



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**MISC REVISION NO. 5 OF 2015**

**IN THE MATTER OF THE INQUEST INTO THE DEATH OF THE LATE PETER NGUNDI  
MWELENGA.....DECEASED**

**A N D**

**1. MAURICE NDOO..... 1<sup>ST</sup> PETITIONER**

**2. KINYIUA MWELENGA ..... 2<sup>ND</sup> PETITIONER**

**V E R S U S**

**REPUBLIC..... RESPONDENT**

**RULING**

This matter has been brought to this court under its revision jurisdiction through a letter dated 23rd July 2015 from C. K. Nzili and Company Advocates for the family of the deceased represented by two people MAURICE NDOO and KINYIVA MWELENGA. The matter arises from the ruling in the Mwingi Senior Resident Magistrate's Court in Inquest No. 1 of 2011, which ruling was delivered by the inquest court on 25th of April 2014.

The ruling was in respect of an inquest into the death of PETER NGUNDI MWALENGA who was alleged to have died in police custody of Corpral Kenneth Kangongo, PC Geoffrey Mugambi, PC Johnson Kilonzo, CP John Koitine, and PC Mohamed Omar of Ngomeni police post.

The inquest court concluded its ruling by stating as follows:-

***“Both postmortems, include (sic) the cause of death to be blunt force trauma or musculoskeletal injury. From the evidence it is not possible with certainty (sic) who among the police officers in whose custody he died administered the beatings or indeed whether his alleged attempt to flee custody led to his high impact fall into a ditch may have been (sic) a contributing causative factor in his death. The courts findings is 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) into the real or speculation. Damages for wrongful death may be an avenue for recompense. This file is recommended closed.”***

From this ruling and direction of the inquest court, Mr. Nzili counsel for the family of the deceased has come to court through his above letter seeking this courts intervention to grant orders as follows:-

- 1. “To reverse the ruling to the extent that no criminal action be taken against the perpetrators.”**

2. ***That this court directs the perpetrators namely Corporal Kenneth Kagongo, PC Geoffrey Mugambi, PC Johnson Kilonzo, CP John Koitine and PC Mohammed Omar be arrested and charged for the death of the deceased herein.***
3. ***Any other relief in favour of the deceased family.***

Under the provisions section 362 of the Criminal Procedure Code, (cap.75), this court is not bound to allow either the complainant or applicant on the one case, or the State on the other hand, to address it in revision proceedings. However the court allowed Mr. Nzili Advocate for the family of the deceased as well as Mr. Okemwa for the DPP to address the court, with regard to this request for revision.

Mr. Nzili stated in court that the inquest court conducted an inquest under Section 387 of the Criminal Procedure Code (cap.75) and that under that section the inquest court had only 3 legal options.

The first option was that if the inquest court found criminality and established that culprits were involved, the inquest court was required under the law to issue summons for the said culprits to be charged. The second option available to the inquest court was to order that the inquest starts denovo and at the same time summon the suspects to be present during the denovo inquest. The third option was for the inquest court to make recommendations for institution of proceedings by the Director of Public Prosecution (DPP) for carrying out investigations.

Counsel submitted that the family of the deceased were aggrieved by the fact that, though the inquest court made a finding that the deceased died in the custody of police officers at Ngomeni police post and also that the body had sustained injuries and that the said police officers shared responsibilities, it went ahead to order closure of the file.

Counsel thus urged this court to apply the provisions of Section 362 of the Criminal Procedure Code (cap.75) and consider the legality, correctness, and propriety of the inquest court's decision in light of what the inquest court was under the statute required to do. According to counsel, the court fell short of making the appropriate orders. Counsel urged this court to direct the Director of Public Prosecutions to take appropriate action against culprits who were identified by the inquest court.

In response to the submissions by counsel for the deceased's family, Mr. Okemwa for the Director of Public Prosecution stated that the inquest court made a clear finding that the deceased died in the custody of police officers. Counsel submitted that the purpose of the inquest was to establish what caused the death of the person who was in lawful custody of the police. Counsel pointed out that Mr. Nzili had been following the progress of the matter since 2010 and wrote a letter to the OCPD and a report from the family doctor was tendered as evidence in inquest court.

Counsel concurred with the submissions of Mr. Nzili that the inquest magistrate was wrong in saying that he could not apportion liability and in suggesting pursuit of damages without giving directions on what should be done next. Counsel suggested the inquest court should have directed that a fresh inquest be held. Counsel pointed out that this court has discretionary powers which it can exercise in these proceedings.

I have considered the request to revision of the inquest court's ruling. I have also considered the submissions on behalf of the deceased family, and those on behalf of the state.

I have perused the evidence in the inquest. The court heard evidence of 21 witnesses, all called by the State. Mr. Nzili for the family of the deceased was allowed during the inquest to cross examine the said witnesses and he did so for most of them.

At the close the inquest, the magistrate delivered a ruling concluding as stated above in this present ruling. The inquest magistrate found that the deceased died in police custody but said he could not apportion blame among police officers. He proposed pursuit of a claim for damages and closed the inquest file.

This matter has now been brought to this court through the revision procedure. I have perused the provisions of section 387 and 388 of the Criminal Procedure Code (cap.75) regarding inquests. As correctly pointed out by Mr. Okemwa for the DPP the inquest was conducted under Section 387 of the Criminal Procedure Code, and there is no provision for any aggrieved person to appeal to this court. As such in my view Mr. Nzili for the deceased family, has correctly invoked the provisions of Section 362 of the Criminal Procedure Code (cap.75) by coming on this court under its revision jurisdiction.

At the conclusion of an inquest, the inquest court is required to make specific orders.

