



REPUBLIC OF KENYA



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**Republic v Waswa (Criminal Appeal E043 of 2023)
[2025] KEHC 7140 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E043 OF 2023**

**REA OUGO, J
MAY 29, 2025**

BETWEEN

REPUBLIC APPELLANT

AND

CLEOPAS WANYONYI WASWA RESPONDENT

RULING

1. The appellant/applicant, in a Motion dated 2nd September 2024 brought under Articles 48 and 159 of *the Constitution*, section 348A, 350 (v) and 358 of the Criminal Procedure Act, seeks the following orders;
 - i. That the applicant be granted leave to introduce additional evidence.
 - ii. That the applicant be granted leave to amend the petition of appeal filed herein.
2. The application is based on the grounds stated on the face of the application and a supporting affidavit dated 2nd September 2024, sworn by Kipkirui Serem, an officer attached to DCI Gucha South, who was previously with DCI Bungoma South. His affidavit outlines the background of the application as follows: The respondent herein was charged in Bungoma CMCR. NO. E 1588 OF 2020 with two counts, namely, fraudulent registration of land document ownership contrary to Section 103 (C) (I) of the *Land Registration Act* and forgery contrary to Section 349 of the *Penal Code*, with an alternative charge of fraudulently altering a document. Upon conclusion of the case, he was acquitted under Section 215 of the *Criminal Procedure Code*. The complainant was Jacinta Afande. Together with her deceased husband, Paul Mutanda, she had purchased the parcel of land in question from one Evans Wamalwa Musee, part of E. Bukusu/kanduyi/7816, and the appellant also bought part of the land from the same Evans. During his investigations, he forwarded two sale agreements, one provided by the respondent and another by one Bernard Joash Ambowee, both allegedly signed by the same vendor, the late Evans Wamalwa Musee. He also asked the complainant, who is now deceased, to provide



proof of ownership, and she gave him a nearly illegible copy of a handwritten sale agreement. Upon further inquiry, the complainant informed him that the original sale agreement had been produced in Bungoma High Court Civil Suit No. 59 of 2000. He wrote to the Judiciary, Bungoma Law Courts, requesting this document. He was informed that the said agreement was missing from the court file, and he secured a judgment clearly indicating that Paul Mutanda, the plaintiff and complainant's husband, produced the original sale agreement between himself and Evans Wamalwa Musee. The defendant in Bungoma High Court Civil Suit No. 59 of 2000 was the respondent herein, Cleophas Wanyonyi Waswa. At that time, Evans Wamalwa Musee had passed away. During the trial, a Forensic Document Examiner's Report was provided, confirming that the signatures on both sale agreements were made by different authors, thereby raising doubts about the credibility of the sale agreement provided by the respondent herein. Their attempt to present the Document Examiner's report and judgment from Bungoma High Court Civil Suit No. 59 of 2000 was verbally declined by the trial magistrate in court, in his presence. Their attempt to have Bernard Joash Ambowee testify was likewise unfairly declined, demonstrating a blatant disregard for *the Constitution* and the rules of Natural Justice and equity. The decision to bar Joash from testifying appeared to be a calculated move aimed at denying justice to the complainant and her family, as well as ensuring a predetermined outcome, which was an acquittal. The ruling declining to produce both the Document Examiner's report and judgment in Bungoma High Court Civil Case No. 59 of 2000 is not reflected or recorded in the proceedings. The trial was lengthy, taking over three years to conclude, with a plea being taken on 15th December 2021 and judgment delivered on 30th June 2023. During the trial, different prosecution counsels also handled the case. The document, the Examiner's Report, is not only crucial but reliable and relevant in this Appeal. The maker of the document examiner is available to produce and subsequently be examined and cross-examined on his report. The judgment in Bungoma High Court Civil Case No. 59 of 2000 is also vital in establishing that the original sale agreement between the then complainant's husband, Paul Mutanda, now deceased, and Evans Wamalwa exists and was produced in Civil Suit No. 59 of 2020 as an exhibit. Although the complainant at trial, Jacinta Afande, has since passed on, the matter is still sustainable as she has surviving dependants who are her children. It is in the interest of justice that the handwriting expert's report, the sale agreement dated 15th May 1989, as well as the judgment in Bungoma High Court civil suit No. 59 of 2000, be allowed into the court records.

