REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: Mrima, J.]

CRIMINAL APPEAL NO. 23 OF 2019

WYCLIFFE ODHIAMBO OJWANG.....APPELLANT/APPLICANT

-versus-

REPUBLIC.....RESPONDENT

RULING

1. *Wycliffe Odhiambo Ojwang*, the Applicant herein, was charged, tried and convicted of the offence of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act No. 3 of 2006** in *Migori Chief Magistrate's Sexual Offence Case No. 14 of 2018* (hereinafter referred to as '**the case'**). The Applicant appeared in person. The Applicant was sentenced to 20 years' imprisonment.

2. Dissatisfied with the conviction and sentence, the Applicant filed a Petition of Appeal with the leave of this Court on 04/11/2019.

3. At the hearing of the appeal the Applicant indicated to the Court that he wished to file an application to adduce additional evidence. The Court allowed the request.

4. On 02/12/2019 the Applicant filed the application. It was supported by his own Affidavit. The Applicant contended that he was not accorded a fair trial and that h was not allowed to call crucial evidence.

5. The application was heard by way of written submissions on 04/02/2020. The Applicant contended that the father to the complainant had approached his family and recanted his evidence and explained how the Applicant was framed in the case. He also stated that the father of the complainant was ready to attend Court and testify.

6. The application was opposed. The State urged this Curt to disallow the application since the alleged father of the complainant did not swear any affidavit to vouch the alleged averments. Counsel referred to several decisions of this Court on the subject.

7. The foregone is the background to this decision. **Section 358(1)** of the **Criminal Procedure Code** grants this Court, as an appellate Court, the jurisdiction to deal with an application seeking to adduce additional evidence. 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.**

8. The High Court is now called to exercise its discretion. The discretion must be exercised on sufficient grounds. 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. The legal principles therefore cut across.

9. The Court of Appeal in **Republic vs. Ali Babitu Kololo (2017) eKLR** while approving **Samuel Kungu Kamau vs. 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 vs. 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 filing 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)

10. I 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**. I also dealt with the applicable principles as enunciated by the then Eastern Africa Court of Appeal in **Elgood v. Regina (1968) E.A. 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.

11. The allegation by the Applicant is a serious one for the reason that it is very unfair to frame anyone of any crime. The Applicant has however treated the matter rather casually. There is no disposition by the father to the complainant to the effect that indeed the Applicant was not the author of the alleged misdeed. I also note from the record that the father to the complainant did not testify.

12. The disposition by the father to the complainant would have been the link between the evidence on record and the intended further evidence. That would have accorded this Court an opportunity to weigh that evidence against the record and determine whether the intended evidence met the criterion stated above. Unfortunately, that is not the case.

13. For the foregone reason, the applicant cannot succeed. It is hereby dismissed and the appeal shall proceed for hearing on a date to be fixed now.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 22nd day of May, 2020

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

Wycliffe Odhiambo Ojwang, the Applicant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant