



REPUBLIC OF KENYA



**Mburu v Republic (Criminal Application E009 of 2022)  
[2023] KECA 108 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 108 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPLICATION E009 OF 2022  
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA  
FEBRUARY 3, 2023**

**BETWEEN**

**DAN KANG'ARA MBURU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An application for leave to adduce additional evidence from the Judgment of the High Court of Kenya at Nairobi (Ong'undi, J.) dated 22nd January, 2019 in HC. CR.A. No. 17 OF 2018)*

**RULING**

1. As can be deemed from the application and annexures, the applicant, Dan Kang'ara Mburu, was charged with the offences of dealing in suspect property and abuse of office. Unfortunately, the applicant neglected to file a copy of the ruling from his conviction and also neglected to file a copy of the High Court Judgment referred to dated January 22, 2019, which would have aided the court's grasp and understanding of the issues.
2. Nonetheless, the brief discernible background of the matter is that the applicant, a police officer, was attached to Makongeni Police Station and he proffered charges of operating an un-roadworthy motor vehicle against one Dominic Makau in Makadara Traffic Case No 4628 of 2017. The said vehicle, an Isuzu Minibus, registration number KBC 661G, was impounded on August 16, 2017 and was suspected to have numerous defects including but not limited to absence of seatbelts, faulty brakes, absence of full beam lights, worn out tyres, missing driver's window, corroded metallic body, defective axle, defective exhaust and defective speedometer.
3. Dominic Makau claimed that his vehicle was detained for 9 days after he failed to pay a bribe and was thereafter subjected to a fake inspection which termed the vehicle un-roadworthy. He maintained that his prosecution was meant to intimidate Public Service Vehicle (PSV) operators who don't pay bribes



and also claimed that he had been threatened that he would not have his vehicle returned even if he is released by the court.

4. Ethics and Anti-Corruption Commission's (EACC) case against the applicant, as deemed from the application, was that they had received complaints that police from Makongeni Police Station extort money from PSV operators on the Jogoo Road-Muthurwa terminus route under the instruction of their superior District Traffic Officer, Patrick Mwenja, and that they further victimized any PSV operators who did not give bribes and who were suspected to be working with the EACC. It would appear that following the complaints, the applicant was caught in an operation organized by EACC and he was charged with dealing with suspect property and was also charged with abuse of office. He was convicted on both counts and sentenced to 1-year imprisonment or to 500,000/= fine for each count.
5. The present application is dated June 23, 2022 and brought primarily under rule 29 (1)(b) of the *Court of Appeal Rules* seeking in prayer 1 that the court grants leave to adduce additional evidence, for purposes of his appeal, and that the said leave operates to validate the additional evidence already filed. Prayer 2 seeks to have the court take the additional evidence or direct the trial court to take the same. Prayer 3 asks the court to give further orders it may deem fit and particularly that Makongeni Police Station be directed to surrender a file namely Makadara Traffic Case No 4628 of 2017, *Republic v Dominic Makau*.
6. The grounds relied upon are that there are exceptional circumstances to justify the additional evidence, that the evidence is credible and may change the outcome of the case and that even with due diligence, the evidence in issue could not have been discovered before the conclusion of the case. The applicant also states that the complainant was conflicted, that EACC maliciously prosecuted the applicant due to a grudge arising from the applicant having previously arrested vehicles owned by EACC officers. The applicant also claims that his prosecution was against public interest, that his prosecution was meant to circumvent the prosecution of Makadara Traffic Case No 4628 of 2017 and was an abuse of the legal process. He states that the application ought to be granted in the interest of justice and will not prejudice the respondent.

The applicant filed submissions dated August 4, 2022 in support of his application, which we have considered.

7. The application is brought under rule 29 of the *Court of Appeal Rules* 2010, which has been replaced by rule 31 of the *Court of Appeal Rules* 2022.
8. The evidence sought to be introduced is a bundle of letters. The contents of the letters can be summarized as follows:
  - i) A letter dated November 12, 2019 by the applicant's counsel to the National Police Service seeking copies of the complaint by Dominic Makau and other relevant documents.
  - ii) A letter dated 9/8/2018 from EACC to the Office of the Director of Public Prosecution (ODPP) setting out the origin of the issue, and the alleged actions of the officer, and asking DPP to reconsider the decision to charge Dominic Makau.
  - iii) Letters dated 5/11/2018 and 22/8/2018 internally within ODPP forwarding details on the file compiled in the traffic offence and showing the status of the traffic case which only had one witness as of November 14, 2018.



- iv) Two letters dated November 13, 2017 from the applicant’s lawyer, one to the ODPP and another to the Nairobi Traffic Commandant, stating that Dominic Makau and one Mr Mwangi, went to Makongeni Police Station and demanded release of the vehicle in issue, which release was denied, and they threatened dire consequences. It was said that Mr Mwangi identified himself as an EACC officer. The applicant was then arrested by EACC officers two days after testifying in the traffic case and was taken to EACC offices, booked and released on cash bail.

