



## REPUBLIC OF KENYA

### IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Njoki & Ouko SCJJ)

APPLICATION NO. E018 OF 2023

—BETWEEN—

GODRICK SIMIYU WANGA .....PETITIONER/ APPLICANT

—AND—

REPUBLIC.....RESPONDENT

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*(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 17<sup>th</sup> March 2023)*

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#### Representation:

Mr. Bryant for the Applicant  
(Bryant's Law Advocates LLP)

Ms. Mwanzia for the Respondent  
(Director of Public Prosecution)

### RULING OF THE COURT

[1] UPON perusing the Notice of Motion by the applicant dated 4<sup>th</sup> July, 2023 and filed on 5<sup>th</sup> July, 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 the 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.*

**[2] NOTING** that on 1<sup>st</sup> September 2023, a Consent Order was adopted by this Court on the following terms:

1. *That by Consent dated 17<sup>th</sup> August 2023 and filed online on 21<sup>st</sup> August 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 4<sup>th</sup> July 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. The 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 4<sup>th</sup> July 2023 by Timothy Bryant, counsel for the applicant,

and written submissions filed on 5<sup>th</sup> July 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 9<sup>th</sup> August 2023 and filed on 16<sup>th</sup> August 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 Shakhhalanga 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 Shakhhalaga 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 other 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 4<sup>th</sup> July 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.**

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

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

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

.....  
**NJOKI NDUNGU**  
**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**

