IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & AZANGALALA, JJ.A)

CRIMINAL APPEAL (APPLICATION) NOs. 103, 106 & 108 OF 2014

BETWEEN

PETER WAHIGA KABIRU……...….....1ST APPELLANT

SIMON BAABU MWANGI.....2ND APPELLANT

ZACHARY SINDA KEROSIA.....3RD APPELLANT

AND

REPUBLIC …….….....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nyeri (Wakiaga, Ngaa, JJ.) dated 19th September, 2014

in

H. C. Cr. A. Nos. 177, 181, 182 & 183 of 2011)

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RULING OF THE COURT

1. The hearing of the main appeal herein has been held in abeyance pending the hearing and determination of a notice of motion dated 7th January 2016. It is premised under ***Rules 29, 31 42*** and ***43*** of the ***Court of Appeal Rules 2010***, but the focus is on Rule 29. Rule 31 relates to the general powers of the Court to deal with main appeals while Rules 42 and 43 prescribe the procedure for making applications.

2. The applicant is the 1st appellant in the consolidated appeals, ***Peter Wahiga Kabiru,*** and he seeks the following orders:-

> **"1. That the material sought to be introduced be characterized as relevant exculpatory evidence.**
>
> **"2. That the attached affidavit of Mr. Josephat Mithanga Kagunda be admitted into evidence.**
>
> **3. That the attached documents being:**

a) Defence/exhibit 2, a clear copy of Josephat Mithanga Kagunda's identification card.

b) Defence/exhibit 3, a copy of his (sic) Josephat Mithanga Kagunda's driver's license.

c) Lease agreement between Applicant's Company Jungle Car Hire and the Landlord Anpemu Limited owners of applicant's business premise at Anpemu House dated 26 September 2008.

d) Receipts issued to the applicant by the landlord of Anpemu House in Ngara.

Be admitted into evidence.

4. That the documents produced as defence exhibit 2 & 3 be taken to a document examiner along with the clear copies submitted herein for comparison and an expert opinion on how they compare.

In the alternative

5. That this honourable court be pleased to evaluate defence exhibit 2 and 3 in light of the clear copies now provided.

6. That the office lease agreement and the rent payment receipts issued to the applicant/appellant by his landlord at Anpemu House in Ngara be admitted into evidence."

3. In essence the applicant seeks to introduce new evidence to clarify some doubts which were expressed by the High Court when considering his defence. That evidence is in form of legible copies of exhibits already produced and considered by the two lower courts, fresh documents supporting his tenancy, and fresh evidence in form of an Affidavit from a person who did not testify at the hearing of the case. He believes a fresh evaluation of that evidence would exonerate him from the offences on which he was convicted.

4. There were five offences charged and tried before the Chief Magistrate's Court in Nyeri. It was alleged that on the 30th December 2009 the applicant, jointly with four others, committed the offences of Robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***; personating a public officer contrary to ***Section 105(b)*** of the Penal Code; making a document without authority contrary to ***Section 357(A)*** of the Penal Code on an unknown date; and was in possession of public stores as well as suspected stolen property contrary to ***sections 324(3)*** of and ***323*** of the Penal Code respectively on 12th January 2010. The trial court **(J.Kiarie, SPM)** found each of those charges proved against the five co-accused, except count three, (making a document without authority), and sentenced them to death on the count of robbery with violence and imprisonment for one year on the other counts. The High Court **(Wakiaga & Ngaah JJ.),** on first appeal, reviewed and re-assessed the evidence on record and allowed the appeal of one appellant on all counts; allowed the appeals of the remaining appellants on the counts of possession of public stores and suspected stolen property; but dismissed their appeals on convictions for robbery with violence and personating a public officer.

5. The main appeal is therefore a second appeal where, by dint of ***section 361*** of the ***Criminal Procedure Code (CPC)***, the jurisdiction of this Court is limited to the consideration of issues of law only. A fundamental issue then arises before the merit consideration of the application before us: does this court have jurisdiction to admit and consider the application under ***Rule 29*****?**

6. Rule 29, as far as is relevant to this application 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 –

(a)……

(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". *(emphasis supplied).*

7. There are thus two crucial thresholds; a jurisdictional one and a discretionary one. The discretionary threshold is obviously dependent on the jurisdictional one and has received judicial interpretation over the years. We take it from the case of ***Joginder Auto Service Ltd v Mohammed Shaffique & Another [2001] eKLR*** where the court stated as follows:

"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.""

