REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 11 OF 2018

ABDULSWAMAD SWALEH MOHAMED.....1ST APPELLANT

MOHAMEDSALIM MOHAMED.....2ND APPELLANT

JOHN KARISA KARUME.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice Nyakundi

Aboubakar Mwanakitina Advocates for the appellant

Mr. Mwangi for the State

RULING

The appellant by way of a notice of motion dated 2.9.2019 expressed to be brought under Section 358 of the Criminal Procedure Code, Article 50 and 159 (2) (d) of the Constitution seeks the following substantive order:

(a). That the Honourable Court do allow the appellants to adduce additional evidence in the pending appeal.

In obtaining leave of the Court to adduce additional evidence, the appellant relied upon the grounds on the face of the motion and his affidavit dated 2.9.2019.

The respondent opposed the notice of motion furthered in the grounds of opposition dated 3.9.2020. In light of the above application both counsels filed written submission to orient their perspectives.

I have considered the motion and submissions by both counsels appearing for the parties, I wish to determine the application as follows on this issue:

(a). Whether the appellant has satisfied the threshold to be granted the leave to advice additional evidence in his appeal.

Determination

In the provisions stipulated under Section 358 of the Criminal Procedure Code denotes power to the Court to facilitate the admission of the fresh evidence if its effect would advance the interests of justice. The cases of **R v Ali Babitu Konono {2017} eKLR** while approving the dicta in **Samwel Kungu Kamau v R {2015} eKLR,** the Court of Appeal had this to say:

> ***"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 v Saikwa {1984} KLR 275:**

"This Rule is not intended to enable a party who has discovered fresh evidence to improve 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 purposes of allowing parties to make 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 leave accrues to grant adduction of additional evidence as the set principles in **Elqood v Regina {1968} EA 274** are satisfied by the party invoking the discretion of the Court. Thus:

(a). That the intended evidence was unavailable at the trial.

(b). That the evidence is relevant to the issues.

(c). That the evidence is believable.

(d). That the evidence is capable of creating a reasonable doubt in the mind of the Court as to the guilt of the appellant when considered alongside the evidence already on record.

Bearing in mind the above minimal guidelines the **Court in Ladd v Marshall {1954} 3 ALL ER 745** addressed the instances when a party would be allowed to adduce additional and new evidence. In this case the Court held that:

"the Rule is applicable in a way to temper procedure with the interests of justice. That in order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: First it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. Second, the evidence must be such that if given, it would probably have an important influence on the result of the case, although it need not be decisive. Third, the evidence must be since as is presumably to be believed or in other words it must be apparently credible, although it need not be incontrovertible."

Turning now to the notice of motion and the underlying facts, I will direct my attention to the nature of the evidence stated to be admitted. First, was the evidence in which the appellant could have obtained earlier before the pending appeal. In the application and affidavit by the applicant he alludes to the private investigators report commuted after conviction and sentence. Its that report which contains glaring gaps in the police investigations. That in the vast domain of criminal justice administration the applicant was prejudiced occasioning an injustice.

Further, that the facts contained in the private investigators report would support the view which renders infringement to the right to a fair hearing under Article 50 of the Constitution. There can be no dispute that if the contents of the appellant's private investigators report had been presented before the trial Court it would have made an important influence on the final Judgment.

Finally, in the circumstances alluded to by the appellant are true, it appears that there was a real likelihood of collusion and conspiracy by the state witnesses to frame up a complaint against the appellant.

A prominent right entrenched in our Article 50 (2) (a) of the Constitution ***"deals with presumption of innocence of an accused person until the contrary is proved."***

That follows that the procedural pre-trial and trial rights under Article 49 and 50 of the Constitution provide Judges with powerful tools in the criminal administration of justice. Their primary objective is the protection of the Courts processes and procedure and the maintenance of public confidence in the administration of justice. The same logic evidently governs cases where any relevant and potentially credible evidence disclosed to the Court even after the fact of conviction, it would be illogical and inconsistent to ignore it.

In an affidavit sworn by the appellant and not controverted by the respondent, he avers personally that he obtained adverse information on the issue of his arrest and indictment. It was also his contention that because of the nature of the trial he decided to commence a private inquiry to establish that his trial was initiated and commenced at the motion against the public interest.

For the foregoing reasons, I exercise discretion to grant the motion dated 2.9.2019 under Section 358 of the Criminal Procedure Code to admit the private investigators report which could not be admitted in evidence at the trial as the same was not within the knowledge of the appellant. In granting the motion as a direction of a special measure in the exercise of discretion, I consider it appropriate in the interest of the administration of criminal justice.

Accordingly, a copy thereof the additional evidence be shared with the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mrs. Bakari holding brief for Aboubakar for the appellant

2. Mr. Mwangi for the state