



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)**

**CRIMINAL APPEAL (APPLICATION) NO. 12 OF 2012**

**BETWEEN**

**BROWN TUNJE NDAGO.....APPLICANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Appeal from the judgment of the High Court of Kenya at Malindi (Ibrahim & Odero, JJ.) dated 21<sup>st</sup> September, 2011***

**in**

**H.C.Cr.A. No. 118 of 2009)**

**\*\*\*\*\***

**RULING OF THE COURT**

Before us is a motion on notice dated 2<sup>nd</sup> August, 2012. It is expressed to be brought under **section 3A & B** of the Appellate Jurisdiction Act as well as **rule 29** of the Court of Appeal Rules. The applicant is essentially seeking leave of this Court to adduce additional and new evidence by filing an affidavit containing photographic evidence and to call two witnesses, namely **Mr. Monda**, a State Counsel and **Mr. Issa**, the investigating officer of the case, the subject of the appeal and the instant application.

The grounds in support of the application are that, this was a classical case of mistaken identity evidence where honest but mistaken witnesses gave evidence in court that led to the conviction of the applicant by the Principal Magistrate's Court, Kwale in **Criminal Case No. 2232 of 2002**; that much as the trial court warned itself of the dangers of relying on the evidence of a single witness in convicting the applicant and his co-accused, the warning was however in respect of the applicant's co-accused and not the applicant, that the trial court also failed to grant any credence to the investigating officer's warning about another person with similar features as the applicant; that **Mr. Monda**, learned State Counsel who prosecuted the appeal in the superior court on behalf of Republic filed a notice under **section 352A** of the Criminal Procedure Code informing the superior court that the Republic did not support the conviction of the applicant on the basis that the evidence of PW12, the investigating officer suggested that there was another suspect with similar features as the applicant; that the superior court ignored **Mr. Monda's** notice though, that though the trial court in its judgment conceded that the applicant might have been a victim of mistaken identity, the superior court totally ignored this finding; that the applicant had since conducted

his own investigations, received a colour photograph of a person with similar characteristics as him and who was the subject of the investigations by **Mr. Issa** whose name was **Sammy Otieno** currently held at Shimo La Tewa Prison on charges arising out of his alleged other criminal activities. In the premises, the applicant urgently required leave to adduce this new evidence of photographs. Further; that due to their crucial role in the unfolding saga, it was essential to have **Mr. Monda** and **Mr. Issa** summoned to give further evidence regarding the photographs and their attitude towards the viability or otherwise of the identification evidence given by the prosecution witnesses during the trial of the applicant.

The affidavit in support of the application sworn by one, **Benard Omondi**, a Paralegal merely reiterates and expounds on the foregoing grounds.

The motion upon being served on the respondent did not elicit any response by way of a replying affidavit or any other form of opposition.

In his oral submissions in support of the application before us on 15<sup>th</sup> April, 2013, **Mr. Bryant**, learned counsel for the applicant submitted that he had come before us under **rule 29** of this Court's Rules well aware that the High Court was not acting in exercise of its original jurisdiction as provided under that rule but that, that was the only rule that came closest to aiding his case. He also urged us to consider the justice of the case without being bogged down by procedural technicalities in pursuit of the current constitutional dispensation and finally he urged us to invoke **section 3A & B** of the Appellate Jurisdiction Act and allow the application.

**Mr. Oyiembo Robert**, learned Assistant Director of Public Prosecutions opposed the application saying that we did not have jurisdiction to entertain the same on account of it not coming within any of the exceptions contemplated by **rule 29** of this Court's Rules.

The applicant with another, were charged before the Principal Magistrate's Court at Kwale with twelve counts of robbery with violence contrary to **section 296(2)** of the Penal Code. The prosecution case revolved around a series of robberies committed in the hotels and supermarkets in Diani area of Kwale County. The applicant and his co-accused entered a plea of not guilty and were subsequently tried. At the end of the trial the applicant was acquitted of counts 1, 2, 3, 7, 8, 9, 10, 11 and 12. He was however convicted on counts 4, 5 and 6.

The evidence with respect to count 4 given by the complainant, **Mwanjuma Juna** PW1, his manager **Saidi Tsungu Musa** PW2 and two employees **Ramadhan Juma Babu** PW3 and **Wycliffe Gichana Onsongo** PW4 was that on 13<sup>th</sup> November, 2007 at about 8.30 p.m. PW1 closed his supermarket and they all prepared to leave. Suddenly they were approached by two men outside the supermarket, among them the applicant. He had a gun hidden under his sweater which he pulled out and brandished at PW1. The witnesses were all ordered to lie down whereupon the two men proceeded to rob PW2 of **Kshs.85,000/=** representing the day's sales as well as robbing them of their mobile phones and other personal effects. Police were later called in and after the applicant was arrested, an identification parade was conducted and the witnesses were able to positively identify the applicant as one of the men who robbed them.

With regard to count numbers 5 and 6 evidence was given by PW7 **Jacob Manyara**, the proprietor of **Eden Drops Hotel** in Diani and PW9 **John Kanyali** who was a guest at the hotel at the material time. Both stated that on 6<sup>th</sup> November, 2007 at about 7.30 p.m. they were in the hotel taking tea together when two men approached them whilst holding the hotel guard hostage. One man had a gun in his hand. They ordered them to lie down and proceeded to rob them of their valuables. Both witnesses identified the applicant among the robbers.

