Manyibe & 4 others v Office of Director of Public Prosecutions & 2 others (Criminal Revision E001 of 2022) [2023] KEHC 2757 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2757 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL REVISION E001 OF 2022

WM MUSYOKA, J

MARCH 24, 2023

BETWEEN

DENNIS ROSANA MANYIBE ..... 1ST APPLICANT

FRANCIS KAYEMIT ..... 2ND APPLICANT

DUNCAN WAFULA ..... 3RD APPLICANT

MUSA JUMA ..... 4TH APPLICANT

MICHAEL CHERUGUT ..... 5TH APPLICANT

AND

OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS AT KAKAMEGA .... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

(Revision arising from the ruling, directions and orders delivered and made on 21st January 2022, in Kakamega Inquest No. 3 of 2020, Raymond Mulanda Lubanga, Deceased, by Hon. Eric Malesi, Principal Magistrate)

RULING

1. These revision proceedings were commenced by way of a letter, dated 24th January 2022, addressed to the Presiding Judge, by Victor Shivega & Company, Advocates, on behalf of the applicants, invoking section 362 of the Criminal Procedure Code, Cap 75, Laws of Kenya, and inviting the Judge to call up the inquest file, with a view to review the proceedings conducted, and thereafter revise the orders made, should the court be persuaded that that is the way to go.

2. The reasons identified in the letter, for the revision sought, are, among others:

a. That the inquest file had been placed before 3 different magistrates on divers dates, and proceedings taken without the knowledge or in the absence of the applicants;

b. That the directions, orders, observations and ruling made in their absence were substantive in nature and affected their rights to a fair hearing, and resulted in violation of their fundamental rights;

c. That the magistrate, who rendered the final ruling, took over the closed inquest file, and condemned the applicants unheard, without any evidence that they had been informed to attend court;

d. That the magistrate, who had taken the evidence, had on 14th December 2021, on her own motion, and in the absence of the applicants, recused herself on allegations of bribery by the investigating officer;

e. That the magistrate, who wrote and delivered the ruling on 21st January 2021, did not hear the witnesses testify nor examine their demeanour; and

f. That, upon the new magistrate taking over, he did not give directions on the way forward after hearing all the sides.

3. Contemporaneously with the letter to the Judge, the Advocates for the applicants filed a Motion, dated 24th January 2022, seeking conservatory orders, with relation to the proceedings being taken against the applicants, based on the outcome of the inquest proceedings, pending the hearing and determination of these revision proceedings. The affidavit in support was sworn by the 4th applicant. He avers that he was in the team of police officers who had received a distress call from the 1st applicant, about fracas at his business premises, and the police officers proceeded there and arrested the deceased, who later died in hospital, of self-inflicted injuries. Investigations were done, the investigations file was forwarded to the 1st respondent, who did not find any malice on the part of the applicants, and did not charge them with murder. He avers that the trial court took evidence, concluded the matter and closed the file, then handed the file over to another magistrate, who delivered a ruling without notice to them. He avers that although the applicants did testify in the proceedings, it later transpired that there were efforts to have the trial court bribed, to find them culpable for murder, and the investigating officer was subsequently arrested over that allegation, and the trial magistrate even recorded a statement. He avers that the applicants had been made victims of findings that were compromised.

4. He has attached, to his affidavit, a copy of a letter from the 1st respondent, dated 20th January 2020, which exonerated the applicants, and recommended an inquest; copy of the impugned ruling, delivered on 21st January 2022; and extracts or excerpts from the Police Occurrence Book, with respect to the arrest of the investigating officer.

5. The Motion was placed before me on 24th January 2022, and I certified it urgent, and allocated it a date for hearing. In the meantime, I granted temporary conservatory orders, and placed the applicants on personal bond each.

6. On 31st January 2022, the father of the deceased, Robert Lubanga Simiyu, filed a Motion herein, dated 29th January 2022, seeking to be joined to the instant proceedings. That application was allowed, by consent of the principal parties, on 2nd March 2022.

7. Neither of the respondents filed responses to the request for revision. However, there is nothing untoward about that, given that these revision proceedings commenced by way of a letter, as opposed

to pleadings, and raised pure points of law, and the best way to deal with such a process is by legal arguments, carried in written submissions.

8. Directions were given on 12th May 2022, for disposal of the revision by way of written submissions. There is compliance. Both sides have filed written submissions, for I see submissions by the applicants, the 1st respondent and the interested party.

9. The applicants submit that the findings by the inquest court were to effect that the inquiry by the court, and the police investigations, pointed to commission of an offence of murder, and that the applicants were responsible for the murder. It is submitted that that finding was an incitement for a conviction for murder against the applicants. It is submitted that the inquest court had no jurisdiction to order the arrest and detention of the applicants. It is submitted that the inquest court ought not have pronounced itself on the criminal liability of the applicants. It is further submitted that the evidence gathered could not sustain a charge for murder, for reasons that: investigations for murder ought to be carried out, the applicants could not have formed an intention to commit murder as they were meeting the deceased for the first time, the applicants were on routine police patrol, the 1st applicant was not at the scene when the fracas started, the 1st applicant did not board the police vehicle, not all the applicants boarded the police vehicle and the 4th applicant did not board the police vehicle. It is argued that it was imputed that there was malice on the part of the police, hence no reasonable analysis was made, and the findings of the inquest court were, therefore, incorrect, improper and unreasonable.

