



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 38 OF 2017**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 42 OF 2017**

**M M ..... 1<sup>ST</sup> APPELLANT**

**K M ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Ruling and Order in Mwingi Senior Resident Magistrate's Court Criminal Case No. 262 of 2016 by K. Sambu S P M on 24/08/17)*

**J U D G M E N T**

1. The Appellants herein were arraigned before Court on the **19<sup>th</sup> August, 2016** and charged with the offence of **Infringing a Child's Rights to Health Care** an act in contravention of **Section 9** as read with **Section 20** of the **Children Act Cap 141(k)**. They also faced a second count of **Exposing a Sufferer of an Infectious Disease in a Public Place** contrary to **Section 28(b)** of the **Public Health Act, Cap 242(k)**.

2. The Appellants herein, a husband and wife were charged following allegations stated in statements of the charges; they denied the charges and the matter was set down for hearing. During pendency of the matter, the victim in question died. On the **15<sup>th</sup> day of June, 2017**, the Prosecution Counsel, **ODPP – Mr. Maina** filed an application seeking an order to have the body of **T M** exhumed for purposes of having an autopsy done to ascertain the cause of death. The Notice of Motion was brought pursuant to the provisions of **Article 53(1)(c)(d)** of the **Constitution** and **Section 202** as read with **Section 205** of the **Penal Code**. The application was premised on a ground that the Deceased died of a highly infectious Pulmonary Tuberculosis owing to acts or omission of the Respondents.

3. **No. 233863 C I Mathews Abich Masaga** swore an affidavit where he deponed *inter alia* that it was suspected that the Appellants were responsible for the demise of the victim (**T**) and therefore culpable.

4. The learned State Counsel **Mr. Maina** appeared before the Court on the same date (**15<sup>th</sup> June, 2017**) in the absence of the Appellants and their Counsel and made an application thus:

*“Matter is before court for our notice of motion of application dated 15<sup>th</sup> June, 2017 seeking to have the body of one T M exhumed for purposes of autopsy to confirm the cause of death.”*

5. The Court ordered thus:

*“Notice of motion application dated 15<sup>th</sup> June, 2017 on the face of the record supported by the grounds set out and the sworn affidavit of one MATHEWS ABICHA MASANGA be and is hereby allowed in terms of the prayers sought herein.”*

6. This prompted the Respondents through their Counsel, **Mr. Mbaluka** to file an application dated the **16<sup>th</sup> day of June, 2017** seeking review and setting aside of the *ex parte* orders so that they could have an opportunity of responding to it and be heard as being condemned unheard was contrary to the spirit of natural justice. Further that the Appellants ought to have been granted a fair trial as envisaged by **Article 50** of the **Constitution** and weighty issues raised needed to be addressed in the presence of the Appellants.

7. The Respondent filed grounds of opposition where it stated that the application lacked merit and was an abuse of the Court process. The learned Magistrate considered the application. He was of the view that the orders sought were to assist the investigation arm to unearth and/or to unravel the cause of death of the victim and whether the Appellants were criminally culpable. He relied upon the provisions of **Section 387(2)** of the **Criminal Procedure Code**. That the Appellants' rights as envisaged under **Article 5(f)** of the **Constitution, 2010** were yet to accrue therefore their rights were not violated as they would defend themselves if any charges were to be preferred against them.

8. Aggrieved by the decision of the Court the Appellants appealed on grounds that:

- The learned trial Magistrate erred in fact and law by failing to acknowledge that the Appellants' constitutional rights under **Article 50** will be violated when he failed to grant the orders sought.
- The learned trial Magistrate erred in fact and law by failing to appreciate the fact that the Appellants' constitutional rights will be infringed.
- The learned trial Magistrate erred in fact and law when he demonstrated open bias in conducting the matter.
- The learned trial Magistrate erred in fact and law when he entertained Prosecution application of exhumation in the Criminal Proceedings herein when the Appellants were not party to the Prosecution fresh investigation.
- The learned trial Magistrate misdirected himself in both fact and law when he failed to make a finding that the Prosecution wrongly approached Court by bringing the Miscellaneous Application to seek orders to investigate different issue in **Criminal Case No. 262 of 2016**.
- The learned Trial Magistrate erred in fact and law when he failed to appreciate the appearance of the defense and the counsel while making orders for exhumation in absence of the Appellant and/or his counsel on record.
- That the decision of the learned trial Magistrate was biased in that he dismissed the application dated **16<sup>th</sup> day of June, 2017** seeking to set aside exparte orders issued in absence of accused persons.
- The learned trial Magistrate erred in law and fact when he considered (extraneous) matters not on record to make a Ruling being appealed against herein.

9. The Appeal was canvassed by way of written submissions. It was the submission of the Appellants that the trial Court conducted proceedings as if the Appellants were not parties to the Criminal Proceedings and no prejudice will be occasioned if the application is to be set aside so as the procedure in Criminal Proceedings is followed. That the procedure adopted by the Lower Court deprived the Appellants of their right to be present throughout trial as envisaged by **Section 194** of the **Criminal Procedure Code** and **Article 50** of the **Constitution**.

