REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 34 OF 2018

REPUBLIC.....STATE

VERSUS

GODFREY KIPKEMOI KANGOGO .....ACCUSED

RULING

1. Godfrey Kipkemoi Kangogo (the "Accused Person") is facing a murder charge before this Court. He is accused of the murder of I J B ("Deceased") on 06/07/2018 in Rongai Sub-County within Nakuru County.

2. Immediately after plea was taken, two applications were filed – one each by the Prosecution and Defence asking for certain orders. I heard both Applications simultaneously. This Consolidated Ruling will address both Applications. Each side vehemently opposed the other side's Application. I will address each Application in turn.

3. The Prosecution's Application is dated 24/07/2018. It requests for an order that the Accused Person does provide samples of "blood, saliva, head hair, pubic hair, finger nails and buccal swabs so that they can be compared to those of the Deceased which were collected during the post-mortem on 12th July, 2018." The Prosecution explains that this order is requested because investigations have revealed that the Deceased was raped prior to being murdered.

4. The Prosecution says that during the post-mortem examination for the Deceased, the pathologists took samples of the blood, liver, kidney, eye fluid, pubic hair, head hair, high vaginal swab, finger nails and stomach contents. These samples are to be sent to the Government Chemist for DNA analysis. The Prosecution believes that samples taken from the Accused Person will ineluctably link him with the murder of the Deceased.

5. The Defence vehemently opposed the Application. The opposition is grounded on three precepts which Mr. Mongeri, Learned Counsel for the Accused Person, expounded during the hearing of the Application. I will return to them shortly.

6. Mr. Chigiti, Learned Prosecution Counsel, argued the Application on behalf of the State. He was supported by Mr. Langat, the Victim's family's lawyer. I allowed Mr. Langat to participate in the proceedings at this stage pursuant to the Victim Protection Act.

7. Mr. Chigiti argued that the purpose of requiring the samples from the Accused Person was to establish if there was a link between him and the murder since investigations had established that the Deceased had been raped before her murder. Mr. Chigiti sought to rely on section 36(1) of the Sexual Offences Act. To this extent, he relied on ***Boniface Kyalo Mwololo v Republic (Court of Appeal Crim. App. No. NAI 1 of 2016); [2016] eKLR***.

8. Section 36 of the Sexual Offences Act provides as follows:

> *(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.*
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> *(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.*
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> *(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.*

(4) The dangerous sexual offenders databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.

(5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.

(6) An appropriate sample or samples taken in terms of subsection (5)—

(a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and

(b) in the case of blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.

9. In the ***Boniface Kyalo Mwololo Case***, both the High Court and the Court of Appeal upheld the constitutionality of Section 36 of the Sexual Offences Act. Mr. Chigiti argued that in view of that decision, it is proper for the Court to order the Accused Person to avail the samples since there are allegations of rape in the case.

10. Mr. Chigiti also sought to distinguish the case from ***COI & GMN and Chief Magistrate, Ukunda Law Courts (Mombasa Court of Appeal Civ. Appel No. 56 of 2016)***. The Defence relied heavily on this case to oppose the Application. In that case, the Court found anal examination compelled for purposes of proving the offence of sodomy were unconstitutional. Enroute to that decision, the Court of Appeal remarked thus:

Our understanding of section 36 of the Sexual Offences Act is that whereas a Court is empowered thereunder to direct examination of an Accused Person to establish his involvement in a sexual offence, such discretion is subject to limitation. In that, the Court can only issue such an order with respect to an offence committed under that Act and not any other. Further, in exercising that discretion, like any other discretion, the Court is required to act judiciously within the confines of the law.

11. Mr. Mongeri pointed out that the charge facing the Accused Person as disclosed in the Information is murder. It is not a sexual offence. Indeed, Mr. Mongeri pointed out that the High Court only tries murder cases in the first instance. As such, he argued that reliance on section 36 of the Sexual Offences Act to request the order for samples is misguided.

12. Mr. Mongeri is right on this one. The charge facing the Accused Person is not one under the Sexual Offences Act. As such, the Prosecution cannot rely on Section 36 of the Sexual Offences Act to gain an order for samples to be supplied. If the Prosecution must succeed in its request, that request must be based elsewhere.

