



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 137 of 2003

AUGUSTINE MWENDA KIAMA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Juma & Mitey, JJ.) dated 19th March, 2003

in

H.C.C.R.A. NO. 303 OF 2001)

RULING OF THE COURT

We have before us an application by way of notice of motion expressed to have been brought under “**Rules 31 & 42 of the Court of Appeal Rules.**” The order that the applicant, **Augustine Mwenda Kiama**, seeks from this Court is stated as follows:-

“1. That the Honourable court be pleased to call for and receive the Occurrence Book of 1st February, 2001, from Nyeri Police Station, and admit the same as part of the record of appeal in Criminal Appeal No. 137 of 2003, on the following grounds:-

- (a) The trial magistrate’s court and the superior court came to a concurrent finding that the applicant was guilty of the offence of robbery after agreeing with the prosecution’s case that the applicant had the ignition key for motor vehicle registration No. KAD 198W on 1st February, 2001, when he went to report at the Nyeri Police Station that the said motor vehicle had been robbed from him.
- (b) The information entered in the Occurrence Book on 1st February, 2001, after the applicant reported the robbery of his motor vehicle registration No. KAD 198W would be unadulterated and would be the truth of what was in the possession of the applicant at that time.
- (c) This is the last opportunity that the applicant has to argue his appeal and he ought to be granted the order sought.”

When the application came up for hearing before us on 15th May, 2006, **Ms. Lucy Mwai**, the learned counsel for the applicant, urged us to allow the application as, in her view, it is only production of the Occurrence Book (O.B.) that will determine the truth.

In opposing this application Mr. Orinda, the learned Principal State Counsel, submitted that what the Court was being asked was to transform itself into a Court of facts. It was Mr. Orinda's submission that what the applicant was seeking was to adduce additional evidence which, in his view, is not within the jurisdiction of this Court.

What is before us is essentially an application for production of the O.B. 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 O.B. 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*.

Even assuming that we had jurisdiction to receive additional evidence, we do not think the applicant met the requirements for admission of additional evidence. In **MZEE WANJIE AND 93 OTHERS VS. A.K. SAIKWA, A.C. KANYARATI, S.W. KIBOGO AND WILLIAM GACHIRINGA (1982-88) 1 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 also be shown that the new evidence would have been likely to have affected the result of the suit.***
- 3. The question of re-appraisal would be reserved for argument at the hearing of the appeal.”***

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 V. 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 O.B. be produced right from the time of the trial and in the superior court. In the present application, the applicant is asking for the O.B. 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.

In view of the foregoing, we find no merit in this application and we order that the same be and is hereby dismissed.

Dated and delivered at Nyeri this 19th day of May, 2006.

P.K. TUNOI

JUDGE OF APPEAL

E.O. O’KUBASU

JUDGE OF APPEAL

E.M. GITHINJI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR