Kamau v Republic (Criminal Appeal E048 of 2021)
[2022] KEHC 11884 (KLR) (20 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11884 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E048 OF 2021

GV ODUNGA, J

MAY 20, 2022

BETWEEN

ROBERT NJUGUNA KAMAU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This ruling is the subject of a Notice of Motion dated October 22, 2021. By the said application, which is expressed to be brought pursuant to Article 50 (2) (c), (h) of the *Constitution* of Kenya 2010 and Section 358 (1) of the *Criminal Procedure Code* the Applicant herein seeks the following orders:

    1) That leave be granted to the Applicant to adduce additional evidence in the appeal against his conviction and sentence;

    2) That upon such leave being granted, the Honourable Court do direct the manner and extent in which the evidence in issue shall be taken; and

    3) Such other orders as the Honourable Court may deem expedient for the expeditious hearing and determination of the appeal.

2. According to the Applicant, *vide* a judgement delivered on the 28th day of July, 2021, the applicant herein was found guilty and convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*, No 3 of 2006. Dissatisfied with the judgement of the trial court, the applicant herein filed this appeal against the conviction and sentence.

3. It was averred that the before the trial court, the applicaht had no legal representation and upon being placed on his defence, he informed the Court that he was the only witness for the defence as his other witnesses were beyond his reach.

4. Based on legal counsel, he averred that it was incumbent upon the trial court as provided under section 211 (2) of the *Criminal Procedure Code* to satisfy itself about the alleged witnesses and whether the witnesses would have supplied material evidence to advance the defence's case. According to the Applicant, the trial court ought to have taken steps to compel the attendance of his witnesses before the trial court and by not so doing the trial court overlooked its responsibility to summon his other witnesses and erroneously proceeded to convict and sentence him to life imprisonment for the said offence.

5. It was averred by the applicant that he was a layman of merely 20 years of age at the time of the sentence and could hardly understand his legal recourse in the circumstances that his trial was conducted to conclusion, and in particular, the manner in which the trial court failed to consider his alleged *alibi*, contrary to section 211 (2) of the *Criminal Procedure Code*.

6. According to the Applicant, his intended witnesses will adduce evidence buttressing his *alibi* which the prosecution never disproved. Hence his application for the exercise of discretion in his favour pursuant to section 358(1) of the *Criminal Procedure Code*.

7. In support of his application the applicant submitted that though he had indicated to the trial court that he intended to line up witnesses to testify on his behalf, owing to circumstances beyond his control, given that he was held in custody, he found himself as the only defence witness as the intended defence witnesses relocated to an address beyond his reach and he was not able to reach them. That being the case, the Applicant duly informed the trial court of his inability to procure the defence witnesses whose presence was extremely crucial, given that he raised the defence of *alibi*.

8. Even after having indicated to the trial court his inability to procure his defence witnesses, the trial court proceeded to hear the defence case without due regard to the provisions of Section 211(2) of the *Criminal Procedure Code* which places the onus on the trial court to satisfy itself about the veracity of the Applicant's alleged witnesses and whether the said witnesses would have supplied material evidence to help advance the Applicant's case. The trial court further failed to exercise its inherent powers in line with Section 211(2) of the *Criminal Procedure Code* where it could issue summons to the witnesses to attend court or to give any other directions that would ensure their attendance in court.

9. Be that as it may, the Applicant advanced a defence of *alibi* which was in effect dismissed by the trial court for want of corroboration. Therefore, the Applicant's Notice of Motion Application dated October 22, 2021 is founded on two heads; the first being that the trial court erroneously overlooked the provisions of Section 211(2) of the *Criminal Procedure Code* and the second being the dismissal of the defence of alibi advanced by the Applicant.

