.[3]

The Act goes on to say:

"In this Act the expression 'oath' in the case of persons for the time being allowed by law to affirm or declare instead of swearing includes affirmmation and declaration and the expression 'swear' in the like case includes affirm and declare."[4]

The conditions under which children and mentally deranged persons may lawfully be sworn or affirmed have been discussed earlier.[5]

In England, a person who is not a competent witness but is mistakenly sworn is not lawfully sworn for the purpose of perjury law. Thus, in Cleggs case[6], the defendant in a criminal trial pretended that he was his own son. The court took evidence. In a charge of perjury, it was held that he could not be indicted for perjury since he was not competent.

The law has taken a twist in that the accused person is a competent person as from I898, although his evidence must be treated with caution, to avoid prejudice or favour on him. However, the principle is that incompetent witnesses cannot commit perjury in England.[7]

The question whether a witness is, or is not lawfully sworn is a question of law, rather than fact as it used to be under Common Law.[8] The English oaths Act of I96I has extended situations where one can affirm to situations where it is not reasonalbly

practicable to administer an oath in the manner prescribed by, and appropriate to, his religious belief. The rationale behind this is to avoid any temptation to think that "lawfully sworn" is a question of fact, which hence deprives an accused of any defence to the effect that he was not lawfully sworn.

Having seen that the forms and ceremonies used in swearing and affirming, or the religious beliefs of the witness do not matter for the purpose of perjury, we can safely conclude that "lawfully sworn" is not much of an essential element of the crime. As long as a witness has sworn or affirmed, he is automatically lawfully sworn. Perhaps the only issue that need to be considered in determining whether a person is lawfully sworn is whether the person, or court receiving the evidence has authority to do the same or not.

The question whether a witness is lawfully sworn is or not in Kenya is of no significance at all. It has alrea been seen that the forms and ceremonies or even the belief of the witness do not matter.[9] The penal Code complements and emphasises on this by stipulating that;

(i) It is immaterial whether the testmony is given on oath or under any other sanction authorized by Law[10]

(ii) The forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speek the truth are immaterial, if he assent to the forms and ceremonies actually used.[11]

(iii) It is immaterial whether the false testmony is given orally or in writing.[12]

Secondly, in Kenya, the wording ~~constuction~~ of S. 108 (I) talks only of "false testmony" without requiring that the swearing or affirming be lawful. Even entertaining the su-

supposition that the statute is not intended to alter Common Law unless expressly stated, the provisions outlined above show a that "lawfully sworn" is not important here. Thirdly, the issue of whether the witness need be a competen person is resolved by the Penal Code.

It stipulates that:

"It is immaterial whether the person who gives the testimony is a competent witness or is not , or whethe the testimony is admissible in the proceeding or not."[13]

Thus, a technically possible defence that a the accused was not lawfully sworn, owing to his lack of competence, which exists in England, does not exist in Kenya.

Although the law is designed here to be stricter than its counterpart in England, so as to raise its efficiecy, the rationale seems less logical. One fails to see why a defence of incompetence should not be provided. The evidence Act stipulates that all persons are competent to testify unless they are prevented from understanding the questions put to them or from giving rational answers by tender years, extrem age, disease or any similar cause.[14] Thus, it is not totally inconceivable that a person may give evidence, and h is found later to be incompetent and is dropped by the court. Incompetence precludes admissibility. The law is that inadmissibility of evidence does not preclude perjury. The question of inadmissibility and materiality will better be understood in a seperate heading.

Little will be ~~devolted~~ devoted to the question of lawful swea-ring because as found, it is less important, except maybe the injustice the law has created, if not failed to curb, on account of deprivation of a possible defence.

However, it is important to note that the law of perjury relates to assertory, and not promissory oath. Thus, a Parliamentarian, or a President, or a judge who breaches his oath may not be prosecuted for perjury. Perhaps it is only in the distinction of assertory oaths from promisory oath that "Lawfully sworn" is of any relevance in the law of perjury.

The question can be summarised in the following words;

"The testimony must be sanctioned not merely by an oath, but by a judicial oath, in the course of a regular proceeding; by an authorised person. For if the oath were extra-judicial, the witness could not be punished for committing perjury under that oath, and therefore one of the securities for truth, which the law has provided would be wanting."[15]

A breakdown of this assertion illustrates that the test for "lawfully sworn" is the judicial character of the oath/affirmation and the authority of the person receiving it, which is the subject of the ensuring subheading. The assertion shows that despite the extent of errosion done to the doctrine, it is still as essential element in the crime of perjury.

Judicial Proceeding

At Common Law, for a false statement to be perjury, it must have been made in a judicial proceeding. Before the promulgation of the Perjury Act of U K, judicial proceeding had already been extended to include ~~on~~ any matter where the law required oath to be taken.[16]

The position had been put clear by the I85I Evidence Act which stated that

"every court, judge, justice officer, commissioner, arbitrator, or other person .... having by law or by consent of the parties authority to hear, receive and examine evidence is hereby ~~empowed~~ empowered to administer an oath to all such witnesses as are legally called before them respectively." I7

It therefore was not material whether the court was one of record or not, nor whether it was one of Common Law or Equity, or of civil law or an ecclessiastical court. It was not material whether the oath was taken in the face of the court or out of it. As such, a sheriff, his deputy or under-sheriff on a wit of inquiry will be a person authorised to examine a matter. So is a registrar. Where the parties concerned give consent that evidence be taken on oath, the receiver of such oath poses as a person authorised to take evidence on oath. If the witnesses give false evidence in those circumstances, they may perjure themselves.

The perjury Act now stipulates that

"The expression 'judicial proceeding' includes a proceeding before any court, tribunal, or person having by law power to hear, receive and examine evidence on oath."I8

This was an attempt to re-define 'judicial' proceeding. Before it, seperate statutes and pieces of law required evidence to be taken in their own senses. For instance, under the ~~Bankruptcy~~ Bankruptcy Act,

"The court may examine evidence on oath, either by word of mouth, or by writen interrogatories, any person (so) brought before it concerning a debtor ...."I9

More often than not, such evidence was taken by a registrar, and produced to the court. The registrar was an appropriate officer to whom evidence may be given, and if it is false, perjury might be inferred. Again under the Arbitration Act of 1889 (now repealed by S. 17 of the Perjury Act), givir false testimony before an arbitral tribunal was a perjury. At Common Law, Cockburn CJ said about false evidence taken corruptly, wilfully and knowingly given to a court martial; "... the offence of taking false oath before a court martial is perjury at Common Law."[20]

Those seperate provisions were consolidated by the Perjury Act. Under it, all ordinary courts of law, courts-martial and tribunals are all judicial proceedings for the purpose of perjury.

Under Common Law, the court taking the evidence must be properly constituted, and must have competent jurisdiction over the matter in which false evidence is tendered. In Buxton V Gouch,[21] false oath was taken in a court of requests, in a matter concerning lands. It was held that the accused could not be indicted for perjury because the court did not have jurisdiction over such cases.

The Perjury Act does not require that the court should have "competent jurisdiction" but it is presumed that it is not intended to change the Common Law position, as later cases show. In shaw V R,[22] justices of a licensing court held a special preliminary meeting, for which there was no statutory authority. They had no power to administer oath. It was held that the oath was

not taken in a judicial proceeding.

Even the officers taking the evidence must be competent to do so. Under the I85I Evidence Act, a person acting in a private capacity is not competent. So aren't people who are authorised to take only some kinds of oath and not others or those who, although ordinarly take oath have no legal authority to do so.[24] This provision was reproduced by the Perjury Act.[25] The officer must not always be a judge or magistrate. The registrar or anybody else with authority will suffice as seen above. Under the I889 Commissioner for Oaths Act, Every person who being an officer of, or performing the duties in relation to any court, is for the time being so authorized by judge of the court or by or in pursuance of any rules or orders regulating the procedure of the court, and every person directed to take an examination in any cause or matters in the supreme court shall have authority to administer any oath ....."[26] As such, an affidavit signed out there and administered by commissioner for oath or a public notary is also a good deposition for the purpose of perjury.

A statement made out of England for use of registration of any instrument in U K, or for use with the High Court is also good for the purpose of perjury. The commissioner for oath may administer oath in a foreign country, or any other person who by law of that foreign country has authority to do so.[27] By an amendment of the Commissioner for Oaths Act in I89I ambassadors, envoys, secretaries, counsul in foreign

embassies may take affidavits to be admitted as evidence in England.[28]

In the case of perjury in an affidavit or the like, the offence is committed when the deponent takes oath to the truth of the affidavit, and it is not necessary to aver or prove that the affidavit was filed or in any way used.[29]

The problem with affidavits is that while in a court proper the witness has to object to oath so that he may be allowed to affirm, the grounds for which declarations in an affidavit is made is not exposed to the commissioner. The essentials of an oath which supposedly warrants truth such as belief are wholly ignored.

Secondly, "judicial proceeding" has been extended so far that the commitment of the deponents's mind to truth due to fear or respect of the court is lost. This will be verified later.[30]

In Kenya, 'judicial proceeding' is not defined. It however cannot be doubted that a court proper is a judicial proceeding when conducting its business. "Court" is defined as "any court of Kenya, of competent jurisdiction."[3] Whether a court has competent jurisdiction or not is determined by the law constituting it. Thus, the High Court is established by the constitution and conferred with unlimited jurisdiction in both criminal and civil matters.[3] Parliament may also establish courts subordinate to the High Court. Consequents to this, the Magistrates Courts and the Khadhis courts have been established. All these courts form 'judicial proceeding' for the purpose of perjury.

Parliament may also establish courts subordinate to the High Court. Consequent to this, the Magistrates Courts and the Khadhis courts have been established. All these courts form 'judicial proceeding' for the purpose of perjury.

