



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 30 OF 2015

BETWEEN

JACKSON WANYOIKE NJUGUNA

JOSEPH MAINA NJOROGE APPLICANTS

AND

REPUBLICRESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Muchemi & Odunga, JJ) delivered on 27th November, 2013 in

H.C.CR. A NO. 238 OF 2005)

RULING OF THE COURT

The appellants **JACKSON WANYOIKE NJUGUNA** and **JOSEPH MAINA** (hereinafter the 1st and 2nd applicants) filed a Notice of motion under Section 3A and 3B of the Appellate Jurisdiction Act as well as Rule 29 of the Court of Appeal Rules.

The motion was supported by the affidavit of Ibrahim Onyata the then counsel for the applicants sworn on 27th July, 2015. Mr. Onyata deponed that the applicants had requested the trial court to avail Occurrence Book entries of 25.06.2007 and 26.06.2007; that the appellants were not supplied with witness statements and that the further evidence sought by the applicants was crucial to their case.

Apart from an order for the production of the Occurrence Book of 25.06.2007 and 26.06.2007 as well as the witness statements, in the motion there was a further prayer that the initial report made by the complainant and as entered in the Occurrence Book be availed to the applicants.

The motion came before us on 19.10.2016 and Mr. Swaka, learned counsel who had taken over the brief from Mr. Onyata argued the motion. He reiterated the averments in the supporting affidavit and laid emphasis that the applicants had sought for the production of the Occurrence Book of 25.06.2007 and 26.06.27 in the trial court.

Mr. Gitonga, learned Senior Principal Prosecution Counsel opposed the motion on the basis that Rule

29(1) (b) of this Court's Rules does not allow for the exercise of the court's discretion to adduce additional evidence when exercising its mandate as a second appellate court. For this proposition he relied on the authority of **Samuel Kungu Kamau v Republic Nairobi Criminal Appeal No. 29 of 2015** (UR).

We have anxiously considered the motion and the supporting affidavit, the oral submissions made before us, the authorities cited as well as the law. As pointed out by Mr. Swaka for the applicants, the record does indicate that on 13th August, 2008 the two appellants separately requested the trial court to avail the Occurrence Books of 25.06.2007 and 26.06.2007.

We further note that contrary to the orders sought in the motion, there was no prayer for availing of the witness statements and/or the complainant's initial report as recorded in the Occurrence Book. Be that as it may, Rule 29 (1) of this Court's Rules provides as follows:

29 (1) "On any appeal from a decision of a 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."

The above rule has been interpreted in various cases of this court. In **Samuel Kungu Kamau v Republic (supra) the authority of Brown Tunje Ndago v Republic [2013] eKLR (Criminal Appeal (Application) No. 12 of 2012)** was quoted wherein this Court held 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 which it is acting as a first appellate court from the decision of the superior court."

The appellants herein were convicted of the offence of robbery with violence and sentenced to death by the Chief Magistrate's Court, Makadara. They unsuccessfully appealed to the High Court against their convictions and sentences and have now come to this Court. They are seeking to have further evidence as they wish to challenge the evidence of their identifications. They contend that the evidence sought is crucial for purposes of establishing that they were not positively identified.

We also note as pointed above, that indeed a request for the production of the Occurrence Book of 26.06.2007 and 27.06.2007 was made to the trial court.

However, of fundamental concern to us is that the appellants' appeal is a second appeal. In **Samuel Kungu Kamau v Republic** (supra) this Court stated that:

"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 Kanoni v Republic [2011] eKLR (Criminal Application No. 5 of 2011) 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.”

In **Kamau v Republic** (supra) this Court cited the case of **Daniel Mwathi Njaramba & 2 Others v Republic** [2013] eKLR (Criminal Appeal (Application) No. 233 of 2012 where the court stated:

“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.”

It concluded that:

“We are aware that Sections 3A and 3B of the Appellate Jurisdiction Act gives this Court a wide latitude to make orders to ensure the efficient administration of justice. However, such justice must be within the boundaries and the framework of the law; invoking the overriding objects of the Appellate Jurisdiction Act cannot confer on the Court a jurisdiction that it does not have.”

We too are of the same mindset. Rule 29 1(b) of this Court’s Rules is clear and as a second appellate court we do not have jurisdiction to allow for the adduction of additional evidence.

In view of the foregoing, we find that this application is devoid of merit. It is hereby dismissed.

Dated and delivered at Nairobi this 25th day of November, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR