



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

MISC. CRIMINAL APPLICATION NO. 39 OF 2008

NISHA SAPRA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING ON REVISION

The applicant came before this Court by way of Chamber Summons dated 23rd January, 2008 and brought under ss.3(3), 362, 364(1)(b) and 364(2) of the Criminal Procedure Code (Cap.75, Laws of Kenya). She was invoking this Court's revision jurisdiction, and sought a hearing on her contention that the learned Magistrate at the Nairobi Chief Magistrate's Court, in Inquest No.19 of 2005 [Deceased, **Yogesh Madan Mohan Sapra**], had made a ruling on 15th January, 2008 which called for the High Court's scrutiny with regard to correctness, legality and propriety.

The general grounds founding the application may be summarized as follows:

- (i) that the inquest Magistrate had no power or jurisdiction to order that the applicant be apprehended and arraigned before the High Court to be tried for murder under s.387(4) of the Criminal Procedure Code (Cap.75);
- (ii) that the order made by the inquest Magistrate on 15th January, 2008 is illegal and a nullity;
- (iii) that the said order was made in excess or want of jurisdiction, and/or abuse of Court process;
- (iv) that s.387(4) of the Criminal Procedure Code (Cap.75) did not confer any power or jurisdiction upon the inquest Magistrate to make the said order;
- (v) that the only proper course for the inquest Magistrate was to record his opinion and send a copy thereof to the Attorney-General under s.387(4) of the Criminal Procedure Code.

The evidentiary basis of the application is set out in the affidavit sworn by the applicant's advocate on 23rd January, 2008. The said advocate, **Mr. Billing**, deposes that the applicant had been arrested promptly by a Police officer after the ruling in the said Inquest No. 19 of 2005 and, since then, the applicant has remained in Police custody. The deponent states his belief "that the learned Magistrate's Ruling/Order warrants revision under sections 362, 364(1)(b) and 364(2) of the Criminal Procedure Code."

Annexed to *Mr. Billing*'s affidavit is the inquest ruling which is being questioned. For the full tenor and effect of the said ruling, some of its passages will be set out hereinbelow:

(a) "This is not a trial. My role is limited to conducting an inquiry into the circumstances surrounding the deceased's death, and [making] appropriate recommendations within the confines of the Criminal Procedure Code. This is not the forum where blame can be apportioned."

(b) "...certain key matters appear to be beyond any form of controversy; firstly, it is common ground that the deceased sustained his injuries at his residence aforesaid on the night of 20th August, 2005. At the time, he was in his bedroom alone with his wife, *Nisha*. Secondly, it is clear that the injuries were violently inflicted by [the] use of a sharp object. Thirdly..., the deceased died slightly more than two weeks following the injuries, and in the course of treatment."

(c) "Knowing that the deceased sustained injuries inflicted by a sharp object, which injuries later killed him, three key questions that this inquest must resolve, in my opinion, are: firstly, whether the evidence [gives] a specific identification of this 'sharp object'; secondly, in what circumstances ...the 'sharp object' [penetrated] the deceased; and finally, whether it is possible to identify any person who can be prosecuted for any offence disclosed in the circumstances so proved."

(d) "What emerges from this evidence is that by all means, the deceased suffered a grave injury. The nature of the injury suggests a forceful thrust of the weapon that drove it deep into the body of the deceased."

(e) "So far the evidence shows that Witness No.1, *Nisha*, inflicted [the] fatal injury on the deceased by stabbing him using a kitchen knife...Now that the evidence points to a specific act by a specific person, I am at the end of this ruling expected to make a specific recommendation as to the offence disclosed in the evidence, for which the person implicated by it should be charged. It has been submitted on behalf of the deceased's family that this offence should be murder. *Mr. Rebello* referred the Court to sections 203, 206 and 213 of the Penal Code. His submission is that the necessary ingredients and intention for the offence of murder are established. *Mr. Billing* submitted that on the evidence, no recommendation for the offence of murder, manslaughter or [any] other offence should lie."

(f) "In conclusion, it is now possible to state that the deceased...died as a result of injuries inflicted using a kitchen knife...The injuries were inflicted at his residence at Lower Kabete on the night of 20th August, 2005. All the evidence adduced ascribes full responsibility to his wife, *Nisha Sapra*..., the principal suspect [in] the offence...."