The Evidence Act gives us an opportunity to draw an analogy and extend the bounds of 'judicial proceeding' by stating that 'court' includes all judges, magistrates and all persons except arbitrators, legally authorized to take evidence.[33] What matters is not the institution or the building in which oath is taken, but the "authority of the person administering oath and taking evidence" to do so. This implies the task of a person dealing with the law of perjury to look at the provisions of the law constituting each court to examine whether it can take evidence on oath. The following is a list of situations where the law constituting the 'courts' authorise them to take evidence on oath:

(I) Under the Land Control Act, "Any person who knowingly makes any false statement in an application or appeal under this Act, or who knowingly gives any false information of an application or appeal under this Act shall be guilty of an offence and liable to imprisonment or a fine or both."[34]

(2) Under the Rent Restriction Act,

"The procedure to be followed by the tribunal shall, except as herein provided, be that prescribed under the Civil Procedure Act so far as it is practicable ..." although the procedure may be

prescribed by the minister. The Civil Procedure Code in its turn authorizes judges/officials/bodies whose procedures are prescribed by it to take evidence on oath.[35]

(3) Under the Commissions of Inquiry Act, every commissioner shall have the power of the High Court to summon witnesses and to call for the production of books, plans, and documents and to examine witness on oath.[36]

(4) Under the Agriculture Act, the Agricultural Appeals tribunal "may require any witness to give evidence on oath, and ~~ofr~~ for that purpose, the chairman may administer oaths.[37]

(5) Under the Agricultural Produce (Export) Act, a person who gives false information in a written warranty or invoice, label or certificate whereof he misdescribes the produce in any material particular is guilty of an offence and is liable to penalties prescribed by law for the ~~creime~~ crime of cheating.[38]

These are but only a few examples of instances where perjury may be prosecuted for. A number of problems emerge from this system of describing the law. Firstly, finding out which tribunal or body may take evidence on oath or not is laborious.

Secondly, the system lacks consistency. Some Acts recognize the offence and go further to prescribe penalties for it which may or may not be the same as those in the Penal Code. Others merely require evidence to be given on oath, without prescribing punishment ~~ofr~~ for those who falsify the testimony. Others simply state that evidence shall be taken in the manner it would be taken in open or

ordinary court under the Civil Procedure Act.

Thirdly and most serious, some statutes do not address themselves to the question of whether evidence should be taken on oath or not. For instance, while the Agricultural Produce (Marketing) Act vests the board with very important quasi-judicial duties of promoting organized marketing, it doesn't vest them with power to hear evidence under oath. It only vests the board with power to require any person to furnish in such manner and insuch form as the board may request, information as to his transaction in any regulated produce and as to the stocks of any regulated produce in his possession or under his control.

A person dealing with perjury in such a case would be confused whether to treat 'in such manner and in such form as the board may request' as conferring authority on the board to hear evidence on oath or not.

Another example where one may be confused likewise is when dealing with information given to a pannel of elders constituted under the Magistrate (Amendment) Act of I98I. While the elders are vested with the important duties of determining issues relating to beneficial ownership of land, boundaries, claim to occupy or work land and trespass to land, the Act doesn't state what the procedure of doing this is to be determined.

The point raised here is that lack of a proper definition of "judicial proceding" is a potential source

of confusion in Kenya, which was eradicated by the Perjury Act in England, as seen earlier. Solutions to the problem will be discussed in the concluding chapter.

Concerning the Competence of the court officer, the Oaths and Statutory Declarations Act stipulates that;

> "A magistrate or Commissioner for oaths may take a declaration ...."[39] and that
>
> "A magistrate, the Registrar of the High Court, a deputy Registrar and a district Registrar may administer any oath or affirmation or take any affidavit or statutory declaration .... which might lawfully be administered or taken by a commissioner for oath."[40]

It goes further to state that

> "The Chief Justice may appoint persons being practising advocates to be commissioners for oath,[41] (and). A commissioner for oath may .... in any part of Kenya administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclessiastical matters relating to the registration of any instrument whether under an Act or otherwise."[42]

Oaths or declarations taken by those persons are "lawful swearing/declarations" for the purpose of the law of perjury.

The statute adds that a person authorized by the litigants to hear their evidence on oath is by "law authorized to recieve it on oath" for the purpose of perjury.[43]

Various observations may be made concerning the meaning of "judicial proceeding" and "authority to hear

evidence on oath" expoused above. Evidence may be given out of the court, in the absence of an honourable judge, to the commissioner or any other person. Where this is the case, there is disregard for the warranties of an oath. The witness need not object to taking of oath so as to be affirmed, like he would have done in a 'court proper' before a judge. The practice of giving evidence out of court has the effect of reducing the mental commitment of the witness to truth giving. It has been observed that the fear of eternal punishment as a stimulant to truth should come just before the witness testifies. It is difficult to see how one's mind would be committed to that aspect of fear before a commissioner for oaths.

The other thing we get from the provisions of the Oaths and Statutory Declarations Act is that 'judicial proceeding' is given a restricted meaning. Even though it includes courts proper, ecclessiastical, matters, matters relating to registration of any instrument in Kenya, and holds judges, magistrates, registrars commissioners for oath and persons taking evidence on oath by consent of the parties as having authority to administer oath, it doesn't help us to draw an analogy and extend the doctrine to other fields like the pannel of elders.

Under the Judicature Act, the English Foreign Tribunals Evidence Act of I856 is scheduled as one applicable in Kenya.[44] Under that Act, the court or judge may on exparte application by any person shown to be duly authorized to make such application examine a witness and the evidence thereby obtained may be used in a foreign tribunal. Such

evidence if falsely sworn can constitute perjury. Foreign tribunals, ambassadors, counsul, etc are not expressly stated to be part of 'judicial proceeding' like in England. However, by virtue of theEnglish Act of I856, letters of request may be sent to a foreign tribunal to examine witnesses abroad for use here in Kenya.

Therefore undoubtedly foreign tribunals are part of judicial proceeding for the purpose of the law of perjury in Kenya.

While an English judge in a trial for perjury will labour very much to determine whether the court which was the scene of crime was properly constituted or not, his counterpart in Kenay has no such business. In Kenya, " it is immaterial whether the court or the tribunal is properly constituted, or is held in the proper place or not, if it actually acts as a court or tribunal in the proceeding in which the testimony is given."[45] The competency in the jurisdiction of the court is not considered.

The Uganda Penal Code is similar to the Kenya one. In BUNYORO Kingdom Goverment V Mukebu Aguda,[46] the accused in a trial in an African Court was found by the court as being guilty of "knowingly telling the court lies, thereby intending to mislead the court" and sentenced to four months imprisonment. He appealed to the Central African Court which nowheld him guilty of subornation of perjury and enhanced the sentence to six months. One of the grounds of appeal was that the court had no jurisdiction to impose such punishment.

Sir UDO UDOMA CJ said,

"The reason for this (limit of jurisdiction) is not far to seek .... the accused .... may not be able to afford the fine or compensation, in which event the order of the court inflicting the punishment may become impossible of performance. The order may thus be rendered negatory and of no effect, since it cannot be carried into execution. That of course is ~~not~~ Most undesirable, and would be contrary to the well known principle of law that a court cannot make an impossible order"[47]

It is important to distinguish competence of the court from jurisdiction. Competence, which is the one that doesn't matter in perjury law is the actual composition of the court while Jurisdiction is the authority of the court to deal with that matter. The question whether a court is, or is not properly vested with jurisdiction is always an important principle of the Rule of the law in Natural Justice. A decision of a court which doesn't have authority to make such decision is void.[48]

Under the African Courts Ordinance, now repealed, it did not matter for the purpose of perjury whether the evidence was taken under oath or not. Such was an example of the discriminatory nature of colonial laws. But that is not our discussion now.

Finally, it is important to state when judicial proceedings commence and terminate.

Criminal proceedings begin.[49]

(i) When the police officer brings an arrested person to court to answer a charge

(ii) by a police officer or prosecutor making a charge against a person before a magistrate and requesting the issue of a warrant or summons,

(iii) when a person brings private prosecution (which are rare in Kenya) .

Civil proceedings commence when the Plaintiff files a plaint in court.

A preliminary proceeding is also a judicial proceeding for the purpose of perjury. In a preliminary inquiry, the magistrate tries to find sufficient evidence with which he can commit the accused to the High Court. While in the course of so doing, false information is given, it might impart perjury penalties.

In R V Apili [50] the accused gave a statement at a preliminary inquiry, which she contradicticted during trial. Under Ugandan law, if two statements which contradict are given, one of them is prima facie,perjury. She pleaded guilty to cheating, but the High Court quashed the conviction on other grounds.

For the purpose of perjury penalties, judicial proceeding extends to the delivery of judgement. Hence in R V Baker [51], the accused had already pleaded guilty to a charge of selling beer without a valid licence. He falsely swore that when previously convicted of a similar offence, he had not authorized his solicitor to plead guilty It was held that such was perjury.

Even where a person offering himself as bail for another cheats about his qualification, he becomes liable to perjury penalties.[52] However, courts practice show that such persons are not normally required to give evidence

pertinent to their qualifications on oath.

An examination of what is implied by a 'judicial proceeding 'exposes the fact that a very wide meaning has been given to it, especially in England. Due to lack of a proper definition in Kenya, only a restrained interpretation can be given to it. Conferring judicial or quasi-judicial duties to tribunals and at the same time not authorizing them expressly to take evidence on oath, is analogous to an elderly person taking too much food into the mouth, but having no teeth to chew it. The position is much clear in U K as the provisions of the Perjury Act show.

Indeed in U K, perjury has been extended further than to ordinary courts or tribunals. If a person lawfully sworn otherwise than in a judicial proceeding wilfully makes a statement which is false or does not believe it to be true or wilfully uses a false affidavit for the purpose of the Bills of Sale Act of I878, he is guilty of an offence. Again, if one swears falsely with regard to obtaining or registering a marriage certificate, he is guilty of an offence.[54] So it is an offence if one falsly swears to evidence relating to births and deaths.[55] In other situations, a person may be convicted of perjury for giving false testimony even without having taken an oath. It covers a great number and wide variaty of circumstances in the ordinary course of business.[56] In Kenya, the operational scope of perjury law is limited. Even by a liberal construction, perjury cannot be extended to a statement made to a Bank Manager in ordinary course of business.

It cannot also be extended to a statement made to the Parmanent Secretary in a government ministry. Even where it might be extended to quasi-judicial bodies, the construction has to be strained since as pointed earlier, most statutes rarely ever address themselves to this question.

Materiality of the Statement

The most controversial element of the crime is that the false statement must be material in the proceeding. At Common Law, the essence of the offence is the tendency of the statement to mislead the court. Thus, false evidence must be relevant to a question already raised, or to be raised in the proceeding, for it is wholly foreign from the purpose, or altogether immaterial and neither in any way pertinent to the matter in question, not tending to aggrevate or ~~extemate~~ extenuate the changes, nor likely to influence the jury or judge to give the readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is idle and inisignificant.[57]

Thus, in R V Tyson,[58] upon an idictment for robbery committed on April Thirteenth, between 8.00 and 10.00 at night, a witness for the accused

(i) swore that the prisoner was at home at the time, and

(ii) that the prisoner had lived in the same house for the two years previous, and

(iii) during the whole time he had not been absent from the same house for more than three nights together

It was found as a fact that the last two statements were false, and that the prisoner had been in prison for

for a whole year of the said period. In a trial of perjury by the witness, the issue was whether the last two statements were material. It was held that they were material, in as much as they tended to render more probable the previous statement made that the prisoner was at home.

