



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

HCCR E004 OF 2020

DIRECTORATE OF CRIMINAL INVESTIGATIONS.....APPLICANT

VERSUS

SELINA WANGUI WAMBUI.....RESPONDENT

RULING

1. By way of a Notice of Motion application filed on 16th March, 2021 and which is expressed to be brought under the provisions of ***Section 387 (2) of the Criminal Procedure Code, Article 159 (2) (d) of the Constitution of Kenya*** together with all other enabling provisions of the law, the applicant sought the following orders: -

i. Spent

ii. That this honorable court be pleased to issue orders for the chief government pathologist to exhume the remains of one male adult namely David Gikurumi Murai who was buried at Boiman Village in Nyandarua County on 29th October 2020 for the purpose of a repeat post mortem and extraction of samples for toxicology and DNA to ascertain the cause of death.

iii. That the OCPD and OCS of Nyahururu Police Station to provide security during exhumation.

iv. That the exhumed body be examined and extraction of specimens for toxicology and DNA samples to be done at the grave site or any other place as will be advised by the government pathologist.

v. That any other orders and/or directions be made as the court may deem fit owing the circumstances of the case.

2. The application is further supported by the Supporting Affidavit dated 16th March 2021 sworn by No. 62024 Detective CPL Reuben Mwaniki, Police Officer attached to Directorate of Criminal Investigations Headquarters (DCI) - Homicide Section who deponed that the DCI is conducting further investigations into the cause of sudden death of one David Gikurumi Murai, the deceased herein who was found lying dead in his house on 23rd October 2020 and thereafter buried on 29/10/2020 at Boiman Village within Nyandarua County.

3. It was his averment that one Selina Wangui Wambui, the accused herein was arrested and charged for the offence of murder before Nyahururu High Court vide CR No. 247/184/2020 and HCCR E004/2020 and that thereafter the Director, DCI ordered that the homicide team from DCI Headquarters take over and conduct further investigation into the matter.

4. That upon taking over the team interviewed several witnesses, looked at the autopsy report and also viewed the photographs taken during the documentation of the scene which said photographs were sent to the Chief Government Pathologist to give a professional opinion in consultation with the autopsy report who was of the opinion that the autopsy report appears not to be consistent with the facts and circumstances of the case.

5. CPL Benson deposed that the team is of the opinion that the body needs to be exhumed and a repeat postmortem done in order to clear some outstanding issues hence the present application.

APPLICANT'S SUBMISSIONS

6. The applicant submitted that the initial autopsy report was conducted by a doctor who does not possess any training in pathology and is just a senior medical doctor. They contended that the pathologist who recommended for removal of the body possesses training in the field of pathology. In his opinion he stated that the autopsy would have had a better outcome had it been conducted by a pathologist.

7. It was their argument that no prejudice will be occasioned on the accused if the order of exhumation is granted. That the practice towards exhumation is for one to seek a court order to enable remains of the deceased to be exhumed. **Sections 387 and 388 of the Criminal Procedure Code** allows state authority through the office of the DPP or the court to allow an inquiry into the cause of death and **Section 159 (d) of the Constitution** states that justice shall be administered without undue regard to procedural technicalities.

8. The applicant reiterated that the sole purpose for requesting for the exhumation is to allow for further investigations into the cause of death. Reliance was placed on **Republic versus Geoffrey Kipchumba Kangogo [2018] eKLR**. Further, it was stated that the order sought is allow the police to carry out further investigations which cannot be established through cross examination of the pathologist.

9. The applicants pointed out that the family of the deceased who are the custodians of the deceased have no objections to the orders sought and that it will help clear the doubt that they have in regard to the cause of death.

10. Reliance was also placed on **George Taitimu vs Chief Magistrates Court Kibera & 2 others [2014] eKLR** where it was held that the DPP and the Police are not prevented from continuing investigations or even receiving new evidence once the accused has been charged and in the course of trial.

COMPLAINANT'S SUBMISSIONS

11. The complainant stated that one of the grounds raised in opposing the application is on jurisdiction. To this end, they submitted that although the application reads '*In the Chief Magistrate's Court at Nyahururu*' it was filed before the High Court and this such procedural technicality and typographical error is curable under **Article 159(d) of the Constitution**.

