



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CRIMINAL APPEAL NO. 91 OF 2011**

**BETWEEN**

**JOHANA KIMELI:.....APPELLANT**

**AND**

**REPUBLIC:.....RESPONDENT**

*(Being an appeal from the decision of the Senior Resident Magistrate Hon. N. Shiundu dated 16<sup>th</sup> May, 2011 At Eldoret Chief Magistrate's Court Criminal Case No. 1422 of 2011)*

**RULING**

The appellant **Johana Kimeli** was charged and convicted in the Chief Magistrate's Court a Eldoret in Eldoret CRC No. 1422 of 2011. He was then fined Kshs. 80,000/- in default to serve one (1) years imprisonment. He has appealed against his conviction and sentence.

The charge sheet has not been included in this record. It is therefore not possible to determine the particulars of the offence. From the exhibited proceedings however, it is apparent that the appellant was charged with an offence related to carrying out construction without approved building plans. The petition of appeal lodged by the applicant suggests that the construction plans had indeed been approved hence this application whereby the appellant seeks to be allowed to adduce additional evidence to wit the approved building plan No. 657/2010.

The application is based on the main ground that the said plan was not available to the appellant when he was arraigned in court. There is an affidavit in support of the application sworn by the appellant in which it is deponed, *inter alia*, that when he was convicted the owner of the premises had not served him with the said approved plan which he has no availed. The same position was urged by his counsel during the hearing of this application.

The application is opposed. **Mr. Oluoch**, Learned Senior Deputy Prosecution Counsel, submitted that the appellant had not satisfied the conditions for the order he seeks. In his view, the appellant as a mason could have obtained the alleged additional evidence at the time he was arraigned in court.

I have considered the application, the supporting affidavit and the submissions of counsel. Having done so, I take the following view of the matter. The offence with which the appellant was convicted was allegedly committed on 16<sup>th</sup> May, 2011 at around 1:20pm. The charge sheet has not been exhibited but it seems obvious that the appellant was arraigned in court on the same date 16<sup>th</sup> May, 2011. The appellant is

recorded to have pleaded guilty when the charge was read to him and when the facts were stated he confirmed that they were true. When given an opportunity to mitigate he said he had none.

It is unbelievable that as a mason, the appellant would have commenced construction of the building without any plan. Yet that is exactly what the appellant said he did when the charge was read to him and when the facts of the offence were stated. Another opportunity to introduce the plan presented itself when the appellant was asked to mitigate. He said he had no mitigation to offer.

The principle upon which an appellate court, in a criminal case, will exercise its discretion as to whether to allow additional evidence to be adduced were stated in **Elgood -Vs- Regina (1968) E.A 274**. They are as follows:-

- 1) *The evidence which is sought to be called must be evidence which was not available at the trial;***
- 2) *It must be relevant;***
- 3) *It must be credible;***
- 4) *The court will consider the evidence together with the evidence on record to determine whether it could create reasonable doubt.***
- 5) *It is only in very exceptional cases that the evidence will be permitted.***

The appellant was alleged to have been in the process of construction when he was arrested. He should have been carrying out the construction on the basis of a building plan. So the plan was available at the time of taking his plea, yet he never alluded to the same. In my view the appellant has become wiser after the event. I detect no special circumstance in his case.

In the premises I decline the appellant's application. It is accordingly dismissed.

It is so ordered.

**DATED AND DELIVERED AT ELDORET  
THIS 6<sup>TH</sup> DAY OF OCTOBER, 2011**

**F. AZANGALALA  
JUDGE**

**Read in the presence of:-  
Mr. Kiboi for the appellant and  
Mr. Oluoch for the state.**

**F. AZANGALALA  
JUDGE  
6<sup>TH</sup> OCTOBER, 2011**