



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL REVISION NUMBER 127 OF 2016
(Inquest number 14 of 2016-Elias Kimata Muthii-Deceased)
(Revision arising from the decision of K.T. Onesmus, SRM contained in
a letter dated 12th August 2016 in respect of inquest into the death of
Elias Kimata Muthii-Deceased)

RULING

The relevant background information is that on 14th July 2016 a one **Daniel Kago Kamau** parked motor vehicle registration number **KAQ 573 J** and went for shopping at a nearby shop, and upon returning, he reversed the vehicle for about three metres then heard screams and stopped only to see a woman holding a baby claiming that he had run over the baby. He rushed the baby to hospital but unfortunately the child died.

Pursuant to the provisions of section **386** of the Criminal Procedure Code^[1] the police wrote to the Magistrates Court, Nyeri Law Courts and notifying the court about the said death. The Base Commander, Nyeri, wrote to the DCIO, Nyeri and recommended a public inquiry into the said death. On 1st August 2016, the Office of the DPP, Nyeri wrote to the Base Commander Nyeri and recommended that the file be placed before a competent court to conduct an inquest and 10th August 2016 the Base Commander Nyeri wrote to court forwarding the file for the court to conduct the inquest.

Instead on holding the inquest, on 12th August 2016, the Learned Senior Resident Magistrate wrote to the Base Commander Nyeri Traffic Base stating *inter alia*:-

"I have perused this file and found that the evidence so far in (sic) record are (sic) incriminating against Daniel Kamau Kago. He was the driver of KAQ 573 J Nissan Pick-Up. He carelessly/recklessly reversed the vehicle and caused death of a minor Elias Kimata Muthii. I find this is an offence which has been caused by a known person. It doesn't fall under the provision of section 386 (i) (a-d) of Criminal Procedure Code. This driver did not take due care and the results (sic) is a loss of life. You will therefore proceed to summon the driver to your station and charge him for causing death under provisions of section 64 of Traffic Act ..."

On 29th September 2016, the DPP wrote to the Resident Judge seeking to have the decision by the learned magistrate revised under the provisions of sections **362** to **367** of the Criminal Procedure Code.^[2] There were no court proceedings, ruling, judgement, order or decision but a written communication by the magistrate.

The question that arises is whether there is a decision to revise. Section 362 (2) of the Criminal Procedure Code^[3] provides that:-

“The High Court may call 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 subordinate court.”

I am satisfied that by virtue of the powers conferred upon the High Court by the above section, this court has powers to examine the correctness, legality or propriety of the magistrates opinion/decision contained in the letter referred above.

Further, Section 364 confers the powers to the high court to revise lower courts decisions and these powers include (a) exercising any of the powers conferred on it as a court of appeal by sections 354, 357 and 358 and (b) in the case of any other order other than an order of acquittal, alter or reverse the order. Also relevant are the provisions of Article 165 (6) and (7) of the constitution of Kenya 2010 which provides as follows:-

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

Clearly, from the constitutional and statutory provisions cited above, the High Court has wide powers to review record of any criminal proceedings in subordinate courts and other judicial and quasi-judicial bodies except superior courts.

In the above referred letter, counsel states that the third accused was discharged under

Powers of revision are seen as that exercise of the revision power by the High Court which is basically to call for the records of any inferior Criminal Court and to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court and to pass appropriate orders.^[4] The Section 397 gives powers to the High Court to call for the records as also **suo motu** power to exercise the revisional power on the grounds mentioned therein, i.e., to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior Court, and to dispose of the revision in the manner indicated under Section 364 of the Criminal Procedure Code.^[5] The revisional power of the High Court merely conserves the power of the High Court to see that justice is done in accordance with the recognized rules of criminal jurisprudence and that its subordinates Courts do not exceed the jurisdiction or abuse the power vested in them under the Code or to prevent abuse of the process of the inferior Criminal Courts or to prevent miscarriage of justice.

The object of Sections 362 to 367 of the Criminal Procedure Code^[6] and the purpose behind conferring the revisional power upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to meet out justice. The power of the High Court, therefore, is very wide. However, High Court must exercise such power sparingly and cautiously. When the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior Criminal Court in its juridical process or illegality of sentence or order.

The basic object behind the powers of revision is to empower the high court to exercise the powers of an appellate court to prevent failure of justice in cases where the code does not provide for appeal. The power however is to be exercised only in exceptional cases where there has been a miscarriage of justice

owing to: - a defect in the procedure or a manifest error on the point of law, excess of jurisdiction, abuse of power, where decision upon which the trial court relied has since been reversed or overruled when the revision appeal is being heard.

The revisional powers though are quite wide, have been circumscribed by certain limitations. Such as **(a)** in such cases where an appeal lies but there is no appeal brought in, originally no proceeding by way of revision shall be entertained at the instance of the party who would have appealed.[7] **(b)** The revisional powers are not exercisable in relation to any interlocutory order passed in any appeal, inquiry and trial. **(c)** The court exercising revisional powers is not authorized to convert a finding of acquittal into one of conviction.[8]

The revisional powers of a High Court are intended to be used by the High Court to decide all questions as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed by an inferior criminal court and even as to the regularity of any proceeding of any inferior court. The object of conferring such powers on the High Court is to clothe the highest court in a state with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders.

The revisional powers are entirely discretionary. There is no vested right of revision in the same sense in which there is vested right of appeal. These sections do not create any right in the litigant, but only conserve the powers of the High Court to see that justice is done in accordance with the recognized rules of criminal jurisprudence and that subordinate criminal courts do not exceed their jurisdiction, or abuse the powers vested in them by the Code.

Guided by the above legal interpretations, the question that begs to be addressed in this case is whether or not the learned magistrate erred in refusing to hold an inquest and concluding that the matter referred to him did not fall under the provisions of section **386 (i) (a-d)** of the Criminal Procedure Code[9] which provides as follows:-

386 (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)

(b) has been killed by another person or by an accident; or

(c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence; or

My understanding of the above provision is that it covers a person killed by an accident or circumstances raising reasonable suspicion that someone has committed an offence. The minor in this case was hit by a reversing vehicle. It is irrelevant that the person who caused the accident is known. As to whether the circumstances surrounding the occurrence of the accident point towards the commission of an offence or not is a matter to be interrogated after conducting the inquest and should the magistrate hearing the inquest find that an offence was committed, then the magistrate can state so in his findings and recommend either prosecution or further investigations as he may deem appropriate. It was improper for the learned magistrate to make conclusion as to the culpability of the driver without hearing witnesses, hence his decision contained in the letter dated 12th August 2016 is improper and therefore illegal.

I therefore direct that a public inquest into the death of **Elias Kimata Muthii** be conducted by a competent magistrate as provided under the law so as to inquire into the circumstances surrounding the said death.

Signed, Delivered and Dated at Nyeri this 10th day of October 2016.

John M. Mativo

Judge

[1] Cap 75, Laws of Kenya

[2] Ibid

[3] Ibid

[4] Krishnan and Anr. Vs. Krishnaveni and Ano {1997} 4 SCC 241

[5] Supra

[6] Ibid

[7] See Section 365 (5), CPC

[8] See Section 364 (4), CPC

[9] Cap 75, Laws of Kenya