

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL REVISION NO. 8 OF 2014

IN THE MATTER

OYUGIS PRINCIPAL MAGISTRATES COURT

INQUEST NO. 1 OF 2010

AND IN THE MATTER OF

PHILIP OTIENO ODHIAMBO (DECEASED)

RULING

1. This matter came to my attention when I struck out **Homa Bay Criminal Appeal No. 102 of 2013, *Ronald Aloo Augo v Republic*** for want of jurisdiction. I therefore decided to examine the record of proceedings before the subordinate court and satisfy myself of the legality and propriety of the findings and orders made therein in accordance with **section 362** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***.
2. The circumstances of the inquest were that upon recommendation of the Office of the Attorney General, the magistrate court at Oyugi carried out a public inquest into the death of **PHILIP OTIENO ODHIAMBO** ('deceased') who had been found shot dead at Wire Forest. After hearing the witnesses, the learned magistrate found that the death of the deceased was caused by commission of an offence by **RONALD ALOO AUGO**. The learned magistrate therefore made the following orders/directions;

In the premises, I find that the death of the deceased, Philip Otieno Odhiambo was caused by commission of an offence by Ronald Aloo Augo. He may be charged with the offence of manslaughter contrary to section 202 of the Penal Code. Consequently, I hereby order that the said Ronald Aloo Augo be arrested and charged accordingly before this court for the offence he committed leading to the death of the deceased.

In this regard and pursuant to the provisions of section 387(3) of the Criminal Procedure Code, I hereby issue a warrant of arrest for the said Ronald Aloo Ougo.

3. **Section 387(3)** of the ***Criminal Procedure Code*** provides as follows;

387(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. The provision seems to suggest that once the magistrate has concluded that the offence was committed by a known person or persons, the magistrate must summon that person or those persons or cause his or their attendance by way of a warrant of arrest. This is to enable the suspects to answer to the charges framed by the magistrate. It is on the basis of the charges framed that the magistrate proceeds with the trial. The provision empowers the magistrate to charge and try the suspect without any reference to the power of the Director of Public Prosecutions to decide

whether or not to commence the prosecution.

5. In ***Nisha Sapra v Republic Nairobi High Court Misc. Criminal Application No. 39 of 2008 (Unreported)*** J B Ojwang' J., (as he then was) in a ruling dated 27th February 2008 held that the order of arrest issued by the learned magistrate under **section 387(3)** of the ***Criminal Procedure Code*** was inconsistent with the prosecutorial powers of the Attorney General conferred by **section 26** of the former Constitution. He stated as follows;

Since the prosecutorial function by section 26 of the Constitution, belongs in substance to the Attorney General, the inquest Magistrate's mandate was limited to stating his finding of fact, without preferring a particular course of prosecution action to be taken by the Attorney General. I will not, however, hold this shortcoming in the inquest ruling to have compromised the prosecutorial decision later taken by the Attorney General as there is no evidence that the Attorney General has made reliance on not just the inquest-findings, but also on the records of evidence in the Police files. These foundations of prosecution have the effect of rendering the inquest proceedings, as such, essentially a historical record, and I hold that it will not by any means prejudice the applicant. The Attorney General may proceed with prosecution in accordance with the law.

6. I agree with the reasoning. I also hold that **Article 157(6)(a)** of the Constitution which vests in the Director of Public Prosecutions the State power to, "*institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed,*" does not permit the magistrate's court to initiate criminal proceedings in the manner prescribed by **section 387(3)** of the ***Criminal Procedure Code***.
7. In the circumstances, the order of arrest and consequent warrant of arrest issued against **RONALD ALOO AUGO** be and is hereby set aside. This decision shall be forwarded to the Office of the Director of Public Prosecutions, Homa Bay to deal with the findings of the inquest in accordance with the law.

DATED and DELIVERED at HOMA BAY this 9th day of February 2015

D.S. MAJANJA

JUDGE