



**Kemei v Director of Public Prosecutions & another (Criminal Appeal  
52 of 2020) [2022] KEHC 12153 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12153 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL 52 OF 2020  
JM BWONWONG'A, J  
JULY 27, 2022**

**BETWEEN**

**APC PETER KEMEI ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**DCI KAPOSOKWONY ..... 2<sup>ND</sup> RESPONDENT**

*((Being an appeal against the recommendatory decision of Hon. G. A. Ollimo, RM, delivered on his behalf by Hon. I.G.Rubu, RM, on 6th March 2020 in Kimilili Senior Principal Magistrate's Court in Inquest No. 11 of 2017 Republic v Alex Yona Naibei Alias Kisa (the Deceased))*

**JUDGMENT**

1. The appellant filed his petition of appeal against the decision of Hon GO Ollimo delivered on March 6, 2020, in which he recommended an unspecified criminal charge against the appellant in respect of the death of Alex Yohana Naibei alias Kisa.

**The grounds of appeal**

2. In this court the appellant has raised nine grounds of appeal in his petition. The appellant's grounds of appeal are as follows.
  - ' 1. That the learned trial magistrate erred in law and fact in holding that the Appellant was reckless, careless and negligent in the performance of his duties and that the use of force was not justified.
  2. That the learned magistrate erred in failing to analyze, appreciate and determine that the use of force was a last option and was proportionate to the threat that confronted the officer who was lying on the ground.



3. That the learned magistrate erred in law in failing to consider the provisions of section 49 (5) and 61 of the *National Police Service Act* regarding saving and protecting the life of an officer in self defence as read together with the provisions of Article 238 of the *Constitution* of Kenya.
4. That the learned trial magistrate erred in law and fact in failing to find that there was no mens rea on the part of the appellant which is a necessary ingredient in a charge of murder.
5. That the learned magistrate erred in law in failing to exercise her discretion properly in accordance with her call of duty.
6. That the learned magistrate erred in law and fact in failing to consider the conduct of the deceased ante and which called for use of reasonable force.
7. That the learned magistrate erred in law and in fact by failing to consider and appreciate that the appellant took the necessary precaution by firing to the air before firing at the deceased.
8. That the learned magistrate was biased.
9. That the findings of the learned magistrate were against the weight of available evidence.”

### **The findings of the magistrate’s court**

3. At the conclusion of the inquest proceedings the learned Resident Magistrate in his ruling made nine findings which were as follows:
  - ’ 1. The deceased’s cause of death was severe haemorrhage resulting from gunshot wound to the chest.
  2. Only one firearm was fired and the same was fired from G3 rifle serial No xxxx.
  3. The said G3 rifle was fired by No xxxx APC Peter Kemei.
  4. It therefore follows that APC Peter Kemei is culpable for deceased’s death.
  5. The use of force was not justified in the circumstances as the officers were four in number. It cannot therefore be that they were overpowered by the deceased.
  6. The officer’s use of the firearm was reckless, careless and negligent in the scheme given the part of the body targeted.
  7. The use of firearm was reckless, an officer, with knowledge, capacity and training ought to have thought about the likely consequences.
  8. The shot was fired in broad day light ruling out the possibility of accidental shooting.
  9. The evidence tendered herein is enough to sustain a criminal charge against the said officer.’
4. Following the foregoing findings, the learned Resident Magistrate in his ruling recommended that:
  - ’ As in this regard that this court recommends that the decision of this court be forwarded to the Officer of the Director of Public Prosecutions Bungoma to deal with the findings of the inquest in accordance with the law.’



5. The court concluded that the evidence tendered was enough to sustain an unspecified criminal charge against the appellant and recommended that the file be forwarded to the Office of the Director of Public Prosecutions for further action.

### **The evidence upon which the findings were based**

6. The evidence upon which the recommendation was as follows.

Rose Chepkwemai Naibei (Pw 1) gave evidence that she is the mother of the deceased. She testified that on August 13, 2017 she was at home around 6 pm when the deceased emerged and they had a brief conversation. Pw 1 further testified that they had dinner with the deceased. That after the evening she and the deceased's father retired to bed but they were woken up at 4. 00 am in the morning by strange noises outside from the deceased who was talking to himself '*ntakufa ama ntakunywa sumu*' (I will die or I will take poison.) In the following morning the deceased was cutting grass nearby his demolished house and he still was uttering the same words that he uttered the previous night.
7. PW1 recalled that when she inquired why he was uttering those words, the deceased chased her away to a nearby maize plantation. Pw 1 then proceeded to the AP Post at Kaptetelia. She reported the incident and was escorted by four police officers to her home. On arrival at her homestead, the police officers directed her to stay behind. Pw 1 observed them. On arrival, one officer with a coastal accent shot in the air. That at this point, the deceased was on top of an incomplete SDA building. When the deceased saw Pw 1, he disembarked from the top of that building. The deceased then uttered the following words: 'Ken my friend let me tell you. Tukae chini tuongee.' (let us sit down we discuss).
8. Ken suddenly hit the deceased with a stick on the thigh after the deceased uttered those words. He further hit the deceased with the stick on the head. Ken and Kenei had emerged from the maize plantation after the officer from the coast had shot in the air. That the deceased picked a stick that Ken hit him with; which stick had dropped down. He then begun chasing Ken. He chased Ken round the cypress tree two times and on the third attempt, the in charge Ap officer instructed Ken to shoot. It was at this point that she heard a loud gun shot and saw the deceased falling to the ground. When asked a question by the court, Pw 1 testified the Kemei shot the deceased in the upper right chest. It was her testimony that she saw officer Kemei shoot the deceased to the ground and the gunshot penetrated to his back. Pw 1 was shocked and was unable to move.
9. Rodgers Naibei Chepkwarot (Pw 2) testified that he is the father of the deceased. He testified that on August 14, 2017 at around 5 am he heard noises outside. On inquiry he found that it was the deceased who was demolishing his house using a wooden rod. He testified that he inquired from his other children the reasons for the deceased's action but they did not know. He proceeded to report the incident at Kaptama Police Station where he recorded a statement.
10. It was his testimony that he received a phone call from a neighbor who informed him that his son had been shot dead by a police officer. On arrival at the scene, he found a big crowd gathered adjacent to the deceased's house. The deceased's lifeless body was lying on the ground. Four AP officers from Kaptelelio police post were also present. The deceased had bullet wound on the chest and his body was taken by officers from Kaptama. He testified that he was also present when the post mortem was conducted on August 21, 2017 at Dreamland Mission Hospital.
11. Victor Rodgers Naibei (Pw 3) testified that he is a brother to the deceased. That on August 14, 2017 he heard disturbance from outside and upon inquiry, he noticed that the deceased was demolishing his own house. He testified that later on police officers arrived at the scene and tried to apprehend the deceased but he proved stubborn. Pw 3 heard a gunshot and ran closer to the scene to have a better view.



