



**Kioko (DCD) v Republic (Criminal Revision E002 of 2024)
[2025] KEHC 9391 (KLR) (14 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 9391 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL REVISION E002 OF 2024**

TM MATHEKA, J

APRIL 14, 2025

BETWEEN

BENEDICT KYULE KIOKO (DCD) APPELLANT

AND

THE REPUBLIC RESPONDENT

JUDGMENT

1. An inquest into the death of Benedict Kyule Kioko the deceased was conducted by the Makindu Senior Principal Magistrate’s Court vide Inquest No. 1 of 2019. The court delivered a ruling on 11/10/2013 and stated that;

“Therefore, it is my considered view that the three rangers acted lawfully in course of their duty to safeguard the wildlife and in the circumstances, I do not find any illegality or unlawfulness in the action they took. They did not deliberately or intentionally cause the death of the deceased herein. I therefore direct this file to be closed with no further action.”

2. The ruling prompted the firm of Kilonzo & Co. Advocates to invoke the revisional jurisdiction of this court through a letter dated 11/01/2024. In the letter, the firm stated that they are on record for the family of the deceased and have instructions to apply for revision of the said ruling. The request for revision is on the following grounds:

- a. The death of the deceased was caused by an illegality or the misconduct of the three rangers; Ibrahim Godana Aden, George Otieno Afwamba and Ranger Kitheka as they were involved in the shooting of the deceased and they acted in contravention of the Police Act and the *Wildlife Conservation and Management Act* 2013 by unlawfully firing at the deceased thereby killing him.



- b. The learned magistrate correctly found that the deceased was shot by the three rangers on 15th February 2019 at page 12 of the findings/ruling. Further, in all the proceedings, the police officers admitted shooting the deceased at pages 10,11,12,13,14,15 of the proceedings.
 - c. The learned magistrate erred in misinterpreting the jurisdiction of the court by attempting to reach a finding of guilt or not guilty on the charge of murder at page 13,14 and 15 of the findings/ruling by holding that the court did not find any omission or unlawfulness or use of the excessive force by the three KWS officers contrary to the law.
 - d. Having found the cause of death was a result of gunshot wounds arising out of the shooting of the deceased by the three KWS officers, the magistrate ought to have ordered for charges to be brought against the police officers for either manslaughter or murder instead of finding that the rangers acted lawfully in cause of their duty and not finding illegality or unlawfulness at page 15 of the ruling.
 - e. The learned magistrate converted the inquest into a trial and purported to acquit the three KWS officers at page 14 and 15 of the findings contrary to the next date conferred on an inquest court.
 - f. The learned magistrate erred in determining the unlawfulness and or illegality of the shooting instead of referring those issues to a trial court.
 - g. The learned magistrate erred in closing the file after finding that the three KWS officers who shot the deceased are known and ought to have forwarded his opinion to the Director of Public Prosecutions under section 387(4) of the *Criminal Procedure Code* for further action that the office would deem necessary to take.
 - h. Since there is no avenue for an appeal by the family of the deceased person from the decision of the inquest, this court has been called upon to exercise jurisdiction of review order to do justice by vacating the magistrate order recommending closure of the file and determining the unlawfulness of the murder of Benedict Kyule and order that on the findings of criminal culpability, the ruling together with the opinion of the magistrate as to who was responsible for the death to be forwarded to the Director of Public Prosecution for his necessary action.
3. Directions were given that the matter be canvassed through written submissions and the same have been duly filed on behalf of the deceased's family. The State did not file submissions.

Submissions by Kilonzo & Co. Advocates

4. It was submitted that according to the post mortem report, the deceased died as a result of gunshot wounds and that the trial court found a nexus between the deceased and three KWS rangers. That it was therefore wrong for the court to reach a finding that the rangers action of shooting the deceased was not an omission, unlawful or excessive use of force. Relying on section 387 of the *Criminal Procedure Code* (CPC), it was submitted that the court misinterpreted the jurisdiction of an inquest court by attempting to reach a finding of guilty or not guilty on the charge of murder.
5. It was submitted that the court should have ordered for charges to be brought against the three rangers for either murder or manslaughter.
6. Relying on section 362 of the CPC, it was submitted that this court has jurisdiction to vacate the magistrate's finding and to order the DPP to exercise powers under Article 167 of the *Constitution*.



7. It was submitted that the issue of whether the deceased had a gun or not is for the trial court and could not be resolved by the inquest court. That the killing cannot be justified under section 112 of the *Wildlife Conservation and Management Act* and as such, it was unlawful and it was wrong for the inquest court to find that it was a reasonable action taken by the three rangers. It was submitted that according to the evidence on record, an offence of murder was committed by the three police officers and they should be charged with murder contrary to section 203 as read with section 204 of the *Penal Code*.
8. Reliance was placed on the Republic Thro' Cid Mwingi -vs- Julius Kilonzo Muthengi [2015] eKLR where the court held;

“The learned magistrate, in the ruling found that a number of people were connected to the death of the deceased, but that it was not known who among them was responsible for the fatal blow. He nonetheless specifically mentioned Kalelu Kavusuki as an accomplice or an accessory after the fact to the killing of the deceased. The magistrate however expressed an opinion that he did not know the person who had committed the offence and recommended a civil claim for unlawful death and closed the file.

In my view the magistrate should not have recommended a civil claim by the family of the deceased. The law did not confer on him such powers. The magistrate should have recorded the findings on criminal culpability as well as his opinion that it was not specifically known who had killed the deceased and forwarded his opinion to the Attorney General, now Director of Public Prosecution, under Section 387(4) of the *Criminal Procedure Code*, for whatever action that Office would deem necessary to take.

Having found that the learned magistrate was wrong in recommending a civil claim and closing the file and since in my view there is no avenue for an appeal by the family of a deceased person from the decision of an inquest, in my view this court's review jurisdiction is called into play in order to do justice. I thus exercise the review powers of this court delete or vacate the magistrate's order recommending a civil claim and closure of the file. Instead I order that based on the findings on criminal culpability the ruling together with the opinion of the magistrate as to who was responsible for the death be and is hereby forwarded to the Director of Public Prosecution for his necessary action.”

9. The State did not file submissions.
10. The only issue for determination is whether this court should revise the ruling of the inquest court.
Analysis & Determination
11. The revisional jurisdiction of this court is codified in section 362 of the CPC which provides that;

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”
12. It has been argued on behalf of the deceased's family that the learned magistrate misinterpreted the jurisdiction of an inquest court by attempting to make a finding of guilt/not guilty.
13. A Magistrate's power to conduct an inquest is found in section 386(1) as read together with section 387 of the CPC thus;



386(1) The officer in charge of a police station, or any other officer specially empowered by the Cabinet of CPC Secretary in that behalf, on receiving information that a person—

- (a) has committed suicide;
- b. has been killed by another or by an accident;
- c. has died under circumstances raising a reasonable suspicion that some other person has committed an offence; or
- d. is missing and believed to be dead;

shall immediately give information thereof to the nearest magistrate empowered to hold inquests, and, unless otherwise directed by any rule made by the Minister, shall proceed to the place where the body of the deceased person is, and shall there make an investigation and draw up a report on the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), the marks appear to have been inflicted; and the report shall in the case of paragraph (a), (b) or (c); be forwarded forthwith to the nearest magistrate empowered to hold inquests; and in the case of paragraph (d) shall immediately send to the Director of Public Prosecutions through the Inspector- General of the National Police Service as full a report as possible together with details of all supporting evidence relating to the circumstances surrounding the disappearance and the grounds upon which the death of that person is presumed to have taken place.

Section 387 CPC

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.
2. Whenever the magistrate considers it expedient to make an examination of the dead body of a person who has been already interred, in order to discover the cause of his death, the magistrate may cause the body to be disinterred and examined.
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. (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 Director of Public Prosecutions.
5. If at the termination of the inquiry the magistrate is of the opinion that no offence has been committed, he shall record his opinion accordingly.



6. In the case of an inquiry relating to a missing person believed to be dead the magistrate shall at the termination of the inquiry report the case together with his findings to the Director of Public Prosecutions and shall make recommendations as to whether or not the period regarding the presumption of death provided for by section 118A of the *Evidence Act* (Cap. 80) should be reduced and if so what lesser period should, in the circumstances of the death, be substituted for the period of seven years.
14. From the above provisions, it is clear that the mandate of a magistrate holding an inquest is, inter alia, to give an opinion as to whether the commission by some known person or persons of an offence has been disclosed; in which case the magistrate should 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.
15. To elaborate the nature of an inquest, the court) in *Kemei -vs- Director of Public Prosecutions & another (Criminal Appeal 52 of 2020)* [2022] KEHC 12153 (KLR) (27 July 2022) stated that;

