



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO.5 OF 2019

ELIJAH OGINDA.....APPLICANT

VERSUS

REPUBLIC THROUGH

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

TRUPHENA NYANGARA OSIDE.....2ND RESPONDENT

RULING

1. There are two applications which were heard simultaneously as they are inter-related the question being to exhume or not to exhume. The application by the appellant is dated 10th January 2019, and seeks that there be a stay of execution of the (+) orders issued on even date by N. Wairimu (PM) for disinterment or exhumation of the remains of **VERONICAH KWAMBOKA OSINDE** (deceased) pending hearing and determination of the appeal herein. The application by the 2nd Respondent, urges court not to stay the orders.

2. The background to this matter is that the deceased died suddenly on 11.12.2018 at her home – her body was found by her eldest son **EDWIN ONYWERI OGINDA**. At the time, the appellant was in Kisumu. The deceased's sisters and mother requested for an autopsy, which was carried out, and it revealed that the cause of death was cardiac arrest.

3. However just before the burial, the deceased's siblings filed another application on 20.12.2018 in Misc. Appl. No. 118 of 2018 because they were not satisfied with the initial autopsy and wanted a second opinion. The court gave orders directing them to have a pathologist of their own choice extract samples from the deceased's body before 5.00pm on 20.12.2018, failing which the appellant was at liberty to carry on with the burial arrangements.

4. According to the appellant, the 2nd Respondent did not extract the organs from the body, and he laments that they only wanted the burial to be stopped. Consequently the burial took place as scheduled on 21.12.2018, as had been advertised by both families.

5. On 24.12.2018, the deceased's mother filed **Eld. CMCC No.1280 of 2018** seeking orders for exhumation and when they were not granted, they roped in the Director of Public Prosecution (DPP) who thus filed **Cr. Appl. No. 343 of 2018**, seeking similar orders.

6. Meanwhile on 8.1.2019, file No. **CMCC No.1280 of 2018** was placed before the Principal Magistrate suo moto and she directed that the matter be heard at 4.00pm and that the appellant must respond by then. The court proceeded with the hearing at 5.07 pm to 8.45 pm on the said date, where the appellant says was after office hours and his counsel even protested.

7. The ruling was delivered on 10th January 2019 allowing exhumation of the body. The appellant was aggrieved with these orders and filed the present application for stay, saying exhumation will be traumatic to the appellant and the three children he has with the deceased.

Further that the appeal has overwhelming chances of success, as medical evidence clearly indicated that the deceased died on arrival at the hospital, and this is something the court cannot ignore. It is also argued that the Respondent will not suffer any prejudice, loss or inconvenience if the stay orders are granted. The applicants thus came to the High Court on the very date that the ruling was delivered, and obtained orders of temporary stay pending inter partes hearing.

8. Later on in the day, the 2nd respondent filed an application dated 10.01.19 which basically is a reply to the appellant's prayer. The application is supported by the 1st Respondent (DPP). She urges the court to discharge the temporary stay orders and not allow any further stay saying the orders of exhumation are intended to assist the police in investigations. She (being a sister of the deceased) states that there is no truth in the claims that the children will be traumatized by the exhumation, as they are infact now in school and would not participate in the exercise.

She deposes in the supporting affidavit that the family is anxious to lay to rest what caused their sister's death as they were not satisfied with the autopsy report compiled by **DR. NALIANYA** and wished to have a second opinion. However due to a cluster of odd inhibitions, including receiving the court order at 4.30pm which made it impossible to get a pathologist in a timely fashion to harvest the body organs for a second medical opinion, the burial took place, against their wishes.

She urges the court to allow exhumation to proceed saying a report by one **DR WALONG** dated 6th January 2019 indicates the dangers of having unpreserved body staying long before autopsy as it will have undergone significant morphological changes which could prejudice investigations. She explains that the family could have moved to court the next morning to get appropriate orders, but the deceased was hurriedly buried by 9.00am.

9. The appellant's position is that the appeal will be rendered nugatory if exhumation is done, insisting that there is no rush. The respondents state the converse it is submitted on behalf of the appellant that an order for exhumation can only be granted in very exceptional circumstances, urging this court to pay heed to provision of Section 386 and 387 CPC saying one such instance is if there is an on-going inquiry.

10. Further that so far police have not presented a report as to justify exhumation.

11. It is contended that the respondents were given a chance for post mortem and a further opportunity to harvest the body organs and they failed to do so.

Further, that if exhumation is allowed later on appeal the court finds that it shouldn't have been conducted, the appellant will suffer irreparably by being subjected to witnessing a second burial and exposing him to a second mourning period.

12. The appellant's counsel also took issue with the status of the 2nd Respondent who is said to have been an interested party in the proceedings in the lower court, and ought not to file an application independent of the two main parties in the lower court. In this regard, the court is urged to be guided by the Supreme Court decision in Pet. No. 16 of 2016. Methodist Church of Kenya V Mohammed Fugicha & 3 others.

13. It is further argued that the 2nd respondent's application is premised on matters which were not in the lower court basically in the form of an affidavit sworn by Edwin Oginda which was permitted by the High Court to form part of the record. The pursuit for exhumation is described as geared by speculation, and will not aid the course of justice.

14. The 2nd respondent's counsel submits that the refrain about the deceased's children being traumatized by the exhumation is hot air, as her eldest son Edwin is among those who would wish to have the body exhumed to enable further investigations into what led to his mother's death.

