



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Application 92 of 2011

IN THE MATTER OF: THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA  
SECTIONS 8 AND 9

IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE CHAPTER 75 LAWS OF  
KENYA  
AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF  
MANDAMUS

BETWEEN

ROSE K. WAMBUA (Suing in her capacity as next of kin of

ROBERT MUSYOKA – Deceased) ..... APPLICANT

AND

ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT

COMMISSIONER OF POLICE ..... 2<sup>ND</sup> RESPONDENT

JUDGEMENT

(1) Filed on 22<sup>nd</sup> September 2011 is a Notice of Motion in which the Applicant seeks that this Court makes the following Judicial Review order-

**“An Order of Mandamus do issue directing the 1<sup>st</sup> Respondent to carry out his statutory obligations as provided in Section 388 of the Criminal Procedure Code Cap 75 Laws of Kenya in a judicious manner.”**

(2) The 1<sup>st</sup> Respondent is the Attorney General and The 2<sup>nd</sup> Respondent the Commissioner of Police. Prior to 12<sup>th</sup> July 2012 when The Statute Law (Miscellaneous Amendments) Act No. 12 of 2012 amended Section 288 of The Criminal Procedure Code, the powers thereunder to direct inquiries into the cause of death were exercisable by The Attorney General. Neither the 1<sup>st</sup> nor the 2<sup>nd</sup> Respondent challenged these proceedings.

(3) This is the story behind these proceedings as told by the Applicant. Robert Musyoka (hereinafter the “Deceased”) was on or about 3<sup>rd</sup> September 2004 arrested and booked at Mariakani Police

Station. It is said that he was in perfect physical and mental health at the time of his arrest. About 10 days later, on the 14<sup>th</sup> September 2004, the police informed the Applicant that the Deceased had committed suicide and was found dead in the washroom of the Police Station.

(4) The Applicant was dissatisfied with the explanation and on several occasions through his advocates sought to have an inquiry conducted into the cause of the death. This would be in accordance with the provisions of Section 388 of The Criminal Procedure Code. The Court was shown four letters of 16<sup>th</sup> September 2009, 14<sup>th</sup> September 2009, 24<sup>th</sup> September 2009 and 10<sup>th</sup> August 2010 written to the Assistant Director of Public Prosecution. That office was then a department in the office of The Attorney General. The Assistant Director responded only once in a letter dated 16<sup>th</sup> September 2009 addressed to the Provincial Criminal Investigations Officer (PCIO) Coast and copied to the Applicants lawyer. That letter is reproduced-

“16<sup>th</sup> September 2009

PCIO  
COAST

**RE: IN THE MATTER OF THE ESTATE OF ROBERT MUSYOKA - OUR CLIENT – ROSE K. WAMBUA**

Enclosed please find a self explanatory letter of complaint (addressed to us).

We are dismayed to note that to date you have not responded to our previous inquiries.

This is, therefore, to require you to urgently respond to our earlier letters to enable us advise the complainants.

**ONDARI J. N.**

**ASSISTANT DEPUTY PUBLIC PROSECUTOR**

**PROVINCIAL STATE COUNSEL**

**FOR: ATTORNEY GENERAL**

Encl.

c.c

Charles Kioko, Munyithya &

Co. Advocates  
4<sup>th</sup> Floor, NSSF Building,

Nkrumah Road,

P.O. Box 43370,

**MOMBASA.”**

(5) Due to that inaction the Applicant who is the father of the Deceased commenced these Judicial Review proceedings.

(6) Vide the amendment to Section 388(1) the Powers of the Attorney General as to inquiries into

the cause of a particular death was transferred to the D.P.P. That Section now reads-

**“The Director of Public Prosecutions may at any time direct a Magistrate to hold an inquiry, in accordance with Section 387, into the cause of a particular death to which the provisions of that Section apply and shall in the case of missing person believed to be dead give such directions as he deems fit.”**

(7) The office of the D.P.P did not oppose the application and infact on one occasion (on 18<sup>th</sup> June 2012), when represented by Mr. Ondari, indicated that it was likely to concede to the matter. This application is therefore unopposed.

(8) Section 388(1) must necessarily be read together with Section 387(1) which provides-

**“When a person dies while in the custody of the police, or of a prison officer, or in a 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.”**

The allegation here is that the Deceased died while in the custody of police and so an inquiry by a Magistrate into the cause of death was mandatory. There is implied in this Section, I think, an obligation by the police to give information of such death to the nearest Magistrate empowered to hold Inquests so that this mandatory inquiry is held. Where no inquiry is carried out into the cause of such death and it is brought to the attention of the D.P.P then it would be the duty of the D.P.P to direct a Magistrate to hold that inquiry. The D.P.P is instructed by the provisions of Article 157(11) of Constitution 2010, when exercising his powers, to have regard to the public interests, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. The powers given by Section 388 of The Civil Procedure Code must be exercised in this manner. I am willing to hold, and I so do, that these parameters held true even before the promulgation of the Constitution 2010 and even when the powers of Section 388 was being exercised by the Attorney General.

(9) Where a person dies while in custody of the police and no inquiry is commenced by a Magistrate under Section 387(1) and this is brought to the attention of the D.P.P he must issue directions to a Magistrate to hold an inquiry under Section 388. In that way the D.P.P will be acting in public interest, in the interest of the administration of justice and consistent with the provisions of Section 387 of The Criminal Procedure Code.

(10) In the end I have no difficulty holding that the 1<sup>st</sup> Respondent has failed to discharge his statutory duty under Section 388 and I hereby grant the order of mandamus as sought in the Notice of Motion of 6<sup>th</sup> September 2011 save that the order shall be directed at the D.P.P. There shall be no order on costs.

(11) No order was sought against the 2<sup>nd</sup> Respondent and none could possibly issue.

**Dated and delivered at Mombasa this 27<sup>th</sup> day of February, 2013.**

**F. TUIYOTT  
JUDGE**

**Dated and delivered in open court in the presence of:-**

**Miss Kariuki for Applicant**

**No appearance for Respondents**

**Court clerk – Moriasi**

**F. TUIYOTT  
JUDGE**