



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 178 OF 2019

M'MUKINDIA M'EMENYI.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

RULING

1. Before me is an application dated 20th March 2020 seeking for Orders;

a. That the applicant be subjected to a medical examination to ascertain if indeed the applicant had undergone a **PROSTATECTOMY** where all his male sexual organs (testicles) removed long before the alleged date of commission of the offence and admit the report as new evidence.

b. That consequently the Honourable Court to admit the medical evidence report as new evidence at the hearing of the appeal.

2. The application was supported by the sworn affidavit of the appellant who averred that he had undergone an operation of Prostatectomy at Cottolengo Mission Hospital where he had his testicles removed leaving him unable to cause erection and therefore incapable of committing the alleged offence of defilement. That he never adduced this important evidence as he was sure that the court would allow his consistent prayer to have the matter dealt with by the Njuri Ncheke where he would have adduced the evidence. That as a layman and with no legal representation he was not aware of the seriousness of the charges he was facing and his way around the court processes. That this new evidence is critical for determination of the charge against him and would raise doubts as to whether he committed the aforesaid offence. The appellant reiterated these sentiments in his submissions and further cited the case of **Lo versus Republic [2019] eKLR** in support of his submissions.

3. The Respondent opposed the application through Replying affidavit dated 10th June 2020 sworn by **Brenda.N.Nandwa**. She averred that the appellant had this particular evidence during the trial. That the appellant ought to have raised adduced it during the trial in order for the doctor to have examined him properly before the matter proceeded. That the appellant has not demonstrated that this piece of evidence though it was available during trial he could not, despite reasonable diligence have made it available. That a basic research a prostatectomy is the surgical procedure for the partial or complete removal of the prostate and not total removal of the male sexual organs. That this piece of evidence is therefore an afterthought. The respondent equally cited the case of **Republic v Ali Babitu Kaloo [2017] eKLR**, **Samuel Kungu Kamau v Republic [2015] eKLR**, **Jackson Tarus KipKurui v Republic [2019] eKLR**.

Analysis and Determination

4. **Section 358 of the Criminal Procedure Act** permits the appellate court for reasons to be recorded, to receive additional evidence, and may either take evidence itself or direct it to be taken by a subordinate court. The said provision stipulates 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.”

5. See also, **Republic v Richard Mwangi Wambugu [2010] eKLR**.

6. The exercise of this power is however circumscribed within certain principles. See the case of **Tentere Sankale v Republic [2018] eKLR** where the court cited the case of **ELGOOD –VS- REGINA [1968] EA** at page 274 where the court of appeal held;

“(a) The 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 purposes of the appeal are:-

(i) the evidence that it is sought to call must be evidence which was not available at the trial;

(ii) it must be evidence relevant to the issues;

(iii) it must be evidence which is credible in the sense that it is well capable of belief;

(iv) 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 (R. V. PARKS [1961] 3 ALL E.R. 633 applied; statement in JOHN HASAKWA V. R. CR. A. NO. 132 OF 1954 (U R) disapproved);

(b) It is only in very exceptional cases that the Court of Appeal will permit additional evidence to be called;

(c) In the circumstances, in the interest of justice the application should be allowed;

d) The affidavit in support of an application to admit additional evidence should have attached to it a proof of the evidence sought to be given;

(e) On consideration of the evidence, the charges could not be said to have been proved beyond a reasonable doubt.....”

See also; **Republic v Ali Babitu Kololo [2017] eKLR**

7. I will subject this request for adduction of additional evidence to the aforesaid test. The appellant herein was charged and convicted of the offence of defilement contrary to **Section 8 (1) as read with 8 (2) of the Sexual Offences Act No. 3 of 2010**. He was also sentenced to serve life imprisonment. The particulars of the offence were that on 29th May 2014 he defiled VG a child aged 7 years. He has appealed the trial court's decision on conviction and sentence and now seeks to produce a discharge summary note dated 19/3/2014.

8. From the onset it is clear that the evidence was available to the appellant during the trial. The appellant did not adduce the said piece of evidence or even make the court aware of its availability. It has been argued that he is a layman and had insisted on this matter being referred to Njuri Ncheke for determination. I have perused the trial courts record and there is no mention that the appellant sought to have the matter referred to Njuri Ncheke as alleged in his application.

9. I do note that the appellant was not represented during the trial but he aptly cross-examined all the witnesses. From the record, he was quite aware of the case he faced.

10. The foregoing notwithstanding, does the probative value of the additional evidence rout the evidence by the prosecution or create doubt as to the guilt of the appellant? The additional evidence is a discharge summary note; there are no treatment notes attached to it; or a well-analysed medical report or opinion which this court may examine for purposes of forming an opinion that it is credible evidence and well capable of belief. In fact, the appellant is asking the court to order that he be subjected to a medical examination. Notably, and contrary to the assertion by the appellant, the prostatectomy procedure carried out on the appellant was a removal of his testicles only and not all his male organs. I therefore agree with the Respondent that the authenticity of the discharge summary is put to question.

11. In his defence the appellant stated that; **If I had raped her, she couldn't have walked**. This is quite a different narrative from the appellant who now claims that he could not perform a sexual act. But, the relevance of this excerpt is that no hint whatsoever was given by the appellant of the claims he is making now. One wonders why he did not raise his incapacities as a defence. I do not find any credibility in his claims for no medical evidence which supports his claim that he cannot perform a sexual act through his sexual genitalia. The discharge summary is not sufficient or credible medical support of his claim.

12. The Court of Appeal in **Samuel Kungu Kamau vs. Republic [2015] eKLR** while discussing its power to admit additional evidence under **Rule 29 (1) of the Court of Appeal Rules** on similar application of admission of additional evidence under **Section 385(1) of the Criminal Procedure Code** 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 exercised very sparingly and great caution should be exercised in admitting fresh evidence.’ (Emphasis added)

13. I appreciate that the appellant is a layman and was not represented by legal counsel in the trial. But, that notwithstanding, he understood the nature of the case he faced. See his cross-examination of witnesses as well as his defence. He has not also given any explanation of or impediment that prevented him from adducing the so called new evidence in his defence, or at least raising it during trial. I have dispelled his

reason that he wished to raise the issue before Njuri Ncheke. Needless to state that Njuri Ncheke has no jurisdiction to try criminal cases. The only plausible explanation for this application is that he intends to use the so called additional evidence to make out a fresh case and improve the chances of his appeal.

14. On the basis of my analysis, the application does not meet the threshold set out in law. See **ELGOOD –VS- REGINA [1968] EA**.

15. The upshot is that the application dated 20th March 2020 lacks merit and is hereby dismissed. The appeal shall proceed to hearing. In line with the overriding objective of the court, I will give directions on the hearing of the appeal in order to avoid any further delay. It is so ordered.

Dated, signed and delivered at Meru this 29th day of July 2020

F. GIKONYO

JUDGE