Mwendwa v Republic (Criminal Revision E088 of 2022)
[2023] KEHC 19339 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19339 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL REVISION E088 OF 2022

FR OLEL, J

JUNE 29, 2023

BETWEEN

PATRICK MUTURI MWENDWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before court is the chamber summons application dated 15th June 2022 filed by the Applicant pursuant to Article 165 (6) of the *Constitution of Kenya 2010*, Section 362 and 314 of the *Criminal Procedure Code*. The prayers sought by the applicant are that;

    a) That this honourable court be pleased to stay further proceedings in Engineer MCSO E 76 of 2021 Republic v Patrick Muthuri Mwenda pending hearing and determination of this application.

    b) That this honourable court be pleased to review the ruling made on 9th June 2022 in Engineer SPM MCSO E76 of 2021 Republic v Patrick Muthuri Mwenda.

    c) That upon (3) above, this honourable court be pleased to order that this matter be placed before the head of station for further directions or allocation.

2. The appellant averred that he is the accused person in Engineer MCSO No. 076 of 2021 and had been subjected to unfair treatment by the court including the trial magistrate telling him that once his bond is cancelled, he would remain in remand as the hearing proceeds at the courts own motion. Thereafter his bond was cancelled by the trial court without any basis and was only reinstated by the High Court. The applicant states that the several utterances made by the trial magistrate were made in bad faith as he had never failed to attend court and is always represented by his advocate, but such utterance were directed towards him without any basis whatsoever.

3. The applicant further stated that due to the magistrate action his confidence in the court had been eroded as he had also noted that the magistrate does not write down everything said by a witness especially when his advocate was cross examining a witness. This prompted him to file an application for recusal of the trial magistrate. This was done by his application dated 18.05.2022 and vide a Ruling dated 09.06.2022, the trial magistrate declined to recuse herself, thus prompting this application as he had no faith that the said court will be impartial.

4. The Respondent filed their Replying Affidavit sworn by one Eunice Njeri Kanyita on 27.07. 2022 in opposition to the said application. She stated that she was working as a public prosecutor at the office of the Director of Public Prosecution, Nyandarua County and was attached at Engineer Law Court. During the entire proceedings, there was not a single day the court made any utterances which could be depicted as biased as against the applicant. Further she had seen the trial magistrate write down all proceedings when the witnesses were testifying and the same could be confirmed by a perusal of the proceedings of court records.

5. With regard to the issue of the applicant's bond, one PC Nancy Gateri approached her with an affidavit where she deponed that the applicant intended to jump bail once the prosecution case was closed. The court was presented with the said affidavit and the court directed it be served with the defence counsel who filed his Replying Affidavit on 18.02.2022. Subsequently, the application to cancel bond was heard inter-parties and the trial magistrate in her wisdom cancelled the applicants bond. He applied for review/revision and the learned judge reinstated his bond terms.

6. As regards the finding of the trial magistrate, who refused to recuse herself, the applicant had not demonstrated any bias and the grounds put forth in the supporting affidavit were extraneous. The applicant was ignorant of court procedures as high court orders are never signed by the trial magistrate but by the Deputy Registrar of the High Court. The Respondent also alleged that the applicant was hell bent on delaying the conclusion of the trial and had told the investigating officer that they had settled this matter with the victim's family and sought her assistance to have the case terminated.

7. The applicant's game plan was that if the recusal order was granted and the matter placed before another magistrate the applicant was likely to ask for the matter to start denovo and there was also likelihood that the family of the complainant would not cooperate with the prosecution hence the case will stand compromised. The application was an afterthought and has no merit there should be dismissed.

Applicant Submissions

8. The appellant repeated facts as pleaded and stated that he had been subjected to unfair treatment by he court, which cancelled his bond without any basis and the same was reinstated by the high court upon successful revision of the said orders. The trial magistrate had also made several bias utterances as against the applicant and the final result was the courts cancellation of his bond terms. The applicant had lost faith in the trial court being fair and made an application for the trail magistrate to recuse herself which application too was refused as the magistrate had misapplied the law.

