



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 39 OF 2017**

**CALVINCE OWINO HILTER.....APPELLANT/APPLICANT**

**-versus-**

**REPUBLIC..... RESPONDENT**

**RULING**

1. The Applicant herein, **Calvince Owino Hilter**, was charged, tried and convicted of the offence of **Robbery with Violence and Gang Rape in Rongo Senior Resident Magistrate’s Criminal Case No. 251 of 2017** (hereinafter referred to as ‘**the case**’). He was sentenced to suffer death and 40 years imprisonment respectively. He lodged this appeal with the leave of this Court.

2. As the appeal was about to be heard, the Applicant filed a request to adduce additional evidence in the form of the OB Entry of 26/11/2016 relating to him at Awendo Police Station. The Appellant argued that he wanted to use the Report to challenge the prosecution’s evidence on the alleged stolen items.

3. The application was then left to the discretion of the Court by the State.

4. I have cautiously considered the application. The application was presented by way of an Affidavit, The applicable provision of the law in such applications is **Section 358(1)** of the **Criminal Procedure Code** which stipulates 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.’***

5. That aside, it remains that the High Court has absolute discretion to take additional evidence. Such discretion must however be exercised on sufficient grounds. 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 **Samuel Kungu Kamau vs. Republic (2015) eKLR**, which case was referred to in the Court of Appeal case of **Republic vs. Ali Babitu Kololo (2017) 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 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 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)*

6. The issue of additional evidence on appeal has a long history. In the 1960s the then Eastern Africa Court of Appeal in the case of **Elgood vs. Regina (1968) E.A. 274** laid down the applicable principles for consideration which principles have stood the test of time to date. They 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 the other evidence at the trial.**

7. With the foregoing in mind, the crux of the application is that the Appellant wishes to use the additional evidence to challenge the evidence already on record. The Appellant was supplied with all witness statements by an order of the trial court. The Investigating Officer testified and the Appellant examined him at length and produced several exhibits. The Appellant did not request for the OB Report although it was all along available. With such a finding the first principle turns out against the Appellant in that the evidence that is sought to be called was indeed available at the trial.

8. I have also noted in the application that the Appellant intended to use the said additional evidence to largely contest the prosecution evidence on his identification in the case. That line can still be taken notwithstanding the intended evidence.

9. This Court therefore finds and holds that the application is not merited as it has the effect of re-opening a case long closed and revisiting issues settled at the trial. The Appellant still has an opportunity to challenge the evidence at the hearing of the appeal. Consequently, the application for additional evidence is hereby dismissed.

**DELIVERED, DATED and SIGNED at MIGORI this 14<sup>th</sup> day of February 2019.**

**A. C. MRIMA**

**JUDGE**

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

**Calvince Owino Hilter** the Applicant/Appellant in person.

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

**Evelyn Nyauke** – Court Assistant