Section 387 of the Criminal Procedure Code (cap.75) under which the inquest herein was held by the magistrate's court provided as follows:-

***“387(1) when a person dies while in the custody of the police or a prison officer, or in a prison, the nearest magistrate empowered to hold inquest, 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, order an inquiry into the cause of death either instead of or in addition to the investigations held by the police or prison officer and if he does so he shall have the powers in conducting it which he would have in holding an inquiry into an offence.***

***(2) Whenever the magistrate considers its 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 summons or warrant for his or their arrest, or take such other steps as may be necessary to secure his or the attendance to answer the charge; and on the attendance of the person or persons the magistrate shall commence the inquiry denovo and shall proceed as if he has taken cognizance of the offence.***

***(4) If at the termination of inquiry the magistrate is of the opinion that an offence has been committed by a person or persons unknown he shall record his opinion and shall forthwith send a copy thereof to the Attorney General.***

***(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.***

***(6) In the case of an inquiry relating to a missing person believed to be dead the magistrate shall at the termination of the inquiry report the case together with his findings to the Attorney General and shall make recommendations as to whether or not the period regarding presumption of death provided for under section 118A of the evidence act should be reduced and if so what lesser period should, in the circumstances of the death, be substituted for the period of 7 years.”***

It is clear to me that this matter does not relate to a missing person who is to be presumed dead. Therefore the provisions of section 187(6) of the Criminal Procedure Code do not apply. The deceased herein died and his body was seen and identified by witnesses including the police.

Under section 387(1) of the Criminal Procedure Code the magistrate in cases of a person who has died in police custody or prison custody is required to hold an inquest. The provisions of the law are mandatory therefore it was right for the magistrate at Mwingi to hold this inquest.

The powers of the court in the inquest are provided for under (2) (3) (4) (5).

Under (2), the magistrate has powers to order the exhumation or disinter of a body which was buried for examination. This provision is not applicable in the present case as the body of the deceased was not

buried before postmortem examination and the learned magistrate did not find it necessary to make an order in that regard.

Under (3) the law provides that if before or at the termination of the inquiry the magistrate forms the opinion that an offence has been disclosed as having been committed by a person or persons known then the magistrate can issue summons or a warrant for the arrest to attend in court and shall commence the inquiry denovo and proceed as if he had taken or admitted the charge for the offence disclosed.

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.

Under (5), if at the termination of the inquiry the magistrate is of the opinion that no offence has been committed, he or she is required to record his opinion accordingly. In my view the options available to the magistrates are 3. Firstly either at the termination or before the termination of the inquiry, if the magistrate forms the opinion that an offence has been committed by unknown person or persons he or she is required to summon that person or persons to appear in court and proceed as if that person or persons have been charged with the offence that the magistrate considers or his opinion that was committed. The opinion of the magistrate does not need to be formed at the conclusion or termination of the inquiry it can be formed even before the inquiry is terminated or concluded.

The second option that the magistrate has is that the inquiry court after the termination of the inquiry if it is of the opinion that an offence has been committed but by a person or persons who are not known then the court has to record that opinion and should therefore send a copy of that opinion to the Director of Public Prosecutions. In that event in my view it will be the Director of Public Prosecution to decide what else to do. The court does not have powers to order the Director of Public Prosecution on what action they should take.

The third alternative available to the magistrate is if at the termination of the inquiry the magistrate is of the opinion that no offence has been committed, then the magistrate will record that opinion and leave it there. The magistrate in this event is not required to make any further orders either for further investigations or any given information formally to the Director of Public Prosecution.

In the present case the learned magistrate found that the deceased died in the hands of the police. He also found that the police officers were to blame. He mentioned the name of the police officer. The magistrate however did not make any orders as to the nature of the offence disclosed after the termination of the proceedings. The magistrate did not also make any finding that no offence had been committed. The magistrate merely closed the file and suggested a civil claim.

In my view the magistrate did not comply with the provisions of section 187(3)(4) and (5) of the Criminal Procedure Code. At the end of the inquiry or inquest the magistrate was required to make a finding as to whether any known person or persons had committed any offence and then make orders as to their being summoned to court to answer charges if magistrate found that offences or offence was committed by unknown person or persons. In the alternative the magistrate was at liberty to form an opinion at the termination of the inquiry that an offence had been committed by some unknown person or persons and record that opinion and forthwith send a copy of that opinion to the Director of Public Prosecution. The third opinion was for the magistrate at the termination of the inquiry to find that in his opinion no offence had been committed and record that opinion accordingly and leave the matter there.

The procedure adopted by the magistrate in finding the police officers mentioned culpable but without either mentioning the offence or requiring that they be summoned to stand trial in court was a mistake. The said magistrate B. A. Otieno RM is no longer at Mwingi. In effect it would be wishful thinking to send back the file to him to make appropriate orders. In the interest of justice therefore, and since the magistrate found the police officers culpable in causing the death of the deceased, the proper order that should have been made was that the named officers be called or summoned to appear before the Mwingi court for them to participate in the inquest taking in mind that they will now be suspects. This

will be a denovo inquest as required by the law to establish whether indeed they should have ultimately be charged with murder or a minor offence that is related to the death of the deceased. I thus review the decision of the inquest court and order that a denovo inquest be held after warrant of arrest or summons are issued against the police officers named by the subordinate court at Mwingi as required under Section 187(3) of the Criminal Procedure Code.

These orders will be transmitted forthwith to the subordinate court at Mwingi for further action as directed above in accordance with provisions of Section 367 of the Criminal Procedure Code.

**Dated and delivered at Garissa this 6th day of July 2016.**

**GEORGE DULU**

**JUDGE**