



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CORAM; HON. JUSTICE R. MWONGO, J.**

**CRIMINAL REVISION CASE NO. 30 OF 2019**

**STEPHEN MWANGI MWAURA.....APPLICANT**

**VS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Applicant seeks two orders. That the ruling delivered in the lower court in CMCC Engineer Inquest No. 7 of 2016 on 28<sup>th</sup> June, 2019 be stayed; and that the said ruling be set aside.

2. Inquest No. 7 of 2016 at Engineer Law Courts was commenced to inquire into the circumstances leading to the death of Purity Waithera Mwangi, the Applicant's wife. The applicant had taken her to hospital and upon arrival she was pronounced dead. After hearing ten witnesses the inquest magistrate delivered the said ruling.

3. The conclusion of the inquest court was inter alia as follows:

***“Since PW8 was the last to be with the deceased while she was alive and since medical evidence shows that the cause of her death is as result of multiple blunt force trauma to her head and neck which is evidenced by the injuries to the head as well as the sighs of lack of oxygen in her body, it is my finding that PW8 Stephen Mwangi Mwaura had a hand in the death of his wife Purity Waithera Mwangi. I hereby recommend that he should be charged with the relevant offence in respect of the said death.”***  
(Underlining added)

4. The applicant argues that the Inquest court overstepped its authority by making the said recommendation. He states that the ruling invades the area of the DPP's responsibility under **Article 157 (6)** of the **Constitution** which grants the DPP the sole authority and power to “institute and undertake” criminal proceedings.

5. The applicant further argues that under Section 387 of the **Criminal Procedure Code**, the magistrate conduction the inquest only has power to “record his opinion”. In the case he made a recommendation that the applicant should be charged with the relevant offence. As a result, he submits, he was forthwith arrested to face charges relating to the death of his wife in CMCC Engineer Miscellaneous No. 13 of 2019.

6. Reliance is placed by the applicant on the cases of **In Re Estate of Philip Otieno Odhiambo (Deceased) 2015 eKLR** and **Republic Thro' CID Mwingi v Julius Kilonzo Muthengi, Majanja J** held that **Article 157 (6) a)** of the **Constitution** vests the DPP with power to institute and undertake criminal proceedings but does not empower the magistrate's court to initiate criminal proceedings. In **Julius Kilonzo's** case, Dulu J held that the magistrate should not have recommended a civil claim by the deceased's family as the law did not confer on him such powers.

7. The counsel for the family of the deceased at the inquest was permitted to participate in these proceedings. He filed submissions opposing the application. Counsel exhibited that the inquest magistrate did not initiate criminal proceedings; that the action of recommending a change is distinguishable from the magistrate's recommendation in the **Julius Muthengi** case for civil litigation, because in Julius Muthengi the magistrate has no such power.

8. Counsel further argued that the inquest magistrate did not order arrest or issue a warrant of arrest as in the **Philip Otieno** case. Further, counsel submitted that there was no evidence shown to indicate that the ruling compromised the DPP's powers.

9. The DPP also opposed the application. Like the other counsel, the DPP relies on the **Philip Otieno** case. She argues that the “*recommendation*” of the inquest magistrate should not be regarded as an institution of criminal proceedings, as the court did not arrogate

itself any jurisdiction in the subsequent proceedings. That the trial court was within the remit of **Section 387 (4)** of the **Criminal Procedure Code**, and made no enforceable orders in respect of its finding.

10. In the inquest it is clear that the learned magistrate came to the conclusion that the Applicant had a hand in the deceased's death. The inquest having been commenced under **Section 387** of the **Criminal Procedure Code**, the powers set out under that section enable the inquest magistrate to do the following:

a) If the magistrate is of the opinion that some unknown person committed an offence, she was required under **Section 387 (4)** of the **Criminal Procedure Code** "*record his opinion*" and shall forthwith send a copy thereof to the Director of Public Prosecutions.

b) If the magistrate is of the opinion that no offence has been committed, then "*he shall record his opinion accordingly*" **Section 387 (4)** of the **Criminal Procedure Code**.

c) Where the magistrate is of the opinion that an offence has been committed by a known person, then - and this is a problematic provision - he:

**"shall issue a summons or warrant of arrest, or take such other steps as may be necessary to secure his or their attendance of to answer the charge; and on the attendance of the person the magistrate shall commence the inquiry de novo....."** **Section 387 (3) of the Criminal Procedure Code.**

11. Clearly, the inquest magistrate formed an opinion (in terms of **Section 387 (3)** of the **Criminal Procedure Code**) that there was "*the commission by some known person or persons of an offence*". However, the magistrate did not slavishly follow the requirements of **Section 387 (3)** of the **Criminal Procedure Code** probably realizing that that provisions was in conflict with **Article 157** of the **Constitution**. The provision of the Constitution clearly vests prosecutorial power on the DPP. Instead the trial magistrate made a recommendation that the applicant be charged.

12. In the **Philips Otieno** case, Majanja J held as follows:

***"I hold that Article 157(6)(a) of the Constitution which vests in the Director of Public Prosecutions the State power to, "institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed," does not permit the magistrate's court to initiate criminal proceedings in the manner prescribed by section 387(3) of the Criminal Procedure Code.*** (Underlining added)

13. It may be noted 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.

14. The question in this case is whether by using the words: "*I hereby recommend that he should be charged with the relevant offence*", the inquest magistrate was thereby exercising the powers of the DPP under the constitution. Does a recommendation amount to an institution and undertaking of criminal proceedings in terms of the constitutional power assigned to the DPP?

