



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 93 OF 2011

**IN THE MATTER OF: THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA
SECTIONS 8 AND 9**

AND

**IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE CHAPTER 75 LAWS OF
KENYA**

AND

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
MANDAMUS**

BETWEEN

**HASSAN KINAKO SUKU (SUING IN HIS CAPACITY AS NEXT OF KIN OF
ALI SUKU KINANGO – DECEASED) APPLICANT**

AND

ATTORNEY GENERAL 1ST RESPONDENT

COMMISSIONER OF POLICE 2ND RESPONDENT

JUDGMENT

1. This application seeks to invoke the power of the Hon. Attorney General (now DPP) under section 388 of the Criminal Procedure Code cap. 75 Laws of Kenya to order an inquest into the death of a person in the circumstances set out in section 387 of the Act. Section 388 of the Act is in the following terms:

“388. (1) The Attorney-General may at any time direct a magistrate to hold an inquiry, in accordance with section 387, into the cause of a particular death to which the provisions of that section apply and shall in the case of missing person believed to be dead give such directions as he deems fit.”

2. Section 387 (1) sets out the circumstances of death calling for an inquest in the following terms:

“387. (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, 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, 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.”

3. This matter proceeded to hearing after several adjournments for the purposes of affording the respondent time to take instructions on the matter. The efforts were fruitless. Counsel for the applicant, Ms. Ngugi, urged that the applicant desired that an inquest be carried out into the death of the deceased who died while in police custody in 2004 and noted that while there has been correspondence between the applicant and the Director of Public Prosecution (DPP), no action has been taken to date.
4. Counsel for the DPP, Mr. Muriithi, confirmed that there had been correspondence between the applicant and the DPP and that the DPP had unsuccessfully sought instructions from the police by three letters culminating with a letter of 25th May 2014.
5. The Notice of Motion dated the 6th September 2011 is therefore unopposed. However, the applicant must satisfy the court that the prayers sought in the Notice of Motion are justified by the law and facts of the case. The Motion specifically seeks ‘*an order of Mandamus to direct the 1st respondent to carry out his statutory obligations as provided under section 388 of the Criminal Procedure Code in a judicious manner.*’
6. In the verifying affidavit which has not been controverted, sworn on the 6th September 2011 by the applicant who sues as the next of Kin of the deceased, it is shown by annexures thereto in form of correspondence that the DPP had as early as 2nd December 2005 directed the Coast Provincial Criminal Investigations Officer of the Police that an inquest be held into the circumstances of the death and that as at 31st March 2011, before the proceedings were filed, the DPP had not received any response as to the progress, if any, on the matter. It is quite clear that the police have refused to conduct the inquest as required by law into the death of the deceased who is alleged to have died in police custody at Central Police Station, Mombasa.
7. I have considered the issues that seem to arise from this application and found as follows:
 - a. The issue of *locus standi* of the applicant who sues merely as a ‘next of kin’ without demonstrating any Grant of Representation to the Estate of the deceased is cured by the liberalization of standing by the Constitution of Kenya, 2010 where under Article 22 (2) (a) proceedings may be initiated by ‘(a) a person acting on behalf of another person who cannot act in their own name.’
 - b. There is a positive obligation under section 387 (1) of the Criminal Procedure Code for a magistrate’s court to hold an inquest into the death of a deceased in custody.
 - c. Although the power of the DPP under section 388 of the Criminal Procedure Code is expressed in permissive terms, the same must in practice assume a mandatory connotation when it is considered that while the magistrate’s court is empowered to hold the inquest, it is for the DPP or the Police on direction of the DPP, to move the court. The DPP’s discretion in the matter is also circumscribed by the circumstances of this case where the police have refused, despite specific directions by the DPP in that regard, to have an inquest held by the magistrate’s court empowered to hold inquest.
8. I therefore find that the Director of Public Prosecution is under a statutory duty under section 388 of the Criminal Procedure Code to institute inquest proceedings before a competent court in terms of section 387 thereof. I also consider that the court should give effect to the deceased’s family interest in knowing how the deceased met his death for emotional relief and to establish whether there was any criminal and or tortuous causes which may attract consequences in penal and pecuniary redress.
9. Over and above the personal interest of the family, there is a public interest in the general public information as to the cause of death in police custody with a view to remedy and prevent incidents in the future.
10. Accordingly, I grant the applicant’s Notice of Motion dated 6th September 2011 with costs to the

applicant. In view of the passage of time since the deceased died in 2004, the matter will be mentioned on a mutually convenient date after 30 days to confirm prompt compliance with the order of the court.

Dated, signed and delivered this 17th day of July, 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Miss Ngugi for the Applicant

No appearance for the Respondents

Ms Linda - Court Assistant