



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL CASE NO. 25 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

MOSES KIPRONO NGENO.....ACCUSED

RULING

Pursuant to the **Court of Appeal Orders** issued on 25th July 2013, this court proceeded to take additional evidence from Moses Kiprono Ngeno and Ernest Langat. The first witness i.e Moses Kiprono Ng'eno testified without any hitch. However, Ernest Langat had to be stepped down to enable this court determine whether or not the person or persons who gave him the information he presented to court as evidence should be summoned to testify. This court invited submissions from learned counsels from both sides.

It is the submission of Mr. Nyaingiri, learned advocate for Moses Kiprono Ngeno, the accused person herein, that this court should summon and receive evidence from those people who gave the information that Ernest Langat has given to this court. It is Mr. Nyaingiri's submission that if this court does not summon those persons, then the evidence of Ernest Langat will be rendered inadmissible for being hearsay evidence hence of no probative value. The learned advocate urged this court to widen the scope of evidence and witnesses for the broad interest of justice. In other words Mr. Nyaingiri urged this court not to be limited by the Court of Appeal orders. Mr. Mutai, learned Senior Principal Prosecuting counsel urged this court to reject the request because to do otherwise will make this court breach the Court of Appeal orders and in essence sit on appeal in its decision. Mr. Mutai pointed out that the moment this court delivered its verdict convicting the accused, it became *functus officio*.

I have carefully considered the rival submissions. There is no doubt that on 3rd August 2009, Lady Justice Ang'awa convicted the accused person herein for the murder of his wife, Lucy Chepkoech Ngeno and thereafter sentenced him to suffer death. Being dissatisfied the accused appealed to the Court of Appeal vide **Nakuru C.A.CR.App. No. 185 of 2009**. Before the appeal was heard, the accused (appellant) successfully applied for leave to adduce additional evidence. The Court of Appeal gave the order pursuant to the provisions of **Rule 29(1)** of the **Court of Appeal Rules**. The court of appeal's order was in the following terms.

“We direct the High Court to take additional evidence from both Ernest Langat and Moses Kiprono Ngeno, the applicant herein. The High Court shall thereafter certify the evidence to this Court with a statement of its opinion of the credibility of the two persons in compliance with Rule 29(3) of this Court's Rules.”

I have now been urged to take additional evidence from other witnesses other than Ernest Langat and Moses Kiprono Ng'eno. The question which I must grapple with is whether this court has the discretion

to go wide and receive additional evidence from witnesses other than those specifically named by the Court of Appeal. With respect, I agree with the submissions of Mr. Mutai, that this court is *functus officio* in the matter. This court can only do what the Court of Appeal directed it to do pursuant to **Rule 29(1) (b)** of the **Court of Appeal Rules**. A critical examination of the order will reveal that this court was directed to do the following:

1. **Take additional evidence from Ernest Langat and Moses Kiprono Ngeno.**
2. **To certify the evidence of the witnesses named in (I) hereinabove.**
3. **Give an opinion of the credibility of Ernest Langat and Moses Kiprono Ngeno.**

It is clear in my mind that the Court of Appeal expressed itself in clear terms. This court was directed to take additional evidence from two witnesses, namely Ernest Langat and Moses Kiprono Ngeno. This court was never given the leeway or discretion to expand the number of witnesses. The Court of Appeal specified the number and names of those witnesses. I have taken time to examine the Ruling of the Court of Appeal delivered on 25/07/2013. At page 3 of the aforesaid ruling the Court of Appeal stated in part as follows:

“Although Langat did not disclose the source of his information, he sensationally claimed that he was aware that, following a disagreement between Charles Kenduiywo and the deceased, the former killed the latter.”

Mr. Nyaingiri, urged this court to take additional evidence from those people named by Mr. Ernest Langat to have given him the information he wanted to tender before this court. It is obvious from the above excerpt that Ernest Langat did not disclose the sources of his information. It is therefore not right for this court to accede to the application since the accused had failed to seek for leave to present evidence of such witnesses as additional evidence. The accused made an application to adduce additional evidence from named witnesses. If this court allows the request to receive additional evidence from witnesses other than those named it would in effect be reviewing the decision of the Court of Appeal. This court does not have jurisdiction to review the decision of the Court of Appeal. The application by the accused person amounts to this court being asked to undertake a fishing expedition in search for evidence. This court's role is strictly limited by the order from the Court of Appeal. When complying with the Court of Appeal directive, this court is not undertaking a retrial but simply taking additional evidence as ordered by the Court of Appeal. Basically, it has no discretion enjoyed by the trial court. If the accused person feel that there is need to call other witnesses other than those named, then the right forum is the Court of Appeal and not this court.

In the end, I see no merit in the request. I decline the application to receive additional evidence from witnesses other than those named by the Court of Appeal.

Dated, Signed and delivered this 27th day of November, 2013.

J.K.SERGON

JUDGE

In open court in the presence of

Miss. Muthee for Director of Public Prosecution

Mr. Nyaingiri for the Accused

Mr. Korir- court clerk