3. The application was opposed. The respondent deposed in his affidavit that the application lacks merit as it either seeks to introduce documents that have already been produced in evidence or to introduce documents that were never supplied before or during the trial in the Subordinate Court. He asserts that the Judgment issued in Bungoma High Court Civil Suit No. 59 Of 2000 was produced in evidence as Defence Exhibit No. 5. According to the bundle of documents supplied to me by the prosecution before the trial commenced, the examiner's report was not part of the documents provided to me. At no time during the trial did the Prosecution seek to produce the alleged Document Examiner's Report. He has carefully reviewed the evidence of the Prosecution witnesses, and none of them mentioned the alleged Document Examiner's Report. He is aware that on 2nd August 2022, the prosecution sought to call a witness named Benard Joash Ambwoye, but this application was opposed by my Counsel on record for the following reasons: that we had not been served with the statement of the alleged witness and the document he intended to produce and that the prosecution was on a last adjournment. The court, upon hearing the parties, declined the Prosecution's application to introduce a new witness. From the evidence on record, it is clear that the suit parcels of land have been subjected to several suits, namely: Bungoma High Court Suit No. 59 Of 2000 - Paul Maloba Mutanda -vs- Evans Wamalwa Muse & Cleophas Wanyonyi Waswa, 2. Bungoma Elc Case No. 42 Of 2014 – Cleophas Wanyonyi Waswa – vs- Jainta Maloba, And 3. Eldoret Civil Appeal No. 274 Of 2008 - John Chesiro Mutanda -vs- Evans Wamalwa Muse & Cleophas Wanyonyi Waswa. In view of the aforementioned facts, the application now before the Court is merely an afterthought.



4. The parties canvassed the application through written submissions. The applicant gives a background of the proceedings in the lower court. The applicant submitted as follows: *The Constitution* confers supervisory powers on this court to do justice; the overriding objective of the judiciary is to serve all, and it is against this justification that the application was filed. The respondent has no objection to the petition being amended and the judgment in Bungoma High Court Civil Suit No. 59 of 2000 being allowed. The application is premised on sections 348A, 350(1), and 358 of the *Criminal Procedure Code*. By dint of the said provisions, this court has the jurisdiction to hear and allow the orders sought. It was submitted further that the application was brought without delay. The additional evidence documents they seek to adduce is extremely relevant in determining the present appeal as the respondent was charged with fraudulent registration of a land document among other charges and the document examiner's report is an expert opinion after analysis between the known signature of one Evans Mzee/ Musee and the signature purported by the respondent to be that of Evans Mzee/ Musee. The expert opinion will enable this court arrive at an informed fair and just decision and an important influence on the outcome of the appeal. Reliance was made decisions of the court of appeal in *Yahya vs Republic (criminal appeal No. 36 of 2021.)* {2022} KECA 380) KLR.) (4 March 2022) Judgment); *Parvin Singh Dhalay vs Republic* (1997) KLR 514; *Elizabeth Kamene Ndolo vs George Matata Ndolo — Civil Appeal No. 128 of 1995* and *Juliet Karisa vs Joseph Barawa & Another Civil Appeal no. 108 of 1988* stated that: -

“.... Of course, where the expert who is properly qualified in his field makes an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected...”

...expert evidence is entitled to the highest possible regard, and though the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds ...”

...opinion of experts should not be rejected unless there is a cogent basis for so doing”.

5. On the relevance of the judgment in civil Suit No. 59 of 200, it was submitted that it pertains to the issue before the court, as the respondent has admitted this in his replying affidavit. The judgment serves as proof that the complainant's original sale agreement was produced in the matter and that it could not be traced.

6. It was further submitted that the judgment in Bungoma HCCC No. 59 of 200 is a judicial document that is both authentic and reliable. They draw the court's attention to the provisions of section 45 of the *Evidence Act*. The sale agreement between Mark Masinde Musee and Bernard Joash Amboye is also reliable and is the document upon which the handwriting expert relied to analyse and compare the signatures alleged to be those of one Mark Masinde Musee. Bernard Joash is available to testify on this matter. The respondent will be at liberty to cross-examine regarding this. The document examiner is also available to testify. The report is an official document, as per the provisions of sections 77 (1), (2), and (3) and section 3 of the *Evidence Act*. On availability, it was submitted that the additional evidence they seek to introduce at appeal was not available within the meaning of the law, at the time of the trial in that the willingness to produce or admit the same into evidence was lacking. The evidence is fresh



and will make a significant impact in the determination of the appeal. The applicant relied in the case of Samuel Kengu Kamau vs Republic where it was stated that:

“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 determination of the appeal”

