



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 193 OF 2016

SIMON WANJOHI.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Judgment of the Chief Magistrate's Court at Molo Hon. R. Amwayi – Resident Magistrate delivered on the 13th December, 2016 in CMCR Case No. 1369 of 2016)

RULING

The appellant **SIMON WANJOHI** has filed this application seeking to adduce additional evidence in this appeal. The applicant prays that a DNA report on the child born to the complainant as the result of the alleged defilement be tabled in court as an exhibit.

The applicant had been arraigned before the trial court on 10/5/2016 facing a charge **of DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(4) OF THE SEXUAL OFFENCES ACT**. Following a full trial the applicant was convicted and was sentenced to serve twenty (20) years imprisonment. Being aggrieved he filed this appeal.

Together with his appeal the appellant filed a Notice of Motion seeking

“THAT the applicant may be granted orders that a DNA be conducted and be allowed as additional evidence during the hearing and determination of his appeal which is against his conviction and sentence in a judgment delivered on the 13th day of December, 2016 in CM’s Court, Molo Criminal Case Number 369/2010”

The prosecution through the learned State counsel had no objection to the application. The applicant assured the court that he was ready to meet the full cost of the DNA test.

The applicable law on the calling of additional evidence on appeal is found in Section 358 of the Criminal Procedure Code which provides 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 reason, 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”

The mere fact that an appellant has made an application to have additional evidence adduced during his appeal does not mean that said application must be allowed. The courts have by way of precedence established certain rules or guidelines governing the circumstances under which an application for additional evidence may be allowed.

In **SAMUEL KUNGU KAMAU Vs REPUBLIC [2015]** The Court of Appeal cited the decision in **JUDITH DEBORA CAVE SHAW Vs FRANCIS ROBERT SHAW**, Civil Application No. NAI 361 of 2005 (unreported) where it was held that

“.....before this court gives leave to a party to call additional evidence under Rule 29 it must be shown that the evidence sought to be introduced could not have been obtained by reasonable diligence before or during the hearing of the suit in the superior court and secondly, it must be shown that the new evidence sought to be introduced would have been likely to affect the result of the suit”.

I have carefully perused the proceeding of the trial before the lower court. The applicant was represented by counsel during the trial. At no time was any application made for a DNA test to be conducted. Granted that at the time of the trial the complainant was pregnant – she had not yet given birth. Thus in the circumstances it may have been difficult to conduct a DNA test on the baby.

However this is where the second limb of the test in the **Judith Debora Cave Shaw** test comes into play. The purpose of a DNA test is to establish the **paternity**. A DNA test will not in any way provide assistance in determining whether or not the complainant had been defiled or to put it in another way – an act of defilement does not of necessity result in a pregnancy.

Further in the same **SAMUEL KUNGU KAMAU Case** (Supra) the court went on to hold as follows:-

“It has been said time and again that the unfiltered 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” (own emphasis)

In **WANJE Vs SAKWA [1984] KLR 275** Chesoni Ag. J/A (as he then was) stated as follows

“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 and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff [or an appellant] to make out a fresh case in appeal (my own emphasis)

Bearing in mind the above authorities I am not that the applicant’s prayer for additional evidence by way of a DNA test is warranted in this case. Even if the DNA test were to exclude the applicant as the father of the child born by the complainant, neither will not prove or disprove the fact of defilement.

For the above reasons I decline to allow this prayer for additional evidence.

Dated in Nakuru this 24th day of November, 2017.

Maureen A. Odero

Judge