



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 183 & 184 OF 2019

(CONSOLIDATED)

LAWRENCE FRANK WANYAMA.....1ST APPELLANT

ALEX MAHOGA OLABA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Introduction

1. The appeals herein were fixed for hearing on 4th December, 2019 after parties agreed to file written submissions as means of canvassing the appeals. On this date, only counsel for the 2nd Appellant, Mr. Bwire had filed his submissions. The rest of the parties applied for adjournment for various reasons. Consequently, the appeals which had been consolidated were fixed for hearing on 25th February, 2020 as the court was soon breaking for the Christmas and the judge seized of its conduct proceeding on annual leave.
2. As fate would have it, the Covid-19 pandemic truck and the scheduled hearing did not take off as expected on 25th February, 2020. Resumption of hearing is currently by Google Teams link.
3. On 11th May, 2020 the Respondent (DPP) filed a Notice of Motion application also dated 11th May, 2020 in which the main prayer is that the court takes additional evidence identified in the grounds supporting the application and to direct the manner to take such evidence and subject to conditions this court deems appropriate to achieve the ends of justice. The said application is the subject of this ruling. It is brought under Article 159(2) of the Constitution, Section 358 of the Criminal Procedure Code and all other enabling provisions of the law.
4. The main ground on which the application is premised and therefore the basis of allowing the additional evidence is that the Appellants have listed as one of their grounds of appeal that the trial court erred in law by taking into account the evidence of the complainant PW1, while the said witness was sworn and cross examined by advocates for the Appellants. That the Applicant (Respondent) therefore, wishes to introduce additional evidence to the effect that indeed PW1 was sworn in and cross examined subject to the directions of the court. That it is in the interest of justice that the prayers sought be granted before the appeal is heard and determined.
5. The application is supported by a sworn affidavit of Evelyne Onunga, a prosecuting counsel in the office of the DPP on 11th May, 2020.
6. The affidavit basically reiterates the grounds on which the application is premised. Additionally, it is alluded that the trial magistrate failed to record that PW1 was indeed sworn while she actually was sworn in and cross examined by counsel for the Appellants. That therefore the additional evidence shall be seeking to confirm the fact that PW1 was sworn before she adduced her evidence. Counsel adds that no prejudice would be occasioned if the additional evidence were adduced, and furthermore, the same would serve the interests of justice.
7. In opposing the application, the 1st Appellant filed Grounds of Opposition dated 14th May, 2020. I will summarize the twelve grounds raised as follows. First, that the application is bad in law, misconceived and an abuse of the court process; that it is premised on uncertain and unspecified provisions of the Constitution and designed to usurp the power vested in the court. Second, that the application does not meet the legal threshold of the legal principles enunciated in the case of **Elgood Vs Regina (1969)EA, 274**. Third, that the application seeks to correct an incurable defect in trial proceedings thus offending Article 25(c) of the Constitution which provides that the right to a fair trial is one which will not be limited Fourth, that the additional evidence would violate Article 50(4) of the Constitution to the extent that it would go against the Bill of Rights of the 1st Appellant and render the trial and appeal unfair and/or detrimental to the administration of justice. Fifth,

that court records cannot be impeached, questioned, amended, replaced, altered or rectified by any additional evidence of whatsoever nature and hence allowing the application would be tantamount to amending or rectifying the record of proceedings. Sixth, that the Applicant seeks to amend a legally fatal defect that does not fall within the meaning of additional evidence under Section 358(1) of the Criminal Procedure Code. Seventh, that by stating that the trial magistrate failed to indicate that PW1 was sworn amounts to a grave accusation of a criminal nature against the said trial magistrate which allegations are not the purview of this court. Eight, that the Applicant has failed to disclose the purport of the additional evidence, the name(s) of the witness(es) and how and when the Applicant became privy to the additional evidence and the precise nature of the additional evidence thus rendering the application fatally defective. Nine, that the learned trial magistrate, court officials, prosecution counsel and the defence in the trial are incompetent to state what happened in the trial, more so when the trial was heard in camera. Ten, that the application is not in public interest or in the interest of the administration of justice and is an abuse of the legal process contrary to the provisions of Article 157(11) of the Constitution. Eleven, that since the Applicant has addressed the issue of the unsworn evidence in response to the Petition of Appeal and in their submission to the appeal renders the application a delay in delivery of justice. Twelve and finally, that if the application is allowed, it would occasion great injustice to the 1st Appellant and fetter the interests of justice.

