



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CORAM: D.S MAJANJA J.**

**CRIMINAL APPEAL NO. 107 OF 2018**

**BETWEEN**

**DAVID NYAKWARA ASIAGO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal from the decision and ruling of Hon. M.M Nafula – SRM***

***dated 2<sup>nd</sup> November 2018 at the Principal Magistrate’s Court***

***at Ogembo in Inquest No. 7 of 2018)***

**JUDGMENT**

1. The subject of this appeal is an inquest at Ogembo Law Courts to inquire into the death of STELLAH BWARI ONDARI (deceased).
2. The magistrate hearing the inquest heard the application by Mr. Begi, Advocate for DAVID NYAKWARA ASIAGO to come on record for his client. In a ruling dated 2<sup>nd</sup> November 2018, the learned magistrate held that the rights under **Article 50** of the Constitution only apply to accused persons and not suspects as follows:

*“Since the suspect has not been charged, I decline to allow Mr. Begi to come on record for him. However I allow the prosecution to bond David Nyakwara to court (sic) to testify before court and this court will cross-examine him if at all there will be need since this is an inquiry.”*
3. At this juncture, I wish to point out that DAVID NYAKWARA ASIAGO had been charged with the murder of the deceased but charges and information was quashed under section 276(1) of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) and an inquest preferred by the Director of Public Prosecutions.
4. While I agree with the learned magistrate that the provisions of Article 50 of the Constitution do not apply in the circumstances, it does not automatically follow that the advocate for a suspect or any person mentioned cannot have audience before the court in an inquest investigating the circumstances surrounding the death of the deceased.
5. As the trial magistrate pointed out, an inquest is defined as an official process to discover the facts about something bad that has happened. The duty of the court is to elicit facts and anyone who is adversely mentioned is entitled to be heard and represented by an advocate. This is a foundational right under the rubric of the right to natural justice since adverse consequences may flow not only from being mentioned adversely but also from the result of the inquest.
6. The duty of counsel in such instances will be to elicit more facts and indeed ensure that his client’s interests are taken care of. In other words, any party who is likely to be adversely mentioned and in this particular case, the petitioner, who was a suspect, is entitled to have his counsel participate in the inquest proceedings and that right includes the right to cross examine witnesses.
7. I accordingly set aside the ruling of the trial magistrate dated 2<sup>nd</sup> November 2018 regarding the petitioner’s right to engage counsel and order that the petitioner, DAUDI NYAKWARA ASIAGO shall be entitled to be represented by counsel of his choice at the inquest and who

shall be at liberty to cross-examine the witnesses.

8. I have considered the proceedings and I do not find any basis to transfer the inquest to any other magistrate or court as there is nothing to show that the court is unfair or biased.

9. The petition is allowed on the terms I have set out. There shall be no order as to costs.

**Dated and delivered at Kisii this 17<sup>th</sup> day of December 2018.**

**D.S MAJANJA**

**JUDGE**

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Mr. Begi for the Petitioner.