He points out that even if both parties were to hush up the matter and abandon the pursuit for exhumation, the 1st respondent (DPP) has an unrestricted right to investigate the cause of death, and when appropriate, upon an inquest. He contends that to order stay of the exhumation is tantamount to barring the state from concluding their investigation.

15. Counsel submits that the longer the exhumation delays, the more prejudicial and amounts to obstruction of investigations.

16. The DPP also opposes orders of stay of exhumation saying Section 387 (2) and 380 of the Criminal Procedure Code empowers DPP to apply for exhumation orders for purposes of investigations especially where the circumstances of death are suspicious. It is explained that investigations have commenced but cannot be concluded without exhuming the body so as to subject it for various tests.

17. There is no dispute that questions abound from some members of the deceased's family concerning what caused her death. There is suspicion of foul play – this is what propelled the lower court to grant the orders. There is also no dispute that an appeal contesting the orders for exhumation has been filed. The issue of the place of 2nd Respondent in this matter and the additional evidence allowed was already addressed by Sewe (J) in her ruling of 25.01.2019 and I need not revisit the same. Any aggrieved party ought to have appeared before the said judge for review of her orders, or else file an appeal against the said orders.

18. Even if the argument by the appellant's counsel was to hold water, that application is basically a response to the appellant's own application, and does not take any party by surprise.

19. Should that order abide hearing of the appeal? Will a stay order help in resolving the riddle of her death – will it serve the interests of justice and fairness. Whereas it is true that an initial autopsy was conducted, some of the deceased's relatives were not satisfied with the outcome and sought a 2nd examination.

20. Their attempts to harvest the body parts so as to pursue for further examination were thwarted by the factor of time, leading to what appears to the deceased's sister to be a hurried burial.

A medical report has been presented giving a brief of the prejudice that will be occasioned if the body remains interred for a prolonged period.

21. I have considered the arguments which were presented in court borrowing from the case of **R V Geoffrey Kipchumba Kangogo** that an exhumation order should not be granted where the existence of evidence sought is speculative and uncertain and its value in assisting the defendant's defence is conjectural and remote. The court added that;

“...an order for exhumation should only be granted where it will resolve a demonstrating important or material issue in the case.”

22. Indeed in the legal encyclopedia **AMERICAN JURISPRUDENCE** (12th Edition), the question that must guide this court is whether exhumation is absolutely essential in the administration of justice. Going by the information, presented – especially the alleged hurried burial, I am persuaded that there is reason for the respondents to express doubt and suspicion regarding the cause of death – that a second autopsy will give them the where-withal to pursue certain theories including challenging the conclusions of the official post mortem report.

Let me borrow from the words of the Judge in the case of **U.Z** (suing on behalf of **KM** (a minor Deceased) v Cabinet Secretary for Health and the **Attorney General [2014] eKLR** and paraphrase it a bit that, the main issue in this matter is what is just, in this case would letting the body remain in the ground, continuing to decompose while awaiting hearing and determination of the appeal achieve justice? What if at the end of the day the court finds that exhumation was indeed merited – would the respondents doctors be able to detect all that is possible even after decomposition, in light of the report by **DR EDWIN WALONG** dated 6th January 2019 or would justice be achieved by having the body exhumed, subject it to a 2nd autopsy then re-bury. This court is asked to weigh the issue of emotional trauma to be suffered by a bereaved spouse against the quest for truth and justice.

23. 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. There is greater prejudice to be suffered in retaining the body for a longer period pending hearing of the appeal. Once again borrowing from the legal encyclopaedia, **AMERICAN JURISPRUDENCE (2nd Edition)**.

“The right of relatives of the deceased person to have the corpse remain undisturbed after burial must yield to the public interest, and in a prosecution for homicide, the exhumation of the victim’s remains may be ordered on application....where it appears absolutely essential to the administration of justice.

24. The **DPP** has confirmed to this court that police are pursuing investigations into the death of **VERONICA KWAMBOKA OGINDA**, and greater prejudice shall be occasioned and indeed it will be an obstruction to the quest for justice. Unlike the arguments raised and reasons given in the case of **GODFREY KIPKEMBOI KANGOGO [2018]eKLR** the theory the which respondents wish to pursue namely that given the pattern of events immediately after the deceased’s body was found in the bathroom, suggest foul play – cannot be established unless a second autopsy is conducted. This is unlike the Kangogo case where the alternative theory of death could easily be established by cross examination of the pathologist – in this instance such an occasion will not present itself at this stage.

25. There is also the lament that the trial magistrate misconducted herself by sitting beyond official hours, and that counsel for appellant had protested about sitting beyond official hours. The question to ask is – what prejudice did this occasion? I do not think the sitting affected the manner in which the arguments were presented or the ultimate decision by the trial court. My understanding is that the nature of the matter was only to push it to conclusion, and go the extra mile. That cannot be a reason to fault the trial court and when it comes to procedure over substance, the latter takes precedence and finds refuge under Art 159 (2) (d) of the Constitution.

26. I hold and find that it would be prejudicial and against the principles of justice to grant orders to stay the lower court’s orders.

The application for stay is thus dismissed.

Delivered and Dated this 7th day of February 2019 at Eldoret

H. A. Omondi

Judge