



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. APPEAL NO. 133 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

PATRICK NJOROGE KAMAU.....APPELLANT

RULING

1. The Appellant (Patrick Njoroge Kamau) was arraigned before the Thika Chief Magistrate's Court charged with a single count of robbery with violence contrary to section 296(2) of the Penal Code. He was convicted of the charge after a fully-fledged trial in which the Prosecution called five witnesses. He was sentenced to death.

2. The Appellant, aggrieved by both the conviction and sentence, has appealed before this Court. He filed his Memorandum of Appeal and a Supporting Affidavit. His appeal was scheduled for hearing before me on 11/01/2017. When it was called, the Appellant that he was not ready to proceed but that, instead, he had an application to make.

3. His application was that he wanted to be given the Occurrence Book from Thika West Police Station indicating his arrest. He believes that what is in the OB is different than what is in the "first report" which was provided to him at trial. He argued that he had even applied to recall PW1 on the strength of this but his request was declined.

4. Mr. Kinyanjui, for the Prosecution, opposed the application. Mr. Kinyanjui argued that in essence this was a request to adduce additional evidence. Yet, he argued, the circumstances did not justify this as the addition of additional evidence at this stage would unfairly prejudice the Prosecution. The Appellant, Mr. Kinyanjui argued, requested for a first report during the trial – and it was provided to him. His request for the OB at this stage is a change of story. Mr. Kinyanjui, therefore, urged the Court not to grant the request.

5. The power of the High Court to receive additional evidence is stipulated in section 358 of the Criminal Procedure Code thus:

(1) 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 of 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.

6. Hence, the only test in our law for when the High Court sitting as a first appeal can receive additional evidence is “if it thinks additional evidence is necessary.”

7. From our jurisprudence and practice, we can distill the principles which guide the Court in exercising this discretion granted to it. The principles are pivoted on the realisation that a trial has already been concluded and that, therefore, the re-opening of evidence should only happen in exceedingly exceptional circumstances. The Appellant must provide cogent and convincing reasons why he should be permitted to adduce additional evidence after a conviction. The reasons must satisfy the following three-part test:

a)The Appellant must demonstrate that he could not, with reasonable diligence, lead that evidence at the trial;

b)The evidence sought to be adduced must be relevant and potentially verdict-altering; and

c)There is *prima facie* indication that the evidence is credible – although there is no requirement to demonstrate that it is incontrovertible at this stage.

8. This is the test I will now utilise to determine if the Appellant’s application is merited.

9. PW1, the Complainant, testified on 03/09/2013. After her testimony, the case was adjourned to 08/10/2013. On that day, the Prosecution was ready to proceed with two witnesses. The Appellant was not: he applied for PW1 to be recalled. His request was granted by the Learned Trial Magistrate. On 04/02/2014, the Complainant was present in Court ready to testify pursuant to the recall order. The Prosecutor had 4 other witnesses as well. The Appellant was, however, not ready to proceed: he wanted an adjournment so that he could be supplied with a copy of the first report. An order was given for him to be supplied with a copy of the first report and the case was adjourned. The copy was apparently supplied because the case took off again on 10/04/2014 with PW2 testifying.

10. It would appear that PW1 was never put on the stand again. Additionally, the Appellant never referred to the First Report he had requested for either in cross-examining the Prosecution witnesses or in his defence.

11. Now on appeal, the Appellant says that the actual OB would exculpate him and therefore he wants it brought before the Court.

12. It should be readily obvious from this account that the Appellant had the opportunity to ask for the First Report and the Occurrence Book and that he, indeed, requested for the former and it was provided to him. He now says that what he really needed was the Occurrence Book and not its extract. However, if that were the case, he could have raised the issue with the Court when the First Report was supplied to him. Instead of requesting for the actual Occurrence Book, the Appellant proceeded with the trial and even gave a sworn statement. He never raised any defence based on the Occurrence Book.

13. It is, therefore, my finding that the Appellant had the opportunity to call for the evidence but he failed to do so. It is now too late for him to re-open his case in this way. It would be unfair on the Prosecution to re-open the evidence and a new line of defence post-conviction. In my view, therefore, the Appellant does not satisfy the first part of the test to produce additional evidence: he has not demonstrated with cogent reasons that he was unable, with reasonable human efforts, to present the evidence he is now asking for.

14. Additionally, I would hold that the Appellant does not satisfy the second and third conditions: there is no *prima facie* evidence that the Occurrence Book will reveal the information that the Appellant says it

will. This conclusion is based, in part, on the fact that the defence theory the Appellant now raises on appeal was not pursued at all during trial. Respectfully, it appears to be an afterthought.

15. In the end, therefore, I conclude that the application is not merited and it is dismissed. The appeal shall be set down for hearing.

Dated and delivered at Kiambu this 20th day of January, 2017.

JOEL NGUGI

JUDGE