REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS APPLICATION NO. 114 OF 2016

IN THE MATTER OF SECTIONS 385, 386 AND 387 OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

AND

IN THE MATTER OF THE INQUEST NO. 4 "A" OF 2012 IN THE SENIOR RESIDENT MAGISTRATES COURT AT OGEMBO

AND

IN THE MATTER OF ARTICLE 22 AND 23 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

BETWEEN

ZEPHANIA OGORO OBUYA………........................…………..................APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS……......………..1ST RESPONDENT

RESIDENT MAGISTRATE, OGEMBO……………......……...…...….2ND RESPONDENT

AND

REPUBLIC……………………..……………………........…………………..APPLICANT

VERSUS

ZEPHANIA OGORO OBUYA..............……………..............…………. RESPONDENT

R U L I N G

1. This ruling relates to the application dated 9th November 2016 in which the ex parte applicant seeks orders of certiorari to remove and quash the decision of the Resident Magistrate court made on 27th June 2016, recommending the charging of the driver of motor vehicle Reg. No. KAG 946T for the offence of causing death by dangerous driving.

2. The applicant also seeks orders of prohibition to prohibit the 1st respondent, whether by himself, his employees and/or agents or from arresting him.

3. The Application was based on grounds that the recommendation of the trial court arising from the inquest conducted by the trial magistrate was erroneous, unfair and unjustified in the circumstances of the case, and further, that implementing the said recommendations will occasion the ex-parte applicant double jeopardy that will lead to a miscarriage of justice.

4. The exparte applicant further contends that motor vehicle Reg. No. KAG 964T does not belong to him even though he does not dispute the fact that he was driver of the said motor vehicle but that he was not driving the said motor vehicle at the time that the accident is alleged to have taken place.

5. The ex-parte applicant also swore a verifying affidavit dated 5th October 2016 in which he repeated and expounded on the grounds set out in the Notice of Motion and added that the trial magistrate acted in an arbitrary manner that is likely to cause him irreparable damages as he will be arrested and charged with an offence that he did not commit. He maintains that it was not established, beyond reasonable doubt, that he was the person driving the suit motor vehicle at the time of the alleged accident.

6. The 2nd respondent opposed the application through the Grounds of Opposition dated 12th January 2017 wherein it states as follows:

> **1. The Notice of Motion Application has no merit, is bad in law and an abuse of the court process.**
>
> **2. The Notice of Motion Application is un-maintainable.**
>
> **3. The Notice of Motion is frivolous, vexatious and embarrassing.**
>
> **4. The Notice of Motion Application is not well founded and does not disclose a prima facie case in that the ex parte applicant was not sentenced but only an inquest was done and recommendation given by the 2nd respondent.**

7. When the application came up for hearing on 27th February 2017, parties agreed to canvass it by way of written submissions.

Applicant's submissions

8. M/s Aboki Begi Advocates for the applicant highlighted the provisions of **Section 386 (1) (b) of the Criminal Procedure Code (CPC)** which deals with the circumstances under which an inquest may be conducted by a magistrate upon receiving information from the police regarding a death and specifies the steps to be taken by the police in initiating the inquest process. According to the ex parte applicant, the police did not undertake the steps prescribed under **Section 386 (1) (b) of the CPC** as the evidence of the police officer who investigated the accident was not taken and no report of a police officer was availed to the magistrate thereby making the basis of the inquest questionable.

9. It was therefore the applicant's case that the trial magistrate conducted the inquest contrary to the law as the police did not submit a report in court to enable/prompt the court to carry out the inquest.

10. The ex-parte applicant also submitted that the evidence tendered at the inquest by PW1 and PW2 was not credible as the said witnesses did not identify him as the driver of the suit motor vehicle.

11. The ex-parte applicant argued that even though courts are reluctant to issue orders of judicial review to stop intended prosecutions, there are however, instances where the orders of judicial review to stop prosecutions can be issued. In this regard, he cited the case of **George Joshua Okungu & Another vs Chief Magistrates Court Anti Corruption court at Nairobi** in which the court cited, with approval the

holding in **Republic vs Monister for Home Affairs and Others Ex parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323** wherein it was held:

> ***"whereas we appreciate the fact that the decision whether or not to prosecute the petitioners is an exercise of discretion this court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision maker exercises discretion for an improper purpose; (3) where the decision maker is in breach of the duty to act fairly; (4) where the decision maker has failed to exercise statutory discretion reasonably; (5) where the decision maker acts in a manner to frustrate the purpose of the Act donating the power, (6) where the decision maker fetters the discretion given; (7) where the decision maker fails to exercise discretion; (8) where the decision maker is irrational and unreasonable…"***

12. The ex parte applicant submitted that the act of preferring charges against him fell under the ambit of abuse of discretion as the said decision was based purely on suspicion. He further relied on the decision in the case of **Republic vs The Commissioner of Lands ex parte Lake Flowers Limited Nairobi HC Misc Application No. 1235 of 1998** wherein it was stated:

> ***"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief… The High Court has the same power as the high court of England up to 1977 and much more because it has the exceptional heritage of a written constitution and the doctrines of the common law and equity in so far as they are applicable and the temptation to try and contain judicial review in straight jacket… Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality…The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse of power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations. Even on the important principle of establishing standing for the purposes of judicial review the courts must resist being rigidly chained to the past denied situations of standing and look at the nature of the matter before them…Judicial Review is a tool of justice, which can be made to serve the needs of a growing society on a case to case basis…The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."***

The 2nd respondent's submissions

13. Ms Winny Ochwal, counsel for the 2nd respondent, highlighted the issues for determination to be:

> **a) Whether the recommendation of the trial court conducting the inquest was erroneous, unfair and unjustified.**
>
> **b) Whether the implementation of the recommendation of the trial court will occasion the applicant double jeopardy.**

14. On the first issue, the respondent submitted that inquests are conducted by magistrates in compliance with Sections 387 and 388 of the Criminal Procedure Code in instances of occurrence of death where it is suspected that there was foul play and that it is upon the conclusion of the inquest that a recommendation can be made for the arrest and commencement of criminal proceedings against a suspect if it discloses the commission of an offence.

15. The respondent further submitted that the evidence adduced at the inquest led to a finding by the trial magistrate, that the ex-parte applicant could have been involved in the offence of causing death by dangerous driving and that the court was therefore justified to forward its recommendation to the Director of Public Prosecution for his necessary action.

16. The respondent relied on the finding in the case of **Thuita Mwangi and 2 Others vs the Ethics and Anti corruption Commission & 3 Others H.C. Petition No. 36 of 2013** wherein it was held that only the trial court can make a finding on whether or not a criminal offence was committed after hearing the evidence.

17. The respondent therefore argued that the magistrate did not act in any manner that was unfair, unjustified or erroneous so as to warrant the quashing of the decision arising from the inquest.

18. On the issue of whether or not the implementation of the recommendation of the magistrate will occasion the ex parte applicant double jeopardy, the respondent submitted that all the trial magistrate did was to make a recommendation that the ex parte applicant be charged. The respondent cited the case of **Regina vs 2 [2005] 3 ALLER 95** wherein it was held that the principle of double jeopardy is infringed if the accused is on trial again for the offence of which he has been acquitted or convicted.

19. It was the respondent's case that the ex-parte applicant fully participated in the inquest without questioning the process and therefore, his challenge of the outcome of the inquest rather than the process was misconceived.

20. The respondent stated that the circumstances under which an application for judicial review can be made were laid out by Odunga J in the case of Republic vs **Attorney General & 4 Others ex-parte Diamond Haslum Lalji and Ahmed Hasham Lalji [2014] eKLR** as follows:

> ***"Judicial review applications do not deal with the merits of the case only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution and continuation of the criminal proceedings and once the court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution's evidence even if wee to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the court abetting abuse of the court process by the prosecution."***

21. The 2nd respondent contended that the application did not meet the threshold for the grant of orders of judicial review in the nature of certiorari and sought for its dismissal.

<u>Analysis and determination</u>

22. I have carefully considered the exparte applicant's application, the 2nd respondent's grounds of opposition, the parties respective written submissions and the authorities that they relied on.

23. It is worthy to note, at this point, that the 1st respondent did not make and response to the application dated 9th November 2016 even though it filed grounds of opposition to the initial application wherein the ex parte applicant sought leave to apply for orders of judicial review.

24. I note that the main issues that present themselves for determination are:

> **a) Whether the inquest, the outcome of which application was properly conducted in compliance with Section 386 (1) (b) of the Criminal Procedure Code.**
>
> **b) Whether the ex parte applicant has made out a case to warrant the issuance of orders of Judicial Review to stop his intended prosecution.**
>
> **c) Whether the implementation of the trial court's decision will occasion the ex parte applicant double jeopardy.**

25. On the first issue of whether or not the inquest before the trial court was conducted in compliance with the provisions of **Section 386 (1) (b) of the Criminal Procedure Code**, I note that the said Section stipulates as follows:

> **386. Police to inquire and report on suicide, etc.**
>
> **(1) The officer in charge of a police station, or any other officer specially empowered by the Minister in that behalf, on receiving information that a person—**
>
> **(a) has committed suicide;**
>
> **(b) has been killed by another or by an accident;**
>
> **(c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence; or**
>
> **(d) is missing and believed to be dead; shall immediately give information thereof to the nearest magistrate empowered to hold inquests, and, unless otherwise directed by any rule made by the Minister,**
>
> **shall proceed to the place where the body of the deceased person is, and shall there make an investigation and draw up a report on the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument report shall in the case of paragraph (a), (b) or (c); be forwarded forthwith to the nearest magistrate empowered to hold inquests; and in the case of paragraph**
>
> **(d) shall immediately send to the Director of Public Prosecutions through the Commissioner of Police as full a report as possible together with details of all supporting evidence relating to the circumstances surrounding the disappearance and the grounds upon which the death of that person is presumed to have taken place."**

26. I have perused the proceedings of the trial court which were attached to the applicant's affidavit and marked as **ZOO – 1 (b)**. From the contents of the said proceedings; I note that a total of 7 witnesses testified on the circumstances that led to the death of the deceased one Justus Okongo Muchama and it was not disputed that the deceased died as a result of injuries that he sustained in an accident that took place on 27th October 2010 when motor vehicle registration Number KAG 964T allegedly knocked him down. The accident was reported to the police who then initiated inquest case No. 4 "A" of 2012 before Ogembo Senor Resident Magistrates' court.