12. He recalled that he witnessed officer Kemei kneel down and shoot the deceased on the chest and the deceased fell to the ground. He testified that that the deceased was not armed. He also testified that he witnessed the police officers place a panga on the deceased's chest. He also testified that he knew the other officers in the company of Kemei namely Corporal Simiyu who was around seven metres away from Kemei, 'Mcoast' who was inside the maize plantation when the shots were fired and Kennedy who was standing next to the maize farm.
13. No xxxx APC Peter Kemei (Pw 4) testified that on August 14, 2017 at around 7.30 am, Pw1 went to Kaptelelio AP post to report a disturbance caused by the deceased in her home. That he in the company of APC John Kassim, Apc Kennedy Kipluchey and Apc Willis Simiyu proceeded to the scene. That when the deceased who was wielding a panga saw them approaching, he charged at them. Despite being ordered to stop, the deceased continued and charged at Apc Kiplichey who restrained him using a 'fimbo' stick. Subsequently, the deceased continued charging towards Kassim who ran away, tripped and fell next to a tree. That the deceased lifted his panga in an attempt to cut Kassim. He testified that it was at this time that he tried to aim the right arm in an attempt to stop the deceased but unfortunately, he shot him on the chest and he fell on the ground and died.
14. It was his testimony that the deceased's mother was the only family member of the deceased present when he fired the shots. Further that the deceased was armed at the time he fired his shots. Questioned by the court Pw 4 testified that Pw 1 was behind her when he fired.
15. No xxxx APC Joseph Kassim Mwate (Pw 5) testified that he was attached to Kaptelelio Ap post. He testified that he accompanied his colleagues to the scene following a report by Pw 1 that his son was causing a disturbance. He testified that on arrival, the deceased was armed with a panga and was very hostile to them and started chasing them. It was at this point that the deceased started charging at him and he fell down. That the deceased who was armed caught up with him and tried to cut him but he heard gunshots and the deceased fell down.
16. It was his testimony that he was armed with a rifle but he did not fire any shots. Further that the APC Peter Kemei fired two shots. He testified that the officers were overwhelmed by the deceased who was violent and was not ready to listen to them.
17. No xxxx APC Kennedy Kipluchei (Pw 11) testified that on August 14, 2017 upon receiving a report of Pw 1, Pw 11 in the company of his colleagues went to the scene. On arrival, the four officers divided themselves into two groups. That Willis Simiyu and Peter Kemei were in one group and Joseph Kassim and himself in another group. He testified that he heard a gunshot and rushed to the direction of the sound and observed the deceased running after his other two colleagues. Further, that he shouted at the deceased and switched his attention to him and Joseph Kassim.
18. It was his testimony that the deceased was armed with a panga and shouted at them that he was to cut somebody in Sabaot language, which language he understood. That he distracted the deceased with a cane but the deceased caught up with his colleague Kassim. It was at this point that that he heard a gunshot and the deceased fell down. That it was at this point that he discovered that his colleague had fired a gun. In cross examination, he testified that the deceased was wild and armed and it was therefore difficult to apprehend him immediately.
19. Geoffrey Kwemoi Naibei (Pw 7) testified that he is a farmer and the deceased's uncle. It was his evidence that he witnessed the post mortem of the deceased which was conducted at Dreamland Hospital
20. No xxxx PC John Kareithi (Pw 8) testified that on August 14, 2017 he was serving at the report office at Kapatama Police Station, when Rodgers Naibei came to file a report that his son, the deceased had



- threatened to cut him to pieces. That he and his colleagues proceeded to the scene where they found the deceased's dead body. That they took the body to the mortuary and recovered a panga from the scene.
21. No xxxx APC Willis Makokha Simiyu (Pw 9) testified that on August 14, 2017 he proceeded to the home of Pw 1 following her report that her son had threatened to cut her with a panga. That Pw 9 proceeded to that home in the company of APC Peter Kemei, APC Joseph Kassim Mwale and APC Ken Kipchuleii. He also testified that APC Peter Kemei and APC Joseph Mwale carried their G3 rifles. That on arrival, the deceased who was carrying a panga threatened and charged at APC Kassim, who tried to flee but he tripped and fell down which enabled the deceased to catch up with him. That the deceased pounced on him and attempted to hack him. He testified that it was at this point that APC Peter Kemei shot in the air and shot a second shot which hit the deceased on the chest.
  22. No xxxx Inspector of Police Alfred (Pw 10) a forensic ballistics expert at CID headquarters testified that he received exhibits from the scene of crime being a G3 rifle and 15 rounds of ammunition. His findings were that the G3 rifle was in good general and mechanical condition. Further that the rounds of ammunition were suitable to be used in the rifle. He produced a report to that effect dated October 2, 2017.
  23. Dr Ombogi Haron (Pw 11) of Bungoma County Referral Hospital produced a post mortem report prepared by Dr Wafula Hesborn dated August 21, 2017. The post mortem was performed on the body of Alex Yona Naibei. His findings were as follows. The body had bullet wound on the left supra clavicle region. That there was massive hermo-thorax on the respiratory system and fracture on the sternum. The cause of death was cardio respiratory arrest due to severe hemorrhage resulting from a gunshot.
  24. No xxxx PC Kennedy Kipsoi (Pw 12) testified that he was the investigating officer attached at DCI Mt Elgon. Pw 12 testified as follows. He visited the scene of shooting with the OCPD Mt Elgon. At the scene, they found the body had been removed from the scene. He further testified that he inspected the premises, which had been demolished and interrogated the witnesses. He also took photographs of the scene and recovered spent cartridges. Further, that at Kaptetelelio AP Camp, he recovered a G3 rifle with a magazine containing 18 rounds of ammunition and established that the rifle had been used by APC Peter Kemei.

