



REPUBLIC OF KENYA

High Court at Machakos

Criminal Revision 331 of 2011

GEORGE KAVITA MUTEMWA AND 2 OTHERS ..... APPLICANTS

VERSUS

REPUBLIC ..... RESPONDENT

RULING ON REVISION

On 21.9.2011, the Kilungu Resident Magistrate's court after hearing the witnesses in Inquest No.5 of 2011 made orders for warrants of arrest to issue against the three person whom he found to have been identified as having fatally injured the deceased, SAMSON MUINDE WAMBUA on 13.11.2010.

Vide a letter dated 3.10.11, the Director of Public Prosecution applied to the High Court to exercise its Powers of Revision and set aside the said order on the grounds that:

***The proceedings were terminated prematurely before all available evidence was placed before the court.***

During the hearing of the application, Ms Gakobo the Senior State Counsel submitted on behalf of the Director of Public Prosecutions that the Trial Magistrate issued a warrant of arrest thereby directing the Director of Public Prosecution to institute charges, yet it was the Director of Public Prosecutions' mandate to originate such proceedings.

Section 387(3) of the Criminal Procedure Code stipulates as follows:

***“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 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.”***

A clear reading of Section 387(3) Criminal Procedure Code shows that the trial magistrate may come up with an opinion before or at the termination of the inquiry. There was therefore no requirement under Section 387(3) Criminal Procedure Code, for the magistrate to hear all the witnesses if it was clear to the magistrate that the evidence already on record had established that an offence had been committed by some known person or persons.

The magistrate however went a step further and made orders for the named persons to be arrested and arraigned before the High Court. This went beyond the jurisdiction of the magistrate. My view of Section 387(3) Criminal Procedure Code is that it gives the power to the magistrate to issue a warrant of arrest if the magistrate commences the inquiry *de novo* and proceeds as if he had taken cognizance of the

offence that had been disclosed.

Now that the magistrate did not proceed to deal with the inquiry as provided for under Section 387(3) Criminal Procedure Code, then he ought to have recorded his opinion and sent a copy to the Director of Public Prosecutions to deal with in accordance with his mandate as provided for under article 157(10) of the Constitution which provides:

***“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”***

The order for issuance of warrants of arrest for the three named persons for arraignment in court was made without the jurisdiction and the same is hereby set aside.

I further order that the inquest do proceed before any other magistrate. If there is no other magistrate at Kilungu Law Courts, the inquest is to be heard at Machakos Law Courts.

Orders accordingly.

**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 23<sup>rd</sup> day of May 2013.**

**B. THURANIRA JADEN**

**JUDGE**