



REPUBLIC OF KENYA



KENYA LAW
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**Ogang v Republic (Criminal Appeal E032 of 2022)
[2024] KEHC 7887 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E032 OF 2022
MS SHARIFF, J
JUNE 28, 2024**

BETWEEN

DENNIS OCHIENG OGANG ALIAS DENO APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The appellant moved to court in an application dated 26th May 2023 seeking two orders: that the application be certified urgent and be heard on priority basis and that the court grants leave to call for a copy of the first report made by the complainant herein (Investigation Diary) and adduce the same as an additional or further evidence in the interest of justice.
2. This motion is premised on the following grounds:
 - i. That appellant herein was not provided with the complainant's first report made to police about the incident.
 - ii. That the appellant has now come to learn that the said first report contains some material evidence or facts that are crucial to his case and the appeal herein.
 - iii. That the applicant only came to learn about the same only after filing this appeal.
 - iv. It is therefore in the interest of justice that the appellant be granted leave to call for the first report made by the complainant and the said report be used as an additional evidence herein.
 - v. That the orders sought will not prejudice the respondent in any way since the report intended to be adduced is their own document.
 - vi. That it is in the interest of justice that the orders sought be granted.



3. The respondents opposed the application vide grounds of opposition dated 11.12.2023 and filed it's submissions of even date in which it is averred that the application has no legal basis as the Appellant has not demonstrated the evidentiary value of the Investigation Diary that he is seeking leave to adduce as additional evidence
4. The respondent also submit that the application is an abuse of the court process, lacks merit, baseless and misconceived. Therefore, they pray that the application be dismissed.

Issue for determination

- a. Whether the appellant should be granted leave to adduce the investigation diary as additional evidence.

Analysis and determination

This court has considered the respective rival submissions of parties. On the issue whether the appellant should be granted leave to adduce the investigation diary as additional evidence, this court shall place reliance on the Supreme Court case of *Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamed & 3 Others* (2018) eKLR wherein the court set out the governing principles of allowing additional evidence as follows:-

“We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- a. The additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- b. It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- e. The evidence must be credible in the sense that it is capable of belief;
- f. The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- g. Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- h. Where the additional evidence discloses a strong prima facie case of wilful deception of the Court;
- i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.



- j A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
- k The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

6. Applying this principle, I find that the appellant has not demonstrated that he could not after exercising due diligence, have obtained the said report during trial and I note that no application was made before the trial court for the respondent to avail the same. The said report cannot be termed as new evidence given that it has always been available save, as aforesaid, no request had been made by the appellant for its production. (See *Karmali Tarmohd & Anor -v- HH The Agha Khan Platinum Jubilee Hospital - v- Munyambu* (1988) KLR.

7. In the case of *Samuel Kangu Kamau -v- Republic* (2015) eKLR the court considered a similar issue and rendered itself thus:-

“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..”

8. The power to allow an appellant to adduce additional evidence is discretionary and is stipulated under the provisions of Sections 358 (1s) of the *Criminal Procedure Code* that:-

“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..”

It is quiet apparent that the appellant’s current application is aimed at filing in gaps that were left open during his defence. Such an attempt does amount to an abuse of court process and this court will not contenance the same.

Disposition

- 9. On the balance the notice of motion dated 26.5.2023 is disallowed for want of merit.
- 10. Appellant is directed to file and serve written submissions within 14 days from the date hereof and the Respondent to do so within 28 days from the date hereof.
- 11. Mention on 30.7.2024 to confirm compliance.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF JUNE, 2024.

M. S. SHARIFF

JUDGE

