



**Nezerali v Regional Criminal Investigation Office Coast County  
Government of Mombasa & 4 others (Criminal Revision Application  
E177 of 2022) [2022] KEHC 12755 (KLR) (24 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12755 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL REVISION APPLICATION E177 OF 2022**

**JN ONYIEGO, J  
AUGUST 24, 2022**

**BETWEEN**

**KIRAN A. NEZERALI ..... APPLICANT**

**AND**

**REGIONAL CRIMINAL INVESTIGATION OFFICE COAST COUNTY  
GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT  
PUBLIC HEALTH OFFICE ..... 2<sup>ND</sup> RESPONDENT  
MEDICAL SUPERINDENT COAST GENERAL MOMBASA . 3<sup>RD</sup> RESPONDENT  
OCS CENTRAL POLICE STATION MOMBASA ..... 4<sup>TH</sup> RESPONDENT  
MANAGEMENT KOJA SHIA ITHNASHERI CEMETERY MOMBASA .... 5<sup>TH</sup>  
RESPONDENT**

**RULING**

1. By a notice of motion dated July 6, 2022, filed under Criminal Misc Application No 313 of 2020, the Regional Criminal Investigation Office Coast moved the chief magistrate’s court Mombasa for orders that; the body of Abbas Anverali Nazerali which was interred and buried on May 15, 2022 at Koja Shia Ithnasheri cemetery situated in Mvita sub- county be exhumed for purposes of medical examination to confirm the cause of death; the OCS central to provide adequate security during the exhumation; the public health officer Mombasa county to supervise the exhumation of the body of Abbas Anverali Nazerali(deceased) within 7 days of the order; the medical superintendent at Coast Provincial General Hospital to conduct post-mortem of the body of Abbas Anverali(deceased) immediately upon exhumation.



2. The application was anchored on the grounds that a report had been made at Kilindini police station by Shakir Anwar a Pakistan national also a brother to the deceased who claimed that circumstances under which his brother died were suspect and questionable hence the demand to exhume the body to ascertain the actual cause of death. In support of the application, PC Pharis Thoya swore an affidavit deponed on July 6, 2022 in which he narrated on how the police received a report from the said Shakir who claimed that the medical reports obtained from Agakhan hospital where the deceased was taken by his wife Kiran (5<sup>th</sup> respondent) and a family friend for treatment revealed that the deceased's body upon admission had swellings and multiple wounds for many months, was suffering from insomnia and altered mental status. That despite admission of the deceased in ICU, the wife and the said family friend demanded to take the deceased back home against doctor's medical advice (annexture KCL-6) where he later died on the same day before being transferred to Mombasa hospital who formally confirmed while at the emergency room that he had indeed died.
3. That having reported the incident of the deceased' death at Mombasa central police station before they could have the body accepted for preservation pending investigation, the wife proceeded to have the body buried against police advice hence attracting suspicion on the deceased' cause of death. That there was no prejudice likely to be suffered by the respondents if the exhumation order was issued. On the other hand, the 5<sup>th</sup> respondent (wife to the deceased) filed a replying affidavit sworn on July 13, 2022 opposing the application on grounds that there was no basis for exhumation of the body and that the opening of the deceased's grave will traumatise the family further
4. Having canvassed the application fully, the Hon V O Adet delivered his ruling on July 27, 2022 thus allowing the prayer for exhumation to facilitate a post-mortem examination on the body of the deceased to ascertain the cause of his death. Dissatisfied with the said order, one kirana widow to the deceased moved to this court by way of a notice of motion dated July 28, 2022 seeking revision orders against the said ruling as follows;
  - 1) Spent
  - 2) The honourable court be pleased to call up for purposes of revision of the orders granting exhumation in Mombasa chief magistrates court Misc Application No E313 of 2022 and to issue orders altering the said orders issued and dismissing the application filed therein
  - 3) This honourable court be pleased to bring to this honourable court for purposes of quashing the subordinate court's orders of the learned magistrate given on July 27, 2022 in Mombasa chief magistrate's court criminal Misc Application No E313 of 2022
  - 4) This honourable court be pleased to dismiss the exhumation application in Mombasa chief magistrate's court Criminal Misc Application No E313 of 2022;
  - 5) Costs of the application be provided for
5. The application is based on the grounds set out on the face of it and averments contained in the supporting affidavit sworn by the applicant on July 27, 2022. It is the applicants' case that; she and her five children are opposed to the exhumation order as there was no basis laid out to warrant issuance of the same; that an exhumation order is issued only in the clearest terms and exceptional circumstances; the impugned order is contrary to the customs and religious beliefs of the deceased hence a taboo; the trial court lacked jurisdiction to issue the impugned order under section 388 of the CPC; the investigating officer's averments are based on hearsay evidence and or information; the deceased died of natural causes as he had been unwell for long and upon admission he refused to undergo dialysis hence his discharge.



