



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**(Coram: A. C. Mrima, J.)**

**CRIMINAL CASE NO. 4 OF 2020**

**REPUBLIC.....PROSECUTOR**

**-versus-**

**SAMWEL MWITA KAYANDA.....ACCUSED**

**RULING**

1. On 17/06/2020 the accused person herein, *Samwel Mwita Kayanda*, was charged with the murder of one *Thomas Marwa Mwita*.
2. The accused person denied the charge and a trial was held. The prosecution called 6 witnesses.
3. At the close of the prosecution's case the Defence Counsel, *Miss Okota*, made submissions. *Mr. Kimanthi*, Senior Principal Prosecution Counsel submitted as well.
4. There was one contested issue. It was on the Post Mortem Report. The defence submitted that the Post Mortem Report which was produced as Prosecution Exhibit 1 by *Dr. Victor Awinda Omollo (PW5)* was not for the deceased in the matter but for one *Thomas Morota Mwita* and as such there was no evidence on the proof of death of the deceased in this case one *Thomas Marwa Mwita*.
5. It was further submitted that there was no need of placing the accused person on his defence.
6. The prosecution was of the contrary position. The State admitted that there was an error on the Post Mortem Report relating to the name of the deceased. It was however submitted that the error in the Report had been sufficiently explained by the Investigating Officer who testified as PW6. Counsel further submitted that in any event the error was curable under **Section 382** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya.
7. The State further urged this Court to consider the fact that there was ample and credible evidence against the accused person pointing to his culpability in committing the crime and that an innocent life was lost.
8. In a rejoinder Miss Okota reiterated that the deceased subject of this matter, *Thomas Marwa Mwita*, was not the subject of the post mortem examination and that the possibility that the deceased is alive somewhere is not remote. According to the Defence Counsel the error went to the root of the matter and highly prejudiced the accused person who stood at the verge of being called upon to defend himself over an information of killing someone yet there was no evidence of the alleged death and the cause of the death.
9. To clearly appreciate the contest, I will revisit the evidence surrounding the post mortem report. That was mainly the evidence of PW5 and PW6.
10. As said PW5 was the medical officer who conducted the autopsy. That was on 10/03/2020 at St. Akidiva Mindira Hospital in Migori. The time was 02:30pm.
11. PW5 testified that the autopsy he carried out aforesaid was for one *Thomas Morota Mwita*. The body was identified to him by *Simion Joseph Kayanda (PW3)* and *Sorong Joseph* (not a witness). The witnesses were accompanied by the investigation officer.
12. PW5 further testified that he carried out the examination and filled in the report. He did not know the deceased or any of the identifying witnesses.
13. PW6 testified that he was an investigator attached at the DCI Kuria West Sub-County offices. He stated that on 06/03/2020 at around 1300 Hrs. and while in office with his colleagues one *Mwita Kayanda (PW4)* reported that his son had been attacked the previous day by one

Samwel Mwita Kayanda with a panga and sustained an injury at the back of his head. The son was rushed to a hospital in Sirare town where he was referred to Migori County Referral and Teaching Hospital. The injured was then taken there. He was however later referred to Kisii Level 5 Hospital for specialized treatment but died on the way. PW6 booked the report.

14. The police visited the scene of crime the following day. PW6 was one of the officers in the visit. The police interrogated several people.
15. PW6 organized for and a post mortem examination was conducted on 10/03/2020. He attended the examination together with *Simion Joseph Kayanda (PW3)* and *Sorong Joseph* who were relatives of the deceased. The relatives identified the body of the deceased and he witnessed the autopsy.
16. At the end of the exercise the cause of death was ascertained and a report was filled.
17. On cross-examination by the Defence Counsel PW6 stated that the name of the deceased was *Thomas Marwa Mwita*. He confirmed that he was the one who had initiated the autopsy. He filled in the first page of the report. He instead indicated the name of the deceased as Thomas Morota Mwita. PW6 admitted that the name of the deceased in the report was different from the name of the deceased he gave out.
18. When asked to explain the anomaly, PW6 stated that it was an oversight on his part.
19. During re-examination, PW6 clarified that the name of the deceased he indicated on the first page of the report was given to him by the father of the deceased. He admitted that it was possible he did not get the name correctly. He however stated that the identification of the deceased during the examination was not in issue.
20. PW6 confirmed that he did not know the deceased prior to his death. There is also no evidence that PW6 went to see the body of the deceased at the mortuary any time before the autopsy was conducted. It seemed that PW6 saw the body of the deceased on the day of the autopsy for the first time.
21. *Simion Joseph Kayanda* testified as PW3. I have carefully gone through his testimony. I did not come across anywhere he indicated to have identified the body of the deceased prior to the autopsy. I have also gone through the evidence of PW1, PW2 and PW4 who all knew Thomas Marwa Mwita well. None of them testified that they identified the body of Thomas Marwa Mwita before the post mortem examination was conducted.
22. I have previously dealt with the issue of identification of a body of deceased prior to an autopsy. That was in **Migori High Court Criminal Case No. 15 OF 2017 Republic vs. John Busere Chacha, John Rioba Mwikwabe, Catherine Mogesi and Japanese Rioba (2020) eKLR**. In that case the Post Mortem Report did not indicate the names of the persons who identified the body of the deceased to the medical officer prior to the post mortem examination. Further, no witness testified that he/she identified the body of the deceased as required.
23. In finding that the cause of death was not proved, I expressed myself as follows: -

