



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 91 of 2007

SIMON OCHULU NAMUYA.....1st APPELLANT

JAMES EMAKAI MANMAN.....2nd APPELLANT

VERSUS

REPUBLIC RESPONDENT

[From original conviction and sentence in Criminal Case number 425 of 2006 of the Chief Magistrate's Court at Kisumu]

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk – George/Laban

Appellant in person

RULING

The application filed by both appellants on the 14th February 2009 is two pronged. It is firstly for leave to adduce more grounds of appeal and secondly for the production of a police occurrence book (O.B) during the hearing of the appeals.

The leave to adduce more grounds of appeal is in essence leave to amend the petitions of appeal and this may be granted without much ado under the proviso to Section 350 (2) of the Criminal Procedure Code. We, accordingly, grant the first prayer.

Regarding the second prayer, Section 358 (1) of the Criminal Procedure Code grants this court the power to take further evidence. It provides that:-

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

The Learned Senior Principal State Counsel, Mr. Musau, is of the view that the prayer for further evidence is not merited as it is not shown even by way of the supporting affidavit that the intended further evidence would lead to this court arriving at a different verdict.

The first appellant contended that their request for the occurrence book (O.B) at this stage is prompted by the refusal of the learned trial magistrate to have it produced during the trial.

However, the lower court record does not bear out the appellants. It shows that the trial magistrate granted the appellants’ request to have the occurrence book (O.B.) dated 31st may 2006 to 6th June 2006 produced in court. The request was granted on several occasions and at one point the trial magistrate ordered that the OCS Kondele Police Station appear in court and produce the said occurrence book (O.B). A-long the way, the occurrence book was forgotten and the appellants did not persist in having it produced. This was an indication that they waived their request and opted to proceed with the trial without the occurrence book.

The waiver meant that the appellants no longer required the occurrence book. They deemed that its production was no longer necessary. Therefore, their current request for its production on appeal is, in our view, an afterthought.

In any event, they have not shown as observed by the learned State Counsel, that the production of the occurrence book will add value to their appeals.

The second prayer must in the circumstances be rejected and we hereby reject it.

Those are our orders.

Dated, signed and delivered at Kisumu this 29th day of October 2009

J. W. MWERA

J. R. KARANJA

JUDGE

JUDGE

JRK/aao