



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. CRIMINAL APPLICATION NO. E002 OF 2020

NICHOLAS MWANGI MUGO.....1ST APPLICANT

THOMAS MUTHEE MUGO.....2ND APPLICANT

CHARLES MAINA MUGO.....3RD APPLICANT

FRANCIS KIMANI MUGO.....4TH APPLICANT

VERSUS

LUCY NYAGUTHII KIMANI.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS..3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

THE MINISTRY OF HEALTH.....5TH RESPONDENT

KIRINYAGA COUNTY HEALTH

EXECUTIVE/CEC HEALTH.....6TH RESPONDENT

RULING

1. The background to the **application dated 5.11.2020** is fairly straight forward.

The applicants are sons of the 1st Respondent who is the second wife of the deceased, one Titus Mugo, who died at Trinity Hospital on the 25.10.2020, having been admitted therein for treatment.

Earlier on, the deceased had been in and out of hospital, specifically Aga Khan Hospital since October 2019 with numerous ailments.

From the affidavits filed, it is not clear whether the applicants were in touch with their late father the deceased. I say so because being grown up men, they ought to have known that their father was unwell, and was in and out of hospital. If they were, then, they have decided to withhold very vital information from the court.

2. However, a keen perusal and consideration of the affidavits in support of the application sworn by each of the applicants, which are basically repetitive, none of them deponed to have known that fact, or even visited their father while he was in hospital.

The only glimpse or semblance of such is the deposition of one of the sons, the 1st Applicant, Nicholas Mwangi Mugo, that his brother Peter Wambettah Mugo who resides in the United States of America had communicated to him about their father's illness and admission into hospital. Suffice to say that the applicants were aware of their father illness, and his hospitalization.

3. By the affidavits, it is also clear that the deceased used to live at Ngong with the 1st Respondent while the residences of the applicants are undisclosed.

4. While admitted at Trinity Hospital on the 21.10.2020, the deceased passed away. The Applicant's disposition is that the 1st Respondent did not inform them of their father's death and only learnt from neighbours of their father's death. They also claim that they were excluded from viewing the body at the Kenyatta Hospital Mortuary nor were they allowed to take part in the burial arrangements. They further claim that they were not included as next of kin of the deceased at the Trinity Hospital.

They did not however say that they were barred from visiting him while at the hospital, nor that they were chased away from the venue of meetings to prepare the burial.

5. By the affidavit evidence placed before the court by the applicants, there seem to have been no bad blood between the two families. Trouble came when one of the applicants, the 1st applicant claimed that his father and his brother who resided at the United States of America one Peter Wambettah Mugo told him that he had communication with his father that the 1st Respondent had no good intentions towards their father, and wanted to kill him. This communication is alleged to have been via some electronic messages, attached as exhibits to the 1st Applicants affidavit.

6. The applicants further deponed that they reported the said messages to the Police Station under OB No. 12/28/10/2020 for investigation but nothing was done. They then approached the court via this application for several reliefs, including one for an order to delay the burial to wait for a post mortem on the body of the deceased to determine the cause of death as they suspected foul play. The application was not heard and the burial took place on the 3.11.2020 when the hearing of the application was scheduled for the 4.11.2020.

The above material facts gave rise to the present application, See paragraph 7.

7. The Notice of Motion dated 5.11.2020

It is premised on the provisions of **Section 146 of the Public Health Act**. The applicants seek the following orders: -

1) Spent.

2) Spent.

3) That the 5th or 6th Respondents or by themselves or persons with their authority exhume or permit the exhumation of the body of Titus Mugo Kimani that was buried at Kariti in Sagana.

4) That upon granting prayer 2 above the court do direct the O.C.S Sagana Police Station to provide security during the exercise.

5) That the court be pleased to direct a post mortem to be conducted on the deceased to ascertain the cause of death and the applicants be allowed to be present by themselves or appointed representatives.

6) That during the reburial of the deceased the applicants and members of their family be allowed to be present.

The application is supported by affidavits of each of the applicants and opposed by a replying affidavit of the 1st Respondent.

8. Though served with the application and an affidavit of service filed on the 25.11.2020, only the 1st, 2nd, 3rd and 4th Respondents entered appearance. It is only the 1st Respondent who filed a response as stated above. The Applicants and the 1st Respondent filed their submissions to urge the court on their respective positions.

The applicants filed their submissions by their Advocates Wetaba Were & Associates on the 12.1.2020 while the 1st Respondent by Wahome Gikonyo & Co. Advocates filed her submissions on even date.

I have considered the affidavit evidence and authorities cited by both parties.

9. Issues for Determination

i. Whether the applicants have met the legal threshold for orders of exhumation of the deceased's body.

ii. Whether the applicants have satisfied the requirements under Section 106 B (2) & (4) of the Evidence Act, Cap 80 Laws of Kenya.

Analysis and Determination

10. At the beginning of this ruling, I have stated the material facts in respect of this application, as placed before me.