13. To this extent, the Prosecution turned to Comparative Law. It relied on ***Schmerber v. California 384 U.S. 757, 86 S. Ct. 1826 (1966)***. This is a decision of the US Supreme Court on a similar question. In the case, the Petitioner was involved in a road accident and the Police suspected he was driving while intoxicated. At the hospital, he was requested to give a blood sample for chemical analysis. He declined. The Police Officer ordered the physician to draw blood anyway. A chemical analysis showed that the Petitioner's blood alcohol levels were way beyond the legal limit. The Petitioner sought to suppress the evidence citing the 5th Amendment of the US Constitution (on the privilege against self-incrimination). His argument, similar to the Accused Person's here, was that compelled blood draw abrogated his right against self-incrimination and other dignitary rights protected by the Constitution.

14. In rejecting that argument, the US Supreme Court held that:

We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

It could not be denied that in requiring petitioner to submit to the withdrawal and chemical analysis of his blood the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purposes of the privilege. The critical question, then is whether petitioner was thus compelled "to be a witness against himself."…

… *In the present case……Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds*.

15. In other words, the US Supreme Court held that the privilege against self-incrimination seeks to protect compulsion against "testimonial" disclosures. This means that the privilege is not violated by such non-testimonial compulsions as requiring a person to provide a blood sample; a handwriting sample; fingerprints or to participate in an Identification Parade or even to speak certain words or model particular clothing. Other US Supreme Court cases that have similarly held including ***United States v. Wade, 388 U.S. 218, 221–23 (1967)*** and ***Holt v.***

United States, 218 U.S. 245, 252 (1910).

16. Mr. Mongeri protested that the Kenyan Constitution contains a *per se* prohibition against self-incrimination and that compelled provision of the samples requested by the Prosecution was a clear violation of Article 50(2)(l) of the Constitution. Mr. Mongeri also argued that the request is against the rule of presumption of innocence as well as an affront against the rule of fair hearing.

17. Mr. Mongeri referred the Court to a decision of the High Court, ***John Kithyululu v Republic (Voi High Court Crim. Case No. 12 of 2015***) in which the Court rejected a similar request for compelled blood draw. The Judge in that case held as follows:

> *17. Accordingly, having had due regard to the oral submissions by counsel for both the Appellant and counsel for the State, this court came to the firm conclusion that without a statutory provision in place, there were practicable difficulties in enforcing the order that had been sought by the Prosecution. Indeed Parliament deemed it fit to specifically provide for taking of DNA samples from persons accused persons of committing sexual offences in the Sexual Offences Act to prevent questions of enforcement of such orders.*
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> *18. If it was the intention of Parliament that all that was required was a court order to extract blood sample from a person charged with any other offence other than a sexual offence, then nothing would have been easier than for Parliament to have enacted a law to that effect.*
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> *19. Bearing in mind that Article 159(2)(d) of the Constitution of Kenya mandates courts to administer justice without undue regard to technicalities, time is now be ripe for Parliament to enact laws to regulate the extraction of blood or other samples from persons accused of other offences other than sexual offences. This would take care of technical exigencies that could occur during prosecution of such cases for whatever reason.*

18. It is important to note that the Learned Judge in the ***Kithyululu Case*** did not hold, as a matter of law, that compelled blood draws are per se unconstitutional. The narrow holding seems to be that such compelled blood draws are impermissible absent a legislative framework akin to section 36 of the Sexual Offences Act. Indeed, on the overriding question whether compelled blood draws constitutes unconstitutional infringement of the right against self-incrimination, the Learned Judge was categorical that it is not. She stated thus:

> *Having said so, it is clear from the aforesaid decided cases that an Accused Person's right against self-incrimination constitutes giving oral or documentary testimony against himself and does not extend to taking of blood samples to prove a particular fact. There is therefore only a bar of communications and testimony by an Accused Person.*
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> *Article 50(2)(l) of the Constitution of Kenya therefore only related to communication that may be obtained from an Accused Person through coercion, unfair or unconstitutional means. For the foregoing reasons, this Court was not persuaded by the Accused Person's submissions that there would be a violation of rights under the provisions of Article 50(2)(l) of the Constitution if his blood sample was taken because taking of samples is per se not unconstitutional or an infringement of an Accused Person Person's rights*.

19. On my part, I have anxiously considered the rival arguments in this case and reviewed extensively existing comparative jurisprudence on the subject including cases decided by the US Supreme Court after ***Schmerber v California*** which was cited to me by the Prosecution. As recently as 2013, in ***Missouri v. McNeely***, ***569 U.S. 141 (2013)***, the US Supreme Court refused to depart from its primary holding in ***Schmerber*** only making a finding that the Police must always obtain a warrant before compelling blood draw unless there were specific exigent circumstances. These exigencies are to be determined on a totality of circumstances case-by-case basis.

