



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS
Revision Case 8 of 2009

(From the original inquest case no. 1 of 2005)

MRS JOYCE MUMO MAKENZIE[DECEASED]

REVISION

1. On 21.7.2009, M/S Kilonzo & Co. Advocates wrote a letter to me and sought that I should invoke the powers of this court and revise the findings in Machakos Inquest No. 1 of 2005 – alleged wrongful killing of Mrs. J.M. Mackenzie (deceased). It is their complainant that;

- a) ***“The death of the deceased was caused by an illegality or the misconduct of the police as they acted in contravention of the police Act and the Administration Police Act, by unlawfully firing at the deceased thereby wrongful killing.***
- b) ***The learned magistrate correctly found that the deceased was shot by one of the police officers at page 18 of the findings whilst in the all proceedings the police officers denied shooting the deceased at pages 21, 23, 27, 28, 29, 30, 31, 32, 33.***
- c) ***The learned magistrate erred in misinterpreting his jurisdiction by attempting to reach of findings of guilt or not guilty on the charge of murder at page 20 of the findings.***
- d) ***Having found the cause of death, to be the shooting of the deceased by one of the police officers are magistrate ought to have ordered for charges to be brought against the police officers for murder or manslaughter.***
- e) ***The learned magistrate converted himself into a trial court and purported to acquit the police officers at pages 20 and 21 of the findings.”***
- f) ***The learned magistrate converted himself into a trial court and purported to acquit the police officers at pages 20 and 21 of the findings.”***

2. I have now read the proceedings and findings in that Inquest. The learned magistrate upon analyzing the evidence of the 32 witnesses who testified concluded as follows;

“From the evidence, it is therefore clear that the deceased died from a bullet wound fired by the police officers PW5, PW6, and PW7 for evidence adduced shows that PW8 did not fire any round since after the accident he became unconscious.”

3. Later, he started thus;

“From this evidence it is therefore not possible to specify from which gun was fired the shot which caused the death of the deceased. It can only be concluded that the death of the accused (sic) was fired from either the gun held by PW5, PW6 on PW7”

4. Having so concluded, the learned magistrate went on to state as follows:-

“Further, having considered the circumstances leading to and after the shoot out, I find no evidence to show that the action by the three officers was unlawful or activated by malice aforethought that would warrant a charge of murder being preferred against all or any of them.”

5. He then recommended that the file be closed.

6. With that background in mind, are the complaints by the advocates for the deceased’s family genuine?

7. As I understand it, an Inquest is conducted so that upon evaluating the evidence tendered, the court can determine the cause of death and whether probable cause has been established for a person responsible for that death to be prosecuted. In the instant case, the learned magistrate found for a fact that either, PW5, Cpl David Kambi or PW6, PC Denies Psamut or PW7 Cpl Benjamin Ngila were the persons who shot and killed the deceased, Joyce Mumo Makenzie. Having so done, it was her duty to examine whether there was probable cause for them to be prosecuted for either the offence of murder or manslaughter. She concluded that they were not to be prosecuted and she gave her reasons based on the evidence; that the shooting was accidental because the police officers were pursuing armed robbers who had committed a crime and the deceased, who was rushing her injured workers to hospital was shot by mistake. Was that decision equivalent to that of a trial court? In my mind the answer is in the affirmative. The learned magistrate was obligated to state why either the police officers should be charged with an offence and leave the trial to another court or why they should not be charged and why the investigation’s file should be closed. She did the latter but the decision was so conclusive, it was akin to that of a trial court. Having found that three persons may have been responsible for the death, the proper order to make was to order the DCIO Machakos to arrest the three police officers, and establish who to charge for the offence of manslaughter. To acquit them at an inquest is improper. In the event, I will revise the orders made and shall substitute that finding with the above finding.

8. Orders accordingly

Dated and delivered at **Machakos** this **30th** day of **September 2009**.

Isaac Lenaola

Judge