



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NYERI

(CORAM: BOSIRE, GITHINJI & VISRAM, JJ.A.)

CRIMINAL APPLICATION NO. 5 OF 2011

BETWEEN

MARCARIOS ITUGU KANYONI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Application to grant leave to adduce additional evidence in an appeal from a judgment of the High Court of Kenya at Nyeri (Sergon & Makhandia, JJ.) dated 13<sup>th</sup> January, 2010

in

H.C.C.R.A. NO. 53 OF 2007)

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RULING OF THE COURT

This is an application under **Rule 29 (1) (b)** of the Court of Appeal Rules whereby the applicant essentially seeks leave of the Court to adduce additional and new evidence by calling three witnesses, namely, **Inspector Mutembei**; the **Registrar of Motor Vehicles** and one **Alfred Karimi**.

The applicant was charged with two offences before the Chief Magistrate's Court, Nyeri, firstly, robbery with violence contrary to **Section 296 (2)** of the Penal Code. That charge alleged that the appellant jointly with others not before the court robbed one **Nahashon Kairu Ndugo** of motor vehicle registration No. KAP 027D Toyota Corolla valued Shs.500,000/=, a driving licence and Shs.800/=. In the second count, the appellant was charged with obtaining Shs.115,000/= from **Rose Kananu Makota** by falsely pretending that he would sell motor vehicle registration No. KAN 818T Toyota Corolla to her contrary to Section 313 of the Penal Code.

The prosecution case was briefly as follows.

Sometime in January 2005 **Rose Kananu Makotha** (Rose) who lives in Nanyuki travelled to Meru and upon arrival at Meru Town she hired the appellant's taxi to take her to her rural home. Although she did not know the appellant before they exchanged mobile phone numbers in the course of the journey. After one week Rose called the appellant and hired his taxi to take her to Nanyuki. While on the way the appellant told Rose that he is the one who had sold a motor vehicle to one Fatuma (whom Rose knew before) and told Rose that if she needed a motor vehicle he could get her one. Thereupon rose told him to look for a good car for her.

On 16<sup>th</sup> February, 2005 at 1 p.m. the appellant and another person approached **Nahashon Kairu Ndugu** (Nahashon) a taxi driver at Dunia stage, Dandora, Phase 2 Nairobi and hired taxi registration No. KAP 027D Toyota Corolla, owned by **Edward Kamunde Mburu**, to take them to Mweiga in Nyeri ostensibly to pick the wife of one of them. They arrived at Mweiga at about 3.30 p.m. where another person joined the appellant and his confederate. Nahashon was instructed to drive further on and after driving for four – five km he was asked to slow down whereupon he was robbed of the motor vehicle, money and personal items. This was about 4.30 p.m. Three days later on 19<sup>th</sup> February, 2005 the appellant took motor vehicle registration No. KAN 818T, a Toyota Corolla to Rose in Nanyuki and offered to sell the motor vehicle to her at Shs.235,000/= in presence of Daniel Kimathi, a taxi driver at Nanyuki. Rose paid Shs.20,000/= to the appellant on that date and the appellant left the motor vehicle with her. On 21<sup>st</sup> February, 2005, the appellant went to Rose’s home in the company of one Alfred Karimi whom he introduced as his agent. He gave Rose a copy of the Log book and asked her to complete the transaction with Alfred Karimi. Rose paid Shs.35,000/= to Alfred Karimi on that day. On 26<sup>th</sup> February, 2005 Rose and Alfred Karimi signed a written agreement of sale of the motor vehicle whereupon Rose paid a further Shs.60,000/= making a total payment of Shs.115,000/=. After using the motor vehicle for about 1 ½ months Rose took it to a garage for repair of a dent which it had before she bought it. At the garage the mechanics noticed that the registration number inscribed on the window was KAP 072D and informed Rose. According to the evidence of Rose when she noticed the numbers she took the vehicle to Nanyuki Police station whereupon one Inspector Mutembei inspected the engine number and informed her that there was no problem as the engine number had not been tampered with. The vehicle was later impounded by another police officer. The investigations revealed that the engine and chassis numbers of the motor vehicle had not been interfered with; that the number plate KAN 818T belonged to another motor vehicle belonging to Edwin Olale Manyala which was stolen in Migori in January, 2005 and that the motor vehicle recovered from Rose was infact motor vehicle registration No. KAP 027D which Nahashon was robbed of.

At the trial, the appellant denied committing both offences although he admitted that Rose had at one time hired his taxi.

The appellant was convicted on both counts on the basis of the evidence of identification by Nahashon; the evidence of identification by Daniel Kimathi as the person who sold the motor vehicle to Rose and on the basis of the evidence of Rose. His appeal to the High Court was dismissed on 13<sup>th</sup> January, 2010 after which the applicant filed an appeal to this Court – *Criminal appeal No. 367 of 2009*. There is an obvious discrepancy between the date of delivery of judgment and the date the notice of appeal was lodged. On or about 3<sup>rd</sup> January, 2011, the applicant filed a petition for a new trial – *Petition No. 1 of 2011* in the High Court under article 50 (1) (6) of the Constitution. However, Mr. Maragia learned counsel for the applicant stated at the hearing of the application that the petition has been withdrawn.

As we have already observed, the application is brought under **Rule 29 (1) (b)** which provides:

**“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 supplied)**

**(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”.**

Mr. Kaigai, the learned Principal State Counsel submitted in essence 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 acting in its original jurisdiction such as where the High Court has convicted a person for murder or treason. Mr. Maragia did not respond to that submission.

In this case, the applicant was convicted by a Senior Resident Magistrate. He appealed to the High Court which dismissed the appeal. In dismissing the appeal the superior court was not exercising its original

jurisdiction. Needless to say, it was exercising appellate jurisdiction. By **Section 358 (1)** of the Criminal Procedure Code, the High Court when exercising its appellate jurisdiction has jurisdiction to take further evidence if it thinks that additional evidence is necessary.

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.

The finding is sufficient to dispose of the application. However, it is expedient and just to consider the merits of the application.

As **Rule 29 (1) (b)** indicates although the court has absolute discretion to take additional evidence, the Court would only exercise its discretion if there is a sufficient reason. The principles upon which the court exercises its discretion was stated in **Elgood v Regina** [1968] EA 274, one of which principles being that the evidence that is sought to be called must be evidence which was not available at the trial. Further it is only in very exceptional cases that the Court of Appeal will permit additional evidence to be called.

In this case, Alfred Karimi and Inspector Mutembei who the applicant seeks to be called as witnesses were mentioned by Rose at the trial. Similarly, the discrepancy of the records of the two motor vehicles was referred to at the trial.

The applicant who was represented by a counsel throughout at the trial did not apply for the witnesses to be summoned either for cross-examination by his counsel or as defence witnesses. Clearly the evidence of the three persons was available at the trial but the applicant did not show he needed it. Secondly, the applicant has not shown that this is one of the exceptional cases warranting additional evidence to be called. He has not, for example, shown that the applicant would suffer great injustice or that the decision of the trial magistrate or the first appellate court would have been different had the evidence sought to be called been available.

For those reasons, the application is dismissed.

Orders accordingly.

**Dated and delivered at Nyeri this 7<sup>th</sup> day of July, 2011.**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**