***18. As to the cause of the death of the deceased, PW5 produced a Post Mortem Report which he stated that he personally filled in after conducting the autopsy. The report opined that the possible cause of the death of the deceased was severe head injury due to assault.***

***19. PW5 stated that the body of the deceased was identified by relatives who were accompanied by PW6. PW5 however did not give the names of the relatives. PW5 also stated that he did not know the deceased prior to the examination.***

***20. PW6 also testified that she did not know the deceased or any of the accused persons. She also did not testify on whether she took part in taking the body of the deceased to the mortuary. Both PW5 and PW6 admitted that the Post Mortem Form did not contain the names of the persons who identified the body of the deceased before PW5 conducted the post mortem examination.***

***21. In response to the position, the Learned Prosecutor submitted that the failure to indicate the names of those who identified the body of the deceased in the Post Mortem Form was cured by the testimony of PW3. I will now revisit the testimony of PW3.***

***22. As said, PW3 was the father of the deceased. He testified that the deceased had told him that he had been assaulted by the accused persons. PW3 neither identified the body of the deceased prior to the autopsy nor witnessed the post mortem examination.***

***23. The testimonies of PW1, PW2 and PW4 also do not aid the position. None of them testified that he/she identified the body of the deceased prior to the autopsy or witnessed the post mortem examination.***

***24. From the record therefore none of the witnesses who knew the deceased identified the body of the deceased prior to the autopsy or witnessed the post mortem examination. The Post Mortem Form did not either indicate the names of those who allegedly identified the body of the deceased.***

***25. The question which now calls for an answer is whether the body on which PW5 conducted the post mortem examination was of the deceased. From the evidence there seems to be no indication to that end. PW5 may have conducted the autopsy on the body of the deceased or another person. I am alive to the possibility of having several people with similar names especially from the Kuria community. I take judicial notice thereof.***

26. ***There is also no evidence from Pastor Machage Memorial Hospital that its Mortuary held only one body in the name of Peter Marwa John and whose autopsy was conducted by PW5 on 29/06/2017.***

27. ***The obtaining position is not foreign to consideration by Courts. In the High Court, Khamoni, J. in Nyeri High Court Criminal Case No. 13 of 2003 Terepublic vs. Beth Wangari Kimangu (2003) eKLR rightly stated as follows: -***

*In a prosecution like this one, it is vital for a police officer who has recovered a dead body, firstly, to bring the people thought to be relatives of the deceased to see whether they can identify the body he has recovered to be that of their relative, and secondly, if they identify the body, that police officer to be on hand, jointly with the aforesaid to perform a postmortem, and thirdly, that police officer to subsequently release the body, formally, to relatives of the deceased to go and bury. All that should be in the evidence adduced before the trial court.*

*Failure by the Police to play that role, as they have failed to do in this case, creates a gap fatal to the Prosecution's case as it could well be that the postmortem evidence the Prosecution's case as it could well be that the postmortem evidence the Prosecution is relying upon in this case, though having the names of children of the Accused as the dead persons and having names of Winnie Wangui Muchiri and Samuel Wambugu Muchiri as identifiers, relate to bodies which are not children of the Accused. In those circumstances, I do not see how the Accused should properly be put on her own defence as in my opinion that failure by the police erases any prima facie case that may have been there against the accused.*

