Githaiga & 2 others v Republic (Anti-Corruption and Economic Crimes Appeal E001 of 2022) [2023] KEHC 3620 (KLR) (Anti-Corruption and Economic Crimes) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3620 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E001 OF 2022

EN MAINA, J

APRIL 27, 2023

BETWEEN

DAVID MURUNGU GITHAIGA ..... 1ST APPLICANT

WILFRED MUNYORO WERU ..... 2ND APPLICANT

ISAAC NYAKUNDI NYAMONGO ..... 3RD APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Conviction and Sentence of the Appellants by the Honourable Hon. L.N. Mugambi). Made and/or delivered on the 28th Day of January 2022 and 31st January, 2022 respectively, ay Milimani Law Courts)

RULING

1. By the Notice of Motion dated 24th November 2022 the Appellants herein seek leave to adduce additional evidence in this appeal preferred against their conviction and sentence. They also seek that they be granted leave to introduce the KPMG Forensic Audit Report for Discount Securities by Tahir Sheikh and Peter Kan for the year 2009 which is in custody of the Capital Markets Authority and the Liquidator's Report by Johnson Olteita and Wycliff Shmiah on the Liquidation of Discount Securities; of 2009 by Capital Markets Authority. Also that this court do compel the Capital Markets Authority. and KPMG to furnish copies of the reports to the court, the Appellants and the Respondents within reasonable time before the appeal is heard and further that they be allowed to refer to the reports and produce them as exhibits and as new evidence and any cross examination by the Respondents be allowed.

2. The grounds for the application as stated on its face and as supported by the affidavit of David Murungu Githaiga (1st Appellant) are that: -

    a. The report by the Liquidator was a statutory requirement and that gave the status of the company and dealings as at the year 2009 when the offences are said to have been committed.

    b. The report by KPMG was a government report requested for and independent which report was to address the position, liquidity and dealings of discount securities at the time of the offences.

    c. That the two reports will shed light to the activities of discount securities limited and the charges against the Accused.

    d. That the Appellants believe that the lower court was denied a chance to scrutinize the evidence and evaluate the same against the charges.

    e. The reports have evidence that money was not lost and would exonerate the Accused Persons against the charges and this would affect the decision of the honourable court in appeal.

    f. That the Accused believed that the reports were part of the investigations and had no opportunity to call for the same during the hearing.

    g. The prosecution had a duty to produce the reports as evidence as the same had information on the running and final status of the company (Discount Securities).

    h. The reports are independent and will give independent evidence to the court and do not prejudice the case for any party.

    i. The reports are in custody of independent bodies that were mandated by the government to carry on the exercises.

    j. The parties are in custody of government regulatory body the capital markets authority which is the regulatory body and that had the control rule(s) and regulations that the discount securities relied on.

3. The application is opposed through the Replying affidavit of Faith Mwila, Principal Prosecution Counsel in the office of the Director of Public Prosecutions. She deposes that the Applicants have not met the threshold for this court to exercise its discretion in their favour; that the evidence sought to be adduced is not new and there is nothing to prove it was unavailable in the course of the trial; that it is stated in paragraph 10 of the supporting affidavit that the applicants were aware of the reports and that they mentioned it in the course of their defence; that the application does not draw a clear nexus between the evidence sought to be adduced and the issues for determination by the court; that the Appellants were accorded a fair trial and were not denied an opportunity to adduce the evidence sought to be introduced; that the appellants have not demonstrated that the reports will create doubt in the mind of the court as to the guilt of the Appellants and further that it is not true that the reports were supplied to the prosecution but were not availed to the defence.

4. The application proceeded by way of written submissions.

Case for the Appellants/Applicants

5. Learned Counsel for the Appellants submitted that the two reports are in the public domain and hence capable of belief; that the reports were obtained through a government exercise government exercise and hence they are credible; that the reports would change the figures of the amounts alleged to have been lost and would greatly influence the verdict of the court and impact the safety of the conviction and sentence; that the evidence was admissible in the lower court but was not in the custody of the defence and was never brought to the court. Counsel argued that the essence and purpose of Section 358 of the *Criminal Procedure Code* is to make sure no evidence is left out that would benefit a litigant; that the evidence sought to be introduced was in the custody of the prosecution during the trial and the defence at all material times thought it would be brought to the attention of the court and further that the prosecution will not be prejudiced by the introduction of that evidence as it will have a chance to test the evidence in reply. Counsel contended that the accused person should be afforded every opportunity to raise a defence at any time and reiterated that the new evidence is very material to the court's decision.

