REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.132 OF 2017

T G C.....APPLICANT

-V E R S U S -

REPUBLIC.....RESPONDENT

R U L I N G

The appellant/applicant was on 28/12/2015 found guilty and convicted for the offence of defilement contrary section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2016. He was sentenced to serve life imprisonment.

He is aggrieved by the conviction and sentenced and filed this appeal. Meanwhile, he has filed the Notice of Motion dated 27/7/2017 in which he seeks orders that:

> ***(1) The Hon. Court do allow the applicant to adduce additional evidence and***
>
> ***(2) The court do give directions on the manner in which the evidence shall be taken.***

The evidence that the applicant seeks to adduce is a birth certificate to confirm that he was born on 28/11/1997 and to produce the Attendance Register for [particular withheld]High School to support the applicant's alibi that he was in school on the day the alleged offence was committed. Both were annexed. The application is brought under Section 358 of the Criminal Procedure Code and grounds found in the body of the application that at the time of arrest, the applicant was only 17 years old; that he intends to challenge the legality of the sentence of life imprisonment. He exhibited the birth certificate which is dated 27/7/2017. Mr. Waichungo added that at the time of plea the court addressed the appellant as a subject and the doctors report indicated appellant was 17 years.

The applicant also intends to call the Principal of [particular withheld]High School to support his alibi defence because he was not able to produce the school letter in the Lower Court.

The appellant relied on the decision of ***Cr.A.No.33/2007 Daniel Kipng'etich Sang v Republic*** and ***Cr.A.No.25/2015 Ali Babitu Kololo v Republic***.

The learned State Counsel opposed the application and filed submissions. He relied on principles set out in the case ***Wanje v Saikwa (1984) KLR 275*** where the court held that:

> ***(1) The applicant must show that the evidence sought to be adduced could not be obtained with reasonable diligence for use at the trial;***
>
> ***(2) The evidence must be such that if given, it would probably have an important influence on the result of the case;***
>
> ***(3) That the evidence is on the face of it credible.***

Counsel argued that the evidence sought to be produced should have been sought and produced at the hearing had the applicant been diligent enough.

As regards evidence in support of the alibi, the school wrote to the court indicating that applicant was not in school as he had been sent home on 14/7/2014 and never went back to school.

Counsel relied on the decision of ***Samuel Kungu Kamau v Republic CRA.29/2015***.

Section 358 of the Criminal Procedure Code reads as follows:

> ***"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)……..***
>
> ***4)……"***

Under the above section, the High Court has a discretion to take additional evidence either by itself or by a subordinate court where it deems it fit to do so. Several court decisions have dealt with this issue.

The case of ***Republic v Parks (1961) ALL ER 639*** which was cited in ***Eigood v Republic 1968 EA CA 274***, the court set out the principles to be considered before taking additional evidence to be:

> ***"Those principles can be summarized in this way: First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, 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."***

In the case of ***Joginder Auto Service Ltd v Mohamed Shaffigue & another CCA.210/2000***, cited in ***Samuel Kungu Kamau v Republic CRA.29/2015*** the court added: ***"…… These are general principles but we cannot say that they are the only ones. The relevant rule authorising the adduction of additional evidence uses a general phrase, namely, 'sufficient reason'. This is the phrase used in Rule 29 of Court of Appeal to adduce more evidence.***

Under Section 358 of the Criminal Procedure Code the phrase used is "if it thinks additional evidence is necessary….." meaning it is an exercise of the court's discretion in each case.

As regards the request to adduce the birth certificate in evidence, it is apparent that the birth certificate was only procured in 2017 – it is dated 27/7/2017, over 1½ years since the applicant was convicted. The delay in procuring the certificate is not explained but it is clear it was not available at the trial. I have perused the record and it is clear that when the applicant appeared for plea, the trial court referred to the appellant as a subject, meaning he may have been under age. When the applicant was examined at Nyahururu District Hospital on 7/7/2014, his age was indicated as 17 years. The record also shows that the applicant was a student at the time and the hearing had to be adjourned at times to enable him attend to school. Having considered the submissions on this issue of the appellant's age at the time, I am of the view that exceptional circumstances arise and there is no doubt that additional evidence by production of the birth certificate will form a basis for challenging the legality of the sentence meted on the appellant.

The second limb of the application is adduction of further evidence on the alibi. In his defenc,e the applicant said he was in school when the offence was allegedly committed. DW2, the applicant's mother told the court that there was a letter saying that the applicant was in school when the offence was committed. The record does not show whether the court saw the letter or not, or whether the court granted the defence time to have the letter produced by the author. The record is silent. It means that the said evidence may have been available but the applicant being a lay man did not know how to present it to the court or call his witnesses.

It is my considered view that this evidence is relevant to the case herein. The applicant faces life imprisonment sentence and in my view, adducing of the further alibi evidence would enable him ventilate his appeal and no prejudice will be suffered by the prosecution.

After all, the court will have to evaluate that additional evidence together with the rest of the evidence on record and arrive at its decision whether or not the applicant was properly convicted. Consequently, I do allow the application dated 27/7/2017 to adduce further evidence by producing the applicant's birth certificate; and secondly the Headmaster of Mt. [Particulars Withheld] High School be called to produce Attendance Register for the period June and July, 2014. The additional evidence shall be taken by this court. The additional evidence shall be taken before the appeal is heard.

It is so ordered.

Dated, Signed and Delivered at NYAHURURU this 19th day of January, 2018.

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R.P.V. WENDOH

JUDGE

Present:

Mr. Mutembei – for prosecution

Mr. Waichungo for appellant

Soi Court assistant

Present - appellant