10. The other issue, that the applicants submit on, relates to the letter by the 1st respondent, dated 20th January 2020. It is argued that the 1st respondent had evaluated the evidence gathered by the police on investigations, and had formed an opinion that the evidence could not sustain a charge for murder against the applicants, and that the forwarding of the file to the court was for the purpose of conducting an inquest for closure of the file. It is submitted that the findings of the court contradicted the findings of the 1st respondent. It is argued that the inquest court placed the applicants in custody before granting the 1st respondent a chance to evaluate the next course of action upon delivery of the ruling. It is submitted that the inquest court usurped the powers of the 1st respondent, by directing the 1st respondent on what was to be done in the circumstances, and it should not have ordered the detention of the applicants without input from the 1st respondent. It is argued that the inquest court should have forwarded it findings to the 1st respondent for review before further action. It is submitted that the inquest proceedings did not rely on new evidentiary material, and what was before the court was the police investigations file, which had earlier been placed before the 1st respondent, and which was the basis of the letter dated 20th January 2020. It is submitted that the 1st respondent, by its letter of 20th January 2020, had not transferred its constitutional powers, under Article 157 of *the Constitution*. It is submitted that the inquest court did not have the jurisdiction to make the orders it made, and the applicants cite In re Estate of Philip Otieno Odhiambo (Deceased) [2015] eKLR (Majanja, J) and Stephen Mwangi Mwaura vs. Republic [2020] eKLR (Mwongo, J). It is finally submitted that the findings and proceedings in the inquest could not pass the test of correctness, legality and propriety, under section 362 of the Criminal Procedure Code. It is argued that the inquest evidence cannot sustain a murder charge, and it is prayed that the applicants be discharged and the inquest court be directed to close the file.

11. On his part, the 1st respondent argues on 2 points. 1, whether the succeeding magistrate ought to have relied on the material recorded by the magistrate who disqualified herself, and 2, whether the order by the inquest court offended the provisions of Article 157 of *the Constitution*. On the first point, the effect of relying on the evidence recorded by the recusing magistrate, to make the impugned orders, it is submitted that that raises issues of fairness, as the said magistrate had disqualified herself upon

allegations of bribery, and there could be a perception that the trial was not fair nor impartial. Republic vs. David Makali 3 others [1994] eKLR (Cockar, Omolo & Tunoi, JJA), Republic vs. Jackson Mwalulu & 8 others [2004] eKLR (Omolo, Tunoi, JJA & Deverell, Ag. JA) and Jasbir Rai and 3 others vs. Tarlochar Sinju Rai and 4 others [2013] eKLR (Mutunga CJ&P, Rawal DCJ&VP, Ibrahim, Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ) are cited.

12. Related to that is the complaint that when the previous magistrate recused herself, the incoming magistrate did not take the views of the 1st respondent, before giving directions that he would prepare a ruling, based on the evidence recorded. It is observed that the court did hear some of the applicants who were in court then, but it is submitted that the views of those applicants could not sanitise the impugned proceedings. It is further submitted that an inquest is a public inquiry, which should involve many other people, rather than just the suspects.

13. On the second issue, the propriety of the orders of the incoming magistrate, the 1st respondent cites In re Estate of Philip Otieno Odhiambo (Deceased) [2015] eKLR (Majanja, J), Republic Thro' CID Mwingi vs. Julius Kilonzo Muthengi [2015] eKLR (Dulu, J), Stephen Mwangi Mwaura vs. Republic [2020] eKLR (Mwongo, J) and Nisha Sapra vs. Republic [2008] eKLR (Ojwang, J), to make the point that the law does not allow the court presiding over an inquest to order or direct what the 1st respondent should do with respect to a prosecution, and it should not even recommend or suggest a civil claim for the wrongful death. It is further submitted that the courts have held that section 387(3) of the Criminal Procedure Code is inconsistent with the constitutional provisions, so far as prosecutorial powers are concerned, to the extent that it appears to suggest that the court could direct that a suspect be charged of some offence, for that power and discretion lies exclusively with the offices vested with such power under *the Constitution*. It is concluded that the trial court ought not have relied on the impugned recorded evidence to prepare its ruling, and should have conducted fresh proceedings, and it is proposed that the ruling be set aside, and the matter referred to the 1st respondent to make an independent decision, in accordance with Article 157 of *the Constitution*.

14. On his part, the interested party submits that there was no illegality, impropriety, incorrectness or irregularity in the direction by the court that the applicants be charged, to warrant interference by the High Court or to set aside the findings of the trial court. He submits that the incoming magistrate had jurisdiction to conduct an inquest on the matters at hand, by virtue of sections 385 and 387 of the Criminal Procedure Code. It is submitted that in an inquest there are no parties, no prosecutors, no defence and no trial, since the purpose of an inquest is to establish facts, comparable to an inquisitorial process of investigation. It is submitted that the recusal of the initial magistrate did not automatically render the prior proceedings questionable, and no issues have been raised, as to the propriety or legality or regularity or correctness of the said proceedings. It is further argued that since the court was handling inquest proceedings, it was not necessary for it to hear any party before giving directions, and, in any case, notices were given but some of the parties did not attend court. On whether the evidence at the inquest met the threshold for a murder trial, it is submitted that the recommendations of the inquest court represented the opinion of the magistrate, and since the murder charge was to be placed before the High Court, those issues ought to be addressed at that level. He argues that Stephen Mwangi Mwaura vs. Republic [2020] eKLR (Mwongo, J) upheld the ruling of the inquest court, and declined to set it aside.

15. The proceedings herein raise the following, in principal; the jurisdiction of a magistrate handling an inquest, and how an incoming magistrate, taking over a matter from an outgoing magistrate, ought to handle it thereafter.

16. Let me start with the issue of jurisdiction. The issue raised by the applicants is not that the magistrate who rendered the ruling had no jurisdiction, but rather whether he acted properly and within the law

to continue the proceedings from where the previous magistrate had left off, in view of the reasons behind the recusal of the other magistrate. The second level is with respect to the orders made in the ruling itself, as to whether the jurisdiction to conduct an inquest, extended to making the orders that were made in that ruling.

17. The proceedings, the subject of this revision, are provided for under sections 385, 386, 387 and 388 of the Criminal Procedure Code. Sections 385 and 386 are general provisions, while sections 387 and 388 are specific on conduct of inquests or inquiries by magistrates.

18. Section 385 is on the jurisdiction of magistrates to hold inquests, which lies with magistrates of the first and second class, and any other magistrate specially empowered by the Chief Justice. Section 386 directs the police on what to do whenever they get information about a suicide or a killing of a person by another or death in circumstances which suggest that the killing was by another person or a person is missing and is believed to be dead. It requires them to make a report to the nearest magistrate empowered to conduct inquests, and unless, directed otherwise, proceed to where the body of the person is, carry out investigations, draw a report and forward it to the magistrate. The police should also present the body to a medical officer for post-mortem.

19. Section 387 provides for conduct of inquiries by an empowered magistrate on causes of death. That jurisdiction covers the deaths the subject of section 386, and also those that occur when a person is in the custody of a police or prison officer. Under section 387(1), the magistrate has all the powers exercisable by a court conducting an ordinary criminal case. Under section 387(2), where the body has already been buried, there is power to order exhumation. Section 387(3) deals with situations where, during the inquest or at the end of it, the magistrate forms an opinion that an offence has been disclosed by a known person. He is empowered to issue summons or a warrant of arrest of the person, or otherwise arrange to secure his attendance, to answer the charge, and upon the attendance, the magistrate should commence the inquiry de novo, and should proceed, thereafter, as if he had taken cognisance of an offence. If, at the termination of the inquest proceedings, an offence is disclosed, committed by unknown persons, then the magistrate compiles a report, and forwards it to the 1st respondent.

20. Section 388 provides for conduct of inquests or inquires at the instance of the 1st respondent. Section 388 is subject to section 387, and it empowers the 1st respondent to direct an empowered magistrate to conduct an inquiry to a particular death. Under section 388(2), where an inquest has terminated, the 1st respondent may direct the empowered magistrate to reopen the inquiry, and make further investigations, whereupon the magistrate would proceed as if the proceedings had not been terminated.

21. It would appear that the proceedings that were conducted in Kakamega CMC Inquest No. 3 of 2020, were initiated under section 388, for they were commenced vide the letter from the 1st respondent, dated 20th January 2020, which was placed before the magistrate by the 2nd respondent vide a letter dated 9th July 2020. It required an inquiry into the cause of death of a person in the custody of police officers.

22. These are revision proceedings. The applicants have invoked section 362 of the Criminal Procedure Code, which empowers the High Court to the recall any criminal proceedings conducted by any subordinate court, for the purpose of satisfying itself as to the correctness, legality or propriety of any finding or order, and to satisfy itself as to the regularity of the proceedings. The proceedings conducted in Kakamega CMC Inquest No. 3 of 2020 were criminal proceedings. Firstly, because they are provided for under a law which governs criminal proceedings, and secondly, as the outcome determined the criminal liability of the persons named in the final order. The magistrates who conducted the

proceedings preside over a subordinate court, within the meaning of Article 169 of *the Constitution*. I, therefore, have jurisdiction to examine the proceedings in Kakamega CMC Inquest No. 3 of 2020.

23. Were the said proceedings regular? The matter was placed before the trial court by the 1st and 2nd respondents, which was within their power and mandate under sections 386 and 387 of the Criminal Procedure Code. Were they conducted in accordance with the applicable law? That is the moot point. Several issues arise, and I shall discuss each of them in turn.

24. The first is whether it was necessary, in the first place, to conduct the inquiry, in view of the letter by the 1st respondent. The purpose of conduct of inquest proceedings is to primarily determine the cause of death, particularly where it is suspected that the same was by the hand of another. Where the persons responsible for the death are known, there would be no need to conduct an inquiry, the suspects ought to be arrested and arraigned to answer to a charge of either murder or manslaughter, or any other related offence. The inquest would be conducted where there is doubt or where the causation is clouded in some mystery, for the court to unravel the mystery. Where there is no mystery, or the circumstances are fairly clear, then the 1st and 2nd respondents need not ask the court to conduct an inquest.

25. In this case, the police conducted investigations, and compiled a report or a file, which they presented to the 1st respondent. The 1st respondent wrote to the 2nd respondent the letter dated 20th January 2020, in which he indicated that after reviewing the report or file, he did not find it necessary to charge those involved, and proposed closure of the file, but through inquest proceedings, to be conducted by a magistrate. In his own words, he said, "This report is consistent with the evidence on record that the deceased jumped from a moving vehicle. There is no malice on the part of the Officers and the owner of the Bar to harm deceased."

26. The question I ask is, whether it was necessary for the 1st respondent to ask that an inquest be conducted, if he had already decided not to press the charge, and to have the file closed. Under Article 157 of *the Constitution*, the 1st respondent has the exclusive power to conduct criminal prosecutions, and for the purpose of those prosecutions, to order the 2nd respondent or the Inspector General of Police to conduct investigations. If further investigations were required, beyond what was in the report placed before him, why did he not act under Article 157, and order the 2nd respondent or the Inspector General of Police to conduct those investigations, instead of directing the magistrate to do that which the 2nd respondent or the Inspector General of Police could do, and which was, indeed, within their constitutional and statutory mandate to conduct. If the 1st respondent had decided to close the matter, why did he not just close it? Did he need as the court to conduct proceedings for the mere formality of having the investigations closed? I am not aware of any law that requires that courts be asked to conduct proceedings, as a mere formality, to facilitate closure of investigations being conducted by the 1st and 2nd respondents. It is up to the 1st and 2nd respondents to decide whether or not to prosecute, and they should not push that role to the courts.

