



REPUBLIC OF KENYA



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**Waweru v Republic (Criminal Revision E187 of 2023)
[2024] KEHC 2410 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL REVISION E187 OF 2023
RM MWONGO, J
MARCH 6, 2024**

BETWEEN

GABRIEL WANDERE WAWERU APPLICANT

AND

REPUBLIC RESPONDENT

*(In respect of a Ruling by Hon G. Waithera delivered on 31st October
2023 in the Inquest Court in CM Criminal Inquest No E007 of 2022)*

RULING

1. Following the death of one Joseph Wachira Muriithi on 5th December 2022, an inquest was conducted by a Magistrate in the Chief Magistrates Court Criminal Inquest No E007 of 2022. The inquest court determined that the deceased died as a result of being hit by a motor vehicle Registration No KCT XXXX, a Toyota Sienta.
2. In the ruling in the Inquest Court, the learned Magistrate found that an offence was committed by a known person; and recommended that Gabriel Wandere Waweru, the applicant herein, be charged with the relevant offence in respect of the death of the deceased.
3. Aggrieved by certain aspects of the said ruling, the applicant filed a letter dated 10th November, 2023 seeking revision by this Court of the Inquest ruling. The grounds of the request for revision are, *inter alia*, that:
 - i. Under section 387 of the Criminal Procedure Court, the trial magistrate was required to express her opinion as to whether the commission by some known person or persons of an offence had been disclosed;
 - ii. In her ruling, the trial magistrate at paragraphs 20,21, 22 and 24 made findings that went beyond the expectations of an inquest.



- iii. These findings by the trial magistrate went too far over and beyond what was required of the trial magistrate and amount to findings of guilt on the part of the suspect which is not within the province of an inquest trial;
 - iv. The findings, having been made pursuant to a judicial process, if allowed to stand would be binding and very prejudicial to the suspect if charges are preferred against him since it is apparent that his guilt has already been determined and would therefore compromise his right to a fair trial.
 - v. The High Court has jurisdiction under section 362 of the Criminal Procedure Code to call for the record of the subordinate court and review the correctness, legality or propriety of the findings contained in the ruling of 31/10/2023.
4. The court ordered that the DPP be served and that parties should file submissions. In addition, the Inquest file was called up by the court for perusal.

Applicant's Submissions

5. The applicant submits that an inquest is not a criminal trial but an inquiry into the cause of a death in the circumstances listed under sections 386(1) and 387(1) of the *Criminal Procedure Code*.
6. Further, the applicant urges that a magistrate exercising inquest jurisdiction must be careful not to make inferences of guilt or conclusive findings on the commission of an offence that would prejudice a criminal trial should the suspect be eventually charged. This is especially so in light of Article 50 of *the Constitution* that guarantees the right to a fair hearing. In particular, Article 50 (2)(a) guarantees the right to be presumed innocent until the contrary is proved.
7. In the letter dated 10th November 2023, the Applicant has taken issue with the findings of the trial magistrate. At paragraphs 20, 21, 22 and 24 of the ruling, the trial magistrate makes findings that go too far beyond what is expected of an inquest.
8. The applicant submits that the trial magistrate should have shied away from making findings in the terms: that the "evidence proved beyond doubt that Gabriel hit the deceased and caused his death"; that "there was a falling below the standard of care of skill of a competent and experienced driver by Gabriel Wandere"; that "Gabriel did not exercise the necessary caution", and that "...leads this court to the conclusion that Gabriel was travelling at a high speed"
9. The applicant asserts that these findings are not mere opinions but are couched in a manner that clearly makes them pronouncements of guilt of the suspect thereby taking away his presumption of innocence. By making these findings, the trial magistrate fell into error of law.

Respondent's Submissions

10. The respondent filed submissions dividing the contentions into issues for determination as follows.

Whether the recommendation of the trial Court conducting the inquest was erroneous, unfair and unjustified

11. The respondent submit that inquest is conducted by the Magistrate's in compliance with Section 387 and 388 of the *Criminal Procedure Code* in instances of occurrences of death where it is suspected that there was foul play and upon conclusion, a recommendation is made for the arrest and commencement of criminal Proceeding against a suspect if it discloses the commission of an offence.



