Njuguna v Republic (Criminal Appeal E038 of 2022)
[2024] KEHC 11316 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11316 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E038 OF 2022

DKN MAGARE, J

SEPTEMBER 26, 2024

BETWEEN

DORCAS WAITHERA NJUGUNA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This is an application dated 28/3/2024 which is described as an application by the Appellant for the taking of additional evidence in this Appeal, being an appeal from the judgment and sentence of the Honourable Faith Muguongo, Senior Resident Magistrate in Nyeri Criminal Case No. 1513 of 2019 - Republic -v- Dorcas Waithera Njuguna.

2. The application is said to be made under Articles 3(1), 10, 19, 20, 21, 22, 25, 27, 35(1)(a) and (b), 48, 50(2)(c), (j), (k), 157(11), 159(1) and (2)(a) and (e), as read with Articles 165(1)(b), (3)(a), (b), (d)(ii), (e) and (6) of *the Constitution* of Kenya, 2010, Sections 358(1), (2), (3) and (4) of the Criminal Procedure Code, Sections 2(1) and 3(1), (2), (3), and (4), 11, 144(2) and 165 of the *Evidence Act*, Section 3(1)(a) and (b) of the *Judicature Act*, Sections 3, 5 and 25 of the *High Court (Organization and Administration) Act*, 2015 and Rule 20(1) and (2) of the High Court (Organization and Administration) (General) Rules, 2016.

3. The application seeks the following orders:-

    a. That this Honourable Court do order a stay of the hearing of the main Appeal pending the hearing and determination of this application, being an application for the adducing of additional evidence by the Appellant.

    b. That this Honourable Court do take further evidence in this Appeal.

c. That as an alternative to prayer 2 above, this Honourable court do direct the taking of further evidence by any Magistrate at the Nyeri Law Courts, with the exception of the Honourable Faith Muguongo and the Honourable Alfred Kibiru.

d. That this Honourable Court do make such further or other orders as may be necessary for the ends of justice and to prevent an abuse of the process of the court and/or the occasioning of an injustice, prejudice, embarrassment or inconvenience to the Appellant, as the justice and circumstances of this case may require.

e. That there be no order as to costs.

4. The application is supported by a lengthy Supporting Affidavit of Dorcas Waithira Njuguna, the Applicant herein sworn on 28/3/2024 and filed on 5/4/2024. It has 7 printed pages comprised in 28 paragraphs and several sub paragraphs and 144 pages of annextures.

5. The grounds in support of the application has several sections. The first section is dealing with the Constitutional Underpinnings of the Application, which are the articles named above, that is Article 50(2)(c), (j) and (k) of *the Constitution* of Kenya as read with Articles 19, 20, 21, 22 and 25 which guarantee the Appellant the right to a fair trial.

6. The Applicant posited that the fundamental fair trial rights and the principle of 'equality of arms' were violated by the Respondent by non-disclosure of a statement by the Investigating Officer, which had exculpatory material and which was only disclosed in Nyeri Chief Magistrate's Court Criminal Case No. 1706 of 2019 - Republic v. John Mwaura Kamau and not to the Appellant.

7. It was their case that under Article 157(11) of *the Constitution*, the Director of Public Prosecutions has a constitutional duty to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

8. It is their case that non-disclosure of a material statement of the investigating officer to the Appellant during her trial was against the interests of the administration of justice and a gross violation of the constitutional duty to avoid abuse of the legal process. This is, according to the Applicant, a violation by the Prosecution of the fundamental right to access to justice under Article 48 of *the Constitution* in that it impaired the Appellant's ability to seek and obtain a remedy through the formal criminal justice system in conformity with well-established human rights standards and principles.

9. They posited that withholding of the statement in question also amounted to a violation by the Prosecution as an agent of the State of Article 35 of *the Constitution* as to the Appellant's fundamental right to access to information held by the State, particularly information which she required for the purpose of protecting her fundamental right to a fair trial.

