



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 72 OF 2015

REPUBLIC

PROSECUTOR

VERSUS

ERICK ONCHOKE

ACCUSED

RULING

1. The deceased was murdered on 16th June, 2015, at Khayega, and the body was taken to Kakamega Hospital Mortuary, from where it was transferred to Hema Hospital Mortuary. Dr Ezekiel Okanda Zoga, performed a post-mortem examination on the body of the deceased on 18th June 2015.

2. On 4th November 2015, the accused person was arrested and later arraigned in court where he was charged with

the murder of the deceased. The accused pleaded not guilty and the case proceeded to hearing and so far twelve witnesses have testified.

3. Dr. Zoga, who testified as PW 13, who performed a post-mortem examination on the body of the deceased testified and stated that his qualifications include a bachelor's degree in medicine and surgery from Nairobi University and that he qualified as a consultant ophthalmologist from the same University in 2009. According to him, one of the units taken in the study of medicine at the bachelor's level is pathology.
4. When the prosecution sought to lead the Doctor to produce the post-mortem report, the defence counsel objected, arguing that Dr Zoga is not a pathologist and, therefore, not qualified to conduct the post-mortem examination. According to the defence, the doctor was not qualified to perform the autopsy when he did as he was already an eye specialist. They contend that this being a sensitive matter in which the accused's rights are at

stake, the court should not allow the doctor masquerading as a pathologist to produce

the post-mortem report. It was their case that the murder of the deceased involved two rifles and three other weapons, and only a pathologist would have been in a position to conduct a proper post-mortem.

5. The prosecution submitted that Dr. Zoga is a medical officer with a medicine and surgery degree, qualifying him to conduct post-mortem examinations.
6. On behalf of the victim's family, counsel holding watching brief urged the court to dismiss the objection as there is no single law that states that a medical officer cannot produce a post-mortem report. He posited that the doctor should be allowed to make the report, and the defence could cross-examine the witness on any issue arising therefrom.
7. The key issue for determination is whether Dr Zoga's post-mortem report is admissible as evidence. According to Section 77 of the Evidence Act, a medical practitioner who

has conducted a post-mortem examination can provide expert testimony on the cause of death. Section 77 provides as follows:-

“(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)...

(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.”

8. The Medical Practitioners and Dentists Act defines a medical practitioner as ***“a person registered under this Act as a medical practitioner”***. Dr. Zoga testified that he was a doctor and gave his registration number as A4874. The

defence did not challenge his registration status but relied on his being an ophthalmologist rather than a pathologist to object to the report he prepared.

9. I am cognizant of the fact that the National Coroners Service Act, 2017, establishes the framework for investigating deaths in Kenya and provides for the appointment of coronial officers to conduct investigations. However, the Act has not been fully operationalised, although it recognises the importance of forensic medical science services in investigating deaths. Needless to say, the said Act was enacted long after the witness had performed a post-mortem on the deceased and cannot operate retrospectively. As it stands, post-mortem examinations can be conducted and are still being conducted by the medical officers with the legal framework for the admissibility of the medical officer's reports being laid out in Section 386(2) of the Criminal Procedure Code, which provides that:-

“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 Cabinet Secretary 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.”

10. Additionally, the Health Act, 2017, which establishes a unified health system and provides for the regulation of health care services and health care service providers under Section 84 (2) of the said Act provides the legal basis for the authorization of a medical practitioner to perform a post-mortem examination and states as follows:-

“(1) Subject to subsection (2), a post mortem examination of the body of a deceased person may be conducted if—

(a) the person when alive gave consent thereto;

(b) the spouse(s), child, guardian, brother or sister of the deceased, in the specific order mentioned, gave consent thereto; or such an examination is necessary for determining the cause of death. (Emphasis ours)

(2) A post mortem examination may not take place unless—

(a) there is a medical practitioner in charge of clinical services in the hospital or authorized institution or of the mortuary in question, or any other medical practitioner authorized by such practitioner; or

(b) in the case where there is no medical practitioner in charge of clinical services, a medical practitioner authorized by the person in charge of such hospital or authorised institution, authorizes the post mortem examination in writing and in the prescribed manner.”

11. The defence did not adduce any evidence that Dr. Zoga was not authorised to conduct the post-mortem when he did. He was a medical officer and practitioner therefore qualified to perform post-mortem examinations and provide expert testimony.
12. In a country such as Kenya, where there is a dearth of medical specialists and, more specifically, pathologists, it is common knowledge that medical officers have been performing post-mortems. Until such a time as there shall be a critical mass of qualified pathologists in the country, to insist that only a pathologist should conduct post-mortems and produce post-mortem reports in court would lead to great injustice. A reading of Section 43(2) of the National Coroners Service Act is indicative of the present reality in Kenya, as it provides that the Coroner may hire a suitably qualified practitioner, medical provider, qualified medical practitioner or any other expert to conduct a post-mortem examination of a body.
13. In the case of **Republic v Clinton Gitonga Mbae [2024] KEHC 2320 (KLR)**, Njuguna J. considered a preliminary

objection urging the court to render a post-mortem report inadmissible as it was prepared by an unqualified person thus flaunting the National Coroner's Service Act, the laws of natural justice and the Constitution. In dismissing the objection, the learned Judge held that:-

“15. On the other hand, and most importantly, there is already in place a law that speaks to the admissibility of PW1's testimony. As rightly pointed out by the respondent, Section 386(2) of the Criminal Procedure Code is still in force and applicable in this case. Its fate is unknown when the National Coroners Service Act will be fully operationalized but for now, it is the applicable law in this regard. It states thus:

(2)....

16. In this case, the cause of death of the deceased was in question and therefore the body of the deceased was presented to Embu Level 5 Hospital for post-mortem. According to the information, the alleged murder occurred within

Embu County and the police officers were within the law by presenting the body at the said hospital where it was examined by PW1. In my view, this is within the meaning of the above cited provision.”

14. Based on the evidence presented, I find that Dr. Zoga's medical qualifications qualify him to conduct a post-mortem examination and to tender post-mortem reports prepared by him to the court. His testimony and report are therefore admissible as evidence. The defence shall have the opportunity to cross-examine him on the procedure done and his findings should they have issues with his conduct and report.
15. The upshot is that I find no merit in the objection by the defence counsel and it is hereby overruled.

Dated, signed and delivered at Kakamega this 7th day of October 2025.

**A. C. BETT
JUDGE**

In the presence of:

Ms. Chala for the Prosecution

Ms. Adhiambo for the Accused

Mr. Innocent Ondieki holding watching brief for victim's family

Court Assistant: Polycap