8. The 2nd Appellant on his part opposed the application by way of Grounds of Opposition filed on 15th May, 2020 by the law firm of Wafula Simiyu & Co. Advocates. Six grounds have been raised which I also summarize as follows. First, that the application lacks merit, is misconceived frivolous and an abuse of the court process raised with a mischievous intention to seal the fatal gaps/defects and mistrial on the record of appeal upon which the conviction was premised. Second, that the trial court is now *functus officio* as the record of proceedings has been certified as true copy of the proceedings, and that the record cannot be corrected by affidavits. Third, that the purported additional evidence to confirm that PW1 was sworn amounts to a fatal procedural defect that is not curable under Section 358 of the Criminal Procedure Code. Fourth, that the alleged additional evidence fails to meet the legal threshold set out in the case of **Elgood Vs Regina (1968) EA 274** for admission of additional evidence. Fifth, that the application seeks to prejudice the 2nd Appellant as it seeks to patch up defects in the 2nd Appellant's grounds of appeal. Furthermore, the additional evidence is unknown, unspecified and witnesses who would adduce it unknown rendering the application ambiguous and devoid of merit. Sixth, that since the Applicant has addressed the issue of the unsworn evidence in its submission to the appeal is a pointer that the application is a delaying tactic. Seventh, that the application is an admission that the trial was a mistrial.

Submissions

9. The application was canvassed by way of written submissions with each party granted an opportunity to highlight the submissions. The hearing was via Google Teams Link. The Applicant was represented by learned State Counsel, Mr. Hassan whilst learned counsel, Mr. Bowry represented the 1st Appellant and Mr. Mukuna the 2nd Appellant.

10. Brief submissions on behalf of the Applicant were filed on 12th May, 2020 by Principal Prosecution Counsel, M/s Everlyne Onunga. The gist of the submissions is that, although the trial court record of proceedings indicate that PW1 was not sworn, the fact is that she was indeed sworn. That since Section 358 of the Criminal Procedure Code allows the admission of additional evidence, it would be in the interests of justice to allow the Applicant to avail the said evidence. Furthermore, it is submitted that the omission on the face of the record was purely a typographical error which does not reflect the actual proceedings that were recorded. It is thus urged that the additional evidence be availed by the persons who administered the oath on PW1 or the prosecution counsel or the defence counsel or as the court may direct.

11. It is further submitted that allowing the admission of additional evidence is purely within the discretion of the court provided that the Applicant meets the threshold set out in the case of **Elgood Vs Regina (1968) EA 274**. Counsel also cited **Court of Appeal Criminal Appeal No. 8 of 2017 (2017)e KLR** (parties not disclosed) and a ruling in **High Court Criminal Case No. 45 of 2012 (Nrb) - R Vs Patius Gichobi Njagi & 2 others**.

12. Learned State Counsel, Mr. Hassan whilst emphasizing the written submissions implored on the court to decide the manner in which the additional evidence would be adduced, but suggested that it could be done by way of affidavits.

13. In response to the counsel for the 1st Appellant's submission that he misrepresented the holding in a ruling in **H.C.Cr. Case No. 45 of 2012 – Patius Gichobi Njagi & 2 Others**, counsel submitted that the issues being canvassed herein are matters law and parties need to address them without emotions.

14. As regards the assertion that if the application is allowed, it would violate the Appellants' constitutional rights to a fair hearing, Mr. Hassan differed stating that these are issues that can well be addressed at the hearing of the appeal. He urged the court in making its decision to be guided by the criteria set out in the case of **Elgood v Regina (supra)**.

15. On behalf the 1st Respondent, learned counsel, Mr. Bowry filed written submissions as well as a list of authorities on 19th May, 2020. Counsel submitted that the application does not meet the threshold set out in the case of **Elgood Vs Regina (supra)** for grant of leave to adduce additional evidence. Further, as regards the holding in the case of **R Vs Patius Gichobi Njagi & 2 Others (supra)** in which the Applicant submits that the court allowed adduction of additional evidence, Mr. Bowry took issue with what he called a misrepresentation of the holding in the decision. He submitted that at no point did the court allow additional evidence. Instead, when the trial judge noted that witnesses were not sworn, she declared the trial a mistrial and directed that fresh hearing be conducted.