“An inquest is a judicial inquiry conducted to determine the surrounding circumstances and the cause of a person's death. It is an inquiry that examines witnesses on oath who testify on any relevant matter or information in order to establish as to who the deceased was, how and under what circumstances he met his death. The inquest is an inquiry to establish material circumstances in respect of the death of the deceased. It is an investigative process. This is clear from the provisions of sections 387 (4) and (5) of the *Criminal Procedure Code*, which read as follows:(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 Director of Public Prosecutions (DPP).(5)If at the termination of the inquiry the magistrate is of the opinion that no offence has been committed, he shall record his opinion accordingly.”
16. The Black's Law Dictionary defines an inquest to mean;

“an inquiry by a coroner or medical examiner sometimes with the aid of a jury into the manner of death of a person who has died under suspicious circumstances or who has died in prison.....”
17. It is therefore clear that an inquest is an investigation into the facts and circumstances surrounding a death. An inquest court is different from a trial court, and cannot therefore apportion culpability/liability or exonerate from culpability /liability as that is the preserve of a trial court. The law states that the inquest court will record its opinion and depending on what the opinion is, send the same to the appropriate authority or agency as provided for by law.
18. In the English case of *R (On the application of Maughan -vs- Her Majesty's Senior Coroner for Oxfordshire)* 2020 UKSC 46 Supreme Court of the United Kingdom; the court stated:

“An inquest was a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which were suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there were no parties, there was no indictment, there was no prosecution, there was no defence, and there was no trial, simply an attempt to establish facts. It was an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accused and the accused defended.”



19. In this matter the learned magistrate established a nexus between the deceased's death and three KWS Rangers. From page 12 of his ruling the learned trial magistrate stated ;

“ that it is clear that the deceased was shot in the exchange of fire between the three Rangers and the suspected poachers, who as evidence shows the deceased was among them although no other person was seen or evidence led to show that other suspected Poachers were involved. The only evidence by the two Rangers suggested involvement of other suspected poachers was that they stated that they heard gunshots of an automatic rifle like AK-47 which shot running away from the scene ...The investigating officer visited the scene found the deceased body lying in the bushand the wooden 303 rifle was at the scene next to the body of the deceased ...There was a spent cartridge collected from the scene, the ballistic expert P W 10 confirmed that ...the wooden rifle 303 had fired one cartridge which was collected next to the body of the deceased which was produced as P exhibit 4...

20. It was not denied by the KWS rangers that they shot the deceased person. The ballistics expert confirmed that this and so did the investigating officer. The reason given was that the deceased was among poachers who ran away.

21. I note with concern that the investigating officer and ballistics expert did not answer the question of the alleged automatic rifle fire that is said to have caused the reaction by the rangers into firing numerous times. Where were these cartridges found? Other than where the body of the deceased was lying with one spent cartridge next to his body, where were the other cartridges recovered from? PW11 testified to collecting cartridges. He produced photos of the scene but none indicated where the spent cartridges were found, including the ones alleged to have come from an unknown gun/(s)

22. These questions remained unanswered from the inquest and it is not clear how the court could arrive at the conclusive determination that indeed the deceased was in a group of poachers, yet the court itself noted that there was no such conclusive evidence.

23. Hence it was not within the powers of the inquest magistrate to exonerate the KWS personnel from liability/culpability. and order that the file should be closed with no further action. That could only have come from a trial court.

24. A person died. The persons who killed that person were identified in the inquest. Whether or not they ought to be charged with any offence it is within the ambit of the DPP. Whether they acted in the course of their duty or shot the deceased in self defence or in the defence of wildlife, that is for the trial court to determine should the DPP determine that there was an unlawful killing to warrant a charge.

25. In the circumstances and pursuant to the powers of this court under article 165(6) and (7) of the Constitution which states:

6. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

7. For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice

26. From the foregoing I find that the application has merit for revision is merited.

27. The finding of the subordinate court be and is hereby set aside and substituted with an order that the file be placed before the DPP for his necessary action.



28. Orders accordingly.

Notice issued to parties

DATED, SIGNED AND DELIVERED VIA CTS ON 14TH APRIL 2025

MUMBUA T MATHEKA

JUDGE

Court Assistant Chrispol.

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

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