



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISC CIVIL APP NO. 15 OF 2018**

**IN THE MATTER OF SECTION 118A OF THE EVIDENCE ACT**

**AND**

**IN THE MATTER OF PIUS MUKONO MURAGE(PRESUMED DCD)**

**RULING**

1. The applicant Veronica Wanyaga Mugo brought this application under Section 1A & 1B & 3A C.P.A & Section 118A of the Evidence Act seeking orders that the court be pleased to declare and presume dead one Pius Mukono Murage who disappeared and has not been heard of continuously for the last eight years.

2. That the court do issue an order to the Registrar of Deaths to issue a death certificate for Pius Mukono Murage. The application is based on the grounds that the applicant is the wife of Pius Mukono Murage (to be referred to as ‘the missing person’) and she deposes that the missing person disappeared from home in the year 2009. A report was made on 9/11/2009 at Kianyaga Police Station vide OB No. 21/9/11/2009. Since then the missing person has never been seen or traced or heard of. She prays that the application be allowed. In her submission, Ms. Muthike submits that there is a rebuttable presumption that said missing person is dead. She relies on **Section 118A of the Evidence Act** which provides:-

***“Where it is proved that a person has not been heard of for seven years by those who might be expected to have heard of him if he were alive, there shall be a rebuttable presumption that he is dead.”***

She also relies on various authorities.

3. Having considered the application, the issue for determination is whether an order should be issued to declare and to presume the missing person as dead.

**Section 386 of the Criminal Procedure Code Cap 75 Laws of Kenya** provides:

***“The officer in charge of a police station, or any other officer specially empowered by the Minister in that behalf, on receiving information that a person –***

***(a) has committed suicide; or***

***(b) has been killed by another or by an accident; or***

***(c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence; or***

***(d) is missing and believed to be dead; shall immediately give information thereof to the nearest magistrate empowered to hold inquests, and, unless otherwise directed by any rule made by the Minister,***

***shall proceed to the place where the body of the deceased person is, and shall there make an investigation and draw up a report on the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), the marks appear to have been inflicted; and the report shall in the case of paragraph (a), (b) or (c); be forwarded forthwith to the nearest magistrate empowered to hold inquests; and in the case of paragraph (d) shall immediately send to the Director of Public Prosecutions through the Commissioner of Police as full a report as possible together with details of all supporting evidence relating to the circumstances surrounding the disappearance and the grounds upon which the death of that person is presumed to have taken place.***

(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.

(3) When the body of a person is found or a person has committed suicide or has been killed by another or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, a person finding the body or becoming aware of the death shall immediately give information thereof to the nearest administrative officer or police officer.”

From the averments by the applicant this court finds that Pius Mukono Murage is a missing person and presumed to be dead within the meaning of the above section.

4. The procedure to be followed is for the police to conduct investigations and an inquest. Section 387(6) of the Criminal Procedure Code provides:-

“6) In the case of an inquiry relating to a missing person believed to be dead the magistrate shall at the termination of the inquiry report the case together with his findings to the Director of Public Prosecutions and shall make recommendations as to whether or not the period regarding the presumption of death provided for by section 118A of the Evidence Act should be reduced and if so what lesser period should, in the circumstances of the death, be substituted for the period of seven years.”

Section 388(1) of Criminal Procedure Code provides:-

(1) The Director of Public Prosecutions may at any time direct a magistrate to hold an inquiry, in accordance with section 387, into the cause of a particular death to which the provisions of that section apply and shall in the case of missing person believed to be dead give such directions as he deems fit.

These provisions lay down an elaborate procedure to be followed in the event of a missing person. Where a procedure is laid down in the statute in the Case of Masoud Salim Hemed & Another –v- D.P.P. & 3 Others the court stated:-

It has now been established as a matter of best practice jurisdictional point that where the constitution or statute makes provision for a specific procedure for redressing certain grievances, that special procedure should be strictly followed. See the long line of cases restating the position including The Speaker of the National Assembly –v- The Hon. James Njenga Karume, Civil Application No. 92 of 1992 (unreported); Kipkalya Kiprono Kones –v- Republic & Another ex-parte Kimani Wanyoike & 4 Others, (2008) 3 KLR (EP 291); and Wanyoike –vs- electoral Commission of Kenya (No. 2)(2008) 2 KLR (EP) 43. In the Karume case, the Court of Appeal stated that:-

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particulars grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

5. From the findings of the court above, it must be considered that the subject of these habeas corpus proceedings is a ‘missing person believed dead’ within the meaning of **Section 386 of the Criminal Procedure Code (CPC)**. The Criminal Procedure Code provides for an inquest into missing persons believed dead.

6. The applicant has not met the required threshold to prove that the missing person has not been heard or seen. She did not annex any other affidavit by relatives.

The letter from the Chief which is annexed states that the whereabouts of the missing person are unknown. The presumption of death is rebuttable. As such the party seeking an order that the missing person be presumed dead must adduce sufficient evidence. The applicant has only shown that a report was made to the police and she advertised once in the local dailies. The applicant has not adduced sufficient evidence. She did not adduce evidence from other relatives to confirm that the said missing person has not been seen or heard. The persuasive decisions cited by the applicant In the Estate of Julius Kathurima alias Kathumba S/o Kirera (2016) eKLR. Are rebuttable presumption was ordered based on the testimony of various witnesses.

7. In the matter of Eliud Mungai (2015) eKLR, evidence was tendered in affidavits and statements of witnesses for the court to arrive at the presumption of death. The applicant brought the application under Section 118A of the Evidence Act. A presumption of death is made where it is proved that a person has not been seen or heard for seven years by close relatives who might have been expected to have heard of him. Due inquiry must be made and a party must prove that the inquiry has been made. My view is that the applicant has not adduced evidence to warrant the court to issue the order. Section 118A of the Evidence Act envisages that the missing person has not been seen, not by one person but “by ‘those’ who might be expected to have heard from him- emphasis mine.

8. The **Criminal Procedure Code at Sections 386, 387 and 388** makes provision as to the inquiry to be made in case of a missing person. A Magistrate conducts an inquiry and at the termination of the inquiry he gives a report and his findings to the Attorney General.

9. After such an inquiry and the finding by the Magistrate the court can then be moved to issue an order presuming the missing person is dead.

10. There is an elaborate procedure to be followed under the Criminal Procedure Code for declaring a missing person as dead. Where the statute has made provision for the procedure to be followed, that procedure must be strictly followed. The application before me has not met

the threshold for the inquiry envisaged under the **Criminal Procedure Code**. My view is that an inquiry involving the members of the family ought to be conducted before the order can be issued. In this case the applicant has proved that she made a report to the police. It was upon the police to investigate and if it comes to the conclusion that the person is missing, open an inquiry file and place it before a Magistrate to conduct an inquest.

11. **In Conclusion:**

The applicant has failed to tender sufficient evidence to warrant this court to order that there is a rebuttable presumption that the missing person is dead.

There is none compliance with the procedure under the **Criminal Procedure Code**. I find that the application is without merits and so I dismiss it.

**Dated at Kerugoya this 15<sup>th</sup> day of February, 2019.**

**L. W. GITARI**

**JUDGE**