



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL REVISION NO. 6 OF 2014

LAWRENCE MURIITHI MACHARIAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant filed a Notice of Motion dated 5th May, 2014 seeking for orders from this court to the effect that the findings of Honourable Wekesa in **Nyeri Chief Magistrates' Court Inquest No. 4 of 2011** made on 14th September, 2011 be revised and that pending the revision, the trial of the applicant in **Nyeri Chief Magistrates Court Criminal Case No. 10 of 2013** be stayed. The motion was brought under **sections 362,364 (1)(b) and 367 of the Criminal Procedure Code.**

In the affidavit in support of the motion the applicant states that his motor-vehicle was involved in a road traffic accident on Nanyuki-Nyeri road in which a pedestrian was knocked and killed. According to the findings in the inquest that ensued, both the deceased and the applicant were held to be liable for the accident. Although the decision in the inquest was made in September, 2011, it was only in November, 2013 when applicant was charged in court apparently after he had come to testify in a civil case arising out of the same accident.

The applicant's case is that since both he and the deceased were held to blame for the accident, there is no way he could be held to be criminally liable for the accident. For this reason, the applicant has asked the court to review the findings in the inquest and to stop the criminal trial against him.

When the application came up for hearing, counsel for the state Mr Njue opposed the application for review on the ground that the findings in the inquest could not be reviewed since the proceedings of the inquest and the findings thereof have not been faulted; what the applicant ought to have challenged, so argued the state counsel, is the criminal case that rose out of the inquest.

Even then Mr Kimunya for the applicant argued that the court has unfettered discretion under **section 362** of the **Criminal Procedure Code** to review the proceedings in the criminal case against the applicant and review the decision to charge the applicant.

I have had the chance to read the decision of the learned magistrate in the **Nyeri Chief Magistrates Court Inquest No. 4 of 2011**; in her ruling the learned magistrate made the following pertinent findings:-

1. The deceased died as a result of the injuries she sustained after being knocked down by the

applicant's vehicle registration number **KAL 781 R** which at the material time was being driven by the applicant himself;

2. The deceased was not careful and diligent in crossing the road as a result of which she was knocked down;
3. There was a minibus ahead of the applicant's vehicle which could possibly have obstructed the applicant's view, hence the traffic accident;
4. The applicant was approaching a shopping centre hence he ought to have been more careful; and finally,
5. The deceased was to bear the blame for failing to exercise care while crossing the road but the applicant was also to blame since he ought to have been more careful as he was approaching a shopping centre.

The applicant does not challenge the decision or the findings of the learned magistrate in this inquest into the death of the deceased. It has also not been demonstrated that the decision to charge the applicant arose from the opinion of the learned magistrate in the inquest. The decision to charge the appellant was taken when, as I understand the applicant, he was testifying in a civil case that arose out of the same accident; it is then that the presiding magistrate in that case remarked that the applicant ought to have been charged with the offence with which he is now facing.

The remarks of the magistrate in the civil case should not have been taken as the opinion of the inquest magistrate and I would agree with the learned counsel for the state that, as long as the proceedings and findings of the inquest into the deceased's death were regular and lawful there is no basis for review of those proceedings or the findings thereof.

Counsel for the applicant conceded that though he may have mistakenly targeted the inquest proceedings, nothing stops this court from invoking its powers under **section 362** of the **Criminal Procedure Code** and examining the record of the criminal proceedings before the subordinate court against the applicant to satisfy itself of the proceedings correctness and legality. That section provides:-

362. Power of High Court to call for records

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.

One of the circumstances under which the High Court may call for and examine the record of any criminal proceedings from the subordinate court is through an application for revision; however, this is not the only means through which this court may intervene in the criminal proceedings before a subordinate court for purposes of revision- the court can still intervene for the same purpose in any other manner whenever circumstances so demand. I understand this to have been the applicant's learned counsel's argument that although his application is targeted at the inquest, albeit undeservedly, the court has unfettered powers to intervene in criminal proceedings in the subordinate court in exercise of its revisionary powers to satisfy itself of proceedings correctness, legality without any formal application. Indeed this seems to be the meaning of **section 364 (1)** of the **Criminal Procedure Code** which states:-

364. Powers of High Court on revision

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may...(italics mine).

For purposes of revision which the applicant's counsel seems to bidding for, I would consider the criminal proceedings against the applicant to be the sort of proceedings "*which otherwise have come to the court's knowledge*" without the court having called for them or formally reported to it by means of an application.

Regardless of the manner the proceedings come to it, this court has been clothed with powers under **section 364 (1)(b)** to make an appropriate order after 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. The question that then follows, as far as the applicant's application is concerned, is whether the criminal proceedings against the applicant in the **Nyeri Chief Magistrates Court Criminal Case No. 10 of 2013** are regular and if not whether this court should intervene and terminate them in exercise of its revisionary powers.

The record in **Nyeri Chief Magistrates Court Criminal Case No. 10 of 2013** shows that the applicant was charged in court on 12th November, 2013 with the offence of causing death by dangerous driving contrary to **section 46** of the **Traffic Act (Cap 403)**. The particulars of the offence are stated thus:-

“LAWRENCE MURIITHI MACHARIA: On the 10th day of February, 2011 at about 6.30 pm along Naromoru Kiganjo road near Kwa J area in Nyeri County within the Republic of Kenya being the driver of motor-vehicle registration KAL 781 R make pajero drove the said motor vehicle on the said road in a manner which was dangerous in the circumstances of the case including the nature conduct condition and the use of road and the amount of traffic which was actually at the time which (sic) reasonably be (sic) expected to be on the road and caused the death of Elizabeth Gakenia by leaving your lane and knocking the said pedestrian who died while being rushed to the hospital due to the injury caused by the said vehicle.”

A plea of not guilty was entered and it would appear that nothing much happened after that until this application herein was filed.

The charge, in its fundamental aspects is inconsistent with the findings of the learned magistrate in the inquest into the deceased's death the most important of which was that the deceased was careless and did not exercise proper or any proper look-out before crossing the road. The applicant was found to have been negligent only because, in the learned magistrates view, he ought to have been more careful while approaching a shopping centre where people such as the deceased would be expected to be crossing the road. Neither the facts nor the opinion of the learned magistrate revealed carelessness of such extent that warrant the applicant being charged with offence of causing death by dangerous driving; at least this is not what her opinion says.

More importantly, however, is the question whether the appropriate procedure was followed in charging the applicant particularly considering that this was a case that was preceded by an inquest. The opinion of the magistrate was delivered on 14th September, 2011 and since then no action was taken against the applicant until 12th November, 2013, almost two years later, when the applicant was charged. The applicant says that timing of his prosecution was informed by the remarks made, apparently by the magistrate presiding over a civil case arising out of the accident in question and in which the applicant had come to testify that he ought to have been charged with the offence of causing death by dangerous driving; indeed he swore that he was arrested outside the court immediately after he testified. His evidence was not controverted and therefore I would presume his version of facts to be true.

The law on the procedure in conducting inquests into sudden deaths is found in sections **385 to 389** of the **Criminal Procedure Code**. Under **section 386**, where a police officer receives information that a person has been killed, for instance by an accident, he is to give this information to the nearest magistrate empowered to hold inquests and also submit an investigation report on the apparent cause of death. Under **section 387** of the same Code, the magistrate empowered to hold inquests is to hold an inquiry either instead of or in addition to the investigation conducted by the police. Under **subsection 4 of section 387** of the Code, if at the end of the inquiry the magistrate is of the opinion that an offence has been committed by some person he is to record his opinion and forward a copy thereof to the Director of Public

Prosecutions presumably for appropriate action by the his office.

There is no doubt that the inquest in question was governed by and was subject to the provisions of **section 386** and **section 387** of the **Criminal Procedure Code**; what is in doubt is whether any report was sent to the Director of Public Prosecutions as required under **subsection 4** of **section 387** of the Code and whether in arresting and charging the appellant the Director of Public Prosecutions was acting on the report of the magistrate who conducted the inquiry. Counsel for the state did not deny that these crucial provisions of the law were not complied with; if anything, I understood him to advise the applicant's counsel, quite correctly in my view, that there was nothing amiss with the inquest and that what should have been faulted were the criminal proceedings in which the applicant had been charged.

If, as is now evident, the appellant was charged without complying with the provisions of **sections 386** and **387** of the **Criminal Procedure Code** but rather on the direction of a magistrate who had nothing to do with the inquest in to death of the deceased it logically follows those proceedings in which the applicant was charged are irregular, unlawful and unsustainable.

For the foregoing reasons and in exercise of the powers vested upon this court under **section 362** and **section 364** of the **Criminal Procedure Code**, I dismiss the charge of causing death by dangerous driving contrary to section 46 of the Traffic Act against the applicant and terminate the proceedings in **Nyeri Chief Magistrates' Court Criminal Case No. 10 of 2013**. The applicant is discharged forthwith.

Signed, dated and delivered in open court at Nyeri this 13th April, 2015

Ngaah Jairus

JUDGE