IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 8 OF 2017

BETWEEN

REPUBLIC …… APPELLANT

AND

ALI BABITU KOLOLO …… RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Malindi (Chitembwe, J.) dated 17th March, 2016 ***in Misc. Criminal Application No. 25 of 2015*****)**

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JUDGMENT OF THE COURT

1. Before us is an interlocutory appeal against the exercise of the learned Judge's (Chitembwe, J.) discretion in allowing the respondent to adduce additional evidence under the provisions of ***Section 358(1)*** of the ***Criminal Procedure Code***. The said provision stipulates 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."

2. The locus classicus case on the principles that a court ought to take into account in exercising such discretion has all along been the decision of the predecessor of this Court in ***Elgood vs. Regina (1968) E.A. 274*** which adopted the summary enunciated by Lord Parker C.J in ***R. vs. Parks (1969) All ER at page 364***. The principles are:-

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 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."

3. With the foregoing in mind, the gravamen of the appeal is that on 10th September, 2011 at around 4:00 p.m. David Tebutt and Judith Tebutt arrived at Kiwayu Safari Village Hotel at Lamu for what they had hoped to be a spectacular holiday. After an evening meal and a few drinks they both retired to their banda which was close to the sea shore. At around midnight Judith was awakened by her husband's yelling. She noticed that there were men inside the banda and one was armed with a rifle. She was immediately dragged out of the banda and into a boat which was at the shore. It appears that her husband struggled with the intruders and ended up being shot dead.

4. By then the commotion had attracted the attention of the guards on duty who alerted the police. They discovered David's lifeless body and that Judith was missing. There was a trail of footprints from the banda in question heading towards the ocean. They also noted that alongside those footprints were impressions made by what they described as '*tanga'* shoes. **Ali Babitu Kololo (**the respondent) was arrested the following day as a suspect. Suspicion arose from the allegation that he had on the material night informed Bunu Omar Lali (PW11) of the murder and kidnapping of foreigners coupled with the fact that he had worked at the hotel prior to the incident. Another vital piece of evidence that the prosecution relied on was that the respondent was found wearing '*tanga'* shoes which were believed to have left the impressions at the scene.

5. The respondent was charged with two counts. One of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***; and secondly, with kidnapping in order to murder contrary to ***Section 258*** of the ***Penal Code***. The particulars of the first count were that on the night of 10th and 11th September, 2011 at Kiwayu Safari Village Kiunga in Lamu County, the respondent jointly with others not before court being armed with offensive weapons namely AK 47 rifle robbed Judith Tebutt of her handbag containing assorted clothing of unknown value, two British national passports No. 306329151 and 50159498 of unknown value and an unknown amount of money and during the time of such robbery shot dead David Tebutt. On the second count, the particulars read that on the above mentioned date and place the respondent jointly with others not before court kidnapped Judith Tebutt, a British national in order that the said Judith Tebutt may be put in danger of being murdered.

6. Owing to the fact that the incident involved British nationals, Scotland Yard got involved in the investigations. Apparently, some of the exhibits were taken for forensic examination in the United Kingdom (UK). Neil Hubberd (PW14), a detective attached to Scotland Yard testified as much. In his opinion the forensic evidence confirmed that the shoes which were in the respondent's possession were the same ones which had left impressions at the scene.

7. Subsequently, Judith who had been kidnapped and held captive in Somali for a period of six months was released. She was not able to identify the respondent as one of the assailants. Be that as it may, the trial court was convinced that the circumstantial evidence irresistibly pointed towards the respondent's guilt. As such, he was convicted for the two offences and sentenced to death. He appealed against the trial court's decision which appeal is still pending.

8. It seems the respondent through his advocate, had sought the assistance of **Reprieve**, a legal charity in the UK to obtain forensic evidence in connection with the case against him which he believed was being held by the UK authorities. Initially, the UK authorities declined to avail the evidence prompting **Reprieve** to file suit on behalf of the respondent being ***[2015] EWHC 600 (QB) Ali Babitu vs. Commissioner of Police for HTE Metropolis*** for orders compelling the release of such evidence. By a ruling dated 11th March, 2015 the UK authorities were directed to release the said evidence to the

respondent. The evidence in question was released in two phases, on 16th March, 2015 and 15th April, 2015.

9. Thereafter, the respondent filed an application dated 28th May, 2015 at the High Court seeking *inter alia,* leave to adduce additional evidence in the appeal. The additional evidence intended to be adduced was the forensic evidence which had been released by the UK authorities. The application was premised on the grounds that firstly, despite the evidence in question being in the possession of the prosecution during the trial, the same was not disclosed to the respondent. The respondent only became aware of the evidence when the detective from Scotland Yard testified; by the time the evidence was released pursuant to UK Court's order dated 11th March, 2015 the criminal proceedings against him had been concluded. Secondly, had the evidence been tendered, the trial court would have arrived at a different conclusion. Thirdly, the evidence will assist the court in disposing the appeal. The additional evidence sought to be adduced was annexed to the affidavit sworn by one Zoe Bedford in support of the application. The application was strenuously opposed by the state.

