Republic v Mandila (Criminal Case E022 of 2025)
[2025] KEHC 10702 (KLR) (22 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10702 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL CASE E022 OF 2025

S MBUNGI, J

JULY 22, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

MARTIN MANDILA AKA MARTO ..... ACCUSED

RULING

1. The accused is charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on the night of 26th of October 2023, at Murram Village in Lugari Subcounty within Kakamega County, jointly with another not before the court murdered Nelson Ongaya Mbaya.

2. On the 27th of May 2025, the prosecution made an oral application for the accused to be escorted to the hospital in for a blood sample to be taken from him for submission to the Government Analyst for DNA analysis. The prosecution states that a nail was recovered at the scene of crime and wit will be used as an exhibit. As such, it is intended to ascertain whether there is any connection between the blood on the nail and the accused.

3. The defence strongly opposes the application with the accused stating that he was reluctant to accept the DNA test.

4. Although counsel did not expressly state so, I understood the defence arguments against self-incrimination to be premised on Art 50(2)(l) and that of privacy to be premised on Article 31(a-c). The respective provisions are as follows:

> " 31. Every person has the right to privacy, which includes the right not to have—
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> (a) their person, home or property searched;
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> (b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed"

And

"50. (2) Every accused person has the right to a fair trial, which includes the right—

(l) ....to refuse to give self-incriminating evidence"

5. In response, the prosecution stated that the issue of a blood sample is very important to the justice of the case; that the sample may as much clear the accused as it may incriminate him; and that it was standard practice to obtain samples in such cases.

6. In my analysis, only two issues arise: Whether the requirement to provide a blood sample a is violation of the right to privacy; and whether it constitutes a violation of the right against self-incrimination.

7. The parties did not submit on the law or avail any authorities, nevertheless my research has led me to several legal positions and authorities

8. The statutory position with regard to blood sample provision in criminal cases is contained in Sections 122 A-D of the *Penal Code*. The provisions are in the following terms:

" 122A. Senior police officer may order DNA sampling procedure on suspect

(1) A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.

(2) In this section—

"DNA sampling procedure" means a procedure, carried out by a medical practitioner, consisting of—

(a) the taking of a sample of saliva or a sample by buccal swab;

(b) the taking of a sample of blood;

(c) the taking of a sample of hair from the head or underarm; or

(d) the taking of a sample from a fingernail or toenail or from under the nail, for the purpose of performing a test or analysis upon the sample in order to confirm or disprove a supposition concerning the identity of the person who committed a particular crime;

"Serious offence" means an offence punishable by imprisonment for a term of twelve months or more.

> 122B. Suspect to comply with order
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> Where a suspect in respect of whom an order has been made under section 122A resists compliance with the order, members of the police force, under supervision of an officer of or above the rank of inspector, shall be entitled to use reasonable force in restraining the suspect for the purpose of effecting the procedure.
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> ...
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> 122D. Order or consent to be proven
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> The results of any test or analysis carried out on a sample obtained from a DNA sampling procedure within the meaning of section 122A shall not be admissible in evidence at the request of the prosecution in any proceedings against the suspect unless an order under section 122A or a consent under 122C is first proven to have been made or given."

9. From a purely statutory standpoint under the *Penal Code* provisions, it appears that a police inspector, or above, has authority to order a suspect to provide a blood sample under the following criteria. First, that the person from whom the sample is sought is suspected of having committed a serious offence; second, that there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence; third, that the sample may help confirm the identity of the person who committed a particular crime.

10. Seeing as the law is very clear in Section 122 A of the *Penal Code* concerning the authority of a senior police officer to order for a DNA sampling procedure, I recommend that for future cases, the police force exercise their mandate to perform the same. This is of course with exception to causing prejudice to the accused or a contravention of their human rights according to Article 28 of the *Constitution* which states that, "Every person has inherent dignity and the right to have that dignity respected and protected."

Right to Privacy

11. The right to privacy is recognized in common law as an independent personality right, as it is under our constitution. Undergirding it is the concept of the individual's dignity. It denotes, in relation to one's body, the existence of a sphere of individual inviolability. This includes the protection of one's body from intrusions by the state and others and the correlated right to bodily autonomy or self-determination against interference or molestation. (See generally The Bill of Rights Handbook, Iain Currie and Jonathan De Waal 6th Ed 2016). Thus, the right to privacy is simply the right to be left alone. It guarantees your inherent right to ensure your private details are not publicly consumed without your consent.

12. Here in Kenya, in the case of *E M W K & Another v Attorney General & 3 others* [2017] eKLR Const Pet 347 of 2015, it was held that the petitioner, a girl who had been strip searched by the police, had

had her privacy and dignity violated. Mativo J found that although the right to privacy is protected in Kenya, it is not an absolute or illimitable right, when he stated;

> " 85. A strip search constitutes an interference with the privacy of the individual concerned. It is recognized that common law recognizes the right to privacy as an independent personality right. Privacy is therefore, a valuable aspect of one's personality. The right to privacy is protected in terms of both common law and the Constitution of Kenya. the right is however not absolute as there are competing factors such as maintaining law and order that can bear a significant limitation on the right. A careful weighing up of the right to privacy and other factors is necessary."

13. In the case of *S v Orrie* 2005 (1) SACR 63 (C), the High Court in South Africa held that the involuntary taking of a blood sample for the purposes of DNA sampling infringed both the right to bodily security and integrity, but that the infringement was justifiable. that court also held that suspects must be advised of their status as suspects.

14. Article 25 of the *Constitution* sets out the rights that are incapable of limitation. As they do not include the right to privacy, I consider that an accused person's right to privacy can be subjected to statutory limitations such as those in the *Penal Code*.

15. In the present case, what is sought is an order of the court to require the accused to avail a blood sample for purposes of criminal law administration. There is, as stated earlier, already statutory underpinning for a suspect to be required to avail a blood sample. What the statute demands is that an order in writing be issued by a police officer above the rank of inspector. The conditions to be fulfilled must be that the person from whom the sample is sought is suspected of having committed a serious offence; that there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence; third, that the sample may help confirm the identity of the person who committed a particular crime.

16. The application having been a simple oral application, and the response being equally simple and oral, there was no allegation that section 122 of the *Penal Code* is unconstitutional. All law is deemed constitutional unless specifically impugned and declared unconstitutional.

17. From this view, it cannot properly be argued that the accused's right to privacy will be infringed by an order for provision of a sample of his blood as the purpose is the administration of criminal justice.

Right against self incrimination

18. The question whether requiring the accused persons to provide blood samples amounts to giving self-incriminating evidence, and therefore, is constitutionally prohibited is still elusive. There are numerous judicial pronouncements on the subject I do not wish to multiply them. But suffice to cite what Majanja J stated when he encountered this question in the consolidated petition of *Richard Dickson Ogendo & 2 others v Attorney General & 5 others* [2014] eKLR that:

> " 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."

Kamau J also dealt with this question in the case *Republic v John Kithyululu* [2016] eKLR and stated the following:

> "“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. Article 50(2)(l) 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) (l) 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."

Odero J similarly dealt with the question in the case of *R v Amos Kipyegon Cheruiyot* [2016] eKLR and reached similar conclusion.

19. On my part, I agree with the postulation of the law in the foregoing cases and come to the same conclusion that Gikonyo, J did in *Republic v Timothy Mwenda Gichuru & 2 Others* [2017] eKLR that

> "...the right 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. Thus, blood sample is not compulsory oral examination or confessions or declarations; it is real or physical evidence which the accused could be compelled to provide if there are reasonable grounds to believe that DNA procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence."

20. Similarly, in *Republic v Godfrey Kipkemoi Kangogo* [2018] eKLR Criminal Case 34 of 2018 Ngugi, J dealing with a similar application for extraction of blood sample for purposes of DNA profiling, set out the arguments on the point, relying on the Supreme Court of USA in the case of *Schmerber v California* 384 U.S 757, 86 s. Ct. 1826 (1966) as follows:

> "It could not be denied that in requiring petitioner to submit to the withdrawal and chemical analysis of his blood the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purposes of the privilege. The critical question, then is whether petitioner was thus compelled "to be a witness against himself."... In the present case.....Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.
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> 15. In other words, the US Supreme Court held that the privilege against self-incrimination seeks to protect compulsion against "testimonial" disclosures.

> This means that the privilege is not violated by such non-testimonial compulsions as requiring a person to provide a blood sample; a handwriting sample; fingerprints or to participate in an Identification Parade or even to speak certain words or model particular clothing. Other US Supreme Court cases that have similarly held including *United States v Wade*, 388 U.S. 218, 221–23 (1967) and *Holt v United States*, 218 U.S. 245, 252 (1910)."

21. Ngugi J concluded *R v Godfrey Kipkemoi* (*supra*) by finding that:

> " ...the request for the samples of blood, saliva, head hair, pubic hair, finger nails and buccal swabs from the Accused Person so that they can be compared to those of the Deceased which were collected during the post-mortem examination on 12th July, 2018 is justified",

I therefore aver that the Prosecution must demonstrate that there are reasonable grounds to believe that the DNA sampling procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.

22. In *John Kithyululu v Republic* (Voi High Court Crim. Case No. 12 of 2015) Kamau J held as follows:

> " 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.
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> 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.
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> 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.
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> ...
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> Article 50(2)(l) of the *Constitution of Kenya* therefore only related 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 rights under the provisions of Article 50(2)(l) of the *Constitution* if his blood sample was taken because taking of samples is per se not unconstitutional or an infringement of an Accused Person's rights.

23. In the present case, I see no reason to deviate from the general rationales given in the authorities cited. I think the correct position is that extraction of blood for sampling by DNA does not amount to obtaining evidence of a testimonial or communicative nature. Accordingly, such an exercise does not violate the accused person's right against self-incrimination. I so find and hold.

24. Accordingly, I direct as follows:

    a. The accused shall present himself to the Investigating Officer in this case within fourteen days from the date hereof;

    b. The Investigating Officer and such other senior officer of the rank of inspector or above, shall escort the accused to Kisumu Government Chemist;

    c. A doctor at the said hospital shall extract a sample of blood from the accused and the same shall be duly submitted to the Government Chemist/ Analyst for DNA profiling.

    d. The report of the results of the said profiling and analysis shall be availed to the prosecutor and the defence counsel, when concluded.

25. The defense has the right to appeal.

26. It is so ordered.

27. Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT OF KAKAEMGA THIS 22ND DAY OF JULY, 2025.

S. N MBUNGI

JUDGE

In the presence of:-

Elizabeth Angong'a-Court Assistant