



REPUBLIC OF KENYA



KENYA LAW
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**Kenyan Marine & Fisheries Research Institute v Okemwa (Civil Appeal
(Application) 109 of 2019) [2022] KECA 990 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 990 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 109 OF 2019
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA
SEPTEMBER 23, 2022**

BETWEEN

KENYAN MARINE & FISHERIES RESEARCH INSTITUTE APPELLANT

AND

EZEKIEL NYANGOYA OKEMWA RESPONDENT

*(An application to introduce new evidence in the pending appeal from the
judgment of the Employment and Labour Relations Court at Mombasa
(Rika J.) dated 8th July 2016 in Mombasa ELRC No. 186 of 2013)*

RULING

1. Kenya Marine & Fisheries Research Institute, the Applicant herein, seeks leave to adduce more evidence, being salary cards for 1981 to 1998, which show that Dr. Ezekiel Nyangoya Okemwa, the Respondent herein, was earning a monthly salary of Kshs 31,880/= per month as opposed to the one of Kshs 218,664/= awarded by the Court. This prayer is in a notice of motion application dated April 19, 2022, filed by the Applicant pursuant to the then Rule 29 (1)(b) of the *Court of Appeal Rules* of 2010 (now Rule 31(1)(b) of the *Court of Appeal Rules* of 2022). The main grounds for the application are that the applicant has instituted an appeal by a Notice of Appeal dated 21st July 2016 and a Record of Appeal dated 5th August 2019, and the evidence sought to be adduced is crucial, urgent and important, owing to the weight of the matter in question. In support of the application, the Applicant filed an affidavit sworn on April 19, 2022 by its Director General, Prof. James Njiru, reiterating these grounds. The deponent averred that the Applicant's appeal is seeking to disturb an award of general damages of Kshs 53,455,592/= issued in favour of the Respondent, which figure was arrived at using the wrong salary scale, and that this is the backdrop of the instant application seeking additional evidence be allowed.
2. In opposition, the Respondent filed a replying affidavit sworn on May 13, 2022 by William O. Wameyo, his advocate. The Respondent's case is that the evidence the Applicant now seeks to introduce was



always in its possession, no explanation has been offered on the failure to adduce it during the trial, and that the truth of the matter is that the Applicant did not attend Court nor tender any evidence during the hearing of the suit in the trial Court, which was concluded in its absence. Further, that the evidence sought to be introduced was never included in the Applicant's list of documents in the trial Court, neither did the Applicant file any application to set aside the judgment of the trial Court. Therefore, that the introduction of the new evidence will prejudice the Respondent. Lastly, that the unreasonable delay in making this application remains unexplained.

3. We held a virtual hearing of the application on May 16, 2022. Mr. Lagat, learned counsel for the Applicant, relied on his written submissions dated April 24, 2022, in which he cited the decisions by this Court in the case of *Mzee Wanjie and 93 others vs A. K. Saikwa and others* (1982-88) 1 KAR 462 and by the Supreme Court of Kenya in *Hon. Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamed and 3 Others*, [2018] eKLR on the principles that guide this Court when exercising its discretionary power under Rule 29 of the Court of Appeal Rules. The counsel submitted that the salary cards sought to be adduced as additional evidence are duly certified from the Applicant's records and had not been found during trial, but that after due diligence was exercised, were now available. Further that the said evidence related to the entire period of the Respondent's employment and will have an important influence to the matter.
4. Mr. Wameyo, learned counsel for the Respondent, likewise relied on his written submissions dated May 13, 2022, and contended that no reason was offered by the Applicant to explain why the documents were not tendered in evidence during the trial, since salary slips are basic documents that should be easily traceable from an employee's file and were therefore in its possession. In addition, that the Applicant did not attend court during the trial and therefore did not offer any evidence at all, and consequently, the introduction of the documents will be greatly prejudicial to the Respondent, as they raise new issues on which the Respondent will not have a chance to cross-examine the Applicant or call witnesses and produce documents thereon. Therefore, that the Applicant is seeking to conduct a new trial in the appeal, and the threshold set in the case of *Mzee Wanje and 93 others vs A.K Sankara & others* (supra) had not been met.
5. We have carefully considered the application before us and the rival submissions by learned counsels. The application is grounded on Rule 31 of the *Court of Appeal Rules* of 2022 which provides as follows:
 - (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.
 - (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.



6. Leave to adduce additional evidence is therefore at the discretion of the Court, and the principles applicable in the exercise of the Court's discretion under Rule 29 were summarized by Chesoni, Ag. JA. (as he then was) in *Mzee Wanjie and 93 others vs A. K. Saikwa and others* (supra) as follows:

“The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 and those principles are:

1. It must be shown that the evidence could not have been obtained with
 - (a) reasonable diligence for use at the trial;
 - (b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
 - (c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

7. 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* [supra] as follows:

“(79)

- (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.

8. 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.”
9. We note that the Applicant did not bring any evidence to demonstrate the difficulties it faced, and due diligence it undertook to access and produce the Respondent’s salary cards that it seeks to introduce as new evidence, particularly as the Respondent was its employee and the said records were in its custody and control. In addition, the Applicant does not dispute the averments that it did not participate at the hearing of the suit in the trial court nor tender any evidence thereat, and even though we have powers to order cross-examination of the said evidence, there is the risk that the additional evidence is an attempt to have a second bite at the cherry so to speak, and intended to set out a new case and fill the gaps in the Applicant’s pending appeal. We therefore decline to exercise our discretion in favour of the Applicant for these reasons.
10. In the circumstances, the Notice of Motion application dated April 19, 2022 is not merited, and is accordingly dismissed with costs to the Respondent.
11. Orders accordingly.

DELIVERED AND DATED AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2022.

A.K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

