Owuor v Republic (Criminal Appeal E120 of 2023)
[2025] KEHC 7938 (KLR) (Crim) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 7938 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E120 OF 2023

AB MWAMUYE, J

APRIL 30, 2025

BETWEEN

NICOLAS OWUOR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

Introduction

1. The Appellant/Applicant, Nicolas Owuor, was charged and convicted with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The trial was conducted before the Chief Magistrate's Criminal Court at Milimani, in S.O. No. 37 of 2017. Subsequently, the Appellant was dissatisfied with both conviction and sentence and he lodged this appeal.

2. Pending the hearing of the substantive appeal, the Applicant filed a Notice of Motion application dated 17th October 2024 premised on Articles 50(2)(k) and 165(6) of the *Constitution*, Section 358 of the *Criminal Procedure Code*, and Sections 5 and 11 of the *Evidence Act*. Through this application, the Applicant seeks to have an affidavit allegedly sworn by the Complainant on 30th December 2022, one IA, admitted as additional evidence in this appeal.

3. The Respondent opposes the application, contending that the application is misconceived, lacks merit, and fails to meet the threshold required under Section 358 of the *Criminal Procedure Code*. The Respondent has filed Grounds of Opposition dated 27th January 2025, urging this Court to dismiss the application entirely.

5. In his Application, the Applicant seeks the following orders:

a. That this Honourable Court be pleased to admit into evidence of this appeal the Affidavit of one IA dated 30th December 2022.

b. That there be no order as to costs.

6. In support of the application, the Applicant has filed a Supporting Affidavit sworn by Kiruja Mbaya, counsel for the Applicant. The core of this application is that the Complainant purportedly swore an affidavit after trial commenced, seeking to recant her initial testimony. The Learned Trial Magistrate, however, declined to admit or even hear the Complainant on the matter. The affidavit was similarly rejected when the Applicant sought to have it produced as a defence exhibit without lawful or sufficient reason, thereby infringing on the Applicant's right to adduce relevant evidence.

7. It is contended that the refusal to admit the affidavit breached the Applicant's fundamental rights to a fair trial by limiting his right to adduce and challenge evidence under Article 50(2)(k) of the *Constitution*, as well as violating the general principle in Section 5 of the *Evidence Act* which states that all evidence that proves or disproves a fact in issue is admissible.

8. The Applicant contends that the affidavit is directly relevant as it purports to show the Complainant's true position: that the relationship in question was consensual, that she misrepresented her age, and that she now retracts the allegations of forced sexual acts.

9. The Applicant prays that, in the interests of justice, the affidavit be admitted as additional evidence on appeal, relying on Section 358 of the *Criminal Procedure Code* which vests this Court with the discretion to take additional evidence or direct such evidence to be taken.

8. In response to the Application, the Respondent filed Grounds of Opposition dated 27th January 2025, stating that the Application lacks merit, is misconceived, and an afterthought; the Application does not meet the threshold of section 358(1) of the *Criminal Procedure Code*; and the Application should be dismissed in its entirety.

9. The Application was canvassed by way of written submissions and in compliance both parties filed their submissions.

Applicant's Submissions

10. The Applicant, through his counsel filed submissions dated 10th March, 2025. The Applicant relies on Article 25 of the *Constitution*, which makes the right to a fair trial non-derogable, and Article 50(2)(k), which guarantees every accused person the right "to adduce and challenge evidence." The Applicant argues that the Learned Trial Magistrate erred in rejecting an affidavit that was material to the defence, thereby limiting the Appellant's fundamental right to defend himself fully.

11. The Applicant concedes that courts hold a general discretion to admit or exclude evidence. However, it is argued that the Learned Trial Magistrate exercised this discretion improperly. The Applicant cites *Kinyatti v Republic, Criminal Appeal No. 60 of 1983* and Section 150 of the *Criminal Procedure Code* to demonstrate that the court retains inherent powers to recall or re-examine witnesses if the interests of justice so demand. The Applicant further relied on JWM & Kenya National Commission on Human Rights vs The Attorney General & The Director of Public Prosecutions, Constitutional Petition No. 42 of 2019.

12. According to the Applicant, the affidavit in question is precisely the sort of evidence that a trial court and now an appellate court should consider, especially when it is the alleged victim recanting or clarifying prior testimony. The Applicant also cited Anthony Watuku Kibandi v Republic, Misc. Criminal Application No. 70 of 2020, where the High Court noted that illegally obtained evidence

may be excluded, but in this matter, there is no contention that the affidavit was procured through illegitimate means.

13. The Applicant posits that producing evidence does not obligate a court to adopt it or find it credible, rather, it merely allows the court to weigh it against other evidence. The Applicant relied on the case of Tentere Sankale v Republic, Criminal Appeal No. 2 of 2018. In the same context, the Applicant cites a New York authority, People v Shilitano, N.Y. 161 112 NE 733 (1916) purely to illustrate that courts should examine all available evidence, including recantations, for inherent believability. It is therefore argued that the court need only open its doors to the contested affidavit, weigh it accordingly, and make a finding rather than shutting it out ab initio.

