



Olunga v Jeruto & another (Suing as the Legal Administratrixes of the Estate of Alex Tumwet Cherop – Deceased) (Civil Appeal E026 of 2022) [2024] KEHC 3394 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E026 OF 2022
AC MRIMA, J
APRIL 11, 2024**

BETWEEN

RICHARD OSUNDWA OLUNGA APPLICANT

AND

DOROTHY JERUTO 1ST RESPONDENT

JANE KOMEN 2ND RESPONDENT

SUING AS THE LEGAL ADMINISTRATRIXES OF THE ESTATE OF ALEX TUMWET CHEROP – DECEASED

RULING

1. This ruling relates to a Notice of Motion dated March 10, 2023. It was taken out by the Appellant/Applicant.
2. The application sought leave of this Court for the Appellant/Applicant to adduce additional evidence on appeal. According to the Appellant, the evidence were the proceedings and decision in Kitale Chief Magistrates Traffic Case No. E564 of 2021 Republic vs. Richard Osundwa Olunga (hereinafter referred to as ‘the Traffic case’).
3. Through an Affidavit in support of the application, the Appellant herein deposed that he was sued as the Defendant in Kitale Chief Magistrates Civil Case No. 41 of 2019 Dorothy Jeruto & Jane Komen [Suing as the Legal Administratrixes of the Estate of Alex Tumwet Cherop(Deceased)] v Richard Osundwa Olunga (hereinafter referred to as ‘the civil case’).
4. It was averred that the cause of action in the civil case was based on negligence that allegedly led to an accident on 1st February 2010 involving the Late Alex Tumwet Cherop (hereinafter referred to as ‘the



- Deceased’) and motor vehicle registration number KCJ 899N make Toyota Vanguard Station Wagon (hereinafter referred to as ‘the vehicle’) a result of which the deceased suffered fatal injuries.
5. The Appellant further averred that he was sued in the civil case as the insured/beneficial owner/legal owner, the driver and/or registered owner of the vehicle and that the judgment thereof was delivered on 22nd August, 2022. The Appellant was found wholly liable for the accident and was decreed to compensate the estate of the deceased.
 6. Dissatisfied with the trial Court’s rendition in the civil case, the Appellant preferred the instant appeal.
 7. It was deposed that, later, the Appellant was acquitted in the Traffic case. That was after the determination of the civil case and having already preferred this appeal. As a result, the Appellant filed the instant application in a bid to introduce the proceedings and the decision in the Traffic case herein, which according to him are relevant in respect to settling the issue of liability. The Appellant noted that he was found wholly liable in the civil case, but instead found not liable at all in the Traffic case.
 8. Through his written submissions dated 30th October 2023, the Appellant expounded on the foregoing. He referred to several decisions in urging this Court to allow the application.
 9. The application was vehemently opposed by the Respondents. They filed a joint Replying Affidavit they swore on 26th April, 2023 in which they expressed their utter displeasure to the findings in the Traffic case and indicated that they had instructed the ODPP to lodge an appeal against the said decision.
 10. To the Respondents, since the findings in the Traffic case are not final, they can not be of any value to the current proceedings more so since eye witnesses testified in the civil case as opposed to in the Traffic case.
 11. In their written submissions dated 24th January, 2024, the Respondents went through the guiding law on the subject and referred to several relevant decisions. They urged this Court to dismiss the application and forge towards an early determination of the appeal.
 12. As said, the application under consideration is one for leave of the Court for the Appellant to adduce additional evidence on appeal. Therefore, Section 78 of the *Civil Procedure Act* and Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules, 2010 are the legal foundational basis of the application. For ease of reference I will reproduce the said provisions.
 13. Section 78 of the *Civil Procedure Act* states as follows: -
 1. Subject to conditions and limitations as may be prescribed, a appellate court shall have power –
 - a)
 - b)
 - c)
 - d) to take additional evidence or to require the evidence to be taken;
 - e)
 2. Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.
 14. Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules, 2010 provide as follows: -



- 27.
- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if
 - a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
 - b. the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.
 - (2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.
28. Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the Court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.
29. Where additional evidence is directed or allowed to be taken the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.
15. Superior Courts have, as well, dealt with the aspect of additional evidence on appeal. The Supreme Court in *Mohammed Abdi Mohamud v Ahmed Abdulahi Mohamad & 3 Others* [2018] eKLR laid down the following governing principles: -
79. We therefore lay down the governing principles on allowing additional evidence in appellate Courts in Kenya as follows:
- (a) the additional evidence must be directly relevant to the matter before the Court and be in the interest of justice;
 - (b) it must be such that, if given, it would influence or impact upon the result of the verdict although it need not be decisive;
 - (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
 - (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
 - (e) the evidence must be credible in the sense that it is capable of belief;
 - (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
 - (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;



- (h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;
- (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful;
- (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;
- (k) The Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

16. The Court of Appeal in *Safe Cargo Limited v Embakasi Properties Limited & 2 Others* [2019] eKLR, in a Five-Judge Multi Bench, added its voice to the subject in as follows: -

12. This Court in discussing its power to admit additional evidence under Rule 29(1) stated as follows in *Republic v Ali Babitu Kololo* [2017] eKLR

.... 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 the determination of the appeal.

17. Guided by the foregoing parameters, this Court shall now apply the same to the matter at hand. This Court has carefully considered the record in the civil case and the intended additional evidence.

18. It is a fact that one of the central issues in both the civil case and the traffic case was the manner in which the accident occurred and who was to blame. Several witnesses testified in both cases. Whereas the police officer who investigated the traffic case testified in the traffic case, another officer just produced the police records on how the accident occurred in the civil case. There were also several eye witnesses in the traffic case as opposed to the civil case.

19. Indeed, it is undeniable that the traffic case had not been determined by the time the civil case was. As such, the additional evidence was not available at the hearing of the civil case.

20. The nature of the additional evidence is worth a mention. It is such evidence that will greatly enable this Court to fairly determine the manner in which the accident occurred and who was to blame. The evidence will also accord this Court an opportunity to ascertain the weight of the evidence by the witnesses who testified in both cases. No doubt, the evidence is intended to remove any vagueness or doubt over the manner in which the accident occurred and has a direct bearing on the main issues in this appeal.

21. This Court is satisfied that the additional evidence is not aimed at removing lacunae and filling gaps in the Appellant's evidence or, in other words, to fill up omissions or patch up the weak points in case. Since the Appellant was held to be wholly liable for the accident, the additional evidence is needful.

22. It is on the basis of the above that this Court, reluctantly so, has to give way to the application.

23. The application is, hence, merited and, in the end, the following orders do hereby issue: -

- a. Leave is hereby granted to the Appellant/Applicant to adduce additional evidence on appeal.



- b. The evidence shall be limited to the production of the proceedings and decision in Kitale Chief Magistrates Traffic Case No. E564 of 2021 Republic v Richard Osundwa Olunga.
- c. The evidence shall be produced either by the one who is the custodian of the Court file or his/her nominee, or by the consent of the parties herein, as the case may be.
- d. No any other witness shall be recalled for examination as a result of the additional evidence.
- e. In the event a witness has to produce the additional evidence, such evidence will be recorded by this Court.
- f. Given the age of this appeal, a date for receiving the additional evidence shall be fixed today.
- g. Costs of the application shall be in cause.
- h. If need be, leave to appeal is hereby granted.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 11TH DAY OF APRIL, 2024.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Abok, Learned Counsel for the Appellant/Applicant.

Mr. Kiboi, Learned Counsel for the Respondents.

Chemosop/Duke – Court Assistants.