12. The evidence adduced at the inquest led to a finding by the trial Court that the Ex-parte Applicant could have been involved in the offence of causing death by dangerous driving.
13. The respondent submits that the inquest court fully complied with section 386(1)(b) of the CPC which deals with the steps to be taken by the investigating officer. The section provides:

“Sec 386(1)(b)(1) The officer in Charge of a Police Station, or any other officer specially empowered by the Minister in that behalf, or receiving information that a person-

- (b) Has been killed by another or by an accident;

Shall immediately give information thereof to the nearest Magistrate empowered to hold inquest, and, unless otherwise directed by the 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 be forwarded forthwith to the nearest Magistrate empowered to hold the inquests;”

14. The respondent cited the case of Thuira Mwangi & 2 others v. EACC & 3 others High Court Petition Number 36 of 2013, where the court stated that only the trial Court can make a finding on whether or not a Criminal offence was committed after hearing the evidence.

Whether the implementation of the recommendation of the trial Court will occasion miscarriage of justice

15. The respondent further submitted that the trial Court after hearing of the inquest recommended that the Applicant be charged. The applicant does not challenge the process of the trial Court in conducting the inquest. Rather, he is aggrieved by the elaborate and accurate analysis by the trial Court in finding that he was culpable.
16. The trial Court is mandated to pronounce itself properly after taking and hearing all the witnesses the circumstances that led to the death of the deceased person that is not disputed.
17. There is no denying that the Applicant was the driver of the Motor Vehicle that hit and killed the deceased. The elaborate analysis by the trial Court in finding the Applicant culpable should not form a defense to halt Criminal proceedings against the Applicant.

Issues for Determination

18. The only issue for determination is whether the Inquest Court exceeded the scope of its mandate in its determination

Analysis and Determination

19. The applicant seeks revision of the ruling made on 31st October, 2023 for reasons that in her ruling the trial magistrate at paragraphs 20, 21, 22 and 24 made the findings, inter alia, that:

- “ 20. Pieced together, these strands of circumstantial evidence proved beyond doubt that Gabriel hit the deceased and caused his death on the night in question.



21. A further analysis of the evidence shows that there was a falling below the standard of care or skill of a competent and experienced driver by Gabriel Wandere in the way he drove his vehicle when the circumstances are considered.
 22. The accident occurred during nightfall in an area with no street light. Because of this, a motorist's vision would be greatly impaired, and a prudent driver would know to drive carefully under such conditions. The facts presented before this court show that Gabriel Wandere did not exercise the necessary caution.
 24. Had Gabriel Wandere been more cautious, he would have noticed the deceased before he hit him. The gravity of the injuries sustained by the deceased and the force of the impact that caused his body to land 2 meters off the road leads this court to the conclusion that Gabriel was travelling at a high speed."
20. The applicant argues that under Section 387 of the *Criminal Procedure Code*, the magistrate conducting an inquest only has power to "record her opinion". In this case she instead recommended that the applicant should be charged with the relevant offence.
 21. Further, the applicant argued that these findings by the trial magistrate went too far over and beyond what was required of the trial magistrate and amount to findings of guilt on the part of the suspect which is not within the province of an inquest trial.
 22. The applicant thus seeks that this court determine that the above paragraphs "went too far over and beyond what is required of the trial magistrate"; Accordingly the applicant is, by implication, seeking that these paragraphs be found to be pronouncements of guilt taking away the presumption of innocence of the applicant. That is my understanding of the submission by the applicant.
 23. The scope of the power of a magistrate in an inquest is found in section 386 read together with Section 387 of the *CPC*. Section 386 has already been quoted above; Section 387 provides:
 - "(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.”

24. It is clear that the mandate of a Magistrate holding an inquest is, inter alia, to determine whether, in his or her opinion, an offence has been disclosed by a known person, and if so to issue a summons or warrant of arrest. The object of the power is to ensure that the person suspected of having committed the offence is secured to attend and answer the charge.

