



REPUBLIC OF KENYA



KENYA LAW
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**Nyongesa v Republic (Criminal Appeal 67 of 2019)
[2023] KEHC 3962 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3962 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 67 OF 2019
JRA WANANDA, J
APRIL 28, 2023**

BETWEEN

BERNARD NYONGESA ALIAS REUBEN KOECH APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Appellant and a co-accused were charged in Eldoret Chief Magistrate's Court Criminal Case No. 193 of 2018 with the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act*, No. 3 of 2006. The girl alleged to have been defiled was stated to have been 16 years old at the time of the offence and a class 5 pupil.
2. After analyzing the evidence, the trial Court found both the Appellant and his co-accused guilty and convicted them. Subsequently, both were sentenced on 26/04/2019. On his part, the Appellant was sentenced to 20 years imprisonment.
3. Being dissatisfied with the decision, the Appellant lodged this Appeal on 7/05/1/2019. He later successfully applied for bail pending Appeal.
4. He has now brought the present Applicant by way of the Notice of Motion dated 30/03/2021 seeking the following orders;
 - a. [Spent].
 - b. That the Appellant/Applicant be granted leave to adduce additional evidence in the appeal against his conviction and sentence.
 - c. That the Court does direct the manner in which the evidence in issue shall be taken.
 - d. That any other order that this Honourable Court deems fit to grant in the interest of justice.



5. The application is premised on the grounds set out therein and the contents of the Supporting Affidavit of Jacob Situma.
6. The Application was opposed by the State which relied on the Replying Affidavit sworn by Prosecution Counsel Emma Okok and filed on 23/06/2021.
7. The parties were then directed to file Submissions on the Application. The Appellant filed his Submissions on 8/07/2021 through Messrs KWEW Advocates LLP. The Respondent's Submissions were filed on 23/07/2021 by the said Ms Emma Okok.

Appellant's Submissions

8. Learned Counsel for the Appellant submitted that additional evidence intended to be adduced is contained in the letter and averments of the Appellant's area chief one Joseph K. Koech of Chepsaita Location, the evidence would displace the Prosecution's case in the Appellant's favour, the said chief is ready and willing to adduce his evidence in the manner to be so directed by this Court including swearing an Affidavit to depone his averments, he is ready to be cross-examined by the Respondent, the Appellant intends to use the additional evidence to contest the prosecution's evidence on his identification in the case. the trial Court, without satisfying itself as to the proper identity of the Appellant, went ahead to convict him of the crime as charged, it failed to ascertain that the ingredients of the aforesaid offence had been proved beyond reasonable doubt. He cited the case of John Mutisya Mbeetu v Republic [2018] eKLR.
9. Counsel added that Section 358(1) of the Criminal Procedure Code, Cap 75, Laws of Kenya grants this Court the discretionary power to order the taking of additional evidence. He relied on the cases of Republic vs. Ali Babitu Kololo (2017) eKLR and Elgood v Regina [1968] E.A. 274 and urged that the Application meets the threshold set in law, at the time of the trial the Appellant was not aware of the presence of the additional evidence he intends to produce, it was only after the conviction that the chief became aware of the malicious and trumped up charges against the Appellant that he volunteered to come to Court and present information known to him personally about the character and disposition of the complainant, it will be important for this Court to grant the prayers sought in order to interrogate the averments by the chief as "to reports on the ground indicating that Reuben Nyongesa Mukhwana is innocent and was only framed", it will be in the interest of justice for this Court to be able to interrogate the assertion that "the complainant in the case has a knack of raising similar accusations against other people".
10. Counsel added that the said information was not available at the trial, Section 2 of the Chief's Act, Cap. 128 Laws of Kenya defines a "Chief" as the person appointed for any area to the offices of Chief in the public service, according to Section 6 of the Act, the Chief is mandated to maintaining law and order in their area of jurisdiction, the chief is not vested in the outcome of the judicial process, the evidence intended to be adduced is relevant, it is intended to demonstrate that the Appellant was not properly identified as the assailant, the evidence shall demonstrate that the complainant was not truthful in her testimony and she has a habit of raising similar allegations for unknown reasons, the Appellant was unrepresented during the trial, the chief is an impartial, independent, and competent witness in this matter and his evidence is capable of belief, his evidence if admitted shall be subjected to the rigorous test of cross examination by the Prosecution and further interrogation by this Court to determine its probative value, admission of the additional evidence would actualize the Appellant's fundamental rights of a fair trial under Article 50 of *the Constitution* of Kenya.
11. In conclusion, Counsel stated that the Appellant has satisfied the preconditions for grant of leave to adduce additional evidence, the Application is merited and had demonstrated the existence of



exceptional circumstances, additional evidence will form a firm basis for challenging the legality of the sentence meted out against the Appellant.