### **The appellant's submissions**

25. Messrs Walter Wanyonyi and company advocates for the appellant submitted that the learned magistrate failed to analyse and reconcile the evidence on record by concluding that the use of force was not justified. That the learned magistrate did not consider the conduct of the deceased prior to and at the point of shooting and that the deceased was armed and would endanger the lives of the officer at the scene. He also submitted that the appellant's defence was not considered.
26. The appellant also submitted that there were grave contradictions in evidence of Pw 1, Pw 2 and Pw 3 which the court failed to address. Counsel also submitted that the conduct of the deceased and what actually transpired at the scene was also not considered. He further submitted that there were contradictions. Counsel therefore submitted that had these contradictions been addressed, the determination by the learned magistrate would have been different.
27. Furthermore, he submitted that the learned magistrate did not consider the provisions of the *National Police Service Act*, the *Constitution* and the *Penal Code*. He also argued that the defence of self defence is provided for under section 17 of the Penal Code. That the trial court ought to have evaluated the facts leading to the offence and should have subjectively assessed whether the appellant believed that his colleague was in actual danger. The appellant cited the Court of Appeal case of *Ahmed Mohammed Omar & 5 other v Republic [2014] e-KLR*, in which the court analysed the test of culpability, where



the defence of self-defence is raised. According to that case the test to be applied is the subjective test and not an objective test.

28. In addition, the appellant submitted that the learned magistrate conducted the inquest proceedings in a casual manner. That the appellant was not cautioned against giving self-incriminating evidence and did not accord him an opportunity to cross examine the witnesses who had testified adversely against him.
29. He has therefore urged this court to set aside the recommendation of the learned magistrate.

### **The respondent's submissions**

30. Prosecution counsel, Mr Robert Oyiembo, submitted that the appellant has not established that he has a right of appeal against the recommendation of the court. He further submitted that section 347 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya, limits the right of appeal to a person who has been convicted. Counsel submitted that the appellant had not been convicted and therefore he had no right of appeal against the recommendation of the magistrate. He submitted that the lower court considered the evidence adduced during the inquest and was entitled to weigh it and make an informed recommendation. The lower court therefore made the correct decision in law and fact in directing that the matter be forwarded to the Office of the Director of Public Prosecutions to deal with it in accordance with the law.
31. He therefore submitted that the appeal should be dismissed.

### **Issues for determination.**

31. I have considered the entire evidence produced during the inquest proceedings and the submissions of both counsel. As a result, I find the following to be the issues for determination.
  1. Whether the appeal is competent
  2. What are the appropriate orders to be made by this court?

### **Analysis and determinations**

#### **Issue 1**

32. The first issue is whether the appeal is competent. It is trite law that a right of appeal is only granted by statute and in the absence of such a statutory right of appeal, the appeal is incompetent. See *Anarita Njeru Karimi v Republic No 2 (1979) KLR 162*.
33. An inquest is a judicial inquiry conducted to determine the surrounding circumstances and the cause of a person's death of a deceased person. It is an inquiry that examines witnesses on oath who testify on any relevant matter or information in order to establish as to who the deceased was, how and under what circumstances he met his death. The inquest is an inquiry to establish material circumstances in respect of the death of the deceased. It is an investigative process. This is clear from the provisions of sections 387 (4) and (5) of the Criminal Procedure Code, which read as follows:

' (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 (DPP).



(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.'

34. Furthermore, the circumstances in which inquests are held and conducted by the magistrates are set out in sections 385, 386, 387 and 389 of Criminal Procedure Code (Cap 75) Laws of Kenya. It is clear from these provisions that no right of appeal is provided for in respect of any recommendation or orders of the magistrate, who is conducting an inquest. The suspect in the inquest proceedings is not a convicted person and therefore has no right of appeal to the High Court under section 347 (1) and (2) of the Criminal Procedure Code. It is clear therefore that a suspect against whom the magistrate has recommended that he be prosecuted by the DPP on a particular charge has no right of appeal against the recommendatory order of the magistrate in that regard. It therefore follows that there is no right of appeal against the recommendation made by a magistrate's court in the inquest proceedings.
35. Furthermore, it is trite law that a right of appeal to a higher court must be grounded upon a clear statutory provision. In other words, there is no statute that confers a right of appeal upon any party or person against whom an order has been made in the inquest proceedings. It therefore follows that the appellant's appeal against the recommendatory order of the magistrate in that regard is incompetent with the result that the current appeal is hereby struck out for being incompetent.