10. They stated that the non-disclosure of the statement in question to the Appellant, when looked at in contradistinction to the disclosure of same statement to the other accused, John Mwaura Kamau was an act of discrimination by the Prosecution against the Appellant within the contemplation of Article 27 of *the Constitution*. This violated the Applicant's fundamental right to equality before the law and to equal protection and equal benefit of the law.

11. They submitted that the orders sought were pertinent for the proper exercise by this Honourable Court of judicial authority under Article 159(2) of *the Constitution*. In that respect the Applicant invoked this Court's unlimited original jurisdiction to hear and determine an application of this nature and to exercise supervisory jurisdiction over the trial court by virtue of Articles 165(1)(b), (3)(a), (b), (d)(ii), (e) and (6) of *the Constitution*. The Applicant invoked Article 10 as read with Article 3(1) of *the Constitution* which places an obligation to every person to respect, uphold and defend *the Constitution*.

12. The second aspect were the statutory Foundations for the application. The Applicant relied on Sections 3, 5 and 25 of the *High Court (Organization and Administration) Act*, 2015 and Rule 20 of the High Court (Organization and Administration) (General) Rules, 2016, for purposes of the Court's supervisory jurisdiction over the subordinate courts. It is her case that Sections 358(1), (2), (3) and (4) of the Criminal Procedure Code, allow the appellate court to take additional evidence or to direct such evidence to be taken by a subordinate court.

13. The Applicant submitted that Sections 2(1) and 3(1), (2), (3), and (4), 11, 144(2) and 165 of the *Evidence Act* have sufficient enabling provisions on the law of evidence necessary for the taking of the additional evidence sought.

14. Thirdly the Applicant posited that the factual matrix allow the Applicant to adduce additional evidence. It is their case that the evidence left out is of decisive character and the additional evidence sought to be adduced is relevant and credible.

15. The additional evidence could have been a decisive factor in the trial court's findings about the credibility and reliability of the only two Prosecution witnesses, who were also the only two Prosecution witnesses in the John Mwaura Kamau case. They stated that by its very nature, on the basis of evidence tendered by the investigating officer in John Mwaura Kamau's case, the additional evidence that the investigating officer would give is likely to be a decisive factor in the decision whether the trial court would have reasonably reached the conclusion that the Appellant was guilty in the face of such evidence.

16. It was her case that this vital evidence was not made available to, and was withheld from the Appellant at her trial before the trial court, despite having been available at the time she testified in her defence and as such there was a miscarriage of justice in all circumstances of the case.

17. They argued that by reason of the fact that the Honourable Faith Muguongo was the trial magistrate in the case from which this Appeal has been preferred, it is reasonable and consistent with the proper administration of justice that the additional evidence, if allowed, be not taken before her. By the same token, and given the fact that John Mwaura Kamau's case which is based on identical facts as the case appealed from is currently pending before the Honourable Alfred Kibiru, it is equally not appropriate for the additional evidence sought to be taken before him.

18. The Applicant beseeched the court that proceeding with the hearing of the main appeal without taking the additional evidence of the investigating officer would be gravely prejudicial to the Appellant, a miscarriage of justice, and a violation of her fundamental fair trial rights under Article 50 of *the Constitution*.

19. The investigating officer Cpl. Jesse Macharia filed a replying affidavit on 12/6/2024, which is dated 6/6/2024. He indicates that he was the investigating officer in CR. Case No. 1513 of 2019, in which the Appellant was convicted.

20. He stated that there were 2 cases being CR. 1513 of 2019 and CR. 1706 of 2019. A statement is said to have been recorded on 15/3/2022 after the prosecution closed its case. The complainants were Nicholas and Charles Wambugu Gitonga.

21. The deponent stated that to the best of his knowledge he led all the evidence he had in this matter. He did not find any need to hide evidence.

