



Mwiti v Director of Public Prosecutions & another (Criminal Revision E104 of 2024) [2024] KEHC 11095 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL REVISION E104 OF 2024
EM MURIITHI, J
SEPTEMBER 19, 2024**

BETWEEN

LABAN MWITI APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 6/2/2024 pursuant to sections 362, 364 and 387 of the *Criminal Procedure Code*, Articles 47, 50 and 165(3), (6) and (7) of the *Constitution*, sections 3, 4, 5, 6 and 7 of the *Fair Administrative Actions Act* and all other enabling provisions of law, the applicant seeks:
 1. Spent
 2. Spent
 3. Spent
 4. That the honorable court be pleased to call for and review and/or set aside and/or vacate the ruling (wrongly dated 3rd March 2024) issued in the chief magistrate's court in Isiolo Inquest No. 1 of 2019.
 5. That this Honorable court do make any other orders it deems fit in the circumstances.
2. In his supporting affidavit sworn on even date, the applicant avers he is the director of club 280 in Isiolo town. Following the recommendation of the chief magistrate's court in Isiolo Inquest No. 1 of 2019 of the arrest and prosecution of the manager of club 280 for the murder of Naman Karani Mungania, he is apprehensive of his imminent arrest, for an offence he knows nothing about. He was



not aware of the inquest proceedings and neither did he participate in any way. He is advised by his advocates that the inquest proceedings were conducted in an irregular, improper and incorrect manner and thus the resultant recommendations were illegal and in contravention of the clear provisions of section 387 (3) of the *Criminal Procedure Code*, and this court is obligated to call for the record in Isiolo Inquest No. 1 of 2019 to set it aside. The trial court erroneously made the harsh and adverse recommendations without summoning him or giving him a chance to be heard. A casual look at the ruling reveals that there is no evidence linking him with the offence of murder and he stands to suffer irreparably and great prejudice unless this court intervenes. He relies on *Manyibe & 4 Others v Office of Director of Public Prosecutions & 2 Others* (Criminal Revision E001 of 2022) [2023] KEHC 2757 (KLR) (24 March 2023) (Ruling).

Submissions

3. The application was urged orally and a ruling reserved.
4. The DPP conceded the application as follows:

“Mr. Masila:

Only 6 witnesses were called of a total of 18 witnesses who recorded statements. The applicant did not record a statement with the police in as much as the alleged offence occurred at his Bar in Isiolo. Furthermore, the trial magistrate did not summon the applicant and went ahead to recommend charges against him. It is for those reasons that I concede the application. However, this will not stop the 1st Respondent DPP from charging the applicant if we establish that an offence has been committed taking into consideration evidential threshold and public interest threshold. The decision was based on an Inquest not DPP’s decision. The DPP should not be estopped from charging he applicant.”

5. For the Applicant, it was urged that a retrial would be inappropriate as follows:

“Mr. Mutuma G.

I pray that the application be allowed in terms of prayer No. 4 that the entire ruling is set aside. We should not have a retrial.

The Court should set aside the order and close the Inquest. The conditions for ordering retrial is that applicant should not be prejudiced. The DPP would have a chance to reopen the case patch political evidence. The proceedings were not defective. It is that there was lno evidence that could lead to a conclusion that the applicant was involved. The Inquest should be closed.”

Determination

6. The issue for determination is whether the trial court exceeded the scope of its mandate under section 387(3) of the *Criminal Procedure Code*.
7. Section 387 of the *Criminal Procedure Code* provides for inquiry by a magistrate into the cause of death as follows:

“(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.”

8. The import of that provision was expounded 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) (Ruling), by the Court (W. Musyoka J.) as follows;

“This provision is about what the magistrate should do after forming the opinion that some known persons were responsible for the death under inquiry. He should cause them to attend court before him, whether by way of summoning them or by getting them arrested, to answer to the charges. That is to say that such persons officially become suspects in the inquiry, and are required to attend the inquiry, thereafter, as suspects, to answer to the allegations made against them in that inquiry as suspects. Such suspects would, of course, be entitled to legal representation as suspects. Once such suspects attend court, either in answer to summons or upon their arrest, the magistrate should commence the inquest *de novo*. The decision to require attendance of the suspects to answer to the charge could be made at any time of the inquest proceedings, either at the first appearance or before the oral hearings, in the middle after taking some evidence or at the termination in the final ruling. Where made in the middle of the proceedings, the proceedings would have to start *de novo*, so that the suspects participate in the proceedings as suspects, who would be entitled to the rights that accrue to accused persons. Where the decision is made in the terminal ruling, then the inquest proceedings have to start afresh. That is the purport of section 387(3). No one should be condemned unheard. The provision, in section 387(3), is designed to ensure that the suspects get an opportunity to have the case against them, as presented in the inquiry, to be set out in their presence, where they would have a chance to challenge it, by way of cross-examination of the witnesses, and where they would get a chance to take to the witness stand and tell their story from the perspective of a suspect, and not a mere witness. The final decision, at the end of the inquiry, on whether they ought to face murder or manslaughter or other charges, before the court with jurisdiction to try them for such offences, should



be made after they have had a chance to participate fully in the proceedings. Section 387(3) captures the fair hearing principles that are set out in Article 50 of the Constitution.”

9. At the conclusion of the inquest proceedings, the trial court, by its ruling dated 3/3/2024 held that:

“From the evidence on record, it was clear that on 17/7/2018 the Deceased was at Club 280 in Isiolo town. IW1 stated that he called and informed her that he was in the club. That he had taken a drink and could not foot his bills since he had no money. IW5 testified that the Deceased’s call data was last traced at Club 280 in Isiolo town. That he further interrogated the club’s watchman who informed him that he did see the Deceased while entering into the club on 17/7/2018 but did not see him while leaving. He further stated that the management of Club 280 denied seeing the Deceased at the premises, an assertion which to my mind is a mere denial to cover up on what really transpired at the Club on the material day. It is eminent that almost all the prosecution witnesses have stated that the deceased died as a result of trauma from a blunt object. IW5 adduced a copy of Post mortem report which shows that after examination, the Pathologist formed an opinion that the cause of death was trauma due to assault. From this evidence, I find that the deceased must have met his death in the hands of the management of the Club 280 when he was unable to foot his bill. Owing to the sufficient evidence to pointing at the culpability of the management of Club 280 in Isiolo town, I recommend that the then manager and proprietor of Club 280 be charged with the offence of Murder of Naman Karani Mungania. It is so ordered.”

10. The provisions of section 387 (3) of the Criminal Procedure Code reproduced herein above are explicitly clear that the mandate of the inquirer is, *inter alia*, to determine whether, in their opinion, the commission of an offence has been disclosed by a known person, and if so to issue a summons or warrant of arrest. Once the arrest has been effected, the said person is arraigned in court to answer to the charge.
11. The applicant herein must have learnt of the recommendation of the trial court with utter disbelief and dismay, since he neither knew of the existence of the inquest proceedings nor took part therein. That was an affront of his right to a fair hearing under Article 50 (1) of the Constitution, which guarantees to every person “the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
12. The finding that “that the deceased must have met his death in the hands of the management of the Club 280 when he was unable to foot his bill” was made without hearing applicant owner of the Club in breach of his fair trial guarantees of Article 50 pre-emptorily protected under Article 25 (c) of the Constitution. Article 50 (2) (k) of the Constitution which gives the right to every person accused to “to adduce and challenge evidence.” Moreover, “the management of the Club 280” in the Inquest ruling need not be the owner thereof.
13. This court finds that, in recommending his prosecution for the offence of murder of Naman Karani Mungania, the trial court condemned the applicant without hearing him, stripping him of his presumption of innocence under Article 50 (2) (a) of the Constitution and in breach of section 387 (3) of the Criminal procedure Code.



Orders

14. Accordingly, for the reasons set out above, the court finds that the recommendation by the trial court was irregular and in contravention of the provisions of Section 387 (3) of the *Criminal Procedure Code*, and it is set aside.

Order accordingly.

DATED AND DELIVERED THIS 19TH DAY OF SEPTEMBER, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Masila for the DPP.

Mr. Mutuma G. for the Applicant.