9. Under Article 165(6) of the *constitution of Kenya* 2010, the High Court had supervisory jurisdiction over subordinate court and also pursuant to Section 362 of the *Criminal Procedure Code*, the High court could call for and examine the record of any criminal proceedings before any subordinate court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or oral recorded or passed. The High Court could also examine the regularity of any proceedings of any subordinate court.

10. The applicant submitted that the component of confidence in a judicial officer is the basis upon which application for recusal are made. The law was that

> Disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias.

Reliance was placed on *Metropolitan Properties (FG-C) Ltd. v Lannon and Amp; others* [1969] 1QB 577 and *Kalpana H Rawal v Judicial Service Commission and 2 others* [2016]eKLR.

11. Bias or likelihood of bias is the essential requirement to be satisfied on a balance of probabilities and a reasonable men's test was the required threshold. It was proved that the magistrate conduct of Cancellation of bond on its own motions formed a basis, which led to the apprehension that the trial court was biased and the accused was unlikely to get fair trial before the said court. The trial magistrate in her ruling delivered misapplied those requirements and arrived at the wrong findings.

12. Further the applicant faulted the trial magistrate as she failed to apply the reasonable men test, which test was that of a person standing on the dock and expecting a fair trial before the court. The apprehension of bias or presence of bias was also not put into consideration by the trial magistrate. Reliance was placed on *Barnaba Kipsongok Tenei v Republic* [2014] eKLR when faced with similar circumstances the court order for the trial court to recused itself. It was clear that fairness in administration of Justice would not prevail and that the trial was unlikely to proceed in an impartial manner. The applicant urged this court to allow his application and the file be transferred to another magistrate for trial hearing and determination.

Respondent's Submissions

13. The Respondent submitted that the test of bias was an objective test. It was a discretionary jurisdiction which ought to have been exercised on the basis of facts and sound legal principles. The ordinary prudence of the petitioner was to be tested objectively by comparing it with that of any other hypothetical reasonable person with equal development of mind and senses. Reliance was placed on *Charles Koigi Wamwere and 2 others v Republic* [1992]eKLR and *Satish Chand Singhal and state of Rajasthan* [2007] Cri LJ 4132.

14. The respondent also submitted that the standard of proof was on a balance of probability. A judge or magistrate was duly bound to disqualify him/herself if by objective standards and on a balance of probabilities it has been shown either that he/she was biased or that grounds existed for a reasonable apprehension of it and the onus of establishing the actuality of bias of such grounds of reasonable apprehension was on the applicant. If such grounds were shown/established the judge would disqualify him/herself but if not, the judge would not disqualify him/herself.

15. The ground advances by the applicant were that the trial magistrate cancelled his bond terms without any justification, the trial magistrate did not capture all the proceedings especially when the defence counsel was cross examining witnesses and also verbal threats made by the magistrate towards the applicant. The magistrate was also faulted for her refusal to sign a release order.

16. The Respondent submitted that the trial magistrate carried out her judicial function and cancellation of bond does not amount to the judicial officer being biased. It was importance for judicial officers to discharge their duty and not to readily succumb to suggestions of appearing bias. Reliance was placed on *Raybos Australia Property Ltd and another v Tactran Corporation Property ltd and others* [1986] 6 NSWLR 272.

17. The applicant also did not raise any prior complainant of the magistrate failing to record proceedings until after his bond was cancelled and he had also been placed on his defence. Such serious allegations should have been made immediately it was noticed. It was also not demonstrated where/which witness the proceedings were not well captured. Finally on the issue of threats by the trial magistrate, the same were baseless and there was no evidence to support the same. The release order too could not be signed on the skeleton file which did not contain the Ruling of the High Court which still had possession of the original file. It was also the duty of the Deputy Registrar to sign the release and not the trial magistrate.

