IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

CRIMINAL APPEAL (APPLICATION) NO. 113 OF 2014

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

BETWEEN

BERNARD GATHIAKA MBUGUA.....1ST APPELLANT

JOHN MZEE MTUU.....2ND APPELLANT

DAVID KINYAGIA MARY.....3RD APPELLANT

ERICK KIPKURUI KIPKEMOI.....4TH APPELLANT

JOHN KARANJA NJUGUNA.....5TH APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an application for leave to adduce additional evidence under Rule 29 of the Court of Appeal Rules and Section 361 of the Criminal Procedure Code

CAP 75 Laws of Kenya)

in

H. C. Cr. C. No. 42 of 2010

****

RULING OF THE COURT

1. There seems to be a growing belief by appellants and learned counsel alike, that in criminal appeals that rest on identification, an appellant is entitled to an acquittal unless an identifying witness mentions the name or description of the perpetrator of the crime and that report is recorded in the police **Occurrence Book** (OB). It would not matter that the witness mentioned the name or gave the description to the first person or people to arrive at the scene of the crime, whether they were people in authority or not, and it would not matter whether the witness subsequently made the description in the full statement made to the police at the first opportunity. Unless the report was in the OB, it was of little or no probative

value, so seems to be the belief. We say this because we have seen an upsurge of applications filed for introduction of further evidence in first and second appeals, and almost invariably they all seek the production of OBs.

2. Perhaps the belief is encouraged by the emphatic pronouncements made by this Court in many of its decisions, on the significance of a first report. We may go back to 1952 in the case of ***Terekali & Another vs. Republic [1952] EA 259*** when the predecessor of this Court stated as follows:-

> ***"Evidence of first report by the Complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others…"***

3. That case is still good law, and has indeed been followed in many subsequent decisions. But whether or not a report on identification was made, when it was made and where or how it was made, are all matters of evidence which the court must in its duty evaluate in line with established principles. Take the application before us.

4. It is a notice of motion taken out under ***Rule 29(1), (2), (3) & (4)*** of the ***Court of Appeal Rules, 2010*** (the Rules) seeking two substantive prayers as follows:-

> ***"b. THAT..this honorable Court does grant leave to the applicants/appellants to adduce additional evidence which has emerged and would be useful for this honorable Court to arrive at a fair and just finding as per Rule 29 of the Court of Appeal Rules and Section 361 of the Criminal Procedure Code Cap 75.***
>
> ***c. THAT upon grant of prayer (b) above this honorable Court be pleased to admit the contents of the OB Number 64 of the 11th day of April 2010 and OB Number 37 of 13th day of April 2010 from Naivasha Police Station."***

5. The background to the application is this:

The application is made by **John Karanja Njuguna ('the applicant')**, who is the 5th appellant before us. Together with seven others, they were charged, tried and convicted by the High Court (**Emukule J.)** sitting in Nakuru for the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***. It was alleged in the Information filed by the Attorney General on 2nd June 2010, that they jointly murdered **Clement Muguimi ('the deceased')** on 11th April 2010 at Kenya Nut Farm, in Morendat, Naivasha. A snapshot of the evidence on record shows that the deceased was one of six security guards employed by M/S Kenya Nut Company to guard their farm in Morendat which specialized in macademia nut growing and cattle rearing. Although the farm had electric fencing round it, it appears to have blocked a road used by members of the public to access a fishing spot in Malewa River. The management of the farm, fearing the destruction and theft of their crops, gave instructions to the security guards not to allow anyone to trespass through the farm. On the evening of the fateful day, according to the security guards who testified, a group of 15 young people invaded the farm with the intention of forcing their way through the farm but they were repulsed by the security guards. They retreated and then returned with a huge group of about 35 others, making 50, who overpowered the security guards and in the process killed the deceased.

6. After hearing 8 prosecution witnesses and all the accused persons, the trial court acquitted three of them but convicted the appellant and the four co-appellants before us. After hearing submissions on mitigation from the accused persons who were all young people in their early 20s, the trial court opted to sentence them to a uniform custodial sentence of 20 years each. They have now challenged their convictions and sentences while the Director of Public Prosecutions has given notice for confirmation of the convictions and enhancement of the sentences to death. The main appeal is still pending hearing but, as stated earlier, we have to dispose of the interlocutory matter submitted by the applicant.