27. My understanding, of the letter of 20th January 2020, is that the proceedings that the 1st respondent envisaged were to be conducted in Kakamega CMC Inquest No. 3 of 2020, were not for the purpose of the magistrate establishing the cause of death of the deceased, and the complicity of those under whose custody he was in, for the 1st respondent had already determined the cause of death, and found that there was no complicity of either the police officers under whose custody he was in or of the owner of the bar business. That is why I keep asking, so, if the cause of death was clear, and there was no criminal liability for those who had custody of the deceased, why bother the magistrate? What the magistrate is required to do, under sections 387 and 388 of the Criminal Procedure Code, had already been done by the 1st respondent, when he determined that the file be closed, as the deceased was responsible for his own death, and none of the persons around were liable for it. The inquest was a duplication. It

would be abuse of court process and duplication of roles to ask the court to do what the 1st respondent had already done.

28. Proceeding in the manner that the 1st respondent proposed in the letter of 20th January 2020, which led to the initiation of Kakamega CMC Inquest No. 3 of 2020, yielded the results of the confusion that is now being experienced. The 1st respondent had decided that he would not prosecute, and he only wanted the court to go through the motions, and order closure of the investigations and the proposed prosecution. The courts do not act under the directions of anyone. That is what judicial independence is all about. When the matter was placed before the magistrate, the magistrate proceeded with it in the manner that he is directed to under section 387, to conduct an investigation or an inquiry, by way of taking evidence, and then make its independent decision on that evidence, and determine cause of death, and establish whether or not any crime or offence might have been committed, and if one is cognisable, summon those said to be responsible. The power under section 387 is not to close police inquiries or investigations, but to determine whether or not there was criminal culpability in a death, and to take the steps that are set out in section 387. The magistrate is not bound to do that which the 1st respondent recommends, but to be guided by the relevant law, section 387 of the Criminal Procedure Code. The 1st respondent wanted the court to waste its time conducting proceedings to bring closure to what the 1st respondent had already closed, but as the court is independent, it did not go by that desire of the 1st respondent, but followed the law. The outcome was what duplicity does, create a messy situation, where the 1st respondent did not get what he desired, and is now stuck with a decision, to prosecute, which is contrary to his own decision, not to prosecute.

29. Should the court have conducted the inquest in view of the letter dated 20th January 2020? I do not think it should have. The 1st respondent has exclusive jurisdiction to make decisions on whether or not to prosecute, and to require the 2nd respondent to conduct further investigations to facilitate any contemplated prosecution. The letter of 20th January 2020 was clear that a decision had been taken not to prosecute, and to close the matter. The matter was being placed before the court, not for further investigation or inquiry, but to close the matter. I reiterate that the 1st respondent is not empowered by section 388 to direct a magistrate to close a matter, but to conduct an inquiry or a further inquiry. The magistrate, before whom the file was placed, should have declined to deal with it, for the 1st respondent did not require her to conduct an inquiry, but to close the matter, which is not what is envisaged under sections 387 and 388. She should have noted that the 1st respondent had already decided the matter, and that there was nothing more for the magistrate to do. By pressing on with the matter, the magistrate ended up creating the embarrassing situation, where he is directing the 1st respondent to do that which he had already said he would not do. I believe that there was impropriety and irregularity or incorrectness in the manner these proceedings were initiated. The magistrate ought to have declined to exercise jurisdiction over matter that the 1st respondent had already exercised jurisdiction, on whether or not the applicants should be charged. The reading of paragraph 46 of the impugned ruling suggests that the magistrate did not read the letter of 20th January 2020, or, if he did, he did not understand its purport, for if he had read it and understood it, he would not have proceeded with the inquest.

30. The parties have not addressed me on section 387(3) of the *Criminal Procedure Code*, yet I believe it is most critical. I have recited the provision hereabove, but let me set it out verbatim. It says:

> "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."

31. This provision is about what the magistrate should do after forming the opinion that some known persons were responsible for the death under inquiry. He should cause them to attend court before him, whether by way of summoning them or by getting them arrested, to answer to the charges. That is to say that such persons officially become suspects in the inquiry, and are required to attend the inquiry, thereafter, as suspects, to answer to the allegations made against them in that inquiry as suspects. Such suspects would, of course, be entitled to legal representation as suspects. Once such suspects attend court, either in answer to summons or upon their arrest, the magistrate should commence the inquest de novo. The decision to require attendance of the suspects to answer to the charge could be made at any time of the inquest proceedings, either at the first appearance or before the oral hearings, in the middle after taking some evidence or at the termination in the final ruling. Where made in the middle of the proceedings, the proceedings would have to start de novo, so that the suspects participate in the proceedings as suspects, who would be entitled to the rights that accrue to accused persons. Where the decision is made in the terminal ruling, then the inquest proceedings have to star afresh. That is the purport of section 387(3). No one should be condemned unheard. The provision, in section 387(3), is designed to ensure that the suspects get an opportunity to have the case against them, as presented in the inquiry, to be set out in their presence, where they would have a chance to challenge it, by way of cross-examination of the witnesses, and where they would get a chance to take to the witness stand and tell their story from the perspective of a suspect, and not a mere witness. The final decision, at the end of the inquiry, on whether they ought to face murder or manslaughter or other charges, before the court with jurisdiction to try them for such offences, should be made after they have had a chance to participate fully in the proceedings. Section 387(3) captures the fair hearing principles that are set out in Article 50 of *the Constitution*.

32. The question is, did the magistrate herein apply section 387(3)? The ruling of 21st January 2022 is clear that the magistrate formed an opinion that some known persons had committed an offence. He identified them, at paragraph 45, in fact he had earlier identified them as suspects on 11th and 21st January 2022, as the applicants now before me. That being the case, he should have complied with section 387(3), by having summons issued to have them attend court before him, or have warrants issued for their arrest to have brought before him under police escort, or use any other means to have them attend court before him, so that they could answer to the charge that was disclosed, according to him, in the inquest proceedings. The effect of that would be that he would have had to commence the proceedings de novo, where the applicants would have attended and participated in the proceedings as suspects to the disclosed charge, and would challenge the evidence tendered at the inquiry as suspects. That the magistrate did not do. Section 387(3) was not complied with, hence there was an irregularity or incorrectness or impropriety.

