



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, O'KUBASU & KEIWUA, JJ.A.

CRIMINAL APPEAL (APPLICATION) NO. 62 OF 1993

JAMES IMBWOYERE OBOWOM APPELLANT

AND

REPUBLIC RESPONDENT

(Application for leave to take additional evidence from the judgment of the High Court of

Kenya at Nairobi (Khamoni J) dated 17th June, 1993

in

H.C.CR.C. NO. 35 OF 1992)

RULING OF THE COURT

The appellant, **James Imbwoyere Obowom**, was convicted of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** and sentenced to death. He has appealed to this Court but while his appeal is pending he took out a notice of a motion under **rule 29 (2) of the Court of Appeal Rules** seeking leave to adduce additional evidence during the hearing of the appeal. The evidence sought to be adduced relates to the production of the Occurrence Book (O.B.) of 13th August, 1991, from Kilimani Police Station.

The principle upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be adduced for the purpose of the appeal were set out by the Court of Appeal for East Africa in the case of **ELGOOD VS REGINA [1968] E.A. 274**. It was held that the evidence sought to be called must be evidence **which was not available at the trial** and must be relevant to the issues. It must be evidence which is credible in the sense of being capable of belief. It was further held that it was only in very exceptional cases that the Court of Appeal will permit additional evidence to be adduced.

Mr Oira who argued this application on behalf of the applicant/appellant was not able to convince us that he really understood the principles set out in the **Elgood case**. The O.B. which is sought to be produced as additional evidence was available during the trial of the appellant. We found it very difficult to understand Mr Oira's submission and when asked to explain the gist of his application, all he told us was that he had been instructed by his client to make this application. Well, counsel must take his client's instructions bearing in mind the relevant legal principles applicable in the circumstances of each case. It is

not enough to come to Court and say "I have been instructed by my client". Indeed by the time Mr Oira concluded his submissions he appeared to have conceded that this application was absolutely unnecessary.

In view of the foregoing we are of the opinion that there is no merit in this application and it is accordingly dismissed.

Dated and delivered at Nairobi this 21st day of December, 2001.

R. S. C. OMOLO

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

M. Ole KEIWUA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR