



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW NO. 367 'B' OF 2010

IN THE MATTER OF: AN ORDER OF ARREST AND PROSECUTION OF ONE KENNEDY OWINO

AND

IN THE MATTER OF: CRIMINAL PROCEDURE ACT LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW BY KENNEDY OWINO

BETWEEN

KENNEDY OWINO.....APPLICANT

VERSUS

1. THE SENIOR RESIDENT MAGISTRATE'S COURT, KILIFI

2. THE HONOURABLE ATTORNEY GENERAL.....RESPONDENTS

RULING

The Application

1. The Notice of Motion application before the court is dated 11th October, 2010 filed by the Ex-parte Applicant. The motion prays for the following orders: -

1. An Order of Certiorari do issue to remove to the High Court and quash the Ruling of the Senior Resident Magistrate's Court No. 4 of 2007 on the 23rd August, 2010.
2. Costs of this application.

2. The application is premised on the grounds set out therein, and in the verifying affidavit of Mr. Kennedy Owino sworn on 27th September, 2010 and a statement of even date.

3. The Ex-parte Applicant's case is that he is an Inspector of Police currently stationed at Kasarani Police Station previously stationed at Mtwapa Police Station, Kilifi District. Sometime on or about 27th May, 2005 at about 2.30 a.m. while he was on duty at Mtwapa Police Station, he received a distress call about a robbery around Ndonya area within Mtwapa. He was deployed together with PC Charles Mwadime and PC Wambua to proceed to the scene and see what had happened. At the scene, the home of one Malimu, they met a vigilante group who informed them that the thugs had left, but they interrogated the victim who informed them that a group of about 8 people had attempted to attack but were repelled by dogs. They then returned to the police station and recorded the incident in the Occurrence Book.

4. While at the station, the Officer in Charge called him again at about 3.45 a.m. to attend to another call from the same area, and they then proceeded to the home of one Nassir Bajefa with the vigilantes. At the home of the victim they were informed that a group of 8 persons had attacked and injured the victim and at the same time stole Kshs. 15,000/=, watch and mobile phone. As they were still questioning the said Nassir Bajefa, they heard screams from a neighbouring home. The home belonged to one Mrs. Mumba. They went there to find what was happening. In the Applicant's group was PC Mwadime and some vigilantes. At the said home they saw two group of people whom they ordered to surrender but who ran away.

5. They then, both Mr. Mwadime and the Applicant, shot in the direction of the fleeing thugs. After that they went into Ms. Mumba's house. She informed them that she had about 7 employees within the homestead and they asked her to get them. She informed them that two of her workers could not be traced.

6. They then conducted a search and discovered two people namely Chengo Katana and Kassim Said lying in the shamba. They rushed them to Coast Provincial General Hospital where Chengo Katana was pronounced dead and Kassim Said was admitted for treatment and later discharged. They reported the incident to their superiors.

7. Later in 2007 an inquest, being Inquest No. 4 of 2007 was instituted at Kilifi Resident Magistrate's Court to establish the cause of death of the said Chengo Katana. During the inquest it emerged that two firearms had been fired and therefore any one of them could have caused the injuries to Chengo Katana and Kassim Said.

8. On or about 23rd August, 2010, the Senior Resident Magistrate P. M. Kiama delivered a Ruling whereby he ruled that the Applicant herein be arrested and charged with the offence of manslaughter and causing grievous bodily harm. The Applicant states that the finding was not based on any sound evidence as the ballistic report was not produced to confirm which gun, his or P. C. Mwadime's, had fired the fatal shot or the shot that caused injury to Kassim Said. Further, no comment was made on the culpability or otherwise of P.C. Mwadime or how the court arrived at the decision that the Applicant was the one to be charged. The Ex parte Applicant states that it is not true that he used excessive force when he responded to the alarm which response they did in good faith without malice. Unless this Court intervenes, he is likely to be prejudiced by having to defend a criminal case that is being instituted against him illegally and unlawfully and he is in danger of being wrongfully convicted in illegal criminal proceedings. The Applicant states that the media has reported that he should be arrested and charged with murder which has caused and continues to cause him psychological torture and mental anguish.

The Response

9. None of the Respondents in this matter filed a response to the application.

Submissions

10. Parties made oral submissions to the application. Mr. Odhiambo S. O., learned counsel for the Ex-parte Applicant submitted that it is not the duty of the court to order for an arrest of a person who after inquest the court finds to be a person of interest. That power belongs to the Director of Public Prosecution and so the said order of the Court was illegal and unprocedural and must be set aside.

11. Mr. Isaboke learned counsel for the DPP submitted that a report was made at Mtwapa Police Station about a robbery. The OCS mobilized his officers and moved to the scene. But they found attackers had left. However, they met a group of people who started exchanging fire with the officers. Two people were killed. It is not clear who shot the fatal bullet. Ballistic experts were not called to determine the killer shot. There was no evidence among the officers who can state that they saw the person who shot the robbers. Mr. Isaboke submitted that in the absence of such evidence the Inquest Magistrate had no powers to order for arrest of anybody. Inquest is normally carried out to establish who is responsible for murder. In this matter robbery took place at night. There is an apparent error on the face of the record when the Magistrate ordered a direct arrest of one of the witnesses. What the court could have done was to order the witness to answer to court summons, but not to order arrest of witness. Even then, the entire proceedings have to start *denovo*. Counsel submitted that in the absence of ballistic evidence the Magistrate could only have directed the Attorney General to carry out further investigations but not to order an arrest.

12. Ms. Kiti for the Attorney General adopted the submissions of Mr. Isaboke.

The Determination

13. I have carefully considered the Application. The application is not opposed. The Respondents filed no response. In their oral submissions the Respondents respective counsel virtually supported the Ex-parte Applicant's application.

14. I have looked at the application and the authorities cited. I have also looked at Article 157 of the Constitution. The powers to commence criminal prosecution are solely vested in, and are exercisable only, by the Director of Public Prosecutions independently. In the matter before the court, the Magistrate, being a judicial officer, could not exceed his duty of finding where the fault lay. Having found that the Ex-parte Applicant was a person of interest, it was *ultra-vires* the court to order the arrest of the Ex-parte Applicant. All the court needed to do was to avail a report of its finding to the interested parties including the DPP. The DPP would then be expected to proceed independently. This position was captured by **Judge Dulu in Misc. Revision No. 5 of 2015 – In the Matter of the Inquest into the Death of the late Peter Ngundi Mwalenga – Deceased and Maurice Ndo & Another vs. Republic** as follows:

“... Under (4), at the termination of the inquiry if the Magistrate is of the opinion that an offence has been committed by a person or persons unknown, he is required to record his opinion as such and send a copy to the Attorney General now the Director of Public Prosecution.”

15. From the foregoing it is the finding of this court that the honourable Magistrate acted in excess of her powers and jurisdiction, and so the order made on 23rd August, 2010 is a nullity and is accordingly hereby set aside and quashed. The upshot is that the application before the court is granted with costs to the Ex-parte Applicant.

Dated, Signed and Delivered at Mombasa this 15th day of October, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Odhiambo for the Applicant

Mr. Fedha holding brief Makuto for Respondents

Mr. Kaunda Court Assistant