



REPUBLIC OF KENYA



KENYA LAW
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**Wanjiru v Republic (Criminal Appeal E022 of 2023)
[2024] KEHC 14974 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14974 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E022 OF 2023
CW GITHUA, J
NOVEMBER 21, 2024**

BETWEEN

MOSES KIMANI WANJIRU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By way of an Amended Notice of Motion dated 5th March 2024, the applicant, Moses Kimani Wanjiru through his advocates, Miroya Wanjala & Company Advocates sought the following orders which are reproduced verbatim;
 - i. Spent;
 - ii. That this honourable court be pleased to expunge from the record the submissions dated the 16th of October, 2023 and all other pleadings filed by the firm of J.M Kagwi & Co. Advocates;
 - iii. That this court be pleased to expunge from the record, the application dated the 7th of November, 2023, together with the draft amended Petition of Appeal amended on the 7th of November, 2023, and any other document thereof filed by the appellant himself;
 - iv. That this honourable court be pleased to grant leave to the appellant to adduce new evidence which has become available to the applicant after conviction and while incarcerated;
 - v. That leave be granted to the appellant through the firm of Miroya Wanjala & Co. Advocates to further amend the Petition of Appeal as per the draft petition annexed hereto;
 - vi. That this honourable court be pleased to admit the appellant to bail or bond pending hearing and determination of Criminal Appeal no. E022 of 2023; and
 - vii. That this honourable court be pleased to make any further orders it deems fit and just.



2. In the grounds anchoring the Motion and in his supporting affidavit, the applicant averred that he was charged, tried and convicted of the offence of defilement by the Kandara Senior Principal Magistrate's Court Sexual offence Case no. 79 of 2019 and was sentenced to life imprisonment. He was dissatisfied with his conviction and sentence and he proffered the instant appeal.
3. He contended that the Memorandum of Appeal which was drawn and filed on his behalf by the firm of J.M Kagwi & Co. Advocates, his previous advocates, was not done satisfactorily and he subsequently sought and obtained leave to amend it. Thereafter, he prepared and filed an application together with a draft amended petition of appeal dated 7th November 2023 which his current advocates found deficient and wishes to further amend his petition of appeal as per the annexed draft petition of Appeal; that the intended further amendment will help to bring out the new and compelling evidence he had discovered as well as other issues that will assist this court in arriving at a just and fair determination of his appeal.
4. In the applicant's view, the written submissions filed on his behalf by his previous advocates were shallow and did not substantively cover his grounds of appeal hence his prayer that the same be expunged from the court record.
5. In support of his prayer for leave to adduce new evidence, the applicant claimed that when he was serving sentence, he discovered from friends of his late mother, namely, Monica Muthoni Mwangi and Priscilla Wanjiru (hereinafter Monica and Priscilla) that his late mother Susan Nyakeru had adopted him on 21st August 2002 when he was approximately one or three months old ; that he was therefore 17 years old when his trial commenced yet he had been tried as an adult which was contrary to the law; that this was information he discovered after his conviction which was not within his knowledge during the trial.
6. To substantiate the above averment, the applicant annexed to his supporting affidavit a copy of his alleged late mother's death certificate, a letter from the Directorate of Children Services, Kiambu County and two affidavits sworn by Monica and Priscilla.
7. With regard to his prayer for bond pending appeal, the applicant deposed that during his trial in the lower court, he was out on a cash bail of Kshs. 30,000; that he did not abscond his trial and he was willing and ready to abide by any terms this court may impose as a condition for grant of bail pending appeal. He urged the court to note that he had already served two years of his sentence.
8. The application is opposed by the respondent vide a replying affidavit sworn on 20th May 2024 by learned prosecution counsel Ms. Muriu. In the said affidavit, Ms. Muriu deposed that she was not opposed to the applicant's prayer seeking to expunge from the court record earlier submissions filed by his previous advocates. She asserted that what she was opposed to is his attempt to further amend his petition of appeal to introduce what he claimed to be new and compelling evidence.
9. Ms. Muriu contested the applicant's claim that he had discovered new and compelling evidence after his conviction as in her view, the documents annexed to his supporting affidavit did not amount to proof of his age at the commencement or during his trial; that the letter from the Directorate of Children Services, Kiambu County did not confirm that he was the child that was adopted by one Susan Nyakeru on 21st August 2002. She urged the court to note that when placed on his defence, the applicant informed the trial court that he was 21 years old.
10. In response to the applicant's prayer for bond pending appeal, Ms. Muriu averred that the applicant had not demonstrated that his appeal had high chances of success. She deposed that having been convicted, the applicant had been deprived of his right to liberty; and, considering that he had not demonstrated any special circumstances that would warrant consideration by this court, his application



for bail pending appeal should fail especially because she was ready to expedite hearing of the applicant's appeal.

11. In response to the averments made by Ms. Muriu, the applicant filed a further affidavit sworn on 7th June 2024 wherein he avowed that he was not aware of his background, including his correct year of birth; that it was the complainant's mother who brought a birth certificate to the trial court which showed that he was an adult.
12. In addition, the applicant asserted that since he was adopted, he was not in a position to attach his birth certificate, medical records, baptism card or birth notification to confirm his age and he wholly relied on the records kept by the Children's Office at Thika.
13. The application was canvassed by way of written submissions. In his submissions, the applicant apparently abandoned all but one prayer sought in his application as he only submitted in support of his prayer for leave to be allowed to adduce new evidence. His submissions replicated the depositions made in his supporting and further affidavits.
14. On the other hand, Ms. Muriu re-iterated the contents of her replying affidavit in her written submissions and further urged the court to find that the applicant had failed to meet the legal threshold for leave to adduce additional evidence on appeal.
15. To buttress the above submission, counsel asserted that the applicant knew his age all along since the record of the trial court shows he had a birth certificate which was to be handed over to him by the police and that is why he was able to state his age when he was put on his defence; that in his further affidavit, he made reference to a birth certificate provided by the complainant's mother that he did not avail to this court in support of his application; that therefore, the evidence he wanted to avail on appeal was not new and was not one that could not have been obtained by reasonable diligence before or during hearing of his case.
16. I have carefully considered the application, the affidavits in support and in opposition thereto as well as the rival submissions made by the parties. Having done so, I find that the main issue for my determination is whether the applicant has demonstrated that he deserves the orders sought in his application.
17. As stated earlier, the first two main prayers seeking that the submissions filed by his previous counsel and the application and draft amended petition of appeal dated 7th November 2023 be expunged from the court record were not opposed by the respondent. I however wish to note that contrary to the applicant's averments, the court record shows that he was not given leave to amend his petition of appeal since his application dated 7th November 2023 was never prosecuted. In the circumstances, the applicant ought to have applied for withdrawal of that application instead of praying that the same be expunged from the record.
18. Be that as it may, since the applicant has expressed an intention not to pursue the application, in the interest of good order and tidying up the court record, I will mark the application as withdrawn. I will also allow prayer 2 of the Motion and order that the written submissions filed on behalf of the applicant on 19th October 2023 by his previous Advocates be and are hereby expunged from the record.
19. Turning to the key issue for determination which is whether or not the applicant should be granted leave to adduce new and compelling evidence to prove that he was a minor when his trial in the lower court commenced, I wish to state at the outset that this court under Section 358 of the Criminal



Procedure Code section (CPC) has wide and unfettered discretion to admit additional evidence on appeal. Section 358 (1) of the CPC stipulates as follows:

“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.”

However, like all judicial discretions, the above discretion must be exercised judiciously in accordance with established legal principles and only when it was necessary to meet the ends of justice.

20. The power of the court to take additional evidence was discussed by the Court of Appeal in Samuel Kungu Kamau V Republic (2015) KECA 249, which was cited by the respondent where the court quoted with approval its previous decision in Wanje v Saikwa [1984] KLR 275 in which it had held as follows;

“.....Before the Court of Appeal will permit additional evidence to be adduced under rule 29 it must be shown that it could not have been obtained by reasonable diligence before and during the hearing. It must also be shown that the new evidence would have been likely to have affected the result of the suit.”

See also: Judith Deborah Sawe Cave Shaw V Francis Robert Shaw Civil Application No. Nai 361 of 2005.

