



**Maiyo & others v Republic (Miscellaneous Application
E006 of 2023) [2023] KEHC 3709 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3709 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION E006 OF 2023
RN NYAKUNDI, J
APRIL 25, 2023**

BETWEEN

WILLIAM MAIYO & 3 OTHERS APPLICANT

AND

REPUBLIC RESPONDENT

RULING

- 1 This matter has been brought to this court under its revision jurisdiction *vide* an application dated 25th January 2023 by the firm of Bundotich Korir and company advocates appearing for the applicants. The matter arises from a ruling in the Eldoret Principal Magistrate's Court in Inquest no E010 of 2021, which ruling was delivered by the inquest court on 24th of January 2023.
- 2 The ruling was in respect of an inquest into the death of Mercy Cheptoo who was alleged to have drowned while escaping arrest.
- 3 After hearing 12 witnesses, the inquest court concluded its ruling by stating as follows: -

“In the circumstances, the deceased was running away from arrest by the chief who she had pleaded for mercy to no avail but instead of postponing the arrest, in exercising mercy upon Mercy, this chief ordered his men after her and instead of his men appreciating the danger posed by River Sosiani on this 5.2 ft 25-year-old of lean physique, as described by the doctor of her body, they made sure she entered into the river only to be removed as a corpse.

As a result, from the finding above, pursuant to the provisions of section 387 (3) of the Civil Procedure Code, I direct that William Maiyo, Barnabas Tanui, Julius Mutai and Sammy Koech present themselves before the SCCIO Eldoret West within 7 days or be arrested. They be charged with the offence of Manslaughter Contrary to section 202 as read with section 205 of the [penal code](#) Cap 63 Laws of Kenya.”



- 4 From this ruling and direction of the inquest court, the applicants filed an application seeking the following orders: -
1. Spent.
 2. Spent.
 3. That the ruling delivered by Hon. B.K. Kiptoo in Chief Magistrate inquest no E010 of 2021 on 24.01.2023 be set aside, varied and or reviewed.
- 5 The circumstances of the inquest were that upon recommendation by the Director of Public Prosecution, the magistrate court at Eldoret carried out a public inquest into the death of Mercy Cheptoo ('deceased') who allegedly had been found dead in River Sosiani. After hearing the witnesses, the learned magistrate found that the death of the deceased was caused by commission of an offence by William Maiyo, Barnabas Tanui, Julius Mutai and Sammy Koech.
- 6 Section 387(3) of the [Criminal Procedure Code](#) provides as follows;
- 387(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.
- 7 To my mind, there is no doubt that the tenor and effect of the provision is that once a magistrate finds an offence was committed by a known person or persons, the magistrate then can summon such a person or persons by way of a warrant of arrest. The provision then empowers the magistrate to charge and try the suspect without any reference to the power of the Director of Public Prosecutions to decide whether or not to commence the prosecution.
- 8 I have considered the decisions cited by both parties and I am cognizant of the fact that if a magistrate issues an order of arrest as provided under section 387 (3) of the [criminal procedure code](#), it will be inconsistent with the prosecutorial powers of the Director of Public Prosecution. My focus then will be on the directions issued by the Learned magistrate.
- 9 The learned magistrate pronounced himself as follows: -
- “I direct that William Maiyo, Barnabas Tanui, Julius Mutai and Sammy Koech present themselves before the SCCIO Eldoret West within 7 days or be arrested. They be charged with the offence of Manslaughter Contrary to section 202 as read with section 205 of the [penal code](#) Cap 63 Laws of Kenya.”
- 10 I note that Section 387 (3) of the [Criminal Procedure Code](#) has not been amended to bring it into strict conformity with the constitutional provision of Article 157 of the [Constitution](#). Thus, an inquest magistrate who determines that an offence has been committed by a known person cannot, strictly, invoke the entirety of Section 387 (3) of the [Criminal Procedure Code](#). Indeed, the magistrate must be careful to avoid using the said section in light of the provisions of Article 157 (6) of the Constitution vesting powers to institute criminal proceedings on the DPP.
- 11 In the case of [Paul Ng'ang'a Nyaga v Attorney General & 3 Others](#) (2013)eKLR it was held that: “ this court can only interfere with and interrogate the acts of other constitutional bodies: if there is sufficient evidence that they have acted in contravention of [the constitution](#)”.