6. She further stated that the exhumation order was obtained in bad faith as the statement of the doctor who treated the deceased last was not attached. That the 1<sup>st</sup> respondent had deliberately withheld material evidence including laboratory results which revealed that the cause of death of the deceased was natural and no foul play was detected.
7. In response, the 1<sup>st</sup> and 4<sup>th</sup> respondent filed a replying affidavit sworn on the August 3, 2022 by PC Pharis Thoya stating that; the first respondent was under obligation in law to act on a complaint made over the suspicious circumstances under which the deceased died; his office acted properly in compliance with the DPP's direction to investigate the complaint; from the medical records obtained from Agakhan hospital and the discharge of the deceased by the applicant against doctor's advice led to the conclusion that the death of the deceased was suspect; the directive by the central police station to preserve the body was ignored as the applicant went ahead and buried the body of the deceased without authority; the prayer for post-mortem is intended at helping the court to complete investigations under section 386 of the CPC; the applicant has not proved grounds for revision and that public interest demands investigation over the deceased's death be completed without abusing the court process.
8. Equally, Mahek Fatima Abbas Nazerali a daughter to the deceased swore an affidavit on August 17, 2022 basically corroborating the averments contained in the applicant's replying affidavits to the extent that the family of the deceased has no doubt that the deceased died of natural causes. Equally, Nurjehan Abbas a son to the deceased also filed an affidavit on July 17, 2022 thus supporting the applicant
9. In her rejoinder, the applicant filed what she referred to as a replying affidavit sworn on August 15, 2022 in response to the 1<sup>st</sup> applicant's replying affidavit asking the court to expunge some exhibits introduced in this application yet they were not part of the record before the lower court.
10. Simultaneously filed with the revision application is also a notice of motion dated July 28, 2022 seeking; stay of execution of the order of exhumation of the deceased's body pending hearing and determination of the revision application; the court to issue an order of maintenance of statusquo during the pendency of the revision application. This application was canvassed before Hon Justice Sewe who delivered her ruling on August 10, 2022 thus maintaining the statusquo pending hearing and determination of the revision application. In the same ruling the court also addressed the issue of lack of jurisdiction thus holding that the revision application was properly before the court and that the court has jurisdiction. the court also held that the prayer for stay was spent as that prayer had been granted at the exparte stage pending hearing and determination of the appeal.
11. When parties appeared before me for hearing of the substantive application for revision, they agreed to canvass their respective submissions orally. Mr Makori for the applicant literally adopted the averments contained in the applicant's affidavit in support of the application. Learned counsel submitted that the court did improperly allow learned counsel Mr Oloo to appear and address the court on behalf of the complainant who was not a party to the proceedings without any formal application to come on record. Learned counsel further submitted that the exhumation order was meant to frustrate and embarrass the deceased's family.
12. Mr Makori further submitted that the evidence of an investigating officer is hearsay evidence hence not admissible. To buttress this position, counsel made reference to the case of *Jared Benson Kangwana & 2 others v Director of Public Prosecutions & 3 others ; Monarch insurance company LTD & 2 others (interested parties)* [2022] eKLR to express the point that an affidavit sworn by an investigating officer is not helpful as it amounts to mere hearsay evidence. For that reason, he expressed the position that PC Thoya's evidence is hearsay evidence hence cannot be relied on. Counsel urged the court to set aside the order as there was no factual basis upon which the order was made.



