



**Loorkusi v Republic (Criminal Appeal 130 of 2017)
[2023] KEHC 1308 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL 130 OF 2017
F GIKONYO, J
FEBRUARY 28, 2023**

BETWEEN

OLONYOKIE LOORKUSI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Additional evidence on appeal

1. The only prayer which is relevant to this decision in the applicant's undated application received in court on April 28, 2022 is the one seeking adduction of additional evidence pursuant to section 358 of the *CPC*; in particular, that RRL produces her birth certificate through the registrar of births and deaths Narok registry to ascertain her correct age.
2. In his support affidavit, the appellant averred that the evidence sought to be relied on is one that exists as per the investigation officer at page 34 of the record.
3. The appellant has cited the cases of *Republic V Parks* All Er 639 which was cited *Eigood v Republic* 1968 EA CA 274, *Joginder Auto Service Ltd v Mohamed Shaffique & Another* CCA 210/2000 cited in *Samuel Kungu Kamu v Republic* CRA. 29/2015.

Appellant's submissions.

4. The appellant's submissions are considered in detail in the analysis. I record also that the appellant relied on the following authorities;
 - i. *Elgood V Regina* {1968} EA 274.
 - ii. *Ladd V Marshall* {1954} 3 ALL ER 745



- iii. *Tarmohamed & Another V Lakhani & Co* (1958) EA 567
- iv. *Joginder Auto Service Ltd V Mohamed Shaffique & Another* CCA. 210/2000 cited in Samuel Kungu Kamu V Republic CRA. 29/2015
- v. Thomas Mwambu Wenyi Vs Republic (2017) eKLR

The respondent’s submissions.

- 5. Mr. Ondimu orally submitted that the applicant’s request is not for additional evidence but of evidence which is already in court. That the applicant referred to page 34 of the record. Fact of age was proved as exhibit 2 and on evidence of PW1. These are questions that may be determined in the appeal. He urged this court to dismiss that application.

Analysis and determination.

Is there any lawful basis for adduction of new evidence in this appeal?

- 7. Section 358 of the *Criminal Procedure Act* permits the appellate court for reasons to be recorded, to receive additional evidence, and may either take evidence itself or direct it to be taken by a subordinate court. The said provision stipulates that:

“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.”

- 8. See also, *Republic v Richard Mwangi Wambugu* [2010] eKLR.
- 9. The exercise of this power is however circumscribed within certain principles. See the case of *Tentere Sankale v Republic* [2018] eKLR where the court cited the case of *Elgood –vs- Regina* [1968] EA at page 274 where the court of appeal held;

“(a) 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 purposes of the appeal are:-

- (i) the evidence that it is sought to call must be evidence which was not available at the trial;
- (ii) it must be evidence relevant to the issues;
- (iii) it must be evidence which is credible in the sense that it is well capable of belief;
- (iv) the court will, 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 the other evidence at the trial (R. V. Parks [1961] 3 ALL E.R. 633 applied; statement in John Hasakwa V. R. Cr. A. No. 132 of 1954 (U R) 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 a reasonable doubt.....”
10. The essential test is that, the additional evidence; (i) was not available at the trial; (ii) is relevant to the issues; (iii) is credible in the sense that it is capable of belief; and (iv) is capable of creating a reasonable doubt as to the guilt of the appellant.
 11. When these ingredients are present, the court will find the evidence to be necessary and be admitted in an appeal.
 12. I will subject this request for adduction of additional evidence to the aforesaid test.
 13. The charge herein was defilement of RRL a child aged 14 years.
 14. Evidence on the age of, by PW1, RRL, was recorded at page 11, 12 and 13. She also confirmed that she had undergone an age assessment.
 15. PW5 a clinical officer also testified and produced an age assessment report. See page 21 of the record.
 16. The trial court in its judgment considered the evidence on age and made a determination on the issue thereof.
 17. Now, the appellant is seeking RRL to produce her birth certificate through the registrar of births and deaths Narok registry to ascertain her correct age.
 18. The certificate intended to be produced as additional evidence relates to the age of the complainant.
 19. In light of the evidence, and the law on proof of age, it has not been shown that the additional evidence herein is necessary, or one that would create any or reasonable doubt as to the guilt of the accused. In any event, age and proof thereof is one of the essential elements of defilement which also constitutes one of the issues of, that should be determined in the appeal. In the premises the applicant may not avail himself of the argument that the evidence was not available during the trial as he is a layman. I have perused the trial courts record and there is no mention that the appellant/applicant sought to have the registrar of births and deaths summoned.
 20. I do note that the appellant was not represented during the trial but he aptly cross-examined all the witnesses. From the record, he was quite aware of the case he faced.
 21. The upshot is that the application herein lacks merit and is hereby dismissed.
 22. The appeal shall proceed to hearing. To avoid any further delay, I will give appropriate directions in line with the overriding objective of the court.
 23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 28TH DAY OF FEBRUARY, 2023.



F. GIKONYO M.

JUDGE

In the presence of: _____

1. Appellant
2. Ms. Mwaniki for DPP
3. Kasaso – CA

