Ngugi v Republic (Criminal Appeal E087 of 2023)
[2024] KEHC 7061 (KLR) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7061 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E087 OF 2023

BM MUSYOKI, J

JUNE 7, 2024

BETWEEN

LEONARD JOHN MUNYUA NGUGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. When this matter came for hearing of the appeal on 4-06-2024, the appellant sought through application dated 31-05-2024 to be allowed to adduce additional evidence in the appeal. The application was supported by the appellant's affidavit sworn on 31-05-2024.

2. The grounds put forth by the applicant's advocate in his submissions were that the documents he sought to produce as additional evidence were not available to him at the time of the trial, they had in impact or influence on the lower court's verdict and that they were relevant to the case. The counsel's line of argument was substantially a departure from the grounds appearing on the face of the notice of motion. The grounds appearing on the application were clearly touching on the merits of the appeal. For this reason, I will not consider the grounds shown in the application. I will address myself to the principles which have been settled as points of consideration in applications of this nature.

3. Counsel for the appellant cited and relied on the cases of *Elgoon v Regina (1968) EA 274*, *LO v Republic* (2019) eKLR, *Samuel Kungu Kamau v Republic* (2015) eKLR and *Okeno v Republic (1973) EA 32* which set out grounds for allowing an application for adducing of additional evidence on appeal. The Supreme Court of Kenya has also restated and settled the grounds to be applied in our courts. In *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & Others* (2018) eKLR, the court held that;

4. '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;

    e. The evidence must be credible in the sense that 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 fascie* 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 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 week points of his/her case;

    k. The court will consider proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on 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.

5. If any of the above principle is found lacking in the evidence sought to be adduced, the application must fail. The applicant submitted that he was at the time of the trial not able or in a position to obtain or get the documents he seeks to introduce in the appeal. For clarity purposes these documents are; a letter from the Office of the Director of Public Prosecution dated 27-06-2017, a letter from the same office dated 15-03-2018, a letter whose date is unclear apparently authored in December 2017 from the office of Director of Criminal Investigations Kikuyu and plaint and 3 defences filed in Environment and Land Court at Thika case number E028 of 2023. There is another letter dated 18-12-2017 from the Office of the Director of Public Prosecutions which is attached to the application but not marked. The said letter is also not referred to in the prayers in the notice of motion. I take it that the said letter was inadvertently placed in the application and was not meant to be party of the evidence the

appellant sought to adduce. The respondent has submitted that these documents are not new to any of the parties; that they are not relevant and that they have no impact on the outcome of the case. I will address each of the five documents as against the principles set by the Supreme Court in the *Mohamed Case* (*supra*).

6. In respect to the letter dated 27-06-2017, the respondent submits that it is part of the lower court record and was available to all the parties at the time of the hearing. I have carefully gone through the court record and particularly proceedings of 21-09-2017. On that date, the prosecutor made an application to withdraw the matter under Section 87A of the *Criminal Procedure Code*. In response to that application, the advocate for the complainant made reference to a letter dated 27-06-2017. According to what is recorded, the complainant's advocate indicated that the letter was advising the prosecutor to withdraw the matter under Section 202 of the *Criminal Procedure Code*. The appellant and his advocates were in court on that day and participated in the application. The letter was also captured in the court's ruling delivered on 12-10-2017. I have no doubt that the letter referred to in these proceedings is the same one produced as exhibit 1 in the application before me. That document in my considered opinion is not new. The appellant had access to that letter even before PW1 testified. This particular evidence does not therefore meet the criteria set out above for reason that it was available for the appellant during the trial.

7. I turn to the letter dated 15-03-2018 which is marked as exhibit 2. This letter was addressed to the Presiding Judge of this court. It was seeking revision of decisions of the subordinate court dated 8-03-2018 and 12-10-2017. The rulings sought to be revised denied the prosecution's application to withdraw the case under Section 87A of the *Criminal Procedure Code.*

8. The proceedings show that on 18-04-2018, the matter came before the trial court and the prosecution stated that the matter was pending for revision before the High Court. He sought an adjournment on that ground and the appellant had no objection. In the subsequent proceedings of 31-05-2018, 24-07-2018, 28-08-2018 and 20-11-2018 the pendency of High Court Revision which was described as revision number 4 of 2018 was the reason for adjournments. The appellant was present on all these dates. It is clear that the parties were aware of the revision, its nature and contents. I hold that the letter dated 15-03-2028 having been the origin of the revision, it could not and cannot be new evidence. The appellant as an active party who benefited from the adjournments which were caused by the existence of the revision cannot turn around now and say that he was not aware of the letter which was the basis of the revision. With use of reasonable diligence, he would have known existence and contents of the letter. I hold the view that one cannot just sit pretty while a revision touching on the case in which he is the accused is undergoing revision.

9. The other document sought to be introduced is the one done in December 2017. The document is said to be a report written by one Adan A. Hassan who is described as DCIO Kikuyu. It is not clear where, when and how the applicant got the said document. It contains an analysis of the evidence collected by the police. It appears to me that the document was photocopied from a bundle of spirally bound bundle. Whereas it is not clear whether the appellant had opportunity or was in a position to get or access the document before or at the time of the hearing, I am not convinced that the document passes the test of credibility. The contents of the document are not credible because the same is not signed and its date is not clear. I doubt its admissibility. In any event, an advisory opinion from a DCIO to a CCIO is not relevant to a trial in a criminal case. The final decision to charge rests with the Office of the Director Public Prosecutions. A further scrutiny of the document shows reference to criminal case number 750 of 2015 while the case before the trial court was 700 of 2015. This document also fails the relevance test.

10. The last documents the appellant seeks to adduce are pleadings in Thika ELC number E028 of 2023. This matter was filed in 2023 after the judgment in the lower court was delivered. Obviously, the applicant would not have had opportunity to get these pleadings. But of what probative value would they have in this appeal? I don't see any. In my opinion, it should be the reverse. It is the appeal herein which may have some bearing on the ELC matter. It is not appropriate that every suit filed becomes evidence in another case. The ELC suit is completely different from this case. The applicant should proceed and prosecute his appeal to conclusion.

11. The totality of the above is that I find no merit in the appellant's application dated 31-05-2024 and I proceed to dismiss it. It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT