



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 20 OF 2014

LABAN KIPSANG TENDET.....1ST PETITIONER

SOLOMON TANUI KIPKEMOI.....2ND PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

On the 11th day of November 2014, the respondent through his counsel, Mr Allan Wanjohi made an application before the deputy registrar requiring the attendance of the petitioners in court on 18th November, 2014 to answer to charges of murder. That application was granted and the summonses for the petitioners were duly issued. On the same day, the respondent filed in this court a charge sheet or information charging the petitioners with two counts of murder contrary to **section 203** as read with **section 204** of the Penal Code. In the particulars of those counts the respondents are alleged to have respectively murdered police constable George Nderitu and one William Kariuki (herein “the deceased persons”) on the night of 19th January, 2014 at Solio Ranch.

On 17th November, 2014, just a day before they were scheduled to appear in court and take plea, the petitioners filed this petition seeking a raft of prayers all targeted against the decision to charge them with the offence of murder; these prayers are enlisted in the petition as follows:-

- a. A declaration that the decision made by the respondent, either by himself and/or any agent and/or investigative agency acting on the respondent’s behalf, on a date unknown to the petitioners and communicated through a letter dated 22nd September, 2014 and 11th September, 2014 and all proceedings consequent to, or flowing from that decision, are in violation of the Petitioner’s constitutional and legal rights and are as such, a nullity in law, void and of no legal effect.
- b. A declaration that the charges of murder by the 2nd respondent against the petitioners, of one P.C. George Nderitu and William Gichuhi Kariuki, made in the High Court in this matter be found to be null and void as they are a breach, infringement, violation and denial of the petitioners’ fundamental rights to equality before the law, equal protection and equal benefit of the law as enshrined in **article 27(1)** of the Constitution.
- c. A declaration that the criminal proceedings initiated in this court and about to commence on 18th November, 2014 or any subsequent date, be stopped and dismissed forthwith as this will amount to an infringement, breach or otherwise contravention of the petitioners’ rights to a fair trial as enshrined in article 50 of the Constitution of Kenya.

- d. A conservatory order to stay the taking of the plea and the consequent prosecution of the criminal proceedings against the petitioners in this matter as relates to the death of one P.C. George Nderitu and one William Gichuhi Kariuki, as the same are an abuse of the process, arbitrary, capricious and malafides by the respondent.
- e. An order of Judicial Review in the nature of certiorari, directed to the respondent or any other officer and/or agent, acting under the authority of the respondent, to remove to this honourable court, the decision made by the respondent either by himself and/or any other agent and/or investigative agency acting on the respondent's behalf, made on a date unknown to the petitioners and communicated to them through a letter dated 22nd September, 2014 for the purposes of being quashed.
- f. An order of Judicial Review in the nature of prohibition, directed to the respondent or any other officer acting with his authority from proceeding with the conduct and/or prosecution of the criminal charges against the petitioners in relation to the death of one P.C. George Nderitu and William Gichuhi Kariuki, until an inquest as by law ordained, is conducted as required by law.
- g. An order compelling the respondent or any other officer acting with his authority to commence effective fresh investigations on the alleged criminal offence levelled against the petitioners.
- h. Any further order or relief that the Honourable Court deems fit, just and expedient to uphold the rule of law and to protect the rights and freedoms of the petitioners under the Constitution.
- i. The costs of the petition be awarded to the petitioners.

In their quest for these prayers the petitioners **invoked articles 19, 20, 21, 22, 23, 27, 47, 50(1), 159 and 165(3) (d) of the Constitution.**

According to the affidavits they swore, the petitioners deposed that they are rangers within the uniformed and disciplined cadre of officers serving with the Kenya Wildlife Service (herein "the Wildlife Service") and at the material time deployed in Aberdare National Reserve.

Amongst their day-to-day duties, the petitioners are required to take all reasonable steps to prevent the commission of offences prescribed under the Wildlife (Management and Conservation) Act and in particular to protect wildlife from poachers.

Due the nature of their job, so they swore, the petitioners are normally equipped with firearms for use whenever circumstance so require; such circumstances seem to have arisen on the night of 18th to 19th January, 2014. On the material date and time, they were lawfully armed and on patrol duties within the Solio ranch, in the course of their duties, when they confronted three poachers one of whom was armed with a G3 rifle. They shot and killed two of them whom they later came to learn were identified as police constable David Nderitu and one William Gichuhi Kariuki (the deceased persons).

As a result of this incident, they were summoned by the Divisional Criminal Investigation Officer (D.C.I.O) Nyeri Central to record statements regarding the deceased persons' death. They later learned that the respondent had decided to charge them with the offences of murder and on 12th November, 2014, they were served with summonses to appear in court to answer to those charges.

It is the petitioner's case that an inquest as prescribed under the provisions of **sections 385 to 388** of the **Criminal Procedure Code** ought to have been conducted before the respondent could charge them. In the absence of such an inquest, the petitioners urge that the respondent has not only contravened **article 157(4)** of the Constitution but has also breached or threatened to breach the petitioner's constitutional rights under **articles 27, 47 and 50** of the **Constitution** which guarantee them the right to equal protection and benefit before the law, the right to a fair administrative action and the right to a fair trial respectively.

The respondent opposed the petition and accordingly filed a replying affidavit sworn by Mr Job Kaigai

Karundu, the Assistant Director of Public Prosecutions in charge of the respondent's Nyeri office.

Mr Karundu denied that the respondent has infringed or has any intention of infringing on the rights of the petitioners as alleged in the petition and, in particular, the decision to charge them for the murder of the deceased persons does not infringe their constitutional rights either under **articles 27, 47 or article 50** of the **Constitution**.

The respondent admitted, however, that indeed the deceased persons were shot within Solio ranch on the night of 18th to 19th January, 2014.

According to the respondent, after the fatal shooting, investigations were commenced vide "**Nyeri Central CID inquest file Number 1 of 2014**". Mr Karundu deposed that P.C Muli who was one of the investigating officers informed him, which information he believed to be true, that the investigations were prudently and impartially conducted.

As part of the investigations, so Mr Karundu swore, witnesses were interviewed and statements were taken including those of the petitioners; those investigations revealed that the deceased persons were shot by the petitioners and after analysing and reviewing the evidence, the respondent came to the conclusion that there was sufficient evidence to sustain charges of murder against the petitioners.

The respondent, according to Mr Karundu, does not dispute that the petitioners were in the course of their duty as rangers of the Wildlife Service and that they had been issued with firearms but even so the death of the deceased persons had to be vindicated; in this respect, the respondent did not find any legal excuse on the part of the petitioners to fatally shoot the deceased persons.

The rest of Mr Karundu's affidavit comprised depositions on law on the respondent's powers to prosecute under **article 157(6) and (10)** and the basis of inquests under section **385 to 388** of the **Criminal Procedure Code**. He also delved into what I believe are legal arguments against the petition. I must mention here that these depositions were unnecessary for the simple reason that they are not facts but points of law that are by their very nature outside the realm of factual contestations.

Apart from the petitioners' and the respondent's affidavits, an interested party, Naftally Nderitu Mathenge, a father to one of the deceased persons also filed a replying affidavit. Mr Mathenge swore that he identified the body of his son in the mortuary and that his was a clear case of murder. In his view therefore there was no need for an inquest. Just like the respondent he also resorted to deposing on the respondent's powers to prosecute and the failure by the petitioners to prove that their constitutional rights have been violated.

That is as far as the affidavits of the contesting parties went.

Alongside the petition, the petitioners also filed a motion basically seeking a stay of their prosecution pending the hearing of initially, the motion and subsequently, the petition herein. When Mr Mugambi for the petitioners appeared before me *ex parte* on the basis of a certificate of urgency on the 17th November, 2014, I granted the conservatory order and stayed the prosecution of the petitioners pending its hearing *inter partes*. The motion was eventually dispensed with and parties agreed to have the main petition determined instead; in the meantime conservatory orders were extended pending the hearing and determination of the petition.

All the parties filed written submissions which I have had the opportunity to consider in coming to this judgment.

At the heart of the petitioners' petition is the question whether the circumstances in which the petitioners used their firearms and the petitioners died were sufficiently investigated or investigated at all as to come to the conclusion, which the respondent came to, that the petitioners should be put to trial on a charge of murder of the two persons whom they suspected to be poachers.

As I understand the petitioners, Solio ranch is renowned and popular for its rhinos and for this very reason, it is an attractive poaching ground which then calls for tight security and vigilance. It is against this background that they confronted persons they suspected to be poachers in conditions that warranted the use of force. Whether the use of force was necessary and, if it was necessary, how much of that force was necessary in the circumstances in which the petitioners found themselves, are amongst the questions that ought to have been laid to rest before any decision to charge the petitioners with the offence of murder was arrived at. It is also not disputed that the petitioners were lawfully armed and in the course of their duties and within their area of jurisdiction when they shot and killed persons they suspected to be poachers. The petitioners urge that, in these circumstances, it is only in an inquest, where any questions relating to the deceased's death, for instance whether they were murdered, or whether they were killed in self-defence or still, whether they were killed in protection of wildlife could have been settled. To the extent that the respondent decided to charge them without such an inquest, the petitioners urge that their rights to equal protection and benefit of the law under **article 27** of the **Constitution** were infringed; by the same token, it is also their case that their rights to fair administrative action under **article 47** and their right to a fair trial under **article 50** of the **Constitution** have also been infringed.

As noted, the decision to charge the petitioners with the murder of the deceased persons had everything to do with the firearms with which the petitioners' were armed at the material time. For purposes of determination of this petition, it would be necessary to examine in some measure the law applicable to the use of these firearms if not for anything else, for this court to satisfy itself that the arming of the petitioners with the deadly weapons and their subsequent use with fatal consequences could possibly have been within or outside the legal parameters and whether it is an aspect of evidence that ought to have been investigated in the context of an inquiry as prescribed under **sections 385-388** of the Criminal Procedure Code.

Firearms have been made available for use by the uniformed and disciplined officers of Kenya Wildlife Service under **section 112 (1)** of the **Wildlife Conservation & Management Act, 2013**; the firearms are for use by the officers whenever it is necessary in discharge of the functions for which the Kenya Wildlife Service is established. It follows that as long as they are in the course of their duties, the uniformed and disciplined officers in the employment of the Wildlife Service are authorised to use firearms as and when it is necessary.

Section 112 (3) of the Act is more particular on the instances when these firearms may be used; it states as follows:-

112. (1)...

(2)...

(3) A member of the uniformed and disciplined cadre, after acquiring the requisite training, and when authorized by the Director-General, may use firearms for the following purposes, in the course of and for his lawful duty—

(a) in the course of law enforcement against-

(i) any person charged with an offence punishable under this Act, when that person is escaping or attempting to escape lawful custody;

(ii) any person who, by force, removes or attempts to remove any other person from lawful custody;

(iii) any person who, by force, attempts to prevent the lawful arrest of himself or any other person; or

(iv) any person unlawfully hunting any wildlife using a firearm;

(b) in self-defense or in defense of another officer or other person;

Parts (a) (iv) and (b) of section 112 (3) are more pertinent to the petitioner's petition in the sense that they authorise the disciplined and uniformed employees of the Wildlife Service who, no doubt include the petitioners, to use the firearms against any person unlawfully hunting any wildlife using a firearm or in self-defence or in defence of another officer or other person.

In their statements to the police, copies which they attached to their respective affidavits, the petitioners demonstrated to them the circumstances under which they shot and fatally wounded the deceased persons. It is necessary to reiterate their depositions here that on or about the night of 18th and the morning of 19th January, 2014 they were on patrol duties within Solio ranch when they encountered three persons whom they suspected to be poachers. Their suspicion was founded on the fact that one of the strangers was armed with a G3 rifle and indeed when they gunned them down, they recovered the rifle, seven rounds of ammunition and a sword.

Previously before this incident, more particularly at around 12.45 am on 19th January, 2014, they had heard two gunshots in the Kongoni area within the same ranch. Fearing that the shots might have been fired by poachers, the petitioners' platoon commander, one Salim Makomba, instructed the 2nd petitioner to lay an ambush at the possible escape route. They went and laid the ambush as instructed and at about 2 a.m., they saw three men approaching one of whom, as noted, was armed. Perhaps because of their suspicions on the motive of these strangers and fearing for their own lives, the petitioners opened fire and managed down two of them; the third one is said to have escaped.

The platoon commander was informed and the petitioners remained at the scene until 6 a.m. when their seniors and police officers arrived.

The respondent's version of facts does not contradict any of what I suppose are the material depositions in the petitioners' affidavit; in particular, it has not been disputed that the petitioners were lawfully armed and in the course of their duty when they shot the deceased persons. It has not been disputed that the deceased persons were within the ranch in which the petitioners had been conscripted to protect wildlife. No reason has been given shown why the deceased could possibly have been in the ranch at 2 a.m. while armed with a high calibre assault weapon, ammunitions and a sword. All these questions beg for answers which I cannot find in the replying affidavit of Mr Job Kaigai Karundu. The brief information which Mr Karundu was given by Mr Muli who said to have been one of the investigating officers was that the investigations were "prudently and impartially conducted".

It is not clear why Mr Muli himself did not swear the affidavit and perhaps elucidate more on the details of his investigations. Much as Mr Karundu has sworn that the investigations into the deaths of the deceased persons were properly conducted and that the respondent directed the petitioners to be charged with the offences of murder after analysing and reviewing the evidence contained in investigation file submitted to him, he has not revealed the nature of that evidence or attempted to demonstrate how relevant that evidence is to the petitioners' depositions.

The respondent may have had his own reasons to keep close to his chest the evidence that informed his decision to charge the petitioners; however, when a petition such as the one before court is filed it is incumbent upon him to disclose as much information as possible if not for anything else, to controvert the allegations raised by the petitioners and help this court to make a conclusive determination of the issues before it.

In the absence of any evidence to the contrary and on the basis of the material before me, I see no other factual finding one can make except to conclude that the petitioners were lawfully armed and in the course of their duties when they fatally wounded the deceased persons. In the same breath I find that, in the absence of any contrary evidence, the deceased persons were armed with a G3 rifle, seven rounds of ammunition and a sword. It is also apparent that the deceased persons were shot dead in Solio ranch at 2 a.m.

If that is the background or the circumstances under which the deceased persons were shot and killed it would only be prudent to weigh the petitioners' actions against those particular circumstances and more importantly against the law which regulates their use of firearms. That law, as noted, authorises the petitioners in their capacity as uniformed and disciplined officers of the Kenya Wildlife Service to use firearms in protection of wildlife against poachers and also in self-defence, amongst other instances. The questions that would then follow would be, *inter alia*; whether the petitioners were using the firearms for either or both of these purposes at the time they shot the deceased persons; it would also be important to establish why the deceased persons were not only in the ranch at what one may consider as odd hours but also why they were armed, if at all they were armed as alleged. One of the deceased persons is alleged to have been a police officer; the question whether he was on duty at that particular hour and in Solio ranch would also be a valid question for interrogation.

As I have said before, I have not found any hint from the respondent's affidavit of what the investigations he conducted could probably have revealed in answer to these questions. I cannot, on my part, pretend to answer them because I am of the humble view that the best forum that these questions ought to have been interrogated is in an inquest into the cause of the death of the deceased's persons.

The law on this aspect of the criminal justice process is found in **sections 386, 387 and 388** of the **Criminal Procedure Code (Cap. 75)** and it is appropriate at this juncture to look at these provisions in detail and assess their relevance to the petitioners' situation.

Under **section 386 (1)** whenever an officer in charge of a police station receives information to the effect that a person has either committed suicide; or he has been killed by another person or by an accident; or has died under circumstances raising a reasonable suspicion that some other person has committed an offence; or is missing and believed to be dead, he must give that information to the nearest magistrate empowered to hold an inquest. He is also required to proceed where the body of the deceased is and investigate and make a report on such details as the apparent cause of death, the nature of the injuries sustained and the weapon that may have been used to inflict such injuries. His report is to be forwarded to the nearest magistrate empowered to conduct an inquest except that where the victim is believed to be missing and dead the report shall be forwarded to the Director of Public Prosecutions.

In **section 387 (1)** a magistrate shall also conduct an inquiry into the cause of death of a person if the person dies in police custody, or in the custody of a prison officer, or in prison. The magistrate has the discretion to conduct such inquiry where death occurs under any of the circumstances referred to in **section 386(1)** either in lieu of or in addition to the investigations conducted by the police or by the prison authorities.

The Director of Public Prosecutions is also clothed with the discretion under **section 388 (1)** to direct a magistrate to hold an inquiry in accordance with section 387 into the cause of a particular death.

Does the petitioners' case fall under any of the category of cases that may be subjected to an inquiry under the provisions of **sections 386, 387 or 388** of the Code? In my humble view it does; such an inquiry could properly have been conducted under **section 386** of the Code. In its pertinent part it provides 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) ...

(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) ...

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 (if any), the marks appear to have been inflicted; and the 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.

The deceased persons were killed by another person or persons for that matter and in the respondent's belief they also died under circumstances that raised a reasonable suspicion that some other person (read the petitioners) had committed an offence; the police report could properly and legally have been forwarded to the nearest magistrate in either of the two scenarios.

Under **section 387(1)**, the nearest magistrate is clothed with the discretion to conduct the inquest; I understood counsel for the respondent to submit since it is not mandatory under this provision that an inquest be conducted there was nothing wrong in arraigning the petitioners to court without any inquest. Counsel is correct to the extent that an inquest into death where one has been killed by another or it is suspected that he died as a result of an offence committed by another person is discretionary; however, it must be demonstrated that a report was made to the nearest magistrate who was thereby given the opportunity to exercise his discretion, one way or the other. The respondent cannot assume that the magistrate may probably have refused to exercise his discretion and conduct an inquest and that it would have been of no consequence to present an investigation report to him; it must be shown that he has been given the opportunity to either conduct or reject to conduct an inquest and he will, as matter of law, be expected to give his reasons, whichever direction he adopts, as discretion is not exercised whimsically or capriciously but judiciously.

Finally, under **section 388** of the Code, the respondent himself had the opportunity to direct the nearest magistrate to conduct the inquest the moment the investigation report was submitted to him; this provision is self-explanatory and I need not belabour it.

It must also be noted that much as the respondent has disputed the need for an inquest, it would appear that his investigators and he himself had such an inquest in mind; I say so because in paragraph 8 of his affidavit, Mr Karundu has clearly stated that upon the death of the deceased persons "*investigations were commenced via Nyeri Central CID inquest file Number 1 of 2014*".

In the letter communicating the decision to charge the appellants, reference was also made to the "inquest"; the respondent wrote as follows:-

Ref. No: ODPP/CAM/4/150

11th September, 2014

Job Kaigai Karundu

Office of the Director of Public Prosecutions

P.C.'s Office Block A, 3rd Floor

Central Province

P.O. Box 463-00100

NYERI

RE: INQUEST INTO THE DEATH OF NO. 84025

**PC GEORGE NDERITU ATTACHED TO CENTRAL BANK OF KENYA POLICE
POST-NYERI & ANOTHER**

Refer to your letter dated 9th June, 2014.

Upon perusal of the entire evidentiary material, the DPP directs that D3 Solomon Tanui and D4 Laban Kipsang be charged with the murder of PC George Nderitu and William Gichuhi Kariuki.

Proceed accordingly and expedite.

Returned herewith is the duplicate inquiry file No. Inquest 1/2014 for your action as above.

signed

KIOKO KAMULA

DEPUTY DIRECTOR

FOR: DIRECTOR OF PUBLIC PROSECUTIONS

The reference to the “inquest” in Mr Karundu’s affidavit and in the respondent’s letter can only have been in its technical sense as understood under **section 385** of the Criminal Procedure Code; as far as I can gather, there is nothing in the respondent’s pleadings or affidavit to that suggests that either the investigators, Mr Karundu or the respondent meant anything else.

The trouble is while the respondent proceeded as if an inquest had been conducted, no inquest, as known in law was ever conducted. The “inquest” the investigators passed off as having been conducted has no legal basis.

In his affidavit, Mr Karundu dwelt to a great length on the powers of the respondent to prosecute and how he is not under the direction of anybody in exercise of those powers. Counsel need not have sworn on the extent of the respondent’s powers for nowhere else are these powers more evident and entrenched than in the Constitution itself; their existence is not in dispute as to warrant any depositions on oath. In any event, I did not hear the petitioners questioning the respondent’s powers; rather, their quarrel with the respondent is the manner in which he is exercising his powers with regard to their case. This then invites me to consider this question of exercise of the powers to prosecute by the respondent and I reckon the appropriate place to begin is the source of these powers.

Article 157 (6) of the Constitution vests the respondent with powers of prosecution; it states:-

“(6) The Director of Public Prosecutions shall exercise State powers of prosecution...”

While exercising these powers, the respondent is assured by **article 157(10)** of the Constitution that he does not require the consent, the direction or control of any person or authority to initiate any criminal proceedings and generally in executing the functions for which his office is established; however, he bears an equally important responsibility of ensuring that the exercise of his powers or the execution of the functions of his office are consistent with the public interest, the interest of the administration of justice and the need to desist from the abuse of the due process of the law. This responsibility is encapsulated in **article 157(11)** of the Constitution which is to the effect that:-

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

My understanding of **articles 150(10) and (11)** of the Constitution is that despite the wide sphere of independence which the respondent enjoys in exercise of the powers conferred upon his office, the exercise of those powers is not totally unbridled; it is subject to the reins of due process which, among other things, require the respondent to act in a quasi-judicial manner whenever he has to exercise the discretion to prosecute or not to prosecute.

This petition is not the first of a kind in which this question has been discussed in our local jurisprudence; as far back as 1985, the same issue arose in **Stanley Munga Githunguri versus Republic (1985) eKLR** in which the High Court (A.H. Simpson (CJ) and S.K. Sachdeva, W.Mbaya, JJ) cited with approval the English decision in **DPP versus Humphreys (1976) 2ALL ER 497** where Lord Salmon is quoted to have said as follows:-

Irrespective of the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

As I understand him, the learned judge appears to have been saying that while a prosecutor is free to institute any prosecution against any person whenever an offence is alleged to have been committed, a court of law ought not to entertain such a prosecution if it is underpinned by an abuse of the due process; it must instead rise to the occasion to prevent such a prosecution.

Following this decision, the Court in Githunguri case concluded that:-

“Notwithstanding the powers conferred upon the office of the Attorney General by section 26(3) of the Constitution the High Court (and not any subordinate court) has an inherent power and duty to secure fair treatment for all persons who are brought before court or a subordinate court and to prevent an abuse of the process of the court.”

The decisions in **Murang’a High Court Constitutional Petition No. 4 of 2013 Peter Macharia Ruchachu versus Director of Public Prosecutions & Another** and **Nairobi High Court Constitutional Reference No. 165 of 2011 Rosemary Wanja Mwangi & Two Others versus Attorney General & Three Others** cited by the petitioners’ counsel followed this line of thought.

