



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NOS.301 & 302 OF 2012**

*(An Appeal arising out of the conviction and sentence of Hon. D.A. Okundi - SPM delivered on 16<sup>th</sup> November 2012 in Kiambu CM. CR. Case No.89 of 2011)*

**RICHARD CHEGE WAIHENYA.....1<sup>ST</sup> APPELLANT**

**STEPHEN WAIHENYA RUHOHI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The appeals lodged by the Appellants challenging their conviction and sentence on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** is pending hearing and determination by this court. On 19<sup>th</sup> June 2015 the 2<sup>nd</sup> Appellant filed an application, pursuant to the provisions of **Article 165(5) & (6)** of the **Constitution** and **Section 358** of the **Criminal Procedure Code**, seeking the leave of this court to be allowed to adduce additional evidence. In particular, the 2<sup>nd</sup> Appellant applied for the Occurrence Book records of 5<sup>th</sup> and 6<sup>th</sup> January 2011 of Kiambu Police Station be produced in evidence during the hearing of the appeal. The 2<sup>nd</sup> Appellant further applied for the original handwritten evidence of Daniel Chege Gathecha in Police File No.21A/5/2011 be produced into evidence and the said Daniel Chege Gathecha be called to adduce evidence in court. In his application, the 2<sup>nd</sup> Appellant contends that the two pieces of further additional evidence were crucial for the purposes of determining his appeal. Through Counsel Mr. Saeni, the 2<sup>nd</sup> Appellant argued that it was imperative in the interest of justice for the said evidence to be adduced because the 2<sup>nd</sup> Appellant is of the view that the evidence will exonerate him from the crime. He submitted that this court had jurisdiction to allow additional evidence to be adduced for the broader interest of justice. He relied on **Kerugoya HC Criminal Appeal No.13 of 2012 Peter Githinji G. Kioi –Vs. Republic** where the High Court, in similar circumstances, had allowed the Appellant to adduce additional evidence during the hearing of his appeal. Mr. Saeni explained that the evidence of Daniel Chege Gathecha is critical for the purposes of determining the guilt or otherwise of the 2<sup>nd</sup> Appellant. He submitted that the 2<sup>nd</sup> Appellant did not call the said witness to testify during trial because of ignorance of the court process and the fact that he was not represented by counsel. Learned counsel appeared to suggest that the failure by the prosecution to call that witness was deliberate. The decision not to call him was made with a view to concealing from the court the true facts of the case.

Mr. Mureithi for the State opposed the application. He stated that the State was not opposed to the contents of the Occurrence Book requested being availed to the court. However, as regards the calling of Daniel Chege Gathecha as a witness in this court, he was of the view that it would cause confusion in these proceedings. He submitted that as an appellate court, if such request was allowed, it would be tantamount to the court reopening the case. He submitted that the 2<sup>nd</sup> Appellant had the right and the opportunity to call the said Daniel Chege Gathecha to testify in the case. He did not take up this opportunity. He urged the court to dismiss the application.

We have carefully considered the arguments made by parties to this application. We take the following view of the matter: that this court has jurisdiction to grant leave for an appellant to adduce additional evidence is not in doubt. It is provided under **Article 50(6)(b)** of the **Constitution** and **Section 358(1)** of the **Criminal Procedure Code** which provides as follows:

***“In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record the reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.”***

Courts have given directions in regard to circumstances under which additional evidence may be taken on appeals filed in respect of criminal cases. In **Peter Githinji Kioi case** (supra) Githua J set out some of the principles to be considered:

***“The principles which the court should apply in the exercise of its discretion in deciding whether or not to allow additional evidence to be called in a criminal appeal were set out by the East African Court of Appeal in the case of Elgood Vs Regina (1968) EA 274 which was cited with approval by our Court of Appeal in Simon Mwangi Wambui Vs Republic Criminal Appeal No.280 of 2011.***

***Some of the guiding principles enumerated in the Elgood case are that the evidence sought to be called was not available in the trial court: it must be relevant to the issues raised in the Appeal; it must be credible in the sense that it is capable of belief and it must be evidence which if considered by the court, it is of the opinion that were it available before the trial court and was considered alongside other evidence, it may have created doubt regarding the guilt of the appellant as charged.”***

In the present application, the 2<sup>nd</sup> Appellant seeks to call additional evidence of one Daniel Chege Gathecha. According to the 2<sup>nd</sup> Appellant, he was denied the opportunity to call this witness during trial due to his ignorance of the legal process. Mr. Mureithi for the State did not buy this argument. He submitted that the said Daniel Chege Gathecha was available for the 2<sup>nd</sup> Appellant to call as a defence witness but the 2<sup>nd</sup> Appellant chose not to do so. Our evaluation of the facts of this application leads us to reach the same conclusion as Mr. Mureithi. The 2<sup>nd</sup> Appellant knew that Daniel Chege Gathecha had recorded a statement with the police in respect of the criminal case facing him. He was aware that he could call him as a defence witness when he was put on his defence by the court. It is not open for the 2<sup>nd</sup> Appellant to argue at this stage of the proceedings that he should be given an opportunity to call additional evidence. The evidence that he seeks to call as additional evidence was within his reach during trial. This court is not persuaded by the argument advanced by the 2<sup>nd</sup> Appellant calling for additional evidence in this appeal. The application is disallowed.

As regard the availing of the O.B. reports of 5<sup>th</sup> and 6<sup>th</sup> January 2011 of Kiambu Police Station related to this case, this court allows the same. The prosecution did not oppose the request. The said O.B. reports shall be availed to the 2<sup>nd</sup> Appellant before the next hearing date. It is so ordered.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2015**

**L. KIMARU**

**JUDGE**

**G.W. NGENYE – MACHARIA**

**JUDGE**