



**Kahiga & another v Republic (Criminal Revision E025 of 2022)  
[2022] KEHC 12213 (KLR) (18 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12213 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL REVISION E025 OF 2022  
FN MUCHEMI, J  
AUGUST 18, 2022**

**BETWEEN**

**EDWARD MUTAHI KAHIGA ..... 1<sup>ST</sup> APPLICANT**

**RIGATHI GACHAGUA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. On 7<sup>th</sup> February 2022, the applicants filed this application dated 4<sup>th</sup> February 2021 under certificate of urgency seeking for revision of the orders made by the Chief Magistrate Hon. W. Kagendo summoning the applicants herein to attend court and give evidence in the inquest.
2. The applicants rely on the grounds that the prosecution had called all its witnesses in inquest No. 9 of 2018 at the time the order to summon the applicants was made. None of the witnesses had mentioned the applicants in their evidence. Further that the summoning of the applicants was prompted by the advocate who was representing the family of the deceased in the inquest namely Martha Waweru being an application from the bar. The court is yet to make its ruling in the inquest and as such there is no finding of the court implicating the applicants by laying a basis for issuing the summons.
3. The 1<sup>st</sup> applicant is the governor of Nyeri County while the 2<sup>nd</sup> applicant is the Member of Parliament for Mathira Constituency while the 3<sup>rd</sup> and 4<sup>th</sup> applicants are employees of the Nyeri County Government. The summoning of the two persons without complying with the law is likely to embarrass them and to erode public confidence which would violate Constitutional rights of the Applicants. It was further stated that the counsel for the deceased family relied on Section 387(3) of the *Criminal Procedure Code*. This led to the order by the Chief Magistrate that the two appeal in court to give evidence which they do not have.



4. The respondent did not oppose this application. Ms. Mwaniki for the respondent said that she had consulted with the prosecuting counsel in the inquest who said that by the time the impugned order was made, he had called all the witnesses he had prepared. In his opinion, the prosecuting counsel said the evidence of the applicant's has no probative value in the inquest.
5. Attached to the application are the statements of the applicants, not dated but filed together with the application. The 1<sup>st</sup> applicant states that he knows nothing about the occurrence of the accident that killed the deceased Dr. Wahome Gakuru the governor of Nyeri County at the material time. The 1<sup>st</sup> applicant was the Deputy Governor at that time and he succeeded the deceased as the governor in the county. He stated further that he learnt of the accident from other people on the material morning and that he knows nothing else about the cause or circumstances surrounding the accident.
6. The second applicant's statement was very brief. He states that he learnt about the accident through the media on the material day and know nothing more about the accident or the death of the late governor.
7. At the time directions were being taken on further hearing, an objection for the issue of the summons was made by the applicants' advocates. The counsel for the prosecution informed the court that the said witnesses had already recorded statements which were found to have no probative value in the inquest. He said:-

“The prosecution had gone through the statements and were of the opinion that they were of no probative value....”
8. The prosecution counsel then left the matter for the court to decide whether to call the applicants to testify or not. Mr. Wahome Gikonyo for the Applicants and holding brief for other counsels on record for other parties opposed the application. Mr. Wahome relied on Section 387(3) of the Criminal Procedure Code arguing that the magistrate was yet to find implicating evidence against his clients to justify issuing summons to them to come and testify.
9. Section 387(3) of the Criminal Procedure Code empowers a magistrate conducting an inquest to issue summons after forming an opinion that a person or persons known or unknown has committed an offence. Such summons are issued before or at the termination of the inquest. The position in this application is that the magistrate had not yet made an opinion that the applicants had committed any offence and as such the summons calling them to testify were issued contrary to the law.
10. In the ruling rejecting the objection by the defence the magistrate emphasized on the public importance of the case that involved the governor of Nyeri County. She was of the view that the cause of death and whoever was responsible had to be unearthed to bring to finality the inquest. As the magistrate conducting the inquest, it was not unusual to emphasize on the importance of any available evidence. The only flaw was the issue of the summons contrary to the provisions of the law.
11. The second aspect in this application is that the prosecution who had already called 17 witnesses with only one remaining had already perused the statements of the applicants and found them to have no probative value. The prosecuting counsel ably communicated this position to the court but the issue was not addressed in the ruling. The court chose to grant the request of the victims advocate without examining the value that the statements would add to the inquest. I have looked at brief statements of the applicants and agree with the respondent in this application that the statements have no proactive value. The summoning of the Applicants to court to testify in the inquest will not serve any useful purpose in my considered view.



12. This application for revision is brought under Section 362 of the Criminal Procedure Code which provides:-

“The High court may 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 any proceedings of any such subordinate court.”

13. Considering the foregoing analysis, I reach a conclusion that the summons to the applicant issued on 12<sup>th</sup> August 2021 in CM inquest No. 9 of 2018 were irregularly issued. I also find that it was a misdirection by the magistrate to reject the objection raised by the counsels for the applicants against the issue of summons on 20<sup>th</sup> January 2022 in the said inquest.

14. Consequently, I find this application merited and I allow it in the following terms:-

- a. That the orders made by the magistrate Hon. K. Micheni on 12/08/2021 in Inquest No. 9 of 2018 raising witness summons against the applicants are hereby quashed.
- b. That the ruling delivered on 20<sup>th</sup> January 2022 in the same inquest is hereby reviewed by allowing the applicants objection to the issue of the said summons.

15. The orders herein apply in Criminal Revision No. E026 of 2022.

16. It is hereby so ordered.

**DATED AND SIGNED AT NYERI THIS 18TH DAY OF AUGUST, 2022.**

**F. MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEO LINK THIS 18TH DAY OF AUGUST, 2022**

