



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL CASE NO 9 OF 2016

REPUBLIC.....PROSECUTOR/RESPONDENT

VERSUS

SULEIMAN MWAGANDI KIPONDA

TONY MWAGANDI KIPONDO alias MUMBA

SAFARI MWALIMU alias NGONYO.....ACCUSED/APPLICANTS

RULING

1. The Accused (hereinafter Applicants) filed a Notice of Motion application dated 8th July 2019 brought under Article 49 (1) (f) & (g), Article 50 (1) (2) (b) (c) (d) (f) (g) (h) (j) (l) (4), Article 31 and 28 of the Constitution of Kenya seeking for orders that:-

- i. A declaration that section 55 of the National Police Service Act violates the constitutional rights of an accused person as regards evidence gathering.
- ii. That the exhibits 6 and 11 (a), (b) & (c) be expunged from the record as they were illegally obtained and their admission will result in an unfair trial.
- iii. That the court calls for and examines the record of the Miscellaneous proceedings that allegedly took place at the Magistrate's Court in Malindi.
- iv. That the court supplies the defence with the said records of the miscellaneous proceedings that allegedly took place in the Magistrate's Court on/or 24th February 2016.
- v. That the Prosecution produces the Investigation Diary of this instant case.
- vi. Any other order that this Honourable Court deems fit to meet the ends of justice.

2. The Application is supported by the Affidavit of each Applicant dated 8th July 2019. They state in their identical affidavits that they were detained on the 20th February 2016 when they went to report an assault at Lamu Police Station. On the same day at around 2pm the Investigation Officer (PW8), Ole Shakei, beat up the 1st Applicant and forcibly removed his t-shirt and short leaving him naked for the night. They averred that on the 22nd February, 2016 the Investigating Officer forcibly took them to the hospital on Lamu Island where their blood samples were taken without their consent. That when they tried to inquire why their blood was being taken they were beaten by PW8.

3. The Applicants further stated that on the 24th February 2016, they were bundled into the police Land cruiser and transported to Malindi Law Courts without being informed what was happening. That during their transportation, PW8 continued to beat them on the legs and stomach. That when they arrived at Malindi Law Courts they were not part of the proceedings in court as they remained in the cells and therefore they did not know what transpired in court until 2nd July 2019 during the main hearing in this case. They stated that they were never served with the pleadings or application nor were they served with the order of the court but were informed that the Magistrate declined to hear their case. That during their detention at Lamu Police Station, the Applicants were not informed of their rights as arrested persons and they were never taken to hospital despite having injuries from the assault.

4. The Applicants further stated that the exhibits or evidence were obtained by violation of their constitutional rights and freedoms enshrined in Articles 28, 31, 49, 50 and 51 of the Constitution of Kenya and therefore the evidence must be excluded and that their admission would

otherwise render the trial unfair. They stated that the police were seeking protection under section 55 of the National Police Service Act, which is inferior to the Constitution. They further stated that the police had forum shopped looking for a friendly Magistrate to endorse the violation of their rights and prayed that the Application be allowed.

5. The prosecution opposed the application by way of a Replying Affidavit of Corporal Daniel Ole Shakei dated 15th July 2019. He stated that on 20th February 2016 he was called by sergeant Jiwa to join him to visit the scene of a murder. That he returned to Lamu Police Station and while booking the murder in the occurrence book (O.B) he noted that the Applicants had made a report at 09.50hrs alleging that they had been assaulted by the deceased but had managed to overpower him and taken his machete. He stated that he was given the blood-stained machete and when shown the Applicants, he noted that the 1st Accused Applicant had blood-stained patterns on his clothes. He rushed back where the deceased's body lay and obtained a blood sample and thereafter returned to the police station where he requested for the blood-stained clothes from the 1st Accused Applicant and gave him alternative clothing. He denied that he took the clothes by force.

6. Ole Shakei deponed that the Applicants were arrested on 20th February 2016 which was a Saturday and therefore they could not be arraigned before a court. That on Monday 22nd February 2016, he prepared an application to allow him to conduct further investigations. That he explained the application to the Applicants before presenting them in Lamu Law Courts from where they were referred to Garsen Law Courts where a judge with jurisdiction to handle murder cases sat. That on arrival at Garsen Law Courts they were informed that the presiding Judge and the magistrate were away on official duty and were advised to proceed to Malindi Law Courts. That at Malindi Law Courts, the prosecution counsel presented the application before a competent Magistrate in presence of the Accused Applicants and orders were granted.

