



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. 50 OF 2019**

**KENYA WILDLIFE SERVICE.....APPELLANT**

**VERSUS**

**JEREMIAH OMOLLO.....RESPONDENT**

***(Suing as legal representative to the estate of Richard Anyango Onyango-Deceased)***

***(Appeal from the judgment and decree in Bondo PM's Court Civil Suit No. 83 of 2018 delivered on...by Hon E.N.Wasike, Senior Resident Magistrate)***

**RULING**

1. This appeal was filed on 21/11/2019 and the same was admitted to hearing on 16/7/2020 after the lower court record was availed on 14/7/2020. The court then gave directions on the disposal of the appeal by way of written submissions on 2/12/2020 and scheduled the appeal for mention to confirm compliance and to fix a judgment date, on 14/12/2020. On the latter date, the Respondent who is the applicant herein intimated to court that he had intended to file an application for adduction of additional evidence and so he sought for more time to do so and the court granted him time to file and serve upon the Appellant's Counsel the intended application as the appellant had already complied with directions of the court and filed their written submissions to canvass the appeal.
2. This application therefore arrested the proceedings which were due for fixing of a judgment in the appeal. This ruling determines the Respondent's Notice of Motion dated 7<sup>th</sup> October 2020 and filed in court on 4th January, 2021 seeking orders that this court grants him leave to adduce additional evidence on appeal. The additional evidence sought to be adduced is the Government Chemist's Analysis Report dated 12<sup>th</sup> April, 2018 confirming that the deceased on whose behalf the suit giving rise to this appeal was initiated, died as a result of snake bite.
3. The application also seeks orders that the additional evidence be admitted by way of an affidavit and the same be filed as a supplementary record of appeal. He also prayed that costs be in the cause.
4. The applicant who is self -represented relies on the six grounds on the face of the application and an affidavit in support sworn by himself on 7<sup>th</sup> October, 2020.
5. According to the applicant, the Officer who officiated the deceased's post mortem and who requested for tests to be done by the Government Chemist was away when the postmortem and report was collected and that the said report was only recovered later after it was found to have been misfiled. He claims that the said report will be rendered meaningless yet he had invested heavily in establishing the cause of the deceased's demise. He annexed a copy of the said report from the Government Chemist
6. Opposing the Notice of Motion, the Respondent's Counsel filed Grounds of Opposition dated 13<sup>th</sup> January 2021 contending that the application was brought with unexplained unreasonable delay; the application is couched in a tenor unpalatable to the rules of Evidence contained in the Evidence Act; the application is incompetent and does not lie; the application offends section 78 of the Civil Procedure Act; the application is incurably defective; the application is misconceived and the section of the law under which it is brought does not cover it; the application is not supported by proper affidavits; the application is a departure from the object to serve substantive justice; and that the application is an abuse of the court process.
7. The application was argued orally with the Respondent submitting in person whereas Mr. Siganga Advocate submitted on behalf of the Appellant.
8. The Respondent/Applicant nonetheless filed written submissions dated 11/12/2020 which he relied upon heavily in his oral submissions while Mr. Siganga relied on his Grounds of Opposition and the authorities filed in support thereof.

9. In his written submissions, the applicant relied on several decisions including **Mohamud Mohamud v Republic [2018] e KLR** and urged the court to do substantive justice. He submitted that the Appellant will not be prejudiced in any way and that the additional evidence will assist the court to make its decision in the expedition of justice. He submitted reiterating his affidavit in support that the new evidence sought to be adduced was not available to him at the time of filing suit. He relied on the case of **Attorney General v Torriner Enterprises Ltd [2019] e KLR ; Raila Odinga & 5 Others v IEBC & Others [2013] e KLR; Kensilva Express Ltd v Commissioner of Insurance** Capp No. 39 of 2009 and urged the court to allow his application.

10. Opposing the application by the Respondent, Mr. Siganga submitted relying entirely on his Grounds of Opposition and list of authorities filed and submitted that there is nowhere where the applicant had indicated that the evidence intended to be adduced was unavailable. Counsel urged this court to dismiss the application by the Respondent with costs.

#### **DETERMINATION**

11. I have considered the application for leave to adduce additional evidence of appeal, the grounds and affidavit in support and the grounds of opposition, together with the submissions and authorities cited by both parties. I have also perused the entire trial court record.

12. In my humble view, the main issue for determination is whether the application is meritorious.

13. Section 78 of the Civil Procedure Act, Cap 21 Laws of Kenya gives this Court the power to take additional evidence, or to direct that additional evidence be taken by a trial court. This is an exercise in discretion, meaning that parties must give the Court sufficient reason to allow an application to take additional evidence.