20. I have also looked at the structure of our Bill of Rights, the history of the privilege against self-incrimination as well as our constitutional history as I am required to do under Article 259 of the Constitution. I have also considered our emerging jurisprudence on the question including the most recent decision of the High Court on the subject to wit ***Republic v Timothy Mwenda Gichuru & 2 Others [2017] eKLR***. In this case, after considering our emerging jurisprudence exhaustively, Justice Gikonyo concluded as follows:

> *I agree with the postulation of the law in the foregoing cases and come to the same conclusion that the right of an Accused Person not to incriminate himself, protects against compulsory oral examination for the purposes of extorting unwilling confessions or declarations implicating the Accused in the commission of the crime. Thus blood sample is not compulsory oral examination or confessions or declarations; it is real or physical evidence which the Accused could be compelled to provide if there are reasonable grounds to believe that DNA procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence. But I must state here that although our statutory law on provision of blood sample(s) 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*.

21. I fully agree with this exposition of the law. I am persuaded that the privilege against self-incrimination as enshrined in the Constitution serves a dual purpose: First, it is dignity affirming. It aims to maintain a proper balance between the State and the individual and check the government from engaging in unnecessarily intrusive investigatory tactics to detect and investigate crime. To this extent, self-incriminating evidence is excluded because it offends the community's sense of fair play and decency (***Rochin v California 342 U.S. 165 (1952)***).

22. Second, testimonial self-incrimination is historically excluded simply because of the unreliability of coerced testimony against self.

23. Testimonial coerced evidence is *per se* violative of the Constitution under both rationales. Differently put, the privilege against self-incrimination applies categorically to testimonial evidence. However, when it comes to physical or real evidence, compelled evidence may be admissible if it passes the dignitary threshold (see ***Rochin v California 342 U.S. 165 (1952)***). Compelled physical evidence such as compelled blood draws would fall afoul the Constitution only if the method used to compel the production of the evidence violates the

dignity of the individual or offends the community's sense of fair play and decency. I believe that this formulation is in accord with the ***COI & GMN Case*** *(supra)*.

24. What, then, is the practical implication of this formulation?

a. First, there is a *per se* prohibition against testimonial or other communicative evidence by the Accused Person.

b. Second, for physical or real evidence, an analysis must be conducted on whether the compelled evidence violates the dignity of the Accused Person or in any other way offends evolving community standards of decency and fair play.

c.Third, unless a demonstrably palpable exigency exists, warrantless compelled evidence is inadmissible. In other words, the Prosecution would have to persuade a Judicial Officer that there is reasonable cause for the compulsion and a judicial order for compulsion to issue.

d. Fourth, where compulsion involves highly intrusive investigations such as compelled blood draw, the Prosecution must lay a foundation for the compulsion which must meet a higher standard of probable cause for the warrant or Court order to issue. As the ***Schmerber*** Court said, "bodily intrusions cannot be allowed on the mere chance that the desired evidence might be obtained," (***Schmerber v California 384 US 770 (1966)***). As Gikonyo J. says in the ***Timothy Mwendwa Gichuru Case***, the Prosecution must demonstrate that there are reasonable grounds to believe that the DNA sampling procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.

25. Applying these considerations to the present case, it is my finding that the request for the samples of blood, saliva, head hair, pubic hair, finger nails and buccal swabs from the Accused Person so that they can be compared to those of the Deceased which were collected during the post-mortem examination on 12th July, 2018 is justified. The request is eminently not testimonial or communicative in nature. Second, unlike the situation in ***COI & GMN Case***, the samples here will be collected in conditions which will respect the human dignity of the Accused Person and by qualified medical personnel. Additionally, the results of the analysis done on the samples provided will be provided to the Defence well in advance of the trial; and the Defence will have an opportunity to challenge them or respond to them as appropriate. I therefore find nothing that shocks the conscience about the requests by the Prosecution or that offends the community's evolving standards of decency and fair play.

26. Third, the samples will be provided pursuant to a judicial order.

27. Finally, looking at the totality of circumstances, the Prosecution has laid a proper basis for the request. There are reasonable grounds to believe that DNA testing might produce evidence tending to confirm or disprove that the Accused Person committed the alleged offence. Evidence shows that samples were drawn from the body of the Deceased; and DNA sampling procedures may match these samples with those drawn from the Accused Person or not. The ultimate importance of the evidence will be a matter for the Court to determine at trial. Consequently, I am persuaded that the request by the Prosecution is reasonable and I grant it.

