REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)

PETITION (APPLICATION) NO. E032 OF 2023

-BETWEEN-

RUTH WANJIKU KAMANDE ..... APPELLANT/APPLICANT

-AND-

REPUBLIC ..... RESPONDENT

(Being an application for leave to adduce additional evidence)

Representation:

Mr. Nkarichia and Ms. Wambui for the Applicant
(*Mohammed Muigai LLP*)

Ms. Mwanza for the Respondent
(*The Director of Public Prosecutions*)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion by the applicant dated 22nd March, 2024 and filed on 25th March, 2024 pursuant to Articles 50 (2) (k), 159 (2) (d) & (e) of the Constitution of Kenya 2010, Rules 3 and 26 of the Supreme Court Rules and all other enabling provisions of law in which the applicant seeks the following orders:

a. *This Honourable Court be pleased to admit as additional evidence an Expert Medical Report on the Battered Woman Syndrome in line with the Draft Medical Report annexed to the Petitioner's Supporting Affidavit in such a manner and subject to such conditions as the court may find appropriate;*

b. *The Petitioner/Applicant be granted fourteen (14) days leave from the date of determination of this Application to adduce the said additional documentary evidence in the instant appeal;*

c. *This Honourable Court do issue any other or further order as it may deem necessary to meet the ends of justice;*

d. *The order for costs of an incidental to this application abide the result of the said Appeal;* and

[2] UPON considering the grounds on the face of the application, and the averments contained in the supporting affidavit of Ruth Wanjiku Kamande, deponed on 22nd March, 2024 wherein the applicant contends that: the Court of Appeal certified the appeal on grounds that it raises matters of general public importance regarding the doctrine of the Battered Woman Syndrome (*hereinafter BWS*) and its applicability to the defence of self-defence in criminal trials in Kenya; for the reason that, this common law doctrine of self-defence, as it is applied fails to curve out a *"conscience exemption"* for victims of domestic violence thereby continually perpetuating a grave miscarriage of justice; to the extent that it fails to take into consideration the unique psychology and circumstances of battered intimate partners when assessing the proportionality of the victim's actions, denying such victims a reasonable opportunity for justice;

[3] THEREFORE, the applicant seeks to adduce the expert medical report of Dr. Frank Njenga, a licensed clinical psychologist who evaluated the applicant on or about 24th January 2023, wherein he expounds on the intersectionality between BWS, Post Traumatic Stress (PTSD) and Premenstrual Dysphoric Disorder (PMDD); by providing invaluable psychological insight on BWS,

expounding on its causes and effect as evaluated from the applicant's perspective, which in turn shall enable the Court to understand the role that the condition played in the events underlying the Petition; noting that the mental evaluation undertaken to determine the applicant's fitness to stand trial did not take into account or seek to determine whether she was predisposed or potentially afflicted with the syndrome; in consequence, the report now sought to be availed offers additional, compelling and consequential probative evidence and it will be in the interest of justice that the application filed be granted; since, this is an exceptional opportunity for the Court to render itself definitively on BWS not only for the benefit of the applicant but victims of domestic violence in Kenya; and

[4] UPON considering the applicant's written submissions dated 22nd March, 2024 and filed on 25th March, 2024 the applicant affirms that the evidence sought to be adduced, exhibited as a draft expert medical report, meets the statutory and jurisprudential threshold set out by this Court in ***Mohamed Abdi Mahamud v. Ahmed Abdi Abdullahi Mohamad & 3 Others*** [2018] eKLR as the applicant satisfies the eleven elements set out therein on grounds that: it is credible evidence prepared by a practising medical practitioner and a clinical psychologist with over 30 years' experience, after repeated physical interviews with the applicant, and a number of observations; it is directly relevant to BWS, and will influence/impact the verdict by translating theoretical perspectives into practical psychological insights; it is not intended to introduce new facts or issues for determination but will enable the Court to authoritatively and conclusively review the principle of BWS and Intimate Partner Violence, deepening its appreciation of the clinical, medical and psychological underpinnings; giving consideration that at the trial the defence of BWS was unavailable to the applicant because it had no statutory underpinning or common law adoption by judicial initiative; as such, the applicant could neither have procured nor utilized the expert medical report to advance her defence; and

