



Nazerali v Regional Criminal Investigation Office Coast & 4 others (Criminal Appeal 122 of 2022) [2023] KECA 85 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 85 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL 122 OF 2022
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
FEBRUARY 3, 2023**

BETWEEN

KIRAN A. NAZERALI APPELLANT

AND

REGIONAL CRIMINAL INVESTIGATION OFFICE COAST . 1ST RESPONDENT

**COUNTY GOVERNMENT OF MOMBASA, PUBLIC HEALTH
OFFICE 2ND RESPONDENT**

**MEDICAL SUPERINTENDENT, COAST GENERAL MOMBASA 3RD
RESPONDENT**

OCS CENTRAL POLICE STATION MOMBASA 4TH RESPONDENT

**MANAGEMENT KHOJA SHIA ITHNASHERI CEMETERY
MOMBASA 5TH RESPONDENT**

(Being an appeal from the ruling of the High Court of Kenya at Mombasa (Hon Justice Onyiego dated 24th August 2022 in Criminal Revision Application No E 177 of 2022)

JUDGMENT

1. This is an appeal arising from the decision of the High Court sitting in Mombasa (Onyiego, J) on 24th August, 2022 in which the Learned Judge dismissed an application that sought the revision of the decision in Mombasa Chief Magistrate’s Court Misc. Criminal Application No. E313 of 2022 made on 27th July, 2022. The application before the Learned Trial Magistrate, was presented by the Regional Criminal Investigation Office, Coast, the 1st Respondent herein. It sought the exhumation of the body of Abbas Anverali Nazeralli (the deceased) which was interred on 15th May, 2022 for the purposes of medical examination to confirm the cause of death. The application was based on the report made to the police by one Shakir Anwar who claimed to be a brother of the deceased alleging that there



- were suspicions regarding the circumstances that led to the death of the deceased. According to the 1st Respondent, against the medical advice, the deceased's wife, the Appellant herein, and a family friend transferred the deceased from Aga Khan Hospital to Mombasa Hospital. At Aga Khan Hospital, it was alleged that the medical examination had revealed that the deceased's body had swellings, old multiple wounds and that he was suffering from insomnia and altered mental status. The deceased later died the same day at the emergency room of the latter Hospital. It was alleged that the immediate family members of the deceased were neither made aware of the circumstances under which the deceased died nor were they informed of the fact of internment.
2. According to the 1st Respondent, despite the said report and against the police advice, the deceased's wife hurriedly interred the body before the matter was fully investigated.
 3. The said application was opposed by the Appellant on the ground that there was no basis for the exhumation of the body and that the opening of the deceased's wife would traumatize the family further.
 4. In his ruling delivered on 27th July, 2022, the Learned Trial Magistrate granted the prayer for the exhumation of the deceased's body for the purposes of conducting a post-mortem examination to ascertain the cause of death. It was his finding that from the circumstances presented and particularly based on a letter from a Dr. Sam Oula, the Applicant had demonstrated that the events after the discharge of the deceased from Aga Khan Hospital on 14th May, 2022 should be subjected to investigation to establish the cause of death and this could only be done by exhuming and conducting an autopsy on the body of the deceased.
 5. Aggrieved by the said decision the Appellant herein moved the High Court by a motion dated 28th July, 2022 seeking the revision and quashing of the trial Magistrate's decision on the ground that the same were granted without any basis and were contrary to the customs and religious beliefs of the deceased. It was further contended that the Learned Trial Magistrate lacked the jurisdiction to issue the impugned order under Section 388 of the Criminal Procedure Code; and that material evidence relating to the cause of death of the deceased which revealed that the deceased died from natural causes were withheld by the Respondents.
 6. The Appellant's position that the deceased died from natural causes was supported by the children of the deceased, Mahek Fatima Abbas Nazeralli and Nurjehan Abbas.
 7. The Revision Application was opposed based on the replying affidavit sworn by PC Pharis Thoya on the ground that based on the material availed to the police, they were legally obliged to undertake the investigations on the circumstances surrounding the death of the deceased in compliance with the directives of the Director of Public Prosecutions.
 8. From the ruling appealed from, it appears that the issue of jurisdiction was dealt with by Sewe, J on 10th August, 2022 by which the Court found that the matter was properly before the Court.
 9. It was contended before the High Court that the material relied upon was hearsay and hence unreliable. On the part of the Respondents, it was submitted that the grounds for revision had not been met and that religious beliefs do not count on matters of investigations of murder. The Respondents' position was that the application for exhumation of the body was properly before the Learned Trial Magistrate pursuant to section 146 of the [Public Health Act](#) as read with sections 387(2) and 388(3) of the [Criminal Procedure Code](#).
 10. The Learned Judge, upon considering the material before him found no merit in the application for revision and dismissed it. According to him, the point of contention was whether the Magistrate's



