



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & M'INOTI, JJA.)

CRIMINAL APPEAL NO. 88 OF 2016 (R)

BETWEEN

GODFFREY MUCHUGIA GITONGA.....1ST APPELLANT

BERNARD THAIRO WANGARE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an application for leave to adduce additional evidence within an appeal from a judgment of the High Court of Kenya at Nairobi (Ogola & Kamau, JJ.) dated 14th November, 2013

in

HC.CRA. NO. 159 & 160 OF 2016)

RULING OF THE COURT

The application before us seeks an order that further evidence in the form of Occurrence Book (OB) entries for 21st November 2008 from Kikuyu Police Station be admitted or that directions be given for the same to be taken by the High Court.

As framed, the motion is expressed as brought under **Rule 29** of the Court of Appeal Rules, 2010 but at the hearing of the application, **Ms. Betty Rashid**, the appellant's learned counsel, beat a hasty retreat, conceded the inapplicability of that rule, and

instead took refuge under **Article 159** of the Constitution as the basis for the application.

The application comes in the context of a second appeal by the appellants who were on 6th April 2011 convicted on a charge of robbery with violence contrary to **section 292 (2)** of the Penal Code and sentenced to death as by law prescribed. Their first appeal to the High Court was dismissed vide a judgment rendered by E.K. Ogola and J. Kamau, JJ, on 14th November 2013. It is common ground that the initial conviction of the appellants and its upholding by the High Court rested in the main on the evidence of their identification at the scene as part of a gang of robbers that on 20th November 2008 robbed **Stephen Kimani Gikonyo** and **Peter Mwaura Mwangi** of various goods and items at Gikambura in Kiambu West District and used actual violence on them. They were all the while armed with crude

weapons namely pangas and rungun.

On a second appeal, this Court deals only with matters of law. This is a jurisdictional question spelt out for criminal matters in **section 361** of the Criminal Procedure Code as follows;

“361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-

(a) On a matter of fact”

See KARINGO vs. REPUBLIC [1982] KLR 214 and THIONGO vs. REPUBLIC [2004] 1 EA 333.

Whatever legal conclusions may be drawn from the evidence respecting the OB report which Ms. Rashid says was the first report on the robbery with no mention of the appellants in it, the fact remains that the contents of that report whether it contains the appellants’ names, is first and last a question of fact. In asking us to have the same introduced at this point, the appellant is essentially inviting us to wade into the realm of fact assessment, which is an area patently outside our jurisdiction. Moreover, the said document not having been sighted and appreciated by the two courts below, we would be embarking on a *de vono* examination which is not open to us as a second appellate court.

It is no accident that under **Rule 29(1) (b)** of the Rules of Court, adduction of additional evidence is expressly stated to apply

when this Court is considering a first appeal from the decision of a superior court exercising its original jurisdiction. This is so because, by dint of **sub rule (1) (a)**, a first appeal proceeds by way of re-hearing and the Court is mandated to re-appraise the evidence and through its re-analysis, and re-assessment in a fresh and exhaustive manner, to draw its own inferences of fact. In a word, a first appeal permits and involves, not only matters of law if raised, but, critically, matters of fact. These latter are expressly excluded from our jurisdiction under a second appeal and therefore an application such as the one before us cannot lie.

As we have already intimated, **Ms. Rashid** on finding **Rule 29(1)** unavailable, sought solace under **Article 159** of the Constitution. With respect, that move can only be termed as mischievous. When we invited her to provide authority for the novel proposition that the said Article of the Constitution could provide the procedural cloak or hook for an application for adduction of further evidence, counsel conceded, as she had to, that she had none and was unaware of any.

We are confident that the Constitution and in particular **Article 159** is not and cannot be taken to be a wide-open-free-for-

all highway for the bringing of all manner of applications before this or any other court. The main procedural statutes the Civil Procedure Act and the Rules made thereunder; the Criminal Procedure Code and; for this Court the Court of Appeal Rules; make full provision for the procedural bases for all kinds of applications as provided by law. Where some applications cannot from their very nature be entertained by the Court, no amount of ingenuity, creativity, craft or sleight of hand riding upon **Article 159** can lend them admittance where the door is jurisdictionally shut.

We have said enough to show that this application is devoid of merit. We are certain that what is sought by it advances the appellants’ case not a bit. The point that counsel wishes to urge is a proper subject of comment on the basis of the record and submissions as to its import as submitted by Mr. Mailanyi, the learned Senior Assistant Director of Public Prosecutions.

Moreover, this Court has in recent times decried the growing wholly unhelpful practice of bringing applications for production of OB’s on appeals, just to make the point that an appellant was not named or

described in the first report. See **BENARD GATHIAKA MBUGUA & OTHERS vs. REPUBLIC** [2016] eKLR.

We mention this to say that even had we the requisite jurisdiction in a first appeal, which we do not have as this is not such appeal, the application would still have been a non-starter.

The application is accordingly dismissed.

Dated and delivered at Nairobi this 28th day of July, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR