



IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 51 OF 2017

CORAM: HON R.E. ABURILI

BETWEEN

LO.....APPELLANT/APPLICANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Ruling of the SRM's court of Ukwala (Hon. G. Adhiambo) in Ukwala SRM CR Case NO. 73 of 2015 delivered on 15th May 2017)

RULING

1. By a Notice of Motion dated 21st January 2019, the Appellant LO seeks leave to adduce additional evidence in the appeal against his conviction and sentence. Further, that upon such leave being granted, the Court do direct the manner in which the evidence in issue shall be taken; and such orders as the court may deem expedient for the first and expeditions heating and determination of this appeal.
2. The grounds upon which the application are premised are on the face of the application as supported by the affidavit sworn by George Miyare, Advocate for the Appellant who is service a 20 year prison sentence.
3. The evidence sought to be adduced is a Birth Certificate No. [xxxx] for Baby FO given on 1/8/2018; and notification from Jera Dispensary on Patient No. [XXXX] issued on 2/10/2018 on HIV/AIDS status of the Appellant LO.
4. In His grounds and depositions by his advocate Mr. Miyare, the appellant claims that he could not adduce the stated evidence due to stigma in society associated with the HIV/AIDS and further that the new evidence will contradict the particulars of the charge and Respondent's evidence; that the Appellant is serving unlawful and unjustified sentence hence he should be accorded the opportunity to ventilate his case; that this court has discretion to grant the prayers sought and that no prejudice will be occasioned to the Respondent if the Orders sought are granted.
5. The affidavit by Mr. George Miyare, Advocate explains out the above grounds in detail and annexed the intended new evidence.
6. The prosecution did not file any response to the application. The only submitted in response to Mr. Miyare's arguments.
7. According to the Prosecution, there was no justification for the application as the Appellant had all the opportunity to adduce the said evidence before the trial court.
8. The submissions by Mr. Miyare reiterate the grounds and the depositions in his affidavit, citing relevant provisions of the law and the Constitution and urging the court to grant the orders sought as the state would not be prejudiced in any way by the accused/convict seeking to adduce additional evidence.

Determination

9. The power to allow an appellant to adduce additional evidence on appeal is discretionary and is stipulated under the provisions of **Section 358(1)** of the **Criminal Procedure Code**. 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.”

10. The locus classicus case on the principles that a course ought to take into account in exercising such discretion has all along been the

decision of the predecessor of this Court in *Elgood vs Regina (1968) E.A. 274* which adopted the summary enunciated by Lord Parker C.J in *R. vs. Parks (1969) All ER at page 364*. The principles are: -

a. *That the evidence that is sought to be called must be evidence which is not available at the trial.*

b. *That it is evidence that is relevant to the issues.*

c. *That it is evidence that is credible in the sense that it is capable of belief.*

d. *That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial.”*

11. With the foregoing in mind, the gravamen of the application is that the appellant was convicted of the offence of defiling a child age 14 years contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. That he has evidence in his possession namely the medical records for his status on HIV/AIDS and the Birth Certificate for the child born of the alleged defilement which would displace the respondent's case in his favour hence he should be allowed to adduce such evidence in the interest of justice. The appellant was sentenced to serve 20 years imprisonment and he has challenged both the conviction and sentence.

12. In **Misc. Criminal Application No. 25 of 2015**, the learned Judge (Chitambwe, J.) in a ruling dated 17th March, 2016, was faced with a similar application wherein he 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 28th May, 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.”

13. The above ruling was challenged before the Court of Appeal vide **CA CRIMINAL APPEAL NO. 8 OF 2017 (Malindi) Republic v All Babitu Kololo [2017] eKLR** wherein the appellant faulted the learned Judge for allowing the respondent to adduce additional evidence.

14. After considering the record, submissions by parties and law, and as per **Section 358(1)** of the *Criminal Procedure Code* the Court of Appeal held that the High Court has absolute discretion to take additional evidence but it should only exercise such discretion if there is sufficient reason. 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 [2015] eKLR** 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 exercised very sparingly and great caution should be exercised in admitting fresh evidence.’

(Emphasis added).

15. In as much as the Court of Appeal was in the above mentioned case discussing its power under **Rule 29(1)** of the *Court of Appeal Rules*, it believed that that the considerations set out thereunder are applicable where the High Court is considering a similar application of admission of additional evidence under **Section 385(1)** of the *Criminal Procedure Code*.

16. And applying the principles set out in the *Elgood case* to the circumstances of that case, it found like the learned Judge that the forensic evidence sought to be adduced and annexed to the affidavit in support of the application was not within the knowledge of the respondent during the trial. That he only learnt of the same when the detective from Scotland Yard testified; he promptly made application for adducing additional evidence after receiving the evidence in question. Equally, the Court of Appeal found that such evidence which the respondent contended went to the issue of whether the shoes recovered on the respondent matched the impressions at the scene ought to be considered together with the evidence on record to determine whether it would create a reasonable doubt in the prosecution's case.

17. The Court of Appeal 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.

18. On the basis of the above decision, and considering the length of the sentence imposed on the appellant herein by the trial court; and the fact that the birth certificate in issue and the HIV/AIDS status report of the appellant were issued after the judgment date in the trial court on 1st and 2nd October 2018 respectively; and the fact that the prosecution did not put up any serious opposition to the application for adduction of additional evidence by the appellant which evidence is already in his possession; and as there as there is no prejudice that is likely to be occasioned to the Respondent or victim of the offence; I find the application merited. I proceed to grant the application and order that the appellant is hereby allowed to adduce additional evidence on appeal as prayed and direct that the appeal be mentioned on 29th April 2019 on the mode of taking of the additional evidence by this court.

Dated, signed and delivered in Open court at Siaya this 26th Day of March 2019.

R.E. ABURILI

JUDGE