IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 300 OF 2005

ELIUD OLE MBARIA .....APPLICANT/APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Application for production of additional evidence under rule 29(a) & (b) in an appeal from a judgment of the High Court of Kenya at Nairobi (Mutungi & Ochieng, JJ) dated 14th April, 2005

in

H.C. Criminal Appeal No. 786 of 2002)

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RULING OF THE COURT

Eliud Mbaria, the applicant in this undated notice of motion filed on 28th August 2007, was the first accused before the Chief Magistrate's Court at Nairobi in Criminal Case No. 521 of 2001, having been charged in that court together with another person with the offence of robbery with violence contrary to section 296(2) of the Penal Code and an alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. They were so charged in Nairobi Chief Magistrate's Court Criminal Case Number 521 of 2001. They both pleaded not guilty to both charges. That court heard the entire case in which both the applicant and the other accused effectively participated. They were unrepresented. The record shows that during the trial in that court, the second accused, who is not before us, applied for the occurrence book (OB) at Loitoktok Police Station to be availed for purposes of cross-examination of the first prosecution witness who was the complainant. The trial court adjourned the hearing to enable the police to produce that OB and that witness was stepped down to await availability of that OB from Loitoktok Police Station. When the hearing resumed, the prosecution is recorded as having stated in court that the OB at Loitoktok Police Station had nothing relevant to the case as the complainant made no report at Loitoktok Police Station. The hearing proceeded and at the end of it, the learned Senior Resident Magistrate (Wanjala (Mrs.)), in a lengthy judgment delivered on 4th July 2002, found the applicant together with the other accused person guilty of the main offence of robbery with violence, convicted them of the same and later on 18th July 2002, sentenced them to death. They both appealed to the superior court against that conviction and sentence. The superior court's record shows that the other accused who was the appellant in High Court Criminal Appeal Number 786 of 2002 passed on, leaving the applicant's appeal which was Criminal Appeal No. 789 of 2002 to proceed to hearing in the superior court. The superior court, in a judgment dated and delivered on 14th April 2005, upheld both conviction

and sentence and thus dismissed the applicant's appeal. The applicant was still not satisfied with the superior court's judgment and he has come to this Court by way of this Appeal. That appeal is pending hearing by this Court. However, in the meantime, the applicant has filed this notice of motion which, as we have stated, is undated but filed on 28th August, 2007. He is seeking orders that:

"OB number 6 of 22nd February, 2001 of Kabete Police Station be produced and form part of my appeal as a new evidence under rule 29(a) and (b) on the grounds that:

(a) The trial court failed its duty (sic) of enacting section 173 of Evidence Act and order production of this OB to clear ambiguity between defendant and prosecution evidence about how and where the M/vehicle ignition keys were recovered.

(b) Its only this OB can (sic) reveal the correct position where the said ignition keys were recovered.

(c) More grounds are analyzed on the annexed affidavit sworn (sic).

(d) Am facing death penalty (sic) on a charge by robbery with violence."

The application is supported by an alleged affidavit which is not sworn but is stated to have been sworn before a magistrate on 9th July 2006. That alleged affidavit repeats verbatim the grounds in support of the application which we have reproduced hereinabove and adds only two matters namely that the OB was not requested during the trial because the applicant was not represented and that more grounds would be raised at the hearing of the application. It is not easy to comprehend the reason why an affidavit allegedly sworn on 9th July 2006 should have been used in supporting an application filed on 28th August 2007, over a year later. Be that as it may, we note that the notice of motion was filed by the applicant in person and delay in filing the application could be blamed on the prison authorities. Mr. Ondieki took over the conduct of the application and urged us in his submissions that we could use our inherent powers to consider and allow the application as rule 29 of the Court of Appeal Rules is so broad that it covers both civil and criminal matters and that the applicant could not seek the OB at the trial stage because he was not abreast with the language in which the trial was conducted. In so urging us to grant the application, he referred us to a decision of this Court in the case of Henry Kimathi vs Republic – Criminal Appeal No. 24 of 2002 (unreported) and other cases all of which we have anxiously considered.

Mr. Kaigai, the learned Senior State Counsel, while not minding the production of the alleged OB, felt that in law, rule 29(a) only applied to appeals from a decision of a superior court acting in the exercise of its original jurisdiction and thus does not apply to this matter in which the superior court exercised its appellate jurisdiction and not its original jurisdiction. He thus opposed the application.

This application is brought pursuant to rule 29(1) (a) and (b) of this Court's Rules. That rule states 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) to re-appraise the evidence and to draw inference of fact; and

(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."