The test of materiality under Common Law is as:

> "in as much as nothing can be more apt to incline the jury/judge to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge or all the circumstances relating to it is material."[59]

Some English judges have misapplied the test by holding that 'material' means material to the charge, or issue in question, rather than its capability to mislead the judge about the credibility of the witness. This was the case in R V Townsend,[60] where a false statement was given, in a prelimiary inquiry, to the truth of an alleged criminal libel. It was held that the statement was immaterial, because truth, was not material in a charge of criminal libel at Common Law. Also in R V Tate,[61] in a trial for assult, the alleged perjurer falsely said that he had seen the accused's wife commiting adultery. The accused's defence was that he assaulted out of provocation. It was held that the adultery of the wife could not affect the fact of the assault or even the accused's liability for it. It was only a mitigating factor, which did not absolutely absolve the accused of his criminal liabilities.

In the above two cases, the 'materiality' of a false statement is restricted.

Since a judicial proceeding includes evidence given in mitigation,[62] it is clear that those cases were wrongly decided. Evidence in mitigation should be relevant evidence for that whole judicial proceeding. Secondly, the fundamental test of whether the testimony had capability of misleading the judge about the credit of the witness, was not applied.

In R V Baker,[63] RUSSEL LJ; restated the law;

> "The answer to (the question of materiality) is that the Defendants answers would affect his credit as a witness and all false statements wilfully ... and corruptly made as to matters which affects his credit are material.'

The defendant had been an accused in a criminal trial. The accused's statements are treated with caution, to avoid prejudice. An accused, as a general rule may not give evidence of his previous bad character or convictions. The Defendant contended that evidence of his previous convictions was immaterial, or better put, inadmissible. The court considered that evidence of his previous convictions would affect the mind of the judge in determining the sentence to impose.

It is therefore, no defence that the evidence would have been inadmissible in law.

R V Phillpotts[64], P s attorney had falsely sworn that he had examined the copy with the original, and that he had examined the memorandum at the foot of the copy with the entry in the Act-book. He defended himself by contending

that the copy would have been indmissible at law anyway. CAMPBELL CJ said;

If "false swearing occurred in a judicial proceeding, then can it be said that it was with reference to a fact wholly immaterial to the proceeding? ..... The question whether perjury had been committed, must depend upon the state of things when the witness left the Box, ie, whether it is less perjury if the document turns out not to be admissible in Evidence, and the judge had done wrong in admitting it. If (inadmission was considered) it would make the commission of the offence depend upon the decission of a nice question of law .... Here, the evidence was offered to procure the admission of a document, that document if admissible, would be material to the question being tied ....."[65]

In the discussion of materiality, three features are vivid, viz;

(a) Due to the wide interpretation given to judicial proceeding, materiality is not required to the point in issue or crime charged.

(b) A material fact is that which influences the Judges' mind towards the credibility of the witness.

(c) A statement which bears directly to the ultimate outcome of the case is material.[66]

It is the second meaning ie (b), which invites most controversy. What might influence one judges, mind may not influence the mind of the other. Credibility is itself a matter of fact and not law. Although a number of cases have been cited where it was held that the

statements of the perjurers would influence the judges mind, in none of them is it possible to cite the criterion to be used by the judge to determine whether he can be influenced or not. The issue that has always been posed therefore, is whether materiality is a question of law or fact.

S. (I) (6) of the Perjury Act has settled the law in favour of the judge ie, stipulates that it is a question of law and not fact, to be determined by the judge not the jury.[67]

This provision is futile, in as much as it doesn't set a criterion for the judge to determine whether his mind would be influenced by certain utterances or not. In the cases cited above, the courts considered themselves affected by the perjurer's statements. But in Sweet Escotts case[68] it was held that a witness's false evidence concerning his previous convictions was immaterial because the convictions were so old that a reasonable bench of magistrates could not have been led by them to take any adverse view of his credit. Thus, the only test that we can apply is that of a 'reasonable magistrate or judge'. The Perjury Act therefore, did not resolve the issue.

The problem still lingers with confusing effect. The confusion is revealed in two conflicting cases. In Murray's case,[69] D was not indicted for false statements made when he was permitted to testify in rebuttal of a witness's denial under cross examination. An opposite result was reached in Gibbons case[70] elleven out of twelve judges held that D was

guilty, because his statement was logically relevant to the issue in question, that is, the witness's credibility.

The court reasoned that although the evidence may have no merits to the cause, and is immaterial, if it has a direct tendency to corroborate the evidence concerning what is material, it is material. But in some cases, the court is bound by law to ignore the evidence, in which case, the value of 'tendency to corroborate' is lost. The dissenting dicta of Martin B is most logical. He said: "I cannot conceive how the error of the magistrates can make that evidence material in the sense in which it should be material to support an assignment of perjury upon it."[71]

This dicta is also important in our analysis of the logic of the law in stipulating that even an inadmissible matter is material like in Philpotts.[72] The better reasoning is that if a fact is not admissible at law, it can not affect the ultimate decision of the court, because it would not be heard in the first place. Older authorities had always adhered to this reasoning. The reason why this logic should be followed is that the law insists that the person or the court must have authority or competence to do the same. It does not appear reasonable that such persons or court while being competent should make a mistake by admitting inadmissible evidence and the witness falls victim of their error.

If Martin B'S reasoning is followed, it is true that we would necessarily be restricting judicial proceeding only to the fact or charge in issue. This seems more congruent with the general law of evidence. The problem of; "is the statement likely to influence the judge's mind

about the credibility of the witness" would also be reduced.

Stephen thought that in the law to materiality, relating if Phillpotts[73] is followed strictly, the doctrine of materiality would be abrogated [74] - owing to its wide interpretation. However, it is the doctrine adopted by the Perjury Act. Stephen explained ~~h~~ this by saying;

> "It is difficult to imagine a case in which a person would be under any temptation to introduce into his evidence a deliberate lie about a matter absolutely irrelevant to the matter before the court. (The statement is perhaps only immaterial where) it is so irrelevant that it is no longer made by a person in the character of participant in that proceeding."[75]

The view can be criticised on various points. Firstly, it is only difficult to imagine a person giving wholly irrelevant evidence, but not totally impossible. A statute that predicates its provisions on possibilities is ~~not~~ on a most perilous course. Secondly, who is a 'person in the character of participant' in a proceeding? Stephen thought that the doctrine being so wide, we should be looking for immateriality rather than the materiality of the statement. Various points are to be observed, concerning the doctrine:

(i) The degree of materiality does not matter, as long as it is circumstantially material.[76]

(ii) It is not necessary that evidence should be sufficient for the Plaintiff to recover upon. Infact he might be the ultimate loser. This is because materiality does not point to the fact in issue only.[77] I don't

see the reason why it should be material if it is incapable of changing the Plaintiff's position. Thus, where the perjured evidence is the only corroborative evidence in cases where corroboration is required, it is material.

(iii) Materiality can be retrospective. False testimony on a matter to be raised in future is material.[78]

Two defects might be pointed out here. Firstly, it is a necessary aspect in the administration of justice that evidence must be taken before the parties concerned, otherwise, the taking of it is defective in law. Secondly, who is to determine whether the matter will be raised later in the proceeding or not?

(iv) A person offering himself as bail, having cheated about his qualifications has perjured.[79]

Although all cases cited to advance these points are 19th century cases, they illustrate the problems which would, and infact have been, encountered by giving a very wide interpretation to materiality. The Perjury Act, by adopting the wide interpretaion expressed in Phillpotts[79] has not solved those problems. More of such are expected.

In Kenya, courts have not really addressed themselves to the question of materiality. However, it is expected that the interpretation given in England would be applied here. In R V Allibhai Mitha[80] the High Court of Uganda expressed the meaning of materiality. In that case, the Appellant sued Mrs. Shabanu Manji Melari for a balance of instalments owing to a hire purchase agreement for a lorry.

In a Kampala District Court, the Appellant cheated inter alia that he had never seized the lorry, that he

did not know the registration number of the lorry had been changed and that he had not changed the registration number.

NORMAN CJ said:

> "....If it was infact not material, the conviction could not stand even though the appellent mistakenly thought it was material and that his perjury would be likely to assist his case ... We are however, satisfied that the question whether or not the appellent took to the lorry to Mwanza was a material question .... The appellent as Plaintiff was seeking to recover the whole of the unpaid instalments. Primafacie, he would not be entitled to the instalments if he had by seizure resumed possession of the lorry so that one of the main issues before the court was whether or not the appellent had seized the lorry. If the court was satisfied that the appellent took the lorry, it would inevitably be more inclined to think that he had seized the lorry."[8I]

The first point we observe is that "materiality" is a question of law, and not fact. It does not depend on what the witness or the appellent thinks to be the status of his statement. This position of the law is also the position in England.

Secondly, the last few words indicate that what is material is 'what would make the court to be inclined to think' of the existence of a fact. The ~~fact~~ law in East Africa, and in Kenya applies the test of materiality applied in Englan The problems relating to 'materiality rule' pertaining to

the wide interpretation in England have been discussed earlier. Those problems are imported into Kenya, and are applied without any attempt to solve them.

In Antoinie Ernesta V R[82] the appellent's testimony was given in Seychelles local language. The trial judge acted as an interpreter, but was not sworn, while the registrar recorded it. The witness lied. In a charge for perjury, NEWBOLD J held inter alia that the record of the testimony which is the subject matter of the charge should be legally admissible.[83] I do not think he would have come to a different conclusion even if the record of the testimony was legally inadmissible because the Penal Code stipulates that 'it is immaterial whether the evidence falsified was admissible or not'.[84]

This is an anomalous situation emanating from a wide interpretaion of 'materiality' in England which has been imported into Kenya. The anomalous character is that inadmissibility does not preclude materiality, while the general law of evidence insists that inadmissible evidence is not evidence for the purpose of the proceeding because it will not be heard anyway. One fails to see why the error of a magistrate to admit otherwise inadmissible evidence should make a witness liable.

Since materiality does not point only to the point in issue, but to the general proceeding, a person who offers himself as bail would be guilty of perjury if he cheats about his qualification. Bail is a temporary release of an accused person from remand on finding sureties or securities to appear for trial. The question that one may

ask is whether it is fair to involve a bail man in a proceeding in which he was neither party nor witness. This question can be answered in the negative on grounds that his cheating does not make the accused guilty or innocent. These are questions before the court. If a surety of five hundred shillings is granted, I do not think a surety who cheats that he has a one-acre ~~peace~~ piece of land will have occassioned more injustice than one who says he has five hundred acres. The law of perjury cannot claim to be of the objective of 'preventing the occassion of injustice due to cheating' any more at ~~ta~~ that juncture. In practice, however bail men are not sworn and this might save them from the severe rule of materiality.