- 12 Likewise the court in *Hon. James Ondicho Gesami v The Attorney General & Others* Petition no 376 of 2011 reflected as follows:- “ The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges... In my view, requiring that the petitioner subject himself to the normal criminal prosecution process mandated by law where he has all the safeguards guaranteed by *the constitution* does not in any way amount to an attack on his human dignity in violation of his constitutional right”
- 13 This court was asked to exercise revisionary power donated by Section 362 as read with Section 364 of the *Criminal Procedure Code* on the decision reached by the trial magistrate upon conclusion of the inquest against the respondent. The decision discussed so far has a final and binding determinations of particular questions which arose during the inquest as prosecuted by the Officer of Director of Public Prosecution. In challenging procedural decisions, the question will usually be whether this court should be as a matter of discretion review the impugned decision arrived at by that other court under Article 50 (1) of *the Constitution*. The decision on whether or not to institute criminal proceedings rests entirely with the office of the Director of Public Prosecutions as stipulated in Article 157 (6), (7), (8), (9), & (10) of *the Constitution*. That power is reinforced by *the Constitution* but cannot be said to be absolute. The position I take in relation to the questioned order is whether or not such procedural fundamentals are in contravention of *the constitution*. In construing the phrases in the aforesaid ruling one can classify the decision as a managerial decision arising out of the proceedings before the session magistrate. As such the phrase is a device to be used where courts considers a directory order on particular matters to meet the compliance deadline. There is no doubt about *the constitution* imperative of the office of the Director of Public Prosecution and the functions as to the jurisdiction on administration of Criminal Justice in Kenya. In one sense the decision can imply a command to the Director of Public Prosecution to act in a particular manner but one taking it out of context it can also give the meaning inferred by the Applicant. The language in Section 362 of the *Code* revolves around impropriety, irregularity, illegality, incorrectness or unjustness of the order, ruling, or decision by a subordinate court being a subject of review or revision by the High Court. Therefore, in this context I find the following grounds in the case of *Council of Civil Service Union and Others v Minister for the Civil Service* (1985) AC 374 apply *Mutatis Mutandis* to the facts of this case as herein stated Lord Diplock classified these as “Illegality, “Irrationality and “Procedural Impropriety”
- “Illegality” prevents power from being exceeded; administrative bodies must act within the powers granted to them by Parliament. This head of judicial reviewed includes examples where a decision-maker has acted for an improper purpose, or failed to take account of relevant considerations, or ignored relevant ones. ‘Irrationality’ prevents power from being abused: it allows the court to interfere with an administrative decision that is not within a range of options open to a reasonable decision-maker.¹⁹ ‘Procedural Impropriety’ prevents a breach of natural justice: it imposes fair decision-making procedures including the recognition of a legitimate expectation, the right to a hearing and a trial by an impartial judge; this head of review can also include the failure of an administrative body to observe a procedural rule specified by statute. “Procedural Impropriety” the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even when such failure does not involve any denial of natural justice.
- 14 The question in this case is whether by using the words: “I direct that William Maiyo, Barnabas Tanui, Julius Mutai and Sammy Koech present themselves before the SCCIO Eldoret West within 7 days or be arrested”, the inquest magistrate was thereby exercising the powers of the DPP under *the constitution*.



Specifically, I do not believe so. I appreciate the anxiety as to the procedural fairness as against the Director of Public Prosecution. There is assumption that the decision was to usurp the mandate of the office of Director Public Prosecution, but I think it was necessary in all the circumstances to give the set guidelines dependent on the context of the decision. An essential feature of the context is the statute which creates the discretion as regards both its language and the shape the legal decision within which the decision has to be taken by the session magistrate.

