



REPUBLIC OF KENYA



In re Makau Musau (Inquest 1 of 2022) [2024] KEMC 25 (KLR) (3 June 2024) (Judgment)

Neutral citation: [2024] KEMC 25 (KLR)

**REPUBLIC OF KENYA
IN THE MACHAKOS LAW COURTS
INQUEST 1 OF 2022
CN ONDIEKI, PM
JUNE 3, 2024
IN RE MAKAU MUSAU**

JUDGMENT

Part i: Background

1. This is an Inquest into the death of Patrick Njogu, who was alleged to have succumbed to injuries he sustained in a traffic road accident.

Part ii: Summary Of Evidence Presented

2. The state called six witnesses.
3. IW1, James Mwangi Murage, was the driver of motor vehicle registration number KBM 001P Toyota (V8) Landcruiser (hereinafter “the car”) which belonged to Hon. Martha Karua (hereinafter “Hon. Karua”). He recalled that on 29th January 2022, at around 1 pm, he left Nairobi chauffeuring Hon. Karua to a political rally which was to begin at 2 pm in Machakos town. He testified that on board too was Corporal Wandia. He testified that when they reached Mlolongo area, a reversing lorry hit the left front wing of the car damaging the headlight. He narrated that he did not grasp the registration details of the lorry. He testified that he was driving at a slow pace because there was heavy traffic on that stretch. He testified that he did not pull up the car, because he was directed by Hon. Karua to proceed on basis that she was late for the said rally. He narrated that when they reached the scene of the accident at the Kenya Israel bridge, there was a motor cycle registration number KMFV 105F carrying a rider and pillion passenger, and which was being ridden ahead of another small white van (hereinafter “the van”) which was being driven right ahead of the car and that the van hit the motor cycle and the passengers landed on the left side of the road and that the motor cycle was shoved to the right hand side of the road. He narrated that the van sped off, as he swerved to the extreme right side of the road to avoid hitting the two motor cycle passengers, but the car came into collision with the motor cycle. He testified that the car did not hit or run over the two passengers. He testified that he had no opportunity to read the registration details of the van. He narrated that shortly after, a certain motorist rushed the rider and pillion passenger to hospital. He narrated Hon. Karua directed him to drop her at the rally before he proceeds to report to the accident. He narrated that he complied.



4. IW2, Police Service Number 228542, Corporal Tabitha Wandia, a bodyguard of Hon. Karua informed this Court that she was a passenger in the car on the fateful day, sitting on the front passenger seat and that Hon. Karua was sitting on the back left seat. She recalled that they met a long convoy waiting for them at Kyumbi and joined. She narrated that when they reached the scene of the accident at the Montezuma Funeral Home bridge, there was a small van which was being driven in front of the car on the left side while the car was on the right side heading towards Machakos town general direction. She narrated that two passengers were riding on a motor cycle which was between the car and the said small van. She narrated that the motor cycle was hit by the van and thrown to the right side of the road together with the passengers and the car passed but she couldn't tell whether car hit the passengers. She narrated that they stopped and Hon. Karua directed her to get out of the car and check them. She testified that she found the two injured and bleeding. She testified that they were rushed to hospital by a tricycle. She testified after they dropped Hon. Karua at the rally, IW1 reported to the police.
5. IW3, Junior Mwaka, informed this Court that he was the rider of the said motor cycle and that his friend, Patrick Njogu (deceased), was a pillion passenger. He recalled that the fateful day, they were part of the convoy which was accompanying Hon. Karua to the rally, a journey which started from Kyumbi junction at around 12 pm. He testified that a small white motor vehicle hit the motor cycle while he was on motion on the left part of the road. He narrated that both the small white motor vehicle and motor cycle were being driven on the left lane of the road heading to Machakos general direction at level side-by-side, with the said small white motor vehicle being on the left side of the left lane and the motor cycle at the right side of the left lane. He narrated that when the said vehicle hit the motor cycle, they were thrown to the road on left lane but the motor cycle was shoved off the road, to the left side of the road. He testified that his friend was ran over by motor vehicle registration number KBM 001P Toyota (V8) Landcruiser (the car). He narrated that they were rushed to Machakos Level 5 Hospital and that he was later transferred to Bishop Kioko Hospital. He narrated that although he discharged after one week, his friend was unlucky since he was pronounced dead on arrival. He identified his P3 Form and it was marked MFI 1.
6. IW4, Ambrose Kaloki Ndundu, informed this Court that he is a mechanic and that he witnessed the post-mortem of his nephew, Patrick Njogu and his role was to confirm identity of the body which he did positively.
7. IW5, Paul Mbuchi, a motor vehicle inspector testified that upon inspecting motor vehicle registration number KBM 001P, he noted the following: (i) minor scratches on the front bumper; (ii) the nearside front wing was dented; and (iii) the nearside front headlight was smashed. He observed that there were no pre-accident defects. Further, IW5 testified that upon inspecting motor cycle registration number KMFV 105F, he noted the following: (i) rear axle shaft damaged; (ii) rear suspension was damaged; (iii) the rear wheel rim chain cover, and axle bar extensively damaged. He observed that there were no pre-accident defects. He produced the inspection reports as Exhibits 2 and 3 respectively.
8. IW6, Police Service Number 66495 Police Constable Daniel Chacha based at Machakos Police Station, Traffic Records, recalled that on 29th January 2022, he received a report of an accident which occurred at Montezuma Bridge and proceeded to the scene. He testified that at the scene, the victims of the accident, the motor vehicle and motor cycle had already been removed but there were debris and blood stains on the scene and that there were scratch marks on the front left side of the motor vehicle. He testified that he directed the driver of the motor vehicle to take it to for inspection. He testified that he recorded witness statements and opened an Inquest File. He testified that motor vehicle registration number KBM 001P hit the motor cycle. He testified that he drew the sketch map and fair map of the road view. He testified that since the registration details of the alleged van could not be established, he blamed the driver of motor vehicle registration number KBM 001P for the accident. He produced the



P3 Form, police abstract, rough sketch, fair sketch, insurance certificate for motor vehicle registration number KBM 001P, insurance certificate for motor vehicle registration number KMVF 105F, the driving licence of the driver of the motor vehicle, and the post-mortem report as Exhibits 1, 4,5,6,7,8,9 and 10 respectively. He finally testified that according to the post-mortem report, the cause of death was multiple injuries on the head and chest caused by a blunt force trauma.

Part iii: Questions For Determination

9. This Court has framed two questions for determination as follows:
 - i. First, the manner and apparent cause of death of Patrick Njogu.
 - ii. Second, whether there is evidence disclosed to support a proposition of criminal culpability by some known person or persons.

Part iv: Analysis Of The Law; Examination Of Facts; Evaluation Of Evidence And Determination

10. The process for an inquest is designed to be inclusive, involving all conceivable parties and/or interested persons and/or witnesses, to the furthest extent practicable and as appropriate, to contribute to the fact-finding exercise.
11. In Victoria State, in South-Eastern Australia, a common law jurisdiction, in *Domascewicz vs. State Coroner* [2004] VSC 528, at page 28, the Court attempted to elucidate the nature of an inquest as follows: “An inquest is not a proceeding inter pa rtes. It is part of an investigative process which is concerned, inter alia, to set the public mind at rest where there are unanswered questions about a reportable death.”
12. In its innate nature, an inquest is inquisitorial and thus a misnomer in common law jurisdictions - like Kenya - which are largely adversarial. In an inquisitorial order of things, a Court in a common law set-up finds itself in uncharted territories, playing a role, which ordinarily should be played by investigative agencies, and in particular, the National Police Service Commission as established under Article 243 of *the Constitution*. But if only the *National Coroners Service Act*, 2017, is operationalized, this oddity will certainly find a panacea.
13. The principal purpose of an inquest is two-fold: First, to establish the manner and cause of death. Second, to fashion an opinion whether criminal culpability of any known person(s) has been established and offer recommendations.
14. The manner of death is the fashion that brought about the cause of death. In this perspective, there are four known possible manners of death as follows: (i) natural causes; (ii) death caused by an accident or injury not intentionally caused by the deceased or by another; (iii) suicidal death which results from the intent by the deceased to terminate his/her own life by any means; (iv) homicide, which results from an accident or injury when the injury was intentionally caused by another person to the deceased; or a person acts in such a willful and wanton (reckless) disregard for life that his/her actions are likely to cause death like manslaughter or driving of a motor vehicle that causes a fatality while under the influence of alcohol or drugs.
15. However, there are rare circumstances where the manner of death is unestablished or difficult to establish and it is deemed to be undetermined death, which arises if evidence as to the manner of death is unclear and the evidence is not sufficient and conclusive to reach a verdict.



16. Section 385 of Criminal Procedure Code (herein after referred to as the CPC) provides that a magistrate of first and second class or one specially empowered by the Chief Justice shall hold an inquest.
17. The scope of Inquests is limited. Section 386 of the CPC provides that a police officer in charge of a Police Station or any other police officer specially empowered by the Minister in that behalf on receiving information that a person: (i) has committed suicide; or (ii) has been killed by another or by an accident; or (iii) has died under circumstances raising a reasonable suspicion that some other person has committed an offence; or (iii) is missing or believed to be dead, shall give such information immediately to the nearest magistrate empowered to hold inquests.
18. Additionally, the police are required, unless otherwise directed by any rule made by the Minister, to proceed to the place where the body is and they are expected to investigate and then draw up a report on the apparent cause of death describing such wounds fractures, bruises and other marks of injury as may be found on the body and stating in what manner or by what weapon or instruments (if any) the marks appear to have been inflicted. This is based on the opinion of the person visiting the scene. That report is made based on the evidence compiled by officers specially trained on scenes of crime and forensic issues.
19. I have herein above pointed out that the scope of an inquest is constricted. It is not the business of this Court, sitting in inquest, for instance to apportion civil or criminal liability lest it offends the Judicial Review principle against making decisions ultra vires. Section 387(3) of the CPC provides that where before or at the termination, the magistrate decides that an offence has been committed by a known person, the person will be arrested and there will be a new trial. However, this section has been challenged in multiple cases on constitutional grounds.
20. The jurisdiction of this Court is limited to establishing whether there is evidence to support criminal culpability of any person(s) in the regard to the death of Makau Musau. Once the Court forms an opinion in that direction, the opinion will not form basis of prosecution but rather for the consumption of the Director of Public Prosecution, who may wish to exercise the prosecutorial powers enshrined in Article 157 (4) & (6)(a) of *the Constitution*. In Re Estate of Phillip Otieno Odhiambo (Deceased) [2015] eKLR, Majanja J. held that a magistrate sitting in inquest cannot, before or at the termination of the inquiry, if the magistrate has formed 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. The learned Judge concludes that this will amount to arrogation of powers of the DPP. His Lordship reasoned 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 a manner prescribed by section 387(3) of the Criminal Procedure Code."
21. In Re Joyce Mumo Makenzie (Deceased) [2009] eKLR, Lenaola J. (as he then was) held that a Magistrate sitting in inquest cannot enter conclusive findings in the nature of an acquittal. The learned Judge states as follows: "As I understand it, an Inquest is conducted so that upon evaluating the evidence tendered, the Court can determine the cause of death and whether probable cause has been established for a person responsible for that death to be prosecuted. In the instant case, the learned magistrate found for a fact that either, PW5, Cpl David Kambi or PW6, PC Denies Psamut or PW7 Cpl



Benjamin Ngila were the persons who shot and killed the deceased, Joyce Mumo Makenzie. Having so done, it was her duty to examine whether there was probable cause for them to be prosecuted for either the offence of murder or manslaughter. She concluded that they were not to be prosecuted and she gave her reasons based on the evidence; that the shooting was accidental because the police officers were pursuing armed robbers who had committed a crime and the deceased, who was rushing her injured workers to hospital was shot by mistake. Was that decision equivalent to that of a trial Court? In my mind the answer is in the affirmative. The learned magistrate was obligated to state why either the police officers should be charged with an offence and leave the trial to another Court or why they should not be charged and why the investigation's file should be closed. She did the latter but the decision was so conclusive, it was akin to that of a trial Court. Having found that three persons may have been responsible for the death, the proper order to make was to order the DCIO Machakos to arrest the three police officers, and establish who to charge for the offence of manslaughter. To acquit them at an inquest is improper. In the event, I will revise the orders made and shall substitute that finding with the above finding."