25. The nature of an inquest was described by the court in *Kemei v Director of Public Prosecutions & another* (Criminal Appeal 52 of 2020) [2022] KEHC 12153 (KLR) (27 July 2022). There, Bwonwong’a J held:

“An inquest is a judicial inquiry conducted to determine the surrounding circumstances and the cause of a person’s death of a deceased person. 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.”

26. At the conclusion of an inquest, the inquest court is required to make specific orders. In this case the inquest court found that an offence had been committed by a known person, the applicant. The inquest court then recommended Under Section 387 (3) that the applicant be charged with the relevant offence in respect to the death of Joseph Wachira Murithi.

27. The trial magistrate is entitled to make an opinion which prompts a charge to which a person must answer.

28. The power of revision which this court has been asked to exercise is to find that the four paragraphs remove the applicant’s presumption of innocence and to expunge them. The power of revision vested in this court by section 362 of the *CPC* is as follows:

“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” (Emphasis added).



29. The question here is; do the impugned findings of the magistrate in the inquest court fall afoul of the law? Are the paragraphs or any aspect of them incorrect, illegal or lacking in propriety in terms of section 362 of the CPC? This is what the court is required to establish.
30. The applicant is apprehensive that the inquest findings will be admitted as evidence and, having in his opinion stripped him bare of his presumption of innocence, will be relied upon by the subsequent criminal trial court to find the applicant guilty.
31. The court did not convict the applicant for the offence of causing the death of the victim.
32. In Manyibe & 4 others v Office of Director of Public Prosecutions & 2 others (Criminal Revision E001 of 2022) [2023] KEHC 2757 (KLR) (24 March 2023) it was stated that an inquest takes the nature of criminal proceedings. Where section 387(3) is invoked, the suspect would be in a position similar to that of a defendant in criminal proceedings, as he would have to deal with the adverse evidence against him. There, Musyoka J held:

“Whoever initiates the inquest proceedings bears the responsibility of prosecuting them. There can be no criminal proceedings without a prosecutor, and inquest proceedings are, in nature and character, criminal proceedings. Is there a defence? Not in the strict sense of the word, but where section 387(3) kicks in, the suspect would be in a position similar to that of a defendant in criminal proceedings, as he would have to deal with the adverse evidence against him. Is there a trial in inquest proceedings? Trials are not just about persons, they are also about issues. In an inquest, there are issues that the magistrate would be required to resolve, whether or not there are parties to the proceedings, other than the prosecutor. The hearing is intended to provide material to the magistrate to help him resolve the issues. The hearing is the trial, of the persons before the court in criminal proceedings, and of the issues before the court, in civil and criminal proceedings. Whenever a hearing has to be conducted in any matter, there would be a trial, for a hearing becomes necessary where there are issues for trial or determination. Inquests are conducted to determine issues, which are clearly set out in sections 386, 387 and 388 of the Criminal Procedure Code.”

33. An inquest is a judicial inquiry or investigation to ascertain the facts relating to an incident. “Inquest” is defined in Black’s Law Dictionary 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.....”

34. The report that is made to the magistrate for inquiry under Section 386(1) CPC, in a case such as the present one, is to investigate whether a person has been killed by another or by an accident; or under circumstances raising a reasonable suspicion that some other person has committed an offence. This is under sub-sections 1(b) section and 1(c) of the CPC:

“(1) The officer in charge of a police station, or any other officer specially empowered by the Minister in that behalf, on receiving information that a person— (a) has committed suicide; or (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; (d) is missing and believed to be dead; shall immediately give information thereof to the nearest magistrate empowered to hold inquests”



