



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.481 OF 2010**

*(An Appeal arising out of the conviction and sentence of Hon. G.L. Nzioka - SPM delivered on 3<sup>rd</sup> September 2010 in Kibera CM. CR. Case No.3699 of 2009)*

**LAWRENCE MWANZIA TITUS.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Appellant, Lawrence Mwanzia Titus was charged and convicted of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death as is mandatorily provided by the law. Being aggrieved by the decision, the Appellant has filed an appeal to this court. The appeal is pending hearing and determination. Pending the hearing of the appeal, the Appellant has applied to this court that he be allowed to adduce additional evidence by way of affidavit pursuant to **Section 358** of the **Criminal Procedure Code**. It is the Appellant's case that during the trial, the trial magistrate misconducted herself by intimidating his lawyer. In particular, the Appellant stated that the trial magistrate shouted and intimidated her advocate to the extent that the advocate missed some of the court's session due to intimidation. The Appellant further stated that by virtue of the hostile atmosphere that the trial was conducted, he was not accorded a fair hearing. He further complained that the trial magistrate restricted his counsel and himself when he cross-examined the prosecution witnesses. In particular, he complained that he was not accorded sufficient time to cross-examine the said witnesses. It is in that regard, that the Appellant is of the view that unless he is given an opportunity to adduce additional evidence in form of an affidavit, the court would not have an opportunity of reaching a fair verdict after taking into consideration the entire circumstances of the case. Ms. B. Rashid for the Appellant reiterated the contents of the Appellant's application in her submission before court.

Mr. Murithi for the State opposed the appeal. He submitted that, in essence, the Appellant was seeking to have the case retried by the backdoor. He was of the view that the application is made in abuse of the due process of the court. He submitted that the prayers sought in the application are not available to the Appellant. There were no new or compelling reasons for this court to allow the Appellant to adduce additional evidence. He reiterated that the Appellant was represented by counsel when he was being tried at the magistrate's court. He cannot therefore complain at this stage of the proceedings that he was not accorded fair trial. The Appellant did not raise these issues before the trial magistrate and therefore that court was denied the opportunity to respond to the allegation. As regard the complaint that the trial magistrate restricted the time upon which the Appellant was required to cross-examine the prosecution witnesses, Mr. Murithi submitted that the trial magistrate was entitled to manage proceedings before the court. It cannot therefore be said that the Appellant's right to be accorded fair trial was breached when the

court was exercising its mandate. He urged the court to dismiss the application as it lacked merit.

We have carefully considered the submission made by the parties to this appeal. The issue for determination by this court is whether the Appellant made a case for this court to grant him leave to adduce additional evidence pursuant to **Section 358** of the **Criminal Procedure Code. Section 358(1)** of the **Criminal Procedure Code** provides thus:

*“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.”*

**Section 358** of the **Criminal Procedure Code** does not provide the instances under which the High Court, sitting as an appellate court can call for additional evidence. However, this court is aware that such additional evidence may be called where the interest of justice demands it.

In the present application, the Appellant complained that he was intimidated by the trial court which made it impossible for him to conduct his defence as he would have liked to. The Appellant craves for leave of this court to be allowed to adduce additional evidence by way of affidavit essentially to set out what he considers to be misconduct on the part of the trial court. This is a court of record. The trial court too is a court of record. We have perused the record of the court. At no time did the Appellant raise any issue with the trial court in regard to the manner in which the trial was being conducted. The Appellant did not complain that he was being rushed to cross-examine the prosecution witnesses. Neither did he complain that his advocate was not being given a chance to defend the case in a manner that he thought fit. The Appellant did not at any time during trial seek the recusal of the trial magistrate on the ground that he felt that the trial court was not according him a fair trial.

Whereas this court takes cognizance of the fact that the Appellant is entitled to a right to fair hearing as provided under **Article 50** of the **Constitution**, such exercise of the right to fair hearing can only be exercised within the rules and procedures of the court. In the present application, if this court were to allow the Appellant’s application, nothing would prevent other appellants in future to make a similar request to impeach the record of the trial court by raising issues which were not presented before the trial court. This would render impossible the orderly conduct of proceedings in the courts with appellate jurisdiction. This court is of the opinion that the allegations made by the Appellant against the trial court are an afterthought. It is meant to introduce something that was not part of the proceedings before the trial court.

In the premises therefore, the Appellant’s application therefore lacks merit and is hereby dismissed. This court shall proceed to hear the appeal on the basis of the record of the court. It is so ordered.

**DATED AT NAIROBI THIS 14<sup>TH</sup> DAY OF OCTOBER 2015**

**L. KIMARU**

**JUDGE**

**G.W. NGENYE – MACHARIA**

**JUDGE**