Another anomaly imported into Kenya is the doctrine of retrospective materiality. The construction of the Kenyan Penal Code is that a statement is material if 'it is intended to be raised in the proceeding.' This, like in England, has the effect of extending 'judicial proceedings' to spheres it probably was never contemplated. A confession made to the police in a police station can be used in court as evidence. False information in them constitute perjury because they are 'intended to be in a judicial proceeding'.

The unfairness of this rule is reflected in Barney Confait V R[85]. In a trial for rape, the appellent had voluntarily tendered incriminating evidence to a police sergeant. At trial, he repudiated it and the prosecution applied to treat him as a hostile witness. He was charged with perjury, on assigment that when given the alleged

false statement and asked whether he recognised his signature, he answered that he recognized the signature, but still maintained that he did not sign any document. One of the grounds of his appeal for convictions for perjury was that the alleged false statement had not been proved to be material in the trial for rape. It was however held that the statement was material because it was intended to be raised in the trial for rape.

Another adverse effect of the restrospective materiality rule is that a witness in the position of the accused in the above case is discouraged from giving evidence voluntaily, because he would fear to get into the complication of the law of hostile witnesses and perhaps consequent perjury. Those who give evidence in such circumstances are discouraged from repenting and changing contents to the true state of facts. They are not free to repent because if they repent, they will give contradictory evidence wherefrom perjury will be inferred.

The most serious anomaly with retrospective materiality rule is that it is incongruent with the criminal law Procedure produce, which requires that the presence of the parties in a criminal trial when evidence is being tendered is very essential. In Alexius Afumu V R ,[86] the magistrate allowed a witness for the prosecution to give evidence in the absence of the accused. It was held that the trial was illegal. Whereas that is the procedural position, it appears that with restrospective materiality warranting it, a witness may be punished for perjury in a trial that turns up to be illegal after all.

The ongoing discussion reveals the confusion, anomalies, unfairness and incongruence surrounding the doctrine of 'materiality' all of which emanate from a wide interpretation of the word. This is both in England and in Kenya. Perhaps the rationale behind a wide interpretation is to encompass a large class of perjurers, thus making the court procedure fool-proof. However, as seen there are more adversities than advantages to be realized. The writers submission is that all rules resulting from a 'wide meaning of materiality' should be discarded. Materiality should be restricted to statements capable of affecting a final decision, ie facts before the court, only.

The Requisite Mens Rea and Actus Reus

A person cannot be convicted for perjury unless he

(i) knowingly makes the false statement or

(ii) does not believe the statement to be true.

The first impression we get is that positive mens rea is required. Mere negligence will not suffice.

Hawkins put it that;

> "It seemeth that no one ought to be found guilty thereof without clear proof, that the false oath alleged against him was taken with some degree of deliberation; for if, upon the whole circumstances of the case, it shall appear probable that it was owing rather to the weakness than the perverseness of the party as where it was occassioned by suprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury."[87]

A direct intention, will be a wilful one and can sustain perjury.

Again, if the witness is reckless, and does not bother to ascertain the truth of what he states, he can be indicted.

It must be shown that the witness's attention was sufficiently drawn to the exact question put to him. In R V Stolady;[88] the prisoner was indicted for perjury of an information against B for trespassing in pursuit of game. The prisoner had been called by B as his witness and swore that he had lodged with B and that B was never absent from his lodgings on any Sunday morning during the whole time that they lodged together, which included the Sunday in question.

POLLOCK CB was of the opinion that the attention of the prisoner ought to have been called to the particular day on which the offence was committed, and that a general allegation including all Sundays was not sufficiently precise upon which to be found an indictment for perjury.

It can safely be said that the interpretation given to 'knowingly' or 'willfully' is a strict one. Still a stricter one has been that it must be impossible that the statement can be true.'[89] An stricter one still is that there cannot be perjury unless the false statement is given with an intention to mislead.[90]

In R V Singh;[91] the appellent falsely swore;

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Infact the appellent had been absent from Kenya for two periods, one for three months and the other for two and a half months respectively. At trial, the appellant admitted that he intended the judge to understand that he was in Kenya throughout this period without break. It was held that this statement was too vague and ambigous to amount to perjury.

What then is the effect of this strict interpretation? It is that it becomes very hard for the prosecution to prove the offence, and thus the court cannot convict. In Uganda, to ease this tension, it is provided that if two statements are made in contradiction, one of them is perjured. But how easy is it to determine which of the two is false? It is presumed that in cross-examination, the later statement is final. This still does not tell us which of the two is false and an attempted determination can only be arbitrary.

The mens rea problem is much felt when the statement made is an opinion. While the law insists that the statement be absolute and direct, it is still possible that it can be half-false and half-true. How is the crown to prove the half-false part of it. Opinion evidence is admitted only on the rationalisation that the judge cannot be expected to meticulously understand all phenomena. He has to be helped by experts on the subject, to understand. He has to be helped by experts on the subject, to understand. How easy will it be to prove that what you don't understand is not faithfully believed to be true?

The expert may sometimes not have researched enough. He doubts the content of his opinion. Supposing even we

manage to prove that he doubts, should we really punish him for not having done his home-work? The effect, if such question is answered affirmatively, is to discourage the only people we have, ~~and we badly need~~ to enlighten us from helping us. With modern sophisticated scientific and technological phenomena, we cannot encourage the discouragement of the experts. I would say that recklessness has no business to suffice as mens rea in expert opinion. It is only direct intention, proof of which, still begs for yet another expert, that will suffice.

The court muddled about the question in R V Schlesinger[92] where D said that he 'thought' that a certain writing was not his, whereas infact 'he thought it was his'. The court recognised the difficulty of proving that fact but still insisted that perjury could be committed in such circumstances. It stated that when an opinion is not genuinely held, it was perjury, although no criteria for selecting half-false from half-true statements was set. Smith and Hogan think that the case discarded the idea that the statement must be 'absolute and direct'.[93] In my opinion, the case only dealt with what was a technical possibility and should not be considered to have gone that far. Hence, the problem of strict interpretation of 'mens rea' thrives both in U k and in Kenya. The impact of this will be seen in an ensuing chapter.

The mere fact of giving the statement is the actus reus of the crime. Infact the statement might be true, but as long as the witness believes it to be false, or does not bother to ascertain its truth, he has committed the crime.

The position is analogous to attempting impossible crimes under general criminal law, which is culpable.

The essence of perjury is that the offender has proved false to the oath which he has sworn, rather than that he has made one or more false statement. It is single offence to the single oath he took. As such, various false statements made are all assignments to one charge of perjury. This doctrine has been abused in Kenya. For instance, in Shah V R[94] it was held that charging three seperate charges for perjury committed in deposition of three statements is not fatal. I think that is erroneous, as long as it goes to affect the sentence of the accused.

Subornation of Perjury

The law stipulates that any person who 'aids, abets, counsels, procures, or suborns another to commit perjury is guilty of the misdemeanour termed subornation of perjury.[95] In England also,

"Every person who aids, abets, counsels, procures, or suborns another person to commit an offence against this (Perjury) Act shall be liable to be proceeded against, indicted, tried and punished as if he were a principal offender."[96]

In Kenya, " any person who aids, abets, counsels, procures or suborns another person to commit perjury is guilty of the misdeneanour termed subornation of perjury."[97]

At Common Law, subornation of Perjury was considered more serious than perjury itself, and thus treated as a seperate offence.

Today, the Perjury Act does not add anything new to the law, except that under general criminal law, a person is not indictable for procuring or counselling another to commit an attempted crime. In subornation, even if the witness is procured to falsify evidence does not infact do it, the suborner is still liable. The procurer and the perjurer are not one principal offenders but two, governed by seperate regimes of law.

The offence of subornation is rather far-fetched. I have only found one case where the offence was slightly discussed. In Bunyoro Kingdom Government V Mukebu Aguda,[98] the Central District Court had upheld D's convictions for-~~merly of~~ perjury. The court said that D had been guilty of subornation of perjury 'and enhanced the sentence to six months instead of four.

On appeal, Sir UDO UDOMA CJ said; ~~that~~

> "... the convictions could not be sustained because if the charge was one of subornation of perjury, then the person who should have been punished was ... Someone else who had apparently suborned him. If on the other hand the court mistakenly dealt with the offence as subornation of perjury when infact it was not, the accused was wrongly convicted."[99]

He set aside the convictions.

Despite the great use of the law of subornation of perjury that can be put to discourage perpetrators of perjury such as advocates as will be verified later, there has been very few prosecutions for this offence.

Indeed in East Africa, there is no other reported case of this offence except the one cited above. The infrequency of prosecution could be explained in that for the offence to be prosecuted, there must be a successful case of perjury itself and as seen, there are very few prosecutions for perjury.

SUMMARY

In my summary of this chapter, I would say that the essential elements of the crime of Perjury have been much confused in England. The confusion comes from the wide meanings attached to the terms 'lawfully sworn', 'judicial proceeding' and 'materiality'. More of it comes from the strict meaning attached to 'wilfully' or 'knowingly', causing the offence to be very difficult to prove.
These problems have been imported into Kenyan law.
The whole position is analogous to a fisher-man netting a large bounty, but is unable to pull the net out of the water.
Additional problems pertinent to perjury law concern procedural technicalities whose examination is the business of the next chapter.

FOOTNOTES

I. Perjury Act I9II (I & 2 Geo 5, (6) S. (I) (I)

2. Penal Code, Cap 63 of the laws of Kenya, S. IO8 (I) (I)

3. Perjury Act I9II (I & 2 Geo 5, C 6) S. I5 (I)

4. Ibid S. I5 (2)

5. Supra

6. (I868) I9 LT, 47.

7. Smith & Hogan. Criminal Law, 4th edition (London Butterswo I978) P7I3

8. In Singh V R, (I958) I All ER I99, the case was withdrawn from the jury where D, a Sikh, had given evidence on affirmation although taking of oath was not prejudicial to his religious belief, because a copy of the Sikhs holy book was not available in the magistrates court. It was held that the affirmation was not good in law.

