



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.8 OF 2014

REPUBLIC.....DIRECTOR OF PUBLIC PROSEUTIONS

VERSUS

PAUL WAINAINA BOIYO alias SEKI.....1ST ACCUSED

CHRISTOPER LUMBAZIO ANDIKA alias LUMBA2ND ACCUSED

ANDREW KARANJA WAINAINA3RD ACCUSED

SAMUEL KURIA NGUGU alias VISI..... 4TH ACCUSED

ESTHER NDINDA MULINGE5TH ACCUSED

RUTH WATAHI IRUNGU alias ATLANTA.....6TH ACCUSED

RULING

1. This ruling is in respect to the Prosecution's application dated 3rd December, 2021. The same was brought under sections 33(b), 48(1) and 18(1) of the Evidence Act seeking the following order:

THAT the Honourable court be pleased to order that the Toxicology Report in respect of the deceased herein generated by Lancet South Africa be produced as evidence in Court by experts from Lancet Kenya, the Representatives in Kenya.

2. The Application was premised on the following grounds:

I. THAT there is now a fully established laboratory in Kenya with competent experts.

II. THAT availing experts from South Africa is estimated to cost a whopping Kshs. One Million, Nine Hundred Thousand (Kshs. 1.9Million) which amount has not been allocated for and that may occasion unnecessary delay of the trial.

III. THAT currently, South Africa is on lockdown, a situation whose persistence is uncertain.

IV. THAT the Report in issue is an expert report, which can be handled by experts in the same field (Science) hence need not to be subject to a particular person given that the Report in question originates from the same body/Institution.

Prosecution's Case

3. Cpl. Maxwell Otieno swore a Supporting Affidavit dated 3rd December 2021 where he stated that the body organs of the deceased were sent to Lancet South Africa for a toxicology examination. That the consequent report was sent back to Kenya and was in the hands of Dr. Andrew Kanyi Gachii who was the family pathologist. That the said doctor participated in the postmortem of the deceased together with Dr. Ndegwa.

4. It was the Prosecution's case that the defence insisted on availing experts from South Africa to come and produce the postmortem report instead of Dr. Kanyi Gachii who produced the post mortem report.

5. Cpl. Maxwell Otieno deposed that some time in November 2019, he travelled to South Africa and met representatives from Lancet South Africa. It was his case that the total cost involved in bringing the experts over cost One Million, Nine Hundred Thousand Kenya Shillings

(Kshs. 1,900,000), an amount that had to be footed by the Prosecution. He further stated that there was a new Covid-19 variant in South Africa and consequently, the country was locked down. That these two factors made it difficult for the experts in South Africa to be brought over from South Africa which then caused a delay in the case, contrary to Article 50 of the Constitution of Kenya.

6. Cpl Otieno further deposed that Lancet have fully established a branch in Kenya which to their knowledge had experts who could adequately answer any questions about the toxicology report, generated by their mother branch in South Africa.

Prosecution's Submissions

7. The Prosecution filed submissions dated 31st January, 2022. It was their submission that the fact that Lancet South Africa prepared and compiled the report and then sent to Kenya to Dr. Gachii who participated in the postmortem of the deceased clearly showed that they had impliedly given authority to the said Dr. Gachii to produce the same as an agent. It was their further submission that Dr. Gachii not only participated in the postmortem but also testified and produced a postmortem report as an exhibit in the proceedings, thereby making him not only an agent but also an interested person within the confines of section 18 (1) of the Evidence Act.

8. The Prosecution submitted that the toxicology report that was to be produced was based on science and that the doctors in Lancet Kenya possessed equal or the same knowledge with the ones from Lancet South Africa. That further, Dr. Gachii was an expert in the same field that the report covers and could respond to any questions raised.

9. The Prosecution submitted that the Kshs. 1.9 Million was an unreasonable expense. That the onset of Covid-19 reduced foreign travel and the country was locked down, thereby occasioning unreasonable delay. That the report was compiled while the doctors were discharging their professional duties. That section 33 (b) gave a way out that fellow professionals could submit a report being a discharge of professional duty.

Response

The Application was opposed by the 1st, 2nd and 5th Accused while the 3rd, 4th and 6th Accused did not file any responses.

1ST Accused Person's Response.

10. In his sworn Replying Affidavit dated 14th December 2021, Dr. John Khaminwa counsel for the 1st Accused, while conceding that the deceased's samples were taken to Lancet South Africa for toxicology examination, stated that it was in the interests of justice that the toxicology report be produced by the author and not Dr. Kanyi Gachii. He further stated that it was necessary to call the maker of the report so that he could be cross - examined in compliance with the accused's right to a fair trial.

11. Counsel stated that the law in Kenya allowed evidence statements or documents by persons who cannot be called as witnesses. That however, for that section to be invoked, it must be demonstrated that the maker of the statement or document has died, cannot be found or was incapable of giving evidence or his attendance could not be procured without an amount of delay. It was his further averment that the applicant failed to demonstrate or satisfy any of the conditions. That the applicant failed to demonstrate that there would be unreasonable delay or expense in procuring the author of the toxicology report and that the Kshs. 1,900,000 was an exaggeration and was unfounded.

12. It was the 1st Accused's contention that the travel restrictions in South Africa were unfounded and unverifiable and that the prosecution could avail the toxicology report. Further, that if the prosecution brought another witness to produce the toxicology report, they would have to ensure that the alternative expert was familiar with the handwriting of the author of the document.

The 1st Accused Person's Submissions.

13. In submissions filed on 14th February, 2022, the 1st Accused submitted that the family pathologist was not an impartial person to produce the toxicology report. That the prosecution did not attempt to explain why the report was handed over to a family pathologist and not a government pathologist who could produce it in court. It was his further submission that because of the strong ties between the family pathologist and the deceased, it was difficult to believe that the report was produced in South Africa. He relied on the case of MC INGONISH VS LORD ADVOCATE (2001) 3, WLR 107 to support his submission.

14. It was the 1st Accused's submission that the claim by the prosecution that it had insufficient resources to secure the attendance of the South African pathologist was false. It was his further submission that he was skeptical whether the deceased's organs were sent to South Africa for examination.

15. The 1st Accused submitted that the evidence that the family pathologist intended to produce would infringe on the Accused person's rights. He relied on the case of KINYATTI VS REPUBLIC (1986) eKLR to support his submission. That the production of the statement by the family pathologist went to the merit of the case.

16. The 1st Accused submitted that the prosecution failed to prove that they had taken steps to secure the attendance of the witnesses from South Africa. That the amount of Kshs 1.9 million was an exaggerated figure and that it was intended to justify the attendance of the family pathologist in these proceedings. He relied on the case of JAMES BARI MUNYORI VS REPUBLIC (2010) eKLR to support his submission.

17. The 1st Accused submitted that it was the intention of the prosecution and that of the victim's family to manipulate the criminal

proceedings to secure the conviction of the Accused persons. They prayed that this court strikes out the application with costs.

2ND Accused Person's Response

18. The 2nd Accused Person filed a Replying Affidavit dated 10th December 2021. He averred that section 33 of the Evidence Act was applicable only where a basis had been established. That the Prosecution had not tendered any evidence to show any effort that they took to procure attendance of the said expert. That the expert who prepared the toxicology report should attend court and explain his expert opinion and be cross-examined. The 2nd Accused Person stated that failure of the maker of the report to explain his opinion deprived all Accused persons of their right to a fair trial.

2ND Accused Person's Submissions

19. It was the 2nd Accused's submissions that the Prosecution ought to demonstrate why attendance of such witnesses could not be procured. He relied on section 33 of the Evidence Act and in the case of KENNETH MWENDA MUTUNGI V. REPUBLIC (2019) eKLR to support his submission. It was his further submission that the prosecution had failed to explain the reasons for its delay in bringing this Application to this honorable court.

5Th Accused Person's Response

20. The 5th Accused filed a replying affidavit and submissions dated 10th December, 2021.

She averred that the prosecution had been indolent in producing witnesses and that the application was Contrary to Section 33, 48 and 77 of the Evidence Act and to Article 50 (2) of the Constitution.

21. The 5th Accused submitted that any experts other than the ones who made the report would be tendering hearsay evidence and that such secondary expert would be relying on data and incapable of making their own independent professional opinion based on accurate and relevant medical evidence.

They relied on JAPHET BUNDI VS. REPUBLIC (2020) EKLR.

22. I have considered the Notice of Motion and Supporting Affidavit both dated 3rd December 2021, the written submissions by the Prosecution dated 31st January 2022, the 5th Accused's Replying Affidavit and submissions dated 10th December, 2021, the 2nd Accused's Replying Affidavit and Submissions dated 10th December 2021 and 14th December 2021 respectively, the 1st Accused's Replying Affidavit and submissions dated 14th February, 2022. The only issue for determination is:

Whether the toxicology report prepared by experts in Lancet Laboratories South Africa could be produced by their counter parts from Lancet Laboratories in Kenya or by Dr. Kanyi Gachie, the family pathologist.

23. The Prosecution have relied on sections 33(b), 48(1) and 18(1) of the Evidence Act in their Application. Section 18(1) states that:

“Statements made by a party to the proceeding, or by an agent to any such party, whom the court regards in the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions.”

Section 33(b) states that:

“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured, without an amount of delay, or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases-

b) When the statement was made by such person in the ordinary course of business and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or properties of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document, usually dated, written or signed by him.”

Section 48(1) of the Evidence Act states that:

“When the Court has to form an opinion upon a point of foreign law, or science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art or in questions as to identity, or genuineness of handwriting or finger print or other impressions.”

24. PW20, Dr. Andrew Kanyi Gachii, testified on 28th November 2018. He told the court that he was a consultant pathologist and a forensic specialist with a Masters in Pathology (UON) and Forensic Medicine (Dundee University, Scotland UK). His testimony was that during post mortem, they collected samples and sent them to South Africa for toxicology. The Defence objected to the witness giving evidence in the toxicology report on the grounds that he was not the maker of the report and that he was not an expert in toxicology and that the report had not been given to the defence contrary to Article 50 of the Constitution.

