REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW NO. 3 OF 2018

ESCOL KIBIWOTT KOSGEI.....................................1ST APPLICANT

PHILIP KIPROTICH KOSGEY................................2ND APPLICANT

GEOFREY KIPYEGON BOIT...................................3RD APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.......RESPONDENT

RULING

1. The exparte applicants seek orders of certiorari to quash the decision of the Director of Public Prosecutions (**DPP)** to institute charges against them in connection with the death of **JOSPHAT MBACHIRA** (deceased) based on irregularly obtained evidence and despite a pending inquest in Kapsabet Principal Magistrate's court Inquest No. 7 of 2017.

2. They also pray for an order of prohibition to restrain the **DPP** from commencing any criminal proceedings relating to the death of the deceased until the inquest aforementioned is concluded on merit.

3. The court upon granting decree for the exparte applicants to commence judicial review proceedings directed that the leave so granted do operate as stay of implementation of the impugned decision intending to prefer charges against the exparte applicants vide Eldoret High Court Criminal Case No.33 of 2018.

4. The background to this matter is that on 10th May 2018 police upon carrying out investigations into the murder of one **JOSPHAT MBACHIRA** where there was an ongoing inquest. However by a miscellaneous application made by police, an order for exhumation and autopsy was allowed leading to subsequently applying to terminating the inquest, and applicants were to be taken to court for plea taking on 22.05.2018.

5. Apparently prior to this the 2nd applicant had been summoned to appear before the Kapsabet Court as a witness in the inquest. The 1st applicant had initially been arrested as a suspect but released without any charges being preferred against him. Eventually the **DCIO NANDI SOUTH** wrote to the Principal Magistrate at **KAPSABET** informing her that the **DPP** had advised to dispose of the matter by way of a public inquest pursuant to Section 385 of the Criminal Procedure Code. This led to the commencement of the inquest and hearings begun and the court had ordered the detention of the suspects before they were released on bond. Thereafter on two occasions the prosecution attempted to terminate the inquest i.e on 26th July 2017 and 16th November 2017 but this was turned down.

6. Meanwhile the **DPP** initiated **Eld. HCCRC No 33 of 2018** where the applicants are to be charged for the offence of murder – but plea which was to be taken in May 2018 was stayed pending hearing and determination of this matter.

7. The exparte applicants oppose being charged for the criminal offence before completion of the inquest, and although the court directed that the respective counsel file submissions, only **Mr Kibii** for the 2nd applicant complied. The other two counsels informed this court they would adopt those submissions. It is therefore mischievous for **MR MAGUT** to sneak in his written submissions and expect them to form part of the court record. I will not consider them, they are expunged from the record and returned to him.

UNPROCEDURAL TERMINATION OF INQUEST

8. It was submitted that the inquest was not terminated, procedurally as the claims by the Respondent that there was a directive by the High Court to terminate are not supported by any evidence, and the applicants fear that their right of fair administrative action will be violated –

the inquest was scheduled for hearing on 2nd August 2018.

9. It is their contention that the decision by the Respondent to exhume the deceased's body as part of the investigation, was done without their participation nor were they notified. They point out that the office of the **DPP** had by a letter dated 4th July recommended that the issues surrounding the death be explored through an inquest as there wasn't sufficient evidence to warrant anyone being charged with murder. It is on account of the afore going that they urge the court to find the decision by the **DPP** to have them arrested and charged for murder as a violation of their fundamental Constitutional rights, because once the inquest commenced, it ought to have been allowed to reach its logical conclusion.

10. The applicants' term this new move as cruel, inhuman and degrading treatment, and this court ought to give them protection by allowing their prayer.

11. It is pointed out that under Article 157(8) of the Constitution of Kenya, the **DPP** may only discontinue a prosecution with permission of the court, and that in excising its powers Article 157 (II) requires the **DPP** to;

> **" … have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.**"

They term the decision to arrest and charge them as an abuse of the legal process. They also contend that the Respondents acted in violation of their rights under Article 50(4) which provides that;

> "Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."

12. It is submitted that there was no directive from the High Court terminating the inquest, and the **DPP** simply involved the provisions of Article 157 (6) (c) of the Constitution and a letter from it suffice at Nandi county to terminate the same. This termination of the inquest was done without the participation of the exparte applicants and only involved the representative of the **DPP** and the magistrate.

13. Counsel urged this court to be guided by the decision in **LABAN KIPSA**NG **TENDET AND ANOR VS DPP [2016] eKLR** which the court stated;

> **"…an inquest in my view would be a befitting forum in which the respondent would clearly have demonstrated that in exercising his powers, he was not influenced by caprice or whim, if the prosecution of the inquest would have been the inquest's verdict."**

The court is urged to find that the decision to terminate the inquest was irregular.

14. In response to this the Respondents' by a replying affidavit sworn by **JOB MULATI WAMOYO** deposed that the initial recommendation for an inquest was premised to a post mortem report by **DR KEMEI** who had described the cause of death as unknown – so against his beater judgment from the witnesses' statements, which indicated that the applicants were involved in beating the deceased, an inquest was recommended.

15. However in the course of the hearings in the inquest, it became apparent that the evidence of the eye witnesses was inconsistent with the Doctor's findings, and she sought a verification from the medical Superintendent at Kapsabet County. Referral Hospital, **DR KEMEI** wrote a response (JMW1) dated 27th March 2017 indicating that the cause of death was unknown, and some body parts had been taken to the pathologist. It stated: Reproduce letter dated 27.03.13. This prompted the **DPP** to write to the Chief Government Pathologist seeking clarification on the post mortem report which seemed to have contradicting observation and findings. By a letter dated 16th May 2017, the Assistant **DPP** acting under the instructions of the **DPP** directed the Director of Criminal investigation (**DCIO**) to have the doctor summoned and the body be exhumed and afresh post mortem be done and investigations be taken over by the Homicide Section **DCIO** headquarters.

16. It is stated that the inquest court was informed of the new development and the court ordered that the investigations proceed alongside the inquest.

Upon completion of investigation the file was forwarded to the office of the **DPP** Nairobi who then directed that the inquest be terminated and three applicants and two more suspects be charged with the offence of murder, this was because as the joint post mortem by Dr. Kemei and Dr. Johnsen Oduor now had a clear cause of death and this complied with the witnesses statement justified preference of the charge.

ILLEGALLY OBTAINED EVIDENCE

The applicants contend that the manner in which the order for exhumation was obtained and the subsequent fresh post mortem done in their absence was in bad faith and counsel wondered why these process could not have been raised in the course of the inquest. Further when the application for exhumation was done, it was not disclosed to the court that the body was already the subject of an ongoing inquest, resulting in orders being obtained at Hamisi Law Courts where the body had been interred, yet ideally the magistrate handling the inquest was better placed to make a decision as to whether an examination ought to be conducted if full disclosure had been made.

17. This is termed as improperly obtaining evidence and thus violating the rights of the applicants. The contention being that once the applicants were suspects, then they had the right to be informed about the order for exhumation and even be allowed to have a representative

during the exercise, as well as during autopsy.

Counsel urged the court to be guided by the provisions of Art 157 (1) and find that what the respondents did amounted to abuse of court process, and the Respondent acted unreasonably and with procedural unfairness.

18. Further that under Art 50 (4) of the Constitution the manner in which the additional evidence was obtained violated the Bill of Rights as it was an illegal process.

19. The Respondents submitted that Article 157 of the Constitution gives the **DPP** .. power to undertake criminal proceedings against any person before any court other than court martials; so once the 2nd post mortem confirmed the cause of death, then the respondent had a right to have the applicant's charged.

20. Further that in exercising such powers the **DPP** paid regard to the public interest in the administration of justice and infact avoided abuse of the court process. Counsel points out to the contents of the affidavit by detective **THOMAS TANUI** who denied that fresh investigations were conducted, insisting that the applicants were never charged before the Principal Magistrate's Court at Kapsabet, and the investigations were on-going even as the inquest was being conducted, because nothing prevented further investigations. That these further investigations focused on the autopsy performed on the deceased after the initial autopsy failed to disclose the cause of death, and the Dr. who had conducted the initial autopsy was in agreement with the subsequent findings following the 2nd autopsy.

21. It is contended that the 2nd Respondent's counsel was informed about the autopsy through his mobile phone and the he declined to attend and he was non-committal as to whether he would inform his client to attend the exhumation.

They argue that the exhumation and autopsy were conducted in broad daylight at the grave and in the presence of the Doctor who had conducted the initial post mortem.

22. As to why the orders of exhumation were obtained from **HAMISI** court, they explained that it is because after filing a miscellaneous application at Kapsabet seeking exhumation and autopsy, the magistrate at Kapsabet directed that the matter be filed in a court with jurisdiction where the body was interred. He insists that the inquest court was informed of that development, and in any event the matter has now been overtaken by events as the inquest was terminated and the applicants have been charged with murder; and no prejudice will be occasioned to the applicants.

23. The Respondents lament that they will be greatly prejudiced if they are ordered not to prosecute the applicants after painstakingly gathering evidence which clearly points to their involvement. This they contend will erode public confidence in the office of the **DPP** as law enforcers. The Respondents maintain that the decision to charge the applicants resonates with Article 157 of the Constitution as conducting an inquest hearing which the cause of death and those who caused the death are known is what would amount to abuse of the legal process.

24. It is submitted that the issue regarding fair administrative actions and the right to a fair administrative actions and the right to a fair trial does not even arise as there was no accused person being tried in the inquest, and Article 50 (1) and (2) focus on the trial process.