10. According to the Applicant, Section 211(2) of the *Criminal Procedure Code* is an embodiment of Article 50(2)(c) of the *Constitution* of Kenya, 2010 which affords the accused person the right to have adequate time and facilities to prepare for trial. Consistent with Article 50(2)(c) of the *Constitution*, Section 211(2) of the *Criminal Procedure Code* operates to afford the accused person the Constitutional right to fair trial and thus provides that:-

> (2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

11. It was submitted that the trial court, was legally bound to facilitate the Applicant herein in terms of affording him adequate time and facilities to prepare his defence as espoused under Article 50(2)(c) and Section 211(2) of the *Criminal Procedure Code*. This submission was based on the case of *George Ngodhe Juma & Others vs Attorney General* (2003) eKLR where the Court defined "facilities" to mean, *inter alia*, the resources, conveniences or means which make it easier to achieve a purpose and unimpeded opportunity for doing something.

12. In this application, it was submitted that the trial court has the obligation to assist the accused person in ensuring the presence of crucial witnesses who will aid the court in arriving at a just decision. The terms under which Section 211 (2) of the *Criminal Procedure Code* are couched mandate the trial court to investigate the reason why the defence witnesses have failed to attend court and may then issue orders to aid the accused person obtain their attendance if the trial court deems fit. The process of inquiry is mandatory even though the orders to be issued may not be. In the instant case, the Applicant's intended witnesses were key in the advancement of his case and could have properly corroborated his defence of *alibi*, and thus the trial magistrate ought to have taken steps to ascertain the whereabouts of the defence witnesses and consider whether to issue orders or process that would ensure their attendance for trial.

13. From the record, it was noted that the Applicant had no legal representation before the trial court and thus could not have urged the trial court's compliance with Section 211(2) of the *Criminal Procedure Code*. The Applicant's inability required the trial court's compliance with Section 211(2) of the *Criminal Procedure Code* is further premised on the grounds that the Applicant at the time of trial was a mere layperson of 20 years old with little or no understanding of the available legal recourse in the circumstances that the trial court failed to comply with statutory provisions.

14. According to the Applicant, owing to the unfortunate circumstances under which the trial court overlooked the provisions of Section 211(2) of the *Criminal Procedure Code* and the dismissal of the Applicant's defence of *alibi*, the he now seeks to adduce additional evidence in the appeal against his conviction and sentence and that his intended witnesses will adduce evidence to corroborate the Applicant's *alibi* that was never disturbed by the prosecution at the time of trial.

15. It was submitted that section 358(1) of the C*riminal Procedure Code* affords this Court the legal prerogative to admit additional evidence and that the principles upon which an appellate court in a criminal case may exercise its discretion to allow additional evidence to be adduced for the purpose of the appeal were set out by the Court of Appeal for East Africa in the case of *Elgood vs Regina* [1968] EA 274 which was cited with approval in the Court of Appeal case of *Daniel Kipngetich Sang vs Republic* [2011] eKLR.

16. Further to the above, it was submitted that the Supreme Court of Kenya in the case of *Charles Maina Gitonga vs Republic* [2018] eKLR laid down the governing principles on allowing additional evidence in appellate court by holding that :-

    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 would 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 made aware of and procured the further evidence in the course of the 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 the lacunae and filing 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 the 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."

17. The Applicant submitted that consistent with the Supreme Court holding in the *Charles Maina Gitonga vs Republic* cited above, the Applicant's intended additional evidence sought to be adduced is directly relevant to the matter before the court for consideration and will have an impact upon the outcome of the instant appeal. He further submitted he could not have procured his intended witnesses and neither could he produce written testimonies by the said witnesses for reasons that the intended witnesses could not be traced and the Applicant herein was held in custody. Therefore, the evidence that is sought to be adduced was effectively unavailable at the time of trial and therefore, if allowed will remove any vagueness or doubt over the case for it will corroborate the *alibi* defence unfairly dismissed by the trail court.

