



Nangolo v Republic (Criminal Appeal 028 of 2018 & Miscellaneous Criminal Appeal E192 (Kitale) of 2021 (Consolidated)) [2022] KEHC 14277 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEHC 14277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPEAL 028 OF 2018 & MISCELLANEOUS
CRIMINAL APPEAL E192 (KITALE) OF 2021 (CONSOLIDATED)**

**JK SERGON, J
SEPTEMBER 29, 2022**

BETWEEN

OSCAR EKIDOR NANGOLO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. On September 22, 2021, the applicant was found guilty and convicted for the offence of defilement contrary section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2016. He was sentenced to serve 10 years' imprisonment.
2. Aggrieved by the conviction and sentence, the applicant filed an appeal under Lodwar HCCRA No E028 of 2021.
3. In this instant matter, the applicant had filed a notice of motion dated October 6, 2021, seeking the following orders, *inter alia*, that the Applicant be given leave of court to tender additional evidence during the hearing of the Appeal.
4. The Applicant seeks to adduce evidence that the complainant's Birth Certificate, produced at the trial court, is a fake document; and would require the Registrar of births and deaths to avail more details on the same. However, in his Supporting Affidavit to this Application, no annexures have been attached on the same.
5. The Application is brought under section 358 of the *Criminal Procedure Code*, and grounds in the Application that at time of the alleged offence occurring, the complainant was an adult who consented to sex with the Applicant, whom they allegedly were in a relationship with. He thus intends to challenge the legality of the sentence of 10 years' imprisonment.



6. Counsel for the Applicant submitted that the conditions for invoking Section 358 of the *Criminal Procedure Code*, are that three conditions must be demonstrated: (i) The evidence could not be obtained at the time of the trial. (ii) That the evidence seeking to be adduced is important and is likely to have an impact on the case or sentence. (iii) Additional evidence is believable and reliable.
7. On the first element, that the produced birth certificate at the trial by the prosecution, is now in doubt as to its authenticity as the Applicant has obtained information that it is a fake document. On the second element, that it is evident the complainant was an adult at the time of the alleged offence. And, on the third element, that the evidence sought to be adduced is from the Registrar of Persons (sic) in ascertaining the genuine Birth Certificate.
8. To that end, the counsel submitted that there is an element of criminal perpetuated by the prosecution through the witness.
9. The learned State Counsel opposed the application and submitted that such Applications are sparingly allowed. That in this instant case there lacks adequate evidence to show forgery, and that the Applicant has not demonstrated how he obtained the note. That such evidence should have been obtained during the trial process, if Applicant was diligent.
10. Further, that allowing the application would have the state suffer prejudice as the case may be ordered for a retrial. That the Applicant is seeking to get a retrial. Reliance was placed on the cases of *Wycliffe Ojwang vs R* (2020) eKLR; and *LO v R* (2019) eKLR.
11. In rejoinder the Applicant's counsel stated that they do not wish to rely on a note, and are not seeking a retrial, but that the evidence in conviction was illegal, and thus challenging the conviction. That the appeal is clear on what is challenged.
12. I have looked at Section 358 of the *Criminal Procedure Code*, which reads 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;
 3. ...
 4. ..."
13. As to the above section, the High Court has a discretion to take additional evidence either by itself or by a subordinate court where it deems it fit to do so. Several court decisions have dealt with this issue.
14. The case of *Republic v Parks* (1961) All ER 639 which was cited in *Eigood v Republic* 1968 EA CA 274, the court set out the principles to be considered before taking additional evidence to be:

“Those principles can be summarized in this way: First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, 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.”

15. In the case of *Joginder Auto Service Ltd v Mohamed Shaffique & another* CCA 210/2000, cited in *Samuel Kungu Kamau v Republic* CRA 29/2015 the court added:

“... These are general principles but we cannot say that they are the only ones. The relevant rule authorising the adduction of additional evidence uses a general phrase, namely, ‘sufficient reason’. This is the phrase used in Rule 29 of Court of Appeal to adduce more evidence.

Under Section 358 of the Criminal Procedure Code the phrase used is “if it thinks additional evidence is necessary...” Meaning it is an exercise of the court’s discretion in each case.

16. Additionally, in *Misc Criminal Application No 25 of 2015*, the high court in a ruling dated March 17, 2016, held:

“In the end, I do find that this being a criminal case which has resulted to the invocation of the death penalty, the applicant should be accorded all the available avenues to ventilate his case. No prejudice will be suffered by the prosecution. I do allow the application dated May 28, 2015... The appellant to include the additional evidence to be part of the record if it is in documentary form. If there is need to call a witness to produce or adduce additional evidence, the applicant shall inform the court of such need and shall be at liberty to do so. The additional evidence shall be taken by this court... The additional evidence shall be taken first before the appeal is heard.”

17. Aggrieved by the above decision, the Appellant therein challenged the ruling for allowing the Respondent to adduce additional evidence. The challenge was in the Court of Appeal case of CA Criminal Appeal No 8 of 2017 (Malindi) *Republic v All Babitu Kololo* [2017] eKLR. In that Appeal case, the Court held that the High Court has absolute discretion to take additional evidence, however such discretion should only be exercise where there is sufficient reason.

18. Therein, the Court of Appeal referred to its own decision in and a discussion of rule 29(1) of the *Court of Appeal Rules* in *Samuel Kungu Kamau vs Republic* (supra) where it stated:-

“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 exercise very sparingly and great caution should be exercised in admitting fresh evidence.



19. Additionally, the Court of Appeal, in Criminal Appeal No 8 of 2017 (*supra*) further stated:

Moreover, we concur with the learned Judge that the admission of the said evidence would actualize the respondent's fundamental right of a fair trial under Article 50 of the Constitution. We do not see how the same would prejudice the prosecution. It is trite that the admission of additional evidence does not mean that the same is conclusive proof of the same, the court is still under a duty to look at the probative value of the evidence. It is at that juncture that the prosecution can attack the weight of such evidence. ...What the respondent sought in the High Court was the admission of the said evidence which was then in his possession. Accordingly, we find that he properly approached the court under Section 358(1) of the Criminal Procedure Code. For those reasons, we find no merit in the appeal and it is hereby dismissed.

20. Notably, the evidence sought to be adduced, in this instant matter, is from the Registrar of Births and Deaths. The additional evidence is in ascertaining the authenticity of the Birth Certificate produced by the investigating officer in the trial. At the trial, the source of the Birth certificate was not revealed.

21. It is argued that the Applicant obtained information that the Birth Certificate produced was a fake document, after the trial court proceedings were done. There is no indication that he had any reason to doubt the authenticity of the documents, during the trials court proceedings.

22. Moreover, no prejudice that is likely to be occasioned to the respondent or victim of the offence; and nonetheless, the court will have to evaluate that additional evidence together with the other evidence on record, before arriving at its own conclusion and decision - as to whether or not the applicant was properly convicted - the application is thus allowed as prayed. The additional evidence shall be taken by this court on October 27, 2022.

DATED, SIGNED AND DELIVERED AT LODWAR THIS 29TH DAY OF SEPTEMBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