18. The Respondent stated that this application is not merited and prayed that it be dismissed.

Analysis and Determination

19. Article 165(6) of the *constitution of Kenya* empowers the high court to exercise supervisory jurisdiction over subordinate courts. The *criminal procedure code* at section 362 provides that;

> " 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 subordinate courts."

20. The only issue for determination by this court is whether, there was proper basis laid out, upon which the trial magistrate ought to have recused herself from handling this matter further, given the litany of complaint's made by the applicant.

21. The common law principle that no one should be a judge in his or her own cause is the basis upon which the rule against bias or apprehension of bias was founded. There is, first, a presumption of judicial impartiality, which is preliminary but important hurdle an applicant for recusal of a judge must overcome. The inquiry proceeds no further if this presumption is not successfully rebutted early in the proceedings.

22. The second hurdle is the test for recusal, is that the facts put forward in support of the allegations of bias or apparent bias must meet. This test is a two- dimensional reasonable standard test of a reasonably informed observer who would reasonably entertain an apprehension that the judge would (not might) be biased towards one party in the case. This test enables a court to determine whether the allegation of lack of judicially impartiality in any given case could lead to the recusal of the judge.

23. The test for recusal was set in the case of *Porter v Magill* [2002] 1 All ER 465 where the house of lords stated that;

> " The question is whether the fair minded and informed observer, having considered the facts would conclude that there was a real possibility that the tribunal was biased."

24. In the Supreme court case of *Jasbir Singh Rai & 3 others v Tarlocham Singh Rai & 4 others* [2013] eKLR 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 been

always taken into account. The term is thus defined in *Black's law Dictionary*, 8th Edition [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 circumstance's 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 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 is 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 common law traditions, 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 profile, 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 recusal of a judge, particularly in the case of a collegiate Bench, is of any materiality, in a given case."

25. Regulation 21 part 11 of the *Judicial service (code of conduct and Ethics) Regulations* 2020 state that;

> " when courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is 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 constitution of bias must be specifically alleged and established.
>
> The court has to address its mind to the question as to whether a reasonable and fair-minded sitting court and knowing all relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible if the answer is in the affirmative, a disqualification will be inevitable."

26. A judge or magistrate is thus duty bound to disqualify him/herself if by objective standard, and on balance of probability it has been shown either that he was biased or that grounds exist for a reasonable apprehension of it. The onus is on the applicant to establish the actuality of bias or grounds of reasonable apprehension of it. The judge or magistrate against whom bias has been established or shown has a duty to disqualify his/herself when such grounds have been established to exist. The judge has an equal and matching duty not to disqualify him/herself , if the grounds of bias has not been established/made out. See *Maina Wa Kinyatti v Rep* (Criminal Appeal No 60 of 1983).

27. The applicant pleaded several grounds upon which, they requested the trial magistrate to recuse herself. The said grounds were;

a) That prior to prosecution of the application for cancellation of bond, the accused was informed off record that once bond is cancelled, the trial will be done at the courts own motion.

His Bond was subsequently cancelled without any justification and reinstated by the High court on an application for revision.

b) The trial Magistrate has time and again failed to write down/ note the evidence of witnesses especially during cross examination, when his counsel is asking the witness questions.

c) The trial Magistrate refused to sign his release order after he had been released and/or his bond reinstated by the high court.

d) There have been various verbal threats by the magistrate on several occasions.

28. I have read through the entire court proceedings and find that the applicant's allegations that the trial magistrate failed to properly record proceedings, especially when his advocate is cross examining the witnesses has no basis. The applicant was charged in October 2021, all the eight (8) prosecution witnesses had testified and this matter had set down for defence hearing, by the time the application for recusal dated 18th May 2023 was filed. During the whole trial, the applicant was represented by two counsel's and at no point did the applicant or his counsel's raise any concern that the trial magistrate had failed to properly note/record the proceedings and/or was on her laptop especially when his counsel was asking various prosecution witnesses questions.