9. Supra

IO. Penal Code; Cap 63, S. IO8 (I) (6)

II. Ibid S. IO8 (I) (C)

I2. Ibid S. IO8 (I) D)

I3. Ibid S. IO8 (I) (F)

I4. Evidence Act; Cap 8O; S. I25

I5. Thomas Starke on Evidence, pg 9I

I6. R V Voster R & R, 459

I7. Evidence Act I85I (I4 & I5 Vic C 99) S. I6

I8. Perjury Act I9II, (I & 2Geo 5, C 6) S. I (2)

I9. Bankruptcy Act I883 (I & 2 Geo. 5 C. 6) S. 27 (3)

2O. Arbitration Act I889 (52 & 53 Vic C 49) S.22

2I. R V Heathe (I864) 4 B & S 947 at 949

22. (I706) 3 Salk 269

23. (I9II) 6 Cr App. Rep I03

24. Evidence Act I85I (I4 & I5 Vic C 99) S. I6

25. Perjury Act I9II (I & 2 Geo 5, C 6) S. (I) (3)

26. Commissioner For Oaths Act I889 (52 & 53 Vic C IO) S.2

27. Ibid S. 3 (I)

28. Ibid S. 6

29. R V Phillpotts. (I85I) 2 Den 302

30. Infra

3I. Interpretation and General Provisions Act Cap 2 S. 3 (I)

32. The Constitution of Kenya; S. 60

33. Evidence Act Cap 80 S. 3 (I)

34. Land Control Act Cap 302 S. 2I

35. Rent Restrictions Act Cap 296 Subsidiary Rules, Rule II

36. Commissions of Inquiry Act Cap I02 S. IO (I)

37. Agriculture Act Cap 3I8 Subsidiary Rules, Rule 5

38. Agricultural Produce (Export) Act, Cap 3I9 S. I3 (3)

39. Oaths and Statutory Declarations; Cap I5, S. 8

40. Ibid S. I2

4I. Ibid S. 2

42. Ibid S. 4

43. Ibid S. I4

44. Judicature Act; Cap 8 S. 3 (I) (b) scheduled in Part I

45. Penal Code; Cap 63; S I08 (I) (e)

46. [I963] EA 539

47. Ibid pg 5I4

48. Although the law is not clear as to whether it is void or voidable.

49. Doughlas Brown Criminal Procedure In Uganda and Kenya; 2nd Edition, (London: Sweet & Maxwell I970) Pg I8

50. (1932) 35 4 U L R 64

51. (1913) 9 Cr App. Rep. 192

52. R V Royson (1628) Cr. Car. 146

53. Perjury Act 1911 (1 & 2 Geo 5, C6) S. 2

54. Ibid S. 3

55. Ibid S. 4

56. Smith and Hogan Op cit pg 721

57. Russel On Crime 12th edition (Stevens & Sons London, 1964) Volume I, pg 295

58. (1867) LR I CCR 107

59. Russel On Crime Op cit. p 295

60. (1866) 4 F & F 1089

61. (1871) 12 Cox CC 7

62. R V Wheeler (1917) 1 KB, 283

63. Facts given above; note 51

64. (1851) 2 Den 302

65. Ibid pg 309

66. IN R V Mullay (1865) Le & Ca 593, D falsely swor that his name was Edward, while infact it was Benard Edward. He was convicted of Perjury.

67. Smith and Hogan Op. cit p. 717

68. (1971) 55 Cr. App Rep 316

69. (1858) 1 F & F 80

70. (1862) 9 Cox CC 105.

71. Ibid pg 109

72. (1851) 2 Den 302

73. Ibid

74. Smith And Hogan Op. cit pg 717

75. Ibid pg 717

76. R V MUSCOT (I7I3) IO Mod Rep. I92

77. R V Rhodes (I7O4) 2 Ld Raym 886

78. Finney V Beesley (I85I) I7 QB 86

79. R V Royson (I628) Cro Car, I46

79 (a) (I85I) 2O

8O. (I945) EACA, VOL. XII 54

8I. Ibid p. 55

82. [I962] EA 5O5

83. Ibid pg 5O9

84. Penal Code, Cap 63; S. IO8 (I) (e) provision in note I3 (above).

85. [I958] E A 29

86. (I953) 26 KLR 87

87. Hawkins I PC, 27, & 2, P 429

88. Facts got from Russel on crime Op. cit Pg 3OO

89. R V Sing 24 KLR Vol. I, pg 8

9O. Ibid

9I. Ibid.

92. (I867) IO QB 67O

93. Smith and Hogan Op. cit pg 7I8 footnote 4 in that book.

94. Facts got from Collingwood Op. cit. Pg IO8

95. Penal Code Cap 63

96. Perjury Act I9II (I & 2 Geo 5, C 6) S. 7 (I)

97. Penal Code; Cap 63, S IO8 (2)

98. Facts given above; note 46

99. Ibid pg 542

Chapter Three

THE PRACTICAL PROBLEMS IN THE LAW OF PERJURY

Even without the difficulties of proving the substantive elements of the crime of perjury, the law is encumbered with strict technicalities. The atmosphere under which evidence is rendered perjerous, the circumstances in which the crime may be taken cognisance of and the policy behind which the witnesses are protected to ensure testifying without fear or favour, are all not conducive to successful prosecution. An examination of these bottlenecks reveals the problem.

CORROBORATION

Perhaps the most serious problem the law creates for itself is the requirement that the evidence relating to the falsity of the statement charged must be corroborated. Corroboration generally means, supporting evidence given by two or more different persons, or two different aspects given by one person pointing to the certanity of a fact. In most cases where corroboration is required, one can readily justify the requirement. For instance, it would be unsafe to convict on the unsworn evidence of a child of under an actual or apparent age of fourteen years because the child can easily be tutored, without requiring his evidence to be corroborated. It would also be unsafe to convict on uncorroborated evidence of rape because persons can fancy sexual attitudes.

Even though the amount of corroboration needed, even in this cases, is seemingly little, so that even circumstantial evidence will suffice, it is undeniably a constricture which a prosecutor purporting to prosecute perjur would face. The case at hand is Barney Confeit V R[2] facts of which have been described elsewhere[3]. Among the grounds of appeal against conviction, was that there was no corroboration of the evidence of sergent Sicobo who recorded the statement on the point the statement was made or signed by the appellant.

The Appellant had said at his trial for perjury:

> "Yes, I recognise my signature on the document just handed over to me. It is not true that I gave a statement to the police. This is my signature but I still maintain that I did not sign any document. I cannot understand how my signature has come to be on this document."

FORBES JA followed DENNING LJ'S dicta in Jeffery V Johnson[4], a case concerning Bastardy law where the latter stated;

> "The evidence, of the matter can be divided into two parts. First, the part in which she proves that the man was the father and Secondly, the part in which she proves the handwriting of the latter. It is the first part, her evidence as to personality, which needs corroboration. That corroboration is afforded by the contents of the letter. She does not prove the contents of the letter. She only proves the handwriting to be that of the man."[5]

Thus Forbes JA reasoned that because sergeant Sicobo gave evidence of the taking of the statement and identified the statement in evidence and swore that the signature was that of the appellant, the statement itself corroborated the evidence of sergent Sicobo.

Prima facie, it would appear very easy to find corroborating evidence so that with a document alone all you need is to find somebody to testify that the accused wrote the contents and/or signed it. That cheap theory was used to dismiss the Appellant's case in Shah V R [6] where SINCLAIR J held that in certain circumstances, a man might be convicted of perjury on documentary evidence alone, eg where the falsehood of the matter sworn is directly proved by the accused's own writing.

However, it was observed in Barney Confert V R[7] that "..... It is only on the question of the falsity of the statement charged that corroboration is required ....."[8] How easy this is to prove leaves alot to be desired. Mr. Ole Tukai suggests that it is very difficult to prove the falsity of a statement, because it is only known by the maker himself within himself.[9] The court can only treat his evidence as true for all practical purposes. I agree with him because as I have argued elsewhere, the question of mensrea is a subjective one.[10] There is no objective or scientific test for truth whereas the law insists that only direct intention to cheat will suffice.

In Barney Confeit V R,[11] FORBES JA said that the corroborating evidence should be capable of showing that the statement was knowingly and falsely made. From this dicta, one can observe that the rationale behind the

requirement ~~it~~ must be considered unsafe to convict with corroborated evidence because those who call upon witnesses to give evidence for their side of the case can influence them. Again, the crime of perjury is one which is susceptible of being prosecuted maliciously out of the bitterness of one losing his case. A human being is naturally likely to think that had it not been for the evidence of witness X,'he would not have lost. He would then prefer allegations against' witness X out of that ~~that he perjured~~, bitterness. The law requires that corroborating evidence be given to test the truth of what 'witness X' said so that the allegations made against him that he perjure can be confirmed valid or invalid. This leads me to conclude that the requirement of corroboration is an attempt to prevent abuse of the law of perjury by opposing parties.

Because 'witness X' is assured that the party against whom he gives evidence will not abuse the law and maliciously prosecute him he will freely give the evidence. He is protected from giving evidence out of fear of prosecution by the requirement.[12]

To go back to those who call upon 'witness X' to give evidence for their side of the case, to reveal the full rationale of the requirement, we observe that 'witness X' is naturally likely to give evidence favouring him. In some cases, not every word he pronounces may go to favour him. He might have forgotten a small bit of the whole story, which small bit he will fit with a small lie, but on the whole, his story is basically true. This

is what I am calling an amalgamation of truth and falsity. The law requires the evidence to the falsity to be corroborated so as to facilitate the isolation of the falsity from the truth in this amalgamation, or to show that most of the testimony given was deliberately biased to favour the person who called him.

Whereas the rationale behind the requirement is very important in as much as it avoids abuse of the law, it has acted as a boomerang in making the offence too difficult to prove, which discourages prosecution.

SELF CONTRADICTION

In Kenya and other countries, the law provides that if a person gives two contradicting statements, perjury should be assigned to one of them.[13] The Mens rea problem is reduced because the question here is which of the two if perjury and not whether perjury was committed at all. However, the statement assigned then should be proved to have been made with intent to cheat and it must be corroborated and material. The Mens rea problem is not totally eradicated.

In England self-contradiction is not prima facie perjury. The rationale behind lack of the provision for self-contradiction is that ".... if self-contradiction were to be an offence in itself, the witness who had made a false statement would have no incentive to correct himself. Since the truth is the goal of the trial process, it would be unfortunate if obstacles were put in pursuit."[14] Obstacles would be put if provisions for prosecution for self contradiction are made, but what an obstacle it

does create to a prosecutor purporting to prosecute for perjury! This again renders the law to act as a boomerang, by casting a high burden on the prosecution in England. However, in view of the policy behind it, provisions for self-contradiction should not be removed in Kenya.

THE LIES BREWERY

THE ADVERSARY SYSTEM OF THE COURTS

If anybody has ever considered whether a witness is ever given a chance to do what he is called upon to do, ie 'to tell the whole truth, and nothing else but the truth', he would conclude that our court practice is most unconducive to truth giving. The process is precisely that a witness is sworn as a matter of formality, and then in the examination in chief, he gives evidence.