22. In *Republic Thro' CID Mwingi vs. Julius Kilonzo Muthengi* [2015] eKLR, Dulu J. held that a magistrate Court exercising its inquest powers cannot recommend a civil claim. The learned Judge states thus: "In my view the magistrate should not have recommended a civil claim by the family of the deceased. The law did not confer on him such powers. The magistrate should have recorded the findings on criminal culpability as well as his opinion that it was not specifically known who had killed the deceased and forwarded his opinion to the Attorney General, now the Director of Public Prosecutions under section 387(4) of the Criminal Procedure Code, for whatever action that office would deem necessary to take. Having found that the learned magistrate was wrong in recommending a civil claim and closing the file and since in my view there is no avenue for an appeal by the family of a deceased from the decision of an inquest, in my view this Court's review jurisdiction is called into play in order to do justice. I thus exercise the review powers of this Court delete or vacate the magistrate's order recommending a civil claim and closure of the file. Instead, in order that based on the findings on criminal culpability the ruling together with the opinion of the magistrate as to who was responsible for the death be and is hereby forwarded to the Director of Public Prosecutions for his necessary action."
23. Further elucidation on the nature of inquests is found in the English case of *R vs. South London Coroner; Ex Parte Thompson*, quoted in *Arnetts vs. Mccann* [1990] 170 CLR 596 at 616, where the Court stated as follows: "Once again it should not be forgotten that an inquest is a factfinding exercise and not a method of apportioning guilt. The procedure and rules of evidence, which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring whichever metaphor one chooses to use."
24. Where the police officers are not able to establish the cause of death at the scene, Section 386(2) of the CPC provides that where the officer considers it expedient, the officer shall, subject to any rule made by the Minister forward the body, to a medical officer for examination, ensuring that transportation of the body shall not render examination useless. The medical officer is required to conduct an autopsy and make a report on the cause of death based on the evidence that they find upon examination. The report is then forwarded to a magistrate empowered to hold an inquest.
25. However, where the cause of death is known and is clear from the evidence available and the person(s) who caused the said death are identifiable, there will be no point in holding an inquest.



26. In any event, under Section 388(1) of the CPC, the DPP is vested with powers to direct a magistrate to hold an inquest in accordance with section 387 of the CPC. Section 388(2) of the CPC provides that where a magistrate terminates an inquest under Section 387, the DPP, where he considers that there is need for further investigations may direct the magistrate to re-open the inquiry and further investigations are then began, in which case the magistrate shall have full powers to re-open the inquiry and make further investigations and proceed in same manner as if the inquiry had not been terminated.
27. Where the magistrate forms the opinion that death has occurred but no offence has been committed or that it has occurred through misadventure, then the magistrate shall record such an opinion accordingly.
28. In compliance with section 386 (1), the said Base Commander in charge of Machakos Traffic Police did give information about the death of Patrick Njogu to the Director of Public Prosecutions (the DPP) and further in accord with the requirements of section 386(2), this Court observes that the said officer did forward the body to the medical officer for examination.
29. In accord with the limited scope of inquests, this Court now embarks on interrogation of the evidence to establish the cause of death of Patrick Njogu and whether there is evidence disclosed to support a proposition by this Court that there is criminal culpability by some known person or persons.
 - i. The manner and apparent cause of death of Makau Musau
30. Owing to the paucity of precedents in Kenya around the terminology applied namely the “cause of death”, this Court thought it necessary to look elsewhere in other common law jurisdictions.
31. In the Australian case of *Re the State Coroner; ex parte the Minister for Health* [2009] WASCA 165 [16], the meaning of ‘cause of death’ was discussed. It was held that a coroner is not restricted when interpreting the cause of death and for that reason, the ‘cause of death’, is not confined or restricted by concepts such as ‘direct cause’, ‘direct or natural cause’, ‘proximate cause’ or the ‘real or effective cause’, or whether it was ‘reasonably foreseeable.’ This position received vindication in *WRB Transport vs. Chivell* [1998] SASC 7002; (1998) 201 LSJS 102 [20] by Lander J with Mullighan J agreeing. In this case, Lander, J. said that in ascertaining the ‘the cause or circumstances of the... death of any person ...’: “The Coroner ... has to carry out an inquiry into the facts surrounding the death of the deceased to determine what, as a matter of common sense, has been the cause of that person’s death. The inquiry will not be limited to those facts which are immediately proximate in time to the deceased’s death. Some of the events immediately proximate in time to the death of the deceased will be relevant to determine the cause of death of the deceased. But there will be other facts less proximate in time which will be seen to operate, in some fact situations, as a cause of the death of the deceased. This is a factual inquiry which only has, as its boundaries, common sense.”
32. Therefore, it will be necessary, in each inquest, to delineate those acts, omissions and circumstances which are, at least potentially, to be characterized as causing or a cause of the death of the deceased. This is to be undertaken by applying ordinary common sense and experience to the facts of the particular case. See *March vs. E & MH Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506, 515 (Mason CJH), 522 (Deane J); *WRB Transport* [21]; *Saraf* [18] – [19]; *Doogan* [29].
33. There must be a causal link between the death and the matter under investigation to bring the matter within the scope of an inquest. In determining that a causal relationship exists, coroners use a “common sense” test of causation limited by principles of remoteness.
34. In *R vs. Doogan; ex-parte Lucas-Smith & Ors*, (2006) 158 ACTR, the Supreme Court of the Australian Capital Territory discussed this context while reviewing an inquest into the Canberra