15. The word recommendation is defined in the **Oxford English Dictionary** as:

***"Put forward with approval as being suitable for a purpose or role, advise as a course of action; make appealing or desirable."***

16. In **Black's Law Dictionary** the definition of the word "*recommendation*" is as follows:

***"A specific piece of advice about what to do especially if given officially; A suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious."***

17. From the above definition, it is clear that the word recommendation does not amount to instituting any type of action. It is, however, tantamount to an opinion or advice proposing a course of action. To recommend stops for short of taking action; it does not amount to instituting or undertaking any action, leave alone instituting criminal proceedings. What the trial magistrate did was to opine and propose a course of action. The recipient of the information could act in accordance with the recommended proposal or not, at his/her discretion.

18. In my view, what the constitution prohibits an inquest magistrate from doing is to invoke any power which can be construed as somehow instituting or undertaking criminal proceedings.

19. 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 prosecutorial 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."***

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.*”**

20. In the present case, after the inquest magistrate recommended in the inquest ruling that the applicant be charged with the relevant offence, that was the conclusion of the ruling. After the ruling was read, the Inquest File proceedings show that the following transpired:

***“Prosecution: Pray for warrant of arrest against Stephen Mwangi Mwaura.”***

***Court: Warrant of arrest to issue against Stephen Mwangi Mwaura.***

21. It was after the Ruling that the DPP applied for a warrant of arrest. The applicant was then arrested and taken to the police station. Thereafter, the prosecutor filed an application in the same court on 26<sup>th</sup> July, 2019, in a different proceeding, viz, CMCER Engineer Miscellaneous Criminal No. 13 of 2019 seeking that the applicant be held for investigations.

22. In exercise of this court's supervisory powers under Article 165 of the Constitution, I called up the said Inquest File No. 7 of 2016 Engineer. I also called up Engineer SPM Court Miscellaneous Criminal Application No. 13 of 2019. I have already made reference to Inquest File No. 7 of 2016.

23. With regard to SRM Miscellaneous Criminal Application No. 13 of 2019, it appears from the proceedings therein that the Applicant herein was arrested by the police on 23<sup>rd</sup> July, 2019 at Githurai in Nairobi County and detained at Kinangop Police Station. After his arrest, an application was filed by the OCS on 26<sup>th</sup> July, 2019 seeking to hold the Applicant herein for a further 7 days at Kinangop Police Station. The arrest was occasioned, according to the affidavit of Sergeant Absolom Wekesa filed in that Miscellaneous Case for reason:

***“1. ....***

***2. That the case was initially a public inquest vide inquest 7 of 2016 and after the conclusion of the hearing the magistrate ruled that the accused person be charged for the offence of murder contrary to section 203 as read with section 204 of the Penal Code.”***

24. The reason given for the arrest is, however, not strictly in accord with the Inquest Magistrate's ruling, as the magistrate *“recommended that the Applicant be charged with the appropriate offence”*. The miscellaneous application was however stayed as this court had issued a stay in this Revision Application by consent of the parties. The Applicant was therefore released forthwith pending the outcome of the present revision application. At present, therefore, the Applicant is at liberty and his constitutional rights are not alleged to be violated.

25. I agree with Ojwang J (as he then was) and Majanja J to the extent that **Section 387 (3)** of the **Criminal Procedure Code** cannot be invoked to initiate criminal proceedings or do anything else that ought to be done by the DPP.

26. Whether an arrest amounts to initiating criminal proceedings in a question not entirely within the scope of the applicant's request for setting aside the ruling herein for making a recommendation that the applicant be charged.

27. 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 a recommendation by a magistrate cannot, in my view amount to initiating criminal proceedings.

28. I think that the danger posed to individuals named as offenders in an inquest under **Section 387 (3)** of the **Criminal Procedure Code** is contained in the portion that contravenes Article 157 where it provides that the inquest magistrate may, with regard to the alleged offender:

***“.....take 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 the offence.*** (Underlining added)

Thus, the indication that there is a charge and securing the attendance to answer a charge are in my view within the role and functions of the DPP not the Inquest Court.

29. Given all the circumstances set out herein I find that in making a recommendation, the inquest magistrate did not invoke a power belonging to the DPP. The DPP's role is to initiate a criminal case. That means to investigate a criminal case and prosecute the suspect.

30. I will make one observation on the action of the magistrate. I do find that after reading the ruling, the action of the inquest magistrate to issue an arrest warrant on request, was a dangerous action in that the inquest magistrate's inquest jurisdiction had expired. That is, the inquest magistrate was, in my view, *functus officio* with regard to the inquest. To my mind, her role in the inquest was, to inquire, then prepare and provide an opinion or report stating the outcome of the inquest inquiry. Such report would then be availed to the DPP/Prosecutor as one of the pieces of information available for the DPP in its investigations concerning the alleged crime.

31. Accordingly, I decline to set aside the inquest magistrate's ruling and direct that the DPP may commence or continue with investigations into the alleged offence.

32. Orders accordingly.

**Dated and Delivered at Naivasha this 30<sup>th</sup> Day of January, 2020**

.....

**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. C. Mburu holding brief for Thairu for the Applicant
2. Ms Maingi for the Respondent
3. Applicant - Stephen Mwangi Mwaura - not present
4. Court Clerk - Quinter Ogutu