REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Case 19 of 2006

REPUBLIC ::: PROSECUTOR

V E R S U S

1. ERASTUS OLOKO SICHANGA

2. OBED MWAKE

3. OBATIA SICHANGA

4. CALEB TOKA SICHANGA::::::::::::::::::::::::::::: ACCUSED

R U L I N G

Messrs ***Erastus Oloko Sichanga, Obed Omwake, Obatia Sichanga and Caleb Toka Sichanga***, the 1st, 2nd, 3rd and 4th accused, respectively, were brought to this court on 13/3/06 to answer a charge of murder contrary to **section 203 as read with section 204 of the Penal Code.** The plea was deferred to 14.3.2006 when all the accused pleaded not guilty and were remanded in prison custody pending the hearing of the case on 18th, 19th and 20th December, 2006. The particulars of the charge to which the accused pleaded not guilty were that:-

"***the 4 accused between 10th August, 2005 and 5th February, 2006 at Epanga village, Ebusikhale Sub-location, West Bunyore Location, in Vihiga District within Western Province jointly murdered JOHNSON EKHALE.***"

On 27.4.2006, the said accused through their advocates, C. G. OUMA & COMPANY, filed an

application by way of a Notice of Motion dated 26.04.2206 hereinafter referred to as ("**the said application**") seeking orders that the body of the deceased, ***Johnson Ekhale***, be disinterred and removed to New Nyanza General Hospital mortuary at the accuseds' expense so as to facilitate a further autopsy by a pathologist of the accuseds' choice. The affidavit in support of the said application was sworn by Advocate Charles B. G. Ouma on 27.4.2006.

In a nutshell, the accused through their said advocate alleged that the accused were initially charged with the offence of assault causing actual bodily harm which was later changed to maim in Maseno SRM Criminal Cases Nos.983 and 937 and 965 all of 2005. Thereafter, the charge of murder was preferred against them. Their contention was that the postmortem report in possession of the prosecution on the body of the deceased, ***Johnson Ekhale***, was inconclusive because, in their view, the deceased's death was not caused by natural causes.

An order dated 3/3/2006 for disinterment of the body of the said deceased made by the learned Senior Resident Magistrate, W. B. Mokaya (Miss), in Kisumu SRM Misc. Criminal Application No.2 of 2006 was on 28.3.2006 set aside on revision by this court sitting in Kisumu in Kisumu H.C. Criminal Revision No.27 of 2006. There was no appeal against the order of revision. The High Court sat as an appellate court when it made its decision on revision.

Mr. Otete, learned counsel for the accused, conceded in his submission during the hearing of the said application that the order for disinterment by the lower Bench was revised by the High Court sitting in Kisumu as aforesaid. This was also borne out by the contents of paragraph 20 of the affidavit in support of the said application. However, Mr. Otete expressed the view that under section 77 of the Constitution, the accused persons had a right to access evidence to enable them to prepare for their defence in this case. **Section 77 (2)(c)** of the Constitution stipulates:-

77 (2) "Every person who is charged with a criminal offence:-

(c) shall be given adequate time and facilities for the preparation of his defence;

Have the accused been denied their constitutional right under this section as contended by Mr. Otete?

Mrs. Kithaka, Senior Principal State Counsel, submitted that the application in this case was unprocedural and section 387 of the Criminal Procedure Code, Cap 75, was not relevant as it relates to inquests. In her view, the police had investigated the crime and established the cause of death of the deceased following which the accused were charged.

I have duly perused the said application and given due consideration to the submissions of both counsel. Firstly, the application in this case was a replica of the earlier application made in the lower court in Maseno SRM Misc. Criminal Application No.2 of 2006 and the orders for disinterment made by the lower court in that application were revised and set aside by this court on revision as aforesaid. It is not alleged that new circumstances arose to give rise to the making of the said application. There not having been any appeal to the decision of this court on revision, the matter cannot be resuscitated on the same facts in an attempt to obtain the orders declined earlier. The matter has in law been conclusively decided and the said application is not only misplaced but is an abuse of the process of the court. For that reason, the application must fail.

Moreover, section 77 (2) (c) of the constitution invoked by the accused was not shown to have been breached and indeed the circumstances relied on in its invocation were not shown to have given rise even remotely to the alleged denial of the accuseds' right to adequate time and facilities to prepare for their defence. I agree with Mrs. Kithaka that **sections 386** and **387 of the Criminal Procedure Code, Cap 75**, had no relevance to the said application. The accused have been charged with murder and have pleaded not guilty and their case has been fixed for hearing. I do not understand them to say that the post mortem report in possession of the police is false or was illegally manufactured. There is simply no basis for the

orders they seek.

In the result, I dismiss the application by the accused.

Delivered, dated and signed at Kakamega this 14th day of December, ..2006

G. B. M. KARIUKI

J U D G E