



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT HOMA BAY**  
**CRIMINAL REVISION NO. 52 OF 2015**  
**IN THE MATTER**  
**HOMA BAY CHIEF MAGISTRATES COURT**  
**INQUEST NO. 1 OF 2013**  
**AND IN THE MATTER OF**  
**DA, WA, SN, BA, PO, EA, YA and CA (deceased children)**

**RULING**

1. This matter was brought to my attention by the Chief Magistrate, Homa Bay under **section 363** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** 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.

2. The circumstances of the inquest were that upon recommendation of the Office of the Director of Public Prosecutions, the Chief Magistrate's Court at Homa Bay carried out a public inquest into the death of **8 students** which was as a result of dormitory fire which occurred on 22<sup>nd</sup> August 2012 at Asumbi Girls Primary School.

3. After hearing 30 witnesses, the learned magistrate (Hon. N. Kariuki, RM) made the following finding and order;

*39. I find that the school administration namely the head teacher Sr Antonia Musula was in a position of responsibility and had a duty of care to secure the safety, well being and interests of the eight deceased pupils as provided by law and were (sic) negligent in her duty. Ultimately eight innocent young lives were lost and I believe that her omissions amounted to a negligent act that caused harm contrary to section 244 of the Penal Code.*

*40. I hereby find that an offence has been disclosed as stated above and **order summons issue to Sr. Antonina of Asumbi Girls primary school be served upon her by the OCS Rangwe Police Station within the next 14 days whereafter she shall be availed for plea taking on 14.6.15 at Homa Bay Law Courts.***

4. **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.*

5. The tenor and effect of the provision is 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.

6. 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 27<sup>th</sup> 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.*

7. I agree with the reasoning and as I held in *Re Philip Odhiambo Otieno (deceased) HB Criminal Revision No. 8 of 2014 [2015]eKLR, Article 157(6)(a)* of the Constitution 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.*" This provision does not permit the magistrate's court to initiate criminal proceedings in the manner prescribed by **section 387(3)** of the *Criminal Procedure Code* which no doubt the learned magistrate had in mind when she directed that suspect be summoned to take the plea. The provision is patently unconstitutional is so far as it purports to vest the Judiciary with powers that are clearly reserved for the Director of Public Prosecutions.

**8. In the circumstances, I revise and set aside the orders issued summoning Sr Antonina Musula of Asumbi Girls Primary School to take plea on 14<sup>th</sup> June 2015.** 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 10<sup>th</sup> day of June 2015.**

**D.S. MAJANJA**

**JUDGE**