REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

CRIMINAL CASE NO. 13 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

SAMWEL KARIUKI MWAGO..... ACCUSED

RULING

1. The accused is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code.** The particulars are that on the night of 21st and 22nd March, 2019, at Mirera in naivasha Sub County within Nakuru County, jointly with another not before the court murdered Stephen Ndegwa.

2. After plea taking on 9th April, 2019, the accused was granted bond on condition that he relocates to Ol Kalau. On 27th May, 2019, the prosecution notified the court that they had not received photographs of the scene, call data and a "T"shirt which had been submitted to the Government Analyst for analysis. The court ordered the prosecution to supply all witness statements, photographs, and documents which it would rely upon in prosecuting the case.

3. On 3rd July, 2019, the prosecution made an oral application for the accused to be escorted to Naivasha Referral hospital for a blood sample to be taken from him for submission to the Government Analyst for DNA analysis. The prosecution states that a blood stained "T" shirt was recovered at the scene of crime and it will be used as an exhibit. As such, it is intended to ascertain whether there is any connection between the blood on the "T" shirt and the accused.

4. The defence strongly opposes the application. Counsel argues that the accused has a right not to incriminate himself; that he has a constitutional right to his own body including his blood; that his right to privacy will be violated by such action. He further states that the materials already provided to the defence by the prosecution, there is no there is no mention of the said "T" shirt.

5. Although counsel did not expressly state so, I understood the defence arguments against self-incrimination to be premised on **Art 50(2)(l)** and that of privacy to be premised on **Article 31(a-c).** The respective provisions are as follows:

> ***"31. Every person has the right to privacy, which includes the right not to have— (a) their person, home or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed"***
>
> and
>
> ***"50. (2) Every accused person has the right to a fair trial, which includes the right—***
>
> ***(a) ....***
>
> ***....***
>
> ***(l) to refuse to give self-incriminating evidence"***

6. In response, the prosecution stated that the issue of a blood sample is very important to the justice of the case; that the sample may as much clear the accused as it may incriminate him; and that it was standard practice to obtain samples in such cases.

7. Only two issues arise: Whether the requirement to provide a blood sample a is violation of the right to privacy; and whether the it constitutes a violation of the right against self-incrimination.

8. The parties did not submit on the law or avail any authorities, despite the court requesting the parties to file authorities on the issue. Nevertheless, my research has led me to several legal positions and authorities.

9. The statutory position with regard to blood sample provision in criminal cases is contained in **Sections 122 A-D** of the **Penal Code.** The provisions are in the following terms:

> ***"122A. Senior police officer may order DNA sampling procedure on suspect***
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> ***(1) A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.***
>
> ***(2) In this section—***
>
> ***"DNA sampling procedure" means a procedure, carried out by a medical practitioner, consisting of—***
>
> ***(a) the taking of a sample of saliva or a sample by buccal swab;***
>
> ***(b) the taking of a sample of blood;***
>
> ***(c) the taking of a sample of hair from the head or underarm; or***
>
> ***(d) the taking of a sample from a fingernail or toenail or from under the nail, for the purpose of performing a test or analysis upon the sample in order to confirm or disprove a supposition concerning the identity of the person who committed a particular crime;***
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> ***"serious offence" means an offence punishable by imprisonment for a term of twelve months or more.***
>
> ***122B. Suspect to comply with order***
>
> ***Where a suspect in respect of whom an order has been made under section 122A resists compliance with the order, members of the police force, under supervision of an officer of or above the rank of inspector, shall be entitled to use reasonable force in restraining the suspect for the purpose of effecting the procedure.***
>
> ***....***
>
> ***122D. Order or consent to be proven***
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> ***The results of any test or analysis carried out on a sample obtained from a DNA sampling procedure within the meaning of section 122A shall not be admissible in evidence at the request of the prosecution in any proceedings against the suspect unless an order under section 122A or a consent under 122C is first proven to have been made or given."***

10. From a purely statutory standpoint under the Penal Code provisions, it appears that a police inspector, or above, has authority to order a suspect to provide a blood sample under the following criteria. First, that the person from whom the sample is sought is suspected of having committed a serious offence; second, that there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence; third, that the sample may help confirm the identity of the person who committed a particular crime.

11. There is a growing body of recent jurisprudence on the question of requisition of blood samples, and I seek to consider some of them.

Right to privacy

12. As I noted earlier counsel did not make elaborate arguments supported by authority either way. However, I understood the defence to be saying that it would be an improper exercise of power for the court to allow an accused person to be subjected to extraction from his body of his blood sample as this would be akin to an intrusive and intimate abrogation of his person and privacy without his consent.

13. The right to privacy is recognized in common law as an independent personality right, as it is under our constitution. Undergirding it is the concept of the individual's dignity. It denotes, in relation to one's body, the existence of a sphere of individual inviolability. This includes the protection of one's body from intrusions by the state and others and the correlated right to bodily autonomy or self-determination against interference or molestation. (See generally **The Bill of Rights Handbook, Iain Currie and Jonathan De Waal 6th Ed 2016**). Thus, the right to privacy is simply the right to be left alone. It guarantees your inherent right to ensure your private details are not publicly consumed without your consent.

14. Here in Kenya, in the case of **E M W K & Another v Attorney General & 3 others [2017] eKLR Const Pet 347 of 2015**, it was held that the petitioner, a girl who had been strip searched by the police, had had her privacy and dignity violated. In that case, Mativo J drew a connection between privacy and dignity stating:

> ***"52. Article 31 of the Constitution provides the Right to Privacy of the person, home or property searched. It has become established law, insofar as privacy is concerned, that this right becomes more powerful and deserving of greater protection the more intimate the personal sphere of the life of a human being which comes into legal play..…***
>
> ***53. There is a connection between an individual's right to privacy and the right to dignity. Privacy fosters human dignity insofar as it is premised on and protects an individual's entitlement to a "sphere of private intimacy and autonomy." The rights of equality and dignity are closely related, as are the rights of dignity and privacy."***

15. In the case of **S v Orrie 2005 (1) SACR 63 (C),** the High Court in South Africa held that the involuntary taking of a blood sample for the purposes of DNA sampling infringed both the right to bodily security and integrity, but that the infringement was justifiable. That court also held that suspects must be advised of their status as suspects.

16. In the **EMWK** case, Mativo J also found that although the right to privacy is protected in Kenya, it is not an absolute or illimitable right, when he stated:

> ***"85. A strip search constitutes an interference with the privacy of the individual concerned. It is recognized that common law recognizes the right to privacy as an independent personality right. Privacy is therefore, a valuable aspect of one's personality. The right to privacy is protected in terms of both common law and the Constitution of Kenya. <u>The right is however not absolute as there are competing factors such as maintaining law and order that can bear a significant</u> <u>limitation on the right.</u> A careful weighing up of the right to privacy and other factors is necessary."***

17. **Article 25** of the **Constitution** sets out the rights that are incapable of limitation. As they do not include the right to privacy, I consider that an accused person's right to privacy can be subjected to statutory limitations such as those in the Penal Code.

18. In the present case, what is sought is an order of the court to require the accused to avail a blood sample for purposes of criminal law administration. There is, as stated earlier, already statutory underpinning for a suspect to be required to avail a blood sample. Unlike in the case of **EMWK** which involved inhumane strip searching, what the statute demands is that an order in writing be issued by a police officer above the rank of inspector. The conditions to be fulfilled must be that the person from whom the sample is sought is suspected of having committed a serious offence; that there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence; third, that the sample may help confirm the identity of the person who committed a particular crime.

19. The application having been a simple oral application, and the response being equally simple and oral, there was no allegation that **section 122** of the **Penal Code** was unconstitutional. All law is deemed constitutional unless specifically impugned and declared unconstitutional.

20. From this view, it cannot properly be argued that the accused's right to privacy will be infringed by an order for provision of a sample of his blood as the purpose is the administration of criminal justice.

Right against self-incrimination

21. This is the more critical and concerning ground of opposition to the request for extraction of a blood sample because the right against self-incrimination is one of the rights that cannot be limited pursuant to **Article 25** of the **Constitution.** This right is corollary to the right to be presumed innocent unless proven guilty.

22. The right against self-incrimination under our constitution is availed to an accused person. In contradistinction to a suspect, an accused person knows without equivocation, ambiguity or a shadow of doubt, that she or he is the subject of a charge for a specific offence in a criminal trial. Thus, evidence elicited in contravention against the privilege of self-incrimination can readily be excluded by a court at trial. What is the scope of that right in relation to extraction of a blood sample?

23. This question has been addressed in a number of cases locally. In **Republic v Timothy Mwenda Gichuru & 2 Others [2017] eKLR,** Gikonyo, J, was faced with a similar application by the prosecution for the provision of a blood sample. After considering our emerging jurisprudence exhaustively, he concluded as follows:

> ***"I agree with the postulation of the law in the foregoing cases and come to the same conclusion that the right of an Accused Person not to incriminate himself, protects against <u>compulsory oral examination for the purposes of extorting unwilling confessions or declarations implicating the Accused in the commission of the crime. Thus blood sample is not compulsory oral examination or confessions or declarations; it is real or physical evidence which the Accused could be compelled to provide if there are reasonable grounds to believe that DNA procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.</u> But I must state here that although our statutory law on provision of blood sample(s) is sprinkled in various statutes, the core of the matter is that courts may direct a person charged with serious offence to provide blood samples for purposes of DNA testing if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence"***.

24. Gikonyo, J continues:

"[8] Now that I am of that persuasion, is this request for blood samples merited? In this age of technology, DNA has become an investigative tool which will determine with almost certainty that a person committed or did not commit an offence. Such evidence is also admissible in judicial proceedings whether civil or criminal or sui generis. Therefore, the manner in which the blood sample for DNA testing and sampling is obtained is a matter of the Constitution and the law. Accordingly, where a person has not given blood samples voluntarily, an order of the court is required to compel the person to provide the blood sample. But, for the order to issue I suggest that the prosecution must show:-

(i) That there are reasonable grounds to suspect that the person has committed or has been charged with a serious offence;

(ii) That a test or analysis upon the blood sample might confirm or disprove a supposition concerning the identity of the person who committed a particular crime; or

(iii) That there are reasonable grounds to believe that the DNA sampling procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence

[10] I now go back to the ultimate test; are there reasonable grounds to believe that DNA testing procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.The Prosecution stated that the exhibits recovered by the IO had blood on them and it is necessary for the accused persons to provide blood for DNA sampling thereto. These items are to be relied upon as exhibits in this case. The accused argued that the sampling may have been done on the blood on the exhibits and they fear that the prosecution may simply match the blood samples they are seeking from them thus incriminating them. There is absolutely nothing to show that the blood on the exhibits has been tested and analyzed. Again, the blood may or may not match and in any event, the analysis shall be subjected to admissibility test. Therefore, the fear by the accused is unfounded. But of significance is that the prosecution has an honest belief that DNA testing of the blood on the exhibits and of the accused persons might produce evidence tending to confirm or disprove that the suspect committed the alleged offence. This belief is not unfounded. Accordingly, I find that provision of blood samples does not infringe the right to fair trial."

25. Similarly, in **Republic v Godfrey Kipkemoi Kangogo [2018] eKLR Criminal Case 34 of 2018 Ngugi, J** dealing with a similar application for extraction of blood sample for purposes of DNA profiling, set out the arguments on the point and stated as follows:

"…the Prosecution turned to Comparative Law. It relied on Schmerber v. California 384 U.S. 757, 86 S. Ct. 1826 (1966). This is a decision of the US Supreme Court on a similar question. In the case, the Petitioner was involved in a road accident and the Police suspected he was driving while intoxicated. At the hospital, he was requested to give a blood sample for chemical analysis. He declined. The Police Officer ordered the physician to draw blood anyway. A chemical analysis showed that the Petitioner's blood alcohol levels were way beyond the legal limit. The Petitioner sought to suppress the evidence citing the 5th Amendment of the US Constitution (on the privilege against self-incrimination). His argument, similar to the Accused Person's here, was that compelled blood draw abrogated his right against self-incrimination and other dignitary rights protected by the Constitution.

14. In rejecting that argument, the US Supreme Court held that:

We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

It could not be denied that in requiring petitioner to submit to the withdrawal and chemical analysis of his blood the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purposes of the privilege. The critical question, then is whether petitioner was thus compelled "to be a witness against himself."…

… In the present case……Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.

15. In other words, the US Supreme Court held that the privilege against self-incrimination seeks to protect compulsion against "testimonial" disclosures. This means that the privilege is not violated by such non-testimonial compulsions as requiring a person to provide a blood sample; a handwriting sample; fingerprints or to participate in an Identification Parade or even to speak certain words or model particular clothing. Other US Supreme Court cases that have similarly held including United States v. Wade, 388 U.S. 218, 221–23 (1967) and Holt v. United States, 218 U.S. 245, 252 (1910)."