By and large, the affidavit evidence is not supported by any credible evidence. It is however clear that the applicants were well aware of their father's illness. They however failed to disclose whether or not the 1st Respondent, their step mother barred them from visiting their father in hospital, or whether they actually did.

All what they capitalised on is the alleged text messages from one of their brother; who resides out of the country.

I have looked at the alleged text messages. They do not show where they came from, the author or the recipient.

11. Though the Applicant's reported a complaint to the police before the burial, it is not clear, and it has not been stated why no investigation was conducted. The 2nd Respondent filed no reply to the application.

It is also not clear or stated why a post mortem was not conducted at the Trinity Hospital or at the mortuary before the deceased was buried. The Applicants have not stated that they were barred from, or requested for the postmortem to be conducted and were denied either at the hospital or at the mortuary.

12. What is clear is that the deceased was ill for a long period of time, from October 2019 upto to 25.10.2020 when he died. This is confirmed by medical records produced by the 1st Respondent from Trinity Care Centre dated 17.11.2020 where the deceased was hospitalised, and German Medical Centre dated 23.10.2020, where several medical tests were conducted.

The Applicants have not faulted these medical records nor denied that they knew their father was hospitalised.

13. There is no evidence at all tendered by the applicants that they requested for a post mortem to be conducted and it was denied. I have perused all the affidavits and I am not convinced that the applicant's made any requests that were turned down. It seems that the only complaint arose upon the death of the deceased from the alleged communication from their brother.

14. It is interesting that the applicants in their written submission failed to interrogate the material facts, by faulting them or accepting them save faulting the police for abdication of their duty when a complaint was made. Indeed, I agree there was no reason why the police did not take any action on the complaint. Other than stating that the applicants were barred from the funeral preparations, nothing was placed before the court to authenticate the claim. No third party swore an affidavit to that effect.

15. I have perused the Funeral Programme. All the deceased's family is stated there, including the applicants. Indeed, his ill health is well stated, starting from 2019 upto date of death. It is trite law that he who alleges must prove **Sections 107 – 109 Evidence Act**. The burden of prove in a criminal matter is beyond reasonable doubt. It is therefore not just enough to state without offering any prove.

16. I am convinced that the deceased's illness was known to his family, including the applicants at all material times. The issue of foul play given the circumstances does therefore not arise, and none was proved.

17. In the case of **Elijah Oginda V- Directorate of Criminal Investigations & Another. (2019) eKLR.**

The court, faced with the question as to whether to exhume a body or not, rendered that:

“The test is simply whether justice requires accommodating the appellants position regarding emotional trauma without a doubt, the pendulant swing heavily in favour of truth and justice.

18. In the **Re: Matheson (deceased) (1958) ALL E.R 202, Justice D.A. Onyancha.** quoting par 4 & 5 thus:

“From time immemorial it has been the natural desire of most men that after their death, their bodies should not only be decently and reverently interred, but should also not remain in the grave undisturbed. This how it should and is indeed respected by societal institutions including the Courts of Law”.

19. The applicants have not told the court whether or not they were barred from attending their father's funeral. Indeed, a party ought to place all relevant materials before the court to enable it arrive at a just and truthful determination.

The alleged text messages that apparently are the course of the dispute in this application, in my considered view ought to be governed by the above legal provisions and strictly complied with; failing which they cannot be admitted as evidence.

In the case **County Assembly of Kisumu & 2 Others V. Kisumu County Assembly Service Board & 6 Others (2015) eKLR**, the court rendered that the provisions of **Section 106 B of the Evidence Act** were mandatory in nature and that a court should not admit in evidence or rely on manipulated electronic evidence or record.

20. **Section 106 B (4)** provides:

“In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following –

(a) Identifying the electronic record containing the statement and describing the manner in which it was produced.

(b) Giving such particulars of any device involved in the production of that electronic record as may be

appropriate-----

As stated earlier, the text messages relied on by the applicants lack all the ingredients contained in **Section 106 B** and therefore cannot be admitted as evidence - **County Assembly of Kisumu – Supra**

21. The result is that the alleged messages carry no evidential value, and cannot be admitted as such. That being the case then, the court cannot rely on unauthenticated materials to come to a just decision. It is trite that a court cannot rely on suspicious evidence alone to sustain a conviction, or any finding based thereon.

21. In their own affidavit – evidence, the applicants state that the alleged text messages were the basis of this application as they suspected foul play in the death of their father. Everything they relied on was suspicious. They had no *iota* of proof.

As held in the case **Kanyi -vs- R (1991) eKLR**, suspicion alone cannot suffice as evidence, and is not a substitute for the prerequisite evidence beyond reasonable doubt.

22. For the foregoing, I find and hold that the applicant’s application lacks merit and must be dismissed. It is so dismissed, with no orders on costs.

Orders accordingly.

DATED AND SIGNED THIS.....DAY OF.....2021

J. N. MULWA

JUDGE

DATED AND DELIVERED AT KERUGOYA THIS 7TH DAY OF NOVEMBER 2021

R. M. MWONGO

JUDGE