



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A)**

**CRIMINAL APPEAL (APPLICATION) NO 67 OF 2017**

**REPUBLIC.....APPLICANT**

**AND**

**JANET NASIMIYU.....1<sup>st</sup> RESPONDENT**

**CHRISTINE MURICHO.....2<sup>nd</sup> RESPONDENT**

**PHYLIS MATINGI MURICHO.....3<sup>rd</sup> RESPONDENT**

*(Being an application for leave to adduce additional evidence*

*under Rule 29 of the Court of Appeal Rules)*

*in*

*H.C.Cr. A No 16 of 2012)*

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**RULING OF THE COURT**

**Background:**

1. Before us is a notice of motion filed on 28<sup>th</sup> March, 2018. It is expressed to be brought under Rule 29 (1) (b) and (c) of the Court of Appeal Rules (the Court Rules). The State (the applicant herein) seeks to adduce evidence in respect of the pending appeal which was filed by **Janet Nasimiyu, Christine Muricho and Phylis Matingi Muricho (the respondents)**.
2. A brief background to the application is that the respondents were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 18<sup>th</sup> April, 2012, at Bukirimu village in Bumula District of Bungoma County, they murdered **Simon Kundu Muricho (the deceased)**.
3. The High Court (Ali-Aroni, J) heard the prosecution evidence and the respondents’ defences and in a judgment delivered on 15<sup>th</sup> May, 2012 found the respondents guilty as charged and sentenced them to death as by law prescribed.
4. Aggrieved by that decision, the respondents filed an appeal to this Court. When the appeal came up for hearing, the applicant applied for an adjournment to enable the State to file a formal application for leave to adduce additional evidence.
5. The applicant filed a notice of motion on 28<sup>th</sup> March, 2018 seeking leave to adduce additional evidence. The additional evidence is in regard to evidence the applicant was unable to produce during the trial as the pathologist who carried out the post mortem on the body of the deceased was not available to testify on the scheduled hearing dates. The applicant sought orders that the Court grants orders that the additional evidence be adduced by way of affidavit evidence or in the alternative, the pathologist be called to adduce oral evidence before a court of competent jurisdiction.
6. The Motion is based on the grounds that the applicant made it very clear to the trial court that the pathologist was available to testify on a particular Thursday but the court declined to grant an adjournment for the pathologist to testify and produce the post mortem report in respect

of the deceased; that for justice to be done to the victim and the respondents it would be fair and just for the additional evidence to be tendered; that failure by the pathologist to testify on the appointed date or at all should not be visited on the victim; and that in the interest of justice, this Court should exercise its discretion and admit the additional evidence.

7. The motion was supported by the supporting affidavit of **Felister N. Njeru**, the County Director of Public Prosecutions, Bungoma in which she deponed that the murder trial in the High Court was conducted by various prosecutors who conducted the trial with due diligence, commitment and dedication; that the hearing of the trial was adjourned on diverse dates due to various reasons on the part of the prosecution and the defence; that on the day that the pathologist who performed the post mortem on the deceased was scheduled to testify, he was unavailable as he was conducting an operation at the hospital and could only be available on the Thursday of the same week; that upon placing this information before the court and seeking an adjournment, the same was declined; that thereupon the prosecution was directed to close its case thereby locking out crucial evidence; and that the additional evidence sought to be adduced by the applicant is a post mortem report in respect of the deceased.

8. The respondents all filed individual replying affidavits in similar terms contending that the prosecution had many opportunities to call witnesses, including the pathologist but failed to do so; that a last adjournment and a further two last adjournments were granted to the applicant which led to the closure of the prosecution case; that the trial court exercised its discretion when it disallowed further adjournments and cannot therefore be faulted for locking out the pathologist's evidence; that there was no documentary evidence to prove that the doctor who performed the post mortem on the body of the deceased was prevented by sufficient cause from attending court and testifying; that the prosecution had a period of four (4) years to prosecute its case, avail witnesses and tender evidence which it considered vital for its case; that at no time did the pathologist who prepared the post mortem report on the body of the deceased attend court during the four (4) years that it took for the trial to be concluded; that it is a constitutional requirement that prosecution of cases be finalized expeditiously; that the prosecution did not exercise due diligence in prosecuting its case; and that adducing evidence at this stage will be highly prejudicial to the respondents and will occasion them grave injustice. The respondents urged us not to allow the application.

### **Submissions**

9. When the application came up for hearing, **Ms. Oduor**, the Principal Prosecution Counsel (PPC) appeared for the applicant while **Mr. Momanyi** appeared for the respondent. The applicants had filed a list of authorities while the respondents had filed written submissions. **Ms. Oduor** submitted that the case before the trial court was closed before the pathologist had testified; that the hearing of the trial was adjourned on several occasions by the prosecution due to the unavailability of the pathologist; that the introduction of additional evidence would not be prejudicial to the respondents; that despite bonding the pathologist and writing seven (7) letters to the respective DCIOs to avail the prosecution witnesses and exhibits, the pathologist did not attend court; that failure to call the pathologist would cause an injustice on the victim and the mistakes of the prosecution should not be visited on the victim; that this court has discretion under Rule 29 (1) of the Court Rules to allow additional evidence to be adduced, and that this can be done orally or by way of affidavit; that the new evidence to be adduced will have an impact on the appeal; and that if the application for leave to adduce additional evidence is not allowed, this will have a negative impact on the appeal as the pathologist's evidence regarding the cause of death of the deceased, the state of the body of the deceased at the time it was recovered and at the time the post mortem report was prepared will not be available to the Court.

10. In contention of the application, **Mr. Momanyi** counsel for the respondents relied on the replying affidavits sworn by the respondents. Counsel submitted that the prosecution was all along aware that the post mortem report sought to be introduced was to be produced by the pathologist who was based in Bungoma where the trial was being conducted; that had the applicant exercised due diligence, the evidence would have been adduced at the trial; that there was no evidence that the letters attached to the instant application were delivered to the DCIO to satisfy the Court that the applicant had acted with due diligence to ensure the availability of witnesses, including the pathologist; that the Court's discretion under Rule 29 of the Court Rules should be used sparingly and should not be used to fill a lacuna in the prosecution's case to the prejudice of the respondents; and that the evidence of the pathologist was available at the trial and is therefore not new evidence. Counsel urged us to dismiss the application.

### **Determination**

11. We have perused the record, the application and supporting affidavit, the replying affidavits, written and oral submissions by counsel, the authorities cited and the law.

12. Rule 29 (1) (b) of the Court of Appeal Rules gives this Court the power to take additional evidence, or to direct that additional evidence be taken by a trial court. This is a discretionary power which has to be exercised judiciously with reason and not capriciously. The parties must provide the Court with sufficient basis upon which to exercise its discretion whether to allow an application to admit additional evidence.

13. The principles that guide this Court in determining an application to adduce additional evidence have been laid down in Rule 29 of the Court Rules and by various authorities.

Rule 29 of the Court Rules provides as follows:

***“29(1) On any appeal from a decision of the superior court acting in the exercise of its original jurisdiction, the Court shall have power - (emphasis supplied)***

***(a) ...***

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

14. It is notable that the Court that seeks to admit new evidence, under Rule 29 of the Court Rules must have the jurisdiction to do so. This Court in the case of **Brown Tunje Ndago vs Republic [2013] eKLR (Criminal Appeal (Application) No. 12 of 2012)** stated that:

**“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.”**

15. In **The Administrator, HH The Aga Khan Platinum Jubilee Hospital v Munyambu [1985] KLR 127** this Court held that:

**“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.”**  
(Emphasis supplied).

See **Karmali Tarmohamed & Another v I.H.Lakhani [1958] EA 567, Judith Deborah Cave Shaw v Francis Robert Shaw, Civil Application No. NAI. 361 of 2005 (unreported) and Wanje v Saikwa [1984] KLR 275**

16. In **Joginder Auto Service Ltd v Mohammed Shaffique & Another [2001] eKLR (Civil Appeal (Application) No. Nai. 210 of 2000)** this Court stated:

**“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 authorising the adduction of additional evidence uses a general phrase, namely, "sufficient reason."”**

17. Accordingly, in a nutshell, for this Court to exercise its discretion in favour of the applicant to adduce additional evidence, the applicant must establish: that the Court has jurisdiction to entertain the application; that the evidence sought to be adduced could not have been obtained with reasonable diligence during the trial; that the evidence may have an important influence on the outcome of the appeal; and that the evidence sought to be adduced is credible.

18. In the instant application, on the issue of jurisdiction, there is a pending appeal to this Court filed by the respondents against their conviction and sentence by the High Court. The respondents were convicted for the offence of murder by the High Court in its original jurisdiction. As a first appellate court, this Court therefore has the jurisdiction to hear and determine this application for the introduction of additional evidence.

19. On the question whether the additional evidence sought to be adduced, was available, easily procured and within the knowledge of the person so seeking to admit it into evidence, as conceded by the applicant, the evidence sought to be adduced was within their knowledge at the trial save that it was not produced at the trial as the pathologist did not attend court during the trial. It is notable that the trial court adjourned the hearing of the case on several occasions, eight to be precise, to allow for the prosecution witnesses, including the pathologist to attend the hearing at the trial court. We are not satisfied that the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial.

20. It is trite that the unfettered power of the Court to receive additional evidence should always be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal. As was held in **Wanjie v Saikwa (supra)**;

**“This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”**

(Emphasis supplied).

21. It is notable that the trial proceeded for a period of about four (4) years. There is no evidence that the pathologist attended court during that period. It is on record that the pathologist was based in Bungoma where the trial was taking place. The prosecution office and the police station were also based in Bungoma. The prosecution did not seek a date that was convenient to the trial court and the pathologist. On 18<sup>th</sup> November, 2014, the prosecution informed the trial court that the pathologist had indicated that he was unavailable as he was engaged in theatre at the hospital conducting an operation. The trial court (H. Omondi, J) declined to allow the application for adjournment and ordered the prosecution to proceed with the case. The learned Judge stated: **“Although the State was admitted (sic) the court stated that the matter was being adjourned for the very last time. My own view is that it is due to these countless indulgence that (sic) prosecution has not taken the court seriously in issues of bonding witnesses to attend.”** Ali-Aroni, J took over the trial from H. Omondi, J. and on 19<sup>th</sup> May, 2015 upon application by the prosecution to call the pathologist to testify, the learned Judge declined to reverse the ruling of H.Omondi, J due to the laxity of the State Counsel.

22. As conceded by the applicant, the post mortem report was at all times available to the applicant and their counsel. In the circumstances, we are not satisfied that the additional evidence sought to be adduced by the applicant could not have been tendered if due or reasonable diligence had been exercised by the applicant.

23. On the question whether the evidence sought to be adduced may have a significant influence on the case, the applicant has not indicated how the evidence of the pathologist and the post mortem report will affect the outcome of the appeal.

In the result, we are not satisfied that the additional evidence sought to be adduced will have a significant impact on the outcome of the pending appeal. Further, the applicant has not advanced sufficient reason why the evidence sought to be adduced was not with due diligence on the part of the applicant adduced during the four (4) year trial period.

24. Accordingly, we find that this application lacks merit and it is hereby dismissed.

25. Orders accordingly.

**Dated and delivered at ELDORET this 6<sup>th</sup> day of June, 2019.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR.**