



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEALS NOS. 157, 158, 159 & 160 OF 2014

RICHARD MUKOTI MULE.....1ST APPELLANT

JOHN KIOKO.....2ND APPELLANT

JOEL MICHUKI WAINAINA.....3RD APPELLANT

ONESMUS MANGUKA PHILLIP.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Application before the Court for determination was filed by the 4th Appellant in Criminal Appeal No. 157 of 2014, by way of a Notice of Motion dated 24th August 2015 and filed in Court on 25th August 2015. The 4th Appellant was granted leave to amend his appeal by this Court on 19th November 2015 which was his first prayer in the said application. The outstanding prayer in the said application which is the subject of this ruling is seeking orders that further evidence of 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 be produced.

The grounds for the said application as stated in the Notice of Motion and supporting affidavit sworn on 24th August 2015 by the 4th Appellant, are that though 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 were extensively mentioned during the proceedings, the Occurrence Book was not produced despite having a bearing on the proceedings, neither were the said entries produced as exhibits. Further, that it has come to the attention of the 4th Appellant and his advocates on record that there are conflicting entries that were made 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 would have a bearing on the appeal herein. According to the 4th Appellant, he got extracts of 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 after his conviction, which differ materially with the extracts that were shown to him during his trial. He annexed copies of the extracts shown to him during trial and of the ones he obtained after conviction.

The 4th Appellant averred that given the nature of conviction and sentence herein, it is only fair that further evidence of the entries made as O.B. No. 4/30/7/12 and O.B. No. 6/30/7/12 recorded in the occurrence book at Mlolongo Police Station on 30th July 2012 be taken.

The 4th Appellant's application was canvassed by way of written submissions, and the 4th Appellant's learned counsel, Wesonga, Mutembei & Kigen filed submissions dated 22nd January 2016, while the learned prosecution counsel, Mr. Cliff Machogu, filed submissions dated 26th February 2016.

The 4th Appellant submitted that his prayer is premised upon section 358 of the Criminal Procedure Code which gives the High Court powers to call for additional evidence which it may take itself or direct that the additional evidence be taken by a subordinate court. Further, that the entries in O.B No. 4/30/7/12 and 6/30/7/12 were extensively mentioned during the proceedings at the subordinate court upon further examination-in-chief of prosecution witness No. 5 (PW5), and upon the cross-examination of prosecution witness No. 6 (PW6), and that the testimony of these two witnesses was key to the Applicant's conviction.

The 4th Appellant's counsel gave examples of the material contradictions between the extract of the entries in Occurrence Book No. 4/30/7/12 and No. 6/30/7/12 that were shown to the 4th Appellant at the trial, and the extract of the same entries that the 4th Appellant was able to obtain after conviction and while in custody.

The prosecution on its part submitted that the evidence that the 4th Appellant is seeking to have produced as new evidence during appeal was present during trial, and was extensively mentioned by PW5 and PW6, and that the 4th Appellant was given a chance to cross-examine the witnesses on the said evidence. It was argued by the prosecution that the principles upon which an appellate court can exercise its discretion in a criminal case to allow the taking of additional evidence under section 358 of the Criminal Procedure Code were set out by the Court of Appeal in the case of **Elgood –vs- Regina (1968) E. A 274**, and restated by the Court of Appeal in the case of **Simon Mwangi Wambui –vs- Republic 2014 eKLR** .

I have considered the pleadings and submissions by the 4th Appellant and prosecution counsel, and also perused the record of the trial Court. The applicable law on the calling of additional evidence on appeal is **section 358** of the *Criminal Procedure Code*, which provides as follows:

“(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 Court of Appeal considered the principles upon which an appellate court exercises its discretion in a criminal case to allow additional evidence in **Elgood v Regina [1968] EA 274**. The principles which apply in this application are that the evidence sought to be introduced was not available at the trial, the evidence must be relevant, the evidence must be credible in the sense that it is well capable of belief, and that it is only in very exceptional cases that additional evidence will be allowed.

I have perused the lower Court's record as pertains to the witnesses Sergeant Wesley Soi (PW.5) and Police Corporal Abdi Mamo (PW6). The two witnesses first gave evidence on 30th October 2012, which is the date when PW5 stated during examination-in-chief that they booked the Appellants in O.B 4/30/7/12/ and OB/6/30/712. PW6 on that date also referred to the said O.B entries as showing the names of the 4th Appellant, during his cross-examination by the said Appellant.

The said witnesses were again recalled for further cross-examination on 22nd February 2013, upon application by the newly appointed Advocate for the 4th Appellant, a Mr. Gichuki who was holding brief for Mr. Nzaku. No questions were asked on the said O.B entries during the further cross-examination by the said Advocate. It is thus my finding that what the 4th Appellant is seeking is not new evidence as it is a document that was clearly referred to by the said witnesses and was available, and on which the 4th Appellant and his Advocate had more than ample opportunity to cross-examine on.

In addition, there is no record of the 4th Appellant or any of the other Appellants seeking to be availed the said OB entries. Furthermore, as the 4th Appellant was represented by an Advocate during the second cross-examination of PW5 and PW6, the Advocate could have applied for production of the OB entries as exhibits if indeed they were thought to be relevant at the time, but he did not.

Lastly, it is also not evident how the 4th Appellant was availed or shown the extract of 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 he attached to his supporting affidavit as annexure "OM 3". He stated that the said extracts were shown to him during trial, however there is no such application on the record of the trial proceedings or any record of the same being ordered by the Court.

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.

The prayer seeking orders that further evidence of 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 be produced in the 4th Appellant's Notice of Motion dated 24th August 2015 is accordingly denied for the foregoing reasons.

There shall be no order as to costs.

DATED AT MACHAKOS THIS 7TH DAY OF JUNE 2016.

P. NYAMWEYA

JUDGE