# Kamotho v Wamwaya (Appeal E275 of 2024) [2025] KEELRC 954 (KLR) (26 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 954 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**APPEAL E275 OF 2024**

**DKN MARETE, J**

**MARCH 26, 2025**

**BETWEEN**

**EUNICE KAMOTHO ............................................................................ APPELLANT**

**AND**

**ESTHER NJOKI WAMWAYA ........................................................... RESPONDENT**

## RULING

1. This is an application by way of a Notice of Motion dated 25th September, 2024 and seeks the following orders of court;
    1. That the applicant be granted leave to file additional evidence in support of her case as espoused in paragraph two (2) – six (6) of the supporting affidavit and the attached witness statement.
    2. That cost of this application be in the cause.
2. This is grounded on the basis that the proceedings in EMEL E0886/2021 went on at a time that the intended appellant was very ill.
3. The Appellant further avers that judgement was made without affording her a hearing and she has now lodged an application for leave to file an appeal out of time to challenge the said judgment. Such leave is now granted and the appeal filled.
4. The Appellant/Applicant begs to be heard. She avers that the evidence she wishes to adduce is fresh and impactful to the outcome of this appeal. Lastly, this application is made in good faith and in the interests of justice.
5. This is as follows;
    a. That the proceedings in the Honorable Court in CMEL E0856/2021 (Hon. G.M. Gitonga PM sitting) went on at a time that the appellant was very ill.

b. That with the judgement certainly disfavoring her, the court having not heard from her much, the appellant lodged an application for leave to file a Memorandum of Appeal to this Honorable court in challenge the said Judgment.

c. That the leave has since been granted and the Memorandum of Appeal has since been filed in this appellate court.

d. That it would now be just and fair for the Honorable court to hear from her, having been the respondent in the matter all along-being the former employer of the claimant so that she is not condemned unhear in the matter.

e. That the evidence she has to give the Honourable court is fresh and would make a significant impact in the determination of her appeal.

f. That this application is made in good faith and in the interest of justice.

g. That the appellant will be happy to lead her evidence and even have the Claimant (or her advocates) cross examine her on it to allay any fears of prejudice thereabouts.

6. The Claimant/Respondent opposes the application in her Grounds of Opposition which comes out thus;

    1. That the applicant has not demonstrated that additional evidence could not be obtained by reasonable diligence before and during the hearing at the trial court.

    2. That the new evidence the applicant seeks to rely on does not have an important influence on the result of the case if it was available at the time of trial.

7. She also in a Replying Affidavit seeks to rely on the implications of Section 78 of *Civil Procedure Act* which comes out as follows;

> That my advocate has advised me on the law on adducing additional evidence at an appellant stage as follows, The said application is basically grounded on Section 78 of the *Civil Procedure Act* Cap 21 Laws of Kenya which provides for Powers of appellate Court in appeals from the subordinate Court to the High Court, and is similar to Rule 29(1) (b) of the Court of Appeals Rules. The Section provides
>
> (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-
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> a) To determine a case finally,
>
> b) To remand a case;
>
> c) To frame issues and refer them for trial,
>
> d) To take additional evidence or to require the evidence to be taken;
>
> e) To Order a new trial.
>
> 2) Subject as aforesaid, the appellate Court shall have the duties as are charged conferred and imposed by this Act on Courts of Original Jurisdiction in respect of suits instituted therein.

8. She relies on the authority of (Application) 84/2012 ThatAttorney General Vs. Torino Enterprises Limited [2019] KLRThat which is one of the latest decisions from the Court of Appeal on the question

of whether or not an appellate Court should allow an application for adduction of new evidence, the superior Court cited Rule 29(1) (b) of its Rules and many other decisions and stated

9. She also seeks to rely on authorities of ThatDorothy Nelima Wafula Versus Hellen Nekeso Nielsen and Paul Fredrick Nelson [2017] eKLRThat it was expressed that under that Under Rule 29(1) (a), additional evidence will be introduced on appeal in the discretion of the Court "for sufficient reason. The Court further stated that;

> " Though what constitutes "Sufficient reason" is not explained in the rule, through Judicial practice, the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a Party seeking to present additional evidence on appeal. Before this Court can permit additional evidence Under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing, two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not incontrovertible"

10. She further submits that from the above guidelines set by the Court of Appeal, the duty of this Court in the instant Notice of Motion is to determine;

    a. Whether there is additional new evidence;

    b. Whether that evidence could have been obtained by the Applicant after reasonable diligence before and during the hearing;

    c. If there is a probability that the additional evidence would have an important influence on the result of the case and

    d. Based on the foregoing, is there sufficient reason to admit the additional evidence"

11. It is her case that what the appellant/applicant is seeking to introduce evidence that could have been adduced at the lower court but chose not to. Again, such evidence does not add value to these proceedings.