15 In *Nisha Sapra v Republic* [2008] eKLR the court (Ojwang J. (as he then was) held that Section 387 (3) of the *Criminal Procedure Code* was inconsistent with the prosecution powers of the Attorney General under Section 26 of the former Constitution. There the inquest magistrate had found that all responsibility for the deceased's death was ascribed to Nisha Sapra. He went on to prescribe

“ 1. That Witness no 1 Nisha Sapra be apprehended and arraigned before the High Court to be tried for the murder of her deceased husband.”

16 Ojwang J found this action to be beyond the inquest magistrate's remit stating:

“Since the prosecutorial function, by section 26 of the Constitution, belongs in substance to the Attorney-General, the inquest Magistrate's mandate was limited to stating his findings of fact, without preferring a particular course of prosecutorial action to be taken by the Attorney-General.

17 I agree with Ojwang J (as he then was) to the extent that Section 387 (3) of the *Criminal Procedure Code* is to be read in conjunction with Article 157 (6) of *the Constitution*. The decision as to the appropriate period for the indictment will be a matter for the Direction of Public Prosecution

18 The question then I ask myself is, Did the inquest court initiate criminal proceedings?

19 Under normal circumstances, Police Officers, security officers or watchmen and even members of the public, routinely arrest alleged suspect of crimes. Thus, an arrest following the applicants' failure to present themselves before the SCCIO Eldoret cannot, in my view amount to initiating criminal proceedings. The applicants had been accorded an opportunity to present themselves before the SCCIO within seven days for the DPP to commence criminal proceedings or not.

20 The Learned magistrate directed the applicants to present themselves before the SCCIO Eldoret West within 7 days or be arrested. To my mind, the applicants should have presented themselves so that the DPP could decide whether to initiate criminal proceedings or not. The inquest court did not order for their arrest but simply directed them to present themselves before the SCCIO Eldoret within 7 days. It could be different if the inquest court ordered that the applicants be arrested and arraigned in court. I therefore find that the inquest magistrate did not initiate criminal proceedings.

21 Given all the circumstances set out herein I find that in directing the applicants to present themselves before the SCCIO Eldoret, the inquest court did not invoke a power belonging to the DPP. The DPP's role is to initiate a criminal case. That means to receive investigation summary of evidence on a specific criminal case from the National Police Service and thereafter comply with Article 157 (6) of *the Constitution*.

22 Finally, the issue of a 7 days' window period is strictly administrative to help the Applicants be advised further and to keep them informed of the next cause of action. By making a determination by the inquest, the learned trial magistrate became functus officio and therefore without such administrative scheduling there would be difficulty for any variations in this circumstances to be made by the necessary actors in the Criminal Justice System following the outcome of the inquest. The characteristic of



natural justice or procedural fairness requires that any suspect in adversarial proceedings is entitled to know the case which he or she has to meet and have a reasonable opportunity to prepare for that case. Suspects of a crime should not be taken unfairly by surprise. As a consequence to the above I find no miscarriage of justice occasioned were the Applicants to present themselves to the director of Criminal Investigation or even reporting to the Director of Public Prosecution Eldoret who had already compounded the Criminal file and subsequently elected in the 1st instance an inquest be held by a court of competent jurisdiction.

23 Accordingly, I decline to set aside the inquest magistrate's substantive findings and directions that the applicants present themselves before the SCCIO Eldoret within seven days save for a variation that the question of indictment or initiating a prosecution be left within the ambit of Article 157 (6) (7) (8) (9) & (10) of *the Constitution* as to the DPP constitutional peculiarity on compliance. The essence of time be presumed to start count down w.e.f from 2nd day of May, 2023

24 Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 25TH DAY OF APRIL, 2023

In the presence:

Applicants Present

Mr. Mugun for the State

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R. NYAKUNDI

JUDGE

