



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

REVISION CASE NO.111 OF 2013

REPUBLICAPPLICANT

AND

1. KENNEDY WAMALWA

2. JAMES WANJAMA.....DECEASEDS

3. JUSTUS OKACH ODUOR

4. SHABAN RAMADHAN

5. EVANS GICHERU NDUNGU

RULING

1. It is said that sometime in June 2011 Kennedy Wamalwa, James Wanjala, Justus Okach Oduor, Shaban Ramadhan and Evans Gicheru Ndungu (jointly referred to as the deceased persons) met their deaths on account of bullet shots from Police guns.
2. Following those deaths Hon. Josphine Maragia, RM conducted an inquiry and terminated it with the following findings,

“I therefore find no good grounds to conduct further inquiry into the matter. I order that the file be closed accordingly. Deceaseds kin may seek further redress in a civil Court.”

3. By a letter dated 3rd October 2013 the Director of Public Prosecutions requested this Court to exercise its revisionary powers and to set aside the said order of the Magistrate. This Court was further asked to order that a “full public inquest” be held before a different Magistrate. The D.P.P was of the view that the inquiry by the Learned Magistrate was irregular as she simply perused the police file without hearing witnesses.
4. The Deceased died while in the custody of the Police and the inquiry conducted by the Learned Magistrate would be pursuant to the provisions of Section 387 (1) of The Criminal Procedure Code. Those provisions require as follows:-

“387.(1) 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.”

5. Although I have always thought that such an inquiry should be by way of a public inquest, the statute itself does not require a hearing and the taking of evidence of witnesses. To that extent the inquiry conducted by the Learned Magistrate may not be irregular.
6. That said, there is something venerable about every human life and so an inquiry into its sudden loss in the hands of a third party must be transparent and thorough. Where the Third Party is the Police, various interest groups will want to be satisfied that the deaths are not extrajudicial killings or do not disclose the commission of an offence. There would be the friends and relatives of the Deceased persons and the General Public. And not in the least the Police themselves would want their conduct vindicated.
7. It is my view that the anxieties, tensions and suspicion that this kind of deaths bring are better dealt with when the inquiry conducted is in the nature of public inquest. A Desktop inquiry may only serve to deepen any suspicions. On the other hand a public inquest allows for an open, transparent and participatory process.
8. In exercise of my supervisory authority, I do hereby set aside the orders of Hon. Josephine Maragia RM dated 3rd October 2012 in Inquest Cause No.19 of 2012 and order that a fresh inquiry be conducted by way of public inquest by another Magistrate.

DATED, DELIVERED AND SIGNED AT BUSIA THIS 18TH DAY OF DECEMBER 2013.

IN THE PRESENCE OF:-

KADENYICOURT CLERK

KELWONSTATE COUNSEL

F. TUIYOTT

J U D G E