



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MALINDI**

**Criminal Appeal 55 of 2005**

**1. OMAR KALU JEFWA & 3 OTHERS**

**2. MOHAMED SHALI BAIN**

**3. BALOZI KITSAO KATANA**

**4. NURU SALIM OMAR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

When this appeal came up for argument, learned counsel for the appellants made an application under Section 358 of the Criminal Procedure Code seeking to adduce additional evidence on appeal. The application was not opposed by the learned counsel for the respondent, whose only concern was the procedure used. He relied on the case of **R V Kipkering Arap Koske**, (1949) 16 EACA, 135, whose relevance seem to have been confined in many cases to what constitutes circumstantial evidence.

In the case the Court of Appeal for Eastern African held, *inter alia*, that an application to call additional evidence is not granted automatically. That it is a matter of judicial discretion and will only be granted where existence of special circumstances has been shown by the applicant. But more significantly, that case established that the correct procedure in making the application is for the applicant to show, by affidavit, why the evidence was not adduced at the trial and the nature of additional evidence sought to be adduced.

This means that a formal application by way of Notice of Motion supported by an affidavit sworn either by the applicant or his counsel is the vehicle for bringing such application. Without pre-empting the application, there are established parameters for the grant of such application.

It is ordered that the applicant files a formal application within 14 day from today's date and serve the same on the Attorney General who has 14 days from the date of service to respond. Thereafter a hearing date to be taken at the registry.

Dated and delivered this 9<sup>th</sup> day of March 2006 at Malindi.

**W.OUKO**

**JUDGE**

9.3.2006

Coram

W.Ouko, J

Mr.Shujaa for Mr. Abubakar

Mr.Ogoti for Respondent.

Three Appellant present.

Ruling delivered.

W.OUKO

JUDGE