7. The applicant further submitted that the test of proportionality requires courts to consider the likely procedural consequences of admitting the fresh evidence and the potential prejudice that might be occasioned to the respondent if this were to be done, weighing this against the justification advanced in support of the application. The evidence will not prolong proceedings, as all makers of the documents are readily available to produce them. There are competing interests of substantive justice, urging the court to consider and allow their application; the guiding factor for retrial must always be the demand for justice, on which basis the entire application is premised.
8. The respondent filed written submissions dated 16.12.2024. it is submitted that the power to allow an appellant to adduce additional evidence on Appeal is discretionary and provided for under section 358 (1) of the *Criminal Procedure Code*. The principles the Court ought to take into account were set out in the case of *Elgood vs Regina* [1968] E.A 274, which was adapted by Lord Parker in *R vs Parks* [1969] ALL ER, it was held as follows:
 - “(a) the principles upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be called for the purposes of the appeal are:
 - (i) the evidence that it is sought to call must be evidence which was not available at the trial;
 - (ii) it must be evidence relevant to the issues;
 - (iii) it must be evidence which is credible in the sense that it is well capable of belief;
 - (iv) the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the Court as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial
9. The respondent does not object to the amendment of the petition and the judgment of Bungoma High Court No. 59 of 2000 as it was produced by the Respondent in his defence as Defence exhibit No. 5. It is a document forming part of the Record of Appeal. The Respondent submitted that the only issue in contention is whether the applicant should be allowed to adduce further evidence regarding the Forensic Document Examiner's report and the sale agreement for Land Parcel No. E. Bukusu/ South Kanduyi/3173 between Mark Masinde and Bernard Joash Amboye. The Respondent contends that he was not served with the Forensic document examiner's report dated the 22nd day of June 2022. It is clear that at the time of trial, the appellant had the evidentiary material but chose not to supply the same to the Respondent, and as can be apparent from the proceedings, there was no mention of the forensic report by any of the witnesses presented by the appellants. In regard to the evidence of Bernard Joash Amboye, it can be gleaned from the proceedings on pages 25-29 of the Record of Appeal that it is clear that the prosecution was on its last adjournment, and it sought to introduce a witness whom



no witness statement had been served upon the defence and the court made a finding on the issued at pages 28-29 and they agree with the findings of the court. Prayer No. 1 of the application should fail.

Analysis And Determination

10. I have considered the rival affidavits and submissions. The provisions of Section 358(1) of the Criminal Procedure Code stipulates that;
 - (1) 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
11. The power to allow an appellant to adduce additional evidence is discretionary. The principles to consider in such an application were well stated in the case of *Elgood vs Regina* [1968] (Supra) as follows;
 - a. That the evidence that is sought to be called must be evidence which was not available at the trial
 - b. That it is evidence that was relevant to the issue
 - c. That it is evidence that is credible in the sense that it is capable of belief
 - d. That 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.
12. Parties have agreed that the appellant/ applicant can amend their petition and rely on the Judgment in HCCC Bungoma 59 of 2000 at the hearing.
13. The applicant contends that during the trial, a forensic document examiner's report was made available, but an attempt to present it was verbally declined by the court. I have examined the court proceedings, and there is no indication that the appellant sought to introduce the aforementioned report. The record on page 23 shows that after Bernard Joash Ambrose was sworn in, the prosecutor informed the court that Bernard was a witness who recorded his statement later, but the defence had not received it. The defence counsel objected on the grounds that the court had directed that all documents and witness statements be supplied to the defence as per Article 50 of the Constitution. The prosecution had presented four witnesses and were on the last adjournment, asserting that they should proceed with other witnesses. In a ruling dated August 26, 2022, the trial court declined the application, stating that granting it at this stage would cast a bad light, as it would give the prosecution an unfair advantage over the defence and involve altering the introduction of new witnesses and evidence at the eleventh hour. This would have a major adverse impact on the management of the case, as the prosecution would fill in significant gaps in the document and the defence application by the prosecution.
14. Regarding the court proceedings of 2/8/2022, Miss Kibet, for the prosecution, did not inform the court of the nature of the evidence this witness was to present. The prosecution could have followed up their oral plea with a formal application to be permitted to adduce the additional evidence. To argue that the court deliberately declined to allow forensic evidence to be tendered is unpersuasive. In my view, this evidence was not new. I find that the appellant did not raise this issue before the trial court. There is nothing on record indicating that the prosecution requested the court to note their intention to call the document examiner or that Bernard was to identify or produce a document. The appellant



has not convinced me that credible evidence was lacking during the trial, considering the nature of the charges the respondent faced in court.

15. In the case of Samuel Kungu Kamau vs Republic [supra], the court stated that its unfettered power to receive additional evidence should always be exercised sparingly and only where it is shown that the evidence is fresh and would significantly impact the determination of the appeal. The appellants have failed to demonstrate that the evidence they seek to admit is newly discovered or fresh. I acknowledge that it would significantly influence the determination of the appeal. However, I find that the appellant/applicant has not established their entitlement to an order for the taking of additional evidence. The applicant is granted leave to amend the petition of appeal and serve it within 14 days from the date of this ruling.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF MAY 2025

R. E.OUGO

JUDGE

In the presence of:

Miss Karani -For the Appellant/ Applicant

Mr. Murunga - For the Respondent

Wilkister C/A

