



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL CASE NO 12 OF 2015

REPUBLIC.....APPLICANT

VERSUS

JOHN KITHYULULU.....RESPONDENT

RULING

1. On 9th March 2016, the Prosecution made an oral application to have blood samples retrieved (sic) from the Accused person at Moi Referral District Hospital, Voi on two (2) grounds. The first ground was that blood sample was retrieved (sic) from the Accused person before he was charged but that the same was not analysed by the Government Chemist as it was contaminated before it got to him.
2. Secondly, the blood sample was central to this case because at the time of the alleged offence, there was a struggle between Fredrick Kiarie Mukaru, the deceased herein, in which the Accused person was said to have sustained injuries.
3. It was the Prosecution's argument that it was necessary to obtain the Accused person's blood sample to establish if the samples found at the scene of crime matched his blood. It was the Prosecution's further submission that the Accused person would not suffer prejudice as his blood sample had been taken before he was arrested and consequently, the court ought to determine the matter herein without undue regard to technicalities.
4. On the other hand, Counsel for the Accused person submitted that taking blood samples would violate the Accused person's constitutional rights and in particular his right not to give self-incriminatory evidence against himself. Counsel was apprehensive that if the Accused person's blood sample matched the blood that was found at the scene of the crime, then the Accused person would be self-incriminating himself.
5. The said Counsel was also categorical that the Prosecution had been negligent in the contamination of the blood sample and that the Accused person could not be told to submit a sample many months after the sample was taken. It was his argument that the burden of proof lay with the Prosecution and consequently, the Accused person's rights must be protected.
6. Article 50 (2)(1) of the Constitution of Kenya, 2010 which the Accused person was relying upon provides as follows:-

“Every accused person has the right to a fair trial, which includes the right to refuse to give self-incriminatory evidence.”

7. The question of self-incrimination has been dealt with in several cases. In the case of **Richard Dickson Oendo & 2 others v Attorney General & 5 others [2014] eKLR**, Majanja J stated as follows:-

“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. The purpose of protection against self-incrimination was summed up by the US Supreme Court in *Miranda v Arizona* 384 US 436 (1996) where it observed as follows; “All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect of a government, state or federal, must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance, to require the government to shoulder the entire load' to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth....In *Schmerber v California*, 384 U.S 757 (1966) the United States Supreme held that the compulsory taking of blood for analysis of its alcohol and its use in evidence did not violate the defendants privilege against self-incrimination. ”.

8. In the case of **Pennsylvania vs Muniz 496 US 582**, the United States Supreme Court further held as follows:-

“The privilege against self-incrimination protects an "accused from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature," *Schmerber v. California*, 384 U. S. 757, 384 U. S. 761, but not from being compelled by the State to produce "real or physical evidence," *id.* at 384 U. S. 764. To be testimonial, the communication must, "explicitly or implicitly, relate a factual assertion or disclose information." *Doe v. United States*, 487 U. S. 201, 487 U. S. 210. Pp. 496 U. S. 588-590.”

9. There is indeed no guarantee that the result of the analysis of the Accused person’s blood would match the blood that was found at the scene of the crime although there is a chance that it could be exculpatory or inculpatory as the outcome of such a test would not be known until such test was done.

10. 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.

11. Article 50(2)(1) of the Constitution of Kenya therefore only relates 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 his rights under the provisions of Article 50(2) (1) of the Constitution if his blood sample was taken because taking of samples is *per se* not unconstitutional or an infringement on an accused person’s rights.

12. Notably, the provisions of Section 36 of the Sexual Offences Act Cap 62A (of the Laws of Kenya) provide that a person committing an offence under the said Act can be directed by the court to give DNA samples. An accused person’s rights when charged with a sexual offence are not any less than those of an accused person who has been charged with a murder case, for example, just because his sample can be taken.

13. However, the court is not blind to the fact that an order directing sample to be taken from an accused person in any other case other than a case involving a sexual offence must be with the consent of such accused person. The challenges of enforcing an order for extracting samples, which is invasive in nature, if not consented to by an accused person, may very well lead to an altercation between such a person and the persons taking him to hospital to remove the sample and between him and persons removing his samples.

14. Although the altercation is speculative at this juncture, it is not a far-fetched occurrence where a person, such as the Accused person herein, has vehemently opposed an application made by the Prosecution to take his blood sample. Any action of pulling and shoving between the Accused person, the police officers escorting him to a hospital and medical officers extracting his blood of whatever magnitude has the potential of leading to degrading treatment to him.

15. This degrading treatment would by no means infringe upon the Accused person's constitutional rights which are protected under Article 25(a) of the Constitution of Kenya. The same provides that a person's rights to freedom from torture and cruel, **inhuman and degrading treatment** (emphasis court) and punishment shall not be limited.

16. In this regard, this court was in agreement with the holding of Makau J in the case of **Antony Murithi v O.C.S Meru Police Station & 2 others [2012] eKLR** in which he restrained the prosecution from using data that had been obtained from samples and saliva that had been taken from the petitioner therein without his consent.

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.

19. Bearing in mind that Article 159(2)(d) of the Constitution of Kenya mandates courts to administer justice without undue regard to technicalities, time is now be ripe for Parliament to enact laws to regulate the extraction of blood or other samples from persons accused of other offences other than sexual offences. This would take care of technical exigencies that could occur during prosecution of such cases for whatever reason.

20. The Prosecution ought not to bear blame for the contamination of the blood sample from the Accused person as it was not in their control. However, in the view of the reasons given herein above, unfortunate as it may be, the Prosecution's application to have the Accused person escorted to Moi District Referral Hospital, Voi to have his blood sample taken is hereby disallowed as the same has the potential of infringing his constitutional rights and which, this court, has a duty to uphold at all times.

21. It is so ordered.

DATED and DELIVERED at VOI this 23rd day of March 2016

J. KAMAU

JUDGE

In the presence of:-

Miss Mukangu..... for State

Mwanyumba.....for Accused person

Simon Tsehlo– Court Clerk