28. I will now turn to the Defence's Application dated 27/07/2018.

29. The request is, basically, that the body of the Deceased be exhumed, and a second post-mortem examination be done on the body by a different doctor as well as a doctor representing the Accused Person.

30. The basic argument in favour of the Application is that the Accused Person strongly feels that the doctor who conducted the post-mortem examination was biased and that he manipulated the results "in a manner to suggest foul play."

31. Mr. Mongeri offered three sets of arguments in favour of his Application. First, he relied on the affidavits of the Accused Person and his father who deponed to the fact that the Accused Person's father had had contact with Dr. Titus Ngulungu, the Lead Doctor who conducted the autopsy prior to the autopsy. They say that he had indicated that he would represent them at the autopsy since the Accused Person was already a suspect but that he changed his mind and decided to be the official State pathologist in the case. At that point, they depone, Dr. Ngulungu insisted that they take a second doctor, a Dr. Wangare Wambugu and gave them no choice of a different doctor. This led them to suspect that a plan was afoot to manipulate the autopsy report. They say that their alarm was exacerbated by the fact that they were expressly excluded from the autopsy – and only the Deceased's family representatives were allowed.

32. In the second place, the Accused Person has deponed that Dr. Ngulungu is a friend to the family of the Deceased and that he teaches at [particulars withheld] University together with the mother of the Deceased hence further raising the spectre of bias.

33. Thirdly, the Defence is persuaded that it is crucial for its defence for a second autopsy to be done. Mr. Mongeri argued that they believe that the findings of a second autopsy will give them the wherewithal to pursue certain theories for the defence including disproving the conclusions in the official Post-Mortem Report.

34. Both Mr. Chigiti for the State and Mr. Langat for the Victim's family strongly opposed the Application. The gist of their opposition is that it is strongly repugnant to African customs to exhume bodies. Further, both argued that the Application is unnecessary and pre-mature. They also argued that no evidence was tendered to challenge the authenticity of the Post-mortem Report and justify an order for exhumation. Lastly, they argued that all the issues the Defence wishes to raise in a second Post-mortem examination can be raised in cross-examination or defence.

35. In response, Mr. Mongeri relied on ***UZ (Suing on Behalf of KM (a Minor Deceased) v Cabinet Secretary for Health & the Attorney General [2014] eKLR***. In that case, UZ applied for the exhumation of the body of a Deceased minor who was allegedly killed by the Police.

The Deceased's father objected to the exhumation, in part due to his belief that Duruma customary law that exhumation was repugnant. The Learned Judge subjected the belief to the test under Article 159(3) of the Constitution and concluded thus:

> *The main issue in this matter is what is the justice in this case? The simple answer is that the cause of death of the little girl called K. If Duruma customary law is an impediment towards the search for justice for the Deceased, then it is repugnant to justice and it is inconsistent with the Constitution to that extent, and therefore null and void*.

36. Mr. Mongeri says that this is one case where the alleged African customs which find exhumation repugnant must give way to the dictates of justice. He argued that to the extent that the customs are repugnant to justice, they are null and void.

37. I should begin by stating what I believe to be the correct legal standard to apply in a case like this. A request to exhume a Deceased's body at the instance of an Accused Person is one that calls for the balancing of the rights of the Deceased's family to have the Deceased's body remain undisturbed and respected in accordance with their religion or traditions – factors which implicate rights to culture and religion as well as dignitary and privacy rights of the family on the one hand. On the other hand, these rights must be weighed against the right of an Accused Person to be afforded all reasonable facilities to mount his defence in order to ensure that there is a fair trial.

38. The rule announced by Justice Muya in the ***UZ Case*** *(Supra)* is surely right that where customary law, even if ascertained, becomes an impediment in the search for justice, then that customary law is null and void to that extent. The test, however, is whether the justice of the case requires accommodation of the request by the Accused Person. Neither right is absolute: the Deceased's family do not have an absolute veto to bar the exhumation of the body of their loved one based on their beliefs or privacy rights where there is a legitimate reason to order such an exhumation at the instance of an Accused Person who faces murder charges. At the same time, an Accused Person does not automatically gain an entitlement to exhumation just because he so requests. There must be a legitimate and compelling reason for the request.