### **Invocation of the revisionary jurisdiction of the High Court**

36. Notwithstanding the fact that the appeal has been disposed of, the issue as to whether the recommendatory order of the learned magistrate is correct in law, merits attention. In this regard, the invocation of the revisionary jurisdiction of the High Court pursuant to section 362 as read with section 364 of Criminal Procedure Code is necessary. The invocation is necessary for the court to satisfy itself as to the legality, correctness or propriety of any findings, or order recorded or passed or the regularity of any proceedings of the magistrate's court, and if necessary proceed to make appropriate orders.
37. In view of the vesture of the revisionary jurisdiction in this court, I now proceed to enquire whether the decision made by the learned Resident Magistrate was in accordance with the law. In this regard, I find that the learned Resident Magistrate failed to make a finding in respect of the offence with which he recommended to the DPP to charge the suspect. It was his duty having taken into account the entire evidence and to make a finding as to what offence had been committed by No xxxx APC Peter Kemei (Pw 4). If he concluded that the deceased died of natural causes, the learned Resident Magistrate would be entitled to order the closure of the file and the inquest proceedings.
38. On the other hand, if he concluded that the death of the deceased was caused by an unknown person, the court would be entitled to make an order to that effect but has to make an order reserving to the prosecuting authorities or interested party the right to re-open the file if the person who caused the death is subsequently discovered.
39. In the instant appeal, it is necessary to re-evaluate the evidence of all the witnesses who testified at the inquest, including the person or persons suspected to have committed the offence, for which he or they have been called to answer to enable this court to satisfy itself as to the legality of the recommendatory order of the learned Resident Magistrate.
40. There is the eye witness evidence of the following witnesses. The mother of the deceased (Pw 1 Rose Chepkwemai Naibei), the brother of the deceased (Victor Rodgers Naibei (Pw 3) and APC police officer No xxxx and APC Willis Makokha Simiyu (Pw 9).



41. Furthermore, the suspect himself who is the appellant, being No xxxx APC Peter Kemei, (Pw 4) in the inquest proceedings admitted in his evidence shooting the deceased. Pw 4 testified that he tried to aim and shoot the deceased at his right arm in an attempt to stop the deceased from hitting a fellow officer, No xxxx APC Joseph Kassim Mwate (Pw 5), but unfortunately, he shot him in the chest and the deceased fell on the ground and died.
42. In addition to the foregoing evidence, there is the evidence of the investigation police officer, No xxxx PC Kennedy Kipsoi (Pw 12), who took the gun of the appellant No xxxx APC Peter Kemei (Pw 4) together with other related exhibits to No xxxx Inspector of Police Alfred (Pw 10), a forensic ballistics expert for examination. Pw 10 confirmed that it was the gun of the appellant (Pw 4) that fired the fatal shot.
43. The report of the pathologist, Dr Wafula Hesborn dated August 21, 2017, which was produced in evidence by Dr Ombogi Haron (Pw 11) of Bungoma County Referral Hospital found the cause of death of the deceased was due to cardio respiratory arrest due to severe hemorrhage resulting from a gunshot.
44. I have also considered the evidence of the brother of the deceased Victor Rodgers Naibei (Pw 3) whose evidence seems to be contradictory.
45. The standard of evaluation of the evidence adduced during the inquest proceedings and the applicable law.
46. The need for evaluation of the evidence by both the appellant and the other witnesses before coming to any conclusion was considered in the case of *R versus Maula Dad (1936) KLR Vol XVII 70* at page 71. In that case, there was a road traffic accident which resulted in the death of one Durham. An inquest was held by the resident magistrate and resulted in a finding that his death was accidental. The accused was brought before the magistrates' court for committal on a charge of manslaughter. The magistrate declined to commit the accused to trial on the ground that there was insufficient evidence of an omission amounting to culpable negligence. When the case went before the High Court (Sir, Joseph Sheridan, CJ and Webb, J) for revision to consider whether the order should be set aside, the learned judges said: -
- ' It is conceded, and there is ample authority for the proposition, that a Magistrate in committal proceedings is not bound to commit for trial simply because there is evidence on the one side which, if believed, would support a conviction; he is entitled to weigh the evidence, but at the same time, he is not entitled to usurp the functions of the Court of trial.'
47. The learned judges in the same case went further and quoted with approval the case of *Fattu versus Fattu (26 All 564)* where it was said: -
- ' If he arrives at the conclusion, either at the close of the case for the prosecution or after hearing the accused's witnesses, that it (i.e the evidence for the prosecution) is not true, he can give effect to his opinion by discharging the accused. If it is a matter of weighing probabilities, he would be well advised in leaving the case to the court which alone is empowered to try it.'
48. It is clear from this decision that in an inquest, the magistrate has the obligation to weigh the evidence of both the prosecution and the suspect and his witnesses; he cannot look at the evidence of the prosecution only and commit the suspect to trial; neither can he look at the evidence of the accused



only and discharge him. The magistrate can only come to a particular conclusion only after he has weighed the evidence of both sides but conscious of the fact he is not the trial court.