33. Instead of complying with section 387(3), he applied section 387(4), which requires that he forwards a report to the 1st respondent. He said in paragraph 46 of the ruling:

> "A certified copy of this ruling shall forthwith be transmitted to the Office of Director of Public Prosecutions. In the meantime, the five individuals listed in the immediate preceding paragraph shall be remanded in custody awaiting the processing and further necessary action by the Director of Public Prosecutions. This is particularly so because at the conclusion of the police investigation, which as we have stated above is the only material that came out during the inquiry, the matter was ripe for prosecution were it to get the go ahead of the Director of Public Prosecutions."

34. Paragraph 46 of the impugned ruling establishes that the magistrate was mixed up about the provisions of section 387(3) and section 387(4). Section 387(3) applies where the court forms an opinion that known persons committed an offence, he summons them and then starts the proceedings de novo, with them participating in the proceedings as suspects, rather than mere witnesses. Section 387(4) applies where the magistrate forms the opinion that an offence was committed by unknown persons, whereupon he forwards the opinion to the 1st respondent. See *Republic Thro' CID Mwingi vs. Julius Kilonzo Muthengi* [2015] eKLR (Dulu, J). In this case, the magistrate formed the opinion that the applicants had committed an offence, and he should have summoned them, and commenced the inquest afresh, with them appearing as suspects, not as witnesses or as accused persons. There would have been no role for the prosecution there, hence there would have been no need to involve the 1st respondent, as that is not required by section 387(3). The involvement of the 1st respondent is required by section 387(4), where the opinion is that the offenders were unknown. Of course, after the persons envisaged in section 386(3) attend court, and the inquest is conducted de novo, the final outcome, whatever it is, has to be communicated to the 1st respondent. According to the magistrate, the offenders were known, so section 387(4) did not apply, and there was no need to forward the ruling to the 1st respondent at that stage. As the case fell under section 387(3), the magistrate could only forward the final ruling after hearing the matter de novo. Clearly, therefore, there was an impropriety or incorrectness or irregularity in the final order, as it did not conform with sections 387(3)(4) of the *Criminal Procedure Code.*

35. For avoidance of doubt, section 387(4) states:

> "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."

36. The parties have tussled over the issue of the magistrate ordering the arrest and detention of the applicants, pending action by the 1st respondent. Part of the problem with this order is misinterpretation of section 387(3), which I have dealt with above. Section 387(3) empowers the magistrate to summon or order arrest of the suspects, not for the purpose of detention, or awaiting action by the 1st respondent, but rather for the purpose of them attending the court, before the magistrate, so that he can commence the inquest de novo. In this case, there was power to order arrest, but not for the purposes stated in the ruling. Secondly, the order presupposes that the 1st respondent would prosecute the applicants for the offenses contemplated. It implied that the magistrate was expecting that the 1st respondent would prosecute the applicants. The magistrate had no jurisdiction to decide for the 1st respondent whether he should prosecute the applicants or not. That jurisdiction is the exclusive preserve of the 1st respondent, he does not act, under *the Constitution*, on the whims or directions of anyone, including the court. The order, for arrest and detention of the applicants, pending prosecution by the 1st respondent, was illegal, for there was no legal basis for it.

37. I note that there has been judicial opinion, to the effect that section 387(3) of the Criminal Procedure Code contravenes or conflicts with Article 157 of *the Constitution*, to the extent that it appears to empower the magistrate to initiate criminal proceedings. That was the position taken in *In re Estate of Philip Otieno Odhiambo (Deceased)* [2015] eKLR (Majanja, J), *Stephen Mwangi Mwaura vs. Republic* [2020] eKLR (Mwongo, J) and Nisha Sapra vs. Republic [2008] eKLR (Ojwang, J). I do not, with respect, quite agree that section 387(3) contravenes Article 157 of *the Constitution*. Section 387(3) is not about a criminal case being initiated against anyone, but about persons being mentioned adversely in an inquest. Should the magistrate conducting the inquest form opinion, that the persons mentioned

adversely were responsible for the death, the subject of the inquiry, then it ought to bring them into the inquest proceedings, even if they had testified as witnesses, and start the inquest afresh, de novo, so that the persons adversely mentioned have an opportunity to confront the adverse evidence. Section 387(3) does not talk about initiating separate criminal proceedings, where the persons face a formal charge, but the same inquest proceedings commencing afresh or de novo, to enable those mentioned adversely deal with the adverse evidence, so that the final decision, on the inquest, is made with them having been given an opportunity to be heard. The "charge" referred to in section 387(3) is not a formal charge, but the adverse mention in the inquest proceedings. Section 387(3) does not require the magistrate to frame a formal charge, nor the suspects to plead to a formal charge. The "charge" talked about in section 387(3), is implicit in the inquest proceedings, or the investigation file that the 1st and 2nd respondents usually place before the inquest court, for the purpose of the inquest, being the suggestion that the suspects caused or contributed to the causation of the death under inquiry.

38. Either way , the inquest law, as it stands, belongs to a bygone era, and it is not in tune with current legal and constitutional dispensation, and it ought to be revised, to align it to current law and practice. The said law dates back to the colonial era, when the role of magistrates was vastly different from what obtains today. The provisions were introduced in 1959, and need an overhaul. Magistrates played administrative and police roles then; and courts were largely a department in the office of the Attorney-General, and did the bidding of the Executive, which is not the case today. It will be noticed, for example, that section 388(1) talks of the Director of Public Prosecutions, who was also the Attorney-General then, directing the magistrate, which ought not to be the case, as magistrates do not serve under the Director of Public Prosecutions, and should not be directed by him in any manner. Magistrates courts should have no role at all in criminal investigations, for the roles spelt out in sections 386, 387 and 388 point to that. Criminal investigations, under *the Constitution*, 2010, is the exclusive role of the 1st and 2nd respondents, and the *Criminal Procedure Code* ought to be amended to align it to *the Constitution*, 2010, to take away involvement of magistrates in criminal investigations.