14. The section provides:

**78. (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—**

**(a) to determine a case finally;**

**(b) to remand a case;**

**(c) to frame issues and refer them for trial;**

**(d) to take additional evidence or to require the evidence to be taken;**

**(e) to order a new trial.**

**(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.**

15. The power of the court to take additional evidence has been adjudicated upon in several decisions. In **Karmali Tarmohamed & Anor. Vs. I.H.Lakhani [1958] EA 567** the predecessor to the Court of Appeal held:

**“(i) except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available.”**

16. In **The Administrator, HH The Aga Khan Platinum Jubilee Hospital v Munyambu [1985] KLR 127** it was held that:

**“1. In exercising its discretion to grant leave to adduce additional evidence under rule 29 (1) (b) of the Court of Appeal Rules, the Court of Appeal will generally give such leave if the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial, if it will probably have an important influence on the result of the appeal, and is apparently credible though it need not be incontrovertible. Such evidence will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and where to refuse the application would affront common sense or a sense of justice.”[emphasis added]**

17. In **Wanje v Saikwa [1984] KLR 275** the Court of Appeal held inter alia:

**“1. 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.**

**2. It must also be shown that the new evidence would have been likely to have affected the result of the suit.”**

18. The above decision was cited with approval by the Court of Appeal in **Judith Deborah Cave Shaw v Francis Robert Shaw, Civil Application No. NAI. 361 of 2005 (unreported)** where it was held that:

**“... before this Court gives leave to a party to call additional evidence under Rule 29 it must be shown that the evidence sought to be introduced could not have been obtained by reasonable diligence before or during the hearing of the suit in the superior**

*court, and secondly, it must be shown that the new evidence sought to be introduced would have been likely to affect the result of the suit.”*

19. The Court of Appeal further held in Joginder Auto Service Ltd v Mohammed Shaffique & Another [2001] eKLR (Civil Appeal (Application) No. Nai. 210 of 2000) that:

**“Rule 29(1)(b), of the Rules does not set out what constitutes sufficient reason. But this Court and other courts in different common law jurisdictions have, over the years, enunciated principles to guide the courts in applications for leave to adduce additional evidence.... In summary these and several other cases decided that the power of the court and more particularly this Court, to receive further evidence is discretionary, which discretion is exercised on three broad principles, namely:**

**(1)The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.**

**(2)The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and**

**(3)The evidence must be apparently credible, although it need not be incontrovertible.**

**These are general principles, but we cannot say that they are the only ones. The relevant rule authorizing the adduction of additional evidence uses a general phrase, namely: “sufficient reason.””[ emphasis added]**

20. The matters that the Court takes into consideration when considering whether or not additional evidence in Appeals whether criminal or civil appeals are also well established. In addition to those that have been cited above, the Court of Appeal in Brown Tunje Ndago v Republic [2013] eKLR (Criminal Appeal (Application) No. 12 of 2012) held that:

**“This Court has jurisdiction to admit additional evidence only where there is a pending appeal in this Court from a decision of the superior court in its original jurisdiction such as where the superior court has convicted a person for murder or treason. In other words, this Court will only be seized of jurisdiction to entertain the application in situations which it is acting as a first appellate court from the decision of the superior court.” (see CA decision in Samuel Kungu Kamau v Republic [2015] e KLR).**

21. It follows that the court in the exercise of its appellate jurisdiction has jurisdiction to hear and determine an application for adduction of additional evidence only where the court is a first appellate court.

22. The applicant herein has invoked sections 1,3 and 3A and 78 of the Civil Procedure Act to seek that this court allows him to adduce evidence in the form of an attached copy of Report from the Government Chemist dated 12/4/2018 showing the cause of death of the deceased to be due to snake bite.

23. The background against which the applicant seeks these orders is fairly straight forward. He filed suit before the Principal MAGISTRATE’S Court at Bondo seeking for damages arising from an alleged negligence of the Appellant herein KWS following the demise of his brother after an alleged fatal snakebite on 4/4/2018 at Warianda village. After postmortem was carried out, some samples including bite site tissue and blood samples of the deceased were taken to the Government Chemist for analysis to determine whether the actual cause of death of the deceased was attributed to the alleged snake bite. However, that report which was submitted by the police at Bondo was never availed to the applicant until after the determination of the suit in the lower court, which suit was determined in his favour.

24. The appellant herein was dissatisfied with the judgment and decree of the lower court and filed this appeal and among the grounds of appeal, principally, is that the trial court relied on documentary evidence which was only marked for identification and not produced in evidence as exhibits to enter judgment for the respondent/ applicant.

25. A perusal of the trial court record does reveal that apart from the respondent’s National Identity Card which was produced as an exhibit 1, all the other documents intended to be relied upon by the Plaintiff/ Respondent herein and which were filed with the plaint as required and served on the appellant’s Counsel were only marked for identification and not produced as exhibits. The applicant then closed his case and the Appellant did not call any evidence so it closed its case and submissions were filed.

