



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HCCR APPEAL NO. 30 OF 2011

REPUBLIC.....PROSECUTOR

- V E R S U S -

PAUL MUTEMI KANYI.....APPELLANT

R U L I N G

On 10/6/2016, the appellant Paul Mutemi Kanyi filed an application by way of Notice of Motion brought under s.358 of the Criminal Procedure Code and Article 50(2) (k) of the Constitution.

The application seeks orders: -

a) That the Hon. Court be pleased to direct the receiving and admission of

(i) The O.B. 27/15/10/009 of Muranga Police Station.

(ii) The O.B. 26/30/12/009 of Muranga Police Station

b) That this honourable Court be please (*sic*) to admit the said evidence and extracts of the same be produced.

c) That upon the grant of prayer (a) and (b) above this honourable court does permit the said evidential value does form part of the grounds of appeal. The application is premised upon 6 grounds set out on the face of the application.

1) The applicant wishes to have additional evidence taken before he pursues the appeal.

2) The application is premised upon the provisions of section 358 of the Criminal Procedure Code Cap 75 Laws of Kenya and Article 50 (2) (k) of the Constitution of Kenya 2010.

3) That there is glaring evidence that what was reported was not what was testified and as such upon production of evidence the court will have been assisted to arriving at a far finding.

4) ...that the reportee or the person who made the report did not indicate to the police his ability to identify the assailants.

5) The subject motor vehicles as reported and as testified in court are different thereby casting doubt as to the authenticity and credibility of the prosecution witness.

6) The appellant will be greatly prejudiced if the application is not allowed. That trial court and the 1st appellate court based their conviction on facts hidden or unknown by the complainant.

In the supporting affidavit, sworn on 8/7/16 – the appellant/applicant seeks out the evidence he would like the court to admit at paragraph 3. He depones that the said evidence is in the form of the following extracts which I have quoted verbatim from his affidavit.

a) “The O.B. Muranga Police Station 27/15/10009 which states that: -

OUT ON INQUIRIES NOW PC Ngoro and PC Kimtai do took on above subject concerning a car hijacking incidence of suspected motor vehicle KAG 106 Toyota Station Wagon within Kahirwa Area.

RETURN FOLLOW UP REPORT: now P.C. Ngoro called P.C. Kimtai back to the station with one Charles Macharia Maria who has been hijacked and reported around 1300hrs. when he went to Cooperative Bank at Muranga Township and withdrew Ksh. 60,000/= he also reported he had another 30,000/= in his pocket. He reported he wanted to proceed to Nairobi to buy gear box and Crankshaft for his car and on reaching Victory Shop he gave Mama Muthoni ksh. 10,000/=. On reaching Mugoiri Bus Stage he met with 3 men holding police communication and called him, telling him he was looking suspicious and on reaching them they got hold of him and put him in a car Reg. No. KBG Metallic colour and proceeded to sagana they covered his head with a black jacket and started removing money from his pocket. They took and they never took anything else. They dumped me to unknown direction. The reportee has sustained injury on the knees and left hand and ally bruises which are sight injuries now has been issued with treatment note and further police investigations to follow. Signed Kimtalic.”

Apart from the above extract the appellant/applicant depones that the charge sheet refers to another OB no 26 of 30th December 2009.

In a ruling delivered on the 5th April 2017, I gave the prosecution time to respond to the application and/file submissions.

When the matter came for mention of 5th May 2017 the prosecution had filed neither a response nor submissions. Counsel for the applicant told the court that the prosecution was not objecting to the application. The state counsel present told the court he had no such instructions.

Section 358 of the Criminal Procedure Code chapter 75 of the laws of Kenya provides for the taking of additional evidence.

(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.

The applicant also relies on Article 50(2) (k) which provided for the right of an accused person to adduce and challenge evidence.

No authorities were cited by either the applicant or the prosecution.

I have carefully considered the application before me. I have also sought guidance from the decisions of other judges. A brief stroll through the Kenya Law Reports reveals a host of authorities on this issue.

To begin with the principles to be applied in such cases are set out in ELGOOD v. 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:

(i) the evidence that it is sought to call must be evidence which was not available at the trial;

(ii) it must be evidence relevant to the issues;

(iii) it must be evidence which is credible in the sense that it is well capable of belief;

(iv) 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.

Pursuant to the above principles I have perused the lower court file.

The 3rd Appellant was represented by counsel.

When the complainant PW1 testified he told the court how he was able to identify the 3rd appellant. In addition, the issue of the OB arose during the cross examination of the complainant by counsel for the 3rd appellant. A question was put to him and his response was that ‘I did not read the OB’. During the testimony of PW5 no 58160 PC ERIC GITHINJI, PW6 NO 232908 INSPECTOR SAMSON ANDANYA the issue of identification as raised by the appellant was also raised. These witnesses were never referred to OB whose contents as is apparent from the record, were available to the appellant.

It also comes out even more clearly in the testimony of PW12 NO. 34671 SGT ALFONCE MBURU during whose testimony and cross examination the evidence in the OBs came up. He was cross examined at length by counsel for the appellant. In fact, the record shows that on 11th November 2011, there was a request for the OB of 15th October 2010 to be availed. The witness was recalled and cross examined further by the applicant’s counsel and the other accused persons then. Hence it is clear from the record that this evidence was always available. The evidence sought to be produced therefor fails the first test, that (i) the **evidence that it is sought to call must be evidence which was not available at the trial**. The record shows that it was available.

There is also nothing attached to the affidavit as **proof of the evidence sought to be given**. The

applicant's alleged extract of the OB sought to be produced is not supported by any evidence of its authenticity.

While dealing with a similar situation in RICHARD MUKOTI MULE & 3 V REPUBLIC [2016] EKLR Justice P. Nyamweya put it thus;

Likewise, there was no certification or explanation as to how the entries in O.B No. 4/30/7/12 and O.B No. 6/30/7/12 recorded at Mlolongo Police Station on 30th July 2012 which the 4th Appellant annexed and marked as "OM 4" were obtained, to confirm their authenticity. The credibility of these entries is therefore in question and this Court cannot order additional evidence to be called on documents whose veracity has not been established.

I agree as the application in that case is not different from the one in this case the appellant has not even annexed any extracts, but quoted from an unknown source what refers to as extracts from the OB, Murang'a Police station.

The Court of Appeal in **Daniel Kipnetich 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.

No exceptional circumstances have been established in this case to warrant the request

From the foregoing it is clear that the application falls short of the requirements for it to succeed. It must fail and the same is dismissed accordingly.

Dated, signed and delivered this 11th May 2017 at Nyeri.

Teresia Matheka

Judge

In the presence of

Court Assistant: Harriet