bushfires. The Court stated that an inquest must examine both the initial ignition of the fire and the factors that caused the fire to spread, but must not become a form of Royal Commission. The Court explained, at paragraph 29, that “A fine line must be drawn at some point beyond which, even if relevant, factors which come to light will be considered too remote from the event to be regarded as causative. The point where such a line is to be drawn must be described as the “common sense” test of causation affirmed by the high Court of Australia in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506. The application of that test will obviously depend upon the circumstances of the case and, in the context of a coronial inquiry, it may be influenced by the limited scope of the inquiry which, as we have mentioned, does not extend to the resolution of collateral issues relating to compensation or the attribution of blame.”

35. In the decision of *Harmsworth vs. State Coroner* [1989] VR 989 at 996, Nathan, J. warned that unless a coroner confines an inquest using principles of remoteness and causation, then “Such an inquest would never end, but worse it could never arrive at the coherent, let alone concise, findings required by the Act, which are the causes of death, etc.”
36. The need for a causal connection between the death and the subject matter of the inquest must be applied in common sense manner. Like other judicial proceedings, coroners should receive all relevant evidence before making findings, comments and recommendations.
37. Upon examining the body of the deceased, Dr. Michieka formed an opinion that the cause of death was multiple injuries on the head and chest due to a blunt force trauma consistent with a traffic road accident.
38. By close of the inquest, this evidence was not controverted.
39. This Court thus reaches a conclusion that the cause of death was in keeping with a blunt force trauma occasioned by a traffic road accident.
 - ii. Whether there is evidence disclosed to support a proposition of criminal culpability by some known person or persons
40. In their description of the how the accident occurred, the testimonies of eye witnesses namely IW1, IW2 and IW3 are inconsistent and irreconcilable. Three versions emerged.
41. The first version came from IW1 who testified that motor cycle registration number KMFV 105F (carrying a rider and pillion passenger) was being ridden ahead of a small white van which was sandwiched between the car (motor vehicle registration number KBM 001P Toyota (V8) Landcruiser) and the motorcycle, and that the van hit the motor cycle the result of which passengers landed on the left side of the road and that the motor cycle was shoved to the right hand side of the road but the car did not run over it and that the car did not hit or run over the two passengers.
42. The second version emerged from IW2 who testified that the motor cycle was sandwiched between the van and the car, and that the van was right in front left side of the car while the car was behind on the right side of the road heading towards Machakos town general direction and that the motor cycle was hit by the said van and both the motor cycle and passengers were shoved to the right side of the road but she was not sure whether the car run over the motorcycle and passengers.
43. The third version was presented by IW3, the rider of the motor cycle who testified that both the small white motor vehicle and motor cycle were being driven on the left lane of the road heading to Machakos general direction at level side-by-side, with the said small white motor vehicle being on the left side of the left lane and the motor cycle at the right side of the left lane. He narrated that when the said vehicle hit the motor cycle, they were thrown to the road on left lane but the motor cycle was shoved off the



road, to the left side of the road. He testified that his friend was ran over by motor vehicle registration number KBM 001P.

