IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWERA & MUSINGA, JJ.A)

CRIMINAL APPEAL NO. 280 OF 2011

BETWEEN

SIMON MWANGI WAMBUI…………………………APPELLANT

AND

REPUBLIC …...RESPONDENT

*(An appeal from a ruling of the High Court of Kenya at Nairobi(**F.A. Ochieng' & Warsame, JJ**.) dated 18th May, 2011*

in

H.C. Cr. A. NO. 447 OF 2007)

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RULING OF THE COURT

This is an application under ***sections 3A*** and ***3B*** of the ***Appellate Jurisdiction Act, Rule 4*** of the Court of Appeal Rules and under the inherent power of the court for two orders. Firstly, that time for making the present application be extended, and secondly, that the Court be pleased to take additional evidence or direct additional evidence to be taken limited to the determination as to whether or not the appellant had bow-legs at the time the offence was committed. The application is supported by the grounds on the body of the application and in the applicant's affidavit.

The appellant was convicted by the Senior Resident Magistrate at Kibera of three counts of ***robbery with violence contrary*** to ***section 296(2)*** of the Penal Code and one alternative count of ***indecent assault on a female*** contrary to ***section 144*** of the Penal Code. He was sentenced to death on the first count and the sentences on the three other counts were ordered to remain in abeyance. His appeal to the High Court against conviction and sentence was dismissed on 18th May 2011 and thereafter he filed this second appeal.

When his appeal came for hearing on 12th November, 2013 he applied for adjournment through his counsel to enable him make the present application. The application for adjournment was allowed and the appellant was ordered to file and serve the application for leave to introduce additional evidence within 30 days. However, the application was not filed until 15th January, 2014.

According to the appellant, the delay in filing the application was due to failure by the Medical Officer at Kamiti Prison to prepare a medical report despite his attempts to have the medical report prepared. He explains that when the Medical Officer and the Officer in Charge of the prison ultimately refused to have a medical report prepared, his advocate took photographs of his legs to use them as evidence. He deposes that he does not have bow legs and has annexed two photographs to the application.

Although the application was filed over sixty days from the time limited by the Court, we have considered that the appellant was convicted of three capital offences and has been sentenced to death on one count. We have in our discretion enlarged time for filing the application and thus deemed the application as filed within time.

Rule 29(1) (b) of the Court of Appeal Rules gives this Court power in its discretion and for sufficient reason to take additional evidence where the appeal is from a decision of the High Court acting in exercise of its original jurisdiction. The principles upon which an appellate court exercises its discretion in a criminal case to allow additional evidence were laid down in **Elgood v Regina [1968] EA 274**. Two of the four principles which apply are that the evidence sought to be introduced was not available at the trial and that it is only in very exceptional cases that additional evidence will be allowed.

Mr. Oyalo, learned counsel for the applicant, appreciates that the appeal is not from the decision of the High Court in exercise of its original jurisdiction and states that the application is not brought under ***Rule 29(1) (b).*** However, he submitted that the Court has jurisdiction to remedy an injustice under the overriding principle and inherent jurisdiction, if it is satisfied that an injustice exists. He nevertheless relies on the principles in **Elgood v Regina** (supra) to support the application.

This application can be decided solely on the basis of the established principles for reception of additional evidence and we do not find it necessary to decide whether the Court should depart from the provision of ***Rule 29(1)*** that additional evidence can only be allowed on an appeal from the decision of the High Court acting in exercise of its original jurisdiction.

The evidence that the application intends to produce relates to whether or not he has bow-legs. He stated that some of the witnesses identified him at the scene of the crime because he had bow legs and that the trial magistrate referred to that evidence. We have perused the evidence of the main prosecution witnesses and the judgments of the two courts below. It is clear that the prosecution case was dependent on visual identification of the appellant and the two courts below made a finding that the appellant was identified by the witnesses. It is only ***David Mutoro Wasilwa*** (PW4), complainant in count 5, who specifically referred to the appellant as having bow legs. However, even this witness testified that he saw the appellant clearly and identified him. This being a second appeal, the Court can only consider points of law and not issues of fact raised in this application.

The appellant was represented by a counsel during trial who exhaustively cross-examined all the witnesses. The appellant had also an opportunity to ask the High Court at the hearing of the first appeal to take additional evidence under ***section 358*** of the ***Criminal Procedure Code***. He did not do so nor did he raise the issue of identification by bow legs in his written submissions. The additional evidence that the appellant intends to introduce was always available at the two courts below and there are no exceptional circumstances warranting admission of additional evidence at this late stage. The application is an afterthought and has not merit.

Accordingly, the application is dismissed.

Dated and delivered at Nairobi this 4th day of April, 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

/hg.