27. The exparte applicant's contention was that the evidence of the police officer who investigated the accident was not taken and therefore no report of the police officer as required by **Section 386 (1) (b) of the Criminal Procedure Code** was availed to the magistrate so as to form a basis for the inquest. I find this argument by the ex-parte applicant to be far from the truth as the proceedings of the trial court show that PW7 P.C. TOM MEME testified as the investigating officer and produced sketch plans relating to the

accident that was the subject of the inquest.

28. From the above foregoing, it is clear to me that the trial court did not carry out an inquest out of the blues as the applicant seemed to suggest but that the inquest was conducted following a proper report filed by the police after their investigations of the accident that led to the death of the deceased.

29. Turning to the issue of whether a case has been made out by the applicant to warrant the issuance of orders of judicial review to stop the intended prosecution of a criminal case, courts have held time and again that they ought not to usurp the constitutional mandate of the Director of Public Prosecution (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the said intended prosecution or criminal proceedings are likely to fail, has been held, time and again, is not a ground for stopping the proceedings by way of judicial review because judicial review is concerned not with the merits of the case, but with the decision making process.

30. In the instant case, the ex parte applicant's testimony before the trial court was that he was not the driver of the accident motor vehicle at the time the accident is alleged to have taken place as he had by then already parked the vehicle and handed over the keys to the owner of the vehicle one Mr. Lawrence Siro. My take is that the ex-parte applicant's testimony by the inquest court, that he did not cause the accident will form a good defence if any case is preferred against him before the traffic court should any charges be instituted against him, but such a defence cannot be relied upon by this court to halt the intended proceedings undertaken bona fides as such a defence is open to the applicant in the said criminal proceedings. The only time that the court can halt criminal proceedings is if the applicant demonstrates that the intended criminal proceedings constitute an abuse of process. The above position was expressed by the court's in **Joram Mwenda Guantai vs The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007) 2EA 170**, wherein the court of Appeal held:

> ***"It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."***

31. In the instant case, the trial magistrate made a determination that an offence of causing death by dangerous driving had been committed by the driver of motor vehicle Reg. No KAG 964T upon hearing the evidence of the prosecution witnesses who included the applicant. The trial magistrate, in my humble view, heard the evidence of all the persons who would be affected by her decision before making her determination. No material was placed before me to show that there was abuse of process in arriving at the decision or that the trial court took into account irrelevant matters or did not take into account certain relevant matters.

32. The bottom line, which is not challenged in this proceedings, is that the deceased died in an accident involving the suit motor vehicle and all that the trial court did was to recommend that traffic case charges be instituted against the driver of the said motor vehicle.

33. Under the above circumstances. I am not satisfied that this is a proper case in which this court ought to bring the intended criminal proceedings to a halt since the applicant, will in the event he is charged in court, be afforded an opportunity to defend himself, cross examine witnesses and tender evidence in his defence. I note that the trial magistrate, in making her recommendations, stated as follows:

> **"I am of the opinion that an offence was committed, being causing death by dangerous**

driving, the said offence being committed by the driver of the said motor vehicle."

34. From the above extract of the trial court's findings, it is noteworthy that the identity of the said driver is not disclosed by the trial court and therefore to my mind, it is a matter that the owner of the motor vehicle is under a duty to disclose to the police if the applicant's case is that he was not the driver of the suit motor vehicle at the time the accident occurred. Clearly, the motor vehicle could not have been "driving itself" without an actual driver when the accident occurred.

35. Turning to the last issue of double jeopardy, the applicant argued that the implementation of the trial magistrate's recommendations will occasion him double jeopardy.

36. **Blacks Law Dictionary 8th Edition** defines double jeopardy as follows:

> **"The fact of being prosecuted or sentenced twice for substantially the same offense."**

37. From the above definition, it is clear that the double jeopardy rule is infringed if an accused is tried twice for the same offence. The case before the trial court was not a prosecution *per se*, but an inquest into the circumstances that led to the death of Justus Okongo Muchama (deceased) in which the applicant herein was merely a witness and not an accused person. Under the above circumstances, the ex parte applicant cannot, by any stretch of imagination, be deemed to have been on trial before the lower court that conducted the inquest so as to justify his claim that the implementation of the recommendations of the trial court could subject him to double jeopardy.

38. In conclusion and having regard to the reasons that I have discussed hereinabove, the application dated 9th November 2016 fails and is dismissed with costs to the respondent.

Dated, signed and delivered in open court this 17th day of October, 2017

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Okemwa for the Applicant

- Miss Opiyo for the 2nd Respondent

- Omwoyo: court clerk