REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL CASE NO. 52 OF 2017

REPUBLIC.....PROSECUTOR

=VERSUS=

TERESIA WAIRIMU THUO.....ACCUSED

RULING

1. The DPP has requested that a doctor at Mercy Mission Hospital, Eldama Ravine, the facility at which the post mortem of the deceased subject of the murder trial herein was performed by a another doctor who then served at the facility but had since left and could not be traced to come and produce the post mortem report which he filled after the exercise. The witness PW9 is said to be the third doctor since the doctor who conducted the post mortem left the hospital. Two other doctors had left the hospital after the doctor who performed the post-mortem and none of the previous doctors can be secured to attend the Court to produce the Post mortem report on behalf of the examining doctor.

2. The Defence has objected to the production of the report by this doctor PW1 who did not know the doctor who had conducted the post-mortem or his handwriting.

3. In setting the stage for the application, the Prosecutor lead the witness into setting out his academic and professional qualifications as Bachelor of Medicine Bachelor of Surgery MBChB, 2012 Kampala University, Uganda, with 4 years of post-qualification experience at the Hospital and to confirm that he had been deputed by Mercy Mission Hospital to attend Court and to present the post mortem on its behalf and that the stamp on the Report was a genuine official hospital stamp for Mercy Mission Hospital.

4. Section 77 of the Evidence Act provides for production of documents in the nature of by persons other than their maker where the circumstances set out therein are fulfilled as follows:

> "77. Reports by Government analysts and geologists
>
> 1. **In criminal proceedings any document purporting to be a report under the hand** of a Government analyst, **medical practitioner** or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis **may be used in evidence.**
>
> **2. The Court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.**
>
> 3. When any report is so used the Court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.
>
> [Act No. 14 of 1991, Sch.]"

5. There is no requirement that the witness who produces the report on behalf of another under section 77 to be conversant with the handwriting of the maker of the report. Indeed, a post mortem report, it appears from subsection (1) of section 77, may be ***used in evidence,*** and it may therefore be produced a person such as the Investigation Officer in a case or any person who may have been given the report by the examining medical practitioner or by a hospital which maintains record of such reports, as in this case, and the Court may only call the maker for cross-examination, in compliance with the accused's right to fair trial to challenge evidence.

6. If the maker is not available, the Court may nonetheless use it pursuant to section 33 (b) of the Evidence Act, which provides as follows:

"33. Statements, **written** or oral or electronically recorded, of admissible facts made by a person who is dead, **or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured,** without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable, are themselves admissible in the following cases—

a. ….;

b. made in the course of business

when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business **or in the discharge of professional duty;** or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;"

But see ***R. v. Masalu*** (1967) EA 355, where Platt, J. (as he then was) rejected a post-mortem report when considering section 32 of the Indian Evidence Act, 1872 in ***pari materia*** with our section 33 of the Evidence Act holding that although the report was technically admissible in evidence, the Court should exercise its discretion to refuse to admit it as prejudicial to the accused, and said:

"The conflict is of interest in that the basic rule in a criminal trial is that the accused should be able to test the evidence which is adduced against him so that justice can be seen to be done as the judgment proceeds upon evidence which has been seen to be given in Court. On the other hand, s. 32 seeks to provide a method where, by virtue of death or other circumstances, when the only evidence is a document, that document should be admitted in evidence. The safeguards under s. 32 are that the document should have been made in such circumstances that in that in the normal way of things mistakes would not occur, and that there would be any reason why the maker of the document should state anything but the truth.

In his first argument, the learned State Attorney appearing for the Republic called upon the Court to understand the difficulty situation in which this country finds itself with regard to technical experts of one sort or another who do not always remain in the country. Of course, the Courts must have every sympathy on this point and the Criminal Procedure Code does attempt to provide some aid in this direction. But since the Republic is well aware of the difficulties which it faces, I do not think that it can be argued that such difficulties cannot be overcome by normal administrative arrangements. Of course, in the case of death which happens as it may be without warning no such arrangements can easily be made. But in the case of persons retiring and leaving the country I cannot say that it could be beyond the resources of the Republic to arrange for experts such as doctors to leave on record the circumstances of the post-mortem examination which they have undertaken. With respect therefore to the learned State Attorney, I think the situation cannot be brewed to such an extent that the basic rules of criminal procedure should be foregone. In my opinion, it is of greater importance that an accused person should be able to see and hear and test the evidence adduced against him than that the Republic should be permitted to adduce evidence which cannot be so tested. I am also aware of the reasons for the production of document under s. 32, as I have explained above, but again I would say that it cannot be entirely satisfactory to rely on a report, such as post-mortem report in a capital charge, when it is reasonably well-known that from time to time mistakes do occur in such reports. I think to rely entirely upon an untested report would not be in the interest of the Republic in general.

Section 32, in my opinion, provides for the technical admissibility of this document. But to admit such document would be prejudicial to the accused and, as I have said, it would not be in the interests of the Republic in general. I think it is clear beyond doubt that in a criminal trial the Court always has a discretion to refuse to admit evidence which may be prejudicial to the accused although technically admissible.

I have no doubt that it would be wrong in that it would be prejudicial to the accused to admit this port-mortem report in the circumstances in this case and accordingly I reject it."

7. I think the requirement for familiarity with the handwriting and signature of the maker of the report, on witnesses who produce official reports on behalf of another, is a good practice to guarantee the ***authenticity*** or ***genuineness*** of the report. There is section 77 of the Evidence Act, a presumption as to genuineness of signature on the document and of the qualification of person signing it. In considering sections 77 Evidence Act and 304 of the Criminal Procedure Code (now repealed), Philip P. Durand in ***Evidence for Magistrates*** (1969) at p.187 observed as follows:

> **"A question is raised as to whether a medical examination may be classified as an "analysis" so as to allow a "report" to be admissible before the High Court under s. 77 K.E.A.** Note, however, ss. 209 C.P.C dealing with the admissibility of the deposition of a medical witness in a subordinate Court, and 304 C.P.C. dealing with the deposition of Government analyst, medical officers or other medical practitioner.
>
> Under s. 77 K.E.A. and s. 304 C.P.C. the Court may, if it thinks fit, summon and examine the analyst making the report or the medical officer or practitioner who made the deposition. This provision is not found in s. 234 C.P.C., hence at a Preliminary Inquiry, the medical officer or medical practitioner who made the report may not be summoned and examined on the subject-matter of the report.
>
> It was noted in the case of **Kapoor Singh s/o Harnam Singh v. R.**, (1951), 18 E.A.C.A. 283, 286, in considering the equivalent section in the Tanganyika C.P.C. (s.154) that the section
>
> > **"…is merely an enabling section authorizing the reception in evidence of the report of a Government**

Analyst and dispensing with formal proof of the signature to such report. It does not preclude the prosecution or the defence from proving the nature of an exhibit by other expert evidence."

8. As to the meaning of contents of the report, it may suffice to call a person with qualifications sufficient to enable him interpret the report and respond to questions that the examining counsel may have on the meaning and import of the report. If the findings are contested, it may be necessary to call the maker of the report. It is in the consideration of the particular case, that the Court has discretion under section 77(3) of the Evidence Act that –

> "3. When any report is so used the Court may, **if it thinks fit**, summon the analyst, ballistics expert, document examiner, **medical practitioner,** or geologist, as the case may be, and **examine him as to the subject matter thereof."**

9. Moreover, even with expert reports, it is the Court which must make its mind on the facts of the case as established by the evidence before it and the opinion of the particular expert is not binding on the Court. In ***Wainaina v. R*** 1978) KLR 11, Madan, JA. delivering the judgment of the Court said when considering evidence of a handwriting expert-

> "In our opinion there is no rule which requires corroboration of the opinion of a hand writing expert whose evidence is like **the evidence of the class of other experts which it is open to the Court to accept or reject."**

See also ***Asira v. R*** (1986) KLR 227, ***Hassan Salum v R.*** (1964) EA 126 and ***Onyango v. R*** (1969) EA 363.

10. The accused's right to fair trial in this regard is secured in the right under Article 50 (2) (k) of the Constitution to *"adduce and challenge evidence"* by cross-examination by counsel for the accused in the usual way, and the Court shall form its own opinion on the report and credibility of the expert (see ***Muyezi v. Uganda*** (1971) EA 225 and ***Mutonyi v. R*** (1982) KLR 203). In addition, the Court will examine and weigh the whole evidence produced before it, (see ***Okethi Olale & Ors. v. R*** (1965) EA 555) before establishing whether the offence has been proved to the required standard of beyond reasonable doubt.

