



**Wanga v Republic (Application E018 of 2023)  
[2023] KESC 108 (KLR) (Civ) (21 December 2023) (Ruling)**

Neutral citation: [2023] KESC 108 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**CIVIL**

**APPLICATION E018 OF 2023**

**MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU & W OUKO, SCJJ**

**DECEMBER 21, 2023**

**BETWEEN**

**GODRICK SIMIYU WANGA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application to adduce additional evidence and for extension of time to file a Notice of Appeal out of time in respect of the decision of the Court of Appeal at Malindi in Criminal Appeal No. 15 of 2020 (Kairu, Nyamweya & Lesiit JJA), dated 17th March 2023)*

**Circumstances under which the Supreme Court acting as an appellate court could admit additional evidence.**

*In an application that sought leave to file an appeal to the Supreme Court out of time and to adduce additional evidence, the Supreme Court held that where a prayer was made for admission of additional evidence together with the prayer for leave to file an appeal out of time and there being no appeal on record at the time of filing the application, the prayer was premature.*

Reported by John Ribia

**Law of Evidence** – additional evidence – application to adduce additional evidence in a second appeal – application to adduce additional evidence in an appeal before the Supreme Court - what principles did the Supreme Court consider in determining an application to admit additional evidence - whether an application for admission of additional evidence that was filed without an appeal being on record was premature - , section 20; , rule 26.

**Brief facts**

The applicant initially sought leave to file a notice of appeal out of time which prayer was granted by consent. The application also sought leave of the court to adduce additional evidence.



## Issues

- i. What principles did the Supreme Court consider in determining an application to admit additional evidence?
- ii. Whether an application for admission of additional evidence that was filed without an appeal being on record was premature.

## Held

1. Section 20 of the as read with rule 26 of the granted the Supreme Court power to admit additional evidence in an appeal before it. Section 20 of the provided the issues the court should consider before doing so. They were whether the additional evidence:
  1. was directly relevant to the matter before court,
  2. was capable of influencing or impacting on the decision of the court,
  3. could not have been obtained with reasonable diligence for use at the trial,
  4. was not within the knowledge of the party seeking to adduce the additional evidence,
  5. removed any vagueness or doubt over the case,
  6. was credible and bore merit,
  7. would not make it difficult or impossible for the other party to respond effectively; and,
  8. disclosed a case of willful deception to the court.
2. The exercise of jurisdiction of the Supreme Court to admit additional evidence shall not be whimsical, and the court would not be in haste in granting the same. The Supreme Court would exercise restraint in admitting fresh evidence.
3. An application for additional evidence should be predicated upon a filed appeal and upon the applicant showing that the additional, new and fresh evidence could not have been obtained with reasonable diligence for use at the trial; was not within his knowledge; or could not have been produced at the time of the suit or petition. Where a prayer was made for admission of additional evidence together with the prayer for leave to file an appeal out of time and there being no appeal on record at the time of filing the application, the prayer was premature. The petition of appeal was the one that contained all the grounds of appeal, the facts and evidence in support as well as the applicable law and without it, the Supreme Court could not properly determine the prayer for admission of additional evidence.
4. The applicant had not set out the additional evidence he sought to adduce. He merely alluded to affidavit evidence on the circumstances of his arrest and details about on the right to a fair trial and the effects of its violation. The court could not determine the relevance or the credibility of the fresh evidence and whether the same fit the criteria set out in section 20 of the with such bare material.