29. This issue was for the first time raised in the application dated 18th May 2023 and for the record I do repeat that this allegation was not supported by the proceedings so far undertaken. There is no proof on a balance of probability that the court failed to properly record the evidence so far taken, and the lengthy handwritten cross examination proceedings of the various witnesses bear out a different story. The allegation that the magistrate has been making vile threats directly to the applicant, too suffers the same fate of not being adequately supported by tangible evidence.

30. The second issue raised that the trial magistrate failed to sign his release order after his review application was successful too cannot be factual. As rightly pointed out by the Respondent it was the deputy registrar of the High court to sign the order extracted from the Ruling In High court at Naivasha Criminal Revision No E018 of 2022, releasing the applicant from prison and/or the original file had to be returned to Engineer law court bearing the original Ruling/ order before the release order could be signed by the trial magistrate. If indeed the trial magistrate refused to sign the release order before she verified the authenticity of the said order, then she cannot be faulted for acting with abundance of caution.

31. The third and most crucial issue raised by the applicant was that he bore the brunt of unfair treatment by the trial magistrate who irregularly cancelled his bond without and justification. The matter was coming up for ruling, when the trial magistrate ordered that he be locked up in the cells, yet he had been faithfully attending court and was not a flight risk. Prior to cancellation of his bond, the magistrate had also told the applicant, that she can cancel his bond and from there hence forth the hearing would proceed after one year and his advocate Mr Wainaina knew that she could operate in such a manner.

32. The respondent on their part did contend that the applicant was given a fair hearing, he had an opportunity to file his replying affidavit and upon hearing of the bond cancellation request, the same was allowed and the applicants bond was cancelled. The applicant exercised his constitutional right to apply for review in the high court, which reinstated the applicants bond terms.

33. In determining this issue, I need not go into the question of whether the trial magistrate is or was actually biased. All the court can do is to fairly examine the facts which are alleged to show bias or likely bias and from those facts draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased. See *Porter v Magill* [2002] 1 All ER

34. The trial magistrate cannot be faulted in making her ruling as she did vide her ruling of 24th February 2022. The applicant was dissatisfied and correctly applied for review of the said ruling before the honourable judge and his application was allowed and his bond terms reinstated. The only question looking at the proceedings from the view of a fair-minded person sitting in court and knowing all the facts was there or could there have been real biased or perceived bias by the trial magistrate various considerations made, during the said proceedings to cancel bond and the subsequent ruling where the said bond was cancelled.

35. The trial magistrate in her considered ruling did not delve deeply into this aspect, which was the most critical prism with which she should have considered her ruling. It was her holding that

> " on the 2nd ground, cancellation of the bond and its reinstatement is not a ground on which a reasonable man can infer bias. I have considered the case of *Charles Alwando Opondo v Republic* (1978) eKLR and it was held that bond during trial is a matter of the courts discretion and it cannot be used as a basis to infer bias unless the circumstances points towards bias."

36. While the finding of the trial magistrate might be legally correct, that she cannot be accused of being biased for making a ruling, she erred by failing to look at the entire bail proceedings from the view of a fair-minded person sitting in court and knowing all the facts. She failed to evaluate the entire proceedings from a neutral third-party position, before coming to her conclusion.

37. The prosecution did inform court that, based on the affidavit of one PC Nancy Wambui Gateri that the applicant intended to jump bail and was interfering with witnesses. The alleged affidavit dated 19th January 2022 was not filed in the trial suit. The court allowed the applicant advocate to respond, heard arguments and thereafter made a ruling to cancel the applicants bond. The simple question, which arises, is that by relaying on an affidavit which was not filed in the proceeding's, and which made unsupported allegations did the trial magistrate err and could she be perceived as being biased by fair minded person sitting in court and knowing all the facts?

