



**REPUBLIC OF KENYA**

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

**[CORAM: MRIMA, J.]**

**CRIMINAL APPEAL NO. 15 OF 2019**

**1. DANIEL OTIENO AGAL**

**2. DENIS ORONY ONYAGO.....APPELLANTS/APPLICANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicants herein were charged, tried and convicted of the offence of Robbery with violence contrary to **Section 296(2)** of the **Penal Code**, Cap. 63 of the Laws of Kenya in *Migori Chief Magistrate's Criminal Case No. 650 of 2016* (hereinafter referred to as '**the case**'). The second Applicant was represented by **Mr. Awino** Counsel whereas the first Applicant appeared in person. The Applicants were each sentenced to 15 years' imprisonment.

2. The firm of *Messrs. Okong'o, Wandago & Company Advocates* lodged this joint appeal by filing a Petition of Appeal on 08/03/2019. On 25/03/2019 Daniel Otieno Agal, the first Applicant/Appellant herein, lodged *Criminal Appeal No. 20 of 2019*. These twin appeals are yet to be consolidated.

3. Be that as it may and as the joint appeal was about to be heard, the Appellants filed the Notice of Motion dated 29/05/2019 on the instant date. The application sought leave to adduce additional evidence in the joint appeal. The nature of the additional evidence was stated as the '*Occurrence Book Report No. 32 of 20<sup>th</sup> September 2019*'. The application was premised on the 18 grounds on its body and was supported by the Affidavit of **Mr. Marvin Odero**, Counsel.

4. The application was heard by way of oral submissions on 28/06/2019 and ruling reserved for 19/09/2019. On 18/09/2019 the Applicants filed another Notice of Motion which was evenly dated. This subsequent application sought to correct the dated of the occurrence book report from 20/09/2019 to 20/09/2016. The subsequent application was allowed by consent on 19/09/2019. The Notice of Motion dated 29/05/2019 was then fixed for this ruling.

5. The application was strenuously opposed. It was contended that the application was short of the conditions for grant of leave to adduce additional evidence. The Applicants were emphatic that the application met the said conditions.

6. I will start with the law on additional evidence. The applicable provision is **Section 358(1)** of the **Criminal Procedure Code**. 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.**

7. The law therefore gives a discretion to the High Court to admit further evidence on appeal. Such discretion must however 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.

8. 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 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)

9. 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.**

10. Returning to the matter at hand, there's no doubt that the Occurrence Book Entry No. 32 of 20/09/2016 (the first report) has all along been available at the Migori Police Station. The record does not show that the Applicants applied for its production in vain. As to the allegation that the complainant later conceded that he did not positively recognize the Applicants as among the robbers, the same remains an allegation. There is no sworn deposition by the complainant to that effect. The Court cannot therefore interrogate the allegation to *inter alia* ascertain whether the evidence was unavailable at the trial.

11. I also doubt whether the intended evidence is capable of creating a reasonable doubt on the otherwise guilt of the Appellants when considered alongside the evidence already on record. I say so because it has been held that failure to give the names of the attackers in the first report does not *per se* vitiate any evidence on identification. The Court of Appeal in **John Mwangi Kamau v. Republic (2014) eKLR** agreed with its earlier holding in **Nathan Kamau Mugwe v. Republic Criminal Appeal No. 63 of 2008** (differently constituted) as it considered the effect of not giving the description of the suspects in the first report to the police. The Court held that: -

**It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness an opportunity..... to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect.....**

12. Further, I am alive to the circumstances under which most of the first reports are made. More often than not the reports are recorded when the victims are still in shock of the ordeal and may not be composed. Such a victim may later relax and have a good recollection of the events and those culpable in the commission of the crime.

13. Although it is desirable that the first report contains the description of the suspects it cannot be conclusively held that the identification of the suspects involved in the commission of the crime solely relies on the first report. I remain alive to the fact that further investigations usually follow after the first report.

14. The Applicants herein had the opportunity and indeed examined all the witnesses on their evidences while in possession of their statements. The second Applicant was indeed represented by Counsel. I therefore do not see how the sole production of the first report will create any doubt in the mind of this Court.

15. I am hence least convinced that the application is merited. It is for rejection. I hereby dismiss the Notice of Motion dated 29/05/2019. A hearing date for the appeal shall now be fixed.

**DELIVERED, DATED and SIGNED at MIGORI this 15<sup>th</sup> day of October 2019**

**A. C. MRIMA**

**JUDGE**

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

**Mr. Marvin Odera**, Counsel for the Applicants/Appellants.

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