25. In a Ruling dated 28th May 2019, the court partly upheld the objection on the grounds that the witness had not demonstrated expertise in toxicology and neither was he the maker of the document. From the proceedings, Dr. Gachii was recalled to testify on 25th July 2019. He testified on the post mortem findings and indicated that a conclusive finding was necessary from a toxicologist and that was why as the family pathologist, he sent samples for toxicology examination to Lancet Laboratories in South Africa.

26. On 30th May 2019, the court gave an order on the application by the prosecution for the investigating officer, No. 62769 CPL Maxwell Otieno to be issued with summons to enable him travel to South Africa for the purpose of effecting service and securing the attendance of an expert from Lancet South Africa for the purpose of producing the toxicology report prepared on 18th November 2013.

27. I am persuaded by the case of KENNETH MWENDA MUTUNGI V. REPUBLIC (2019) eKLR where Limo J. held that:

“The provisions of sections 33 clearly gives me way for the production of documents/expert evidence if the makers cannot be found or whose attendance cannot be procured without an amount of delay or expense which in the circumstances appears unreasonable, The Prosecution of any party who wishes to rely on such evidence are required to get another expert witness from the same field and who is familiar with the handwriting of the author of the document to tender that evidence.”

The Learned judge further held that:

“This court takes the position that evidence touching on the expert opinion should be tendered by experts as provided under section 48 of the Evidence Act and in situations where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar field of expertise and who are familiar with handwritings of the unavailable expert can be called upon to tender such evidence as provided under section 33 of the Evidence Act and such evidence are admissible and by dint of section 77(1) of the Evidence Act, the evidence is presumed genuine and authentic. Courts however have a discretion if called upon to call makers of such documents if the interest of justice so demands. It is therefore apparent that the condition precedent to the operation of section 77 is provided under section 33 which means that the basis has to be laid before a witness other than the maker of a document can completely tender the evidence.”

28. The Prosecution have stated that the medical report was prepared by Lancet South Africa who did it while discharging their professional duty. This was not a personal duty. In the binding case of CHAOL ROTIL ANGELA VS. REPUBLIC (2001) eKLR, the Court of Appeal held that:

“A medical doctor or pathologist is a professionally trained and qualified person. When carrying out a postmortem examination, he is, undoubtedly, performing and discharging a professional duty. When completing and signing post mortem examination report, he is doing so in the discharge of a professional duty. When completing and signing postmortem examination report, he is doing so in the discharge of a professional duty. We think, under the circumstances, that, subject to other requirements being met, a postmortem examination report is a document made in the discharge of a professional duty and would be covered by section 33(b) of the evidence Act.”

29. In this case having considered the application, the rival positions and indeed earlier proceedings touching on the toxicology report, I find that the Prosecution have established a basis for the reliance on section 33 of the Evidence Act. I also take judicial notice of the challenges posed by the COVID 19 pandemic. With respect to costs of travel, it is my considered view that the amount suggested by the Prosecution is exaggerated and could be lower but it is an expense all the same. It is my finding that the aforementioned reasons are satisfactory. This position is supported by the case of KENNETH MWENDA MUTUNGI V. REPUBLIC (supra) where it was held that:

“That the provisions of section 77 has been read together with section 33 to mean that even if the trial court can admit documentary evidence from a witness other than the other maker, basis must be laid first as held in Boaz Owiti Okoth (Supra) and Fahim Salim Swaley (supra).

That the provisions of section 77 of the Evidence Act on its own allows a person other than one who prepared a report such as P3 to produce it provided that the presumption of authenticity is met and if the document is signed by the person who held the office and qualifications which he professed to hold at the time when he signed it [section 77(2)] of the Evidence Act”

30. At this stage, the authenticity of the report is not in issue as that would be a matter of evidence. It is my considered view that allowing a medical expert from Lancet Kenya to produce the toxicology report would expedite the hearing of this case which all parties agree has regrettably taken quite some time. I see no prejudice to be suffered by the defence as the witness can be cross-examined. I observe however that this court had earlier ruled that Dr. Kanyi Gachii being the pathologist who extracted the samples and send them for toxicology examination in Lancet South Africa, and having admitted not being an expert in toxicology, was not the proper witness to produce the toxicology report. This court has not been asked to review the said ruling.

31. In the end, I allow the Notice of Motion Application dated 3rd December, 2021. I grant Summons to be duly issued by the Deputy Registrar of this court to the relevant expert or experts from Lancet Kenya to come and testify on 8th and 9th March, 2022 being the final trial dates for the prosecution case. Any report, Statement or demonstration of the required qualification and expertise falling within the ambit of this ruling should be served upon all the parties way in advance of the hearing date.

RULING DELIVERED, DATED AND SIGNED THIS 21ST DAY OF FEBRUARY, 2022.

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R. LAGAT-KORIR

JUDGE

RULING DELIVERED ELECTRONICALLY TO THE PARTIES AT THEIR EMAIL ADDRESSES AS PER THEIR EARLIER CONSENT.