16. Counsel submitted that although the application is partly brought under Article 159(2) of the Constitution, the specific part of the Sub-article has not been cited, rendering the application incomprehensible. With regards to invocation of Section 358 of the Criminal Procedure Code, counsel submitted that whilst it is discretionary on the court to allow additional evidence, the same cannot be admitted with a view to curing a procedural defect in the proceedings of the trial court. That if the court were to allow the evidence the same would violate the 1st Appellant's right to a fair trial which is not limited under Article 25 (c). That it further violates Articles and 50 (4) and 157(11) of the Constitution. In this regard, counsel relied on the case of **Samuel Muriithi Mwangi Vs Republic (2006) e KLR**.

17. Counsel added that this court relies on what was recorded at the trial. That therefore if a witness was not sworn, that remains the record which cannot be altered or impeached or corrected by additional evidence. As such, the Applicant cannot hide under the guise that the failure of the record of proceedings to show that the witness was sworn or because the witness was cross examined by the defence was purely a typographical error.

18. It was also submitted that since the issue of whether or not PW1 was sworn before she testified has been addressed by the Applicant in its written submissions to the appeal, the present application is merely intended to patch up weaknesses in its case and delay the hearing of the appeal.

19. In the oral submissions, Mr. Bowry basically emphasized the written submissions and urged that the application lacks merit and the same ought to be dismissed.

20. The 2nd Applicant's counsel filed written submissions on 15th May, 2020. By and large they reiterate similar issues as were raised by counsel for the 1st Appellant, reasons wherefore the court need not be repetitive. I do however highlight that, counsel while restating that the application is mischievous as it intends to fill up gaps in the procedural defects of the trial court proceedings, submitted that at this stage, the trial court was *functus officio* and was only bound by its record. For this reason, neither the trial magistrate nor its court officials can be competent witnesses to adduce additional evidence. Furthermore, they would be couched on what to say, thus prejudicing the Appellants. The case of Samuel **Kungu Kamau Vs R (2015) e KLR** was cited to buttress the submission that additional evidence should not be used to patch up gaps in the prosecution case or fill up any lacuna in an appeal.

21. Counsel also emphasized that the application does not meet the threshold provided under Section 358 of the Criminal Procedure Code or set out in the **Elgood case**(supra) and by the Court of Appeal in the case of **Muema Nzale Wambua Vs R (2018) e KLR**. As such, counsel submitted that the application was merely a fishing expedition and offends Articles 25(c) and 50(4) of the Constitution and an admission that the trial was a mistrial.

22. Other cases cited in opposition to the application are: **Reuben Mulatia Vs R (2017)e KLR**. **Johnson Muiruri Vs R (2013)e KLR**, **May Vs R (1981) e KLR** and **Charles Karuga Wahome Vs R (2007) e KLR**.

23. In his oral submission, learned counsel Mr. Mukuna associated himself with submissions of counsel for the 1st Appellant and further emphasized his written submissions.

24. In rejoinder, Mr. Hassan insisted that the court in the case of **Patius Gichobi Njagi** (supra) ordered for additional evidence through affidavits. He further imputed a criminal conduct on the part of the trial magistrate for failure to record that PW1 was sworn when she indeed was sworn. For this reason, he submitted that Section 382 of the Criminal Procedure Code can be invoked to cure the defect.

Determination

25. The main prayer in this application is basically that this court allows the taking of additional evidence and to direct the manner in which this evidence ought to be taken and by whom. The crux of the application is that the record of the trial court proceedings indicates that PW1, the complainant in the trial was not sworn before she testified, yet the actual position is that she was sworn. The additional evidence is therefore intended to clarify the latter position.

26. I find the task of this court very simple. I say so because the issue of allowing additional evidence to be adduced is a matter of law. The power to allow a party to adduce additional evidence on appeal is discretionary and is envisaged under **Section 358(1)** of the **Criminal Procedure Code** which provides 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.”

