REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 29 OF 2016

REPUBLIC ……..…….. PROSECUTOR

VERSUS

AMOS KIPYEGON CHERUIYOT …… ACCUSED

RULING

The accused person herein had been arraigned before the High Court on a charge of murder. Plea was taken on 29/6/2016. On that same date the prosecution through the learned state counsel made an application seeking a court order to compel the accused to provide a blood sample for comparison purposes **'Mr Ombati'** counsel for the accused opposed the application on grounds that accused was not willing to provide a blood sample. Although not directly submitted by defence counsel I have no doubt that his objection was also based on the argument that to provide a blood sample may be tantamount to the accused incriminating himself.

Article 50(2)(1) of the Constitution of Kenya provide that

> ***"Every person has the right to a fair trial, which includes the right to refuse to give self-incriminatory evidence"***

Does providing a blood sample amount to such self incrimination? This matter has been considered in several other cases. My learned brother **'Hon. Justice Majanja'** considered this issue in the case of **DICKSON OGENDO & 2 OTHERS Vs ATTORNEY GENERAL & 5 OTHERS 2014 eKLR** where he held as follows –

> ***"To my mind, the privilege of an accused person not to incriminate himself protects against compulsory oral examination for the purposes of extorting unwilling confession or declaration implicating the accused in the commission of crime. The purpose of protection against self-incrimination was summed up by the US Supreme Court in MIRANDA VARIZONA 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 award 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 crucial, simple expedient of compelling it from his own mouth …. In SCHMER BER Vs CALIFORNIA, 384 US 757 (1966), the United States Supreme Court 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".***

The consensus therefore in all these decision is that the rule against self incrimination is confined to protection against suspect being compelled to make an oral statement or to testify in such a way as to condemn himself. Indeed this matter was further clarified in the American Case of **PENNSYLVANIA Vs MINIZ 496 US 582,** where the United States Supreme Court held that

> ***"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 mature" <u>SCHMERBER Vs CALIFORNIA 384 U-S 757 284 U-S 761</u>, but not from being compelled by the state to produce "real or physical evidence" ….. To be testimonial, the communication must, "explicitly or implicitly" relate to a factual assertion or disclose information <u>"DOE – UNITED STATED 487 U.S 201, 487 U.S 210"</u>.

In this case the accused is not being asked to provide testimonial or communicative (written) material that may implicate him – he is being asked to provide **'real or physical evidence'** in the form of a blood sample. There is no guarantee that such blood sample will end up incriminating the accused. It may well be that the results of the blood sample analysis may exonerate him.

I am mindful of the decision of my learned sister **<u>Hon. Justice Jackie Kamau</u>** in **<u>REPUBLIC Vs JOHN KITHYULULU, (2016) eKLR</u>** where she denied similar prosecution request for a blood sample on the basis that the possibility existed that the same may have to be obtained forcibly. However this being a decision of a court of concurrent jurisdiction is not binding on this court and with respect I am of a different view.

My own take is that once a court order is made, the accused is obliged to comply. Any attempt to resist a lawful court order can be dealt with as and when it arises using the various remedies available in law.

I note that under Section 36 of the Sexual Offences Act, 2006 an accused person charged with a sexual offence can be directed by the court to provide DNA samples. The aim here is to ensure that all material is availed to enable the court reach a just decision. The rights of a suspect charged under the Sexual Offences Act are not any less than the rights of a suspect charged with a criminal offence under the Penal Code. To require that a suspect provide a blood sample does not in my opinion vidate his right against self incrimination. I therefore allow this application and order that the accused be escorted to PGH – Nakuru to have a blood sample extracted from him by a medical officer trained to carry out such extraction.

Dated, signed and delivered at Nakuru this 29th day of July 2016.

Maureen Odero

<u>Judge</u>