18. According to the Applicant, his additional evidence sought to be adduced does not constitute fresh evidence as to mount a fresh case in the appeal since he had indicated to the court that he would line his witnesses to testify and corroborate his *alibi* defence, however, the said witnesses could not show up in court having relocated to unknown address. To worsen the Applicant's situation, he could not at the time employ any efforts to trace the said witnesses as he was held in custody.

19. The Applicant therefore submitted that the said additional evidence is credible and capable of belief and in the circumstances of the case will properly disclose a strong prima facie case of wilful deception of the trial court.

20. The Applicant took issue with the grounds of opposition as filed by the Respondent and relied on the case of *Niazsons (K) Ltd vs China Road and Bridge Corporation (K) Ltd* (2001) 2's EA 502 (CAK) where the court clarified that a "Ground of Opposition" is declared to be a point of law which must not be blurred with factual details which are liable to be contested and to be proved through the process of leading evidence. In this case it was submitted that the Respondent's Grounds of Opposition points to no known point of law but merely states facts and restatements of facts that are materially liable to

be contested and to be proved by way of leading evidence. The Applicant therefore implored this court to dismiss said Grounds of Opposition as the same amounts to abuse of court process.

21. It was the Applicant's case that pursuant to Section 211(2) of the *Criminal Procedure Code*, it was incumbent upon the trial court to compel the attendance of the Applicant's witness vide summonses or better still require the said witnesses to tender material evidence that could help further the Applicant's case before the trial magistrate. Accordingly, Section 358(1) of the *Criminal Procedure Code* comes in to salvage the breach of the right to fair trial occasioned by the trial court's failure to comply with the provisions of Section 211 (2) of the *Criminal Procedure Code*.

22. Therefore, it was submitted, in the circumstances of the instant case, the application is wholly meritorious and ought to be allowed to help undo the injustice already done to the applicant. He therefore prayed that:

    a) This Court be pleased to grant the him leave to adduce additional evidence in the appeal against his conviction;

    b) Upon such leave being granted, this Honourable Court be pleased to direct the manner and extent in which the said evidence in issue is to be taken and that this Court be pleased to grant any other orders it may deem expedient in the furtherance of the interest of justice in the instant case.

23. It was further submitted that the courts have affirmed as much, that the *Criminal Procedure Code* mandates courts to comply with the provisions of the section 211 thereof and in any event record the responses by or from an accused person, failing which renders a trial irregular and a nullity. That merely stating that "section 211 explained and the accused person elects" does not suffice to meet the legality test under section 211 (2) of the *Criminal Procedure Code* in the eyes of an unrepresented accused person.

24. In response to the application, the Respondent filed grounds of opposition to the effect that:

    1) That the instant Application is misconceived, frivolous, vexatious, incompetent and an open abuse of the court process.

    2) That the instant application is meant to delay the hearing of the appeal.

    3) That taking of additional evidence is the discretion of the High court.

    4) That the alleged new evidence sought to be adduced was available and within the knowledge of the applicant at the time of the trial.

    5) That the witnesses sought to be called and adduce evidence were within the reach of the applicant and he was given an opportunity to adduce but neglected to do so.

    6) That the evidence sought to be adduced is meant to fill the gaps in the defense case and make a fresh case in the appeal.

    7) That the applicant has not met the prerequisite requirements for the grant of the orders sought

25. It was submitted on behalf of the Respondent that the power to allow an appellant to adduce additional evidence on appeal is discretionary and is stipulated under the provisions of Section 358(1) of the *Criminal Procedure Code*. The respondents submitted that the principles upon which the appellate court in criminal cases may exercise its discretion to allow additional evidence for the purpose of the appeal were set out in the famous case of *Elgood vs Regina* (1968) EA which adopted the summary enunciated by Lord Parker CJ in *R vs Parks* (1969) All ER at page 364. The Respondent also

relied on the decision of the Court of Appeal in *Republic vs Ali Babitu Kololo* (2017) eKLR in which *Samuel Kungu Kamau vs Republic* (2015) eKLR.