Court correctly, legally and properly conducted court proceedings before it granted the orders. It was his finding that the Appellant herein failed to address the elements under section 362 and 364 of the Criminal Procedure Code but concentrated instead on the merits of the decision.

11. The Learned Judge found that the background of the dispute leading to the suspicion as to the cause of death of the deceased was the conduct of the Appellant preceding the death of the deceased. It was the Learned Judge's view that notwithstanding the pain to the family attendant to the exhumation, public interest does supersede personal law or interest, community or religious practices or beliefs. According to him, circumstances of the case merited an order for exhumation of the body of the deceased for the purposes of further inquiry by way of an inquest to ascertain the actual cause of death.
12. Before us 8 grounds of appeal were raised. In summary it is contended that the learned Judge was wrong in finding that the Magistrates' Court had the power to entertain the application; in failing to consider the relevant provisions of the law: in failing to find that the decision of the Magistrate's Court was based on hearsay; in finding that there was evidence of suspicious circumstances to warrant the grant of the orders sought; and in finding that the deceased was buried in contravention of the police advice.
13. At the virtual hearing of this appeal, Learned Counsel for the Appellant, Mr. Makori relied on the written submissions and his oral address. The gist of both was that the Learned Magistrate lacked the jurisdiction to order exhumation under section 358 of the Criminal Procedure Code under which the application was brought. Accordingly, the decision was based on circumstances which were totally different from the ones that were before the court as the deceased had not died in custody since that provision deals with inquiry in cases of death. It was submitted that in interpreting and applying the provisions of Section 388(3) of the Criminal Procedure Code, the Court failed to consider the express provisions of subsection
 1. which provides that the same should be done in accordance with section 387 as read with Section 386(1). In support of the submissions the appellant relied on the decision of the Supreme Court in *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR, *S.K. Macharia v Kenya Commercial Bank & Others* [2012] eKLR and *Motor Vessel Lillian S v Caltex Oil* [1989] eKLR.
 1. It was also noted that despite this matter being filed in the Criminal court, the Application made was grounded upon the Civil Procedure Rules which are alien in a criminal setting. It was also submitted that the Hon. Judge erred in law in his failure to find that the affidavit of PC Pharis Thoya was inadmissible hearsay evidence as he was deposing on matters unknown to him and stating his opinion on the same. In the Appellant's view the Court ought to have relied on the Affidavit sworn by Hussein Chandoo which was a first hand account of what transpired in the Hospital leading to his discharge. The Appellants also took issue with the fact that the Complainant did not swear any affidavit in the matter hence no cogent reasons warranting the exhumation sought were given.
15. It was submitted that since orders of exhumation are granted in exceptional circumstances, granting them with no factual basis would go contrary to the well established principles guiding issuance of exhumation orders. In this case, however, the Appellant submitted that the 1st Respondent was on a fishing expedition as they had not shown any evidence to justify the exhumation and instead solely relied on the vexatious complaint by the deceased's estranged brother. The Learned Judge was also faulted for having arrived at erroneous conclusions not supported by the evidence on record.
16. Submitting on behalf of the 1st and 4th Respondents, Mr. Makuto through both his written submissions and oral address stated that there was no basis for contending that the order of exhumation



will lead to emotional trauma and that the right of the relatives of the deceased to have the corpse remain undisturbed after the burial must yield to public interest and the administration of justice.