Analysis

22. The sole question before this court is whether the court should allow the adducing of further evidence. To be able to answer that question, two issues arise, that is whether, there is further evidence that is capable of being adduced by the applicant and whether the applicant has met parameters for adducing further evidence.

23. Before deciding whether there is evidence to be adduced, the court has to settle on the parameters for grant of interlocutory orders. Fortunately, this is a well-trodden route. On the basis of stare decisis, the Supreme Court has given guidance in at least 4 cases, which are all consistent and binding on this court. The court shall thus not re-invent the wheel but ride on wisdom of the Supreme Court.

24. The Supreme Court Koome; CJ & P, Ibrahim, Wanjala, Njoki & Ouko, SCJJ) in Petition (Application) No. 7 of 2017- Patrick Thoithi Kanyuira Versus Kenya Airports Authority ... adopted the following wisdom as follows: -

> "(4) The English Court of Appeal in the case of Ladd v. Marshall [1954] 1 WLR 1489 established three-part test, namely, non-availability, relevance and reliability, for the appellate Court to accept fresh evidence in a case on which a judgment has already been delivered. Laying down the definitive rule for the admissibility of new evidence Denning LJ, explained that;
>
> > "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

25. This was followed by its other decision in the case of Petition (Application) No. 38 of 2019 - Cyrus Shakhalaga Khwa Jirongo Versus Soy Developers Limited & 9 others [Maraga, CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ)] where the supreme court posited as follows: -

> "27....The import of Section 21(3) of the *Supreme Court Act* was considered in Evans Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others SC Petition No. 18 & 20 of 2014; [2014] eKLR (Kidero). In the concurring Judgment of Njoki Ndungu SCJ at paras. 368-69 she delivered herself thus: "The upshot of this is that this Court may make the same kind of orders that the High Court is empowered to make under Articles 22 and 165, when the matter comes to the Supreme Court on appeal, as the Court would find fit. As alluded to earlier on these remedies include declarations of rights, injunctions, conservatory orders, declaration of invalidity of any law, orders for compensation, orders for judicial review or any other appropriate relief where rights and fundamental freedoms have been denied, violated or are threatened. SC Petition (Application) No.38 of 2019 -11- Taking all these legal provisions into consideration, it is manifest that this Court may make any order that the High Court has jurisdiction to make in the enforcement of rights and fundamental freedoms. This Court also has the latitude to make any order that would be necessary for determining the real question in issue in this appeal and to ensure that the principles of *the Constitution* are promoted - including an order for a witness to be cross-examined. I am alive

to the fact that this is not a remedy that this Court would hastily grant but in light of the violation of constitutional rights that occurred it is the most appropriate remedy under the circumstances."

(28) It is therefore, without belaboring the point any further, a fact that this Court has the jurisdiction to hear and determine an application for leave to adduce additional or new evidence. What is also apparent is that the exercise of that jurisdiction shall not be whimsical, and the Court would not be in haste in granting the same. It has to consider all the relevant prevailing circumstances and make such order as it would deem fit in the interests of justice.

26. In the case of Mohamed Abdi Mahamad v. Ahmed Abdullahi Mohamed & 3 others SC Petition Nos. 7 & 8 of 2018; [2018] eKLR (Wajir), the court set the following as the criteria for adducing evidence. The supreme court stated and expanded the rule in Ladd v. Marshall [supra] as follows: -

" We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows: -

a. the additional evidence must be directly relevant to the matter before the Court and be in the interest of justice;

b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

c) it is shown that it would not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

d) where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit; e. the evidence must be credible in the sense that it is capable of belief; f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

g) whether a party would reasonably have been made aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process;

h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;

i) the Court must be satisfied that the additional evidence is not utilized for the purpose of removing the lacunae and filling gaps in evidence. The Court must find the further evidence needful;

j) a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in the appeal, fill up omissions or patch up the weak points in his/her case;

k) the Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."

27. This is also the position taken by the supreme court of Uganda sitting at Mengo in the case of Attorney General v. Paul Kawanga Semwogerere & 2 others Constitutional Applicati*on No. 2 of 2004*; [2004] UGSC 3.

