



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CRIMINAL APPLICATION NO. 77 OF 2014

U Z (Suing on behalf of K M (a minor Deceased).....APPLICANT

VERSUS

CABINET SECRETARY FOR HEALTH

ATTORNEY GENERAL.....RESPONDENTS

AND

M Y.....1ST INTERESTED PARTY

**INSPECTOR GENERAL OF THE NATIONAL POLICE
SERVICE.....2ND INTERESTED PARTY**

RULING

By way of a Notice of Motion application dated the 2nd September, 2014 and which is expressed to be brought under the provisions of Section 387 of the Criminal Procedure Code and article 165 (3) (a) of the Constitution the applicant seeks the following orders.

- 1. That the Court do grant an order directing the 1st Respondent either himself or persons under him and such other authorized persons as may be deemed necessary to exhume the body of K M buried on the 23rd day of August, 2014 at Nunguni Village – Kinango Kwale County.***
- 2. Leave be granted to the applicant to conduct an independent post mortem examination on the body of K M.***

The grounds are to be found in the body of the application and the supporting affidavit of **U Z** who is the applicant in this case.

This application is opposed by the 1st Interested party **M Y** who in his replying affidavit depones that he is the father of the Deceased and he depones that a post mortem of the body of his daughter was carried and conducted in the presence of the applicant, her two brothers **H Z** and **T Z** and himself.

Further that there is no need of a second post mortem report to prove that the police unlawfully killed the Deceased so long as the post mortem report established that the Deceased's death was due to severe head injury leading to Cardio Pulmonary arrest and the Head injury was caused by a bullet.

Further that the orders sought are against Duruma customs and traditions which forbid the disturbance of a dead body unless the spirits of the Deceased itself seeks for a reburial which is not the case in the present application.

The Director of Public Prosecution is not opposed to the application for the exhumation of the body of **K** and learned Counsel Mr. Muteti has gone to great length to explain the action the office has taken including giving directions to the Inspector General of Police to conduct investigations on the matter now before this Court, secondly, that the independent police oversight authority is also investigating the same matter. To that effect it is deemed necessary by the Director of Public Prosecution to have a second post mortem examination conducted in the presence of Government Pathologist as there is a clear dispute as to the cause of death.

The action by the Director of Public Prosecution is laudable for its in conformity with article 157(11) of the Constitution which provides,

“In exercising the powers conferred by this article the Director of Public Prosecution shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process”.

The main ground for opposing this application is presumed on Duruma customs and traditions which are against exhumation or disturbance of dead bodies.

Assuming that, what has been deponed by the first interested party reflects the correct position under Duruma customary law (for it has not been established through affidavits and annexures or otherwise that that is the custom) can it be said that it passes the test under article 159(3) of the Constitution, which provides,

“Traditional dispute resolution mechanisms shall not be used in a way that

(a) Contravenes the bill of rights.

(b) Is repugnant to justice and morality or results in out comes that are repugnant to justice or morality.

(c) is inconsistent with this Constitution or any written law.”

Section 387(2) of the Criminal Procedure Code donates powers to a magistrate conducting an inquiry to order for exhumation of a dead body so as to discover the cause of death.

Article 165(3) (a) of the Constitution vests the High Court with unlimited original jurisdiction in Criminal and Civil matters.

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 thee Deceased, then it is repugnant to justice and its inconsistent with the Constitution to that extent and therefore null and void.

A perusal of the affidavits do show that there is a running dispute between the father and mother of the Deceased and what seems to occupy their minds is the issue of compensation. Compensation is not part of the Criminal process (at least not at this stage).

This Court does find merit with orders sought for exhumation of the body of **K** and the conducting of a second post mortem examination.

It is ordered that exhumation of the body of the Deceased be carried or conducted as prayed and leave to conduct an independent post mortem examination is hereby granted. The Government Pathologist to be

present during the examination that will be carried on 12th September, 2014.

Subsequently reports to be filed in Court within fourteen (14) days from the time of the examination.

Ruling delivered dated and signed this **9th** day of **September, 2014**.

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M. MUYA

JUDGE

9TH SEPTEMBER, 2014

In the presence of:-

Mr. Muteti for the State

Mr. Khaminwa and Mr. Ndumbi

M. MUYA

JUDGE

Mr. Muteti:

We need the logistics. We had to make arrangements with the Kwale County Commander.

Court:

Orders to be extracted Mr. Muteti for Director of Public Prosecution to liaise with Counsels towards logistics for the exhumation and post mortem examination.

M. MUYA

JUDGE

Order also to be served on Independent Police Oversight Authority. Photocopies of the ruling to be furnished to the parties.

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M. MUYA

JUDGE

9TH SEPTEMBER, 2014