44. Upon placing the three inconsistent versions on the scales of evidence, invoking section 119 of the [Evidence Act](#) – which provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case - this Court finds the third version (narrated by Junior Mwaka, IW3) most vivid, compelling, appealing most to logic and thus bearing the heaviest weight. The two other versions turned logic on its head.
45. In relation to the Mlolongo accident theory advanced by IW1, if at all it occurred, then the driver deserted his duty of reporting to the police, conferred on his shoulder by dint of section 73(1) the [Traffic Act](#) and Guideline 171 of the Highway Code. The report would offered IW1 the most convenient corroborative evidence. By his own conduct, therefore, IW1 stripped himself of corroborative evidence that it occurred. Ultimately, the Mlolongo accident theory failed to generate persuasion in the mind of this Court that it was so, having been unsupported by cogent evidence. This Court finds the theory a charade, advanced with the sole purpose of refracting the attention of this Court to the telling damages on the car recorded in the said inspection report (Exhibit 2), which damages were consistent with a collision with the motor cycle.
46. Gleaning from the rider’s version of events and the plane of the doctrine of causation, the rider (IW3) is blameworthy having informed this Court – unwittingly so - that he was riding at level, side-by-side with the van whose registration details are hitherto unestablished. IW3 further informed this Court that both the van and himself were heading to the same Machakos general direction, with the said van being driven on the left side of the left lane and the motor cycle being ridden on the right side of the same left lane. It can be discerned that the impact from the said van on the said moto cycle sent the motor cycle into a spin to the right lane (when facing Machakos general direction). In other words, the van and the motor cycle were on motion on the same left lane at the same level at the same time, heading to the same direction. This conduct, which has now gained immense popularity amongst motorcyclists, is a flagrant contravention of the [Traffic Act](#) and the Highway Code.
47. With wanton abandon of the [Traffic Act](#), specifically Rule 73 of the Traffic Rules read with Guideline 52 of the Highway Code, riding side-by-side translates that the rider (IW3) there was oncoming traffic which hindered the use of the right lane, meaning that the rider was overtaking in an unsafe manner by inter alia riding too close to the motor vehicle being overtaken in a manner that was incontestably reckless, having used the same left lane which was in use by the van he was overtaking, instead of using the oncoming traffic (right) lane. This conduct is prohibited by Guideline 52 of the Highway Code which provides as follows: “Overtake only when it is safe and legal to do so. Do not get too close to the vehicle you intend to overtake. Use your mirrors, signal when it is safe to do so, take a quick sideways. Glance if necessary into the blind spot area and then start to move out. Do not follow a vehicle ahead which is overtaking. When overtaking, move quickly past the vehicle you are overtaking. Allow plenty of room. Move back to the left as soon as you can but do not cut in. Give way to oncoming vehicles before passing parked vehicles or other obstructions on your side of the road...Stay in your lane if traffic is moving slowly in queues...”
48. It seems to me that the euphoria which is usually witnessed during political campaigns ruled the heat and mind of the rider. The conduct of the rider (IW3) led to contact with the van, sprawling them on the hard tarmac on the right hand side which then exposed the deceased to be hit by the driver of motor vehicle registration number KBM 001P. This conduct was by all standards reckless in the manner and threshold contemplated by sections 46 and 47 of the [Traffic Act](#) which provides that “Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner



which is dangerous to the public, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road, shall be guilty of an offence whether or not the requirements of section 50 have been satisfied as regards that offence and be liable to imprisonment for a term not exceeding ten years and the court shall exercise the power conferred by of cancelling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified for holding or obtaining a driving licence for a period of three years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is the later.” Section 47 of the [Traffic Act](#) provides that “(1) Any person who drives a motor vehicle on a road recklessly, or at speed, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is at the time or which might reasonably expected to be on the road, is guilty of an offence and liable— (a) for a first conviction, to a fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding two years; and (b) for a second or subsequent conviction, to a fine not exceeding three hundred thousand shillings, or imprisonment for a term not exceeding one year, and the court shall exercise the power conferred by of canceling any driving licence or provisional driving licence held by the offender and declaring the offender disqualified for holding or obtaining a driving licence for a period of two years starting from the date of conviction or the end of any prison sentence imposed under this section, whichever is later. .. (3) Where a person is convicted of aiding, abetting, counselling, procuring or inciting the commission of an offence under this section, and it is proved that he was present in the vehicle at the time, the offence of which he is convicted shall, for, the purpose of the provisions of this Act relating to disqualification for holding or obtaining driving licences, be deemed to be an offence in connection with the driving of a motor vehicle.”