13. Mr Makuto for the 2<sup>nd</sup> and 4<sup>th</sup> respondent also adopted the content contained in PC Thoya's replying affidavit to the application thus opposing the application. Counsel contended that the grounds for revision under section 362 and 364 of the CPC have not been met. On the question whether the order of exhumation amounts to breach of Islamic norms, counsel submitted that religious beliefs do not count when investigating cases of murder and that the DPP cannot be barred from ordering investigation of an inquest on murder allegation. In this regard, the court was referred to the finding in the case of *Elijah Oginda v Director of criminal investigations & another* [2019] eKLR and *ODPP v Principal magistrate Shanzu* [2021] eKLR.
14. Learned counsel submitted that an inquest having been opened, a post-mortem report is necessary. Mr Makuto contended that what matters in granting exhumation order is the interest of justice. To support this proposition, counsel relied on the holding in the case of *Directorate of Criminal Investigation v Selina Wangui Wambui* (2020) eKLR.

### Determination

15. I have considered the application herein, response thereto and oral submissions by the applicant and 1<sup>st</sup> and 4<sup>th</sup> respondents. The issues that arise for determination are; whether the applicant has met the criteria for revision; whether lower court had jurisdiction to issue the orders for exhumation and; whether Mr Oloo advocate appearing for the complainant was properly on record. Before I endeavour to determine grounds for revision, I wish to determine the aspect of lack of jurisdiction of the trial court. The applicant claimed that section 388(3) of the CPC under which the application was filed is not applicable hence the orders issued could not apply. A perusal of the said application before the trial court clearly indicates that it was brought under section 146 of the *Public Health Act* and section 388(3) of the CPC. Under section 386(1) of the CPC, a magistrate's court is empowered to conduct an inquest to ascertain the cause of death of a person who is reported by an officer in charge of the nearest police station in situations where there is information that the deceased person had committed suicide, killed by somebody or by road accident or died under circumstances raising reasonable suspicion that some other person may have committed an offence or the person has gone missing and believed to be dead.
16. Under the said provision, the officer in charge of the concern police station is duty bound to investigate, compile a report and place the same before a magistrate's court to conduct an inquest to ascertain the cause of death. In order to establish the cause of death, a post-mortem report is critical. In circumstances where the deceased has been buried and where circumstances allow, the body can be exhumed and an autopsy conducted to determine the cause of death. Under section 146 of the *Public Health Act* and section 387(2) of the CPC, a magistrate is empowered to authorize exhumation of a body that has been interred for purposes of holding an inquiry. In the instant case, the trial magistrate was properly seized of the power to entertain an application for exhumation of the body. The application therefore was properly framed under section 146 of the *Public Health Act*.
17. The quotation of section 388(3) of the CPC which empowers the DPP to direct a magistrate's court to conduct an inquiry where a person is said to have died in prison or while in custody of the police or in any other case mentioned under section 386 of the CPC is not fatal hence curable under article 159 (2) of the *Constitution*.
18. Having held as above, I will now turn to the question whether the applicant has met the threshold for revision of the orders; under section 362 of the CPC, the high court is empowered to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of



satisfying itself as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed and as to the regularity of the proceedings.

19. Section 364 of the CPC further provides that; in case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the high court may exercise appellate jurisdiction as conferred under section 354,357 and 358 of the CPC and in the case of any other order other than an order of acquittal, alter or reverse the order. The high court’s supervisory role as provided under section 362 of the CPC over subordinate courts, anybody or person or authority exercising quasi-judicial function is further galvanized under article 165(6) & (7) of the *constitution*. See *Andrew Kibet Cheruiyot & another v Medical practitioners and Dentists board & 2 others* Petition No 260 of 2013
20. It is therefore incumbent upon the applicant to establish the existence of the ingredients stated under section 362 of the CPC without losing sight of the fact that the power of revision is purely discretionary. See *Republic v Anthony Thuo Karimi*[2016] e KLR where the court held that;  