[5] FURTHERMORE, the report, which is not voluminous, will allow for an effective response by the State as it is expected that the final copy to be filed in Court will not exceed 60 pages; by dint of it containing evidence that will remove vagueness or doubt over the case with a bearing on the main issue therefore, it is not an attempt to deceive or otherwise undermine the Court's ability to impartially, objectively and comprehensively address the substratum of the appeal; neither does the applicant seek to fill up an evidentiary gap or eliminate lacunae in the pleaded case nor to make a fresh case in the appeal or fill up omissions or patch up weak points in her case; instead, due to the current failure or non-recognition of Intimate Partner Violence within the criminal justice system, there is a grave shortcoming in the dispensation of justice; even though Parliament has enacted the Protection Against Domestic Violence Act, there is a yawning deficit in the legal system in terms of failure to perceive what should happen and what judicial protection to offer victims who retaliate against their abusers; to this end, the State will suffer no prejudice from the additional evidence sought to be adduced; and

[6] UPON considering the replying affidavit of Fredah Mwanza, Senior Assistant Director of Public Prosecutions, sworn on 16th April, 2024 in opposition to the application and written submissions dated 16th April, 2024 and filed on 17th April, 2024 all to the effect that: the instant application is nothing but an attempt by the applicant to make a fresh case, fill up omissions or patch up her case; taking note that the State owes no responsibility to conduct a psychiatric evaluation for an accused person to determine possible defences, it is squarely the responsibility of the accused to present evidence such as a psychiatric evaluation for purposes of enabling the trial court to determine the existence of possible defences; the applicant did not present any such evidence at trial or before the first appellate court for evaluating and making a finding on the applicability of BWS in this case; moreover, the applicant has not demonstrated any specific challenge(s) that may have made it difficult or impossible to present the psychiatric report;

[7] ADDITIONALLY, the annexed draft report allegedly prepared upon examination of the applicant's state of mind more than eight (8) years after the date of commission of the offence, the subject matter of the instant appeal, does not include an actual examination of the applicant around the time of the incident; it neither presents a medical history or a history of violence against the applicant by others or by the deceased victim or a combination of both, nor explain how such violence traumatized her throughout the episode preceding the crime but rather refers to scientific literature, which were matters within the purview of the superior courts below and can still be referred to in arguments by parties in this appeal without being adduced as additional evidence for the disposal of this appeal;

[8] BESIDES, it is submitted that the applicant has not demonstrated that the personality disorders or syndromes alluded to in the report are novel medical discoveries that she was precluded from raising and advancing at trial in support of the defence of insanity; what's more, the largely persuasive judicial determinations by courts of other jurisdictions and academic writings contained therein are not within the speciality of the proposed medical expert requiring to be adduced as additional evidence; inevitably, the application falls woefully short of the standard set out in ***Mohamed Abdi Mahamud Case*** and as further pointed out by this Court in ***Wanga v Republic (Application E018 of 2023) [2023] KESC 108 (KLR)*** the Court's exercise of this jurisdiction shall not be whimsical and the court would not be in haste in granting the same; alternatively, this being a second appeal against a conviction of murder, the Court's jurisdiction as a second appeal as enunciated in ***Chemagong vs. Republic*** (1984) KLR 213 confines it to points of law; and

[9] NOTING that the applicant proposes a more nuanced and responsive test to be developed by the Court when evaluating applications of adducing additional evidence in criminal proceedings that recognize the distinctive character of criminal proceedings as distinguishable and separate from civil (or quasi-civil) proceedings; that the test may reflect as follows: (a) additional evidence as being directly relevant to the matter before the court; (b) additional

evidence may influence or impact the result of the verdict either by removing vagueness or by conclusively addressing an issue at trial; (c) additional evidence should not have been available at trial; (d) additional evidence ought to assist the court in fair, just and conclusive determination of the issue; and (e) proportionality and prejudice that may arise if the additional evidence is admitted; and