39. Inquests are akin to the preliminary inquiries and committal proceedings that magistrates used to conduct in yesteryears, for the purpose of assessing whether there was evidence to support referring a murder or treason case to the High Court for trial. Those procedures were found to be duplicitous, for the accused would be subjected to 2 trials, one before the committing magistrate, and the other at the High Court, should he be committed there. Secondly, it also caused lengthy delays to completion of criminal proceedings for the offences in question. Inquests have the same effect, duplicity and lengthy criminal proceedings. The 1st and 2nd respondents can do what the magistrate conducting the inquest does. The 2nd respondent carries out investigations, and where he forms an opinion that there is evidence to sustain a trial and conviction, forwards the file to the 1st respondent for approval, and, where approval is given, prosecution. That is what a magistrate does in an inquest, carry out an inquiry or investigation, at the end of which he gives an opinion as to whether the evidence would sustain a conviction, and forward his opinion to the 1st respondent. The 1st respondent does the same, evaluate the report from the 1st respondent, or the magistrate where an inquest has been conducted, to assess whether or not to prosecute. That the 2 respondents can competently do, and certain classes of inquests or inquiries by magistrates should be done away with, in much the same way preliminary inquiries and committal proceedings were.

40. I believe everything that I have discussed above addresses all the issues raised by the parties, except the submission by the interested party that there are no parties to an inquest, no prosecutors, no defence and no trial. It would be a misnomer to say that there are no parties to an inquest. An inquest always commences at the behest of someone. It is not initiated by the court, on its own motion. From the language of sections 386 and 388, it should be clear that it is initiated by either the police

or the 1st respondent. In the previous dispensation, the police could initiate criminal proceedings, whether they be a case where a person faces formal charges or it is inquest proceedings. The police had prosecutorial powers. Under the new dispensation, prosecutorial power and function is the preserve of the 1st respondent, and, therefore, as at now, criminal proceedings should commence at the behest of the 1st respondent. The person initiating the inquest would be a party to the proceedings, for the proceedings are driven by him and not the court. The magistrate cannot prosecute the case, and the case would collapse should the person initiating it not take charge. Are there other parties? There would be no other parties, in cases where there is no adverse mention of anyone or where no one is suspected to have caused the death the subject of the proceedings. However, once the magistrate decides to proceed, under section 387(3), after forming the opinion that some offence was established from the material before the court, and some known person had some responsibility for it, and he brings that person into the inquest proceedings, then that person becomes a party, for he would be a suspect, and liable to have an adverse report being made against him, at the conclusion of the proceedings. That would allow him to participate in the proceedings as a party, inclusive of getting legal representation, so as to confront any adverse evidence touching on him. Are there prosecutors? Whoever initiates the inquest proceedings bears the responsibility of prosecuting them. There can be no criminal proceedings without a prosecutor, and inquest proceedings are, in nature and character, criminal proceedings. Is there a defence? Not in the strict sense of the word, but where section 387(3) kicks in, the suspect would be in a position similar to that of a defendant in criminal proceedings, as he would have to deal with the adverse evidence against him. Is there a trial in inquest proceedings? Trials are not just about persons, they are also about issues. In an inquest, there are issues that the magistrate would be required to resolve, whether or not there are parties to the proceedings, other than the prosecutor. The hearing is intended to provide material to the magistrate to help him resolve the issues. The hearing is the trial, of the persons before the court in criminal proceedings, and of the issues before the court, in civil and criminal proceedings. Whenever a hearing has to be conducted in any matter, there would be a trial, for a hearing becomes necessary where there are issues for trial or determination. Inquests are conducted to determine issues, which are clearly set out in sections 386, 387 and 388 of the *Criminal Procedure Code*.

41. Let me now turn to the second issue, how a magistrate, taking over a criminal matter, from another magistrate, should handle it, particularly where the previous magistrate disqualify or recuse themselves. The argument raised, in the instant case, is that, upon taking the matter over, the incoming magistrate ought to have started the matter de novo, considering the reason for the outgoing magistrate disqualifying herself. I have said above, that inquest proceedings are a form of trial, where evidence is taken, and a decision rendered at the end of it, which may affect the rights of individuals. The law on inquests does not provide for what should happen where one magistrate has to leave, and handover the matter to another magistrate. The fall-back for this should be section 200 of the *Criminal Procedure Code*.

42. Section 200 provides that the incoming magistrate may deliver a judgment written and signed by the outgoing magistrate. Where no judgment has been written and signed by the outgoing magistrate, the incoming magistrate may either prepare a judgment based on the evidence recorded by the outgoing magistrate, or resummon the witnesses and recommence the trial. There is a provision with respect to where a judgment was delivered, convicting the accused, but he had not been sentenced, the incoming magistrate may pass sentence or make any other order that the outgoing magistrate may have made. Where the recording of evidence was not complete, the accused person would be entitled to ask for a recall of witnesses. It is also provided that where a person is convicted on the basis of evidence partly recorded by the outgoing magistrate and partly by the incoming magistrate, on appeal, the High Court may set aside the conviction, if it forms the opinion that the person was materially prejudiced by that,

and order a retrial. These provisions suggest the range of orders that the incoming magistrate could make in the circumstances. The provisions appear to give the magistrate a wide discretion.