### **The applicable law in respect of inquests**

49. At the conclusion of the inquest, the magistrate conducting the inquest may discharge a suspect if there is no evidence of a material ingredient of the offence. The magistrate may also discharge if the evidence produced before him is incredible and discredited that no court properly directing itself could recommend that the suspect be charged for the offence disclosed by the evidence.
50. Furthermore, I am not sitting as a first appeal court. And for that reason, I am not by law allowed to re-evaluate the evidence and make my own independent conclusions. *See Okeno v R [1972] EA 32.* If I were to do so, it will prejudice the fair trial of the suspect, which is legally impermissible. All the issues raised by Mr Wanyonyi are issues that may be raised and be determined by the trial court; which is equipped to make final findings on the evidence adduced before it.
51. Furthermore, the use of firearms is regulated by the *National Police Service Act*, No 11A of 2011 in sections 49 (5) and 61 of the Act as read with the Sixth Schedule, which sets out the circumstances under which a police officer may resort to the use of force and firearms.
52. Section 49 (5) of the aforesaid act reads as follows:

' Where a police officer is authorized by law to use force, the officer shall do so in compliance with the guidelines set out in the Sixth Schedule.'
53. Section 61 of the aforesaid act reads as follows:

' (1) Subject to subsection (2), a police officer shall perform the functions and exercise the powers conferred by the *Constitution* and this Act by use of non-violent means.  
(2) Despite subsection (1), a police officer may use force and firearms in accordance with the rules on the use of force and firearms contained in the Sixth Schedule.'
54. Part A of the Sixth Schedule provides for the use of force by the police in the following terms:
  1. A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result.
  2. The force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders.
  3. When the use of force results in injuries—
    - (a) The police officers present shall provide medical assistance immediately and unless there are good reasons, failing to do so shall be a criminal offence; and
    - (b) Shall notify relatives or close friends of the injured or affected persons.
  4. A police officer who uses any form of force shall immediately, report to the officers' superior explaining the circumstances that necessitated the use of force and the supervisor shall judge the rightfulness and decide on the next step, subject to these regulations.



5. Any use of force that leads to death, serious injury and other grave consequences shall be reported immediately by the officer in charge or another direct superior of the person who caused the death or injury, to the Independent Police Oversight Authority who shall investigate the case.
  6. The Inspector-General shall not be precluded by virtue of paragraph (5) from conducting investigations into the matter.
  7. A police officer who makes a report to the Independent Police Oversight Authority in accordance with paragraph (5) shall—
    - (a) Secure the scene of the act for purposes of investigations; and
    - (b) Notify the next of kin, their relative or friend of the death or injury as soon as reasonably practical.
  8. It shall be a disciplinary offence for a police officer to fail to report in accordance with these regulations.
  9. An officer shall not tamper or otherwise damage any evidence from the scene of the act.
  10. A Police officer in uniform shall at all times affix a nametag or identifiable Service number in a clearly visible part of the uniform.
  11. Following the orders of a superior is no excuse for unlawful use of force.'
55. It is clear from the foregoing provisions of the law that the use of force by police officers should be proportional and should be used as a matter of last resort.
56. Counsel for the appellant submitted as follows. The force used by the appellant to protect the life of No xxxx APC Joseph Kassim Mwate (Pw 5) was justified. I understand Mr Wanyonyi to be submitting that the learned magistrate should have discharged the appellant. Furthermore, counsel submitted that in view of the adverse findings made by the court and in order to cushion the appellant against the incriminating evidence, the court should have accorded the appellant the opportunity to cross examine the witnesses who had given adverse evidence against him. The record shows that the appellant was not given the opportunity to cross examine the witnesses. It is only the learned magistrate who asked the appellant questions. Counsel also submitted that the learned magistrate did not consider the contradictions between the evidence of the police on the one hand and that of the family of the deceased namely the parents and brother of the deceased. Another issue issued by Mr Wanyonyi is whether courts in Kenya are still obliged by section 17 of the Penal Code to apply English common law principles in matters of self defence and defence of another person are applicable in view of the provisions of *National Police Service Act*, No 11A of 2011 in sections 49 (5) and 61 of the Act as read with the Sixth Schedule are matters that call for judicial resolution.
57. Furthermore, the evidence of the mother (Pw 1) of the deceased was that:
- ' When the AP in charge gave instructions to his officers to shoot, I observed Kemei shoot the deceased Kemei shot the deceased's chest and the gunshot penetrated to his back. The deceased was shot on the upper right chest.'
58. The above and related issues that have been raised by Mr Wanyonyi are issues that may be raised and be determined by the trial court; which is equipped to make final findings of fact based on the evidence adduced before it. These are not matters for this court to determine; for if I were to do so, I