26. It was the Respondent's submission that the evidence intended to be called by the applicant was available at the time of hearing of the criminal case at the trial court. The trial court ensured that all the safeguards of the rights of the accused under article 50 of the *Constitution* were protected as the appellant was informed of his rights to defend himself after the court ruled that he had a case to answer. The applicant was given ample time to prepare for his defence and call witnesses if he wished to.

27. Lastly, it was submitted that the evidence sought to be adduced by the applicant are only meant to fill in the gaps of the defence case and make a fresh case in the appeal. The applicant has been convicted and sentenced by the trial court. Looking closely at the proceedings, the appellant never crossed examined the prosecution witnesses in the line of his *alibi* that he intends to call witnesses to corroborate. Reliance was placed on the case of *Charles Anjare Mwamusi vs R* CRA No 226 of 2002, *Victor Mwendwa Mulinge vs Republic,* that *alibi* defence must be brought forward early in the proceedings otherwise the Court would be justified in finding that the defence is an afterthought.

28. According to the Respondent, the correct approach is for the trial court to exhaustively examine the entire prosecution evidence in totality and weigh it against that of the appellant and make a finding supported by reason that the prosecution case displaced the defence raised by the appellant. The applicant stated that he was far away from the scene of crime when he was cross examined, however in examination in chief he did not put forward any *alibi*. His explanation was vague and couldn't match the overwhelming evidence by the prosecution hence there was no alibi adduced by the appellant at the trial court.

29. Accordingly, it was urged that the Notice of motion application does not meet the threshold for grant of orders for calling additional evidence, thus lacks merit and ought to be dismissed.

Determination

30. I have considered the application, the affidavits in support of and in opposition to the application, the submissions made and the authorities relied upon.

31. Broadly, I agree with the principle set out in *Niazsons (K) Ltd vs China Road and Bridge Corporation (K) Ltd* (2001) 2's EA 502 (CAK) a "Ground of Opposition" is declared to be a point of law which must not be blurred with factual details which are liable to be contested and to be proved through the process of leading evidence. Accordingly, where a party intends to challenge factual matters, he ought to file a sworn affidavit rather than purporting to challenge factual averments by way of ground of opposition. That principle applies to both criminal and civil proceedings and is meant to show the veracity of the contentions and also to avoid ambush.

32. In this case however, if I understand the grounds, the Respondent simply contended that based on the material placed by the applicant even if true would not meet the legal threshold for granting leave to adduce additional evidence. Accordingly, nothing turns on that issue.

33. In this case it was submitted that the Respondent's Grounds of Opposition points to no known point of law but merely states facts and restatements of facts that are materially liable to be contested and to be proved by way of leading evidence. The Applicant therefore implored this court to dismiss said Grounds of Opposition as the same amounts to abuse of court process.

34. This application is premised upon section 358 of the *Criminal Procedure Code* which provides as hereunder:

(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.

(2) When the additional evidence is taken by a subordinate court, that court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal.

(3) Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.

(4) Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court.

35. It is therefore clear that this Court has the power to, based on reasons to be recorded, to either take additional evidence itself or direct that the evidence be taken by a subordinate court. That section does not prescribe the conditions upon which such evidence is to be taken and in light of the lacuna, this Court must rely on the decisions handed down by the Court in respect of the said provision. In *Bernard Gathiaka Mbugua & 4 others vs Republic* [2016] eKLR, the Court of Appeal expressed itself as hereunder as regards the provision:

> " That provision has received numerous judicial interpretations which are consistent, firstly, that the jurisdiction lies only with respect to first appeals, whether civil or criminal (see *Marcarios Itugu Kanyoni v Republic* [2011] eKLR). The case before us is indeed a first appeal on a murder conviction. Secondly, the discretion exercisable by the court is not absolute, since the applicant must establish sufficient cause. What is sufficient cause has also received judicial insights and there are no closed categories for it. But there are principles and guidelines which have been widely applied by the courts. We may first refer to *Samuel Kungu Kamau v Republic* [2015] eKLR , which was also about production of OBs, to illustrate what the discretion is not about. This Court stated thus:-
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> > "It has been said time and again that the unfettered power of the Court to receive additional evidence should always be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal. In the words of Chesoni Ag JA (as he then was) in *Wanje v Saikwa* [1984] KLR 275:
> >
> > "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 a fresh 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."