Besides visual identification, a month after the robbery, the applicant surfaced at the supermarket and ordered a beer. PW1 recognized him and called the police. Upon seeing the police approach, the applicant took to his heels but was chased and apprehended. He was later charged for the offences and after trial convicted. As a consequence he was sentenced to death.

In the course of his judgment, the learned magistrate remarked

**“... An issue came up with the evidence of PW12 Corpl (sic) Issa Wachira that accused 2 was probably a victim of mistaken identity. This court has noted that infact this witness only gave evidence in respect f(sic) the incidents of Italian supermarket, Asin Supermarket and Leisure Golf Club not Eden Drops. It was also clear from the evidence of this witness that he literally had incorrect facts ... further whereas PW12 talks of a similar person with accused 2 this suspect arrested was not named in court. He was also not placed in any parade with accused 2 to further test the accuracy of (sic) otherwise of the identification of the witness herein ...”**

With that the learned magistrate dismissed the applicant's defence of mistaken identity and proceeded to convict and sentence the applicant to death.

The applicant then appealed to the superior court. The appeal was however unsuccessful. In dismissing the appeal, **Ojwang, J.** (as he then was) and **Odero J.** on this aspect of mistaken identify had this to say:

**“... Even if the 2 appellant may have been mistakenly arrested (which we find has not been proved to have been the case) in respect of the robbery at the Italian Supermarket, he could not have been so unfortunate, as to have also been 'mistakenly arrested' with respect to yet another robbery that is the one at Eden Drop Hotel ... We are in agreement with these findings of the trial court. It is clear that this allegation of a 'similar looking' brother was just a red herring raised to deflect from the positive identification of the 2<sup>nd</sup> appellant at the scene. Lastly as we have pointed out earlier the fact that the 2<sup>nd</sup> appellant took to his heels upon seeing the police cannot be ignored if he was thus “innocent” brother then why did he run away. Why not remain seated and finish his beer like any other ordinary citizen would do ...”**

As already stated, the applicant's appeal to the superior court was dismissed on 21<sup>st</sup> September, 2011 after which the applicant filed a further and perhaps last appeal to this Court which is pending hearing. In the meantime and as we have already observed, the applicant has mounted the instant application basically under **rule 29** of this Court's Rules. However, we think that the applicant meant **rule 29(1)(b)** which provides *inter alia*:

**“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 (emphasis ours)**

**(a) ...**

**(b) In its discretion, for sufficient reason, to lake additional evidence or direct that additional evidence be taken by the trial court or by a Commissioner.”**

From the plain, obvious and unambiguous reading of the aforesaid provisions of the law it can be readily discerned that we definitely have no jurisdiction to entertain this application. 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. However, this is not the case here. The applicant was first tried and convicted by the Principal Magistrate's Court at Kwale. He unsuccessfully appealed to the superior court. In dismissing the appeal, the superior court was not exercising its original jurisdiction, rather it was exercising its appellate jurisdiction. By dint of **section 358(1)** of the Criminal Procedure Code, the High Court was best placed to undertake the exercise we are now being asked to do if it had been properly moved in good time by the applicant. That provision of the law allows the High Court when exercising its appellate jurisdiction to take further evidence if it is so desired.

Faced with a similar scenario in the case of **Marcarios Itugu Kanyoni v Republic, Cr. Appl. No. 5 of 2011 (UR)** this Court differently constituted delivered itself thus:

*“The provisions of rule 29(1) are plain and Mr. Kaigai has construed them correctly. 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 ...”*

Yet again in the case of **Gerald Ngala Kafwani & Anor v Republic Mombasa Cr. Appl. No. 77 of 2010**, this Court again differently constituted delivered itself thus on a similar application:-

*“... The issue therefore arises; whether the rules of this Court admit of the procedure adopted. Rule 29 of the Court of Appeal Rules 2010 states as follows ... The emphasized portion clearly shows that the rule is applicable on a first appeal. The appeal, as earlier stated is not from the High Court in exercise of its original jurisdiction. Rule 29(1) would, therefore, in those circumstances not avail the applicants ... In the matter before us, there is express provision under rule 29 (supra) delimiting the circumstances and manner of admitting additional evidence before the Court of Appeal. The exercise of inherent powers does not arise where there is express provisions. As stated earlier, however, that provision does not cover the circumstances stated in the application before us. On the law therefore, the application is non-starter ...”*

So there it is in black and white! We have no jurisdiction to entertain the application as we are not sitting as a first but a second appellate court on the decision. Though counsel for applicant urged us to go beyond the provisions of the law and look at the justice of the case, we decline such invitation as it is tantamount to staging a coup'detat against an express and unambiguous provision of the law. If the legislature had intended that this Court as a second appellate court should admit further evidence on second appeal, nothing would have been easier than specifically stating so. Next the applicant has invited us to invoke **section 3A & B** of the Appellate Jurisdiction Act as well as fair trial provisions in our current constitutional dispensation. We again decline the invitation on account of the fact, that the question involved herein goes to jurisdiction and is not therefore amenable to **Article 159(1)(d)** of the Constitution or **section 3A & B** of the Appellate Jurisdiction Act.

The upshot is that at this stage we find no reason to interfere with the record of appeal as it stands and we decline to admit additional evidence in the manner sought by the applicant. That finding will not in any way prejudice the appeal because at the hearing of the appeal the appellant's counsel will have an opportunity to demonstrate from the record just like **Bernard Omondi** attempts to do in the supporting affidavit that the conviction was based on evidence of mistaken identity. The application is accordingly dismissed.

**Dated and delivered at Malindi this 25<sup>th</sup> day of April, 2013**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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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**