



**Wambua v Republic (Miscellaneous Application E025 of 2023)
[2024] KEHC 10375 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10375 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E025 OF 2023**

MW MUIGAI, J

JULY 29, 2024

BETWEEN

SANDRA MWELU WAMBUA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Notice of motion

1. Vide the Notice of Motion dated 15th May, 2023 before this Court the Applicant seek the following orders:-
 1. Spent.
 2. The Court to stay proceedings in E573/2022, E575/2022 and E 576/2022 R vs Sandra and the consequential orders issued on 4/4/2023 by the court sitting in Wamunyu law Courts.
 3. Criminal matters E573/2022, E575/2022 and E576/2022 be and are hereby transferred from the Principal Magistrate's Court at Wamunyu to any other Competent court for hearing and final determination.
 4. All the orders issued by the Honourable Court sitting at Wamunyu on 4/4/2023 be quashed together with consequential implications and matters be tried a fresh by a different competent court
 5. Civil Suit ELC MCLEC14/2023 be transferred to another competent court separate from the Criminal Cases E573/2022, E575/2022 and E576/2022.
 6. The Presiding Magistrate and the ODPP conducting the matters recuse themselves



2. The application is supported by the Applicant's affidavit sworn on the same day as the application. The Applicant averred that the said matters were set for Pre Trial directions at Wamunyu Law Court on 4th April 2023 and the Court.
3. On the same date, the Court directed the matters to proceed to full trial with the accused being given audience to address the Court when it was not a hearing date.
4. According to the Applicant, the Honorable Court called up the accused to testify even before the Prosecution case had commenced and the ODPP and the Counsel watching brief in the matters did not object to the turn of events where the matters were laid down for hearing and not Pre - Trial directions.
5. He averred that the court proceeded unprocedurally with the ODPP and the Counsel Watching brief failing to object to the hearing and that the Court issued orders requiring counting and collecting of stones which had been transferred by the accused to her home and which orders failed to direct that the stones be stored at Masii Police Station as exhibits.
6. The Applicant averred that the court issued an order that the counsel watching brief provide the Applicant's account so that the accused can deposit Kshs 1,000,000 when in the actual sense the accused received Kshs 1,300,000 and the ODPP did not object.
7. That the Trial Court failed to rely on original documents hence hastening to hearing process to deny the Investigating Officer and other officers who had information relating to the matters from adducing evidence in court and the honorable court failed to adhere to procedure and the unprocedural proceedings yielded a mistrial to his detriment
8. He averred that the said orders issued in the Criminal Case E573/2022 at Wamunyu Law Courts have been applied by the Honorable court at Machakos to abate the Civil MCELC14/2023 and that the criminal cases and the civil cases being handled by the same court is occasioning an injustice.
9. He averred that he had no confidence with the court handling the matters and that the matters be transferred to other court.

Replying Affidavit

10. The Respondent's counsel, Martin Mwongera swore Replying Affidavit on 7th November, 2023. He averred that the Trial Court granted an order for the Applicant to go to the disputed piece of land and collect stones and canvas yet neither the accused nor the applicant obeyed the Trial Court's orders and the Trial Court insisted that the Trial Court orders had to be obeyed by the Accused and the Complainant.
11. He averred that was the genesis of the Complainant's issue with the Trial Court and requested that the matter be transferred to another different court.
12. That the transfer of cases cannot be left to the whims of the Applicant without any substantial injustice and that upon close scrutiny of the application, it lacks merit and should be dismissed.

Applicant's Submissions

13. In support of the application, it is submitted by the Applicant that the issue for determination was whether the court sitting in Wamunyu presided by Hon Mbatia should recuse herself from presiding over the criminal cases.



