



REPUBLIC OF KENYA



**In re Mesalim Salim Mwanzuga (Deceased) (Inquest E001 of 2022)
[2022] KEMC 34 (KLR) (16 August 2022) (Legal Opinion)**

Neutral citation: [2022] KEMC 34 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
INQUEST E001 OF 2022
ZK KAGENYO, RM
AUGUST 16, 2022
IN THE MATTER OF THE INQUIRY INTO THE DEATH
OF MESALIM SALIM MWANZUGA (DECEASED)**

LEGAL OPINION

1. On the 15th night of June 2019, IW 1, Arubu Hassan Jamal got to the house of his estranged wife, the deceased, and found her in an intimate situation with one Suleiman Abedi. When he got into the house, Suleiman Abedi dashed out and IW 1 alleged that he came to realize later that the said Suleiman Abedi had left with his Tecno phone.
2. The following morning, IW 1 and the deceased went to the home of the said Suleiman Abedi and found his father, IW 3 one Abedi Suleiman. From what I discerned from the evidence of IW 1 and IW 3, all that IW 1 had gone for at the house of IW 3 was the person of Suleiman Abedi and when he failed to find him at his home, he left a distraught, disgruntled and agitated person.
3. On her part, on that 16th day of June 2019, the deceased went to her father's house, IW 5, one Salim Chilungu Mwanzuga and informed him of the disagreement she had with IW 1.
4. Later in the day, IW 1 and the deceased went to the village chairman, IW 4 one Kaingu Chengo and IW 1 lodged his complaint with IW 4 and needed IW 4 to take action against the said Suleiman Abedi. IW 4, in his capacity as the village chairman, slated for a hearing of the matter the following day being the 17th day of June 2019 at 1400 hours. In attendance, IW 1, the deceased, Suleiman Abedi, IW 3 and IW 5 among others would be required to attend.
5. Come 17th June 2019, at 1400 hours when the matter ought to have been heard, by the time the meeting was being called to order, the village chairman, the deceased, Abedi Suleiman and his 2 daughters and a neighbour were present. IW 1 and Suleiman Abedi, the person of interest then, were missing. No sooner had the deceased relayed the apologies for the non-attendance of IW 1 to the meeting for having been bereaved than IW 1 appeared and started demanding for the production of Suleiman Abedi. He could not hear any explanation from the village chairman nor from the father to the said Suleiman Abedi and the outcome was that he walked out of the meeting with threats of proceeding to do something that the members present shall live to remember.



6. After these warning shots, IW 1 informed the court that, in the company of the deceased, the two went to the place where the wanted Suleiman Abedi worked. The objective of this visit, according to, IW 1 was to solely get his Tecno phone. It was his evidence that they passed through the Kaya Likunda forest and indeed, the deceased met the said Suleiman Abedi as IW 1 stood at a distance watching, waiting for the phone to be brought from Suleiman Abedi by the deceased. The deceased did not stay long and she came and told IW 1 that Suleiman Abedi had directed her where to get the cellphone in question. With that package of information, the two started their journey back passing through the very same route. Suleiman Abedi did not record his witness statement. Given the previous two reactions when IW 1 failed to find Suleiman, the court could not take it as gospel truth that the motive was to go get the Tecno phone from Suleiman Abedi. Further, given the nature in which IW 1 was desirous of meeting Suleiman this court is at a position of doubt that if at all the deceased met the said Suleiman, could IW 1 contain himself to stay at such a distance as he said. All these however are case theories which could only be demystified by the evidence of Suleiman Abedi, the missing link.
7. Deep into the forest while going back, at one point, the deceased expressed her interest in picking some fruits from a certain tree. IW 1 excused himself to answer to a long-call of nature and left the deceased admiring the fruits she had intended to pick. The two were 10 metres apart and as soon as IW 1 dressed up, he heard what sounded to be like quack sounds coming from the point he had left the deceased. On looking up, he saw the deceased hanging by the tree she had left her and his efforts to rescue her were in futility. According to IW 1, the deceased put a noose on her neck by use of her scarf and hang herself to death. It was a suicide in his analysis.
8. The matter was reported at Diani Police Station and at 2015 hours, according to the investigation's diary, the police vested the scene, processed the scene accordingly and had the body taken to Kwale hospital mortuary whereat the following day a post mortem was conducted at 1100 hours.
9. A post mortem report dated 18th June 2019 was produced as Inq.Exh 4 while the 7 photographs were produced as Inq. Exh 3.
10. By 11th July 2019 all the witnesses had recorded their statements, and on 4th September 2020, the file was forwarded to the Office of Director of Public Prosecutions (ODPP) for directions whereby the ODPP on 19th March 2020, directed that the matter to be disposed of by way of an inquest.
11. The file would lie somewhere for the next 3 months and on 9th June 2020, the court was notified of the death of Mesalim Salim Mwanzuga. This was the notification that is contemplated by section 386 (1) of the *Criminal Procedure Code* albeit it being made a year later after the death of the deceased. At this point, it is important to point out that section 386(1) of the CPC dictates that the said notice be made immediately. This was not the case.
12. Be that as it may, the court took special notice of the last paragraph of the correspondence dated 9th June 2020 that told the court,

A case file has been opened as a result of the death and you will be notified of the outcome immediately the investigation is over.
13. This correspondence was signed by the SCCIO Msambweni, Felix Nyamawi. I am finding it difficult to understand why the SCCIO would tell the court that the position was that the matter was still under investigations while indeed the same had been dealt with between his office and the ODPP and the latter had indeed given concurrence to the brief by the SCCIO to their office dated 4th September 2019, the DPP concurring with the same on 19th March 2020. In the end on 14th March 2022, the investigations report was presented before court. the apparent delay in this matter could not be



accounted for by the investigating officer, IW 9, NPS Service No. 111467 PC Abraham Kiplagat and in fact, nothing could be shown as having been done in the investigations file during the period between 9th June 2020 and 13th March 2022.

