



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW CASE NO.8 OF 2008**

**IN THE MATTER OF THE NAIVASHA CHIEF MAGISTRATE'S INQUEST CASE NO.7 OF 2006**

**AND**

**IN THE MATTER OF AN APPLICATION BY ALEX NGEWA, CHARLES K. MUNYAO AND LAWRENCE MWANGI FOR AN ORDER OF CERTIORARI**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHIEF MAGISTRATE, NAIVASHA.....RESPONDENT**

**CPL. ALEX NGEWA )**

**PC CHARLES K. MUNYAO ).....SUBJECTS**

**CPL. LAWRENCE MWANGI )**

**RULING**

It is important to begin this ruling with a brief background of the events that have led to the application to which it relates. Joseph Kimani Wanjiru was a young businessman in Nakuru town aged at the time of his death on 24<sup>th</sup> May, 2005 only 22 years. It was alleged that he was shot by police officers on the Nakuru/Gilgil road. An inquest into the circumstance of his death was conducted by the Chief Magistrate, Naivasha Law Courts, F. N. Muchemi (as she then was). The hearing ran between 7<sup>th</sup> May, 2006 to 20<sup>th</sup> March, 2008 when the court rendered its ruling after hearing and considering the evidence of sixteen (16) witnesses. In concluding her ruling, the learned magistrate stated that:

**“It is my considered opinion that four (4) of the witnesses in this case were involved either directly or indirectly with the killing of the deceased. The evidence show that prior plans and arrangements had been done earlier by the persons involved. I therefore direct that the following persons be charged with murder of deceased:**

**(a) P/No.36033 Cpl. Alex Ngewa of Gilgil Police Station.**

**(b) P/No.28435 P.C. Charles K. Munyao of Gilgil Police Station.**

**(c) Dennis Kimata, P.W.15 in this case.**

**(d) P/No.57563 Cpl. Lawrence Mwangi of Narok Police Station.**

**It is hereby directed that the OCPD Naivasha Police Station takes action as directed with immediate effect and in addition conduct further investigation on the points which were not covered including the mobile phone call register of the deceased. I hereby so rule and declare.”**

Being apprehensive that they would be arrested and charged with murder in compliance with the above order, three of the suspects, Alex N Ngewa, Charles Munyao and Lawrence Mwangi moved the High Court for leave to bring judicial review application to quash the above decision by *certiorari* and also to stay the execution and implementation of the decision of the court below.

Upon leave and stay being granted, the three applicants brought a motion for orders of *certiorari* on the grounds that the applicants were not afforded an opportunity to be heard and that the proceedings were defective as the relevant laws and procedures were not followed.

For the respondent, the Chief Magistrate, Naivasha, it was submitted on the grounds of opposition that the application is premature and misconceived as the applicants have not been charged; that the applicants’ rights to a fair hearing were not violated as they participated in the inquest; that the recommendation that the applicants be charged with murder was not fatal and could be cured by an amendment and; that the Attorney General could, independent of the Chief Magistrate’s recommendation have the applicants charged with that offence.

The interested party, Grace Wanjiru Kibui, the mother of the deceased in her replying affidavit averred that the applicants were not entitled to a hearing in an inquest which is purely a fact-finding exercise; that they could only be heard after being charged; that no law was breached by the magistrate’s order and; that the application has been brought prematurely and in bad faith. Apart from these arguments, parties have also filed written submissions and counsel for the applicants has in addition filed authorities.

I have taken into consideration all the foregoing. One single broad question to be determined in this application is whether the applicants are entitled to an order of *certiorari*. It is now settled that an order of *certiorari* will issue if the decision being challenged was made without or in excess of jurisdiction or where the rules of natural justice are not complied with. See **Kenya National Examination Council Vs. Republic Exparte Gathenji and others**, Civil Appeal No.266 of 1996. **Sections 385 and 388** of the **Criminal Procedure Code** lay down the jurisdiction and procedure of holding an inquest.

The jurisdiction is vested in the Subordinate Court of the 1<sup>st</sup> or 2<sup>nd</sup> class. The latter category, by dint of

**Sections 2 and 3 of the Magistrates' Courts Act** includes Chief Magistrate's Court. An inquest will be held if there is information that a person has committed suicide or killed by another or by accident or is missing and believed to be dead and there is doubt regarding the cause of death. As I have said, **Sections 385 to 388 of the Criminal Procedure Code** provide, among other things, the procedure to be employed by the magistrate seized of the inquest. But relevant to this application is **Section 387 (3) of the Criminal Procedure Code** which stipulates that:

**"387(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 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."**

(Emphasis supplied).

If at the termination of the inquiry the magistrate forms the opinion that an offence has been committed by some unknown person or persons, he must record that opinion and forward it to the Attorney General. However, if in his opinion the evidence presented before him discloses the commission of either murder or manslaughter, he shall so record. What is important to note for the purposes of the present application is the statement I have emphasized in **section 387(3)** that once it is apparent that the offence was committed by known person or persons, the magistrate must summon that person or those persons or cause his or their attendance by way of a warrant of arrest. This is to enable the suspects to answer the charges.

The applicants, though called as witnesses were not given this opportunity before the court below ordered that they be charged with murder. As witnesses, they did not have the chance to test the evidence presented by way of cross-examination. Perhaps they were not even in attendance throughout (each day) the two years the sixteen witnesses testified. They had no counsel and indeed they had no opportunity to state their side of the story. Their testimony as witnesses did not amount to being heard in true sense of the rules of natural justice. **De Smith & Brazier on Constitutional and Administrative Law** – (6<sup>th</sup> Edition) 1999 at Page 557 wrote:

**"The rules of natural justice are minimum standards of fair decision-making imposed by the Common Law on persons or bodies who are under a duty to *"act judicially"*; they were applied originally to courts of justice and now extend to any person or body deciding issues affecting the right or interests of individual where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The context of natural justice is therefore flexible and variable. All that is fundamentally demanded of the decision-maker is that his decision to its own context be made with due regard for the affected parties' interest and accordingly be reached without bias and after giving the party or parties a chance to put his or their case....."**

The applicants were ambushed as the rules of natural justice were not complied with. Judicial review is concerned with the procedure followed to reach a decision and not the merit of that decision. The procedure laid down under the cited provisions of the Criminal Procedure Code was not followed.

In the result, the motion dated 3<sup>rd</sup> July, 2008 succeeds with cost and the decision of the Chief Magistrate rendered on 20<sup>th</sup> March, 2008 in Naivasha C.M.CR. Inquest No.7 of 2006 will be and is hereby quashed by *certiorari*.

**Dated, Delivered and Signed at Nakuru this 8<sup>th</sup> day of April, 2011.**

**W. OUKO**

**JUDGE**