

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 5 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

ELIZABETH NANGILA MAKOKHA.....ACCUSED

RULING

1. What is for decision today is on oral application made by the state on 27th June 2018 for the court to order that blood sample be taken from the accused in interests of justice, as blood stains were found at the scene.
2. Counsel for the defence Mr. Farouk Kyalo has strongly opposed the application contending that such action will prejudice the constitutional rights of the accused. Counsel contended that the accused could not legally be compelled to assist the prosecution in carrying out their investigations. Counsel said that where an accused objects to DNA testing, then doing so would amount to a violation of Article 25 of the Constitution, as such would amount to inhuman and degrading treatment. Counsel emphasized that only under Section 36 of the Sexual Offences Act, is court granted statutory power to order DNA tests in offences of a sexual nature.
3. In response Mr. Okemwa for the State stated that the prosecution made the application to court because they were alive to the provisions of Article 25 of the Constitution on inhuman and degrading treatment. Counsel also stated that with regard to Article 50 of the Constitution on fair hearing, the State was not out to seek self-incriminating evidence but fairness, as both the deceased and the accused had equal rights.
4. I have considered the request by the prosecution and the strong opposition from the defence. The defence counsel later (as promised in arguments) supplied this court with two case authorities – **Republic vs John Kithyululu [2016] eKLR** and **Anthony Muriithi vs The OCS Meru Police Station & 2 Others [2012] eKLR**, both decisions of the High Court.
5. In the earlier [2011] case of **Anthony Muriithi (Supra) a Constitutional Petition at Meru** – the police had arrested the accused for a sexual offence and his blood sample forcefully removed from his body despite his protests. The court found that such was a violation of the accused’s constitutional rights, and granted an injunction restraining the prosecution from using the data obtained as a direct result and/or incidental to the blood and saliva samples taken from the petitioner in the pending criminal case.
6. In the later in the case of **Republic vs John Kithyululu [2016]** the prosecution made an oral application in the **Voi High Court** to take a blood sample from the accused, as the earlier blood sample extracted by the police could not be analysed by the Government Chemist as it was contaminated. The court after referring to the cases of **Richard Dickson Ogendo & 2 Others vs Attorney General & 5 Others [2014] eKLR** and the case of **Anthony Muriithi (Supra)**, came to the conclusion that as Article 25 (a) of the Constitution provided for protection against torture and cruel, inhuman and degrading treatment, obtaining blood samples for DNA a test without consent could only be ordered by the court if Parliament made statutory law on the same, as was the case under section 36 of the Sexual Offences Act No. 3 of 2006. Otherwise taking such blood sample from any person or suspect has to be with the consent of that person.
7. I agree with the reasoning in the case of **Republic vs John Kithyululu (Supra)**. In my view, respect for privacy and dignity of a person is a primary requirement of justice, and is protected under Article 31 and 28 of the Constitution, and Parliament has to pass statutory or written laws under Article 24 of the Constitution, in order to limit those rights.
8. I thus disallow the request by the prosecution.

Dated and delivered at Garissa this 19th day of September, 2018.

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George Dulu

JUDGE