

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CRIMINAL APPEAL NO.129 OF 2015

NAVEED AHMED.....
APPELLANT

VERSUS

UGANDA
RESPONDENT

(Appeal from the Judgment and sentence of Hon. Lady Justice Catherine Bamugemereire J, dated 22/02/2011 at the High Court of Uganda at Kampala)

CORAM: HON. MR. JUSTICE A.S. NSHIMYE, JA
HON. MR. JUSTICE ELDAD MWANGUSYA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

RULING OF THE COURT

This is an application brought under Rules 30(1) b and 43(1) b of the Rules of this court in which the applicant seeks leave to adduce additional evidence at this court in Criminal Appeal No. 70 of 2011 arising from Kampala High Court Criminal Case No. 149 of 2009.

The grounds of this application are set out in the notice of motion as follows:-

- 1. There has appeared additional evidence which the Applicant intends to adduce and which will assist the court to determine the appeal and/or case once and for all.***

- 2. The additional evidence intended be adduced was not available and/or within the reach or the Applicant at the time of hearing Criminal Case No. 142 of 2009.**
- 3. The intended additional evidence will ensure that justice is not only done but also seen to be done.**
- 4. The Respondent shall not in any way be prejudiced if this application is allowed.**
- 5. It is in the interest of justice that this application be allowed.**

The notice of motion is supported by the affidavit of the applicant, which we are constrained to reproduce in *extenso*.

The relevant paragraphs state as follows;-

- 2. THAT I was, together with Muzaffar Hussein and Fahad Ahmed, charged and convicted on counts of murder and sentenced to death by Hon. Lady Justice Catherine Bamugemereire on 22/02/2011 and I am currently in Luzira Upper prison, Kampala.**
- 3. THAT I have since filed an appeal against both the conviction and sentence which is pending before this is honorable court.**
- 4. THAT there is some additional evidence that I intend to adduce during the said appeal which I did not have at the time I underwent the trial.**
- 5. THAT firstly, during my trial, I indicated to the trial Judge that I had a witness to call and I asked for some few days to contact him through my friends but I was not allowed the time since the time for the criminal session is limited.**

- 6. THAT I have now, through my friends, been able to locate the said witness, Matovu Wasswa Dauda, with whom I was lodging with at the time the offence is said to have committed and he is willing to come and testify accordingly.**
- 7. THAT my friends have also been able to locate a one Nokrach Patrick, which had been hired to kill the late Gurbax Singh by Ikram Yousuf.**
- 8. THAT Nokrach Patrick is also willing to come and give evidence on this appeal.**
- 9. THAT my relatives have also been able to secure immigration information about the exiting of the country by Ikram Yousaf just a few hours after the murder of Gurbax Singh and his son Ballijit Sigh. (a copy of the immigration records and letter are hereto attached and jointly marked, as anenxture "A").**
- 10. THAT they were also able to access and have received phone print outs from different telecommunication companies to show that Ikram Yousuf, my other co-accused and Gurbax Singh had been in communication immediately before his death. (a copy of the print outs is hereto attached and marked as annexiure "B").**
- 11. THAT Fahad Ahmed, the other person with whom I was co-charged and convicted has since come out to state that he, Muzaffar Hussein and Ikram Yousuf planned to frame me in the said murder.**
- 12. THAT when Muzaffar Hussein our other co-accused heard that Fahad Ahmed was to reveal their plans wherein they framed me in this matter, he attempted to kill him while in prison.**
- 13. THAT the prisons authorities have compiled a report about the statements and confessions made by**

the said Fahad Ahmed and the events that followed, including the attempted made and are willing to testify to this in this court. (Sic)

14. THAT a t the time I was under trial, I did not have all this evidence, especially, that I was on remand throughout the entire trial.

There are also two other affidavits in further support of the application. One is deponed to by Kawamara Christopher , which is to the effect that Ikram Yousuf used to communicate with him on Telephone No. 0715 414542, and that on 13th March 2009 the said Ikram Yousuf was with him at Bunga a Kampala suburb at about 9:00 am. That he intended to give evidence to confirm that the phone number stated above was used by the said person about the time of the commission of the offence.

