

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
HIGH COURT MISCELLANEOUS CRIMINAL
APPLICATION NO. E002 OF 2025

REPUBLIC

.....APPLICANT

VERSUS

PAUL KIMANI MWANGI

.....RESPONDENT

RULING

1. By an undated notice of motion application brought under the provisions of Article 50(1), (2), (c), (e), (j) and (k), Article 159(2), (a), (b), (d) and (e) of the Constitution of Kenya 2010, Section 173 of the Evidence Act (Cap 80) Laws of Kenya and all enabling

provisions of the law, the applicant is seeking for the following orders;

a) That this Honourable court be pleased to issue an order that the respondent be escorted to the Government Chemist Nairobi for his DNA samples to be obtained for purposes of DNA sampling and analysis and comparison with deceased samples.

b) Any other orders this honourable court may deem fit to grant.

2. The application is based on the grounds thereto and an affidavit sworn by the learned state counsel Shirley Chepkonga. It is averred that by an order issued vide Misc Criminal Application No. 71 of 2020 at PM's Court at Engineer, the court directed the investigating officer to escort the respondent to the Government analyst for DNA sampling and analysis. That the

respondent had been arrested over an offence of murder.

3. That the respondent was escorted to the Government analyst and DNA samples taken. However, when (PW11) C.N. Ngura the government analyst testified and produced the government chemist report he indicated that the DNA samples of the respondent were not submitted for analysis and/or compared.
4. The applicant argues that the failure to analyze the samples taken from the respondent for DNA analysis will highly prejudice its case and cause miscarriage of justice. That to the contrary the respondent will not be prejudiced as he will have an opportunity to test the veracity of the evidence availed through cross-examination. Therefore, it is only fair and just that the orders sought be granted.

5. The respondent did not file any response to the application but the parties were directed to file skeleton submissions to dispose of the application. The applicant argued that the respondent is charged with the offence of murder vide HCCRC No. 5 of 2020, Republic vs Paul Kimani Mwangi and so far a total of 12 witnesses testified in support of its case and the case closed on 5th November, 2024.

However, in the absence of the subject DNA results the prosecution case will be prejudiced.

6. The applicant submitted that, compelling the respondent to submit DNA samples does not amount to self incrimination and neither does it fit in the ambit of Article 50(2)(1) of the Constitution of Kenya. That the outcome of DNA will enable the court arrive at a fair determination of the case.

7. The applicant relied on the case of; Republic vs John Kithyululu [2016] KEHC 5990 (KLR) where the court held that, taking of an accused's blood sample is not unconstitutional or an infringement on the accused person's rights.
8. The applicant also relied on the provisions of Section 122A (1) of Penal Code to submit that the DNA results may prove or disprove that the respondent committed the offence. Finally, the applicant submitted that the respondent is charged with a serious offence that carries a sentence of a death.
9. I have considered the application in the light of the material placed before the court. First and foremost, the exhibit memo annexed to the supporting affidavit marked 'SC 1' proves that indeed the investigation officer took the respondent for sample for DNA

analysis. The same must have been misplaced at the government chemist.

10. It is notable that the prosecution case depends on the investigations carried out by state agencies and any negligence or failure of duty on their part cannot be visited upon the prosecution case. This is akin to the argument mainly in civil cases that “the mistake of the course” should not be visited upon the litigant.
11. Furthermore, the prosecution as it were, is an agent of necessity. In a criminal matter, it shoulders the responsibility to prosecute a case on behalf of the victim and to a large extent the public. Consequently, before the court can dismisses the prosecution’s case, it should always remember the scale of justice must balance for justice to be done and be seen to be done.
12. The question that must be borne in mind is whether by allowing the prosecution to re-open a closed case,

the defence will suffer any prejudice. In the same vein, reversed, the question will be; if the prosecution is not allowed to re-open the case, whether the prosecution and by extension the victim will be prejudiced.

13. I subscribe to the principle of "the lesser evil". The question then is; if the DNA sampling is done, will the accused be prejudiced? In my considered opinion, if the DNA analysis will be carried out, there two results that will arise; positive and negative. If positive, it will enhance the prosecution case but just like any other evidence adduced, the respondent will have an opportunity to interrogate the evidence adduced through cross-examination. If the results will be negative, the respondent will be exonerated.

14. However, if the DNA analysis is not done at all, then the prosecution case will be prejudiced and the truth in the matter may never be known. If, as submitted herein, the case is hinged on circumstantial evidence, the failure to adduce DNA analysis evidence may be fatal to the prosecution case and in that case, justice may never be served.
15. Finally, it is notable that although the prosecution closed its case in the murder trial, the court has not rendered its decision as to whether the accused has a case to answer or not.
16. In the given circumstances, the court is inclined to allow the application as prayed.
17. However, notably the matter has apparently delayed as the file was inadvertently filed away as it awaited the decision herein. The delay is highly regretted. To expedite the matter, I direct the investigating officer

take the respondent for DNA sampling on or before 13th March, 2026. The government analyst to give the analysis thereof priority and avail the results in seven (7) days. In the meantime, the criminal matter be set down for hearing on priority basis.

18. It is so ordered.

Dated, delivered and signed this 10th day of March 2026.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Chepkonga for the State

Mr. Wairgei for the respondent

Ms. Hannah: court assistant