



REPUBLIC OF KENYA



KENYA LAW
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**Mbugua v Republic (Criminal Revision E155 of 2024)
[2025] KEHC 4835 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E155 OF 2024
FN MUCHEMI, J
APRIL 24, 2025**

BETWEEN

JAMES MBUGUA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. This application dated 12th November 2024 seeks for orders that all crucial evidence not called for during the hearing be admitted and that all witnesses who recorded statements and did not testify to be called to do so. The applicant further seeks for the setting aside and review of the orders issued on 22nd August 2024 and all consequential orders.
2. The applicant states that he is PF No. 199xxxxxxx, an inspector of Prisons at GK Prison Thika where he was an early shift officer duty officer. The applicant states that on 22nd August 2024, judgment was issued in Inquest No. 4 of 2020 where further investigations or prosecution of himself and others were preferred in relation to the death of the deceased James Kamau Njoroge. The applicant argues that the grounds on which the said judgment was based on was not conclusive as more evidence and witnesses ought to have been called to testify on the issues relating to the death of the deceased.
3. The applicant states that on 22/7/2016 as he was taking over duties he was accompanied by night shift sergeant Kioko and as they were conducting the head count, one remandee in charge Daniel Kamande Njuguna informed them that the deceased was causing nuisance during the night. The applicant avers that he instructed Senior Sergeant Okwara to take the deceased to Thika Prison medical facility at 8 am from where he was referred to Thika Level 5 Hospital. At around 11.15am, he received a call from the hospital that the inmate had died while undergoing treatment.



4. The applicant avers that he never noticed any injuries on the deceased during the morning unlock with Sergeant Kioko and further that if he knew an assault had happened, he would have acted on it immediately. The applicant further avers that Inspector Opiyo whom he shared duty office roles with, never wrote a statement nor was he called to testify as to the happenings of that day, which was very irregular as he would have collaborated his story.
5. The applicant further avers that the main witnesses who were remandees namely Moses Kamau Njora, Daniel Kamande Njuguna, Anthony Mugendi Mwari and Gaspher Kagiri Njubi who were on the same ward together with the deceased did record their statements with the investigating officer but the court did not call for their evidence.
6. The applicant states that it is an open public inquest and any evidence or information that can shed light on it should be called for. the applicant requests for the inquest to be repealed and all critical witnesses be availed in court to give evidence.
7. The applicant states that there has been a recommendation that he and other officers be charged with murder contrary to Section 203 of the *Penal Code*.
8. The applicant avers that the Prisons Department where the deceased was remanded were not involved in the post mortem procedure which was unprocedural.
9. The applicant argues that he is not involved in any way nor did he take part in the events that led to the death of the deceased and thus the directions in the judgment that the Office of Public Prosecution to prosecute in unfair and prejudicial to him.
10. The respondent filed grounds of opposition dated 15th January 2025 in opposition to the application. The respondent states that it is not enough to merely state that the rights of the applicant have been violated and infringed without specifically stating the nature of violations of such rights. The respondent avers that Article 157(6)(a) of the *Constitution* mandates the Director of Public Prosecutions 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. Further, the Director of Public Prosecutions does not require the consent of any persons or authority for the commencement of criminal proceedings and in exercise of his powers or functions shall not be under the direct control of any person or authority.
11. The respondent argues that the instant application is pre-mature as the Director of Public Prosecution has not made a decision whether or not the applicant ought to be charged with any offence. The respondent further argues that the applicant has not demonstrated any issues for the court to determine.
12. The respondent states that the applicant's rights as claimed are not absolute but are subject to some limitations. Further the applicant has not demonstrated that he will suffer substantial in justice if charged in court as criminal cases are determined on merits.
13. The applicant avers that the applicant has not challenged the correctness, legality or propriety and regularity of the lower court proceedings as envisaged in a revision application but sought for orders that cannot be sought in a revision application.

The Respondent's Submissions.

14. The respondent submits that Inquest No. 4 of 2020 Thika Law Courts was commenced to inquire into the circumstances leading to the death of John Kamau Njoroge. The deceased was a remand prisoner to Thika GK Prison when he met his death while being attended at Thika Level 5 Hospital



after developing a strange behaviour fighting unknown illusions that he could see mirrors falling where it is alleged he was hitting the walls injuring his lungs.

15. The respondent submits that the opinion or recommendation of the inquest magistrate should not be regarded as an institution of criminal proceedings as the court did not arrogate itself with any jurisdiction in the subsequent proceedings. The trial court was within the remit of Section 387(4) of the *Criminal Procedure Code* and made no enforceable orders in respect of its finding. In the inquest it is clear that the learned magistrate came to the conclusion that the applicant had a hand in the deceased's death.
16. The respondent submits that the inquest magistrate formed an opinion in terms of Section 387(3) of the *Criminal Procedure Code* that there was the commission by the applicant and other persons of an offence and recommended that the applicant be charged. Thus the respondent relies on the case of Philips Otieno vs Republic (no citation given) and submits that the ruling of the trial magistrate does not amount to instituting any type of action, it is an opinion or advice proposing a course of action.
17. The respondent submits that the instant application is premature and purely speculative as no decision has been made as to whether or not to charge the applicant with any criminal offence.

The Law

18. This court is empowered by Article 165(6) of the *Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

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.

19. Section 362 of the *Criminal Procedure Code* provides:-

The High Court may call 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.

20. Section 364(1) of the *Criminal Procedure Code* provides:-

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may"-

- a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
- b. In the case of any other order other than an order of acquittal alter or reverse the order.

- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.



21. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of *Joseph Nduvi Mbuvi vs Republic* [2019] eKLR:-
- “In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”
22. Similarly Nyakundi J in *Prosecutor vs Stephen Lesinko* [2018] eKLR outlined the principles which will guide a court when examining the issues pertaining to Section 362 of the *Criminal Procedure Code* as follows:-
- a. Where the decision is grossly erroneous;
 - b. Where there is no compliance with the provisions of the law;
 - c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
 - d. Where the material evidence on the parties is not considered; and
 - e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.
23. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.
24. Section 362 of the *Criminal Procedure Code* addresses cases for revision where the magistrate has made a mistake, irregularity or illegality. The High Court has power to correct such misdoings by giving the appropriate orders in an application for revision.
25. I am guided by the provisions of Section 362 and 364 of the *Criminal Procedure Code* in dealing with this application whereas the applicant I obligated to demonstrate that the magistrate conducting the inquest committed any of the outlined in Section 362.
26. The magistrate in the inquest heard over ten (10) witnesses whose evidence is summarized in his ruling. The duty of the magistrate was to evaluate the evidence and determine whether a criminal offence in relation to the death was committed and whether there is sufficient evidence to charge any suspects who may have been involved in the death of the deceased. In the same death, the cause of death and the surrounding circumstances must be taken into account.
27. I have perused the ruling of the magistrate and found that he noted that the injuries on the deceased inmate who was in custody of Thika Main Prison at the time of his death. There was evidence that some of the Prison Officers including the applicant were found to have attempted to cover up the murder



of the deceased. It was recommended that the three prison officers be investigated further with a view of being charged with the murder of the deceased.

28. The applicant herein prays for orders that all crucial evidence not called for during the inquest be admitted and that all witnesses who recorded statements and did not testify during the inquest be called to testify. The application also seeks for orders of review, varying and setting aside the judgment/ruling of the inquest delivered on 22/08/2024.
29. The magistrate recommended that the three prison officers be investigated with a view of finding out whether there is sufficient evidence to charge them with the murder of the deceased. The matter is now in the hands of the investigators and with the office of the Director of Public Prosecutions (ODPP) under investigations. The investigations in the matter are not restricted to the applicant and the other two officers but the department of the Director of Criminal Investigations must cover all the relevant areas and come up with this recommendation to the Respondent.
30. The holding of inquest is meant to give recommendation for further investigations, It is important those investigations be allowed to take place. I am of the view that setting aside the ruling of the inquest not serve any useful purpose. The calling of witnesses who recorded statements and did not testify in the inquest, would not add value to the investigations. However, as I have already observed, the investigations in this matter are not restricted to only those witnesses who testified, but the net can be cast as wide as possible based on the leads that will be available.
31. Section 362 of the [Criminal Procedure Code](#) requires that the applicant demonstrate that the magistrate who conducted the inquest committed a mistake, illegality, irregularity or impropriety in issuing any order or in making any finding. The applicant herein does not blame the magistrate for any impropriety mistake or irregularity. In fact he blames the initiators of the inquest or failing to call crucial evidence which does not fall under the provisions of Section 362.
32. I have considered all the foregoing issues and I am of the view that the applicant has failed to pass the test set under Section 362 of the [Criminal Procedure Code](#).
33. This application dated 12th November 2024 lacks merit and it is hereby dismissed.
34. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF APRIL 2025.

F. MUCHEMI

JUDGE