The other affidavit in support is that of Muzzaffar Hussein. He is appellant no.2 in the appeal from which this application arises. We are also constrained to reproduce his affidavit in *extenso*. The relevant parts read as follows;-

- 1. THAT I am male Pakistani National currently in the condemn section of Luzira Upper Prison Kampala - Uganda, having been charged, convicted and sentenced to death in 2011.***
- 2. THAT I have learnt of the above application filed by Naveed Ahmed wherein he is seeking the leave of the court to adduce additional evidence in his appeal.***
- 3. THAT I have evidence connected to the application and the criminal case that I wish to state that I did not state at the trial.***

- 4. THAT prior to the case, I had come to Uganda in 2007 and I was a businessman dealing in second hand clothes and cosmetics.**
- 5. THAT It was in 2008 when I first met a one Ikram Yousaf at Bunga. He comes from my area back home in Pakistan.**
- 6. THAT the said Ikram Yousaf told me how he was brought to Uganda by a one Gurbax Singh, now deceased and one of the victims of the murder giving rise to the above case, and how after cheating Ikram's money, Gurbax was treating him like a slave.**
- 7. THAT Ikram Yousaf also told me that Gurbax had confiscated his passport. I felt bad about Ikram's situation and I went with him to talk to Gurbax Singh who was very abusive when I brought up the matter.**
- 8. THAT after a few days that is on 17th November, 2008, police came to my home and took all of us to Kabalagala Police station and I was told that we had hired someone called Nockrach Patrick to kill Gurbarx Singh.**
- 9. THAT I was not aware of such a thing and I told Police the same. I was released on police bond the following day.**
- 10 THAT Ikram Yousaf continued demanding his money and passport from Gurbarx Singh. In march 2009, Ikram Yousaf asked me to accompany him yet again to Gurbarx's home to plead with him to give Ikram at least a little money which would b enough for buying air tickets plus the passport because Ikram wanted to go back to Pakistan.**

- 11 THAT I also asked a friend of mine, Fahad Ahmed, who is convict number 2 in the criminal case, to accompany me.**
- 12 THAT we agreed to go to Gurbarx Singh's home on 13th March 2009 in the evening when Gurbarx Singh had returned from work.**
- 13 THAT at the appointed time, Fahad Ahmed and I went first and Ikram joined us later at around 9:00 PM. Gurbarx Singh welcomed and served us some alcohol which we drunk as we chatted.**
- 14 THAT after a while, Ikram Yousaf went confronted and asked Gurbarx Singh to give him his money and the passport. Gurbarx Singh declined to give the passport and Ikaram Yousaf and Fahad Ahmed went inside the house to talk to Gurbarx Singh's son, Balijit Singh, about the same issue of money.**
- 15 THAT after a while, me and Gurbax Singh heard noise from inside the house and we too went in only to find them fighting.**
- 16 THAT Gurbax Singh immediately joined in to defend his son and all of us got involved in the scuffle and a result of the commotion, it became violent.**
- 17 THAT eventually, we managed to subdue Gurbax Singh and his son, only for me to realize that Gurbax Singh had suffered an injury on the head where Ikram Yousaf had hit him with a hammer.**
- 18 THAT Gurbax Singh then directed Ikram Yousaf to where the money and passport was. After getting them, Ikram instructed Gurbax to write a cheque**

worth 20,000,000 (twenty million shillings) balance of his money, which Gurbax Singh did.

- 19 THAT Ikram Yousaf then handed me and Fahad Ahmed the cheque to withdraw the money from the bank the following morning and share it equally among the two of us as a reward for assisting him get his money and passport back.**
- 20 THAT Ikram Yousaf then left for the airport to catch a flight which he had booked earlier that day.**
- 21. THAT we kept in touch with Ikram Yousaf on phone until he boarded the plane to fly out of the country.**
- 22. THAT meanwhile, despite our efforts to stop the bleeding by wrapping a cloth around the injured head, Gurbax Singh's bleeding continued till his life was fleeing from our hands.**
- 23. That we got scared and ended up killing him in order to protect ourselves.**
- 24. That after this, I and Fahad Ahmed, went to Jericho Hotel where we found Naveed Ahmed and asked him if he would like to come with us to Kabale for tour to which request Naveed Ahmed agreed.**
- 25. That we then left Kampala on 14th March 2009 for Kabale and we were later arrested and brought back to Kampala.**
- 26. That we were taken to Kireka Police Station where we were charged with murder and remanded to Luzira and then tried and convicted and sentenced to death.**

27. That we only framed Naveed Ahmed because Ikram Yousaf had fled the country and we had no one else to look at apart from Naveed Ahmed.

28. That I did not state all these facts during the trial because I had denied at police and thought I had to maintain my statement throughout the trial.

29. That I am now willing to tell this truth to the court if given an opportunity.

At the time of trial Mr. Anthony Wameli who appeared for the applicant expounded on the facts already set out in the notice of motion and the accompanying affidavits.

Ms. Betty Khisa Assistant DPP who represented the respondent opposed the application contending it had no merit whatsoever. We have found no reason to reproduce in any detail the argument of both counsel.

