



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.69 OF 2011

(An Appeal arising out of the conviction and sentence of Hon. B. Nzakyo – RM delivered on 1st April 2011 in Githunguri SRMC. Inquest Case No.3 of 2007)

SAMUEL NGUGI NGANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This appeal is preferred by the Appellant, Samuel Ngugi Ng'ang'a against the Ruling and Order dated 17th January 2011 that was issued by the magistrate's court at Githunguri. The learned magistrate held an inquest in accordance with **Section 387** of the **Criminal Procedure Code** arising out of the deaths of Samuel Muiruri Nyoro and John Muriithi Ndungu. Upon consideration of the evidence adduced by the witnesses, the learned magistrate found that an offence had been disclosed to warrant a prosecution for the offence of murder. The said court issued an order for the Appellant to be arrested and charged with the murder of the deceased. The Appellant was aggrieved by the said ruling and order. He duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging the ruling of the magistrate's court. He faulted the magistrate for reaching a finding that he was guilty of the murder of the deceased on the basis of evidence that did not establish his guilt. He was aggrieved that the magistrate had not considered evidence adduced in support of his case. He faulted the magistrate for shifting the burden of proof to him. In particular, the Appellant was aggrieved that his evidence was discredited for reason that he did not produce a medical report to support his case. For the above reasons, the Appellant urged the court to allow his appeal and set aside the ruling and order of the magistrate's court.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Gachoka for the Appellant and Ms. Ngetich for the Respondent. Mr. Gachoka reiterated the contents of the petition of appeal. He submitted that the magistrate was not justified in finding the Appellant guilty of murder on the basis that the Appellant did not produce a medical report to prove the Appellant's claim of having been attacked. According to Mr. Gachoka, it was the duty of the learned magistrate to make further inquiries on the issue before reaching her determination. Ms. Ngetich for the Respondent opposed the appeal. She submitted that sufficient evidence was adduced linking the Appellant with the offence. She submitted that the Appellant was properly identified. She stated that the Appellant's evidence that he had been attacked had not been corroborated. She was of the view that a case had been established against the Appellant.

This court has carefully considered the rival submission made by the parties to this appeal. Before making its determination, it is important for this court to outline the circumstances under which an inquest is held. Inquest proceedings are conducted pursuant to the provisions of **Part XII** of the **Criminal Procedure Code**. The relevant section is **Section 387** which provides thus:

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

(2).....

(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 of his or their arrest, or take such other steps as may be necessary to secure his or their attendance to answer to the charge; and on the attendance of the person the magistrate shall commence the inquiry de novo and shall proceed as if he had taken cognizance of the offence.

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

(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.”

From the above provisions, it is clear that the main objects of an inquiry in inquest is therefore to determine the cause of death, the circumstances surrounding the death, whether any person was responsible for such death and whether the death can be attributed to or is as a result of the commission of any offence. The magistrate is therefore required to record a finding as to whether or not there is sufficient evidence to warrant the prosecution of any person for an offence. What is important therefore is whether there is sufficient evidence to warrant the prosecution for an offence rather than whether there is sufficient evidence to prove the guilt of any person. This is so since an inquiry in inquest under **Section 387** of the **Criminal Procedure Code** is not a criminal trial. Pursuant to the provisions of **Article 157(6) (a)** of the **Constitution**:

“The Director of Public Prosecutions shall exercise State powers of prosecution and may;

a) 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;”

The issue in the present appeal relates to whether there is sufficient evidence to prosecute the Appellant for the charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Having established that the inquiry conducted by the learned magistrate was not a criminal trial, the issue whether or not there is sufficient evidence to have the Appellant charged with the offence of murder lies with the Director of Public Prosecution. Under **Article 157(10)** of the **Constitution**, in exercise of his powers to commence criminal proceedings, the Director of Public Prosecution shall not require the consent or authority of any person. For added measure, the Article stipulates that in exercise of the powers or functions, the Director of Public Prosecution shall not be under the direction or control of any person or authority.

The recommendation made by the magistrate when conducting an inquest does not bind the Director of Public Prosecution in making the decision whether or not to prosecute the Appellant in this appeal. That decision will ultimately be the Director of Public Prosecution’s. It is not for this court to decide whether

or not the learned magistrate was right or wrong. The learned magistrate in holding the inquest was simply obliged to make finding on whether an offence has been disclosed or committed either by a person(s) known or unknown. For the above reasons, the finding by the learned magistrate that an offence had been established to warrant prosecution of the Appellant cannot be faulted. The appeal therefore fails.

In the premises therefore, the appeal is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 1015

L. KIMARU

JUDGE