



**PKW v Republic (Criminal Appeal 103 of 2022)
[2024] KEHC 2617 (KLR) (11 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2617 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 103 OF 2022
SC CHIRCHIR, J
MARCH 11, 2024**

BETWEEN

PKW APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. Through the Notice of motion dated 18th July 2023 the Applicant seeks for the following orders:

- a). That the appellant be granted leave to adduce further evidence which was not available at the lower court.
- b). That the complainant be subjected to an age assessment test before the hearing and determination of the appeal.
- c). That any orders that the court may deem expedient for the fast and expeditious hearing and determination of the appeal.
- d). That the costs of this application be provided for.

2. The Application is supported by his affidavit of an even date.

3. In his affidavit, the applicant avers that his main ground of appeal against the decision of the Trial court is that the court failed to consider the contradictory evidence on the age of the complainant; that he was not aware of his right to request for an Age- assessment. He further states that he recently came across new evidence that showed that the complainant was not 15 years at the time of the alleged offence.

4. He argues that he should be given an opportunity to be heard again, since he would otherwise serve an unlawful sentence if the prayers sought was not granted.



5. The respondent opposed the Application.
6. The respondent contends that the Appellant is seeking to introduce evidence and which evidence in any event was already available at the trial court.
7. They aver that there are various means to ascertain the age of the complainant other than the age assessment and that Applicant had an opportunity to question the age of the complainant as opposed to seeking to introduce new evidence when the matter is already at this stage.
8. The Respondent further states that the alleged evidence is still not available, as at the time of the application, and the applicant would still need the court's assistance to subject the complainant to an age assessment for purpose of procuring the evidence he is seeking for.

Applicant's submissions

9. In his submissions, the appellant states that he was convicted of the offence of defilement of a 15-year old, who claimed to have been in form four at the time ; that he could not effectively cross-examine the complainant on this issue as he was not represented.
10. In making a case for admission of additional Evidence, he has relied on section 358 of the *Criminal Procedure Code*, the decision in the case *Mohamed Abdi Mohamudv ahmed Abdulabi Mohamad and 3 others* (2018)eKLR and *Safe Cargo Limitedv Embakasi Properties Limited And 2 Others* (2019) eKLR.
11. He prayed to introduce a letter dated 5th July 2023 from the complainant's former school which he claims would prove the age of the complainant .
12. The Respondent did not file submissions

Determination

13. The only issue for determination is whether this court should allow the admission of new evidence on Appeal.
14. Section 358 of the *Criminal Procedure Code* (cap.75) allows an appellate court to admit fresh evidence in the interests of justice. The section reads as follows;

“Power to take further evidence

1. In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.
2. When the additional evidence is taken by a subordinate court that court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal.
3. Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.
4. Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court.



15. The case of *Elgood v Regina* (1968) E.A. 274 highlights the principles upon which an appellate court, in a criminal case, can exercise its discretion in deciding whether or not to allow additional evidence for the purpose of the appeal. The principles are :
- (1) That the evidence that is sought to be called must be evidence which was not available at the trial.
 - (2) That it is evidence that is relevant to the issues.
 - (3) That it is evidence that is credible in the sense that it is capable of belief.
 - (4) 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.
16. In the case of *Samuel Kangu Kamau v Republic* (2015) eKLR the Court of Appeal stated that;
- “It has been said time and again that the unfettered power of the court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in determination of the appeal.”
17. From the above stated principles, 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.
18. On the first principle, the Applicant has not indicated what effort he made if any, to procure what he now considers new evidence. The Applicant must be able to convince the court that he was not aware of the evidence in question and that he made an effort to look for, but was not successful. His affidavit is very silent on this. On the first principle therefore the Applicant has failed the test.
19. On the 2nd and 3rd principle, the factor of age is central to sexual offences affecting minors as the question of age determines the appropriate sentences in the event that the accused person is convicted of the offence. Whether the, complainant was 15 years or not is therefore a relevant issue and the facts that would go towards proving or disapproving that fact is relevant.
20. This takes us to the last two principles. The two principles presuppose that the Evidence which the Applicant seeks to have admitted are available. This will allow the court to interrogate its relevancy and the effect it would have had on the case if the said evidence could have been available during trial.
21. In the present case , the Applicant does not have the Evidence. He is telling the court to subject the complainant to Age assessment test as to establish her age. He is not sure of her age and he wants the court to assist him to fish for that evidence. In effect there is no basis upon which this court can determine the merit of the Applicant’s Application as the said evidence has not been availed
22. The Court of Appeal, (Chesoni Ag JA, as he then was), in *Wanje v Saikwa* [1984] KLR 275 stated that:
- “This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purposes of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case on appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh



case or to improve their case by calling further evidence. It follows that the power by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”

23. The applicant argument is that the complainant was probably not 15 years at the time of the trial. In his supporting affidavit, he attached a letter purporting to come from the complainant’s school showing that the complainant sat for her KCPE in 2015, then aged 13 years. The letter is not in an official letter head of the school as would be expected. In the lower court proceedings, the prosecution produced the birth certificate as Exhibit 1 which stated that the complainant was born on 5/12/2004. Even if the letter that has been submitted was available at the time of trial and it would have been erroneous for the court to disregard the Birth certificate and base its finding on a letter. In short the letter is not credible in any event.
24. In short, the Applicant has failed to demonstrate that he is deserving of the orders sought and the Application is hereby dismissed.

DATED SIGNED AND DELIVERED AT KAKAMEGA THIS 11TH DAY OF MARCH 2024

S.CHIRCHIR

JUDGE

Godwin – court Assistant

Mukwale for the Applicant

The Applicant