11. In ***R. v. Hussen***, (1990) KLR 407, 413 Abdullah, J. accepting the possibility of admission of documents under section 77 of the Evidence Act highlighted the importance of cross-examination on the document as follows:

> "This dried blood was scrapped off the floor by Scenes of Crime and Government Chemists personnel, who handled various exhibits discovered in the store, which were analyzed **and the report of the Government Chemist who is abroad and may not return until the end of the year, was produced under s. 77 of the Evidence Act, upon Mr Ghalia for the accused indicating that he did not object to production of such exhibits.**
>
> However, Mr. Ghalia has challenged the findings on the grounds that the several exhibits which were received on different dates are not specifically indicated as to when each was received and that the exhibits may have come in contact with each other. There is evidence that the exhibits were handled mostly by the trained and experienced personnel of Scenes of Crime as well as Government Chemist. There is no suggestion from evidence, that any of the exhibits may have come in contact with the other after it was recovered. Be that as it may, **in the absence of the Government Chemist who could not be adequately questioned, the report may not be treated as conclusive evidence, where such evidence needs to be closely examined."**

12. Similarly, the Court of Appeal (Omolo, Githinji & Onyango Otieno, JJA.) in two decisions delivered by the same Bench on the same date the 26th March 2004, ***Ogeto v. R*** (2004) 2 KLR 14, 17 and ***Soki v. R*** (2004) 2 KLR 21, 27 settled the issue of section 77 of the Evidence Act as follows:

Ogeto's case

> "The postmortem on the body of the deceased was done by Dr. Ondingo Steven. The postmortem report was produced as exhibit at the trial by corporal Ambani under section 77 of the Evidence Act. One of the grounds of appeal is that the trial Court erred in receiving the postmortem report which was inadmissible. Mr Gichaba, learned counsel for appellant, submitted before us that postmortem report does not have probative value as it is hearsay evidence since Dr Ondingo Steven was not called as a witness. **Section 77 (1) of the Evidence Act allows such document under the hand of a medical practitioner to be used in evidence. By section 77 (2) of the Evidence Act, the Court is allowed to presume that the signature to any such document is genuine and the person signing it held the office and qualification which he professes to hold at the time he signed it.** The appellant was represented by counsel at the trial who did not object to the Act and **the Court did not see it fit to summon Dr Ondingo Steven for examination. Nor did the appellant's counsel ask for the calling of the doctor for cross-examination. In our view the postmortem report was properly admitted as evidence in accordance with the law."**

Soki's case

> "Before we allow this appeal, as we must do, we need to comment on the manner PW3 (Exh 1) was produced and the way it was dealt with by the trial Court and the superior Court. **Section 77 (1) allows any document purporting to be report under hand of a government analyst, medical practitioner or any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis to be used in evidence. The same could be produced by a police officer as was done in this case provided the accused does not object.** It is however necessary that in a case such as this where an accused person is not represented by a counsel, that the accused be made aware of the consequences of the P3 or such other documents being produced by the police in the absence of the maker of such a document. The Court should explain to the accused his right to insist on

seeking to cross-examine the maker if he so wishes. In this case, the appellant, should have been made aware that he could seek to cross examine the maker of P3 if he so wished. That was not done but we make haste to add that in our view, nothing turns on that omission as in any case the ingredients of the offence of robbery were satisfied even if injuries were not proved. *"*

13. It is clear that a document such a report by a government analyst or medical practitioner etc., in this case a post-mortem report, may be produced in evidence by a person other than the maker but if the accused wishes and the Court finds it fit, the maker may be called for cross-examination.

14. Significantly, the Evidence Act contemplates production of documents of doubtful admissibility under section 170 as follows:

> "Production of documents of doubtful admissibility
>
> 170. (1) A witness summoned to produce a document shall, **if it is in his possession or power, bring it to Court notwithstanding any objection which there may be to its production or to its admissibility, but the validity of any such objection shall be tried by the Court.**
>
> (2) The Court, if it sees fit, may inspect the document, unless it is a document-
>
> (a) to which the provisions of *section 131* of this Act are applied, or **take other evidence to enable it to determine on its admissibility."**

The accused may then take up any objection as to its production or admissibility of such a document.

15. So the accused may not object to the presentation of the document in this case, where ***admissibility*** is allowed by section 77 (1) of the Evidence Act. He may only pursue, as he may be advised by Counsel, the ***cross-examination*** of the maker of the report in terms of section 77 (3) of the Evidence. If the maker is not availed, the matter will go to the weight to be given to the document in terms of conclusiveness of its findings as in ***R. v. Hussen***, supra, or the Court may reject it as in ***R. v. Masalu***, supra.

Orders

16. Accordingly, for the reason set out above, the Court now determines that the post-mortem report in this case is ***admissible*** pursuant to section 77 of the Evidence Act and that it may be ***produced*** pursuant to that provision by the witness (PW9) offered by the Prosecution to present the post-mortem report on the deceased, subject to suitable cross-examination and, consequently, shall allow him to do so. If there is need, on request by counsel for the accused, the Court shall, ***"if it thinks fit"*** summon the maker of the Report in terms of section 77 (3) of the Evidence Act.

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF DECEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Ngamate & Co. Advocates for the Accused.

Ms. Muriu, Prosecution Counsel for the DPP.