“The revisional powers of the high court are quite wide. Such powers are intended to be used by the high court to decide all questions as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed by an inferior court”
21. Similar position was held in the case of *Republic v James Karie Mutengei*(2017) e KLR. Basically, a court sitting in exercise of its revisionary powers should confine itself to the parameters of the provisions governing grant of revision orders and not to readily accommodate applications which ought to be subjects of appeal but disguised as revision applications.
22. In the instant case, the point of contention is whether the hon court correctly, legally and properly conducted court proceedings before it granted the orders. Unfortunately, the applicant has not bothered to argue the application by addressing the elements under section 362 and 364 of the CPC nor article 165(6) & (7) of the *constitution*. She has simply concentrated on the merits of the decision which would have safely attracted an appeal.
23. However, the above observation notwithstanding, the court can exercise its unlimited powers to exercise jurisdiction as held by my sister Hon Sewe to make a determination. The background of the dispute herein leading to suspicion as to the cause of death of the deceased is the conduct of the applicant preceding the death of the deceased. According to the applicant, her husband fell sick on May 14, 2022 and was taken to Agakhan hospital where doctors recommended admission and emergency dialysis be conducted. That the deceased refused to consent hence release after she signed against the doctor’s advice not to discharge the patient. That the deceased died out of natural causes hence the immediate family has no complaint.
24. On the other hand, the investigating officer through the DPP’s directive and upon receipt of a complaint from the brother alleging foul play in the circumstances under which the deceased died has decided to initiate investigation. The investigating officer is relying on the suspect conduct of the applicant in discharging the deceased against doctors’ advice and also for hurriedly burying the body against the advice of the OCS central police station. Among the documents attached to the application before the lower court for exhumation of the body is a copy of a form referred to as leave against medical advice marked as annexure RCI-6) Agakhan hospital dated May 14, 2022 in which the family insisted in the discharge of the deceased on grounds that they were to transfer him to Nairobi or Pakistan. The said form reveals that the deceased had suffered among other ailments, acute kidney injury with hyperkatema which needed emergency dialysis as a life saving measure.



25. From the record therefore, it was not the deceased who refused to be treated at Agakhan but rather the family (applicant) who pretended that they wanted to take him to Nairobi or Pakistan but instead proceeded to a nearby clinic known as Tudor health centre where he was briefly attended to but they could not manage his severe condition. From there, he was taken home where the condition worsened and subsequently died allegedly on his way to Mombasa hospital where they were advised to get a letter from the police as the deceased didn't die in their facility. It was this letter that advised for preservation of the body but instead the applicant proceeded to bury the body without the knowledge of the police.
26. Following the deceased' brother's complaint seeking further investigations on circumstances under which his brother died, the police were under obligation to commence investigation which includes conducting a post-mortem examination of the body thus calling for its exhumation. Whereas exhumation of a body already interred can be painful to the family members, public interest and the dictate to attain substantive justice does supersede any personal law or interest, community or religious practices or beliefs. This position was succinctly espoused in the case of *Republic v Godfrey Kipkemoi Kangogo* (2018) e KLR, *ODPP v Principal Magistrate Shanzu* (supra) and *Elijah Oginda v Directorate of criminal investigations & another* (supra).
27. Having considered the conduct of the applicant during the admission of the deceased at Agakhan on May 14, 2022, his discharge against doctor's advice on the same day and later presentation of the body of the deceased to Mombasa hospital where police intervention was call for and further having defied police advice to preserve the body, is itself sufficient ground to warrant further inquiry by way of inquest to ascertain the actual cause of death. The kidney injury the cause of which is not clear from the doctor's form ought to be clarified during the inquest. To stop exhumation will basically mean closing investigation prematurely.
28. I do not see any serious prejudice to be suffered if the order is intended at achieving substantive justice. A brother to the deceased who is the complainant is equally a close relative and therefore will be affected if the order is not granted. To balance the scales of justice the exhumation order is inevitable and therefore the trial court's order is upheld.
29. As to whether the evidence of the investigating officer is hearsay hence inadmissible, one would have to look at the nature of information tendered to the court. The investigating officer gave information touching on the evidence he gathered and what he did in the course of investigation. Those facts are not in dispute hence admissible in law.
30. Regarding the question whether Mr oloo appearing for the complainant properly participated in the proceedings without first making a formal application, the answer can be found under section 9 of the *Victim Protection Act* which bestows powers upon the court presiding over a matter to allow any victim or representative thereof to participate in any legal proceedings. Leave to so participate doesn't have to be by way of formal application. It can be granted by the court through verbal application.
31. In view of my holding above, I do not find any sufficient ground upon which to interfere with the learned magistrate's finding as no illegality, impropriety or irregularity of proceedings has been established. To that extent, the revision application herein is dismissed and the original file be returned to the lower court for implementation of its orders.

**DATED DELIVERED AND SIGNED VIRTUALLY AT MOMBASA THIS 24TH DAY OF AUGUST, 2022**

.....  
**J.N.ONYIEGO**



**JUDGE**