8. In the case of ***Samuel Kungu Kamau v Republic [2015] eKLR*** the court further stated:

"It has been said time and again 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. In the words of Chesoni Ag JA (as he then was) in Wanje v Saikwa [1984] KLR 275:

"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 added)

9. The *locus classicus* on the principles has all along been the decision of the predecessor of this Court in ***Elgood V. Regina (1968) E.A. 274*** which in turn adopted the summary enunciated by *Lord Parker C.J* in ***R. v. Parks (1969) All ER*** at page 364. The principles are:-

"(a) That the evidence that is sought to be called must be evidence which was not available at the trial.

(b) That it is evidence that is relevant to the issues.

(c) That it is evidence that is credible in the sense that it is capable of belief.

(d) That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial."

10. On the basis of the above authorities, it would appear to be the bottom line that it will be in rare and exceptional cases where an appellate court will grant an application for additional evidence. But the principles would only be applicable if the court has jurisdiction to consider the application in the first place, because as has been said *ad nauseam*, jurisdiction is everything and a court which has none downs its tools. We must therefore adjudicate on that issue first.

11. When asked to address us on the issue, learned counsel for the appellant **Mr. Paul Ng'arua** responded that the Court of Appeal was a Court of justice and should rise to the occasion especially where the appellant is facing the death penalty and interpret the rule in a way that will accommodate the appellant. He referred us to the case of ***Republic v. Moses Kiprono Ngeno [2013]eKLR,*** a High Court case where the Court of Appeal had made an order for recording of specific additional evidence. However, the case was about murder and had gone to the Court of Appeal on a first appeal. It is distinguishable. He also referred us to a decision of this Court in ***Daniel Kipngetich Sang v. Republic [2011] eKLR*** in which an order was made for production of a birth certificate to prove the age of the appellant and assist the Court in making a decision on the legality of appellant's sentence. Those were, however, exceptional circumstances addressing an issue of law under ***Section 361(1)(b)*** of the CPC and had nothing to do with the facts in the main appeal. It is also distinguishable.

12. For his part, learned ***Senior Assistant Director of Public Prosecutions, Mr. Kaigai*** was in no doubt, from the reading of rule 29, that it was not applicable. In his view, if it was granted, it would mean that factual matters of evidence will be discussed in the Court of Appeal contrary to the limiting provisions of Section 361 of the CPC. As there were concurrent findings of fact by the two courts below, this Court was bound to respect those findings. He submitted that the application was an afterthought and there was no basis to consider it.

13. A similar jurisdictional issue arose before this Court in the ***Samuel Kungu Kamau case (supra)*** and the Court followed the previous decision in ***Brown Tunje Ndago v Republic [2013] 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 which it is acting as a first appellate court from the decision of the superior court."

14. After analyzing other authorities the Court concluded as follows:

"***Rule 29 gives this court power to receive additional evidence when it is sitting on any appeal from a decision of a superior court acting in the exercise of its original jurisdiction. Thus, in a second appeal, this Court does not have the jurisdiction to order the taking of additional evidence. In Marcarios Itugu Kanyoni v Republic [2011] eKLR, the court went on to consider the application on merit, but stated that:***

"The provisions of Rule 29 (1) are plain …. This Court has jurisdiction to take additional evidence only when it is dealing with a first appeal from the conviction by the High Court. The Legislature could not have intended that a second appellate court which deals with appeals on points of law only should have jurisdiction to take additional evidence which generally deals with matters of fact. It is the High Court sitting as a first appellate court over the applicant's appeal which had jurisdiction to take additional evidence. The applicant did not invoke the jurisdiction of the superior court. From the foregoing, we make a definite finding that this Court has no jurisdiction to entertain the application."

This proposition of law was also stated in <u>Daniel Mwathi Njaramba & 2 others v Republic</u> [2013] eKLR (Criminal Appeal (Application) No. 233 of 2012 where the Court rendered itself as follows:

"Based on the foregoing it is clear that this Court can only exercise its power under the said provision to admit additional evidence where it is sitting as a first appellate court from the decision of the High Court in exercise of its original jurisdiction."

15. We are persuaded that the above is the correct exposition of the law and we respectfully adopt that reasoning. In the result, we find that the application before us does not lie under ***Rule 29*** of the Court's Rules and the Court lacks the jurisdiction to consider it. It is struck out. Orders accordingly.

16. This ruling is delivered under Rule 32 of the Rules of this Court owing to the retirement of Hon. Justice F. Azangalala as at 31st March, 2017.

Dated and delivered at Nyeri this 5th day of April, 2017.

P. N. WAKI

……

JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

<u>DEPUTY REGISTRAR</u>