



**IN THE COURT OF APPEAL
AT NAKURU
(CORAM: OMOLO, WAKI & NYAMU, J.J.A)
CRIMINAL APPEAL (APPLICATION) NO. 33 OF 2007**

BETWEEN

DANIEL KIPNGETICH SANGAPPLICANT/APELLANT

AND

REPUBLICRESPONDENT

(An application for leave to adduce additional evidence in an appeal from the judgment of the High Court of Kenya at Kericho (Kimaru, J) dated 25th July, 2006

**in
H.C.CR.A. NO. 55 OF 2004)

RULING OF THE COURT

The appellant herein was on 29th June, 2004 convicted by Kericho Senior Resident Magistrate for the offence of rape and was sentenced to serve life imprisonment. His appeal to the High Court against both conviction and sentence was dismissed on 25th July, 2006 and he proceeded to mount a further appeal before this Court which is still pending.

In the meantime the appellant has sought by notice of motion dated 22nd February, 2011, leave to adduce additional evidence before the appeal is heard. The only additional evidence he seeks to adduce is a birth certificate to confirm that he was born on 8th October, 1988. The application is predicated on **Article 159 (d)** (sic) of the Constitution, **section 3A** of the Appellate Jurisdiction Act **and Rule 29** of the Court of Appeal Rules. **Section 3A** of the Appellate Jurisdiction Act is, of course, irrelevant as it applies to civil litigation while **Article 159 (2) (d)** of the Constitution enjoins courts to be guided by the principle that “*justice shall be administered without undue regard to procedural technicalities.*” In our view, the orders sought in the application do not merely amount to procedural technicalities but to substantive matters of evidence. That leaves **Rule 29** which donates the discretionary power to the court to take additional evidence or direct the taking of it by the trial court. It states in relevant part:

“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.”

Such evidence may be taken orally or by affidavit.

The principles upon which this Court may consider an application for additional evidence have been stated in various decisions of the Court and its predecessor. We take them from **Elgood v Regina [1968] EA 274** where it was held:

“(a) the principles upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be called for the purposes of the appeal are:

(i) the evidence that it is sought to call must be evidence which was not available at the trial;

- (ii) *it must be evidence relevant to the issues;*
 - (iii) *it must be evidence which is credible in the sense that it is well capable of belief;*
 - (iv) *the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial (R. v. Parks [1961] 3 All E.R. 633 applied; statement in John Hasakwa v. R. Cr. A. No. 132 of 1954 (ur) disapproved);*
- (b) it is only in very exceptional cases that the Court of Appeal will permit additional evidence to be called;
- (c) in the circumstances, in the interest of justice the application should be allowed;
- (d) the affidavit in support of an application to admit additional evidence should have attached to it a proof of the evidence sought to be given;”

As stated earlier, the only additional evidence sought to be produced is a birth certificate of the appellant and a copy of it is exhibited with the affidavit in support of the application. The appellant states through his counsel on record Mr. Katwa Kigen, that the birth certificate was procured by the appellant’s elder sister from the Registrar of Persons on 13th November, 2006, which was just over two years after the appellant’s conviction by the trial court and three months after dismissal of his appeal by the High Court. It was not available therefore for consideration when those courts considered the case. It was further submitted by Mr. Kigen that the further evidence will establish that the appellant was aged 14 years and was therefore a minor when he was sentenced to life imprisonment by the trial court which imprisonment was confirmed by the High Court. The legality of the sentence shall therefore be put to question before this court at the hearing of the appeal.

For his part, learned State Counsel Mr. Nyakundi did not oppose the application.

We have considered the depositions made in the affidavit in support of the application, the submissions of both counsel thereon, and the principles applicable. It is our view that exceptional circumstances have been disclosed in the application and there can be no doubt that the additional evidence will form a firm basis for challenging the legality of the sentence meted out against the appellant as envisaged in **section 361 (1) (b)** of the Criminal Procedure Code. We allow the application and admit the birth certificate identified as **E. No [particulars withheld]**, registered in Kericho District on 31st October, 2006 as part of the evidence in the record of appeal. The appeal shall be listed for hearing and disposal expeditiously.

It is so ordered.

Dated and delivered at Nakuru this 29th day of September, 2011.

R.S.C. OMOLO

JUDGE OF APPEAL

P.N. WAKI

JUDGE OF APPEAL

J.G. NYAMU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR