



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 48 OF 2014

EVANS KILUGHA MWANGAGE.....APPELLANT/RESPONDENT

VERSUS

REPUBLIC.....RESPONDENT/APPLICANT

RULING

1. The Appellant was granted leave to file an Appeal by Muya J on 21st November 2012. On 13th July 2016, this court directed him to file his Written Submissions. Instead of doing so, on 27th July 2016, he filed Amended Grounds of Appeal and the said Written Submissions. Although the State was also directed to file its Written Submissions by 11th August 2016, it did not do so but instead it filed a Notice of Motion application dated 23rd August 2016 on 24th August 2016. This court deemed it prudent to dispose of first before dealing with the substantive appeal.

2. In the said Notice of Motion application that was brought under the provisions of Section 358 of the Criminal Procedure Code Cap 75 (Laws of Kenya), the State had sought **THAT:-**

- 1. This Honourable Court be pleased to allow the taking of additional medical evidence from a doctor from Voi Referral Hospital.**
- 2. Summons be issued to the medical superintendent Voi Referral Hospital directing for the attendance of a doctor for purposes of giving evidence.**
- 3. Any Other/ directions the Court deems fit to grant(sic).**
- 4. There be liberty to apply.**

THE RESPONDENT'S/ APPLICANT'S CASE

3. The application was supported by the Affidavit of Franklin Sirima, a Prosecution Counsel from the Office of the Director of Public Prosecution. It was sworn on 23rd August 2016. The Respondent's/Applicant's Written Submissions were dated 25th October 2016 and filed on 27th October 2016.

4. The said deponent contended that medical evidence was adduced during trial which showed that the Complainant had been suffering from gonorrhoea but that at the close of both the Appellant's/Respondent's and Prosecution's case, medical evidence was presented to the Trial Court that

showed that the Appellant/Respondent was not suffering from the said condition. He contended that there was need for a doctor to come and testify on whether there was correlation between the condition (gonorrhoea) that was found on the Complainant but was absent in the Appellant.

5. He emphasised that the additional medical expert evidence to be adduced at this stage would be in the interest of justice and was not meant to prejudice the Appellant's appeal.

6. The Respondent/Applicant relied on the provisions of Section 358 of the Criminal Procedure Code that provides as follows:-

“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. It referred this court to the case of Okeno vs Republic (1972) E.A. 32 in which it was held as follows:-

“the duty of the first appellate court is to analyse and reevaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

8. It also relied on the case of Samuel Kungu Kamau vs Republic [2015] eKLR and on the common law rules that dealt with credibility of expert evidence which it set out as the field of expertise rule, expert rule, common knowledge rule, ultimate issue rule and basis rule.

9. In other words, it submitted that evidence of such an expert must be recognised as credible by others who are capable of evaluating its theoretical and experiential foundations, that such person must have sufficient knowledge and experience to entitle him to be held out as an expert who can assist the court, that such expert's evidence should be something upon which the court would need such expert's help and not rely on its own general knowledge, that such expert contribution should not have the effect of supplanting the function of the court in deciding the issue before it and that admissibility of the expert opinion would depend on proof of the factual basis of the opinion.

10. It therefore urged this court to allow its application as prayed.

THE APPELLANT'S/ RESPONDENTS' CASE

11. This court gave the Appellant an opportunity to file his Replying Affidavit or Grounds of Opposition to respond to the present application. However, he did not so. Instead, on 29th September 2016, he filed what he referred to as **“Opposing Position of the Appellant.”** In view of the fact that he was not represented by counsel, this court took into consideration the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 that mandate courts to administer justice without undue regard to procedural technicalities.

12. The said grounds of opposition could be summarised as follows:-

1. THAT the issue of him having had gonorrhoea was addressed by the Trial Court where he was taken to Wundanyi Sub-District Hospital for examination and a Report duly submitted before the said court.

2. THAT the Prosecution was satisfied with the said Report whereupon he was convicted.

3. THAT the Respondent's/ Applicant's application ought to be disallowed and the High

Court proceed to make a determination of the case based on the evidence that was on record.

13. He therefore urged this court to disallow the Respondent's/Applicant's application and hear and determine his Appeal herein.

LEGAL ANALYSIS

14. As was rightly pointed out by the Respondent/Applicant, under Section 358 of the Criminal Procedure Code, when dealing with an appeal from a subordinate court, the High Court may take additional evidence itself or direct a subordinate court to take the said evidence. As can be seen from the said Section, the High Court does not take this option as a matter of course. Certain conditions must be met before it can order the taking of such additional evidence.

