



REPUBLIC OF KENYA



KENYA LAW
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**Wanjala v Republic (Criminal Appeal E085 of 2022)
[2023] KEHC 26028 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E085 OF 2022
A. ONG'INJO, J
NOVEMBER 28, 2023**

BETWEEN

OSCAR WEKESA WANJALA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of D. Odhiambo (SRM) in Shanzu
SPM's Court S. O. Case No. 59 of 2020 delivered on 28th October 2022)*

RULING

1. By a Notice of Motion application dated 11th September 2023, the appellant sought that leave be granted to adduce new and fresh evidence in the form of a letter dated 20th August 2021 dispatched by the advocate of the complainant to the Director of Public Prosecutions and received on 23rd August 2022. It was also sought that additional evidence be taken by this court from the maker of the document before the appeal is heard.
2. The application is supported by grounds on its face and the affidavit of Oscar Wekesa Wanjala, the appellant.
3. The Respondents were served with the application but there is no response filed. Directions were also taken that the appeal be canvassed by way of written submissions but it is only the applicant's advocate that filed submissions dated 31st October 2023 and filed on 1st November 2023.
4. Section 358(1) of the *Criminal Procedure Code* provides: -

“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.”



5. The principle governing adduction of additional evidence was enunciated by Lord Parker, CJ in R v Parks (1969) All ER at page 364 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.”
6. The appellant was convicted and sentenced to serve 15 years for the offence of defilement contrary to Section 8(1) as read with 8(4) of the *Sexual Offences Act*.
7. The particulars were that he defiled a 16 year old girl and impregnated her but he has evidence in his possession being a letter dated 20th August 2021 that was written by the Complainant’s advocate to the Director of Public Prosecutions indicating that the complainant’s mother had lodged a complaint under OB No. 40/xx/xx/2021 at Kiembeni Police Station where she reported that one Ali Mrisho was the person who had defiled her daughter and not Oscar Wekesa Wanjala the appellant herein. The appellant sought that if he is allowed to adduce such evidence, it would be in the interest of justice and that it will dislodge the Respondent’s case that he committed the offence of defilement.
8. In consideration that the Respondents have not responded to the application or file submissions, in consideration of Section 358 (1) of the *Criminal Procedure Code*, in consideration of the principles set out by Lord Parker, CJ in R v Parks (1969) All ER at page 364, in consideration of the grounds supporting the application, this court finds that this is a case that is fit for the exercise of discretion to grant leave to the applicant to adduce additional evidence. The said evidence is in possession of the respondents and they are therefore in a position to investigate and respond accordingly. No prejudice will be suffered by them. The appellant is therefore granted leave to adduce additional evidence by way of an affidavit concurrently with the submissions in support of the appeal. Upon filing of the submissions and the additional evidence, the Respondents will be at liberty to interrogate the same and respond accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 28TH DAY OF NOVEMBER 2023**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for Respondent

Ms. Matoke Advocate H/B for Mr. Dullu Advocate for the Appellant

Appellant present in person

HON. LADY JUSTICE A. ONG’INJO

JUDGE

Order:



Appellant will have 14 days to file and serve submissions adduction currently with affidavit of oral evidence. Upon service, the respondents will also have 14 days to file and serve submissions and Record of Appeal. Hearing on 9.1.2024.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

28.11.2023