12. It was the complainant's submission that although the postmortem report indicates that the cause of death was asphyxiation by strangulation, a look at the post mortem report at page 3 indicates that his digestive system was "***cyanised liver and spleen inflamed gastric mucosa with malodoroius reddish fluid***" that the doctor who carried out the postmortem report clearly saw the need to have a toxicology report carried out in order to establish the cause and or event leading to the deceased's death however no copy of the toxicology report has been presented thus a clear indication that the said samples never got to the CID offices. Reliance was placed on **Republic v Geoffrey Kipchumba Kangogo** as quoted in **Elijah Oginda vs. Republic through Directorate of Criminal Investigations & Another [2019] eKLR**.

13. The complainant contended that the file was allocated to the CID Offices and Homicide Team after the respondent had already taken plea thus calling for the need to carry out further investigation. That the hearing has not commenced and as such thus cannot be construed as a mechanism for fishing for speculative evidence and even so nothing bars the prosecution and investigation officer from carrying further investigations even where a matter is pending in court as was supported by the case of **George Taitimu vs Chief Magistrate's Court Kibera & 2 others [2014] eKLR** as cited in the case of **Republic v Kennedy Onsarigo Sebe & 3 others [2019] eKLR**.

14. Lastly, the complainant asserted that there in need to have the body exhumed to help answer the question on how the deceased was murdered. Reliance was placed on **Elijah Oginda v Republic through Directorate of Criminal Investigations & Another [2019] eKLR** and **UZ (suing on behalf of KM (a minor deceased) v Cabinet Secretary for Health & 3 Others [2014] eKLR**.

RESPONDENT'S SUBMISSIONS

15. The respondent submitted on the issue of jurisdiction and the standard of proof required to grant the present application.

16. On the question of jurisdiction, the respondent argued that what is before the court is a murder trial and not an inquest as stipulated in **Section 387 of the Criminal Procedure Code** and therefore this court has no jurisdiction to order the exhumation of the remains of the deceased. Reliance was placed on **Republic v Godfrey Kipkemboi Kangogo [2018] eKLR**, **Elijah Oginda v Republic [2019] eKLR** and **Article 165 of the Constitution**.

17. The respondent submitted that the application is largely conjectural and that the opinion of the chief government pathologist is not an exhibit before the court. It was their assertion that the applicant's statement that the doctor who conducted the autopsy has no training in pathology has no basis. That their application and evidence produced failed to meet the requisite standard of proof.

18. In conclusion, the respondent averred that the postmortem already filed clearly indicated what the probable cause of death was. The contents of the stomach, spleen, liver and blood are in possession of the applicant incase further tests are required and that the only reason the applicant is seeking the exhumation of the body is to prove the hypothesis that the deceased could have died on poisoning which is speculative.

ANALYSIS AND DETERMINATION

19. First and foremost, I wish to address the issue of jurisdiction as raised by the respondent. It has long been established that jurisdiction is everything and without it the Court must down its tools otherwise everything after that becomes a nullity. (See: **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**).

20. The respondent submitted that the high court seized of a murder trial has no jurisdiction to direct the exhumation of a body as the same is vested on the magistrate's court by way of inquest according to **Section 387 and 388 of the Criminal Procedure Code**.

21. However, in the present matter there was no inquest held as to the sudden death of the accused. **Section 387(2) of the Criminal Procedure Code** donates powers to a magistrate conducting an inquiry to order for exhumation of a dead body so as to discover the cause of death nevertheless **Article 165(3) (a) of the Constitution** vests the High Court with unlimited original jurisdiction in criminal and civil matters. Accordingly, I find that this court has proper jurisdiction to entertain the application under **Article 159 and 165 of the Constitution**.

In any case, one cannot fault a party on procedure over substance, the latter takes precedence and finds refuge under *Article 159 (2) (d) of the Constitution*.

22. Now moving to the main issue at hand which is whether the exhumation orders sought should be allowed? The applicant submitted that the DCI needs to carry out further investigations particularly of toxicological nature are required to determine the deceased's cause of death. A claim that was supported by the deceased's family i.e. the complainant. The respondent is opposed to the same on the basis that the application is largely conjectural and that the postmortem already filed clearly indicated what the probable cause of death was.

23. Looking at all the circumstances surrounding this case, I find that it serves justice that the prosecution's application be allowed. It is my considered view that to determine the deceased's cause of death is a material issue in this case and not speculative as contended by the respondent.

24. As cited by all the parties, I have thoroughly gone through the case of *Republic v Godfrey Kipkemoi Kangogo [2018] eKLR* where it was held that:-

“I should begin by stating what I believe to be the correct legal standard to apply in a case like this. A request to exhume a Deceased's body at the instance of an Accused Person is one that calls for the balancing of the rights of the Deceased's family to have the Deceased's body remain undisturbed and respected in accordance with their religion or traditions – factors which implicate rights to culture and religion as well as dignitary and privacy rights of the family on the one hand. On the other hand, these rights must be weighed against the right of an Accused Person to be afforded all reasonable facilities to mount his defence in order to ensure that there is a fair trial.

