



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 319 of 2009

REPUBLIC.....APPELLANT

VERSUS

RICHARD MWANGI WAMBUGU.....RESPONDENT

***Evidence- Taking of additional evidence - in order to discover or obtain proper evidence -  
Section 173, Law Evidence Act, (Cap. 80, Laws of Kenya).  
Criminal Law and Procedure - court may in dealing with an appeal - order the taking of  
additional evidence, the Criminal Procedure Code, (Cap. 75 Section 358)***

**RULING**

This ruling relates to a Notice of Motion (*the Application*) dated 24<sup>th</sup> February 2010 brought under a certificate of urgency by G. E. Mugambi, a State Counsel, Office of the Attorney-General in which the Attorney-General seeks leave to adduce additional evidence during the hearing of the appeal. The application is based upon the Supporting Affidavit of one Simon Manyara Munge, the complainant sworn on 24<sup>th</sup> February 2010, the attachments thereto, and the grounds on the face of the application -

- (a) *that new evidence has been found which would not be availed even with due diligence during the hearing of Nakuru C.M.Criminal Case No. 6769 of 2008 which gave rise to the appeal herein,*
- (b) *that if the said evidence is produced, the said appeal will have overwhelming chances of success, and*
- (c) *that it is in the best interest of justice that the application is allowed;*

The Respondent, Richard Mwangi Wambugu, did not file any reply to the affidavit of the complainant, Simon Manyara Munge. Instead Mr. Githui learned counsel for the Respondent submitted to the court that the application should be dismissed because -

- (a) *Section 173 of the Evidence Act does not allow the court to call for evidence. It only allows the Court to ask questions.*
- (b) *the deposition which the applicant now seek to present to the court is what they ought to have done in the lower court when they had called an expert Luka Wako who gave evidence that the chassis of the two motor vehicles were intact. Counsel submitted that the prosecution had had their opportunity and that no case is made for recalling a witness, the applicants had exhausted their chances; and*
- (c) *that the deponent Simon Manyara Munge was not being candid, in paragraph 4 of his supporting affidavit that he had known the person who had carjacked him whereas in his evidence on oath he had testified that they had been driven to an unknown destination; the counsel called the deponent a liar.*

I have considered the application, and the arguments by both counsel. What emerges from the application is that there is a divergence of records of the subject motor vehicle KAL 906M, and KAA 256K, both as to their chassis numbers, and particulars of ownership. The complainant has obviously gone to great lengths to unearth what he believes to be the correct information and identity of his motor vehicle, and desires this new evidence, be availed to the court in order to ensure that justice is done to him as a complainant and for the court to ensure that there is no miscarriage of justice against the Respondent.

I agree with Mr. Githui that Section 173 of the Evidence Act, (Cap. 80, Laws of Kenya), does not empower this court or the lower court to call for or adduce additional evidence. The section merely allows this and the lower to raise any question during the trial in order to

discover or obtain proper evidence. This or the lower court cannot raise any questions where a trial is concluded or on appeal unless it first makes an order for the taking or adduction of additional or further evidence.

Section 358 of the Criminal Procedure Act, (Cap 75, Laws of Kenya), confers upon this court for reasons to be recorded, power to receive additional evidence, and may either take evidence itself or direct it to be taken by a subordinate court.

As already stated, the complainant has, not being a Police detective, gone to great length, to obtain what he believes to be the evidence necessary to prove that the motor vehicle KAL 906M before it was baptized KAA 256K was actually his, and not that of the Respondent. *Secondly*, for the Attorney General to actually prefer an appeal, there must be in existence a great grievance with the proceedings and outcome of the prosecution in Nakuru CMC Cr. Case No. 6769 of 2008 which gave rise to the appeal. *Thirdly*, and despite submission by Mr. Githui learned counsel for the Respondent, that the prosecution had had their day in court, the application herein raises a deep suspicion that the records of the rival vehicles - KAL 906M and KAA 256K at the Registrar of Motor Vehicles are compromised. The only way of clearing that suspicion, and determining the identity of motor vehicles KAL 906M and KAA 256K is by obtaining further evidence on the matter. Both parties will have opportunity to test the veracity or otherwise of the complainant's claims by cross-examination and re-examination if necessary. No party would be prejudiced. As they say, it is better for one guilty person to go scot free, than an innocent person should be confined to the dungeons.

Section 358 provides that where the court determines that additional evidence should be taken, this court may either take the evidence itself, or direct that it be taken by a subordinate court and have such evidence certified and forwarded to the High Court.

I therefore direct that the trial file be remitted to the subordinate court for the taking of additional evidence, and thereafter remit the same to the High Court for purposes of determination of the appeal herein.

The motion herein succeeds and there shall be orders accordingly.

**Dated, delivered and signed at Nakuru this 30<sup>th</sup> day of April, 2010**

**M. J. ANYARA EMUKULE**

**JUDGE**