



REPUBLIC OF KENYA



KENYA LAW
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**In re Obadia Kepha Ondabu (Deceased) (Criminal Revision
85 of 2022) [2023] KEHC 1372 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1372 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL REVISION 85 OF 2022
CW GITHUA, J
FEBRUARY 23, 2023**

(From original Inquest No. 1 of 2014 of the PM'S Court at Ogembo)

RULING

1. This ruling relates to an application for revision made in letter dated April 13, 2022 authored by the firm of Kairu Kimani & Co. Advocates on behalf of the family of the late Obadiah Kepha Ondabu (hereinafter the deceased).
2. The application seeks revision of a ruling delivered by Hon. Naomi Wairimu (PM) on February 21, 2017 in Ogembo Principal Magistrate's Court Inquest No. 1 of 2014. According to the trial court's record, the Inquest was held pursuant to recommendations made by the then Directorate of Public Prosecutions in letter dated November 5, 2013 to establish the culprit(s) responsible for the murder of the deceased whose body was retrieved from River Gucha on December 7, 2012 with stab wounds.
3. A post mortem examination performed on the body revealed that the deceased's cause of death was cardio respiratory arrest secondary to strangulation and intra-abdominal bleeding after an assault.
4. In the application, the court was invited to enquire into the legality, correctness and propriety of the trial court's ruling and to recommend which suspects ought to be charged with the offence of murder or to order that the inquest commences denovo before a different magistrate.
5. In support of their application, the deceased's family relied on the persuasive decision of Hon. George Dulu J in *Maurice Ndoo & another v Republic* [2010] eKLR where the Hon. Judge ordered an inquest to start denovo after finding that the magistrate who conducted the inquest in that case erred in law by simply closing the file at the conclusion of the inquest and recommending civil action instead of making orders envisaged under section 387(1) to (6) of the *Criminal Procedure Code*.
6. In the inquest under reference, after hearing a total of fifteen witnesses, the learned magistrate in her ruling pronounced herself as follows;

“Having considered the evidence on record other than confirming that indeed the deceased died and the cause of death, it is impossible to establish who caused the strangulation marks



found on the deceased's neck since all the people who saw him before his death were unable to tell who committed the act. I would make a finding that in view of the lack of evidence linking anyone with the death of the deceased to anyone in particular; I would therefore close the inquest herein with no recommendations for prosecution as the evidence does not point to any suspects.”

7. Under section 362 as read with section 364 of the *Criminal Procedure Code* (CPC), the High Court in the exercise of its revisional jurisdiction is empowered to call for and examine the records of any subordinate court to satisfy itself as to the regularity of the lower court's proceedings or the legality, correctness or propriety of orders made therein and thereafter make appropriate orders.
8. Besides the revisional jurisdiction donated under section 362 and section 364 of the C.P.C. which is limited to revision of decisions or orders made in criminal proceedings, the High Court also possesses general supervisory jurisdiction over any person or entity in addition to subordinate courts. This jurisdiction is donated under article 165(6) as read with article 165(7) which mandates the High Court to call for the record of proceedings before any subordinate court or person, body or authority except a superior court and make any order or give any direction it considers appropriate to ensure the fair administration of justice.
9. Under Section 365 of the Criminal Procedure Code, the court in the exercise of its revisional jurisdiction is empowered to hear and determine an application for revision without hearing any of the parties. In this case, I did not find it necessary to hear the applicant's counsel since the material placed before me was sufficient to dispose of the application.
10. Guided by the above constitutional and statutory provisions, I have read the evidence which was presented before the inquest court alongside the ruling made by the learned magistrate. I find that the only issue for my determination is whether there was any error, illegality or impropriety in the proceedings before the inquest court and the resultant ruling.
11. At the outset, I wish to observe that the inquest in this case was conducted under the provisions of Section 386(1) as read with section 387 of the *Criminal Procedure Code* which mandates magistrate to hold inquires into the cause of death of persons who had either;
 - a. Committed suicide; or
 - b. had been killed by another or in an accident; or
 - c. had died under circumstances raising a reasonable suspicion that some other person had committed an offence; or
 - d. a person who was missing and believed to be dead
12. Section 387 of the *CPC* on the other hand, provides for the holding of inquests for persons who die in police or prison custody. Given that the inquest in question was held under Section 386 (i) of the *CPC*, the remedies or orders the inquest court was mandated to grant are spelt out in Section 387(3), (4) and (5) of the *Criminal Procedure Code*.

Under subsection (3), if before or after the inquiry the magistrate was of the opinion that a criminal offence had been committed by some known person or persons, the magistrate was required to issue summons or warrant for the suspects arrest or use any other means to compel his/their attendance to answer to the charges and upon such attendance, the inquiry would be started denovo and proceed as if the magistrate had admitted the charge for the offence disclosed.



13. Under subsection (4), if at the conclusion of the inquiry the magistrate was of the opinion that an offence had been committed by an unknown person or persons, the magistrate was obligated to record that opinion and send a copy thereof to the Director of Public Prosecutions who would then decide on the next course of action.
14. The third and final option for a magistrate is provided for under subsection (5) which states that if at the end of the inquiry the magistrate was of the opinion that no offence had been committed; he or she was required to record that opinion and rest the matter at that point.
15. In this case, the evidence adduced by the prosecution witnesses especially the doctor who performed an autopsy on the body of the deceased left no doubt that the deceased did not die a natural death. The evidence clearly disclosed that his death was unlawfully caused by strangulation and assault given the stab wounds found on his body. At the conclusion of the inquiry, the learned magistrate came to the same conclusion and correctly found that the evidence placed before the court failed to disclose the identity of the person or persons who had unlawfully killed the deceased.
16. The above conclusion by the learned magistrate in effect means that though she did not expressly say so, she made a finding that a criminal offence, namely, murder or another minor offence related to the deceased's death had been committed by unknown persons. As stated earlier, the law required that if such a finding was made, the magistrate was to record an opinion to that effect and send a copy thereof to the Director of Public Prosecution (DPP) for further action.

In this case, it is my finding that the learned magistrate erred by closing the inquest instead of making an order that her ruling be served on the DPP presumably to facilitate further investigations or taking of other action that may unravel the culprits behind the deceased's death.

17. The allegations made by counsel on behalf of the deceased's family that the prosecution deliberately failed to call some witnesses and that the police covered up the murder in order to shield the suspects were not put before the learned magistrate who conducted the inquest to enable her to investigate their truth or otherwise and make appropriate orders. In an application for revision such as the present one, the court is bound by the lower court's record and cannot consider any information or claims that are outside the court record.
18. Having established that the learned magistrate seized of the inquest correctly found that the evidence presented before the court failed to disclose the identity of the person or persons who had unlawfully caused the deceased's death, I am unable to find any legal basis to make the orders sought by the applicant.

But having found that the learned magistrate erred by not sending her opinion to the DPP as required by the law, I hereby review the decision of the inquest court by ordering that the Hon. Deputy Registrar serves the Hon. magistrate's ruling on the Assistant Director of Public Prosecutions, Kisii County in compliance with Section 387(4) of the *Criminal Procedure Code* within the next 7 days.

It is so ordered.

DATED, DELIVERED AND SIGNED AT KISII THIS 23RD DAY OF FEBRUARY, 2023.

C. W. GITHUA

JUDGE

In the presence of;

Mr. Ombati holding brief for Mr. Kimani for the Applicant



No appearance for the Respondent

Ms. Aphline Court Assistant