ILLEGALLY OBTAINED EVIDENCE

The Respondents insists that evidence was legally obtained as orders for exhumation were properly obtained from court and there was no requirement that the applicants be present during the process.

25. Subsequently it is the Respondent's contention that the inquest was properly and legally terminated.

This court is urged to be guided by the decision in **Nairobi Civil Appeal No. 270 DPP** versus **MARTIN MAINA and 4 others** which outlined grounds under which order prohibiting criminal prosecution may be faulted, and that this case does not meet the threshold.

26. Counsel also referred to **Homa Bay Criminal Revision No.8 of 2014** in the matter of Oyugis Principal Magistrate's court Inquest No.1 of 2010 which held that Article 157(6) (a) does not permit the magistrate's court to initiate proceedings in a manner prescribed by Section 387(3) of the Criminal Procedure Code; as the same was inconsistent with the prosecution powers then conferred on the Attorney General.

27. Furthermore, that merely because at one point the **DPP** indicated to the magistrate that it did not have evidence to charge the accused, did not take away the **DPP's** power to prosecute.

28. Lest we lose right of what is in issue here – it is not so much the fact relating to the findings in the 2nd post mortem conducted, or even the exhumation process per se.

The major issues revolve around the decision by **DPP** leading to sudden termination of the inquest without participation of the applicants in the process. What are the procedural rules; because judicial review is about the process, not the legality of the content. (2) what was the legitimate expectation of the applicants once they participated in the inquest?

(3) Are the prosecutorial powers conferred on the **DPP** by Article 157 of the Constitution unlimited?

29. I am certain that no one doubts the prosecutorial powers conferred upon the **DPP** by virtue of Article 157 (6) of the Constitution of Kenya. However the same Constitution requires that those powers be exercised impartially and with fairness, and devoid of abuse of the legal process. The applicants had been subjected to a process (incidentally some of them were the prime suspects) and the purpose of the

inquest was to find out whether there were grounds to warrant putting the matter of the deceased's death to rest – either by recommendation that certain persons be charged, or directing that the evidence did not link the death to any known person or cause and thus close the inquest. At that time, the cause of death was unclear as not to suggest foul play.

30. Once an inquest begins then it can be terminated under Section 387 (3) CPC either by;

a) By issuing summons and recommending that certain persons be charged,

b) The court may order the police to conduct further investigation

c) The court may direct hearing of the inquest De novo either on application by the prosecution or on its own motion especially if the process had been previously conducted by another magistrate, and the succeeding magistrate is unable to comprehend the record.

31. Since the applicants were the prime suspects then any other decision taken in the course of the hearing of the inquest, especially where it would affect them would demand that they be informed. That was a legitimate expectation – little wonder then that the Respondents infact recognized this and made an attempt to notify one of the Respondents counsel by phone about the exhumation and autopsy exercise an acknowledgement of the significance of the applicant's involvement in decision made relating to the inquiry.

32. Even if the **DPP** in exercise of his discretion to prosecute was persuaded that continuing with the inquest was an abuse of the legal process, the fair and reasonable thing to do was to make such an application in the presence of the applicants and the applicants be granted a chance to be heard on that application for termination. That is the basic principle of natural justice – the right to be heard in a matter whose decision directly affects an individual. Power granted to a body or person for a specific purpose must not be exercised simply so as to fulfill an ulterior end. What was so difficult in requesting the inquest court to summon the persons affected, and be informed of the decision to terminate the inquiry because they were going to be charged for a criminal offence, hear their response, then make a ruling?

The duty to act rationally was on the Respondent - indeed the principle of reasonableness is well enunciated in the case of **ASSOCIATED PROVINCIAL PICTURE HOUSES LTD VS WEDNESBURY CORPORATION [1948]IKB 223** where Lord Greene MR stated:

> **"it is that discretion must be exercised reasonably …. He must call his own attention to the matters which he is bound to consider … if he does not obey those rules he may truly be said … to be acting unreasonably."**

33. Even if (for argument sake) the applicants were to be said to have no right to address the court regarding the inquest, on grounds that there was no one yet charged, then since the administrative action by the **DPP** was going to affect them, what was their resources? Were they expected to be sitting ducks just wading in water to be shot? I think not. When an administrative action is to be taken, which will affect certain persons, then they ought to be given at least a written reason for the action.

Instead what was being communicated was "the action has already been taken. We have terminated the inquest, you are to appear in court to face murder charges."

Naturally the applicants' reaction was "why? What has happened?." I am persuaded that Article 157(6) is not a blanket provision giving the **DPP** unchecked powers, and I concur with Mr. Bitok that those powers are bridled by the law and must not be used capriciously.