[10] HAVING therefore considered the totality of the application, response and submissions, **WE NOW OPINE** as follows:

(i) Section 20 of the Supreme Court Act as read with Rule 26 of the Supreme Court Rules grants this Court the power to admit additional evidence in an appeal before it. To consider the prayer for leave to admit additional evidence, the applicant is bound to satisfy all governing principles posited in our decision in ***Mohamed Abdi Mahamud Case*** which have now been enacted in Section 20 (2) of the Supreme Court Act as follows:

a. is directly relevant to the matter before the 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) Before applying these principles to the application at hand, we have considered the applicant's proposal for a more nuanced test in criminal proceedings, such as this case, where the matter has been

certified as a matter of general public importance. This is in contradistinction to the test in ***Mohamed Abdi Mahamud Case,*** applicable to quasi-civil proceedings that sought to balance the competing rights and interest of private parties.

(iii) Examining the test accentuated by the applicant, it embodies five of the eight guiding principles as now codified into law as encapsulated under Section 20 (2) of the Supreme Court Act, without distinction of applicability in civil, quasi-civil or criminal appeals. We did not understand the applicant to be challenging this statutory provision. At any rate, this is not the appropriate manner or forum to do so. We say no more.

(iv) Turning to the issue at hand and applying the above principles to the present application, our perusal of *Para 6 on page 2* of the draft medical report indicates that the report sought to be introduced relates to the issue of BWS, focusing on medical and scientific literature as well as related literature for a comprehensive review of the applicant's mental condition at the time of commission of the offence; paying particular attention to the intersection between mental health and the law, as well as the mental health of women, because of the defence of BWS which is specific to the female gender. Further, at *page 21* of the Report, it is stated:

> *"94. In the preparation of this report, we debated the merits or otherwise of carrying out our own mental status of examination of RWK, so many years after the tragic events, but decided against it. To carry out a medical examination eight years after the event risks it being completely unreliable plus the equally serious risk of the introduction of new evidence not available at the time of trial. Our decision in this regard might be seen as the wrong one but it is our view that new evidence is not likely to be*

of additional value in this opinion on the BWS." [Emphasis added].

(v) It is evidently manifest that the draft medical report sought to be adduced, though it relates to the issue of the doctrine of BWS, the primary issue before the Court in this appeal, is not pegged on a medical evaluation conducted on the applicant, and moreover, the evaluation was not conducted at the time of the commission of the offence by the applicant. Instead, it falls within the confines of medical and scientific literature and, to some extent, makes reference to judicial findings and arguments.

(vi) In our view, and without making further inferences that we reserve for the trial itself, this information was and remains readily available both to the litigants and to the Court. We are not persuaded that the same could not be adduced at the trial or before the Court of Appeal, the applicant appreciating that BWS traces its existence from common law.

(vii) Suffice to say, and bearing in mind that this is a second appeal, we agree with the respondent that the matters in the draft medical report are best left to arguments at the trial without having to be introduced in evidence. In any event, the appeal having been founded on certification as involving matters of general public importance, the Court will have to consider factors that transcend the applicant.

(viii) In the premises, we are not persuaded as to the merits of the application and hold that the same is for disallowing.

(ix) On costs, the 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 to abide by the outcome of the appeal.

[11] CONSEQUENTLY, and for the reasons aforesaid, we make the following orders:

i. ***The Notice of Motion dated 22nd March, 2024 and filed on 25th March 2024 be and is hereby dismissed.***

ii. ***The costs of this application to abide the outcome of the appeal.***

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **5th** day of **July 2024.**

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

.....	.....
S. C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a
a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA