



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.237 OF 2017**

**(In the matter of an application for an order for the release of Stephen Nthuku Kimatu’s alleged body for burial)**

**STERAMALIS STEPHEN NTHUKU.....1<sup>ST</sup> APPLICANT**

**ALEX KALUA NTHUKU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**MBISU KING’ELE.....1<sup>ST</sup> RESPONDENT**

**OFFICE OF THE DPP.....2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**OFFICE OF THE DIRECTOR OF CID.....4<sup>TH</sup> RESPONDENT**

**MACHAKOS COUNTY CID OFFICER.....5<sup>TH</sup> RESPONDENT**

**RULING**

This is a protracted burial dispute that has resulted in the body of a deceased being kept at the City Mortuary since the year 2004. The dispute is between the 1<sup>st</sup> Respondent Mbisu King’ele who is the sister of Stephen Nthuku Kimatu who is claimed to be the deceased and whose body is at the City Mortuary and the Applicants, Steramalis Stephen Nthuku and Alex Kalua Nthuku who are wife and son respectively of the said Stephen Nthuku Kimatu. They disputed that the body which has been at the City Mortuary belongs to Stephen Nthuku Kimatu. To resolve this issue, this court, by consent of the parties, ordered for DNA samples to be taken from the 2<sup>nd</sup> Applicant, the son and from the 1<sup>st</sup> Respondent, the sister of Stephen Nthuku Kimatu. These DNA samples were to be compared with biological samples extracted from the body at the City Mortuary which is claimed by the 1<sup>st</sup> Respondent to belong to Stephen Nthuku Kimatu. The parties complied with the orders issued by this court.

In a report submitted to the court dated 12<sup>th</sup> April 2019, the Government Analyst found that the biological samples extracted from the body could not generate DNA profiles that would enable the body to be identified. In the circumstances therefore, it was impossible to determine whether the body belonged to Stephen Nthuku Kimatu. That would have been the end of the matter. However, the 1<sup>st</sup> Respondent still insisted that the court hears her application so that the body can be released to her and be buried in Stephen Nthuku Kimatu’s ancestral home in Kithyoko in Machakos County.

In her submission before court, the 1<sup>st</sup> Respondent stated that notwithstanding the finding made in regard to DNA, the 1<sup>st</sup> Respondent was of the view that the DNA result was not conclusive. She still insists that the body at the City Mortuary belonged to Stephen Nthuku Kimatu taking into consideration the place where the body was found at Yatta Forest. The 1<sup>st</sup> Respondent insisted that the body of the deceased should be buried in Stephen Nthuku’s ancestral home as required under Kamba customary law. She reiterated that if the body was not that of Stephen Nthuku Kimatu, then *where is Stephen Nthuku Kimatu? Is he still alive or is he dead?* She insisted that the Applicants were denying the identity of the body at the City Mortuary as belonging to Stephen Nthuku Kimatu because there was bad blood between Stephen Nthuku Kimatu and his wife prior to his disappearance and death. She therefore urged the court to allow the body at the City Mortuary be released to her and the same be buried at his ancestral home at Kithyoko.

The application is opposed. The Applicants were vehement in their objection to having the body of the deceased buried at Kithyoko. They insisted that since the body of the deceased has not been established to belong to Stephen Nthuku Kimatu, they were not prepared to bury a

stranger in their land. They were not opposed to the body of the deceased being released to the 1<sup>st</sup> Respondent provided that the same was buried elsewhere other than in their parcel of land at Kithyoko. They urged this court to disallow the 1<sup>st</sup> Respondent's request to bury the body of the deceased on the particular parcel of land.

This court has considered the rival submission made by the parties to this application. It was clear to the court that the matter in dispute is no longer who should the body now lying at the City Mortuary should be released to, but rather where the body should be buried. There was dispute between the affected parties regarding the identity of the body of the deceased. This court with a view to resolving the issue of the identity of the body, directed that a DNA analysis be done with a view to determine whether the body belong to Stephen Nthuku Kimatu. The son of Stephen Nthuku Kimatu and his sister gave DNA samples. The DNA analysis would have resolved once and for all whether the deceased was related to either of them. Unfortunately, the samples from the body of the deceased could not generate material that would have enabled the DNA analysis to be done. The report was inconclusive as regard whether the body now lying at the City Mortuary belonged to Stephen Nthuku Kimatu. That being the case, this court cannot determine with certainty that the body now lying at the City Mortuary is that of Stephen Nthuku Kimatu. In the circumstances therefore, this court cannot accept the invitation made by the 1<sup>st</sup> Respondent for it to declare that the body at the City Mortuary belongs to Stephen Nthuku Kimatu. That being the case, the 1<sup>st</sup> Respondent cannot insist that the body be buried at Kithyoko, the parcel of land of Stephen Nthuku Kimatu.

In the premises therefore, the orders that commends itself to this court is as follows:

- i. The 1<sup>st</sup> Respondent is at liberty to collect the body now lying at City Mortuary for burial.
- ii. The 1<sup>st</sup> Respondent shall bury the body at a place of her choice other than the parcel of land belonging to Stephen Nthuku Kimatu at Kithyoko in Machakos County.
- iii. Any expenses that shall arise or has accrued in respect of the body now lying at City Mortuary shall be paid by the 1<sup>st</sup> Respondent.
- iv. Should any party be aggrieved by this Ruling, this court grants leave for the aggrieved party to appeal.

It is so ordered.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2019**

**L. KIMARU**

**JUDGE**