



REPUBLIC OF KENYA



**St. Joseph Missions of Messiah in Africa Church v State Thro' Director of Public Prosecution
(Criminal Revision E095 of 2025) [2025] KEHC 15467 (KLR) (16 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15467 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL REVISION E095 OF 2025
A. ONG'INJO, J
OCTOBER 16, 2025**

BETWEEN

ST. JOSEPH MISSIONS OF MESSIAH IN AFRICA CHURCH APPLICANT

AND

STATE THRO' DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. This Application for review herein arises from the Rongo Miscellaneous Application No. E022 of 2025 which was filed by the Office of Director of Public Prosecution on behalf of the IP Mboya Benjamin and sought for orders that the Honorable court be pleased to issue orders to enable the respondent to exhume the body of the deceased No. 87386 PC Dan Ayoo Obura, a Police officer attached to GSU Headquarters that occurred on 27/03/2025 and buried on 28/03/2025 in the church compound against the wish of the parents and conduct necessary investigations. On 08/08/2025, the trial court sitting at Rongo allowed the said application.
2. Being aggrieved by the decision the Applicants filed the application herein seeking review of the trial Magistrates orders allowing the exhumation of the body of the deceased citing lack of service and being denied the right to be heard.
3. The Applicants sought that the honorable court be pleased to call for and examine the record of proceedings before Hon. Magistrate in Rongo Criminal Miscellaneous Application No. E022 of 2025 for the purposes of satisfying itself as to the correctness, legality and propriety of the orders of the trial court issued on the 8th day of August, 2025
4. It was also sought that the Ruling and the Subsequent order of the Honorable Magistrate Courts in Rongo Criminal Miscellaneous Application No. E022 of 2025 ordering the exhumation of the deceased Dan Ayoo Obura buried within its compound be revised, stayed, suspended, quashed, varied, set aside and/or substituted with favorable orders.



5. The Application was premised on the ground that the applicant herein was never served with the said application and that the ex parte ruling amounted to willful ouster of the fundamental constitutional provisions particularly the right to fair trial and be heard. It was further contended that the ruling contravened the Applicant's rights under articles 49, 50 & 159(2)(a) of *the Constitution* of Kenya 2010 as it was excluded from the proceedings yet it was made a mandatory participant by being cited as the only Respondent.
6. The application was supported by the grounds on the body of the application and supporting affidavit sworn by Micheal Onyango Kus who identified himself as one of the Directors of the Applicant church and averred that the order was granted without any basis and in blatant violation of the right to fair hearing as provided for by *the Constitution* and contrary to the religious beliefs of the deceased and the cause of death of the deceased did not warrant investigation.
7. The deponent of the supporting affidavit averred that the application at Rongo Court was ill motivated and speculative considering that there were medical records showing the probable cause of death and nothing stopped the Respondents from investigating the said medical documents
8. It was further argued by the Applicants that the orders issued on 8th August 2025 had deprived the Applicant of its right under Articles 49, 50 & 159 (2) (a) of *the Constitution* and there is imminent risk of further infringement on the rights of the Applicants if the orders issued in Rongo Miscellaneous Application No. E022 of 2025 is not stayed, quashed, substituted, varied and/ or revised. That failure to review the order would amount to mockery of *the Constitution* and blatant violation of the Constitutional rights and freedoms guaranteed to everyone.
9. The Respondent herein opposed the application vide grounds of opposition dated 17th September 2025 in which it was indicated that the Respondent filed Rongo PMC Criminal Miscellaneous Case No. E022 of 2025 and sought for orders of exhumation of the body of the deceased GSU Officer P.C Dan Ayoo whose remains were interred in the Applicant's church compound.
10. According to the Respondent the deceased was admitted at St Elizabeth Hospital in Chiga and on 23rd December 2024 he absconded from the hospital and his father filed a missing person report at Chiga Police Post vide OB No. 03/24/12/2024 at 0721 hours.
11. The Respondent also indicated that the father of the deceased had initially filed an application No. EE015 of 2025 which was placed before the court on 10th April 2025 seeking for the exhumation of his son's body. and that when the criminal application was placed before the court it was referred to the court that was also handling a civil suit touching on the same subject matter for appropriate directions to avoid a situation where conflicting orders are issued on the same matter by different courts.
12. The Respondent argued that the criminal application was mentioned alongside the civil suit throughout until judgement was delivered on 6th August 2025 and orders of exhumation granted in both applications and the Applicants cannot claim they did not know the existence of the criminal application to exhume the body.
13. It was further the Respondents contention that the deceased was admitted at the hospital on 20th December 2024 and from the time he absconded on 23rd December 2024 at 8,30pm under unclear circumstances, he died 3 months later on 27th March 2025 and there were no medical documents showing probable cause of death and thus the quest to investigate the circumstances under which he died. That one day after the death the body of the deceased was interred in the Applicants compound after the wife of the deceased hurriedly obtained a burial permit and there was no room to conduct postmortem and establish the cause of death.