34. And let this be made clear – the applicants are not saying "Do not prosecute us for murder." All they ask is that since the Respondent dug out other evidence in the course of the inquest, please allow the inquest to come to its logical conclusion, the **DPP** can present its further evidence at the inquest, and let the court make a finding. You can still charge us for murder but let us get done with the inquest."

35. The **DPP** cannot be allowed to bring other parties just as to wax lyrics about constitutional authority. I recognize that authority and acknowledge what Lord Salmon stated in the English decision of **DPP versus HUMPHREYS (1976) 2 All ER 497** that;

> **"… a judge has and should not appear to have responsibility for the institutions of prosecutions, … if the prosecution amounts to an abuse of the process of the court and is apprehensive and vexatious, that judge has power to intervene…"**

36. So yes the prosecution is free to institute any prosecution against any person whenever an offence is alleged to have been committed, but a court must not entertain such prosecution if it is underpinned by an abuse of the due process, in such instances, then the duty falls upon the court to rise to the occasion and prevent such prosecution.

I can only echo what Ngaah J said in the case of **LABAN KIPSANG TENDET & ANOR VS DPP [2016]eKLR**, that "I must not be misunderstood to be saying that the prosecution of any murder charge must be initiated by an inquest, or that an inquest once begun cannot be terminated. However the decision to terminate the inquest which has begun (especially where certain individuals had been arrested as suspects) and who participated either as witnesses, or remain suspects in the inquest must be communicated to them.

The inquest would be a befitting forum in which the Respondent would clearly demonstrate that further evidence has now disclosed certain details, and would indeed show that in exercising its powers the **DPP** has not been influenced by caprice or whim.

37. The situation prevailing here is distinguishable from that in **Garissa Criminal Revision No. 199 of 2013 IN THE MATTER OF JULIUS KILONZO MUTHENGI** deceased, and the remarks attributed to Dulu (J) in that matter must be placed in context because in the Muthengi case, the inquest had been concluded, and the file ordered closed, with recommendations that family pursue a civil claim for wrongful death, and the judge agreed that the magistrate had no powers to recommend civil litigation under the provisions of Section 387(3),

(4) and (5) Criminal Procedure Code.

38. Infact I do not know why the Respondents are in a panic, lamenting about how the **DPP's** power will have been diluted and public confidence will have been eroded if they are not allowed to prosecute the Applicants. At the risk of repeating myself, what is sought is not a bar to future prosecution, but is made in the context of the then ongoing inquest whose life the **DPP** has attempted to snuff. They ought to find consolation in the observation by **Muchem J** in the case of **R V RICHARD MUNYI NDWIGA & ANOR [2015] eKLR** that where despite the magistrate terminating the inquest, setting the suspects free and ordering the file closed, the learned Judge stated;

> **"However the comments of the magistrate that the accused person were set free was only applicable to the proceedings before him. The DPP was at liberty to conduct further investigations and charge the accused persons with the relevant offence …. there is no legal provision barring the DPP from charging suspects who have been set free in a miscellaneous application. The ruling of the magistrate … did not affect the functions and powers of the DPP…"**

That is the context in which **Majanja (J) made his decision in Re Estate of Philip Otieno Odhiambo (Deceased([2015] eKLR** that the outcome in the inquest did not compromise the **DPP** prosecutorial decision.

39. Indeed I take recognition of **Article 157(10) of the constitution** which provides that;

> " the Direction of Public Prosecution shall not require the consent of any person or anything for the commencement of criminal proceedings in the …. of his or her powers or functions, and shall not be under the direction or … of any person or authority."

40. However that power is not to be exercised in total disregard of Article 157(11) of the Constitution and to have acted thus, the DPP violated Article 47 (1) and (2) regarding fair administrative action and reasonableness.

41. As regards illegally obtaining of evidence and issues of full disclosure and secure/participation of the applicants in the exhumation and the autopsy it would in my view be premature to make any conclusive findings on this – let the inquest be reinstated and take its proper course. The issue of how the evidence was obtained and whether it occasioned prejudice to anyone would best be dealt with at the intended criminal trial – if the **DPP** opts to take that route I will therefore not issue orders of certiorari regarding the institution of the charge based on the manner in which the evidence has been obtained. However I will grant orders which I hereby do, to the extent that the Respondent be prohibited from causing the arrest of the applicants and commencing any criminal proceedings relating to the death of the late **JOSPHAT MBACHIRA** until the hearing and determination of Kapsabet Principal Magistrate Court inquest No.7 of 2016.

For avoidance of doubt there will be no value added in coming back to court, on application seeking clarification regarding the status of the purported terminated inquest – the order terminating the inquest be and is hereby set aside, to pave way for its conclusion and give the **DPP** a chance to properly and constitutionally exercise its authority.

DELIVERED and DATED this 20th Day of July 2018 at ELDORET

H. A. OMONDI

JUDGE