39. The correct rule of law, then, seems to be the following. Exhumation of a body in the face of objections from the family of the Deceased is a radical and extreme step. It should only be ordered in the clearest of circumstances and as a last resort due to the privacy and dignitary interests of the family involved. A request for exhumation of a body that has been buried in order to perform a second autopsy is, therefore, an extraordinary relief which should not be allowed in any case unless it is imperatively demanded under the circumstances and is necessary for the due administration of justice. An order for exhumation should not be granted where the existence of evidence sought is speculative and uncertain and its value in aiding defendant's defense is conjectural and remote. It should also not be granted where the evidence sought can be proved or established by other means. Finally, an order for exhumation should only be granted where it will resolve a demonstrably important or material issue in the case.

40. In summarizing the rule in American jurisdictions, the authoritative legal encyclopaedia, ***American Jurisprudence (2nd edition)*** states the rule as follows:

> *The right of relatives of the deceased person to have his corpse remain undisturbed after burial must yield to the public interests, and in a prosecution for homicide, the exhumation of the victim's remains may be ordered on the application of the state or of the defendant where it appears to be absolutely essential to the administration of justice. Thus, where the question of the guilt or innocence of the accused cannot be determined except by exhumation and autopsy of the body of the deceased, the court may and should order the disinterment even against the will of his relatives, and even though there is no statute specifically authorizing such proceedings. However, whether exhumation will be allowed is a discretionary matter for the court....* ***22 Am.Jur.2d, p. 568, Sec. 19***

41. In ***Commonwealth of Pennsylvania v Kivlin Superior court of Pennsylvania (1979),*** the Superior Court of Pennsylvania stated the rule succinctly:

> *Exhumation of victim's body is to be allowed only under extraordinary circumstances. In second prosecution of defendant for murder, trial court properly exercised its discretion in refusing defendant's motion for exhumation of victim's body, since existence of evidence sought was speculative and uncertain and its value in aiding defendant's defense was conjectural and remote. In second prosecution of defendant for murder, trial court's decision to refuse defendant's motion to exhume victim's body could not have prejudiced defendant, since evidence sought by defendant through such exhumation likely did not exist and even if it did exist would not have furthered defendant's defense*.

42. Applying the rule I have announced above to the case at hand, can it be said that exhumation of the body of the Deceased in the present case is imperatively demanded under the circumstances and is necessary for the due administration of justice? An exhumation would only be necessary for the due administration of justice if it will reveal evidence – not speculative or uncertain in nature -- not otherwise available or possible without the exhumation. Applying that standard to the present case, I am not persuaded that exhumation is imperatively demanded by the circumstances of this case. I say so for four main reasons:

43. First, the allegations of bias against the Pathologist who signed the Post-mortem report can be sufficiently canvassed during cross-examination when he appears to give evidence. The Defence will have an opportunity to confront him with all that it believes are the tell-tale signs of bias and have the Court hear his responses and observe his demeanour.

44. Second, the alternative theory of death that the Defence wishes to pursue does not need to be pivoted on a second autopsy. Cross examination of the Pathologist who performed the autopsy coupled with, if need be, calling of an alternative expert to testify on the possibilities would achieve the purpose.

45. Third, other that the apprehension that the Pathologist was biased and could have manipulated the post-mortem report, there is nothing more than conjecture about what the findings of a second autopsy would be.

46. Fourth, it should be recalled that the Defence bears no burden to prove anything in the case. All the Defence has to do is to raise reasonable doubt about the Prosecution case. At this stage in the proceedings, there is no definite showing that the Defence would need a second autopsy to raise reasonable doubt.

47. Consequently, after due consideration of the circumstances of this case, the request by the Defence for exhumation of the body of the Deceased for purposes of conducting a second autopsy is declined.

48. The final orders of the Court respecting the two Applications, then, shall be as follows:

> **a. The Accused Person shall present himself, at a time agreed between the Prosecution and the Defence but in any event within seven days of today, at Nakuru Provincial General Hospital for purposes of providing the samples of blood, saliva, head hair, pubic hair, finger nails and buccal swabs for DNA testing and analysis for comparison with samples taken from the Deceased during the post-mortem examination on 12th July, 2018.**
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> b. **The request for exhumation of the body of the Deceased, I J B, for purposes of conducting a second autopsy is hereby declined**.

49. Orders accordingly.

Dated and delivered in Nakuru this 4th Day of October, 2018

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JOEL NGUGI

JUDGE