



**Situma v Republic (Criminal Appeal E058 of 2023)
[2024] KEHC 11712 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11712 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E058 OF 2023
AC MRIMA, J
OCTOBER 3, 2024**

BETWEEN

WILSON SIMIYU SITUMA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein, Wilson Simiyu Situma, was charged, tried and convicted of the offence of Robbery with violence contrary to Section 296(2) of the [Penal Code](#), Cap. 63 of the Laws of Kenya in Kitale Chief Magistrates Criminal Case No. E4667 of 2021 (hereinafter referred to as ‘the criminal case’). The Applicant appeared in person.
2. The Applicant was sentenced to life imprisonment.
3. Dissatisfied with the conviction and sentence, the Appellant filed an appeal.
4. As the appeal was pending hearing, the Applicant filed an application by way of Chamber Summons on 28th February, 2024 for leave to adduce additional evidence on appeal.
5. The nature of the additional evidence sought to be adduced on appeal related to the manner in which an exhibit was recovered, processed and eventually produced before the trial Court. The exhibit was a Rifle make AK-47. The Applicant alleged that the evidence was riddled with discrepancies and inconsistencies.
6. In support of the application was an affidavit sworn by the Applicant and undated written submissions.
7. The Applicant, therefore, urged this Court to allow him to adduce more evidence on the aspect of that particular exhibit.



8. The application was strenuously opposed by the State through a Replying Affidavit sworn by Learned Prosecutor, Jackline Kiptoo and written submissions dated 31st July, 2024.
9. It was majorly contended that the application was short of the conditions for grant of leave to adduce additional evidence.
10. A prayer for dismissal of the application was made.
11. With the foregoing background, this Court will now look at the law on additional evidence.
12. The applicable provision is Section 358(1) of the [Criminal Procedure Code](#). The section states that: -

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.
13. The law, therefore, gives a discretion to the High Court to admit further evidence on appeal. Such discretion must, however, be exercised on sufficient grounds.
14. The Court of Appeal has severally discussed its power to admit additional evidence under Rule 29(1) of the [Court of Appeal Rules](#). That provision is *pari materia* with Section 358(1) of the [Criminal Procedure Code](#) which is the enabling law in the High Court.
15. The Court of Appeal in [Republic v Ali Babitu Kololo](#) (2017) eKLR while approving [Samuel Kungu Kamau v Republic](#) (2015) eKLR at paragraph 15 of the judgment, had the following to say: -

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. In the words of Chesoni Ag. JA (as he then was) in [Wanje v Saikwa](#) (1984) KLR 275:

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.’ (emphasis added)
16. This Court further elaborately traced the history of additional evidence on appeal in Migori High Court Criminal Appeal No. 39 of 2017 [Calvince Owino Hilter v. Republic](#) (2019) eKLR. In that matter, the Court dealt with the applicable principles as enunciated by the then Eastern Africa Court of Appeal in [Elgood v. Regina](#) (1968) EA 274. The principles are as follows: -
 - a. That the intended evidence was unavailable at the trial.
 - b. That the evidence is relevant to the issues.
 - c. That the evidence is believable.



- d. That the evidence is capable of creating a reasonable doubt in the mind of the court as to the guilt of the appellant when considered alongside the evidence already on record.
17. Returning to the matter at hand, there's no doubt that the issue of the rifle was at the heart of the criminal case. Evidence was adduced and the Applicant examined the witnesses accordingly.
18. The Applicant's contention that the evidence regarding the rifle was contradictory and veiled with discrepancies is an issue which ought to be taken on appeal. Such does not fall within any of the principles enunciated above.
19. It is this Court's finding that the application is not merited. It is for rejection.
20. It is hereby dismissed.
21. A hearing date for the appeal shall now be fixed.

DELIVERED, DATED AND SIGNED AT KITALE THIS 3RD DAY OF OCTOBER, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Wilson Simiyu Situma, the Appellant/Applicant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.