*Application dismissed.*

## Orders

*Costs to abide the outcome of the appeal.*

## Citations

### Cases

1. Jirongo v Soy Developers Limited & 9 others (Petition 38 of 2019; [2020] KESC 38 (KLR)) — Explained
2. Jirongo v Soy Developers Limited & 9 others (Application 22 of 2019; [2019] KESC 21 (KLR)) — Explained
3. Kidero v Waititu & 4 others (Petition 18 & 20 of 2014; [2014] KESC 11 (KLR)) — Explained
4. Mahamud v Mohammad & 3 others (Petition 7 of 2018; [2018] KESC 26 (KLR)) — Explained
5. Rai & 3 other v Rai & 4 others (SC Petition No 4 of 2012; [2014] eKLR; [2014] 2 KLR 253) — Explained

## Statutes

1. Constitution of Kenya, 2010 — article 22 (1), 29, 48, 49, 50 (2) (q), 51 (2), 163(4)(a) — Interpreted



2. Supreme Court Act, 2011 (Act No 7 of 2011) — section 15, 21, 23 — Interpreted
3. Supreme Court Rules, 2020 (Act No 7 of 2011 sub leg) — rule 15, 26, 36 — Interpreted

### Advocates

*Mr. Bryant* for the Applicant

*Ms. Mwanzia* for the Respondent

## RULING

1. Upon perusing the notice of motion by the applicant dated July 4, 2023 and filed on July 5, 2023 pursuant to article 163(4)(a) of the [Constitution](#), sections 15, 21 and 23 of the [Supreme Court Act, 2011](#) and rules 15 and 36 of the [Supreme Court Rules, 2020](#) seeking the following orders:
  1. That this application be heard by two or more judges as a preliminary procedure to determine extension of time in accordance with section 23(2A)(b) of the [Supreme Court Act](#).
  2. That the honourable court exercises its powers under section 21 (1) of the [Supreme Court Act](#), rule 15 (2) of the [Supreme Court Rules, 2020](#) and articles 22 (1), 50 (2) (q) and 51 (2) of [Constitution of Kenya](#) to extend the time limit in rule 36 (1) for filing the notice of appeal that accompanies this application;
  3. That the honourable court admits further evidence to be submitted by the appellant as may be necessary for determining the appeal, in accordance with section 20 of the [Supreme Court Act](#) and article 50(2)(k) of the [Constitution](#), and the Supporting Affidavit of Timothy Bryant filed herein; and
  4. Any such further or other orders as the appellant may request and this honourable court deem fit in all circumstances.
1. Noting that on September 1, 2023, a consent order was adopted by this court on the following terms:
  1. That by consent dated August 17, 2023 and filed online on August 21, 2023, duly executed by the firm of Bryant’s Law LLP, counsel for the appellant; and Office of the Director of Public Prosecutions for the respondent, wherein they consent that the Supreme Court do extend time to the appellant to file [his appeal] within the next fourteen days (14 days) from the date thereof, the said consent is hereby adopted as an order of this Court.
  2. That the notice of motion dated July 4, 2023 be placed before the hon Chief Justice and President of the Supreme Court for empanelment of a bench to hear and determine prayer 3.The applicant has since filed its appeal being SC Petition No E030 of 2023- *Godrick Simiyu Wanga v Republic* and therefore, the only outstanding issue from the prayers sought in the application is prayer 3 which seeks leave to adduce additional evidence; and
3. Upon now perusing the grounds on the face of the application, supporting affidavit sworn on July 4, 2023 by Timothy Bryant, counsel for the applicant, and written submissions filed on July 5, 2023 wherein he submits that the intended appeal raises issues of general public importance anchored on violation of articles 29, 48 , 49 & 50 of the [Constitution](#) and in particular; the lower court’s failure to recall PW1 for cross-examination; the Court of Appeal’s failure to re-analyse the evidence; violation of the applicant’s right to cross examine the complainant and violation of the applicant’s right to counsel. Further, that the applicant wishes to call fresh evidence in the nature of affidavit evidence on



