

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ)

PETITION (APPLICATION) NO. 11 OF 2017

—BETWEEN—

CHARLES MAINA GITONGA.....APPLICANT

—AND—

REPUBLIC.....RESPONDENT

(Being an application for leave to adduce additional evidence during the hearing and determination of the Petition of Appeal)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion application by the Applicant dated 18th September 2017 and filed on 26th September 2017 premised upon the provisions of Sections 3 of the Supreme Court Act, 2011, Rules 18(2), 23 and 26 of the Supreme Court Rules, 2012 seeking leave to adduce additional evidence during the hearing of the Petition of Appeal dated 21st July 2017 and filed contemporaneously with the instant application; and;

[2] UPON reading the Applicant's affidavit sworn by the Applicant on 7th September 2017, filed alongside the affidavits of Catherine Wanjiru Gitonga and Edith Wambui Gitonga both sworn on 3rd August 2017; and

[3] UPON reading the Respondent's Grounds of Opposition dated and filed on 13th October 2017 and;

[4] UPON considering the Applicant's written submissions dated and filed on 9th October 2017 wherein he submits that he intends to adduce additional evidence before the Court, the nature of which relates to the fundamental issue of the right to assistance of counsel in criminal matters and the right to legal representation provided at the State's expense in cases where substantial injustice would otherwise occur;

[5] AND which evidence, it was argued, was not available or made available at the trial Court (the Magistrate's Court) and Appellate Court of first instance (the High Court), and which additional evidence is relevant and credible that after considering the evidence, this Court would go on to re-consider and make an informed decision both in the interest of justice and to prevent further miscarriage of justice that has been occasioned to the Applicant;

[6] FURTHER, upon considering the Respondent's submissions filed on 13th October 2013 in which it was submitted that the Applicant intends to introduce new evidence that would fundamentally alter the nature of the case, and which evidence the Applicant had the opportunity to adduce at both the trial Court and the Appellate Court of first instance, which he failed to do, for determination by those Courts; and

[7] FURTHERMORE, noting the Respondent's opposition to the Application on the grounds that this Court does not have the jurisdiction, as an appellate Court pursuant to Article 163(4)(a) of the Constitution, to admit new evidence by affidavits or otherwise, and;

[8] UPON considering the main ground in the Application that the new evidence which the applicant seeks to introduce before the Court is premised on the provisions of Articles 50(2)(g) and (h) of the Constitution on the fundamental question of the right to assistance by counsel and legal representation at the State's expense as settled in

Karisa Chengo & 2 Others v R (2015) eKLR and that he was not afforded legal representation at the trial Court and the Appellate Court of first instance in violation of that right;

[9] WE now opine as follows:

- (a) It is manifestly clear to this Court that, while the Applicant was tried and convicted in the trial Court, the question of Legal representation did not arise at all. Similarly, that at the High Court during the hearing of his first appeal, the issue was never raised but was only raised in the Court of Appeal in ***Criminal Appeal No.78 of 2014*** and the matter properly addressed by that Court within its jurisdiction, and;
- (b) Noting that legal representation is not an inherent right available to an accused person under Article 50 of the Constitution or any provisions of the Repealed Constitution and that under Section 36(3) of the Legal Aid Act No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial;
- (c) The application does not satisfy any principle prior or subsequent to the decision by this Court in ***Petition No. 7 of 2018 Hon. Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others*** where the Court stated recently regarding the principles for allowing additional evidence;

“...we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. 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 would 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 made aware of and procured the further evidence in the course of the 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 the 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 the 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.”***

- (d) Applying the above principles to the instant Application, we are unconvinced that the Applicant was not accorded an opportunity to obtain legal representation within the law as then in place during his trial and appeals or as later enacted through the Legal Aid Act, 2016. We cannot also fault the trial Court and the Appellate Court of first instance for alleged violation of Article 50(2)(g) & (h) of the Constitution of Kenya.
- (e) The appeal before us does not turn on the issue of the right to legal representation and therefore the issue, while otherwise an important one, is only one of more significant issues in the appeal.

- (f) More fundamentally, the issue of legal representation or lack thereof is a matter of record and no evidence beyond the trial and appellate Courts' record is required to submit on it as a matter of law which is what this Court is seized of.

[12] **AND** having therefore considered the application and submissions by the respective parties, by a unanimous decision of this Bench, we make the following orders under Section 23(2)(b) of the Supreme Court Act and Rules 21 and 23 of the Supreme Court Rules, 2012:

ORDERS

- (a) The Notice of Motion Application dated 18th September 2017 and filed on 26th September 2017 is hereby dismissed.
- (b) Each Party shall bear its costs of the Application.

[13] Orders accordingly.

DATED and DELIVERED at NAIROBI this 7th day of December, 2018

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M. K. IBRAHIM	J. B. OJWANG
JUSTICE OF THE SUPREME COURT	JUSTICE OF THE SUPREME COURT

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S. C. WANJALA	N. S. NJOKI
JUSTICE OF THE SUPREME COURT	JUSTICE OF THE SUPREME COURT

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I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is
a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA