



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL (APPLICATION) NO. 27 OF 2017

BETWEEN

ISAAC ODUOR ABIERO.....APPLICANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from the Judgment/Decree/Order of the High Court of Kenya at Kisumu (E.N. Maina, J.) dated the 9<sup>th</sup> day of February, 2017*

*in*

**H.C.CR.A. NO. 48 OF 2014)**

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**RULING OF THE COURT**

[1] This is an application for leave to admit additional evidence of the three named persons at the hearing of the appeal.

The application is brought under **Rule 29** of the Court of Appeal Rules and **sections 3, 3A 3B** of the Appellate Jurisdiction Act.

[2] The applicant was convicted by the High Court of the offence of murder contrary to **section 203** as read with **section 204** of the penal code and sentenced to death.

He has appealed against the conviction and sentence in **Civil Appeal No. 27 of 2017**.

This application is filed within the appeal.

[3] The applicant was a Sergeant of police stationed at Kondele Police Station. **I.P Wanyama** was the officer in charge of the police station.

On the night of 14<sup>th</sup> June, 2014, the applicant, **P.C Mwamburi** and **PC Mwangi** were on night patrol at Kondele area. They were armed with firearms. During the patrol, the applicant and the two other police officers found youths watching a World Cup match at a video shop. The police wanted the youths to go home because of the insecurity in the area and the applicant unplugged the television set thus switching it off. This led to a confrontation between the applicant and the youths in the cause of which **Collins Okoth Owino**, the deceased, sustained a fatal gunshot wound.

[4] The prosecution called twelve witnesses at the trial including P.C Mwamburi and P.C Mwangi who were in the company of the applicant. The applicant in an unsworn statement explained the circumstances under which the deceased died. He did not call any witnesses.

In the judgment the learned judge stated:

*“By and large the accused statement corroborated the evidence of the prosecution witnesses. The only point of departure of the two*

*accounts being who caused the gun to go off. According to the prosecution witnesses the accused intentionally pointed his gun to the direction of the deceased, cocked it and then pulled the trigger. His account is that the deceased tried to grab the gun causing his (accused's) hand to reflex as a result of which the gun which was directed at the accused went off and the deceased was shot." (underling our own).*

[5] The application is supported by the affidavit of the applicant in which he states, amongst other things, that, he did not call the three persons as witnesses because he could not reach them and that if the three persons had given evidence it would have changed the outcome of the case. The affidavits of the three persons are annexed.

C.I Wanyama was the OCS, Kondele Police Station. C.I Wanyama seems to say in his affidavit that the investigations were not thorough because only the applicant's gun was taken for ballistic examination and not the guns of the other two police officers.

He also seems to say that in the circumstances obtaining, the police had a duty to protect themselves.

The other two persons **Crispo Oluoch Adero (Crispo)** and **George Odhiambo Swan (George)** were allegedly at the scene. Crispo states that the applicant was surrounded by a group of youths and one had held his rifle and that he heard a gunshot.

On his part, George states that the deceased was holding the applicant's gun and within a few seconds, he heard a gunshot and saw the deceased lying down.

[6] By **Rule 29(1) (b)** of the Court of Appeal Rules, the Court has a discretion, and, for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.

The general principles which guide the Court in exercising that jurisdiction have been stated in many decisions of this Court including in **Samuel Kungu Kamau v Republic [2015] eKLR.**

The general rule is that the discretion should be exercised very sparingly and with caution; that the discretion will not be exercised to patch up the defects on the applicant's case at the trial or to make a fresh case in the appeal; that an applicant is required to show, amongst other things, that the evidence was not available at the trial or could not have been obtained by exercise of reasonable diligence; and that the new evidence is credible and could have an important influence on the result of the appeal.

[7] We have considered the application. The reason given by the applicant for failure to call the witnesses at the trial is that he could not reach them. The applicant was on bond and was represented by a counsel during the entire duration of the trial of slightly over two years. It is not credible that C.I Wanyama, a senior police officer could not be reached. Indeed at the time the application was made he was still the OCS, Kondele Police Station. The applicant does not disclose the steps he took to trace Crispo and George. He did not apply for witness summons.

In a nutshell, the applicant has failed to show that the three persons were not available to testify at the trial.

[8] C.I Wanyama was not at the scene. It seems that his evidence would not have important influence on the outcome of the appeal in view of the explanation by the applicant of the circumstances under which the deceased sustained gunshot wounds which circumstances were considered by the trial court.

The facts stated in the affidavit of Crispo and George are not new evidence. The applicant gave that version of the events at the trial. P.C Mwamburi and P.C Mwangi who were in the company of the applicant also gave similar versions of facts at the trial. Those facts would be mere repetition.

[9] It seems that the sole basis of the application is that the applicant considers that had he called witnesses his defence could have been more credible. The discretion of the Court cannot be used merely to assist the applicant to re-open the trial.

[10] For the above reasons, we find that the applicant has not satisfied the conditions for reception of additional evidence.

Accordingly, the application is dismissed.

*Dated and Delivered at Kisumu this 7<sup>th</sup> day of June, 2018.*

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

*J. MOHAMMED*

.....

*JUDGE OF APPEAL*

I certify that this is a true copy

of the original

**DEPUTY REGISTRAR**