14. On these bases, the Applicant argues that justice demands admission of the Complainant's affidavit so that the appeal may be determined on the fullest possible appreciation of the facts. The Applicant, therefore, urges this court to allow the application and admit the evidence sought to be enjoined in their records.

Respondent's Submissions

15. The Respondent filed its written submissions dated 17th February, 2025. The Respondent's written submissions reiterate that the application is without merit. It relied on Elgood vs Regina [1968] EA 274 for the proposition that additional evidence will only be admitted if (a) it was not available at trial, (b) it is relevant to the issues, (c) it is capable of belief, and (d) it might reasonably create doubt as to guilt had it been considered with other evidence. The Respondent also relied on the case of Samuel Kungu Kamau vs Republic [2015] eKLR.

16. The Respondent argues that the affidavit is not fresh evidence as it was in the Applicant's possession or knowledge at the time of trial. Further, the Respondent questions the credibility of the said affidavit as no attempt was made to call the Complainant as a defence witness to verify the averments in the affidavit since the Applicant was not barred from calling the complainant as a witness.

17. The Respondent therefore urges this Court to reject the affidavit by dismissing the application for lack of merit.

18. Having carefully considered the Application, affidavit, responses and submissions, the following issues crystallize for determination:

    i. Whether the affidavit of IA dated 30th December 2022 constitutes fresh or new evidence not available at the time of trial and meets the threshold under Section 358 CPC

    ii. Whether the Appellant's right to a fair trial under Article 50(2)(k) of the *Constitution* was unjustifiably limited by the trial court's refusal to admit the affidavit.

i. Whether the affidavit constitutes fresh evidence not available at trial and meets the threshold under Section 358 CPC

19. The cornerstone of any application to admit additional evidence on appeal is the requirement that such evidence be "fresh" or "new" suggesting it was unavailable to the party at trial despite reasonable diligence. The court has been called upon to invoke section 358 CPC. The principles for the invocation of new evidence are summarized in the locus classicus case by the Court of Appeal in Elgood v Regina

(1968) E.A. 274 which adopted the principles enunciated by Lord Parker C.J in R. vs. Parks (1969) All ER at page 364 as follows:

> " a. That the evidence that is sought to be called must be evidence which as not available at the trial.
>
> b. That it is evidence that is relevant to the issues.
>
> c. That it is evidence that is credible in the sense that it is capable of belief.
>
> d. That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial."

20. Similarly, in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 others (2018) eKLR, the court emphasized that an appellant must do more than show that a document is helpful as he must satisfy all three classic Ladd-v-Marshall [1954] 1 WLR 1489, limbs and, crucially, demonstrate that the material is not utilized for the purpose of removing lacunae or patching up weak points in the case.

21. From the record, it is manifest that the affidavit dated 30th December 2022 was prepared and available to the defence prior to conclusion of the trial in March 2023. Indeed, the Applicant attempted to produce this affidavit as a defence exhibit, and the trial court refused it. Hence, strictly speaking, it was in existence at the time of trial. It is therefore not "new" evidence in the strict sense that it did not exist, rather, it is evidence that was declined admission by the trial court.

22. The Applicant's failure to call IA as a viva voce witness or to make any procedural application below indicates that the affidavit was squarely within his reach. While a narrow exception exists for evidence improperly excluded by the trial court, that exception presupposes a clear demonstration of error at first instance, something the Applicant does not identify with precision. Moreover, allowing a document only recantation that has never faced cross examination would effectively permit litigants to reserve "second bites" post-conviction, a practice that has been consistently discouraged in our jurisdiction.

23. The affidavit in question was sworn before trial concluded and was in the Applicant's possession. The Applicant made no effort to recall IA or have her testify on its credibility, instead, he sought to admit a document already extant. That fails the freshness test.

24. Section 358(1) of the *Criminal Procedure Code* states:

> " In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by a subordinate court."

25. The key considerations are typically: relevance, reliability, and whether the interest of justice would be served by allowing such additional evidence. The Applicant emphasizes the contents of the affidavit, insisting it is crucial as it potentially negates or casts doubt on the original claims of defilement. The Respondent urges that the affidavit is either hearsay or wholly untested and does not amount to fresh evidence as it was within the Applicant's possession at the trial court. In Samuel Kungu Kamau vs Republic [2015] eKLR, the Court of Appeal reiterated that: -

> " One fundamental consideration whether or not to allow such an application is whether such evidence was available, easily procured and within the knowledge of the person so seeking to admit it into evidence..... It has been said time and again that the unfettered power of

the Court to receive additional evidence should always be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal."