21. The above principles elucidated by the Court of Appeal also applies in equal measure to the High Court when considering whether or not to admit new evidence in a criminal appeal like the one before this court. Consequently, for the applicant to succeed in his application, he must prove that the new evidence he wished to adduce could not have been obtained by reasonable diligence before and during his trial and that if it was available to the trial court, it would have affected the outcome of his case.
22. After perusing the evidence on record, I am not persuaded that the applicant was not aware of his age in the course of his trial. I say this because from the trial court’s record, there is evidence that the applicant’s birth certificate was available as from 18th November 2019 when the OCS Kirwara Police Station was directed by the trial court to hand over the birth certificate to him. This followed the applicant’s complaint that his relatives had taken away his documents and the trial court directed the OCS, Kirwara Police Station to investigate the complaint and give a report on the matter. In his report on 18th November 2019, the OCS informed the trial court that the applicant’s birth certificate was being held by the investigating Officer and the court then directed that the same be handed over to him – See page 11- 12 of the record.
23. Moreover, in his further affidavit, the applicant swore that during his trial, the complainant’s mother gave to the trial court his birth certificate showing that he was an adult. He did not explain why or in what circumstances this was allegedly done since it was not usual for a court to require such evidence from prosecution witnesses.
24. Given the foregoing, it is evident that the applicant knew about the existence of his birth certificate during the trial and the same could have been in his possession given the trial court’s order of 18th November 2019. It is also apparent from the court record that he was actually aware of his age since he volunteered the information to the trial court when he was presenting his defence. He stated in his unsworn statement that he was then 21 years old meaning that when he was arrested and charged with the offence two years earlier, he was 19 years old and was thus an adult.



25. His claim that he only got to learn of his actual age from Monica and Priscilla after his conviction which made him aware that he was a minor when his trial commenced appears to have been an afterthought. In any event, the letter from the Directorate of Children’s Services, Kiambu County annexed to his application which was the source of Monica’s and Priscilla’s information does not authenticate his claim because first, it does not amount to prove of age and secondly, it does not link the applicant to the alleged adoption.
26. Flowing from the foregoing, I am not convinced that the applicant has met the threshold for grant of leave to adduce additional evidence on appeal. In fact, I am not persuaded that the evidence sought to be introduced actually existed and if it did, it is evidence which could have been obtained with reasonable diligence during the trial. Consequently, am satisfied that the prayer for introduction of additional evidence is not merited and must fail.
27. Another prayer made by the applicant was for leave to amend his petition of appeal.
The law pertaining to amendment of a petition of appeal is contained in Section 350 (2) (iv) of the Criminal Procedure Code which states as follows;
“save as provided in paragraph (i) a petition of appeal may only be amended with the leave of the High Court and on such terms and conditions, whether as to costs or otherwise, as the High Court may see fit to impose.
28. It is clear from the above provision that this court has wide discretion to grant leave to an appellant to amend his petition of appeal on terms it deemed just. Although this prayer was vehemently opposed by the respondent, I find that since a petition of appeal forms the back bone of an appeal, it would be in the interest of justice to allow the applicant to amend his petition to enable him plead all the grievances he wishes to ventilate in his appeal against his conviction and sentence. This in my view is what due process is all about. I therefore grant the applicant leave to amend his petition of appeal. The amended petition of appeal to be filed and served within the next 21 days.
29. Lastly, the applicant applied to be admitted to bond pending conclusion of his appeal but as noted earlier, this prayer among others was not addressed in the applicant’s written submissions. And other than claiming in his supporting affidavit that he was out on a cash bail during the trial and that he had already served two years of his sentence, the applicant did not depose to any exceptional or unusual circumstances that would warrant his admission to bond pending appeal. The fact that he was out on bail during his trial is not a ground entitling him to admission to bond or bail pending appeal. Unlike in the lower court when he had an automatic right of appeal, his circumstances had changed after his conviction which extinguished his constitutional right to be presumed innocent until proved guilty.
30. For all the above reasons, the applicant’s Motion dated 5th March 2024 partially succeeds to the extent stated in paragraphs 18 and 28 above.
31. It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 21ST DAY OF NOVEMBER 2024.

HON. C. W. GITHUA

JUDGE

In the Presence of:

Ms Muriu for the Respondent

Ms Miroya for the appellants present



Ms. Susan Waiganjo Court Assistant