27. The locus *classicus* case on the principles that a court ought to take into account in exercising such discretion is the case of **Elgood vs Regina (1968) E.A. 274** which adopted the summary enunciated by Lord Parker C.J in **R. vs. Parks (1969) All ER at page 364**. The principles are: -

a. That the evidence that is sought to be called must be evidence which was not available at the trial.

b. That it is evidence that is relevant to the issues.

c. That it is evidence that is credible in the sense that it is capable of belief.

d. 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.”

28. The Court of Appeal in discussing its power to admit additional evidence under **Rule 29(1)** of the **Court of Appeal Rules** (which considerations are applicable where the High Court is considering a similar application of admission of additional evidence) in the case of **Republic v Janet Nasimiyu & 2 others [2019] eKLR** had the following to say:

“It is trite that the unfettered power of the Court to receive additional evidence should always 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. As was held in *Wanjie v Saikwa (supra)*;

“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 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.”

29. The Supreme Court in *Charles Maina Gitonga v Republic [2018] eKLR* laid down the governing principles on allowing additional evidence in appellate Courts in Kenya as follows;

a. the additional evidence must be directly relevant to the matter before the Court and be in the interest of justice;

b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

c. it is shown that it would not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

e. the evidence must be credible in the sense that it is capable of belief;

f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

g. whether a party would reasonably have been made aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process;

h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;

i. the Court must be satisfied that the additional evidence is not utilized for the purpose of removing the lacunae and filling gaps in evidence. The Court must find the further evidence needful;

j. a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in the appeal, fill up omissions or patch up the weak points in his/her case;

k. the Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

30. One thing is vivid from both sides in the application. The parties are in concurrence that the court, in considering this application, must apply the principles enunciated in the above case law. In so doing, I find this application presenting a unique scenario in the sense that what the Applicant seeks to correct is the fact that the trial court proceedings are not properly recorded. That is to say that the error is apparent on the face of the record and therefore, if the application is granted, it would not occasion any prejudice to the Appellants.

31. Nothing can be further from the truth because, the Applicant, by its own admission has conceded that the learned trial magistrate for whatever reason failed to record that PW1 was indeed sworn. What this implies and confirms is that, *ab initio*, it was never recorded that the witness was sworn. Thus, conclusively, neither the hand written nor the typed proceedings bear the record that PW1 was indeed sworn before she testified.

32. It is then clear that whatever error is being sought to be corrected was not occasioned by a typographical error. This then drives me to next point of determination; whether the record of proceedings can be corrected, impeached, questioned, amended, replaced, altered or rectified by additional evidence.

33. This is an appellate court that wholly relies on record of proceedings of the trial court whilst making its determination. Applying the principles in the cited case law and Section 358 of the Criminal Procedure Code, the fact of how the trial court proceedings were recorded does not at all amount to evidence. If the record was improperly taken, it amounts to a procedural defect which the law provides for other avenues to deal with.

34. To be precise, purporting to correct an omission on the recording of evidence is not a matter that can be regarded as providing fresh evidence which was not available at the hearing. It also cannot be regarded as introduction of evidence that is relevant to the issues of either fact or law in the case, or be said to be evidence of whatsoever nature that materially would affect the appeal if not availed. I am at a loss what really was the intention of seeking the relief, if applying the threshold of the law is anything to go by.

35. I would at the expense of restraining myself state that the application has only served the purpose of delaying the hearing of the appeal.

As correctly and factually submitted by both Appellants, the mischief sought to be cured by the application has been addressed in the both Petition of Appeal and the reply thereto as well as in the submission of the Applicant. At this juncture though the court cannot delve into that line as time is not ripe.

36. In a nutshell, **Article 159(2) of the Constitution** cannot come to the aid of the Applicant. Although the Applicant did not specify the clause of the sub-article he relied on, I understood him to be referring to **Sub-article (2)(d)** which provides that:

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(d) justice shall be administered without undue regard to procedural technicalities.”

37. As I have already rendered myself, this is an application that can only be determined premised on the law. Where the law is specific on strict adherence, then a party cannot seek refuge in Article 159 (2)(d) of the Constitution. The said provision only aids circumstances that are purely occasioned by technicalities. It also directs that parties be not bound by technicalities whilst administering justice. This scenario does not present itself in this application.