26. Courts have applied that policy with particular rigour in criminal appeals. In Situma v Republic [2024] KEHC 11712 (KLR) A.C. Mrima J traced the lineage of section 358(1) CPC to rule 29 of the Court of Appeal Rules and re-affirmed that the discretion to receive new evidence must rest on "sufficient grounds" and be exercised "very sparingly". He thus stated:

> " The Court of Appeal has severally discussed its power to admit additional evidence under Rule 29(1) of the Court of Appeal Rules. That provision is pari materia with Section 358(1) of the *Criminal Procedure Code* which is the enabling law in the High Court.
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> 15. The Court of Appeal in Republic v Ali Babitu Kololo (2017) eKLR while approving Samuel Kungu Kamau v Republic (2015) eKLR at paragraph 15 of the judgment, had the following to say: -It has been said time and again that the unfettered power of the Court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal. In the words of Chesoni Ag. JA (as he then was) in Wanje v Saikwa (1984) KLR 275: This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purposes of removing lacunae and filing in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case on appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.' (emphasis added)

27. He repeated the four-point test distilled from Elgood v Regina (1968) EA 274 (supra); availability, relevance, credibility, and the likelihood of affecting the verdict and dismissed the application because the disputed rifle had already been fully ventilated at trial. Those observations fit the present case like a glove whereby, the affidavit merely recants evidence that was tested in cross-examination, it adds no genuinely new fact, is untested for credibility, and on any objective view could not dislodge the medical and circumstantial proof on which the conviction stands.

28. Recent sexual-offence appeals underscore an added layer of caution where the "new" material is a post-conviction recantation. In Lagat v Republic [2024] KEHC 2075 (KLR), the court observed that there is "no provision in law that allows a complainant to recant her sworn evidence at the appeal stage," describing a similar affidavit as a "desperate attempt... to make a fresh case". The court recognized the systemic danger of coercion or fabrication long after memories fade and the protection normally afforded to child witnesses has dissipated. To admit such a document without viva-voce testing would invert the very purpose of cross-examination and invite what Denning LJ once called "trial by ambush."

29. Section 358(1) CPC itself embeds a proportionality safeguard: the High Court may act "if it thinks additional evidence is necessary," and must record reasons. Necessity has been read conjunctively with the three Ladd v Marshall [1954] 1 WLR 1489 limbs and with the overarching imperative that the

evidence be outcome-determinative. Where, as here, defence counsel could have invoked section 150 CPC to recall the witness but elected not to, the remedy lies in demonstrating error on the existing record, not in reopening the factual matrix. The Court of Appeal in Wanje v Saikwa Wanje vs Saikwa (1984) KLR 275 warned that appellate powers are not a safety-net for tactical omissions.

30. Applying these tests, the affidavit does not meet the criteria, primarily because its assertions lack demonstrable reliability and relevance.

ii. Whether refusal to admit the affidavit infringed the Applicant's rights to a fair trial

31. Article 50(2)(k) of the *Constitution* guarantees every accused person the right "to adduce and challenge evidence" in his defence, and Article 25 confirms fair trial as non derogable right. However, these rights are not carte blanche to flout established rules of evidence. An applicant must first show that a wrongful exclusion at trial deprived him of evidence he could not otherwise secure. Here, no application to recall IA, the complainant at trial was made and thus, no procedural avenue was exhausted. The appellate court is not a forum of first instance to cure every evidential misstep. Courts must balance the accused's entitlement with the imperatives of reliable fact finding and finality. The mere exclusion of a document does not, in itself, amount to an infringement of fair trial rights if the party had a full and fair opportunity to present it lawfully.

32. The Applicant was represented initially by a different counsel but later represented by counsel, who chose not to pursue procedural avenues such as recalling the complainant or applying for re-examination under Section 150 CPC to test the affidavit's veracity. The trial court's manifest duty was to ensure that any evidence admitted could be properly subjected to adversarial testing. Its refusal to admit a hearsay document in lieu of live testimony does not, therefore, constitute an unjustifiable limitation of the right to adduce evidence.

33. In Joseph Ndungu Kagiri v Republic [2016] KEHC 4153 (KLR) the court emphasized that trial courts and by extension appellate courts dealing with section 150 and 358 requests, retain a gate-keeping duty to insist on procedures that protect both reliability and public confidence.

34. The applicant enjoyed every opportunity to present the complainant in person, to seek recall, or to move the court for a reopening before judgment. Choosing instead to proffer a stand-alone affidavit and to do so only after an adverse verdict was a forensic gamble, not a constitutional violation. Denial of a documentary short-cut therefore constitutes a proportionate limitation on the Article 50 rights, fully justified by the twin public interests in finality and accurate fact-finding. The trial court's refusal to receive an untested affidavit when live testimony was available was a proportionate, rules-based limitation that did not infringe Article 50 of the *Constitution*.

35. In the upshot, the affidavit is not "fresh" evidence as it fails the credibility and necessity limbs under Section 358 CPC, and its exclusion did not infringe the rights to a fair-trial. Allowing it would erode the integrity of criminal procedure, encourage post-conviction retractions in vulnerable-witness cases, and undermine the Court's clear admonition that appeals are not venues for mending a case already lost at trial.

36. Accordingly, the application dated 17th October 2024 is dismissed for lack of merit. There will be no order as to costs.

37. A hearing date for the appeal shall now be fixed.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL 2025.

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BAHATI MWAMUYE

JUDGE