



REPUBLIC OF KENYA



**Gorasia v Republic (Criminal Appeal 085 of 2021) [2022] KEHC 15709 (KLR)
(Anti-Corruption and Economic Crimes) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15709 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CRIMINAL APPEAL 085 OF 2021
JM BWONWONG'A, J
NOVEMBER 22, 2022**

BETWEEN

RAMESHCANDRA GOVIND GORASIA APPELLANT

AND

REPUBLIC RESPONDENT

((Being an application for leave to adduce new additional evidence pending appeal arising from the conviction and sentence of Hon. W.F Andayi, C.M, in Milimani Chief Magistrate's Court in Criminal Case No. 1043 of 2016 Republic vs Rameshchandra Govind Gorasia))

RULING

1. This ruling is in respect of both the application of the applicant and the preliminary objection by the respondent. In his application dated March 16, 2022, the applicant sought the following orders.
 - a. An order to grant leave to the applicant to introduce additional new evidence.
 - b. The applicant be allowed to file a supplementary record of appeal.
 - c. The court direct the Ministry of Lands to provide the registration book bearing entry number 996 to the court
 - d. The court to summon the following witnesses to testify in court:
 - i. Messrs Maina Rogoi Advocates, who were the advocates acting for Taj Mall Limited during the purchase of the subject property
 - ii. Messrs Mose Murugu and Rigoro Advocates, who were acting for the vendor (Evans Ombogo) during the sale of the subject property



- iii. The chief valuer whose name appears in the letter dated April 26, 2018, Nyoike N.1.
 - iv. The custodian of the registration book that proves the registration of the transfer of Taj Mall Limited
 - e. Costs of the suit.
2. The application is premised on the grounds on the face thereof and supported by an affidavit dated March 16, 2022, sworn by the applicant. The major averments are that the evidence sought to be introduced is crucial and will help the court make an informed judgement. If the evidence sought to be introduced, had been adopted by the court below, that court could have reached a different verdict. The evidence sought to be introduced is the proof of ownership of the subject property. He avers that the evidence in issue was not in his possession at the hearing, when the trial was conducted in the subordinate court. Witnesses who were not able to testify in the trial court should be given a chance to do so, which in turn will lead to the court making an informed decision. In order to adduce the additional evidence, summons need to be issued to the named individuals to come and adduce the evidence. He contends that no prejudice will be occasioned to the respondent and the application has been made timely and in good faith.
 3. In response to the application, the respondent filed a notice of preliminary objection dated March 24, 2022. The grounds of objection raised are that the application lacks merit, is misconceived and unsubstantiated. The application does not meet the provisions of section 358 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya. The court ought to be satisfied by the admissibility, reliability and relevance of the new evidence sought to be introduced at this stage. The applicant was properly convicted before the trial court and the prosecution discharged its burden of proof beyond reasonable doubt.
 4. In response to the preliminary objection, the applicant filed an affidavit dated April 25, 2022. He claimed that he had proved his case and given reasons as to why further evidence should be admitted. Further, the court should allow the application to introduce additional evidence as the power to do so solely lies with the court as set out in section 358 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya.
 5. Neither the applicant nor the respondent filed written submissions in support of their respective positions.

Issues for determination.

6. I have considered the application, the preliminary objection, the response thereto and the applicable law. The issues that arise for determination are as follows.
 1. Whether the preliminary objection is merited
 2. Whether the applicant should be granted the orders sought.

Analysis and determination

7. Section 358 of the *Criminal Procedure Code* donates power to the Court to facilitate the admission of fresh new evidence if its effect would advance the interests of justice. It reads as follows:

“ 358. 358. Power to take further evidence



- (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.”
8. The cases of *R v Ali Babitu Konono* [2017] e-KLR, while approving the dicta in *Samwel Kungu Kamau v R* [2015] e-KLR, the Court of Appeal observed 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.”
9. The Court of Appeal, (Chesoni Ag JA, as he then was), in *Wanje v Saikwa* [1984] KLR 275 stated that:
- “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 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 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.” (emphasis added)
10. Furthermore, those same principles upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be called for the purpose of the appeal were set out by the Court of Appeal in *Elgood v Regina* (1968) EA 274. Those principles are as follows.
1. The evidence sought to be called must be evidence which was not available at the trial
 2. It must be evidence that is relevant to the issues.
 3. It must be evidence which is credible in the sense that is well capable of belief.
 4. The court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the mind of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.
11. Furthermore, it is only in very exceptional cases that the Court of Appeal will permit additional evidence to be called. Additionally, the affidavit in support of an application to admit additional evidence should have attached to it a proof of the evidence to be called.



12. Turning now to the notice of motion and the underlying facts, I will direct my attention to the nature of the evidence sought to be admitted. First, could the applicant have obtained the new evidence during trial in the lower court.? In the application and affidavit by the applicant, he alludes to a copy of the original transfer, a copy for an application for registration alongside the stamp duty payment slips, a letter dated February 23, 2017, a copy for the 2017 search as well as payment for land rent for that year by Taj mall Limited, a letter dated April 26, 2018 from Nairobi City County addressed to the Chief Land Registrar and a copy of the report by Mr. Mohammed Karisa Kenga, which verified the signatures of the title documents. He claims that these documents were not in his position at the time the trial was conducted in the subordinate court. Further, that if the trial court had considered the said documents, it would have reached a different verdict.
13. In the present case, the applicant has not been candid on whether the intended additional evidence is new, and when he became aware of the same. A perusal of the evidence he intends to be admitted indicates that they are transfer of land documents. These are public documents which were available and could have been obtained with due diligence by the applicant. The applicant could have obtained them if he had wanted them, since they were all along available. The applicant has not complained that he sought the documents but they could not be availed.
14. I find that the applicant has neither demonstrated that the purported additional evidence is new, nor that he could not avail it or act on it during trial. The fact that the documents were not produced in court during the trial, is not sufficient reason to justify introduction of the additional new evidence on appeal.
15. Consequently, I find that the preliminary objection of the respondent/Republic is merited and is hereby upheld.
16. The upshot of the foregoing analysis is that the applicant has not met the threshold for the grant of leave to adduce additional new evidence on appeal.
17. The application's application dated March 16, 2022 consequently fails and is hereby dismissed.
18. Costs in a criminal case are not awarded except in exceptional circumstances. However, they may be awarded if they are authorized by statute. See *Municipal Council of Dar es salaam v Almeida & 3 Others* (1957) EA 244.
19. It therefore follows that there will be no order as to costs.

Ruling signed, dated and delivered in open court at Nairobi this 22nd day of November 2022.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

Mr. Mitugo holding brief for Mr. Katisya for the appellant/applicant

Mr. Mutuma for the Republic/Respondent

