



**Ndiwa v Republic (Criminal Case E009 of 2021)
[2024] KEHC 10386 (KLR) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE E009 OF 2021**

DK KEMEL, J

AUGUST 23, 2024

BETWEEN

HERBERT KIPNUCHE NDIWA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. A brief history of the matter is that, the Applicant herein is facing murder charges before this Court. He pleaded not guilty and the matter proceeded to the hearing of the prosecution’s case. Upon the close of the Prosecution case, vide a Notice of Motion application dated 13th December 2023, pursuant to Section 387 (2) of the *Criminal Procedure Code* and Article 159 (2) (d) of the *Constitution* the Applicant herein seeks orders that this Court be pleased to allow him have a second and independent DNA buccal swab redone with the samples of the deceased and that the costs of the application be provided for.
2. The application was premised on the grounds as preferred on the face of the motion and the supporting affidavit of the Applicant herein. He avers that his DNA buccal samples were collected from him in the year 2021 and that the government analyst only released the results on 9th May 2023. According to him, it took approximately two (2) years for the results to be out and that he is not satisfied with the same results based on the duration it took to be released.
3. Opposing the application, the Respondent herein swore a replying affidavit on 5th April 2024 through Corporal Geoffrey Too from the Criminal Investigations Department attached to Cheptais wherein he avers that the Applicant herein is facing murder charges where he defiled and murdered the deceased. According to him, after receiving a report on the incident, he proceeded investigate, record statements of the witnesses and proceeded to visit the crime scene where he collected samples. He avers that on 4th March 2021, a post mortem was conducted on the deceased, high vaginal swab and blood samples were collected and reserved for forensics. On 5th March 2021, samples of the exhibits were taken to the



government chemist for analysis together with an exhibit memo dated 5th March 2021. He avers that the government chemist analysis has a ton load of work and most times they are not able to furnish the relevant analysis report expeditiously and that the same is not within the control of the Prosecution herein. He avers that the said delay is not uncommon as there is a limit in terms of government analyst chemists in the country. He urged this Court to dismiss the application as it aims to delay justice.

4. Vide directions dated 9th April 2024, this Court ordered that the Notice of Motion Application dated 13th December 2023, be canvassed by way of written submissions. Both parties herein duly complied. The same have been duly perused, analyzed and considered by this Court.
5. As a general matter, absent limiting factors related to the rights of others especially victims of crimes, requests for independent scientific re-tests of samples by the defence should be freely allowed. This is a straightforward reading of Article 50(2)(c) of the *Constitution* guaranteeing every accused person adequate time and facilities for his defence. The extent of that right, however, is limited by the rights of others – especially the victim (deceased) of the crime – and other practical considerations including the practicality of the request; and the impossibility of carrying out the re-test without undue inconvenience to the parties or undue delay.
6. The answer lies in balancing the rights of the accused to collect evidence for his defence in a case such as this one where his liberty is at stake on the one hand and the right to bodily integrity and dignity of the victim (deceased) on the other hand. An order for a second DNA retesting involving collection of samples from the victim can only be issued where at least three conditions are met:
 - i. First, the defence must establish a foundation for the request. Just like in the case for compelled sample collection from the accused, to obtain an order to collect samples from the victim, the defence must demonstrate that there are reasonable grounds to believe that the DNA sampling procedure might produce evidence tending to confirm or disprove that the accused committed the alleged offence. As the US Supreme Court said in *Schmerber v California* 384 US 770 (1966), “bodily intrusions cannot be allowed on the mere chance that the desired evidence might be obtained.” For this condition to be met, the accused must demonstrate that DNA evidence is central or an important pillar of the Prosecution case.
 - ii. Second, evidence collection which violates the dignity of the victim or in any other way offends evolving community standards of decency and fair play cannot be collected. For example, in this case, needlessly subjecting the victim (deceased) to collection of high vaginal swab would be impermissible. This is because the potential to collect evidence of high probative value is disproportionately low compared to the intrusiveness of the procedures.
 - iii. Third, there must be a showing that there exists a reasonable probability that a second DNA test would be of assistance to the defence and that a denial of an order for re-testing would result in a fundamentally unfair trial.
7. From the foregoing, the present case easily yields no conclusion that a re-test of the samples already collected must be allowed as a direct application of Article 50(2)(c) of the *Constitution*. Here, the defence says that the Prosecution’s DNA evidence is subject to attack because of the length of time it took the Prosecution to release the results of the DNA tests to the defence. It is clear from the sworn replying affidavit by the Investigating Officer that the delay was on the government analyst who in this situation are deemed to be few and over loaded with a ton of pending analyst reports. It is imperative to note that these results were with the government chemist until he was summoned before this Court to render a break down of the analysis report as prepared. There is no indication that the Investigating Officer was in possession of the same for the past two years.



8. Also, it is imperative to note that the victim in this particular case is a deceased person and that this Court exercises extreme caution not to interfere with the peaceful resting of the departed victim. It then follows that, besides letting a deceased person rest in peace without unnecessary disturbance, there is the next challenge of costly logistics in disinterring a body, psychological trauma caused to the relatives by reminding them of the death of their loved one hence calling for further counselling expenses or process. To resolve any lingering doubts, i find it unreasonable to give the defence an opportunity to re-test. It is instructive that as soon as the defence was supplied with a copy of the analyst report, no application was made by the defence for a second re-testing but that the defence had to wait all this long until the close of the prosecution's case. The explanation given by the investigating officer seems to tally with the evidence of PW8 during cross-examination by the defence counsel who responded that the delay over the analyst reports would be explained by the analyst. The analyst (PW10) stated on cross-examination and re-examination that he conducted the analysis on 19.5.2023 and that the specimens had all along been kept in the refrigerators and that the DNA does not change despite the period of preservation. Iam satisfied that the DNA specimens were not destroyed by the prolonged period at the Government Chemist at Kisumu. It is also common knowledge that most of the Government Chemist facilities often run out of reagents for use in the DNA analysis and hence the frequent delays to furnish reports. Further, it is noted that the defence did not object to the production of the analyst report as an exhibit. That was the perfect opportunity to challenge the same and to cast aspersions over the same. I find that there is no prejudice suffered by the defence if the application is declined as it has its opportunity to tender its defence in the event that it is called upon to do so.
9. In the result, I find the defence application dated 13th December 2023 lacks merit and is hereby dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF AUGUST 2024.

D. KEMEI

JUDGE

In the presence of:

Simiyu for Applicant

Miss Kibet for Respondent

Kizito Court Assistant

