



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 59 OF 2018

CHRISPINE ODHIAMBO OJODE *alias* SALIM.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment, conviction and sentence of Hon. R. K. Langat Senior Resident Magistrate in Rongo Magistrate's Criminal Case No. 307 of 2017 delivered on 3/10/2018)

RULING

1. The Applicant herein, *Chrispine Odhiambo Ojode alias Salim*, was charged, tried and convicted of two counts of Robbery with violence contrary to **Section 296(2)** of the **Penal Code**, Cap. 63 of the Laws of Kenya in *Rongo Senior Resident Magistrate's Criminal Case No. 307 of 2017* (hereinafter referred to as '**the case**'). The Applicant appeared in person. The Applicant was sentenced to life imprisonment.
2. Dissatisfied with the convictions and sentences, the Appellant filed an appeal. He filed a Petition of Appeal on 06/11/2018.
3. As the appeal was pending hearing, the Applicant filed an application for leave to adduce additional evidence on appeal. The application was filed on 05/12/2019. The nature of the additional evidence sought to be adduced on appeal was stated as the '*Occurrence Book Report Nos. 15, 17 and 35 all of 30th June 2017 Kamagambo Police Station*'. The application was supported by the Affidavit of the Applicant.
4. The application was heard by way of oral submissions on 05/02/2020. The Applicant contended that he applied for the said OB reports to be availed during the trial in vain. He submitted that the OB reports will reveal the scheme to frame him over the charges.
5. The application was strenuously opposed. It was contended that the application was short of the conditions for grant of leave to adduce additional evidence. It was submitted that the Applicant was out delay the determination of the appeal just like the way he delayed the determination of the trial. It was prayed that the application be dismissed.
6. With the foregone background, I will start this discussion with the law on additional evidence. The applicable provision is **Section 358(1)** of the **Criminal Procedure Code**. The section states that: -

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.

7. The law therefore gives a discretion to the High Court to admit further evidence on appeal. Such discretion must however be exercised on sufficient grounds. The Court of Appeal has severally discussed its power to admit additional evidence under **Rule 29(1)** of the **Court of Appeal Rules**. That provision is *pari materia* with **Section 358(1)** of the **Criminal Procedure Code** which is the enabling law in the High Court.
8. The Court of Appeal in **Republic vs. Ali Babitu Kololo (2017) eKLR** while approving **Samuel Kungu Kamau vs. Republic (2015) eKLR** at paragraph 15 of the judgment, had the following 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 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 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)

9. I elaborately traced the history of additional evidence on appeal in **Migori High Court Criminal Appeal No. 39 of 2017 Calvince Owino Hilter v. Republic (2019) eKLR**. I also dealt with the applicable principles as enunciated by the then Eastern Africa Court of Appeal in **Elgood v. Regina (1968) E.A. 274**. The principles are as follows: -

(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.**

10. Returning to the matter at hand, there's no doubt that the Occurrence Book Entry Nos. 15, 17 and 35 of 30/06/2017 were all along available at the Kamagambo Police Station. The record does not show that the Applicant applied for their production in vain. Contrary to the said contention by the Applicant the trial had a chequered history. There was a time when the Applicant applied to this Court vide **Criminal Application No. 9 of 2018** seeking to recall witness. This Court heard and allowed the application. By then several witnesses had already testified. The trial court complied with the order of this Court.

11. What surprises this Court is that the Applicant did not make any mention of the said OB reports in the application to this Court. The reports were made by the three complainants who testified as PW1, PW2 and PW3. Those are the witnesses this Court ordered to be recalled. The Applicant cannot be now heard to bring up the issue of the OB reports. To a very large extent I tend to agree with the prosecution that the Applicant may be out to delay the determination of the appeal. I am equally satisfied that the Applicant did not make any application for the OB reports to be availed otherwise the trial court would have no business declining such an application.

12. I also doubt whether the intended evidence is capable of creating a reasonable doubt on the prosecution's evidence. I say so because it has been held that failure to give the names of the attackers in the first report does not *per se* vitiate any evidence on identification. The Court of Appeal in **John Mwangi Kamau v. Republic (2014) eKLR** agreed with its earlier holding in **Nathan Kamau Mugwe v. Republic Criminal Appeal No. 63 of 2008** (differently constituted) as it considered the effect of not giving the description of the suspects in the first report to the police. The Court held that: -

It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness an opportunity..... to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect.....

13. Further, I am alive to the circumstances under which most of the first reports are made. More often than not the reports are recorded when the victims are still in shock of the ordeal and may not be composed. Such a victim may later relax and have a good recollection of the events and those culpable in the commission of the crime.

14. Although it is desirable that the first report contains the description of the suspects it cannot be conclusively held that the identification of the suspects involved in the commission of the crime solely relies on the first report. I remain alive to the fact that further investigations usually follow after the first report.

15. The Applicant herein had the opportunity and indeed examined all the witnesses on their evidences while in possession of their statements. Three of the witnesses were recalled for further cross-examination by the Applicant. I therefore do not see how the sole production of the first reports will create any doubts in the mind of this Court.

16. I am hence least convinced that the application is merited. It is for rejection. I hereby dismiss the application. A hearing date for the appeal shall now be fixed.

DELIVERED, DATED and SIGNED at MIGORI this 22nd day of May, 2020

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

Chrispine Odhiambo Ojode alias Salim, the Applicant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant