



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. 24 OF 2017**

**GEORGE VOLLINS.....APPELLANT/APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant herein, **George Vollins**, was charged, tried and convicted of the offence of **Grievous Harm** contrary to **Section 234** of the **Penal Code**, Cap. 63 of the Laws of Kenya in **Migori Chief Magistrate's Criminal Case No. 93 of 2016 Republic vs. George Vollins** (hereinafter referred to as '**the case**'). He was sentenced to 14 years imprisonment and timeously lodged this appeal.

2. As the appeal was about to be heard, the Applicant filed a Notice of Motion dated 17/10/2017 seeking leave to adduce additional evidence in the form of statements by three prosecution witnesses and a covering report on the main ground that the prosecution was duty bound to produce the said witnesses' statements and the report but failed to discharge that duty a result of which the Applicant's constitutional right to a fair hearing was infringed.

3. The statements in issue were recorded by the police during the investigations of the case. They were for **Jane Awuor** (the complainant who testified as **PW1**), **David Agwenge** (who testified as **PW2**) and **PC John Mwithia** who was attached to Migori Police Station and was the investigating officer in the case. He testified as **PW6**. **PC Onyango** prepared the covering report but did not testify,

4. The application was supported by the affidavit of **Mr. Philip Ojode**, Counsel for the Applicant sworn on 17/10/2017 which annexed copies of the statements and a copy of the covering report. The Applicant further filed written submissions wherein he expounded why the application ought to be allowed. He referred to various judicial decisions as well.

5. Learned State Counsel **Mr. Kimando** opposed the application. He contended that the statements relate to witnesses who testified and were cross-examined accordingly and that the one who prepared the covering report was not called to testify hence not part of the prosecution's case. He submitted that the application was not merited and ought to be dismissed.

6. I have cautiously considered the application alongside the submissions and the decisions referred to. The application was brought under **Section 29** of the **Court of Appeal Rules, 2010**, **Section 3a** and **3b** of the **Appellate Jurisdiction Act Cap. 9** Laws of Kenya and **Section 309** of the **Criminal Procedure Code, Cap. 75** Laws of Kenya. Suffice to say, none of the said provisions are applicable in this matter before the High Court. The applicable provision of the law is **Section 358(1)** of the **Criminal Procedure Code** which 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.'***

7. That aside, it remains that the High Court has absolute discretion to take additional evidence. Such discretion must however be exercised on sufficient grounds. The Court of Appeal in discussing its power to admit additional evidence under **Rule 29(1)** of the **Court of Appeal Rules** (which considerations are applicable where the High Court is considering a similar application of admission of additional evidence) in the case of **Samuel Kungu Kamau vs. Republic (2015) eKLR**, which case was referred to in the Court of Appeal case of **Republic vs. Ali Babitu Kololo (2017) 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)

8. The issue of additional evidence on appeal has a long history. In the 1960s the then Eastern Africa Court of Appeal in the case of **Elgood vs. Regina (1968) E.A. 274** laid down the applicable principles for consideration which principles have stood the test of time to date. They are: -

**(a) That the evidence that is sought to be called must be evidence which was 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 the other evidence at the trial.**

9. With the foregone in mind, the crux of the application is that the prosecution did not produce the statements as exhibits so that the court would consider them in determining the case. I have perused the proceedings before the trial court and found out that the applicant was provided with all the witness statements at the time he took plea. That was on 15/02/2016. That fact is not denied in this application. With such a finding the first principle turns out against the applicant in that the evidence that is sought to be called was indeed available at the trial.

10. I have as well perused the contents of the statements in issue together with the covering report alongside the entire body of evidence. There are very minor variances between the statements and the evidences of PW1, PW2 and PW6. There is hence nothing new the statements will avail even when produced. Further, the applicant had the opportunity and indeed examined all the witnesses on their evidences while in possession of their statements. I therefore do not see how the production of the statements and the covering report will create any doubt in the mind of this Court.

11. On the applicant's submission that the prosecution was duty bound to produce the statements as exhibits, I take refuge in **Section 143** of the **Evidence Act, Cap. 80** of the Laws of Kenya which gives discretion to the prosecution to decide on the number of witnesses it calls to prove its case. In doing so, the prosecution equally has a discretion on what exhibits to produce. If the applicant was of the view that the statements and the covering report ought to have been produced in evidence, then there was no bar for him to instead lay the necessary basis and apply to produce them in support of his case. That did not happen.

12. I have also noted in the application that the applicant intended to use the said additional evidence to largely contest the prosecution evidence on his identification in the case. That line can still be taken notwithstanding the intended evidence.

13. This Court therefore finds and hold that the application is not merited as it has the effect of re-opening a case long closed and revisiting issues settled at the trial. The applicant still has an opportunity to challenge the evidence at the hearing of the appeal. Consequently, the Notice of Motion dated 17/10/2017 be and is hereby dismissed.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of February 2018.**

**A. C. MRIMA**

**JUDGE**

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

**Mr. Philip Ojode** Counsel for the Applicant/Appellant.

**Miss Monica Owenga**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Miss Nyauke** – Court Assistant