



**Ume & another v Republic (Miscellaneous Criminal Application 57 & 58 of 2017
(Consolidated)) [2024] KEHC 14789 (KLR) (26 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14789 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CRIMINAL APPLICATION 57 & 58 OF 2017 (CONSOLIDATED)
RM MWONGO, J
NOVEMBER 26, 2024**

BETWEEN

SYMON WACHIRA UME 1ST APPLICANT

FRANCIS MURIITHI KITHAKA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicants/Appellants in this consolidated appeal were charged and convicted in the lower court with the offence of robbery with violence.
2. Pending the hearing of the appeal, the applicants filed this application seeking the following orders:
 1. That this court may be pleased to order for the production of the following under listed items on or before the hearing of the substantive criminal appeal HCCRA Nos 57 and 58 of 2017 to ensure fair trial and justice:
 - a. Production of the records and judgment in original Criminal Case No. 49 of 2013 at Kerugoya CM's Court during the hearing of the substantive appeal.
 - b. Production of Occurrence Book (OB) extracts of Kerugoya Police Station of:
 - i. OB NO 71 of 14/10/2013 (71/14/10/2013)
 - ii. OB NO3 of 15/10/2013 (3/15/10/2013)
 - iii. OB NO 7 of 15/10/2013 (7/15/10/2013)
 - iv. OB NO 44 of 15/10/2013 (44/15/10/2013)



- c. Charge sheet and records of original Criminal Case File No. 105 of 2015 at CM's court Kerugoya.
3. The applicants deposed to an 11 paragraphs supporting affidavit and made the following major averments:
 1. That we were both accused persons in criminal case file No 7120/2015 at CMs Kerugoya having been arrested on different dates.
 2. That we were both convicted and sentenced to death by the CM's Court on 4/8/2017 for the offence of Robbery with Violence contrary to Section 296(2) of Criminal Procedure Code.
 3. That we both appealed against both conviction and sentence vide HCCRA Nos 57 of 2017 for the 1st Applicant and 58 of 2017 for the 2nd Applicant and which appeal is still pending before this court.
 4. That the above HCCRA No 57 and 58 of 2017 is the subject matter upon which this application is brought in orders to provide the court with essential, vital and critical information assist it to render an informed, fair and just decision.
 5. That the applicants intend to disprove the evidence as presented in criminal case 712 of 2015 through the production of the issues or documents and information sought in order to set the records straight for the courts.
 6. That the documents sought are held by state organs as provided under article 35 of *the constitution* and which information is critical, vital and essential in order to fairly adjudicate the appeal before this court.
4. The parties filed submissions as follows:

Applicant's submissions

5. The applicants submit that the Occurrence Books (OB's) called for were among the records called for by the applicants during the trial and which the trial court ought to have availed and which was not done. It should be noted that this is not new nor is it introduction of new evidence through the back door as the respondent intimated, since the records bear us out that we made an application for the production of the same to the law court to no avail.
6. It is submitted that this court has inherent powers and original jurisdiction even where the same could not have been sought in the first instance to call for such in order to inform itself as to whether the witnesses (PW1 and 2) recognized or identified the assailants and whether still they gave the said descriptions to the police as alleged in court, whilst not contained in their statements but only adduced in evidence rendering the same dock identification. The same can only be confirmed by the occurrence books as sought.
7. The witnesses PW1 and 2, who were the key witnesses claimed to have recognized/identified the applicants and made the same report to the police in their first report which was a lie. This court being a superior court whose duty is to analyze and evaluate afresh the evidence on record to arrive at its own independent verdict, has a duty to inform itself on the correctness, veracity, accuracy and truthfulness or otherwise of the assertions made by the two witnesses and the only way is via the occurrence books.
8. The production of the items sought will not in any way prejudice the respondent's case since there will be no interrogations but just confirmation that the two witnesses lied to the court.