26. From the authorities that I have cited hereinabove, one fundamental consideration whether or not to allow such an application is whether such evidence was available, easily procured and within the knowledge of the person so seeking to admit it into evidence.

27. There is no evidence that the applicant sought to introduce this evidence in the trial court. The suit in the trial court was initiated on **31/8/2018** and the hearing took place and the plaintiff/ Respondent/Applicant’s case was closed 23/5/2019, whereas the Government Chemist Report is dated 12/ 4/2018 meaning the Report was in existence prior to the filing of suit.

28. However, the applicant in his sworn supporting affidavit claims that prior to the filing of the said suit, he visited Bondo Police Station several times to get copy of the said report which was expected from Kisumu but that he did not get PC Omudho Okwako who had initiated the process of the postmortem on the deceased hence the applicant filed his list of documents without including the said report. Further, that on or about the 20<sup>th</sup> day of September 2020 long after the case in the trial court was over, he received a phone call from Sgt Mutisya informing the applicant that the Report from the Government Chemist had been found misfiled in a different file so the applicant went and collected it.

29. The applicant claims that the said Report is very crucial as it establishes the root cause of the deceased's death, besides the post mortem report on record.

30. The applicant in his testimony before the trial court claimed to be a lawyer by profession. As to whether he is a practicing lawyer is for another day but from the documentation prepared by him in person and from the pleadings, on record, it is clear that he has some legal knowledge. However, it is also clear from the pleadings and testimony that the applicant herein could not tell the difference between production of his exhibits and marking of his exhibits for identification by the trial court and no doubt, closed his case without ensuring or knowing that the documents filed were only marked for identification as opposed of being produced as exhibits to support his case.

31. Among the applicant's documents filed and marked for identification was a post mortem report, death certificate for the deceased and a limited grant ad litem. I reiterate that these documents were not produced as exhibits yet the applicant had filed them and referred to them in his evidence in chief and the trial court simply marked them for identification. There is also no material on record to show that the Appellant/Defendant intimated during pre-trial that the documents as filed had to be produced by the makers thereof.

32. There are some documents such as a death certificate and grant of letters of administration ad litem which could have been produced by the applicant/plaintiff as exhibits yet the record shows that they were simply marked for identification.

33. That in itself is telling about the capability of the applicant to prosecute his case and how the trial court appreciated the applicant's production of his exhibits. It is also evident that even if the applicant/plaintiff had the Report from the Government Chemist, during the hearing of the case before the learned magistrate, the trial court may nonetheless have marked it for identification and not produced it as an exhibit since the trial court only had the identity card produced as exhibit 1 and marked all the other documents for identification.

34. My discovery in this appeal is that the applicant's case was not competently prosecuted by him and that had he been legally represented, the documents would have been produced as exhibits and not merely marked for identification.

35. The trial magistrate on the other hand marked the said documents for identification without any indication that the same would be produced at a later date and by who, yet he went ahead and wrote a judgment referring to the documents as marked, as if they were produced as exhibits. Reliance on those marked documents was obviously erroneous.

36. In my humble view, therefore, whereas this court is of the view that the applicant should have an opportunity to conclusively know the actual cause of death of his brother and whereas the Government Chemist Report is essential evidence which was not in possession of the applicant when the trial proceeded in the lower court because the police who were handling the matter did not avail it to him, this is a suitable case to find that there is sufficient cause to order for a re hearing of the applicant's case to enable him properly prosecute his case before the trial court and for the Appellant to cross examine the applicant on all documents that he may wish to produce as exhibits instead of allowing additional evidence at this stage yet there was in fact, **NO Evidence** adduced in the lower court upon which the trial court founded the judgment.

37. The error in failing to produce the documents as exhibits, which exhibits were to be in support of the applicant's case in my humble view was caused by the trial court and not the applicant and which error is amenable for correction by this court to ensure that substantive justice is achieved.

38. For the above reasons, I find and hold that merely allowing the application by the applicant herein for adduction of additional evidence would not serve the interests of justice in the instant case where the trial court marked the applicant's documents for identification as opposed to production as exhibits.

39. Accordingly, for justice to be served, I make the following orders:

***a) That this entire appeal is hereby allowed to the effect that the judgment and decree of trial court in Bondo PM CC No. 83 of 2018 and all consequential proceedings and orders are hereby set aside and substituted with an order that there shall be a rehearing of the suit before the trial court at Bondo;***

***b) The trial court record to be resubmitted to Bondo PM's Court forthwith for necessary action;***

***c) Each party to bear their own costs of this appeal and the application for adduction of additional evidence, which is hereby subsumed into the appeal.***

**Dated, Signed and Delivered at Siaya this 1<sup>st</sup> Day of February 2021**

Virtually in open court in the presence of both parties.

**R.E.ABURILI**

**JUDGE**