They stated that their client was being persecuted for doing his work diligently.

- v) An affidavit sworn on 24/5/2021 by Lawrence Karisa, a police officer based at Makongeni Police Station, who stated that he was aware the applicant was convicted with anti-corruption offences but still believed the evidence in the traffic case was enough to convict Dominic Makau.

9. The present application urges the court to exercise its discretionary power under rule 29(1)(b) (now rule 31). Rule 29 provided in its entirety:

“29. Power to re-appraise evidence and to take additional evidence

- (1) On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the court shall have power—

- (a) to re-appraise the evidence and to draw inferences of fact;

and

- (b) in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.

- (2) When additional evidence is taken by the court, it may be oral or by affidavit and the court may allow the cross- examination of any deponent. (underlining ours).

- (3) When additional evidence is taken by the trial court, it shall certify such evidence to the court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence; when evidence is taken by a commissioner, he shall certify the evidence to the court, without any such statements of opinion.

- (4) The parties to the appeal shall be entitled to be present when such additional evidence is taken.”

10. We have seen past decisions of this court on considerations in exercise of this discretion. In the case of Samuel Kungu Kamau v Republic [2015] eKLR, the Court stated:

“In the Administrator, HH *The Aga Khan Platinum Jubilee Hospital v Munyambu* [1985] KLR 127 it was held that: -



“1. In exercising its discretion to grant leave to adduce additional evidence under rule 29 (1) (b) of the *Court of Appeal Rules*, the Court of Appeal will generally give such leave if the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial, if it will probably have an important influence on the result of the appeal, and is apparently credible though it need not be incontrovertible. Such evidence will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and where to refuse the application would affront common sense or a sense of justice.”

In the case of *Wanje v Saikwa* [1984] KLR 275 this court held *inter alia* as follows:

- “1. Before the Court of Appeal will permit additional evidence to be adduced under rule 29 it must be shown that it could not have been obtained by reasonable diligence before and during the hearing.
2. It must also be shown that the new evidence would have been likely to have affected the result of the suit.”

The court in *Samuel Kungu Kamau* (supra) further stated:

“And as was stated by this Court in *Joginder Auto Service Ltd v Mohammed Shaffique & Another* [2001] eKLR (Civil Appeal (Application) No Nai 210 of 2000);

“Rule 29(1)(b), of the rules does not set out what constitutes sufficient reason. But this court and other courts in different common law jurisdictions have, over the years, enunciated principles to guide the courts in applications for leave to adduce additional evidence.... In summary these and several other cases decided that the power of the court and more particularly this court, to receive further evidence is discretionary, which discretion is exercised on three broad principles, namely:

- (1) The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.
- (2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
- (3) The evidence must be apparently credible, although it need not be incontrovertible.

These are general principles, but we cannot say that they are the only ones. The relevant rule authorizing the adduction of additional evidence uses a general phrase, namely, "sufficient reason."

11. This court *Archer & Another v Archer & 2 Others* (Civil Application E058 of 2021) [2022] KECA 9 (KLR) (21 January 2022) (ruling) quoted the Supreme Court of Kenya on considerations by appellate courts for such applications. The court noted:

“The Supreme Court of Kenya has also set out guidelines for the admission of additional evidence before appellate courts in *hon Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamed and 3 others* [2018] eKLR, as follows:



- (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
  - (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
  - (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
  - (d) where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
  - (e) the evidence must be credible in the sense that it is capable of belief;
  - (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
  - (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
  - (h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;
  - (i) the court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The court must find the further evidence needful.
  - (j) a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
  - (k) the court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.
10. The Supreme Court in addition stressed that additional evidence at appellate level should be allowed on a case-by-case basis and even then sparingly with abundant caution.”

12. With regard to the application before us, it is most notable that the applicant has made a claim concerning a grudge between him and EACC officials, based on his alleged detention of EACC vehicles. However, none of the letters referred to as additional evidence, have given credence to the claim. There is no availed list of vehicles owned by EACC officers which the applicant has ever personally detained. The applicant also alleged that his arrest and prosecution was meant to curtail the prosecution of the traffic case against Dominic Makau, but that seems improbable as the applicant had already testified in the matter and his evidence was on record for the court’s consideration. Additionally, even with his removal as the case investigator, the matter could still be managed by



another investigator if the ODPP, as an independent body, sees fit to continue the prosecution of Dominic Makau.

13. Further to the above, and contrary to the applicant's assertion, it is highly likely that the applicant could have found the said letters earlier with due diligence; reason being that some of them were authored by his own lawyers while the affidavit by PC Karisa was deponed by his colleague at Makongeni Police Station. As for the internal letters of the ODPP, these were authored to circulate the file regarding the traffic case while the letter by the EACC explains the genesis of the complaint, which issue was already within his knowledge at the beginning of his prosecution.
14. Having considered the application and the facts of the matter and the guiding principles cited above, this court finds the application is unmerited and does not meet the threshold to succeed. The application dated June 23, 2022 is dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