It does not need any emphasis to appreciate the trite law that rule 29(1) of this Court's Rules donates the jurisdiction to this Court to take or direct that additional evidence be taken only in a specific case and that is only in a situation where this Court is hearing or is to hear an appeal from a decision of the superior court acting in the exercise of its original jurisdiction. Even then, the rule allows the court to exercise its discretion and to do so only if sufficient reasons are advanced in moving the court to so take or direct to be taken additional evidence. From the facts we have set out above, it is clear and not in doubt whatsoever, that the appeal in respect of which the applicant is seeking additional evidence to be taken by

us is a second appeal. It is not an appeal from the decision of the superior court exercising its original jurisdiction. It is an appeal from the decision of the superior court exercising its appellate jurisdiction. We are certain, in our mind, that, in law, we have no jurisdiction to entertain the application. We cannot exercise our inherent powers as the position in law is clearly spelt out. To do so would be to create our own laws.

Mr. Ondieki referred to the case of Henry Kimathi vs. Republic – Criminal Appeal No. 24 of 2002 (supra). In that case, this Court did entertain such an application. It must be noted, first, that that was an application made in the course of hearing the appeal, and secondly, that in that case, the applicant had made the omission to consider OB of Tigania Police Station his main defence at all stages of his case i.e. in the trial court and in the superior court, such that non production of that OB actually amounted to a denial of his legal rights in law and thus occasioned injustice as it was part of his defence. In this matter before us, as we have stated, only the second accused in the court below sought an OB to be produced and that was OB from Loitoktok Police Station and not from Kabete Police Station. The applicant never sought production of any OB let alone OB from Kabete Police Station and never raised the question of the omission to produce OB his point of attack in the first appeal. He is raising it now on second appeal. Rule 29(1) (b) which we have cited above prohibits what he is seeking. His counsel says he was unrepresented and thus was ignorant of his rights. With respect, that cannot be so. His co-accused sought OB from Loitoktok and that was in his presence, so that if he was minded to seek the OB from Kabete, he was made aware of his rights then as the trial court indeed obliged his colleague's application. As to the allegation by Mr. Ondieki that he had language problems, that again cannot be so. His alleged affidavit does not raise that as one of the reasons for his not seeking the OB of Kabete Police Station. Mr. Ondieki cannot, in law, give evidence from the bar and expect it to be accepted by a court of law properly directing its mind to issues before it. In any case, throughout the proceedings, there is no complaint about the applicant's inability to comprehend the conduct of the case because of language problems. After the decision in the case of Henry Kimathi vs. Republic (supra), this Court heard an application in the case of Augustine Mwenda Kiama vs. Republic – Criminal Appeal No. 137 of 2003, at Nyeri. That was an application properly brought by way of notice of motion. In its ruling dated and delivered on 19th May 2006, this Court stated:

"What is before us is essentially an application for production of the OB. That is, of course, additional evidence which is sought to be introduced in this second appeal. As we know, only matters of law come for determination on second appeal – see section 361 of the Criminal Procedure Code. By introducing the OB as additional evidence that would indeed transform this Court into a court of facts. That would be contrary to section 361 of the Criminal Procedure Code."

The Court went on in the same case to consider the decision in Henry Kimathi case (supra) and stated:

"This being a second appeal, it must be taken into account that the facts have been settled by the two courts below. We were referred to our own decision in Henry Kimathi vs. R. - Criminal Appeal No. 24 of 2002 (unreported) but it should be pointed out that in that decision, the appellant had always insisted that the OB be produced right from the time of the trial and in the superior court. In the present application, the applicant is asking for the OB to be produced in this Court for the first time. That, as we have already stated, would amount to taking additional evidence on facts of the case. But this being a second appeal, only matters of law fall for consideration. We cannot deal with matters of facts and that has already been settled by the trial court and the first appellate court."

We see no reason for divergence. That settles the main issue before us.

However, even if we were to assume that this Court had jurisdiction to take such evidence or to direct it to be taken, there would still have been some difficulties in this application in having that additional evidence taken by this Court. The law as to what principles the court will apply before such evidence is taken is now well settled.

In the case of Mzee Wanje and 93 others vs. A.K. Saikwa, A.C Kanyarati, S.W. Kibogo and William Gachiringa (1982 – 88) I KAR 462, it was held:

"1. Before the Court of Appeal will permit additional evidence to be adduced under rule 29 it must be shown that it could not have been obtained by reasonable diligence before and during the hearing.

2. It must be shown that the new evidence would have been likely to have affected the result of the suit."

Both the above conditions were not in any way demonstrated before us. Indeed, as we have stated, the applicant's co-accused applied for OB from Loitoktok Police Station and the trial court availed time to look for the same. Had the applicant also done the same, at the same trial, perhaps the same could have been availed. As to the second condition, no attempt was made to show that the result of the entire case would have been affected by the production of the OB.

We think we have said enough to show that this application cannot succeed. We have no jurisdiction to hear it as we have stated above. We must lay down our tools. We dismiss the application.

Dated and delivered at Nairobi this 11th day of July 2008.

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

D.K.S AGANYANYA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR