REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

MISCELLANEOUS CRIMINAL APPLICATION NO. 6 OF 2014

ABSALOM GITERU KIBE…….…….…….....APPLICANT

VERSUS

REPUBLIC……...……...……...RESPONDENT

RULING

The applicant filed a notice of motion dated 14th March, 2014 seeking to have this Court invoke its revisionary powers under **sections 362** and **364** of the **Criminal Procedure Code (cap 75)** so as to satisfy itself of the correctness, legality or propriety of the order of the court in **Murang'a Senior Principal Magistrates Court Inquest No. 13 of 2010** made on 9th May, 2013 and as to the regularity of the proceedings thereof.

Besides the provisions in the **Criminal Procedure Code**, the applicant also cited **articles 165(6), (7)** and **50** of the Constitution.

The application was supported by the affidavit sworn on 14th March, 2014 by the applicant himself; it is apparent in this affidavit that the applicant was once charged, apparently with the offence of murder, in **High Court Criminal Case No. 49 of 2009**; this case was subsequently terminated and the applicant discharged of the charges against him. Rather than proceed with prosecution of the applicant, the state opted to commence an inquest into the cause of the death of the deceased instead.

The outcome of the inquest, according to the judgment delivered by the learned magistrate on 9th May, 2013, was that the applicant must have been the person who perpetrated the deceased's murder and he should therefore be prosecuted for this offence.

The applicant's gripe with the learned magistrate's decision is that he was not aware of the inquest; he was neither bonded to appear as a witness nor was he ever summoned to attend court. According to him, he only became aware of the inquest from his mother who told him that police officers visited their home on 8th February, 2014 seeking to arrest him in execution of warrants of arrest issued by the court in Murang'a. He got to learn of the judgment and the inquest when he visited and made inquiries at the law courts in Murang'a.

Since he did not participate in the inquest yet he was found to be the prime suspect of the offence in question, the applicant submits that the proceedings were irregular and ought to be annulled and a fresh

inquiry commenced.

The respondent did not file any affidavit or grounds of objection to the application; however, submissions were filed on its behalf by the Office of the Director of Public Prosecutions, essentially opposing the application.

According to the Director of Public Prosecutions, though the applicant did not participate in the inquest, he was fully aware of it but simply chose to avoid it. The Director argued that an inquest is a fact finding process and not a prosecution and therefore the applicant should not be heard insisting on those rights that are only available to persons who have been charged; for instance, so the Director argued, despite the fact that the applicant was adversely mentioned in the inquest, he would not have been accorded the right to cross-examine the witnesses even if he had participated in the inquest.

The Director of Public Prosecutions also argued that courts have statutory and inherent powers to preclude a party from their proceedings and in this instance, the learned magistrate did not find it fatal to exclude the applicant from the proceedings.

Finally, as far as **section 387(3)** of the **Criminal Procedure Code** is concerned, the Director urged that it was proper for the learned magistrate to issue warrants of arrest against the applicant to answer to the charge of murder under **section 202** of the Penal Code in view of the evidence presented before her.

Section 387 of the **Criminal Procedure Code** which appears to be in contention in this application reads as follows:-

> ***387.(1) when a person dies while in the custody of police, or of a prison officer, or in prison, the nearest magistrate empowered to hold inquests shall, and in any other case mentioned in section 386(1) a magistrate so empowered may, but shall in the case of a missing person believed to be dead, hold an inquiry into the cause of death, either instead of or in addition to the investigation held by the police or prison officer, and if he does so he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.***
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> ***(2) Whenever a magistrate considers it expedient to make an examination of the dead body of a person who has already been interred, in order to discover the cause of his death, the magistrate may cause the body to be disinterred and examined.***
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> ***(3) if before or at the termination of the inquiry the magistrate is of the opinion that the commission by some known person or persons of an offence has been disclosed, he shall issue a summons or warrant for his or their arrest, or take such other steps as may be necessary to secure his or their attendance to answer to 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 an offence.***
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> ***(4) If at the termination of the inquiry the magistrate is of the opinion that an offence has been committed by some person or persons unknown, he shall record his opinion and shall forthwith send a copy thereof to the Director of Public Prosecutions.***
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> ***(5) If at the termination of the inquiry the magistrate is of the opinion that no offence has been committed, he shall record his opinion accordingly.***
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> ***(6) in the case of an inquiry relating to a missing person believed to be dead the magistrate shall at the termination of the inquiry report the case together with his findings to the Director of Public Prosecutions and shall make recommendations as to whether or not the period regarding the presumption of death provided for by section 118A of the Evidence Act should be reduced and if so what lesser period should, in the circumstances of the death, be substituted for the period of seven years.***

The pertinent parts relevant to this application are **subsections (1) and (3);** it appears from a copy of the inquest proceedings exhibited on the affidavit in support of the application that the deceased did not die in the custody of police, or of a prison officer, or in prison. It appears, from the evidence available, that he may have been killed by another person or persons; he therefore died in circumstances that would fit what has been stated to be *"any other case mentioned in section 386(1)"*. Cases mentioned in **section 386(1)** which would also be subject to an inquest contemplated under section 387(1) include such cases as suicide, murder, accident and disappearance of a person; considering that the deceased may have been murdered, an inquest under **section 387(1)** to establish the cause of his death was appropriate in the circumstances.

As far as I understand the parties' arguments, the bone of contention between them is not whether the inquest was proper but whether the applicant should have participated in the proceedings and whether, at the conclusion of the inquest, it was proper for the learned magistrate to order the arrest and prosecution of the applicant with the offence of murder.

The answers to the twin questions, in my humble view, are found in **section 387(3)**; my understanding of that provision is that if, in the course of an inquest or at its conclusion, the magistrate is of the view that a certain person or persons have committed an offence, he shall either summon him or them or issue warrants for his or their arrest or take any other necessary step to ensure his or their attendance to answer to the charge, which in the magistrates view, he or they have committed.

The question that then arises is, when one is summoned or arrested or when his attendance is secured in any other manner to answer to the charge in these circumstances, is he taking a formal plea for prosecution purposes? Does the trial for whatever offence one is summoned or arrested to answer to commence at that particular instance?

The Director of Public Prosecutions thinks that the culprit takes a formal plea and the trial commences at that stage except that in cases of murder the plea is taken in the High Court which only has jurisdiction to try murder cases. This view appears to be inconsistent with **section 387(3)** itself; much as this section provides that one will answer to the charge, it goes further to say that upon the attendance of the person suspected to have committed the offence, regardless of whether it is murder or not, "***the magistrate shall commence the inquiry de novo and shall proceed as if he had taken cognizance of an offence."*** It does not speak of commencing the trial for the particular offence for which one has been called to answer.

I would suppose, therefore, that the "charge" referred to in **section 387(3)** is not the formal charge of a person for purposes of his prosecution for committing a particular offence; his appearance in court to answer to the "charge" is not the commencement of his trial for having committed a particular offence. It is a charge in the context of an enquiry or an inquest into the cause of a person's death suspected, as in this case, to have been murdered. If the answer to the charge contemplated under section **387(3)** of the Code was to be taken as a formal plea, for instance for a charge of murder, then rather than state that the magistrate shall commence the inquiry *de novo*, then the Act would have expressly stated that such plea shall be taken in the High Court which only has the jurisdiction to pose and receive an answer to such a charge.

I am of the humble opinion that the rationale behind securing the attendance of a person deemed to have committed an offence to answer to a particular charge in an inquest and to commence the inquest afresh in his presence is a deliberate effort meant to not only accord him the opportunity to question the evidence against him but it is also a chance for him to tender exculpatory evidence, if he has any; being a judicial process, with a legal authority to affect the rights of another person or persons, an inquisitorial proceeding of the nature of an inquest is subject to the rules of natural justice the cardinal one of which is that one shouldn't be condemned unheard.

If anything it is only after evaluation and analysis of the evidence by all the witnesses at the inquest, including the person or persons suspected to have committed the offence, for which he or they have been called to answer, that the magistrate can come to a firm conclusion that he or they should be committed to trial for those offences.

The need for evaluation of the evidence by both the suspect and the prosecution before coming to any conclusion was stated in the case of **R versus Maula Dad (1936) KLR Vol. XVII 70 at page 71**. In that case, there was a road traffic accident which resulted in the death of one Durham. An inquest was held by the resident magistrate and resulted in a finding that his death was accidental. The accused was brought before the magistrates' court for committal on a charge of manslaughter. The magistrate declined to commit the accused to trial on the ground that there was insufficient evidence of an omission amounting to culpable negligence. When the case went before the High Court (Sir, Joseph Sheridan, C.J., and Webb, J.) for revision to consider whether the order should be set aside, the learned judges said:-

> ***"It is conceded, and there is ample authority for the proposition, that a Magistrate in committal proceedings is not bound to commit for trial simply because there is evidence on the one side which, if believed, would support a conviction; he is entitled to weigh the evidence, but at the same time, he is not entitled to usurp the functions of the Court of trial."***

The learned judges went further quoted with approval the case of **Fattu versus Fattu (26 All. 564)** where it was said:-

> "***If he arrives at the conclusion, either at the close of the case for the prosecution or after hearing the accused's witnesses, that it (i.e. the evidence for the prosecution) is not true, he can give effect to his opinion by discharging the accused….If it is a matter of weighing probabilities, he would be well advised in leaving the case to the court which alone is empowered to try it."***

It is clear from this decision that in an inquest, the magistrate has the obligation to weigh the evidence of both the prosecution and the accused and his witnesses; he cannot look at the evidence of the prosecution only and commit the accused to trial; neither can he look at the evidence of the accused only and discharge him. The magistrate can only come to a particular conclusion only after he has weighed the evidence of both sides but conscious of the fact his is not the trial court.

In the case at hand the learned magistrate came to the conclusion that the applicant was the principle suspect in the deceased's murder; she may well have been right except that when she arrived at that conclusion the next step should have been to cause the applicant to appear before her either through summons, a warrant of arrest or by some other means to answer to the charge for inquest purposes and not to commit him to the High Court for trial on the same charge. Pursuant to **section 387(3)** of the Code, upon appearance of the applicant, the inquest should have commenced *de novo.*

In the premises, I would allow the applicant's application and exercise the powers granted to this court under **section 364 (b)** of the **Criminal Procedure Code** and reverse the order to commit the applicant to trial for murder and substitute it with the following orders:-

1. The applicant to appear before the magistrates' court answer to a charge of murder in **Murang'a Senior Principal Magistrates Court Inquest No. 13 of 2010** on a date that this court will give when this ruling is delievered**;**

2. In the event that the applicant does not appear as directed by the court, a warrant of arrest to issue against the applicant to secure his attendance at the inquest**;**

3. Upon appearance of the applicant before the court conducting the inquiry, the inquest to begin *de novo* pursuant to **section 387(3) of the Criminal Procedure Code** before any other magistrate other than Hon. J. Wekesa.

It is so ordered.

Dated, signed and delivered at the High Court at Murang'a this 10th day of December, 2014

Ngaah Jairus

JUDGE