- the circumstance of the applicant's arrest and first trial, empirical research on the right to fair trial and the adverse effects if such a right is violated; and
4. Upon perusing the respondent's submissions dated August 9, 2023 and filed on August 16, 2023 wherein it is submitted that the application for leave to appeal out of time is not the appropriate place to seek admission of fresh evidence. In opposing the grant of that prayer, the respondent also contends that the same does not meet the criteria set out in section 20 of the *Supreme Court Act* as well as rule 26 of the *Supreme Court Rules*. The respondent cites this court's decision in *Cyrus Shakhbalanga Khwa Jirongo v Soy Developers Limited & 9 others* [2011] eKLR in support of that contention where this court held that an applicant has to demonstrate *inter alia* that the fresh evidence could not have been obtained by him upon the exercise of due diligence; and
  5. Having considered the totality of the Application, and Submissions put forth, we opine as follows:
    - i. Section 20 of the *Supreme Court Act, 2011* as read with rule 26 of the *Supreme Court Rules* grant this court power to admit additional evidence in an appeal before it. Section 20 of the Act provides the issues the court should consider before doing so. They are whether the additional evidence-
      - a. is directly relevant to the matter before court;
      - b. is capable of influencing or impacting on the decision of the court;
      - c. could not have been obtained with reasonable diligence for use at the trial;
      - d. was not within the knowledge of the party seeking to adduce the additional evidence;
      - e. removes any vagueness or doubt over the case;
      - f. is credible and bears merit;
      - g. would not make it difficult or impossible for the other party to respond effectively; and
      - h. discloses a case of wilful deception to the court.
    - ii. This court has also expressed in *Mohamed Abdi Mahamad v Ahmed Abdullahi Mohamed & 3 others* SC Petition Nos 7 & 8 of 2018; [2018] eKLR, *Evans Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* SC Petition No 18 & 20 of 2014; [2014] eKLR, and more subtly in *Cyrus Shakhbalanga Khwa Jirongo v Soy Developers Limited & 9 others* SC Petition No 38 of 2019; [2020] eKLR that the exercise of this jurisdiction shall not be whimsical, and the court would not be in haste in granting the same.
  6. Applying the above principles to the present application particularly the need to exercise restraint in admitting fresh evidence, we note that in his application, the applicant was initially seeking leave to file his notice of appeal out of time which prayer was granted by consent. He subsequently filed his appeal and it is our finding that an application for additional evidence should be predicated upon a filed appeal and upon the applicant showing that the additional, new and fresh evidence could not have been obtained with reasonable diligence for use at the trial; was not within his knowledge; or could not have been produced at the time of the suit or petition. Where a prayer is made for admission of additional evidence together with the prayer for leave to file an appeal out of time and there being no appeal on record at the time of filing the application, the prayer is clearly premature. The reason for this is that the petition of appeal is the one that contains all the grounds of appeal, the facts and evidence in support thereof as well as the applicable law and without it, the court cannot properly determine the prayer for admission of additional evidence.



- 7. Furthermore, the applicant has not set out the additional evidence he seeks to adduce. He has merely alluded to affidavit evidence on the circumstances of his arrest, empirical evidence on the right to a fair trial and the adverse effects of violation of that right. The court cannot determine the relevance or the credibility of the fresh evidence and whether the same fits the criteria set out in section 20 of the *Supreme Court Act* with such bare material placed before us by the applicant’s counsel. In the circumstance, the application for this and the reasons above, must fail.
- 8. On costs, award of the same is discretionary and follows the principle set out by this court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Petition No 4 of 2012; [2014] eKLR that costs follow the event. On this account, it is only prudent that we defer the issue of costs and abide await the outcome of the appeal.
- 9. For the aforestated reasons we make the following orders:
  - i. Prayer 3 of the application dated July 4, 2023 is hereby dismissed.
  - ii. The costs of this application to abide the outcome of the appeal.
- 10. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF DECEMBER 2023.**

.....  
**M. K. KOOME**  
**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT OF KENYA**

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**P. M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

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**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**JUSTICE OF THE SUPREME COURT**

**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

*I certify that this is a true copy of the original*  
**REGISTRAR**  
**SUPREME COURT OF KENYA**

