DK v Republic (Criminal Appeal 59 of 2018) [2022] KEHC 10249 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10249 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL 59 OF 2018

WK KORIR, J

JUNE 30, 2022

BETWEEN

DK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant, DK was charged, tried, convicted and sentenced to serve life imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2006. He has filed an appeal against the conviction and sentence. Before the appeal could be heard, the Applicant filed the notice of motion application dated 25th November, 2021 brought under Section 358 of the *Criminal Procedure Code*, Cap. 75 (CPC) and Article 50(2)(a) & (6)(b) of *the Constitution* seeking orders as follows:

    (a) That this Honourable Court be pleased to take further and/or additional evidence that was not available at the trial.

    (b) That in the alternative and without prejudice to prayer (1) the Honourable Court do order for a new trial due to new and compelling evidence which has become available.

    (c) That the Appellant be granted leave to amend his Petition to include more grounds of appeal.

2. The application is supported by the grounds on its face and an affidavit sworn by the Applicant on the date of the application.

3. The Respondent opposed the application through an affidavit sworn on 7th January, 2022 by George Mongare, an Acting Senior Assistant Director of Public Prosecutions.

4. The Applicant submits that he has made a case for the production of additional evidence. The evidence the Applicant seeks to adduce is contained in an affidavit attached to his supporting affidavit. The exhibited affidavit was sworn on 11th November, 2022 by one DKS who averred that:

> " 3. That I am the father of DKN aged 13 years the complainant in Kabarnet Sexual Offence Case No. 15 of 2018.
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> 4. That on or about 28th April 2018, my said son had alleged that his uncle my brother DK had defiled him on 18th April 2018.
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> 5. That he had earlier on 5th January 2018 made similar allegation that he had been defiled in school by two boys which allegation was investigated and found to be false.
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> 6. That my brother was subsequently charged in court on 30th April 2018 of defilement and after full trial he was found guilty and sentenced to serve life imprisonment.
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> 7. That my brother has since appealed against the said conviction and sentence which is pending hearing and determination.
>
> 8. That my son has since revealed to my mother and me that he lied to the Court and the doctor that his uncle had defiled him.
>
> 9. That further, he has since stated that the evidence he gave against his uncle was false and made up.
>
> 10. That he has directed me to swear this affidavit on his behalf and inform the court that the allegations against the appellant were made up."

5. The Applicant submitted that the evidence showing that the complainant had lied against him was not available at the time of trial as the complainant had concealed it from the Court. Further, that the evidence sought to be tendered is relevant to the issues raised at the trial and is credible and believable in that his witness had testified at the trial that the complainant was a perpetual liar. The Applicant veers off his application and accuses the trial court of convicting him despite the evidence on record that the complainant had made a similar spurious claim of defilement against two minor boys at school on the 5th January, 2018 and the allegation had been found to be untrue upon investigation. It is the Applicant's case that the additional evidence will confirm that the complainant had lied that he had defiled him.

6. The Applicant's case is that this matter is suitable for taking of additional evidence and this Court ought to exercise its discretion in his favour as there are sufficient reasons for doing so. Further, that new and compelling evidence has become available hence there is need for a retrial.

7. The Respondent on the other hand submits that although the law recognizes that sometimes material evidence may not have been available at the time of the trial, and in such cases it has allowed new evidence to be produced in the court exercising appellate jurisdiction, the discretion to allow new evidence should be exercised in accordance with the well-settled guidelines. According to the Respondent, applying the guidelines to the facts of this case should lead this Court to conclude that the intended evidence was available at the trial, is not relevant to the issues, is not believable, and is not capable of creating a reasonable doubt in the mind of the Court as to the guilt of the Applicant

when considered alongside the evidence already on record. The Court is therefore urged to dismiss the application.

8. The key issue for the determination of this Court is whether the Applicant has made a case for the admission of additional evidence in this matter. The relevant provisions of Section 358 of the *CPC* allows for the admission of additional evidence on appeal as follows:

> " 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."

9. The parties are agreed on the applicable principles regarding the admission of additional evidence. Those principles were stated by the Supreme Court in *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 others* [2018] eKLR as follows:

> "(79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya 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 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 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.

[80] We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution."

10. Earlier, the Court of Appeal in the case of The Administrator, *HH The Aga Khan Platinum Jubilee Hospital v Munyambu* [1985] KLR 127 expressed the circumstances under which additional evidence can be adduced as follows:

> "In exercising its discretion to grant leave to adduce additional evidence under rule 29 (1) (b) of the Court of Appeal Rules, the Court of Appeal will generally give such leave if the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial, if it will probably have an important influence on the result of the appeal, and is apparently credible though it need not be incontrovertible. Such evidence will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and where to refuse the application would affront common sense or a sense of justice."

11. In summary therefore, for the Court to allow an appellant to adduce additional evidence, the appellant must establish that the evidence could not have been obtained with reasonable diligence during the trial; that the evidence is directly relevant to the matter and may influence the outcome of the appeal; and that the evidence sought to be adduced is credible.

12. On the question whether the additional evidence sought to be adduced, was available, could easily be procured and within his knowledge, the Applicant avers that the information was not available during his trial. It is the Applicant's case that he has since been informed by his mother and the father of the complainant that the complainant has revealed to them that he had lied to them, the doctor and the trial court about the alleged defilement. He further avers that the complainant's intention of lodging the spurious allegation against him was to have him punished for constantly disciplining him.

13. The Applicant states that there is cogent evidence to corroborate the fact that the complainant lied in his evidence. In support of this assertion, the Applicant submits that on 5th January, 2018 the complainant had alleged that he had been defiled by two school boys but the investigations had revealed that the allegation was not correct.

14. It is clear that the Applicant relies on the affidavit sworn on 11th November, 2022 by DK S to discredit the evidence of the complainant. The affidavit which has been reproduced in this judgement seeks to convey the fact that the complainant has retracted the testimony he gave to the trial court on the ground that he had lied that the Applicant had defiled him. It goes without saying that the evidence

has been made to aid the Applicant in his appeal. Were the contents of the affidavit to be true then the complainant should swiftly be arrested by the police and charged with perjury. However, the truthfulness of the contents of the affidavit of DKS cannot be verified. The affidavit has not been sworn by the complainant. It has even not been sworn by the mother of the Applicant who initially received the report of the alleged defilement from the minor complainant and testified as a prosecution witness at the trial.

15. It is important to appreciate that the discretion of the court to accept additional evidence should be used sparingly and where the evidence was not available during the trial. This is in line with the holding in *Samuel Kungu Kamau v Republic* [2015] eKLR that:

> " 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."

16. In the case at hand, the evidence that the Applicant seeks to adduce did not exist during the trial. It is fresh evidence that has been made with a view to tilting the appeal in favour of the Applicant. Allowing parties to create evidence after a trial with a view to influencing the outcome of the appeal will result in the mockery of the criminal justice system. The approach taken by the Applicant should not be entertained at all. There is no evidence that has come to light at this stage that can affect the outcome of the appeal. I therefore reach the conclusion that this application is without merit. The same is dismissed.

DATED, SIGNED AND DELIVERED AT KABARNET THIS 30TH DAY OF JUNE, 2022.

W. Korir,

Judge of the High Court