The principles which court must apply before granting an application of this nature were set out in the case of **Ladd vs Mashall (1954) 1 WLR 1489 at page 1491 by Denning LJ** (as he then was) at P. 1491 as follows;-

“To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words; it must

be apparently credible, though it need not be incontrovertible.

We have to apply those principles to the case where a witness comes and says: "I told a lie but nevertheless I now want to tell the truth" It seems to me that the fresh evidence of such a witness will not as a rule satisfy the third condition. A confessed liar cannot usually be accepted as being credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and good ground given for thinking the witness will tell the truth on the second occasion."

These principles were recently discussed and applied by this court in **General Parts (U) Ltd v Kunnal Pradip Karia (court of Appeal Civil Application No. 266 of 2013)** as follows;-

"The principles to be applied by the Appellate court when considering whether to call an additional evidence was laid down since the decision of Lord DENNING in the case of Ladd VS Mashall [1954] IWLR 1491:-

"Those principles are as follows:-

- (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.**
- (2) The evidence must be such that if given it would probably have an important influence on the result of the case though it need not be decisive.**
- (3) The evidence must be such that as is presumably to be believed or in other**

words it must be apparently credible though it need not be incontrovertible.

The decision in Ladd vs Mashall was approved in Skone VS Skone [1971 IWL R 817]. In East Africa it was followed in Mzee Wanje and others vs Saikwa & others [1976-1985] I.E.A 364 (CAK) and A.G vs P.K Ssemogerere & others Constitutional Application No. 2 of 2004(SCU).

In the case of Mzee Wanje (Supra) the court of Appeal of Kenya had this to say:

“It must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial, and that it was of such weight that it was likely in the end to affect the court’s decision. I consider that the same test should be applied to our rules for otherwise it would open the door to litigants leave until an appeal all sorts of material which should properly have been considered by the court of trial” Emphasis added.

In Uganda, Rule 30 of the Court of Appeal Rules grant the Court of Appeal discretionary power to hear additional evidence, for sufficient reasons. The above rule is the handmaid of Article 126 of the Constitution which advocates that in adjudicating cases the courts should apply the principle of substantive justice. That in essence means that the role of the Court of Appeal is not only about law but about justice.

Sufficient reasons were defined by the Supreme Court in Attorney General VS Paul K. Ssemogerere & others, Constitutional Application No. 2 of 2004. In that case, the Supreme Court relied on the authorities in Ladd vs Mashall and Skone VS Skone (Supra), among others, and observed that an appellate court may exercise its discretion to adduce additional evidence only in exceptional circumstances, which include:

- (i) Discovery of new and important matters of evidence which, after the exercise of due diligence, 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.**
- (ii) It must be evidence relevant to the issues.**
- (iii) It must be evidence which is credible in the sense that it is capable of belief.**
- (iv) The evidence must be such that if given it would probably have influence on the result of the case although it need not be decisive.**
- (v) The affidavit in support of an application to adduce additional evidence should have attached to it proof of the evidence sought to be given.**
- (vi) The application to adduce additional evidence must be brought without undue delay.**

As noted from above, the court expanded the principles in Ladd VS Mashall and emphasized the doctrine that litigation should come to an end in the following terms:-

“These have remained the stand taken by the courts, for obvious reasons that there would be no end to litigation unless a court can expect a party to put in full case before the court. We must stress that for the same reason courts should be even more stringent to allow a party to adduce additional evidence to reopen a case, which has already been completed on appeal”

This is the position of the law and we agree with it entirely. We have no reason to depart from this decision which was made by a single Justice of this Court Hon. Justice Aweri-Opio JA. See also ***Kawoya vs National Council for Higher Education. Supreme Court Miscellaneous Application No.8 of 2013*** and ***Attorney General vs P.K Ssemwogerere and Other Constitution Application No. 2 of 2004*** (unreported).

Applying the above principles to facts before us, we find that none of them have been met by the applicant.

The telephone print out could have been obtained at the time of the trial or earlier. We are not convinced that the accused persons cannot obtain evidence for their defence while in custody. Indeed in this case, the evidence the applicant intends to adduce was obtained while he was in custody. The evidence that is intended to be adduced by the applicant’s co-accused at the trial is not such that, it can be believed. He is a confessed liar. His affidavit which we have reproduced in *extenso* tells it all when he states on oath that gave false evidence at the High Court.

All in all we find no merit whatsoever in this application which is hereby dismissed.

Dated at Kampala this **28th** day of **September** 2015.

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HON. MR. JUSTICE A.S. NSHIMYE
JUSTICE OF APPEAL

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HON. MR. JUSTICE ELDAD MWANGUSYA
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL