



**REPUBLIC OF KENYA**

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

**CRIMINAL MISC APPLICATION NO. 42 OF 2016**

**EVANS ODUOR OCHIENG.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. In the notice of motion application dated 23<sup>rd</sup> November, 2016 the Applicant, Evans Oduor Ochieng has asked this Court to direct the Respondent to avail to him extracts of certain entrances in the Occurrence Book (OB) maintained at Busia Police station.
2. Mr. Owiti for the State opposed the application arguing that the Applicant seeks to introduce additional evidence and this can only be done as provided by Section 358 of the Criminal Procedure Code, Cap 75.
3. The Applicant indicates on the face of his application that the same is brought under sections 80, 81, 107 and 163 (c) of the Evidence Act, Cap 80 and Articles 35 and 50(2) (b) & (j) of the Constitution. The sections of the Evidence Act cited by the Applicant actually show that the Appellant proposes to introduce new evidence by way of the O.B. extracts.
4. Section 358 of the Criminal Procedure Code, Cap 75 provides that:

**“358(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.”**

5. In this case, the Applicant does not directly seek to have any witnesses recalled for cross-examination on the contents of the O.B. entries. In my view, the Applicant’s application is more in line with the protection of trial rights in line with Article 50 of the Constitution. Article 50(2)(j) requires that an accused person be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. Although the O.B. is not evidence *per se*, it contains the information given to the police at the first instance by whoever is reporting the crime. The information, if well recorded, will indicate who made the report, the time of making the report, the kind of crime committed and, more crucial, whether any suspect was identified and, if so, whether by name or recognition. It follows therefore that in order to ensure compliance with the constitutional provisions requiring that an accused person be afforded a fair trial the accused person is entitled to the information relating to his or her case as captured in the O.B.

6. In the instant case, the O.B. extracts may work for or against the Applicant. He should not be denied information that may assist in establishing the contents of the first report made to the police. I do not agree with the counsel for Respondent that the Applicant is seeking to introduce additional evidence. Indeed I do not see why an entry in the O. B. relevant to a particular accused person should not be availed to the accused person at the commencement of the trial as a matter of course.

7. In the circumstances of this case, I find the application before me has merit. The Respondent shall provide to the Applicant extracts of O.B. No. 20/9/7/2014, 29/1/12/2014 and an entry made on 8.7.2014 all relevant to the Applicant’s trial. This should be done before the hearing of the appeal which the Applicant has already filed before this Court.

**Dated, signed and delivered at Busia this 31<sup>st</sup> day of January, 2017**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**