14. Reliance was made to Article 50 (1) of *the Constitution* and submitted that the court at Wamunyu rushed the proceedings and the criminal procedure denying the complainant their right to cross examine the accused person.
15. Reliance was made to the case of Joseph Ndungu Kagiri vs Republic and the case of Rattiram vs State of M.P.
16. Reliance was made to the case of Porter vs Magill [2002] on the test for recusal and Rule 5 of the Judicial Code of conduct
17. It was submitted that the judicial officer sitting at Wamunyu law courts in the criminal matters had personal bias concerning the parties.
18. Reliance was made to the case of Charity Muthoni Gitabi vs Joseph Gichangi Gitabi (2017) and Kalpana Rawal vs Judicial Service Commission and 2 others (2016)

Respondent's Submissions

19. On behalf of the Respondent, reliance was placed in Section 81 of the CPC and the case of Maina Kinyatti v Republic [1984] eKLR and the case of John Brown Shilenje v Republic
20. It is submitted that having scrutinized the proceedings in the lower court, there was not fault on the Trial Magistrate and that the Trial Court gave orders which have to be adhered to appropriately. The transfer of cases cannot be left to whims of complainant without any infringement or illegality
21. Reliance was placed on Simon Chege Waweru vs Republic .
22. The Respondent urged this Court to find that the application lacks merit and should be dismissed in its entirety.

Determination

23. The Court considered the application, affidavits in support and in opposition to, submissions filed and the authorities relied upon. The issue for determination is whether the orders sought of stay of proceedings, recusal of the Trial Court and transfer of case(s) should be granted or not on allegation of bias by the Trial Court to the parties.
24. The Applicants application is premised on the applicant's averments that the said matters were set for Pre- Trial directions at Wamunyu Law Court on 4th April 2023 and the court on the same date directed the matters to proceed to full trial with the accused being given audience to address the court when it was not a hearing date.
25. The main issue is whether the Trial Magistrate should recuse herself from dealing with/ handling the criminal matters . The principles governing recusal in this jurisdiction are not well settled. In Jan Bonde Nielson v Herman Philipus Steyn & 2 others HC COMM No. 332 of 2010 [2014] eKLR the court observed that:

The appropriate test to be applied in determining an application for disqualification of a Judge from presiding over a suit was laid down by the Court of Appeal in R v DAVID MAKALI AND OTHERS C.A CRIMINAL APPLICATION NO NAI 4 AND 5 OF 1995 (UNREPORTED), and reinforced



in subsequent cases. See R v JACKSON MWALULU & OTHERS C.A. CIVIL APPLICATION NO NAI 310 OF 2004 (Unreported) where the Court of Appeal stated that:

“...When courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established...”

26. In Philip K. Tunoi & another v Judicial Service Commission & Another CA Civil Application NAI No. 6 of 2016 [2016] eKLR the Court of Appeal adopted the test for recusal propounded by the House of Lords in Porter v Magill [2002] 1 All ER 465, where it stated that,

“The question is whether the fair minded and informed observer, having considered the facts, would conclude that was a real possibility that the tribunal was biased.” The same position was taken by the Supreme Court (per Ibrahim J.) in Jasbir Rai and 3 Others v Tarlochan Singh Rai and 4 Others SCK Petition No. 4 of 2012 [2013] eKLR where he observed that, “The Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in Court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. If the answer is in the affirmative, disqualification will be inevitable.”

27. The principles buttress the standards of conduct enacted in the Judicial Service (Code of Conduct and Ethics) Regulations 2020 dated 26th May 2020. Under Regulation 21 Part II of the said Code of Conduct, a Judge can recuse himself or herself in any of the proceedings in which his or her impartiality might reasonably be questioned where the Judge;

- (a) a) Is a party to the proceedings;
- (b) Was, or is a material witness in the matter in controversy;
- (c) Has personal knowledge of disputed evidentiary facts concerning the proceedings;
- (d) Has actual bias or prejudice concerning a party;
- (e) Has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter;
- (f) Had previously acted as a counsel for a party in the same matter;
- (g) Is precluded from hearing the matter on account of any other sufficient reason; or
- (h) Or a member of the Judge’s family has economic or other interest in the outcome of the matter in question.

28. Regulation 9 of the Judiciary Code of Conduct emphasizes the importance of impartiality of a Judge. Regulation 9(1) provides:

A Judge shall, at all times, carry out the duties of the office with impartiality and objectively in accordance with Articles 10, 27, 73(2) (b) and 232 of *the Constitution* and shall not practice favoritism, nepotism, tribalism, cronyism, religious and cultural bias, or engage in corrupt or unethical practices



29. The case at hand, the applicant being the complainant in the criminal matters averred that the accused person was allowed by the Trial magistrate to ventilate issues during pre trial stage and he was also unhappy with the court orders
30. Taking a look at the orders which the applicant seems to point as bias, the orders seem to be in his favour. Kshs 1,000,000 was to be deposited to the applicant by the accused after providing her with his account details. The money infact ended up being deposited in court as the applicant/complainant did not provide the details
31. The Supreme Court in *Jasbir Singh Rai & 3 others vs Tarlocham Singh Rai & 4 Others* (2013) eKLR. In that case, the court stated that;
- (6) Recusal, as a general principle, has been much practised in the history of the East African judiciaries, even though its ethical dimensions have not always been taken into account. The term is thus defined in Black’s Law Dictionary, 8, h ed. (2004) [p.1303]:
- “Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest.”
- (7) From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.
- (8) It is an insightful perception in the common law tradition, that the justice of a case does not always rest on the straight lines cut by statutory prescriptions, and the judicial discretion in its delicate process, is critical to equitable outcomes. This is what Sir David Maxwell Fyfe meant when he attributed to Lord Atkin a “constructive intuition which operates after learning and analysis are exhausted” [in G. Lewis, *Lord Atkin* (London: Butterworths, 1983), p. 166]. It is precisely such delicate elements of judicial fairness that will also feature in the judgment as to whether or not the recusal of a Judge, particularly in the case of a collegiate Bench, is of any materiality, in a given case.
32. This Court is alive to the binding Constitutional standard in conduct of Court proceedings as provided by Article 50 of *the Constitution*. This entails that each party is entitled to a fair hearing that includes appearing before an independent and impartial Tribunal or Court.
33. *The Constitution* further outlines the independence of ODPP in conduct of Criminal prosecution under Article 157 of *the Constitution* specifically Article 157 (6-12) on the conduct of prosecution of cases. This Court notes from the record, the Prosecution that had power and opportunity to withdraw consolidate amend the charges before the Trial Court did not do so neither was there any objection to the Trial Court orders to both parties. Similarly, Watching Brief Counsel who is allowed by law, specifically Section 9 of the *Victim Protection Act* during Trial did not ask to address the Court and was refused.
34. *The Constitution* protects ALL parties to Court proceedings to address the Court. The Accused person was within his legal and Constitutional right to address the Court and /as ALL other parties were also entitled to address the Court so as to enable the Court make an informed decision. Article 48 & 50 of Constitution protects all parties to the Justice process to participate in the Court proceedings.



35. Article 159 2 a-e of *the Constitution* outlines how judicial authority may be exercised by the Court. Of importance expeditious disposal of cases is allowed by law with regard to safe guarding each party's right(s).
36. The grant of Court orders that the stones and material carted away be returned forthwith and monies paid be repaid forthwith without objection from ODPP means that the Complainant was restituted what was lost without going through a hearing and hence there was no need for Pre – trial directions. The application for bias or misconduct as basis for recusal is made first instance before the Court that is recuse itself. Thereafter, to the Appellate Court.
37. In the absence of cogent and tangible evidence of actual bias or interest or misconduct by the Trial Court and more so without objection by the ODPP Defense Counsel (if any) or Watching Brief Counsel, I find no legal basis for recusal of the Trial Court. Secondly any Court order that a party is aggrieved a party has the legal right of appeal.
38. These authorities cited above and Judicial Service Commission Code of Conduct 2020 Regulations on recusal are clear as outlined above. A party applying for recusal of a judicial officer must do so upon clear grounds. In my view, the allegations made by the applicant were vague, unsubstantiated and intended to undermine the independence of the court.
39. It is also a fact that the record of the proceedings before the court does not show any elements or indication of bias except for the fact the Applicant is aggrieved by the Court orders and is entitled to lodge an appeal especially with regard to the fact that Ksh 1,300,000/- was paid and only Ksh 1,000,000/- was to be repaid forthwith.
40. In the circumstances, the Court finds that in the absence of specific misconduct by Trial Court, that the application for recusal of the learned Trial Magistrate is not proved.

Disposition

1. In the circumstances, the Notice of Motion dated 15th May 2023 lacks merit.
2. Consequently, the Notice of Motion is dismissed with no order as to costs.
3. The Applicant is granted leave to appeal the Trial Court orders especially with regard to the balance of Ksh 300,000/- omitted in the refund if not refunded.

It so ordered.

**RULING DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS HIGH COURT
ON 29/7/2024**

(VIRTUAL/PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE

HIGH COURT MISC CRIMINAL CASE E025 OF 2023 MHC	0
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