36. The *locus classicus* case on the principles has all along been the decision in *Elgood vs Regina* (1968) EA 274 which in turn adopted the summary enunciated by Lord Parker CJ in *R vs Parks* (1969) All ER at page 364 and these principles are:-

> "(a) That the evidence that is sought to be called must be evidence which was 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."

37. In this case, it is contended that at the trial, though the Applicant had intimated that it was his desire to call certain *alibi* evidence, he was unable to do so due to the fact that the whereabouts of the said witnesses were unknown to him since he was in custody and was unrepresented. From the applicant's case, it is therefore clear that he was aware of the nature of the evidence that his witnesses would have given even by then. Accordingly, this evidence, which was available, was however not adduced due to the circumstances of the applicant. In my view these circumstances, while may arguably, find a case whether or not the trial was fairly conducted in light of section 211(1) of the *Criminal Procedure Code* as read with Article 50(2) of the *Constitution*, cannot certainly form the basis of an application under section 358(1) of the *Criminal Procedure Code*.

38. According to the laid down principles, an applicant for additional evidence must prove that the evidence that is sought to be called must be evidence which was not available at the trial. There is a distinction between evidence that was not available and one that was available but was, due to the prevailing circumstances, not availed. The former is what justifies the adduction of additional evidence and not the latter. It is in this light that I understand the opinion of the Court of Appeal in *Republic vs Ali Babitu Kololo* (2017) eKLR in which *Samuel Kungu Kamau vs Republic* (2015) eKLR was cited with approval that:

> "It has been said time and again 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 the determination of the appeal. In the words of Chesoni Ag JA (as he then was) in *Wanje vs Saikwa* (1984) KLR 275:
>
> 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 purposes of removing lacunae and filing 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 a fresh case on 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 by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.'"

39. The second condition is that evidence intended to be produced must be relevant to the issues. In this case, we are told that the evidence is in the nature of *alibi*. Obviously, the evidence tending to show

that an accused was not at the place in which he is purported to have been at the material time, is relevant to the issues for determination. The third condition is that the evidence is credible in the sense that it is capable of belief. In this case based on the material before me, I cannot state that the evidence is capable of belief. However, it is on record that the applicant did inform the Court that since his witnesses relocated, he would be the only witness for the defence. It is arguable whether based on the said statement, the learned trial magistrate ought to have prodded the matter further in line with section 211(1) of the *Criminal Procedure Code*, considering that the applicant was unrepresented That however is a matter for an appeal rather than an application for leave to adduce additional evidence. What is however clear is that the applicant had expressed his willingness to call witnesses. Accordingly, despite non-disclosure of the evidence that the said witnesses intended to adduce, I cannot state that the evidence intended to be adduced is incapable of belief.

40. The last condition is 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. It is trite that *alibi* is formidable defence and if believed would clearly create a reasonable doubt in the mind of the court as to the guilt of an accused.

41. The Applicant's Notice of Motion Application dated October 22, 2021 is founded on two heads; the first being that the trial court erroneously overlooked the provisions of Section 211(2) of the *Criminal Procedure Code* and the second being the dismissal of the defence of *alibi* advanced by the Applicant. The first issue in my view is an issue for appeal. As regards the second issue, the application does not meet the threshold for invocation of section 358(1) of the *Criminal Procedure Code*.

42. Accordingly, the application is disallowed for failing to meet the threshold for leave to adduce additional or fresh evidence.

43. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 20TH DAY OF MAY, 2022

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mitullah for the Applicant

Applicant present virtually

Ms Njeru for the Respondent

CA Susan