28. ***The Court of Appeal in Eldoret Criminal Appeal No. 272 of 2008 Fredrick Okarau Chesebe vs. Republic (2009) eKLR likewise emphasized the need for proper identification of a body of a deceased prior to a post mortem examination.***

29. ***The standard of proof in any criminal case is proof beyond any reasonable doubt. Adding its voice thereto the Court in Fredrick Okarau Chesebe vs. Republic (supra) further stated as follows: -***

*....One of the cardinal principles of our criminal law is that an accused person can only be convicted on clear evidence and that the case against the accused person must be proved beyond reasonable doubt.... It is not upon an accused person to prove his innocence but upon the prosecution to prove its case against the accused person beyond reasonable doubt.....*

30. ***I now find that the failure by the prosecution to indicate the names of those who identified the body of the deceased in the Post Mortem Form and/or the failure to call the witnesses who identified the body of the deceased to the police and PW5 prior to the autopsy and the failure to call the witnesses who were present during the post mortem examination can only be fatal to the prosecution's case. The lapses created sound doubts. (See Bukenya & Others versus Uganda (1972) E.A. 594, Kingi versus Republic (1972) E.A. 280 and Nguku versus Republic (1985) KLR 412).***

31. ***Since it was not established that the body on which PW5 conducted the post mortem examination was that of the deceased this Court is unable to find that the cause of the death indicated in the Post Mortem Form related to the deceased. The prosecution therefore failed to prove the cause of death of the deceased.***

24. The foregoing case is similar to the present one in several aspects. Although the names of those who allegedly identified the body of the deceased in this case appeared on the Post Mortem Form none of them testified to that end. There was hence no one who knew the deceased who either identified the body of the deceased prior to or witnessed the post mortem examination on the body of the deceased.

25. PW6 attempted to explain the error. The explanation seemed to be somehow reasonable. However, the matter did not end there. Page 2 of the Post Mortem Form is usually filled in by the medical officer conducting the autopsy. One of the details to be indicated in the form is the name of the deceased on which the post mortem examination is conducted. The name of the deceased on Page 2 of the Post Mortem Report was Thomas Morota Mwita.

26. PW5 testified that he conducted the autopsy on the body of one Thomas Morota Mwita. PW5 did not attempt any clarification.

27. In view of the evidence of PW5 and PW6 one wonders whether both PW5 and PW6 inadvertently committed the same error on the name of the body which PW5 conducted the autopsy on. Such a possibility can only be remote.

28. Consequently, the issue as to which body PW5 conducted a post mortem examination on at St. Akidiva Mindira Hospital Mortuary on 10/03/2020 at 02:30pm was not settled. There was no corroborating evidence to the effect that it was only the body of Thomas Marwa Mwita which underwent an autopsy on the said day and time. It is therefore possible that PW5 carried out the autopsy on either the body Thomas Morota Mwita or Thomas Marwa Mwita.

29. The error was glaring and went to the root of the case. Such an error cannot be among those contemplated to be cured under **Section 382** of the **Criminal Procedure Code**.

30. The upshot is that although there is ample evidence of the death of Thomas Marwa Mwita, there is, unfortunately, no evidence on the cause of the death of the deceased in this case, Thomas Marwa Mwita.

31. I now find and hold that the prosecution failed to establish a *prima facie* case against the accused person as per the standard set in **R.T. Bhatt vs. Republic (1952) EA 332**. The accused person has no case to answer.

32. As such, placing the accused person on his defence will not only be without any legal basis but for academic purposes. I refuse to take that detour. Pursuant to **Section 306(1)** of the **Criminal Procedure Code** I hereby find accused person, *Samwel Mwita Kayanda*, **NOT**

**GUILTY** of the murder of *Thomas Marwa Mwita*. **He** is hereby set at liberty unless otherwise lawfully held.

33. The accused person is held at the Migori GK Prison. Resulting from the restrictions on Court appearances due to the COVID-19 pandemic and the inability to hold online proceedings at the moment due to frequent power surges coupled with the fact that the decision is in favour of the accused person, this ruling is hereby delivered in the absence of the accused person. The Deputy Registrar shall forward a certified copy of this ruling to the Migori GK Prison.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 31<sup>st</sup> day of August 2020.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open Court and in the presence of:**

**Miss Okota**, Counsel for the Appellant.

**Mr. Kimanthi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

**Evelyne Nyauke** – Court Assistant