The test, however, is whether the justice of the case requires accommodation of the request by the Accused Person. Neither right is absolute: The Deceased's family do not have an absolute veto to bar the exhumation of the body of their loved one based on their beliefs or privacy rights where there is a legitimate reason to order such an exhumation at the instance of an Accused Person who faces murder charges. At the same time, an Accused Person does not automatically gain an entitlement to exhumation just because he so requests. There must be a legitimate and compelling reason for the request.

The correct rule of law, then, seems to be the following. Exhumation of a body in the face of objections from the family of the Deceased is a radical and extreme step. It should only be ordered in the clearest of circumstances and as a last resort due to the privacy and dignitary interests of the family involved. A request for exhumation of a body that has been buried in order to perform a second autopsy is, therefore, an extraordinary relief which should not be allowed in any case unless it is imperatively demanded under the circumstances and is necessary for the due administration of justice. An order for exhumation should not be granted where the existence of evidence sought is speculative and uncertain and its value in aiding defendant's defence is conjectural and remote. It should also not be granted where the evidence sought can be proved or established by other means. Finally, an order for exhumation should only be granted where it will resolve a demonstrably important or material issue in the case.

25. Accordingly, the deceased's family is in support of the present application and the same will not be an invasion of the privacy and dignitary interests of the deceased's family. Does the present application serve the interest of justice? According to my considered view, the answer to this is in the affirmative. Although there was a post mortem carried out on the deceased's body and a report filed, the case was forwarded to the DCI headquarters at the DCI director's request for further investigations and as they were carrying out the same the chief government pathologist was of the opinion that the autopsy report appears not to be consistent with the facts and circumstances of the case. It is my view that finding out the cause of the deceased's death is a legitimate and compelling reason to make the exhumation request and the prosecution has laid a proper basis for the request.

26. In *Elijah Oginda v Directorate of Criminal Investigations & another [2019] eKLR* the court stated as follows: -

“I have considered the arguments which were presented in court borrowing from the case of *R v Geoffrey Kipchumba Kangogo* that an exhumation order should not be granted where the existence of evidence sought is speculative and uncertain and its value in assisting the defendant's defence is conjectural and remote. The court added that;

“...an order for exhumation should only be granted where it will resolve a demonstrating important or material issue in the case.”

Indeed, in the legal encyclopedia *American Jurisprudence (12th Edition)*, the question that must guide this court is whether exhumation is absolutely essential in the administration of justice. Going by the information, presented – especially the alleged hurried burial, I am persuaded that there is reason for the respondents to express doubt and suspicion regarding the cause of death – that a second autopsy will give them the where-withal to pursue certain theories including challenging the conclusions of the official post mortem report.

The test is simply whether justice requires accommodating the appellants position regarding emotional trauma without a doubt, the pendulum swing heavily in favour of truth and justice. There is greater prejudice to be suffered in retaining the body for a longer period pending hearing of the appeal. Once again borrowing from the legal encyclopedia”

27. From the foregoing, it is clear that in determining exhumation request, the paramount consideration is the administration of justice. The prosecution believes that samples taken from the deceased if exhumation orders are granted will enable the investigative team to ascertain the deceased's cause of death which I believe favors truth and justice in the circumstances and will be crucial during the determination of the murder case against the accused.

28. The court is cognizant of the accused's rights as guaranteed by the Constitution and is committed to upholding the same but I do not find that any prejudice will be occasioned on the accused if the orders sought are granted.

29. The upshot is that this Court does find merit with orders sought for exhumation of the body *David Gikurumi Murai* and the conducting of a second post mortem examination. Therefore, orders are granted to the effect that: -

i. The Chief Government Pathologist to exhume the remains of one male adult namely David Gikurumi Murai who was buried at Boiman Village in Nyandarua County on 29th October 2020 for the purpose of a repeat post mortem and extraction of samples for toxicology and DNA to ascertain the cause of death.

ii. That the OCPD and OCS of Nyahururu Police Station provide security during exhumation.

iii. That the exhumed body be examined and extraction of specimens for toxicology and DNA samples be done at the grave site or any other place as will be advised by the government pathologist.

iv. That any other orders and/or directions may be made as the court may deem fit owing the circumstances of the case. Thus there be liberty to apply.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20TH DAY OF DECEMBER, 2021

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CHARLES KARIUKI

JUDGE