7. The applicant swore an affidavit in support of the motion affirming that one of the OB entries Number 64 dated 11th April 2010, which he intends to introduce, did not reveal the person or persons who were reported to the police as having attacked the deceased. That shows the witnesses were unable to identify the attackers. The other entry Number 37 of 13th April 2010 mentions a person who was in the same group with the attackers on 11th April 2010 but the preferred offence was robbery with violence. It shows therefore, in his view, that no offence of murder was committed and that the offence committed was not by the applicant. Learned counsel for him, **Mr. Maragia Ogaro**, submitted that although the applicant was represented by another counsel at the trial, he did not raise the matter of the OB entries because the prosecution did not call the investigating officer or the arresting officer as witnesses. He contended that it was the duty of the prosecution to produce the OB but they closed their case prematurely. Mr. Maragia informed us that he only came across the OB entries shortly before the application was made and he thought they were not only relevant to this case but would assist the appellate court in re-assessing and re-evaluating the facts as required under **Section 361** of the **Criminal Procedure Code.** In his view, the court should allow the OBs to be produced at this stage to confirm that the witnesses did not identify the applicant at the scene. He cited no authority for the principles applicable in considering the application, but there are on record several authorities on the main appeal to underscore the danger of convicting on identification evidence where the witness only sees the perpetrator fleetingly or in difficult circumstances. The application was supported by learned counsel for the 2nd, 3rd and 4th Appellants, **Mr.Mong'eri** and learned counsel for the 1st appellant, **Mr. Karanja Mbugua**, both of whom made brief submissions but filed no applications or lists of authorities.

8. On the other hand, learned Senior Public Prosecution Counsel, **Mr. Amos Chigiti** found no reason to allow the application for the simple reason that it was not merited and is meant to delay the cause of justice. He laid out several authorities of this Court, the Supreme Court of Uganda and the High Court on the principles applicable none of which the applicant satisfied, particularly the requirement that the evidence was not available at the trial. In his view, the prosecution called all the witnesses necessary for support of the facts put forward and was only compelled to close their case due to the inability to find the investigating officer whose evidence would only have been supportive of the evidence on record. Counsel submitted that the OBs sought to be introduced were neither necessary for the prosecution case nor relevant as one of them refers to a different person who committed a different offence and was going to be charged accordingly. At all times during the trial, the applicant was at liberty to call for any evidence he deemed necessary for his defence but he never raised any issue on the OB entries now referred to, he concluded.

9. We have considered the application, the submissions of counsel and the authorities cited by the respondent. For starters, the application is based on all the provisions of ***Rule 29*** but other than ***Sub rule 1***, the others relate to the procedure for taking additional evidence where the court is persuaded to admit any. We must therefore deal with the admission first which, in relevant part, is covered under ***Rule 29(1)*** 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).*

10. That provision has received numerous judicial interpretations which are consistent, firstly, that the jurisdiction lies only with respect to first appeals, whether civil or criminal ***(***see ***Marcarios Itugu Kanyoni v Republic [2011] eKLR).*** The case before us is indeed a first appeal on a murder conviction. Secondly, the discretion exercisable by the court is not absolute, since the applicant must establish sufficient cause. What is sufficient cause has also received judicial insights and there are no closed categories for it. But there are principles and guidelines which have been widely applied by the courts. We may first refer to ***Samuel Kungu Kamau v Republic [2015] eKLR*** , which was also about production

of OBs, to illustrate what the discretion is not about. This Court stated thus:-

> ***"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)

11. The *locus classicus* case 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."***

Those conditions, in our view, ought to be considered together, and it is fairly obvious therefore why, on the authorities, the bottom line is that it will be in rare and exceptional cases that an appellate court will grant that additional evidence be called.

12. Applying the principles to this case, it is clear from the motion and the submissions of counsel that the OB entries are not new evidence as they were always in existence during the trial and could have been retrieved and produced with due diligence. That finding would be enough to dispose of the motion. We further do not find the motion exceptional as it merely intends to underscore the fact, which we are told is apparent on the record, that the applicant was not identified at the scene and even if he was, the identification was not in the first report made to the police. The utility of further evidence to support the same fact, may well be tautological.

13. For those reasons, we find no merit in the application and order that it be and is hereby dismissed. The main appeal shall proceed to hearing.

Dated and delivered at Nakuru this 2nd day of August, 2016

P. N. WAKI

*****.....*****

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR