



REPUBLIC OF KENYA



**Republic v Mbae (Criminal Case E018 of 2023)
[2024] KEHC 2320 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E018 OF 2023
LM NJUGUNA, J
MARCH 6, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

CLINTON GITONGA MBAE ACCUSED

RULING

1. The accused/applicant filed a notice of preliminary objection dated 07th February 2024 against the production of the postmortem report as evidence and seeking that the same be rendered inadmissible. The objection is premised on grounds that:
 - a. The postmortem procedure conducted on the deceased is rendered unconstitutional and illegal for being conducted by an unqualified person;
 - b. The postmortem report be rendered inadmissible as it is prepared by an unqualified person thus flaunting the National Coroner's Service Act, the laws of natural justice and the Constitution; and
 - c. The postmortem report is drawn and structured in biasness, recklessly branding the unnatural death investigation as murder thus depriving the accused his right to fair hearing against Article 50 of the Constitution.
2. The accused/applicant is charged with Murder contrary to section 203 as read together with section 204 of the Penal Code. Particulars of the offence are that on the night of 05th – 06th March 2023 at Gatondo Village in Embu West Subcounty within Embu County, jointly with others not before this court, the accused murdered Justine Muceri.
3. The accused took a plea of not guilty and the same was duly entered. The case proceeded to trial and the prosecution called its witnesses. PW1 was Dr. Godfrey Njuki Njiru of Embu Level 5 Hospital. He



stated that he conducted a postmortem on the body of the deceased, which was identified by 2 relatives accompanied by PC Leonard Ochoro. He observed that the deceased had a stab wound on the left side of the chest and the left lung had collapsed into the chest region. He opined that the same could have affected the left ventricle. He concluded that the cause of death was due to massive bleeding into the left chest cavity with injury to the heart. That he signed the postmortem report which was also stamped. The postmortem report was produced as an exhibit marked as MF11.

4. Counsel for the accused raised an objection, stating that according to the postmortem report, the age and gender of the deceased should be established and these details are meant to guide the doctor on what is required. That the report also states that the deceased was found dead and therefore, there is no need to investigate the cause of death besides the narrative provided on the postmortem report. It was his argument that the preparation of the postmortem report was an abrogation of the duty of the Attorney General, the Office of the Director of Public Prosecutions and the Executive because postmortems are not conducted in accordance with the [National Coroners Service Act](#). He argued that according to Section 4 of the said [Act](#), it is only the County Coroner who is mandated to investigate natural deaths, but since commencement of the Act, there has been no appointment of the County Coroner.
5. It was his argument that the purpose of the [National Coroners Service Act](#) is to delink investigation of natural deaths from other deaths and that the office of the Coroner is supposed to be an independent office. That PW1 is a stranger in the proceedings as he does not work with the Police or the ODPP and therefore, his testimony should not be allowed by the court. That in the absence of a Coroner-General, no other person should purport to perform the duties of a coroner. That the report is unconstitutional and illegal and that the coroner should work independently of the police.
6. That a pathologist should not be allowed get into extensive details of the findings at the risk of failing to be accurate, as stated on page 3 of the postmortem report. That the purported findings do not disclose the time of death and any other causes which could have contributed to the death. That the findings raise doubts as to the cause of death as the same are shallow and that the report does not conform to the law and should be struck out.
7. The prosecution did not file any response to the notice of preliminary objection. The court directed the parties to file their submissions and both of them complied.
8. The accused/applicant submitted that according to the [National Coroners Service Act](#), the Office of the Coroner-General is the only independent body tasked with investigating reportable deaths. Reliance was placed on Sections 6, 9, 15, 18, 20, 22 and 28 of the said [Act](#) and stated that qualified persons under the said Act are trained professionals who are duly appointed and gazetted as coroners. That PW1 is a trained professional as a medical officer but is not appointed and gazetted as a coroner within the meaning of the Act and so his evidence should not be admitted as evidence. That the respondent has not proved that PW1 is duly appointed and gazetted as a coroner. Reliance was placed on the case of *R. v Singh* [1989] 1 QB501, *Jones v Saskatoon* [1994] and *R. v Smith* [1995] where the general sentiment of the courts was that postmortem reports prepared by unqualified persons are inadmissible as evidence.
9. That evidence that is illegally obtained is inadmissible as was held in the case of *Anthony Wakutu Kibandi v Republic* [2020] eKLR. It was his argument that Section 8 of the [Public Officers Ethics Act](#) demands that public officers must exercise professionalism while discharging their duties and they must not present false information to private or public entities. That PW1's illegal execution of his duties denies the applicant's rights under Article 50 of the [Constitution](#). That the postmortem report shows bias against the applicant and it recklessly flaunts Articles 10 and 50 of the [Constitution](#), Section 16(2) of the [National Coroners Service Act](#), and Section 9 of the [Public Officers Ethics Act](#). Further reliance



was placed on the case of *R. v Rosier* [2005] EWCA Crim.195. He urged the court to strike out the postmortem report.

10. The respondent submitted that under Section 386(1) and (2) of the *Criminal Procedure Code*, where there is doubt as to the cause of death of a person, the police are empowered to present a body of a deceased person for examination to the nearest medical officer or other person appointed by the minister. That the said provision stipulates the manner in which a postmortem report should be prepared and PW1 complied with the process. That the applicant correctly stated that the *National Coroners Service Act* was enacted but has not taken effect so that its mandate as provided under Sections 26, 28 and 32 cannot be achieved. That in the absence of regulations to operationalize the *National Coroners Service Act*, Section 386 of the *Criminal procedure Code* remains authoritative as it has not been repealed or rendered unconstitutional. It urged the court to dismiss the preliminary objection.
11. The issue for determination herein is whether the postmortem report should be struck out because it was prepared by PW1, a medical doctor not gazetted under the *National Coroners Service Act*.
12. The *National Coroners Service Act* commenced on 07th July 2017 to establish the independent National Coroners Service. That Act prescribes establishment of the Coroner-General and other officers and staff within in the service. The Coroner service is mandated to, inter alia, conduct postmortem under Section 43 of the *Act*. In fact, section 43(2) of the same *act* provides that the coroner may hire a suitably qualified practitioner, qualified medical practitioner, medical provider or any other expert to conduct a post-mortem examination of a body.
13. The *National Coroners Service Act* is indeed in force. However, its actual implementation is a matter of policy which is usually guided by the regulations as provided for under section 74 of the said Act as follows:

74. Regulations

- (1) The Cabinet Secretary may make regulations generally for the better carrying out of the provisions of this Act.
- (2) Without prejudice to subsection (1), the regulations may prescribe—
 - (a) any matter of procedure or practice under this Act;
 - (b) circumstances when a medical practitioner shall be required to notify a coroner of a death of a person whom the practitioner was attending;
 - (c) other categories of reportable deaths;
 - (d) requirement for a registered medical practitioner who attended the deceased before his or her death—
 - i. to prepare a certificate stating the cause of death to the best of the practitioner's knowledge and belief; or
 - ii. where the practitioner is unable to establish the cause of death, to refer the case to a coroner.
- (3) The power to make regulations under this Act shall be—
 - (a) for the purpose and objective of giving effect to the *Constitution* and this Act;
 - (b) limited to the nature and scope specifically stipulated in the *Constitution* and this Act.



14. The regulations would guide a coroner on whom they may hire for purposes of section 43 of the Act. In the absence of these regulations, it is impossible to also adopt any prescribed forms because the forms have not yet been prescribed. The function of making laws is a preserve of the legislature while the courts are tasked with interpreting it. In the case of the National Coroners Service Act, the law is in force but its implementation heavily depends on the enactment of regulations, which have not yet been put in place. In the preliminary objection, the applicant makes a valid argument, but the National Coroners Service Act cannot be the basis for rendering PW1’s testimony inadmissible as the Cabinet Secretary responsible is yet to make the relevant regulations for use in operationalizing the Act.
15. On the other hand, and most importantly, there is already in place a law that speaks to the admissibility of PW1’s testimony. As rightly pointed out by the respondent, Section 386(2) of the Criminal Procedure Code is still in force and applicable in this case. Its fate is unknown when the National Coroners Service Act will be fully operationalized but for now, it is the applicable law in this regard. It states thus:
- “(2) When, except in the case of a missing person believed to be dead there is any doubt regarding the cause of death, or when for any other reason the police officer considers it expedient to do so, he shall, subject to any rule made by the Minister, forward the body, with a view to its being examined, to the nearest medical officer or other person appointed by the Minister in that behalf, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render the examination useless.”
16. In this case, the cause of death of the deceased was in question and therefore the body of the deceased was presented to Embu Level 5 Hospital for postmortem. According to the information, the alleged murder occurred within Embu County and the police officers were within the law by presenting the body at the said hospital where it was examined by PW1. In my view, this is within the meaning of the above cited provision.
17. In the upshot, I find no merit in the preliminary objection and I hereby dismiss it.
18. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 06TH DAY OF MARCH, 2024.

L. NJUGUNA

JUDGE

.....for the Applicant

for the Respondent