14. I have looked at the evidence as presented before this court and I make a finding that there was room for conducting a more comprehensive set of investigations in this matter. In my opinion, there were set of facts that were overlooked right from the initiation stages of the investigations which I would like to point out some of the examples;

- a. The Post Mortem that was conducted, was conducted by a medical officer who just stated that he was a holder of bachelor's degree in medicine and could not lay a foundation of his understanding in atomic pathology;
- b. While the said medical officer stated that the body of the deceased had no other marks other than the indentation at the neck, it was clear from the IW 5 that there was a mark at the thigh but was not captured at the post mortem report. Further, a plain observation of the photographs produced as Inq.Exh 3 shows marks that were unaccounted for by the medical officer, at the left side of the neck, on the upper surface of the tongue, and what appeared to be blood on her right side of the neck;
- c. To demonstrate how the post mortem appears to have been lightly handled, in the post mortem report that was produced as Inq.Exh 4, at page 1, the body that is indicated to have been presented for examination by the OCS Diani Police Station, and consequently able to be identified by the father and the uncle was that of Amina Salim and not Mesalim Salim Mwanzuga. The body is stated to have been found at Diani Beach while that of the deceased herein is said to have been found at Kaya Likunda forest.
- d. Further, without providing any literature review as to his inference, the medical officer indicated that he formed an opinion that the cause of the death of the deceased was self hanging from a height with a piece of cloth. In my considered opinion, the medical officer ought to have provided the reasoning behind his such succinct finding but the same was lacking.
- e. The medical officer stated that there was a phone recovered from the blazzier of the deceased. The same was not accounted for which can only lead this court to making an inference that there was no attempt to extract any evidentiary material from the said phone.
- f. The fact that Suleiman Abedi had not recorded his statement despite him being such a key witness is such a great bother to the court. It has been 3 years since the death of the deceased and it would only be fair if the investigating officer could have given an account of the efforts he has put in place to summon the said Suleiman or even have him arrested.
- g. While the investigating officer was testifying, he told this court that,

Arubu told me that he went for a long call. There were no feecal deposits shown to us by Arubu. We asked him to show us the feecal deposits but he refused. I did not notice anything on the body when I was at the scene

Immediately after giving that piece of evidence, the investigating officer produced before court a rough sketch plan of the scene and a fair sketch plan of the same which was to scale. These were produced as Inq.Exh 6 (a) and 6 (b) respectively. I have looked at the 2 sketch plans and three things struck my eyes;

- i. The investigating officer indicates that there were feecal deposits labeled as feaces of Arubu, 10 metres from where the body was hanging which contradicts his oral evidence;



- ii. I have looked at the photographs produced in evidence as Inq. Exh 3 and read through the evidence of IW 6, Matano Mwasanzua Yembe who assessed the height of the tree at 2 metres. I notice that the investigating officer indicates to this court that the deceased was hanging 1 metre from the ground surface. Based on the photographs presented and persuaded by the estimate of IW 6, I find that the surface distance of one metre is too high and appears not to be a true reflection of the height at which the deceased was suspending above the ground; and
 - iii. By labeling Inq.Exh 6 (b) as sketch plan of suicide scene, this could have given the investigating a predisposed investigation's theory which could have given him a certain limited trajectory in investigations limiting his clues or curiosity to further leads. I find this to be the similar position taken at the precis of the post mortem form when it was being forwarded to the medical officer whereby it was indicated at the last line that ".....her only to find her dead body dangling from a tree having hanged herself using a scarf." With such a zinger it would appear that it was no longer a case of suspicion before investigations but a finding before investigations. It would appear that that could have informed the medical officer's opinion as to the cause of death hence the specificity in his report.
15. From the foregoing, it is my observation that the investigations into the death of Mesalim Salim Mwanzuga were not given the best shot. Much more that could not break a back could have been done. she deserved better posthumously from those tasked with the investigations in the world she left behind. Nonetheless based on the evidence that was presented before this court, I verily rule out the inference that Mesalim Salim Mwanzuga (deceased) committed suicide. However, due to the limitations occasioned by the investigations, this court can only state that it highly suspects the person last seen with as the person who caused her death but since the investigations were non-conclusive, the court is compelled to opine that the death was caused by an unknown person.
16. The totality of the foregoing is that, pursuant to section 387 (4) of the [Criminal Procedure Code](#), I make an opinion that the offence of murder was committed by an unknown person and I consequently send a copy hereof to the Director of Public Prosecutions.

OPINION DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 16TH DAY OF AUGUST 2022.

KIONGO KAGENYO

RESIDENT MAGISTRATE

In the presence of;-

Mr. Felix- Court Assistant

Ms. Faith – for Director of Public Prosecutions