might prejudice the fair trial of the appellant (Pw 4); in view of what I will recommend below in this judgement.

59. In addition to the foregoing, all the issues raised in the grounds of appeal are equally matters for the trial court to hear and determine.

12. Furthermore, there is evidence from the mother of the deceased that the in charge Ap officer instructed Ken to shoot. In this regard, the law according to the Sixth Schedule to the National Police Service Act, is that following the orders of a superior is no excuse for unlawful use of force.

60. In view of the immediate foregoing, it is important to refer to the function of the USA Grand Jury, which is established under Amendment V to the USA Constitution of 1787. The function of this body is to conduct investigations for serious crimes, which investigations are held in the absence of the suspect/accused. The suspect/accused by nature of its proceedings does not cross examine the witnesses brought before that body of 23 jurors.

61. If the said body returns a bill of indictment (an order to charge the suspect/accused) a warrant of arrest will be issued to take the suspect/accused before the trial court for the commencement of the trial.

62. There is no right of appeal against the order of the Grand Jury. In respect of the Grand Jury, Amendment V to the USA Constitution of 1787 reads as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, nor shall be compelled in any criminal case to be a witness against himself;

63. It is clear from the evidence of the mother of the deceased that the deceased wanted to have a discussion with the police. Instead of entering into a discussion with him, the police took up a stick and hit the deceased in the thigh and the head. The stick fell down. The deceased picked the stick and chased the police officer (Pw 5), who tripped and fell down.

64. The use of force by police officers is allowed by law when non-violent means have failed to subdue the deceased person. Additionally, the force used must be proportionate.

65. The evidence of the mother of the deceased is contradicted by that of the appellant himself (Pw 4) who testified that the deceased charged at the police officers wielding a panga. Pw 4 ordered him to stop charging at them. He did not do so. The deceased chased Pw 5 and caught up with him (Pw 5), who fell down. It is at this point in time that the deceased tried to cut Pw 5 with a panga. Pw 4 further testified that:

66. Immediately before the deceased cut Kassam with the panga, I tried to aim at his right arm in a bid to shoot and incapacitate his right arm but I shot the wrong part (unfortunately). Unfortunately, I shot him on the chest and not the arm as I had aimed. The deceased fell on the ground and died. I thereafter recovered the panga and called Sergeant Emai of Kaptama AP post.'

## **Recommendation**

67. In this case, I find that the learned Resident Magistrate weighed both the evidence of the appellant and that of the other witnesses and made a proper recommendation. However, the learned Resident Magistrate erred in law in failing to make a finding in respect of the offence disclosed by the evidence. I find that in the light of the applicable law and the entire evidence, if believed discloses the offence of murder.



68. In the premises, I confirm the recommendatory order of the learned Resident Magistrate court with the result that the judgement of this court should be served upon the Office of the Director of Public Prosecutions at Bungoma for his further action in accordance with the law in article 157 of the Constitution of Kenya in view of the finding of this court that the evidence discloses murder.

**JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THROUGH VIDEO CONFERENCE AT THIS 27<sup>TH</sup> DAY OF JULY 2022.**

**J M BWONWONG'A**

**JUDGE**

**In the presence of: -**

Mr. Kinyua court assistant

The appellant in person.

Mr. Wanyonyi for the appellant was absent.

Ms. Mukangu for the respondent