38. In testing as to whether an issue at hand is worthy of recusal, the learned judge Ibrahim JSC, in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai 7 4 others* had this to say;

> " The test by Lord Edmund Davis in *Metropolitan Properties (FGC) Ltd v Lannon & Others* [1969] 1 QB 577
>
> > " Disqualification was imperative even in the absence of a real likelihood of bias if a reasonable man would reasonably suspect bias. Acker L.J in *R v Liverpool city justices, ex parte Topping* [1983] 1 WLR 119 elaborated on the test applicable."
>
> The court has to address its mind to the question as to whether 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 was inevitable."

39. In *State v Le Grange*, Ponnan JA observed that;

> " it must not be forgotten that an impartial judge is a fundamental pre requisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy, it is important that the public should have confidence in the courts. Upon this-social order and security depend.

> Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described-perhaps somewhat inexactly- as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is some way predisposed to a particular result, to that is closed with regard to particular issues. Judicial bias has been said to mean 'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office. In common usage bias describes a 'leaning, inclination, bent or predisposition towards one side or another or a particular result'. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgement and renders a judicial officer unable to exercise his or her judicial functions impartially in a particular case."

40. It is my holding that, the trial magistrate failed to consider the right parameters in whether she should have recused herself from this matter. She failed to properly apply the test of a reasonable fair minded observer and had she done so , from a neutral point of view she would have seen that, she conducted the bail cancellation proceedings based on an affidavit which was not filed in the lower court proceeding, (which is a major lacuna), and proceeded to cancel the applicants bail , when the said affidavit did not disclose any tangible evidence of the applicant intending to jumping bail and interfering with witnesses. The trial magistrate was a seasoned arbiter and could not have possibly missed to note this crucial procedural error and to proceed the way she did especially from an impartial third-party perspective formed a reasonable basis for a third party to infer impartiality.

41. In *Sellar v Highland Rly Co*,(No 1){1919} UKHL 1 Lord Buckmaster stated that ;"the importance of preserving the administration of justice from anything which can even by remote imagination infer bias or interest in the judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation maybe cheerfully endured"

42. The matter before court has heavy penal consequences, If the accused is eventually found guilty and the court must at all times be seen to be absolutely impartial. As stated in the case of *sellar* (*supra*), If it can be remotely inferred that the proceedings where held in an impartial manner, then unfortunately in law the right thing to do is for the court to recuse itself, even if it will cause some inconvenience.

43. The trial had reached defence hearing and there is urgent need to bring closure to both parties. An order of recusal would definitely inconvenience the prosecution, who have done a Steller job to concluded their case. But be that as it may in the proceedings being challenged, I do find and hold that there exists a perception of unfairness and impartiality in how the bond proceedings were handled and though remote, it would only be just and fair to have the trial magistrate recuse herself and the matter be concluded by a different magistrate. I entirely rely on the finding of *Sellar v Highland Ray Co* (*supra*)

44. While the prosecution might be right to allege that the applicant wants to delay and scuttle conclusion of this matter, at this point, this court cannot consider the same. The applicant too, has a right to fair hearing as protected by Article 50 (1) and (2) of the *constitution of Kenya* 2010 and the trial court is well equipped to control its proceedings and ensure that the matter is disposed off fairly and efficiently.

Disposition

45. I do find merit in application dated 15th June 2022 and do review and set aside the orders of Honourable Daffline Nyaboke Sure {SRM} dismissing the application dated 18th May 2022, and substitute it with an order allowing the said application in terms of prayers 1 and 2.

46. The file Engineer SPMCR (S.O) 76 of 2021 will be placed before the chief Magistrate, Engineer law court for re-allocation and further orders.

47. It is so ordered.

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN MACHAKOS THIS 29TH DAY OF JUNE, 2023.

FRANCIS RAYOLA OLEL

JUDGE

In the presence of;

Appellant

..... for ODPP

..... Court Assistant