43. Section 200 states:

Conviction on evidence partly recorded by one magistrate and partly by another

(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

44. The courts have considered section 200. *Ndegwa vs. Republic* [1985] eKLR (Madan, Kneller & Nyarangi, JJA) states the principle behind section 200 of the Criminal Procedure Code, in the following terms:

> " Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where the exigencies of the circumstances, not only are likely but will defeat the end of justice, if a succeeding magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial.
>
> Section 200 is not to be invoked where, as seemingly in the instant case, such a half-heard trial is a short one, it could be conveniently started de novo because the prosecution witnesses are still available locally, and passage of time when the trial first commenced and another magistrate taking over almost midway, is so short so as to cause or produce any accountable loss of memory on their part, whether actual, presumed or pretended, to the prejudice of either the prosecution or the accused.
>
> No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration.

It could be also argued that statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in the other cases that will follow..."

45. In the end the court found and held:

> "... In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully '"observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case, in our opinion. The succeeding magistrate was as helpful as he could possible make himself. He acted in an attempt to dispatch justice speedily. We appreciate his motive very much. The sweetness of justice lies in the swift conclusion of litigation ... For the reasons we have stated, in our view the trial was unsatisfactory. "

46. According to *Ndegwa vs. Republic* [1985] eKLR (Madan, Kneller & Nyarangi, JJA), the discretion to continue a criminal trial from where the previous magistrate left off should be exercised sparingly. The principle is that let the case start de novo, unless the exigencies of the circumstances dictate otherwise, or unless the accused person concedes to such continuation. The exigencies being that the ends of justice would be defeated if the case does not continue from where the retiring magistrate let off.

47. Of course, the proceedings herein were not a criminal trial as such, but inquest proceedings. They were criminal proceedings nevertheless, where evidence was taken, and where the court delivered a ruling, whose effect was to fundamentally affect the rights of the applicants, in terms of them being exposed to criminal charges, with respect to serious offences, attracting stiff jail terms. Section 200 applies, so that upon succeeding the outgoing magistrate, the incoming magistrate ought to have contemplated what to do with the matter in terms of section 200. The outgoing magistrate had not written a judgment that he could deliver, but she had completed the oral hearings, and he had to consider whether to write the ruling or not. He opted to write the ruling rather than start the matter de novo. It is the easier thing to do. It leads to speedier disposal of the matter, but according to *Ndegwa vs. Republic* [1985] eKLR (Madan, Kneller & Nyarangi, JJA), no rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject, in favour of a swift disposal of a matter, for the subject is the most sacrosanct individual in the system of the legal administration.

48. I appreciate that by the time the incoming magistrate took over, section 387(3) had not been invoked, and the applicants had not been identified as suspects. Indeed, the outgoing magistrate did not at any time or stage treat or refer to any of the applicants as suspects, and the reference to suspect in the proceedings she recorded was to the deceased person, as he had been arrested, and was being transported to the police station, and was a suspect for the offence for which he had been arrested. It was the incoming magistrate who began to refer to suspects when he took over on 11th February 2022, when he identified the applicants as suspects. Having identified them as suspects, then he should have applied section 200(3), and informed them of their right to recall witnesses. Indeed, going by the principle, in *Ndegwa vs. Republic* [1985] eKLR (Madan, Kneller & Nyarangi, JJA), he should have shied away from continuing with the matter from where the outgoing magistrate left off, and he should have started the matter de novo. *Ndegwa vs. Republic* [1985] eKLR (Madan, Kneller & Nyarangi, JJA) and section 387(3) of the *Criminal Procedure Code* obliged him to.

49. As the applicants were identified by the incoming magistrate, after he took over the matter, and before he delivered the impugned ruling, as suspects, they became entitled, on account of that to demand

the recall of witnesses, under section 200(3). The incoming magistrate himself, would have benefitted from section 200(1)(b), by recalling the witnesses, so that he could himself appreciate the facts, and more importantly have a chance to observe their demeanour. After the incoming magistrate took over the matter, he was in a position to tell, as he eventually did, that there was some evidence upon which he could make the opinion that some offence had been committed by known persons. Since he had not taken the evidence, he should have been slow to proceed to rely on the evidence recorded by the outgoing magistrate, without hearing and seeing the witnesses himself, given that his decision was going to have far-reaching consequences on the applicants. The decision to continue the proceedings from where his predecessor left off was not one he could make without hearing the applicants.

50. I note from the proceedings of 11th February 2022, when 3 of the applicants were in attendance, that they expressed surprise that the incoming magistrate was treating them as suspects. They indicated that they had not been told at any stage that they were suspects, although they had attended the proceedings, and had heard the witnesses. They did not express an opinion on how they would have preferred the incoming magistrate to handle the matter, in view of the provisions of section 200, and it would appear that the incoming magistrate, nevertheless, went on to decide to prepare a ruling based on the material on record. He did not give any particular reason why he did not follow the principle, in *Ndegwa vs. Republic* [1985] eKLR (Madan, Kneller & Nyarangi, JJA), that starting de novo ought to be the norm, and continuing from where the matter was left off the exception, unless the exigencies of the circumstances dictate otherwise, or unless the accused person concedes to such continuation. Going by *Ndegwa vs. Republic* [1985] eKLR (Madan, Kneller & Nyarangi, JJA), where the incoming magistrate decides not to commence the proceedings de novo, and to start afresh, he would be obliged to give reasons, or point out the exceptional circumstances that would militate against staring the proceedings afresh. The incoming magistrate appeared to take the view that, since the outgoing magistrate had completed taking evidence, his hands were tied, and he could go on to prepare and deliver a ruling, yet section 200 gave him options, one of which was starting the matter de novo, the norm according to *Ndegwa vs. Republic* [1985] eKLR (Madan, Kneller & Nyarangi, JJA). Section 200(3) states a fair hearing principle, and it behooved the incoming magistrate to explain that right to the applicants, before he exercised his discretion to continue. The record is silent as to whether that right was explained to the applicants, and I shall presume that it was not. These issues were raised by Mr. Shivega, the Advocate for the applicants, when he appeared before the incoming magistrate, on 21st January 2022, but the court insisted that it had already given its directions on the matter. Clearly, there were irregularities, improprieties and incorrectness in the way the incoming magistrate dealt with the matter of the rights of the applicants to be heard before a decision was made under section 200, on the way forward after taking over the matter.