From the foregoing factual findings, the inquest Magistrate stated that he was making "recommendations"; and the same were as follows:

"1. That Witness No. 1, *Nisha Sapra*, be apprehended and arraigned before the High Court to be tried for the murder of her deceased husband *Yogesh Madan Mohan Sapra*;

"2....."

The instant application is an objection to the above "recommendation", on grounds of illegality, want of jurisdiction, abuse of Court process, nullity. Learned counsel *Mr. Rao* who represented the applicant, asked this Court to exercise its power of supervision over the Subordinate Courts, and proceed by way of the revision jurisdiction, to *quash* the inquest Magistrate's recommendation for a murder charge against the applicant which led to her arraignment in the High Court on 28th January, 2008.

Mr. Rao made submissions on the inquest Magistrate's jurisdiction under s.387 of the Criminal Procedure

Code (Cap.75). That section provides 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....

.....

(4) If at the termination of the inquiry the Magistrate is of the opinion that an offence has been committed by some person or persons unknown, he shall record his opinion and shall forthwith send a copy thereof to the Attorney-General.”

Learned counsel submitted that the inquest Magistrate had gone beyond his remit, which is, at the end of the inquest, to *form and record an opinion, and to submit the same to the Attorney-General*, without “directing” the Attorney-General on what charges to lay, and against whom. In the words of learned counsel: “[The opinion] had to be recorded and sent to the Attorney-General, [but the inquest Magistrate] took over the Attorney-General’s role. The order is wrong in law.” **Mr. Rao**’s main apprehension was that, it was precisely the inquest Magistrate’s perceived excess of authority that led to the prompt arrest of the applicant herein; and so he was urging that the said arrest was itself unlawful.

Mr. Mwangi for the respondent, by contrast, maintained that the inquest Magistrate had only made a recommendation, and not an order for the arrest of the applicant herein; it was only after the Attorney-General had received the inquest ruling, and also studied the evidence on the Police file, that the applicant was placed under arrest. In learned counsel’s words: “*The Attorney-General did not act on orders; if there were orders, then it would have been wrong... The Court only made a finding I think it was only an opinion.*” **Mr. Mwangi** urged that the instant application is misplaced, and the inquest Magistrate’s order should not be subjected to revision.

A clear view of ss.386 and 387 of the Criminal Procedure Code shows, I believe, that the role of the Magistrate’s Court in inquiries preliminary to possible commencement of prosecution, is a *sui generis* one; the Magistrate is not empowered to *originate prosecution*, because that is a constitutional role reposed in the Attorney-General, by s.26 of the Constitution. The relevant provision of the Constitution is s.26(3), which thus stipulates:

“3. The Attorney-General shall have power in any case in which he considers it desirable so to do –

(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person....

.....

“(6) The powers conferred on the Attorney-General by paragraphs (b) and (c) of subsection (3) shall be vested in him to the exclusion of any other person or authority...”

Now although the inquest Magistrate had expressly stated he was making *recommendations*, and the same has been referred to by learned counsel for the respondent as “opinion”, the formulation of the recommendation carries a different tenor and effect, as I would see it. For the learned Magistrate did not just make a finding on the circumstances in which a homicide had taken place; he went further and placed on the incident a typification as *murder*, and called for the applicant to be “*apprehended and arraigned before the High Court to be tried for the murder of her deceased husband...*”

Since the prosecutorial function, by s.26 of the Constitution, belongs in substance to the *Attorney-*

General, the inquest Magistrate's mandate was limited to stating his findings of fact, without preferring a particular course of prosecutorial action to be taken by the Attorney-General.

I will not, however, hold this shortcoming in the inquest-ruling to have compromised the prosecutorial decision later taken by the Attorney-General, as there is evidence that the Attorney-General has made reliance on not just the inquest-findings, but also on the records of evidence in the Police files. These foundations of prosecution have the effect of rendering the inquest proceedings, as such, essentially a historical record, and I hold that it will not by any means prejudice the applicant. The Attorney-General may proceed with prosecution, in accordance with the law.

Orders accordingly.

DATED and DELIVERED at Nairobi this 27th day of February, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Rao

For the Respondent: Mr. Mwangi