At that juncture, everybody, the court, prosecutor and counsel is keen to ensure that no rule of evidence is transgressed. Hearsay and opinions are all striken out, unless they are, by other rules of evidence, admissible. The witness is taken through a motion of interrupted testmony, until he is left bewildered or harassed. The court and the party for whom he gives evidence all expect him to say something anyway. If he gives evidence contrary to what the party called him expects, he subjects himself to the harsher rules of cross-examination. By those interruptions and expectations, the witness is not given an opportunity to tell the whole truth. Where the court and the party for whom he gives evidence is pressing

on him to state what they expect, there is a chance that they may be encouraging him to perjure, especially where the orientating evidence was false. People here fear rather than honour courts of law, and witnesses are more likely to testify with accord to what styles and orientations this fearful monster called the court invents for them rather than their own free motion and will.

Then comes the well cerebrated occasion of cross-examination, by the opposing party or his counsel. The objective of this occasion is to test the credibility of the witness, his memory or to clarify some issues court practi shows that even if the witness is revealed to be incredible through cross-examination, nothing much will be done to him. His evidence will merely 'not be believed'. The multifu-rious objectives of the occasion hinders action from being taken on an incredible witness. I am told that the judge/magistrate always looks keenly at what the cross-exaning counsel is driving at, so that his imputations, allegations and suggestions to the witness should not move him.[I5] Counsel is only interested in driving the witness in a way that the evidence tendered may favour his side of the case. Naturally, he will put imputations, allegations and other pressures to the witness. Research has shown that when witnesses are exposed to such pressures it is natural that they will give in to what this intellec-tual wants of them.[I6]

How can a witness be expected to give nothing but the whole truth, while the court, advocates and the party who calls him all expect him to say something in a certain style, at a certain rate and favouring a certain party?

One cannot fail to doubt whether truth-giving is absolute in such circumstances. Indeed a witness is grossly subordinated Vis-a-vis these parties. Psychologists will not disagree with me that there is nothing easier than controlling a person who feels subordinate to you .

A myriad of factors which are very conducive to the fermentation of lies exist in Kenya unchecked. If we are to consider the public view of lie-telling, we would find that in England, this act was viewed to be so serious, with the long standing history of religion and stable custom so that it was declared a crime if told in a judicial proceeding. This custom was later enacted in Acts of Parliament. An integral statute for the specific purpose of dealing with lies was passed in the name of the Perjury Act in I9II. In Kenya, no long-standing custom or religion can claim good status. Telling lies, be it in a judicial proceeding or not, has not been condemned by any specific custom comprehensible by all Kenyans. Ask a hundred people what lying means to them, and over 50% will tell you something close to 'a little bit of lies is neccessary for self-preservation or protection'.[17] Perhaps the whole element behind truth is trust, and not fear of punishment. But how many people can you trust in the Kenya ~~of~~ today? People all have different and various political, economic and social interests. "Trust them and you will be the loser." So they say.[18] If telling lies is the custom in Kenya rather than truth giving, one cannot fail to understand why the law of perjury of which most are ignorant, is otiose. If the Perjury problem is serious in England where the custom

and practices are the reverse of their counterparts here, one cannot fail to see that the problem is much more acute here.

In America, it was already observed by 1908 that advocates procured their clients to commit perjury, without being prosecuted for subornation of perjury.[19] The advocate being an expert advises his clients in his office. People trust them so that every bit of the whole story is given to them. That fact, with the fact that the adviser knows the requirements and failures of the law of the land will enable him prepare for a case, with fabricated stories and defences. The relationship of the two is said to be one of utmost secrecy, and who knows what pack of lies is carried in that expensive brief case of that high-looking lawyer! He goes to the court very confidently ready to spring to his feet incase a rule of law is infringed, and to cross-examine the witnesses for the other party and say; "I put it to you that what you have told this honourable court is a pack of lies." The turn of the case depends on the popularity of this lawyer, the persuasiveness of this lawyer, his swiftness in producing authorities on his legal prepositions and the impact of his submissions on "His Lordship's" mind. Nobody ever considers the dimension of his contribution to the commission of perjury, by use of fabricated defences.

Of recent, the search for justice has become a bother to many. "Justice delayed is justice denied." A person charged with being drank and disorderly is likely to go to a 'not-too-comfortable' remand for a good number

of days pending his trial if he pleads not guilty. At trial, he might be found guilty anyway, because owing to unknown court technicalities, ignorance of the law which excuses nobody and overwhelming police evidence, his evidence might not be believed, or his defence might be rejected. He should therefore better avoid all this inconvenience by pleading guilty not withstanding the fact that he never took intoxicating material, leave alone being drank and disorderly. The question now is; Isn't he knowingly giving false testimony to the court on a material point, material because it will directly prompt his being convicted? Understand that this technically is not perjury because the accused will not have been "lawfully sworn" at this stage, but consider whether such a practice is not likely to make people think that giving the truth in court is of no consequence any way. To me, the latter is more plausible.

People will more often than not be asked to make cautionary statements at the police station. Confessions taken this way are not merely used by the police to investigate whether a crime was committed, but can also be tendered as evidence in courts. They are intended to be used later in a judicial proceeding. They are to be material. No admission of them will be had in court if they are secured out of inducement such as coercion, Beatings or promises. However, ask a hundred people what their opinion about the police is, and 90% will tell you that the police are harassers and unreasonable people."[20] Many people think that in police stations, beating is the

order of the day particularly when those with whom the police deal refuse to make the statements the way the police want them to. In this psychological atmosphere,one is likely to give incriminating evidence even without the slightest physical inducement. After all, the police are not the judges. He can retract the confession in a court of law. But as seen earlier, a police station can sometimes be 'a judicial proceeding' for the purpose of perjury.

The psychological battle between the police and the public is extended even to witnesses in court. The police call the witnesses for the prosecution. Such witnesses are likely to think that giving evidence contrary to what the police expects of them because they fear that the police will harass them later, perhaps in other fields. One wonders whether most of the prosecution witnesses give 'nothing but the whole truth' in such circumstances.

In Kenya, the vigour with which a crime is taken cognisance of depends on swiftness and knowledge of the victims of crime to see the police. The crime must always attach to somebody. Property, for it to be capable of being stolen, must be owned or possessed by somebody. Somebody must be assaulted and so on. Who is the real complainant in a case of perjury? It is the state, which is a unique aspect of this crime. But who is the state in a court of law? Say it is the juge/magistrate and the prosecutor. Both are laxed in instituting prosecutions for perjury. It was observed in America that prosecutors are not swift to pursue the perjury. "The technicalities of

the rule against perjury operate to make the event of prosecution doubtful".[21] They realise that on top of all the hardships revealed in this dissertation in the rules of materiality, mens rea and corroboration, perjury is a criminal offence which must be proved beyond reasonable doubt. If they were to be keenly on the lookout for perjury, it means they would be having two roles to play Viz; the prosecution of the case in which perjury is committed, and the police role of investigating the crime of perjury itself. I doubt whether they are ever charged with those double-roles in their appointments.

Justice Gaynor of the New York Supreme Court explained that judges and magistrates are laxed to cognise perjury in the following words;

> "The reason may be found in the proneness of appeal judges in recent years to meddle with, and adversely criticise trial judges in matters submitted to the discretion of the latter for the orderly and safe administration of justice. A trial judge may feel reluctant to commit a perjurer during the trial of a case, if on appeal some judge is to hem and haw over his conduct and say maybe it influenced him .. ..."[22]

Precisely put, magistrates fear that the rule against bias may operate on them. Prosecutions for perjury have to be taken in a seperate court because in any case, the trial magistrate may be called as a witness to the perjury. A more plausible reason is that a magistrate may doubt whether the offence is susceptible to proof as regarding

all rules and technicalities ~~encumbing~~ encumbering the law of perjury. Further, he may fear that a commitment of a witness for the offence might work injustice to an innocent party and also take to consideration the policy that a witness must always be protected from giving evidence out of fear or favour.[23] Like the prosecutor, a magistrate will not consider himself as being charged with the police role of investigating the crime.

If there are all these reasons to discourage the only complainant in a case of perjury from instituting proceedings, we can safely assert that perjury is very rarely prosecuted.

The discussion of the rules relating to corroboration and self-contradiction shows that on top of the rules of the substantive law, proving the crime is a most difficult piece of work for the prosecution. The policy behind these rules reveal that the state is not really committed to curbing lie-telling.

The concluding part of the chapter shows that the adversary system of the courts is not quite conducive to smooth truth-telling. Infact there are instances where one is virtually forced to confirm an original lie because his repentence will be treated as an offer of contradicting statements, one of which must be perjury. The system has also encouraged laxity of prosecution. It means that the solution to the perjury problem might as well lie outside the substantive elements of the law. The subject of the subsequent chapter is the examine possible solutions to the problems discussed in this and the previous chapters.

FOOTNOTES

I. Penal Code, Chapter 63, S III

2. [I958] EA 289

3. Supra

4. [I952] I All ER, 450

5. Ibid P 453

6. [I958] EA 332

7. [1958] EA 289

8. Ibid at pg 29I

9. Interview held with Mr. Ole Tukai DM II Kikuyu Court on I9th March I986

IO. Supra

II. In Barney Confeit V R [I958] EA 289 at pg 29I

I2. As exposed by the Justice Committe Report of I973 and reproduced in D.W. POLLARD "False Witness". Cr L R [I974] pp 588 - 596 at 59I

I3. In R V Apili (I932 - 35) ULR,64, the accused was charged with perjury. She had made two contradicting statements; one at a preliminary inquest and the other at her trial. The High Court reversed judgement for conviction on other grounds. In Kenya, see Penal Code S. II2

I4. POLLARD Loc Cit pg 59I

I5. Interview held with Mr. Ole Tukai DM II Kikuyu Court, on I9th March I986.

I6. EDWIN M. BORCHARD COnvicting the Innocent (New Haven, Yale University Press I932) p XVIII

I7. Interview held with different members of the public at different dates between January and April I986 in Nairobi and Kiambu district.

I8. Ibid.

I9. A case is cited in W. A. PURRINGTON "The Frequency of Perjury." Col. L. R.(I908) Vol 8 pp 67 - 8I at pg 72 where an attorney in defending his client in a case for forfeited bail bond ~~b~~ took the witness stand and swore that the bondsman had not been present in the court at the time alleged.