Respondent 's Submissions

9. The state submitted along two prongs as follows:

Whether this court should order for the production of the records and Judgment in Criminal Case No. 490 of 2013

10. The respondent submits that the revisionary Jurisdiction of this Honourable Court is donated by Section 362 of the Criminal Procedure Code (CPC) that provides:

“The High Court may call for and examine the record of any criminal proceeding before any subordinate Court for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, as to any proceedings of any such subordinate Court.”

11. Thus, the court has jurisdiction in this application. It is not disputed that records, judgment and charge sheets in the lower court case can be readily availed.

Whether this court should order for the OB in items (i) to (iv)above

12. The state submits that the applicants' application for Occurrence Book (OB) is not merited as they did not apply for the production of the same during trial where the Respondent would have been afforded an opportunity to provide the maker of the statement recorded in the (OB) to explain the contents, and to be cross examined, if necessary.
13. The applicants have failed to explain the relevance of the said (OB)s to their pending appeal only stating it will be helpful to their appeal as such, their application should be treated as an afterthought and misconceived.
14. They submit that the applicants at this stage wish to take advantage of either the omission or the inclusion of some information embodied in the said (OB)s which the respondent may not have the opportunity to answer to the contents thereof.
15. The Applicants have failed to persuade this Court that it is necessary and in the interest of justice to allow for the production the additional evidence contain in the said (OB)s that was manifestly not interrogated during trial. Accordingly, the respondents submit that allowing the said (OB)s at this appeal stage may constitute new and compelling evidence that the respondent may not be able to rebut.

Issues for Determination

16. The core issue for determination is whether the court should order for the production of the Occurrence Book (OB).

Analysis and Determination

17. The dispute revolves around the applicants request for the production of Occurrence Book (OB) extracts of Kerugoya Police Station, dated 14th and 15th October, 2013. They request for the OBs to be produced before this court at the stage when their appeal will be heard.
18. The applicants submit that the Occurrence Books (OB's) called for were among the records sought for by the applicants during the trial and which the trial court ought to have availed and which was not done. I have perused the record of proceedings of the lower court and have not seen any request for the OBs.



19. The applicants state that they require the OBs to assist the court to establish whether the witnesses (PW1 and 2) recognized or identified the assailants and whether they gave the said descriptions to the police as alleged in court, whilst not contained in their statements but only adduced in evidence rendering the same as dock identification. The same can only be confirmed by the Occurrence Books as sought.
20. The prosecution submit that the applicants have failed to explain the relevance of the said (OB)s to their pending appeal only stating it will be helpful to their appeal as such, their application should be treated as an afterthought and misconceived.
21. The state relied on the decision in: *Atanus Ochola Mutende v Republic* [2008] KEHC 2654 (KLR) where Ochieng J held:

“The applicant has, so far, not persuaded me that it is necessary, in the interests of justice, to allow for the production of the additional evidence. I believe that part of the reason for the applicant’s inability to demonstrate how or why the additional evidence would be necessary, stems from the fact that the applicant has not yet received a copy of the record of the proceedings before the trial court.”

22. Section 358 (1) of the Criminal Procedure Code grants this court the power to take further evidence. It provides that:

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

23. The applicants raised the issue of identification during their defence hearing. They believe that the identification parade was not properly done and would wish to refer to the record in the Occurrence Book to ascertain its veracity.
24. The Court of Appeal held as follows to admit the Occurrence Book as additional evidence: *Daniel Mwathi Njaramba & 2 Others v Republic* [2013] eKLR

“We are of the considered view that in order to test whether the concurrent findings on recognition were safe to warrant the conviction of the appellants it is necessary for us to admit the above mentioned Occurrence Book into evidence.”

25. In light of the *Daniel Mwathi Njaramba* case and given that the issue of identification arose in the lower court, this court is satisfied that the application can be allowed. It is so ordered. The state shall avail the Occurrence Book within 45 days of today’s date. Other documents are on the lower court file and are readily available.
24. Orders accordingly.

DELIVERED AT KERUGOYA THIS 26TH DAY OF NOVEMBER, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Accused 2: Francis Muriithi Kithaka - At Kisumu Maximum



Accused 1: Symon Wachira Ume - At Nyeri Maximum

Mamba for the State

Court Assistant, Murage