Case for the Respondent.

6. On its part the prosecution maintained that the appellant's have not met the threshold to warrant grant of the application. That they have not placed before this court any material to demonstrate any real prejudice should the order not be granted. Learned Counsel argued that the appellants had not demonstrated that the evidence sought to be introduced was not previously available and that it will have a significant impact upon the decision of this court; that the appellants have indeed confirmed that the two reports were prepared in the year 2009; that the KPMG report was adverted to by one of the witnesses (PW28) and hence it is not new evidence discovered after conclusion of the trial. Counsel submitted that although the Appellants concede that they referred to the report during their cross examination they did not produce it and hence this is an attempt to seal the gaps in their defence. Counsel also contended that the question of whether funds were lost and how much was argued by the parties and conclusively determined by the trial court to be Kshs 1,202,143,372/=. She submitted that the trial court examined the source of the deficits and the role played by each of the Appellants and found them culpable as senior managers of Discount Securities Limited. She contended that what the Appellants seek to do is to re-open their case while they have no ground to so. She urged this court to dismiss the application. She placed reliance on the following cases; -*Elgood v Regina* (1968).*Samuel Kangu Kamau v Republic* [2015] eKLR.*Wanje v Saikwa* [1984] KLR 275.

Analysis and determination.

The power of this court to allow an appellant to adduce additional evidence on appeal derives from Section 358(1) of the *Criminal Procedure Code* which states:-

> 358. Power to take further evidence.
>
> (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.

7. A reading of that section reveals that the power is discretionary which discretion must be exercised judicially.

8. In the locus classicus case of *Elgood v Regina* [1968] EA 274 the court adopted the principles enunciated by Lord Parker CJ in *Republic v Parks* [1969] All ER at page 364 as follows:-The evidence that it 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 is well capable of belief.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.

9. In the case of *Samwel Kangu Kamau v Republic* [2015]eKLR the Court of Appeal cautioned that "the unfettered power of the court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in determination of the appeal". The court adopted the reasoning of Chesoni Ag. JA (as he then was) in the case of *Wanje v Saikwa* [1984] KLR 275 that ;-

> " This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out afresh case in appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence".

10. More recently the supreme Court in the case of *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamed and 3 others* Petition No 7 of 2018 consolidated with Petition No 9 of 2018 [2018]eKLR laid down the governing principles on allowing additional evidence in appellate courts in Kenya; which in my view may as well be adopted in Criminal cases, as follows;-

> " 79. .....
>
> 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:
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> 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 willful 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 afresh 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."

11. In this case it is clear that the evidence sought to be introduced is not in the possession of the Appellants. While they claim it is in the public domain, in prayer 5 of their application they seek an order for this court to compel a third party to produce it. They also concede having made reference to the evidence at the trial but contend that it was not availed to them by the prosecution- (See paragraph 10 of the affidavit of David Murungu Githaiga). Clearly this is evidence which with reasonable diligence they themselves could have obtained and placed before the trial court. One of the governing principles laid by the Supreme Court Kenya is that "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". In my view there would be no fairness or due process in allowing a party who had all the means of producing the reports referred to at the trial yet it was within their knowledge and at their disposal the same being documents in the public domain.

12. The other consideration which I find disqualifies the Appellants from being granted the order sought is that it is clear that what the Appellants are trying to do is to merely make a fresh case on appeal to fill up omissions and to patch up the weak points in their case.

13. Had the evidence passed the test of not being within the knowledge of the Appellants at the time of the trial and had it not been all too clear that it is intended to fill gaps and to patch up the defence case then this court would have applied the test of whether prejudice would be occasioned to the prosecution. As it stands that is the only ground upon which this application is premised yet it is not the sole consideration in such an application. It is even worse that the Appellants do not even have the evidence in their possession but want this court to compel a third party to produce it. One would want to conclude therefore that they may not even be privy to the contents of the reports and are only intent on sending this court on a fishing expedition. Moreover, the reports should have been availed to this court in the first instance in order for it to determine whether they would have an impact on the conviction or even the sentences as alleged. As it stands, what this court is being asked to do is to speculate that the reports would be of relevance to the verdict. I am not prepared to speculate. A party coming to court and especially when represented by Counsel is expected to place all the material pertaining to their case before the court. Short of that they would not be deserving of the order that they seek and accordingly, their application is dismissed.

SIGNED, DATED, AND DELIVERED VIRTUALLY THIS 27TH DAY OF APRIL 2023.

E.N. MAINA

JUDGE