20. Interview; see note I7 above.

2I. PURRINGTON Loc Cit pg 72

22. Quoted in PURRINGTON Loc Cit pg 75

23. Ibid.

CONCLUSION AND RECOMMENDATIONS

Criminal Law has the following objectives,[I]

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests.

(b) To subject to public control persons whose conduct indicates that they are disposed to commit crimes

(c) To safeguard conduct that is without fault from condemnation as criminal.

(d) To give fair warning of the nature of the conduct declared to be an offense.

(e) To differentiate on reasonable grounds between serious and minor offences.

It cannot be doubted that the objective of Perjury law is to prevent and forbid a prospective perjurer from committing the offence. However, there is widespread ignorance of the law in Kenya whereas the law insists ~~ta~~ that ignorantia Legim neminem excusat. The object of forbiding and preventing perjury can only be realised if people know that on cheating in a court, they will be punished in the name of secular law. Ignorance must be removed before a witness is called upon to testify.

The frequency of prosecution of a specific crime can have the effect of giving fair warning of the nature of the offensive conduct and thus prevent the commission of it. However, as seen in this dissertation, perjury is rarely prosecuted. The rules of the requisite mens rea, materiality and corroboration are ment to prevent the abuse

of law and safeguard conduct that is without fault from being condemned. They render the prosecution for perjury almost impracticable, and thus a rare exercise.

Thus, it can be said that two objectives of the law of perjury conflict viz forbiding and preventing commission of perjury and subjecting perjurers into public control on one hand and safeguarding conduct without fault from condemnation on the other. Whenever there is a conflict, the latter overrides the former in most cases, and thus witnesses are not given fair warning of the nature of the offence.

Besides failure in realising all the objectives, Perjury law fails from this other perspective :
Criminal Law must realise justice in the following mode;[2]

(i) It must be certain and consistent so that judgements can be foreseen.

(ii) It must be practical. It deals with a conscious and dynamic society and not with postulates.

(iii) It must be free from passion bias and prejudice.

With the current rules of materiality the law of perjury cannot be consistent because there is no objective test to what is material. The effect of a conflicting doctrine of prevention of abuse of the law and prosecutions for the perjurers, the rule of corroboration, aided by other factors make prosecutions almost impracticable.

The first hurdle in the law of perjury is the nature and form of an oath. Under perjury law, the forms and ceremonies used are immaterial.[3] People swear by the name of the most feared, variously called God, 'Mungu','Ngai" 'Cheptalel' or 'Ngwok'. Rarely does the court clerk

inform them that a breach of the oath is punishable not by God, but by the Secular Law of the Land. Yet their belief in that God they refer to is immaterial. Thus, a laymen expecting a witness to tell the truth merely because he swears by the name of the Almighty will be suprised to find that an oath in court is no more than a meaningless formality. The Justice Committee in England recommended that the oath should be made more meaningful by changing its form to read "I solemnly declare and promise that I will tell the truth. I am aware that if I tell a lie or wilfully mislead the court, I am liable to be prosecuted."[4]

This will orientate the witness to secular and mundane sanctions of true than the current reference to supernatural metaphysics. There would be no need to hold a holy book and belittle God's Majesty when one lies in His name. In Oloo S/O Ghai V R,[5(a)] it was held that religious belief is important for a child to understand the nature of an oath. This laborious ascertainment would cease if the child is merely affirmed in the manner recommended. The recommendations of the Justice committee would suit Kenya's position where the problem of the oath is more or less like that in England.

"Affidavits used in Civil Suits are over 50% lies" This is because the deposition will have been made to an ordinary person called the Commissioner for oath. Most likely, the affiant will tell the lies to the commissioner because the posibility of being prosecuted for perjury is not immediate. When he is being cross-examined in court on the contents of the affidavit he will fear being

prosecuted if he changes the contents. Where the contents were deposed to the Commissioner or advocate falsely, by cross-examing the affiant we are only allowing him to confirm the lies he made to the court. Various reasons for doubting truth in the affidavit have been observed;

(i) The commissioner/advocate as an ordinary person may not command as much honour as the judge in court might.

(ii) The deponent would not have to say why he is to declare, rather than swear, while in court he would object to taking the oath and hence be affirmed.

(iii) Both the Commissioner and the deponent do not take it seriously. Cases are there where the commissioner will have signed affidavit forms in advance and the affiant will be aided by a clerk to fill in information.[6]

No one has ever considered to prosecute such commissioners and affiants for subornation or commission of perjury. Judge Sharswood in his essay on Professional Ethis said:

> "...There is no part of his business ... in which a Lawyer should be more cautious or even punctilious, than (making affidavits). Instead of drawing affidavits, and permitting them to be sworn to as a matter of course, as it is feared to be too often the case, counsel should on all occassions take care to treat on oath andwith great solemnity, as a transanction to be very scrupulously watched, because involving great moral peril as well as liability to public disgrace. It lies especially in the way of the profession to give a high tone

~~to~~ to public sentiment ... the Sacredness of an oath .....".[7]

Such a recommendation should be made in Kenya to minimise perjury committed by way of affidavits.

While the English Perjury Act expresses that the term judicial proceeding includes proceedings before any court, tribunal or person having by law power to hear, receive and examine evidence on oath, there is no such a description in Kenya. It is the Evidence Act of Kenya that stipulates that 'court' ~~incharges~~ includes all judges, magistrates and all persons except arbitrators who are legally authorized to take evidence. A person purporting to prosecute for perjury must always seek in the law constituting a certain body to determine whether evidence may be taken on oath, and thus whether the deposition is done in a judicial proceeding. This is a laborious exercise, which might contribute to laxity in instituting proceedings. My suggestion is that a consolidating law be promulgated, defining the terms and stipulating whatever is included in the notion. This will clarify the meaning and the meaning will not have to be sought in the various statutes. The most controversial element of the crime is that the false statement must be material in the proceeding. All attempts to define materiality and its parameters have been unyeilding. The test for materiality is the capability of the statement to influence the judge's mind towards the credibility of the witness at whatever stage of the case it is made. Statements made in the police station intended to be used at trial, down to those made concerning the particular issue of the case and down

to the judgement day are all material in that proceeding. The wide interpretation of 'materiality' has led to confusion. Credibility itself being a question of fact offers no criterion for the test of materiality. Thus, there lacks precision and conformity. It was earlier stated that the law must be certain and consistent. The law of perjury is hampered from being so by rules of materiality.

Due to the wide interpretation of this notion, the Justice Committee observed that there were few acquitals owing to materiality, and that the rule confines the prosecutions to cases where the court has been so seriously mislead.[8] It recommended that to remove the requirement of materiality would be to open the floodgates to the prosecution of those who lie through vanity.[9] To give the law a cosmetic change, it recommended that materiality should cease to be a constituent element but should remain a relevant factor to be taken into consideratio before a prosecution is brought and should be considered in the sentensing process.[10] This is nothing new. It is simply an acknowledgement of the problem of materiality, and not a solution ot it.

In Kenya, consistency in judgements can be achieved if materiality is confined to facts which directly touch on the fact in issue. The doctrine of retrospective materiality, the materiality of inadmissible evidence or materiality after trial which are the source of the present confusion should all be abolished. Once found that a fact does not affect the final decision, it should be considered immaterial. Although this would reduce the

sphere of operation of the law of perjury restricting itself only within properly material facts, it would have the better effect of rendering the law certain and consistent. This is because the test would now be an objective one and not a subjective one depending on a "reasonable judge" as it is now. There are few acquitals owing to immateriality because the law is framed so as to trap a 'large number' of perjurers. But I think the main pursuit should be the achievement of consistent and ascertainable principles of law. Where the law is obscure and much entangled in technicalities, very little will be expected to be done to the 'large number' of offenders caught up in it. Hence, pursuit of clear law is the better choice, if we are to deter and punish offenders and safeguard good conduct, and be able to forsee judgements.

The requirement of a direct intention to mislead the court presents bottlenecks to the law of perjury. It was noted earlier that the truth of a matter is subjective, and only lies in the knowledge of the witness.[11] In R V Singh,[12] it was held that a statement which is too vague and ambigous cannot be a good assignment for perjury. Where the statement perjured is expert opinion, it is very difficult to prove that the opinion was not held genuinely. Perjury is also a criminal offence which beyond all doubts must be proved. The mensrea problem poses a constructure to successful prosecution. I do not recommend that the strict requirement of direct intention to cheat be abolished. It is an objective of criminal Law that conduct that is without fault should be safeguarded from criminal condemnation. To achieve this; guilt must

be established by requiring the prosecution to prove its case beyond all doubts.

The law of perjury is not fullfledged in the commitment of potential perjurers. It insists on protecting them from fear of prosection for the same. The machinery put for this protection is the requirement that the evidence to the 'question of the falsity of the statement charged' must be corroborated. Judicial interpretation has attempted to relax this strict requirement This has not gone too far in disentangling the law from the web. I have argued that the knowledge of the falsity is a subjective one and proving it is very difficult. It is safe to conclude that the requirement acts as a boomerang to the operation of the law. In England the Justice Committee considered the policy underlying this requirement and asserted that the abolition of it would not necessarily deter the potential perjurer who might have the unfortunate side effect of discouraging persons from giving evidence in court for fear, that in a prosecution for perjury, it would be their oath against their prosecutors.[13] Having observed the adverse character of the requirement, they recommended that it should be abolished in proceedings outside judicial proceedings proper.

This is merely giving the law a cosmetic appearance. Firstly the requirement of corroboration is not directed at potential perjurers whom the committee thought might not be deterred, but to the prosecuton of persons who have actually perjured. It goes to 'the ease with which perjury may be prosecuted' and not to 'the effect of it to potential perjurers'.

Secondly, a distinction between a judicial proceeding proper from other judicial proceedings is unwarranted. The main pursuit of the law is the achievement of justice when dealing with life and limb of the persons and their property. Bodies such as the land Control Board, a pannel of elders constituted under the Magistrate Jurisdiction (Amendment) Act, the Agricultural Produce Marketing Board all have quasi-judicial duties of dealing with property. Why we shouldn't ~~we~~ expect smooth administration of justice in the discharge of their duties, I don't know. Thus, with all respect, the committee can only be said to have wobbled about this issue.

If the rule of corroboration is whittled down, ~~tha~~ the law would be capable of abuse and the very important policy of protection of witnesses would be disregarded. Thus in Kenya, the rule should be retained. Prosecution for perjury is one of the many 'future harassment by the police' which the witness would fear as I have argued earlier. But with the rule, a witness need not give evidence out of fear and is able to give ' the whole truth'.