28. The supreme court of Kenya stated as follows regarding the threshold in the case of Barclays Bank of Kenya Limited (Now Absa Kenya PLC) v Commissioner of Domestic Taxes (Large Taxpayer's Office); Kenya Bankers Association & another (Interested Parties) (Petition (Application) 12 (E014) of 2022) [2023] KESC 44 (KLR) (Civ) (16 June 2023) (Ruling): -

> " Bearing in mind that this court settled with finality the question of its jurisdiction to grant leave to a party to adduce additional evidence and laid down the governing principles in the case of Mohamed Abdi case (supra) where it stated:
>
> "(79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us..."

29. There has to be exceptional circumstances. The exceptional circumstances must truly be evidential and new.

30. In this case, the question of consolidating the two cases has been alive since the beginning of the case in the lower court. The evidence sought to be adduced is a statement recorded by the investigating officer in a related case. The same was not for the case herein. How then is the statement to be produced by the Appellant? The evidence to be produced by the investigating officer is not Defence evidence.

31. Further, a statement made to the police is not evidence. It is not a document capable of being produced. It was recorded in a related case not this case. We do not know the depth of the original statement for the case in which it was recorded. There is no nexus between what was said in that statement and the prosecution case.

32. The Appellant was charged that on diverse dates between 21st day of October, 2015 and 23rd May, 2016 in Nyeri town within Nyeri county jointly with others not before court, conspired and defrauded Charles Wambugu Gitonga Kshs. 9,253,300/= by falsely pretending that she was operating genuine business of importing gravel machine crushers.

33. She was convicted and sentenced to 2 years or in alternative 2 million fine. The sentence was to run from 5/9/2022. The Appellant had been arrested on 10/9/2019 and released on 12/9/2019.

34. The question of 1706/2019 and the case No. 1513 of 2019 was raised in court on 3/12/2019. DW2 stated that he knew Dorcas and Isaiah Njuki Njue knew each other. The quest to adduce further evidence started in earnest from 24/4/2023.

35. The second case was said to be pending before the court. The said statement was said to have been filed in the file against John Mwaura. The Appellant requested 21 days to file the application. It was not over one year and 2 months later that the same was filed. It was not served until July 2024. The application to adduce evidence was dismissed for want of prosecution and had hitherto been dismissed on 5/2/2014. A second one was filed on 5/4/2024.

36. Given the order of 5/2/2024, this application is untenable. Even if the same had not been dismissed, the requirement for adducing evidence is provided by Section 358 of CPC as follows: -

> " (1) In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.

(2) When the additional evidence is taken by a subordinate court, that court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal.

(3) Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.

(4) Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court."

37. What is the substance of what is sought to be adduced? A witness statement in a criminal case is not evidence. The new evidence does not relate to the case of the parties herein. The said statement cannot be said not to have been disclosed, when it was for another case.

38. The matter raised was substantively dealt with in the trial court. The questions of propriety of the proceedings is what is in issue in this file. Whether the prosecution disclosed all evidence is an issue that has been in issue including the question on why the Appellant and the accused in 1706 were charged separately and in Nyeri and not elsewhere.

39. I am satisfied that there is nothing new, in the evidence sought to be adduced. Further, the so-called evidence is not evidence at all. There is no purpose shown for the "new evidence." The so called evidence is neither new nor evidence.

40. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case in appeal, fill up omissions or patch up the weak points in his case.

41. The net effect is that the application for adducing evidence is dismissed in limine.

Orders

42. The upshot of the foregoing is that I make the following orders: -

a. The application dated 28/3/2024 for adducing additional evidence is dismissed.

b. The appeal to proceed for hearing.

c. The file be listed for directions immediately after the ruling.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

Represented by:-

Nderitu & Partners Advocates for the Appellant/Applicant

ODPP for the the Respondent

Court Assistant – Jedidah