



IN THE COURT OF APPEAL

AT NYERI

[CORAM: KIAGE, SICHALE & KANTAL, JJ.A]

CRIMINAL APPEAL NO. 121 OF 2017

BETWEEN

DANIEL NZIOKA.....1<sup>ST</sup> APPELLANT

SIMON MAINA.....2<sup>ND</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Embu (F. Muchemi, J) dated 2<sup>nd</sup> August, 2017 In EMBU HCCR. NO. 32 OF 2012

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RULING OF THE COURT

**Daniel Nzioka** (the 1<sup>st</sup> applicant) was the 1<sup>st</sup> accused while **Simon Maina** (the 2<sup>nd</sup> applicant) was the 2<sup>nd</sup> accused in Criminal Case No. 32 of 2012 at the High Court of Kenya, Embu, where a charge of murder was laid against them. They were tried and convicted by **Muchemi, J**, in a judgment delivered on 2<sup>nd</sup> August, 2017, and were sentenced to death. They lodged a notice of appeal on 3<sup>rd</sup> August, 2017 and a record of appeal to this Court followed being Nyeri Criminal Appeal No. 121 of 2017. Two similar applications said to be brought under various articles of the Constitution and other laws followed where the applicants pray in the main:

**“THAT leave be granted to the Appellant to have the proceedings in Siakago Criminal Case No. 589 of 2012 Republic versus Daniel Nzioka Mbuthi & Simon Maina Njiru and the Occurrence book report of 27<sup>th</sup> December, 2011 to be produced in this Appeal to be part of the record of appeal”.**

An application for bail pending appeal was abandoned at the hearing of the motions and, on application of **Mr. Kang’ata Irungu**, learned counsel for the applicants, we consolidated the applications and heard them as one.

In grounds in support of the motions and in supporting affidavits by the applicants, it is stated *inter alia*, that prior to the charge of murder, the applicants had been charged at a Magistrate’s Court in Siakago Criminal Case No. 589 of 2012 “....

**which proceedings give the genesis of the criminal charges against the appellants”;**

that there was an Occurrence Book report of 27<sup>th</sup> December, 2011 which contains information which the Judge at the High Court did not take into account in the judgment despite that information having been given in the testimony of one of the prosecution witnesses; that those proceedings and the report in the Occurrence Book are relevant to the appeal as they contain evidence which was not taken into account by the Judge in the murder charge but:

**“... which evidence will be very key in assisting this Honourable Court make a decision and the said proceedings and report ought to form part of this record of appeal...”**

In submissions made before us when we heard the motions on 11<sup>th</sup> February, 2019 it was **Mr. Kang’ata’s** case that the issue related to when a theft had been reported. According to him, the applicants apprehended the deceased as the thief who had stolen their sheep; they reported the thief to a police station and in the process a mob descended on the deceased and beat him up as a result of which he died the next day.

Further, that the only witnesses in the case were the deceased's mother and brother who had not bothered to take the deceased to hospital and, therefore, the report in the Occurrence Book was crucial as it would show that the applicants made a report to police the day before the deceased died. When we asked Mr. **Kang'ata** whether an application had been made before the Judge at the High Court for production of the proceedings before the Magistrate at Siakago and the Occurrence Book, he replied that such application had not been made and attempted to blame the appellants' then advocate on record for the omission.

**Mr. Peter Mailanyi**, learned Senior Assistant Director of Public Prosecutions, did not wish to respond to the application and he left the whole matter to us.

Rule 29 of our rules (which were not cited by the applicants in the motions) allows for adduction of additional evidence and is in the following terms:

**“29 (1) on any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the court shall have given –**

**a. ----; 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.”**

That is to say that we are empowered to take additional evidence, or to direct that additional evidence be taken by the trial court or by an appointed person which power is an exercise in discretion to be exercised judiciously with reason and not caprice or whim. A party must provide us with sufficient basis upon which to exercise our discretion to allow an application to take additional evidence.

The subject of adduction of additional evidence by this Court was considered in the case of **Muemi Nzale Wambua & another vs. Republic [2018] eKLR** where it was held:

**“This Court has jurisdiction to admit additional evidence only where there is a pending appeal in this Court from a decision of the superior court in its original jurisdiction such as where the superior court has convicted a person for murder or treason. In other words, this Court will only be seized of jurisdiction to entertain the application in situations in which it is acting as a first appellate court from the decision of the superior court.”**

Further consideration had been given to the issue in the earlier case of **The Administrator, HH The Aga Khan Platinum Jubilee Hospital vs. Munyambu [1985] KLR 127** where it was held:

**“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.”**

That scope has recently been expanded by the Supreme Court of Kenya in the case of **Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR** involving an electoral dispute where the court held that additional evidence could be admitted in exceptional circumstances, on a case by case basis. That court laid down the prevailing principles on allowing additional evidence in appellate courts in Kenya to be:

**“(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 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.”**

In the motions before us it is prayed that we grant leave to the applicants to have proceedings in a magistrate’s court and an Occurrence Book to be produced in Criminal Appeal No. 121 of 2017 pending before this Court as part of the record. We have perused the proceedings before the High Court of Kenya, Embu, in Criminal Case No. 32 of 2012. The applicants did not apply for production of the proceedings before the magistrate’s court or production of the Occurrence Book. **Mr. Kang’ata**, learned counsel for the applicants readily admitted before us that such application had not been made at all.

As we have shown in case law we have cited in this Ruling, this Court will readily exercise its discretion under Rule 29 of the Rules of this Court to give leave if the evidence sought to be introduced 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.

The applicants before us have not satisfied any of the principles we have laid out which an applicant needs to satisfy to be entitled to our exercise of discretion to grant leave for adduction of additional evidence. The material sought to be adduced was readily available at the time of the trial before the High Court at Embu – proceedings before the magistrate at Siakago were not applied for to be introduced at the hearing neither was the report in an Occurrence Book applied for. We are not given any material on which to exercise our discretion and in the premises the motions dated 9th May, 2018 and 12th September, 2018 have no merit and are dismissed.

**Dated and Delivered at Nyeri this 27th Day of March, 2019.**

**P. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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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.

DEPUTY REGISTRAR