REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 2 OF 2018

TENTERE SANKALE.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

1. Through a Chamber Summons application dated 25th May 2018 and brought under section 358 of the Criminal Procedure Code, the applicant seeks the following orders;

2. That he be allowed to adduce additional evidence.

3. That the Court be pleased to allow a further cross examination of the complainant and her guardian (PW2) on the additional evidence.

4. That the Court be pleased to make such orders as the ends of justice may require.

5. The application is supported by the grounds of the face thereof and the supporting affidavit of the applicant.

6. During the hearing of the application, the applicant was represented by learned Counsel Mr. Mulei and the state was represented by learned prosecution Counsel Mr. Orinda.

7. According to the applicant, the additional evidence is a birth certificate which indicates that the complainant was 22 years old at the time of the commission of the offence.

8. A brief background of the case is that the petitioner was originally tried and convicted by the Senior Resident Magistrate's Court at Kilungu for the offence of defilement contrary to Section 8 (1) as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006.

9. He was sentenced to 15 years in prison. The evidence that was tendered as proof of the complainant's age was a health card. It indicated that she was 17 years old at the time of the commission of the offence.

10. It was the applicant's submission through Counsel that the matter was reported to the police by the complainant's sister (PW2) who intentionally misled the police by stating that the complainant was a minor.

11. Further, it was submitted that the evidence tendered before the trial Court was fabricated with the sole aim of securing the applicant's conviction.

12. The application was opposed. It was submitted on behalf of the State that section 358 of the Criminal Procedure Code (CPC) applies when the Court is in the process of hearing the appeal. Mr. Orinda contended that the appeal ought to be admitted first. It was also his contention that the issue was not in the petition of appeal.

13. According to him, the proper approach would have been for the applicant to seek leave to amend the petition of appeal and introduce the new ground. It was his submission that the application is pre-mature.

14. In rejoinder, Mr. Mulei submitted that the issue of amendment does not arise as the matter was not before the trial Court. According to him, the use of the word 'dealing' in Section **358 of the CPC** implies that the appeal is alive before the appellate Court.

15. Further, it was his submission that article **159(2) (b)** which supersedes the CPC gives Court a wide latitude in issues of justice. He urged the Court to exercise it's discretion judiciously.

ANNALYSIS AND DETERMINATION

16. Section 358 of the CPC is worded as follows;

> **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.**
>
> **(2) When the additional evidence is taken by a subordinate Court, that Court shall certify the evidence to the High Court, which shall thereupon proceed to dispose off the appeal.**
>
> **(3) Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.**
>
> **(4) Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court.**

17. To begin with the principles to be applied in such cases are set out in **ELGOOD –VS- REGINA [1968] EA** at page 274 where the court of appeal held;

> **"(a) The principles upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be called for the purposes of the appeal are:-**
>
> - **the evidence that it is sought to call must be evidence which was not available at the trial;**
> - **it must be evidence relevant to the issues;**
> - **it must be evidence which is credible in the sense that it is well capable of belief;**
> - **the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial (R. V. PARKS [1961] 3 ALL E.R. 633 applied; statement in JOHN HASAKWA V. R. CR. A. NO. 132 OF 1954 (U R) disapproved);**
>
> **(b) It is only in very exceptional cases that the Court of Appeal will permit additional evidence to be called;**
>
> **(c) In the circumstances, in the interest of justice the application should be allowed;**
>
> **(d) The affidavit in support of an application to admit additional evidence should have attached to it a proof of the evidence sought to be given;**
>
> **(e) On consideration of the evidence, the charges could not be said to have been proved beyond a reasonable doubt.**

18. The Court of Appeal in **Daniel Kipngetich Sang v Republic [2011] eKLR** applied the principles in **ELGOOD** with approval and held that where exceptional circumstances were established then an appeal court could order for the taking of additional evidence.

19. It is discernible from the above that, when sitting as a first appellate Court, the High Court can receive additional evidence "if it thinks that such evidence is necessary".

20. A useful comparison can be drawn from **rule 29(1) (b) of the Court of Appeal rules** which regulate the adduction of additional evidence in appeals from the High Court to the Court of Appeal.

21. In ***Samuel Kungu Kamau vs. Republic [2015] eKLR,*** the Court of Appeal while dealing with an application under rule 29 expressed itself as follows;

> ***"One fundamental consideration whether or not to allow such an application is whether such evidence was available, easily procured and within the knowledge of the person so seeking to admit it into evidence…..It has been said time and again 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."***

22. It proceeded to quote the case of ***Wanje v Saikwa [1984] KLR 275*** where Chesoni Ag JA (as he then was) expressed himself as follows;

> **(1)** ***"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."

23. In this particular case, it is evident from the trial Court's proceeding that a health card was used to show that the complainant was 17 years old at the time of the commission of the offence.

24. The applicant did not cross examine the investigating officer with regard to the health card neither did he raise any issue about the complainant's age. I note that the applicant was unrepresented in the lower Court and it is therefore possible that he did not know his way around Court processes.

25. It is also safe to conclude that the additional evidence was not within the applicant's knowledge otherwise I do not think he would have sat pretty without asking any questions yet he was being faced with a possible jail term.

26. Be that as it may, it is my considered view that the additional evidence is extremely necessary as it is *prima facie* proof that the complainant was 22 years old at the time of the commission of the offence.

27. The age of the complainant is of fundamental importance in defilement cases as it informs the kind of sentence to be meted out once an offender is convicted. In the absence of a rebuttal, the additional evidence has the potential to alter the verdict of the trial Court.

28. In any event the complainant and her parents/guardian ought to have known the correct age and presenting a piece of evidence which was on age would be very prejudicial to the accused/appellant and court would not fail to exercise its discretion to admit the same.

29. With regard to the sentiments of Mr. Orinda, it is evident from the record that the appeal was admitted for hearing on 19/03/2018 and was accordingly scheduled for hearing on 09/04/2018. It was adjourned twice and then on 21/05/2018 when it came up for hearing, Mr. Mulei raised the issue of additional evidence and the Court directed him to file a formal application.

30. It is therefore my considered view that the Court was in the process of dealing with the appeal as per the provisions of **section 358 of the CPC.** I respectfully do not agree that the application is pre-mature.

31. Furthermore, making such a finding will be tantamount to sacrificing substantive justice at the altar of technicalities thus offending the express provisions of **article 159** of the Constitution.

32. Further **Art 50(2)(k**) states that every accused person has the right to a fair trial, which includes the right-) to adduce and challenge evidence; This is a locus classical case for admission of additional evidence as prima facie evidence of concealing evidence to procure a conviction.

CONCLUSION

33. In sum the court finds that the application has merit. Thus the court makes the following order;

1. The registrar of birth and deaths Kibwezi Sub-County to produce records of the complainant including the certified copy of the birth certificate thereof.

2. Evidence to be taken by this court to expedite the disposal of the appeal.

SIGNED AND DATED THIS 10TH DAY OF JULY 2018, IN OPEN COURT.

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C KARIUKI

JUDGE