The rule of self-contradiction was treated with Approval by the Justice Committee.
They said:

> "If self-contradiction were to be an offence in itself, a witness who had made a false statement would have no incentive to correct himself. Since the truth is the goal of the trial process, it would be unfortunate if obstacles were put in the way of its pursuit."[14]

Although the rule of self-contradiction is a boomerang to the operation of the law, the policy behind it, ie protectio of witnesses, is very sound. In Kenya, the rule that self-contradiction is direct perjury should be removed, to give Kenyan witnesses the incentive to correct themselves. Perjury Law has forgotten that it must be practical, that it is dealing with life which is dynamic as a means of handling actualities. Even without the hardships in the substantive law, the circumstances surrounding the commission of the offence are not conducive to successful prosecution. A witness gives evidence in the style and orientation of the monster called the court rather than of his own free motion and will. Counsel, the court and the prosecutor all expect him to say something congruent with his orientating evidence. A prosecution witness had better give evidence favouring that side if he doesn't want to expose himself to cross-examination. So too a witness for the other side. In the circumstances, he feels subordinate to all other parties. His phsychological situation is susceptible to anybody's control. Imputations by counsel, the prosecutor or the court, all weaken his position of giving all the truth.

The American Jurist Harry Hibschman concluding that the witness is not allowed to "tell the truth, the whole truth, and nothing but the truth produces a typical section of how a witness gives evidence in the court.[I5] This includes the court's examination of that witness. He concludes that in that hocus pocus of the courts examination, "either the witness invents the required conversation, or if he is a party,he loses his case. He

is practically forced to lie."[16] In Germany, a witness is not called by the parties, but by the judge and is examined by him or some other judge designated to hear his evidence. Evidence is given in a narrative form. The witness may partly give hearsay evidence and it is for the judge to place proper value upon it.[17] In France, the witness is not interrupted until he gives all his evidence in his own way.[18]

Considering what contribution to the commission of perjury the English Adversary System may have, the Judicial Committee said that it is impracticable to invite a witness to say something without specifying the exact nature of the information required.[19]
Precisely, the peversive rules of hearsay that hinder witnesses ~~of~~ from giving the whole truth should remain. The committee recommended that courts should be encouraged to exercise their powers vigorously without disrupting the normal course of examination. It further said;

> "..... at the conclusion of every witness's, evidence, the judge or magistrate should formally ask him whether he had any further information which he thought might help the court. At that stage, the witness should have a better idea of what was relevant and more able to say what he wanted to ~~a~~ say without interruption ....."[20]

As long as the rules of evidence relating to admissibility remain, this is impracticable. Hearsay will be inadmissible. Moreover, what might help the court must be relevant and it is a question to be determined by the judge, not the witness. Furthermore, will the chairman of the Land

Board or the Agricultral produce Mananging Board be expected to exercise his powers with the same vigour as a judge of the High Court of Kenya? It must be observed that they are administrators and not judges and that question must be answered in the negative.

In Kenya, what we need is to revise the rationale behind the rules of hearsay, confessions, opinions and admission and determine whether for the purpose of perjury, those rules will have effect. For instance, the rule against Hearsay excludes evidence of the statements of other persons only when it is sought to prove the truth of such statements. Hearsay evidence is otherwise admissible in many other circumstances eg when it is sought to prove that a person made a slanderous statement, it is direct evidence to prove that the statement was made. The rule against hearsay is therefore not absolutely necessary. There is no reason why it should not be abolished so that a witness can give evidence in his own style, without interruption, so that he has an oppotunity to tell 'whole truth', like his counterpart in France.

The position of the witness should be hoisted so that he does not feel inferior to anybody. He should not be controlled, either by the court or the other party's counsel. He should be assured that he will not be harassed by the party who calls him, be it the police or a civilian.

The judge/magistrate should warn people from pleadin liable for the sake of convenience. As it stands no [illegible] for convicting people for pleading that way

and those taking part in court processes should feel the duty of discouring people as incubent on them.

The problem of lack of a well-defined complainant in a case of perjury can be solved variously: Justice Gaynor of the New York Supreme court in his paper "How to stop perjury" said;

> "The perjurer would no more dare to come forward in our courts .... if he knew that our trial judges were in the habit of committing perjurers on the spot. Nor would any lawyer produce an obvious perjurer if he knew that to do so would mean his prompt disbarment.

The offence of perjury should be given the nature of court contempt, so as to become punishable on the spot. Magistrates would not have to fear the operation of the rule against bias since they would be acting within their jurisdiction. They, and prosecutors must feel themselves bound to play the police role of being on the look-out for perjury.

We will then need to go to the kitchen of lies and put out the bonfire lit by lawyers. An American President of the State Bar Association was able to say in his annual address;

> "If the lawyers of this state would positively discourage false swearing on the part of their own clients and honestly endeavour to have it punished when committed by the clients or their adversary, the crime would grow suddenly less."[22]

Two instrumentalities can be used to curb the lawyers' problem:

(i) Expose them to the penalties of subornation of Perjury,

(ii) Ensure their immediate disbarment.

The latter might not be very practicable because of the nature of the profession. but it is one that could eradicate perjury problem if it is entrencred as a disciplinary action.

Perjury is rife in courts, yet the victims of perjured evidence will suffer loss ~~of~~ their means of livelihood, sometimes their lives, their property or loss of their valuable time.

The only remedy available for them is to lodge an appeal Appeal process would not solve a Kenyan's problem. It is encumbered with time-limit technicalities, lack of money to cover appeal expenses and disability to procure new evidence. A court in a second appeal case can only hear errors of law and not facts. The fact that a witness has perjured means that he is Incredible. I doubt whether the court of second Appeal will accept credibility as a point of law. If it won't, it means that a victim of perjured evidence will have the appeal remeday limited to cases of first appeal.

The Justice Committee recommended that a new tort of causing damage by deliberate false testimony be created.[23] Damages would be assessable on the usual principles of tort, ie harm suffered in monetory terms. It noted that such a tort would take the nature of the law of negligence, and thus tied to the problems of foreseability and remoteness. It also observed it would be hard to prove the tortious act where damage resulted from an amalgam of

truth and falsehood. In my view, the new tort should not be subjected to the harsh rules of the law of negligence. The tort is a deliberate one not one a reasonable man's expectations. So,I recommend that this tort be introduced here in Kenya. The objective of Torts L is the distribution of loss amongest those who create them. There is no reason why loss suffered by victims of perjured evidence should not be distributed to those who perjure in Kenya.

The committee suggested that a criminal compensation Board, a state ran institution should be created to compensate victims of perjured evidence.[24] It should act as an insurance against failure of the legal system to deter or detect perjury occassioning harm and injustice. This is supported by the fact that the perjurer might die or disappear, there is need for speedy compensation. and the victim is certain of being compensated.
If the Kenyan Government is really committed to justice being done, and being seen to be done, there is no reason why such a compensatory fund should not be established.

The Layman is right when he says that there is alot of cheating in court. This research has shown that the instrumentalities used to ensure smooth and lie-proof administration of especialy justice the one of them termed the law of perjury are idle. The first arm of the failure of perjury law is the hardship of establishing by proof. that a crime was committed. To be capable of proof, the statement charged must be:

(i) false

(ii) wilfully and knowingly be false.

(iii) material

(iv) made in a judicial proceeding,

(v) unequivocally intended to mislead the court seriously

(vi) corroborated

(vii) not ~~merely~~ merely diametrically opposite, and contradictory but positively false.

The policy behind this hardships of proof is the protection of witnesses from fear of prosecution for perjury. The policy is so important and although I recognise those requirements as being adverse to successful prosecution, in view of that policy, I consider the second arm of the problem to be the more serious one.

The second arm of the problem is the circumstances in which the lies are brewed, pondered, given to court and the swiftness with which the prosecutor might institute proceedings. They can be summarised as follows:

(i) The adversary system of the court cannot allow the witness to give the 'whole truth' and 'nothing else'

(ii) The only complainant in a perjury case are very reluctant to institute proceedings.

(iii) The lawyers remain unbarred from encouraging perjury.

(iv) Truth-giving is neither an enstablished custom, nor a legal requirement (except while in court) in Kenya. There is scarcity of lessons to be learnt from people who suffer ill-fates on accout of cheating.

(v) On the contrary, telling the truth in court neither has reward nor has any consequences.

(vi) People in Kenya are ignorant of the law.

Inspite of all these serious defects in the law of perjury, and inspite of the importance of that branch of the law as a watchdog of smooth-administration of justice, the Kenyan Parliament, or the courts have not tried to do anything about it. In England the Perjury Act is the guardian of smooth-administration of justice. In Kenya, nothing of that sort exists. Instead, the law silently exists, in an unpopular section, in an unpopular Penal Code, trapping those who, out of ignorance transgress it. The promulgation of a Kenyan Perjury Act will have two advantages: viz

(a) to publicize the law, so that the principle ignorantia Legim neminem excusat. which has been almost every Kenyan's quarrel with criminal law, will sound meaningful.

(b) To modify and clarify the law.

Perhaps it is time we recommend its promulgation which I consider long overdue. The new Act should contain the law in the form I have reommended in this last chapter. Until that is done, perjury problem thrives.

The existence of perjury law problems and lack of their cure indicates that perjury problem is widespread as a layman, would put it. I hope that my research has answered the perjury problem raised in my thesis.

FOOTNOTES

I. SMITH AND HOGAN: Criminal Law 4th edition (London Buttersworth I978) pg 3

2. JOSEPH GOLDSTEIN: Criminal Law Theory and Procedure (The Free Press New York I974) pg II49

3. Penal Code Cap 63 S I08 (I) (C)

4. The Report of the Justice Committee of I973 is reproduced in D W POLLARD "False Witness" Cr L R (I974) pg 588 - 596 at pg 592

5(a) [I960] E A 86

5. Interview held with Mr. Ole Tukai DM II Kikuyu Court on I9th March I986

6. PURRINGTON W A "The Frequency of Perjury" col L R (I908) Vol 8 pg 67 -8I at pg 76

7. Quoted in PURRINGTON W A Loc Cit pg 77

8. D W POLLARD Loc Cit pg 589

9. Ibid

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I3. D W POLLARD Loc Cit pg 59I

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I5. HIBSCHMAN. H. "You Do Solemnly Swear! or that Perjury Problem" Journal of Criminal Law, criminology and Police Science. Vol 24 (I933 - 34) pg 90I - 9I3 at 908

I6. Ibid pg 9IO

I7. Ibid

I8. Ibid

19. D W POLLARD Loc Cit pg 593

20. Quoted from D W POLLARD Loc Cit pg 593

21. Quoted from W A PURRINGTON: Loc Cit pg 73

22. Ibid

23. D W POLLARD Loc Cit pg 595

24. Ibid

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