38. I would be inclined to end this ruling here but not before I pronounce myself on the suggested manner through which the alleged evidence would be adduced. It is suggested that the persons who were present at the time PW1 testified are the appropriate persons and that they would adduce the evidence by way of affidavits. With this in mind, the most possible persons would be the prosecutor, the trial magistrate or the court assistant. This is bearing in mind that the evidence was taken in camera.

39. My take on this is that any evidence sought to be admitted must be adduced by a competent person. I do not think that any of these persons is competent to avail the evidence to the court. It is illogical that a prosecutor can be a witness in a case he prosecutes. A court assistance is merely an administrator of the court processes and has nothing to do with how and what the trial magistrate records. The trial magistrate on the other hand becomes *functus officio* once the proceedings are certified as true copy of the original record. He/she can revisit the proceedings only when what is typed does not tally with what is on the hand written proceedings. A scenario of this nature does not obtain in this case. Hence, any purported additional evidence to reflect anything short of what is in both the written and typed proceedings would be concocted evidence fetched from coached witnesses. I thus align myself with both counsel for the Appellants that none of the suggested witnesses are competent to adduce the alleged additional evidence.

40. My view is that having found that the relief sought does not meet the threshold provided in law, means that it is futile to proceed to consider other issues raised in the submissions of the Appellants. It is also futile to delve into how such evidence and before which court it should be adduced.

41. It is also important that I mention about the contested content in a ruling in the case of– **Patius Gichobi Njagi & 2 Others H.C.Cr. (Nbi) Case No. 45 of 2012**. The case was introduced by Mr. Hassan, counsel for the Applicant. He submitted that the trial judge upon learning that some witnesses had not been sworn, allowed the taking of additional evidence by way of affidavits. This was heavily contested by Mr. Bowry, counsel for the 1st Appellant who argued that Mr. Hassan was deliberately misleading the court since the court merely referred the case for fresh trial upon learning of the defect. Interestingly, in purporting to support his submission, Mr. Bowry exhibited a ruling on bail application in the same case delivered by R. Korir, J on 22nd July, 2013 which had nothing to do with admission of fresh evidence. Mr. Hassan on his part did not exhibit the ruling he sought reliance on.

42. My research landed me on a ruling delivered by Ong’undi, J on 31st July, 2018. She then was seized of the trial in the case. She only heard three witnesses before the prosecution closed its case whilst the rest of the witnesses had been heard by R.Korir, J. Upon perusal of the record she noted that PW2, PW4, PW5 PW6 and PW9 had given evidence before they were sworn. She thus ruled that the entire trial was a mistrial. Whilst relying on the case of **Samuel Muriithi Mwangi Vs Republic (2006) e KLR (CA sitting in Nyeri)**, she delivered herself thus:

“This court finds itself in a similar scenario. That being the case and due to the said error in the proceedings herein, I render the said proceedings a mistrial, and send the said file back to the Presiding Judge of the Criminal Division to take note and allocate the file to another judge to hear and determine the case. It is unfortunate since this is an old case.”

43. Earlier in the ruling, as correctly pointed out by Mr. Bowry, the judge had stated:

“It is therefore expected that the record clearly shows whether the above mentioned witnesses testified upon being sworn or not. In the present case the record is silent. Since this court is not the one that took that evidence it will simply go by what is shown in the record.”

44. Clearly then, the persistence by Mr. Hassan that the judge allowed the taking of additional evidence is totally misleading. The order for a fresh trial is not one and the same thing as taking additional evidence. Nevertheless, the import of the said decision is not one to be canvassed in this ruling as it bears no relevance at this juncture.

45. As regards the criminal culpability of the learned trial magistrate for failing to record that a witness was sworn, in my view, does not fall under the purview of this court. Any party inclined to pursue the issue is at liberty to do so through the relevant channels.

46. In the result, the best I can render myself is to categorically state that the application lacks merit. The same is accordingly dismissed. The appeal can now be fixed for hearing. It is so ordered,

Dated and Delivered at Nairobi This 2nd June, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Miss Akunja for the Applicant.*
2. *Mr. Bowry for the 1st Appellant/Respondent.*
3. *Mr. Mukuna for the 2nd Appellant/ Respondent.*