



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO 13 OF 2019

JACKSON TARUS KIPKURUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By an application date 11th July 2019 made pursuant to the provisions of **Section 350 and 358 JACKSON TARUS KIPKURUI (Appellant)** has sought to amend the notice of appeal as well as the petition of appeal and introduce the additional evidence in the form of sworn statements or in any other manner as may be directed by this court.

2. The basis for the application is that the appellant has now obtained full record of the lower court proceedings, and after consulting his advocate, realizes there is a need to amend the Notice of Appeal. Further, there is new and more compelling evidence which has emerged, and in the interest of justice, ought to be taken. That the evidence sought to be introduced will not be prejudicial to any party, since the complainant wishes to introduce the evidence in her own interest.

3. The applicant laments that disallowing the application will greatly prejudice both the appellant and the complainant beyond any reasonable compensation or at all. In addition, the record as it stands is likely to cause great confusion especially because the prosecution witnesses also doubled up as the defence witnesses, with serious glaring deficiencies, lack of proper legal direction, and may result in miscarriage of justice and fairness.

4. The background to his matter is that the applicant was charged with the offence of defilement contrary to **Section 8(1) as read with Section 8 (2) of the Sexual Offences Act**, and upon conviction, he was sentenced to serve life imprisonment.

5. In the applicant's supporting affidavit, he deposes that the complainant has now made a statutory declaration, and there is also an age assessment report dated **5th February 2019** showing her correct age after presenting herself before a medical Doctor whose assessment found that she was an adult. Further, the complainant's own birth certificate indicating that she was born on **2nd August the year 2000** defeats all reason, as her brother who follows her and whom their father confirmed was not a twin has a birth certificate showing his date of birth as **5th August 2000** giving a three-day difference which defies logic.

6. Apparently the appellant and the complainant had lived together as husband and wife, and had two children whose birth certificates are annexed showing the appellant as the father, and the complainant as the mother. The applicant's counsel **Mr. Rotich**, in his submissions reiterates the same position alluded to in the foregoing paragraphs.

7. **Miss Oduor** on behalf of the prosecution noted that although the complainant's age was purportedly proved by virtue of the birth certificate, there are discrepancies referred to which would render the findings of the trial court an injustice to the applicant.

8. **Section 358 of the Criminal Procedure Code deals with the Power to take further evidence and provides that:**

(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.

9. The principles upon which an appellate court will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by **Lord Denning LJ, in Ladd v Marshall [1954] 1 WLR 1489 at 1491** which are:

(a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;

(c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

10. This was echoed in the case of **Samuel Kungu Kamau (supra)** but it is significant that the latter case drew from the case of **Karmali Tarmohamed & Anor vs I.H. Lakhani** which stated that:

“except on the grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence **UNLESS** it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available”. [emphasis added]

11. The DPP concedes the prayer seeking introduction of additional evidence. I find that the scenario presented demonstrates that The evidence sought to be introduced is such that it would probably have an important influence on the result of the case, though it need not be decisive. Further, the evidence is apparently credible, and the application is merited.

12. Consequently, I order that:

a) the applicant be and is hereby allowed to amend his notice of appeal within 7 days hereof

b) the applicant be and is hereby granted leave to amend, file and serve the petition of appeal within 7 days from today's date

c) the applicant be and is hereby allowed to adduce further evidence at the hearing of the appeal, by way of a statutory statement

d) the complainant shall attend court at the hearing of this appeal for purposes of cross-examination by the DPP, if need be

e) The appeal shall be listed for hearing on 19th August 2019

Delivered, Signed and Dated this 16th day of August 2019 at Eldoret

H. A. OMONDI

JUDGE