



**JKN v Republic (Criminal Appeal E016 of 2023)
[2024] KEHC 13855 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13855 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E016 OF 2023
LW GITARI, J
OCTOBER 29, 2024**

BETWEEN

JKN APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The matter pending before this court is notice of Motion dated 26th February, 2024 which seeks an order that the applicant be granted leave to adduce additional evidence in Criminal Appeal No. E016 of 2023 against the conviction and sentence which evidence was not available at the hearing of the main trial. That the court to give directions on the manner in which the additional evidence shall be taken. The application is based on the grounds that the applicant was convicted in sexual offences case no. E004/2022 before the Principal Magistrate’s court at Tigania with the offence of incest contrary to Section 20 of the *Sexual Offences Act*. After a full trial he was sentenced to serve ten (10) years imprisonment. The contention by the applicant is that he was not accorded a fair trial by the learned magistrate as he was not given enough time to prepare his defence. The applicant further states that it is in the interest of justice that the application be allowed as no prejudice will be suffered by the respondent.
2. The application is supported by the affidavit of the applicant sworn on 26th February, 2024 where he avers that he had made an application for a second DNA test at his own cost but the court declined. That he has secured evidence to show that he had ongoing dispute between his brother and the complainant’s father who is his brother which was resolved in three meetings which took place on 29th July, 2018, 20th May 2018 and 4th August 2020 and has annexed the minutes of the three meetings as annexures AA1, AA2 and AA3. That he had made an application before the trial court to be allowed to furnish additional evidence which is relevant to the case as he and the complainant’s father had a longstanding grudge over family matters as minutes can attest. He further depones that he has secured



additional evidence thro' the assistance of the area chief. That the evidence will assist the court to understand the genesis of the case.

3. The respondent opposed the application and filed written submission.
4. I have considered the application which is premised under Section 358 of the [Criminal Procedure Code](#) which provides as follows-;

358.

- (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”

The section gives the High Court while sitting as the 1st appellate court from the judgment of the subordinate court discretion to allow the appellant to adduce additional evidence and to give directions on how that evidence is to be received. The High Court may receive the evidence itself or direct the evidence to be taken at the subordinate court.

Article 50 of the [Constitution](#) gives High Court Jurisdiction to allow an application for a new trial in the magistrate's court. Under the Article, there are two situations where the High Court can order a new trial. Article 50 (6) of the [Constitution](#) provides as follows-;

“50

- (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—
 - (a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
 - (b) new and compelling evidence has become available.”

The new evidence refers to evidence which was not available at the time of the trial and which could not have been availed during the trial. The new and compelling evidence connotes that the evidence is weighty, and of such probative value that if it was adduced at the trial, it would have resulted in the court arriving at a different verdict or outcome. The test for allowing an application to adduce new evidence was stated in the case of *Elgood Vs Regina* (1968) E.A 274

“The principles upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be called for the purpose of the appeal are-;The evidence that is sought to call must be evidence which was not available at the trial.It must be evidence relevant to the issues.It must be evidence which is credible in the sense that it well capable for belief.



* The court will be after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with other evidence at the trial.”

* *R-v Parks* (1961) 3ALL E.R 633 applied, statement in *John Hasakwa V R*. CR.A No. 132 of 195 (UR) disapproved).

- b. It is only in very exceptional cases that the court of appeal will permit additional evidence to be called.
- c) In the circumstances, in the interest of justice the application should be allowed.
- d) The affidavit in support of an application to admit additional evidence should have attached to it a proof of the evidence sought to be given
- e) On consideration of the evidence the charges could not be said to have been proved beyond any reasonable doubt.

This case was cited with approval in *Tentere Sankale Vs Republic* (2018) eKLR.

- 5. The Court of Appeal in the case of *Daniel Kipngetich Sang Vs Republic* (2011) eKLR while applying the principles in the case of *Elgood Vs R* (supra) stated the appellate court may allow a party to adduce additional evidence where exceptional circumstances are established.
- 6. The applicant seeks to produce minutes of meetings over dispute involving the appellant and the father of the complainant. These minutes were not mentioned before the trial court. The applicant stated that there was a dispute that never reached court. He never applied before the trial court to rely on the minutes. He was represented by counsel and he was given an opportunity to give his defence and he called witnesses. He was aware of the evidence of the minutes. The minutes are of no probative value as they relate to a dispute which he says was resolved. The appellant did not mention the minutes in the defence. The applicant was under an obligation to give credible reason that he couldn't reach the evidence and it could not have been available after the exercise of due diligence, that the evidence is credible and capable of belief and is capable of creating doubt as to his guilt. The minutes have nothing to do with the complainant. They are not likely to cast doubt on the guilt of the applicant. Such a remote allegation is not what is envisaged by the principle in *Elgood Vs R* (supra). The test is whether the evidence has the capacity to raise doubts in the case and lead to a different finding. My view is that the existent of a dispute that was resolved cannot raise a doubt in the mind of the court in view of the nature of the offence the applicant is facing. The alleged dispute is between him and the complainant's father and not with the complainant.
- 7. This is mainly because the applicant admitted that the complainant was residing in his house and it was during that time that he committed the offence of incest.
- 8. As a result of the incest a child was born and a DNA report proved that he was the father of the child. The applicant admitted in his defence that he was present when the DNA samples were taken. A D.N.A test was done and the report was that he was the father. A second D.N.A test is a waste of time as there is no good reason why the one which was done it cannot be relied on. The D.N.A report is conclusive evidence that he had sexual intercourse with the complainant. It proves the charge of incest as it corroborates the testimony of the complainant.



Conclusion

9. I find that the application does not meet the threshold for allowing the admission of new evidence. The application lacks merit and is dismissed.

DATED SIGNED AND DELIVERED THIS 29TH DAY OF OCTOBER, 2024.

L. W. GITARI

JUDGE

