REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 190 OF 2014

CONSOLIDATED WITH HCRA NO 188 AND 189 OF 2014.

THOMAS KIPTUM MISOI ……..……1ST APELLANT

JOSEPH KIBII TANUI ……..…… 2ND APPELLANT

PHILIP KIPTOO BETT ……..…….. 3RD APPELLANT

VERSUS

REPUBLIC ……..……..... RESPONDENT

RULING

1. The Notice of Motion dated 24th March, 2016 seeks that the appellant in HCRA No. 190 of 2014 *Mr. Philip Kiptoo Bett* be allowed to give additional evidence before the hearing and determination of his appeal. The application was wrongly filed in HCRA No. 190 of 2014 because that appeal was consolidated with HCRA No. 188 of 2014 and HCRA 189 of 2014 and HCRA No. 188 of 2014 is the lead file. The application therefore ought to have been filed in HCRA NO. 188 of 2014 where the applicant in this application is the 1st appellant.

2. Be that as it may, the application is premised on grounds that there is crucial evidence that was not availed to the lower court partly because the appellant was denied an opportunity to present part of it to the trial court and secondly because he inadvertently failed to tender the evidence while presenting his defence; that the said evidence is necessary for the determination of the issues in the appeal and that the applicant is constitutionally entitled to be given an opportunity to adduce and challenge evidence adduced against him.

3. The motion is supported by an affidavit sworn by the applicant on 24th March, 2016 in which he disclosed the additional evidence sought to be tendered on appeal. The evidence consists of sale agreements for plot No. 22 Kaplelach; a letter purporting to prove the applicant's ownership of the said plot; a plaint and ruling in Eldoret ELC No 257 of 2013 which are annexed to the supporting affidavit.

4. The application was argued before me on 2nd June, 2016. Learned counsel *Mr. Magut* for the applicant and learned prosecuting counsel *Ms. Busienei* made brief oral submissions in support and in opposition to the motion.

5. I have considered the application, the proceedings in the lower court, the rival submissions made on behalf of the parties and the grounds of appeal. *Section 358* of the *Criminal Procedure Code* gives this court wide and unfettered discretion in deciding whether or not to allow the tendering of additional

evidence in an appeal. The provision states as follows;

> **(i)** *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.*
>
> ***(ii)*** *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.*
>
> ***(iii)*** *Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.*
>
> ***(iv)*** *Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court .*

6. The principles upon which an appellate court can exercise its discretion to allow the taking of additional evidence in a criminal appeal were set out by the Court of Appeal in ***Elgood V Regina [1968] EA 274*** and were restated by the same court in ***Simon Mwangi Wambui V Republic 2014 eKLR*** . The court must be satisfied that the evidence sought to be adduced was not available at the time of the trial; that the evidence is relevant and credible; the court should consider the evidence together with the evidence on record to determine whether it would create a reasonable doubt and that it is only in very exceptional cases that additional evidence should be permitted.

7. Applying the above principles to the present case, it is clear from the instant application that the applicant (1st appellant) has admitted that the evidence sought to be admitted on appeal was available during his trial and had he been diligent, he would have presented it to the trial court during his trial. It is not new evidence. It is my finding that the applicant has not given any good reason why he did not present that evidence during the trial.

8. A perusal of the lower court's record shows that the appellants were tried and convicted of the offence of destroying 6,200 tea plants valued at Kshs.133,450. And having considered the evidence on record as well as the grounds of appeal, it is my finding that though the evidence regarding ownership of Plot No. 22 was relevant to the charges founding the appellant's conviction, it was not an essential ingredient of the offence charged. Bearing in mind the grounds of appeal, it is my finding that the evidence sought to be introduced on appeal is not necessary for the fair and just determination of the consolidated appeals. It will not add any value to the evidence already on record.

9. The claim that the appellant has a right to adduce and challenge evidence on appeal is at best misplaced. A look at *Article 50(2)* of the Constitution in which this right among others is enshrined leaves no doubt that this right is only accorded to accused persons during a trial and does not apply to appellants during the hearing of an appeal. I say so because ideally, appeals are determined on the basis of the evidence already adduced before the trial court. It is only in the trial that an appellant would have an opportunity to adduce and challenge evidence adduced against him.

10. For all the foregoing reasons, I am satisfied that the application in the Notice of Motion dated 24th March 2016 is not merited and it is hereby dismissed.

C. W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 20th day of July, 2016

In the presence of:

Appellants

Ms. Mokua for the state

Mr. Magut for all the appellants

Cc: Lobolia