REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 134 & 137 of 2003

OMAR GALGALO ……. 1ST APPELLANT

AHMED ADEN KORE ……..……. 2ND APPELLANT

VERSUS

REPUBLIC ……..……..…….. RESPONDENT

R U L I N G

The application before the court is dated 30.5.2005. It is brought by the 2nd appellant and seeks leave of court to introduce at this appeal stage evidence concerning Gerbattula Police Station Occurrence Book record of 5.1.2003. This means that the appellant is seeking leave to call additional evidence which was not adduced during the lower court trial stage.

In his argument before us the 2nd appellant argued that he had sought for the production of the said O.B. several times during the trial in the lower court but that his requests were ignored by the court. He further said that at one time the court had to adjourn over his request to enable the O.B. to be produced the next time but it was not produced when the court resumed. He argued that he wants the court to ascertain whether or not the complainants indeed mentioned their names to the police when an early report of the incident was made. The 1st appellant adopted similar argument.

Mr. Oluoch, the state counsel, strongly opposed the application. He referred us to the principles under which additional evidence will be introduced in the appellate court. He said such principles do not allow the appellants in this case to introduce new evidence.

We have carefully perused the lower court record. Nowhere in the record do we find appellant's application seeking the production of the said Occurrence Book. Only when PW4 was being cross-examined by the applicant over the issue as to whether or not the complainant mentioned the appellant's name to the police did the witness state that it was the court that should decide the matter. It is not clear whether the appellant had sought the O.B. to confirm the witness's that it was the court that should decide that matter. Even if such might have been the position, nowhere in the record did the appellants ask that the O.B. be produced. We do not see a situation where the appellant could have done so, and the court refuse to record the request. We therefore find as a matter of fact that the appellants did not seek the production of the O.B. at any time during the trial. This means in our view, that the idea has only dawned in their minds recently. Should they then be granted the leave they seek under these circumstances?

In the case of **Elgood V. Regina (1968) E.A.** 274 it was held that the principles upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence for the purpose of the appeal are:-

(a) That the evidence that is sought to be called must be evidence which was not available at the trial.

(b) That it is evidence that is relevant to the issues.

(c) That it is evidence that is credible in the sense that it is capable of belief.

(d) That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial.

We are of the view that the total effect of the above conditions when considered together, is that it will be in rare and exceptional cases that an appeal court will grant that additional evidence be called. To enable the appellate court to make a fair and just decision, an applicant unlike in this case, should attach the specific evidence intended to be introduced so that the court can consider whether it justifies granting appellant's request for additional evidence. As things stand, the O.B. or copy therefore was not availed to us. We are however doubtful whether even if the same were availed, the tough conditions set down above could have been fulfilled. As things stand the appellants had opportunity to call for the O.B. during the trial but avoided or at least failed to call for it. They have not convinced us that the entries they seek are in their favour. The impression they gave us is that they do not know the contents thereof and that they are trying their luck to have the O.B introduced in case the entries turn out to be in their favour. Nor do we presently understand that those O.B. records would persuade our opinion on the appellant's conviction. It may be said, however, that if the O.B. entries were shown to us and turned out to be favourable to the appellants, it may have influenced us to grant this application, provided it would be strong enough to change our view about their guilt.

In conclusion, we find that this is not a suitable case where additional evidence should be allowed. We therefore reject the application before us which we hereby dismiss. The court will hear this appeal in October 2005.

We order accordingly.

Dated and delivered in Meru this 29th day of September 2005.

D.A. ONYANCHA

JUDGE

29.9.2005

RUTH N. SITATI

JUDGE

29.9.2005