



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 7 OF 2017**

**JAMES NKOROGO SAIMO *alias* MWITA.....APPELLANT/APPLICANT**

**-VERSUS-**

**REPUBLIC..... RESPONDENT**

**RULING**

1. **James Nkorogo Saimo *alias* Mwita**, the Applicant herein, was 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. 196 of 2016 Republic vs. James Nkorogo Saimo *alias* Mwita** (hereinafter referred to as '**the case**'). He was sentenced to suffer death and timeously lodged this appeal.

2. As the appeal was about to be heard, the Applicant filed a Notice of Motion on 23/03/2018 seeking leave to adduce additional evidence in the form of Migori Police Station Occurrence Book Entry No. 35 of 24/03/2016 contending that the entry will enable him to argue his appeal well and that it will also enable this Court to come up with a different decision on the case.

3. The application was supported by the affidavit of the Appellant. Learned State Counsel **Miss. Owenga** relied on the record in response to the application.

4. I have cautiously considered the application alongside the record. 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 foregone in mind, there's no doubt that the Occurrence Book Entry No. 35 of 24/03/2016 has all along been available at the Migori Police Station. The record does not show that the Appellant applied for its production, but the application declined. That evidence was hence available at the trial.

8. Further the evidence intended to be adduced is the first report by the complainant to the police. That report was followed up by series of investigations including conducting of identification parades hence the same may be of very little probative value if any. The appellant had the opportunity and indeed examined all the witnesses on their evidences while in possession of their statements. I therefore do not see how the production of the OB entry will create any doubt in the mind of this Court.

9. It is to be noted in the appellant intends 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.

10. This Court therefore finds and hold 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 applicant still has an opportunity to challenge the evidence at the hearing of the appeal. Consequently, the Notice of Motion be and is hereby dismissed and the appeal shall be fixed for hearing accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 6<sup>th</sup> day of June 2018.**

**A. C. MRIMA**

**JUDGE**

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

**James Nkorogo Saimo alias Mwita** the Applicant/Appellant in person.

**Miss Atieno**, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Evelyne Nyauke** – Court Assistant.