26. Ngugi J concluded **R v Godfrey Kipkemoi** (supra) by stating what he considered to be the practical implications of this position

"a. First, there is a per se prohibition against testimonial or other communicative evidence by the Accused Person.

b. Second, for physical or real evidence, an analysis must be conducted on whether the compelled evidence violates the dignity of the Accused Person or in any other way offends evolving community standards of decency and fair play.

c.Third, unless a demonstrably palpable exigency exists, warrantless compelled evidence is inadmissible. In other words, the Prosecution would have to persuade a Judicial Officer that there is reasonable cause for the compulsion and a judicial order for compulsion to issue.

d. Fourth, where compulsion involves highly intrusive investigations such as compelled blood draw, the Prosecution must lay a foundation for the compulsion which must meet a higher standard of probable cause for the warrant or Court order to issue. As the Schmerber Court said, "bodily intrusions cannot be allowed on the mere chance that the desired evidence might be obtained," (Schmerber v California 384 US 770 (1966)).

27. He concluded by finding that *"the request for the samples of blood, saliva, head hair, pubic hair, finger nails and buccal swabs from the Accused Person so that they can be compared to those of the Deceased which were collected during the post-mortem examination on 12th July, 2018 is justified"*, adding that the Prosecution must demonstrate that there are reasonable grounds to believe that the DNA sampling procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.

28. In ***John Kithyululu v Republic (Voi High Court Crim. Case No. 12 of 2015***) Kamau Jn held as follows:

"17. Accordingly, having had due regard to the oral submissions by counsel for both the Appellant and counsel for the State, this court came to the firm conclusion that without a statutory provision in place, there were practicable difficulties in enforcing the order that had been sought by the Prosecution. Indeed Parliament deemed it fit to specifically provide for taking of DNA samples from persons accused persons of committing sexual offences in the Sexual Offences Act to prevent questions of enforcement of such orders.

18. If it was the intention of Parliament that all that was required was a court order to extract blood sample from a person charged with any other offence other than a sexual offence, then nothing would have been easier than for Parliament to have enacted a law to that effect.

Having said so, it is clear from the aforesaid decided cases that an Accused Person's right against self-incrimination constitutes giving oral or documentary testimony against himself and does not extend to taking of blood samples to prove a particular fact. There is therefore only a bar of communications and testimony by an Accused Person.

…

Article 50(2)(l) of the Constitution of Kenya therefore only related to communication that may be obtained from an Accused Person through coercion, unfair or unconstitutional means. For the foregoing reasons, this Court was not persuaded by the Accused Person's submissions that there would be a violation of rights under the provisions of Article 50(2)(l) of the Constitution if his blood sample was taken because taking of samples is per se not unconstitutional or an infringement of an Accused Person Person's rights.

29. Ön his part, Majanja J in the consolidated petition of **Richard Dickson Ogendo& 2 others v Attorney General & 5 others [2014] eKLR** stated as follows when he encountered this question:

"To my mind the, the privilege of an accused person not to incriminate himself, protects against compulsory oral examination for the purposes of extorting unwilling confessions or declarations implicating the accused in the commission of the crime."

30. In the present case, I see no reason to deviate from the general rationales given in the authorities cited. I think the correct position is that extraction of blood for sampling by DNA does not amount to obtaining evidence of a testimonial or communicative nature. Accordingly, such an exercise does not violate the accused person's right against self-incrimination. I so find and hold.

31. Accordingly I direct as follows:

a. The accused shall present himself to the Investigating Officer in this case within fourteen days from the date hereof;

b. The Investigating Officer and such other senior officer of the rank of inspector or above, shall escort the accused to Naivasha Sub-County Referral Hospital;

c. A doctor at the said hospital shall extract a sample of blood from the accused and the same shall be duly submitted to the Government Chemist/ Analyst for DNA profiling

d. The report of the results of the said profiling and analysis shall be availed to the prosecutor and the defence counsel, when concluded.

32. Orders accordingly

Dated and Delivered at Naivasha this 24th Day of July, 2019

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Kirenge for the State
2. Mr. Gichuki holding brief for Njuguna for the Accused
3. Accused - Samuel Kariuki Mwago - present
4. Court Clerk - Quinter Ogutu