10. The Respondent on the other hand submitted that the Appellants' rights under **Article 50** were yet to accrue in **Criminal Case Number 262 of 2016** and the Appellants will be invited to prepare their defence. Citing the case of **Boniface Kyalo Mwololo vs. Republic (2016) eKLR** he urged that the Court upheld the importance of the interest of the child. That ordering exhumation of the body of the minor to ascertain the cause of death is not fresh investigation but justice as to the cause of death of the girl. The exhumation is in the interest of justice as to the minor's rights.

11. It is not in doubt that at the outset the learned State Counsel appeared before the Court on the date an application was filed, the **15<sup>th</sup> day of June, 2017** and was heard in the absence of the Appellants who were persons accused.

12. The Appellants herein were arrested, arraigned in Court and charged at the first Court appearance which was on the **19<sup>th</sup> August, 2016**. Having appeared in Court and answered the charges they were guaranteed a fair trial. This was a formal assurance that certain conditions were to be fulfilled. These conditions are stipulated in **Article 50** of the **Constitution of Kenya, 2010**. In particular **Section 50(2)(f)(k)** of the **Constitution** provides thus:

*“(2) Every accused person has the right to a fair trial, which includes the right—*

*(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*

*(k) to adduce and challenge evidence;”*

13. When the learned Prosecuting Counsel appeared before Court on the **15<sup>th</sup> June, 2017** the Appellants were absent. The Court proceeded to grant orders that affected their right to fair trial. The application was introduced in a matter where the Appellants had answered charges and were still innocent until proven otherwise. Anything introduced in the matter should have been brought to their attention so as to have the opportunity of challenging or justifying its legality. The Notice of Motion dated **15<sup>th</sup> June, 2017** has the names of the Appellants stated as the Respondents. It was not an exparte application. The application is supported by affidavit evidence. This was a statement verified under oath. The learned Magistrate was duty bound to give them the opportunity to respond to it.

14. In the impugned Ruling the learned Magistrate argued that the orders sought by the State were intended to assist the investigation arm to unearth/unravel the cause of death of the subject child's matter to establish if the Appellants were criminally culpable. The learned Magistrate cushioned his reason by relying on **Section 387(2)** of the **Criminal Procedure Code**.

**Section 387** of the **Criminal Procedure Code** gives the Magistrate the power to conduct an inquiry into the cause of death. It is important to consider **Section 387(1)** and **(2)** that provides thus:

*“(1) When a person dies while in the custody of the police, or of a prison officer, or in a prison, the nearest magistrate empowered to hold inquests shall, and in any other case mentioned in section 386(1) a magistrate so empowered may, but shall in the case of a missing person believed to be dead, hold an inquiry into the cause of death, either instead of or in addition to the investigation held by the police or prison officer, and if he does so he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.*

*(2) Whenever the magistrate considers it expedient to make an examination*

*of the dead body of a person who has been already interred, in order to discover the cause of his death, the magistrate may cause the body to be disinterred and examined.”*

When the police are investigating the death of a person following sudden death while in police custody, or prison or if a person is missing and is believed to be dead the Magistrate has the power to conduct an inquest and in doing so he/she can make an order for exhumation of the body that has already been interred in an endeavour to establish the cause of death. He is also seized of the power to cause the body to be examined.

15. This was a case where no inquest had been opened, therefore **Section 387(2)** could not be relied upon. That provision of the law would require the police to compile a file and place it before the Court with evidence available for perusal by the Magistrate, who would then give directions in the matter. The case would be heard prior to the Magistrate taking action as provided by **Section 387(2)** of the **Criminal Procedure Code**.

16. This was a case where the victim died prior to the case being heard. The Investigating Officer was determined to carry out further investigations in order to consider substituting the charges that had been read to the Appellants. The question to be determined is whether the Prosecution adopted a proper procedure in the circumstances?

17. Ordinarily the police would have been required to file an ex parte miscellaneous application where the Magistrate would be moved to determine it; and depending on evidence provided consider making the necessary order in accordance with the proviso to **Section 146** of the **Public Health Act Cap 242 Laws of Kenya** which state that:

*“Provided that nothing herein contained shall be deemed to affect the right of a magistrate to order the exhumation of a body or the remains of any body for the purpose of holding an inquiry into the cause of death of any person....”*

18. Otherwise, going by the procedure that was adopted by the Prosecution, they were required to serve the application upon the Respondents and give them the opportunity of being heard.

19. In the premises, I find the Appeal being meritorious, accordingly I allow it. In the result, the Ruling of the trial Court and the order dated the 15<sup>th</sup> day of **June, 2017** be and are hereby set aside. The Appellants shall respond to the application dated the 15<sup>th</sup> day of **June, 2017** which shall be heard by a Court of competent jurisdiction presided over by a Judicial Officer other than the **Hon. K. Sambu**.

20. It is so ordered.

**Dated, Signed and Delivered at Kitui this 26<sup>th</sup> day of July, 2018.**

**L. N. MUTENDE**

**JUDGE**