



**Muasa v Republic (Criminal Revision E050 of 2024)
[2024] KEHC 13463 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION E050 OF 2024**

FR OLEL, J

OCTOBER 29, 2024

BETWEEN

BONFACE KIOKO MUASA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The applicant filed the notice of motion Application dated 10th April 2024, pursuant to provisions of Article 50 of the *constitution* of Kenya 2010, Section 362 and 387 of the *criminal procedure code*, Direction 20 of practice directions on standardization of practice and procedures in the High court 2012. The applicant seeks for orders that;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. This honourable court be pleased to call for the record of the subordinate court and review the correctness, legality, or propriety of the findings and orders contained in the ruling dated 4th April 2024 issued in Kangundo Inquest No E001 of 2022.
 - e. The costs of this Application be in the cause.
2. The applicant relied on the grounds stated on the face of the said Application and his supporting affidavit, where he deponed that he was the first witness in Kangundo Cmcc Inquest No 1 of 2022, where the subject matter was inquiry into the circumstances that lead to the death of one Albanus Kioko Ndeto. Ultimately five witnesses did testify and the trial magistrate did return a ruling dated 4th



April 2014, where the court stated that “ For this reason, I will order that Bonface Kioko Mwanzia be arrested and charged with the offence of murder, contrary to Section 204 of the penal code.”

3. The applicant contended that this finding flies in the face of Article 157(6) of the constitution of Kenya and invaded the DPP’s exclusive mandate as the office with the “sole authority” and power to “institute and undertake” criminal proceedings without directions of any person or authority. The inquest court’s observation was also made in error as that finding was not supported by the evidence presented during the inquest and if allowed to stand, the same would be binding and extremely prejudicial to him, as his guilt would have already been determined without due process. The trial magistrate also made a further error in not granting the Applicant his automatic right to Appeal against the said decision.
4. The applicant thus urged this court to find that it had jurisdiction under Section 362 of the Criminal Procedure Code to call for the trial court record and review the correctness, legality, and/or propriety of the findings contained in the impugned ruling.
5. This application was opposed by the respondent, though the replying the affidavit of prosecution counsel Miss Mary Otulo dated 12th July 2024, wshe deponed that the inquest was conducted in compliance with Section 387 and 388 of The Criminal Procedure Code as it was suspected that the deceased cause of death was due to foul play and upon conclusion of the said inquest, a recommendation was made for the arrest and commencement of criminal proceedings against the Applicant.
6. The respondent urged the court to note that the Applicant was not challenging the inquest process but rather was aggrieved by the final order issued based on the trial court analysis of the evidence presented. The respondent counsel concurred with the applicant’s contention that the trial court finding to “ order the arrest and charging” of the Applicant was wrong as it was made beyond the scope of statutory provisions guiding Inquest proceedings, but this shortcoming would not compromise the applicant’s right to a fair trial if eventually charged.
7. The respondent further urged the court to note that the office of the ODPP would act independently and exercise its mandate in accordance with provisions of Article 157(6) of the constitution of Kenya, the directions to charge guidelines, the inquest file proceedings/ ruling and also evidence obtained by the police as contained in the police file. The respondent therefore urged the court to find that there was no irregularity to warrant revision of the Inquest court’s orders and prayed that the application under consideration be dismissed.

C. Analysis of Law

8. I have considered the application by the applicant as well as the response by the state counsel. The powers of the High court in revision as contained in Section 362 through to 366 of the Criminal Procedure Code (cap.75). Section 362 specifically provides as follows: -

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”.



9. What the High Court can do under its revision jurisdiction is stated under Section 364 of the *Criminal Procedure Code* Cap 75, which states as follows: -

- “(1) in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may –
- (a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
 - (b) In the case of any other order than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
- (3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

10. The statutory provisions, which underpin the Magistracy authority to conduct inquest are provided for under Section 385 -388 of the *Criminal Procedure Code*. In particular, Section 385 of the said code does provide that;

A magistrate empowered to hold a subordinate court of the first, or second class, and a magistrate specially empowered in that behalf by the Chief Justice, shall be empowered to hold inquests.