Both counsel for the petitioners and the respondent relied on the decision in Nairobi High Court Petition No. 160 of 2012 **Francis Anyango Juma versus Director of Public Prosecutions & Another (2012) eKLR** in which Lady Justice Mumbi Ngugi declined to grant a prayer for an order for an inquest to be commenced on the cause of the death of one Agnes Takaa Juma. The latter had died as a result of a road traffic accident on Mombasa road on 29th January, 2015 at around 10.40 pm. Police officers PC Wanjohi and Leah Githaiga were on duty on the material date and as soon as they got information about the accident, they proceeded to the scene and found the deceased’s body 10 metres away from the accident vehicle.

In their investigations, the officers established that the owner of the vehicle Zablon Omwoyo had knocked down the deceased. They also detained the accident vehicle and took it for inspection; they established that the vehicle’s windscreen was shattered, the bonnet was dented and the front grills were damaged. These findings, according to the police, were consistent with the road traffic accident in which the deceased perished.

The petitioner disagreed with the police findings suspecting that the deceased may have been a victim of a ritual killing; it is for this reason that he demanded for an inquest into the cause of the deceased's death.

The court overruled him and held that under **article 158 (10)** of the Constitution the Director of Public Prosecutions has been mandated to carry out his functions without interference from any party. The court noted, however, if there was a clear evidence of violation of a party's rights under the Constitution or a violation of the Constitution itself then the court could intervene.

I agree with the decision of my learned sister as it reflects the true position in law. What counsel for the respondent does not appear to appreciate in this decision is the qualification on the exercise of the powers to prosecute that there are circumstances where the court may be called upon to intervene, for instance where those powers are exercised in contravention of the rights of the individual or in contravention of the constitution itself.

The circumstances in the case must also be distinguished from those obtaining in the instant petition; the police established substantially in my view the circumstances in which the deceased died. They visited the scene of the accident; they also identified and examined the ill-fated vehicle. The police demonstrated that they had, at least endeavoured to obtain all the relevant information that may have informed either of the several options they could possibly take including charging the driver of the vehicle or commencing an inquest.

As I conclude, I must not be misunderstood to be saying that the prosecution of any murder charge must always be initiated by an inquest; not all murder cases would necessarily call for an inquiry as a precondition for their prosecution but when one considers the circumstances under which the deceased persons died in the case at hand, the prosecution of the petitioners for those deaths ought to have been preceded by an inquest; theirs is the sort of case that the legislature must have had in mind when it came up with the provisions relating to inquiries into sudden deaths and missing persons believed to be dead.

An inquest, in my view, would be a befitting forum in which the respondent would clearly have demonstrated that in exercising his powers he was not influenced by caprice or whim, if the prosecution of the petitioners would have been the inquest's verdict.

In the final analysis, I am satisfied that in sidestepping this vital step before making the decision to charge the petitioners with the offences of murder the respondent violated **article 157 (11)** of the Constitution and by the same token infringed on the petitioner's rights under **articles 27(1), 47 (1) and 50 (1)(2)** of the Constitution. For this reason I am persuaded that the petitioners' petition is merited and ought to be allowed; I will allow it in the following terms:-

1. The respondent's direction and or decision to charge the appellants communicated vide the letter dated 11th September, 2014 is hereby declared to be in violation of the the petitioners' constitutional rights under **articles 27(1), 47 (1) and 50 (1)(2)** and thus null and void.
2. The respondent's letter dated 11th September, 2014 communicating the decision to charge the appellant's with the offences of murder as a result of the deaths of P.C. George Nderitu and William Gichuhi Kariuki is removed to this honourable Court and is hereby quashed.
3. Accordingly any ensuing action or proceedings pursuant to the respondent's decision to charge the petitioners including the charges against them which were filed aforesaid in this honourable Court on 11th November, 2014, are hereby declared a nullity.
4. Parties will bear their own costs.

It is so ordered.

Dated, signed and delivered in this court this 29th day of January, 2016.

Ngaah Jairus

JUDGE