49. On the plane of the doctrine of causation housed in both sections 46 and 47 of the [Traffic Act](#), therefore, had Junior Mwaka not recklessly rode the motorcycle, Patrick Njogu would not have been sprawled on the hard tarmac, the result of which exposed him to be hit by motor vehicle registration number KBM 001P, resulting in loss of his life.
50. Similarly, invoking section 119 of the [Evidence Act](#), the driver of motor vehicle registration number KBM 001P is blameworthy. It can be discerned from the manner the accident occurred that the said driver failed to keep a safe distance in contravention of the [Traffic Act](#) and the Highway Code. In this regard, Guideline 50 of the Highway Code provides that “Once moving you should...not drive nose to tail (bumper to bumper); leave enough space between you and the vehicle in front so that you can pull up safely. Keep distance and a sharp look-out for the vehicle’s brake light, anyhand, mechanical or light signals the driver may make to indicate his intention to slow down, stop or turn would allow you plenty of time to act.” The precise distance which is deemed safe is not defined by legislation since different circumstances call for a different separation distance. The test of a safe driving distance is that which the driver can offer the driver sufficient time to take note of the incident ahead, slow down, pull up or even swerve safely.
51. Having addressed my judicial mind to all material circumstances of this incident, this Court draws an inference that had the driver observed this guideline, by leaving enough space between the car he was driving and the motorcycle in front, he would have had sufficient time to take note of the incident, slow down, pull up or even swerve safely. On force of this finding, this Court finds too that the conduct of this driver (IW1) was by all standards reckless in the manner and threshold contemplated by sections 46 and 47 of the [Traffic Act](#) afore-discussed.



52. To add insult to injury, the driver of motor vehicle registration number KBM 001P failed to do the first peremptory business commanded by law – as enacted under section 73(1) the Traffic Act and Guideline 171 of the Highway Code – which is to stop immediately and report the accident to the police. The driver, admittedly, acceded to the blatant unlawful orders allegedly issued by his boss, Hon. Karua, and proceeded to the rally. This reeks of impunity.
53. Consequently, this Court finds that Junior Mwaka is criminally culpable for at least three traffic offences namely: (a) causing the death of Patrick Njogu by dangerous riding contrary to section 46 of the Traffic Act; (b) reckless riding contrary to section 47(1) of the Traffic Act; and (c) riding a motor cycle without a driving licence contrary to section 30(1) read with section 30(7) of the Traffic Act.
54. Similarly, this Court finds that James Mwangi Murage (IW1) is criminally culpable for at least three traffic offences namely: (a) causing the death of Patrick Njogu by dangerous driving contrary to section 46 of the Traffic Act; (b) reckless riding contrary to section 47(1) of the Traffic Act (having failed to keep a safe distance); and (b) failing to stop immediately after an accident contrary to section 73(1) read with section 118(1) & (3) of the Traffic Act.

Part v: Disposition

55. In the upshot, this Court concludes:
 - i. that Junior Mwaka, is criminally culpable for traffic offences namely: (a) causing the death of Patrick Njogu by dangerous riding contrary to section 46 of the Traffic Act; (b) reckless riding contrary to section 47(1) of the Traffic Act; and (c) riding a motor cycle without a driving licence contrary to section 30(1) read with section 30(7) of the Traffic Act.
 - ii. that James Mwangi Murage, is criminally culpable for at least three traffic offences namely: (a) causing the death of Patrick Njogu by dangerous driving contrary to section 46 of the Traffic Act; (b) reckless driving contrary to section 47(1) of the Traffic Act (having failed to keep a safe distance); and (c) failing to stop immediately after an accident contrary to section 73(1) read with section 118(1) & (3) of the Traffic Act.
56. Accordingly, this Court recommends to the Director of Public Prosecutions may wish to exercise powers vested in that office, under Article 157 of the Constitution.
57. Orders accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 3RD DAY OF JUNE, 2024

.....

C.N. ONDIEKI

Principal Magistrate

In the presence of:

Prosecution Counsel:.....

Court Assistant:.....

