REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.56 OF 2018

(Appeal Originating from Nyahururu CM's Court Cr.No.1620 of 2012 by: Hon. J. Wanjala– C.M.)

PETER MWENDIA WAITHAKA.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

R U L I N G

Before this court is a Chamber Summons dated 8/10/2019 in which the appellant seeks the following orders:

1. ……spent;

2. The court be pleased to admit new and additional evidence in the form of an affidavit sworn on 19/9/2019 by one MWG;

3. The court be pleased to take further evidence from witnesess who testified before the trial court and in particular one MWG and allow the cross-examination of the said MG, based on an affidavit sworn on 19th September, 2019;

4. In the alternative to prayer 2 & 3, the court be pleased to direct the trial court or any other competent court to take additional evidence of MWG and examine her on her affidavit sworn on 17th September, 2019;

5. Any other or further order that this court may deem appropriate in the circumstances.

The application is supported by grounds found in the body of the application and affidavit of Maina Kairu, counsel for the applicant.

The applicant's case is that he was charged with two counts of defilement but was convicted on the alternative charges of committing an indecent Act contrary to Section 11(1) of the Sexual Offences Act against which the applicant has appealed. The applicant has attacked the evidence of the two minors which was materially contradictory to the statements made to the police. It is alleged that they were coached; that one of the minors, MWG who is now 16 years old has now sworn an affidavit confirming that she was coached and compelled to give false evidence against the applicant. The said statement is exhibited MK5; that the said evidence was not brought to the attention of the trial court during the trial and that had it been availed, it would have had a significant bearing on the case; that the deponent was then a minor but is now 16 years and better placed to explain herself independently; that it is in the interest of justice that the veracity of the affidavit be tested and the court do allow the said additional evidence for interests of substantive justice.

Counsel relied on the case of ***LO v Republic Cr.A.51/2017*** where the court observed that it is the discretion of the court to admit more evidence at an appeal stage. The counsel also relied on the decision in ***Elgood v Ref [1968] EA 274*** where the court gave four conditions that guide the court in determining such an application and they are: the evidence must be relevant, credible and was not available at the hearing.

In ***James Mwaniki Kairu v Republic Misc.App.7/2017 (Makueni)*** the court considered what amounts to new evidence.

The application was opposed. Ms. Rugut filed grounds of opposition to the effect that the application is frivolous, inept, made in bad faith and an abuse of the court process; that the evidence was available all through the trial and cannot be said to be new evidence; that the said evidence cannot be credible because it is not yet tested.

Ms. Rugut further urged that in the trial in the lower court, the appellant had an advocate and that through cross-examination of the witnesses, it should have established whether the minors were coached or not; that this affidavit having been filed years later, the court cannot establish whether the same was irregularly obtained from the witness. Counsel also argued that the complainants were two and only one is coming up with a different affidavit. Counsel urged the court to tread carefully in taking new evidence at an appeal stage.

The instant application is brought pursuant to Section 358(1)(2) 3 & 4 of the Criminal Procedure Code and Article 50 of the Constitution. Section 358(1) of the Criminal Procedure Rule grants a party power to adduce additional evidence on appeal. The section provides 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."***

The grant of an order to call additional evidence is therefore an exercise of the court's discretion.

The leading case setting out the principles that the court needs to consider in exercising its discretion in such application were set out in the decision of ***Elgood v Regina [1968] EA 274,*** which adopted the principles that were enunciated by Lord Parker CJ in ***Republic v Parks [1969] ALL ER 364.*** A summary of the principles is as follows:

> ***"(1) The evidence that is sought to be called must be evidence which was not available at the trial;***
>
> ***(2) That the evidence to be called is relevant to the issues;***
>
> ***(3) That the evidence is credible in the sense that is capable of belief;***
>
> ***(4) That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial."***

I have considered the decisions cited by the applicant's counsel; ***L.O. v Republic (Supra)*** where the Court of Appeal referred to its earlier decision in ***Samuel Kungu Kamau v Republic [2015] eKLR***. The court stated the unfettered discretion of the court to admit additional evidence on appeal should always be used sparingly and only where it is shown that the evidence is fresh and will make a significant impact on the determination of the appeal.

Chesoni Ag. JA stated:

> ***"This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant 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 purpose 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 in 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 given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."***

The court made the same observation in the case of ***Mzee Wanjie & 93 others V.A.K. Saikwa & others [1982-88] 1 KAR 462.***

The first question this court asks itself is ***whether the evidence of the witness who testified in the lower court, Mary Waithera is new evidence*:**

In my view, if indeed Mary Waithera was in possession of the evidence contained in her affidavit that they were coached, that is not new evidence. This is because the witnesses were subjected to cross examination in the trial court. The appellant was represented by counsel. These facts could have been extracted from her during cross examination of the witness who was then aged 11 years old.

Further to that, the defence would have had the witness statements recorded by the police produced in evidence, What the applicant is trying to do is re-open his case and patch up the weak points in that case. The purpose of additional evidence adduced at this stage is not for purposes of filling up gaps and the court must take care that it does not delve into the merits of the appeal.

Whether the evidence is credible; if it is true, as alleged, that the witness was coached and she perjured the court, how would this court ensure that the witness is now ready to tell the truth? What of if the witness has now been compromised and changed her testimony for the benefit of the applicant? It can go either way. It cannot be established that the evidence contained in the statement is credible as opposed to what was tendered in the trial court. Unlike the other authorities that were where cited additional evidence was allowed, they all involved documentary evidence and not evidence of a person who has changed their testimony. When a witness changes their testimony, the court must take great case of it is to accept such evidence because of the avalanche of applications it might open up. That is why this discretion must be exercised sparingly.

If the instant appeal is premised on alleged discrepancies in the testimonies of the witnesses who testified before the trial court, that should be a ground of appeal but not to be pre-empted by an application of a witness who has changed her mind or has been coerced to change her mind.

In my considered view, the application does not meet the threshold for the grant of the order sought. It is unmerited and is hereby dismissed.

Dated, Signed and Delivered at *NYAHURURU* this *2nd* day of *March*, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for State

Mr. Maina Kairu for applicant

Eric – Court Assistant