15. The criteria is as follows:-

- a. **The court acts *suo moto* and not on the application of a party to a trial.**
- b. **The High Court can only order the taking of such additional evidence if it is hearing an appeal from a subordinate court.**
- c. **It must first satisfy itself that the taking of such additional evidence is necessary.**
- d. **It shall record the reasons why it is necessary to take such additional evidence.**

16. It is important to point out that a court is a neutral arbiter in any proceeding before it. The High Court must therefore exercise the power to take additional evidence very sparingly because it must at all times, guard against descending into the area of the dispute before it. In exercising the said power, a High Court must be cautious not to give an order that would result or have the effect of giving the applying party a second bite of the cherry in prosecuting its case at the appeal stage by filling gaps of the evidence that was tendered or removing lacunae.

17. If it was to be accepted that a party to a proceeding should apply for an order to adduce additional evidence and the same is granted as a matter of course, it could prejudice the rights of the opposing party. It is for that reason that such an order ought not to be given at the instance of a party's application but rather at the instance of a High Court acting *suo moto*.

18. The similarity of this court's power to act *suo moto* can also be seen in the provisions of Section 36 of the Sexual Offences Act Cap 62A (Laws of Kenya). In addressing the said issue, in the case of **Laban Mutua v Republic [2016] eKLR**, the Court of Appeal held as follows:-

“...DNA testing pursuant to section 36 of the Sexual Offences Act is not a mandatory requirement. The section merely provides that, where a person is charged with committing a sexual offence, the court may direct that appropriate sample be taken from the accused for purposes of scientific testing including a DNA test, in order to gather evidence and to ascertain whether or not the accused committed an offence. As can readily be seen, the section can only be invoked at the instance of the court(emphasis court).”

19. Notably, the case of **Samuel Kungu Kamau vs Republic** (Supra) that was relied upon by the Respondent/Applicant herein related to an appeal from the High Court to the Court of Appeal where the provisions of Section 358 of the Criminal Procedure Rules do not apply. It referred to Rule 29 of the Court of Appeal Rules that provide that the Court of Appeal will grant leave for the tendering of fresh evidence if the applying party can show that the said evidence could not have been obtained by reasonable diligence before and during trial and that the new evidence was likely to affect the result of the proceedings. The said Court was also clear that such fresh evidence ought not to be for purposes of filling gaps in the evidence by a party to a proceeding.

20. Notably, while the said case of **Samuel Kungu Kamau vs Republic** (Supra) was distinguishable from the facts of this case in that the instant case deals with an appeal from a subordinate court to the High Court, it nonetheless does contain useful analogy. The fundamental principle therein which is also applicable herein is that the evidence sought to be adduced at the appellate stage must fall in the category of evidence that was not available before and at the time of trial even after due diligence and that once adduced, it will enable the High Court make a just, fair and conclusive determination of the appeal before it.

21. In this particular case, the Respondent/Applicant was seeking orders that the High Court order the taking of additional evidence. This is definitely outside the criteria of when a High Court should order the taking of such evidence because it is an order that a High Court gives *suo moto* having deemed it necessary to make such an order and not an application that is made by a party to a proceeding.

22. Further, the Respondent/Applicant did not demonstrate that the evidence of the medical officer it intended to clarify whether or not there was a correlation between the condition (gonorrhoea) found on the Complainant and was absent in the Appellant/Respondent could not have been available before and during the trial in the Trial Court despite all due diligence. Appreciably, in Paragraph 5 of its Supporting Affidavit, the Respondent/Applicant was categorical that the Appellant/Respondent was tested and found not to have had gonorrhoea.

23. Evidently, the clarification that was being sought by the Respondent/Applicant was not evidence that could not have been obtained during trial. Exercising due diligence, the clarification could have actually been sought during the Examination-in-chief of Williamson Mwadime (hereinafter referred to as "PW 4") who testified that the Complainant had gonorrhoea or addressed in its closing submissions as the Appellant/Respondent raised the issue of him not having committed the offence as he was found not have had gonorrhoea.

24. Accordingly, having considered the application, affidavit evidence, grounds in opposition to the said application, the Written Submissions by both parties and the case law that was relied upon by the Respondent/Applicant, this court came to the firm conclusion that the clarification the Respondent/Applicant was seeking did not fall in the categorical of additional evidence that would have persuaded this court to exercise its power to order for the taking of the same.

25. It was the view of this court that there was a lacuna or gap in the Prosecution's case and the Respondent/ Applicant was attempting to have a second bite of the cherry by introducing new evidence. This would be greatly prejudicial to the Appellant/Respondent. In any event, the said application was misplaced as the orders sought ought to be made by a High Court acting *suo moto* and not at the instance of a party to a proceeding.

DISPOSITION

26. For the foregoing reasons, the upshot of this court's decision was that the Respondent/Applicant's Notice of Motion application dated 23rd August 2016 and filed on 24th August 2016 was not merited and the same is hereby dismissed.

27. This being a criminal proceeding, there shall be no order as to costs.

28. It is so ordered.

DATED and DELIVERED at VOI this 13th day of December 2016

J. KAMAU

JUDGE

In the presence of:-

Evans Kilugha Mwangage..... Appellant

Miss Anyumba.....for State

Josephat Mavu- Court Clerk