



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 8 OF 2014

REPUBLIC

VERSUS

PAUL WAINANA BOIYO alias SHEKI.....1ST ACCUSED

CHRISTOPER LUMBAZIO

ANDIKA alia LUMBA.....2ND ACCUSED

ANDREW KARANJA WAINANA.....3RD ACCUSED

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

ESTHER NDINDA MULINGE.....5TH ACCUSED

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

RULING

1. Paul Wainana Boiyo alias Sheki Christoper Lumbazio Andika, Andrew Karanja Wainana, Samuel Kuria Ngugi alias Visi, Esther Ndinda Mulinge, Ruth Watahi Irungu alias Atlanta, being the 1st to 6th accused respectively are facing trial for the murder of Hon. George Thuo M'mbutiti.

2. At the hearing on 28th January 2018, Andrew Kanyi Gachie a consultant pathologist and forensic specialist at the Kenyatta National Hospital testified as PW 20. He told the court that he conducted the post mortem on the deceased's body with Dr. Ndegwa on 18th November, 2013 at the Lee Funeral Home in Nairobi.

3. In his testimony Dr. Gachie told the court that they extracted samples for toxicology which included blood, stomach content and fluid from the eye and kidney. He said that the samples were submitted to Lancet Kenya which send them to their laboratories in South Africa for analysis.

4. The defence team objected to the production of the toxicology report by the witness. Mr. Solonka learned counsel for the 2nd accused objected on the ground that the witness was not the maker of the document.

5. Dr. Khamina learned counsel for the 1st Accused and holding brief for Mr. Mbiyu for the 3rd Accused, raised an objection on the basis of Article 50 of the Constitution. His submission was that the prosecution was required to give the defence the evidence they were going to rely on. He observed that the defence had been given Dr. Gachie's statement and that the witness could not come with a new report. He submitted that the report was inadmissible and was to be rejected.

6. Mr. Kingangi learned counsel acting on behalf of Mr. Nyasani for the 5th and 6th Accused objected to the production of the report by the witness stating that the maker of the report should be availed. Dr. Khaminwa further added that the witness was a pathologist and not a toxicologist and was therefore not qualified in the area of toxicology.

7. In responding to the objection, Mr. Okeyo learned counsel for the prosecution submitted that the witness was present and participated in the post-mortem on the instruction of the family and that his report was not prejudicial in any way and did not introduce any new evidence at

all. He submitted that the report was arrived at from the analysis of the specimens which the witness had handed over for toxicology analysis. Counsel further submitted that the witness was therefore capable of explaining the contents of the report. He prayed that the objection be dismissed and the report admitted.

8. In reply to the submission by the prosecution, Mr. Solonka reiterated that the witness was not the maker of the document and could only testify on what he himself did. He submitted that Lancet South Africa should come and testify. Dr. Khaminwa associated himself with the position that the makers of the document should come and testify and be cross-examined by the defence.

9. Mr. Kingang'i, on the other hand maintained the position that it was too late in the day for the prosecution to introduce new documents.

10. Two issues arise from this objection. The first is whether the witness (PW20) can testify on the contents of the Lancet report and produce the report. Secondly whether the prosecution can be allowed to call a new witness.

11. On whether the witness (PW20) can testify on the contents of the Lancet Report, it is trite that a witness can produce documentary evidence where the maker's attendance to court cannot be procured.

12. **Section 33 of the Evidence Act** allows the court to admit documentary evidence from a witness where the maker **"is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, 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."**

A basis for production of documentary evidence by another person other than the maker must be laid. There must be reasonable explanation given to the court as to why the maker cannot be procured.

13. **Section 77 of the Evidence Act** allows the court to admit into evidence a report by a government analyst, medical practitioner, ballistics expert, document examiner or a geologist as evidence as long as the authenticity of the documents is not disputed.

In **Joseph Kakei Kaswili -vs- Republic Criminal Appeal No. 102 of 2015 [2017] eKLR** the Court of Appeal held that:-

"Section 33 of the Evidence Act Cap 80 Laws of Kenya deals with admission in evidence of statements made by persons whose attendance to court cannot be procured without an amount of undue delay or expense which in the circumstances of the case appears to the court to be unreasonable Section 77 of the Act on the other hand makes provision for the admission in evidence of medical evidence."

14. However, evidence by experts should be tendered by experts in the same field. **Section 48** of the Evidence Act provides:-

(1) When the court has to form an opinion upon a point of foreign law, or of 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 fingerprint or other impressions.

(2) Such persons are called experts.

15. In explaining the significance of expert evidence, the Court of Appeal in **Mutonyi versus Republic (1982) KLR 203 at 210**, as per Potter JA had this to say:-

"Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like...."

In Cross on Evidence 5th edition at page 446, the following passage from the judgement of President Cooper in Davie versus Edinburgh magistrates (1933) SC 34,40, as scinting the functions of expert witnesses:

"Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence..."

16. In the present case, PW20 wished to adduce the toxicology report prepared Lancet Kenya and it was the prosecution's argument that the witness was capable of explaining the contents of the report, as he was the one who handed over the specimens for analysis. This is not the proper position as PW20 is not an expert on toxicology and his evidence would not enable this court to reach a proper independent judgment on the basis of the facts given. I find that Dr. Gachie, PW20, is not qualified to produce the toxicology report.

17. On whether the prosecution can call a new witness, **section 150 of the Criminal Procedure Code** provides that:-

"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:"

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

18. In **Stephen Mburu Kinyua v Republic [2016] eKLR**, Ngugi J stated that:-

“32. Several authorities have suggested that the first part clothes the Trial Court with discretion to call a witness while the second part creates an obligation on the Trial Court to call the witness if that person’s evidence appears essential to the just decision of the case. For example, in Kulukana Otim v R [1963] EA 257, the Court of Appeal, in considering section 148 of the Ugandan Criminal Procedure Code which is, word for word, the same as our section 150, stated that:

“It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself....”

19. In the present case it is clear that the prosecution is eager to produce the toxicology report while the defence desire to have the maker come to court and produce the said report to enable them cross-examine him. It seems the parties consider the toxicology report crucial in reaching a just determination of the case. Further, no prejudice shall be occasioned on the defence if a new witness is called to testify on the toxicology report as the defence shall have the right to cross-examine.

20. In the upshot, I uphold the objection of the defence and order that prosecution calls the maker of the toxicology report or any other qualified person as set out in section 48 of the Evidence Act to testify on the toxicology report.

21. I further direct that PW20 who was stepped down be recalled to complete his testimony on matters within his competence.

Ruling dated delivered and signed at Nairobi this 28th day of May 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

.....**Court Assistant**

.....**For Prosecution**

.....**For 1st Accused**

.....**For 2nd Accused**

.....**For 3rd Accused**

.....**For 4th Accused**

.....**For 5th Accused**

.....**For 6th Accused**