Respondent's Submission

12. Learned Counsel for the Respondent, Ms. Emma Okok, opposed the Application and submitted that the same is not merited as there are no sufficient grounds to support it. She cited the Supreme Court decision in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR.
13. Counsel submitted that the evidence the Appellant seeks to introduce was available to the Appellant during the trial, the trial commenced on 15/10/2018 when the Appellant took plea and was admitted to bond terms, the Appellant's surety was approved on 17/01/2019 and the Appellant continued with the trial while out on bond, he was placed on his defence on 26/02/2019 and defence hearing proceeded on 1/03/2019, he could have called the chief as a witness but he opted not to do so, the chief is a public officer meant to serve the public, the Appellant was out on bond and was able to access the chief and ask him to be a witness in his case, when the Appellant was placed on his defence he told the Court that he was going to call one witness, he never indicated to the trial Court that he intended to call another witness, his attempt to now bring in the evidence of the chief is an afterthought aimed at filling up omissions in his case.
14. Counsel submitted that what the chief states in his letter amounts to hearsay evidence and the same is not admissible as there is no indication that the Appellant intends to call other witnesses to corroborate the statement made by the chief, the evidence on identification is solid as the Appellant was positively identified by the complainant and her father who both referred to him as "Reuben" since that is how they referred to him at home, it is worth noting that the chief in his letter also refers to the appellant as Reuben Nyongesa Mukhwana, the evidence is not relevant and amounts to hearsay evidence, the Application ought to be dismissed as the reasons set out do not merit granting of leave to adduce additional evidence.

Issues for determination

15. In my view, the following issue is the one that emerges for determination;
 - a. Whether leave to adduce additional evidence should be granted
16. I now proceed to analyse the said Issue.
17. The power to allow an Appellant to adduce additional evidence on Appeal is discretionary and is stipulated in Section 358(1) of the Criminal Procedure Code as follows:

"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."
18. The governing principles on allowing additional evidence in appellate courts in Kenya were set out by the Supreme Court of Kenya in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2018] eKLR 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 could 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 aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
 - (h) where the additional evidence discloses a strong prima facie case of wilful deception of the Court;
 - (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing 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 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.
19. The principles an Appellate Court in a criminal case is to follow in considering whether to allow adducing of additional evidence were also set out in *Elgood v Regina* [1968] E.A. 274 which adopted the summary enunciated by Lord Parker C.J in *R. vs. Parks* (1969) All ER as follows:
- a. That the evidence that is sought to be called must be evidence which as not available at the trial.
 - b. That it is evidence that is relevant to the issues.
 - c. That it is evidence that is credible in the sense that it is capable of belief.
 - d. That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial.”
20. The evidence the applicant seeks to adduce is a letter dated 8/01/2021 from the area chief. I agree with the State Counsel’s submission that from the record of the trial Court, the trial commenced in October 2018 and the Appellant was released on bond in January 2019. He continued with the trial while out on bond. It has not been alleged that during all this stime, the Chief could not be found and neither has it been demonstrated that the Appellant was unable to obtain the said letter from the chief. Although it has casually and in passing been alleged that the Chief came across the alleged information only after the conviction, no explanation of how he came across such information nor evidence that he only came across it after the conviction has been presented. In the circumstances, I am not persuaded that the Appellant was not in a position to obtain the evidence during the trial.



21. Further, I note that letter alludes to the Appellant having being framed and also casts aspersions on the character of the complainant. Inasmuch as the Application is premised on the issue of identification, the letter does not at all mention anything regarding the issue of identification of the Appellant as the assailant. I also agree with the State Counsel that for the Chief's evidence to carry probative value, it may need to be corroborated by the evidence of other witnesses. However, the Chief does not allege that he knows of any eye-witness who could by direct evidence disprove the account given by the prosecution and thus exonerate the Appellant. There is no indication at all that the Appellant intends to call other witnesses to corroborate the Chief's evidence.
22. The Chief has also not adduced any evidence or a list or catalogue of the alleged similar cases of framing done by the complainant to enable the Court assess the possible weight of the evidence.
23. Further, neither the Chief nor the Appellant has sworn any Affidavit to support the Application and the averments made. Instead, it is the Advocate who swore an Affidavit. This omission deprives the Court of the opportunity of assessing the weight of the matters deponed.
24. In the circumstances, I am not satisfied that the letter is relevant to the issues in the Appeal and particularly the issue of identification which is the gist of the Appeal.
25. Further, the letter merely refers to "reports on the ground" which in my considered view, is tantamount to hearsay. In the premises, I am not satisfied that the evidence will create any reasonable doubt on the account given by the prosecution.
26. It is true, as argued by the Appellant's Counsel, that the Appellant was unrepresented during the trial. However, the fact that he had the presence of mind to call his wife as his witness proves that he was at all times aware of the need to call all his relevant witnesses to support his defence. In the circumstances, I also agree with the State Counsel that the attempt to now bring in the evidence of the chief appears to be an afterthought aimed at filling up omissions in the Appellant's defence.
27. The upshot of the above is that I find that the Application is not merited and I accordingly dismiss the same.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

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JOHN R. ANURO WANANDA

JUDGE