11. Further Section 387 of the said *Criminal Procedure Code* allows inquiry by a Magistrate into cause of death. The said proviso also provides that;

- (1) When a person dies while in the custody of the police, or of a prison officer, or in a prison, the nearest magistrate empowered to hold inquests shall, and in any other case mentioned in section 386(1) a magistrate so empowered may, but shall in the case of a missing person believed to be dead, hold an inquiry into the cause of death, either instead of or in addition to the investigation held by the police or prison officer, and if he does so he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.
- (2) Whenever the magistrate considers it expedient to make an examination of the dead body of a person who has been already interred, in order to discover the



cause of his death, the magistrate may cause the body to be disinterred and examined.

- (3) If before or at the termination of the inquiry the magistrate is of the opinion that the commission by some known person or persons of an offence has been disclosed, he shall issue a summons or warrant for his or their arrest, or take such other steps as may be necessary to secure his or their attendance to answer the charge; and on the attendance of the person or persons the magistrate shall commence the inquiry de novo and shall proceed as if he had taken cognizance of an offence.
- (4) If at the termination of the inquiry, the magistrate is of the opinion that an offence has been committed by some person or persons unknown, he shall record his opinion and shall forthwith send a copy thereof to the Director of Public Prosecutions.
- (5) If at the termination of the inquiry, the magistrate is of the opinion that no offence has been committed, he shall record his opinion accordingly.
- (6) In the case of an inquiry relating to a missing person believed to be dead the magistrate shall at the termination of the inquiry report the case together with his findings to the Director of Public Prosecutions and shall make recommendations as to whether or not the period regarding the presumption of death provided for by section 118A of the *Evidence Act* (Cap 80) should be reduced and if so what lesser period should, in the circumstances of the death, be substituted for the period of seven years.

12. The applicant's only complaint is about a specific finding of the inquest court, where the honourable Magistrate did order that "For this reason will order that Boniface Kioko Mwanzia be arrested and charged with the offence of murder contrary to section 204 of the penal code. It is so ordered, Right of Appeal 14 days." He averred that the said finding was made contrary to provisions of Article 157(6) of the *Constitution*, which places the sole responsibility to "institute and undertake" criminal proceedings on the DPP, who does not take any instructions or directions from any third party while undertaking this solemn duty. This finding was also faulted as it presumed, that the applicant was already guilty without any trial being conducted, and that infringed on his right to a fair trial.
13. The respondent did in their reply agree with the applicant's contention that the words "order that the Applicant be arrested and charged" as penned by the inquest Magistrate was wrong since the court's mandate was limited to stating his finding of fact, without preferring a particular course of prosecutorial action to be taken by the DPP.

C. Determination

14. I considered the pleading filed and taken note of the provisions of Section 387 (4) of the said *Criminal Procedure Code* which provide that;

If at the termination of the inquiry, the magistrate is of the opinion that an offence has been committed by some person or persons unknown, he shall record his opinion and shall forthwith send a copy thereof to the Director of Public Prosecutions.
15. The inquest magistrate correctly captured the inquest evidence and found that the evidence of PW2 Veronica Wayua Ndeto, PW3 Lawrence Wahema Ndeto, PW5 PC Stephen Ombiwa, and PW4 IP Rita



Tatu disclosed the offense of murder. At that point, he ought to have recommended that the inquest findings be forwarded to the DPP for his action in line with Article 157(6) of the *Constitution* of Kenya, 2010. The inquest finding that the applicant “be arrested and charged with murder” was, therefore, a misdirection, made in excess of jurisdiction.

16. The words I will order that Bonfice Kioko Mwanzia be arrested and be charged with the offence of murder contrary to section 204 of the penal code” are hereby expunged from the inquest finding in paragraph 8. The findings of Hon Ole Keiwua (CM) in Kangundo CMCRC Inquest No E001 of 2022 will be forwarded to the DPP to make an independent decision as to whether or not there are sufficient grounds or evidence to disclose the offence of Murder.

17. It is hereby so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF OCTOBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 29TH DAY OF OCTOBER, 2024.

In the presence of: -

Mr. Munguti for Applicant

Ms Otulo for Respondent

Shirleen/Kanja Court Assistant