    The Appellant/Applicant in her written submission dated 20th December, 2024 also submits in reliance to section 78 *Civil Procedure Act*.

12. It is her case that the application submits on the old adage of natural justice as espoused under Article 50 and also section 1(a) and (b) of the *Civil Procedure Act*, 2022 and then Rules thereof all requiring courts of law to do justice to litigants.

13. She submits thus;

> This matter was heard and determined, as fate would have it when the Appellant who was the employer of the claimant was in poor health, stuck with the debilitating condition of a Motor Neurone Disease, which by then for the previous thirteen (13) years, and during the trial, had subdued her leaving her unable to move, speak cogently or even hear anything with ease. She missed her the trial but most peculiarly, failed to explain to the Honourable Court exactly under what circumstances the claimant left her employment and the attempts she made to comply with substantive and procedural Fairness of the termination of the claimant's services in the event. The Appellant, though represented, made no instructions at all to her counsel for the purposes of the hearing.

14. In the application before the Court, the Appellant explains that in her condition, she could not effectively communicate with her advocate on record, Mers. C.W. Njuguna & Co Advocates. She was unable to provide an overall road map of the issues, being unwell and unable to speak, and therefore she could not produce her witness statement (or adopt it) so as to be cross examined upon it, or even give her viva vorce evidence. The Counsel on record, unable to get her to the stand, proceeded to close the defence case without her instructions or evidence. As such, the trial court simply did not give her an opportunity to be heard.

15. As indicated in the filed draft witness statement, ...IF she was able to speak to communicate and speak to court cogently, she would have explained the circumstances of the exit of the claimant from her employment as well as walk the court through multiple steps she made, even with her distressing situation, to comply with the law on the severance of an employer from work. As a result, the trial court missed this evidence, and she believes that the court therefore could not have made a just determination of the dispute because of this situation. As showed in the instant application and her supporting affidavit, she is now of a fairer health to explain the issues. The nature of these evidence could have influenced the outcome of the case, the Appellant believes, but the court had no benefit of looking at it.

16. In finality, the Appellant/Applicant seeks to rely on authority of ThatWalter Joe Mburu V Abdul Sahkoor Sheikh & 3 Others Civil Appeal No. 195 of 2002 [2015] eKLRThat where the court held thus;

> " ...<u>First, the taking of additional evidence lies in the discretion of the Court and is intended to aid in the attainment of the ends of justice. Being a plea to the Court's discretion, we take the view that the length of time it takes to bring the application</u>, in this case well over a decade, is a relevant consideration that militates against a favourable exercise of our discretion. The delay is inordinate and no attempt was made to explain it. Its timing bears the hallmarks of dilatoriness and is not in keeping with the salutary object of expeditious justice.
>
> ...<u>that the principal rule has been that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at this stage.</u>"(emphasis added)"

17. Again, in the ThatCivil Appeal (Application) 84/2012That ThatAttorney General Vs Torino Enterprises Limited [2019] eKLR (supra),That on the question of whether or not an appellate Court should allow an application for adduction of new evidence, the Superior Court cited Rule 29(1)(b) of its Rules and many other decisions and held as follows;

> 'In Dorothy Nelima Wafula Versus Hellen Nekesa Nielsen and Paul Fredrick Nelson [2017] eKLR, it was expressed that under that Under Rule 29(1) (a), additional evidence will be introduced on appeal in the discretion of the Court, "for sufficient The Court further stated that;
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> "Though what constitutes "Sufficient reason" is not explained in the rule, through Judicial practice, the Court has developed guidelines to be satisfied before it can exercise its discretion on four of a Party seeking to present additional evidence on appeal. Before this Court cam permit additional evidence Under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing, two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not incontrovertible."

18. The Claimant/Respondent did not file any submission in opposition to the application.

19. This is it. Like is submitted by the Appellant/Applicant, the same scenarios are mirrored in the case of the Applicant. She was critically unwell at the time of trial. She was simply unavailable. These are sufficient reasons for an award of this application.

20. I am therefore inclined to allow this application with orders that each party bears the costs of the same.

**DELIVERED, DATED AND SIGNED THIS 26TH DAY OF MARCH 2025.**

**D. K. NJAGI MARETE**

**JUDGE**

Appearances:

Charon Makoriwa instructed by Otieno Aluoka & Company Advocates for the Appellant/Applicant.

Miss Kariuki instructed by Lemmy Regau & Company Advocates for the Claimant/Respondent.