7. Cpl. Ole Shakei further explained that the Accused Applicants were taken back to Lamu on the same day where their blood samples were taken for further investigation and which samples yielded a negative result. He contended that obtaining blood samples from an accused person pursuant to section 55 of the National Police Service Act or pursuant to a Court Order does not infringe on the rights of an accused person not to self-incriminate. He asked that the application be dismissed.

Submissions

8. The matter came up for hearing on the 17th July 2019. The Applicants' submissions dated 16th July 2019 were filed and highlighted by Ms. Aoko their learned counsel. She submitted that the NPSA was unconstitutional as it opened a door for abuse of the accuseds' right to refuse to give self-incriminating evidence contrary to Article 50 of the Constitution. That the evidence was obtained by force by the police who beat the Accused and that the acts amounted to inhumane and degrading treatment contrary to Article 25(a) (b) and (c) and Article 28 of the Constitution. She relied on the case of **Anthony Muriithi vs OCS Meru Police Station & 2 others [2012] eKLR**.

9. Counsel submitted that the Applicants' right to a fair and public hearing were violated as they were not informed of the reason for their detention, and were not served with the Application before the Malindi Court and did not participate in the hearing. Further, that the police and prosecution looked for a friendly court to issue orders and that the Applicants were denied the right not to give self-incriminating evidence. She relied on the **Republic vs John Kithyululu [2016] eKLR; Richard Dickson Ogendo & 2 others vs Attorney General & 5 others [2014] eKLR**, and; **Republic vs Elizabeth Nangila Makokha [2018] eKLR**. She urged that evidence that was obtained by violation of constitutional rights and freedoms should be expunged from the trial court record and prayed that the application be allowed.

10. Mr. Kasyoka, learned prosecution counsel gave oral submissions. He adopted the averments in the Replying Affidavit of Corporal Ole Shakei and stated that they did not forum shop for a friendly Magistrate but rather they were referred to Garsen then Malindi Law Courts. He submitted that section 55 of the NPSA did not infringe the Applicants' rights not to give self-incriminating evidence as it did not apply where samples were taken. He relied on the case the matter of **COL & another vs Resident Magistrate – Kwale Court & 4 Others [2016] eKLR**.

11. Counsel further submitted that the accused persons never raised the issue of being beaten and that they were present in court in Malindi. He urged that under Article 157 (6) (b) of the Constitution, any other party could institute proceedings and that the Investigating Officer was within his legal mandate to institute the proceedings in Malindi Law Courts. Finally, Mr. Kasyoka submitted that he was not opposed to the prayer 5 and would avail the O.B and investigation diary to the defence.

12. In reply, Ms. Aoko submitted that taking of blood samples could only be done with the consent of the accused. She stated that the court declined the prosecution's request for blood samples from the Accused and prayed that the proceedings before the Magistrate Court, Misc 4 of 2016 be declared a nullity and compensation be paid to the Applicants.

Analysis and Determination

13. I have given due consideration to the pleadings and submissions by both parties. The only issue for determination is whether the blood samples of the Accused were illegally obtained and therefore inadmissible.

14. **Section 55** of the National Police Service Act states that:-

1. A magistrate or a police officer, and any other person appointed to give certificates under [subsection \(2\)](#) of [section 142](#) of the Criminal Procedure Code ([Cap. 75](#)), may take, or cause to be taken in his presence, for the purposes of record and identification, the measurements, photographs, footprints and casts thereof, palm-prints, finger-prints and other forensic evidence of any person in lawful custody or who is subject to police supervision.

2. ...

3. The magistrate, police officer or person appointed as the case may be, shall certify on the prescribed form that the foot prints, finger-prints, palm-prints and other forensic evidence have been taken by him, or caused to be taken in his presence, in accordance with the directions contained on such form, and that the particulars entered on such form are to the best of his knowledge and belief accurate and true.

15. Both the prosecution and the Applicants have intimated that the blood samples taken from the Applicants were obtained pursuant to the above provision of law. However, the question is whether blood samples falls within forensic evidence as used in the section.

16. Forensic evidence has been define in **Black Law’s Dictionary, 8th edition** as:-

“Evidence used in court; esp., evidence arrived at by scientific or technical means, such as ballistic or medical evidence.”

17. From the above definition, it is clear that the term forensic evidence is general and covers a wide field of items and therefore needs to be construed in accordance to *ejusdem generis* rule.

18. **Black Law’s Dictionary, 8th edition** defines *ejusdem generis* rule as:-

“A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items on the same class as those listed.....”

19. In **Spentech Engineering Limited v Methode Limited & 2 others [2017] eKLR** Onguto J defined the *ejusdem generis* rule as follows:-

“The ejusdem generis rule of statutory construction is basically to the effect that wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same character. Of the word “other”, Strouds Judicial Dictionary 3rd Ed says the following in relation to the ejusdem generis rule:

“Where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces ‘other’ persons or things – the word ‘other’ will generally be read as ‘other such like’, so that the persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to, or different from, those specifically enumerated.”

45. Effectively, if one can find that things described by particular words have a common characteristic which constitutes them as a genus then you ought to limit the general words which follow them to the things of that genus.”

20. Section 55 of the NPSA relates to evidence of measurements, photographs, footprints palm-prints, finger-prints which, using the *ejusdem generis* rule of interpretation, are not in the same class or genus as blood samples which must be extracted through a medical process and therefore such blood samples cannot be taken under this provision.

21. The correct provision of law with regards to collection of blood samples is found under **Section 122A** of the Penal Code which provides that:-

(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.

22. **Section 122C** further provides that a sample can be taken with the written consent of the accused person.

23. On the issue of collection of blood sample, the Court of Appeal in **Abiud Muchiri Alex & another v Republic [2015] eKLR** the pronounced itself thus: -

“...Such samples are to be extracted by a police officer of or above the rank of inspector. They are either extracted voluntarily with the written consent of the person from whom they are extracted or by with an order of court compelling such involuntary extraction of the samples.”

24. In the persuasive decision in **Republic v Timothy Mwenda Gichuru & 2 others [2017] eKLR** Gikonyo J, held that:-

“... But I must state here that although our statutory law on provision of blood sample is sprinkled in various statutes, the core of the matter is that courts may direct a person charged with serious offence to provide blood samples for purposes of DNA testing 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. As Odero J stated, it cannot be that an accused person charged under the Sexual Offences Act could be ordered to provide blood samples yet another charged with a serious offence under a different statute cannot be so directed; I think we should be guided by the overall objective of administration of criminal justice for all; the accused; the victims; and the society.

.... Therefore, the manner in which the blood sample for DNA testing and sampling is obtained is a matter of the Constitution and the law. Accordingly, where a person has not given blood samples voluntarily, an order of the court is required to compel the person to provide the blood sample.”

25. Guided by the said provision of law and case law, it is trite that for a blood sample to be collected from an arrested person or an accused person, the said person must have given his written consent and where no such consent is given, by way of a court order. While it is clear that the Applicants' herein did not give their consent, the question before this court is whether the police obtained a court order allowing them to collect the blood samples.

26. In the Replying Affidavit of Corporal Daniel Ole Shakei, the prosecution attached their application (marked “D.O.S 3”) which was argued before the Magistrate on the 22nd February 2016. The application was brought under the provision of Article 49 (1)(g) and sought the main order that: -

2. THAT, the Honourable court be pleased to issue an order to PC Daniel Ole Shakei a police officer attached to the Directorate of Criminal Investigation Lamu West to enable him to hold the 1st, 2nd and 3rd Respondents at Lamu Police Station for fourteen days pending further forensic investigation.

27. From the orders sought it is clear that the Investigating Officer was seeking an extension of time to continue holding the arrested persons beyond the constitutional period of 24 hours to enable them to carry out further investigation. There was no prayer sought that allowed the said investigating officer to extract blood samples from the arrested persons. This was further evidenced by the order of the Magistrate dated the 22nd February 2019, which ordered that the three suspects were to be detained in Lamu Police Station for 14 days pending completion of investigations. I must agree with the defence counsel that the extraction of blood samples from the Applicants was done contrary to law and cannot be admissible.

28. The Applicants also sought that Exhibit 6 (Report of the Government Analyst) be expunged from the court record. I have perused the said report and I note that the findings of the said report are not wholly dependent on the fresh blood samples taken from the Applicants and is therefore admissible in so far as it does not relate to the blood samples taken from the Applicants. In this respect, I observe that there was DNA obtained from dry blood samples which was extracted from various clothing which clearly falls within the collection of forensic evidence by the police investigators.

29. With respect to the dry blood samples collected from the Applicants' clothing, the Applicants contended that they were forcibly stripped and beaten. I have found no evidence of these allegations. It is common ground between the parties that the Applicants were arrested when they went to the police station to report that they had been assaulted by the deceased and other people. The Respondents state in the replying affidavit of Ole Shakei that he observed that 1st Accused had blood stained clothing and that is when he asked him to remove them and provided him with a change of clothing. I dismiss the argument that the Applicants were forced to give self-incriminating evidence as the law against self-incrimination is limited to giving oral or documentary evidence. It would not apply to collection of forensic evidence as happened in this case.

30. Further, the Applicants did not raise the issue of their alleged mistreatment when they first appeared before court. They were first presented before the Hon. SM Nyaga on 9th March 2016 who informed them of the charges they faced and informed them that the trial judge was away. On 15th March, 2016, they appeared before Ongeri J who ordered a psychiatric report and the appointment of defence counsel. It is notable that the Applicants were able to address the court on the issue of bond but did not mention any maltreatment.

31. The court further observes that the Accused have always been represented from the time defence counsel came on record on 27th April 2016 and that their counsel would have raised any violation of the law at the earliest opportunity. I consider the allegations being made at the tail end of the trial to be an afterthought and not borne by evidence. My finding therefore is that the forensic evidence taken from the Applicants' clothing fall within the provisions of Section 55 of the NPSA and was not obtained illegally.

32. On the issue of whether section 55 of the NPSA violates the constitutional rights of an accused person, I am of the view that the constitutionality or otherwise of a law cannot be dealt with in a miscellaneous criminal application such as the one before this court. The **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** sets the guidelines for instituting suits on matters concerning the Constitution of Kenya.

Rule 4 of the Rules provides that: -

“Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.”

33. **Rule 10** provides that an application brought under Rule 4 shall be by way of a Petition. It is expected then that all necessary parties would be enjoined in such a petition.

34. In **Registrar of Trade Unions v Nicky Njuguna & 4 others [2017] eKLR**, the Court of Appeal held that: -

“Counsel for the appellant submitted and rightly so, that matters touching on constitutionality of laws should be commenced by way of Constitutional Petitions under the High Court Practice and Procedure Rules and Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013 (Mutunga Rules). We agree because as much as counsel dismissed this, as a mere procedural technicality, we reiterate the orders sought had far reaching implications and taking a short cut did not help the respondents.....What concerns even most is the fact that key parties or primary parties who are mandated by the Constitution to defend the Rule of law and public interest such as the Attorney General was not a party to the motion nor was the office served.....We also find it was too late for the Judge to determine the matter and merely direct the Attorney General and the Inspector General of the police be served after the event.”

35. I am guided by the above decision to hold that in order for the court to determine the constitutionality of **Sec 55 of the NPSA**, it must be brought before the court as a substantive issue by way of a Constitutional Petition and the relevant parties including the Attorney General be enjoined in such a petition. I therefore decline to delve further into this issue.

36. In the final analysis, I find that the Applicants’ application is partially merited and I therefore order as follows: -

- i. That exhibit 6 shall only be admissible to the extent it does not rely on the blood samples of the Accused persons being exhibit 11 (a), (b) and (c). For the avoidance of doubt, exhibits D1, D2, MW, SMK1, and SMK2 were not illegally obtained. The evidence with respect to the dry blood samples and DNA thereof obtained from Exhibits D1, “MW”, SMK1, SMK2, TMC and Exhibit D2 is admissible and is properly on record.
- ii. That exhibits 11 (a), (b) and (c) were illegally obtained and cannot be admissible in evidence.
- iii. That the prosecution furnishes the Accused persons with the investigation diary for the instant case.
- iv. There shall be no orders on costs.

Orders accordingly.

Ruling delivered, dated and signed at Malindi this 15th day of May, 2020.

.....

R. LAGAT KORIR

JUDGE

This Ruling has been delivered to the Applicants via video link to Malindi GK prison (due to COVID – 19 regulations), in the presence of Mr. Juma (Court Assistant), Mr.Mouko (h/b for Ms. Aoko for the Accused), Ms. Sombo (h/b for Mr. Mwangi for the Respondent) and the 1st, and 2nd Accused (virtually present).