14. The Respondent urged the court to uphold the orders issued at Rongo court as the Applicants had not demonstrated how they were prejudiced and the application lacks merit, it is frivolous and an abuse of the court process meant to delay the exhumation process.
15. The applicants filed submissions dated 17th September 2025 to support their application.

Analysis and Determination

16. Having considered the application, supporting affidavit, grounds of opposition, submissions, and the record, the following issues arise for determination:
 1. Whether the application for review is properly before this Court.
 2. Whether the Applicant was denied the right to be heard through lack of service.
 3. Whether the orders issued by the trial court were illegal, irregular, or improper.
 4. Whether the impugned exhumation order should be reviewed or set aside.
17. The jurisdiction of this Court to review or revise orders of a subordinate court is derived from Sections 362 to 364 of the Criminal Procedure Code (CPC) and Article 165(6) & (7) of *the Constitution*, which empower the High Court to call for and examine the record of any criminal proceedings before any subordinate court to satisfy itself as to the correctness, legality, or propriety of any order or proceedings. Applicant's application seeking review of the magistrate's order on exhumation, is therefore properly before this Court.
18. On whether the Right to Fair Hearing and Service was violated the Applicant's main contention is that the exhumation order was granted without service, hence in violation of the right to be heard. The right to a fair hearing is guaranteed under Article 50(1) of *the Constitution* and is a non-derogable right under Article 25(c). The principle of audi alteram partem dictates that no person should be condemned unheard. The Applicant were named as the Respondents in the application in the judicial proceedings in the subordinate court but were not served and the order issued against them is a nullity, having been obtained in violation of the principles of natural justice.
19. The record of the trial court shows that on 22nd May 2025 Hon. Mutava RM who was in conduct of the matter referred it to the Principal Magistrate Hon. Oruo who was also in conduct of a civil case No E015 of 2025 which touching on the same subject matter and filed by the father of the deceased seeking to have the body of his son exhumed. Hon. Oruo PM fixed the Criminal Misc. Application for directions on 27th May 2025. Subsequently the matter was mentioned severally up to 8th August 2025 when the orders complained of were issued in the application for purpose of investigations and also in Civil Case No. E015 of 2025 allowing the exhumation of the body of the deceased for burial at his father's homestead at Kochieng in Nyando Sub-County.
20. It is appreciated that the application at the subordinate court and the suit filed by the father of the deceased proceeded before the same trial Magistrate and were determined one day apart but the Miscellaneous application does not show that there were any proceedings that took place between the time the matter was taken before Hon Oruo PM and the time that the prayers to exhume the body was allowed. It is also noted that the orders issued in the application and those issued in the civil suit were going to be in conflict with each other to some extent being the Respondent required the body to be exhumed for purposes of investigations whereas the father of the deceased required to exhume the body for purposes of burial in a different location away from the subject church.



21. Considering that no affidavit of service was filed and the record is silent on service it is therefore evident that the Applicant was not served before the orders of 8th August 2025 were issued. Proceeding in the absence of service deprived the Applicant of an opportunity to respond and participate in the hearing, rendering the proceedings procedurally defective and unconstitutional.
22. The power to authorize exhumation of a body is regulated under Section 146 of the *Public Health Act* (Cap 242), which requires that a magistrate may issue such order only upon sufficient cause being shown, usually for public health or criminal investigations purposes.
23. While the ODPP is lawfully entitled to apply for such orders in the interests of justice, the application must adhere to due process, including giving notice to the affected persons or institutions where the burial occurred.
24. The trial court's failure to ensure proper service or to hear the Applicant inter partes amounted to procedural impropriety, thereby tainting the validity of the resultant order.
25. Whether the orders should be set aside the Court, in exercise of its supervisory and revisionary powers, has the authority to quash or vary orders that are illegal, irregular, or improper. Given that the exhumation order was issued without service and in violation of the Applicant's right to be heard, the same cannot stand. It is therefore proper that the order be set aside, and the matter remitted for a fresh hearing inter partes upon proper service.
26. Consequently, this court find the application to be meritorious and accordingly make the following orders:
27. The orders issued on 8th August 2025 in Rongo Criminal Miscellaneous Application No. E022 of 2025 are hereby set aside in entirety.
28. The ODPP's application for exhumation shall heard afresh hearing before Hon. N. Wairimu SPM at Migori CM's Court. Mention on 29th October 2025 for directions.
29. Each party shall bear their own costs of this application.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 16TH DAY OF OCTOBER 2025.

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ANNE ONG'INJO

JUDGE

