

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.180 OF 1999

**(From Original Conviction and Sentence in Criminal Case No.970 of 1998
of the Chief Magistrate's Court at Mombasa. –Jo-Anne Siganga, Miss –
SRM)**

BENARD KAGO NJUGUNA.....APPELLANT

= V E R S U S =

REPUBLIC.....RESPONDENT

R U L I N G

By Notice of Motion filed on 26.2.01, the Appellant Benard Kago Njuguna seeks leave to have a statement recorded by the Police from PW.8, ABDALLA HAMISI produced before this Court as part of the record of Appeal. He invokes S.358 of the Criminal Procedure Code which donates the power to this Court to admit additional evidence for reasons to be recorded.

In his Affidavit in support he states that he cross-examined the said witness on the statement and it was read out in court. It was not produced however as part of the court record which means the Applicant cannot refer to it in his Appeal. Opposing the application, Learned State Counsel Mr. Ogoti submitted that the opportunity to have the statement produced was before the Lower Court but the Applicant did not take it. Having the statement produced at this stage would be tantamount to cross-examining the witness on Appeal and thus constructing a new line of defence on Appeal.

I have perused the Lower Court record as pertains to the witness ABDALLA HAMISI (PW.8). The statement in issue clearly featured in the proceedings and was read out in court. The witness answered questions on it. The applicant could have applied for production of the statement as an exhibit but he did not. He was unrepresented and says he was ignorant of the procedure. As the adage goes however, ignorance of the law is no defence.

I think in this particular matter what the Applicant seeks is not new evidence as such. It is inclusion as part of the record of Appeal of a document clearly referred to and cross-examined on. It is a necessary document for the Appellate Court to have sight of for further appreciation of the evidence and I would in my discretion allow the application made. The statement recorded by Police from PW.8 ABDALLA HAMISI shall be produced when the Appeal comes up for hearing.

I may observe that the Applicant appears to have Advocates on record but the application is made in person. He should clarify whether he is now acting in person before the Appeal is set down for hearing.

Dated this 11th day of May 2001.

P.N. WAKI

J U D G E