35. Thus, where there is such a death, the officer in charge of a police station is required to give information to a magistrate empowered to hold inquests. Under section 387 (1) CPC the magistrate is required to:
- “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”
36. It seems to me that to “hold an inquiry into the cause of death” in these cases essentially means to investigate all facts and circumstances that would enable the inquirer to come to an appreciation or understanding of the cause of the death by an accident or the death under suspicious circumstances. It is in a sense a no holds barred and unlimited investigation that can include any party or person or place or thing that will enable the investigator to unearth the truth.
37. The inquiry by the magistrate is statutorily expected to be “instead of or in addition to” an investigation by a police officer or prison officer. Given that comparative, it is clear to me that an inquest by a magistrate is really intended to be an investigation into the facts and circumstances causing the death, but cannot apportion liability as that is the role of a judge or magistrate acting under criminal law.
38. I therefore think that it is not for an inquest court to give anything more than an opinion as to the cause of death without imputing liability or blameworthiness. An investigation in an inquest by a magistrate approximates one by a police officer or prison officer. Therefore, the language used must be investigatory. Similarly, the standard of proof required in an investigation report cannot by its nature be expected to meet the standard of proof beyond reasonable doubt as that is left for the criminal jurisdiction and not the investigative jurisdiction.
39. The criminal jurisdiction is invoked when the opinion arising from the inquest discloses an offence and a summons or warrant is issued for the arrest of the person implicated to answer to a charge framed for a prosecution by a prosecutor. This is what Musyoka J meant in the Manyibe case above when he said:
- “...but where section 387(3) kicks in, the suspect would be in a position similar to that of a defendant in criminal proceedings, as he would have to deal with the adverse evidence against him.”
40. In R (On the application of Maughan v Her Majesty’s Senior Coroner for Oxfordshire) 2020 UKSC 46 Supreme Court of the United Kingdom an inquest was described in the following terms:
- “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.”
41. I agree with the above position of the English Supreme Court. In Maurice Ndoe & Kinyiua Mwelenga v Republic [2016] eKLR, the inquest court concluded its ruling by utilising language that clearly did not apportion liability in stating that:
- “The courts findings were therefore that he undoubtedly died in police custody. The concerned police officers no doubt share some degree of blame for his demise but the



court cannot apportion liability beyond that without delink (sic- delving) into the realm of speculation.”

42. In other words, the language to be used in an inquest or investigation ought not to be such as to apportion blame or liability as the investigation report will be dealt with in the criminal trial to follow after the inquest or investigation. The inquest or investigation puts together material that advises or informs the prosecution when conducting the subsequent criminal case.
43. It must be remembered that an inquest is an inquisitorial process not an adversarial process; It has no prosecutor; it has no defendant or defence counsel; therefore, it has no safeguards, strictu sensu, for the constitutional conduct of a criminal proceeding properly so called. The investigative process is not measured against, and does not measure with any standard of proof there being no defendants or accused persons under measurement. Inquest courts must not fall into the temptation that they are conducting a trial – they are not, they are conducting an inquiry just as a police officer or prison officer would.
44. Indeed, in the present case, the applicant was not called to testify did not table material before the inquest court. Accordingly, he cannot be condemned
45. In the case of *Kemei v Director of Public Prosecutions & another* (Criminal Appeal 52 of 2020) [2022] KEHC 12153 (KLR) (27 July 2022) Bwonwong’a J held that that in an inquest, the magistrate has the obligation to weigh the evidence of both the prosecution and the suspect and his witnesses. I do not think that the suspect must be the subject of questioning in the inquest. But even if he participates, he is merely giving information to an investigator, and is not subjected to the criminal trial safeguards.
46. In the result I agree with the applicant that some aspects of the inquest report dated 31st October, 2024, are injurious to the applicant. I would strike them out as follows:
 - a. In paragraph 20 the words “evidence proved beyond doubt that Gabriel hit the deceased and caused his death”; are expunged
 - b. In paragraph 21 the words “there was a falling below the standard of care of skill of a competent and experienced driver by Gabriel Wandere”; are expunged
 - c. In paragraph 22 the words “Gabriel did not exercise the necessary caution”, are expunged, and
 - d. In paragraph 24 the words “...leads this court to the conclusion that Gabriel was travelling at a high speed” are expunged.
47. Orders accordingly.

DATED AT KERUGOYA THIS 6TH DAY OF MARCH, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Gabriel Wandere Waweru, the Applicant
2. Mr. Mamba for the State Counsel
3. Mr. Murage, Court Assistant

