



Akelo & another v Republic (Miscellaneous Criminal Application E004 of 2022) [2023] KEHC 2805 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E004 OF 2022**

WM MUSYOKA, J

MARCH 24, 2023

BETWEEN

SIMON AKELO 1ST APPLICANT

ALEX MASHA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. There are 2 applications in this cause, dated February 8, 2022 and November 8, 2022, by the 2 applicants, both seeking that the Magistrate presiding over their criminal case, in Vihiga PMCCRC No 1168 of 2020, disqualify herself from the matter, for violating Article 47(1) of the Constitution, for certain utterances made by her in the course of the proceedings. The applicants express fear that they may not get justice.
2. The applicants face 1 count of causing grievous harm, contrary to section 234 of the Penal Code, Cap 63, Laws of Kenya. They pleaded not guilty on November 2, 2020. 5 prosecution witnesses testified, and the applicants were put on their defence, in a ruling delivered on October 18, 2021. The defence hearing commenced on November 22, 2021. Both applicants gave sworn statements. The matter was then adjourned to allow the applicants call witnesses. On the date appointed for further defence hearing, the defence witnesses were not available, and the applicants were saying that their witnesses needed to go to the police station to have their statements recorded, before they could come to court to testify. The matter was adjourned. Defence hearing resumed on February 23, 2022, when 1 witness testified, after which the matter was adjourned to April 5, 2022, for further defence hearing. On April 5, 2022, the court did not sit, and the matter was fixed for June 13, 2022. On June 13, 2022, the applicants indicated that their witnesses were sick, and asked for another date, which was granted, and the matter was adjourned to July 19, 2022. It did not proceed on July 19, 2022, as the file had not been availed in open court, and it was adjourned to September 6, 2022. On that date the applicants



informed the court that they had moved the High Court for appeal against the judgment of the court, whereupon the court directed that the trial file be forwarded to the High Court.

3. The principal complaint by the applicants seems to concern the events of November 22, 2021, when they claim the trial Magistrate said “Nyinyi najifanya mnajua sheria, hamjui kwamba mimi ndiye nimesomea sheria,” which they translate into English as saying : “You purport to know the law, yet you know it is me who studied law.”
4. The matter was coming up for defence hearing on November 22, 2021, when it transpired that the applicants had filed a Motion, dated October 20, 2021, seeking to have the trial Magistrate disqualify herself from the matter, on grounds that she had openly displayed negative “hostilities” against them. In the alternative, they prayed for stay of proceedings to enable them move the High Court. They averred that the harsh comments were that “Mnajifanya mnajua sheria hali mnajua mimi ndiye nimesomea sheria.” It was also alleged that the trial court had allowed a prosecution witness to testify without a written statement, and that it was when they raised the issue, on October 18, 2021, that the harsh words recited above were uttered.
5. In a short ruling, delivered the same day, the trial court declined the application. It was noted that the court had been informing the applicants of their rights, and had been giving directions to the 2nd applicant, who had been quoting non-existent laws, and raising objections on non-issues, such as objecting to the clinical officer testifying since she did not have a written statement. The trial court underscored the fact that the role of the court is to do justice and to guide the parties. The applicants were accused of being combative, a stance that the court said it would not allow.
6. The Motions were argued before me orally on September 19, 2022. The applicants said that the contention was on a police officer that they were insisting should testify, a Keter, instead of the investigating officer, one Lotodo, whose statement they did not have, but the court declined, and closed the case.
7. The starting point should be that the discretion to recuse or disqualify a judicial officer presiding over a matter lies with the judicial officer himself or herself. A higher court cannot intervene and order the presiding officer to recuse or disqualify themselves, except in cases of Judicial Review or constitutional petition, where fundamental issues are raised about the officer, touching on such issues as conflict of interest or bias or misconduct. Once a judicial officer is asked to disqualify himself, and he or she declines, then the matter ought to go on, after which the parties may raise the issue on appeal, should they be minded to file appeal. Otherwise, they should not engage in an endless tussle or contestation on the issues with the judicial officer presiding over their case.
8. Secondly, the words that the applicants complain about were not offensive nor out of order. The presiding judicial officer guides the proceedings based on the law and procedure, and the directions that are given are what the parties should follow. The parties cannot dictate the processes, for that is the mandate of the presiding officer. Should the parties feel that the presiding officer has given the wrong directions, then they ought to bank those issues, and raise them at the end of the trial, by way of an appeal. To disagree with a judicial officer presiding over a trial, after he or she has made rulings or given directions on a matter, is to be disruptive, and in a sense it might amount to contempt of court, for it would amount to not accepting the authority of the court. A judicial officer, presiding over court proceedings, who allows parties to dictate the pace and direction of a matter, and literally to take the lead in the conduct of the matter, would be guilty of abdicating its responsibility as the referee and the umpire, which is completely unacceptable.



9. I note from the record, that the trial Magistrate was very patient with the applicants, acceding to their frequent applications for adjournment, with grace, even when the prosecution was opposed. I am persuaded that the trial court treated the applicants well.
10. Am persuaded that the presiding Magistrate, in this case, was well within her mandate and power to guide the proceedings, and if the applicants felt aggrieved then they should have waited for the proceedings to come to their final conclusion, by way of a judgment, whereupon they could appeal, and place before the appellate court all these issues that they are now raising. Let the applicants humble themselves before the trial court, and wait to be directed and guided by the trial Magistrate on matters relating to law and procedure.
11. There is absolutely no merit in the 2 Motions, and I hereby dismiss them. The trial court file shall be returned to the trial court, for the finalization of the proceedings, after which the applicants may file an appeal, if they shall be so minded. It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA ON THIS 24TH DAY OF MARCH 2023

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Simon Akelo and Alex Masha, the applicants, in person.

Ms. Koech, instructed by the Director of Public Prosecutions, for the respondent.

