RREPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CRIMINAL APPLICATION NO. 25 OF 2015

ALI BABITU KOLOLO.....APPLICANT/APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

R U L I N G

The application dated 28th May 2015 seeks two main prayers drawn in the following terms:

1. **That this Honourable court be pleased to grant leave to the Applicant/Appellant to adduce additional evidence in this Appeal against his conviction.**

2. **That upon leave being granted this Court be pleased to order such evidence be taken either by the High Court in Malindi or a subordinate Court in Malindi which will certify the evidence to this court.**

The application is supported by the affidavit of ZOE BEDFORD sworn on 28th May 2015. The respondent filed a replying affidavit sworn by Corporal Wycliffe Otando on 12th June, 2015. Parties agreed to determine the application by way of written submissions.

The main issues being raised in the application and submissions by the appellant's counsel are that at the time of the hearing, the appellant was not aware of the presence of the additional evidence he intends to produce. It is indicated in the supporting affidavit that the additional evidence is part of the forensic evidence that was prepared in the United Kingdom but was not included in the testimony of PW14: The appellant was assisted by advocates from the United Kingdom who requested for the additional evidence from the U.K forensic authorities.

It is further submitted that the relevant authorities declined to release the evidence and thus led to the filing of case number[2015] EWHC 600 (QB)-ALI BABITU vs COMMISSIONER OF POLICE FOR HTE METROPOLIS. That case was decided in favour of the appellant and the UK authorities were ordered to comply with the appellant's request under Section 7(1) of the UK Data Protection Act, 1998. The ruling was delivered on 11th March 2015. It is contended that by that time the appellant had already been convicted. The UK authorities released the information on 16th March 2015 and the last batch of the evidence/information was released on 15th April 2015: Armed with the information from the Commissioner of Police of the Metropolis, the appellant filed the current application on 28th May 2015 seeking leave to be allowed to produce additional evidence.

Counsel for the applicant cited the case of **D.M. V REPUBLIC (MACHAKOS) CRIMINAL APPEAL NO. 93 OF 2010** where Justice Thuranira disallowed similar application. In Kerugoya High Court Criminal Appeal NO. 13 of 2012 **PETER GITHINJI KIOI -V- REPUBLIC** Justice C.W. Githua allowed a similar application.

The state strongly opposed the application. Corporal Wyclife Otende's affidavit depones that although the Kenyan prosecuting authorities requested for assistance from the Scotland Yard, United Kingdom, they never dealt with the Metropolitan Police. It is further submitted that the Kenyan Government was not a party to Case Number IHQ/15/0064 in the U.K. Mr. Monda, prosecuting counsel submitted that the appellant willfully removed his advocate, Mr. Wakahiu from acting for him. It cannot be held that the appellant was denied legal representation. The appellant was given all witness statements. He was not subjected to torture or ill treatment during his arrest. The orders granted in the United Kingdom were obtained pursuant to the Data Protection Act of the U.K which is not applicable to Kenya.

It is further submitted by the state that PW14 testified before the trial court. The defence had the opportunity to cross examine the witness. Further, the trial court did not solely rely on the evidence of PW14. It took into account the other evidence and not rely entirely on the forensic evidence.

The main issue for determination for this court is whether the applicant should be allowed to adduce additional evidence and if so, how should the evidence be taken. The operating legal provisions is Section 358 (1) of the Criminal Procedure Code, Cap 75 Laws of Kenya. The specific Section states as follows:-

> **"358(1) in dealing with an appeal from the 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."**

The question as to whether this court can take additional evidence in an appeal has been dealt with in several past court decisions. In the case of **R V PARKS [1961] ALL E. K.634 (cited in the case of ELGOOD V REGINA) 1968 EAC 274,** the court states the principles under which additional evidence can be taken in the the following terms:-

> **"Those principles can be summariesed 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 for this court 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."**

Given the appellant's application, it is clear that the proposed additional evidence was not available to the petitioner during the hearing of his case. This fulfills the first requirement. The evidence was obtained after the court in the U.K ordered the authorities concerned to release the information. The other principle relates to the relevance of the proposed additional evidence, its credibility and whether that evidence could have raised reasonable doubt in the mind of the trial court.

The next issue to be considered is the additional evidence itself. My understanding of this application is that certain prosecution exhibits were taken to the Scotland Yard in the U.K for forensic examination. PW14 who produced that evidence left out part of the information. The supporting affidavit of ZOE BEDFORD in paragraph 18 exhibits the additional evidence as ZB14. The main focus is the **"Tanga Shoe"**, which was alledgedly to have been worn by the appellant. The 6th finding of the trial magistrate in his judgment reads as follows:-

> **"6: That the tanga shoes exhibit 2 were being worn by the accused at the time of arrest and impression found at the scene were made by them."**

It is indicated in the document annexed as additional evidence that the recovered mark from the tanga shoe was of poor quality and when analysed, some features did not align. It is suggested that this could have been due to the shoe mark loosing detail as the sand dried out or was altered by other environment facts such as wind. As a result of that it could not be specifically included or excluded that the tanga shoe made the impression found at Banda 2B. Apart from the above, the rest of the proposed additional evidence needs more explanation by an expert. ZOE BEDFORD is a casework lawyer and is not a forensic expert.

The applicant herein was sentenced to death for the offence of robbery with violence. He was also sentenced to serve seven (7) years imprisonment for the offence of kidnapping in order to murder contrary to Section 256 of the Penal Code. He is now fighting for his life. He is entitled to call for any piece of evidence that can assist him overcome the conviction. The decision in the U.K case number IHQ 15/0064 is only relevant in the U.K. However, due to that decision, the applicant was able to obtain the additional evidence he intend to produce. The applicant is not asking this court to rely on the U.K Judgment.

As to whether the additional evidence is believable or not is for the court to decide after taking that evidence and comparing it with what is already on record. Making a negative at positive or positive conclusion on the additional evidence that is yet to be produced might be seen to be tantamount to have a pre-conceived opinion on that evidence. If all what is to be adduced is that the tanga shoe "impression" or "mark" evidence is doubtful, the court will evaluate that allegation against the evidence on record. It is not a rule or legal principle that whenever additional evidence is taken on appeal, then the appellant will be acquitted if the appeal is against conviction. The additional evidence will simply be evaluated as part of the record and the court make its decision. I do not take it that the prosecution deliberately excluded part of what is alleged to be additional evidence. There is no proof to that effect.

In the end, I do find that this being a criminal case which has resulted to the invocation of the death penalty, the applicant should be accorded all the available avenues to ventilate his case. No prejudice will be suffered by the prosecution. I do allow the application dated 28th May 2015. The appellant is also allowed to file further grounds of appeal as requested in his application dated 20th May 2015. The appellant to include the additional evidence to be part of the record of appeal if it is in documentary form. If there is need to call a witness to produce or adduce the additional evidence, the applicant shall inform the court of such a need and shall be at liberty to do so. The additional evidence shall be taken by this court. The reason being that it would be prudent for this court to understand the additional evidence and analyze it together with evidence on record. The additional evidence shall be taken first before the appeal is heard. The application is granted in the above terms.

Dated and delivered in Malindi this 17th day of March, 2016.

S.CHITEMBWE

JUDGE