51. Let me just point out that the outgoing magistrate had done the right things, in terms of taking evidence from the witnesses marshalled by the 1st respondent, who included the applicants. She did not treat any of the applicants as suspects at any stage of the proceedings that she conducted and recorded, and I presume that she had reserved the issue for determination at the point of writing her ruling, where she would have applied section 387(3), and pronounced on who she was persuaded bore responsibility for the death, and then reopened the inquest proceedings, to start de novo, with the persons identified as suspects, taking part fully in the fresh inquest proceedings, as suspects, with a right to legal representation, to cross-examine witnesses, testify on their own behalf, and to present witnesses. Things went wrong after the outgoing magistrate disqualified herself, and when the incoming magistrate, before he rendered the impugned ruling, named the applicants suspects, on 11th January 2022, but failed to comply with section 387(3), by starting the proceedings de novo, with the applicants as suspects. The incoming magistrate then purported, in the impugned ruling, to forward the matter to the 1st respondent for prosecution, instead of restarting the proceedings, as

required of him by section 387(3). That was a fundamental flaw in the proceedings, which rendered what transpired, after the outgoing magistrate recused herself, a nullity.

52. On not hearing the 1st respondent, before deciding to continue the proceedings from where the outgoing magistrate had stopped at, let me state that the inquest was initiated by the 1st respondent, a decision on how to progress it could not be made without hearing the party who had initiated it. The 1st respondent was the primary party, and the driver of the inquest. Its officers presented the witnesses, and led them in evidence-in-chief. The record is clear that when the inquest proceedings were happening before the outgoing magistrate, the 1st respondent was always presented, and drove the process, as the initiator of the proceedings. However, when the matter was placed before the incoming magistrate on 11th and 21st January 2022, the proceedings of those 2 days happened in the absence of the 1st respondent. As at 11th January 2022, the applicants were not critical parties to the matter, as the outgoing magistrate was yet to name them as suspects, they were named as such on that 11th January 2022, and, therefore, the primary, and indeed the only, party was the 1st respondent. The incoming magistrate could not give directions, on how to proceed under section 200 in the absence of the primary party. What happened on these 2 dates was a violation of the fair trial principles in that regard.

53. The other concern raised is with respect to the finding by the incoming magistrate that the material placed before him pointed to commission of the crime of murder, and that the applicants bore responsibility for it. Section 387(3) empowers the inquest court to make such findings. However, the incoming magistrate could have phrased the findings better. His role was to merely express an opinion on the material, and to give recommendations, based on that opinion. His role was not different from that of the investigating officer, so that it does not come out as if he was convicting the applicants of the offence he opined had been committed. What the magistrate, conducting an inquest, ought to do is to suggest that some crime might have been committed, and recommend a prosecution, and identify the known persons that he believes or opines to bear the greatest responsibility. I agree with the applicants, that the incoming magistrate, in the ruling, at paragraph 45, did not express an opinion, as required of him in an inquest, but made a finding that a crime of murder had been committed, and identified the applicants as the perpetrators.

54. On whether the material gathered by the 2nd respondent, and placed before the magistrate by the 1st respondent, could not sustain a charge for murder, the position should be that the material should be adequate to suggest that there was foul play in the death, or that someone contributed to the death, whether accidentally or intentionally, and the role of the inquest court is to define that role. If it is found to be innocent, then find that there was no foul play, and therefore, there would be no need to prosecute the persons who appear to have some responsibility for it. Where the court forms the opinion that the death was caused intentionally or recklessly or negligently, then find that some offence, founded on either of the 3 would have been committed, and recommend a prosecution. These are matters that go to the substance, and are outside the scope of revision, for revision focuses on the process and not the substance. Those are issues to raise by way of either appeal, judicial review or constitutional petition, or at the trial for the offence charge, should the suspect be formally charged. I shall, therefore, not venture to consider whether or not the material presented was adequate for preferment of a charge for murder. The same would apply to the matter of whether some of the applicants were in the vehicle from which the deceased allegedly jumped from, although one would wonder, why those who were not inside the vehicle, should be treated as suspects, or be recommended for prosecution for acts allegedly done in their absence.

55. On whether the incoming magistrate should have considered the reasons given by the outgoing magistrate to disqualify herself, as a factor in deciding whether to hear the matter de novo, it would appear that the said reasons could be considered. The outgoing magistrate was saying that there were

integrity issues being raised, in the nature of attempts by undisclosed forces, through the investigating officer to influence the outcome of the matter. There were allegations of bribery. The suggestion from the filings by the applicants was that the case was to be influenced against them. Of course, the matter of the case being rigged against the applicants was not placed before the incoming magistrate, but the fact that there were allegations that there were integrity issues surrounding the conduct of the matter, should have been material that should have influenced the incoming magistrate to consider hearing the matter de novo. It is true that there was no disclosure as to when exactly the alleged bribery happened, and whether that affected the evidence that the outgoing magistrate had recorded. But, either way, the allegations of integrity, and the recusal of the officer conducting the proceedings, should have weighed on the incoming magistrate, in deciding whether to start the matter de novo or not. Indeed, it should have been a good reason, for him to start the matter afresh, so that justice would appear to be done.

56. I believe that I have said enough to demonstrate that the inquest proceedings, the subject of this revision, were conducted in a manner that rendered them irregular, improper and incorrect, and that some of the resultant orders were illegal. Consequently, I find and hold that the findings and orders made in the impugned ruling cannot stand, and I hereby set aside the said findings and orders. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF MARCH 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Shivega, instructed by Victor Shivega & Company, Advocates for the applicants.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the 1st Respondent

Ms. Luyali, instructed by Makokha Wattanga & Luyali, Advocates for the interested party.