10. By a ruling dated 17th March, 2016 the learned Judge (Chitembwe, J.) in allowing the application expressed himself as follows:-

"In the end, I do find that this being a criminal case which has resulted to the invocation of the death penalty, the applicant should be accorded all the available avenues to ventilate his case. No prejudice will be suffered by the prosecution. I do allow the application dated 28th May, 2015…. The appellant to include the additional evidence to be part of the record if it is in documentary form. If there is need to call a witness to produce or adduce additional evidence, the applicant shall inform the court of such need and shall be at liberty to do so. The additional evidence shall be taken by this court…The additional evidence shall be taken first before the appeal is heard."

11. It is that decision that has provoked the appeal before us wherein the appellant faults the learned Judge for allowing the respondent to adduce additional evidence. By consent order dated 12th June, 2017 the appeal was disposed by way of written submissions filed by both parties.

12. The appellant submitted that the respondent only instructed **Reprieve** to act on his behalf in a claim against the UK government and the mandate did not extend to making an application to adduce additional evidence. Nonetheless, the respondent filed the application nine months after filing the appeal, there was inordinate delay and the learned Judge ought not to have entertained the application. It was the State's contention that the respondent was not clear as to when he learnt of the additional evidence. According to the State, the respondent failed to give reasons as to why he failed to utilize ***Section 21***of the ***Mutual Assistance Act*** to obtain the evidence and adduce it at the trial.

13. The appellant went on to add that the UK decision could not be the basis for admission of the so called additional evidence before the High Court. All in all, the additional evidence sought to be adduced is for purposes of sealing the gaps in the defence case. It was urged that the prosecution stands to suffer prejudice because it will not be in a position to interrogate and rebut such additional evidence.

14. In opposing the appeal, the respondent maintained that the learned Judge properly applied the principles set out in the ***Elgood case***. He reiterated that he only became aware of the evidence following Mr. Neil's evidence. It was in the interest of justice for the High Court to consider the additional evidence. As far as he was concerned, ***Section 21*** of the ***Mutual Assistance Act*** was not applicable in the circumstances of the case because what was sought was admission of additional evidence in his possession and not retrieval of the evidence from UK authorities. On the respondent's part, the prosecution would not suffer any prejudice for the simple reason that it will have an opportunity to submit

on the probative value of such evidence.

15. We have considered the record, submissions by parties and the law. As per ***Section 358(1)*** of the ***Criminal Procedure Code*** which we have set out herein above, the High Court has absolute discretion to take additional evidence but it should only exercise such discretion if there is sufficient reason. This Court while discussing its power to admit additional evidence under ***Rule 29 (1)*** of the ***Court of Appeal Rules*** in ***Samuel Kungu Kamau vs. Republic [2015] eKLR*** stated:-

"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. 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 purpose of removing lacunae and filling 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 in 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 given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.' (Emphasis added)

16. In as much as this Court in the above mentioned case was discussing its power under ***Rule 29(1)*** of the ***Court of Appeal Rules***, we believe that the considerations set out thereunder are applicable where the High Court is considering a similar application of admission of additional evidence under ***Section 385(1)*** of the ***Criminal Procedure Code***.

17. Applying the principles set out in the ***Elgood case*** to the circumstances of this case, we find like the learned Judge that the forensic evidence sought to be adduced and annexed to the affidavit in support of the application was not within the knowledge of the respondent during the trial. He only learnt of the same when the detective from Scotland Yard testified; he promptly made application for adducing additional evidence after receiving the evidence in question. Equally, we find that such evidence which the respondent contends goes to the issue of whether the shoes recovered on the respondent matched the impressions at the scene ought to be considered together with the evidence on record to determine whether it would create a reasonable doubt in the prosecution's case. Moreover, we concur with the learned Judge that the admission of the said evidence would actualize the respondent's fundamental right of a fair trial under ***Article 50*** of the ***Constitution***. We do not see how the same would prejudice the prosecution. It is trite that the admission of additional evidence does not mean that the same is conclusive proof of the same, the court is still under a duty to look at the probative value of the evidence. It is at that juncture that the prosecution can attack the weight of such evidence.

18. Finally, the ***Mutual Legal Assistance Act*** is an Act of Parliament which regulates mutual legal assistance to be given and received by Kenya in investigations, prosecutions and judicial proceedings in relation to criminal matters, and for connected purposes. Legal assistance envisioned under the Act includes production of documents including records but not limited to government, bank, financial, corporate or business records. See ***Section 6(f)*** of the Act. ***Section 21 (1)*** of the Act stipulates that-

"Where criminal proceedings have been instituted in Kenya against a person, or where a person

is joined in such proceedings as a third party, the Competent Authority may, on application to the court by either the said person or his legal representative, issue a request for legal assistance to a requesting state."

19. Our construction of the above is that the provision is invoked where an accused person or a party in criminal proceedings and in this case the respondent applies for legal assistance which may be in the form of production of documents from a foreign country. In our view, that provision would have been applicable if the respondent was seeking the production of the forensic evidence from the UK authorities. Having used what we consider an alternative legal avenue by making an application to the UK Court ***Section 21*** of the ***Mutual Legal Assistance Act*** was not applicable. What the respondent sought in the High Court was the admission of the said evidence which was then in his possession. Accordingly, we find that he properly approached the court under ***Section 358(1)*** of the ***Criminal Procedure Code***.

20. For those reasons, we find no merit in the appeal and it is hereby dismissed.

Dated and delivered at Malindi this 7th day of December, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR