



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CRIMINAL APPEAL NO. 30 OF 2019**

**PMK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The appellant seeks to adduce fresh evidence. He intends to prove that during his trial and conviction he was a minor aged 17, a fact that was not considered by the lower court. He also states that he did not have benefit of counsel and was held in an adult prison for a long duration.
2. Those matters are set out at length in a notice of motion dated 25<sup>th</sup> May 2021 and the affidavit of his counsel of even date. A *Child Health Card* showing his birthday to be 17<sup>th</sup> December 2000 is annexed. Learned counsel submitted that the new evidence would impact the sentence handed down. In a synopsis, I heard the appellant to say that he did not receive a fair trial.
3. The motion is contested by the Republic. There is a replying affidavit sworn by *Ms. Anne Gakumu*, Senior Principal Public Prosecutor, on 6<sup>th</sup> October 2021. In a nutshell, she states that the appellant was always in possession of the evidence; that he received a fair trial; and, that the motion is an attempt to plug loopholes in his defence.
4. On 8<sup>th</sup> December 2021, I heard submissions from learned counsel for the appellant and respondent.
5. I take the following view of the matter. The main appeal is pending. Grounds 3 (i) to (iii) of the amended grounds of appeal raise some of the issues in the present motion. I thus decline the invitation to comment on the merits of the appeal at this stage. But I can safely state that the appellant was adjudged guilty of *defiling* an 8-year-old girl contrary to the **Sexual Offences Act** and sentenced to life imprisonment. The appeal is against both the conviction and sentence.
6. Section 358 of the **Criminal Procedure Code** allows the appellate court to admit new evidence if “*it thinks the additional evidence is necessary*”. The legal principles were well stated in *Elgood v Republic* [1968] E.A. 274. See also *Republic v Ali Babitu Kololo*, Court of Appeal, Malindi, Criminal Appeal 8 of 2017 [2017] eKLR. One important consideration is that the “*evidence sought to be called must be evidence which was not available at the trial*”
7. In this case, there is no claim that the *Child Health Card* above was not available during the course of the trial. The less I say about it the better. But on that ground alone, I am not satisfied that there are sufficient grounds to adduce fresh evidence or that the additional evidence is necessary.
8. The upshot is that the appellant’s notice of motion dated 25<sup>th</sup> May 2021 is hereby dismissed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 26TH DAY OF JANUARY 2022.**

**KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of-**

Ms. Muritu holding brief for Mr. Ndungu for the appellant instructed by Tripple N W & Company Advocates LLP.

Ms. A. Otieno for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Susan Waiganjo, Court Assistant.