17. It was the 1st and 4th Respondents' position that in the absence of a prescribed form by which to approach the court, the argument that the Respondents erred by approaching the Court by way of Notice of Motion was baseless. It was submitted that section 146 of the *Public Health Act* allows a magistrate to order the exhumation of a body or the remains of any body for the purposes of holding an inquiry into the cause of death. In this case it was submitted that exhumation is absolutely essential to enable the 1st Respondent carry out its mandate under section 386 of the Criminal Procedure Code.
18. According to the Respondents the Appellant failed to disclose the prejudice she will suffer if the exhumation of the body and the investigations are carried out. The Court was urged to dismiss the appeal.

Analysis and Determination

19. We have considered the written and oral submissions by counsel and the authorities cited as well as the material on record.
20. Although the matter the subject of this appeal has been the subject of litigation both before the Magistrates Court and the High Court, this matter is before us as the first appellate court since the matter before the High Court was commenced as a revision pursuant to Sections 362 and 364 of the Criminal Procedure Code and Article 165(3), (6) and (7) of *the Constitution*. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In *Okeno vs. Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R.* [1957] EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] E.A 424.”

21. The matter before the learned Judge, as we have stated above, was not an appeal but a revision brought under the purview of Section 362 of the Criminal Procedure Code which provides as follows:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
22. The jurisdiction under the said section is exercisable not only where the subordinate court has made a finding, sentence or order but also to determine the regularity of any proceedings of any such subordinate court. Under section 364 of the Criminal Procedure Code the Court may, inter alia, alter or reverse the order issued by the Magistrates' Court. That jurisdiction being circumscribed, should not be invoked so as to micro-manage the Magistrate's Courts on matters of merit which ought to be dealt with by way of an appeal. Accordingly, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal.



23. The application before the Magistrate's Court was expressed to have been brought under sections 146 of the Public Health Act and Section 388(3) of the Criminal Procedure Code. Section 146 of the Public Health Act provides as follows:

- 1) Subject to the provisions of section 147, it shall not be lawful to exhume anybody or the remains of anybody which may have been interred in any authorized cemetery or in any other cemetery, burial ground or other place without a permit granted in manner hereinafter provided.
- 2) Such permit shall be granted only to the legal personal representative or next of kin of the person buried, or to his or their duly authorized agent.
- 3) Such permit may be granted by the Minister in respect of anybody or the remains of anybody interred in any cemetery or burial ground or any other place.
- 4) The permitting authority may prescribe such precautions as he may deem fit as the condition of the grant of such permit, and any person who exhumes anybody or the remains of anybody contrary to this Act, or who neglects to observe the precautions prescribed as the condition of the permit, shall be guilty of an offence and liable to a fine not exceeding one thousand five hundred shillings:

Provided that nothing herein contained shall be deemed to affect the right of a magistrate to order the exhumation of a body or the remains of any body for the purpose of holding an inquiry into the cause of death of any person.

24. It is clear that subject to the proviso to the section, a permit to exhume a body may only be issued to the legal personal representative or next of kin of the person buried, or to his or their duly authorized agent. In this case, the application was made by the Regional Criminal Investigations Office, Coast. Clearly therefore unless the proviso applied, the Court could not grant the application as the applicant did not fall under the class of people entitled to apply for the permit. Secondly, the permit could only be issued by the Minister or Cabinet Secretary concerned.

25. Pursuant to the proviso, however, the section does not affect the right of a magistrate to order the exhumation of a body or the remains of any body for the purpose of holding an inquiry into the cause of death of any person. In his ruling

the learned trial magistrate, found that he had the jurisdiction to order for an exhumation pursuant to section 388 of the Criminal Procedure Code. That provision is, however, to be read with section 387 of the said Code under which subsection (1) provides that:

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.

26. In this case there was no allegation that the deceased died while in the custody of the police, or of a prison officer, or in a prison. Accordingly, the first part of the section was inapplicable. As regards section 386(1) of the Criminal Procedure Code, it provides as hereunder:



- 1) The officer in charge of a police station, or any other officer specially empowered by the Minister in that behalf, on receiving information that a person: -
 - a) has committed suicide; or
 - b) has been killed by another or by an accident; or
 - c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence; or
 - d) is missing and believed to be dead;shall immediately give information thereof to the nearest magistrate empowered to hold inquests, and, unless otherwise directed.
27. In the circumstances of this case the only relevant provision is subsection (1)(c) of section 386. The issue therefore was whether there was information that the deceased died under circumstances raising a reasonable suspicion that some other person had committed an offence. As indicated above, the alleged suspicious circumstances were that the medical examination at Aga Khan Hospital revealed that the deceased's body had swellings and old multiple wounds and was suffering from insomnia and altered mental status; that the Appellant, instead of leaving the deceased at the Hospital removed him to Mombasa Hospital where he died; and that against the advice of the police, interred the body of the deceased.
28. It is important to note that the Learned Magistrate, in his ruling expressly found that the applicant had demonstrated that the events after the discharge of the deceased from Aga Khan Hospital on 14th May, 2022 should be investigated to establish the cause of death. Clearly therefore the Learned Magistrate was not impressed with the allegations of the suspicious circumstances that took place before the deceased was discharged on that date. To the extent, therefore that the Learned Judge took into account the events that took place before that date, the Learned Judge, who was not sitting on an appeal from the decision of the Learned Magistrate, was in error.
29. Although the Court has the power to give an order for exhumation, it is not an order that ought to be issued lightly. It has always been accepted that after death there should be a decent and reverend burial of the body of the dead. Thereafter the dead should remain undisturbed for all purposes except when otherwise directed by a court of law since the primary function of the Court is to keep faith with the dead. When a man nears his end and contemplates a burial, he may reasonably hope that his remains will be undisturbed, and the Court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases the Court must and will have regard to the supposed wishes of the deceased. See *James Apeli & Enoke Olasi v Priscilla Buluku* [1985] KLR 777 and *Re Matheson (Deceased)* [1958] 1 All ER, 202.
30. We add our voice to the view that exhumation of a body in the face of objections from the family of the Deceased is a radical and extreme step and should only be ordered in the clearest circumstances and as a last resort due to the privacy and dignity interests of the family involved. Such an order should not be granted where the existence of evidence sought is speculative and uncertain and its value in aiding the case is conjectural and remote or where the evidence sought can be proved or established by other means.
31. In this case, the Learned Magistrate having specifically been persuaded that the events subsequent to the discharge from Hospital ought to be investigated, what ought to have concerned the High Court was those subsequent events. In this case the only event that took place was the interment of the deceased's



body. The Appellant was accused of having done so in the face of instructions from the police barring the internment. There was, however, no evidence on record that the said directive, which was issued to the Hospital as opposed to the Appellant, was brought to the knowledge of the Appellant. At any rate, the alleged directive did no more than permit the Hospital to preserve the body.

32. In the premises, we find that without any specific finding by the Learned Magistrate regarding the need to investigate the events prior to the discharge of the deceased from the Hospital and the fact that there was no evidence the Appellant was aware of any directive, such as there may have been, barring her from the removal of the deceased for internment, there was no evidence of suspicious circumstances warranting the exhumation of the body. Without such evidence, we find that the case did not meet the stringent conditions for disturbing the dead. Accordingly, we find that there was irregularity in the manner in which the exhumation proceedings were conducted as inquiries appropriate to such an order were not made by the Learned Magistrate before the said order was made. The Learned Judge of the High Court by dismissing the revision, based on findings other than those of the Learned Magistrate, was similarly in error.
33. Consequently, we find merit in this appeal which we hereby allow, set aside the order made in Mombasa High Court Criminal Revision Application No. E177 of 2022 on 24th August 2022 dismissing the Application and substitute therefore an order allowing the same.
34. In the unique circumstances of this case, we make no order as to the costs.
35. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF FEBRUARY 2023.

S. GATEMBU KAIRU (FCI Arb.)

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

signed

DEPUTY REGISTRAR.

